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The International Survey of Family Law 2016 Edition

Published on behalf of the International Society of Family Law

General Editor: Professor Bill Atkin

Family Law

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The International Survey of Family Law

2016 Edition

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THE INTERNATIONAL SOCIETY OF FAMILY LAW – OVERVIEW

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), the University of Ulster (Northern Ireland) and the Caribbean. There have since been world conferences in Lyon (France) in July 2011 and Recife (Brazil) in August 2014, as well as regional conferences in Iowa City in June 2012, Israel in December 2012, Brooklyn in New York in June 2013, Seoul, South Korea in October 2013, Israel in January 2014, Nassau, the Bahamas, in November 2014, Chongqing, China, in October 2015 and Wyoming, USA, in May 2016. The next world conference will be in Amsterdam, the Netherlands, from 25 to 29 July 2017.

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 worldwide interest.
   (b) Periodic international conferences on family law subjects of worldwide 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 2011 the Society had approximately 630 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) and those of the world conference held in Lyon in 2011 in Hugues Fulchiron (ed) *Les solidarités entre générations/Solidarity between generations* (Bruylant, Brussels, 2013). 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.

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PREFACE

When lecturing my family law students, it has been my practice to invite the Principal Family Court Judge of New Zealand to take part in a class. In the past 2 years, I have been pleased to welcome his Honour, Judge Laurence Ryan. As he is not keen on delivering a formal lecture, let alone use PowerPoint slides, we decided to do it by way of an interview. So, I asked him questions about his own background, what it is like to be a Family Court judge, what advice he would give budding family lawyers and so forth. We also took questions from the students. This year they asked lots of pertinent questions. One student asked him what he thought was the most significant change in family law during his time as a lawyer and judge. After a moment's reflection, Judge Ryan said the extension of the law to cover 'de facto relationships'. This phrase is used in New Zealand legislation, the most important package being passed in 2001.

Throughout the world, family law is in a state of flux. The exact nature of the topical issues varies because of different histories, cultures, values, and religions and the nature of social change. While the law relating to de facto relationships may be significant in some places, other issues are more important elsewhere. One of the great benefits of this annual survey of family law is the opportunity to see the panorama of challenges across the globe.

In this year's edition with its 26 chapters, unsurprisingly we find a wide range of topics: the effect of terrorist attacks, adoption, abortion, child maintenance (including for adult students), children's rights, affiliation and illegitimacy, child marriage, child support, relocation, co-motherhood, surnames, relocation, international child abduction, marriage in a pluralistic society, marriage equality, polygamy, divorce, spousal maintenance, marital property, domestic violence, succession law and adult guardianship.

My thanks as always for the hard work that the authors have put in, the referees where they have been required, my research assistant, Sean Brennan, my administrative assistant, Angela Funnell, and Dominique Goubau and Christine Bidaud-Garon who have been responsible for producing the French

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résumés at the beginning of each chapter. Both Jordan Publishing and their editor, Cheryl Prophett, continue to do a remarkable job for the International Society.

Bill Atkin
Wellington
June 2016

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REFORMING THE ADOPTION LEGISLATION IN ALBANIA AND THE BEST INTERESTS OF THE CHILD

Dr Ledina Mandia[*]

Résumé

L'adoption est une institution juridique très importante en Albanie. Après la chute du système communiste, les premiers changements ont été apportés dans ce domaine, notamment par **la création du Comité** albanais des a**doptions**. L'Albanie a ratifié et applique la Convention relative aux droits de l'enfant ainsi que la Convention de la Haye sur la protection des enfants et la coopération en matière d'adoption internationale. La législation familiale a été totalement réformée en 2003 par l'adoption du Code de la famille, qui reflète les principes des conventions internationales auxquelles l'Albanie a adhéré. L'adoption, tant nationale qu'internationale, occupe une place particulière dans le Code de la famille. De plus, la loi nr.9695/2007 concernant les **procédures d'adoption** et le **Comité** albanais des adoptions, définit clairement les critères et les procédures de l'adoption nationale et internationale et décrit le rôle particulier du **Comité** ainsi que des agences pour le **traitement des demandes d'adoption des étrangers**. En Albanie, l'adoption est definitive **et irrevocable** et elle est fondée sur le critère de l'intérêt supérieur de l'enfant. Dans cet article sont présentées les nouveautés apportées par le Code de la famille de 2003 ainsi que les modifications correspondantes apportée à la déclaration d'abandon de l'enfant en 2015 par la loi 134/2015. L'article traite également des engagements de l'Albanie aux termes des instruments internationaux en matière d'adoption. En vertu du droit albanais, le **Comité** des adoptions, en tant qu'autorité indépendante, a le devoir de déployer tous les efforts pour retrouver les parents biologiques concerné en vue d'un éventuel retour de l'enfant auprès d'eux. Contrairement à l'adoption nationale, l'adoption internationale est une mesure subsidiaire en Albanie. En vertu des principes de droit albanais, la parole de l'enfant dans les procédures administratives et judiciaires est importante; à ce chapitre, il convient de tenir compte de l'âge et de la maturité de l'enfant, tout en prenant en considération son intérêt supérieur ainsi que le respect de ses droits fondamentaux.

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I THE ADOPTION SYSTEM AND LEGAL FRAMEWORK IN ALBANIA

The legal relationship between parents and children exists because of the blood relation. The same relationship exists because of an adoption realised through a legal procedure. With the adoption is realised a human wish to have children, to grow up and educate them. Such a relationship is based on the will and the best interests of the child. The definition of adoption is the same worldwide, but in some countries '*Adoptio plena*' is accepted and in some other countries '*Adoptio semiplena*'. In all the countries, over the years, a lot of reforms on the adoption system have been undertaken, where the best interests of the child have prevailed.

In Albania, the adoption institution has been known from ancient times through the rules of Canon Law (Canon of Leke Dukagjini in the North of Albania and in the South the Canon of Skenderbeg). According to Canon Law only '*Adoptio semiplena*' has been accepted, meaning that the adoptee did not lose the relationship with the family of origin. Unfortunately, a *corpus juris* does not exist under Albanian custom, but it is a reality that adoption was an important institution during the Turkish invasion because of the influence of the Turkish law, identifying the Albanians' custom and tradition as 'Albanian Law'.

The institution of the adoption was regulated by arts 257–274 of the first modern Civil Code[1] in the time of the Albanian Kingdom. The crucial condition was a difference of 15 years at least between the adoptee and the adoptive parent; the adoptive parent must have reached the age of 40 and at the time of the adoption must not have had children or legal descendants.

The Civil Code of King Zog, which has regulated the adoption relationship, was active until the year 1948, when the new law 'On Adoption' was enacted, in which '*simple adoption*' was accepted, where the adoptee only has the right of the surname and not of inheritance. Only in 1954, through the law 'On inheritance', the right of the full inheritance from the adoptive parent and not from the family of the origin was accepted. Since the year of 1966, under the law 4020, dated 23 June 1965 (FC 1966) for the first time adoption became a judicial procedure, where consent from the biological parent and from a child who has reached the age of 10 has been obligatory. For the first time '*full adoption*' has been accepted. The same legal regulation was adopted under the Family Code (FC 1982), law no 6599, dated 29 June 1982.

After the year 1992, except for the Family Code of 1982, adoptive filiation has been regulated through the law no 7650, dated 17 December 1992 'On the adoption of minors from foreigners and some amendments to the Family Code', accepting the adoption of minors abroad. Through the law of 1992, for the first

[1] Civil Code of Zog, dated 1928, is one of the most modern statutes in Albanian Law, which contained provisions that regulated family relations.

time the Albanian Committee on Adoption was established, which facilitates the procedures for supervising adoption and guaranteeing the protection of the rights of the child.

The recent Albanian Family Code which came into force in December 2003 (FC 2003) is approximated to the United Nations Convention on the Rights of the Child (UNCRC), and the Hague Convention (no 33) 'On the protection of children and cooperation in interstate adoption'.[2] In 2005 Albania has ratified the European Convention 'On the child relations'.[3] In the framework of the harmonization of legislation concerning adoption, after the new Family Code of 2003, in 2007 the law no 9695 was adopted, dated 19 March 2007 'For the procedures of adoption and the Albanian Committee on Adoption'.

Under the new legal framework, an adoption is allowed only if it is in the best interest of the minor and guarantees the respect for their fundamental rights.[4] Under the Albanian legislation adoption is considered as an opportunity for permanent family life for the adoptee, whether or not the adoptee's family has been lost. The adoptive parents have the duty and right to ensure the proper care, development, well-being, education and edification of the adoptee.[5] Not only the adoptive parents, but the state and society also, must offer to families the necessary support to care for their children, in order to prevent their maltreatment and abandonment, and to preserve the stability of the family.[6] The proper care and the best interests of the child are shown in the adoption process, applying to both the administrative and judicial authorities, which have an obligation to double check the conditions of the adoptee and adoptive parents and of the other requirements under the law.

Article 5 of the Family Code provides that: 'Every child, in order to ensure full and normal development of their personality, has the right to grow up in a family environment of joy, love and understanding'. In a nutshell: the State's authorities must guarantee the 'best interest of the child', which remains crucial in the adoption procedures.

II CONDITIONS OF ADOPTION

Adoption is an important episode in the child's life, and that of the biological family and adoptive parents. This is not a simple kinship between those persons, but the law has considered the adoption as a legal action with special importance controlled by the state through the administrative authority and the court, where the best interest of the child prevails.

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2 Hague Convention (no 33) was ratified by law no 8624, dated 15 June 2000.

3 European Convention 'On child relations' was ratified through the law no 9359, dated 24 March 2005.

4 Article 240 of the FC 2003.

5 Article 3/1 FC 2003. This is a crucial principle in parental relations.

6 Article 3/2 FC 2003.

(a) Conditions for the adoptee

Under the Albanian Family Code there is no definition of the 'adoption'. The Hague Convention 'On protection of children and cooperation in respect of interstates adoption', ratified by Albania, does not provide a solid definition of what constitutes the meaning of an adoption. The law no 9695, dated 19 March 2007 'On the adoption procedures and Albanian adoption committee' makes the definition of 'adoption', to mean 'the administrative and judicial procedure, by way of which a child, that has been deprived or not of the familial environment, is provided with an alternative family, with equal rights and duties of its biological parents'.[7] According to art 4 of Hague Convention, it is up to the Central Authorities of the country of origin to determine that the child being considered for adoption is in fact 'adoptable'. Also, the Hague Convention does not contain any definition of the 'orphan'. Under the Family Code of Albania, there is no definition of the 'orphan' or 'adoptable'. According to the Albanian jurisprudence and doctrine, taking into consideration the legal regulation of the institution of adoption, the law no 9695: 'On the adoption procedures and Albanian adoption committee' defines an 'adoptee' as someone who is 'the child deprived or not of the familial environment, who by way of adoption, is placed with another family, to be raised and educated by the adoptive parent(s), as if he or she were their biological child'.[8]

The age of the 'adoptee': According to the Albanian Family Code, art 241/1: 'Only a minor may be adopted'. This means that only a child under 18 years may be adopted, taking into consideration who is considered 'minor' according to the UN Convention on the Child Rights.[9] According to the actual Albanian Family Code, the adoption of adults is not allowed. Only the law of 1965 has allowed the adoption of adults.

The nationality of the 'adoptee': Under the Albanian Law, the adoption of children with Albanian nationality and those of foreign nationality is allowed. Albania has ratified the UN Convention on the Child Rights[10] and the Hague Convention (no 33) 'On protection of children and cooperation in respect of interstates adoption',[11] which provides the possibility of the interstate adoption. Also, the law 9695/2007, 'On the adoption procedures and Albanian adoption committee', provides for the regulation of international adoption, allowing the adoption of a child with a foreign nationality.[12]

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7 Article 3/1 of law no 9695, dated 19 March 2007 'On the adoption procedures and Albanian adoption committee'.

8 Article 3/3 of the law no 9695, dated 19 March 2007 'On the adoption procedures and Albanian adoption committee'.

9 Article 1 of the UN Convention on the Rights of the Child 1989.

10 Article 21 of the UN Convention 1989.

11 Article 1 of the Hague Convention (no 33).

12 Article 29 of the law no 9695, dated 19 March 2007 'On the adoption procedures and Albanian adoption committee'.

Prohibition of adoption: Under the Albanian Family Code, art 243: 'Parents may not adopt their biological children, grandparents may not adopt a grandchild and brothers and sisters may not adopt their siblings.' Also, art 244 of the Albanian Family Code provides that: 'A guardian cannot adopt their ward without court approval of the administration of the minor's properties carried out by him or her, the hand-over the minor's properties, and an evaluation of the fulfilment of the guardian's obligations or a guarantee given by the guardian for the fulfilment of these obligations'.

The registration of the adoptee in Albanian Adoption Committee: Under the Albanian legislation, children may be adopted only if they are registered in the lists of the Committee, about whom: (a) abandonment has been declared by way of a final judgment; (b) consent has been given by their biological parents; (c) consent has been given by the court for the children kept under care if both parents have died, are unknown or have had parental responsibility removed.[13]

As in some other countries, Albania has chosen to require that the child be legally abandoned, regardless of the fact that the process is usually lengthy and expensive. Under the Hague Convention no 33 a definition of the 'legally abandoned' is missing, but the Albanian Family Code provides some regulations on the 'declaration of abandonment'. According to art 250/1 of the Albanian Family Code, 'The district court can declare as abandoned, a minor at a social care institution, public or private, or in the care of another person, when the parents, in an obvious manner, have not been involved with the child for a period of one year before the request for the declaration of the abandonment was submitted.' The court has to assess whether the biological parents have been not interested in the child. According to the Albanian Law, a parent is considered as not having been involved in an obvious manner with the child when they have not maintained a nurturing relationship necessary for the care of the child and have shown severe negligence in the exercise of their parental responsibility.[14] In the Albanian legal framework, it is presumed that the best interest of the child will be to preserve the kinship with the biological family, and only when the will of the biological parent to abandon the child and the consent to adopt him is expressed clearly will the court then make full adoption of the minor possible.

Recently there have been some amendments to the Albanian Family Code concerning the period required for the child to be considered abandoned by the court and some further specification on the calculations of the due date. Such amendments have been necessary to provide the guarantee of the best interest of the child in respect of the requirements of the art 21/(a) of the UN Convention on the Rights of the Child.

According to art 250/2 of the Albanian Family Code as amended, if the minor has been housed in an institution since their birth, the time frame of 1 year,

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[13] Article 20 of the law no 9695, dated 19 March 2007 'On the adoption procedures and Albanian adoption committee'.

[14] Article 250/3 of the Albanian Family Code.

required for the declaration of abandonment, is reduced to 3 months, starting from the day of the child's birth. If the minor has been found abandoned outside state or private institutions, the time frame of one year, required for the declaration of abandonment, is reduced to 3 months starting from the day the child is found. If the child has been housed away from the biological parent(s) in a state or private institution and the parents have declared their consent for the adoption by a notarial declaration, the time frame of 1 year, required for the declaration of abandonment, is reduced to 6 months starting from the day the child left.[15]

According to the Albanian legal framework, the court is obliged to ask the person who has submitted the request for a 'declaration of the abandonment' if they have made any efforts to find the biological parents of the child and to return the child to the biological family, if possible.[16] According to the recent amendments of the Family Code, such efforts are not required if the biological parent has housed the child in a state or private care institution and has expressed consent for the adoption of the child through a notarial declaration. Also, if one of the relatives of the child has requested custody of the child, the court is required to suspend the declaration of abandonment of the child until the court first decides on custody.[17] According to the Albanian Law, the principle that it is in the best interest of the child to grow up within the environment of the biological family prevails. Taking into consideration the same principle, the law provides that the children declared abandoned as above and registered in the Adoption Committee's List may be removed from the list if the biological parents have withdrawn their consent for the adoption of the child within 3 months after they expressed their consent or, even after this 3-month period has elapsed, up until such time as a competent court enters its decision on the adoption of the child.[18]

A new adoption of the adoptee: Under the Albanian Family Code the child may be adopted only once. This means that it is very important to realise a very strong familial relationship between the adoptee and the adoptive parent(s). Under art 242/2 of the Family Code, a new adoption is allowed after the death of the one or both of the adoptive parent(s) or after the death of one of the adoptive parents if the new spouse submits the request.

(b) Conditions for the adoptive parent

The Family Code does not provide a definition of the term 'adoptive parent' or 'adopter', but the law 9695/2007 provides such a definition as follows: 'the person(s) who, by way of adoption, receive children, deprived or not of a

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15 Article 1/1 of the law no 134/2015 'On some amendments on the law no 9062', dated 8 May 2003, 'Family Code', dated 5 December 2015.

16 Article 250/4 of the Family Code.

17 Article 1/2,3 of the law no 134/2015 'On some amendments to the law no 9062', dated 8 May 2003, 'Family Code' dated 5 December 2015.

18 Article 248/1,4 of the Albanian Family Code.

familial environment, treating them as their biological children'.[19] Taking into consideration that the adoption of a minor will be allowed only for his best interest and to guarantee his fundamental rights, some individual qualities and special conditions are required on the part of the adopter.

For the adoption of foreign children, apart from the requirements of the Albanian legislation, the requirements of the foreign law where the child is placed should be fulfilled.

The age of the adopter and the difference in age between the adoptee and the adopter: Under the Albanian Law, there is no minimum or maximum age for the adopter, but the Law has determined an age difference between the adoptee and the adopter. According to art 241/2 of the Family Code: 'The adoptive parent must be at least 18 years older than the minor child'. There is only an exception in the case of step-parent adoptions, where the age difference must be not less than 15 years (art 241/3). It is within the court's discretion to decide on the adoptive parent, concerning the person's age and qualities in order to guarantee the fundamental rights and the best interest of the child. Just as the law does not provide a minimum or maximum age of the adopter and leaves it to the discretion of the court, the same is so for the maximum age difference between the adoptee and the adopter.

The civil status of the adoptive parent: Under the Albanian legislation there is no condition that the adoptive parent should be married. This means that any single person who fulfils the requirements under the law may adopt a child. Also, any divorced or widowed person may adopt a child. Further, under the law only one of the spouses may adopt the child, with the consent of the other spouse.[20]

The number of the persons who adopt the same child: According to art 242/1 of the Albanian Family Code, the child may be adopted only from one person or two persons in the case that they are spouses. There are not provisions on the adoption from the homosexual partners or in case of the cohabitants, although in Albania the cohabitation is known as an institution of the family law.

The number of adoptees by the same adopter: The Albanian Family Code does not place any limitation on the number of adoptees adopted by the same adopter. It is in the discretion of the court to decide on the adoption, so long as the fundamental rights of the child are guaranteed. Also, there are no constraints when the adopter adopts his or her own biological children. It is important for the court to guarantee that it is in the best of the child guaranteed.

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[19] Article 3/2 of law no 9695, dated 19 March 2007 'On the adoption procedures and Albanian adoption committee'.

[20] Article 246/4 of the Albanian Family Code.

The nationality of the adopter: The adoptive parent or his or her spouse may be of Albanian nationality or foreigners. Depending on their nationality the law makes differences in the procedures and the requirements for the adoption taking into consideration the Hague Convention (no 33) and the UN Convention of 1989.

Prohibitions on the adopter: The Albanian Family Code, apart from the prohibition of adoption as provided by arts 243 and 244, provides some prohibitions on the adopter, where: '(a) parental responsibility has been removed by the court; (b) he is affected by a psychiatric disease or has defective mental development or is affected by a disease that could endanger the health and life of the adoptee; (c) he cannot guarantee the performance of parental responsibilities for the care and education of the adoptee'.[21]

(c) Consent for the adoption of the child

Consent given by the parents, the adoptee, the adoptive parents and the spouses of the adopter where they are not adopting the minor together is a mandatory condition for the adoption. At the same time the consent given by the state authorities is very important. This is the reason why all of them should be consulted on the consequences of the adoption and of giving consent for adoption. The consent is required in due legal form, with free will and evidenced in writing.

The consent from the biological parents: In the case of adoption, the consent is required from both biological parents, regardless of their gender, nationality, or civil status. The consent is valid during the administrative and judicial procedures of the adoption, until the court has made an order for the adoption. The consent of the biological parents should be expressed before the court during the judgment for the adoption of the child, and if the parents are resident abroad the consent can be given before the Albanian diplomatic authorities in that country. It is important that the consent be for a specific adoption and not general. If one of the parents is deceased, is unable to express their will, or have had their parental rights removed, the consent of the other parent is sufficient.[22] When both parents of the child are deceased, or when their capacity to act has been removed or the parents are not known, the court decides if the child may be adopted.[23]

The opinion and the consent from the adoptee: According to the UN Convention of 1989, States Parties shall assure the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. In the case of adoption, the child shall in particular be provided the opportunity to be heard in any judicial

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21 Article 245 of the Albanian Family Code.
22 Article 246/2 of the Albanian Family Code.
23 Article 246/3 of the Albanian Family Code.

and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.[24]

Article 246/5 of the Albanian Family Code provides that: 'If the adoptee has reached the age of 10 years old, their opinion may be considered and if they are 12 years of age their consent is required.' The child should be consulted and his or her views and wishes shall be taken into account having regard to his or her age and degree of maturity. An adoption without the consent of the child cannot be allowed. Such consultation may be dispensed with if it would be manifestly contrary to the child's best interest.

The consent should be expressed in the legal form required by law. In adoption proceedings, the child has the right to be heard, in accordance with his or her age and capacity to understand, and for the protection of his or her rights as granted in particular provisions, which guarantee his or her intervention and consent. The child should be heard in the presence of the psychologist during the hearing to assess his or her expressions of opinion, in accordance with his or her mental development and social situation. The minor can be heard alone, through a lawyer, or through another person chosen by the minor.[25]

The consent from the adopter: The consent of the adopter is expressed from the moment of the application to the Committee of the Adoption. Also, regardless of the request being presented to the court, the consent is required during the hearing. If the adoptive parent dies after giving their consent and before the court's decision, the court may continue the judgment procedure for the completion of the adoption. The heirs of the adoptive parent may submit their objection to the adoption to the court. If the court approves the adoption it is effective from the time that the consent was given by the adoptive parent.[26]

The consent of the spouse of the adopter: If the adoption is requested only from one of the spouses, then the consent of the other spouse is mandatory.[27]

III PROCEDURES OF ADOPTION

The adoption is a formal legal action. The adoption is a very complex process, which includes administrative and judicial procedures. During all the procedures the best interest of the child is crucial. Also, further principles provided under the Family Code should be applied by both the administrative body and the court. For surrogacy adoption, pursuant to the law no 8876,

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[24] Article 12 of the UN Convention on the Rights of the Child 1989.
[25] Article 6 of the Albanian Family Code.
[26] Article 249 of the Albanian Family Code.
[27] Article 246/4 of the Albanian Family Code.

dated 4 April 2002 'On reproductive health' the same criteria and procedures of adoption apply, in accordance with the Family Code and the respective legislation.[28]

Administrative procedures: The Hague Convention of 29 May 1993, which is ratified by Albania, in Chapter III deals with the Central Authorities which are to be designated by each Contracting State, and have an international as well an internal aspect to their functions. Internationally their task is to cooperate with their counterparts in other Contracting States, and internally they have to promote cooperation among the competent authorities. Chapter IV deals with the procedure which the process of adoption follows, including the preparation of reports on the prospective adopters and the adoptee, the placement process; moving from one state to another state; exchange of information during the adoption process, etc. Within this framework, Albania has an obligation to undertake the requirements under the ratified international Convention.

The novelty for the institution of adoption after the fall of the communist regime, when the Family Code was not changed, has been the establishment of the Albanian Committee of Adoption according to the law no 7650, dated 17 December 1992 'On the adoption of minors by foreign nationals and on some amendments to the Family Code'. After the Hague Convention, no 33 was ratified in the year 2000, and the new Family Code entered into force, another law was adopted 'On the adoption procedures and Albanian Adoption Committee'. According to the art 252/2 of the Family Code, art 4 of the law no 9695/2007, the Albanian Adoption Committee is an independent central authority in the adoption field, national or international. The Committee reviews and decides on the compatibility of the adoptive applicant and gives its consent to the effectuation of any adoption. Also, the Committee supervises periodically all the adoption cases and, in the case of international adoption, it cooperates with the central authorities of other countries, where the adoption has been effectuated.

Albanian nationals resident or not resident in Albania, who want to adopt Albanian children, approach directly the Committee, which has at its disposal the list for adoption. Foreign nationals resident in Albania for 2 years may directly approach the Committee only if their national legislation allows the children to be adopted by them. In the case of foreign nationals not resident in Albania, they may approach the Committee only through the competent central authorities or mediating agencies of their country, recognised as such by the Committee.[29] This is fully harmonised with the Hague Convention (no 33) of 1993.

The documents submitted by the adoptive parent: (i) the request with the adoption application; (ii) personal data on the interpersonal relations of the family members, information about the family members and their attitude to

[28] Article 261 of the Albanian Family Code.

[29] Article 252 FC; Art 14 of the Law no 9695, dated 19 March 2007 'On the adoption procedures and Albanian Adoption Committee'.

adoption; (iii) data on civil status, such as birth certificate, marriage certificate, divorce certificate or spouse's death certificate; (iv) judicial status certificate; (v) data on the applicant's childhood and rearing; (vi) medical report and the family medical background; (vii) employment certificate, of incomes and of immovable property; (viii) dwelling-place ownership certificate and data on the living conditions; (ix) certificate of economic and social status; (x) certificate of the moral conduct and stature, issued by the local government unit of the residence; (xi) declaration of the willingness on the part of all the family members and friends in support of the adoptive applicant. The executive secretariat conducts a study to determine the applicant's adoptive ability, after reviewing the request and the relevant documents related to the adoptive applicant's right to adopt children.[30] The executive secretariat also verifies and assesses the documentation for every child prepared from the social service institutions nearby to the local government, which serves to find the suitable families to satisfy the child's needs.

The documentation of the adoptee contains: (i) birth certificate; (ii) report on the child's psychological, physical and social status; (iii) report on the existing child's health condition and medical background; (iv) child's opinion, if the child has reached the age of 10, taking into account his or her reasoning ability. If the child has reached the age of 12, the child's consent shall be submitted; (v) Certificates of the biological parents, if they are known; (vi) data report on the parents' medical background, if they are known, information on pregnancy and birth; (vii) written declaration of the biological parent who has given consent to the child's adoption, or the judicial judgment which has declared the child abandoned; (viii) background of the child's transfer into custody, if there are also data on the child's living conditions; (ix) details on the child's life and habits.[31]

Priority to Albanian families: According to art 21(b) of the UN Convention on the Rights of the Child the Contracting States, including Albania, recognise that inter-country adoption may be considered as an alternative means of care for the child, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin. This is a mandatory principle for the Committee, which makes the assessment of the documentation of the adoptee and forward to the court in their written consent for the adoption and for inter-country adoptions, a confirmation that the minor was not able to be adopted in Albania for a period of 6 months from the date of registration on the list of this Committee.[32]

The executive secretariat proposes an eligible adoptive Albanian family for the child, whose name appears on its lists. If this is not possible, and when the child's name has been on the Committee's lists for 6 months, a foreign family may be an adoptive applicant as well. On special occasions, when the child's

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[30] Arts 18 and 19 of the Law no 9695/2007 'On the adoption procedures and Albanian adoption committee'.

[31] Art 22 of the Law no 9695/2007.

[32] Art 253 of the Family Code.

health can be damaged by the above-mentioned deadline, taking into account the child's supreme interest, the Committee may give its consent to the adoption even prior to the termination of this deadline, motivating its consent.[33]

Trial Period: The novelty under the law no 9695/2007 is the 'trial period' after the steering council has given its consent to the adoption, which cannot be longer than 3 months. This time serves to create a kinship between the adopter and the adoptee and to verify the compatibility between them. At the end of the trial period, the executive secretariat draws up a report on the compatibility of the adoptive applicants with the child, and forwards the prepared documentation to the court. If the adoptive applicants have kept the child in the custody of the family for a period longer than 3 months and it is proven that this relationship was affectionate, the trial period is not indispensable.[34]

Judicial Procedures: At the end of the administrative procedure, the Committee prepares the file which contains: (i) the prepared documentation for the adoptive applicant; (ii) the prepared documentation for the child to be adopted; (iii) the decision on the applicants' compatibility; (iv) the steering council's consent to the child's adoption by the applicants; (v) The report on the applicant's compatibility with the child. This file will be addressed to the competent court.[35] Apart from the abovementioned documents, in the case of interstate adoptions confirmation that 6 months after being registered in the Committee's List the minor has no possibility of being adopted in Albania is required.

Usually, the request for adoption, made by an Albanian national, shall be presented at the court of the place of residence of the adoptive parent. The request for adoption made by a foreign or Albanian national who resides abroad shall be submitted to the court of the jurisdiction where the minor resides and the request for adoption of an Albanian minor who lives abroad shall be submitted to the district court of Tirana.[36]

In the adoption process any person with a lawful interest in the protection of the minor, as well as the prosecutor, can intervene and also has the right to appeal the court's decision.

During the hearing of the judicial process, the court takes into consideration the consent given by the child to be adopted, the adoptive applicant and the spouse of that person if married, the institution, and any other person whose consent is requested.

The court verifies if the principle of the best interest of the child and further crucial principles are respected, and verifies if the conditions required for the adoption are fulfilled. Also the court verifies if the administrative procedures

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33 Art 23 of the Law no 9695/2007.
34 Art 25 of the Law no 9695/2007.
35 Article 26 of the Law no 9695/2007.
36 Article 254 of the Albanian Family Code.

have been regular and according to the law, verifies the relationship between the adopter and the adoptee during the trial period and if all the necessary efforts to find the biological parents and return the child to the biological family, if possible, have been made. Finally, the court, after considering all the evidence according to the procedural rules, decides on the full adoption of the child and a change of name if it has been requested by the adoptive parent.

IV EFFECTS OF ADOPTION

The adoption is effective from the date of the final decision. Upon adoption a child shall become a full member of the family of the adopter and shall have in regard to the adopters and their family the same rights and obligations as a child of the adopter whose parentage is legally established. Also, the adopter shall have parental responsibility for the child. At the same time, upon adoption, the same rights and obligations arise between an adoptee and their descendants, on the one hand, as well as with their adoptive families, on the other hand, as those that exist between persons biologically related to each other. All relations between the adoptee and his or her descendants on the one hand and his or her biological family on the other hand cease to exist at the time of adoption. In the case of a step-parent adoption, the rights and duties between the adoptee and their biological parent are not affected.

The adoption is irrevocable and after the decision becomes final, the court shall forward the final decision for registration with the civil registration office where the adoptive parent has their record. With the adoption, the adoptee shall lose any relationship with the biological family and at the same time does not inherit from the biological family.[37]

Upon adoption the adoptee shall assume the name of the adoptive parents. The adoptee takes the surname of the adoptive parent and, if the adoption is by both spouses, takes their common surname; if the adoptive parents have different surnames, they shall agree on the surname to be used by the adoptee; if the parties cannot agree the adoptee takes the surname of the father.[38] Loss of the child's nationality as a result of the adoption shall be conditional upon possession or acquisition of another nationality.

According to the Albanian Law and the international convention ratified by Albania, the adoptive parents and the adopted child, who has come of age, may request data from the Committee on the origin of the adopted child and the child's background. This information may be restricted or rejected on special occasions, when there are reasons to believe that it brings about grave consequences.[39]

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[37] Article 259 of the Albanian Family Code.
[38] Article 260 of the Albanian Family Code.
[39] Art 37 of Law no 9695/2007 'On the adoption procedures and Albanian Adoption Committee'.

V INTERSTATE ADOPTION

The phenomenon of interstate adoption has taken a world-wide dimension and called for an approach, a framework for international cooperation and unified rules on the administrative procedures, procedures for the courts, administrative authorities and private intermediaries. Hague Convention no 33 'On Protection of children and cooperation in respect of interstate adoption' has as objective: (i) to establish safeguards to ensure that interstate adoptions take place in the best interest of child with respect for his or her fundamental rights as recognised in international law; (ii) to establish a system of cooperation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children; (iii) to secure the recognition in Contracting States of adoptions made in accordance with the Convention.[40]

In Albania, ratified international conventions and agreements prevail over internal legislation and are considered part of Albanian's legislation. As a consequence, the Hague Convention no 33 on interstate adoption is the subject of direct application in Albania.

The Convention clearly sets out the rights of the children in interstate adoption, as does the UN Convention on the Rights of the Child in its art 21. Furthermore, it is based upon the recognition that unilateral action by either the state of origin or the receiving state is not enough, but that there needs to be coordination between their policies, including those on emigration and immigration, and direct cooperation with one another when it comes to interstate adoptions.[41]

Albania has adopted a domestic law no 9695/2007 'On the adoption procedures and the Albanian Adoption Committee', which has been approximated with the Hague Convention and covers the issues to do with interstate adoption. Albanian nationals or foreign residents in Albania may adopt Albanian or foreign children, residing in other countries, which have ratified the Hague Convention or have signed bilateral agreements with the competent authorities or agencies, in accordance with the principles of the Convention, provided that: (i) the child has been declared eligible for adoption by the foreign competent body and the relations between parents and children have been discontinued; (ii) the central foreign authority or another counterpart body equal to it has given the necessary authorisation or consent.[42]

The Hague Convention in the art 24 provides that 'a state may refuse to recognize an adoption if it is manifestly contrary to the public policy when

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[40] Art 1 of the Hague Convention no 33, ratified by Albania through the law no 8624, dated 15 June 2000.

[41] Hans Van Loon, 'Hague Convention On protection of children and cooperation in respect of intercountry adoption', in The International Journal of Children's Rights 3, pp 463–468, 1995.

[42] Art 29 of the Law no 9695/2007 'On the adoption procedures and Albanian Adoption Committee'.

taking the child's best interests into consideration. There is not in the Convention a definition of the 'public policy', but states have the discretion to make their own interpretation of the public policy.

The Albanian Family Code in art 257 has provided grounds for prohibition of interstate adoption as follows: (i) the adoption is not recognised in the state where the adoptive parents live; (ii) a conclusion is reached that the adoption will have severe consequences for the minor; (iii) the minor, in the state where the adoptive parents live, does not enjoy the same rights recognised in Albania. The conditions and the effects of the adoption in Albania are determined under the domestic legislation, meaning public policy. In Albania, inter-country adoption is allowed after a 6-month waiting period on the lists of the Albanian Committee of Adoption and, if, during this period, all possibilities for adoption within the country have been exhausted.

Regarding the inter-country adoption in Albania the Committee's steering council verifies: (i) the validity of the adoptive applicants' documentation; (ii) the approval, given by the foreign competent body, of the eligibility of the adoptive applicants; (iii) the applicants' complete and correct documentation; (iv) the consistency of the Albanian legislation principles with those of the adoptive applicant's country; (v) the cooperation with the host country authorities, in order that the adoption does not fail and the child shall be authorised to enter and reside permanently in the host country.[43]

Subject to the above-mentioned conditions on inter-country adoptions, the Committee forwards to the court: (i) the certificate according to which the child could not be adopted in Albania for a period of 6 months; (ii) the certificate according to which, in the applicants' country, the child shall enjoy the same rights as in Albania and that the adoption is irrevocable.[44]

Administrative procedure in inter-country adoption: According to art 252/3 of the Albanian Family Code foreign nationals cannot apply directly to the Albanian Committee of Adoption. The request must be submitted to the Albanian Committee of Adoption through a competent public authority or private organisation as allowed by law. The request and the documents attached to it must be translated into Albanian and legalised according to the law of the country where the adoptive parent lives. The novelty under the law no 9695/2007 'On the adoption procedures and Albanian Adoption Committee' has been the creation of the mediating agencies under the requirements of Chapter III of the Hague Convention no 33, which exercise their functions through the Committee and the foreign competent authorities in interstate adoption. The mediating agencies' duties are provided for under art 34 of the law 9695/2007 and they are mainly focused on preparing the documentation and conducting the study of the adoptive applicants in interstate

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43 Article 27 of the Law no 9695/2007 'On the adoption procedures and Albanian Adoption Committee'.

44 Article 28 of the Law no 9695/2007.

adoption and submitting them to the Committee; and providing counselling to adoptive applicants about adoption and its consequences etc.

Albanian nationals who want to adopt foreign or Albanian children, residing outside Albania, shall address the Committee with a request, to which they shall attach all the stipulated documentation mentioned before in this chapter on the administrative procedures.

The steering council, after verifying that the requirements have been met, decides on: (i) the compatibility of the adoptive applicants, taking into account the whole information about their identity, family, social and health status, as well as the cultural and religious differences with the child; (ii) forwarding the documentation and decision on the compatibility and characteristics of the child whom the applicant wants to adopt to the foreign competent authority.[45]

Recognition of the foreign decision: Under the Hague Convention, as it requires the approval of the two states involved in the interstate adoption, there is no reason for the states not to recognise the decision on the adoption and its effects, except in extreme cases such as fraud or duress exerted on a mother while giving her consent as provided in art 24. Albanian legislation provides rules on the recognition of foreign decisions in interstate adoption. An adoption pronounced in a foreign country, on the request of Albanian citizens, has juridical consequences in the Republic of Albania, if the court, according to the certificate issued by the Committee, observes that the criteria laid down in art 4 of the Hague Convention and the principles of the Albanian legislation in force have been implemented.[46]

VI CONCLUSIONS

Albania has ratified the UN Convention of 1989 'On the Rights of the Child' and the Hague Convention no 33 of 1993 'On Protection of children and cooperation in respect of interstate adoption', which are part of the obligatory legislation prevailing over the domestic legislation. Also, Albania has the obligation to harmonise all its domestic law with both Conventions in order to provide for the best interest of the child and guarantee the protection of the fundamental rights of the child in the internal and interstate adoption.

Since the year 1992, when the new law on the adoption entered into force and the Albanian Committee of Adoption was established for the first time in Albania, a large number of children have been adopted. The New Family Code was adopted only in the year 2003 and made a clear and full regulation of the institution of adoption harmonised with the international conventions dealing with adoption, ratified by Albania over the years. The Family Code of 2003 provides rules on the conditions and procedures for the internal and interstate

[45] Article 30 of the Law no 9695/2007.
[46] Article 31 of the Law no 9695/2007.

adoption, where the principle of the best interest of the child remains crucial. Law no 9695/2007 'On the adoption procedures and Albanian Adoption Committee' provides the definitions of 'adoption', 'adopter' and 'adoptee'. The adoption is irrevocable and upon adoption a child shall become a full member of the family of the adopter.

According to Albanian Law, only the child under 18 years may be adopted, while the adoption of the adults is not allowed. There is no minimum or maximum age for the adopter, but the Law has determined the age difference between the adoptee and the adopter, which must be at least 18 years with an exception in the case of step-parent adoptions, where the age difference must be not less than 15 years.

In the Albanian legal framework, it is presumed that the best interest of the child will be to preserve the kinship with the biological family and only when the will of the biological parent to abandon the child and consent to adopt the child is expressed clearly will the court make possible full adoption of the minor. The child shall be legally abandoned when the parents, in an obvious manner, have not been involved with the child for a period of 1 year before the request for the declaration of abandonment is submitted. To provide the guarantee of the best interest of the child in respect of the requirements of the Art 21(a) of the UN Convention on the Rights of the Child, recently some amendments to the Albanian Family Code concerning the period required for the child to be considered abandoned by the court were made.

In adoption proceedings, the child has the right to be heard, in accordance with his or her age and capacity to understand, and for the protection of the child's rights as granted in particular provisions, which guarantee his or her intervention and consent.

The novelty under the new legal framework is the 'trial period', which serves to create a kinship between the adopter and the adoptee and to verify the compatibility between them.

In conformity with the UN Convention on the Rights of the Child and Hague Convention, the role of the independent authority, the Albanian Committee of Adoption, is crucial internationally and internally, while the court decides finally on the adoption after verifying that all the criteria and the procedures have been undertaken.

While the Hague Convention no 33 does make significant improvements in the international community through its establishment of safe practices and procedures in inter-country adoptions, according to the Albanian legal framework interstate adoption may be considered as an alternative means of care for the child, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin. Furthermore, it is based upon recognition that unilateral consent by the state of

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origin or the receiving state is not enough, but there needs to be coordination between their public policies guaranteeing the best interests of the child.

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AUSTRALIA

REVISITING RELOCATION DISPUTES

Lisa Young[*]

Résumé

Ce chapitre s'intéresse aux décisions concernant le déménagement du parent gardien dans le contexte des réformes relatives à la coparentalité. Il discute des effets potentiellement discriminatoires du processus décisionnel supposément neutre quant au genre et se demande également si les récentes décisions de la Cour, dont le banc pour l'occasion était constitué d'un nombre exceptionnel de magistrats, introduit un changement radical dans le traitement des demandes d'autorisation de déménagement. Le texte conclut en mettant en lumière les informations que ce contentieux révèle à propos du rôle du principe du meilleur intérêt de l'enfant.

I INTRODUCTION

Relocation cases have been a hot topic in family law research for some years now.[1] In Australia, any proposed geographical move by a parent with primary care of a child that would disrupt contact with the other parent would be considered a relocation case, so this could be from one town to another, interstate or overseas. However, relocation cases are not a special category; that is, they are said to be just a parenting dispute where the normal principles

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1 When I wrote my first piece on the topic (L Young, 'Are Primary Residence Parents as Free to Move as Custodial Parents Were?' (1996) 11 *Australian Family Lawyer* 31), Australian commentary on the topic was all but non-existent. Since then there have been a great many publications both in Australia and overseas, for example: D Duggan, 'Rock-paper-scissors: Playing the Odds with the Law of Child Relocation' (2007) 45 *Family Court Review* 193; T Carmody, 'Child Relocation: An Intractable International Family Law Problem' (2007) 45 *Family Court Review* 214; M Henaghan, 'Relocation Cases – The Rhetoric and the Reality of a Child's Best Interests – A View from the Bottom of the World' (2011) 23 *Child and Family Law Quarterly* 226; E Jollimore and R Sladic, 'Mobility – Are We There Yet?' (2008) 27 *Canadian Family Law Quarterly* 341; J Behrens, 'A Feminist Perspective on *B and B* (The Family Court and Mobility)' (1997) 2 *Sister in Law* 65; P Esteal, J Behrens and L Young, 'Relocation Decisions in Canberra and Perth: A Blurry Snapshot' (2000) 14 *Australian Journal of Family Law* 234; L Young, 'Resolving Relocation Disputes: The Interventionist Approach in Australia' (2011) 23 *Child and Family Law Quarterly* 203; P Parkinson, 'Freedom of Movement in an Era of Shared Parenting: The Differences in Judicial Approaches to Relocation' (2008) 36 *Federal Law Review* 145; P Parkinson, J Cashmore and J Single, 'The Need for Reality Testing in Relocation Cases' (2010) 44 *Family Law Quarterly* 1.

apply.[2] And yet relocation cases are the focus of a lot of specific attention, almost as if they are a special or separate category of case. The reason for this, as Chisholm has pointed out, is that they are the 'San Andreas fault' of judicial parenting decisions[3] because they highlight so starkly the difficulty where legitimate parental interests collide with what are determined to be the best interests of the child in maintaining contact with both parents. Like many jurisdictions, Australian law dictates that in making a parenting decision, the best interests of the child are the paramount consideration.[4] So, in a relocation case the question arises of whether primary carer parents are free to live, with the child, where they wish, or whether they should be forced to subordinate that freedom to achieve a parenting arrangement that delivers some judicially perceived maximal benefit for the child.

In this chapter relocation decision-making in Australia will be considered in the context of 'shared parenting' reforms, as will the potential for discriminatory impacts arising from purportedly gender neutral decision-making. The chapter goes on to question whether recent Full Court decisions evince a change in heart in the treatment of parents seeking to relocate. The chapter concludes by considering what relocation decision-making in Australia tells us about the role of the best interests principle.

II AUSTRALIAN RELOCATION DECISION-MAKING IN CONTEXT

The Family Law Act 1975 (Cth) (FLA) has undergone significant amendment to Part VII (which deals with parenting disputes) since 1996, though as indicated above nothing specific has been added in relation to relocation disputes. However, so-called 'shared parenting' amendments – reforms designed to maximise post-separation parent/child contact, in particular father/child contact – naturally play an important part in the resolution of relocation disputes as a relocation can make contact with the 'left-behind parent' difficult. For this reason, the first round of shared parenting reforms in 1996 were predicted to make it harder for custodial parents to secure an order permitting relocation away from the other parent.[5] The perception at this time was that, prior to the reforms, custodial parents were routinely permitted to move. In fact, it is more accurate to say that, provided the relocating parent was not acting *mala fides*, they might well secure an order permitting relocation, *if* they had a 'good' or 'compelling' reason for the move. Absent such a reason, it was arguably not easy to gain court permission to move, though the court did overtly acknowledge the interests of the relocating parent and the impact on

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2 *Sawant & Karanth* [2014] FamCAFC 235; *M v S* [2006] FamCA 1408; (2007) FLC ¶93–313 per Dessau J; *Taylor v Barker* [2007] Fam CA 1236; (2007) 37 Fam LR 461.

3 R Chisholm, 'The "Paramount Consideration": Children's Interests in Family Law' (2002) 16 *AJFL* 87.

4 Family Law Act 1975 (Cth) (FLA), s 65C.

5 L Young, 'Are Primary Residence Parents as Free to Move as Custodial Parents Were?' (1996) 11 *Australian Family Lawyer* 31.

them, and their parenting, of being restrained from moving.[6] It was a challenge to this approach – in particular whether parents proposing to relocate should have to provide a 'compelling' or 'good' reason for the move – that resulted in the first High Court appeal in a relocation case. In the case of *AMS v AIF*[7] the High Court upheld an appeal on the ground, inter alia, that the trial judge erred in requiring a mother to show a 'compelling reason' for a proposed move interstate. While the mother's reasons for moving may well be relevant to the child's best interests, there is no threshold requirement of establishing a good enough reason to be permitted to move.

AMS v AIF was decided under the legislation operating prior to the 1996 shared parenting reforms. Those reforms, while emphasising the importance of maintaining child/parent contact post-separation, did not in fact include any specific provisions that required judicial officers to alter their pattern of decision-making. Rather, the key change was the insertion of s 60B at the start of Pt VII, setting out the objects and the 'underlying principles' of that Part. These included statements about the goal of children having maximal meaningful involvement of both parents in their lives, and the right of children to know and spend time with both parents. However, the substantive provisions of Pt VII were not significantly altered and the enquiry remained a broad one, with a long list of relevant considerations including a catch-all that permitted any relevant matter to be considered, but with the ultimate determinant remaining the child's best interests. In line with convention, the objects and underlying principles of legislation do not form part of the decision-making process as such, unless there is ambiguity in the interpretation of a provision, in which case they can be used to aid in interpretation.[8] These reforms did not have the dramatic impact on decision-making, or the frequency of court ordered shared care, that some may have hope for. While there is no research which compares pre-1996 relocation decision-making to that post the reforms, Esteal et al found in a sample of cases from July 1997 to December 1998 that 68 per cent of applicants seeking to move with a child or children were successful, though there was a significant variation between the two jurisdictions considered in that study (Perth and Canberra). As the authors acknowledge, however, it is very difficult to know whether the rate of success of applicants is distorted to some extent by parents self-selecting out of litigation on advice from lawyers that the new provisions would make it more difficult to secure an order permitting relocation.[9]

The 2006 reforms to Pt VII[10] went much further in trying to encourage decision-makers to make more shared parenting orders. The list of considerations relevant to determining a child's best interests in a parenting decision was divided into two tiers – primary and additional considerations –

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6 Family Law Reform Act 1995 (Cth), which came into force on 11 June 1996.
7 [1999] HCA 26; 199 CLR 160; 163 ALR 501; 73 ALJR 927.
8 *Maldera & Orbel* [2014] FamCAFC 135.
9 P Esteal, J Behrens and L Young, 'Relocation Decisions in Canberra and Perth: A Blurry Snapshot' (2000) 14 *Australian Journal of Family Law* 234.
10 Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth).

with one of the two primary considerations being the benefit to the child of maintaining contact with both parents.[11] Further, while the best interests of the child remain the paramount consideration both before and after the 2006 reforms, the court is now directed to actively consider equal shared physical care of the child in every case where the parents are given equal responsibility for major long-term issues for the child (which is, naturally, very common). Only where a court decides equal shared physical care is not in the child's best interests can it consider some alternative arrangement and even then, it must first consider the child spending substantial and significant time with both parents: FLA, s 65DAA.

Technically, and as with the 1996 reforms, these new provisions do not mandate any particular outcome in a parenting case; the decision still turns on the child's best interests. However, in assessing those interests the amendments indicate a preference for putting more emphasis than was previously the case on maintaining parent/child contact. In other words, the legislature has made it crystal clear that it wants decision-makers to actively consider shared care arrangements in their decision-making process, rather than falling back on more traditional 'every second weekend and half the school holidays' arrangements. Shortly after the introduction of the amendments, Dessau J,[12] after confirming the new provisions did not demand any different approach to relocation cases, said that 'the amended Act does provide a context … that is substantially different from the context in the previous legislation'.[13] However, responding to the father's submission to the contrary, Her Honour was clear that, whatever the impact of the amendments on the exercise of discretion, it could not be to thwart all applications to relocate, as this was obviously not the intention of the reforms.[14]

Relocation cases are relatively common in Australia, and so the court has had ample opportunity to consider how the current parenting provisions apply. As indicated above, the child's best interests are the paramount consideration but they are not the sole consideration. Parental rights to choose where they live must be considered. However, parental interests may have to give way where the interests of the child demand it. Having said this, *AMS v AIF* has established that parents are not under any onus to show a 'compelling' reason for their proposed move, though their reasons for moving may well be relevant to the overall inquiry. More recent case-law has gone on to state that the court is not bound in the orders it makes by the proposals of the parties;[15] therefore, if the evidence leads to the conclusion that the child's interests require it, the court may order an arrangement that was not proposed by either of the

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[11] FLA, s 60CC(2)(a). The other 'primary' consideration is the protection of the child from harm, s 60CC(2)(b).

[12] (2006) 37 Fam LR 32; (2007) FLC ¶93–313 at [28].

[13] Ibid, at [28]. See also [35].

[14] Ibid, at [38]. See also the discussion of this point in *F v F* (2007) 38 Fam LR 52.

[15] *U v U* [2002] HCA 36; (2002) 211 CLR 238 at [70], [72] per Gummow, Callinan JJ; Gleeson CJ and McHugh J agreeing.

parties.[16] However, the court must carefully consider the proposals advanced by the parents; comparing the proposed relocation against the status quo is not sufficient.[17] Even though parenting cases are essentially about where the child will live, it is open to the court to restrain a parent from moving, or to order them to move, to facilitate care.[18] Where the move is international the same approach applies, though the consequences of such a move may increase the difficulty in obtaining court permission (given the impact an international move may have on maintaining parent–child bonds with the 'left-behind' parent).

The conclusions that the court is not bound by the parties' proposals, and that the court has the power to make orders constraining, or requiring the movement of, a parent, are interesting developments in the case-law. While clearly consistent with the broad nature of the relevant provisions, they raise difficult issues in their application. In *Sampson v Hartnett (No 10)*[19] Moore J made an order at first instance that the children live with the mother in Sydney (where the father lived) and have contact with the father. The mother had been living in Geelong[20] (where her family lived) with the children for the 3 years since separation. At trial the mother had been clear she did not intend moving to Sydney and the father did not seek an order that the mother move to Sydney; his proposal was that the children live with him and he was prepared to pay the lion's share of the contact costs with the mother. Thus, the dispute might be framed as whether the children should live with the mother in Geelong or the father in Sydney. Moore J was clearly critical of the mother and her role in weakening the children's relationship with their father, which was not strong. The final orders that had the children living in Sydney predominantly with the mother, reflected Moore J's conclusion that it was crucial both parents participate in the daily lives of the children and that it was impractical for the father to relocate to Geelong (due to his other parenting obligations). Notably, Moore J did not actually order the mother to relocate.

Amongst other things, this case directly raised the questions of the court's power to make orders coercing parents to move and whether it is proper to make orders that do not respond to the parties' applications.[21] In upholding the mother's appeal, the majority (Bryant CJ and Warnick J) said:[22]

> 'We do not say that the true "effect" of her Honour's orders was a wrong result. However, it was an extreme one and we think required an unusually stringent enquiry.'

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16 *Adamson & Adamson* [2014] FamCAFC 232; *Jurchenko & Foster* [2014] FamCAFC 127.
17 *Sayer & Radcliffe and Anor* [2012] FamCAFC 209; *Heaton & Heaton* [2012] FamCAFC 139; *Sawant & Karanth* [2014] FamCAFC 235.
18 *Sampson v Hartnett (No 10)* (2007) 38 Fam LR 315; FLC ¶93–350.
19 (2007) 38 Fam LR 315; FLC ¶93–350.
20 Geelong (which is in the state of Victoria) is about 940 km away from Sydney (which is in the state of New South Wales).
21 Ibid, at [6].
22 Ibid, at [77].

Their Honours concluded the court could make coercive orders which did not coincide with the parties' proposals. This power was held to include the making of an injunction requiring a parent to relocate to a specified location, provided the injunction is limited to the extent necessary to advance the child's best interests.[23] However, their Honours found that Moore J had failed to properly consider alternative proposals and the practicability of the mother moving to Sydney, as required by the legislation.[24]

Dissenting on the issue of the court's power to make this type of coercive order, Kay J had this to say:[25]

> 'In my view the dilemma in this case is to sculpt orders to meet the realities of the case. Those realities are that the father wants to live in Sydney and the mother wants to live in Geelong and each is free to do so. What needs to be achieved, is an order that in the circumstances maximises the opportunities for the children to develop a relationship with both of their parents. It requires a choice of which parent is to be the primary caregiver, that is, with which parent the children are to live, and then a choice of what opportunities should be provided to the other parent to have the children spend time with them.'

This majority Full Court decision, handed down early in the life of the 2006 reforms, was thus clear that the court can consider any parenting arrangement, even if not proposed by the parents, and even if it requires a parent to move their place of residence. In theory, therefore, a parent can be restrained from relocation with the child away from the other parent; a parent (even if not the primary caregiver) could be restrained from moving away from the child; and a parent could be ordered to move with a relocating parent and child. These outcomes are possible notwithstanding any refusal by a parent to concede to the move, even in circumstances where a parent states they are prepared to relinquish primary care of, or contact with, a child to secure their preferred place of residence.

The question of ordering a parent to move *with* a relocating parent arose in the High Court case *MMR v GR*.[26] The family in this case had been living in Sydney, but relocated to Mt Isa (a mining city in another state and some 2,333 km away) because the father had secured a 2-year employment contract there. Separation occurred during the stay in Mt Isa, after which the parents had shared care of the child on a week each basis. However, the mother was isolated from her family, could not find suitable employment and was only able to afford to live in a caravan park; she therefore wanted to return with the child to Sydney. While this was the wife's first preference, she included proposals

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[23] Ibid, at [58].

[24] Ibid, at [78]. For further post-2006 examples of relocation decisions, see *M and S* (2007) 37 Fam LR 32; FLC ¶93–313; *Taylor v Barker* (2007) 37 Fam LR 461; FLC ¶93–345; *F v F* (2007) 38 Fam LR 52; and *Mazorski v Albright* (2007) 37 Fam LR 518.

[25] Ibid, at [136].

[26] (2010) 240 CLR 461. In *Cales v Cales* (2010) 44 Fam LR 376; FLC ¶93–459 at [89] the Full Court rejected an argument that the majority decision *Sampson v Hartnett (No 10)* (2007) 38 Fam LR 315; FLC ¶93–350 was overruled by *MRR v GR*.

based on the father relocating to share care in Sydney and on what should happen if the child was not permitted to move to Sydney. In other words, the mother was not prepared to relinquish care to be able to return to Sydney. Conversely, and despite the fact that he originated from Sydney, the father was clear that he was not prepared to return to Sydney even if the mother was permitted to relocate with the child. Despite the Full Court statements in *Sampson*, Coker FM did not seriously consider the proposal of the father returning to Sydney and ordered that the child stay in Mt Isa with equal time parenting. An appeal to the High Court was successful though not on this point; it was found that Coker FM failed to consider properly the practicability of the mother living in Mt Isa (as required under s 65DAA(1)(b)). Unhelpfully, the High Court did not directly address the question of the court's power to make coercive orders, and in particular the question of ordering the father to return with the mother to Sydney; it did not need to for the purposes of disposing of the appeal. However, nor did it question the assumed position that the court had the power to make the various orders sought in the parties' proposals.

An example of how this approach might look in practice (where the court fashions its own proposals as to where the parents might live based on the notion that either parent can be injuncted to move or not to move) can be seen in *Glover v Taylor*.[27] The primary carer mother and child lived in New South Wales, about 400 km away from the father; there was a well-functioning contact regime. The mother wanted to move to another state (about 3,000 km away) as her husband was being posted there by the Royal Australian Navy. Altobelli FM conceived of five potential parenting/living arrangements, with each having a number of possible variations. One option His Honour identified was that the mother might relocate on her own with the child to the father's town of residence; notwithstanding any potential benefits to the child, neither party had proposed this as a sensible outcome. Notably, His Honour did not propose the father move to the mother's present location. The mother failed in her application and was restrained from relocating the child; if she elected to move anyway, care was to change to the father – even though this would have had precisely the same effect on contact between one of the parents and the child as allowing the mother to move with the child would have had. The only difference was that under the judicial officer's fall back scenario, the child would be separated from their primary care giver instead.

I have argued elsewhere that this 'interventionist' approach to decision making[28] – which permits the court to fashion its preferred parental living arrangements and order parents to move to accommodate those preferences – while open on the plain words of the Act, is problematic and ignores the court's role in such cases. The purpose of giving the Family Courts power to resolve parenting disputes is not to garner for the court some intrusive and supervisory role that ignores the legitimate wishes and interests of parents in how they

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27 [2007] FMCAfam 926 at [11].

28 L Young, 'Resolving relocation disputes: The 'interventionist' approach in Australia' (2011) 23 *Child and Family Law Quarterly* 203.

organise their lives. Absent some danger or harm to a child, intact families would not countenance a situation where a court, effectively of its own motion, made orders about where that family should live so as to maximise the interests of the children in the family but contrary to the parents' wishes as to where they live. The court's role is to resolve a dispute as to where the child should live – not the parents – and while the interests of the child should be a paramount concern in deciding how best to resolve that dispute, the child's perceived maximal interests should not be used as a pretext for orders that re-engineer the lives of the family in the way the particular decision-maker happens to think best. Certainly, this does not happen in 'non-relocation cases'. For example, a court faced with a parenting dispute that does not involve relocation could – *but notably would not* – decide one or both of the parents should move somewhere more appropriate with the child (eg to improve their employment prospects and so their ability to support the child financially). Indeed, in the child support context, notwithstanding parents' primary responsibility to support their children, a parent can choose to organise their life in a way that makes them unable to provide financially for their child, so long as their reason for making that decision is not primarily for the purpose of avoiding that support.[29] This suggests an ideology which rejects the state interfering by telling parents what their work arrangements should be.[30]

Notwithstanding that *Sampson* permits the possibility of the 'left-behind' parent being ordered to relocate to be with the child, the case-law reflects the reality that courts will far more readily consider the possibility of restraining the movement of primary carer parents who wish to relocate with a child. Indeed, there do not appear to be any cases where a 'contact' parent has either been ordered not to move away from their child, or ordered to move with a relocating parent. While there have been a few cases where the relocation of a primary carer parent with child was permitted on the basis that the 'contact' parent could choose to move also if they wished,[31] this evidences a very different approach to the parenting obligations of contact parents as compared to primary carer parents. Notably, in 2008 Parkinson, in assessing the impact of the 2006 amendments on relocation cases, analysed 58 reported relocation decisions, concluding it had become more difficult[32] since the reforms for primary carer parents to secure permission to relocate, particularly in the case of an application to relocate internationally.[33]

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29 Child Support Assessment Act 1989 (Cth), s 117(7B).

30 P Parkinson (chair), Ministerial Taskforce on Child Support, *In the Best Interests of Children – Reforming the Child Support Scheme, Summary Report and Recommendations of the Ministerial Taskforce on Child Support*, Canberra, May 2005, [12.7].

31 *P v P* [2006] FMCA 518; *T v O* [2006] FMCAfam 709.

32 When compared to research undertaken before the reforms: P Esteal, J Behrens and L Young, 'Relocation Decisions in Canberra and Perth: A Blurry Snapshot' (2000) 14 *AJFL* 234; V Kordouli, 'Relocation – Balancing the Judicial Tightrope' (2006) 20 *AJFL* 89.

33 P Parkinson, 'Realities of Relocation: Messages from Judicial Decisions' (2008) 22 *AJFL* 35.

III THE RELEVANCE OF GENDER TO RELOCATION DECISION-MAKING

There has been a degree of critique of the application of the reformed Pt VII provisions, particularly with regard to the potential for child safety to be undermined by a judicial propensity to favour shared care.[34] It might also be assumed that a post-2006 shift in favour of judicially ordered share care played its part in making it more difficult for primary carer parents to secure an order permitting relocation away from the other parent. However, a focus on shared parenting does not explain, per se, why the court would fail to consider seriously orders requiring the 'left-behind' parent to relocate with the other parent and child, given that such orders would also facilitate shared parenting. The reality remains in Australia, as in many jurisdictions, that women are far more likely to perform the role of primary carer of children. Thus, an approach that more readily constrains the freedom of movement of primary carer parents than 'contact' parents – who, despite the judicial rhetoric, appear to be free to move away from their children or not to move to be with their children when they reasonably could – will adversely impact women far more than men.

It has generally been accepted in the debate on relocation that it is mothers who are most likely to be adversely affected by restrictive relocation laws.[35] As feminists have long noted, we are very accustomed to women having their lives constrained, legally, by their role as parents, in ways different from fathers:[36]

> '… [W]here women resort to law, their status is always already imbued with specific meaning arising out of their gender. They go to the law as mothers, wives, sexual objects, pregnant women, deserted mothers, single mothers and so on. They are not simply women (in distinction to men) and they are most definitely not ungendered persons.'

Thus, it feels very natural to treat women differently from men, simply because they are mothers. In addition, it remains the case that women and men experience family life, parenting and their work lives differently, and we should be ever vigilant about scrutinising apparently gender neutral decisions that have particularly harsh outcomes for women simply because culturally women happen to parent more.

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[34] For a summary of key findings of a major report which identifies how shared parenting reforms can be seen to undermine protection of victims of violence, see D Higgins and R Kaspiew, *Child Protection and Family Law … Joining the Dots*, National Child Protection Clearinghouse, Issues Paper No 34, 2011.

[35] For one discussion of the 'equality ideology' in the relocation debate, see Merle H Weiner, 'Inertia and Inequality: Reconceptualizing Disputes over Parental Relocation' (2007) 40 *UC Davis Law Review* 1747 at 1794ff.

[36] C Smart, 'Law's Truth: Women's Experience' in R Graycar (ed), *Dissenting Opinions: Feminist Explorations in Law and Society*, Allen and Unwin, Sydney, 1990 at 7.

Parkinson,[37] however, has challenged the orthodoxy that women's movement is more constrained in this context. It is important to address Parkinson's (albeit brief) arguments because the discussion of relocation laws takes on a different complexion if apparently neutral laws have, in effect, very differential and discriminatory outcomes for women. Parkinson makes a series of claims to support this proposition. Before addressing in turn Parkinson's particular arguments, a general point can be made. Parenting orders are not made in a vacuum; they are made in a context. The reality remains that women *do* parent more than men. Regardless of shifts in parenting patterns over the years, women still do the vast bulk of parenting;[38] they remain our primary carers of children. A woman seeking to relocate is therefore far more likely to be a primary carer; thus if she wishes to move without the child, this will involve her giving up primary parenting. Most men leaving the location of their children will *not* be giving up primary parenting (or even equal shared parenting). Parkinson's point that parenting constrains the movement of both parents in a variety of ways, fails to factor in the very different experiences of parenting for men and women, and thus the very different impact that restraint of movement may have on parents. A consideration of the context of parenting is crucial to any analysis of the way in which relocation decisions might impact on the freedom of movement of parents.

The paper in which Parkinson makes his argument deals with relocation more broadly. Leading into his consideration of whether women's movement is more constrained than men's, Parkinson discusses a number of issues which deserve some comment. First, Parkinson explores the source of any right of parents to freedom of movement and the role of Australia's Constitution.[39] Parkinson notes that the constitutional right to freedom of movement between the states is limited[40] and there is no other source provided for any such right nor any significant exposition of this right in the High Court, with the references to this 'right' deriving from statements from lower courts. However, this analysis arguably just serves to obscure the real issue. It is all too easy to put aside the relevant *interests* of parents in these decisions by pointing out they have no legally enforceable *right* to freedom of movement. Parents should not need to argue a 'right' to freedom of movement to have their interests in where they live considered in an appropriate way when a court is making a decision about where a child shall live.

This focus on rights is not surprising, however, given that much of the wording in the legislation reflects the assumed rights of children to have particular types of relationships with both parents. This is commonly said to flow from the rights of children set out in the United Nations Convention on the Rights of the

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37 P Parkinson, 'Freedom of Movement in an Era of Shared Parenting: The Differences in Judicial Approaches to Relocation' (2008) 36(2) *Federal Law Revie*w 145 at 164ff.

38 See Human Rights and Equal Opportunity Commission, *Striking the Balance: Women, men, work and family*, Discussion Paper 2005, Ch 2.

39 At 151 ff.

40 In *AMS v AIF* the High Court confirmed that the right in s 92 of the Constitution to freedom of interstate movement could be subordinated if the child's best interests require it.

Child (the CRC). However, the CRC recognises that when parenting decisions are being made, rather than having the right to a particular outcome, children have the right only to have their interests seriously considered (see Arts 3 and 9). These rights are expressed in relational terms; children's best interests are 'a' paramount consideration under the CRC. This is not precisely reflected in the Australian legislation which makes the child's best interests *the* paramount consideration and does not speak of parental rights and interests. Thus, statements such as the following by Parkinson may appear palatable in terms of the current legislation but are not reflective of the rights of children reflected in the CRC:[41]

> 'There is nothing in the judgments of the High Court … to suggest that the optimal arrangement for the child can be displaced by the adequate for the sake of allowing a parent's freedom of movement.'

Constructing the argument in terms of rights, where certain rights of children are assumed (to an optimal outcome for example), but other interests of adults are not recognised or respected, naturally supports a restrictive approach to relocation cases. The fact that one does not need to assert a right to have one's interests considered in making a parenting decision is evident in day-to-day decision-making; judges take explicit accounts of parents' interests all the time and very often have to resort to adequate arrangements for children, rather than optimal ones, because of the interests of parents. *MMR v GR* discussed above makes this clear. As the High Court pointed out there, equal shared parenting cannot be ordered under the Act when it is not 'practicable' for the parents (s 65DAA(1)), when the 'reality' of the situation is considered.[42]

Further, in his discussion Parkinson notes High Court Justice Kirby's reference to the (now historical, if indeed it was ever the case) reluctance of courts to interfere with a parent's choice of place of residence where that parent is the 'unchallenged custodian'.[43] Parkinson takes this to imply 'different considerations might apply' where there is a type of shared parenting. However, it is difficult to see how different factual situations lead to different considerations (as opposed to outcomes) – in their nature the considerations are the same. Surely courts should be equally reluctant to impose on *any* parent the obligation to live in a certain place. All parents have an interest in choosing their place of residence and are subject to precisely the same legal principles, regardless of whether they are unchallenged custodians or not. What is different is that a court may conclude the consequences for a child of a move with a parent are different when there has been more, or less, parenting by the other parent, thus leading to different outcomes in such cases.

Turning then to the particular question of the differential impact of relocation decision-making on mothers and fathers, Parkinson begins by quoting his own

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41 At 160.
42 *MRR v GR* [2010] HCA 4 at [15].
43 At 163.

thesis[44] that 'parents are tied to one another by the indissolubility of parenthood'. Whatever ties parenthood may create for some parents, and whatever relevance this thesis may have in other contexts, it seems difficult to argue that this broad proposition is a universal condition of significance to this debate. The fact remains that, whatever the improvement in fathering over the years, there continues to be a group of fathers who effectively play no role as a parent (as indeed, there would be some, though many fewer, mothers who opt out of parenting). For example, in the 2008/09 year in the child support population, 76.1% of paying parents (87.5% of whom are male) are recorded as having 'less than regular' care of their children, which means less than 14% care.[45] Also, in 28.4% of cases the child support liability is at or below the statutory minimum rate of child support.[46] While the statistics do not expose the intersection between the two groups of paying parents, there *will* be a group of parents, predominantly men, who will both pay virtually no support and have no, or almost no, contact with their children. The reason for this is not relevant to this discussion;[47] while biological parenthood is important, it is hardly indissoluble in a practical sense. As this and many papers have suggested, and as the cases bear out, fathers are generally free to walk away from the physical aspect of parenting[48] and there are a group who will do just that, just as there are mothers who will make that choice.

Parkinson then cites, in support of the idea that the practical restraint of movement of both parents may be more equal than has been suggested, a study from the Netherlands[49] where 'separated men with children' were found to move shorter distances from their children than other groups studied. This study was undertaken, say the authors, against a backdrop of limited shared parenting, with women the overwhelming custodians of children. The study was designed, in part, to look at the distance of moves and one hypothesis was that, because women primarily have custody, and because many fathers want to have contact with their children, those fathers will be more constrained in their movement and so will move shorter distances than the women. While the data does show that separated men with children were the group who moved the least distance, the claim[50] by the authors that this confirms their hypothesis that this is *because* of contact with their children is difficult to sustain. No consideration is given to why the moves of these men might be over shorter distances, other than the consideration of one possibility, ie to maintain contact

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44 At 165.

45 Child Support Agency, *CSA Facts and Figures 08–09*, at 22 (available at www.csa.gov.au/publications).

46 It cannot be assumed this is invariably due to low incomes, as where there is equal shared care, relatively equal incomes will result in very low assessment levels. However, only 12.1 per cent of all cases were shared care in this year.

47 It should not be assumed such situations necessarily result from the actions of the mother, although that is one possible reason.

48 They may not, of course, always escape the financial side of parenting so easily, though note the comments above about earning capacity.

49 P Feijten and M Van Ham, 'Residential Mobility and Migration of the Divorced and Separated' (2007) 17 *Demographic Research* 623.

50 Ibid at 639.

with their child who lives with their mother. The absence of any understanding of the reasons why parents moved in this study raises unresolvable questions about what it means. It must also be remembered that these fathers had the freedom to choose whether to go or stay. Further, a study by Braver et al[51] found that in a sample of 602 University students of divorced parents, only 39 per cent recorded that neither of their parents moved post-separation. There were about equal numbers of students who recorded either moving away with their mother, or their father moving away from them. Thus, fathers were just as likely to move away from their children, as mothers were likely to move away with their children. In short, there simply is not sufficient evidence on these matters to make any clear claims. What can be said, however, is that primary carer mothers do have their movement constrained by the family court; the chances of a contact father having his movement constrained is infinitesimal.

Further, in considering whether court decisions – decisions of the state – unfairly discriminate against women in their impact, one must be cautious in relying on what the general population does, or does not, do. *Even if* fathers in the general population are more selfless when it comes to making parenting decisions than mothers (which is the implication of the way this piece is used and a long bow to draw) that is no reason for ignoring disparate treatment of women in decision-making by the state.

Parkinson next hypothesises that non-residential parents might in fact be *more* constrained than primary carers, as they cannot move away and force the other parent to move. *Sampson v Hartnett* now makes clear this is not the case, however remote such an outcome may be in practice. Further, as Parkinson himself has argued, the shadow of the law for mothers wanting to relocate is longer since the 2006 reforms;[52] it is no easy task to get an order permitting a move. Fathers can weigh up the reasons behind their desire to move, and the impact on their relationship with a child, and make a decision whether to go or stay (and many will go, just as many women would go if they could). Men do not need to ask permission – as women do – even though the consequences for the child may be identical.

Parkinson then moves to the argument that, just as a mother may wish to move, so a father may wish to stay, and this needs to be accorded the same weight when considering the matter, as they are both facets of freedom of movement, which is really freedom to choose where you live. In the past, it can only be said that, given no consideration has been accorded to forcing men to relocate, the right of fathers to stay has been an absolute given. Now that the courts have acknowledged they can constrain the mobility of both parents, this argument may begin to have more force. However, as this paper has shown, there can be no doubt that, even in the new interventionist era, very real consideration is

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[51] Sanford L Braver, Ira M Ellman and William V Fabricius, 'Relocation of Children after Divorce and Children's Best Interests: New Evidence and Legal Considerations' (2003) 17(2) *Journal of Family Psychology* 206 at 212.

[52] P Parkinson, 'The Realities of Relocation: Messages from Judicial Decisions' (2008) 22 *Australian Journal of Family Law* 35 at 35.

being given to the desires of fathers to stay where they are. It cannot be said that *more* consideration is given to the desires of primary carer mothers to move.

Parkinson goes on to point out that some mothers move frequently and in this case it may be unreasonable to consider whether the other parent can move with her, due to the high likelihood that the mother will not stay in that location. Many of the fathers who move away from their children may also be 'serial movers'; how would we know? The fact that some women move frequently does not support an argument that women are more or less constrained in their movement. A father who chooses to move regularly, regardless of his parenting obligations, faces no constraint; the serial mover mother may well however. Such behaviour by a mother is, of course, vitally relevant when making the decision as to where a *child* should live. It may well be a reason for leaving the child with the father.

Finally, Parkinson considers the relevance of the evidentiary issue of whether non-resident parents will *in fact* move, if the relocation is allowed on the basis that they reasonably could. Having concluded that the court can do no more than create conditions for meaningful relationships, Parkinson goes on to say that attempting to determine the probability of such an event is counter-productive, on the basis that it will 'encourage strategic position-taking'.[53] It would seem the boat has already sailed in that regard. The current regime achieves this amply, particularly for women, who have long been faced with tough strategic decisions about how to present their cases; do they offer up the alternative of staying (and have this become the best alternative) or do they refuse to stay despite the outcome and appear to be ambivalent about parenting (in a way that did not seem to affect the father in *MMR v GR* to the same extent as the mother in *Sampson*)? Nor is it clear why the question of whether non-resident parents will follow relocating primary carer parents should be ignored given Parkinson's perspective; if optimal arrangements are to be sought, and parents who *could* move are found to be unlikely to do that, then perhaps this is a case where the court might consider making a coercive order against the 'left behind' parent.

These arguments have been dealt with in such detail because accepting the position that the freedom of movement of primary carer mothers is no more constrained than that of contact fathers, supports the notion that modern family law jurisprudence treats parents equally in this area. If, however, one concludes that these arguments do not establish the equal constraint of contact parents (mostly fathers), and that relocation decision-making does, in fact, seriously constrain the movement of primary carer parents (mostly mothers), then arguably there is reason to reconsider the approach to relocation decision-making. Indeed, such a conclusion calls into question the operation of

[53] At 23.

the best interests' principle more generally. Before turning to that point, it is timely to consider recent Full Court decisions as it seems there is a change in the wind.

IV RECENT FULL COURT RELOCATION DECISION-MAKING

Recent Australian Full Court decisions have started to re-engage with the important questions that underpin relocation decision-making. In *Adamson & Adamson*[54] the court considered the power to make orders interfering with a parent's freedom of movement, particularly those that require a parent to move. It could be argued that *Adamson*, together with the Full Court decision in *Jurchenko & Foster*,[55] reflect a judicial shift towards paying more regard to the right of *both* parents to choose where they live. In *Adamson* the Full Court[56] held that a parent's freedom of movement should only be restricted to advance the child's interests 'where those interests would be *so* adversely affected as to justify interference; and then the interference is legitimate only to the extent that it is necessary to avoid such adverse effects' (emphasis added).[57] The same is true, the court held, in the case of the court adopting a proposal not advanced by the parties; modification of the parties' proposals 'can only be as far as is necessary to avoid adverse effects upon best interests'.[58]

Moreover, the Full Court was cognisant that parents should not be treated disparately: 'if interference with parental rights' is required '*all* alternatives, including the [left-behind parent's] exercise of [their] right to choose where [they] lived … would need to be considered' (emphasis added).[59] This approach is reflected in recent successful appeals based on the failure of the trial judge to take proper account of the possibility of a contact parent relocating closer to a primary carer parent who wishes to move.[60] However, reflecting the Full Court's statement in *Adamson*[61] that 'rare' or 'extreme' circumstances are necessary to secure a coercive order requiring even a primary carer parent to move to continue to care for the child,[62] there do not appear to be any decisions where orders were made which coerce 'left-behind' parents to move to be with their child.

These, and other recent Full Court cases, show an increased sensitivity to the particular disadvantages primary carer parents face in these cases in terms of

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54 [2014] FamCAFC 232.
55 [2014] FamCAFC 127.
56 Relying on statements in *AIF v AMS* and *U v U* [2002] HCA 36; (2002) 211 CLR 238.
57 At [66].
58 At [67].
59 At [69].
60 *Jurchenko & Foster* [2014] FamCAFC 127; *Deiter & Deiter* [2011] FamCAFC 82; and *Lorreck & Watts* [2012] FamCAFC 75.
61 Relying on *Sampson*.
62 At [37].

their freedom of movement; in particular, the potential disadvantage these parents (usually mothers) face in court when presented with the question, as in *U v U*, as to what they will do if they are not permitted to relocate. While *U v U* confirmed that the decision-maker cannot discount an option just because it is not presented by a parent as a proposal, more recent decisions have adopted comments of both Kirby and Gaudron JJ in *U v U*[63] which highlighted the invidious position a primary carer finds themselves in when having to concede that, if the relocation is not permitted, they will stay to care for the child. This can easily present as the 'best' alternative and, as we have indicated, lead decision-makers to overlook the reality of the situation. As Kirby J said (in the minority) in *U v U* (and as endorsed in *Jurchenko*[64]):[65]

> 'Treating the wife's refusal to abandon her child and her expression of willingness (if necessary) to stay with the child in Australia as an "alternative proposal" requires, in effect, that parent to show "good" or "compelling" reasons to relocate, given that doing so will always make it more difficult (and in some cases virtually impossible) for physical contact between the other parent and the child to be maintained. Such an approach stacks the cards unfairly against the custodial/residence parent …'

Gaudron J noted the potentially gendered nature of this disadvantage:[66]

> 'Further, it must be accepted that, regrettably, stereotypical views as to the proper role of a mother are still pervasive and render the question whether a mother would prefer to move to another state or country or to maintain a close bond with her child one that will, almost inevitably, disadvantage her forensically. A mother who opts for relocation in preference to maintaining a close bond with her child runs the risk that she will be seen as selfishly preferring her own interests to those of her child; a mother who opts to stay with her child runs the risk of not having her reasons for relocating treated with the seriousness they deserve.
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> It must be acknowledged that it is likely that, in very many relocation cases, a mother will concede that, if she has to choose between relocation and having her child live with her, she will choose to have her child live with her. That being so, she runs the risk that her interests will not be properly taken into account. To avoid that possibility, it is essential that, in relocation cases, each competing proposal be separately evaluated.'

However, notwithstanding something of a resurgence in judicial awareness of the potential disadvantage primary carers may face in relocation cases, there is still an anomaly in the law in respect of the question of the making of 'coercive' orders. In both *Sampson* and *Adamson* the Full Court distinguished orders requiring a parent to relocate from orders restraining a parent's movement, suggesting a more compelling case needs to be made to warrant making the

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63 *Jurchenko & Foster* [2014] FamCAFC 127 at [127].
64 At [100].
65 At [144].
66 At [36]–[37].

former type of order. The Full Court justified this position on two grounds. First, there is this statement in *Sampson*[67] (endorsed in *Adamson*[68]):

> '… A person wishing to relocate will frequently be living in a settled environment awaiting the imprimatur of the court before moving. In other circumstances, where a move has already been made, or is planned, settled arrangements in the new location will be in place or arranged. Where the court may be ordering the return of a parent to a location in which they have lived for some time, but from which they have moved without the consent of the other party and in circumstances in which existing orders or arrangements for the other parent to spend time with the children will be rendered ineffective, there will usually be arrangements in the original location for the practicalities of life, such as accommodation, schooling and employment if relevant, which can readily be identified by the Court. If there are not, that fact would normally be a relevant consideration.
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> To order someone to relocate to another place will require the court to be satisfied that the practicalities of life equally or sufficiently exist in the place to which the party is required to move. One would therefore reasonably expect a close analysis of the moving party's capacity and/or the other parties' capacity to provide for such practicalities having regard to the orders proposed by the court. It is probably only in the circumstance of significant wealth of both parties that it might reasonably be inferred that the practicalities of life could be met without detailed inquiry.'

However, this rationale is nothing more than the normal enquiry that must be undertaken when determining what parenting orders best serve the child's interests. Perhaps when the court says that 'rare' or 'extreme' circumstances are required to coerce a parent to move (as opposed to ordering them to stay), it simply means that it is rarely likely that the arrangements arising out of coercing one parent will be the best in the circumstances. On that interpretation, there should be no distinction between the scrutiny given to the consequences of restraining a parent from relocating away and the consequences of ordering a parent to move. However, in both *Sampson* and *Adamson* the Full Court went further in saying that the effect of ordering someone to relocate is more drastic than an order restraining someone's relocation because the 'person being ordered not to move at least has chosen that location at some stage and for reasons which one assumes at least once existed. This contrasts with a person who may not wish to go somewhere and therefore the order is much more of an imposition on that person's freedom'.[69] It is not clear why the court thinks this is invariably the case. Take for example *MMR v GR* – the mother in that case moved from Sydney to Mt Isa for the father's job and was initially required to stay there despite the very considerable imposition it placed on her, whereas the father could easily have returned to Sydney but little consideration was given to that possibility. *AMS v AIF* was another case where the initial move was for the father's work, and it was he

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67 At [74]–[75].
68 At [38].
69 *Sampson v Hartnett (No 10)* (2007) 38 Fam LR 315; FLC ¶93–350 at [57], confirmed in *Adamson & Adamson* [2014] FamCAFC 232 at [36].

who then moved back to the original home city of the parents. Giving in to the father's requests, the mother reluctantly returned there to try things out, but was unhappy and wanted to return to the new location where she had settled. Both parties had at different times chosen the different locations for various reasons – but at trial it was the mother who was expected to forego her wish so the father could have his choice of residence, and contact with their child. It follows that if 'rare' or 'extreme' circumstances are required before a parent will be ordered to move to follow a relocating parent, and conversely if restraining a carer parent's move does not require rare or extreme circumstances, then primary carer parents wishing to move away (usually mothers) will invariably be disadvantaged – as it will be easier to satisfy a court that it is appropriate to order them to live in a place not of their choosing simply because they are being asked to stay somewhere they are already living.

The foregoing case-law also highlights a further and fundamental problem with relocation cases in practice. In addition to these legal principles being more restrictive of the freedom of movement of parents providing the primary care of children, there is also a practical reason why those same parents may be further disadvantaged. Cases such as *U v U* confirm that, in theory, a parent wishing to move away from their child can be restrained; so a parent exercising contact with their child who wants to move away could be forced to stay to have contact, as contact is the right of the child and generally in their best interests. However, primary carer parents are unlikely to start expensive litigation to force the child's other parent to stay nearby. This is not because the primary carer is necessarily less concerned about their child than, say, a contact parent who initiates proceedings to stop the carer parent relocating with the child. The contact parent who brings proceedings usually does so for two reasons: first, they think it is best for their child to continue to see them frequently; and secondly – and crucially – it is very important *to them* to see their child as much as possible. Conversely, a carer parent may well think it best for the other parent to remain close so they can maintain their relationship with the child, but there will not necessarily be the same personal incentive to start expensive litigation to force the other parent not to move away from their child.

There is no data on why many children are geographically isolated from one parent – that is, we do not know whether more parents with primary care move or whether it is more often the other parent who moves. However, it is plainly the case that both events happen, but that only situations that involve moving the child as well come before the court. Thus, it remains the case that, to the extent it is difficult to obtain court consent for relocation, the freedom of movement of carer parents will be most harshly affected.[70]

As this discussion shows, relocation cases raise very interesting questions about the proper resolution of disputes where the interests of children potentially collide with important interests of parents. For these reasons this topic has

[70] For a critique of this conclusion, see P Parkinson, 'Freedom of Movement in an Era of Shared Parenting: The Differences in Judicial Approaches to Relocation' (2008) 36 *Fed L Rev* 145, 164ff.

become hotly debated in many countries, including Australia.[71] There have been suggestions that the FLA should be amended to include specific provisions to deal with relocation cases,[72] though it seems unlikely this will happen. In turn, this issue raises fundamental questions for some about the appropriateness of the paramountcy principle, at least as it is applied in Australia.

V WAYS FORWARD: IS THE REAL CULPRIT THE BEST INTERESTS PRINCIPLE?

As already noted, the FLA's requirement that the child's best interests are 'the' paramount consideration in decision-making is not consistent with the CRC; the FLA goes further than required by the CRC which reflects the relative nature of the rights of family members. The history of Australian relocation decision-making shows starkly the problem of a principle which is interpreted literally as demanding that children's interests take priority over those of their parents. This problem has not gone unnoticed; it is one of a number of coherent criticisms levelled at the best interests' principle as it operates in family law decision-making.[73]

Scott and Emery, in an analysis of the 'puzzling persistence' of the best interests' principle, argue that, despite persistent criticism, 'the standard's entrenchment is the product of a gender war that has played out in legislatures and courts … for decades'.[74] In the course of their paper, Scott and Emery document the insurmountable obstacles that routinely prevent judicial officers from evaluating the evidence that will be presented in a parenting dispute. In the context of relocation, their analysis would suggest judicial officers are not well

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[71] The research on this topic is too vast to cite, but some examples include: D Duggan, 'Rock-Paper-Scissors: Playing the Odds with the Law of Child Relocation' (2007) 45 *Fam Ct Rev* 193; T Carmody, 'Child Relocation: An Intractable International Family Law Problem' (2007) 45 *Fam Ct Rev* 214; M Henaghan, 'Relocation Cases – The Rhetoric and the Reality of a Child's Best Interests – A View from the Bottom of the World' (2011) 23 *Child and Fam Law Q* 226; E Jollimore and R Sladic, 'Mobility – Are We There Yet?' (2008) 27 *Can Fam Law Q* 341; J Behrens, 'A Feminist Perspective on *B and B* (The Family Court and Mobility)' (1997) 2 *Sister in Law* 65; L Young, 'Resolving Relocation Disputes: The Interventionist Approach in Australia' (2011) 23 *Child and Family LQ* 203; P Parkinson, 'Freedom of Movement in an Era of Shared Parenting: The Differences in Judicial Approaches to Relocation' (2008) 36 *Fed L Rev* 145; P Parkinson, J Cashmore and J Single, 'The Need for Reality Testing in Relocation Cases' (2010) 44 *Family Law Quarterly* 1.

[72] .Family Law Council, *Relocation*, 2006, available at www.ag.gov.au.

[73] See, for example, J Eekelaar, 'Beyond the Welfare Principle', (2002) 14 *Child and Family Law Quarterly* 237; H Reece, 'The Paramountcy Principle: Consensus or Construct?' (1996) 49 *Current Legal Problems* 1; J Herring, 'The Human Rights Act and the Welfare Principle in Family Law – Conflicting or Complementary?' (1999) 11 *Child and Family Law Quarterly* 11; E Scott and R Emery, 'Gender Politics and Child Custody: The Puzzling Persistence of the Best Interests Standard' (2014) 77 *Law and Contemporary Problems* 69; H Rhoades, 'Revising Australia's Parenting Laws; A Plea for a Relational Approach to Children's Best Interests (2010) 22 *Child and Family Law Quarterly* 172.

[74] E Scott and R Emery, 'Gender Politics and Child Custody: The Puzzling Persistence of the Best Interests Standard' [2014] 77 *Law and Contemporary Problems* 69 at 70.

placed to assess which of a range of possible living arrangements is optimal for the child in question. In particular, Scott and Emery take issue with what they argue is the inappropriate reliance on the opinions of mental health professionals (in Australian terms this would be family consultants[75] and expert witnesses, usually psychologists, whose opinions are routinely relied on):[76]

> '… social scientists have questioned whether the evaluators in most custody cases have the expertise to contribute input beyond observations and established diagnoses. These critics argue that psychologists violate both scientific norms and professional ethical standards when they offer opinions based on the typical evaluation process.
>
> This questionable inferential process is deployed in several ways to support opinions that rest on uncertain or illusory science … In general, psychological opinions are shaped by professional and theoretical perspectives and biases in ways that are seldom transparent … in offering opinions on how custodial responsibility should be divided, psychologists make a number of questionable inferential moves on the basis of their observations, evaluating and comparing the relative importance of particular factors to custody. Nothing in the relevant scientific knowledge or in clinical training provides the expertise to perform these functions.'

Scott and Emery favour adoption of the ALI approximation standard: '[a]pproximation allocates custody on the basis of past caretaking in most cases, and thus largely obviates the need for psychological testing'.[77] The authors do not consider the implications of that approach for relocation cases, where pre-separation caregiving cannot be replicated if either of the parents moves. While an approximation standard may have merit in some cases, there are other possibilities that would address the issues raised here. An obvious, if strangely unlikely reform, is a reformulation of the best interests' principle to bring it in line with the CRC: make the children's best interests 'a', not 'the', primary consideration. There is not space to rehearse all the arguments in favour of this approach here,[78] however it is interesting to reflect on whether a shift of this kind could be sold on the basis that it has benefits for mothers *and* fathers (without unnecessarily compromising the interests of children). Indeed, anathema as it may seem to some, it would even be possible to add relevant considerations which reflect the fact that parents' interests *are* considerations relevant to the determination of a parenting dispute. To some extent this is already recognised legislatively, as the court must consider the 'practicability' of shared parenting arrangements: s 65DAA. So, the freedom of parents to live where they wish could be stated to be a relevant consideration – given the current state of the law in Australia this can be viewed as a statement that

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[75] A family consultant is a member of court personnel with a social science background who essentially assists the judicial officer; they routinely make recommendations as to the orders that should be made. For more detail see L Young, A Sifris, R Carroll and G Monahan, *Family Law in Australia*, 2016, LexisNexis, Sydney, [2.43] and [8.90].

[76] E Scott and R Emery, 'Gender Politics and Child Custody: The Puzzling Persistence of the Best Interests Standard' (2014) 77 *Law and Contemporary Problems* 69 at 94–95.

[77] Ibid at 100.

[78] The literature referred to in n 73 provides an overview of the sorts of arguments that can be made in support of this type of reform.

would support the interests of both primary carer and contact parents. Further, this is consistent, as indicated above, with the right of parents to work as they wish, even where that impacts on their ability to meet their obligation to support their children.[79] Most importantly, this would reflect the reality experienced by families not in court – while a decision may need to be made as to where a child lives, the child is just one member of the family, and there must be a weighing, and balancing, of everyone's interests. Nothing in such a formulation prohibits a court from placing more weight on the interests of children where appropriate (which may be very often the case). However, it allows the court to give due regard to important parental interests, avoiding the inevitable conclusion that those interests must always be trumped by perceived inconsistent interests of the child.

In the absence of legislative reform,[80] the Full Court could create legitimate guidelines in this regard; that is, statements of principle which are generally to be applied to direct the exercise of discretion. While legitimate guidelines are more commonly applied in respect of property disputes (perhaps for obvious reasons), I have argued elsewhere that at least one exists in relation to parenting matters (the so-called 'rule in *Rice v Asplund*' which prohibits the re-litigation of parenting disputes in the absence of a change in circumstances).[81] Indeed, there may be an argument that the 'rare' or 'exceptional' requirement for coercive orders amounts to such a guideline.

In this regard it is interesting to consider recent UK jurisprudence on relocation. There is no doubt that the UK would be seen as a jurisdiction where more weight is placed on parental interests than is the case in Australia. This historical approach was acknowledged, at least in relation to domestic relocation, in the 2015 Court of Appeal decision *Re C (Internal Relocation)*.[82] This case held that, contrary to prior practice, the same principles (including those set out in *Payne v Payne*[83]) should be applied to domestic and international relocations. The question had arisen as to whether, for domestic relocations only, a test of 'exceptionality' applied; that is, whether (due to a primary carer parent's right to choose their place of residence) domestic relocation would only be restrained in exceptional circumstances.[84] In reiterating the overriding application of the best interests' principle, and rejecting the existence of any test of exceptionality, Black LJ said:[85]

> '… when one goes back over the internal relocation cases, it is clear that one of the main influences behind the exceptionality "test" was always the welfare of the

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79 See the text accompanying n 29 above.

80 Indeed, the court could create legitimate guidelines to aid with the application of such a reformulated best interests' principle.

81 See L Young, A Sifris, R Carroll and G Monahan, *Family Law in Australia*, 2016, LexisNexis, Sydney, [106].

82 [2015] EWCA 1305.

83 [2001] 1 FLR 1052 at [24].

84 The basis of this 'test' is seen in *Re S (A Child) (Residence Order: Condition) (No 2)* [2002] EWCA 1795; [2003] 1 FCR 138.

85 At [51].

> child. The protection of the freedom of the adults to choose where they would live within the United Kingdom was, of course, another significant influence, but the "exceptional cases" where that would be restricted were those where the welfare of the child required it …'

In Black LJ's view, prior case-law had been misinterpreted as creating what would be called a 'legitimate guideline' in Australia. Having reviewed that case-law, Her Honour found no such guideline but rather saw individual applications of the welfare principle. However, this decision shows that, even in the absence of such a guideline, the welfare principle (which is expressed in similar legislative terms in the UK to Australia) can be applied quite differently:[86]

> 'It is no doubt the case, as a matter of fact, that courts will be resistant to preventing a parent from exercising his or her choice as to where to live in the United Kingdom unless the child's welfare requires it, but that is not because of a rule that such a move can only be prevented in exceptional cases. It is because the welfare analysis leads to that conclusion. One can see from the authorities, and indeed from this case, that the courts are much pre-occupied in relocation cases, whether internal or external, with the practicalities of the child spending time with the other parent or, putting it another way, with seeing if there is a way in which the move can be made to work, thus looking after the interests not only of the child but also of both of his or her parents. Only where it cannot, and the child's welfare requires that the move is prevented, does that happen.'

This is patently a very different welfare lens to that which is being applied in Australia. And if there is any legitimate guideline in Australia, it operates to make it easier to restrict the movement of primary carer parents. Such variations, and the potential for gendered discrimination, support complaints both about the indeterminacy of the best interests' principle and calls for a reformulation of the principle to better acknowledge the interests of all those affected by a court's decision as to the parenting of a child.

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[86] At [53] per Black LJ.

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BELGIUM

NOVELTIES IN BELGIAN FAMILY LAW: CO-MOTHERHOOD, DOUBLE SURNAMES AND THE NEW FAMILY COURTS

*Debbie Horsten, Frederik Swennen and Gerd Verschelden**

Résumé

Après quelques années relativement calmes sur le plan législatif, le Parlement belge a adopté quelques nouvelles lois dans le domaine du droit familial. Ce chapitre s'intéresse aux trois lois les plus significatives. En premier lieu, le droit reconnaît désormais la double filiation maternelle. Les couples de même sexe pouvaient déjà adopter un enfant depuis 2006 mais la Cour constitutionnelle avait conclu à deux reprises qu'en en cas de conflit ou de séparation, le deuxième parent se retrouvait dans une situation défavorable par rapport à la mère biologique. D'où la création de la co-maternité le 1er janvier 2015. L'enfant peut dès lors avoir un père et une mère ou une mère et une co-mère, dans le cas d'un consentement à la procréation assistée. Deuxièmement, les règles patriarcales d'attribution des noms de famille, selon lesquelles l'enfant né hors mariage devait nécessairement porter le seul nom de famille de son père, ont été abolies. Les parents peuvent désormais choisir le nom de famille de la mère, celui du père ou de la co-mère ou, encore, une combinaison du premier nom de famille de chacun d'eux et dans l'ordre qu'ils déterminent. Dans l'hypothèse où les parents ne s'entendent pas sur cette question, l'enfant se verra attribuer uniquement le nom du père ou de la co-mère, selon le cas. La Cour constitutionnelle a cependant déjà déclaré que cette dernière règle était invalide parce que discriminatoire. Il reste également d'autres questions sur la planche de travail du législateur. Enfin et surtout, la Belgique a créé les tribunaux de la famille. Les compétences en matière familiale qui étaient éparpillées entre quatre juridictions différentes, se trouvent maintenant concentrées au sein du Tribunal de la jeunesse et de la famille. De nouvelles règles de procédure familiale ont accompagné cette réforme.

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I CO-MOTHERHOOD

The Act of 5 May 2014 regulating the establishment of the parentage of the co-mother[1] saw the insertion of a new chapter: 'Establishment of the parentage on the co-mothers' side' (chapter II/1), under heading VII: 'Affiliation' of book I of the Belgian Civil Code (CC) after the chapter regulating the establishment of parentage on the mother's side (chapter I) and father's side (chapter II). This Act was – after severe criticism[2] – amended by the Act of 18 December 2014,[3] which came into operation[4] on 1 January 2015 and provides clarity by means of a circular of 22 December 2014.[5] Using the analogy of fatherhood, the new chapter II/1 contains the presumption of co-motherhood (a), allows for voluntary recognition by the co-mother (b) and provides space for the legal investigation into co-motherhood (c).

The introduction of co-motherhood signifies the end of the singular character of original lineage: since 1 January 2015 one child can have original filiation with two women (not yet with two men). This two-sided nature has been preserved: the determination of co-motherhood is only possible in instances of a lack of marriage or established extra-marital fatherhood (art 325/1 CC); existing co-motherhood also prevents the establishment of extra-marital fatherhood (art 319 and 322, first subs CC).[6]

The foundation of motherhood is the birthing of the living child. The foundation for co-motherhood has become the joint intention of parenthood, in other words the intention to commence with a single joint parentage project. This foundation is however broader than consent to (more correctly: assent with) medically assisted reproduction (MAR) to which the Act repeatedly

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1 *Belgian State Gazette*, 7 July 2014, 51703; henceforth: *SG*.

2 F Swennen, 'Meemoederschap vanaf 1 januari 2015: een niet-levensvatbare vroeggeboorte', *Rechtskundig Weekblad* 2014–15, 242.

3 Act of 18 December 2014 (de wet van 18 december 2014 tot wijziging van het Burgerlijk Wetboek, het Wetboek van internationaal privaatrecht, het Consulair Wetboek), Act of 5 May 2014 (de wet van 5 mei 2014 houdende de vaststelling van de afstamming van de meemoeder) and Act of 8 May 2014 (de wet van 8 mei 2014 tot wijziging van het Burgerlijk Wetboek met het oog op de invoering van de gelijkheid tussen mannen en vrouwen bij de wijze van naamsoverdracht aan het kind en aan de geadopteerde), *SG* 23 December 2014, 104985. For a short commentary, see G Seghers and F Swennen, 'Reparatie Wet Meemoederschap', *Tijdschrift voor Belgisch Burgerlijk Recht / Revue Générale de Droit Civil* (henceforth: *TBBR*) 2015, 197–198.

4 Article 31 Act 5 May 2014 and art 19 Act, 18 December 2014.

5 Circular 22 December 2014 on Act of 5 May 2014 (de wet van 5 mei 2014 houdende de vaststelling van de afstamming van de meemoeder) and Act of 18 December 2014 (de wet van 18 december 2014 tot wijziging van het Burgerlijk Wetboek, het Wetboek van internationaal privaatrecht, het Consulair Wetboek), Act of 5 May 2014 (de wet van 5 mei 2014 houdende de vaststelling van de afstamming van de meemoeder) and Act of 8 May 2014 (de wet van 8 mei 2014 tot wijziging van het Burgerlijk Wetboek met het oog op de invoering van de gelijkheid tussen mannen en vrouwen bij de wijze van naamsoverdracht aan het kind en aan de geadopteerde), *SG* 29 December 2014, 106488. Chapter I deals with co-motherhood.

6 The case of the child who is born shortly after the first marriage and within the second marriage (art 317 CC) is discussed in the next section.

refers. The law of parentage makes this connection through the so-called 'volitive reality' rather than the biological reality.

The legislature has opted to create co-motherhood as closely analogous with fatherhood as possible, without remedying established unconstitutionalities in the field. New prejudicial questions relating to co-motherhood must therefore also be expected.

(a) Presumption of co-motherhood

(i) The rule of co-motherhood

A child who is born during a marriage (of the mother, to a woman) or within 300 days after the dissolution or annulment of such marriage has the spouse (of the mother) as co-mother (art 325/2, first subs CC). The Act legislates co-motherhood – based on the marriage of the mother to a person of the same sex – without requiring any proof in respect of the foundation of the filiation. The presence or absence of the joint intention of parenthood is however relevant to the dispute of such legally established co-motherhood (see next section of this chapter). 'The provisions of arts 316 to 317 CC are applicable' (art 325/2, second subs CC). This specifically means that the presumption of co-motherhood will not be applicable:

- in the case of a decision establishing a presumption of absence, when the child was born more than 300 days after the disappearance of the spouse of the mother, without prejudice to bona fide third parties (see *mutatis mutandis* art 316 CC);
- if the child is born into one of the three hypotheses mentioned in Article 316bis of the Belgian Civil Code, unless the mother and her spouse issue a joint declaration (maintaining the presumption of co-motherhood) at the time of registration of birth (see mutatis mutandis art 316bis CC).

A child who is born within 300 days after the dissolution or annulment of the marriage of the mother, and after she has entered into a new marriage (not the previous one, however), has the new spouse as the co-mother (or the new spouse as the father). If this co-motherhood (fatherhood) is disputed, then the previous spouse is deemed to be the co-mother (father) or – in the case of the mother having, prior to her subsequent marriage to a woman, been married to a man – the former husband is deemed to be the father, unless her co-motherhood (or his fatherhood) is disputed or if the co-motherhood (fatherhood) of a third party is established (see mutatis mutandis art 317 CC).

The presumption of co-motherhood applies only to children born after the coming into operation of the Act,[7] thus not for children born prior to 1 January 2015.

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[7] Article 30, first subs Act 5, May 2014.

(ii) Contestation of the co-motherhood of the spouse

Holders of the contestation claim against the legal presumption of co-motherhood are the mother, the child, the co-mother who has established parentage, the woman who claims co-motherhood and the man who claims fatherhood (art 325/3, § 1 CC). The co-motherhood of the new spouse can also be challenged by the former spouse (art 325/3, § 2, sixth subs CC).

Possession of status vis-à-vis the co-mother is legally an absolute ground for the inadmissibility of a contestation claim (art 325/3, § 1 CC). The claims are to be instituted by the respective holders within specified expiration periods:

- the mother: within a year after the birth (art 325/3, § 2, first subs CC);
- the co-mother: within one year of the discovery of the fact that she had not consented to the act that had the purpose of reproduction or within one year of the discovery of the fact that the conception of the child could not be the result of the reproductive act to which she had consented (art 325/3, § 2, second subs CC);
- the alleged co-mother: within one year after the discovery of the fact that she had consented to the conception according to the MAR-Act of 6 July 2007 and that the conception may be as a result of that act (art 325/3, § 2, third subs CC); this action can be initiated prenatally (art 328bis, first subs CC); a successfully contested claim immediately implies a judicial declaration of her co-motherhood (see art 325/3, § 5 CC);
- the alleged father: within one year after the discovery that he is the father of the child (art 325/3, § 2, fourth subs CC); this action can also be initiated prenatally (art 328bis, first subs CC) and a successfully disputed claim implies an immediate judicial declaration of his fatherhood (see art 325/3, § 4 CC);
- the child can at the earliest on his or her 12th birthday and by no later than his or her 22nd birthday institute action or within one year of the discovery that the co-mother had not consented to the act of conception, or the fact that his conception is not the result of that act (art 325/3, § 2, fifth subs CC).

It is noteworthy that reference to the alleged co-mother is made only in the period prior to consent to conception by MAR. The expiration periods for the co-mother and child relate to the act with the reproductive aim (which is a wider criterion). It is certainly not inconceivable that a woman other than the wife of the mother, together with the mother, wish for a child and that their wishes are realised outside the context of MAR, eg through sexual intercourse with a man. In such a case, the time limit for the alleged co-mother will not start running in the absence of a starting point[8] (but the defendants will be able

[8] On what is regarded as discriminatory, see G Seghers and F Swennen, 'Meemoederschap zonder adoptie – de wet van 5 mei 2014 tot vaststelling van de afstamming van de meemoeder', *TBBR* 2014, (480) 484, nr. 11.

to reject the claim as without cause after proof that the spouse consented to the reproductive act through which the child is conceived, see immediately infra).

The claim for the contestation of the co-motherhood of the mother's spouse will be upheld (without proof) unless it is proven, by all legal means, that the spouse had consented prior to conception through artificial insemination (AI) or any other with a reproductive aim, unless the conception cannot be the result thereof (art 325/3, § 3 CC). The adage '*actori probatio incumbit*' is clearly not applicable in this context. The plaintiff in contestation of co-motherhood does not have to prove the absence of a ground for co-motherhood; it is the defending party who, in order to settle the claim as unfounded,[9] will have to prove that the ground is indeed present. This has the effect that a man who had sexual intercourse with a lesbian – but who did not necessarily agree to the conception of the child – will not challenge the co-motherhood of the spouse of the mother if it is proved that the co-mother (before or during the marriage) consented to the fertilisation of the mother.[10] Additionally, an alleged co-mother who has, together with the mother, opted for non-medically assisted fertilisation and is able to provide proof thereof is ruled out.[11]

(b) Voluntary recognition of co-motherhood

(i) Establishment of parentage by voluntary recognition

When co-motherhood is not established by the legal presumption, the co-mother can voluntarily recognise the child under s 329bis CC under certain conditions (art 325/4, first subs CC). This means that the mother and the non-emancipated minor child over the age of 12 must consent to the voluntary recognition (recognition). If the legally required consent is lacking, the refusing party must be summonsed before the family court, which will undertake an attempted reconciliation. Should the attempted reconciliation be unsuccessful, the request for voluntary recognition will be rejected if it is established that the applicant did not consent to the conception in accordance with the MAR-Act or if the conception cannot be the result thereof (art 325/4, second subs CC). If this evidence is not provided, the family court may – strictly legally – refuse the voluntary recognition (only) in respect of children older than one year at the time of service of the summons, as it is obviously contrary to the best interests

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[9] As opposed to the context of challenging the paternity of the husband (art 318, § 4 CC) the claim contesting the co-motherhood of the wife may well be admissible if there is proof of agreement to artificial insemination (AI) or another act of procreation.

[10] In this regard, see L Pluym, 'Juridisch statuut voor meemoeders – Commentaar bij de wet van 5 mei 2014', *Tijdschrift voor Familierecht* (henceforth: *T. Fam.*) 2015, (5) 10, nr. 19, which considers it a disproportionate measure which could possibly violate the right to respect for private life of the biological father and the child because the establishment of the biological paternity is prevented.

[11] On what is regarded as discriminatory, see G Seghers and F Swennen, 'Meemoederschap zonder adoptie – de wet van 5 mei 2014 tot vaststelling van de afstamming van de meemoeder', *TBBR* 2014, (480) 484, nr. 12.

of the child. The contestation after refusal to grant consent can also be initiated prenatally by the woman claiming co-motherhood (art 328bis, second subs CC).

The adult or emancipated minor child has an absolute veto right against the voluntary recognition by the co-mother (see, *mutatis mutandis*,s 329bis, § 1 CC).

There is a legal prohibition against the voluntary recognition by a co-mother when there is an absolute impediment to marriage between the mother and the recognising co-mother (art 325/5 CC). While art 325/4 of the Civil Code does not express it in so many words, voluntary recognition by the co-mother is not possible if the child already has a father. This follows from s 325/1 of the Civil Code.[12]

If a child is voluntarily recognised by a father and a co-mother (successive voluntary recognition), only the first recognition will be of effect for as long as it is not annulled (art 329, third subsection CC). It is possible that the co-mother voluntarily recognises a child who has already been recognised by the mother. In such a case, both filiations have effect (art 329, second subsection CC).

As in the case of paternal recognition – but unlike the case of maternal recognition – recognition of co-motherhood can occur prenatally (art 328, § 3 CC).

Where a married co-mother is married and voluntarily recognises a child who is born to a woman other than her spouse, there exists an obligation of notification to her spouse and marital or jointly adopted children under penalty of non-opposability of this recognition (art 325/6 CC).

(ii) Contestation of voluntary recognition by a co-mother

Holders of the contestation claim are the mother, the child, the co-mother who has voluntarily recognised the child, the woman who claims co-motherhood and the man who claims paternity (art 325/7, § 1, first subsection CC).

Possession of status vis-à-vis the co-mother is an absolute ground for inadmissibility of the contestation claim (art 325/7, § 1, first subsection CC). The recognising co-mother and those who have consented to the recognition (mother and child over the age of 12 years) can only contest the recognition by the co-mother if they can vitiate consent in their evidence (art 325/7, § 1, second subs CC).

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[12] Conversely, paternal voluntary recognition is impossible if co-motherhood is established (art 319 CC).

The contestation claims are to be instituted by the respective holders within specified expiration periods:

- the mother and the voluntarily recognising co-mother: within 1 year of the discovery of the fact that the conception of the child could not have been the result of the reproductive act to which the co-mother had agreed (art 325/7, § 1, fourth subs CC);
- the alleged co-mother: within 1 year of the discovery of the fact that she consented to the conception in accordance with the MAR-Act of 6 July 2007 and the conception can be a result of this act (art 325/7, § 1, fifth subsection CC); this claim cannot be instituted prenatally (art 328bis, a contrario CC); a successful contestation claim implies the immediate judicial declaration of her co-motherhood (see art 325/7, § 4 CC);
- the alleged father: within 1 year of the discovery that he is the father of the child (art 325/7, § 1, sixth subsection CC); this claim, too, cannot be instituted prenatally (art 328bis, a contrario CC) but a successful contestation claim implies the immediate judicial declaration of his paternity (see art 325/7, § 3 CC);
- the child can institute the claim at the earliest on his or her 12th birthday and by no later than his or her 22nd birthday, or within 1 year of the discovery of the fact that conception cannot be the result of the reproductive act consented to by the recognising co-mother (art 325/7, § 1, seventh subs CC).

Also in this context, reference to the alleged co-mother is made only in the period prior to consent to conception by MAR. The time-limits for the co-mother and the child relate to the act with the reproductive aim (which is a wider criterion). It is certainly not inconceivable that a woman other than the one who eventually recognises the child, together with the mother, wish to have a child, and that their wishes are realised outside the context of MAR, eg through sexual intercourse with a man. In such a case, the expiration will not start running period for the alleged co-mother in the absence of a starting point (but she will have to prove the merits of the claim, see immediately infra).

The recognition by the co-mother is nullified if, by all legal means, it has been proven that the co-mother did not consent to the conception in accordance with art 7 of the MAR-Act or the conception cannot be a result thereof (art 325/7, § 2 CC). Unlike in cases in which the co-motherhood of the spouse is contested, the claimant in contestation of the recognition by the co-mother must deliver evidence of the absence of a ground for the co-motherhood.[13] In the context of the contestation of extra-marital co-motherhood, it goes to the merits of the claim of (absence of consent to) MAR, while in the context of the contestation of marital co-motherhood, consent to an act of reproduction *sensu lato* can also be a determining factor. This distinction between the contestation of marital and extramarital parentage could constitute a violation of the fundamental

[13] The claim could, eg, be declared well-founded if the mother has signed a MAR agreement with a first partner and the child is thereafter recognised by a new partner.

rights of the man who fathered a child through sexual intercourse with a woman who is married to a woman: the biological father cannot contest the co-motherhood of the spouse if she can prove that she had consented to this reproductive act (see supra). On the other hand, the recognition by the co-mother in this hypothesis is contestable and – indeed – always justified.[14] Now the proof of consent to and conception through sexual intercourse may imply non-consent to conception by MAR and that the conception could not have been the result of MAR.

(iii) Transitional law

The articles relating to the voluntary recognition by the co-mother (art 325/4 to 325/7 CC) have application from 1 January 2015 in respect of children born before that date, provided that the woman who wishes to recognise the child and the child do not yet have a filiation as a result of adoption (art 30, second subs Act 5 May 2014).

This means that if the co-mother has not yet adopted the child,[15] voluntary recognition by the co-mother can proceed as of 1 January 2015, despite the fact that the child or children were born before that date (either within or outside of the mother's marriage). Thus, voluntary recognition by a co-mother, of a child born from a previous relationship of the mother is possible, with the result that an adoption procedure can be avoided. Even where two women have together had a child through MAR but subsequently separate, the former partner may proceed with voluntary recognition as the co-mother despite refusal to consent by the birth mother, insofar as this recognition is not found to be manifestly contrary to the child's interests (see art 325/4 CC).

If the co-mother has already adopted the child (born before 1 January 2015), then art 30, second paragraph of the Act of 5 May, 2014 excludes voluntary recognition by the co-mother. It is submitted that this *lex specialis* on co-motherhood prevails over the *lex generalis* on the (possible) establishment of filiation of the adopted child towards the adoptive parent after the adoption order has become final. Contrary to art 350, first subsection CC provides, that an original filiation established by voluntary recognition by the co-mother cannot *ex nunc* replace the filiation established by the adoption for children born before 1 January 2015.

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[14] It may be assumed that it is possible to abandon the adoption procedure as long as the adoption has not been pronounced (argument *ex* art 348–8, third subs CC (with regards to withdrawal of consent to adoption) and articles 820 (with regards to abandonment of proceedings) and 1231–14, first subs Judicial Code (with regards to the conversion from full to simple adoption and vice versa): see G G Seghers and F Swennen, 'Meemoederschap zonder adoptie – de wet van 5 mei 2014 tot vaststelling van de afstamming van de meemoeder', *TBBR* 2014, (480) 486, nr. 22.

[15] What is regarded as discriminatory, see G Seghers and F Swennen, 'Meemoederschap zonder adoptie – de wet van 5 mei 2014 tot vaststelling van de afstamming van de meemoeder', *TBBR* 2014, (480) 484, nr. 11.

(c) Judicial establishment of co-motherhood

When there is no co-motherhood of the spouse and there has been no voluntary recognition by the co-mother, co-motherhood can be established by a judgment in accordance with the conditions set out in art 332quinquies, §§ 1, 1/1, 2 and 4 CC[16] (art 325/8 CC). This means inter alia that opposition by the mother and the non-emancipated minor older than 12 years is possible, after which the family court, according to the Act, should assess whether the establishment of co-motherhood would not be manifestly contrary to the interests of the child aged older than one year. The mentally competent major child has a veto right against the judicial determination of the co-motherhood.

The investigation into co-motherhood is legally prohibited if it appears from the judgment that there exists an absolute impediment to marriage between the mother and co-mother (art 325/10 CC). An investigation into co-motherhood is also not possible if the child already has a father. This follows from art 325/1 CC.[17]

Holders of the claim are the mother, the child and the alleged co-mother (art 332ter, first subsection CC). The claim is subject to a 30-year prescription period (see art 331ter CC).

Proof of co-motherhood must be delivered. Possession of status vis-à-vis the alleged co-mother serves as the primary means of proof (art 325/9, first subsection CC, art 331nonies CC). In the absence of possession of status the filiation with respect to the co-mother is proved by the consent to MAR in accordance with art 7 of the MAR-Act, if the conception can be a result thereof (art 325/9, second subsection CC). Neither evidence of another act that had a reproductive aim nor other legal evidence that can prove the intention of joint parenthood is sufficient for the legal merits of the claim. The Family Court will reject the claim if it is proved that the alleged co-mother has not consented to MAR in accordance with art 7 of the MAR-Act or if the child's conception cannot be a result thereof (art 325/9, third subsection CC).

If the defendant is married and the claim involves a child born to a woman other than her spouse, the judgment in which the filiation of the child is determined must be served on her spouse and cannot be opposed to her or to marital or adopted children in absence thereof (art 325/8, second subsection CC). This means that the 'adulterous child', eg, will not be considered as heir if the judgment was not served.

Contrary to the applicable provisions on voluntary recognition by the co-mother (see above), there is no transitional provision on the investigation of co-motherhood. This does not mean that the judicial determination of

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[16] With exclusion of article 332 *quinquies*, § 3 CC, which provides that the application must in any event be refused where it is proved that the alleged parent is not the biological parent.

[17] Conversely, the investigation into paternity is impossible if co-motherhood is established (art 322, first subs CC).

co-motherhood pursuant to arts 325/8 to 325/10 CC would not be possible for children born before 1 January 2015. A claim instituted to give effect to the new law with regards to a child born before its coming into operation is a new legal consequence of an old fact, to which the new law is applicable on the basis of the general principle of immediate application of the new law. This means that a woman who, since 27 July 2007 – the date of coming into operation of the MAR-Act of 6 July 2007 – has consented to her female partner conceiving a child through MAR, may be forced to accept co-motherhood, also in respect of children born before 1 January 2015. Conversely, the co-mother may, in this context, allow her co-motherhood to be judicially determined against the will of the mother. An earlier adoption is not a legal obstacle to the judicial determination of the parentage of the co-mother.[18]

II NAMES

The basic rules governing the granting of the surname have been amended by the Act of 8 May 2014,[19] which came into operation on 1 June 2014.[20] This new name law was clarified in a circular which was published two days before publication of entry into operation[21] and then amended by the Act of 18 December 2014;[22] these amendments having come into operation retroactively.[23] The amendment was accompanied by a circular for the benefit of the officials of the civil registry.[24] The new legal regime is an important, but as of yet imperfect reform to the extent that it pursues equality between men and women.

Article 335 CC contains the basic rules governing the granting of the surname as a result of original lineage (below (a)) in respect of the father and/or mother and art 335ter CC in respect of the co-mother. The granting of the surname as a result of adoptive lineage (below (b)) differs depending on whether the adoption is a simple or full adoption: this is governed by arts 353–1 to 353–6 CC (simple adoption) and art 356–2 CC (full adoption). In addition to these provisions, complex but important transitional law exists (c).

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18 L Pluym, 'Juridisch statuut voor meemoeders – Commentaar bij de wet van 5 mei 2014', *T. Fam.* 2015, (5) 14–15, nr. 40.

19 Act 8 May 2014, *SG* 26 May 2014, 41053.

20 Art 1 Royal Decree 28 May 2014 *SG* 30 May 2014, 42167 (see also art 13 Act 8 May 2014).

21 Circular 30 May 2014 *SG* 30 May 2014, 42170.

22 Act 18 December 2014, *SG* 23 December 2014, 104985.

23 Article 19 Act 18 December 2014 provides that art 17 (which replaces art 12 of the Act of 8 May 2014) takes effect from 1 June 2014.

24 Circular 22 December 2014, *SG* 29 December 2014, 106488. Chapter II of this circular deals with the name.

(a) Surname as a result of affiliation

(i) Paternity and maternity are simultaneously established

The child whose paternal and maternal lineage have been established simultaneously[25] is granted either the name of the father, or the name of the mother, or a (double) name composed of both of the parents' names, in their chosen order with not more than one name of each of them (art 335, § 1, first subsection CC).

The parents thus have a threefold right of choice with a choice of four possible surnames: father's name, mother's name or a double name, with the mother's name placed either before or after the father's name.

In the circular, the difference between a double and a composite name, was stressed. The composite name existed before 1 June 2014,[26] while the double name did not. A composite name forms a single and indivisible entity that is, in principle,[27] transferable only as a whole and without interruption. The double name consists of two parts separated by a single space, of which each of the two parts is transferable.[28] The double name may be formed in several ways: by two single names (single in origin or the first or second part of double names), by a single and a composite name, or by two composite names. A double surname is not transferable *in globo* – with its two parts together.

The parents[29] choose the child's name at the time of the declaration of the birth[30] and the civil status registrar notes choice (art 335, § 1, second subsection CC). There exists a model of declaration of choice of name,[31] which need only be used in the case of the choice of the mother's name or a double name. When choosing a double name, the birth certificate must clearly state which part is the first and which part is the second part of the name.[32]

The express agreement by both parents is necessary. In the case of both parents making the declaration together, an oral statement of choice of name is sufficient. In the case of the declaration being made by one parent (or a third

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25 This is not just applicable to children who have the husband of their mother as father because of the paternity rule, but also to children who were the subject of a prenatal paternal recognition (by separate certificate of recognition) that took place at the latest at the time of the declaration of birth (birth certificate).

26 Think, eg, of noble surnames that consist of several words and surnames of adopted children consisting of two parts (whether or not) separated by a hyphen.

27 The name of a foreign parent consisting of several words should, in principle, be considered an (indivisible) composite name, but may exceptionally, for the application of the Belgian name right, be considered divisible if it is divisible on the basis of the national law of the foreign parent. Circular 30 May 2014, *SG* 30 May 2014, (42170) 42172–42173, with reference to art 37, first subs Code of Private International Law.

28 Circular 30 May 2014, *SG* 30 May 2014, (42170) 42171.

29 Plural.

30 Ie within 15 days after the birth (art 55 CC).

31 Appendix 1 to Circular 30 May 2014, *SG* 30 May 2014, (42170) 42187.

32 Circular 30 May 2014, *SG* 30 May 2014, (42170) 42171.

party), a written joint statement of choice of name by both parents is required by the said model; this declaration may take the form of a private or authentic document.[33] The presumption of consent of the other parent with the performance of a single parent in a regime of joint exercise of parental authority (art 373, second subs CC) does not apply, since article 335, § 1, second subs CC creates a specific statutory exception hereto. Since the law also stipulates that the choice of name must be done at the time of the declaration of birth, it will remain without effect if it is done either prenatally or subsequent to the declaration of birth.[34]

Before the civil status registrar notes the choice of name of the parents, he must verify the transferability of the chosen name. In the event of manifest error or a choice that does not comply with the statutory provisions,[35] the official will refuse note of the choice of the parents and will record the child under the name resulting from the application of the supplementary rules,[36] which means that the child will receive the father's name. The official may not refuse the legal name of choice for reasons of expediency; however, he may rectify substantive errors that are determined when he receives the choice of name.[37]

Once the choice of name has been finalised, it is irrevocable.[38]

In the case of disagreement between two the parents about the choice of name, or if no choice is made, the child bears the name of the father (art 335, § 1, second subs in fine CC). This solution – reverting to the previous regime – was justified as being rooted in tradition and by the absence of condemnation by the Constitutional Court.[39] This default position means that the father has an absolute veto against the granting of any name other than his own. Upon closer reflection, it becomes clear that the freedom of choice exists only for the father. This is the unmistakable Achilles heel[40] of the new rules on name transfer, which are aimed precisely at the establishment of equality between men and women. Shortly after coming into operation, two applications for a declaration of invalidity were instituted.[41]

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33 Circular 30 May 2014, *SG* 30 May 2014, (42170) 42177.

34 Circular 30 May 2014, *SG* 30 May 2014, (42170) 42177.

35 Eg where the parents have chosen a name that does not match their own civil status, eg a nickname, a pseudonym, the name of a third party, an invented or accidentally invented name, etc.

36 Circular 30 May 2014, *SG* 30 May 2014, (42170) 42174.

37 Circular 30 May 2014, *SG* 30 May 2014, (42170) 42175. Eg a difference in spelling between the name in the documents of civil registry and the declaration of choice of name by the parents.

38 Circular 30 May 2014, *SG* 30 May 2014, (42170) 42173.

39 Justification for amendment nr. 10 of the government, *Parliamentary Documents* Chamber 2013–14, nr. 53K3145/007, 2.

40 I Boone, 'Het nieuwe naamrecht. Vrijheid van naamkeuze, maar vaders wil blijft wet' in I Boone and Ch Declerck (eds.) *Actualia Familierecht 2014–2015*, Brugge, die Keure, 2015, 64–65, nr. 34.

41 The first was instituted against the entire Act of 8 May 2014 by a mother whose ex-husband

On 14 January 2016 the Constitutional Court declared article 335, § 1, second para, third sentence CC invalid on the basis of its being contrary to the constitutional principles of equality and non-discrimination (art 10–11 Constitution) and with the principle that the law must guarantee women and men the equal exercise of their rights and freedoms (art 11bis Constitution). The differential treatment is based on the criterion of the sex of the parents. Only very strong considerations can justify differential treatment based solely on sex. Neither tradition, nor the desire to ensure gradual progression, are, according to the Constitutional Court, strong enough considerations to justify a difference between fathers and mothers in the case of absence of choice, especially now that the objective of the Act is to achieve equality between men and women. The Constitutional Court mitigated the consequences of the declaration of invalidity, but at the same time obliged government or parliament to take action and thereby gave an ultimatum:[42] 'In order to avoid legal uncertainty, in particular having regard to the necessity of determining the name of the child from birth, and to allow the legislator to adopt a new regulation, the effects of the invalid provision shall be maintained until 31 December 2016'.

The name determined corresponding to art 335, §§ 1 and 3 CC also applies to other children whose lineage in respect of the same father and mother is established (art 335bis CC). This is to avoid a situation of common children of the same parents having different names. However not all children in one family will bear the same name, because nothing prevents eg half-brothers and half-sisters (with only one common parent) from having different surnames since their lineage on the mother's side or father's side differs.[43]

Parents who did not make a choice of name with their first child can no longer exercise their right of choice at the birth of further common children.[44] The civil status registrar will request that the parents make a solemn declaration that the child in respect of whom they exercise the option of name of choice is their first child together.[45]

(iii) Paternity is established after maternity (or vice versa)

If the lineage on the father's side is established after the lineage on the mother's side, the child's name will in principle remain unchanged. The Act now explicitly provides that the same applies in the (very exceptional) case of maternity being established after paternity (art 335, § 3, first subsection CC).

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refused the double surname for their daughter. The second was instituted only against art 335, § 1, second paragraph CC by the Institute for the equality of women and men (Instituut voor de gelijkheid van vrouwen en mannen).

42 Constitutional Court 14 January 2016, no 2/2016, www.const-court.be/public/n/2016/2016–002n.pdf.

43 Circular 30 May 2014, *SG* 30 May 2014, (42170) 42174.

44 Circular 30 May 2014, *SG* 30 May 2014, (42170) 42175.

45 Circular 30 May 2014, *SG* 30 May 2014, (42170) 42176. The declaration of choice of name model is contained in annexure 1 (see p 42187).

However, the parents – or one parent if the other is deceased – can in a joint declaration to the civil status registrar, recorded in a document, change the name of the mother (exceptionally: of the father) to the name of the mother (exceptionally: of the mother) or to a double name[46] (art 335, § 3, second subsection CC). This declaration must be made within a period of 1 year and, in any event, before majority or emancipation of the child. This 1-year period begins to run from the date of recognition or the entry into force of the judgment that determines the second filiation, with the understanding that, with the determination of an adulterous second filiation, the starting point is the day following the communication of the recognition to, or the service of the judgment on, the spouse of the adulterous parent (art 335, § 3, third subsection CC).

Contrary to what applies in the case of adoption, the minor child does not have any form of participation in the change of his surname that is the result of an amendment to his original lineage, which, it is submitted, is at odds with the law of treaties.[47]

(iii) Replacement of an existing lineage during the minority of the child

In the case of amendment of the lineage on the father's side (exceptionally: from the mother's side) during the minority of the child as a result of proceedings challenging the paternity of the husband (not: challenging legally established motherhood[48]) or proceedings challenging paternal (exceptionally: maternal) recognition by the alleged father (exceptionally: mother) or the alleged co-mother, the judge notes the new name of the child as chosen by the parents[49] in compliance with the above-mentioned choice of name rules (art 335, § 3, fourth subsection CC). In such cases we are dealing with a so-called '2-in-1-procedure', whereby the disputed parentage is immediately replaced by the parentage of the applicant in the dispute proceedings, without the child becoming parentless for a single moment. The declaration of choice of name by both parents[50] or the operative part of the judgment that has declared the 2-in-1-claim to be grounded is recorded on the side of the birth certificate and other documents that relate to the child (art 335, § 3, fifth subsection CC).

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46 Composed of their two names, in order of choice, but with no more than one name from each of them.

47 G Verschelden, 'De nieuwe familienaam: keuzevrijheid voor de ouders zonder inspraak voor het minderjarige kind', *Tijdschrift voor Jeugdrecht en Kinderrechten* 2014, (131) 133.

48 The law erroneously contains a cross-reference to art 312, § 2 CC, since the judgment on the claim of the alleged mother, in contestation of maternity that was established on the basis of the inclusion of the birth mother's name in the birth certificate, not the legal establishment of maternity that the alleged mother herself brings.

49 Again without minor children having some form of participation.

50 Namely 1: parent in respect of whom lineage is being established; and 2: parent in respect of whom lineage has recently been established.

(iv) Co-motherhood is established

Article 335ter CC contains detailed rules regulating the granting of the surname where co-motherhood is established. The co-motherhood is equated with paternity as contained in art 335 CC. This leads to the remarkable conclusion that, in case of disagreement between mother and co-mother in respect of choice – or lack of choice – of name, the child will not be granted the surname of the mother, but that of the co-mother (art 335ter, § 1, second subsection in fine CC).

(b) Surname as a result of adoption

The Act of 8 May 2014 granted adoptive parents greater freedom of choice in respect of the surname and deleted the previous prohibitive provisions relating to the granting of the surname of the female adoptive parent; the distinction between adoptive parents of both different and the same sex has disappeared. In the case of the name, after adoption, consisting of two parts as a result of the application of the new Act, it must be considered a double name, which is divisible.[51]

(i) Full adoption

After full adoption the child's original surname disappears and the child is given the surname of the adopting parent (art 356–2, first subs CC). Where two spouses or cohabitants together adopt the same child, they must choose a new name for the child: the name of one of them or a double name in order of choice, but with no more than one name of each of them (art 356–2, second subs CC). The same choices also exist after full step-parent or partner adoption (art 356–2, third subs CC). A choice of name also applies to common children whose (original or adoptive) lineage is subsequently established (art 356–2, fifth subsection CC).

There is no default rule where the adoptive parents do not agree on, or do not exercise their choice of, the name after adoption. The choice of name by mutual agreement is a prerequisite for the adoption judgment (art 356–2, fourth subsection CC).

(ii) Simple adoption

The same rules apply *mutatis mutandis* to simple adoption as to full adoption: in principle the child's surname changes and the choice of name is exercised by the sole adoptive parent (art 353–1, first subsection CC), by the adoptive parents who adopt together (art 353–1, second subsection CC) or by the adoptive step-parent or cohabiting partner, in consultation with the original parent (art 353–2, § 1, first subsection CC). Yet there exist more possibilities after simple adoption.

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[51] Circular 30 May 2014, *SG* 30 May 2014, (42170) 42183.

In the case of simple adoption of a minor by one adoptive parent or by two spouses or cohabitants, the original surname of the child cannot be maintained,[52] but the parties can request of the Family Court that this name is preceded or followed by the name of the adoptive parent (in the case of adoption by a single adoptive parent) or the name chosen by the adoptive couple. The composition of the name of the adopted child is, in the latter case, limited to one name of the adopted child and one name of the adoptive parent (art 353–1, third subsection CC).

There is no default rule where the adoptive parents do not agree on, or do not exercise their choice of name after adoption. The choice of name by mutual agreement is a prerequisite for the judgment granting the adoption; it is stated in the adoption judgment (art 353–1, fourth subsection CC).

The name chosen by the adoptive parents also applies to children adopted by them at a later stage (art 353–4bis CC), but this does not necessarily mean that all adopted children of the same adoptive parents will have the same surname.[53] The minor child older than 12 years must agree to the choice of name, as must those who must consent to the adoption. In the absence of agreement, the family court shall decide in the best interests of the child and with respect for the fundamental rights conferred on the basis of international law (art 353–5 CC). In the case of simple adoption of a major, the adopted major child and the adoptive parent(s) can request that the name of the adopted major child remain unchanged (art 353–3 j, art 353–5 CC).

In the case of simple step-parent or partner adoption of an adopted child, distinctive rules apply.

In the case of an adopted child of the spouse or cohabiting partner being adopted, and the name of the adopted child was replaced by the name of the adoptive parent, the parties can request that the adopted child retain his name or that he gets an new (double) name, composed of the name of the adoptive child preceded or followed by that of the adoptive parent (art 353–2, § 1, second subsection CC).

In the event that the name of the adopted child was composed of the original name and the name of the adoptive parent at the previous adoption (possibility ex art 353–1, third subsection CC), the parties may request that the adopted child retains his name or that he gets a new (double) name composed of the

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[52] See art 353–3 *a contrario* CC.

[53] Where the first adopted child, after simple adoption eg has retained his name, preceded or followed by the name of either of his adoptive parents and the couple later adopts another child, the name of this subsequently adopted child will normally not be the same as that of the first adopted child. The unit name is guaranteed only, upon closer inspection, to the extent that the adoptive parents have chosen one of their names or a double name composed of the names of each of them (I Boone, 'Het nieuwe naamrecht. Vrijheid van naamkeuze, maar vaders wil blijft wet' in I Boone and Ch Declerck (eds.) *Actualia Familierecht 2014–2015*, Brugge, die Keure, 2015, 74, nr. 54).

name of the adopted child and the name of the adoptive parent, with no more than one name of each of them (art 353–2, § 1, third subsection CC).

(c) Transitional law

It is clear that the new rules apply to all children born or adopted (on or) after 1 June 2014, the date of coming into operation of the Act of 8 May 2014 (art 11, first subsection Act 8 May 2014).

For the application of the transitional law, the crucial question is whether or not there is a common child, born to or adopted by the same parents before 1 June 2014. If so, then the old rules on the naming in principle apply to children who are born or adopted subsequently (deferential operation). There are also, however, important exceptions to this principle, allowing the new law to, to some extent, also have retroactive effect.

(i) Application of the previous law to an existing common child

Where there is at least one child whose lineage in respect of the same parents has been established at the date on which the Act of 8 May 2014 came into operation, the former articles 335, 353–1 to 353–3 and 356–2 CC, depending on the case, remain applicable to the determination of the name of the (adopted) child who was born (or adopted) and whose lineage in respect of the same parents has been established, after the coming into operation of the Act (art 11, second subsection Act 8 May 2014). The right of choice is, in terms of this provision, thus in principle limited to first children born on or after 1 June 2014.

(ii) Extraordinary application of the new law

However, the granting of the surname under the new rules has been possible in certain cases in transitional situations. In almost all cases, the retroactive effect of the new Act is (was) preconditioned by the condition of the absence of common major children at the time of choice of name, which can (could) take place by a joint declaration by the parents or adoptive parents (or upon declaration by the surviving parent or adoptive parent among them), before the civil status registrar. But this condition consisted of exceptions in two particular hypotheses.[54]

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[54] The new rules could still be applied, with the consent of the major children – until 31 May 2015 – in two cases (art 18 Act 18 December 2014); 1: by the surviving parent after the death of one parent or adoptive parent of one or more common minor children of whom at least one has reached the age of majority after 1 June 2014, and the surviving parent was unable to make the joint declaration prior to 1 January 2015; and 2: by the parents or adoptive parents if one or more minor children were registered in the consular population registers, of whom at least one has reached the age of majority after 1 June 2014, and the parents or adoptive parents were unable to make the joint declaration prior to 1 January 2015.

Until 31 May 2015, parents or adoptive parents could, by issue of a joint declaration to the civil status registrar, request that their common children born [or adopted][55] before 1 June 2014 be granted a different name, which is chosen with the application of the new rules. This was possible only on condition that they had no children at the date on which they made the joint declaration.[56] The chosen name immediately applied to all common minor children (art 12, § 1 Act 8 May 2014). Since 1 June 2015, this possibility no longer exists.

A choice made under the application of the transitional provisions is irrevocable,[57] and will therefore determine the name of subsequently born common children.

Where a child is born after 1 June 2014, the joint declaration is made within one year after the date of delivery. Where a child is adopted after 1 June 2014, the joint declaration of name change is made within 1 year after the date of adoption[58] if it took place in Belgium; if the adoption was pronounced abroad, the declaration must be made within one year after the registration of the adoption with the federal central authority (art 12, § 2 Act 8 May 2014). This transitional rule implies that parents who did not, before 1 June 2015, make use of the possibility to change the name of their children born before 1 June 2014 once again have the possibility if they have another child together (through original or adoptive parentage) after 1 June 2014. The name of this new child can be chosen according to the new rules and will therefore immediately apply to all other common minor children.

The transitional provision ex article 12, § 2 of the Act of 8 May 2014 remains applicable until all children born or adopted as minors before 1 June 2014 reach majority, thus until 31 May 2032.

In the case of a common minor child who was born before 1 June 2014, a second filiation can be established after that date – eg by paternal recognition or judicial determination of paternity (after 1 June 2014) after maternity was already established at birth (before 1 June 2014) – then the joint declaration is made within a period of 1 year after the date of the recognition or the date at which the judgment which established this second lineage becomes *res judicata*. If the second parent was adulterous, then the starting point of the 1-year period is the communication to or service of the judgment on the spouse (art 12, § 3, first subsection Act 8 May 2014).

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55 The legislator has forgotten to make the transitional provision of art 12, § 1 applicable to children adopted before 1 June 2014 (I Boone, 'Het nieuwe naamrecht. Vrijheid van naamkeuze, maar vaders wil blijft wet' in I Boone and Ch Declerck (eds.) *Actualia Familierecht 2014–2015*, Brugge, die Keure, 2015, 75–76, nr. 58, footnote 127).

56 A model solemn declaration is included as Annexure 2 to Circular 30 May 2014, *SG* 30 May 2014, (42170) 42187. However, this model is based on a statement that the parents have no common children born before 1 June 2014 (and that the children named in the declaration are their only common minor children).

57 Circular 30 May 2014, *SG* 30 May 2014, (42170) 42173.

58 This starting point is inaccurate: perhaps the date of the delivery of the adoption judgment is what is meant.

Changes to the lineage of a previously born common minor child after 1 June 2014 because the paternity of the spouse[59] or maternal or paternal recognition is successfully challenged by the alleged parent – whereby his parentage is immediately established – then the judge who gave this 2-in-1-claim judgment notes the new name that the parents chose, where appropriate, with application of the new provisions (art 12, § 3, second subs Act 8 May 2014).

The transitional provision ex art 12, § 3 of the Act of 8 May 2014 remains applicable until all minor children born before 1 June 2014 have reached majority, thus until 31 May 2032.

The civil status registrar of the municipality where the child is registered in the population register will be competent *ratione loci* in respect of all declarations of choice of name for such child.[60] The awarded name will be recorded on the edge of the birth certificate and all other documents relating to the child (art 12, § 4 Act 8 May 2014).

III INTRODUCTION OF FAMILY COURTS

(a) Introduction

Since the introduction of the Judicial Code in 1967, the jurisdiction of Belgian courts to hear family cases had been quite dispersed. The Courts of First Instance (District Courts) were generally competent in family matters, however with the exception of jurisdiction of:

- the Justices of the Peace (Subdistrict Courts) regarding conflicts between spouses or legal cohabitants regarding their rights and obligations that arise during their relationship and regarding maintenance obligations;
- the President of the Court of First Instance regarding provisional measures between divorcing spouses;
- the Juvenile Court regarding parental responsibility over children in cases where the parents were not married or legally cohabiting and with regard to juvenile protection law.

The Courts of First Instance also had jurisdiction to hear appeals against judgments by the Justices of the Peace. All other judgments could be appealed before the Court of Appeals.

Hence, families could find themselves involved in proceedings before different courts and in different degrees, which gave rise to strategies of forum shopping

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[59] The Act, again, contains an erroneous cross-reference to art 312, § 2 CC (see fn 49 above).

[60] For children enrolled in the consular population registers, the declaration is made by the head of the consular post where they are registered.

and re-litigation.[61] Proposals for reform had been made for decades,[62] but it took the legislature until 2013 to vote for the Act on Family and Juvenile Courts[63] that, after multiple necessary amendments,[64] entered into force on 1 September 2014.[65]

(b) Judicial organisation

A new Family and Juvenile Court section is created in the Courts of First Instance – though the Justices of the Peace had preferred to be awarded jurisdiction in all family matters on the basis of the proximity principle. Budgetary constraints and the objective of creating unity in case-law by limiting the number of competent courts however made the legislature organise the new sections at the level of districts rather than subdistricts.[66]

The Family and Juvenile Court section is divided into two different courts: the Family Court on the one hand, with Family Chambers and Chambers for Amicable Settlement and the Juvenile Court on the other hand. The Juvenile Court has only retained its jurisdiction regarding juvenile protection law.

Judges cannot sit on trial in the same case both in the Chamber for Amicable Settlement and in the Family Chamber, to which the case is referred if no agreement is reached. This difference avoids the parties concerned being under pressure to reach an agreement. Family judges also cannot hear cases concerning the same minor children as a juvenile judge; more generally there a Chinese wall between the two types of cases. This legislative choice can be deplored, for family law and juvenile protection law had been considered as one continuum before the reform and it is important for both courts' decision process to have insight into the information available at the other side of the 'wall'. Also, one of the objectives of the reform, which is consequently not fully achieved, was to have one judge hearing all cases relating to one family.

(c) Jurisdiction: one family, one court

As aforementioned, all matters pertaining to family relations, both between partners and between parents and children, are heard by the family court.

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61 P Senaeve, 'Familierechtbanken blazen hun eerste kaars uit (en happen naar adem)', *Tijdschrift voor Familierecht* 2015/7, 170.

62 Eg E De Groote, J Mellaerts and B Poelmans, *Naar een humaner familieprocesrecht*, Leuven: Acco, 1994.

63 Act of 30 July 2013 (de wet van 30 juli 2014 betreffende de invoering van een familie – en jeugdrechtbank), *SG* 27 September 2013, 68429.

64 Act of 25 April 2014 (de wet van 25 april 2014 houdende diverse bepalingen betreffende justitie), *SG* 14 May 2014, 39045; Act of 8 May 2014 (de wet van 8 mei 2014 houdende wijziging en coördinatie van diverse wetten inzake justitie), *SG* 14 May 2014, 39086.

65 For a general comment see K Devolder, 'De invoering van een familie – en jeugdrechtbank. Commentaar bij de wet van 30 juli 2013', *Tijdschrift voor Familierecht* 2014/6, 128–147.

66 F Swennen, 'Familierechter en vrederechter: de kool en de geit sparen via de eenheidsrechtbank?', *Tijdschrift voor Familierecht* 2012/9, 194–195.

However, jurisdiction regarding de facto cohabitants is limited to property disputes and to the children, and the former dispersion of jurisdiction still applies to other disputes regarding de facto cohabitation. As said, the only remaining jurisdiction of the Juvenile Court concerns juvenile protection law. Jurisdiction re-administration of estates, guardianship and the protection of incapacitated adults is clustered at the level of the Justices of the Peace.

Once a family court has been seized with a family dispute, it retains territorial competence for all future disputes concerning that same family. Only this same court can decide to refer the family's file to another family court, should this better serve the interest of minor children. Other family courts therefore have to raise their lack of territorial jurisdiction of their own motion. The territorial competence for the first dispute concerning a family is determined by the domicile, or habitual residence in absence of domicile, of the child(ren) of the family and by a hierarchy of other connecting factors, of which the last habitual residence of the defendant or of the couple are the most important, if there are no children of the family.

(d) Proceedings

(i) One family, one file

On the occasion of the first procedure concerning a family, not only is a file of the procedure created, but also a file of the family, to which all documents on all future procedures will be added. This enables the court to fully take into account the family's track record when hearing the case. Some concerns over privacy were expressed in this regard, for family proceedings are adversarial proceedings and all parties have access to the files of the procedure. One can hardly accept that a grandparent claiming a visitation right would have access to the report of the hearing of a child on the occasion of earlier divorce proceedings between the parents, to name just one example. These issues are resolved by creating a file of the procedure for each new dispute concerning the family, to which only the relevant documents of the family file are added. The parties are then allowed access only to the file of the procedure and not to the whole family file.

(ii) Amicable settlement

Before formally applying to the Family Chamber, either party or both parties can bring the case before the Chamber for Amicable Settlement with a view to reconciliation (sic). An attempt to settle amicably (sic) however is never compulsory (Art 731 (2) and (3) Judiciary Code).

In all cases where parties formally apply to the Family Chamber with a view to divorcing, the Court Registrar will send a letter officially recommending mediation, reconciliation and any form of amicable settlement of their dispute. The letter contains the legislative provisions on family mediation, a national

brochure, a national list of specialised accredited mediators and practical information for the specific district (information sessions, service centres and other initiatives).

The President of the Family Chamber before which the introductory hearing takes place:

- must inform the parties of the possibility of resolving their dispute through mediation, reconciliation and any form of amicable settlement (Art 731 (4) Judiciary Code);
- can propose to the parties that they inquire into the possibility of amicable settlement or mediation (Art 1253ter/3 §1(2) Judiciary Code);
- may order the referral of the case to the Chamber for Amicable Settlement if so requested by all parties (Art 731 (5) Judiciary Code); and
- may order the referral of the case to the Chamber for Amicable Settlement if he or she finds it appropriate (Art 731 (5) Judiciary Code). It seems that a compulsory attempt to amicably settle has been introduced herewith, but this was not explicitly mentioned during the parliamentary debates.

At any later stage, either the parties or the judge can ask to the case to be referred to the Chamber for Amicable Settlement (Art 731 (6) Judiciary Code). The judge of the Family Chamber can also try to reach an amicable settlement him or herself (Art 1253ter/3 §3 Judiciary Code).

(iii) Proceedings in absence of amicable settlement

The parties are obliged to attend in person the introductory hearing of their Family Court case as well as every session on the measures regarding the children. If the petitioner does not appear in person, the court can either revoke the petition or refer the case to the cause list. The defendant who fails to appear risks a judgment in absentia.

The Family Chamber can issue an interim order in the case of urgency and the law contains a list of issues that are legally presumed to be urgent, such as the residence of the parties, parental responsibility and maintenance. The interim orders regarding the children are considered to be judgments on the merits of the case and will remain valid after the proceedings.

The Family Chamber remains permanently seized with the case with regard to the issues that are legally presumed to be urgent. This means that the parties do not have to formally apply to the court again – and that no new payment to enter the case on the cause list is required – and can 'activate' the case by registering written pleadings in the case of changed circumstances. Unfortunately, this easy access to the court sometimes gives rise to repeated proceedings with a view of 'procedural stalking' of the other parties.

The Family Chambers can issue orders of enquiry regarding the family to a much larger extent than under the general adversary proceedings, and in particular use these possibilities regarding children.

Unfortunately, however, the Public Prosecutor's role in the Family Chamber has been curtailed by a recent legislative amendment. In cases concerning children, the Public Prosecutor's office was required to advise on the case. In practice, the Prosecutor was present at the hearings and could intervene during the debate. This allowed him to bring the interests of the children to the forefront. Due to financial constraints, the advice is now no longer required.[67] Moreover, advice by the Prosecutor – ex officio or on invitation by the court – is now mostly rendered in writing beforehand, without the Prosecutor being present at the hearing. This situation is disadvantageous for the children concerned, because the Prosecutor has access to all files, including those of the Juvenile Protection Court, and was able to inform the Family Chambers in that regard – and vice versa. The Chinese wall mentioned above therefore has become even stronger.

(iv) Right of the child to be heard

The Belgian legislation already contained some provisions on the right of the child to be heard, in accordance with art 12 of the United Nations Convention on the Rights of the Child. The two most important provisions were the following. On the one hand, every court could hear children who had the power of discernment in cases in which the child was concerned, *ex officio*, at the request of one of the parties or at the request of the child. The court had no obligation to hear the child, except at the request of the latter. On the other hand, children over 12 years old had a right to be heard before the Juvenile Court, also in cases concerning parental responsibility. In both hypotheses, the minutes of the conversation were added to the file but the parties – mostly the parents – could not receive a copy of them, in order to guarantee the child's privacy.

Leaving aside the right to be heard in juvenile protection cases, both aforementioned provisions have been streamlined into one regulation that encompasses both an improvement and a deterioration of the child's position.[68] The right to be heard is now limited to procedures before the Family Chamber concerning parental responsibility and visitation and contact rights. Every child over 12 years old receives an invitation to be heard. The invitation is sent to the home addresses of both parents. The child may then decide whether or not to use this right. Younger children are not invited to be heard except if the judge decides so, ex officio or at the request of one of the parties. The judge however must invite the child to be heard if the child or the Public Prosecutor request so. The child is heard by the judge alone; it is disputed whether or not the Court

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67 F Vroman, 'De rol van het Openbaar Ministerie binnen de familiekamers in eerste aanleg en in hoger beroep na de wet van 19 oktober 2015 (Wet Potpourri I)', *Tijdschrift voor Familierecht* 2015/10, 251–264.

68 On the new regulation: P Senaeve, 'Het hoorecht van minderjarigen sinds de wet tot invoering van de familie en jeugdrechtbank', *Tijdschrift voor Familierecht* 2014/8, 176–195.

Registrar should be present. The child has the right to be assisted by an attorney – provided the attorney is validly appointed – and the judge may allow assistance by a trusted person of the child's choice. After the hearing, the judge must draw up a report that is added to the file, with access and right to copy for the parties. We think this is not necessarily a violation of the child's privacy, for a report is a summary of the conversation, in contrast to the (literal) minutes that used to be added to the file.

(v) Enforcement

All decisions by the Family Chamber – except those concerning status – are provisionally enforceable without the parties having to request so. In some cases, however, the court can deny provisional enforcement.[69]

[69] P Senaeve, 'De voorlopige tenuitvoerlegging van vonnissen in materies van familierecht na de wet van 19 oktober 2015 (Wet Potpourri I)', *Tijdschrift voor Familierecht* 2015/10, 244–250.

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CAMEROON

THE COMMITMENT TO FAITHFULNESS AND THE TEST OF TIME AND SPACE IN CAMEROONIAN LAW

Rachel-Claire Okani[*]

Résumé

Le législateur camerounais reconnaît la monogamie et la polygamie qu'il place sur pied d'égalité, évitant ainsi de décider d'une forme de mariage de droit commun plutôt que d'une autre. L'infidélité étant déjà un problème dans son appréhension au sein des couples monogames, c'est a fortiori le cas pour les polygames. Or l'incohérence entre le droit civil et le droit pénal à ce sujet et la discrimination dans la répression de la violation de l'engagement de fidélité, mettent à mal le principe d'égalité que beaucoup d'Etats, même africains (Bénin, Côte d'Ivoire…), ont pourtant consacré par la suppression du statut de chef de famille en droit. Il est encore plus déconcertant de savoir que c'est le même législateur qui, tout en maintenant l'adultère comme cause péremptoire du divorce au civil, autorise la reconnaissance des enfants adultérins *a patre*, sans dépénaliser la même infraction au plan pénal. Le présent texte aborde ces questions dans leurs dimensions juridiques, tout en se penchant sur le délicat sujet des pratiques de sorcellerie qui, sont encore une réalité dans certaines parties de la société camerounaise.

I INTRODUCTION

Menone Ekasi, initiated to the 'mvet' (traditional musical instrument) by his brother Mbida Akuma Abogo, narrates, with the help of this instrument, which he handles with skill, this thrilling story of the Ndzana Ngazo'o epic,[1] that took place in Eton land in the Central Region of Cameroon.

The hero, Ndzana Ngazo'o, son of Mbogo Akouma and Ngazo'o, is the youngest of the three children. He will become the sole heir after the death of the first two children. He is a Benyagda clan member and is married. More

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1 Towa Marcien and Mani Ernest Pierre *Epopée Ndzana Ngazo'o*, collected texts, translated and commented on, unpublished.

precisely, he is polygamous with three women from different ethnic groups. The first is a Batchenga girl (Alomo Ano'o), the second, an Ewondo girl and the third, an Esele girl (Minnala Ntsa).

The status of Ndzana Ngazo'o as a polygamous spouse does not however prevent him from having a concubine of record, Agnes Abomo, herself religiously married to François Esono, employed by a white logger named Kaban. Their relationship was facilitated by the fact that Ndzana was the host of the foreign couple (Mvele).

As everybody in the village was aware of the relationship, the cheated husband finally became informed by some indiscreet indigenous people. He reacted by filing a complaint against Ndzana alone to chief Bénédicte. The accused is found guilty and sentenced to a heavy fine: 1,000 francs CFA because the woman is religiously married, and this, notwithstanding the scarcity of money at that time. The offence is very serious indeed; hence the proportionate sanction. After all, is it not true that great ills require great remedies?

To everyone's surprise, the infamous Ndzana assumed full responsibility. He not only pays the complete fine, but also gives to her accomplice an almost equivalent sum of 900 francs to buy dresses at the Haramel's shop, a famous trader of the land. She actually bought a black dress, a loincloth fabric, a black silk scarf and a pair of tennis shoes that she puts on while her husband was at work to the greatest delight of her lover.

Irresistibly drawn to her beautiful friend by the dark new clothes that exhibited her fair complexion as well as her tattooed and scarified body, Ndzana, a no less elegant man, hugged her and, again, indulged in adultery. He is so fulfilled that, at the end of the sexual act, he invites his lover to seal a covenant with him, 'the ring covenant' as Mrs Esono (Agnes) so aptly puts it.

A covenant, as we know, is an undertaking, a contract. What agreement have the parties who are both married reached after such an adulterous act and, especially, what are the legal implications?

As old as the issue of common life between men and women may be, it nevertheless remains a matter of concern. The Lord himself faced this problem with our first ancestors, Adam and Eve. The underlying issue in the epic is that of peaceful and harmonious coexistence in society in general and, in particular, between sexes. An issue all the more delicate but also important if we consider what it often costs: destabilisation, destruction of lives in small or large scale when it reaches the stage of wars. The ongoing globalisation of the world, rather than trivialising the issue, will likely render it particularly thorny. And as long as human beings exist, it will remain. The subject is undoubtedly rich

given the number of conflicting values it entails: faithfulness and unfaithfulness, rational and irrational, passion and reason, loyalty and fraud, power and impotence,[2] etc.

Considering the space and time factors in the Ndzana Ngazo'o epic, it is about nothing less than passion. Yet, both in the past and in the present and certainly in the future, the law is an expression of reason. But do we reason passion?

Methodologically, to better understand an issue, it is often beneficial to delimit the scope of study. However, we will make an exception to this rule given that it is difficult to confine to the space, the challenge in this case being that the scene extends into the land of the dead.

Indeed, the scene described in the epic started in Emomilang, the world of the living, and continues right to Engonkeng, the land of the dead; it also involves both the living and the dead, or ghosts. Immediately after the two accomplices made the covenant, they were informed about the sudden death of the cheated husband. Although the law is seriously challenged here given its limited territorial competence as per the facts of the case, it must not be forgotten that, in Africa, the dead are not dead.

Whatever the case, the ring covenant must be subjected to the cool scrutiny of the law. Therefore, we intend to make the necessary legal clarifications by answering two questions, to wit: what is a covenant as presented in this case? What are its consequences?

II CONTENT OF THE COVENANT

Ndzana Ngazo'o, a polygamous husband and his concubine Mrs Esono, née Agnes Abomo, verbally made a covenant. What did they promise to each other and what are the risks involved?

(a) Meaning of the covenant

Basically, the covenant referred to as that of 'the ring' might well have been called the 'the rosary' covenant had there not been an oversight by Mrs Esono. Indeed, Ndzana began by asking for a rosary of the lady who, unfortunately, did not have one. It is thereafter that the idea of the ring came up. It is not just any ring. It is precisely a covenant ring which Mrs Esono took great pains to get off her left hand finger. Besides, this jewel finally fell on the floor. After carefully cleaning a glass, the man filled with water, dropped the jewel inside and drank nine sips of the water. Thereafter, he handed the glass to his

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[2] Luluaki Y John 'Customary Polygamy, Human rights and the Constitution in Papua New Guinea', in Bill Atkin (ed) *International Survey of Family Law, 2014 Edition* (Jordan Publishing, Bristol, 2014) pp. 395–418. Tchego Jean Marie *La famille polygamique: une école supérieure de solidarité. Le cas des Bamiléké du Cameroun* (Demos éd, Yaoundé, 2002).

accomplice so she could do same. She did not want to obey without understanding what was going on. However, Ndzana did not give her the opportunity to hesitate further. He instead insisted that she should drink before asking any questions. She gave up and obeyed. Agnes Esono-Abomo, as she may now be called, drank the famous water and poured the rest down.

Ndzana first got exasperated by the curiosity of his concubine, but ended up giving the following answer:

> 'The covenant we just sealed means that:
>
> If I were to die, you will die also
>
> And if on the contrary, you die before,
>
> I will die as well.'

And he added:

> 'If ever I cheat on you
>
> I will give account to this ring
>
> Of which I drink the water this day
>
> On the contrary, if ever you cheat on me, you will give account to this ring
>
> Because, you women, are by nature unfaithful.'

Analysing the statements by Ndzana Ngazo'o, it is indisputable that the basis of the ring covenant is absolute mutual faithfulness. This is commonly understood as the act of loving only one person, namely the spouse (for married people) or the unmarried partner for singles. In other words, it is the ownership of the other party's sex through a claim of exclusive sexual relations. Yet Ndzana is married to three wives and, as such, his case raises the issue of faithfulness of a polygamous spouse.

A man who is legitimately married to several wives is legally obliged to fulfil his matrimonial duty vis-à-vis each wife. In other words, as long as he remains within the harem, he is a faithful husband. It is in a way a separate faithfulness, given the unique relationship he entertains with each wife. But what about the case where, knowing that by his status he has the possibility to take additional wives especially as the law does not limit the number of women as is the case in Cameroon (unlike in Senegal, for example), a polygamous husband decides to love another woman? Can he be liable for unfaithfulness in this case? The answer is clearly not obvious as we know that marriage is the culmination of a process. Such a husband may well argue in good or bad faith that he is within the marriage process.

Late Professor Stanislas Melone in this regard stated that the faithfulness of a polygamous husband is plural or multiple.[3] As we understand, a polygamous husband is he to whom the law officially grants the right to be unfaithful, unlike a monogamous husband who usurps this possibility since he will always pretend that his current mistress is a potential wife. Therefore, separate, multiple or plural faithfulness are only euphemisms of unfaithfulness, which is synonymous with adultery. Ndzana Ngazo'o knows that only too well. For this reason, he clearly provided the consequences of any unfaithfulness, given that the sanction has, amongst other things, a deterrent (*a priori*) as well as an atonement (*a posteriori*) function.

(b) The applicable law

Ndzana Ngazo'o, the hero whose epic carries the name, is logical in his thinking. It is important to first of all define adultery, as he perceives it. To him, he who cheats is unfaithful. Following this practical approach, we can effortlessly maintain that adultery is the negation of faithfulness.

But if and since we must articulate with reference to laws, namely the Civil Code and the Penal Code of Cameroon,[4] adultery as provided therein does not have the same definition, let alone the same penalties, as determined by Ndzana Ngazo'o in the epic.

Pursuant to art 228 (paras 1 and 2), there is adultery of the husband or wife where any of the parties has sex with a person other than the one lawfully authorised. However, art 361 of the Penal Code defines this offence differently depending on the person's sex. The provisions of para 1 of this Article are in line with the Civil Code's definition of adultery, but only as far as it concerns women. Indeed, a husband is guilty of adultery only when he has sex with women other than his wife or wives in the matrimonial home; or where such sexual relations are usual or common with other women outside the spouses' home (para 2). As may be observed, when it comes to men, the place as well as the frequency and the quantity of persons with whom sexual relations took place matters.

Putting these provisions together and applying them to the behaviour of Ndzana and Mrs Esono, there is no shadow of doubt about their guilt. Ndzana may indeed be found guilty under any of the two possibilities provided in art 361(2) and this will probably be the second possibility, namely having sexual relationships outside the matrimonial home, although they all live under the same roof. There are two reasons for this.

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[3] Melone Stanislas 'Le poids de la tradition dans le droit africain contemporain: à propos du phénomène polygamique au Cameroun et de ses prolongements juridiques' R P 1970 p 423s.

[4] Civil Code: French Civil Code of 1804, applicable in Cameroon by virtue of the law of 22 May 1924. The Penal Code of Cameroon.

Local conventional wisdom says that although a house certainly has a single entrance door, there are several rooms inside. The epic tells us that the hut of Ndzana Ngazo'o was large with nine rooms. And he transferred one of the rooms to the Esono couple which then became their matrimonial home. The rest of the rooms may be considered as the matrimonial home of Ndzana Ngazo'o and his three wives.

That said, the first reason is that the woman forgot the rosary; one can imagine that she left it in her home where she was not present at that moment. The second reason might be that most often a polygamous husband has his bedroom separate from that of his wives who are invited therein following an order defined in the household rules; except, if he still had some little decency, he had preferred to take refuge in another room for his sexual activities.

After clarifying the notion of adultery, it is now important to determine at what point in time it can be considered that adultery has been committed in the epic in the light of the ring covenant: is it when Ndzana has sex with a woman other than Mrs Esono or when he has sex with a woman other than Mrs Esono and his legitimate wives? The same question is valid for Agnes Abomo although the problem seems to have been solved by the death of her husband after the ring covenant. It therefore became clear that she will henceforth be guilty of adultery only if she has sex with a man other than Ndzana following the clauses of the covenant.

As for the penalty, under civil law, adultery is in equal terms a conclusive cause of divorce for both spouses. Under criminal law, the penalty is a prison sentence of 2 to 6 months and may be cumulative or not with a fine (25,000 to 100,000 CFA francs).

Considering Article 43(1) of the Ordinance of 29 June 1981[5] authorising a husband to legally recognise his child born out of wedlock, we wonder whether it is still logical to criminalise this offence. Indeed, what better proof of adultery than a child from this illegitimate sexual relationship? For consistency purposes, it seems desirable to decriminalise adultery given that the civil law, especially the 1981 Ordinance, has already made some compromises in respect of the offence. The Cameroonian legislator will not be alone in this position, as it will be more in line with the daily experience of the Cameroonian population. Indeed, it is noted that very few offended spouses make use of the legal provisions cited above by asking for divorce or, even worse, for imprisonment. To some extent, the late Esono, when he was still alive, was no exception to this trend. He did not sue his wife although she was an accomplice to the adultery. Only Ndzana was prosecuted and punished.

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[5] Ordinance No 81/02 of 29 June 1981 providing for civil status in Cameroon.

As we observed in the preceding paragraphs, positive law provides a series of sanctions for adultery.[6] The private deal between Ndzana and his concubine is not very explicit when it comes to sanction. It merely states that anyone who defiles the covenant will give account to the ring. However, the other component of the covenant concerning the death of a party following that of the other, with or without conditions, remains. Nothing, in our opinion, explains this part of the covenant better than passionate love.

Practices differ across the world. In connection with the issue discussed in this chapter, authorities of an Asian province adopted a quite bold initiative. Indeed, the leaders of Gorontalo, a town located in the North-East of Indonesia opted to transfer the wages of some 3,200 male workers into the account of their wives in an attempt to 'curb chronic and compulsive infidelity of wayward husbands working in the administration'. The decision was expected to incidentally reduce absenteeism and increase productivity as well as satisfy a longstanding recrimination by cheated wives to know the amount of their husbands' wages. Mr Rifly Katili, spokesperson for the authorities, commented on the decision in the following terms: 'I am sure this will eliminate the possibility of extramarital adventure.'[7] The decision implemented on a voluntary basis was nevertheless approved by 90% of married workers of the province. By subtraction, there would still be 10% of unfaithful workers in Gorontalo.

In our opinion, this decision, which can be assessed differently, and although largely consensual, is far from being objectively considered as a sanction in the legal sense because the cheated wives cannot own or even dispose of the wages transferred into their accounts as they are a consideration of the work done by their husbands and, at the same time, enable them to fund household expenses. We believe the decision is more of a call to order from a behavioural perspective, the priority being to enhance productivity at work and contribute to a double impact at the employer and family levels; as well as an incentive to transparency and better financial management within couples. In fact, were it not for the massive support of civil servants, including the employees concerned, the decision of the Gorontalo authorities could be regarded as interference in the private lives of employees; subject to the social context and local customs that are unknown to us.

Whatever the case, the important issue at this juncture is whether the commitments undertaken by the parties under the covenant were respected.

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6 Kere Kere, Gilbert, 'La polygamie et le devoir de fidélité en droit positif camerounais', Revue Penant, May–September 1996, Doctrine, pp 129–36.

7 Landre, Marc'Des fonctionnaires infidèles payés sur le compte de leur femme', *le Figaro* N 21022 cahier n°2, Saturday 3–Sunday 4, 2012, p 21.

III VARYING INTERPRETATIONS

A better understanding of the divergent interpretations may be achieved by exploring the respective roles and actions of various actors in the epic as well as third parties, although the focus is mostly on the parties to the covenant. It is as the event unfolds that we can truly understand who does what. In other words, one can better assess the legal significance of the covenant only after following the entire storyline of the epic.

(a) The covenant process

Shortly after the covenant, Agnes Abomo, now widow Esono, was attacked by a disease affecting both her head, chest and lower abdomen. In reality, she was under a curse. Her lover Ndzana Ngazo'o took her to a health asylum away from the village, more precisely, in the Mendum land whose Chief is Lemana Awono. She received good treatment and her health was restored. Her deceased husband Esono, whose ghost was searching for her in vain in their hut for about a week, finally found her in this other village. Through the confession of his wife, he got the information that it was Ndzana Ngazo'o who took her there. And he expressed surprise asking the question: who was he? Being certain that he would not fail to pay her a visit, he wanted to know when this would happen. His widow continued to provide all the information he needed.

Through this channel, we know that widow Esono's lover would visit her in 3 days. In fact, the cheated ghost wanted revenge by abducting the lover by surprise to the land of the death. However, Ndzana Ngazo'o being a 'wise' man, that is to say, a man with 'four eyes' because he even sees the undead, knew in advance what was being planned against him. For this reason, instead of going in person to his concubine on the third day as planned, he sent one of his daughters (Nnema Bandolo) to carry food (fish) to his lover on the pretext that he was ill. Once the daughter took the food to the lover as requested, she began the journey home. Esono the ghost suddenly appeared and asked about Ndzana Ngazo'o: his wife faithfully reported what the little fish carrier told her concerning Ndzana.

The husband, believing his wife had worked things out with the lover, became furious and forcefully took her along to Engonkeng. Agnes Abomo therefore left the world of the living; she died. Ndzana, her lover, was informed. This news was devastating to him. He kept sobbing. He was pitiful. He knew what would happen to him since he said tearfully that he was doomed.

After the player of 'mvet' has crossed the river Afamba, he moved closer towards Minnala, the third wife of Ndzana Ngazo'o and sought to know what had happened. She replied bluntly: 'Agnes, the beloved wife of Ndzana, died as a result of jealousy.' By personally declaring that he was doomed with the death of his concubine, Ndzana had a new attitude, different from the one he had

previously before the death occurred. Indeed, he had never been so troubled, not even during the death of Abana Ekani Edsong, a village elder or that of his own mother.

There is obviously a reason for this: a covenant, the ring covenant. And indeed, shortly after, the deceased concubine returned to remind him in no uncertain terms: 'Let's go into our country!' Ndzana Ngazo'o wanted to escape the fulfilment of the covenant by promising that he would travel to see her in 3 days. She anticipated and dispelled any doubt the lover may have had on how to find her by clearly indicating the way to Engonkeng or in the world beyond.

After he got himself prepared, Ndzana told Minnala and his wife Esele that he was going to a nearby village. He scrupulously followed the instructions of his sweetheart. After going through a small road, he crossed a river (Longlepam) to access the highway and here was our hero in the land of ghosts. However, he still had to walk in front of a church, slide down a slope and climb its opposite side, count five huts from the entrance of the large village to find his ghost lover. In fact, he nearly went missing when his lover caught him promptly.

The reunion started with accolades followed by news about the family. Thereafter, the concubine was worried about what food would please her lover. It came out that Ndzana prefers couscous. No sooner said than done. The cooked couscous was served with a fish dish and eggplant. Agnes Abomo asked her accomplice Ndzana Ngazo'o to finish the dish though he was full because at Engonkeng, unlike Emomilang, they do not keep food. But the legitimate husband of Agnes, François Esono suddenly appeared. He came in singing while Agnes was busy hiding her lover under a basket. However, the ghost husband soon began to suspect the presence of an intruder, a foreign body and a living being whom he soon discovered as he lifted the basket. He realised that the flame of love between Ndzana and his wife was still burning. Another encounter that obliged Ndzana Ngazo'o to revisit the early days of their romantic idyll, starting from the land of the living when chief Bénédicte sentenced him to pay a fine of 1,000 francs CFA. And again, in the land of the dead! With the difference this time around, the husband decided to personally sentence him to death. A final death because partial death will give the lover the possibility to become a ghost in the world of the living instead of being disgraced forever.

Matching words with action, Esono fully tied up Ndzana Ngazo'o and frantically flogged him to the extent that the whip whistled. Ndzana Ngazo'o had to sob like a child. At this point, Esono summoned Ndzana to produce his ring, more precisely his covenant ring before anything else. Ndzana then begged the ghost husband to loosen him so that he could go get the ring he claimed to have forgotten at home. Ironically, Esono began to flog Ndzana even more intensely instead. Ndzana's life was saved thanks to the intervention of Onambele Etege, chief of the country of ghosts and son of Catherine Onambele.

Onambele Etege was returning from a tour when he found Ndzana Ngazo'o tied up. He sought to know from his torturer Esono what offence the victim had committed that warranted his death. He suggested to the chief not to meddle in this affair which, according to him, was above all understanding. He then narrated the entire story until the last episode of the forgotten ring. He continued to hit Ndzana even after his narration but the chief tried to convince him that it is better to release Ndzana so he could go and take the ring instead of making him a prisoner. The chief further assured him that Ndzana would be judged upon his return. The chief's recommendation was promptly followed.

As Ndzana was about living, his accomplice insisted on knowing precisely when he would return. He answered: in 3 days. Believing he was not telling the truth, his deceased lover promised him a severe beating by the police of the land of the dead and prohibited him from loving a woman in the meantime on the ground that such an adventure would defile the ring (covenant).

Not only did Ndzana fail to return in 3 days, but he fell in love with Alima, a girl from Beboudi in Obala. The deceased lover Agnes Abomo was right and she did not hesitate to trouble Ndzana when she appeared to him. He was tortured with pains to the extent that he was sobbing. He requested his wife Esele Minnala to help relieve the pains by massaging his back.

As he continued to sob, Bénédicte, the great notable of the land, did the same, believing Ndzana Ngazo'o was near death. His main concern was that a mature man of the calibre of Ndzana Ngazo'o could not die without the relevant healing rituals being performed. Many people, usually relatives or in-laws (Mbida Akuma, Kogo Bikele Yama Biloa, Awono, Kobo and even Menone Ekassi) were successively questioned or suspected for various reasons (witchcraft, inheritance of cocoa farm, etc). The anguish of chief Bénédicte was conveyed to the entire Benyagda clan by Kago B with the drums. The entire Benyagda clan estimated at 100 people flocked to the scene uttering cries of anger as they heard the drums. They also wanted to know the culprit. As nobody acknowledged the facts and/or blamed anyone else for committing them, Ndzana himself was called upon to give explanations concerning his illness. And surprisingly, Ndzana denied having eaten couscous from a Mbele woman, as he did not want to name his concubine.

Ngandeme, a powerful man, intervened to save Ndzana Ngazo'o. But the late Agnes Abomo heard the entire story as she was hidden in a bush behind the hut of Ndzana Ngazo'o. She came specifically to remind her lover that he should fulfil their covenant. Naturally Ngandeme saw her thanks to his mystical powers.

In order to save Ndzana's life, Ngandeme picked a white stone and sucked nine times, then ordered the patient to repeat after him:

> 'If you know the Mbele woman

Then you will die.

If on the contrary you do not know her,

Then you will live.'

Ndzana grabbed the stone and sucked it, but repeated the sentence the other way round:

'If I know this Mbele woman

Then I will be healed

If on the contrary I do not know her,

Then I will die.'

The stone toured the Benyagda community as its members were to touch before returning it to Ngandeme for the following declaration: 'This is Ndzana whom I hand over to you. I treat him for his healing. If Ndzana Ngazo'o leaves the border with the Esele, then it is well for the Benyagda.' The 100 Benyagda were to touch the stone pronouncing the famous sentence: 'This is Ndzana whom I hand over to you.' At the end, Ngandeme took possession of the stone, applied on the whole of Ndzana's body, including his eyes. The final destination of the stone was in the bush. However, before it could reach its destination, the stone hit a mound in which was a tree serving as a hiding place to Agnes Abomo, also called Mbele woman, behind the Ndzana's hut. Ndzana's concubine was seriously injured and Ngandeme chased her by saying: 'Go for ever in your grave. Never reappear in the land of the living.' When she finally returned to her final resting place, Ndzana recovered.

What credit can we give to these facts from the legal standpoint?

(b) The legal significance of the covenant

Ndzana Ngazo'o and Mrs Esono née Agnes Abomo by virtue of the ring covenant agreed to be mutually faithful as lovers and to accept the supreme sacrifice of dying for one another. Promise is a debt and yet, it appears from the statement of facts that the covenant was experienced differently by both parties.

Legally, we can assess the covenant in two different ways. However, rather than conducting an assessment following the chronology of events as outlined above, a thematic approach seems preferable, for purposes of clarity given the dual components of the covenant.

Thus, starting from the simplest to the more complex and taking into account Ndzana's duty to honour his three wives, it can be observed that he is in breach

of this duty. Indeed, he is a multi-recidivist for adultery in the sense that his sexual conquest is not limited to the four wives of his life as we knew until then.

From a purely legal perspective and so far as we remain within the duration of the epic, Ndzana was guilty of adultery, not twice, but only once. In the land of the dead, the reunion of the two accomplices was certainly warm but wise or innocent and brief. The sudden arrival of Esono, the lawful husband, hastened the end of the meal and did not give enough time to the two lovebirds. The violent reaction of the husband reflects the spirit of vengeance within him. Since the failed abduction attempt at Emomilang, he bears a huge grudge against Ndzana which is now revived by his presence. Ndzana is undeniably passionate, but to cause the same harm to the same person at his home and in two different worlds is nothing less than provocation. Hence the response that seems proportionate to the attack: final and premeditated capital punishment.

That being said, and even as we share the compassion of Esono, it is hard to understand and admit that he preferred to take the law into his own hands, especially as the suggestion of chief Onambele indicates that there is a court in which Ndzana could be tried. This is all the more inexplicable given that at Emomilang he sued Ndzana in the traditional court chaired by the chief Bénédicte who found Ndzana guilty and sentenced him to a fine of 1,000 CFA francs. Considering that the verdict was particularly swift and severe, such a loss of confidence in institutional justice and recourse to private justice does not seem to be justified.

Furthermore, the abduction of a person in itself, even if justified, is reprehensible. It is important to consider the means of abduction in this case. Indeed, no other method than witchcraft could allow Esono to realise his plan. However, witchcraft is punishable under Article 251 of the Cameroon Penal Code, which provides:

> 'Whoever commits an act of witchcraft, magic or divination likely to disturb public order or tranquility, or to harm another in his person, property or otherwise shall be punished with imprisonment from two to ten years and a with a fine of from five thousand to one hundred thousand francs.'

In fact, Esono is not the only person in the epic to whom this provision may apply.

Clearly, in the epic, Ndzana loosened his belt and dropped his pants. But this act is unequivocal; he had only intended to finish the couscous dish to comply with the habits in Engonkeng where they do not keep food. Even supposing that this was a sign of love to her lover, it would amount to adultery only objectively and not subjectively as far as the covenant is concerned. Although there was no sexual act this time as it was the case in the past, there is nevertheless the offence of unlawful trespassing into the home of Esono.

Having escaped death in the land of ghosts with the help of chief Onambélé who succeeded in convincing Esono, Ndzana was then released to go and bring the ring within 3 days at the latest. However, while Ndzana was expected to be in the land of the living for a very short while only, he fell in love with a girl named Alima Beboudi in the town of Obala. It is now obvious that Ndzana was unfaithful, nothing more nothing less. By this deliberate act, he dishonoured his wives once more, betrayed his partner Agnes Abomo and clearly violated their contract. Bad faith is particularly manifest as Ndzana's adulterous act came almost a day after his predeceased lover reminded and expressly warned him. Therefore this violation can rightly be perceived as an aggravating circumstance as it is known that any adultery by Ndzana within 3 days will definitely defile the covenant.

Agnes Abomo, the lover of Ndzana Ngazo'o, passed from life to death following an excess of anger infused with jealousy on the part of her late husband Esono. Although it is important to mention the mysterious nature of her death, we will dwell more on its consequences.

The parties decided during the covenant that the death of one would automatically and compulsorily lead to the death of the other. As there was no order of precedence, it happened that Abomo was the first person to die. Since she was dead already, logically, Ndzana Ngazo'o would soon follow her. Although he brought the idea of covenant, Ndzana was not less terrified when the news of his lover's death reached him that afternoon. And the late Mrs Esono felt it was necessary to reiterate the covenant to her lover so that he should not forget. But Ndzana Ngazo'o, the dead man on leave, wanted to maliciously escape from fulfilling the covenant by avoiding the trip. He was certainly afraid of death. Nevertheless, he ended up with a deadline of 3 days. Widow Mbele took note of the appointment before leaving. Ndzana was resigned and resolved to keep the commitment made to his ghost friend. After preparations, the unfaithful Ndzana started the journey that took him to his final destination. However, knowingly or not, the hero left Emomilang without the ring that sealed their covenant. And this is precisely what Late Esono who held him hostage at Engonkeng required from him. Tortured almost to death, he was given another 3 days to return the ring. However, unlike the first 3-day deadline, he failed to respect this second one. For the second time, Agnes Abomo, his deceased concubine, appeared and warned him in very strong terms.

In fact, the approach by Abomo is in line with a maxim by which a creditor must specifically follow his debtor to obtain payment of his debt. Indeed, braving the distance between the two worlds, the lover who is the creditor in this case came to summon her debtor Ndzana Ngazo'o to perform his part of the bargain by joining her in the land of the death, which was their new country. It may be noted that her request for a specific deadline coupled with threats of forceful execution are meant only to compel Ndzana to keep his

promise and, indeed, regarding the deadline, a postponement *sine die* by the debtor does not benefit the creditor as it may be akin to non-fulfilment of the obligation.

In the Cameroonian context and using a well-known terminology, Ndzana was a 'carefree man', 'a man without stress or problem', not because he really did not have them, but because he ignored them even when things were critical. He even infringed the last recommendation given to him by Agnes Abomo in an attempt to preserve the purity of the covenant ring he was expected to bring from the land of the living. However, commitments undertaken must be respected and failure to do so meant that Ndzana would face the consequences.

He fell ill. He suffered from an unnamed disease that affected his joints and caused stiffness. Considering that Ndzana was personally and specifically concerned and given the seriousness of the problem, one would have expected him to confess.

Ndzana instead denied having tasted the couscous of the Mbele woman and was only saved thanks to the ultimate intervention of the 'powerful' Ngandeme whose statements he completely reformulated and applied in his own favour. Paradoxically, in the fraudulent reformulation of the magic formula, he effectively admitted that he knew the said Mbele woman and could therefore escape death.

There are a number of issues to be discussed at this level.

Thanks to the small stone of Ngandeme, Ndzana was back on his feet and had definitely returned into the world of the living, unlike his concubine. Ngandeme saw the ghost of the concubine before striking the fatal blow that sent her back once for all to Engonkeng. This is occult power that is not accessible to everyone. The list of persons who could be prosecuted for witchcraft, including the late Esono, may therefore be extended to the 'powerful Ngandeme'. Even Mrs Esono may be liable for prosecution with her easy trips between the two worlds; Ndzana as well is not exempted. Indeed, we already know, from the trick he played on Esono, that he is among the initiates. But we are even more embarrassed when we consider the expression 'mature person' used to designate Ndzana and the traditional meaning of 'ritual healing' and, at the same time, realise that he managed to muddle through under the watchful eyes of the powerful Ngandeme. Ndzana could therefore be stronger and more powerful than the man who saved him – unless there was passive complicity by Ngandeme who concealed a vast conspiracy.

In any case, knowing from the onset that the covenant referred to as that of the ring has to do with the privacy of two persons exclusively, namely Ndzana Ngazo'o and Mrs Agnes née Esono Abomo his concubine, it is difficult to tolerate the interference of anyone else let alone the Benyagda community of 100 people; they are third parties and, as such, are foreign to the agreement. This sudden and untimely presence is even more disturbing especially as we

wonder why Ndzana was prevented from fulfilling the covenant. Some passages in the epic support the possibility of conspiracy.

The great notable Bénédicte, appalled by the poor health condition of the hero, stated that he had placed Ndzana at the border with the Esele. This means that the latter had an important role to play in this specific place. He further used the term 'mature man' referring to Ndzana. This implies respect and justifies the need for a man of his calibre to receive ritual treatment. Finally, Ngandeme – the powerful – announced that 'if Ndzana Ngazo'o leaves the border with the Esele, then it is well for the Benyagda …'. What does Ndzana represent for his clan? It is difficult to clearly answer this question. However, one thing is certain: the mobilisation of the entire community reflects the weight of Ndzana in his community. Several questions come to mind: Is the intervention of third parties a sign of solidarity? If so, for what purpose: physical, moral or mystical strength? Is it for the honour of a sex: men against women? Or for the honour of a tribe (the Benyagda)? We could also include the survival instinct.

Whatever the motives, Ndzana Ngazo'o survived. However, given that the end justifies the means, we cannot say that it is a great victory in the sense that it was achieved by cheating. In the epic, and in relation to the covenant, Ndzana, far from being a model husband, is a difficult and disappointing lover. He is the embodiment of fraud from all points of view. Unlike Ndzana, his lover Abomo Agnes can be credited for having some level of loyalty, if not, total loyalty. The second option applies in respect of her husband while the first option is valid regarding Ndzana. In short, she was faithful in infidelity. The German expression 'Treu über das Grab hinaus', meaning faithfulness beyond the grave, better suits the attitude of Abomo.

Notwithstanding these remarks, the ring covenant could never have prospered in the strict legal sense because, by virtue of art 1134 of the Civil Code, 'agreements that are legally entered into operate as law for those who engaged in them (1). They can be revoked only by mutual consent for reasons allowed by law (2). They must be performed in good faith (3)'.

We have already highlighted the bad faith of Ndzana who eventually withdrew unilaterally from the covenant. These two attitudes go against the provisions of paras 2 and 3 of art 1134. But we know this fact only when it comes to implementing the covenant which, in accordance with art 1134(1) requires strict compliance with its terms by both parties, namely Ndzana and Mrs Esono – Abomo following the principle of the binding force of contracts. Article 1134(1) also suggests the following preliminary question: was the ring covenant legal in the first place? An agreement or act is legal when it is done in accordance with the law. Does the agreement between Mrs Esono and Ndzana fulfil this prior requirement? In other words, does the law allow Cameroonian spouses to cheat or to seal any other love covenant with third parties? Notwithstanding the various inconsistencies in the Cameroonian law as mentioned above, the answer to this question is clearly in the negative. For purposes of public policy, the law prohibits all that is contrary to morality and

public decency. In the final analysis, considering that the purpose of the covenant is immoral and unlawful, this *sui generis* agreement is absolutely void, more precisely, it is void *ab initio*. This nullity of the contract at the onset is logically an impediment to the fulfilment by the parties of their commitments and also neutralises any possible effect that can arise from the contract.

IV CONCLUSION

In the final analysis, passionate love as narrated in the epic of Ndzana Ngazo'o is in sharp contrast with the purely material and self-interested love which, unfortunately, is rampant in the contemporary globalising society.

We may agree with a romantic singer that 'in love, there is always a loser' (J Iglésias). This time, it was a woman, Mrs Esono. However, in making a round of human societies across races, religions, continents, etc, we are afraid that always the same ones end up losing. The reality is that no rule or trend is absolute, and both men and women may be unfaithful. The epic is a perfect illustration of this fact. However, whatever the sex, unfaithfulness may be a weakness, a sickness or even a pandemic like in Gorontalo. But in any case, it is never inevitable.

Whatever it might be, it is more realistic to never lose sight of the fact that promises only bind those who believe in them. Long gone are the days when we could, like a worthy English gentleman, say that 'my word is my bond' because a word given was indeed sacred.

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CANADA

CANADA'S CONFLICTED APPROACH TO INTERNATIONAL CHILD ABDUCTION

Martha Bailey[*]

Résumé

Au Canada, le droit de la famille, le droit criminel, le droit de l'immigration et des réfugiés n'abordent pas de la même manière la question de l'enlèvement international d'enfants. La protection des enfants impliqués dans de telles situations est certainement mieux assurée lorsque ces systèmes sont intégrés et lorsqu' ils choisissent de coopérer plutôt que de mettre de l'avant leurs propres impératifs, valeurs et culture. Au surplus, une meilleure coopération entre les États parties à la Convention de La Haye est nécessaire afin que la résolution des dossiers d'enlèvement international ne soit pas freinée par d'inutiles accusations criminelles ou par le refus d'autoriser un parent à se rendre dans un pays en vue d'y participer aux procédures concernant le droit de garde.

I INTRODUCTION

In 2015 the Human Rights Committee of Canada's Senate issued a report on cross-border child abduction.[1] The report discusses the operation of the Hague Convention on the Civil Aspects of International Child Abduction in Canada ('Hague Convention'),[2] statistics on child abduction, preventive measures, and recommendations for improvement. Missing from the report (and from most discussions of international child abduction) is reference to the tensions and conflicts that arise because of the different approaches to child abduction taken under three legal frameworks: family law, criminal law, and immigration and refugee law.[3] Each of these legal fields deals with the problem of international child abduction, applying different domestic laws and different international

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1 Canada, 'Alert: Challenges and International Mechanisms to Address Cross-Border Child Abduction' (Standing Committee on Human Rights, 2015), www.parl.gc.ca/Content/SEN/Committee/412/RIDR/RMS/13jul15/Report-e.htm.

2 Convention on the Civil Aspects of International Child Abduction, Can TS 1983 No 35.

3 The report does contain a brief note on criminal processes and police involvement at 46-47, but nothing on the conflicts addressed in this chapter.

treaties. Those operating within the separate legal fields proceed according to their own imperatives, values and culture. So it is not surprising that tensions, and sometimes conflicts, arise.

This chapter will outline Canada's treaty system and the particular treaties that are relevant in relation to international child abduction. It will then discuss how these treaties and Canada's domestic laws are applied within the family law, criminal law, and immigration and refugee systems in cases of international child abduction that engage one or both of the other systems. The goal of the chapter is to shed light on inconsistencies inherent in competing legal regimes. A more coherent approach to international child abduction will require greater integration and cooperation among those applying family law, criminal law, and immigration and refugee law within Canada, and also among parties to the Hague Convention. More integration and cooperation will better enable states to achieve the overarching goal of protecting the rights and interests of children involved in cases of international abduction.

II CANADA'S TREATY SYSTEM

Canada's federal government has exclusive power to enter into treaties.[4] Treaties are entered into by the executive branch of government. Canada is a 'dualist' system. If domestic law must be changed in order to carry out treaty obligations, implementing legislation is required. Implementing legislation must be enacted by the level of government that has legislative competence under the constitutional division of powers.[5] The federal Parliament can only enact legislation in relation to those treaties whose subject matter falls within the federal field of competence. If the treaty concerns matters within provincial legislative competence, the provincial legislatures must adopt the necessary implementing legislation. As a general practice, the federal government carries out prior consultation with those provinces that may be called upon to implement a treaty. Modern treaties allow federal states such as Canada to become a party to international conventions and to designate provinces to which the convention applies, which, in practice, will be the provinces that have adopted the required implementing legislation. Canada is able to file subsequent declarations extending the application of the convention to other provinces as soon as those provinces pass implementing legislation.

Canada does not enact special implementing legislation in relation to human rights treaties, but legislators are expected to amend laws as needed to ensure compliance. If there is a difference between the unimplemented treaty and the domestic law, the domestic law prevails. However, unimplemented international human rights treaties can be used as tools of interpretation to resolve

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4 For a thorough analysis of Canada's treaty law see Armand de Mestral and Evan Fox-Decent, 'Rethinking the Relationship between International and Domestic Law' (2008) 53 McGill LJ 573.

5 *Canada (AG) v Ontario (AG)*, [1937] AC 326.

ambiguities in domestic law.[6] The United Nations Committee process for international human rights treaties exerts some pressure on the federal and provincial governments to amend their laws to bring them into compliance with the treaty norms.

The human rights treaties most relevant to international child abduction are the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC).[7] Both Article 23 of the ICCPR and the Preamble to the CRC recognise the family as the fundamental unit of society, entitled to special protection. And Article 17 of the ICCPR expressly guarantees protection against arbitrary interference with family life. Article 3 of the CRC provides that the best interests of the child will be a primary consideration in all actions or decisions concerning the child. Article 8 of the CRC protects the right of the child to preserve his or her identity, including family relations, and Article 9 provides that a child shall not be separated from his or her parents against their will, unless the separation is determined to be in the best interests of the child. States parties are explicitly required to take measures against illicit transfer and non-return of children abroad by Article 11 of the CRC, which also requires states parties to pursue this goal by promoting 'the conclusion of bilateral or multilateral agreements or accession to existing agreements'. Finally, Article 12 of the CRC recognises the right of capable children to express their views and have their views given due weight in matters affecting the child.

Canada's obligations under the ICCPR and the CRC are considerations for decisions within family law, criminal law, and immigration and refugee law. Although human rights treaties cannot override domestic laws, they can be used as tools of interpretation and are increasingly invoked before domestic courts, especially in cases involving children. The best interests of the child principle enshrined in the CRC has been incorporated into domestic family law and immigration and refugee law. In the following discussions of the specific treaties and domestic laws applicable to family law, criminal law and immigration and refugee law cases involving international child abduction, the extent to which ICCPR and CRC obligations have or should affect outcomes will be considered.

III FAMILY LAW

The Hague Convention has been implemented by statute into the law of each of Canada's 12 provinces and three territories.[8] The objectives of the Convention,

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[6] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193.

[7] *International Covenant on Civil* and *Political Rights*, December 19, 1966, [1976] Can TS No 47; *Convention on the Rights of the Child*, Can TS 1992 No 3.

[8] The provincial implementing legislation came into effect at various times from 1983 to 1988. The current implementing statutes are: International Child Abduction Act, SA 1986, c I–6.5; Family Law Act, SBC 2011, c 25, s 80; The Child Custody Enforcement Act, RSM 1987, c 360; International Child Abduction Act, SNB 1982, c I–12.1; An Act respecting the Law of

set out in Article 1, are 'to secure the prompt return of children who have been wrongfully removed to or retained in any Contracting State', and 'to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States'. Article 12 provides that where a child has been 'wrongfully' removed to or retained in Canada, an order will be made for return of the child to the country of his or her habitual residence, unless the application for return has been brought more than a year after the wrongful removal or retention and the child is now settled in his or her new environment. Further, limited exceptions to the rule of automatic return are set out in Articles 13 and 20. Under Article 13, return may be refused if: the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of the removal or retention or acquiesced in the removal or retention; there is a grave risk that return would expose the child to physical or psychological harm, or otherwise place the child in an intolerable situation; or the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take into account its views. And, finally, Article 20 provides that a return may be refused if return would 'not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.'

Canadian courts understand that applications under the Hague Convention are not decided on the basis of the best interests of the child test. Return of the child and summary procedures for determining applications (Article 11 explicitly requires 'expeditious' decisions to be made within 6 weeks if possible) are considered to be in the best interests of children in general. A court hearing an application for return has no jurisdiction to determine what is in the best interests of the child, but instead orders immediate return if a wrongful removal or retention has been made out and no successful defence presented. The best interests of the child determination is left to be made by the state of the child's habitual residence, which is considered best situated to make that determination. As the Manitoba Court of Appeal said:[9]

> '[T]he Hague Convention is not designed or intended to address the best interests of particular children. Its purpose is to prevent the unilateral severance by one parent of the other's relationship with their children, as well as the unilateral selection of a forum most convenient to the departing parent without prior assessment of the children's best interests. Where children are concerned, possession cannot be 9/10ths of the law.'

Children, RSN 1990, c C–13; International Child Abduction Act, SNWT 1987, c 20; Child Abduction Act, RSNS 1989, c 67; Children's Law Reform Act, RSO 1990, c C.12; Custody Jurisdiction and Enforcement Act, RSPEI 1988, c 33; An Act Respecting the Civil Aspects of International and Interprovincial Child Abduction, RSQ c A-23.01; The International Child Abduction Act, SS 1986, c I–10.1; Children's Act, RSY 1986, c 82. The laws of the Northwest Territories in existence on 1 April 1999 apply in relation to Nunavut: Nunavut Act, SC 1993, c 28, ss 3 and 29.

9 *Mahler v Mahler*, [1999] 143 Man R (2d) 56 at para 30.

Canadian Courts hearing Hague Convention applications have considered criminal law in the context of dealing with the 'grave risk' defence. If the child's well-being is linked with remaining close to the taking parent, and that parent cannot return home with the child because of the potential of being charged with the crime of abduction, courts may be reluctant to order return of the child. The Hague Conference on Private International Law has repeatedly mentioned this problem:[10]

> 'The Special Commission reaffirms Recommendation 5.2 of the 2001 meeting of the Special Commission:
>
> > "The impact of a criminal prosecution for child abduction on the possibility of achieving a return of the child is a matter which should be capable of being taken into account in the exercise of any discretion which the prosecuting authorities have to initiate, suspend or withdraw charges."
>
> The Special Commission underlines that Central Authorities should inform left-behind parents of the implications of instituting criminal proceedings including their possible adverse effects on achieving the return of the child.
>
> In cases of voluntary return of the child to the country of habitual residence, Central Authorities should co-operate, in so far as national law allows, to cause all charges against the parent to be abandoned.'

Canadian courts have dealt with the problem of the taking parent facing possible criminal charges by way of undertakings. In a Quebec case, for example, the court of first instance dismissed an application for return on the grounds that return of the child to Hawaii without her mother (the taking parent) would create a grave risk of harm to the child. One of the mother's claims was that she could not return to Hawaii with the child because criminal charges could be launched against her there in regard to the abduction. The Quebec Court of Appeal overruled the lower court and ordered return of the child.[11] But the return order was conditional on the left-behind father undertaking to facilitate the return of the child and the mother by, among other things, refraining from filing or causing to be filed any criminal proceedings against the mother in connection with the removal of the child from Hawaii to Canada. The facts of the case indicated that the dispute over the child could best be resolved in family law proceedings. In this situation it is to be hoped that the criminal law authorities in Hawaii will exercise prosecutorial discretion accordingly.

Canadian courts hearing Hague Convention applications have considered immigration and refugee law in relation to several questions. The first is whether a child who is in Canada illegally can be considered 'settled' within the meaning of Article 12, which provides: 'where the proceedings have been

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[10] Hague Conference on Private International Law, Conclusions and Recommendations of the Fifth Special Commission to Review the Operation of the 1980 Hague Child Abduction Conventions and the 1996 Hague Child Protection Convention (November 2006), para 1.8.4.

[11] *F(R) v G(M)*, 2002 CanLII 41087 (QC CA), http://canlii.ca/t/1ct3l.

commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment'.[12] The possibility that a Board applying immigration and refugee law may order that the child be deported complicates the determination of whether the child is settled.

Canadian courts dealing with Hague Convention applications have treated the immigration status of the child (or taking parent) as a relevant but not determinative factor when considering whether the child is 'settled'. For example, the Nova Scotia Court of Appeal, in coming to the conclusion that a child was not 'settled' within the meaning of Article 12, identified the illegal status of the child and mother as a relevant fact, saying:[13]

> 'the degree to which her mother is settled is a relevant consideration … Her illegal presence here not only raises the question of whether she will be able to remain in Canada, it makes it difficult if not impossible, to work here.'

But this was not the only factor considered. In particular, the court noted that the ongoing issues arising from the failure of the marriage between parents 'also contributed to instability in the present and uncertainty about the future'. The practical effect of illegal immigration status and the likelihood of deportation will affect the weight given to immigration status in a determination of whether the child is settled.

Canadian courts hearing Hague Convention applications have also faced the question of whether a child may be 'habitually resident' in a state where the child has no immigration status. The primary object of the Hague Convention is to ensure the prompt return of children 'to the State of their habitual residence'. But the child's lack of immigration status in the state from which the child has been taken complicates the determination of habitual residence. Canadian courts have proceeded on the basis that a child may be habitually resident in a state in which the child has no legal right to live. For example, without discussion of the issue, the Ontario Court of Appeal proceeded with a Hague Convention application on the basis that child was habitually resident in California, even though the child was an illegal alien in that state. The order of return, however, was made conditional on the child being permitted to enter the United States by United States authorities.[14] In another Ontario Court of Appeal case, the issue was addressed more directly. The Court considered the primary caregiver's illegal status in Florida as one factor in determining that the

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[12] For a helpful discussion of this question from an American perspective, see Michael Singer, 'Across the Border and Back Again: Immigration Status and the Article 12 'Well-Settled' Defense' (2013) 81 Fordham Law Review 3693.

[13] *A v M*, 2002 NSCA 127 at para 87.

[14] *Rayo Jabbaz v Rolim Mouammar* (2003) 171 OAC 102.

child was not habitually resident in Florida. But other factors were considered as well, including the fact that the child had only ever spent 3 months in Florida.[15]

A related issue addressed by Canadian courts hearing Hague Convention applications is whether the illegal status of left-behind parent in the state of habitual residence creates a 'grave risk of harm' within the meaning of Article 13. The question requires consideration of the effect on the child of illegal status and the instability created by the ever-present possibility of deportation. Canadian courts have ruled that illegal status alone does not satisfy the grave risk of harm test. The Ontario Court of Appeal has said: 'The bare fact itself of living without regularized immigration status does not approach the very high threshold required to fall under Article 13(b).'[16] The British Columbia Court of Appeal has reached the same conclusion.[17]

More difficult for Canadian courts hearing Hague Convention applications have been cases involving refugees. Canada has ratified the Convention Relating to the Status of Refugees[18] and the Protocol Relating to the Status of Refugees.[19] The refugee convention and protocol have been implemented by federal legislation.[20] Under the refugee convention and the protocol, the definition of refugee includes 'any person who … owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'. Canada's ratification of the refugee convention and implementation of that treaty into law impose on Canada an obligation not to return refugees to face the persecution they fled. This principle of non-refoulement is considered the 'cornerstone' of refugee protection.[21]

A court applying the Hague Convention *must* order return of the wrongfully removed child if no defence made out. But a child determined to be a refugee *cannot* be returned under the principle of non-*refoulement*. Thus the potential for conflicts between the two regimes runs high.

The first refugee issue addressed by Canadian courts hearing Hague Convention applications is whether the application for return of the child can proceed if a refugee claim is pending. In general courts have said that a pending refugee application does not prevent them from proceeding under the Hague Convention. Courts applying the Hague Convention have held that they are not hampered by the separate refugee process, reasoning that they can deal with

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15 *Jackson v Graczyk*, 2007 ONCA 388.
16 *Rayo Jabbaz v Rolim Mouammar* (2003) 171 OAC 102, para 25.
17 *Rey v Getta*, 2013 BCCA 369.
18 Convention Relating to the Status of Refugees 1951, Can TS 1969 No 6.
19 Protocol Relating to the Status of Refugees 1967, Can TS 1969 No 29.
20 *Immigration and Refugee Protection Act*, SC 2001, c 27. See also *Immigration and Refugee Protection Regulations*, SOR/2002–227.
21 *Németh v Canada (Justice)*, 2010 SCC 56 at para 1.

arguments that return of the child would create a risk of harm with the Article 13 'grave risk of harm' defence. And judges have expressed unwillingness to allow a refugee claim to impede the 'spirit of urgency' that infuses the Hague Convention.[22] The 'spirit of urgency' is expressed in Article 11 of the Hague Convention, which provides that courts should try to decide Hague applications within 6 weeks. Although the refugee determination process has become much more efficient, in 2002 the Ontario Superior Court observed that 'the Hague applications in this court can usually be completed in three to four months. The refugee determination process to the completion of a hearing usually takes about a year.'[23]

Canadian courts have also pointed to the unfairness of allowing a refugee claim to prevent a Hague Convention application from going ahead, particularly because the left-behind parent has no right to present evidence, or to be present at the refugee hearing. As the Ontario Superior Court said:[24]

> 'The stark reality of Canada's refugee claim process is that an abducting parent can bring a child to Canada and claim refugee status on behalf of that child without the consent of the other parent. The process thus begun could take years to complete. The opposing parent has no right to participate or be present at the hearing. Apart from any other defects this procedure may exhibit, at the least, the very initiation of the refugee claim has effectively defeated the major purpose of the Hague Convention – to have the child immediately returned to his home state to permit that state to determine the custody issue between his parents (unless one of the defences is established).'

Commentators who argue that a different approach should be taken to pending refugee claims ground their arguments in this observation of the United Nations High Commissioner for Refugees:[25]

> 'Every refugee is, initially, also an asylum-seeker; therefore, to protect refugees, asylum-seekers must be treated on the assumption that they may be refugees until their status has been determined. Otherwise, the principle of non-*refoulement* would not provide effective protection for refugees, because applicants might be rejected at borders or otherwise returned to persecution on the grounds that their claim has not been established.'

Taking the view that asylum-seekers may become refugees and should not be returned without a chance to prove their claim, commentators have argued that, where a refugee claim is the pending, the Hague Convention proceedings should slow down, there should be a fuller inquiry with *viva voce* evidence, additional procedural protections should be put in place, including independent representation for the child, and perhaps even a best interests of the child

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22 *Toiber v Toiber* (2005), 25 RFL (6th) 28 at para 38 (OSC), upheld by (2006) 25 RFL (6th) 44 (ONCA).
23 *Kovacs v Kovacs* (2002), 59 OR (3d) 671 (SC) at para 72.
24 *Kovacs v Kovacs* (2002), 59 OR (3d) 671 (SC) at paras 82–83.
25 UNHCR, ExCom, UN Doc A/AC 96/815 (1993), para 11.

analysis.[26] These arguments have not had much traction in the past, but the 2011 *AMRI v KER* ('*AMRI*') case may have changed the approach to pending refugee claims.[27]

AMRI did not involve a *pending* refugee claim. It addressed the question of whether a child can be returned under Hague Convention if the child *already* has refugee status. The case involved a 12-year-old girl who had been granted refugee status in Canada and was living in Ontario at the time the left-behind mother's Hague Convention application for return of the girl to Mexico was heard. The case was very badly handled case in the lower courts. But my focus here is on the Ontario Court of Appeal's discussion of the significance of the girl's refugee status. Refugee status does not prevent an order of return under the Hague Convention, but does create a rebuttable presumption that return of the child would create a grave risk of harm.

The Ontario Court of Appeal stated that the Hague Convention does not 'purport to elevate its mandatory return policy above the principle of non-*refoulement*'.[28] However, the prohibition against removal under immigration and refugee law does not apply to removal under other statutory schemes.[29] The Court reasoned that non-*refoulement* is a fundamental principle relating to the protection of human rights and fundamental freedoms within the meaning of art 20, which provides that return of child may be refused if this would violate fundamental principles relating to the protection of human rights and fundamental freedoms. Further, the Court said that the principle of non-*refoulement* would be respected by giving appropriate weight to the refugee determination when considering art 13 'grave risk' defence. The court noted that[30]

> 'the requirement that a Hague Convention judge consider a risk of persecution on a Hague application involving a refugee child accords with the requirements of the Convention on the Rights of the Child … In the Hague Convention context, the weight given to the child's best interests in the CRC strongly supports the conclusion that, in determining whether to grant an order of return in respect of a refugee child, the Hague application judge must treat the child's status as a refugee as giving rise to a rebuttable presumption of risk of persecution or other serious harm to be faced by the child if a return order is issued.'

While the Ontario Court of Appeal's attention to the rights and interests of children and the principle of non-*refoulement* is laudable, there are problems with the rebuttable presumption of risk of harm. First, the left-behind mother, who had been granted custody by a Mexican court, had no notice of the refugee hearing in Canada, no opportunity to participate, and no opportunity to respond to the serious allegations of abuse made against her. Second, the

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[26] M Bossin and L Demirdache. 'When Children Seek Asylum From Their Parents' (2012) 136 New Directions for Child and Adolescent Development 47.
[27] *AMRI v KER*, 2011 ONCA 417.
[28] *AMRI v KER*, 2011 ONCA 417 at para 67.
[29] *Németh v Canada (Justice)*, [2010] 3 SCR 281.
[30] *AMRI v KER*, 2011 ONCA 417 at paras 82–83.

refugee Board was not bound by legal rules of evidence and was able to base its decision on untested evidence. The Ontario Court of Appeal adverted to these facts and said:[31]

> 'In these circumstances, there is potential for the abuse of the IRB refugee determination process by an abducting parent to gain tactical advantage in a looming or pending custody battle. The courts must therefore be alert to any attempt to misuse the refugee protection scheme at the cost of Canada's obligations under the Hague Convention.'

While acknowledging the potential for abuse of the refugee process, the Ontario Court of Appeal considered that allowing the left-behind parent the opportunity to rebut the presumption of grave risk of harm is a satisfactory solution.

In my view, it is highly problematic for a left-behind parent who has never been involved in a proceeding where abuse has been proved against them to have to *disprove* abuse. In refugee cases like *AMRI*, where there is an underlying family law conflict and where the claim for refugee status is based on abuse by the left-behind parent, the left-behind parent should receive notice and have a chance to respond to the claims made against him or her. If this change were made to the refugee procedure, then the resulting decision of the refugee Board would be a sound basis on which to base a presumption that returning the child would create a grave risk of harm. *AMRI* very helpfully underscores that courts hearing Hague applications need to give proper attention to a child's refugee status. But refugee Boards also need to deal with the fact that family conflicts may underpin some the refugee claims. However capable refugee Boards are, decisions based on one side of a story cannot be afforded much weight.

Although *AMRI* was a case where the girl already had refugee status, it has modified the approach of Canadian courts even to *pending* refugee claims. In *GB v VM*, the Ontario Court of Justice adopted the traditional approach of refusing to stay the Hague Convention application pending the result of the child's refugee application.[32] But the court proceeded more carefully, taking note that the application for refugee status might be granted. The 'spirit of urgency' gave way to additional procedural safeguards. Counsel for the child was appointed. An expert assessment of the child was conducted. The child's wishes were extensively considered. All of the evidence was canvassed thoroughly. In the end, the court ordered return of the child to Hungary. The court seemed to interpret *AMRI* as requiring more than usual consideration of possible defences and all possible procedural protections.

Another post-AMRI case, *Borisovs v Kubiles*, involved a child who already had refugee status at the time the Hague Convention hearing took place.[33] The Ontario Court of Justice said that pursuant to AMRI it must: (a) treat the

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[31] *AMRI v KER*, 2011 ONCA 417 at para 73.
[32] *GB v VM*, 2012 ONCJ 745.
[33] *Borisovs v Kubiles*, 2013 ONCJ 85.

child's status as a refugee as giving rise to a rebuttable presumption of risk of persecution or other serious harm to be faced by the child if a return order is issued; (b) consider Canada's non-*refoulement* obligations, and the import of a child's refugee status, under the Article 13 (grave risk of harm) and Article 20 (fundamental freedoms) exceptions to mandatory return; and (c) consider that, by virtue of her status as a Convention refugee, the child's section 7 Charter rights to life, liberty and security of the person are engaged in a Hague Convention application. The court said that the child has a right to a 'risk assessment' prior to her removal, and to a fair process. The risk assessment will proceed on the basis of the rebuttable presumption, and a consideration of the risk to the child's human rights if she were involuntarily returned. A fair process entitles the child to adequate disclosure of the case, a reasonable opportunity to respond to it, and a reasonable opportunity to state her own case. In addition, in the context of a child refugee, the child's views gain greater importance, and her views should be considered in accordance with her age and maturity. The fact that the child is not a party to the application does not detract from her right to be heard.

The current approach of Canadian courts is to proceed with a Hague Convention application, even though the child has refugee status or the child's claim to refugee status is pending. However, the courts give careful consideration to the refugee status or refugee claim, and modify the proceedings accordingly.

One final immigration issue that arises in the context of an application under the Hague Convention is whether an order of return or an order refusing return of a child should be made if the effect of the order may be to separate the child from a parent because of the parent's immigration status. Although this is primarily an issue that should be tackled by immigration authorities, Canadian courts hearing Hague Convention applications should at least be aware of the impact of Hague Convention decisions on the child's CRC and ICCPR right to family life and the right not to be separated from a parent unless this is in the child's best interests. And Canadian courts hearing Hague Convention applications should at least consider the fact that a parent's immigration status may prevent that parent from being present and participating in legal proceedings to determine what is in the best interests of the child. This latter problem was identified by the Hague Conference on Private International Law, which said:[34]

> 'Contracting States should, as far as possible, take measures to ensure that, save in exceptional cases, the abducting parent will be permitted to enter the Country to which the child is returned for the purpose of taking part in legal proceedings concerning custody or protection of the child.'

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[34] Hague Conference on Private International Law, 'Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction' (2001) para 5.3.

In *Crnkovich v Hortensius*, the court granted a Hague Convention application for return of the child to Indiana, despite the taking mother's argument that a deportation order prevented her from entering the United States to properly conduct a hearing or trial.[35] The court noted that the mother had been deported because of her criminal record, and that she had been eligible for a pardon for years but had taken no steps to expunge her criminal record. Because the mother was 'the sole author of her dilemma on this issue', the court did not consider it a basis for refusing return of the child.

In some cases, Canadian courts have addressed the immigration status of a taking parent by way of undertakings. The Quebec Court of Appeal, for example, ordered return of a child to Hawaii, conditional on undertakings given by the left-behind father that included an undertaking to assist the taking mother in obtaining immigration status that would allow her to reside in the United States.[36] The same approach was used by the Ontario Court of Justice, in *Brown v Pulley*, where an order that the children be returned to North Carolina included an undertaking that the left-behind father use his 'best efforts' to assist the taking mother to obtain legal status in the United States. However, the court stated that 'the return of the children to North Carolina is not to be delayed while this process takes place', and that the order of return 'is not conditional upon the mother being able to re-enter the United States'.[37] In these cases, the hope is that the immigration authorities in the state of the child's habitual residence will facilitate entry to that state by the taking parent. The reverse situation has also arisen. In *Medina v Pallett*, the left-behind father had been deported to Honduras, and if the taking mother's defence to the Hague Convention application had been successful, it would have been up to the Canadian immigration authorities whether to allow the father's re-entry to Canada.[38]

IV CRIMINAL LAW

Canada's Criminal Code, ss 282 and 283 provide that abduction by a parent of a child under the age of 14 is punishable by imprisonment for up to 10 years.[39] Canadian authorities recognise that criminal charges are not appropriate in all cases of parental child abduction, and prosecutorial discretion is exercised carefully. Crown counsel must consult with their Chief Federal Prosecutor before proceeding, and the Criminal Code requires that the consent of the Attorney General be obtained before commencing proceedings under s 283. A directive of the Public Prosecution Service of Canada provides:[40]

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35 *Crnkovich v Hortensius* (2008) 62 RFL (6th) 351 (ONSC).
36 *F(R) v G(M)*, 2002 CanLII 41087 (QC CA), http://canlii.ca/t/1ct3l.
37 *Brown v Pulley*, 2015 ONCJ 186, para 199.
38 *Medina v Pallett*, 2010 BCSC 259.
39 *Criminal Code*, RSC 1985, c C–46, ss 282 and 283.
40 Public Prosecution Service of Canada, Public Prosecution Service of Canada Deskbook, 5.10 Parental Child Abduction, 2 Statement of Policy (1 March 2014).

> 'Not all cases of parental child abduction will warrant criminal charges. As with any decision to prosecute, in addition to assessing the reasonable prospect of conviction, Crown counsel must consider whether a prosecution is in the public interest. Civil enforcement is another route that can be used as an alternative to the criminal response when criminal charges are not appropriate.
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> The federal Family Orders and Agreements Enforcement Assistance Act establishes procedures to ascertain the addresses of parents and children residing in Canada from federal information banks to facilitate the enforcement of custody orders. The Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention), which has been adopted by all Canadian jurisdictions, is the main international treaty that can assist parents whose children have been abducted to another country.'

The number one factor weighing against prosecution that is identified in the directive is that 'a less onerous civil remedy is available and would be more appropriate in the circumstances'. Thus, prosecutors in Canada are explicitly charged with considering civil enforcement using the Hague Convention as an alternative to criminal proceedings. This addresses the problem of criminal charges hindering successful return of a child, which was identified by the Hague Conference on Private International Law.

Canada's restrained approach to pressing criminal charges for parental child abduction is not matched by its approach to extradition proceedings to face criminal charges in other countries. The 2015 four-three split decision of the Supreme Court of Canada in *MM v United States of America* ('*MM*') reveals insufficient attention on the part of the majority to the best interests of the child principle and the particularity of international child abduction.[41]

In *MM*, the father was granted custody of the three children in the US state of Georgia, and the mother was not allowed any access. The children ran away from their abusive father and lived for several days in an abandoned house. They then contacted their mother for help. Several weeks later, the mother and children were located in a battered women's shelter in Quebec, where the mother was born (the mother and children are dual citizens of Canada and the USA). A social worker contacted the father, who declined to come to Canada to pick up the children. The father then disappeared. The mother was charged in Georgia with, inter alia, interstate interference with a custody order. The mother was arrested at the shelter in Quebec, and the USA requested extradition.[42]

The first step of the extradition process is that Canada's Minister of Justice must issue an 'Authority to Proceed' that identifies the Criminal Code offences corresponding to the foreign offences. In this case, the corresponding offences listed were abduction in contravention of a custody order and abduction of a

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41 *MM v United States of America*, 2015 SCC 62.

42 Extradition was requested pursuant to the Extradition Treaty between Canada and the United States of America, Can TS 1976 No 3, and the Extradition Act, SC 1999, c 18.

person under the age of 16.[43] The next step is that a court must order committal for extradition. In this case, the court at first instance dismissed the USA's application for committal, because the evidence showed that the mother had not taken the children from the father (they left him of their own accord), that the mother had no intent to deprive the father of possession of the children, and that the Criminal Code defence to abduction was made out because the mother's intent was to protect the children from imminent harm at the hands of the father.[44] The Quebec Court of Appeal reversed the lower court and ordered committal of the mother for extradition. The final step is that the Minister of Justice must order the accused to surrender for extradition. The Minister of Justice took the view that the 'best interests of the child' is not a principle of fundamental justice, but, considering this principle, determined that if the mother were extradited the children the Quebec authorities would determine the children's best interests and place them in foster care if no family members were available. The mother's application for judicial review of the Minister's surrender order was dismissed by the Quebec Court of Appeal. The mother then appealed the committal and surrender orders to Canada's highest court.

The four-member majority of the Supreme Court of Canada dismissed the mother's appeal. According to the majority, the court at first instance that dismissed the application for committal had erred in law in taking into account defences available to the mother and other exculpatory circumstances. Defences may be considered only at the surrender stage. The Minister must not surrender a person for extradition if to do so would be 'unjust or oppressive'.[45] Where surrender would be contrary to the principles of fundamental justice, it will be unjust and oppressive. The Minister must consider, when relevant, the best interests of children who are or may be affected by the extradition and whether there is a significant difference in jeopardy between domestic and foreign law. But the best interests of the child principle may be subordinated to other concerns in appropriate contexts and does not always trump all other concerns in the administration of justice. Here, the Minister's surrender order was 'reasonable' because the Minister had appropriately considered potential defences and the best interests of the children.

The three-member dissent would have granted the mother's appeal in regard to both the committal and the surrender orders. They reasoned that the rule prohibiting the committal judge from considering defences applies to procedural defences but not to a statutory defence that goes to the very heart of the offence. To safeguard the liberty interests of the person sought for extradition, the court hearing the application for committal should be able to

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43 Criminal Code, RSC 1985, c C–46, ss 282 and 280.

44 Criminal Code, RSC 1985, c C–46, s 285 provides: 'No one shall be found guilty of an offence under sections 280 to 283 if the court is satisfied that the taking, enticing away, concealing, detaining, receiving or harbouring of any young person was necessary to protect the young person from danger of imminent harm or if the person charged with the offence was escaping from danger of imminent harm.'

45 Extradition Act, SC 1999, c 18, s 44.

consider that the statutory defence that it was necessary to rescue the children to protect them from imminent harm is not available in Georgia. In Canada, the mother could not be found guilty of abduction because her intent had been to protect the children from the danger of imminent harm at the hands of their father. No reasonable, properly instructed jury in Canada could return a verdict of guilty against the mother in the circumstances. Therefore, the court at first instance was correct in ruling that extradition was not justified.

In regard to the order of surrender, the dissenting judges stated that the Minister of Justice too had a responsibility to consider a statutory defence available in Canada but not in Georgia. As well, Minister had a responsibility to give adequate consideration to the best interests of the children. In this case, it was clearly contrary to the best interests of the children to extradite the mother. It was apparent to all that the children should not be returned to their abusive father. Extradition of the mother to face charges punishable for up to 15 years' imprisonment would penalise the children by depriving them of the only parent who can look after them. The Minister had not considered the impact of the mother's surrender on the family. The Minister's observation that the best interests of the children could be protected by putting them into foster care 'represents an inexplicable rejection of the cornerstone of this country's child welfare philosophy, namely, to attempt whenever reasonably possible to keep children and parents together'.[46] The dissenting judges concluded that:[47]

> '[T]here is little demonstrable harm to the integrity of our extradition process in finding it to be unjust or oppressive to extradite the mother of young children she rescued, at their request, from their abusive father. The harm, on the other hand, of depriving the children of their mother in these circumstances is profound and, with respect, demonstrably unfair.'

The majority in *MM* was focused on the imperatives of extradition law and failed to give attention to the larger scheme of laws protecting children from international child abduction. Under this larger scheme, criminal charges are not always appropriate, and the defence of rescuing children from imminent harm is central. Taking a larger view would perhaps have prevented the majority from extraditing the mother to face charges of interstate interference with a custody order, where the left-behind father had abused the children, had not bothered to bring an application under the Hague Convention, and had refused the opportunity to fetch the children from Quebec. And more careful consideration of the overarching goal of international child abduction laws – protecting the best interests of children – would perhaps have resulted in a less unfortunate result than separating the children from their mother and leaving them to the vicissitudes of foster care.

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[46] *MM v United States of America*, 2015 SCC 62 at para 274.
[47] *MM v United States of America*, 2015 SCC 62 at para 269.

V IMMIGRATION AND REFUGEE LAW

Boards and courts applying Canada's Immigration and Refugee Protection Act (IRPA)[48] have made it clear that they are not bound by rulings made under the Hague Convention. For example, in *Garcia v Canada* (Minister of Citizenship and Immigration), the issue was whether a child could be removed from Canada pursuant to the IRPA even though the Quebec Court of Appeal had dismissed a Hague Convention application for return of the child to Mexico because the child was 'well settled' in Canada.[49] The IRPA, s 50(a) provides that a removal order is stayed 'if a decision that was made in a judicial proceeding … would be directly contravened by the enforcement of the removal order'. The Federal Court of Appeal ruled that the Court of Appeal of Quebec's judgment was not 'directly contravened' by the enforcement of the removal order. Direct contravention requires an express provision that is inconsistent or irreconcilable with the removal order. The determination of the Court of Appeal of Quebec that Rodolfo should not be removed because he had settled into his new environment was simply part of the majority's reasons for judgment. The dismissal of the father's application for a return order under the Hague Convention was the judicial decision, and it did not contain a specific order that was inconsistent or irreconcilable with the removal order. Furthermore, the Hague Convention decision could not be interpreted as conferring permanent resident status on the child.

Boards and courts making IRPA decisions have also said that they are not bound by rulings under the Hague Convention that return of the child would create a grave risk of harm. For example, in *Kovacs v Kovacs*, a Hague Convention application for return of a child to Hungary was heard while a claim for refugee status on behalf of the child was pending.[50] The court, having determined that it could proceed with the Hague Convention application despite the pending refugee claim, dismissed the application on the Article 13 grounds that there was a grave risk that returning the child to Hungary would place him in an intolerable situation. Later the refugee claims of the taking mother and on behalf of the child were rejected.[51] The Federal Court ruled that the prior decision under the Hague Convention that return of the child would create a grave risk of harm did not preclude a determination under the IRPA that the child was not a person in need of protection. The Federal Court reasoned that the parties were not the same, and that the considerations in a Hague Convention application, where the issue is grave risk of harm, and a refugee determination, where the issue is cruel or unusual treatment and absence of state protection, are clearly different.

A troubling aspect of the Federal Court's decision in *Kovacs* is the ruling that the taking mother had committed a 'serious non-political crime' – the

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48 *Immigration and Refugee Protection Act*, SC 2001, c 27. See also *Immigration and Refugee Protection Regulations*, SOR/2002–227.

49 *Garcia v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 75.

50 *Kovacs v Kovacs* (2002), 59 OR (3d) 671 (SC).

51 *Kovacs v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1473.

abduction of her child – and therefore, pursuant to the IRPA, could not be found to be a Convention refugee or a person in need of protection. The Federal Court stated that, even though there was no evidence of a charge or conviction, there were serious reasons for considering that an abduction, a 'serious non-political crime', had been committed. The Federal Court said that it was reasonable for the Board hearing the mother's refugee claim to conclude that the statutory defence to a charge of abduction, that the intent had been to protect the child from imminent harm,[52] would not be available to the mother because the Board disbelieved her claims of abuse. The finding that the mother had committed a serious non-political crime was dispositive of her refugee claim. The Federal Court failed to consider that criminal charges of abduction are not always appropriate or that prosecutors may exercise discretion not to lay such charges. In the circumstances of this case, where a civil remedy for child abduction had been pursued, and a ruling under the Hague Convention made that the child should not be returned because of a grave risk of harm, and the criminal law authorities had not seen fit to pursue charges, it was problematic to refuse to consider the mother's refugee claim because of a hypothetical crime.

Boards hearing claims for refugee status based on abuse by the left-behind parent and absence of state protection have also been faulty in failing to give the left-behind parent notice and a chance to respond to the claims made against him or her. This is what occurred in the *AMRI* case, where the child was granted refugee status based on the abuse of the left-behind mother and absence of state protection, even though the mother had no notice of the claim and no opportunity to respond. If the left-behind parent were given an opportunity to respond to allegations of abuse against them, it would be reasonable to follow the direction of the Ontario Court of Appeal in *AMRI* and to treat the resulting refugee decision as creating a rebuttable presumption that return of the child would create a grave risk of harm in a subsequent Hague Convention proceeding.

A final point for Boards and courts hearing IRPA cases to consider is the exhortation of the Hague Conference on Private International Law 'to ensure that, save in exceptional cases, the abducting parent will be permitted to enter the Country to which the child is returned for the purpose of taking part in legal proceedings concerning custody or protection of the child'.[53] The IRPA provides that it is to be construed and applied in a manner that ensures that decisions taken under it are consistent with the Canadian Charter of Rights and Freedoms and comply with international human rights instruments to which Canada is signatory.[54] In addition to the best interests of the child principle, the ICCPR and CRC rights to family life and the right of the child not to be separated from his or her parents are important factors when considering

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[52] *Criminal Code*, RSC 1985, c C–46, s 285.

[53] Hague Conference on Private International Law, 'Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction' (2001) para 5.3.

[54] *Immigration and Refugee Protection Act*, SC 2001, c 27, s 3(3)(d) and (f).

whether to allow an otherwise inadmissible parent to enter Canada to take part in proceedings concerning custody of the child.

VI CONCLUSION

Canada's family law, criminal law, and immigration and refugee law deal with international child abduction in different ways. Protection of the rights and interests of children involved in cases of international abduction are best protected when there is integration and cooperation among the systems, rather than a narrow focus on each system's own imperatives and values and culture. In addition, greater cooperation between states is needed to ensure that the successful resolution of cases of international child abduction is not hindered by unnecessary criminal charges or refusals to permit a parent to enter a country to participate in legal proceedings concerning custody.

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CHILE

ABORTION IN CHILE

Ursula Pohl[*]

Résumé

Le Chili est un des rares pays au monde dont la législation interdit l'avortement. Mais cela n'est le cas que depuis 1989 alors que Pinochet était au pouvoir. L'actuel gouvernement propose de dépénaliser l'avortement dans trois situations: quand la vie de la femme enceinte est en danger, quand le fœtus n'a aucune possibilité de survie en dehors du sein de sa mère et, finalement, dans les cas de viol. Le présent chapitre discute de cette proposition et en analyse les pour et les contre.

The contemporary President of the Republic of Chile, Michelle Bachelet, initiated in May 2014, in a speech to the nation, an intelligent and informed discussion about proposed legislation, provoked by the theme 'no prosecution' in case of abortion in three special cases.[1] Chilean citizens followed this invitation, conducting a partly passionate debate about the planned change to the law.[2]

Several opinion surveys were conducted on this theme. The result was to the effect that about 70% of the Chilean population were in favour of such a proposed change in the law. Several pollsters also asked the question how the introduction of a policy of no penalty for abortion would be judged. Only 20% of those interviewed supported such a regulation.[3]

In fact, Chile did have, already in the year 1930, such a regulation in the criminal code regulating National Health Policies. It was art 226 according to which abortion was allowed for 'Therapeutic Reasons'. This paragraph was only replaced in the year 1989 by a new one – still valid at the time of writing – according to which abortion is never penalty-exempt. This happened towards the end of the military dictatorship under General Pinochet.[4]

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1 Secretaría General de la Presidencia, Mensaje No 1230–362/, 31.1.2015.

2 Tony Milfusd, SJ, Centro de Etica y Reflexión Social Fernando Vives, SJ, Encuestas sobre el aborto. Una nota ética, www.uahurtado.cl/noticias-universitarias/2015/04/encuestas-sobre-el-aborto-un.

3 Ibid, p 3.

4 Secretaría General de la Presidencia, Mensaje No 11230–362/, 31.1.2015, p 7.

The present government of Chile initiated a proposed law in January 2015, after the proposal mentioned above, according to which there would be no penalty for the following three cases, namely:

- danger to life for pregnant women;
- no possibility of survival for the fetus outside the uterus;
- pregnancy as a result of rape.

In September 2015 the commission of the House of Deputies which is responsible for health matters gave its consent also to the third variant for exemption from penalties for abortion. They did that after having had a debate about this theme for 6 months. Of the commission eight members voted for the acceptance of the regulation, five opposed it. In this connection the deputy Monckeberg was critical of the fact that the planned change in the law made no provision for the punishment of the rapist. As a result, the problem, at this time, could be solved only in connection with the no penalty provision for abortion. He considered this situation, with reference to the protection of the women who are thus affected, completely insufficient.[5]

Tony Mufusd SJ, demonstrated, reflecting about the ethical side of the proposed law, that one must not, under any circumstances, deal with abortion in itself, but only in connection with it as far as the three special cases go. He proceeds from the premise that there is a preponderance of prejudice against abortion in Chile. One must emphasise the fact that it is just a matter of three special cases if one wants to understand the national debate. The agreement with these three narrow possibilities for an abortion must, under no circumstances, become equal to a general agreement concerning the legalisation of abortion. He also criticised, in this context, the fact that, when the survey was taken, there were no questions concerning the reasons which would lead to a decision for or against. Therefore one would arrive at the conclusion without knowing the relevant causes.

Apart from that he pointed to the fact – from an ethical point of view – that in general one took for granted that the interviewed person would know what the debate was all about. Sadly that is not always the case. Thus, one found out later when having a public opinion poll about the pill in the district of Santiago, in the year 2001, that 25% of those polled did not know that this pill could only be taken by the woman; 30% did not know that one would take it after sexual contact; 42% were of the opinion that what was meant was a normal contraceptive that had been used for a long time. He pointed towards a publication in Ethos N 17, under the title: 'Verdict of the citizens – the pill after and the law pertaining to divorce'.[6] He concluded that no one could know whether all the folk polled knew what a 'fetal impossibility'[7] is and, if one

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[5] El País, 16.9.2015, Chile aprueba despenalizar el aborto en caso de violación; www.internacional.elpais.com/internacional/2015/09/16/actualidad/1442423251_8549.

[6] Juicio ciudadano: píldora del día después y ley de divorcio.

[7] Inviabilidad fetal.

could not know whether that concept was understood, then the reply of the interviewees was usable only in a merely limited way.[8]

In the Chilean magazine for birth assistance and gynecology Mauricio Besio wrote concerning the proposed legislation the following:[9]

> 'The new legal regulation which endeavours to give amnesty in three cases has caused great excitement in the public forum and among physicians, especially those who treat pregnant women. At first blush it endeavours to pardon the penalty, without losing respect for the nasciturus, also the pregnant woman and the physician on duty who performs the abortion. In connection with this one appeals to different and contradictory principles in connection with all three variants. However, as one takes a second look, one can see that the respect for the life of the patient which was from the beginning, the foundation of the medical profession, was replaced by the decision of the woman. It was she who would determine whether a treatment would be continued or not. The structure of the planned legislation would result in a definite determination by the woman who would determine the life of the patient and his or her treatment – son or daughter. In this one can detect a hidden principle which opposes respect for life in each person without any discrimination.'

As one can conclude from the positions cited above, the topic has brought about a polarisation of the population in Chile. It can be compared to the debate on the new law about marriage which was substituted for the law of 1884 in 2005. People argued about this law for 10 years after it was introduced in 1995, until it was finally passed. The question whether marriage can be dissolved or not had led to hot debates at that time. The introduction of the exemption from a penalty for abortion in the three cases is being debated now with similar fervour.[10] The influence of the Catholic Church in Chile is impossible to gauge.

Since one assumes that, despite the total prohibition on abortions in Chile, nevertheless one-third of pregnancies are aborted, one can also assume that when it comes to this topic the opinions do clash vehemently. The reason for this is the fact that, on the one hand, there is the line of argumentation on the basis of the Catholic Church ethic, on the other hand, however, there is a multitude of affected women who do not want to accept that they should continue to endanger their lives through illegal abortions or in doing so die. Camilo Marín of the foundation Balmaceda explains that Chile is still one of the most conservative countries with reference to female reproduction rights.[11]

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8 Tony Mifusd, SJ, Dentro de Etica y Reflexión Social Fernando Vives SJ, Encuestas sobre el aborto. Una nota ética. www.uahurtado.cl/noticias-universitarias/2015/04/encuestas-sobre-el-aborto-una-nota-etica.

9 Mauricio Besio R, Proyecto de ley sobre la despenalización del aborto: análisis ético, Revista chilena de obstetrician y ginecología, vol 80, No 2, Santiago de Chile, April 2015, p 1.

10 Ursula Pohl, *Familienrecht in Chile, Rechtsreform und geseslschaftlicher* (Wandel, Baden-Baden, 2013) p 103.

11 Camilo Marín, Fundación Balmaceda, Desarrollo Histórico, Político y Social del Aborto en Chile, 3. Julio 2014, www.fundacionbalmaceda.cl/desarrollo-historico-politico-y-social-delaborto/, p 2.

Marín also notices that in the Chilean political life religion has great influence – in this case of the Catholic Church – whenever debates concerning legislative matters arise. He points to the introduction of article 226 into the legal code covering health matters. This was done on the initiative of the then President Carlos Ibanez del Campo in 1930. He points to the fact that the rights of Chilean women were more prevalent at the beginning of the 20th century than at the beginning of the 21st.[12] The regulation which has been valid since 1989 incorporates abortion into the same category as crimes against humanity without saying a single word about the health situation of the women affected.[13] In a brief historical outline he points to the fact that there has been a penalty in Chile since 1875. This situation, as mentioned above, was changed in 1930, only to become a punishable offence again under Pinochet. Ever since, it has been especially the poor who suffered under the legal prohibition. Citing the institute Alan Guttmacher, he points out that especially poor women are the ones who are hurt when it comes to illegal abortion, for they resort to dangerous methods because of a lack of money. As a result they incur infections and other health problems. The institute, mentioned above, assumes that, when poor women have abortions, 44% suffer from medical complications later.[14]

The text of the proposed law indicates that Chile belongs to the last four countries worldwide that absolutely outlaw abortion. Apart from Chile the countries are: Nicaragua, El Salvador and Malta.[15]

At the same time there have been, already since 1991, parliamentary initiatives for the purpose of drafting new regulations concerning abortion. The feminist deputy – Adriana Muñoz – had already then, together with a few other deputies, introduce a proposed law. In 2003 she attempted, together with other deputies a renewed effort to changing the situation. 2010, 2012, 2013 and 2014 saw further petitions with a view to change the existing legal situation. The result of all this is the fact that for 25 years people have grappled with this theme and again and again new starts for a new regulation have been taken.

It becomes evident, in connection with this theme too – as it did way back in connection with divorce – how difficult it is in Chile to overcome the positions of the Catholic Church. It took many recommendations coming from the United Nations Organisation, which admonished the Republic of Chile for not keeping its international obligations. It was already in the year 2004 when the committee for economic, social and cultural rights recommended that the present laws be revised and abortions or pregnancy, as a result of rape or incest, be classified as penalty-free.[16]

Lately the pressure of the Christian Democrats, within the ruling coalition, against the proposed legislation became extremely vocal, so that the Chilean

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12 Ibid, p 3.
13 Ibid, p 1.
14 Ibid, p 4.
15 Secretaría General de la Presidencia, Mensaje No 1230–362/, 31.1.2015, p 2.
16 Ibid.

President Bachelet removed again the original urgency given to the issue. This means that now one cannot foresee when there will possibly be any legal regulation concerning the theme of abortion in the three cases. The ex-senator Soledad Alvear of the Christian Democrats played a special role in connection with this theme and she gathered the opponents of the proposed law around herself. It must also be mentioned – in this context – that great placards had been mounted on this or that church steeple, sporting the text: 'NO to abortion' ('*NO al aborto*'). This seems to be the official policy of the Catholic Church.[17]

The fearless worker priest Mariano Puga, who is well known in Chile, demonstrated publicly and fearlessly, declaring in an interview that it is peculiar that those who are the most vociferous critics of abortion are those who care the least about children and their future when they are born into similar circumstances. He had already bravely opposed the military dictatorship under General Pinochet and he was awarded the title 'Hero of Peace' ('*Héroe de la Paz*') in 2009 by the Chilean Government.[18]

[17] These placards were seen by the author in Santiago de Chile in January 2016.

[18] Cura Mariano Puga sobre el aborto: 'Hay que dejar que la mama decida en casos límites', www.soychile.cl/Santiago/Sociedad/2014/06/06/254066/Cura-Mariano-Puga-sobre-el-aborto-Hay-que-dejar-que-la-mama-decida-en-casos-limites.aspx.

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CHINA

THE JURIDICAL PRACTICE OF CHILD-REARING QUESTIONS IN DIVORCE PROCEEDINGS AND PROPOSALS FOR IMPROVEMENT

*Chen Wei and Zhang Qinglin**

Résumé

Ce chapitre s'intéresse à la pratique judiciaire en matière de garde d'enfants dans le cadre du divorce. Les auteurs ont analysé un échantillon aléatoire de dossiers de divorce terminés entre 2011 et 2013 dans le Tribunal du Peuple de la ville de Chongqing. Ce chapitre résume les aspects positifs et négatifs de la pratique judiciaire. En conclusion les auteurs formulent six propositions visant à améliorer les choses: introduire le principe du meilleur intérêt de l'enfant, élargir les pouvoirs des officiers de justice en la matière, introduire le système du représentant de l'enfant dans les procédure, s'enquérir des volontés de l'enfant à partir de l'âge de dix ans, augmenter les montants de pensions alimentaires pour enfants et, finalement, rendre effectif l'exercice du droit d'accès.

At present, China's divorce rate has increased year by year. The divorce rate was 1.85%, 2%, 2.13%, 2.29% and 2.58% roughly from 2009–2013.[1]

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* Based on a Survey of Divorce Cases (2011–2013) of a grass-roots People's Court in Chong Qing, China: School of Civil and Commercial Law, Southwest University of Political Science and Law, Chongqing. This article is a stage of a research project named 'Empirical Research on Protection of Women and Children in China' [CLS (2014) D045] funded by the China Law Society in 2014, also a stage of an important special project named 'Empirical Research on Protection of Women and Children in China' (project number: 2014XZZD-002).

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1 See the 2013 Social Services Development Statistics Bulletin released by the Ministry of Civil Affairs, www.mca.gov.cn/article/zwgk/mzyw/201406/20140600654488.shtml, access date: 5 July 2014.

Divorce of parents has changed the way of child-rearing and children's[2] living environment, which will have an important impact on their future growth and development. Thus, solving the child-rearing questions in divorce proceedings properly will benefit children both physically and mentally.

I AN OVERVIEW OF THE RESEARCH ON JURIDICAL PRACTICE OF CHILD-REARING QUESTIONS IN DIVORCE PROCEEDINGS

The research into the juridical practice of child-rearing questions in divorce proceedings will be analysed in the following three ways: the research background, the research subject and the research methods.

(a) Research background

Children are the crystallisation of parents' love and continuation of their life. They are not only important members of the family but also the masters of the country's future and hope of social development. Today, it is common sense for the community to pay more attention to the children's growth and protect the best interests of the child.

In history, children experienced the situation of not being a matter of concern, and being treated as a profit tool to be exploited. Finally, people realised that children are weaker than adults. They need to be taken care of. 'The child best interests principle' has become a generally accepted value: 'Whatever behaviour involving children, whether performed by public or private social welfare institutions, courts, administrative authorities or legislative bodies, should place the children's best interests as a primary consideration' (cited from the 1989 United Nations' Convention on the Rights of the Child Article 3, para 1). Now, 193 countries have ratified the Convention on the Rights of the Child and become members of it. Meanwhile, 'the child's best interests principle' has been recognised by most countries and regions around the world as their highest guideline and discretionary standard for legislative and judicial practice. Our country joined the Convention on the Rights of the Child on 29 December 1991. As one of the members, our country attaches great importance to children, shoulders obligations and responsibilities to protect children, and is gradually establishing and implementing the 'the child's best interests principle'. In order to protect the legitimate rights and interests of children in divorce

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[2] Age limit of the 'child': internationally it usually refers to 0–18, such as in the 1989 United Nations' Convention on the Rights of the Child, where the 'child' is defined as 'any person under 18 years of age'. In China, there is no clear definition of 'child'. In the Modern Chinese Dictionary (the fifth edition), 'child' is defined as 'the person who is younger than juvenile'. The medical profession takes children 0–14 as its study subject. China's Law on the Protection of Minors (amended in 2006) regulates citizens under 18, who are called 'minors'. In accordance with China's Protection of Minors to stress the protection of minors, and to comply with international practice, in this article 'child' refers to a person below 18 years old.

proceedings and properly settle their upbringing problem, our current Marriage Law and relevant judicial interpretation have corresponding provisions.

(b) Research subject

A county of Chongqing Municipality was chosen as the research location. The county is located in the northeast of Chongqing, over 100 km away from the main city, with a population of about one million. It is at the moderate level of economic development in Chongqing. The research is based on the concluded divorce cases involving child-rearing questions (2011–2013) of a grass-roots People's Court so as to get to know the situation of child-rearing questions in juridical practice.

(c) Research methods

The research method included sampling, statistical analysis and forums.

(i) Sampling

From 2011–2013, the county courts have handled 10,785 civil cases, including 2,732 divorce cases amounting to 25.3%. In divorce cases, 665 cases were concluded, 1,259 were completed by mediation, 749 were withdrawn and 59 involved other situations, accounting for 24.3%, 46.1%, 27.4%, 2.2% respectively. Due to limitations of manpower and time, we used a sampling method, taking annually 120 concluded divorce cases from 2011 to 2013 (a total of 360 cases) as the survey's sample.

(ii) Statistical analysis

We carefully reviewed and recorded the data of the 360 cases and performed a statistical analysis on the recorded data.

(iii) Forums

By talking with judges who deal with divorce cases, we learnt more about the judicial practice of handling child custody, analysed problems and difficulties, and discussed counter-measures and suggestions.

II AN ANALYSIS OF THE RESEARCH ON JURIDICAL PRACTICE OF CHILD-REARING QUESTIONS IN DIVORCE PROCEEDINGS

For divorce cases involving child-rearing, we mainly examine four aspects: first, the basic information of the divorce cases being investigated; second,

child-rearing problems of children directly supported by their parents; third, the quota of child maintenance paid by their parents; fourth, visitation rights of their parents.

(a) Basic information of the divorce cases

(i) The amount of child-rearing cases

The total amount of child-rearing cases

In the 360 divorce cases being investigated, there are 292 cases involving child support, accounting for 81% (see **Table 3.1**). The proportion of cases involving child-rearing in divorce proceedings is very high.

Table 3.1 Proportion of cases involving child-rearing in divorce proceedings

	Involving	**Not involving**
Cases	292	68
Proportion	81%	19%

The total amount of child-rearing cases with different numbers of children

There are 177 cases involving one child, accounting for 61%; 104 cases involving two children, accounting for 36%; nine case involving three children, accounting for 3%; two case involving four children, accounting for 1%. Therefore, cases involving one or more children account for more than 60% (see **Table 3.2**).

Table 3.2 Proportion of cases involving child-rearing with different numbers of children

Number	**1 child**	**2 children**	**3 children**	**4 children**
Cases	177	104	9	2
Proportion	61%	36%	3%	1%

(ii) Age of the children

The number of children under 2 years old is 10, accounting for 2%; the number of children between 3 and 9 years old is 212, accounting for 50%; the number of children between 10 and 18 is 202, accounting for 48%. Thus, cases involving children under 2 years old are the least (see **Table 3.3**). Cases with children 3–9 years old and 10–18 years old share a much higher ratio.

Table 3.3 Proportion of different ages of children in divorce cases

Age	Under 2 years old	3–9 years old	10–18 years old
Children (amount)	10	212	202
Proportion	2%	50%	48%

(iii) Gender of the children

227 are male children, accounting for 53 per cent; 197 are female children, accounting for 47%. Obviously, male children are just slightly a bit more than female children (see **Table 3.4**).

Table 3.4 Proportion of different genders of children in divorce cases

	Male	Female
Amount	227	197
Proportion	54%	46%

(iv) Dispositions of child-rearing problems in divorce cases

In the 292 divorce cases involving child-rearing problems, 128 cases were concluded, accounting for 44%; 164 cases were finalised in mediation, accounting for 56%. Therefore, cases finalised in mediation account for more than 60% (see **Table 3.5**).

Table 3.5 Proportion of dispositions of child-rearing problems in divorce cases

	Concluded	Closed in mediation
Amount	128	164
Proportion	44%	56%

(b) Child-rearing problem directly supported by parents

(i) Age of children directly supported by parents

For children under 2 years old, 3 children are directly supported by their father (determined by the court by way of mediation), accounting for 30%; 7 children are directly supported by their mother, accounting for 70%. For children between 10 and 18 years old, 128 children are directly supported by their father, accounting for 63%; 74 children are directly supported by their mother, accounting for 37%. We can see that children under 2 years old are mainly directly supported by mother (see Figure 2-1a) while for the children 3–9 years

old and 10–18 years old, the number of children directly supported by father is 16 % and 12% more than those directly supported by mother respectively (see Table 3.6).

Table 3.6 Proportion of Different Ages of Children Directly Supported by Parents

		Under 2 years old		3–9 years old		10–18 years old	
Father	Concluded in court	0	0	60	14%	64	15%
	Closed in mediation	3	0.7%	80	19%	64	15%
	Total	3	0.7%	140	33%	128	30%
Mother	Concluded in court	3	0.7%	34	8%	33	8%
	Closed in mediation	4	0.9%	38	9%	41	10%
	Total	7	1.7%	72	17%	74	18%

(ii) Gender of children directly supported by parents

149 male children are directly supported by their father, accounting for 35%; 122 female children are directly supported by their father, accounting for 29%. Meanwhile, 78 male children are directly supported by their mother, accounting for 18%; 75 female children are directly supported by their mother, accounting for 18%. Obviously, the number of both male and female children directly supported by their father is more than that directly supported by their mother. In particular, the number of male children supported by fathers is about twice than that of mothers (see **Table 3.7**).

Table 3.7 Proportion of different gender of children directly supported by parents

	Directly supported by father				Directly supported by mother			
	Male		Female		Male		Female	
Concluded	69	16%	55	13%	35	8%	35	8%

	Directly supported by father				Directly supported by mother			
	Male		Female		Male		Female	
Mediation	80	19%	67	16%	43	10%	40	10%
Total	149	35%	122	29%	78	18%	75	18%

(iii) Number of children directly supported by parents

Total number of the children directly supported by parents

271 children are directly supported by their father, accounting for 64%; 153 children are directly supported by their mother, accounting for 36%. Therefore, the number of children directly supported by fathers takes up more than 60% (see **Table 3.8**).

Table 3.8 Proportion of total number of children directly supported by parents

	Children directly supported by father		Children directly supported by mother	
Concluded in court	124	29%	70	17%
Closed in mediation	147	35%	83	19%
Total	271	64%	153	36%

Number of the children directly supported by parents involving one child

In the 177 divorce cases involving one child, 118 children are directly supported by their father, accounting for 67%; 59 children are directly supported by their mother, accounting for 33%. The number of children supported by fathers involving one child is about twice than that of mothers (see **Table 3.9**).

Table 3.9 Proportion of number of the children directly supported by parents involving one child

	Children directly supported by father		Children directly supported by mother	
Concluded in court	42	24%	29	16%

	Children directly supported by father		Children directly supported by mother	
Closed in mediation	76	43%	30	17%
Total	118	67%	59	33%

Number of children directly supported by parents involving two children

In the 104 divorce cases involving two children, in 59 cases two children are supported by one parent; in 45 cases the children are supported by separate parents, accounting for 43% (see **Table 3.10**). In the 45 cases, 20 involve both children being below 10 years old, accounting for 44% which is the highest ratio.

Table 3.10 Proportion of number of the children directly supported by parents involving 2 child

	Two children directly supported by father		Two children directly supported by mother		Children directly supported by separate parents	
Concluded in court	22	21%	8	8%	18	17%
Closed in mediation	18	17%	11	11%	27	26%
Total	40	38%	19	19%	45	43%

(iv) Reasons for deciding either parent as the child's direct caregiver

Divorce cases mediated by court

In mediation divorce cases, with the judge presiding over the mediation, two sides negotiate voluntarily and decide who will be the direct caregiver. Since the reasons why the direct caregiver is made are not indicated in the divorce agreement, we cannot discuss them here.

Divorce cases concluded by court

According to the *Opinion on Child-rearing Problem in Divorce Proceedings*, the reasons for deciding the direct caregiver are listed below (see **Table 3.11**): (A) Child is under 2 years old; (B) Parents have persistent infectious disease or other serious diseases which are not conducive to children's growth; (C) Parents' unfavourable economic conditions are not good for the growth of

children; (D) Parents in other circumstances are not conducive to children's physical and mental health so that the children should not live together; (E) Because the children have been living with one party for a long time, changing the living environment is clearly not good for the healthy growth of the children; (F) The party has no other children, and the other has other children; (G) Children have lived with grandparents together for many years, and grandparents want and have the ability to take care of their grandchildren; (H) Children are more than 10 years old and are willing to live with one party; (I) Other reasons.

In 128 divorce cases involving child-rearing problem, 96 cases have stated the reasons for the children's direct caregiver, accounting for 75%. Among them, on the grounds of (A), one case, accounting for 1%; on the grounds of B, four cases, accounting for 4%; on the grounds of (C), four cases, accounting for 4%; on the grounds of (D), 12 cases, accounting for 13%; on the grounds of (E), 32 cases, accounting for 33%; on the grounds of (F), one case, accounting for 1%; on the grounds of (G), five cases, accounting for 5%; on the grounds of (H), 12 cases, accounting for 13%; on the grounds of (I), 25 cases, accounting for 26%. Thus, decisions made on the grounds of (E) (because children are living with one side for a long time, changing the living environment is clearly not good for the healthy growth of the children) are the most, accounting for more than 30% (see **Table 3.11**).

Table 3.11 Proportion of reasons for deciding either parent as the child's direct caregiver

	A	B	C	D	E	F	G	H	I
Cases	1	4	4	12	32	1	5	12	25
Proportion	1%	4%	4%	13%	33%	1%	5%	13%	26%

(c) Child maintenance paid by parents in the divorce cases

(i) Child maintenance paid by parents

184 children have received child maintenance paid by one side, accounting for 43%; 240 children do not get child maintenance paid by parents, accounting for 57%. Among the 184 children, 107 were concluded in court, accounting for 58%; 77 were mediated in court, accounting for 42%. Among the 240 children, 87 were concluded in court, accounting for 37%; 153 were mediated in court, accounting for 63%. Clearly, nearly 60% of children did not get child maintenance, 14% more than the number of children receiving child maintenance (see **Table 3.12**). Among the children receiving child maintenance, the number of concluded in court is 16% more than the number of mediated in

court (see **Table 3.12**). Among the children not receiving child maintenance, the number of mediated in court is 26% more than the number of concluded in court (see **Table 3.12**).

Table 3.12 Proportion of Child Maintenance Paid by Parents

	Child maintenance paid by parents		**Child maintenance not paid by parents**	
Concluded in court	107	25%	87	21%
Mediated in court	77	18%	153	36%
Total	184	43%	240	57%

Here, we further analyse the reasons why children do not get child maintenance. There are several reasons: (A) both parents have custody of other children respectively; (B) the direct caregiver father voluntarily shoulders all children's child maintenance; (C) direct caregiver mother voluntarily shoulders all children's child maintenance; (D) due to special reasons (illness, whereabouts unknown, prison etc), parent is unable to pay.

Among the 292 divorce cases involving child-rearing problems, 148 did not pay child maintenance. As a direct caregiver, the number of cases where the father or the mother voluntarily shoulders all the children's child maintenance is 75 and 13, accounting for 51% and 9% respectively. The number of cases where the direct caregiver is unable to pay is only 23, accounting for 15%. We can see as a direct caregiver, the number of cases where the father or mother voluntarily shoulders all the children's child maintenance accounts for 60% (see **Table 3.13**).[3]

Table 3.13 Proportion of reasons for not paying child maintenance by parents

	A	**B**	**C**	**D**
Cases	37	75	13	23
Proportion	25%	51%	9%	15%

(ii) Payment of child maintenance

Among the 184 children who can get child maintenance paid by one side, 155 are paid monthly, accounting for 84%; three are paid quarterly, accounting for

[3] Since the occupation and income of parents are not recorded in our sample, we cannot conduct any further analysis.

2%; six are paid every 6 months, accounting for 3%; eight are paid annually, accounting for 4%; 12 choose a one-time payment, accounting for 7%. Clearly, most people choose monthly payment, accounting for more than 80% (see **Table 3.14**).

Table 3.14 Proportion of payment of child maintenance

	Monthly Payment		**Quarterly Payment**		**6-Month Payment**		**Annually Payment**		**One-time Payment**	
Concluded in Court	99		0		3		4		1	
Mediated in Court	56		3		3		4		11	
Total	155	84%	3	2%	6	3%	8	4%	12	7%

(iii) Amount of child maintenance

Among the 184 children who can get child maintenance paid by one side, 40 can get 1–200 Yuan, accounting for 22%; 88 can get 201–300 Yuan, accounting for 48%; 39 can get 301–600 Yuan, accounting for 21%; eight can get 601–1000 Yuan, accounting for 4%; nine can get more than 1,000 Yuan, accounting for 5%. The amount of child maintenance below 300 Yuan goes up as high as 70% (see **Table 3.15**).

Table 3.15 Proportion of amount of child maintenance

	1–200 Yuan		**201–300 Yuan**		**301–600 Yuan**		**601–1,000 Yuan**		**Above 1,000 Yuan**	
Concluded in court	25		75		16		1		1	
Mediated in court	15		13		23		7		8	
Total	40	22%	88	48%	39	21%	8	4%	9	5%

(d) Parents visitation rights in divorce cases

(i) Whether parents demand visitation rights

In the 292 divorce cases involving child-rearing, only three parents in the divorce requested the right to exercise visitation rights, accounting for 1%; in the other 289 cases, the parents did not request visitation rights, accounting for 99%. Obviously, few parents request visitation rights.

(ii) Time and method of parents' visitation rights

In the four cases determining visitation rights, only one case clearly stated the method of visiting the children, which was taking the children home during the summer vacation, accounting for 25%; the other three cases did not clearly state how and when to visit the children, accounting for 75%. Obviously, almost 80 per cent of the cases did not state how and when to visit the children.

(iii) Closed manner of parents' visitation rights

In the four cases involving visitation rights, all four are resolved by mediation in court, accounting for 100%. Clearly, all the cases determining parents' visitation rights were closed by the mediation in court.

III THE EFFECT OF JURIDICAL PRACTICE ON CHILD-REARING QUESTIONS IN DIVORCE PROCEEDINGS

Through analysis of the above-mentioned cases, we can see that some successful experiences and practices arose from the grass-root courts when they dealt with child-rearing questions in divorce proceedings.

(a) Focus on mediation and protecting the best interests of the child

According to art 32, para 2 of China's current Marriage Law, when treating divorce cases in the People's Court, the judge should mediate. Obviously, mediation is a necessary process in divorce proceedings. Based on the natural kinship between parents and children, through legal education, reasoning, persuasion negotiation and mediation between both parents, it will be easy to reach an agreement in favour of the interests of children and reduce the adverse effects of parental divorce on children. When the court manages child custody issues in divorce proceedings, the judges attach great importance to mediation. As noted above, 56% of divorce cases are settled by mediation, the specific details being as follows.

(i) The amount of alimony determined through mediation is relatively high

As described above, children who got alimony below 300 Yuan through mediation take up only 22%, children who got alimony above 300 Yuan through mediation take up only 68 per cent and among them, nine children obtained more than 1,000 Yuan in custody charges and eight children settled through mediation, up to 89%. This helps to satisfy the children's life and study.

(ii) Mediation is more conducive to the fulfilment of the visitation rights

Among the 292 divorce cases involving children support, although only four divorce cases clearly state that the divorced parent can exercise visitation rights to the children, all four cases were determined through court mediation which helps to meet the children's need for emotional exchanges and mutual understanding between parents and children.

(b) Effectiveness of determining child caregiver directly

(i) Determining a parent's responsibility for the children

Article 36 in China's Marriage Law states:

> 'The relationship between parents and children will not vanish because of the break of their parents' divorce. After divorce, whether the children are in the custody of either parent, parents have the right and obligation to bring up and educate.'

Among the 424 children who need a dependant, 64% will be brought up by the father directly through court judgment or mediation and 36% will be brought up by the mother directly through court judgment or mediation. This guarantees the right of children's custody and avoids children without dependant after parents' divorce.

(ii) Mother gets the custody directly for children during lactation

Article 36, para 3 in China's *Marriage Law* states: 'After the divorce, children of lactation will be raised by the breast-feeding mothers.' In 1993, *People's Court on Child Custody in Divorce Cases Dealing with Several Issues Specific Comments* by Supreme People's Court (hereinafter referred to as the 1993 *Divorce Child Support Opinions*) Section 1 provides that: 'Children under the age of two usually are raised by mother.' In the cases investigated, for children under 2 years old, the mother got direct custody in 70% of the cases and father got direct custody in 30% of the cases. Such processing results are in line with our Marriage Law and the judicial interpretation of its provisions. That is, children under the age of 2 are raised by mother on principle. It is conducive to

the growth of young children. As some scholars have pointed out, determining the direct caregivers of young children should reflect the 'juvenile principle'. The principle holds that, because of the mother's nature and instinct when the children are young, the custody of the mother is more important than the father's.

(iii) Maintaining the stability of children's lives for children after lactation

Child support after lactation, according to the Marriage Law, should be negotiated by the parents. If the parents' negotiation fails, the people's court should make a judgment based on the specific circumstances of the interests of both children and parents.

The court in determining the child direct caregiver should, to a certain extent, take into account the stability of the children's living environment, which directly determines the children's direct caregiver. In the 96 cases determining the children's direct caregivers, the cases taking 'children live longer with the party and to change the environment is not good for the healthy growth of the children' as a reason account for 33%, the highest proportion in line with our current judicial interpretation of the Marriage Law.[4] The court takes stability of living conditions of the children before the divorce as an important consideration in determining who will have child custody, which will avoid huge changes in a child's life. As some scholars have pointed out, to determine the child's direct caregiver should reflect the 'principle of a primary caregiver'. The principle holds that the party who bears primary responsibility for raising children in the family will be given priority in the custody dispute in the future. Its main purpose is to maintain the continuity of care for the children.

(c) Effectiveness of determining child support payments

(i) Enhancing foresight and flexibility of alimony payments

Article 37, para 1 in China's Marriage Law states that, when one party raises the children after the divorce, the other party shall bear the necessary living and educational expenses. According to art 21 of the 2001 the Supreme Court Interpretation of Applicable 'People's Republic of China Marriage Law' Issues (a) (hereinafter referred to as the Marriage to explain (a)), alimony payments include living expenses, education expenses and medical expenses, etc. In the survey, we found that some cases of alimony payments are refined, except for living expenses, education expenses and medical expenses shared by both parents.[5] This approach is more forward-looking. It can reduce the financial

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[4] Article 3 in Supreme People's Court in 1993, A Number of Specific Comments on the People's Court Divorce Cases Dealing with Child Support Issues states: 'For minor children aged two year or more, when the mother or the father is required to live with the children, one of the following circumstances is given priority: . . . (2) Children live with the party much longer and life-changing is not healthy for the growth of the children.'

[5] According to the statistics on mediation in the court, for children's medical expenses, each

burden of raising children for the caregiver parent, and avoid secondary disputes and harm to children when problems about medical expenses and education expenses occur. At the same time, in some cases, some of the parents work outside and do not have a stable income to regularly pay child support. Through mediation of the court, with mutual consent of both parties, some or all of the property can be taken as a share of the alimony payments which makes it more flexible.

(ii) Monthly payments as the main payment method

Article 8 in the 1993 *Divorce Child Support Opinion* states that alimony should be paid regularly but it can be a one-time payment. Clearly, the alimony payment method in principle is regularly paid, with a one-off payment mainly for any supplementary payment. The survey data shows that monthly alimony payments account for 84% and the proportion of one-time payment is only 12%. We can see that alimony is mostly a monthly payment and only a small number involves a one-off payment, which is in line with the spirit of judicial interpretation. Monthly payment of alimony can not only guarantee the stability of the child's life and prevent alimony being squandered or diverted to other purposes, but also it can allow for a major change to the amount of alimony. It is a reasonable payment method.

IV THE DEFICIENCIES IN THE JURIDICAL PRACTICE OF CHILD-REARING QUESTIONS IN DIVORCE PROCEEDINGS

As mentioned above, in dealing with child support cases the court has achieved some success, but there are still some deficiencies.

(a) Lack of 'best interests of the child' legislative guidance

It is true that when dealing with child support issues in divorce proceedings, China's Marriage Act, Adoption Act and many of the provisions have shown relevant judicial interpretations of the concept of 'best interests of the child'. However, our current Marriage Law does not clearly establish the 'best interests of the child' principle. Because of the absence of this principle, our judicial activities involving children's rights lack uniform guidelines and codes of conduct. 'It is not conducive to the guidance of parents properly handling issues concerning the interests of children, is not conducive to guiding judges on the basis of uniform guidance to process cases involving children's interests, making it difficult to give priority to protecting the best interests of the child.'[6] For

parent has to pay half of the cases up to the age of 14; for children's education expenses, the agreement of both parents was that each paid half of the cases up to the age of 16.

[6] Chen Wei and Xie Jingjie 'The establishment of the best interests of children priority principle in our country —the lack and perfect of marriage law and relevant laws' Studies in Law and Business, 2005 (5).

example, in divorce cases involving child rearing questions, children who get 300 Yuan account for 70%, a pretty low amount of alimony payments. Further, in 292 divorce cases relating to child support, only four cases identified parents permitted to exercise visitation rights, accounting for only 1%.

(b) Lack of public supervision by the court and appropriate intervention

According to the provisions of arts 36, 37 and 38 of China's current Marriage Law, when dealing with child custody issues upon divorce, both parents first need to negotiate. According to our survey, it found that the content of the agreement is often totally caregiver on the parents, and the court does not engage in appropriate public supervision and appropriate intervention. For example, among the 424 children, nearly 60% did not get child support payments, and up to 63% were determined through mediation. We did not see the direct parent's occupation or income status in the case files and we do not know whether the parent can ensure a normal life and the learning needs for the children. In other examples, among the 104 divorce cases involving two children, only one parent got custody accounting for 57%, but there is no record of a review of their capacity and health status etc.

From foreign judicial practice, 'the state selectively intervenes in the field of family relations through judicial process in order to safeguard the interests of the disadvantaged'.[7] Family law shows a trend of private to public. In the United States, the divorce agreement involving child support payments must comply with the law, otherwise the court will not recognise it. This reflects the functions of judges reviewing the agreement and intervening appropriately. In our survey, the situation where the parent does not pay alimony is common. And most parents pay a much lower amounts of alimony. Parents who exercise visitation rights are few. This may be partly because the judge does not perform enough public supervision and appropriate intervention.

(c) Deficiencies in identifying children's direct caregiver

(i) Impact of the concept of 'child left to husband' and procreation

According to China's Marriage Law and judicial interpretations, child caregivers are directly determined mainly based on both the interests of the children and specific circumstances of parents. According to our survey data, analysed from the children's gender, the number of male children who have their father as caregiver is nearly twice that of the mother. Analysed from the children's number, the total number of children who have their father as caregiver is more than 60%. Where one child is involved, the total number of children who have their father as caregiver is twice that of mother. Where two

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[7] Song Yu 'State intervention and family autonomy: the research on development direction of the modern family legislation' Henan people's press, 2011, p 3.

children are involved, the total number of children who have their father as caregiver is 38%. We believe that the factors that caused this situation are various, in addition to the father's financial capacity. Another very important reason is that people are deeply impacted by traditional family values, the thought of 'the child left to the husband' and procreation.

(ii) Impact of the concept 'parents-oriented'

As mentioned earlier, in the 104 divorce cases involving two children, 45 cases were where each parent raised a child, accounting for 43%, close to half. After the divorce of their parents, children can live with only one parent and their living environment changes. If parents separate two children who have grown up together, it is probably not conducive to the healthy growth of the children. They not only have had to leave their father or mother, but also have to go through the pain of leaving their brothers or sisters. This approach is debatable. In the 45 cases, cases where both two children were aged less than 10 years old accounted for 44%. In our view, this means that in nearly half of the cases, the children are very young. Brothers and sisters being brought up by their parents separately ignores the emotional needs of the children and is not beneficial for the children's physical and mental health and family culture. For example, the provisions of art 402 in Uniform Marriage and Divorce Act states that factors in determining the child's guardianship include the relationship between children and their brothers and sisters. Again, s 68F(2) of the Australian Family Law Reform Act specifies that one of the factors the court should consider is 'the best interests of the child' and the impact of other children separated from their family. So, for the children in divorce proceedings, the relationship between children and their brothers and sisters should be determined as a factor.

(iii) Seldom soliciting the view of the children

Article 5 in the 1993 *Divorce Child-rearing Advice* stipulates that when the children are aged 10 or above and there is a dispute over living with father or mother, both parents should take the views of the children into account. Therefore, divorcing parents and judges in determining the children's care should seek the opinions of children more than 10 years old who have some knowledge and judgment.

According to our survey, on the one hand, from the divorce mediation agreements reached by both parents, we have not seen one record where the views of children had been solicited; on the other hand, in determining child support in divorce cases through court judgments, involving 97 children over 10 years old, only 12 cases were judged by the reason that the 'child reaches 10 years old and is willing to live with that party', the proportion being only 13%. Obviously, most divorced parents and judges in dealing with child custody issues do not seek the views of children over the age of 10 in accordance with law. Such a mediation agreement or a court decision may run counter to the

true wishes of the child, resulting in children not suiting the environment, which is not conducive to the healthy development of children in the future.

(d) Deficiencies in identifying children alimony payments

(i) A large proportion of non-payment of alimony

Article 37 in China's Marriage Law states that the parent who does not directly bring up the children should bear all or part of the child's living and education expenses. Obviously, it is the legal obligation and responsibility of parents who do not directly bring up the children to pay child alimony.

Our survey found that around 60% of the children do not obtain alimony payments from their parents. After further analysing the reasons why the parents do not pay alimony payments, we found that this situation is caused by a variety of reasons. Among them, the situation where parents voluntarily give up the alimony paid by the other side accounts for 60%. Article 10 in the 1993 *Divorce Child Support Opinion* states: 'parents may negotiate and agree that the caregiving party bear all alimony of the children, but it will not be permitted if the investigation has revealed that the caregiving party shows no capacity to raise the children and that this affects children's healthy growth.' In other words, the court has the duty to examine whether a party truly has the ability to raise the children. However, our samples picked from the case files show no records of parents' career and income situation. Thus, we cannot rule out the existence of this situation, that, in order to win the custody of the child, some parents are willing to bear all the cost of raising their own children. If the parents' income is not high, it would be difficult to meet the actual needs of children and it is not conducive to the healthy growth of children to raise children alone.

(ii) Relatively low amount of alimony payments

Article 7 of the 1993 *Divorce Child Support Opinion* provides that the amount of the children's alimony can be decided by the actual needs of the children, the parents' affordability and local living standards. If the parents have fixed incomes, the alimony generally can be 20–30 per cent of their total monthly income. If parents have to bear the cost of more than two children, the proportion may increase, but generally to no more than 50 per cent of monthly gross income. If the parents have no fixed income, the alimony may depend on the annual gross revenue or the industry average income as a reference point. Under special circumstances, it may be appropriate to increase or decrease the above ratio.

In the survey, children who can get 300 Yuan support payments account for around 70%. Children who can get 301–600 Yuan only account for 2%. This shows that most children can only get less than 300 Yuan support payments. It needs to be noted that in most divorce cases our investigation showed a lack of records of both parents' occupation and income statistics. Thus, we are not able

to determine the proportionate amount of alimony that is reached by judicial interpretation of the provisions through mediation or judgment. Therefore, we can only take local residents' per capita consumption level and the minimum living allowance as yardsticks.[8] During 2011–2013, the annual per capita consumption level of rural residents in the county was 4,900 Yuan, 5,600 Yuan and 6,200 Yuan, a monthly average of 408 Yuan, 467 Yuan, 517 Yuan.[9] From 1 October 2011, Chongqing set the urban minimum living guarantee line at 290 Yuan per person per month and the rural minimum living standard guarantee line at 150 Yuan per month.[10]

Articles 36 and 37 in China's current Marriage Law stipulate that, after their parents' divorce, children's living and study and other expenses should be shouldered jointly by their parents, ie each parent shoulders half of the expenses. According to this calculation, if each parent pays 300 Yuan per month, children will be able to get about 600 Yuan alimony per month, which is consistent with the local residents' per capita consumption level and the minimum living allowance, which seems to satisfy children's living and learning needs.

However, we believe that, while the method of calculation seems reasonable, in essence it is not fair. The main reasons are as follows.

First, it ignores the direct caregivers' labour value for educating their children. Care and education from the direct caregiver have both social value and economic value. The divorce economic compensation system[11] of the Marriage Law has established the economic value of housework. In other countries, the German Federal Court held that to take care of their children usually means full compliance with such a duty. The parents do not have to pay money, even if their income is higher than their own living needs. Parents who look after their children only in exceptional circumstances pay additional money to their children. Therefore, we believe that, if the direct parent needs to take care of and educate their children and meanwhile pay the same share of alimony as the other party, it is obviously unfair.

Second, it may lead to the impoverishment of divorced families. After the divorce, because the direct parent needs to raise the children, especially infants and children under 3 years old, they may lose the opportunity to work and

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[8] Through discussions with the judges, we learned that the majority of parents in divorce cases are farmers. They have no fixed income, so the alimony payments cannot be calculated in accordance with the statutory ratio. Therefore, when the judges calculate the amount of alimony, it is usually half of the local consumption level.

[9] Source: Chongqing Municipal People's Government of county network, http://dj.cq.gov.cn/Index.html, accessed on: 5 June 2014.

[10] Source: Xinhua, www.cq.xinhuanet.com/2011-10/19/content_23923182.htm, accessed on: 5 June 2014.

[11] Article 40 in the Marriage Law stipulates: 'The husband and wife may agree in writing that property acquired during the existence of marriage property is owned by each party. Due to raising children, caring for the elderly, or assisting the other in work, one party has the right to request divorce compensation and the other party should compensate.'

reduce their income, which leads to their family members including children living in poverty. If the children are raised by the mother, the situation may be worse. As compared with men, women's employment opportunities and economic income are relatively lower. Meanwhile, with the development of the economy and rising prices, the low amount of child support payments cannot guarantee the basic needs of living and learning costs, so the divorced families with children will live in poverty.

In other countries, in order to avoid divorced women living in poverty because of taking care of children, some countries take direct caregiver as determining factor to consider alimony payments between divorced spouses. As s 75(2)(c) of the Australian Family Law Act, amended in 2008, provides, if one party is taking care of children under 18, the court may in its decision request the other party to pay alimony by agreement. This not only makes the standard divorce maintenance system more objective but can also guarantee the living conditions of families and children. And China's current economic help system[12] is based on the divorced parties' living conditions and does not consider how, because of the divorce, one of the parents' occupation and income are affected by the situation. Therefore, how the direct caregiver's income is affected by raising children should be taken as an important consideration in determining alimony payments.

(e) Insufficiency in exercising parents' visitation rights

Article 38 of China's Marriage Law states:

> 'After the divorce, the parent who does not raise the children directly has the right to visit their children; the other party has the duty to assist. The parties can negotiate the manner and time for visits; if they fail to reach an agreement, the people's court will help to decide. If the visiting behaviour is not conducive to children's wellbeing, the people's court can suspend the right to visit according to law. After the reason for suspension disappears, the right to visit should be restored.'

Survey data shows that, in 292 divorce cases relating to child support, only four determined the visitation rights of the parents, accounting for only 1%, and all four cases were solved through mediation by the parents during court consultation. Only a case specified the time and method, ie during the summer and winter vacation. In the 128 cases of divorce, there is no clear order for a parent to exercise visitation rights. This shows that in the vast majority of divorce cases being investigated, both parents and judges have ignored parents' visitation rights to their children, leading China's visitation rights system to become a dead letter.

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[12] Article 42 in the Marriage Law stipulates: 'At the time of divorce, if one party has difficulty in living, the other party should compensate by providing housing or other personal property based on appropriate assistance by mutual agreement; when the agreement fails, the people's court will decide.'

We analysed the main reason for this situation: first, the majority of divorced parents may be unaware of the legal system of visitation rights. As described above, in the 292 divorce cases in relation to child support, a parent making a request to exercise visitation rights cases accounts for only 1%. This shows that most divorced parents may not understand China's current system of visitation rights. Second, the law does not explicitly attribute visitation rights obligations. According to art 38 in China's Marriage Law, it stipulates that the right to visit is only a right, but does not specify the manner of exercising visitation rights and the responsibilities of the parents. Third, in China's Marriage Law, the visitation rights are not linked with child support and other issues.

V PROPOSALS FOR IMPROVEMENT OF THE JURIDICAL PRACTICE OF CHILD-REARING QUESTIONS IN DIVORCE PROCEEDINGS

In the light of the deficiencies of the juridical practice of child-rearing questions in divorce proceedings, in order to protect the legitimate rights and interests of children, combined with China's actual situation and drawing on the useful experience of foreign legislation on the handling child custody issues upon divorce, we propose the following recommendations for improvement.

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

First, the legislative administration should draw on the recommendations of scholars to establish the principle of 'best interests of the child'. The Marriage Law should clearly state: 'Whenever dealing with all issues relating to children, the children's survival, protection and development should be a primary consideration.' And provisions in the divorce section should state: 'When parents or judges are dealing with child support, custody and other issues, the best interests of the child shall be a primary consideration.' Second, parents and judges in determining the direct caregiver, alimony and visitation rights should take 'the best interests of the child' principle as the guiding ideology and standard. When parents' need and interests of children are in conflict, we need to give priority to the interests of children. As some scholars have pointed out, the principle of 'best interests of the child' should be placed ahead of the 'legal rights of parents' to make sure that the children rights are realised.

(b) Strengthening public supervision of the court and appropriate interventions

Judges are required to carry out substantive examination and supervision. Based on the 'best interests of the child', judges should learn the whole facts of the case and guide parents to solve child custody issues through consultation. When the judge decides direct caregiver of the child, the judge should consider the situation and willingness of the child and parents to meet the spiritual and

material needs of the child and ensure the stability of children's living and learning environment. In determining child alimony, the party who is not the direct caregiver should pay the principal amount of alimony. When a judge exercises divorce mediation or decides visitation rights, the judge should guide the parents to solve the question through consultation and help them to decide the exercise of visitation rights and its method and time.

(c) Establishing a system of 'children's litigation representative'

When the court is dealing with a divorce case, it could designate a litigation representative on behalf of children to participate in its proceedings. A litigation representative has a separate position in the law suit and the representative's main duty is to safeguard the legitimate rights and interests of children, in a comprehensive understanding of the case. The representative will collect evidence on the basis of fully listening to the views of children and give reports and suggestions in the determination of caregivers, amount of alimony, visitation rights and other aspects.

(d) Soliciting the views of the children aged 10 or above

In determining the direct caregiver of children aged 10 or above, divorced parents and the judge should solicit the views of the children themselves. As children grow older, their cognitive ability improves and they have the ability to make their own decisions. Matters relating to children should not be determined solely. Parents cannot have a patriarchal ideology and put their own interests above the interests of the child, and should respect the wishes of the child and the right to self-determination putting the interests of the child as the primary consideration.

(e) High amount of alimony payments

The court should propose an appropriate increase in the amount of child support payments. Given that one of the divorced parents is decided as the direct caregiver, their work or income may be impacted. Thus, based on the different ages of the children, the amount of alimony payments could be adjusted accordingly. For children under 3 years old, the party who is not direct caregiver should pay all alimony payments. For children above 3 years old, the party who is not the direct caregiver should pay two-thirds of the alimony payments.

(f) Guaranteeing the exercise of visitation right

(i) Clarifying the nature of visitation rights

In the course of hearing the case, it is recommended that the judge clearly inform both parents that the visitation right is not only a right enjoyed by a parent, but also a duty to raise the performance of that parent's responsibilities.

The visitation right is not a new one as a result of the divorce, but is an extension of parental authority or guardianship. Parents visiting children after divorce is a form of a joint custody by both parents in raising the children. Therefore, when addressing the issue of child support in divorce cases, visitation rights are not dispensable. Children and parents visiting each other will benefit the children greatly.

(ii) Judges' obligation to inform and review

Judges should perform the obligation to inform and review. First, in relation to the relevant provisions of the right of visitation, the judge should fulfil the obligation to inform the parties in divorce proceedings. Second, the judge bears the obligation to review the agreement reached by the divorced parents. After examination by the judge, the divorce mediation or divorce decree should include the contents of visitation rights (exercise time, place and method). And the judge should ensure that the visitation rights system has been implemented.

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ENGLAND AND WALES

‘WHEN NOTHING ELSE WILL DO’ – MYTHS AND MISREPRESENTATIONS RELATING TO NON-CONSENSUAL ADOPTION IN ENGLAND AND WALES

Mary Welstead[*]

Résumé

Les juges anglais et gallois ont acquis la réputation, à juste titre ou à tort, de retirer des enfants à leurs parents contre leur volonté, admettant ainsi plus largement l’adoption que dans la plupart des autres États. Cela a été très fortement critiqué. En 2013, deux décisions majeures, l’une de la Cour Suprême et l’autre de la Cour d’appel, ont clarifié le droit des adoptions non-consenties. Ces deux décisions ont été discutées avec d’autres décisions, provenant principalement de la Cour d’Appel, dans lesquelles les juges judiciaires ont tenté d’améliorer les principes généraux dégagés dans ces deux décisions, tout en insistant sur le fait que ces décisions ne modifient pas le droit positif. Ces décisions mettent en exergue la tension existant entre, d’une part, la soi-disant rigueur du processus judiciaire qui est censé assurer le respect du droit des enfants et des parents de rester ensemble et, d’autre part, la détermination du gouvernement du Royaume-Uni d’accélérer les procédures d’adoption. Selon le gouvernement, lorsque les circonstances exigent de retirer un enfant à ses parents, il devrait être placé dans une famille adoptive aimante le plus rapidement possible plutôt que de demeurer dans les limbes des multiples familles d’accueil. Il est possible de déduire de ces deux décisions que les Cours et les autorités locales ne doivent pas craindre les adoptions non-consenties lorsqu’elles sont dans l’intérêt de l’enfant et que le placement a été clairement justifié. Les juges sont encouragés à utiliser une démarche holistique dans la construction de leur décision afin de les clarifier et, ainsi, de permettre aux parents à qui l’enfant a été retiré de comprendre exactement pourquoi une décision aussi grave était nécessaire.

I INTRODUCTION

‘The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child’s moral and physical health are not endangered. Public authorities cannot improve on nature.

* CAP Fellow Harvard Law School, Visiting Professor of Family Law, University of Buckingham.

> … It follows inexorably from that that society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent. It follows too that children will inevitably have both very different experiences of parenting and very unequal consequences flowing from it. It means that some children will experience disadvantage and harm, while others flourish in atmospheres of loving security and emotional stability. These are the consequences of our fallible humanity and it is not the province of the state to spare children all the consequences of defective parenting.'[1]

This sacrosanct principle, that children should live with their parents and not be forcibly removed from them to be adopted by strangers unless the circumstances are truly exceptional, is widely held. It is enshrined in both the European Convention on Human Rights 1950 ('the Convention') and the United Nations Convention on the Rights of the Child 1989 (UNCRC). The jurisprudence of both the European Court of Human Rights (ECtHR) and the domestic courts have also confirmed the right in a significant number of decisions. The ECtHR, for example, has stated that:[2]

> 'The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, and domestic measures hindering such enjoyment amount to an interference with the right protected by Art 8 of the Convention.'

The removal of a child from his or her parents may, of course, be justified under Art 8(2) of the Convention if, inter alia, it is in accordance with the law and necessary for the protection of a child's welfare, either physical or moral, or the child's rights and freedoms.[3] The UNCRC, Art 7, in a similar way, states that a child has the right to know and be cared for by his or her parents unless the circumstances fall within Art 9, which provides that:[4]

> '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.'

The jurisdiction of England and Wales has acquired the reputation, rightly or wrongly, for removing children from their parents against their will, and with a view to adoption, to a greater extent than in most other jurisdictions.[5] It has been heavily criticised for doing so.[6]

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1 *Re KD (A Minor) (Ward: Termination of Access)* [1988] AC 806, 812.

2 See, inter alia, *Johansen v Norway* (1996) 23 EHRR 33.

3 See *R and H v UK* [2011] 2 FLR 1236.

4 See Hodgkin and Newell, *Implementation Handbook for the Convention on the Rights of the Child* (3rd edn, UNICEF, Geneva, 2007) p 296.

5 See *Down Lisburn Health and Social Services Trust and another v H and another* [2006] UKHL 36; Fenton-Glynn C, 'Adoption Without Consent – European Parliament – Europa' www.europarl.europe.eu/…/IPOL-STU(2015)5192.

6 See *Re R (A Child)* [2015] 1 FLR 715 at para 45 in which Sir James Munby P maintained that it was irrelevant that the law in the jurisdiction permitted adoption in circumstances where it might not be permitted in other European countries and that the task of the courts was to apply that law.

In 2013, two major decisions in the jurisdiction set out to clarify the law relating to non-consensual adoption. The first of these two decisions was handed down by the Supreme Court in *Re B (A Child) (Care Proceedings: Threshold Criteria)*[7] and the second was given by the Court of Appeal in *Re B-S (Children)*.[8]

In this year's *International Survey of Family Law*, I discuss the decisions in *Re B* and *Re B-S* and a number of other decisions, primarily from the Appeal Court,[9] in which the judiciary has attempted to refine the principles expressed in *Re B* and *Re B-S*, whilst insisting that those two decisions did not change the law. The decisions reflect the tension between the supposedly stringent legal process involved in ensuring that due consideration is given to the rights of children and their parents to remain together and the determination of the United Kingdom government to speed up the process of adoption. The government's view is that, where circumstances demand the removal of children from their parents, they should be placed with a new loving adoptive family as soon as possible rather than being left to linger in the limbo of multiple foster care placements.[10]

II THE LAW RELATING TO ADOPTION

When a local authority wishes to remove a child from his or her parents with a view to adoption without their consent, it must first obtain a court order. The only exception is that the police may remove a child in an emergency under s 46 of the Children Act 1989. Applications for care orders are made under the Children Act 1989 and applications for placements for adoption are made under the Children and Adoption Act 2002 (ACA 2002). The applications are often made together when the court will have to consider the provisions of both Acts.

(a) The Children Act 1989

Before granting a care order, the court must satisfy itself, under s 31(2) of the Children Act 1989:

> '(a) that the child concerned is suffering, or is likely to suffer, significant harm; and
> (b) that the harm, or likelihood of harm, is attributable to—
> (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
> (ii) the child's being beyond parental control.'

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7 [2013] 2 FLR 1075.
8 [2014] 1 FLR 1035.
9 Two of the decisions were decided by Sir James Munby P in the Family Court.
10 See Children and Families Act 2014; *YC v UK* [2012] 54 EHRR 967.

Section 1 of the 1989 Act provides that, in the determination of any question relating to a child's upbringing, his or her welfare shall be the court's paramount consideration. Section 1(2) of the Act requires the court to have regard to: 'the general principle that any delay in determining the question is likely to prejudice the welfare of the child'. Section 1(3) provides a checklist of the factors the court should take into account in determining the question of a child's welfare.

(b) ACA 2002

If the local authority decides that the child should be placed for adoption, the court may grant the placement order under s 21(2) of the ACA 2002 if a care order has already been granted, or if the court believes that the circumstances are such that it would be permitted to make a care order. The court may dispense with the need for parental consent under s 52 of the Act. In deciding whether to grant the placement order, the court must have regard to the more stringent requirement of s 1(2) of the ACA 2002 that the court must consider 'the child's welfare throughout his or her life'. Once a child has been placed with prospective adoptive parents, they may make an application for an adoption order under s 49 of the ACA 2002.

A parent who wishes to object to a care or placement order may apply to the court for it to be revoked up until the moment the child has been placed with prospective adoptive parents.[11] Once that has happened the parents must wait until the prospective adoptive parents make an application for an adoption order. At this point, they may apply to the court for leave to object to the application under s 47(5) of the ACA 2002. Such a parent will have to show that there has been a change of circumstances since the care or placement order was made. The court will then decide whether to grant the parent leave after considering the effect of its decision on the child's welfare throughout his or her life.

(c) Children and Families Act 2014

The enactment of the adoption provisions of the Children and Families Act 2014 was a consequence of the Government's concerns about the length of time proceedings relating to the removal of children were taking. The Act placed a 26-week limit on care proceedings, which may be extended by up to 8 weeks if necessary.[12] The Act also requires local authorities to consider the placing of children with family and friends and where that is not possible to place them with foster parents who would have the dual role of also being the prospective adoptive parents for the children.[13] The use of expert evidence in care and placement proceedings will be limited to circumstances where it is

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11 ACA 2002, s 24.
12 See s 14 of the 2014 Act and s 32 of the Children Act 1989.
13 Children and Families Act 2014, s 2.

essential for the protection of the interests of the child.[14] This means that the evidence of social workers and children's guardians will become much more important. It remains to be seen whether the resources will be available to ensure that children are not removed too hastily but are removed when their interests require it.[15]

III *RE B (CARE PROCEEDINGS: APPEAL)* (2013)[16]

In 2013, the Supreme Court considered an appeal by parents against the making of a care order with a view to placing their child for adoption. Following the court's decision to deny the appeal, there was considerable discussion about its effect on the future of non-consensual adoption. Many lawyers and social workers believed that the requirements to remove a child laid down by the court were so stringent that they would put an end to non-consensual adoptions except in the most extreme of circumstances; the mantra 'nothing else will do' reverberated around the legal world and social work communities. Others, including the Appeal Court's judiciary, were more circumspect and maintained that non-consensual adoption would continue to play a significant role in securing a stable future for children whose parents were incapable of providing it for them.[17]

(a) The facts in *Re B*

M and F were the parents of a daughter who was born in 2010. The Supreme Court gave the child the fictitious name of Amelia, following proposals made by Lady Hale (presumably out of respect for the child so that she did not remain merely an anonymous entity in the minds of the members of the Supreme Court). Amelia had been removed at birth from M and F without their consent, under an interim care order, and placed by the local authority with a foster mother. M had had a hugely dysfunctional upbringing. Her stepfather had been abusive towards her and she had become pregnant seven times by him; six of these pregnancies had been aborted and one resulted in the birth of a daughter, Teresa (a fictitious name also proposed by Lady Hale). In 1999, M left her stepfather's home, where she had been living. Teresa who was aged 10 remained behind and the local authority promptly removed her into foster care. Soon after, M began a relationship with F, who was a criminal and a drug user. He had four daughters with whom he had had very little involvement, partly because of his regular visits to prison during the previous 15 years. M also had a prison record for fraud, for perverting the course of justice, and for perjury.

The local authority applied for a care order with a plan for Amelia's adoption.

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[14] Ibid, s 13.
[15] See Fenton-Glynn, 'Adoption targets' [2016] Fam Law 148.
[16] [2013] 2 FLR 1075.
[17] See *Re R* [2015] 1 FLR 715 below.

(b) The trial court's decision

The trial judge found that from 2010 until 2012 when the case came before him that:

> '(a) The most striking feature of the relationship between the parents was the strength of their united wish that Amelia should be placed in their care;
> (b) They had put a massive effort into making a success of the periods of contact;
> (c) They were devoted to Amelia;
> (d) They each had a warm and loving relationship with her;
> (e) During contact periods they had "not put a foot wrong" and had given her child-centred love and affection "in spades".'[18]

However, the judge believed that, if Amelia were to be returned to the care of M and F, she would be at risk of harm, including unnecessary medical consultations, because M suffered from psychiatric somatisation and factitious disorders. The main features of these two disorders are numerous complaints about physical symptoms which may be exaggerated, or fabricated. M had regularly requested medical investigations which failed to reveal any organic disorder; she simply craved care and attention from other people. A psychiatrist gave evidence and stressed that, for M to overcome her problems, she would require lengthy psychotherapy. It could only be undertaken if M were able to acknowledge her disorders and engage honestly with a therapist. M would also require a multi-disciplinary programme of supervision and support to protect Amelia from potential harm. A further problem was that M had also told lies, on a regular basis, to the various authorities with whom she had had dealings and had made numerous complaints about them and about Amelia's foster mother, to, inter alia, the General Social Care Council, the Local Authority Ombudsman, the NHS Patient Advice and Liaison Service, and to her MP. Both M and F were unable to cooperate with anyone offering professional help who challenged their views.

The judge accepted the evidence given by a psychologist about M's inability to protect any child in her care because her capacity for deception was such a dominant feature of her personality. She lacked insight, refused to acknowledge her difficulties, was evasive and inconsistent. He concluded that he should make the care order with a view to the adoption of Amelia:[19]

> '… what the evidence clearly demonstrates is that these parents do not have the capacity to engage with professionals in such a way that their behaviour will be either controlled or amended to bring about an environment where [Amelia] would be safe … In short I cannot see that there is any sufficiently reliable way that I can fulfil my duty to [Amelia] to protect her from harm and still place her with her parents. I appreciate that in so saying I am depriving her of a relationship which, young though she is, is important to her and depriving her and her parents of that family life which this court strives to promote.'

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[18] Ibid at para 16.
[19] Ibid at para 22.

(c) The decision in the Appeal Court

The Court of Appeal upheld the trial judge's decision albeit with a certain amount of reluctance on the part of Rix and Lewison LJJ. They shared the view that the case:[20]

> 'illustrates a powerful but also troubling example of the state exercising its precautionary responsibilities for a much loved child in the face of parenting whose unsatisfactory nature lies not so much in the area of physical abuse but in the more subjective area of moral and emotional risk.'

(d) The Supreme Court's judgment

In considering M and F's appeal, the Supreme Court, in a lengthy, erudite and complex judgment, considered, first, the threshold criteria laid down in s 31(2) of the Children Act 1989 for the making of a care order; second, the requirement, under Art 8(2) of the ECHR, that any infringement of the right to respect for family life should be proportionate to its legitimate aim, and third, the proper approach to be taken by appellate courts in appeals against a trial court's grant of a care order with a view to adoption.

(i) The Supreme Court's reasoning

(1) The threshold criteria

Significant harm

The court reiterated the requirements for the grant of a care order under s 31(2) of the Children Act 1989. It explained that the phrase 'likelihood of significant harm' meant that there had to be a real possibility that harm will occur based upon a fact, or facts, established on the balance of probabilities. 'Harm' meant ill-treatment or damage to a child's health or development, and included his or her emotional development. Whilst the concept of ill-treatment was absolute, that of damage to health or development was relative to the health or development which could reasonably be expected of a similar child.

Without feeling the need to explain the meaning of the word 'significant', the court said that the consequences of any harm should be more than subtle and ambiguous. In *Re L (Children) (Care Proceedings: Significant Harm)*,[21] for example, Hedley J explained that:[22]

> 'Society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent; … significant harm is fact-specific and must retain the breadth of meaning that human fallibility may

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[20] Ibid at para 175.
[21] [2007] 1 FLR 2050.
[22] Ibid at para 50 ff.

> require of … it is clear that it must be something unusual; at least something more than the commonplace human failure or inadequacy.'

The Supreme Court also maintained that it should be borne in mind that the severity of the harm required was inversely correlated with the likelihood of the harm.[23]

The character of the parents

The Supreme Court held that the character of the parents would inevitably affect the quality of their parenting and it was, therefore, a relevant factor in any decision to remove children. The conduct of the parents which was said to give rise to harm, or the likelihood of harm, did not have to be intentional or deliberate; it must simply be attributable to them and be other than that which it would be reasonable to expect a parent to give to the child.

(2) The relevance of the Convention

Article 8

The Supreme Court held that Art 8 of the Convention did not apply to the threshold stage of the trial judge's enquiry. It was only at the second stage, when the court actually determined the child's future, that an infringement of the Art 8 rights of the children and their parents might be relevant. If the decision did infringe their rights, it had to comply with the proportionality requirement in Art 8(2). The grant of the care order for Amelia with a view to her adoption was an infringement of her, and her parents', rights to respect for their family life under Art 8 of the Convention. In order for it to be lawful, it had to be shown to be proportional to the legitimate aim of the care order which was to protect Amelia's right to grow up free from harm.[24]

The Supreme Court noted that the paramountcy of the child's welfare requirement under the Children Act 1989 ran broadly in parallel with Art 8(2) in that a care order with a view to adoption against the parents' wishes was only justifiable if the welfare of the child required it. It was not enough that it would be better for the child to be adopted than to live with the natural family:[25]

> 'But that is not the end of the story. We all agree that an order compulsorily severing the ties between a child and her parents can only be made if "justified by

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[23] See *Re C and B (Care Order: Future Harm)* [2001] 1 FLR 611 at para 28.

[24] See *YC v United Kingdom* (Application No 4547/10) (unreported) 13 March 2012, where the ECtHR, said that: '… family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, where appropriate, to "rebuild" the family. It is not enough to show that a child could be placed in a more beneficial environment for his upbringing. However, where the maintenance of family ties would harm the child's health and development, a parent is not entitled under article 8 to insist that such ties be maintained.'

[25] [2013] 2 FLR 1075 at para 215.

an overriding requirement pertaining to the child's best interests". In other words, the test is one of necessity. Nothing else will do.'

(3) The Human Rights Act 1998

The Supreme Court held that whilst, s 6(1) of the Act provides that a public authority, including an appellate court, must not act in a way which is incompatible with a Convention right, there is no obligation under the Convention to have a right of appeal against the order of a trial judge. If the domestic law provides such a right, it must also offer a fair hearing in accordance with Art 6 of the Convention. The appellate court must decide whether the trial court's decision was compatible with the Convention but it need not rehear all the evidence relating to the alleged infringement of Art 8.

Lord Kerr and Lady Hale disagreed with this view of the majority. They maintained that, in deciding whether a care order infringed the Art 8 rights of those affected by the care order, the appellate court must consider the issue afresh on the basis of the material put before it. However, in so doing, it should give appropriate weight to the reasons given by the trial judge.[26]

(4) The task of the appellate court in reviewing the grant of the care order

The Supreme Court maintained that, in considering the appeal of a care order, the appellate court had to decide whether the decision of the trial judge was simply wrong rather than plainly wrong.[27] In doing so, the appellate court had not merely to review the way in which the trial judge had exercised his or her discretion; its task was also an evaluative one. Not only did the appellate court have to determine whether the trial judge had considered the need to make a decision which was compatible with the Convention, it also had to factor into the decision the fact that the trial judge had the advantage of having seen the parties and other witnesses.

The Supreme Court noted that the specific findings of fact by a trial judge, even after a meticulous process, were inherently an incomplete and imprecise statement. It was difficult, given the limitations of time and language, for a trial judge to express in the decision exactly everything which had been taken into account to assess the potential future parenting of the child. It demanded wisdom, focused training, and time to reflect and articulate reasons for the decision. In the light of all this it would never be easy for an appellate court to find that the trial judge's decision was wrong.[28]

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[26] Ibid at paras 118 and 205 respectively.

[27] See *G v G (Minors: Custody Appeal)* [1985] FLR 894 at 898 ff.

[28] See in *Re B (A Minor) (Adoption: Natural Parent)* [2002] 1 WLR 258 at paras 16 and 19, where Lord Nicholls explained that: ' . . . There is no objectively certain answer on which of two or more possible courses is in the best interests of a child. In all save the most straightforward cases, there are competing factors, some pointing one way and some another. There is no means of demonstrating that one answer is clearly right and another clearly wrong.

(ii) The Supreme Court's conclusion

The Court concluded, by a majority of 4:1, that the personalities of Amelia's parents, and M's psychiatric condition, meant that there was a real possibility that if Amelia were to be placed in their care her emotional development would be damaged and such damage is no less serious than physical harm. The parents were incapable of cooperating with the professionals whose help would be essential to protect Amelia's welfare. Although allowance was regularly made by the courts for the negativity of parents towards such professionals, the parents' dishonest, manipulative, and antagonistic obstructionism was such that it could not be ignored. Given these facts, the trial judge could not have adjourned the case for a few months, as a proportional response, to explore the possibility of cooperation. Adoption was the only viable option for Amelia; she had already been in foster care for 2 years, any further delay would have been deleterious for her welfare.

It was not possible to remit the case, as Lady Hale had proposed; there were no grounds for interfering with the trial judge's findings and M and F's appeal was dismissed.

(iii) Lady Hale's dissent

In her dissent, Lady Hale took a very empathetic view of Amelia's mother and described her as a 'victim of great misfortune'. Her Ladyship believed that:[29]

> '… the case raised profound questions about the courts' powers to remove children from their parents when the harm feared was emotional or psychological rather than physical. All human beings are frail and have unattractive character traits to some extent which may, or may not, be replicated in their children. Their future depends not only on their parents but also on their own personalities and influences other than those of their parents. The State does not and cannot take away the children of all the people who commit crimes, who abuse alcohol or drugs, who suffer from physical or mental illnesses or disabilities, or who espouse anti-social political or religious beliefs.'

Lady Hale reluctantly accepted the trial judge's assessment of the likelihood of harm although she had the gravest doubts about whether it really did satisfy the threshold requirements. However, her ladyship was unable to accept that the grant of the care order was proportional to the perceived likelihood of harm. Lady Hale regarded it as readily understandable that having a baby removed at birth would not make a mother willingly cooperate with those responsible for that removal:[30]

There are too many uncertainties involved in what, after all, is an attempt to peer into the future and assess the advantages and disadvantages which this or that course will or may have for the child.'

29 [2013] 2 FLR 1075 at para 143.

30 Ibid at para 219.

> 'Anyone who has had to leave a premature baby in a special baby care unit can empathise with the feelings of a mother who is prevented from taking her baby home when, miracle of miracles, that baby is well enough to be discharged from hospital. Of course, the first social work statement to the court explained why the authority was making the application. But the scene was set for a rocky relationship. And this will not have been improved by the parents' frequent complaints about Amelia's progress in foster care.'

Lady Hale concluded that it had not been sufficiently demonstrated that it was necessary to end Amelia's relationship with her parents. It could not be said that that 'nothing else will do'; nothing else had been tried. The harm that was feared was subtle and not immediate; it might never happen. There was a need for Amelia to be protected but the nature of what might be required to achieve that or how the parents might respond to any proposal had not been properly examined. Her Ladyship would have allowed the appeal and sent the case back for a fresh in-depth enquiry by a new guardian.

IV *RE B-S* (2013)[31]

(a) The facts

A few months after the decision in *Re B*, McFarlane LJ granted a mother permission to appeal against the decision of the trial judge to refuse her leave to oppose an application for the adoption of two of her children who were aged 4 and 5 at the time of the hearing. The trial court had dispensed with her consent and granted care and placement orders with a view to the children's adoption. In 2012, the children were placed with prospective adoptive parents who applied for an adoption order in 2013.

(b) The Appeal Court hearing

The President, in a wide-ranging review of the jurisprudence of both the ECtHR and the domestic courts, gave the unanimous, and strongly worded, decision of the Court of Appeal. He elaborated and enlarged on the principles laid down by the Supreme Court in *Re B*.

(i) The least interventionist approach

Sir James Munby P stressed that there had to be a very high level of evidence to justify the draconian decision to destroy family ties between parents and their children without the former's consent. It was not a question of what was optional or reasonable or desirable. Such a grave decision must only be taken in the last resort where adoption and 'nothing else will do'. The President revisited the Supreme Court's approach in *Re B* and reiterated that:

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[31] [2014] 1 FLR 1035.

- any consideration of a child's welfare includes being brought up by a biological parent unless there are overriding welfare considerations;
- the court must consider all available options for the child's future before reaching a decision;
- in weighing the parents' capacity to care for the child against adoption, the court should take into account the support which the relevant authorities would offer to the parents to enable them to keep their child.

(ii) Sloppy practice

Sir James Munby P expressed, forcibly, the concern of the appellate courts about the unacceptable approach to non-consensual adoption cases in first instance cases, notably:[32]

> '… the recurrent inadequacy of the analysis and reasoning put forward in support of the case for adoption, both in the materials put before the court by the local authorities and guardians and also in too many judgments. This is nothing new. But it is time to call a halt.'

In order to prevent 'sloppy practice', a court must be given proper evidence, relating to the pros and cons of adoption for the child before any decision can be made. The court must give an adequately reasoned decision based on a global, holistic, multi-faceted analysis and evaluation of all the courses of action which are realistically possible – a kind of balance sheet. It was no longer acceptable to adopt a so-called linear analysis which outlined the inappropriateness of all of the alternative options to adoption and then concluded that adoption was the only option.

(iii) The relationship between the need for a rigorous judicial approach and the requirement for a speedy decision about a child's future

Sir James Munby P considered how the government's proposals that orders relating to adoptions should be dealt with without delay and, in any event within 26 weeks, fitted in with his insistence that the judicial process in determining the non-consensual adoption of a child must be undertaken with care and rigour. He maintained that there was no incompatibility between the two, indeed, the proposed 2014 Children and Families Act would permit an extension of the time limit:[33]

> 'If, despite all, the court does not have the kind of evidence we have identified, and is therefore not properly equipped to decide these issues, then an adjournment must be directed, even if this takes the case over 26 weeks. Where the proposal before the court is for non-consensual adoption, the issues are too grave, the stakes

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[32] [2014] 1 FLR at para 30.
[33] Ibid at para 49.

> for all are too high, for the outcome to be determined by rigorous adherence to an inflexible timetable and justice thereby potentially denied.'

(iv) The two-stage process in granting leave to oppose an application for adoption

(1) Concerns about the decision in Re W (2010)[34]

Sir James Munby P expressed the court's concerns about some aspects of Thorpe LJ's approach in *Re W*, in which his Lordship had emphasised that an application for leave to oppose an adoption application required a stringent approach. The application:[35]

> '… is an absolute last ditch opportunity and it will only be in exceptionally rare circumstances that permission will be granted after the making of the care order, the making of the placement order, the placement of the child, and the issue of the adoption application.'

Sir James Munby P was critical of the use of the word 'stringent' and even more critical of the words 'exceptionally rare'; they were no longer justifiable. The circumstances which Thorpe LJ listed as limiting a parent's chance of success in obtaining leave to oppose were precisely those required by statute to make an application for leave even possible. Thorpe LJ's approach might well prejudice the position of parents seeking leave to oppose and, thereby, rob them of the only meaningful remedy left to them.

(2) The correct approach – the decision in Re P (Adoption: Leave Provisions) (2007)[36]

According to the President, the correct approach was to engage in a two-stage process laid down by Wall LJ in *Re P*, although he acknowledged it had been applied subsequently in a rather harsh and narrow manner. The first stage of the process required the court to be satisfied that there had been a change of circumstances, and not necessarily a significant change, between the removal of the child and the application for leave to oppose. If the parent overcame that hurdle, the court would then move to the second stage of the process to decide afresh whether the welfare of the child required the dispensing of the parent's consent to allow the adoption application to be granted. If the parents were unable to pass that first hurdle, leave to oppose would have to be refused.

The only qualification Sir James Munby P made to Wall LJ's judgment was that the judicial exercise at the second stage should be more appropriately described as one of evaluation rather than one of mere discretion. The court would have to consider all the circumstances including:

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[34] *Re W (Adoption Order: Set Aside and Leave to Oppose)* [2011] 1 FLR 2153.
[35] Ibid at para 171.
[36] *Re P (Adoption: Leave Provisions)* [2007] 2 FLR 1069.

- the parents' prospect of success in having their child restored to their care if leave to object were to be granted;
- whether the child's welfare necessitates the refusal of leave;
- the evaluation of the child's welfare must take into account all the negatives and the positives of giving or refusing the parent leave to oppose. A balance sheet approach is to be encouraged;
- the more positive the change in circumstances, the more compelling the arguments based on the child's welfare must be if leave to oppose is to be refused;
- the mere fact that the child has been placed with prospective adopters or the length of time since the removal of the child cannot be decisive factors in the decision.

However, the older the child, and the longer he or she has been placed the more harmful the impact of upsetting the status quo is likely to be.

The judge must bear in mind that the need to consider the welfare of the child throughout his or her life which could involve a period of 80–90 years.

Undue weight should not be given to short-term consequences if leave to oppose were to be given.

The argument that the grant of leave to oppose will have an adverse impact on the prospective adoptive parents, and thus on the child should not be given undue weight, although it might have considerable force.

Finally, the President maintained that Wall LJ's wise and humane words in *Re P* should be borne in mind; the test for the grant of leave to object:[37]

> 'should not be set too high, because … parents … should not be discouraged either from bettering themselves or from seeking to prevent the adoption of their child by the imposition of a test which is unachievable.'

(v) Appellate courts and appeals against a refusal of leave under s 47(5)

Sir James Munby P held that the Human Rights Act 1989 imposed a duty on the trial judge not to act in a manner which was incompatible with the Convention but s 6(1) of the Act did not require the appellate court to determine afresh Convention-related issues. Given the potential grave consequences for parents and children and the evaluative nature of the task of the trial judge in deciding whether the mother should be granted leave, the approach of the court should be to consider simply whether the trial judge was wrong.

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[37] Ibid at para 32.

(vi) The substantive hearing of the appeal

The Court of Appeal accepted that the trial judge's decision to refuse the mother leave to oppose the adoption application was not wrong and that the mother's appeal should be dismissed. The judge had considered the Art 8 rights of both the mother and the prospective adoptive parents and the mother's right to a fair trial under Art 6 of the Convention. The judge had applied the correct two-part test relating to a change of circumstances and identified and explained her reasons why, despite the admittedly positive changes in the mother's circumstances, leave to oppose ought not to be given. The judge had balanced what the children would, or might, lose or gain if leave to oppose were or were not to be granted. The judge was entitled to give the various factors the weight that she chose to attribute to them. She had found that, although the children were beginning to recover from their past terrible experiences, the elder girl still had some unhappy and anxious memories. She needed stability and care. Any upset in the children's lives risked their return to the state of serious emotional disturbance which they were in when originally removed from their mother. They had accepted their new home and had become attached to their new prospective adoptive family. The chance of the mother being successful in opposing the adoption application was unlikely and even if she were to succeed, she might be unable to cope with the task of caring for the children; she still had a long road to travel.

V THE AFTERMATH OF *RE B* (2013) AND *RE B-S* (2013)

(a) Uncertainty, confusion, myths and misunderstandings

Sir James Sir James Munby P, in *Re R* (2014),[38] expressed his concern that, in some quarters, there was an impression that the decisions in *Re B* and in *Re B-S* had changed the law in a significant way and that applications for adoptions against parents' wishes would have to surmount a much higher hurdle than before or had even come to an end.[39] He felt the need to address these issues because, from his point of view, they were founded on myths and misconceptions which needed to be laid to rest. He maintained that the decisions had clarified the approach that trial courts and appellate courts should take. They had not changed the law:[40]

> 'Where adoption is in the child's best interests, local authorities must not shy away from seeking, nor courts from making, care orders with a plan for adoption, placement orders and adoption orders. The fact is that there are occasions when nothing but adoption will do, and it is essential in such cases that a child's welfare should not be compromised by keeping them within their family at all costs.'

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38 [2015] 1 FLR 715.
39 Ibid at para 41.
40 Ibid at para 44.

Even after the President's robust statement in *Re R*, there remains confusion about what is the correct approach to take when the removal of children from their parents is at stake. There has been a relentless deconstruction of the decisions in *Re B-S*, and *Re B* and a significant increase in challenges in the Court of Appeal by both parents and local authorities against orders granted by trial judges. Many of the appeals have been based on a pedantic interpretation of *Re B* and *Re B-S* and, where successful, have done little other than give parents a mere pyrrhic victory. The President, in *Re W (Adoption Order: Leave to Oppose); Re H (Adoption Order: Application for Permission for Leave to Oppose)* (2013), explained that success in persuading the Court of Appeal to overturn the decision of a trial judge does not ensure a return of children to their parents:[41]

> 'So that there is no misunderstanding, I emphasise that the parents in both cases have a long way to go. All we have done is direct reconsideration of the preliminary question of whether or not they should have leave to oppose. It will be for the judge to decide that question: he may give leave; he may refuse leave; that is a matter for him. Even if the judge decides to give leave to oppose, the parents may still fail at the third and final hurdle. That again is a matter for the judge. The parents have survived this battle and stand to fight another day; they may yet lose the war.'

The decisions below show what is expected of trial court judges and they illustrate just how difficult it is for the judges to 'appeal proof' their decisions relating to the removal of children from their parents.

(b) The correct approach

(i) Global, holistic evaluations and explicit judgments

(1) Re R (A Child) (2014)[42]

In *Re R* the mother of a 2-year-old girl had had a turbulent and violent relationship with the child's father, primarily fuelled by alcohol abuse. The child was removed from the mother under emergency police powers and had remained in foster care under a succession of interim care orders. The local authority maintained that adoption was the only realistic option and was granted care and placement orders with a view to adoption of the child. The mother was given permission to challenge the trial court's decision and she maintained that the trial judge had, inter alia, taken a linear approach in his judgment rather than the global, holistic one set out in *Re B-S* (2013).

McFarlane LJ found that the trial judge had analysed the case within the framework of the Children Act 1989, s 1(3) welfare checklist and had decided that to place the child with the mother would be fraught with difficulty and unrealistic. The child had an insecure attachment to the mother and the mother

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41 [2014] 1 FLR 1266 at para 48.
42 [2015] 1 FLR 715.

would require 24-hours-a-day support to ensure the child's safety. His Lordship concluded that he should grant the care order sought by the local authority and then went on to consider the application for the placement order in accordance with the adoption welfare checklist in the ACA 2002.

McFarlane LJ did not accept that the trial judge's approach could be described as linear simply because he had expressed his conclusions about one option for a child's care before moving on to consider another option:[43]

> 'A judgment, whether oral or written, is of its nature a literary work – a string of words following in sequence one after the other from the first to the last. In that sense, a judgment is necessarily "linear" in form or, to use my Lord's phrase, in structure. That form or structure almost requires, if the judgment is to have any coherence, that the various options are considered in sequence. The judge, after all, has to start somewhere. As my Lord emphasises, the focus must be on the substance of the judicial analysis, rather than its structure or form.'

McFarlane LJ did not underestimate the task of trial judges faced when making decisions of such momentous importance about a child's future. But, he explained, it is precisely because of the momentous nature of those decisions that the law requires an independent judge to engage in a balancing exercise which requires a global, holistic and multi-faceted evaluation of the child's welfare. He or she must consider all the negatives and positives of each realistic option for the child's future and then select, after a reasoned analysis, the option which is in the child's best interests. The judgment should explain to the parties, not least to the unsuccessful party, why the option selected is the best one for the child. Its reasoning should be so clear that an appellate court will respect the judgment which in an indirect way will benefit the child. When the judgment was looked at as a whole, McFarlane LJ said that it was simply not possible to say that the trial judge's analysis could be criticised. The mother's appeal failed.

(2) Re P (A Child) (2016)[44]

In *Re P*, the mother challenged the making of care and placement orders, with a view to adoption, for her 18-month-old child. Somewhat unusually, the Court of Appeal decided that, although the trial judgment was flawed, the court could analyse the evidence for itself and decided that the orders were justifiable.

The mother, who had cognitive difficulties and an IQ of 78, had given birth to seven children. Prior to the birth of the seventh child, P, the six older children had been removed into care under police protection measures. From then on, the mother had limited contact with them. At the hearing for the placement orders for these children, it was revealed that they were dirty and had been found living in filthy and unsafe conditions at home. They were immature in their development and did not attend school. The mother insisted that she was

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[43] Ibid at para 69.
[44] [2016] EWCA Civ 3.

educating them adequately at home which was clearly not so. She maintained that, at the time of the children's removal, she had been struggling with the terminal illness and subsequent death of her father, had been the victim of a violent sexual offence and had had a miscarriage.

Soon after the removal of the six children, the mother gave birth to P. An interim care order was made and P and the mother went to live with a foster carer. However, the mother, whose main interests were social media and making contact with unsuitable men, absented herself frequently and left P in the care of the foster mother. The local authority applied for a care and placement order with a view to P's adoption; it claimed that the mother could not be trusted to work with professionals and that P would be at risk of significant harm if left in her care. The children's guardian had, at first recommended that P should remain with his mother, supported by P's father, under a supervision order but at the final hearing, he changed his mind.

In a lengthy judgment, the trial judge expressed his concern that the mother had downplayed her neglect of the older children in the assessment relating to the current proceedings. He found that the mother had shown that she was capable of being a good parent to P with very significant support but was also unreliable in her parenting.

In his conclusions, the judge referred to all the relevant principles in *Re B-S* and acknowledged the gravity of removing a child for adoption. He noted the importance of relating the proven parental conduct to the risk of significant harm. He acknowledged that human frailties, lies, defects, different approach to morals and to sexual matters do not mean that significant harm is likely to occur and do not in themselves justify removal; there must be more than that. The trial judge decided that the only way forward was to grant a care and placement order with a view to adoption and dispensed with the mother's consent.

McFarlane LJ gave permission for the mother to appeal because he considered that the judgment fell well short of any holistic analysis. There had been no balancing of the options. His Lordship was also concerned that the trial judge had not addressed the welfare checklist factors adequately.

The Court of Appeal once again expressed sympathy for trial judges facing the difficulties inherent in cases like *Re P*. It held that the judge had attempted to grapple conscientiously with the issues but his judgment was flawed. It was discursive and unstructured in form. Its evaluation and discussion of the long-term options for P were perfunctory. The judgment was linear in both form and substance and lacked any holistic analysis. He had considered the merits of the mother's position and evaluated her strengths and weaknesses and had ruled her out as a long-term carer for P before moving on to consider the adoption option.

The Court of Appeal acknowledged that there was no prescribed form for the judicial exercise and that the term 'holistic' did not have any special meaning. However, more was required than a simple reference to the need to carry out a welfare balancing exercise. Whether an analysis of the realistic options is a 'balance sheet' of the pros and cons or an aide memoire of the key welfare factors and how they match up against each other was considered to be a sterile debate. Although there was no need for the trial judge to tick off each item on the checklist, it could, in a difficult or finely balanced case, be helpful if each one were to be addressed along with any other relevant matters, to ensure that each receives the correct weight. What was essential was that the judge should consider the benefits and detriments of each option and should evaluate each one against the alternatives. There was sufficient evidence before the judge to conclude that the mother was a realistic option as a long-term carer for P and he was also entitled to take on board the negative information about the mother's parenting ability. However, he should then have gone on to consider the issue of adoption, and place that option up against the case for P being cared for by the mother.

It was the task of the Court of Appeal, if it reached the conclusion that the trial judge was wrong, to consider whether to substitute its own order, or remit the case for re-hearing keeping firmly in mind the role of an appellate court expressed by the Supreme Court in *Re B* (2013). The court acknowledged the considerable advantage which the trial judge had had in seeing and hearing the parties give evidence and was reluctant to underrate or interfere with his findings even though his:[45]

> '… phraseology, sometimes blunt, may have failed to reflect the nuance and impression which may not have easily translated into exact expression in an unreserved judgment'.

In spite of the flaws in the judgment, the court felt readily able to identify those sections of it which correlated with the checklist factors and decided that it was not necessary to remit the case for re-hearing. There was sufficient evidence from all those who had been involved with the mother and P for the court to decide the matter for itself. Although it was conscious of the effect on P of no longer being a member of her family were she to be adopted, the court shared the trial judge's view, and for the same reasons, that P's best interests would not be protected were she to be placed in the care of her mother. Adoption was the only outcome which would satisfactorily meet her long-term emotional and physical needs.

(3) Re M (Children) (2016)[46]

In *Re M*, the parents, Mr and Mrs M, appealed against the grant of a care order for JA one of their two adopted boys and accepted that their other child JK should and should remain in foster care. A year after the boys were adopted,

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[45] Ibid at para 41.
[46] [2016] EWCA Civ 61.

they were both taken into care after JK arrived at school with a bloody nose. Mrs A admitted that she had hit him because he was dangerously out of control and was interfering with her driving. After care proceeding were initiated, Mr and Mrs M objected to the grant of the proposed care order for JA.

The trial judge found it sad for all parties that the case was:[47]

> '… a paradigm example of where the laudable desire on the part of a local authority to find an adoptive placement for profoundly disturbed and damaged children appears to have led to those children being placed with a couple who, with the benefit of hindsight, it might be thought were unlikely ever to have been able to cope with their, and in particular, JK's, disturbed and challenging behaviour.'

The judge accepted that the parents loved their children, were committed to them and had taken on a huge task in trying to care for them. The children had made accusations that Mr and Mrs A had hit them, had put JK under a cold shower as punishment, and that there had been a prayer meeting at their home during which JK had been physically restrained whilst those present 'talked in tongues' around him. The judge made no findings about these accusations.

The social worker and the children's guardian concluded that it would not be in the best interests of either child to return to the care of their parents. The judge considered that there were only two alternatives for JA – a return to his parents or long-term foster care – and he chose the latter option. He then referred to the Human Rights Act 1998 and the fact that his decision would interfere with the family life of Mr and Mrs M but it was necessary for the protection of JA's welfare.

The Court of Appeal was critical of the fact that the trial judge had not undertaken any significant analysis of the parents' allegations of a lack of support by the local authority in dealing with a difficult situation; the attitude of the parents towards their punishment of the children and their understanding of its effect on them; the extent to which the parents might cooperate with the local authority if JA were to return; the support which might be offered to the parents, and the wishes of JA about his future. In other words, what would be the positives and negative aspects of one more attempt to reunite JA with his parents?

The Court of Appeal accepted the argument made by the local authority that all these matters would have been in the head of the trial judge in making his decision but that was insufficient; they needed to appear specifically in his judgment. So did the law relating to the burden and standard of proof in care proceedings, the paramountcy principle, and the welfare checklist in the Children Act 1989. The trial judge's reference to Art 8 and the Human Rights Act 1998 was of a minimalist nature. The Court of Appeal explained that:[48]

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[47] Ibid at para 5.
[48] Ibid at para 38.

> 'It is often said the principle purpose of a judgment is to explain to the losing party why they have lost their case. The crisp and concise judgment is undoubtedly to be applauded. In my judgment however, the judge, no doubt in his endeavour to provide an immediate decision, failed adequately to analyse the evidence or explain his reasons for reaching the conclusion he did. Every parent whose child or children are removed permanently from their care at the conclusion of care proceedings is entitled to understand why the judge has decided as he has. These parents needed to understand with clarity why it was now too late for there to be reparation on their part even though they had made abundantly clear their willingness to do anything required of them which would mean JA could return home to their care.'

The Court of Appeal maintained that as both parents and children come in all shapes and sizes, any decision about a care order must relate to the parents' abilities to meet the needs of the children. It also emphasised the importance of the provisions in s 4(1)(a) of the Adoption and Children Act 2002 that a local authority, at the request of an adoptive parent should carry out an assessment of that person's needs for adoption support services, even if there is no requirement to actually provide them. The President expressed the rather forlorn hope:[49]

> '… that, even in the straightened times in which we live, local authorities appreciate that failure to find the funds necessary to support those who adopt disadvantaged children is all too often a false economy, and ultimately it is the children who pay the price when an adoptive placement breaks down.'

The Court of Appeal reluctantly concluded that, given the absence of findings of fact on key issues, it could not make its own order and remitted the matter for retrial and a new evaluation of JA's welfare in the light of all the circumstances existing at the time of the court's decision.

(4) Re Z-O'C (Children) (2014)[50]

In *Re Z-O'C*, the children's guardian, supported by the local authority, successfully appealed against the trial judge's decision to make supervision orders. The local authority had requested the grant of care orders with plans for the 7-year-old girl to be left with her grandparents and for the 15-month-old boy, who had been in foster care since he was 6 weeks old, to be adopted. The two children had different fathers and the older child's father played no part in the proceedings. The mother had three other children each with a different father. Two of these children had also been removed into care and the third was living independently. The decision of the Court of Appeal provides a perfect example of how a trial judge should **not** carry out a determination of the future of children.

Social services had been involved with the mother and her children for 10 years because of general concerns about her lack of parenting abilities. In 2013, the

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[49] Ibid at para 42.
[50] [2014] EWCA Civ 1808.

police took emergency action and removed the children into police protection. The mother was arrested and charged with child neglect but only received a caution. The house was described as unfit for human habitation. It had only partial electricity. There was no food but plenty of takeaway food packaging. Three children slept in the sitting room on wet mattresses. There were no beds in the bedroom shared by three other children. The landlord of the property had obtained a possession order because of the older children's behaviour.

The local authority argued that the mother, and the father of the younger child, even if able to improve their parenting skills would be unable to sustain them sufficiently to give the children a safe, secure and stable home. The local authority had also maintained that the three assessments provided – the psychologist's report, a parenting assessment, and the guardian's report – were sufficient to allow the judge to evaluate possible ways forward and decide the best course of action.

The psychologist had reservations about the mother's ability to care for the children, but maintained that the father had the potential to compensate and he and the mother could be good parents together. This was despite his concern about the father's maturity and the fact that his family did not know of the existence of his child and he would, therefore, lack any extended family support.

The parenting assessment report came to the very different conclusion that the parents would need intensive long-term support if the children were to be returned to them. Neither parent would be able to manage the children when their behaviour became more challenging as they grew older. The parents would be unable to meet, to an acceptable standard, the children's basic health, hygiene, safety, emotional and educational needs.

The children's guardian had only met the parents on one occasion and had had only one contact visit. There had been no family group conference. The guardian had significant reservations about the father. He had done nothing to improve the appalling home conditions in which his baby had been living and accepted no responsibility for the baby having been removed into care. He had failed to attend parenting classes and was not committed to contact with his child. Both he and the mother had claimed that there were no problems with their parenting. There was some evidence about the mother's positive contact visits. However, the father had only attended one-quarter of the possible contact visits to his child and had had virtually no contact with the 7-year-old for whom he was proposing to become a stepfather.

The trial judge found himself in a rather invidious situation; there was no independent social worker's report, the local authority had failed to comply with the order to arrange a family group conference, and the social workers who had compiled the parenting assessment report had not read the psychologist's report. The judge decided, rather strangely, to rely on the latter's report and the oral evidence of the parents and ignore everything else. Despite

his serious criticisms of the father's behaviour, the judge thought that the local authority had given too little weight to the role that the father could play in the future care of both children. The father had shown some motivation to change and had eventually told his family about his child. He had begun a parenting course and had the ability to learn from it. The father's immigration status was tenuous; nevertheless, the judge found that he would be able to parent both children alongside the mother. The latter had improved the state of the house and was to begin a course of cognitive behavioural therapy. The judge concluded that, having balanced the harm which the children had already suffered or were likely to suffer against the parenting capabilities of the mother and father and the likely effect upon the children of being removed permanently from the parents' care, the local authority had not proven that placement orders were appropriate because 'nothing else will do'. He proceeded to make supervision orders for the children who would live with the parents.

The Court of Appeal questioned how the trial judge could possibly have concluded that the children's best interests would be protected if they were to live with the parents. It stressed once more the need for a trial judge to have regard to the factors set out in the welfare checklist. The court must identify whether there were realistic options and if so to compare the benefits and detriments of each one of them and identify the option which is in the best interests of the children. It must then undertake a proportionality evaluation to ask itself the question whether the interference in family life involved by that option is justified. In the final analysis, adoption is only to be ordered if 'nothing else will do'.

The trial judged had failed to carry out such an evaluation. There was no analysis of risk in the judgment. Having discounted the welfare evidence, apart from the psychologist's report, he failed to acknowledge that he was left without anything else to enable him to carry out the welfare evaluation. He had not considered the welfare of the two children separately. The 7-year-old had never lived with the father and did not know him in any significant way.

The Court of Appeal said:[51]

> 'The case is an example of the difficulties which can result from the preparation of inadequate assessments. Whilst delay is always to be depreciated (sic), the judge having identified the deficits in the assessments was wrong in failing to accede to the practical and realistic submission of counsel for the mother to adjourn the matter to enable an independent social worker report to consider the key issues of the motivation of the father and his ability to accept the considerable responsibility necessary for him to be able to support the mother. Without the father's practical and emotional support, the mother would be unable to care for either of her children, and the court needed proper evidence as to his ability to provide her with security and stability and to be an antidote to the mother's difficulties in maintaining a household and environment that was safe and healthy for either of the children.'

[51] Ibid at para 61.

The court allowed the appeal and remitted the matter to the designated family judge for further assessments to be undertaken.

VI A CHANGE OF CIRCUMSTANCES – THE TEST

(a) *Re W (A Child); Re H (Children)* (2013)[52]

In *Re W*, the Court of Appeal accepted that in applications for leave to oppose an application for adoption, a trial judge was required to consider whether there had been a change of circumstances between the grant of the order and the application for leave to oppose the adoption application. The two-stage test to apply was that laid down in *Re P* (2007) (above) and the judge had to consider with great care whether the child's welfare necessitated the refusal of leave because:[53]

> 'It is surely a very strong thing to say to the child – and this, truth be told, is what is being said if the parent's application for leave to oppose is dismissed at this final stage of the process – that, despite your parent having a solid prospect of preventing you being adopted, you (the child) are nonetheless to be denied that possibility because we think that it is in your interests to prevent your parent even being allowed to try and make good that case.'

Undue weight must not be given by the judge to either the short-term welfare consequences for the child if leave to oppose were to be given or that it would have an adverse impact on the prospective adoptive parents because they would have to endure a contested adoption which would have an effect on the child.

In *Re W*, the trial judge had accepted that the parents had established a sufficient change of circumstances but concluded that, as the child had been settled in her new family for a year, the relationship with her parents should not weigh very strongly in the evaluation exercise. Although the judge's decision was careful and detailed, it was unclear whether he had refused the parents leave to oppose because he found that their belief in their prospects of success in opposing the adoption, were leave to be granted, was unrealistic, or because their belief was realistic but the children's welfare demanded a refusal of leave. The Court of Appeal concluded that the parents' appeal should be allowed and the case remitted to the trial judge.

In *Re H*, the trial judge accepted the parents' claim that there had been a change of circumstances. However, any further improvement faced the obstacle that the therapy needed was unavailable from the National Health Service and private therapy was prohibitively expensive. It would not be sensible to disturb the children's lives as they had been with their adoptive parents for a year and had settled well. Therefore, he refused leave to oppose.

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[52] [2013] EWCA Civ 1177.
[53] Ibid at para 23.

The Court of Appeal found the relevant parts of the judgment to be very thin. The trial judge had not made clear whether he found the parents' prospects of success lacked any firm foundation, or if they were being realistic in their belief of success. The Appeal Court held that, given the gravity of the issue, the appeal must be allowed and the case remitted to the trial judge.

(b) *In re T (Children) (Revocation of Placement Order: Change in Circumstances)* (2014)[54]

In *Re T*, the father appealed the decision to refuse him leave to apply for a revocation of placement orders for two of his children. He and the mother had had a very abusive relationship. The father maintained that there had been a change in his circumstances between the grant of the order and his application for leave to revoke. He had separated from the mother and was in the process of divorcing her. He was in a relationship with a new woman. He also claimed that the two children were showing increasing signs of unsettled behaviour.

In his refusal to grant leave, the trial judge found that there was evidence that the parents' relationship was ongoing and that the father's new relationship was only 2 months old. The children's behaviour was to be expected given the uncertainty about their future. McFarlane and Kitchen LJJ granted the father permission to appeal the decision.

The Court of Appeal held that the test of a change of circumstances should not be set too high or unachievable because parents should not be discouraged from improving themselves or from seeking to oppose orders for their children where they have made an effort to improve on their situation. The change must bear some relationship to the negative conduct of the parent when the orders were first granted. The judge was wrong to reach the conclusion that the father's circumstances had not changed. He had focused on the fact that the father's new relationship was at an early stage and had set the bar too high. Although the relationship had only recently started, it was relevant because the main concern when the placement orders were granted related to the abusive relationship between the father and mother. The judge's had not based his view about the cause of the children's unsettled behaviour on any evidence. The court allowed the appeal.

VII 'NOTHING ELSE WILL DO'

Lord Neuberger in *Re B* (2013), found it to be:[55]

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[54] [2014] EWCA Civ 1369.
[55] [2013] 2 FLR at para 77.

> '… inherent in section 1(1) [of the Children Act 1989] that a care order should be a last resort, because the interests of the child would self-evidently require her relationship with her natural parents to be maintained unless no other course was possible in her interests.'

The President in *Re R* (2014) emphasised the last phrase of Lord Neuberger's statement 'in her interests' because he believed it to be an important reminder that:[56]

> '… what has to be determined is not simply whether any other course is possible but whether there is another course which is possible and in the child's interests. This will inevitably be a much more sophisticated question and entirely dependent on the facts of the particular case. Certain options will be readily discarded as not realistically possible, others may be just about possible but not in the child's interests, for instance because the chances of them working out are far too remote, others may in fact be possible but it may be contrary to the interests of the child to pursue them.'

Somewhat surprisingly, given the emphasis on the mantra 'nothing else will do' which has been prevalent throughout the non-consensual adoption cases, Sir James Munby P said:[57]

> 'There is a feeling that "adoption is a last resort" and "nothing else will do" have become slogans too often taken to extremes, so that there is now a shying away from permanency if at all possible and a bending over backwards to keep the child in the family if at all possible.'

His words, however, are a very welcome antidote. Slogans (or mantras) are always dangerous and particularly so when taken out of context as the cases in this section demonstrate.

(a) *Re M-H (A Child)* (2015)[58]

In *Re M-H* the mother appealed against the grant of a placement order with a view to adoption for her 7-year-old daughter who had been in foster care for 18 months. The mother accepted that she could not care for the child because of her alcohol and relationship problems which involved domestic violence. However, she wanted to continue to have a relationship with her daughter and wanted her to remain in foster care. The mother maintained that the judge had not applied the correct test in dispensing with her consent and, even if she had done so, she had not properly balanced long-term fostering against permanent adoption. The test of 'nothing else will do' had not been satisfied.

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[56] [2015] 1 FLR 715 at para 53.
[57] Ibid at para 41.
[58] [2015] 2 FLR 357.

Macur LJ gave the judgment of the Court of Appeal and dismissed the appeal. Her Ladyship explained that the test '*nothing else will do*' has been misunderstood and had been too literally interpreted:[59]

> '… the terminology frequently deployed in arguments to this court and, no doubt to those at first instance, omit a significant element of the test as framed by both the Supreme Court and this Court, which qualifies the literal interpretation of "nothing else will do". That is, the orders are to be made "only in exceptional circumstances and where motivated by the overriding requirements pertaining to the child's best interests" (See *Re B*, paragraph 215) …
>
> … in any contested application there will always be another option to that being sought. In some cases, the alternative option will be so imperfect as to merit summary dismissal. In others, the options will be more finely balanced and will call for critical and often anxious scrutiny …
>
> …there must be a holistic balancing of all the available options to ascertain whether or not the particular child's welfare demands adoption.'

(b) *CM v Blackburn with Darwen Borough Council* (2014)[60]

In *CM*, the mother appealed against a placement order in respect of her 5-year-old daughter, M. She accepted that she was not going to be in a position to care for M, for the foreseeable future, nor was the maternal grandmother with whom M had previously been placed under a special guardianship order. The only viable alternative placement to adoption would be for M to remain in long-term foster care.

The trial judge had approved of a 'twin track' plan in which he granted a placement order which allowed for a 6-month search for an adoptive placement to take place and, thereafter, for either an adoptive placement or a long-term foster placement. The judge had conducted her analysis in accordance with the requirements of *Re B* (2013) and *Re B-S* (2013). However, the mother maintained, inter alia, that the conclusion that adoption was the most appropriate placement did not satisfy the proportionality test because long-term foster-care remained under consideration as a possible option.

In the Court of Appeal, Ryder LJ held that it was appropriate to recognise that the primary plan of adoption might not be possible and a contingency plan was necessary which is very different from deciding that something other than adoption is required. Dual planning was perfectly acceptable in appropriate cases such as here because it was not a matter of either option would do. The mother's appeal was dismissed

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[59] Ibid at para 10.
[60] [2014] EWCA Civ 1479.

VIII TIME LIMITS FOR DEALING WITH APPLICATIONS

The Government in the UK has expressed concern about the length of time taken to resolve the future of children who have been removed from their parents. The Children and Families Act 2014 put these concerns on a statutory basis. The 26-week time limit in the Act may be extended in certain circumstance provided that there was sufficiently good a reason for the delay. The President has emphasised the importance of keeping to the deadline.[61]

(a) Too rapid a decision – *Re S-W (Children)* (2015)[62]

In *Re S-W*, the Court of Appeal was concerned not about the delay in reaching a decision but the precise opposite. The trial judge had granted final care orders for three children 3 weeks after the local authority had made the initial application. It was concerned about the general neglect of the children, and the mother's use of drugs and alcohol and her inability to give up a violent relationship. The judge viewed the case as one which required a rapid decision. The three children had been in care for well over a year, two were in settled placements and one had had multiple placements. The mother had recently tested positive for drugs. The outcome was inevitable that care orders would be made.

All the parties were devastated by the judge's decision which was expressed in acerbic language, and consequently, they felt unable to explain to him the complexity of the situation. McFarlane LJ gave the mother permission to appeal and said:[63]

> 'The judge's approach could not have been more robust. He sought to justify such an approach on the basis that recent family justice reforms and case-law. There is a need for the Court of Appeal to consider whether such a robust summary approach is justified and/or required by the recent extensive changes to procedure and case-law and, if so, how the basic requirements of a fair trial and judicial analysis are to be accommodated in such a process.'

King LJ gave the Court of Appeal's judgment and allowed the appeal and remitted it for rehearing by a designated family judge. She remarked on the judge's reference to the mother's looking 'upset and bewildered'. King LJ claimed to readily understand the mother's feelings; the judge had given no reasons for his rapid decision to make final care orders at the very beginning of the process to determine the long-term future of the three children. Her Ladyship stated that every judge will be conscious that, whilst it is in a child's best interests for their future to be determined without delay, it is equally in their best interests that the determination of their future should be fair and

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61 See www.familylawweek.co.uk/site.aspx?i=ed113230.
62 [2015] 2 FLR 136.
63 Ibid at para 3.

compliant with Art 6 of the Convention. It was only in the most exceptional circumstances that a court should deal with a case in such an unfair and summary manner.

Lewison LJ explained that:[64]

> 'It has long been a fundamental principle of English law that justice must not only be done, but must be seen to be done. Where a judge has apparently made up his mind before hearing argument or evidence that principle has undoubtedly been breached. A closed mind is incompatible with the administration of justice.'

Sir James Munby P added:[65]

> 'We are all familiar with the aphorism that "justice delayed is justice denied". But justice can equally be denied if inappropriately accelerated. An unseemly rush to judgment can too easily lead to injustice. As Pauffley J warned in *Re NL (A child) (Appeal: Interim Care Order: Facts and Reasons)* [2014] EWHC 270 (Fam), [2014] 1 FLR 1384, para 40, "Justice must never be sacrificed upon the altar of speed."'

He emphasised the need for a trial judge, first, to allow the parent to put his, or her, case, even if weak, to the court and, second, to allow the parent to confront those who have accused him, or her, of the behaviour alleged to necessitate the child's removal.

(b) Too long a delay – *Re T (Children)* (2015)[66]

In *Re T*, the Court of Appeal considered the effect of a 6-month gap between the final hearing and the decision of the trial judge.[67] The parents had 10 children who were the subject of care applications which began in February 2014. By the time of the final hearing in September 2014 only four of the children remained with their parents. Prior to the judgment being given in March 2015, the judge was sent information updating him on the father's situation since the September hearing. The judge made all the orders sought by the local authority. The father appealed and argued that, in the light of the substantial time gap of 6 months, the judge was wrong not to have acted on the information which he had submitted. The Court of Appeal allowed the appeal and remitted the case to the trial judge for rehearing.

According to the court, in some cases the time gap would have little or no consequence because the case had intractable features. In others it would be

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64 Ibid at para 43.
65 Ibid at para 54.
66 [2015] EWCA Civ 606.
67 The Court of Appeal made clear that s 32 of the Children Act 1989 required a formal process for the grant of extensions of the normal 26-week period for dealing with applications for orders.

very relevant. In *Re T*, the issue of whether the younger children could remain with the parents required the judge to consider the new information put before him before giving his judgment.

IX CRITICISM OF LOCAL AUTHORITIES

(a) *Re A (A Child)* (2015)[68]

In *Re A*, Sir James Munby P was nothing other than scathing in his criticisms of the conduct of the local authority, its social workers and the children's guardian in their 'evidence' relating to a father who wished to be the sole carer of his son, A. The local authority had applied for care and placement orders with a view to A's adoption. The President said:[69]

> 'The present case is an object lesson in, almost a textbook example of, how not to embark upon and pursue a care case.'

A was born while his mother was serving a prison sentence. Her relationship with A's father ended when she went to prison for offences of dishonesty and sexual offences relating to a minor; she was not seeking to care for A. Prior to the birth, the local authority ordered an inexperienced social worker to undertake a pre-birth assessment. The social worker made a negative assessment of the father, based on an exaggerated view of information about him and her value laden judgments about it. She maintained that the father's claims to have been present at the scene of a fatal accident when he was a schoolboy was a lie, although she had no real evidence that this was the case. He had had sex with an under-age teenage girl on one occasion when he was 17, for which he had received a caution. He occasionally got drunk and resorted to physical violence with members of his extended family. He had at times taken cannabis. He had, for a short time, been a member of the English Defence League (EDL). This membership, according to the social worker put him at risk of violent retaliatory attacks. Furthermore, she maintained that the EDL was an immoral organisation which inflicted physical violence on innocent Muslims. She believed that A needed to live in an environment which supported difference, equality and independence and be taught how to express his views in a socially acceptable way. The father needed to appreciate and accept diversity. The social worker also told the father that he seemed unable to accept and acknowledge his immoral behaviour and, in particular, that sex with an underage girl was a criminal offence. The father responded that:[70]

> '… social services are wankers … I don't bat for the other team you know … , do you really think I'm going to sit and do something to my son, touch him or something.'

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[68] *Re A (A Child)* [2015] EWFC 11.
[69] Ibid at para 7.
[70] Ibid at para 58.

The local authority drew on the assessment and maintained that the father lacked honesty with professionals; minimised important matters; was immature, and had little insight into major issues. It was of the opinion that, if A were returned to the father, he would be at risk of suffering significant harm and of his needs being neglected through inappropriate care. It also maintained that neither of A's parents had accepted the immoral nature of their actions, were both unwilling to change, and neither had the ability to protect A from sexual risks and dangers.

Sir James Munby P maintained that there had been very little analysis of any sort of the so-called 'facts', or their relationship to the risk of harm to A, which underpinned the local authority's request for care and placement orders for him. The President showed a liberal approach contrary to that of the social worker. He commented that:

> '• Young men do have sexual intercourse with under-age girls but, if that behaviour were to be treated as grounds for care proceedings without further information, the care system would be overwhelmed;
> • If because of his short term membership of the EDL, the father risked serious threats of violence, it might be a relevant matter but it was not easy to see why the appropriate remedy should be A's adoption rather than the provision of suitable security arrangements;
> • Drinking, on occasion, to excess, and use of cannabis were not sufficient reasons to jeopardise the father's care of A. Many parents behaved in this way;
> • Comments about A's mother's conduct were irrelevant; she and the father were not a couple. The father and his mother, A's grandmother, were quite capable of protecting A from any risk during contact;
> • The claims by the social worker about the father's violence should be kept in perspective. The number, frequency and gravity of them were not such for major concern.'

The President maintained that:[71]

> 'The truth is that the local authority's case was a tottering edifice built on inadequate foundations …'

and:[72]

> '… There is, unhappily, more than a whiff here of "give a dog a bad name".'

The local authority, he found, had 'harped' on about the allegedly immoral aspects of the father's behaviour in an inappropriate way which was to be criticised. Sir James Munby P maintained that:[73]

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71 Ibid at para 11.
72 Ibid at para 30.
73 Ibid at para 60.

> '… the city fathers of Darlington [the local authority] and Darlington's Director of Social Services are not guardians of morality. Nor is this court. The justification for State intervention is harm to children, not parental immorality. Secondly, how does any of this translate through to an anticipation of harm to A? The social worker ruminates on the "current risk he poses" to "vulnerable young women"? What has that got to do with care proceedings in relation to the father's one-year-old son? It is not suggested that there is any risk of the father abusing A. The social worker's analysis is incoherent.'

The President went on to quote from the decision of HHJ Jack in *North East Lincolnshire Council V G & L*:[74]

> 'The courts are not in the business of providing children with perfect homes. If we took into care and placed for adoption every child whose parents had had a domestic spat and every child whose parents on occasion had drunk too much then the care system would be overwhelmed and there would not be enough adoptive parents. So we have to have a degree of realism about prospective carers who come before the courts.'

In spite of some of the shortcomings of the father, Sir James Munby P did not accept that he presented a risk which might result in A suffering significant harm, and certainly not the sort of risk which would justify adoption. To deny A a home with his father would be to engage in social engineering which was not the task of the court. There were many positives in favour of the father; he loved his son dearly (the social worker believed that love was insufficient to provide a child with the level of safe, stable and nurturing care needed to thrive and be parented in a safe, stable, home environment) and he had been found to be truthful about his behaviour.

By contrast, Sir James Munby P found that the local authority's analysis, its handling of the case and its conduct of the litigation had been atrocious. There had been significant failings in social work practice, in case analysis and in case management. There had also been other serious failures; the delay in the case was outrageous. A was born in January 2014 and it was not until September 2014 that care proceedings were issued. The local authority had abused s 20 of the Children Act 1989 to accommodate A during that time.

The President ordered that A should be placed in the care of his father but before doing so he vehemently blamed Darlington Borough Council, its legal department, and its senior management, who were largely invisible in court, for the mishandling of the case. The latter were ultimately responsible for the failings of weak and inexperienced social workers who risked being scapegoated if they were to be named by the court and this he declined to do.

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[74] *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050, para 50.

(b) *Re W (A Child); Re H (Children)* (2013)[75]

Sir James Munby P's final words in his judgment in *Re W* and *Re H* were ones of warning to local authorities to obey court orders. In *Re H* (2013), the local authority had not followed a court order relating to position statements for each child and to any objections it had relating to leave to oppose being granted. The order had been lost in the local authority's system and the parents were left in the dark. This was deplorable and the President used strong words:[76]

> 'It is, unhappily, symptomatic of a deeply rooted culture in the family courts which, however long established, will no longer be tolerated. It is something of which I complained almost thirteen years ago: see *Re S (Ex Parte Orders)* [2001] 1 FLR 308. Perhaps what I say as President will carry more weight than what I said when the junior puisne. I refer to the slapdash, lackadaisical and on occasions almost contumelious attitude which still far too frequently characterises the response to orders made by family courts. There is simply no excuse for this. Orders, must be obeyed and complied with to the letter and on time. Too often they are not. They are not preferences, requests or mere indications; they are orders.'

X CONCLUSION

Removing a child from parents to be adopted by strangers is unquestionably one of the gravest decisions a court can make; it changes the lives of both parents and children for ever. The law is clear in that it demands that all decision-making which relates to non-consensual adoption be governed by the lodestar of the child's best interests as laid down in the Children Act 1989 and the ACA 2002. But, as all family lawyers know, determining what action is in the best interests of the child is extremely difficult, and particularly so, when the child is considered to be at risk of other than physical harm. It is, therefore, not surprising that the judiciary is in constant search of approaches which will help to make the very difficult task, of deciding whether to remove a child or not, easier. Efforts have been made to overlay the law with additional glosses such as 'nothing else will do', and 'the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life', and 'society must be willing to tolerate very diverse standards of parenting'.

The decisions in this chapter illustrate the legal discourse which has taken place between the trial courts and the Court of Appeal over the last 2 years. A discourse which has been led, primarily, by Sir James Munby P in an attempt to educate judges, lawyers and social workers and end the confused reactions to the Supreme Court judgment in *Re B* (2013) and the Appeal Court in *Re B-S* (2013). Four conclusions appear to emerge from this interchange:

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[75] [2013] EWCA Civ 1177.
[76] Ibid at para 50.

- The law has not changed; there are occasions when adoption is the only realistic option when it is in a child's best interests.
- The glosses which the courts have used are not factors in their own right; they are simply part of the consideration of the child's best interest.
- Social workers, children's guardians and local authority lawyers must go about their task with greater care. They must present clear evidence about the impugned conduct of a parent and demonstrate its relationship with the harm which they claim a child has suffered or is likely to suffer.[77]

  In spite of the need to ensure that there is no delay in determining a child's future, this must not be at the expense of a serious fact-finding process.
- Judgments must be holistic and not linear. The former requires that all the criteria relating to a child's welfare must be considered alongside all the available options for the child's future and a balancing exercise be undertaken before a decision is made.

  There must be clarity in the judgments so that the parents, whose child is being removed, understand exactly why such a grave step is necessary.

One issue which has not been addressed in the decisions is how the courts decide where the line should be drawn between acceptable and unacceptable forms of parental behaviour and, thereby, avoid accusations of social engineering. The President in *Re A* (2015) was remarkably sanguine about the father's behaviour; other judges might have taken a less liberal approach to the father's consumption of marijuana and alcohol and his recourse to familial violence and regarded it as harmful for the child. Given the multi-cultural nature of the jurisdiction, neutral assessment of parental behaviour may well be problematic. Culture, ethnicity or religion have not yet appeared as an issue in the non-consensual adoption decisions and the question remains open as to what would happen if they were to be raised as they have been in private law cases.[78]

On a final note, there is a major division of opinion between those who would like to see more children removed from parents for adoption at an earlier stage in their life and those who repeatedly emphasise the rights of children to remain with their parents except in the most exceptional of circumstances. The decisions suggest that the courts pay lip service to the latter view, yet the reality is that many of the children who come before them are ultimately removed. Sir Martin Narey, the government adoption adviser, has pointed out that two-thirds of the children returned to their parents' care go back into the care system in the future.[79] Is it perhaps time to acknowledge that the rights of

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[77] In 2016, the Association of Directors of Children's Services (ADCS) and the Children and Family Court Advisory and Support Service (Cafcass) updated their template for local authority social workers to use when presenting evidence to support applications for care or supervision orders.

[78] See Welstead M, 'The Battle for Children's Souls: The Role of Religion in Parental Disputes' in B Atkin (ed), *International Survey of Family Law 2013 Edition* (Jordan Publishing, Bristol, 2013) 91.

[79] www.gov.uk/government/news/call-for-views-birth-parent-contact-and-siblings-in-care.

children to family life with their parents should not be used as a reason to compromise the welfare of children who are in need of protection? Maybe there is a competing right for children at risk – they have a right to family life with a new family, if the circumstances demand it.

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EUROPE

PREVENTING AND COMBATING DOMESTIC VIOLENCE IN EUROPE: THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Jamil Ddamulira Mujuzi[*]

Résumé

En 2015, la Grande Chambre de la Cour européenne des droits de l'Homme a fait observer que 'la violence [familiale] perpétrée contre les femmes . . . [est] encore un grave sujet de préoccupation dans les sociétés européennes contemporaines'. La jurisprudence de la Cour européenne des droits de l'Homme montre que les victimes de la violence familiale ont saisi la Cour en faisant valoir que les différents Etats ne disposaient pas de mesures efficaces pour prévenir ou combattre la violence domestique. Elles ont soutenu que certaines politiques ou décisions prises par les fonctionnaires de l'Etat les avaient exposées à la violence domestique. L'objectif de cet article est de montrer quelles sont, selon la Cour, les mesures que les États doivent mettre en place pour prévenir et combattre la violence familiale.

I INTRODUCTION

In 2015 the Grand Chamber of the European Court of Human Rights observed that domestic violence perpetrated against women is still a matter of grave concern in contemporary European society generally,[1] and is 'widespread' in some European countries.[2] Case-law from the European Court of Human Rights demonstrates that domestic violence is committed in many European countries in different forms and with varying severity.

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1 *Rohlena v The Czech Republic* (Application no 59552/08) 27 January 2015, para 71.

2 *Bljakaj and Others v Croatia* (Application no 74448/12) 18 September 2014, Joint Partly Concurring and Partly Dissenting Opinion of Judges Lazarova Trajkovska and Pinto De Albuquerque, para 5.

Domestic violence acts have included: verbal abuse[3] or attacks;[4] psychological abuse;[5] making serious death threats;[6] uttering vulgar expressions and making derogatory remarks, as well as threatening to cut the victim's hair, preventing contact with other family members, and force feeding her.[7] They have also included attempted rape;[8] hitting the victim several times and threatening her with a knife and a pair of scissors;[9] inflicting severe injuries on a victim leading to her death;[10] beating up the victim;[11] kicking the victim;[12] assaulting the victim leading to injuries;[13] assault;[14] and finally, strangling the victim, pulling her hair, hitting her in the face and kicking her 'in the back and in other parts of her body'.[15]

It is evident from the case-law that domestic violence is perpetrated by a wide range of family members against a wide range of victims. These have included: former husband[16] or partner;[17] husband against wife and children[18] or wife and child;[19] husband against wife;[20] wife against husband;[21] boyfriend against

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3 *A v Croatia* (Application no 55164/08) 14 October 2010, para 27; *B v The Republic of Moldova* (Application no 61382/09) 16 July 2013, para 7.

4 *Mudric v The Republic of Moldova* (Application no 74839/10) 16 July 2013, para 33.

5 *Veljkov v Serbia* (Application no 23087/07) 19 April 2011, para 6.

6 *Bljakaj and Others v Croatia* (Application no 74448/12) 18 September 2014, Joint Partly Concurring and Partly Dissenting Opinion of Judges Lazarova Trajkovska and Pinto De Albuquerque para 5; *Zalevskiy v Ukraine* (Application no 3466/09) 16 October 2014, para 36.

7 *M and M v Croatia* (Application no 10161/13) 3 September 2015, para 133.

8 *B v The Republic of Moldova* (Application no 61382/09) (16 July 2013), paras 9 and 16.

9 *Rumor v Italy* (Application no 72964/10) 27 May 2014, para 10.

10 *V v Slovenia* (Application no 26971/07) 1 December 2011, para 83.

11 *Mudric v The Republic of Moldova* (Application no. 74839/10) 16 July 2013, para 7.

12 *A v Croatia* (Application no 55164/08) (14 October 2010), para 27.

13 *B v The Republic of Moldova* (Application no 61382/09) 16 July 2013; *Bevacqua and S* v *Bulgaria* (Application no 71127/01) 12 June 2008, paras 67 and 78; *Eremia v The Republic of Moldova* (Application no. 3564/11) 28 May 2013, para 45; *Rumor v Italy* (Application no 72964/10) 27 May 2014, para 11.

14 *Witek v Poland* (Application no 13453/07) 21 December 2010, para 6; *YC v The United Kingdom* (Application no 4547/10) 13 March 2012, para 7.

15 *Valiulienė v Lithuania* (Application no 33234/07) 26 March 2013, para 7.

16 *Bevacqua and S v Bulgaria* (Application no 71127/01) 12 June 2008, para 3; *Mudric v The Republic Of Moldova* (Application no 74839/10) 16 July 2013, para 7; *Zalevskiy v Ukraine* (Application no 3466/09) 16 October 2014, para 11.

17 *Rumor v Italy* (Application no 72964/10) 27 May 2014, para 3; *Valiulienė v Lithuania* (Application no 33234/07) 26 March 2013, para 7; *Veljkov v Serbia* (Application no 23087/07) 19 April 2011, para 6.

18 *Bljakaj and Others v Croatia* (Application no 74448/12) 18 September 2014, Joint Partly Concurring and Partly Dissenting Opinion of Judges Lazarova Trajkovska and Pinto De Albuquerque, para 5; *C v The United Kingdom* (Application no 14858/03) 10 May 2007, para 12.

19 *Lewicki v Poland* (Application no 28993/05) 6 October 2009, para 18.

20 *Mijušković v Montenegro* (Application no 49337/07) 21 September 2010; *Palanci v Switzerland* (Application no 2607/08) 25 March 2014, para 23; *R and H v The United Kingdom* (Application no 35348/06) 31 May 2011, paras 22 and 61; *Rylski v Poland* (Application no 24706/02) 4 July 2006, para 20; *Šobota-Gajić v Bosnia and Herzegovina* (Application no 27966/06) 6 November 2007, para 7; *YC v The United Kingdom* (Application no 4547/10) 13 March 2012, para 7.

21 *YC v The United Kingdom* (Application no 4547/10) 13 March 2012, para 7.

girlfriend;[22] parents against their children;[23] father against his young daughter (9 years old);[24] father against son;[25] brother against sister;[26] mother against her minor daughter;[27] and son against his mother.[28] The court has also acknowledged that there can be both primary and secondary victims, stating '[i]t is also well known that a child's psychological health may be endangered if the child has to see or hear domestic violence'.[29]

The prevalence of domestic violence in Europe has prompted the Council of Europe to adopt a range of instruments for preventing, addressing and combating domestic violence.[30] The European Court of Human Rights has also observed that 'the particular vulnerability of victims of domestic violence and the need for active State involvement in their protection is emphasised in a number of international instruments'.[31]

One of the requirements that have to be met before the European Court of Human Rights may admit a case is that the author has exhausted domestic remedies. Thus, art 35(1) of the European Convention of Human Rights provides that '[t]he court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law'. Therefore, for the court to admit a case alleging domestic violence, the allegations must have been brought to the attention of domestic courts in the state party.[32] Because of the fact that the European Court of Human Rights deals with cases alleging human rights violations in Europe, many victims or potential victims of domestic violence have approached the court and argued that states parties have, inter alia, failed to protect them from domestic violence, or to put in place sufficient measures to prevent domestic violence, hence violating some of their rights in the European Convention of Human Rights. It is against that background that the Court has handed down judgments stating the measures that have to be taken for states to prevent domestic violence and to protect victims of domestic violence. The purpose of this chapter is to highlight that jurisprudence.

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22 *Czarnowski v Poland* (Application no 28586/03) 20 January 2009, para 7.
23 *K.A v Finland* (Application no 27751/95) 14 January 2003, para 16.
24 *M and M v Croatia* (Application no 10161/13) 3 September 2015, paras 133–135.
25 *Zalevskiy v Ukraine* (Application no 3466/09) 16 October 2014, para 11.
26 *Mocarska v Poland* (Application no 26917/05) 6 November 2007, paras 9 and 11.
27 *V v Slovenia* (Application no 26971/07) 1 December 2011, para 83.
28 *Witek v Poland* (Application no 13453/07) 21 December 2010, para 6. However, in one case the perpetrator is not mentioned. See *Scozzari and Giunta v Italy* (Applications nos 39221/98 and 41963/98) 13 July 200,0 para 160.
29 *Husseini v Sweden* (Application no 10611/09) 13 October 2011, para 62. See also para 109.
30 *A v Croatia* (Application no 55164/08) (14 October 2010), paras 45–47.
31 *Eremia v The Republic of Moldova* (Application no 3564/11) 28 May 2013, para 73; *Hajduová v Slovakia* (Application no 2660/03) 30 November 2010, para 41.
32 *Ilievska v The Former Yugoslav Republic of Macedonia* (Application no 20136/11) 7 May 2015, para 51.

II PROSECUTING AND PUNISHING DOMESTIC VIOLENCE

The Council of Europe Convention on preventing and combating violence against women and domestic violence requires countries to criminalise acts of domestic violence.[33] Some international human rights bodies have also called upon European countries to criminalise domestic violence.[34] Case-law from the European Court of Human Rights shows that domestic violence has indeed been criminalised in many European countries and there have been cases where perpetrators have been prosecuted and convicted.

In some countries a victim of domestic violence may withdraw charges against the perpetrator. However, the court has warned that 'the more serious the offence or the greater the risk of further offences, the more likely that the prosecution should continue in the public interest, even if victims withdraw their complaints'.[35] This means, inter alia, that the prosecution of serious domestic violence offences is not solely for the satisfaction of the victim. It also has a broader public interest objective – to punish those who commit such acts, to provide reassurance to other victims, and perhaps also deter other would-be offenders. It should also be noted that some victims may withdraw their complaints due to pressure or intimidation from the perpetrator. In these cases it is in the public interest that the perpetrator is prosecuted.

As the discussion below shows, domestic violence offences have been prosecuted by public prosecutors. However, an important issue is whether a victim of domestic violence should have the duty to institute a private prosecution should the state decline to prosecute the perpetrator, or whether the law should provide that domestic violence cases can only be prosecuted by private prosecutors. It should be noted that the right to institute a private prosecution is available in many European countries.[36] In *Bevacqua and S v Bulgaria*[37] the applicant was shouted at, hit and pushed by her former husband. She argued before the European Court of Human Rights that Bulgarian law was contrary to, inter alia, arts 3 and 8 of the European Convention of Human Rights because:[38]

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[33] See arts 33–40.

[34] Concluding observations of the Committee on Economic, Social and Cultural Rights on the fifth periodic report of Finland E/C.12/FIN/CO/5 16 January 2008, para 25; Concluding observations of the Committee on the Elimination of Discrimination against Women on the combined seventh and eighth periodic reports of Poland, CEDAW/C/POL/CO/7–8, 22 October 2014, para 25(c); Concluding observations of the Committee on Economic, Social and Cultural Rights on second periodic report of Estonia, E/C.12/EST/CO/2, 16 December 2011, para 20.

[35] *B v The Republic of Moldova* (Application no 61382/09) 16 July 2013, para 54.

[36] European Union Agency for Fundamental Rights, 'Challenging the decision not to prosecute' (2014). Available at http://fra.europa.eu/en/publications-and-resources/data-and-maps/comparative-data/victims-support-services/prosecution (accessed 2 January 2016).

[37] *Bevacqua and S v Bulgaria* (Application no 71127/01) 12 June 2008. See also *MP and Others v Bulgaria* (Application no 22457/08) 15 November 2011, paras 44–46 for the domestic violence legislation in Bulgaria.

[38] *Bevacqua and S v Bulgaria* (Application no 71127/01) 12 June 2008, para 63.

> 'the relevant law according to which the burden to prosecute for light bodily injury rested with the victim was incompatible with the State's duty to provide protection against domestic violence and was discriminatory in that the law's shortcomings impacted disproportionately on women.'

She added that Bulgarian law 'treated domestic violence as a trivial family matter that did not warrant public prosecution' and was therefore deficient.[39] She added that, because of the sensitive nature of the case, she risked 'a violent reaction' from her husband if she were to institute a private prosecution against him.[40] She added that the authorities, instead of assisting her to prosecute her husband 'charged her with abduction when she sought refuge, together with her son, in a shelter for abused women'.[41]

The Court rejected the applicant's submission that 'her Convention rights could only be secured if [the perpetrator] was prosecuted by the State and that the Convention required State-assisted prosecution, as opposed to prosecution by the victim, in all cases of domestic violence'.[42] The Court added that states have a margin of appreciation in terms of the Convention to put in places the measures they deem appropriate to give effect to right to family life under Article 8.[43] The Court added that it 'cannot exclude that the relevant Bulgarian law, according to which many acts of serious violence between family members cannot be prosecuted without the active involvement of the victim …, may be found, in certain circumstances, to raise an issue of compatibility with the Convention'.[44] However, the Court concluded that:[45]

> 'The Court also considers that the possibility for the first applicant to bring private prosecution proceedings and seek damages was not sufficient as such proceedings obviously required time and could not serve to prevent recurrence of the incidents complained of. In the Court's view, the authorities' failure to impose sanctions or otherwise enforce [the perpetrator's] obligation to refrain from unlawful acts was critical in the circumstances of this case, as it amounted to a refusal to provide the immediate assistance the applicants needed. The authorities' view that no such assistance was due as the dispute concerned a "private matter" was incompatible with their positive obligations to secure the enjoyment of the applicants' Article 8 rights.'

In a later case, the court also dealt with the issue of private prosecution as an effective domestic remedy. In *Valiulienė v Lithuania*[46] the Court found that the law was amended to empower victims of domestic violence to prosecute perpetrators and that after the amendment:[47]

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39 *I* (Application no 71127/01) 12 June 2008, para 63.
40 *Bevacqua and S v Bulgaria* (Application no 71127/01) 12 June 2008, para 63.
41 *Bevacqua and S v Bulgaria* (Application no 71127/01) 12 June 2008, para 63.
42 *Bevacqua and S v Bulgaria* (Application no 71127/01) 12 June 2008, para 63.
43 *Bevacqua and S v Bulgaria* (Application no 71127/01) 12 June 2008, para 63.
44 *Bevacqua and S v Bulgaria* (Application no 71127/01) 12 June 2008, para 63.
45 *Bevacqua and S v Bulgaria* (Application no 71127/01) 12 June 2008, para 83.
46 *Valiulienė v Lithuania* (Application no 33234/07) 26 March 2013.
47 *Valiulienė v Lithuania* (Application no 33234/07) 26 March 2013, para 78.

> '[C]riminal acts causing minor bodily harm are to be prosecuted only upon a complaint by the victim, who in turn becomes the private prosecutor. Even so, a public prosecutor retains the right to open a criminal investigation into acts causing minor bodily harm, if the crime is of public importance or the victim is not able to protect his or her interests … The Court is thus satisfied that at the time relevant to the instant case Lithuanian law provided a sufficient regulatory framework to pursue the crimes attributed by the applicant to [the perpetrator].'

Whether or not a private prosecution is an effective remedy in dealing with cases of domestic violence is debatable because there are a number of inherent challenges associated with instituting a private prosecution. These include the fact that it is a costly exercise and in some countries there is no legal aid for private prosecutors; a public prosecutor may take over and discontinue a public prosecution;[48] and in some European countries legislation does not allow victims to institute a private prosecution.[49] In fact there is a move in the European Parliament to discourage states from authorising victims to institute private prosecutions. The European Commission's Director-General for Justice's Guidance Document, relating to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA,[50] states that:[51]

> 'Currently, some national practice applies the system whereby the victim has the right to pursue the prosecution as a private or subsidiary prosecutor (as a consequence of the 'role of the victim in the relevant criminal justice system'). It may be argued that such a concept is not qualitatively – from the perspective of victims' interests – the same as a review set out in Article 11. Becoming a private prosecutor may have its advantages but also constitutes an additional burden on the victim in terms of time, costs etc. Therefore it is questionable if this burden may be mitigated by the provision of free legal aid and other assistance.'

It is argued that victims of domestic violence should only be expected to conduct private prosecutions if it is practicable for them to do so depending on factors such as their financial standing, the seriousness of the offence, and the impact the act of domestic violence has had on them. Otherwise some perpetrators may go unpunished. Another challenge is that in some countries not all domestic violence offences are prosecutable. For example, in *TM and CM v The Republic of Moldova*,[52] the European Court of Human Rights held that:[53]

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48 Jamil Ddamulira Mujuzi 'The Right to Institute a Private Prosecution: A Comparative Analysis' (2015) 4 *International Human Rights Law Review* 222–55.

49 See Harmonisation and Co-operation Between Prosecutors at European: Proceedings of the second Pan-European Conference of Prosecutors General, Bucharest 12–16 May 2001, (2002) 20–21.

50 Ref Ares (2013)3763804–19/12/2013. Available at http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf.

51 At 31. Emphasis in the original.

52 *TM and CM v The Republic of Moldova* (Application no 26608/11) 28 January 2014.

53 *TM and CM v The Republic of Moldova* (Application no 26608/11) 28 January 2014, para 47.

> 'The prosecutor's position that no criminal investigation could be initiated unless the injuries caused to the victim were of a certain degree of severity … also raises questions regarding the efficiency of the protective measures, given the many types of domestic violence, not all of which result in physical injury, such as psychological or economic abuse.'

This means that there is a need for such legislation to be amended to criminalise all acts of domestic violence as one of the ways to combat domestic violence.

As previously discussed, domestic violence is criminalised in many European countries and some people have been prosecuted and convicted. The sentences imposed have included fines in countries such as Croatia,[54] Macedonia[55] and Ukraine,[56] some of which have been paid.[57] In one case the court was concerned that the 'fines applied to [to the perpetrator] were small … and did not have any deterrent effect'.[58] The court appears to be of the view that a fine imposed on a domestic violence perpetrator should have a deterrent effect. There is evidence at least from one European country where courts continued to impose fines on a perpetrator whenever he committed a domestic violence act against the victim.[59] This could be indicative of the fact that fines may not deter people from committing domestic violence. In fact the Committee on the Elimination of Discrimination against Women is of the view that fines were ineffective in preventing domestic violence in Ukraine.[60]

Other sentences have included imprisonment for 2 years imposed on a husband for issuing serious death threats against his wife;[61] 'a 1-year period of imprisonment suspended on probation for 4 years'[62] which was enforced when the applicant breached the conditions of probation;[63] 2 years' imprisonment;[64] '3 months in prison, suspended for a period of 2 years';[65] 'suspended custodial sentence of 3 months' imprisonment';[66] 3 years and 3 months' imprisonment;[67] and 3 years' imprisonment.[68] However, in some cases where people have been

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54 *A v Croatia* (Application no 55164/08) 14 October 2010, para 27.
55 *B v The Republic of Moldova* (Application no 61382/09) 16 July 2013, para 9.
56 *Zalevskiy v Ukraine* (Application no 3466/09) 16 October 2014, para 11.
57 *B v The Republic of Moldova* (Application no 61382/09) 16 July 2013, para 9.
58 *B v The Republic of Moldova* (Application no 61382/09) 16 July 2013, para 53.
59 *A v Croatia* (Application no 55164/08) 14 October 2010, paras 27–28 (fined three times for committing domestic violence against his partner).
60 Concluding observations of the Committee on the Elimination of Discrimination against Women on the combined sixth and seventh periodic report of Ukraine, CEDAW/C/UKR/CO/7, 28 January 2010, para 26.
61 *Bljakaj and Others v Croatia* (Application no 74448/12) 18 September 2014, Joint Partly Concurring and Partly Dissenting Opinion of Judges Lazarova Trajkovska And Pinto De Albuquerque, para 5.
62 *Czarnowski v Poland* (Application no 28586/03) 20 January 2009, para 7.
63 *Czarnowski v Poland* (Application no 28586/03) 20 January 2009, paras 8 and 23.
64 *Lewicki v Poland* (Application no 28993/05) 6 October 2009, para 29.
65 *Mijušković v Montenegro* (Application no 49337/07) 21 September 2010, para 39. However, the sentence was set aside on appeal.
66 *Palanci v Switzerland* (Application no 2607/08) 25 March 2014, para 25.
67 *Rumor v Italy* (Application no 72964/10) 27 May 2014, para 15.
68 *V v Slovenia* (Application no 26971/07) 1 December 2011, para 6.

imprisoned for domestic violence-related offences, they were actually convicted of other serious offences that had been committed against their victims.[69] In other words, what the prosecutors emphasised in court was not the issue of domestic violence but rather the fact that other serious offences had been committed in a domestic context. This creates the impression that domestic violence offences do not attract serious sentences.

Another issue relates to the enforcement of the sentences imposed on domestic violence perpetrators. In some cases the facts show that people were prosecuted of domestic violence but are silent on whether or not they were convicted.[70] In Croatia where a fine was imposed after a conviction for domestic violence there was 'no indication that this fine has been enforced'.[71] In Croatia if a fine is imposed and the perpetrator fails to pay it, the court will order his imprisonment. However, he may not serve the sentence. For example, in one case the perpetrator did not pay the fine and did not serve the prison sentence because the '[p]rison was full to capacity'.[72] He could not serve the sentence later on because '[e]xecution of the sentence became time-barred'.[73] Therefore, the mere fact that a law provides for sentences for domestic violence offences and the courts in fact impose such sentences does not mean that in practice such sentences are enforced.

III PROTECTION ORDERS

One of the measures to combat domestic violence is that legislation in different European countries empowers courts to issue protection orders against perpetrators. These can be issued in a number of countries including Croatia,[74] Macedonia,[75] and Bulgaria.[76] These protection orders have been for periods such as 1 year,[77] 6 months,[78] and 3 months.[79] In Croatia, a court may impose 'protective measures' in order to protect a victim against domestic violence. The specific measures have included 'prohibiting access to the applicant at a distance of less than one hundred metres' and 'compulsory psycho-social treatment'[80] against the same perpetrator. This means that different 'protective

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69 *V v Slovenia* (Application no 26971/07) 1 December 2011 (the applicants were convicted of manslaughter in that they had inflicted severe injuries to one of their children leading to her death); *Rumor v Italy* (Application no 72964/10) 27 May 2014 (the applicant's husband was convicted of attempted murder).

70 *B.R v Poland* (Application no 43316/98) 16 September 2003, para 10.

71 *A v Croatia* (Application no 55164/08) 14 October 2010, para 27.

72 *A v Croatia* (Application no 55164/08) 14 October 2010, para 34.

73 *Av Croatia* (Application no 55164/08) (14 October 2010), para 34.

74 *A v Croatia* (Application no 55164/08) (14 October 2010), para 31.

75 *B v The Republic of Moldova* (Application no 61382/09) 16 July 2013, paras 18–20.

76 *Bevacqua and S v Bulgaria* (Application no 71127/01) 12 June 2008, para 48.

77 *A v Croatia* (Application no 55164/08) 14 October 2010, para 31; *Veljkov v Serbia* (Application no. 23087/07) 19 April 2011, para 71.

78 *A v Croatia* (Application no 55164/08) 14 October 2010, para 31.

79 *B v The Republic of Moldova* (Application no 61382/09) 16 July 2013, para 18; *Eremia v The Republic of Moldova* (Application no 3564/11) 28 May 2013, para 46.

80 *A v Croatia* (Application no 55164/08) 14 October 2010, para 31.

measures' may be imposed against the same person. Unlike in some countries where the measures in place have been aimed at exclusively protecting victims, in Croatia the measures are also aimed at preventing future violence by ensuring that the perpetrator undergoes treatment. In some countries, despite evidence of domestic violence being committed against the victim, courts will not order the perpetrator's eviction from the apartment he is sharing with the victim if the perpetrator does not have alternative accommodation.[81] In Hungary the police are empowered to issue temporary restraining orders for up to 70 hours if they visit a home and find that domestic violence is being committed there.[82]

Another issue that the court has dealt with is whether a victim of domestic violence is required to apply for a protection order as a domestic remedy before approaching the European Court of Human Rights. In *B v The Republic of Moldova*,[83] the applicant submitted before the European Court of Human Rights that 'she was systematically beaten and insulted by her husband' leading to their divorce although they continued to share an apartment.[84] The court held that in the circumstances it was not feasible for the applicant to apply for a protection order before approaching the court as it was not an effective remedy.

It is of note that adult victims of domestic violence must apply for a protection order on their own otherwise the court will find the application inadmissible for not exhausting domestic remedies. In *B v The Republic of Moldova* where the mother and her sons approached the court before the sons had laid a complaint of domestic violence against their father in the Moldovan courts, the court in dismissing the application for not exhausting domestic remedies held that:[85]

> 'at the time when the relevant complaints were made to the domestic courts … [by the first applicant] the second and third applicants were adults and could lodge themselves court actions if they intended to do so. However, they did not lodge any court action or made any other complaints, nor did they submit to the Court any evidence that they had authorised their mother to lodge such court actions or complaints in their name. Accordingly, the Court accepts the Government's objection concerning the second and third applicants' failure to exhaust domestic remedies.'

If there is evidence that the perpetrator has continuously subjected the victim to domestic violence, he or she should be evicted from the residence shared with the victim. The court held that 'allowing [the perpetrator] to live in the same apartment as his victim rendered ineffective other measures in the protection order and exposed her to the risk of further ill-treatment'.[86] The court added

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81 *B v The Republic of Moldova* (Application no 61382/09) 16 July 2013, paras 17–19.
82 *Kalucza v Hungary* (Application no. 57693/10) 24 April 2012, para 37.
83 *B v The Republic of Moldova* (Application no 61382/09) 16 July 2013.
84 *B v The Republic of Moldova* (Application no 61382/09) 16 July 2013, para 7.
85 *B v The Republic of Moldova* (Application no 61382/09) 16 July 2013, para 33.
86 *B v The Republic of Moldova* (Application no 61382/09) 16 July 2013, para 57.

that the fact that the applicant and the perpetrator shared an apartment subjected her 'to constant fear of further ill-treatment, given the number of past attacks which she had suffered' and that '[t]his fear was sufficiently serious to cause the applicant suffering and anxiety amounting to inhuman treatment within the meaning of art 3 of the Convention'.[87]

The court concluded 'that the authorities have not satisfied their positive obligation under Article 3 of the Convention to protect the first applicant from ill-treatment'.[88] The challenge is that in some countries, although the law provides for protection orders, in practice some courts and the police do not take domestic violence issues seriously. For example, in *TM and CM v The Republic of Moldova*[89] the court found that the state had violated art 3 of the Convention (art 3 is discussed in detail below) because it had failed to protect the applicants against domestic violence.[90] In reaching that conclusion, the court observed that:[91]

> 'After being assaulted for a second time … and applying for a protection order, the first applicant had to wait ten days for the court to deal with her application, despite there being a twenty-four-hour time-limit established by law for doing so. When the order was eventually issued, it was not sent immediately to the applicants, nor to the police for enforcement, which exposed the applicants to a further risk of ill-treatment. Furthermore, despite all the evidence in the file, both the courts and the prosecutor's office refused to offer effective protection until [when it was too late]. It follows that the applicants were not given effective protection until a year after the first incident involving physical harm had been reported, and half a year after the formal application for such protection had been made.'

The fact that the law provides for domestic orders in the circumstances in which they may be applied for is not enough to protect domestic violence victims. These orders must be issued as soon as possible and need to be enforced properly by police and courts when breached.

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87 *B v The Republic of Moldova* (Application no 61382/09) 16 July 2013, para 58. See also *Mudric v The Republic of Moldova* (Application no 74839/10) 16 July 2013, para 45, where the court held that 'the fear of further beatings by [the perpetrator] … was sufficiently serious to cause the applicant suffering and anxiety amounting to inhuman treatment within the meaning of art 3 of the Convention'.

88 *B v The Republic of Moldova* (Application no 61382/09) 16 July 2013, para 60. See also para 61.

89 *TM and CM v The Republic of Moldova* (Application no 26608/11) 28 January 2014.

90 *TM and CM v The Republic of Moldova* (Application no 26608/11) 28 January 2014, para 49.

91 *TM and CM v The Republic of Moldova* (Application no 26608/11) 28 January 2014, para 48.

IV OBLIGATIONS IMPOSED BY THE EUROPEAN CONVENTION ON HUMAN RIGHTS ON STATES TO PREVENT DOMESTIC VIOLENCE

The European Convention on Human Rights does not provide for the right not to be subjected to domestic violence. However, it provides for rights which are almost always violated whenever a person is subjected to domestic violence. These include the right not to be subjected to inhuman or degrading treatment (art 3); the right to family life (art 8); and the right to life (art 2). Article 1 of the European Convention on Human Rights states that states 'shall secure to everyone within their jurisdiction the rights and freedoms' contained in the Convention. It is against this background that victims and potential victims of domestic violence have approached the European Court of Human Rights alleging that states have failed in their duties to prevent domestic violence or to protect them against domestic violence. The court has thus developed jurisprudence stating the obligations imposed on states to prevent and combat domestic violence. It is to this jurisprudence we now turn.

(a) Domestic violence as a violation of the right to family life

Article 8 of the European Convention of Human Rights provides for the right to family life. In one case the court found that the applicant had been subjected to domestic violence by the same person, her former husband, for close to 3 years and that the 'violence was both verbal, including serious death threats, and physical [assault], including hitting and kicking the applicant in the head, face and body, causing her injuries'.[92] There was also evidence that the perpetrator 'suffered from several mental disorders, including a severe form of PTSD', had a 'tendency towards violence', had 'reduced ability to control his impulses' and needed 'continuing compulsory psychiatric treatment'.[93] The court observed that there was sufficient evidence that the husband presented a threat to the applicant's physical integrity and well-being and that the state party had a positive obligation to protect the applicant to such violence.[94] The court clarified that this obligation might arise under arts 2, 3 and 8 of the Convention, all of which were invoked by the applicant.[95] However, in order to narrow down the issues before it, the court decided to dispose of the case on the basis of Article 8 because it was the most relevant to the facts before it.[96] Referring to its earlier jurisprudence, the court held that:[97]

> 'While the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities, there may in addition be positive obligations

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92 *A v Croatia* (Application no 55164/08) 14 October 2010, para 55.
93 *A v Croatia* (Application no 55164/08) 14 October 2010, para 56.
94 *A v Croatia* (Application no 55164/08) 14 October 2010, para 57.
95 *A v Croatia* (Application no 55164/08) 14 October 2010, para 57.
96 *A v Croatia* (Application no 55164/08) 14 October 2010, para 57.
97 *A v Croatia* (Application no 55164/08) 14 October 2010, para 59.

> inherent in effective "respect" for private and family life and these obligations may involve the adoption of measures in the sphere of the relations of individuals between themselves.'

The court added that, on the basis of art 8, states have 'to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals'.[98] The court added that 'the obligation on the State under art 8 of the Convention in cases involving acts of violence against an applicant would usually require the State to adopt adequate positive measures in the sphere of criminal-law protection … Bringing to justice perpetrators of violent acts serves mainly to ensure that such acts do not remain ignored by the relevant authorities and to provide effective protection against them'.[99] The court held that the state party had violated art 8 because:[100]

> 'The national authorities failed to implement measures ordered by the national courts, aimed on the one hand at addressing [the former husband's] psychiatric condition, which appear to have been at the root of his violent behaviour, and on the other hand at providing the applicant with protection against further violence by [the former husband]. They thus left the applicant for a prolonged period in a position in which they failed to satisfy their positive obligations to ensure her right to respect for her private life.'

The court has also found a violation of Article 8 in a case where the perpetrator had assaulted the applicant repeatedly and attempted to rape her, yet was not evicted from the apartment they both resided in.[101] The police and the courts 'failed to balance the rights involved and effectively forced the first applicant to continue risking being subjected to violence or to leave home'.[102] The above jurisprudence shows that failure to prevent domestic violence may lead to a violation of the perpetrator's right to family life.

(b) Domestic violence and the right not to be subjected to torture or to cruel or degrading treatment

Article 3 of the European Convention on Human Rights provides that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment'. Article 3 prohibits torture; inhuman treatment; degrading treatment; inhuman punishment; and punishment. Jurisprudence from the European Court of Human Rights shows that domestic violence victims have not alleged being subjected to torture or inhuman or degrading punishment. This could be explained by the fact that in international law torture may only be committed by public officials in their official capacity.[103] However, domestic violence victims have alleged inhuman or degrading treatment.

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[98] *A v Croatia* (Application no 55164/08) 14 October 2010, para 60.
[99] *A v Croatia* (Application no 55164/08) 14 October 2010, para 67.
[100] *A v Croatia* (Application no 55164/08) 14 October 2010, para 79.
[101] *B v The Republic of Moldova* (Application no 61382/09) 16 July 2013, para 71.
[102] *B v The Republic of Moldova* (Application no 61382/09) 16 July 2013, para 75.
[103] Article 1 of the Convention against Torture defines torture as follows: 'For the purposes of this

While the European Convention of Human Rights does not define 'inhuman' treatment or 'degrading' treatment, the European Court of Human Rights has provided some guidance. It has defined inhuman treatment as premeditated, applied for hours at a stretch, and causing either actual bodily injury or intense physical and mental suffering. Further, it has defined treatment as degrading when it causes victims feelings of fear, anguish and inferiority, capable of humiliating and debasing them, and possibly breaking their physical or moral resistance.[104]

In order for a victim to succeed on the ground that the violence amounted to ill-treatment under art 3, the ill-treatment must attain a minimum level of severity if it is to fall within the scope of art 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, duration, physical and mental effects and, in some instances, the sex, age and state of health of the victim.[105] Further, art 3 requires that the authorities conduct an effective official investigation into the alleged ill-treatment even if such treatment has been inflicted by private individuals. For the investigation to be regarded as 'effective', it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation of result, but one of means.[106]

Apart from investigating domestic violence allegations and punishing those found guilty of domestic violence,[107] the state also has to take other measures if it is to comply with art 3. The court held, in a case involving Moldova, that:[108]

> 'The Moldovan law provided for specific criminal sanctions for committing acts of violence, including against members of one's own family … Moreover, the law provided for protective measures for the victims of family violence …, as well as, more generally, for the eviction of persons who systematically break the rules of

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Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.' The European Court of Human Rights has referred to this definition in its jurisprudence. See for example, *Jalloh v Germany* (Application no 54810/00) 11 July 2006; *Selmouni v France*, judgment of 28 July 1999; and *Kafkaris v Cyprus* (Application no 21906/04) 12 February 2008.

104 *Valiulienė v Lithuania* (Application no 33234/07) 26 March 2013 para 66. See also 70.

105 *B v The Republic of Moldova* (Application no 61382/09) 16 July 2013, para 42; *Mudric v The Republic of Moldova* (Application no 74839/10) 16 July 2013, para 39; *Rumor v Italy* (Application no 72964/10) 27 May 2014, para 57; *Valiulienė v Lithuania* (Application no 33234/07) 26 March 2013, para 65.

106 *B v The Republic of Moldova* (Application no 61382/09) 16 July 2013, para 45; *Mudric v The Republic of Moldova* (Application no 74839/10) 16 July 2013, para 42.

107 *Durmaz v Turkey* (Application no 3621/07) 13 November 2014, para 65.

108 *B v The Republic of Moldova* (Application no 61382/09) 16 July 2013, para 50.

> living together … The Court concludes that the authorities had put in place a legislative framework allowing them to take measures against persons accused of family violence.'

In order to determine whether or not a state violated art 3, the court has to establish whether 'the domestic authorities were aware, or ought to have been aware, of the violence to which the applicant had been subjected and of the risk of further violence, and if so whether all reasonable measures had been taken to protect her and to punish the perpetrator'.[109] A violation of art 3 would be found if the relevant authorities remained 'totally passive' when the victim complained about domestic violence to them.[110] In other words, domestic authorities must demonstrate 'exceptional diligence' in investigating, preventing and prosecuting domestic violence cases.[111] Failure by state officials to take effective measures to prevent domestic violence, such as investigating the allegations, enforcing a protection order and prosecuting the perpetrator 'resulting in his virtual impunity' where it is clear that the victim is at risk and she is later assaulted, is a violation of art 3.[112] The court added that the investigation under art 3 must be effective and it does not necessarily mean that it will result in prosecution.[113] The court emphasised that:[114]

> 'For the investigation required by Article 3 of the Convention to be regarded as "effective", it must not only be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible; a requirement of promptness and reasonable expedition is also implicit in that context.'

In another case, the court clarified the obligation under art 3 of the Convention in the following terms:[115]

> '[T]he obligation on the State under Article 1 of the Convention cannot be interpreted as requiring the State to guarantee through its legal system that inhuman or degrading treatment is never inflicted by one individual on another or that if it is, criminal proceedings should necessarily lead to a particular sanction. In order that a State may be held responsible it must, in the view of the Court, be shown that the domestic legal system, and in particular the criminal law applicable in the circumstances of the case, failed to provide practical and effective protection of the rights guaranteed by Article 3.'

In one case, the father of the child victim allegedly subjected her to a wide range of violent acts. These included: cursing her, uttering vulgar expressions, and calling her names such as 'stupid' or 'cow'. He threatened to cut her long hair,

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[109] *B v The Republic of Moldova* (Application no 61382/09) 16 July 2013, para 51.
[110] *B v The Republic of Moldova* (Application no 61382/09) 16 July 2013, para 53. See also *Bevacqua and S v Bulgaria* (Application no 71127/01) 12 June 2008, para 80; *Eremia v The Republic of Moldova* (Application no 3564/11) 28 May 2013, para 75.
[111] *M and M v Croatia* (Application no 10161/13) 3 September 2015, para 149.
[112] *Eremia v The Republic of Moldova* (Application no 3564/11) 28 May 2013, paras 64–66.
[113] *M and M v Croatia* (Application no 10161/13) 3 September 2015, para 146.
[114] *M and M v Croatia* (Application no 10161/13) 3 September 2015, para 148.
[115] *Valiulienė v Lithuania* (Application no 33234/07) 26 March 2013, para 75.

ensure that she never have contact with her mother, and frequently force fed her when she refused to eat.[116] At times he smeared the food all over her face. He also threatened her with physical violence and acted on his threats, for example, by hitting her in the face and squeezing her throat.[117]

The court gave particular regard to the applicant's young age, 9 years old at the time of the incidents, and considered that the cumulative effect of all the above described acts of domestic violence would, if they were indeed perpetrated, render the treatment she was allegedly exposed to as degrading and sufficiently serious to reach the threshold of severity required for art 3 of the Convention to apply.[118] Therefore, the state's procedural positive obligation to investigate was triggered.[119] The court added that the state's 'obligation to protect her from future ill-treatment was also engaged'.[120] The court also held that the applicant's complaints under Article 8 of the Convention were 'absorbed by her complaints under art 3 thereof'.[121] The court found that that there was a violation of art 3 because the authorities had failed to promptly investigate and prosecute the applicant's father for all the domestic violence acts he committed (only focusing on the serious ones).[122] However, the court did not find that the state had violated its obligation under art 3 to prevent the applicant's ill-treatment. This is because the applicant 'did not argue that the domestic authorities had breached their positive obligation by failing to prevent the alleged acts of domestic violence against … [her] that had already occurred'.[123] This case raises a couple of important issues when it comes to the issue of domestic violence. It makes it very clear that a state party has different obligations under art 3: the first obligation is to prevent ill-treatment; the second obligation is to investigate ill-treatment; and the third obligation is to prosecute those who have committed domestic violence. The case also discusses the relationship between arts 3 and 8 of the Convention. If the 'State has adequately discharged its positive obligation to prevent ill-treatment [under art 3] … the domestic authorities have also complied with their positive obligation … under art 8 of the Convention'.[124] In a case where the authorities delayed removing the perpetrator from the applicant's house for several months and he continued to physically and mentally abuse her, failed to enforce protection orders and also to take him for mental treatment, the court held that:[125]

> 'the manner in which the authorities had handled the case, notably the long and unexplained delays in enforcing the court protection orders and in subjecting [the

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[116] *M and M v Croatia* (Application no 10161/13) 3 September 2015, para 133.
[117] *M and M v Croatia* (Application no 10161/13) 3 September 2015, para 133.
[118] *M and M v Croatia* (Application no 10161/13) 3 September 2015, para 135.
[119] *M and M v Croatia* (Application no 10161/13) 3 September 2015, para 140.
[120] *M and M v Croatia* (Application no 10161/13) 3 September 2015, para 141.
[121] *M and M v Croatia* (Application no 10161/13) 3 September 2015, para 143.
[122] *M and M v Croatia* (Application no 10161/13) 3 September 2015, para 145.
[123] *M and M v Croatia* (Application no 10161/13) 3 September 2015, para 153.
[124] *M and M v Croatia* (Application no 10161/13) 3 September 2015, para 165. See also *TM and CM v The Republic of Moldova* (Application no 26608/11) 28 January 2014, para 52.
[125] *Mudric v The Republic of Moldova* (Application no 74839/10) 16 July 2013, para 55.

> perpetrator] to mandatory medical treatment, amounted to a failure to comply with their positive obligations under Article 3 of the Convention. There has, accordingly, been a violation of that provision in the present case.'

The mere fact that the perpetrator of domestic violence violated the applicant's rights under art 3 of the Convention does not necessarily mean that the state failed in its obligation to protect the applicant against domestic violence. In *Rumor v Italy*[126] the applicant had been assaulted by her former partner and she argued that her treatment violated her rights under art 3 of the Convention a submission with which the court agreed.[127] The court held, however, that Italy had not violated its obligations under art 3 because after committing domestic violence against the applicant,[128]

> '[t]he applicant's former partner was immediately arrested and remanded in custody. He was charged with attempted murder, kidnapping, aggravated violence and threatening behaviour. The criminal proceedings were conducted with due expedition and he was sentenced to three years and four months' detention.'

The court concluded that:[129]

> '[T]he authorities had put in place a legislative framework allowing them to take measures against persons accused of domestic violence and that that framework was effective in punishing the perpetrator of the crime of which the applicant was victim and preventing the recurrence of violent attacks against her physical integrity.'

If there is information that domestic violence is being committed against a person, it is 'the duty of the police to investigate of their own motion the need for action in order to prevent domestic violence, considering how vulnerable victims of domestic abuse usually are'.[130] In other words, there is no need 'of a formal complaint about domestic violence' from the victim.[131] The above jurisprudence shows that for a state to comply with its obligations under art 3, it has to take effective measures to prevent and combat domestic violence. These measures include enacting relevant legislation and ensuring that the legislation is enforced against the perpetrators without delay.

The issue of whether a state would be in violation of art 3 of the Convention by deporting a person to a country where she could be subjected to domestic violence arose in the case of *N v Sweden*.[132] The applicant argued that her deportation to Afghanistan would be contrary to art 3 of the Convention because she would be persecuted by her husband's and her family for, inter alia,

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126 *Rumor v Italy* (Application no 72964/10) 27 May 2014.
127 *Rumor v Italy* (Application no 72964/10) 27 May 2014, para 61.
128 *Rumor v Italy* (Application no 72964/10) 27 May 2014, para 64.
129 *Rumor v Italy* (Application no 72964/10) 27 May 2014, para 76.
130 *TM and CM v The Republic of Moldova* (Application no 26608/11) 28 January 2014, para 46.
131 *TM and CM v The Republic of Moldova* (Application no 26608/11) 28 January 2014, para 46.
132 *N v Sweden* (Application no 23505/09) 20 July 2010.

separating from her husband as this was against Afghan traditions and that she would be an outcast in Afghanistan and would be able to find employment.[133]

The court referred to human rights reports from international organisations and government agencies which showed that domestic violence was rampant in Afghanistan.[134] The government conceded that the situation of women was 'very difficult' in Afghanistan[135] but submitted that the applicant had 'failed to substantiate being at a real and concrete risk of being subjected to ill-treatment upon return to Afghanistan, either by Afghan authorities or by private individuals'.[136] The government also argued that there was no evidence that the applicant was in an extramarital relationship.[137] The applicant argued that if deported to Afghanistan 'she would face a real risk of being persecuted, or even sentenced to death, because she had separated from her husband and was involved with another man'.[138]

She added that her family and husband's family in Afghanistan knew that they had separated and were not impressed by that and that if deported 'she would still be at risk of treatment contrary to Article 3 of the Convention'.[139] The court observed 'that women are at particular risk of ill-treatment in Afghanistan if perceived as not conforming to the gender roles ascribed to them by society, tradition and even the legal system'.[140] The court also found that the applicant was still formally married to her husband and that, if she were deported to Afghanistan and he also went back to Afghanistan, he 'may decide to resume their married life together against the applicant's wish' and that legislation in that country 'requires, *inter alia*, women to comply with their husbands' sexual requests'.[141] The Court added that there was evidence to show that Afghan 'authorities see violence against women as legitimate, so they do not prosecute in such cases'.[142] The court pointed 'out that there are no specific circumstances in the present case substantiating that the applicant will be subjected to such treatment by [her husband], but the court cannot ignore the general risk indicated by statistic and international reports'.[143] The court concluded that the facts showed that[144]

> '[T]here are substantial grounds for believing that if deported to Afghanistan, the applicant faces various cumulative risks of reprisals which fall under Article 3 of the Convention from her husband …, his family, her own family and from the

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133 *N v Sweden* (Application no 23505/09) 20 July 2010, para 10.
134 *N v Sweden* (Application no 23505/09) 20 July 2010, paras 34–38.
135 *N v Sweden* (Application no 23505/09) 20 July 2010, para 40.
136 *N v Sweden* (Application no 23505/09) 20 July 2010, para 41.
137 *N v Sweden* (Application no 23505/09) 20 July 2010, para 43.
138 *N v Sweden* (Application no 23505/09) 20 July 2010, para 47.
139 *N v Sweden* (Application no 23505/09) 20 July 2010, para 50.
140 *N v Sweden* (Application no 23505/09) 20 July 2010, para 55.
141 *N v Sweden* (Application no 23505/09) 20 July 2010, para 57.
142 *N v Sweden* (Application no 23505/09) 20 July 2010, para 57.
143 *N v Sweden* (Application no 23505/09) 20 July 2010, para 58.
144 *N v Sweden* (Application no 23505/09) 20 July 2010, para 62.

> Afghan society. Accordingly, the Court finds that the implementation of the deportation order against the applicant would give rise to a violation of Article 3 of the Convention.'

In the light of this case, the applicant does not have to show evidence that there is 'a real and concrete risk of being subjected to ill-treatment' should she be deported. What matters is that there are substantial grounds for believing that, if deported, she would be subjected to treatment contrary to art 3. Such grounds could be obtained from publicly available reports on the situation of human rights in a given country.

The same issue also arose in the case of *AA and Others v Sweden*.[145] The applicant argued that, if deported to Yemen, she would be subjected to domestic violence as there were no effective laws and measures in that country to protect women and children against domestic violence.[146] This is because 'the Yemeni law did not provide protection against domestic violence since it was considered a family affair'.[147] The majority of the court found that the deportation of the applicant to Yemen would not be a violation of arts 2 or 3 of the Convention. However, in a dissenting opinion, Judge Power-Forde held that the court's jurisprudence shows that 'victims of domestic violence fall within a group of "vulnerable individuals" entitled to State protection' and that 'physical violence and psychological pressure of the type that occurs within domestic abuse amounts to "ill-treatment" within the meaning of art 3'.[148] The judge added that the 'fact that the gender based violence occurs in Yemen in no way diminishes the relevance or applicability of the [court's] principles'.[149] The judge added that '[t]here is compelling evidence that the Yemeni authorities fail to take protective measures in the form of effective deterrence against domestic violence … There is nothing to suggest that this situation is likely to change upon the applicants' return to that country.'[150] The judge held further that:[151]

> 'Expulsion by a Contracting State may give rise to an issue under Article 3 and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case, Article 3 implies an obligation not to deport the person in question to that country … Objectively, the policies, practices and laws of Yemen demonstrate that systemic and structural discrimination in the form of gender-based violence exists in that country and that breaches of the most fundamental human rights of women and girls are common. To my mind and in the light of their credible history, the subjective test has also been satisfied by these applicants. That the real risk of ill treatment occurs in a country whose 'traditions' endorse such practices against women in no way diminishes the fact that domestic and gender based violence violates Article 3.'

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[145] *AA and Others v Sweden* (Application no 14499/09) 28 June 2012.
[146] *AA and Others v Sweden* (Application no 14499/09) 28 June 2012, paras 39–44.
[147] *AA and Others v Sweden* (Application no 14499/09) 28 June 2012, para 60.
[148] *AA and Others v Sweden* (Application no 14499/09) 28 June 2012, para 28.
[149] *AA and Others v Sweden* (Application no 14499/09) 28 June 2012, para 28.
[150] *AA and Others v Sweden* (Application no 14499/09) 28 June 2012, para 28.
[151] *AA and Others v Sweden* (Application no 14499/09) 28 June 2012, paras 28–29.

The court seems to be moving towards a higher threshold in cases where a person alleges that her deportation or expulsion would be contrary to art 3 of the Convention as it would expose her to domestic violence. In *RH v Sweden*[152] the applicant argued, inter alia, that if expelled to Somalia, she faced a 'real risk' of being killed by her family members as she had refused to agree to a forced married.[153] The government argued that the applicant 'had failed to substantiate her claim that her family and male relatives had subjected her to ill-treatment or that they would do so in the future'.[154] After referring to the general human rights situation in Mogadishu, Somalia,[155] the court observed that it remained 'serious and fragile'.[156] However, the court held that 'there is no indication that the situation is of such a nature as to place everyone who is present in the city at a real risk of treatment contrary to Article 3'.[157] The court also examined the personal circumstances of the applicant[158] and observed that 'she has family living in the city, including a brother and uncles. She must therefore be considered to have access to both family support and a male protection network'.[159] Against that background, the court concluded that[160]

> 'While not overlooking the difficult situation of women in Somalia, including Mogadishu, the Court cannot find, in this particular case, that the applicant would face a real risk of treatment contrary to Article 3 of the Convention if returned to that city. Thus, her deportation to Mogadishu would not involve a violation of that provision.'

However, in their dissenting opinion, some judges held that there was evidence to show that if expelled she would 'face a real risk of being subjected to inhuman or degrading treatment or punishment, if not worse'.[161] The above jurisprudence shows, for the court to find that the applicant's deportation or expulsion would be contrary to art 3, the evidence has to show that the risk is 'real'.

(c) The right to life

Article 2 of the European Convention on Human Rights provides for the right to life. As indicated above, some domestic violence acts have included death threats and in one case the victim died as a result of domestic violence. There is case-law indicating that in domestic violence cases states have violated art 2.

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[152] *RH v Sweden* (Application no 4601/14) 10 September 2015.
[153] *RH v Sweden* (Application no 4601/14) 10 September 2015, para 44.
[154] *RH v Sweden* (Application no 4601/14) 10 September 2015, para 55.
[155] *RH v Sweden* (Application no 4601/14) 10 September 2015, paras 29–40.
[156] *RH v Sweden* (Application no 4601/14) 10 September 2015, para 67.
[157] *RH v Sweden* (Application no 4601/14) 10 September 2015, para 68.
[158] *RH v Sweden* (Application no 4601/14) 10 September 2015, paras 69–73.
[159] *RH v Sweden* (Application no 4601/14) 10 September 2015, para 73.
[160] *RH v Sweden* (Application no 4601/14) 10 September 2015, para 74.
[161] *RH v Sweden* (Application no 4601/14) 10 September 2015, Joint Dissenting Opinion of Judges Zupančič and De Gaetano, p 32.

This has been succinctly summarised by some judges of the European Court of Human Rights in the following terms:[162]

> 'There have been domestic violence cases where the European Court of Human Rights has found a violation of Article 2 on account of the failure of the relevant domestic authorities to take all necessary and reasonable steps to afford protection to the lives of family members (domestic violence victims).'

V OTHER MEASURES TO COMBAT DOMESTIC VIOLENCE

Apart from enacting the relevant legislation on domestic violence, some governments have also taken other initiatives to combat domestic violence. For example, the Croatian government informed the European Court of Human Rights that the strategies it had adopted to combat domestic violence included 'the education of all those involved in cases of domestic violence and cooperation with the non-governmental organisations working in that field as well as financial and other support for them'.[163] The police will register the perpetrator 'for supervision by that office as a "family trouble-maker"'.[164] In Bulgaria a victim may seek help from 'a non-governmental organisation assisting female victims of domestic violence'.[165] The Romanian government set aside a sum of money for the purpose of 'prevention of domestic violence'.[166] In Moldova a perpetrator with a history of mental problems may be ordered to undergo 'compulsory medical treatment'.[167] In the United Kingdom a domestic violence victim may be rehoused[168] and some domestic violence perpetrators may be ordered to attend accredited domestic violence programmes.[169] In Macedonia there is a First Family Centre which 'offers sessions regarding domestic violence'.[170] In Germany, 'custody for preventive purposes was particularly important in cases of imminent domestic violence'.[171] Also in Germany, the Church provides 'advice centres' for victims of domestic violence.[172]

Where an allegation was made that the government's policy which allocates houses to victims of domestic violence and not to non-victims was

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[162] *Lewicki v Poland* (Application no 28993/05) 6 October 2009 (Joint Partly Dissenting Opinion of Judges Mijović and Hirvelä), p 16.
[163] *A v Croatia* (Application no 55164/08) 14 October 2010, para 54.
[164] *B v The Republic of Moldova* (Application no 61382/09) 16 July 2013, para 10.
[165] *Bevacqua and S v Bulgaria* (Application no 71127/01) 12 June 2008, para 15.
[166] *Lăcătuş and Others v Romania* (Application no 12694/04) 13 November 2012, para 44.
[167] *Mudric v The Republic of Moldova* (Application no 74839/10) 16 July 2013, para 36. See also para 50.
[168] *McCann v The United Kingdom* (Application no 19009/04) 13 May 2008, paras 9 and 21.
[169] *James, Wells and Lee v The United Kingdom* (Applications nos. 25119/09, 57715/09 and 57877/09) 18 September 2012, para 91.
[170] *Mitovi v The Former Yugoslav Republic of Macedonia* (Application no 53565/13) 16 April 2015, para 29.
[171] *Ostendorf v Germany* (Application no 15598/08) 7 March 2013, para 54.
[172] *Schüth v Germany* (Application no 1620/03) 23 September 2010, para 31.

discriminatory, the court held that 'cases involving domestic violence are not the same as cases which do not involve domestic violence, such that different treatment of them cannot, as such, be discriminatory for the purposes of art 14 of the Convention'.[173] However, there have been challenges in implementing some of these measures. For example, the Croatian Protection against Domestic Violence Act provides for 'the protective measure of compulsory psychosocial treatment'.[174] Where there was evidence that the perpetrator who 'had been diagnosed with several mental disorders and had been undergoing treatment for years'[175] had committed several domestic acts against the victim, '[a] protective measure prohibiting access to the applicant at a distance of less than 100 metres for a period of 1 year was … ordered, as well as a protective measure of compulsory psycho-social treatment for a period of 6 months'.[176] However, the perpetrator had not 'undergone the compulsory psycho-social treatment because of the lack of licensed individuals or agencies able to execute such a protective measure'.[177] This example shows that, for such measures to be effective, the facilities must be in place for the perpetrator to undergo the necessary treatment.

VI CONCLUSION

This chapter has provided an overview of case-law from the European Court of Human Rights on the issue of domestic violence. It has been illustrated that domestic violence has been criminalised in many European countries and that there have been cases where people have been prosecuted and convicted. The chapter has also discussed the jurisprudence dealing with the measures states are required to put in place to effectively prevent and combat domestic violence in Europe. In particular, the author has dealt with the following issues: acts of domestic violence; perpetrators of domestic violence, and victims of domestic violence. The author demonstrates that, before approaching the court for a remedy, a victim of domestic violence is required to exhaustive domestic remedies if such remedies are effective. Other issues discussed are: prosecuting and punishing domestic violence; the enforcement of sentences impose on domestic violence perpetrators; circumstances in which protection orders may be issued and their effectiveness in preventing domestic violence; the obligations imposed by the European Convention on Human Rights on states to prevent domestic violence; domestic violence as a violation of the right to family life; domestic violence and the right not to be subjected to torture or to cruel or degrading treatment; domestic violence and the right to life; and general measures adopted by some countries to combat domestic violence.

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[173] *McCann v The United Kingdom* (Application no 19009/04) 13 May 2008, para 36.
[174] *M and M v Croatia* (Application no 10161/13) 3 September 2015, para 91.
[175] *A v Croatia* (Application no 55164/08) (14 October 2010), para 30.
[176] *A v Croatia* (Application no 55164/08) (14 October 2010), para 31.
[177] *Av Croatia* (Application no 55164/08) (14 October 2010), para 34. See also para 54.

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FRANCE

A CHRONICLE OF FRENCH FAMILY LAW

*Centre for Family Law at Jean Moulin University Lyon**

Résumé

L'évolution du droit de la famille est toujours liée à l'évolution de la société et aux événements qui la marquent. Cette acception est particulièrement vraie cette année en France. D'abord, ce sont des évènements douloureux et un contexte difficile qui ont provoqué des changements. Les monstrueux attentats qui se sont produits à Paris ont fatalement eu des répercussions dans la législation française. La décision du gouvernement d'admettre les enfants des victimes du terrorisme en qualité de pupille de l'Etat français doit être saluée (1). Elle est la manifestation concrète de la solidarité nationale. En revanche, le projet de loi du gouvernement relatif à l'élargissement des cas dans lesquels la déchéance de nationalité peut être prononcée et à son inscription dans la constitution française est beaucoup plus discutable (2). La crise économique qui sévit en France comme dans beaucoup d'autres pays a conduit le législateur français à modifier le barème d'attribution des allocations familiales (3). Ensuite, probablement sous l'influence des droits fondamentaux, il est possible de constater que les Français aspirent de plus en plus au libre choix. Des discussions ont ainsi eu lieu ou sont en cours à propos de la vaccination obligatoire (4), de la liberté de conscience et de religion (5), de la modification de la mention du sexe sur les registres de l'état civil (6) et de la fin de vie, notamment en raison de la médiatisation de l'affaire Vincent Lambert (7). Le législateur essaie aussi d'adapter la loi en trouvant un équilibre entre ce que la science permet et ce que l'éthique autorise. L'exemple le plus significatif cette année est sans doute la loi « de modernisation du système de santé » (8). Enfin, le législateur essaie d'adapter la législation à la réalité de la société française. Une loi de simplification et de modernisation du droit de la famille a été votée (9) et une place particulière doit être réservée à sa principale mesure : la création d'une habilitation familiale pour gérer la situation des personnes vulnérables (10). Une nouvelle loi sur l'adaptation de la société au vieillissement de la population a également été adoptée (11). L'actualité jurisprudentielle est également très riche cette année. Pour la première fois depuis la condamnation de la France par la Cour EDH, les magistrats français ont dû statuer sur la gestation pour autrui (12), mais ce n'est pas l'unique question de filiation qu'ils ont eu à trancher (13). Ils ont

* A chronicle collectively written by the academic staff, PhD holders and PhD candidates at the Centre for Family Law at Jean Moulin University Lyon 3 and by others, researchers and family law experts, aimed at presenting recent developments in family law in France. Under the direction of Christine Bidaud-Garon and Hugues Fulchiron, this collective chronicle was written by Bastien Baret, Marine Bathias, Younès Bernand, Clara Delmas, Eric Fongaro, Philippe Guez, Jézabel Jannot, Guillaume Millerioux, Aurélien Molière, Jean Nicolau, Amélie Panet, Sandra Simonelli, Stessy Tetard and Richard Vessaud.

également dû se prononcer sur une étonnante question : la révélation publique d'un adultère est-elle une atteinte au droit à l'honneur compte tenu des mœurs actuelles ?(14). Quant au droit venant de l'Union européenne, il est nécessaire de signaler que le règlement « Successions » est entré en application depuis le 17 août 2015 (15).

I STATUS OF WARD OF THE NATION FOR CHILDREN VICTIMS OF TERRORISM[1]

The plight of orphans whose parents were victims of war is organised in the code of military disability pensions and war victims. In 1990, the category of war orphans was extended to child victims of terrorism. The French government was reminded of the existence of this status following the attacks on French soil in January and November 2015.

In 2010, 28 children had been 'adopted by the Nation' and the total number of war orphans was 254. Note that, unlike children in care, the nation's pupils are the sole responsibility of their family or guardian. This special status for the children concerned is worthy of gratitude from the nation, manifested by additional protection afforded to the applicant.

Wards of the Nation have, in fact, protection and material and moral support from the state right up to their 21st year. More specifically, this status entitles you to:

- maintenance grants to ensure the child's basic needs (care, clothing, food, entertainment), paid if necessary from birth;
- grants for medical expenses, cures, additional medical care benefits under social security and free medical aid;
- vacation subsidies;
- grants for studies that can be renewed until the end of graduate studies if they are undertaken before they are 21 years old. War orphans are legally exempt from the payment of tuition fees in universities;
- grants for projects by wards who have entered the labour force before 21 years. Subsequently, the wards can benefit from individual social loans – interest-free loans for professional projects, Research Assistance grants for a first job, or recruitment by way of reserved jobs in the administration, local authorities and public bodies.

[1] By Younès Bernand, PhD holder, Family Law Centre, Université Jean Moulin Lyon 3.

II A NOTE ABOUT THE BILL ON DEPRIVATION OF NATIONALITY[2]

At the crossroads of the law on persons and fundamental rights, the French news has been marked by new debates on nationality. In the aftermath of the attacks that left blood on Paris in November 2015, the President of the Republic solemnly reunited the whole Parliament in order to affirm the unity of the Nation in the face of terrorism. Aiming to fight against this scourge, the President proposed to apply the deprivation of the French nationality to persons who have been condemned for an act of terrorism, even if they are born French.[3]

If the weapon of deprivation is traditionally presented in French law as a sanction striking against one who, after acquiring French nationality, betrayed the trust of the community who welcomed them, it has been used only twice against French persons by birth: in 1848, to punish the French who had practised the slave trade (a deprivation in the name of humanity); and in 1940 against the French who had fled from France between 10 May and 10 June 1940 (a decree of 8 December 1940 thus declared Charles de Gaulle deprived of his French nationality).

However, we shall avoid confusing 'political' deprivation and deprivation for crimes and misdemeanours under the ordinary law (even though totalitarian regimes, which use it as their favourite weapon, like to erase the borders); but deprivation is a measure too serious, symbolically and juridically, not to be strictly circumscribed. Under French law, it can be pronounced on grounds of particular gravity, especially, in case of condemnation 'for an act qualified as a crime or misdemeanour constituting an attempt on the fundamental interests of the Nation or a crime or misdemeanour constituting an act of terrorism' (art 25 and following of the French Civil code). Deprivation is not reserved to cases of acquisition of French nationality: to date, it is not about creating stateless persons.

Breaking with French tradition, the proposal made before the Congress aroused intense debates. Beyond the intellectual communities, it deeply divided political parties, particularly within the left-wing majority, and inflamed public opinion. In fact, a certain vision of the Nation is at stake. Moreover, when the bill started to be discussed in the National Assembly, we witnessed a kind of leap forward: in the name of equality, it was proposed to extend deprivation to every French person, whether or not they had another nationality.

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[2] Hugues Fulchiron, Professor at Université Jean Moulin Lyon 3, Director of the Family Law Centre, Institut Universitaire de France.

[3] The bill proposed by the French Government to Parliament ('Constitutional bill of protection of the Nation') was voted on by the Assembly on 10 February 2016 and thus has been transferred to the Senate. Its future seems rather uncertain.

Arguments invoked are both juridical and political, nay ethical.[4]

From a legal point of view, the arguments of international law are not decisive as it is true that in principle each state is master of its nationality. Only one rule is set: no one shall be arbitrarily deprived of his or her nationality (cf in particular art 15(2) of the United Nations Declaration of Human Rights), which, given the gravity of the acts committed and the procedural guaranties existing, should not be disputed. However, eventually creating stateless persons does not seem to respect the state's duty to fight against what constituted one of the greatest scourges of the past century, even if the texts are not absolute (cf the New York Convention of 30 April 1961, the Geneva Convention of 28 July 1951).

We ought to take into consideration European engagements by France. Even though EU law respects the competence of member states on nationality, and even if the creation of a European citizenship did not call into question this rule, European citizenship is linked to the possession of the nationality of a member state, each state determining sovereignly who its nationals are. Nonetheless, a decision of withdrawal or of deprivation of the nationality of a member state is likely to cause indirectly the loss of the qualification as a European citizen. That is why the European Court of Justice (ECJ) affirms that the exercise by the member states of their competence may be subject to control of the court.[5] We can imagine that, in this case, the sanction should appear justified and proportionate, provided that the infractions targeted are strictly defined and, most likely, limited. Indeed, the text concerns not only crimes, but also misdemeanours, which widen the scope of infractions that could be covered considerably.

For its part, the European Court of Human Rights (ECtHR) drove a stake through the principle of state sovereignty, asserting that nationality, as part of the identity of the person, falls within the scope of art 8 of the ECHR that guarantees the right to respect for private life.[6] Thus, a refusal to grant nationality, more still the withdrawal of this nationality, could be submitted to the court. It would then be up to the court to appreciate the gravity of the attempt and its proportionality regarding the legitimate aim pursued. Probably the court would also examine the practical consequences of such a measure: is the person concerned susceptible of being expelled from the territory? And to which destination?

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4 On this debate, cf particularly on the side of jurists, P Lagarde, *Le débat sur la déchéance de nationalité, essai de clarification*, JCP éd G 2016, 105, H Fulchiron, *Déchéance*, JCP éd G 2015, 1378.

5 *Rottmann* ECJ, 2 March 2010.

6 See ECtHR cases: *Karassev v Finland* ECtHR 12 January 1999, 31414/96, *Genovese v Malta* ECtHR 11 October 2011, 53124/09, *Labassée v France* and *Mennesson v France* ECDH 26 May 2014, no 65941/11 et no 65192/11, Dalloz 2014, p 1797 (decided together).

In national law, the question arose on the conformity of the deprivation of nationality to the French Constitution. And that is why doubts existed that we planned to enshrine deprivation within the Constitution itself.

But it is mostly the *'political' arguments* that gave all their weight to the debate.

Even if the partisans of the reform invoked the principle of equality in order to extend the deprivation to French-born persons, the measure divides. In the name of equality, the risk is the stigmatisation of a part of the population. As a matter of fact, who are the persons likely to be concerned by this measure? In our collective psyche, the French Muslims of immigrant origin are targeted. Even if it could appear fair for a society to defend itself against elements aiming to destroy it, the measure would concern only the ones who actually committed particularly hateful acts, that being a tiny minority of persons. Nevertheless, this egalitarian alleged measure sends a disastrous message to the French of immigrant origin: their French nationality is juridically and symbolically 'weakened'.

The concrete consequences of such a measure have also been debated. If the person concerned was born in France and lived there, he could not be expelled from the territory. Otherwise it would constitute a disproportionate attempt on his right of respect for private life. Moreover, to which country could he be sent to? The country of his other nationality, if he has one? But most of the time, he no longer has any real link with this country. And it is very likely that the state concerned would not agree to receive him, unless welcoming him in a way not really compatible with respect for human rights (in most of the cases). To think that to *juridically* cut off those concerned from the national community would permit that community to *effectively* get rid of him is an illusion. In any case, the ECtHR is watching.

According to some, this measure is above all symbolic: the one who breaks the social pact shall be expelled from the community. But, whatever the atrocity of the crimes committed, to what extent can a State justify this attempt on the principles it is based on? This is an eternal debate that international news drives and makes more topical than ever.

III FAMILY POLICY, MODIFICATION OF THE SCALE OF FAMILY ALLOWANCES[7]

Nowadays family policy tends to be more and more pragmatic with the institution of scales in many fields. For instance, Christiane Taubira, the former Minister of Justice, explained in June 2015 why a scale has to be put in place for the offset benefit, because it would help attorneys and judges to determine

[7] By Marine Bathias-Venet, PhD student in Law, Family Law Centre, Université Jean Moulin Lyon 3.

the right amount for the benefit. This is an illustration of family policy that has been led in France for some years by the official purpose of reducing arbitrary decisions.

For the modification of the scale of family allowances, the government intended to establish a fairer distribution of social aid. For the 2015 social security budget, a modulation of the amount of family allowances was based on the household's financial resources for the relevant calendar year. Concretely, it impacts on wealthy households as Manuel Valls, French Prime Minister, said. Only households that earn more than €6,000 per month are concerned by the modification, so more or less, 12% of families.

The decree of 3 June 2015 details the scale modulation. Two rates have been established. The first one is set to €67,140 per year and the second one is set to €89,490 per year. For those wealthy households a percentage is applied so as to minimise their family allowances. For example, a household with two children that earns less than €66,000 a year will receive €129.35 a month, while the same household that earns more than €68,000 will perceive €64.75.

For certain, universality as it applies to family allowances was eliminated in the 2015 budget, but this modification officially has the virtue of bridging the gap between poor and wealthy households. More fundamentally, the goal of the reform is to reduce the social security deficit which was up to €400m in 2015. Nevertheless, in practice, the establishment of the modulation is complex especially for social security services. Also, some consider the reform as essentially demagogic, aimed at reassuring the traditional socialist electorate. After all, the modulation of family allowances can be explained and understood, even if its purpose is not really based on family considerations.

IV VACCINATION IN FRANCE: PARENTS' FREEDOM VERSUS PUBLIC HEALTH POLICIES[8]

Throughout 2015, the vaccination of children took up a major role in French legal headlines. As the French Constitutional Council was asked to decide on the validity of a law that imposes several injections on every French minor, voices have been criticising immunisation campaigns.

On 15 January 2015, the French Constitutional Council received a constitutional question (*question prioritaire de constitutionnalité* – QPC) from the Court of Cassation, the country's highest judicial body. The particular issue at stake was whether the French public health code arts L 3111–1 to L 3111–3 (provisions enacted by Parliament) were compliant with certain rights and freedoms that are ensured at the constitutional level. The applicants in that case argued that mandatory vaccination could expose their children to risks that are

[8] By Jean Nicolau, PhD student in Law at Université Jean Moulin Lyon 3 and Universidade de São Paulo.

at odds with health protection policies and requirements enshrined in the 1946 Constitution's preamble – a text that enjoys the same binding force as the 1958 Constitution which is currently in force. The Constitutional Council was therefore faced with an issue of particular importance, and the way it would address it would have a direct impact on the following concern: constitutionally, may French law oblige parents or any person in charge of children to immunise them against diphtheria, tetanus and poliomyelitis?

In a decision dated 20 March 2015,[9] the Constitutional Council gave a positive answer to this question. The constitutional judges considered that Parliament has the right to determine vaccination policies in order to protect individual and collective health. The Council added that by imposing mandatory vaccinations, the legislator intended to fight against three diseases that are both very serious and contagious, or simply unlikely to be eradicated. Additionally, the Council stated that exceptions to the mandatory vaccination rule might only be accepted when there is evidence of recognised medical contra-indications.

The Constitutional Council thus ruled that the Parliament, and not the Council itself, is vested with the right to define vaccination policies that aim at protecting individual and collective health. The Council stated that it does not have the general power of appreciation and decision-making that the French Parliament has, nor does it possess the technical and scientific means to be in a position to check if Parliament could have achieved the same constitutional health protection objectives by using other tools. In practical terms, the decision handed down by the Constitutional Council maintained the following situation: whether they want it or not, parents are still obliged to have their children vaccinated in accordance with the relevant public health code provisions.

Yet, such a decision does not seem to please a significant part of French society. Less than 2 months after the decision was made public, a controversial petition launched in mid May by Professor Henri Joyeux attracted over 560,000 signatures in 2 weeks; on 16 June 2015, this number had already gone up to 662,000. Just like the couple who launched the initial proceedings that led to the Constitutional Council's decision referred to earlier, Professor Joyeux has been arguing that some vaccines could be dangerous to children's health. However, Professor Joyeux's main target is the hepatitis 'B' vaccine, the injection of which is non-compulsory but very commonly done in France.

The situation becomes even more complex when other specialists such as Professor Daniel Floret, president of the Public Health Council's vaccination commission, not only disagrees with Professor Joyeux and his followers, but also believes that some vaccines, including the one against hepatitis 'B', have not been made compulsory by French authorities for an extremely practical reason: the current lack of injections in France.

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[9] Decision no 2015–458.

As this recent development suggests, the debate over the compulsory vaccination of children does not seem to have come to an end in France.

V THE CHILD'S BEST INTEREST: CORNERSTONE OF THE BALANCE BETWEEN FREEDOM OF RELIGION AND PARENTAL RESPONSIBILITY[10]

To what extent can parents choose to baptise their child according to their own religious beliefs? This question falls within the scope of parental responsibility. According to the French Civil Code, the child's education belongs to the parents as a prerogative of parental responsibility.[11] As a matter of fact, the choice and the providing of a religious education, which may consist, for instance, in the baptism of the child, is part of this prerogative.[12] However, when the parents both exercise parental responsibility, this religious choice is not considered as a usual act because it represents an important decision regarding the life of the child. That is why such a decision is submitted to the consent of both parents.[13] But, problems arise when the parents cannot manage to agree on the religious education they aim to give to their child.

This is a situation the 'Cour de Cassation', ie the French final court of appeal, had to solve in a decision on 23 September 2015.[14] In that case, both parents exercised parental responsibility, but they had a very conflicting relationship that ended in the placement of their two children, aged 6 and 7 years old, into the French Welfare Social Services. Moreover, the father's right to access the children[15] was suspended because of violent behaviours he had displayed when he was visiting them. The father asked the mother about having their two children baptised. One year after her tacit refusal, he applied to a Family Court judge to judicially obtain this authorisation. The first judge refused to grant it, finding that, having regard to the refusal of the mother and the fact that the father had not established the reality of his convictions and religious practice, the requirement was not motivated by the children's best interest. The Court of Appeal rejected as well the father's request on the grounds that the children refused to be baptised (they did not understand the meaning of this process) and that this sacrament was not compatible with their interests.[16]

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10 By Clara Delmas, PhD student in Law, Université Lumière Lyon 2.

11 See art 371–1 of the French Civil Code: 'Parental responsibility is a set of legal rights and responsibilities aiming for the best interest of the child'. Parental responsibility belongs to the parents until the child's majority or emancipation in order to protect the child's safety, health and morality, to ensure his or her education and development, in the respect of his or her person. 'Parents shall include the child in the decisions that affect him or her, having regard to the age and maturity of the child'.

12 See A Gouttenoire, H Fulchiron, 'Autorité parentale', *Rép Civ Dall*, spéc no 99.

13 Art 372–2 of the French Civil Code creates a presumption of agreement between the parents regarding usual acts.

14 Civ 1ère, 23 Sept 2015, no 14–23724, *RTD Civ* 2015 p 861, note J Hauser; *Dr Fam*, 2015, no 11, p 69 focus M Lamarche; *RJPF*, 2015, no 11, p 18, note A Cheynet De Beaupré.

15 See art 373–2–1 of the French Civil Code.

16 Limoges Court of Appeal, 10 Sept 2013, no 12/00803.

The father went to the French Supreme Court, arguing that the previous judges violated his freedom of religion by referring to the children's choice and without looking to see if the baptism effectively constituted a danger for them. Indeed, it had been previously adjudged that a judge cannot forbid the baptism of a child (even placed into the Welfare Social Services) unless a danger is proved.[17] However, the answer given by the French final court of appeal on 23 September 2015 invalidates this solution. By deciding that the 'parental responsibility conflict regarding the baptism of the children must be solved depending only on the children's best interest', the Court confers on the judges the power to forbid such a baptism by determining the child's best interest (that is sovereignly determined by the trial courts). And in the present case, this best interest was evaluated, first of all, with regard to the will expressed by the children not to be baptised,[18] and in addition, because of the difficult relationships they had with their father (actually they refused to see him again). Therefore, the Court concluded that the request of the father had to be refused, and that this refusal did not violate the father's freedom of conscience and religion.

Finally, do we have to consider that, by referring to the young children's will regarding baptism in order to evaluate their best interest, the French Supreme Court seems to recognise tacitly the children's freedom of conscience and religion?[19] Nevertheless, it remains that the child's best interest constitutes the cornerstone of the balance between freedom of religion and parental responsibility.

VI DRAFT LAW OF 29 SEPTEMBER 2015 (NO 3084) ABOUT THE MODIFICATION OF SEX DESIGNATION ON CIVIL STATUS REGISTERS[20]

This bill aims at simplifying the French procedure for sex modification on the civil status register for transsexual people.

Currently, such a modification of civil status can only be obtained with a judicial proceeding. Transsexual people should not only have the physical appearance of the opposite sex and corresponding social behaviour, but they must also prove that they have had treatment (hormone treatments and eventually surgery) that has led to an 'irreversible change of appearance'. However, removal of genitals is not required for the sex change in the civil status register. In case of doubt about the irreversibility of the change, judges

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17 Douai Court of Appeal, 8 January 2013, *Dr fam* 2013, no 69, obs Neirinck.

18 And this can be debated as the children in that case had not been heard by the judge but only by the Welfare Social Services and, furthermore, they were only 6 and 7 years old. The question of the child's discernment must necessarily come up if the child's opinion must be taken into consideration when determining best interest.

19 This right is internationally guaranteed by art 14 of the United Nations Convention on the Rights of the Child (20 November 1989).

20 By Christine Bidaud-Garon, Assistant professor at University of New-Caledonia, member of the Economic and Legal Research Laboratory (LARJE).

may request advice from a medical expert. If the bill is passed, many changes will occur. First, the procedure would no longer be automatically judicial. The sex change request would be made to the prosecutor. The President of the court would only be approached if the prosecutor had serious doubt on the reality of sexual transition.

Moreover, the conditions for obtaining a sex change on the civil status records will be significantly modified. The person will only have to prove that 'the sex mentioned on the civil status register does not match his or her intimate experience of identity' and that society considers the person as belonging to the other sex. This change is particularly important because it introduces the concept of 'social sex' into French law. For the moment there is the notion of 'apparent sex' and only in the jurisprudence. The new text would allow people to obtain a modification of their sex on their birth certificate from the beginning of the sex change process. Currently, they must wait for the end of the sexual conversion process because the law requires that sex change be irreversible at the time of the modification on civil status. Sex reassignment processes take generally between 3 and 9 years, and during this period the modification cannot be obtained currently in France. This has important consequences for their right to privacy. Their birth certificates, identity cards, passports and even their social security documents reveal their biological sex and thus their transsexualism. They cannot choose to reveal or not reveal this part of their privacy: they are forced to do so. In addition, the draft bill sets up total freedom of proof and makes no reference to the possibility for the judge to ask for medical expertise. The bill gives a list of items that can be used as evidence (testimony stating that the person has adapted their behaviour to the social sex claimed, production of administrative or commercial documents establishing that the person is known as the claimed identity) but this list is not exhaustive.

Finally, the draft bill provides that social sex may be registered in place of biological sex on the birth certificates of the children they had before the sex change and on the marriage certificate when this marriage was celebrated before the sex change. These modifications can only be made if the spouse and children agree. If the children are minors, the legal guardians of the children must consent. Currently, those changes are impossible. Sex change can affect only the birth certificate of the transsexual. The draft bill is the logical continuation of the French law of 17 May 2013 which opened up marriage to same-sex couples and adoption to same-sex married couples. The possibility of having two legal mothers or fathers has been allowed in France since this law and, finally, this bill would simply be another situation in which this kind of filiation is possible. Unfortunately, the legislator did not provide for the mandatory hearing of the child. The proposal does not provide for the child's personal consent from a specific age. This is very unfortunate because the child is of course affected by this change and this is a very significant change. One must hope that this condition will be added during parliamentary debates.

VII END OF LIFE: THE VINCENT LAMBERT CASE AND THE LATEST FRENCH LAW CREATING NEW RIGHTS IN FAVOUR OF PATIENTS AND PEOPLE IN END-OF-LIFE SITUATIONS[21]

The Grand Chamber of the European Court of Human Rights (the Court) stated that the execution of the Council of State decision to stop the artificial hydration and feeding of Vincent Lambert[22] does not violate art 2 of the European Convention of Human Rights (ECHR), which guarantees the right to life.[23]

First of all, the court applies the conditions developed in previous similar judgments:[24] a third party could, in exceptional circumstances, act in the name and on behalf of a vulnerable person if there is a 'risk that the direct victim will be deprived of effective protection of his or her rights', and if there is an 'absence of a conflict of interests between the victim and the applicant'.[25] In the present case, the court 'concludes that the applicants do not have standing to raise the complaints under arts 2, 3 and 8 of the Convention in the name and on behalf of Vincent Lambert'.[26] Therefore, all applications are incompatible *ratione personae* with the provisions of the Convention within the meaning of art 35 §3. That is why the Court examines 'below all the substantive issues arising in the present case under art 2 of the Convention, given that they were raised by the applicants on their own behalf'.[27]

On the merits of the case, the Vincent Lambert judgment is not as major as expected. Certainly, this judgment upholds the Leonneti Act on patients' rights and end-of-life situations,[28] but the court has not identified any new main principles. With caution, the court restricts its control to the procedure that leads to stopping the artificial hydration and feeding, without saying if this stop could, per se, lead to a violation of the State's positive obligation to protect the right to life. To justify its restricted control, the court indicates that it has never ruled on the question, which is the subject of the present application.[29] Also, it states there is no consensus between the Council of Europe member states in favour of permitting the withdrawal of artificial life-sustaining treatment.[30] Thus, 'in this sphere concerning the end of life, as in that concerning the

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21 Guillaume Millerioux, PhD student in Law, Family Law Centre, Université Jean Moulin Lyon 3.

22 Council of State, 24 June 2014, no 375081; See G Millerioux, 'End of life: the case of Vincent Lambert (Council of state)' in Bill Atkin (ed), *International Survey of Family Law 2015 Edition* (Jordan Publishing, Bristol), p 113.

23 ECtHR, 5 June 2015, *Lambert and others v France*, req No 46043/14.

24 Ibid, see the analysis of the ECtHR on previous cases, §§ 93–95.

25 ECtHR, *Lambert and others v France*, § 102.

26 Ibid, § 105.

27 Ibid, § 112.

28 Patients' rights and end-of-life situations Act (no 2005–370), 22 April 2005; F Sudre, 'Brevet de conventionnalité pour la Loi Leonetti', *JCPG* no 25, 22 June 2015, p 732.

29 ECtHR, *Lambert and others v France*, § 136.

30 Ibid, § 147.

beginning of life, States must be afforded a margin of appreciation, not just as to whether or not to permit the withdrawal of artificial life-sustaining treatment and the detailed arrangements governing such withdrawal, but also as regards the means of striking a balance between the protection of patients' right to life and the protection of their right to respect for their private life and their personal autonomy'.[31] In its final considerations, the court reiterates that it is 'aware of the importance of the issues raised by the present case, which concerns extremely complex medical, legal and ethical matters'.[32] Such delicate questions justify the application of the subsidiary principle. In the end, the court declares 'that domestic law, as interpreted by the *Conseil d'État*, and the decision-making process, which was conducted in meticulous fashion in the present case',[33] are compatible with the requirements of art 2.

The Vincent Lambert case has rehashed the debate on euthanasia in France, especially by pointing to the limits of the Leonneti Act. After long debates in the French Parliament, the law no 2016-87 creating new rights in favour of patients and people in end-of-life situations, was adopted on 2 February 2016. The new Law is moderate and appears as a compromise with a humanitarian bent.[34] As proof of this, both sides (pro-euthanasia and pro-palliative care) are unsatisfied. The new law contains a few small reforms. The most noteworthy is the introduction of the possibility, for the patient, of asking for 'deep and continuous sedation' in certain cases.[35] Moreover, the new Law strengthens the binding nature of advance directives: they are effective until the patient revokes them and doctors have to respect the patient's wishes, unless the advance directives are manifestly inappropriate, or, in the case of medical emergency, until a complete medical evaluation has been made.[36] Finally, as a response to the Vincent Lambert case, the new art L1110–5–1 of the French Public Health Code considers that artificial feeding and hydration are 'treatments' that could be stopped if they establish an unreasonable obstinacy.

In other words, the new French law tries to put the patient at the heart of his or her own death, to guarantee an end-of-life compatible with the human dignity and to develop palliative care. This last point, especially, has to be improved. Nowadays, only 20% of the patients who need palliative care have access to it.[37]

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31 Ibid, § 148.
32 Ibid, § 180.
33 Ibid, § 181.
34 P Mistretta, 'De l'art de légiférer avec tact et mesure – À propos de la loi n° 2016-87 du 2 février 2016', *JCP G* no 8, 22 February 2016, doctr 240.
35 See art L1110–5–2 of the French Public Health Code.
36 See art L1111–11 of the French Public Health Code.
37 A Cheynet de Beaupré, 'Fin de vie : l'éternel mythe d'Asclépios', *Dalloz* 2016, p 472.

VIII LAW NEWS ON BIOETHICS[38]

(a) Donation and self-preservation of gametes

Besides the legislative evolution of French law regarding the issue of 'end of life',[39] we report the publication of Edict no 2015–1282 of 13 October 2015, which finally allows the application of one of the innovations from the bioethics law of 7 July 2011: the possibility of gamete donation by people who have not yet procreated. This broadening of the list of donors was accompanied by the right of self-preservation of gametes themselves: this ability, conditional upon a donation, is an exception to the principle of prohibition of self-preservation of gametes – a principle indeed maintained, despite sharp criticisms expressed from an ethical point of view. This decree, supplemented by an Order of 24 December 2015 'on the rules of good clinical and laboratory practices of medically assisted procreation', limits the scope of this cryopreservation right: it states, in particular, the minimum proportion of gametes to be given (not beyond five for egg donation and not beyond three collections for sperm donation) for self-preservation to be allowed.

The Law No 2016–41 of 26 January 2016 on 'modernization of our health system' (called 'Health law') also brought about several alterations to the French bioethics law, the main ones of which we report here.

(b) Research on gametes and embryos in vitro

Biomedical research in the context of medically assisted reproduction can now be performed on gametes intended to form an embryo or the in vitro embryo before or after transfer for gestation, if each parent consents.

(c) Organ harvesting and donation

French law has also experienced significant changes in the legal system of organ donation and organ harvesting from deceased adults: the new rule, coming into force on 1 January 2017, is the authorisation of such removal provided that the person has not made his refusal known during his lifetime. Was it not already the case? Yes and no. Let us explain: under the present law, the rule is a presumption of consent to the removal – a sort of 'alleged donation' – but the Code of Public Health states that 'If the doctor has no direct knowledge of the deceased's will, he must try to collect from relatives opposition to the donation of organs, expressed during his lifetime by the deceased, by any means …'.[40] This obligation on the doctor to seek the opinion of relatives on the question of the existence of a refusal expressed by the person during his lifetime results most often in practice in a direct seeking of the consent of his relatives to the

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[38] By Jézabel Jannot, PhD student in Law, Family Law Centre, Université Jean Moulin Lyon 3.

[39] See above Part VII on this point.

[40] Article L 1232–1, paragraph 3, of the Code of Public Health, in the version in force until 1 January 2017.

removal. However, this obligation disappears as a result of the text of the 'Health law'. In a context of the scarcity of organs available for transplant, it must be understood that, in absence of an explicit refusal by the person during his lifetime or revocation of this refusal, the presumption of consent to organ harvesting becomes in a manner of speaking irrebuttable, whereas before it was a simple presumption where the relatives could thwart the person and prove otherwise.

Behind these legislative developments, here and there, the real question addressed to the lawyer should not be overlooked: that of the need for thinking of ways of legally understanding the link – or, rather, the separation – between the individual and the body, between the individual and the constituents and products of the human body.

IX SIMPLIFICATION AND MODERNISATION OF FRENCH FAMILY LAW[41]

French family law gradually undergoes reforms in order to simplify itself and get modernised. If some useful changes were brought to the law of succession and gifts by the law of 16 February 2015, it is especially divorce and guardianship that were reformed by an Ordinance of 15 October 2015.

(a) Divorce law

First of all, it was a question of articulating when the Family Court can intervene and the procedure for the liquidation and sharing of the property interests of spouses. The objective was more especially to strengthen the liquidation powers of the judge hearing an application for divorce. The former version of art 267 of the Civil Code was not clear enough on the extent of these powers. The separation between divorce and the division of property of the spouses is now enshrined. However, it allows the divorce court to rule on all of the liquidation and division of property interests if it considers that, in the light of persistent disagreements between the spouses, no amicable solution is possible. For this, the law authorises the judge to decide, even *ex officio*, on the determination of the matrimonial regime. This power will, first, allow the spouses to conduct an amicable split, and secondly, the court to appreciate if there is any chance of a claim for a compensatory allowance. This clarification and reinforcement of the powers of the Family Court should improve the regulation of the consequences of divorce.

(b) Parental authority

Secondly, it deals with the rules of legal administration, that is to say, the prerogatives of parents about the patrimony of their minor children were

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simplified. Until now, the scope of the powers relating to the exercise of legal administration was variable depending on whether parental authority was exercised jointly by both parents or by one, two situations respectively referring to pure legal administration and legal administration under judicial supervision. In the second case, the judge's intervention was justified because of the unilateral exercise of parental authority. This system was considered stigmatising for single parents. The reform was therefore to remove legal administration under judicial control, and to restore equal treatment between families, based on a presumption of good property management of the juvenile or by his or her legal representatives. The reform aims to erase the judge and reflects, therefore, a certain confidence in the parent with sole custody. The intervention of the judge is now limited to acts that would present a risk of seriously affecting the patrimony of the minor. It also established a warning system that allows any parent, a third party or the public prosecutor to apply to the guardianship judge if he or she is aware of a risk situation for the property interests of the child.

Evolutions without great revolution in divorce, a small revolution in legal administration, this is the way we could describe the modifications brought by the order of 15 October 2015. The great revolution brought about by the text is undoubtedly in the creation of family empowerment.

X A NEW MEASURE FOR THE PROTECTION OF ADULTS: FAMILY EMPOWERMENT[42]

In principle, the family and the management of vulnerability form a solid duo. It is naturally to the family that we turn when weakness or disease affecting the autonomy of one of our own occurs. Moreover, art 415 of the French Civil Code provides that the protection of vulnerable people is *a must for families*. It is in this sense that the order of 15 October 2015 created a new tool, exclusively family related, for the protection of adults.

So far, judicial authorisation was reserved for spouses. Art 219 of the French Civil Code provides that, when a spouse is unable to express his or her will, the other can ask the judge to be empowered to represent that spouse in an act or series of acts in the exercise of powers under the matrimonial regime. Now, this prerogative is extended to all modes of conjugality and to descendants, ascendants and siblings.

This family empowerment is very different from this model. Much more than a simple extension, this is actually a real creation, the legal nature of which is not without raising some doubts. This new measure, which gives the person empowered more power than the power conferred by art 219 of the French Civil Code, is a mix of rules concerning the future protection mandate and that of guardianship. It borrows from the future protection mandate its liability

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regime (as it should have referred to art 421 of the Civil Code concerning judicial measures) and establishes the principle of conservation of the legal capacity of the protected person. The rest of the plan is largely inspired by the concept of guardianship.

It is the judge who fixes the extent of that power. It may be limited to certain acts or be general. It should be noted that, even if it is in the family, this measure is not trivial. It is a restrictive form of capacity, since the protected adult may act only within the limits of the powers granted to the authorised person. The acts committed in violation of this rule will be automatically void.

As for guardianship, the measure may not exceed 10 years renewable for a maximum of 20 years if the person's health condition requires. In addition to the terms by which the measure comes to an end or where the person's health status has made it unnecessary, it will end on the death of the protected person, a court decision ordering an ordinary measure of protection (maintenance of justice, guardianship or trusteeship) or, where empowerment is ordered only for certain acts, when they are done.

This new measure that complements the existing legal arsenal in French law has some advantages, but it also raises many questions and some concerns.

XI A NEW LAW ON ADAPTATION OF SOCIETY TO THE AGING OF THE POPULATION[43]

On Monday, 28 December 2015, after a lengthy decision-making process, the President of the French Republic enacted legislation that will meet the challenge of an aging population. That imminent major social issue requires structural adaptations. The question has never been taboo or ignored by the legislature or professionals. But, for the first time, all legal provisions regarding gerontology have been gathered in a same corpus, instead of just being a disparate mass of documents. This text aims to anticipate possible social and political consequences of aging. Indeed, in 2060, one-third of the French population will be more than 60 years old. Five million citizens will be over 85 years old. This legislation emphasises three key elements: anticipation, adaptation, and support for the loss of independence.

The first key element, anticipation, is intended to prevent and delay the loss of independence. It allows spotting and fighting social and medical inequalities. With old age, fragilities and pathologies lead inevitably to care-dependency. That is why this legislation intends to facilitate access to technical assistance and collective actions to ensure better nutrition, use of medicines and prevent suicide: getting ready for old age to avoid unnecessary suffering.

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[43] Sandra Simonelli, PhD student in Law, Family Law Centre, Université Jean Moulin Lyon 3.

The second key element, society adaptation, enables public policies to foresee rising life expectancy and to ensure healthy and dignified aging. To serve that purpose, two measures were taken.

First, this legislation intends to provide for adaptions to assist the mobility of elderly people, in particular when it comes to public transport.

Secondly, it highlights seniors' commitment to social activity and the protection of their rights as citizens. For example, a national civic service has been created which offers the opportunity for elderly people to work and involve themselves in community life. Also, the protection of elderly people is emphasised. Indeed, French legislators showed themselves very suspicious of intimate people abandoning those dependent old persons. There is a wish to reduce abuses and attempts of dishonest appropriation of their property and patrimony. That is why France intends to protect vulnerable people by generalising the incapacity to receive donations for specified persons. The text prohibits staff from medical or social establishments and health-care professionals from accepting donations, legacies or any financial advantages (art 911 Code civil). This prohibition includes physical persons but also entities (associations, corporations, etc). The legislation allows doctors to request prosecutors to take protective action (legal safeguard) when it appears that one of the patients needs protection due to deteriorated mental abilities (art L3111–6 Code de la santé publique).

Finally, the last key element aims to improve material support provided to people who are losing their independence, thanks to substantial financial resources to facilitate autonomy at home in a safe environment. In concrete terms we are talking about group housing will be developed so that vulnerable persons will no longer be left alone. Health-care professionals will support close relatives. Domestic help will be modernised and professionalised. For that purpose, a personalised financial allocation (benefit) to support autonomy was created. It ensures that people over 60 years can still live in their home whatever incomes they receive.

The government wishes for a better representation of elderly people and participation in the elaboration of public policy. For example, a national institution was created in order to study older people's standards of way of life. So, without a doubt, we are looking to follow this dynamic rhetoric for always more adaptation, reasonable anticipation and pragmatic accompaniments.

XII INTERNATIONAL SURROGACY AND THE COURT OF CASSATION: THE STEP-BY-STEP APPROACH[44]

In two decisions issued by the Plenary Assembly of the Court of Cassation on 3 July 2015,[45] the French Supreme Court has clarified the reception that must be granted to international surrogacy. These decisions are the result of a step-by-step evolution revealing the influence of the European Court of Human Rights (ECtHR) on French family law.

These cases concern the transcription into French civil status records of birth certificates made in Russia after a surrogacy. Here, the designated father is the French biological father, and the designated mother is the woman who gave birth. In these cases, these acts were neither illegal nor falsified, and the facts reported corresponded to the reality. That is why the Plenary Assembly allows the transcription of the aforementioned birth certificates. If this decision is not really a surprise, it is nonetheless new.

To revisit the course of history, it should first be recalled that surrogacy is clearly prohibited in France.[46] In response, some couples decided to take their chance abroad and come back with their new-born issue from a surrogate mother. The Supreme Court has decided to refuse the transcription of these birth certificates, on two legal bases: first, having regard to public order,[47] and then because of the fraud involved.[48] In response, some parents decided to apply to the European Court of Human Rights. This court decided, on 26 July 2014,[49] that France had violated art 8 of the European Convention that guarantees the right to respect for private and family life. If the meaning of this court's decisions is sometimes unclear, in this case the vast majority of the legal opinions expressly agreed on the fact that this violation was due to the non-recognition of the biological father, but does not concern the intended mother. In other words, the ECtHR seems to consider that France should recognise parentage corresponding to biological filiation, but does not solve the question of the 'intended parent'.

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44 By Amélie Panet, Assistant Professor at Université Jean Moulin Lyon 3, Family Law Centre, and Bastien Baret, PhD student in Law, Family Law Centre, Université Jean Moulin Lyon 3.

45 Cass Ass Plén 3 July 2015, No 14–21.323 and No 15–20.002, *D* 2015, 1819, note H Fulchiron et C Bidaud-Garon, 1438, obs I Gallmeister, 1481, édito S Bollée, et 1773, point de vue D Sindres; *AJ fam* 2015, 364, obs A. Dionisi-Peyrusse.

46 Article 16–7 of the Code civil: 'Toute convention portant sur la procréation ou la gestation pour le compte d'autrui est nulle' ('Every contract relating to procreation or gestation by way of surrogacy is void').

47 Civ 1re, 6 April 2011, no 10–19.053, no 09–66.486 et no 09–17.130.

48 Civ 1re, 13 Sept 2013, no 12–18.315 et no 12–30.138.

49 CEDH, 5e sect., 26 June 2014, no 65941/11, *Labassée*, et no 65192/11, *Mennesson*, *D* 2014. 1797, note F. Chénedé, 1773, chron H Fulchiron et C Bidaud-Garon, 1787, obs P Bonfils et A Gouttenoire, 1806, note L d'Avout, 2015. 702, obs F Granet-Lambrechts, 755, obs J-C Galloux, 1007, obs A Dionisi-Peyrusse, et 1056, obs H Gaudemet-Tallon ; *AJDA* 2014. 1763, chron L Burgorgue-Larsen ; *AJ fam* 2014. 499, obs B Haftel, et 396, obs A Dionisi-Peyrusse ; *Re crit DIP* 2015. 144, note S Bollée ; *RTD civ* 2014 616, obs J Hauser, et 835, obs J-P Marguénaud; *RDSS* 2014 887, note C Bergoignan Esper ; *JDI* 2014. Comm 16.

Following this decision, and despite the advice of some authors asking the domestic courts not to follow the European position,[50] the French Supreme Court considered in the cases studied that the surrogacy process does not forbid, by itself, the transcription of the birth certificates.

Thus, we can easily see the influence that the European Court of Human Rights in practice has by driving the change in the French Supreme Court's position. If the surrogacy process on principle prevented the transcription, this is no longer the case. However, these two decisions concern birth certificates that are in accordance with reality: where the designated father is the biological father and the designated mother is the woman who gave birth. Hence, the court explains that, in order to refuse the transcription, the Court of Appeal must prove that 'the act was irregular, falsified or that the facts reported do not correspond to the reality.' This proposition suggests that, in the case of an 'intended parent', the transcription can be refused. Nevertheless, uncertainty remains as no solution has been given yet in this kind of situation.

As a conclusion, we must point out that we may learn more about this question really soon. Indeed, such cases will be submitted to the Court of Cassation, as they have already made it to the Court of Appeal of Rennes. This Court of Appeal[51] was seized with the case of twins, born in the USA in November 2010. Their birth certificates, established by American authorities, mentioned intended parents, French spouses, as real, legal parents. The town hall of their French residence applied to the consular officer responsible for civil status, in order to obtain the transcription of birth certificates. As serious indications led the Public Prosecutor to think that the spouses resorted to surrogate motherhood, he refused the transcription. In a judgment released on 12 June 2014, the Tribunal de Grande Instance (Court of First Instance) of Nantes refused the transcription of the birth certificates, judging them tainted with a fraud, the French law considering that agreements regarding surrogate motherhood are absolutely null.

The Court of Appeal of Rennes, probably hearing the message from the Court of Cassation, dismissed the fraud theory. As a matter of fact, it is now admitted that an agreement for gestational surrogacy concluded between the intended parent and the surrogate mother does not prevent the transcription of a birth certificate which concerns a child born abroad, so long as the act was neither irregular, nor falsified; or that the facts reported correspond to the reality. The conditions of the birth should not be opposed to the child's interests, as the law makes no distinction among the modes of conception. However, the Court of Appeal stressed that maternal descent can be established only through the one who gave birth. The Californian birth certificates indicate the intended French mother as the mother, but this does not match the reality, as it is a Californian woman who gave birth. Moreover, the spouses made a judicial confession in accordance with art 1356 of the civil procedure code, as they admitted in their

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[50] F Chénedé, 'L'établissement de la filiation des enfants nés de GPA à l'étranger', *D* 2015, 1172.
[51] CA Rennes, 28 September 2015, JurisData 2015–021767.

records that they resorted to a surrogate. Consequently, the American birth certificates, mentioning false facts, cannot be transcribed into the French registers. In addition, and as the action of cancelling the birth certificate is not a status action, the Court of Appeal refused to order a genetic test to verify if the intended father, indicated in the birth certificates, was also the biological father of the twins.

What should we remember about this decision? The Court of Appeal confirmed the judgment, but substituted different reasoning, and this is the main point. The judgment was based on the fraud. As this reason was clearly rejected by the ECtHR and recently by the French Supreme Court, the Court of Appeal changed its stand. Following the advice of the Court of Cassation, the Court of Appeal proved that 'the act was irregular, falsified or that the facts reported do not correspond to the reality'. It confirmed that we are truly on a step-by-step approach, and that the French judges want to give minimal effect to the condemnation by the ECtHR.

XIII WRONG FILIATION AND CONSEQUENCES ON INHERITANCE[52]

In a case decided by the Court of Cassation on 10 June 2015,[53] parentage of a little boy – born in 1992 – had been established with his mother and his mother's husband by the presumption of husband's paternity.[54] The parentage had also been strengthened by the legal presumption of 'possession of status'.[55] Fourteen years later, his 'parents' divorced. In 2010, his mother informed the child that his putative father was not his real father, but her new husband was. Therefore, in 2011 the mother referred the matter to the state prosecutor to contest the paternity and obtain a DNA analysis with the authorisation of her child, the putative father and the real father. A few days later, the real father died. His inheritors decided to contest the action on paternity because of their rights in the succession.

The French Civil Code states: 'when the apparent status is consistent with the title, the action may be brought only by the child, his father, his mother or the person who alleges to be his real parent. The action lapses after 5 years from the day when the apparent status has ended or from the day when the parent vis-à-vis whom the bond of filiation is contested dies. No one, except the State prosecutor, may contest a filiation when the title consistent with the apparent

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[52] By Richard Vessaud, PhD student in Law, Family Law Centre, Université Jean Moulin Lyon 3.

[53] Cass civ 1ère, 10 June 2015, no 14–20.790, JurisData no 2015–013923.

[54] Art 312 of the French Civil Code: 'The father of a child born during marriage is the husband' (our translation).

[55] Art 311–1 of the French Civil Code establishes a legal presumption of parenthood when a bundle of evidence is brought. Such evidence is, for instance, the fact that the child bears the name of the alleged parents, or the fact that the alleged parent have paid for the child's education, or that the relationship between them is recognised as a parental relationship by the family and the whole of society.

status has lasted at least five years since the birth or the recognition'.[56] On 15 May 2014, the Court of Appeal of Aix-en-Provence declared the action non-lapsed and admissible, but devoid of legal basis regarding art 336 of the French Civil Code that states: 'a lawfully established parentage may be contested by the State prosecutor if evidence making it implausible can be found from the actions, or in the case of fraud in law'. The French Court of Cassation, on 10 June 2015,[57] annulled the challenged decision and referred the case to a different Court of Appeal. In fact, the Court of Cassation reproached the Court of Appeal of Aix-en-Provence for not having assessed if there was proportionality between the rights of the inheritor and the liberty of everybody to know their origins and establish parentage.[58]

Since the European Court of Human Rights decision *Jäggi v Switzerland*,[59] there is no problem to obtain a DNA analysis and determine who is the real father even if the real father died. But, a question thus arises: is it possible to establish filiation with all the inheritance consequences in this case? The debate is still open …

XIV AN ALLEGATION OF ADULTERY DOES NOT CONSTITUTE PUBLIC DEFAMATION[60]

The Court of Cassation, in a judgment of 17 December 2015, ruled that an allegation of adultery does not in itself constitute public defamation.[61] In this case, the authors of a book on the former companion of the French President (Ms T) revealed in an interview to a magazine that she would have had an affair for several years with another politician (Mr D) at a time when both were married. Believing that this information violated his honour and reputation, he brought defamation lawsuit against the authors to obtain compensation for damage. Both the trial judges and the Court of Appeal of Paris dismissed that action, and the applicant appealed on points of law to the Court of Cassation.[62] That appeal was dismissed. According to the Court of Cassation, 'lifestyle changes as well as moral evolution no longer justify the imputation of marital infidelity being a sufficient ground to harm the honour or reputation of a person'.

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56 Art 333 of the French Civil Code.

57 Cass civ 1ère, 10 June 2015, n°14–20.790.

58 This right can be highlighted by reference to art 8 of the ECHR that guarantees the right to respect for privacy and family life.

59 13 July 2006, No 58757/00.

60 By Philippe Guez, Professor at Université de Polynésie Française.

61 Cass Civ 1ère, 17 December 2015, No 14–29549, *D act* 4 January 2016, obs S Lavric; *D* 2016, 277, obs E Dreyer; *AJ fam* 2016, 109, obs B de Boysson ; *Gaz Pal* 23 February 2016, no 8, p 31, obs F Fourment.

62 The plaintiff would certainly have been successful in basing an action on art 9 of the Civil Code, which protects respect for private life. Certainly, the right to respect for private life can be balanced with the public's right for information. In this case, no need for information seemed to justify the revelation of an affair between a politician and a journalist that had been over for several years.

The position taken by the Court of Cassation can be explained by reasons of legal technique. For defamation, the main element of the offence is constituted by the existence of the infringement of honour or reputation. However, this element is objectively understood by the jurisprudence. If a fact is admitted by society, it will not be considered defamatory even if it is perceived as such by the person who considers him or herself a victim of defamation. The Court of Cassation had to clarify if, nowadays, an imputation of adultery is subject to stigma so as to characterise it as defamation. If it considered that this was not the case, the Court decision does not mean that any imputation concerning sexuality does not constitute defamation. In this case, the liaison alleged to have been conducted by the plaintiff was not presented pejoratively. Otherwise, defamation seems likely to be upheld. Thus in a judgment of 25 February 2014, the Court of Cassation ruled that attributing to a person a 'dissolute character, an immoderate taste for alcohol, and a penchant for debauchery' violated the honour and the reputation of the plaintiff.[63]

As an initial reaction, saying that adultery is not contrary to the common representation of morality in French society today may surprise. The duty of fidelity between spouses is indeed always an obligation of marriage (art 212 Civil Code). And, moreover, it is only within marriage that this obligation is legally imposed. No duty of fidelity is imposed by law on unmarried cohabitation (art 515-8 Civil Code) or a contract of civil partnership (art 515–1 Civil Code).[64]

But if the obligation of fidelity still remains one of the defining traits of marriage, its importance is less than in the past.[65] Since 1975, adultery is not a criminal offence and no longer automatically provides legal grounds for divorce. Certainly, often an extra-marital relationship may justify the divorce based on fault and lead to damages. However, adultery is not always a cause for divorce. It depends on the circumstances in which it was committed. Sometimes infidelity may be excused, for example when spouses were no longer living together for a long time,[66] when one of them is a victim of domestic violence or when the divorce procedure drags on.[67]

Moreover, outside of the relationship between spouses, marital infidelity is almost of no consequence. Thus, the mere fact of having an affair with a married person is not a fault likely to engage the civil responsibility of its

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63 Cass Crim, 25 February 2014, No 13–80826, *Dr pén* 2014, comm 59, note M Véron.

64 CA Montpellier, 4 January 2011, No 10/00781, *Dr fam* 2011, comm 89, note V Larribau-Terneyre; CA Rennes, 5 May 2015, No 211, 14/01737, *Dr fam* 2015, comm 140, note J-R Binet.

65 C Philippe, 'Quel avenir pour la fidélité ?', *Dr fam* 2003, chron 16 and 'L'article 212 du Code civil: du XX^{e} au XXI^{e} siècle', in *De code en code – Mélanges en l'honneur du doyen Georges Wiederkher,* Dalloz, 2009, p 627; L Antonini-Cochin, 'Le paradoxe de la fidélité', *D* 2005, p 23; A Mignon-Colombet, 'Que reste-t-il du devoir de fidélité entre époux?', *LPA* 31 janv 2005, n° 21, p 6; E Bazin, 'La fidélité dans les couples', *Gaz Pal* 23 fév 2012, no 54, p 9.

66 See CA Aix-en-Provence, 11 December 2014, No 14/032142, *Dr fam* 2015, comm 47, obs A-Cl Réglier.

67 See CA Toulouse, 16 November 1991, RTD civ 1992, 103, obs J Hauser.

author.[68] A donation granted following an adulterous relationship is now perfectly valid.[69] The same applies to the contract between a dating agency and a married person.[70]

This development led some to question whether the obligation of fidelity should always be present as a matter of public policy in marriage.[71] Some rulings have admitted that the spouses could mutually waive the duty of fidelity during a divorce proceeding.[72] If such a development was implemented, marriage would look more like other forms of legally recognised unions. The marriage merely would be a method of organising the common life of two people, which it already tends to have become.

XV ENTRY INTO FORCE OF THE 'SUCCESSION REGULATION'[73]

The Regulation (EU) no 650/2012 of the European Parliament and of the Council of 4 July 2012 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Acceptance and Enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, known as the 'Succession Regulation', entered into force on 16 August 2012. However, it applies to the succession of persons who have died on or after 17 August 2015.

For many specialists of private international law, this instrument is a genuine revolution. It aims to facilitate the proper functioning of the internal market by removing the obstacles to the free movement of persons who currently face difficulties in asserting their rights in the context of a succession having cross-border implications. It also enables citizens to plan their succession in advance.

The scope of the Regulation includes all civil-law aspects in relation to the succession to the estate of the deceased, namely all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary

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68 Cass Civ 2st, 5 July 2001, No 99–21.445, *RTD civ* 2001, 856, obs J Hauser and 893, obs P Jourdain; *JCP G* 2002, II, 10139, note Houtcieff; *D* 2002, 1318, obs Ph Delebecque.

69 Cass Civ 1ère, 3 February 1999, No 96–11.946, *D* 1999, 267, rapp X Savatier, note J-P Langlade-O'Sughrue; *JCP G* 1999, II, 10083, note M Billiau and G Loiseau; *RTD civ* 1999, 364, obs J Hauser and 383, obs J Mestre and 892, obs J Patarin; Cass, ass plén, 29 October 2004, No 03–11.238, *D* 2004, 3175, note D Vigneau; *JCP G* 2005, II, 10011, note F Chabas ; *AJ fam* 2005, 23, obs F Bicheron; *RTD civ* 2005, 104, obs J Hauser.

70 Cass Civ ère, 4 November 2011, No 10–20.114, *AJ fam* 2011, 613, obs F Chénedé; *JCP G* 2012, no 9, note D Bakouche; *D* 2012, 59, note R Libchaber; *Dr fam* 2012, comm no 21, note D Vigneau.

71 C Philippe, above n 66; L Antonini-Cochin, above n 66.

72 TGI Lille, JAF, 26 November 1999, *D* 2000, *jur* 254, note X. Labbée; *RTD civ* 2000, 296, obs Hauser.

73 Eric Fongaro, Assistant Professor at Université de Bordeaux, Research Institute on Business Law and Family Property and Succession Law.

transfer under a disposition of property upon death or a transfer through intestate succession. However, the instrument does not apply to revenue matters. At present, it applies to all member states of the European Union, except Denmark, the United Kingdom and Ireland.

In light of the increasing mobility of citizens, in order to ensure the proper administration of justice within the Union, and in order to ensure that a genuine connecting factor exists between the succession and the Member State in which jurisdiction is exercised, the Regulation provides that the general connecting factor for the purposes of determining both jurisdiction and the applicable law is the habitual residence of the deceased at the time of death. Thus, art 4 states that 'The courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole'. With respect to applicable law, the application of the Regulation is universal. This means that any law designated as a result of the application of the Regulation must be applied whether or not it is the law of a Member State. If the deceased did not choose a law to govern his or her succession and unless otherwise provided for by the Regulation, the law applicable to the succession as a whole will be the law of the state in which the deceased had his or her habitual residence at the time of death. But, where by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a state other than the state in which the deceased was habitually resident, the law applicable to the succession will be the law of that other state. This exception is an example of what is called 'the proper law' method.

Further, one of the most revolutionary provisions of the Regulation is found in relation to choice of law. According to art 22, 'A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death'. Also, a person having multiple nationalities may choose the law of any of the states whose nationality he or she possesses. The Regulation specifies that the choice of law must be made expressly by way of a declaration in the form of a disposition of property upon death or must be demonstrated by the terms of such a disposition.

The Regulation also contains provisions that are most welcome, as they allow for the determination of the law applicable to the dispositions of property upon death. Thus, it is to be noted that, whilst such dispositions (from a succession-based analysis) are meant to be governed by the law applicable to the succession, the Regulation, through the connecting factors it provides, may in some circumstances allow the law applicable to the succession to be modified. Thus, not only does the Regulation facilitate estate planning strategies under the control of the law applicable to the succession, but it also facilitates strategies which lead to direct control of the law applicable.

In relation to recognition, enforceability and enforcement of decisions, the principle is that a decision given in a member state must be recognised in the

other member states without any special procedure being required, but decisions given in a member state and enforceable in that state shall be enforceable in another member state when, on the application of any interested party, they have been declared enforceable there in accordance with the procedure provided for in arts 45 to 58. This procedure is the same as the one found in the regulation 'Brussels I'.

Authentic instruments constitute another specific provision in the 'Succession Regulation'. According to art 59, 'An authentic instrument established in a Member State shall have the same evidentiary effects in another Member State as it has in the Member State of origin, or the most comparable effects, provided that this is not manifestly contrary to public policy in the Member State concerned'.

Finally, the Regulation creates a European Certificate of Succession. This certificate, which will be issued for use in another member state, and which must not replace internal documents used for similar purposes in the member states, was created for the benefit and use of heirs, legatees having direct rights in the succession, as well as executors of wills or administrators of the estate who, in another member state, need to invoke their status or to exercise respectively their rights as heirs or legatees and/or their powers as executors or administrators.

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INDIA

MAINTENANCE, NON-RESIDENT INDIANS AND THE LAW

Anil Malhotra and Ranjit Malhotra[*]

Résumé

La législation relative aux obligations alimentaires est complexe en Inde. On la trouve dans différentes lois et elle peut dépendre de la religion des personnes. De ce fait, une législation différente s'applique aux hindous, aux musulmans et aux chrétiens, et il existe également des les lois laïques. L'obligation alimentaire peut inclure des dispositions relatives au logement des femmes et des enfants, selon un standard qui correspond au logement familial des parties lorsqu'elles vivaient ensemble. Le montant de l'obligation est déterminé en tenant compte des besoins du demandeur et des moyens des parties. Le paiement peut prendre la forme d'une rente ou d'un capital. Pour les parties vivant hors de l'Inde, qui sont nombreuses, le paiement peu être ordonné dans la monnaie étrangère. En plus de la législation pertinente, le présent article examine la jurisprudence récente sur le sujet.

I EXISTING FAMILY LAW LEGISLATION IN INDIA

It may be relevant to give a background on the existing Indian family law, keeping in mind that there is no uniform civil matrimonial legislation in India governing all religions, caste, communities, denominations and groups in India. There being no uniform civil or matrimonial code, all Indian citizens are governed by their respective codified personal statutory laws enacted or approved by Parliament.

(a) The Indian background

The Constitution of India enacted on 26 November 1949 resolved to constitute India as a Union of States and a Sovereign, Socialist, Secular, Democratic Republic. Today, a population of over one billion Indians live in 29 States and seven Union Territories within India besides about 25 million Indians who reside in foreign jurisdictions and are called Non-Resident Indians. Within the territory of India spread over an area of 3.28 million square kilometres, the large Indian population comprised of multicultural societies professing and

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practising different religions and speaking different local languages coexist in harmony in one of the largest democracies in the world.

The Indian Parliament at the helm of affairs legislates on central subjects in the Union and Concurrent lists and State legislatures enact laws pertaining to State subjects as under 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 to its citizens 'Fundamental Rights' which can be enforced directly in the respective High Courts of the States or directly in the Supreme Court of India by issue of prerogative writs under arts 226 and 32 respectively of the Constitution of India. Under the Constitutional scheme, amongst others, freedom of religion and the right to freely profess, practise and propagate religion are sacrosanct and are thus enforceable by a prerogative writ issued by any of the High Courts or the Supreme Court.

Simultaneously Part IV of the Indian Constitution lays down 'Directive Principles of State Policy' which are not enforceable by any court but are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles while making laws. Under art 44 of the Constitution in this Part, the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. However, realistically speaking, to date a uniform civil code remains an aspiration which India has yet to achieve and enact. Hence, there is no uniform matrimonial or civil law statutorily enacted by Parliament in India and Indian Citizens are governed by separate codified personal laws. All matrimonial matters are adjudicated at the first level in Family Courts or a District Court (if there is no Family Court) exercising territorial and subject matter jurisdiction as per relevant statutes, being the principal courts of original jurisdiction in all matrimonial matters. Against the decisions rendered by these courts, appeals are preferred to the High Court concerned with exercising territorial jurisdiction within the specific States in which these Family Courts or District Courts are situated. Against the decisions rendered by the respective High Courts, final appeals can be instituted in the Supreme Court of India whose judgments are final and applicable in all courts throughout the territory of India. However, the Supreme Court of India is not bound by its own decisions and can differ, vary, confirm or change its view in later decisions.

(b) Prevailing statutory family laws of different communities

India is a land of diversities with several religions with Hindus dominating with the largest number. The oldest part of Indian legal system is the personal laws

governing the Hindus and the Muslims. The Hindu personal law has undergone changes by a continuous process of codification. The process of change in society has brought changes in law reflecting the changed social conditions and attempts the solution of social problems by new methods in the light of experience of legislations in other countries of the world. The Muslim personal law has been comparatively left untouched by legislations over a period of time.

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 as hereunder.

(a) The main marriage law legislation in India applicable to the majority population constituted of Hindus is known as the Hindu Marriage Act 1955 (HMA), which is an Act to amend and codify the law relating to marriage among Hindus. It applies to parties who are Hindus by religion. 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 to be provided 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 (SMA), as an Act to provide a special form of marriage in certain cases, and for the registration of such and certain other marriages and for divorces under this Act. This enactment of solemnising marriage by registration is resorted to by Hindus, non-Hindus and foreigners marrying in India who opt out of the ceremonial marriage under their respective personal laws. Registration is compulsory under this enactment. Divorce can also be

obtained by non-Hindus under this Act. This legislation governs people of all religions and communities in India, irrespective of their personal faith. Likewise, under the Foreign Marriage Act 1969, a person has only to be a citizen of India to have a marriage solemnised under this Act outside the territorial limits of India.

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

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

(e) The Muslim Personal Law (Shariat) Application Act 1937, 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 uniform designated civil and criminal judicial courts within every State in India, which work 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 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 under the Muslim religion 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 Indian judicial system applicable to all.

Accordingly, maintenance *pendente lite* (maintenance during the pendency of the matrimonial litigation) and litigation expenses, permanent alimony and maintenance, maintenance of children as also settlement/division of matrimonial property/home as also rights of residence in the matrimonial home will be examined in this chapter in the light of all personal laws currently prevailing in India, besides looking at the parallel provisions for these heads under the Special Marriage Act 1954 (SMA) and other laws referred to above. It may be reiterated that the SMA is applicable between any two persons who fulfil the conditions of solemnisation of special marriages under the SMA, irrespective of religion, nationality, caste, creed or faith. It may be repeated that there is no universal matrimonial civil law in India enacted by Parliament or

uniform civil code applicable to all persons or citizens in India, and hence there is no reference or discussion with regards to any uniform matrimonial civil law in India, as there is no such Code.

II MAINTENANCE UNDER FAMILY LAWS IN INDIA

The wife is entitled to maintenance from the husband, as is invariably the case made out under s 24 or 25 of the Hindu Marriage Act, or s 37 of the Special Marriage Act. Section 125, CrPC gives the wife an additional claim for maintenance, irrespective of any matrimonial proceedings under the personal laws of the parties or the Special Marriage Act, as the case may be. The statutory provisions under various laws in India may be summarised as hereunder.

(a) Position of Maintenance under Personal Laws and Special Marriage Act

(i) Position of maintenance under Hindu Laws

In Hindu Law, there are two statutes, which provide for maintenance, viz, the Hindu Marriage Act 1955 (HMA) and the Hindu Adoptions & Maintenance Acts 1956 (HAMA).

Position of maintenance under the Hindu Marriage Act (HMA)

Section 24 of the HMA provides for interim maintenance and states:

> 'Maintenance *pendente lite* and expenses of proceedings. Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable.
>
> Provided that the application for the payment of the expenses of the proceeding and such monthly sum during the proceeding, shall, as far as possible, be disposed of within sixty days from the date of service of the notice on the wife or the husband, as the case may be.'

Section 25 of the HMA dealing with permanent alimony and maintenance, to be decided at the time of passing a decree or subsequently, reads as follows:

> 'Permanent alimony and maintenance. (1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his

> maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and the property of the applicant, the conduct of the parties and other circumstances of the case, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.
>
> (2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.
>
> (3) If the court is satisfied that the party in whose favour an order has been made under this Section has remarried, or if such party is the wife, that she has not remained chaste, or if such party is the husband, that he has had sexual intercourse with any women outside the wedlock, it may, at the instance of the other party, vary, modify or rescind any such order in such manner as the court may deem just.'

Position of maintenance under Hindu Adoptions and Maintenance Act

A Hindu wife has the advantage of an additional statute, the Hindu Adoptions and Maintenance Act 1956 (HAMA). Under s 18 of the HAMA, a Hindu wife is entitled to live separately from her husband without forfeiting her claim to maintenance, provided her separate living is justified which means that the husband:

(i) is guilty of desertion;
(ii) has treated her with cruelty;
(iii) is suffering from a virulent form of leprosy;
(iv) has any other wife living;
(v) keeps a concubine in the same house, or is living or habitually resides with a concubine elsewhere;
(vi) has ceased to be a Hindu by conversion to another religion; or
(vii) if there is any other cause justifying living separately.

The section provides two specific bars which would disentitle a wife from claiming maintenance under this Act: (i) if she is unchaste; or (ii) if she ceases to be a Hindu by conversion to another religion.

(ii) Position of maintenance under the Special Marriage Act (SMA)

This is a secular law applicable to all those persons who are married in India under this Act, irrespective of their caste, community, nationality or religion. Section 36 and 37 of the SMA also provides for maintenance *pendente lite* other than permanent alimony and maintenance for the wife, respectively. Unlike the Hindu Marriage Act 1955, there is no provision in the SMA for maintenance for the husband. The sections read as follows:

'Section 36. Alimony *pendente lite*.Where in any proceeding under Chapter V or Chapter VI it appears to the district court that the wife has no independent income sufficient for her support and the necessary expenses of the proceeding, it may, on the application of the wife, order the husband to pay her the expenses of the proceeding, and weekly or monthly during the proceeding such sum as, having regard to the husband's income, it may seem to the court to be reasonable.

Provided that the application for the payment of the expenses of the proceeding and such weekly or monthly sum during the proceeding under Chapter V or Chapter VI, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the husband.

Section 37. Permanent alimony and maintenance. (1) Any court exercising jurisdiction under Chapter V or Chapter VI may, at the time of passing any decree or at any time subsequent to the decree, on application made to it for the purpose, order that the husband shall secure to the wife for her maintenance and support if necessary, by a charge on the husband's property such gross sum or such monthly or periodical payment of money for a term not exceeding her life, as, having regard to her own property, if any, her husband's property and ability, the conduct of the parties and other circumstances of the case, as it may seem to the court to be just.

(2) If the district court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as it may seem to the court to be just.

(3) If the district court is satisfied that the wife in whose favour an order has been made under this Section has remarried or is not leading a chaste life, it may, at the instance of the husband, vary, modify or rescind any such order and in such manner as the court may deem just.'

(iii) Position of maintenance under Parsi Law

The Parsi Marriage and Divorce Act 1936 provides for maintenance *pendente lite* and for permanent alimony and maintenance. It is significant to note that, prior to Amendment Act 5 of 1988, only a wife was entitled to maintenance under the provisions of the Act. After the Amendment the provision has been brought at par with the Hindu Marriage Act 1955 and now even a husband can seek maintenance. The relevant sections of this enactment provide for maintenance as follows:

'Section 39. Alimony *pendente lite*. Where in any suit under this Act, it appears to the Court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the suit, it may, on the application of the wife or the husband, order the defendant to pay to the plaintiff, the expenses of the suit, and such weekly or monthly sum, during suit, as having regard to the plaintiff's own income and the income of the defendant, it may seem to the court to be reasonable.

Provided that the application for the payment of the expenses of the suit and such weekly or monthly sum during the suit, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the wife or the husband, as the case may be.

Section 40. Permanent alimony and maintenance. (1) Any Court exercising jurisdiction under this Act may, at the time of passing decree or at any time subsequent thereto, on an application made to it for the purpose by either the wife or the husband, order that the defendant shall pay to the plaintiff for her or his maintenance and support, such gross sum or such monthly or periodical sum, for a term not exceeding the life of the plaintiff as having regard to the defendant's own income and other property, if any, the income and other property of the plaintiff, the conduct of the parties and other circumstances of the case, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the movable or immovable property of the defendant.

(2) The Court, if it is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-Section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.

(3) The Court if is satisfied that the party in whose favour an order has been made under this Section has remarried or, if such party is the wife, that she has not remained chaste, or if such party is the husband, that he had sexual intercourse with any woman outside the wedlock, it may, at the instance of the other party, vary, modify or rescind any such order in such manner as the court may deem just.

Section 41. Payment of alimony to wife or to her trustee. In all cases in which the Court shall make any decree or order for alimony it may direct the same to be paid either to the wife herself, or to any trustee on her behalf to be approved by the Court or to a guardian appointed by the Court and may impose any terms of restrictions which to the Court may seem expedient, and may from time to time, appoint a new trustee or guardian, if for any reason it shall appear to the Court expedient so to do.'

(iv) Position of maintenance under Christian Law

Provisions for maintenance under the Christian Law are contained in the Indian Divorce Act 1869 as amended in 2001. The relevant sections in this regard are:

'Section 36. Alimony *pendente lite*. In any suit under this Act, whether it be instituted by a husband or a wife, and whether or not she has obtained an order of protection, the wife may present a petition for expenses of the proceedings and alimony pending the suit.

Such petition shall be served on the husband, and the court, on being satisfied of the truth of the statements therein contained, may make such order on the husband for payment to the wife of expenses of the proceedings and alimony pending the suit as it may deem just.

Provided that the petition for the expenses of the proceedings and alimony pending the suit shall, as far as possible, be disposed of within sixty days of service of such petition on the husband.

Section 37. Power to order permanent alimony. Where a decree of dissolution of the marriage or a decree of judicial separation is obtained by the wife, the District Court may order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it thinks reasonable, and for that purpose may cause a proper instrument to be executed by all necessary parties.

Power to order monthly or weekly payments. In every such case the Court may make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the court may think reasonable.

Provided that if the husband afterwards from any cause becomes unable to make such payments, it shall be lawful for the court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order wholly or in part, as to the court seems fit.

Section 38. Court may direct payment of alimony to wife or to her trustees. In all cases in which the court makes any decree or order for alimony it may direct the same to be paid either to the wife herself or to any trustee on her behalf to be approved by the court and may impose any terms or restrictions, which to the court seem expedient and may from time to time appoint a new trustee if it appears to the court expedient so to do.'

(v) Position of maintenance under Muslim Law

The personal law statutes governing a Muslim woman's right to maintenance are the Dissolution of Muslim Marriages Act 1939 and the Muslim Women (Protection of Rights on Divorce) Act 1986. The former Act provides for grounds under which a women married under the Muslim law can seek dissolution of the marriage. One of the grounds provided is that 'the husband has neglected or has failed to provide for her maintenance for a period of 2 years', as under s 2(ii) of the Dissolution of Muslim Marriages Act 1939. The latter Act, as its very title indicates, makes provision for protection of rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands, which includes right of maintenance as well. Section 2(ii) of the Dissolution of Muslim Marriages Act 1939 is quoted as hereunder for purposes of ready reference:

'2. Grounds for decree for dissolution of marriage.

A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:

i. …

ii. that the husband has neglected or has failed to provide for her maintenance for a period of two years.'

The Muslim Women (Protection of Rights on Divorce) Act 1986, which is an Act to protect the rights of Muslim women who have been divorced by or have obtained a divorce from their husbands, provides for making of an order for payment of maintenance under s 3 and 4 of this Act by making an application to a Magistrate in the area where the divorced woman unable to maintain herself resides. This is apart from the right of the Muslim Woman to claim *Mahr* under s 3 of this Act which provides for *Mahr* or other properties of Muslim woman to be given to her at the time of divorce by her former husband and which can also be enforced by making an application to a Magistrate. In this regard s 3 and 4 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 is as follows:

'3. *Mahr* or other properties of Muslim woman to be given to her at the time of divorce.—

(1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to—
   (a) a reasonable and fair provision and maintenance to be made and paid to her within the *iddat* period by her former husband;
   (b) where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;
   (c) an amount equal to the sum of *mahr* or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law; and
   (d) all the properties given to her before or at the time of marriage or after the marriage by her relatives or friends or the husband or any relatives of the husband or his friends.

(2) Where a reasonable and fair provision and maintenance or the amount of *mahr* or dower due has not been made or paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, *mahr* or dower or the delivery of properties, as the case may be.

(3) Where an application has been made under sub-section (2) by a divorced woman, the Magistrate may, if he is satisfied that—
   (a) her husband having sufficient means, has failed or neglected to make or pay her within the *iddat* period a reasonable and fair provision and maintenance for her and the children; or
   (b) the amount equal to the sum of *mahr* or dower has not been paid or that the properties referred to in clause (d) of sub-section (1) have not been delivered to her,

   make an order, within one month of the date of the filing of the application, directing her former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as fit and proper having regard to the needs of the divorced

woman, the standard of life enjoyed by her during her marriage and the means of her former husband or, as the case may be, for the payment of such *mahr* or dower or the delivery of such properties referred to in clause (d) of sub-section (1) to the divorced woman:

Provided that if the Magistrate finds it impracticable to dispose of the application within the said period, he may, for reasons to be recorded by him, dispose of the application after the said period.

(4) If any person against whom an order has been made under sub-section (3) fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for levying the amount of maintenance or *mahr* or dower due in the manner provided for levying fines under the Code of Criminal Procedure, 1973 (2 of 1974) and may sentence such person, for the whole or part of any amount remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one year or until payment if sooner made, subject to such person being heard in defence and the said sentence being imposed according to the provisions of the said Code.

4. Order for payment of maintenance.—

(1) Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force, where the Magistrate is satisfied that a divorced woman has not re-married and is not able to maintain herself after the *iddat* period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in his order:

Provided that where such divorced woman has children, the Magistrate shall order only such children to pay maintenance to her, and in the event of any such children being unable to pay such maintenance, the Magistrate shall order the parents of such divorced woman to pay maintenance to her:

Provided further that if any of the parents is unable to pay his or her share of the maintenance ordered by the Magistrate on the ground of his or her not having the means to pay the same, the Magistrate may, on proof of such inability being furnished to him, order that the share of such relatives in the maintenance ordered by him be paid by such of the other relatives as may appear to the Magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order.

(2) Where a divorced woman is unable to maintain herself and she has no relative as mentioned in sub-section (1) or such relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the second proviso to sub-section (1), the Magistrate may, by order direct the State Wakf Board established under section 9 of the Wakf Act, 1954 (29 of 1954), or under any other law for the time being in force in a State, functioning in the area in which the woman resides, to pay such maintenance as determined by him under sub-section (1) or, as the case may

> be, to pay the shares of such of the relatives who are unable to pay, at such periods as he may specify in his order.'

III DIVORCED WIFE'S RIGHT TO RESIDENTIAL ACCOMMODATION

The Bombay High Court in two rulings *Ajit Bhagwandas Udeshi v Kumud Ajit Udeshi*[1] and *Sunita Shankar Salvi v Shankar Laxman Salvi* held that the divorced wife cannot be left without a roof over her head. In *Udeshi*, the tenancy of the flat was for the benefit of the family and the wife occupied it as member of the family. *Salvi* is important from the point of view that, irrespective of the financial contribution or joint ownership on record, the courts in India are concerned about providing residential accommodation to a divorced wife who has no resources of her own.

In *Komalam Amma v Kumara Pillai Raghavan Pillai*,[2] the Supreme Court of India endorsed the right of a woman to a residence as included in the general term 'maintenance'. The Apex Court elaborated on the concept of maintenance as follows:[3]

> '9. Maintenance, as we see it, necessarily must encompass a provision for residence. Maintenance is given so that the lady can live in the manner, more or less, to which she was accustomed. The concept of maintenance must, therefore, include provision for food and clothing and the like and take into account the basic need of a roof over the head. Provision for residence may be made either by giving a lump sum in money, or property in lieu thereof. It may also be made by providing, for the course of the lady's life, a residence and money for other necessary expenditure. Where provision is made in this manner, by giving a life interest in property for the purposes of residence, that provision is made in lieu of a pre-existing right to maintenance and the Hindu lady acquires far more than the vestige of title which is deemed sufficient to attract Section 14(1).'

Basically, the law in the Indian jurisdiction relating to the concept of maintenance for the wife under the provisions of the HMA 1955 and the HAMA 1956 includes the amount of maintenance given to her to generally sustain the same lifestyle to which she was accustomed. As will be noticed, this view is also reiterated in the ruling of the Supreme Court of India. Furthermore, the judgment reiterated the position of law as enunciated by the Supreme Court of India in one of its earlier judgments of the year 2005. This particular judgment of 2005 very succinctly elaborates on the concept of maintenance as statutorily provided under the provisions of the HAMA 1956:[4]

> '12. In *B.P. Achala Anand Vs. S. Appi Reddy and Anr* (2005 (2) SCALE 105), it was observed as follows:

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1 *Ajit Bhagwandas Udeshi v Kumud Ajit Udeshi* AIR 2003 Bombay 120.
2 *Komalam Amma v Kumara Pillai Raghavan Pillai* AIR 2009 SC 636.
3 At para 9 at p 637.
4 At para 12 at page 638.

> "Having said so generally, we may now deal with the right of a wife to reside in the matrimonial home under personal laws. In the factual context of the present case, we are confining ourselves to dealing with the personal law as applicable to Hindus as the parties are so. A Hindu wife is entitled to be maintained by her husband. She is entitled to remain under his roof and protection. She is also entitled to separate residence if by reason of the husband's conduct or by his refusal to maintain her in his own place of residence or for other just cause she is compelled to live apart from him. Right to residence is a part and parcel of wife's right to maintenance. The right to maintenance cannot be defeated by the husband executing a will to defeat such a right (See: MULLA, *Principles of Hindu Law*, Vol. I, 18th Ed. 2001, paras 554 and 555). The right has come to be statutorily recognized with the enactment of the Hindu Adoption and Maintenance Act, 1956. Section 18 of the Act provides for maintenance of wife. Maintenance has been so defined in clause (b) of Section 3 of the Hindu Adoption and Maintenance Act, 1956 as to include therein provision for residence amongst other things. For the purpose of maintenance the term 'wife' includes a divorced wife."'

Hence, it is clear from the case-law analysis that the right of a wife to get maintenance from her husband also encompasses a right of residence either in the matrimonial home or a separate residence. Furthermore, the estranged wife along with her maintenance claim can also stake a claim for her right to separate residence from her husband in light of the settled position of law. Out of abundant caution, it is equally important to refer to the provisions of the Protection of Women from Domestic Violence Act 2005 (Domestic Violence Act 2005 or DVA 2005), which is legislation very favourable to women rights in actual implementation, and is certainly not advantageous where the alleged erring spouse is a husband.

IV DISPOSAL OF PROPERTY UNDER THE PROVISIONS OF THE HINDU MARRIAGE ACT 1955 AND PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT 2005

There is no talk of division of assets in Indian divorce laws. Financial settlements are limited to paying maintenance. On this aspect of the matter, both the HMA 1955 and the Special Marriage Act 1954 (SMA) are gender-neutral, allowing the spouse with the smaller income to seek maintenance. However, there are some provisions under the Indian laws which talk about the division of properties between the parties on divorce. Section 27 of HMA 1955 empowers the court to adjudicate upon the division and distribution of the property of the divorced couple at the time of the passing of the divorce decree, and is reproduced below for ease of reference:

> **'27. Disposal of property**
>
> In any proceeding under this Act, the court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and the wife.'

The Delhi High Court held in *Subhash Lata v VN Khanna*[5] that s 27 of the Act concerns only property presented at or about the time of marriage, which is alleged to belong jointly to both the spouses. It is a pre-condition for getting relief that such property must belong jointly to both the spouses.

However, many High Courts have differently interpreted s 27 of the HMA 1955 and have elaborated the scope of the application of the section. Some of the judgments interpreting s 27 of the HMA are referred as hereunder.

The Punjab and Haryana High Court held in *Inderjit Singh v Manjit Kaur*[6] that no order under s 27 can be passed with the respect to the property which exclusively belongs to the wife. A Division Bench of the Allahabad High Court in *Hemant Kumar Agrahari v Lakshmi Devi*[7] held that s 27 of the HMA 1955 does not confine or restrict the jurisdiction of matrimonial courts to deal only with the joint property of the parties, which is presented at or about the time of marriage but also permits disposal of exclusive property of the parties provided they were presented at or about the time of marriage. Hence, the court has the right to deal with the property of the parties acquired jointly at or about the time of the marriage and also with the exclusive property of the parties presented at or about the time of the marriage with a clear exception to the '*istridhan*' (woman's property given to her at time of marriage). A court has no right to pass orders regarding the '*istridhan*' of the woman as stated above.

Furthermore, ss 17 and 19 of the DVA provide for the right of a woman to reside in her matrimonial home when in a domestic relationship and empowers the courts to provide for residential accommodation for the aggrieved spouse in cases where the domestic violence is proved. Sections 17 and 19 of the DVA 2005 read as follows:

> **'SECTION 17 OF DOMESTIC VIOLENCE ACT, 2005:**
>
> SECTION 17: Right to reside in a shared household:
>
> (1) Notwithstanding anything contained household: in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same.

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5 *Subhash Lata v. VN Khanna* AIR 1992 Delhi 14.
6 *Inderjit Singh v Manjit Kaur* 1987 (2) *Hindu Law Reporter* 496.
7 *Hemant Kumar Agrahari v Lakshmi Devi* AIR 2004 All 126 (DB).

(2) The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law.'

and

'SECTION 19 OF DOMESTIC VIOLENCE ACT, 2005:

SECTION 19: Residence orders–

(1) While disposing of an application under sub-section (1) of Section 12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order–
   (a) restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household;
   (b) directing the respondent to remove himself from the shared household;
   (c) restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides;
   (d) restraining the respondent from alienating or disposing off the shared household or encumbering the same;
   (e) restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate; or
   (f) directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require:

Provided that no order under clause (b) shall be passed against any person who is a woman.'

The Supreme Court of India in *Vimlaben Ajitbhai Patel v Vatslaben Ashokbhai Patel with Ajitbhai Revandas Patel v State of Gujarat*[8] held that the statutory right of a woman to reside in her matrimonial home arises only in cases where the matrimonial home is the property of the husband. This judgment carves out the obligations of a husband towards his wife in the following categorical terms:[9]

'21. Maintenance of a married wife, during subsistence of marriage, is on the husband. It is a personal obligation. The obligation to maintain a daughter-in-law arises only when the husband has died. Such an obligation can also be met from the properties of which the husband is a co-sharer and not otherwise. For invoking the said provision, the husband must have a share in the property. The property in the name of the mother-in-law can neither be a subject matter of attachment nor during the life time of the husband, his personal liability to maintain his wife can be directed to be enforced against such property.'

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8 *Vimlaben Ajitbhai Patel v Vatslaben Ashokbhai Patel with Ajitbhai Revandas Patel v State of Gujarat* 2008 (4) SCC 649.

9 At para 21, page 660.

Clearly, the import of this judgment rendered lays down that the issue of maintenance of a wife is the personal obligation of the husband and the liability is solely fastened on him while he is alive. Further, the Supreme Court has interpreted the provisions of the DVA 2005 dealing with the wife's right to reside in her matrimonial home:[10]

> '27. The Domestic Violence Act provides for a higher right in favour of a wife. She not only acquires a right to be maintained but also thereunder acquires a right of residence. The right of residence is a higher right. The said right as per the legislation extends to joint properties in which the husband has a share.
>
> 28. Interpreting the provisions of the Domestic Violence Act this Court in *S.R. Batra vs. Taruna Batra* (2007) 3 SCC 169 held that even a wife could not claim a right of residence in the property belonging to her mother-in-law, stating:
>
> > "17. There is no such law in India like the British Matrimonial Homes Act, 1967, and in any case, the rights which may be available under any law can only be as against the husband and not against the father-in-law or mother-in-law…
> >
> > Hence, the DVA, 2005 gives a right to the aggrieved spouse to reside in the matrimonial home. Where the aggrieved wife qualifies for maintenance from her husband, she also has a right to only reside in the properties belonging to her husband and not the mother-in-law."'

In another Bombay High Court judgment, *Abhijit Bhikaseth Auti v State of Maharashtra & another*,[11] the provisions under s 17 and 19 of the DVA 2005 have been elaborated. The case was filed by the wife against the husband on the ground of domestic violence committed by him. The judgment explains the extent of the applicability of s 17 and 19 in the following terms:[12]

> '12. Section 17 reads thus:
>
> 17. Right to reside in a shared household: (1) Notwithstanding anything contained household: in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same.
>
> (2) The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law.
>
> 13. Sub Section (1) of Section 17 starts with a non-obstante clause which has over-riding effect over other statutes. The sub-section provides that every women in a domestic relationship shall have right to reside in a shared household whether or not she has any right, title or beneficial interest in the same. This is indeed a provision which enlarges the scope of the concept of matrimonial home under the

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[10] At paras 27 and 28 at page 662.
[11] *Abhijit Bhikaseth Auti v. State of Maharashtra & another* AIR 2009 (NOC) 808 (Bom).
[12] At paras 12 and 13.

> existing laws dealing with matrimonial relationship. This is in the context of the definition of domestic relationship under clause (f) of Section 2 which means relationship between two persons who live or have, at any point of time lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of a marriage. The definition of shared household under Section 2(s) of the said Act is very wide. It even includes a household which may belong to the joint family of which the respondent is a member. Section 19 which give power to the Magistrate to pass residence orders providing for grant of various orders in relation to a shared household for protecting the rights of the aggrieved person to occupy a shared household. The learned Magistrate in a given case can even direct the respondent to remove himself from a shared household.'

Hence, under the Indian laws the division of property in cases where marriage ends up in a divorce has been specifically dealt only under the above mentioned legislation, ie the provisions of the DVA 2005. Whether or not a foreign national can be charged under the DVA 2005 is a debatable point. In the Indian context, it is a very powerful tool to nail down the husband, especially in matters of alimony, maintenance and right of residence.

Thus, on the basis of the above discussion, the position regarding the property of the parties to the marriage is very clear and unambiguous. The court may or may not deal with the property of the parties acquired after the marriage. In the facts and circumstances of a case, if the wife feels that some specific property was bought by the parties after the marriage, she can claim the share in the property under s 27 of the HMA 1955 as well.

In terms of the provisions of the DVA 2005, it is important to note, that another efficacious alternative remedy is available for Hindu wives in cases where they are ill-treated and not kept properly by the husband. The DVA 2005 not only provides for a right to maintenance that might be granted to a wife but also a right to residence that has to be provided to the wife by the husband, depending on the facts and circumstances of each case. Hence, claiming a right to maintenance along with the right to residence is yet another remedy available to the wife.

V WHETHER THE INDIAN COURTS ARE IN A POSITION TO DETERMINE AN APPLICATION FOR MAINTENANCE WHILE THE HUSBAND IS NOT RESIDENT WITHIN THE INDIAN JURISDICTION

The concept of 'maintenance' in India is statutorily defined under s 125 of the Code of Criminal Procedure 1973 (s 125), s 24 and 25 of the HMA 1955 and s 18 of the HAMA 1956. Under Indian law, the term 'maintenance' is a measure of social justice and an outcome of the natural duty of a man to maintain his wife, children and parents, when they are unable to maintain themselves. The object of maintenance is to ameliorate the economic condition

of women and children, as it lowers them down in society after divorce proceedings are started as a result of which the husband refuses to maintain the wife and the child. The remedy available to the Hindu wife under s 24 and 25 of the HMA 1955 and s 18 of the HAMA 1956 are civil in nature.

However, it is important to mention that proceedings initiated under s 125 of the Indian CrPC 1973 are criminal proceedings and, unlike the personal laws, are of a summary nature and apply to everyone regardless of caste, creed or religion. The object of such proceedings however is not to punish a person for his past neglect. The provision has been enacted to compel those who can do so to give support to those who are unable to support themselves. Maintenance can be claimed either at the interim stage, ie during the pendency of proceedings, or the final stages of proceedings under the relevant provisions both of the HMA 1955 and/or the CrPC 1973. But, at the same time it is important to mention that contested divorce proceedings under the HMA 1955, as also claims for maintenance, can be protracted, time-consuming and cumbersome proceedings, sometimes leading to inordinate delay.

With regard to the determination of an application for maintenance by the courts in India when the husband is not residing with the Indian jurisdiction it is stated that, even though the husband in such cases is not ordinarily resident in India, maintenance will still be granted to the wife and the children, by the courts in India adjudicating upon maintenance applications under the above mentioned provisions of law. The reasons for this are that in divorce proceedings the spouse who is not able to earn a livelihood is bound to get maintenance from the other spouse during and after the divorce proceedings subject to fulfillment of all other requirements of law.

There is a specific ruling addressing this issue. The legal position was dealt by the Delhi High Court in 2004. In a lucid and an erudite judgment in *Anubha v Vikas Aggarwal*,[13] the court handed down an authoritative pronouncement taking into account a humanitarian approach especially on the rights of deserted/abandoned non-resident Indian spouses (commonly referred to as NRIs). This particular judgment is also posted on the Delhi High Court website and the portions most relevant to the facts and circumstances of the case read as follows:

> 'This is one of those classic cases where Indian citizens who go abroad and marry Indian women and thereafter maltreat such women and inflict cruelty and dump them in alien and hostile environment without even bothering to give adequate maintenance. Such persons take advantage of the fact that they are outside the jurisdiction of the Courts of India and most of the time battered married women do not have resources to fight back and bring the culprits to face the consequences of their wrong doings. To deal with such kind of cases and to counter the mischief of such people who exploit the women of this country, and who feel that the strong arms of law cannot reach them, stern action should be taken at every level against them and they should be made to pay such amount of maintenance as would be

[13] *Anubha v Vikas Aggarwal*, Regular First Appeal 38/2002, decided on 17 November 2004.

> necessary to restore some dignity and comforts to such women to lead a normal life again. Therefore, in this regard, the duty is cast on the State that such persons who marry Indian women and then dump them in foreign countries by resorting to the laws of those countries for taking divorce, which may not be valid in India, and without giving any maintenance and without discharging their liabilities, to be served with the notices and the orders passed by the court through the embassies and High Commissions of India in those countries so as to bring them under the jurisdiction of the Courts to enforce the liabilities fastened on them under India law and to make them comply with the orders passed by the Courts in India. Indian citizens residing outside as NRIs either on account of having a residency permit or on account of having work permit should not be allowed to violate the rule of law of this country. So long they are citizens of India, they are not immune from the laws of this country and must be made to comply with the orders passed by the Courts in India.'

Similarly, in a Delhi High Court decision in *Radhika v Vineet Rungta*,[14] an application for maintenance was filed, before the Indian Courts, by a wife who was residing in India against her husband who was working and residing in the United States of America. In this case as well, maintenance was granted to the wife by the court even though the husband was not ordinarily resident in India at the time of the judgment.

VI THE LIKELY VIEW OF THE INDIAN COURTS OF THE HUSBAND'S INCOME BEING PAID TO HIM IN A FOREIGN OR OVERSEAS JURISDICTION

This particular issue specifically deals with the consequential impact of the salary income or other income of the husband in the foreign or overseas jurisdiction on the amount of maintenance that might be or other income potentially awarded to the wife presently residing in India. In India, the quantum of maintenance provided to one of the parties in a divorce proceeding is at the discretion of the court depending on the facts and circumstances of each case. The test employed by the courts in the Indian jurisdiction is the means test, as to what amount of money the estranged wife would need to sustain herself and her children.

However, in relation to the quantum of maintenance, s 23 of the HAMA 1956, categorically lays down the conditions that will be taken into account by the court in awarding maintenance to the aggrieved spouse. It provides that it shall be at the discretion of the court to determine the amount of maintenance, if any, payable; and in doing so the court shall be guided by the considerations set out in s 23(2) or (3) of the HAMA 1956:

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[14] *Radhika v. Vineet Rungta* AIR 2004 Delhi 323.

> **'23. Amount of maintenance**
>
> (1) It shall be in the discretion of the Court to determine whether any, and if so what, maintenance shall be awarded under the provisions of this Act, and in doing so, the Court shall have due regard to the considerations set out in sub-section (2), or sub-section (3), as the case may be, so far as they are applicable.
>
> (2) In determining the amount of maintenance, if any, to be awarded to a wife, children or aged or infirm parents under this Act, the following factors shall be taken into account—
>
> (a) the position and status of the parties;
> (b) the reasonable wants of the claimant;
> (c) if the claimant is living separately, whether the claimant is justified in doing so;
> (d) the value of the claimant's property and any income derived from such property, or from the claimant's own earnings or from any other source;
> (e) the number of persons entitled to maintenance under this Act.
>
> (3) In determining the amount of maintenance, if any, to be awarded to a dependant under this Act, regard shall be had to—
>
> (a) the net value of the estate of the deceased after providing for the payment of his debts;
> (b) the provision, if any, made under a will of the deceased in respect of the dependant;
> (c) the degree of relationship between the two;
> (d) the reasonable wants of the dependant;
> (e) the past relations between the dependant and the deceased;
> (f) the value of the property of the dependant and any income derived from such property, or from his or her earnings or from any other source;
> (g) the number of dependants entitled to maintenance under this Act.' Section 25 of the HAMA 1956 also provides that the amount of maintenance may be altered on change of circumstances.'

The Delhi High Court in *Radhika v Vineet Rungta* lamented at the practice of the parties to the litigation not disclosing their actual income. In a terse ruling, Justice Vikramjit Sen held as follows:[15]

> '3. Cases where the parties disclose their actual income are extremely rare. Experience, therefore, dictates that where a decision has to be taken pertaining to the claim for maintenance, and the quantum to be granted, the safer and surer method to be employed for coming to a realistic conclusion is to look at the status of the parties, since whilst incomes can be concealed, the status is palpably evident to all concerned. If any opulent lifestyle is enjoyed by warring spouses he should not be heard to complaint or plead that he has only a meagre income. If this approach had been followed, it would have been evident that the warring spouses enjoy an affluent lifestyle. It has already been noted that the learned trial Court has not discussed the Husband's income. While granting maintenance it is incumbent

[15] *Radhika v Vineet Rungta* AIR 2004 Delhi 323 at para 3 at pp 323 and 324.

> on the Court to make such monetary arrangements as would be conducive to the spouses continuing a lifestyle to which they were accustomed before the matrimonial discord. In the application under Section 24 of the Hindu Marriage Act, it has been categorically pleaded that the Husband is getting a salary of US$ 72,000 per annum which is equivalent to Rs.30,24,000/ per annum along with the perquisites. A mention is made of the receipt of interest of approximately US$ 1,000 per month as also accounts in various banks. It is pleaded that the Husband is a joint owner of properties valued at over Rs.2,00,00,000/. The wife has pleaded that since 5-10-1998 she has been living at the mercy of her parents; that she has no movable or immovable properties or other assets in her name except a nominal amount of interest from deposits. It has been categorically stated that the Wife has no income to support herself and to meet her necessary expenses.'

The court, after making an assessment of the overseas income of the husband resident abroad, awarded the maintenance to the wife resident in India:[16]

> '8. Discounting all other incomes, I find that the Husband should be held to have an income of at least US $ 50,000 annually. Considering the lifestyle to which the spouses would be accustomed, and the above minimum assessment of the disposable income of the Petitioner, I am of the considered view that the learned Trial Court should have granted Rs.15,000/ per month towards maintenance *pendente lite*. It is ordered accordingly. By adopting this approach an effort has been made to balance the income and the earnings of the Husband against the income of the Wife, and ensuring that the normal lifestyle and status can be preserved in some measure.'

Here, it will be noticed that the Court assessed the annual income of the husband to be at least 50,000 USD, but awarded the wife a sum of Rs 15,000/ per month towards maintenance *pendente lite*, which after conversion at present exchange rates works out to 300 USD per month only.

Furthermore, the Supreme Court in *Vinny Parmar v Paramvir Parmar*[17] dealt with the question of the reasonable amount of maintenance that the appellant wife was entitled to be paid by the husband in a case of divorce on the grounds of cruelty. The trial court and the High Court did not take note of the actual income of the husband and the amount of maintenance granted to the appellant wife was considered to be low as per the lifestyle of the husband. The Supreme Court in this recent judgment elaborated upon the broad principles to be kept in mind by the courts when dealing with the question of award of maintenance and permanent alimony.

The court elaborated on the legal position in the following terms:[18]

> '10. In *Shri Bhagwan Dutt vs. Smt. Kamla Devi and Anr* (1975) 2 SCC 386, though this Court has considered the amount of maintenance payable to wife under Section 488 of the Code of Criminal Procedure, 1898, the principle laid down is applicable to the case on hand. In para 19, this Court held 'The object of

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16 At para 8 at p 324.
17 *Vinny Parmar v Paramvir Parmar* AIR 2011 SC 2748.
18 At paras 10 to 12 at p 2750.

these provisions being to prevent vagrancy and destitution, the Magistrate has to find out as to what is required by the wife to maintain a standard of living which is neither luxurious nor penurious, but is modestly consistent with the status of the family. The needs and requirements of the wife for such moderate living can be fairly determined, only if her separate income, also, is taken into account together with the earnings of the husband and his commitments.

11. In *Chaturbhuj vs. Sita Bai* (2008) 2 SCC 316, which also relates to maintenance claim by deserted wife under Section 125 of the Code of Criminal Procedure, 1973. The following statement in para 8 is relevant which reads as under:

> "Where the personal income of the wife is insufficient she can claim maintenance under Section 125 CrPC. The test is whether the wife is in a position to maintain herself in the way she was used to in the place of her husband. In *Bhagwan Dutt v. Kamla Devi* it was observed that the wife should be in a position to maintain a standard of living which is neither luxurious nor penurious but what is consistent with status of a family. The expression unable to maintain herself does not mean that the wife must be absolutely destitute before she can apply for maintenance under Section 125 CrPC."

12. As per Section 25, while considering the claim for permanent alimony and maintenance of either spouse, the respondent's own income and other property, and the income and other property of the applicant are all relevant material in addition to the conduct of the parties and other circumstances of the case. It is further seen that the court considering such claim has to consider all the above relevant materials and determine the amount which is to be just for living standard. No fixed formula can be laid for fixing the amount of maintenance. It has to be in the nature of things which depend on various facts and circumstances of each case. The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay, having regard to reasonable expenses for his own maintenance and others whom he is obliged to maintain under the law and statute. The courts also have to take note of the fact that the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and mode of life she was used to live when she lived with her husband. At the same time, the amount so fixed cannot be excessive or affect the living condition of the other party. These are all the broad principles courts have to be kept in mind while determining maintenance or permanent alimony.'

The Apex Court in categorical terms laid down the factors and circumstances to be borne in mind by the courts while adjudicating upon the issue of grant of maintenance to the aggrieved spouse in divorce cases. Further, the Apex Court, while allowing the appeal of the appellant wife, enhanced the maintenance earlier granted to the wife by the trial court and the High Court. This was on the basis of detailed reasons advanced as follows:[19]

> '15. In the light of the details furnished by both the parties, we are of the view that the amount of Rs.1,40,000/ determined as net monthly income of the

[19] At para 15 at p 2751.

> respondent-husband is not acceptable. Equally, direction for payment of maintenance at the rate of Rs. 20,000/ per month to the appellant wife is also inadequate. It is relevant to point out that the status of the appellant before her marriage is also one of the relevant factors for determining the amount of maintenance. It is not in dispute that before her marriage with the respondent, she was working as an Air Hostess in Cathay Pacific Airlines and after marriage she resigned from the said post. Considering the conditions prescribed in Section 25 of the Act relating to claim of permanent alimony/maintenance and the fact that the appellant is not permanently employed as on date and residing with her sister at Mumbai, taking note of the respondent's income from salary as Sr. Commander in Air India, other properties standing in his name, age being 42 years, future employment prospects and also considering the fact that the respondent re-married, having a child and also to look after his parents, we feel that the ends of justice would be met by fixing maintenance at the rate of Rs.40,000/ per month instead of Rs.20,000/ per month as fixed by the Family Court and affirmed by the High Court. The same shall be payable from the date of her application and continue to pay in terms of Section 25 of the Act. The respondent is granted one year time from 01.08.2011 to pay all the arrears payable in six equal instalments. It is made clear that if there is any change in the circumstance of either party, they are free to approach the Court concerned to modify or rescind. As suggested and fixed by the High Court, in the alternative, we fix the amount of permanent alimony/maintenance at Rs. 40 lakhs in lump sum to be paid by the respondent within a period of six months from 01.08.2011 which will forfeit all her claims. The respondent is free to opt any one mode to comply with the same. If the respondent opts the first method, the same is subject to the conditions prescribed in sub-section (3) of Section 25 of the Act. The appeals are allowed to the extent mentioned hereinabove. No order as to costs.'

It will be noticed that the court, first, doubled the monthly maintenance to be provided to the aggrieved wife. In the alternative, the court also provided the one time option to the husband to pay a consolidated lump sum towards permanent alimony/maintenance. It is important to mention that the amount of permanent alimony/maintenance in the case was doubled from 20 lakhs to 40 lakhs. This, after conversion at that time, worked out at 24,494.6 British pounds to 48,989.3 British pounds.[20] The Supreme Court reiterated the earlier law of the means test as also taking into account the factors to be taken into consideration while deciding the quantum of maintenance and permanent alimony by the courts.

In *Mr Rajat Taneja v Ms Harmeeta Singh*,[21] the Delhi High Court specifically dealt with the question of quantum of maintenance to be paid to an aggrieved wife in divorce proceedings who is staying in India while the husband is residing outside India. The observations of the court in this regard have been elaborated as follows:[22]

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[20] Approximately, as per the current exchange rate at that time on a prominent currency converter website www.oanda.com – current rates of exchange now may vary.

[21] *Mr Rajat Taneja v Ms Harmeeta Singh* (2008) 149 PLR 18.

[22] At paras 38 and 39 at pp 21 and 22.

> '38. As held by the Supreme Court in the decision reported as *United India Insurance v. Patricia Jean Mahajan*, AIR 2002 SC 2607: 2002 (6) SCC 281, when compensation has to be paid in India to the claimants of a deceased working abroad, standard of living in India, cost of living in India and other related factors have to be considered and in light of the said facts considering income of the husband in a foreign country further taking note of the fact as to what is the cost of living in the said foreign country, loss of dependence has to be worked out.
>
> 39. Similar principles would apply to grant of monthly maintenance to a wife stationed in India but husband being abroad and earning in foreign currency.'

Hence, in cases where the wife is resident in India and has to be paid maintenance by the husband working outside India, the cost of living and the expenditure in both the countries where the parties are residing has to be kept in mind while calculating the quantum of maintenance to be paid to the wife.

Therefore, from the position of law as elaborated above, the relevant considerations laid down in the HAMA 1956, HMA 1955 and/or the CrPC 1973, depending on the recourse sought by the aggrieved wife, will have to be taken into consideration by the court when arriving at a decision on the quantum of maintenance to be provided to the wife. Hence, along with the salary of the husband, the court will also take into consideration other relevant factors before granting the maintenance, i e the status of the parties, the number of claimants, other properties of the husband and any income from such properties, cost of living in both the countries, etc.t can hence be asserted that the quantum of maintenance to be paid to the aggrieved wife cannot be decided on the basis of the salary of the husband alone.

To sum up, therefore, it can be stated that, if the aggrieved wife has no means of livelihood to maintain herself, she can claim any of the financial remedies as analysed above. The relevant provisions in this regard that could potentially be invoked free of personal laws are under s 125 of the CrPC 1973, as it is a religion-neutral provision.

VII MAINTENANCE UNDER S 125 OF THE CRIMINAL PROCEDURE CODE 1973

Apart from the personal laws, the Code of Criminal Procedure 1973 (CrPC) also provides for maintenance of wives, under Chapter IX containing s 125 to 128. Unlike the personal laws which are applicable only to persons belonging to particular religions, the provisions of the Code of Criminal Procedure 1973 are applicable to all persons irrespective of religion. Relief under this Code is speedy and is available irrespective of whether or not any matrimonial proceedings are pending. Maintenance under CrPC is also available separately even if matrimonial proceedings are separately pending under other provisions of the law, though the quantum may get reduced if separate maintenance under

any other statutory provision of a matrimonial law has already been awarded and is being paid. The relevant extract of s 125 CrPC is quoted as follows:

> 'Section 125. Order for maintenance of wives, children and parents. (1) if any person having sufficient means neglects or refuses to maintain–
>
> (a) his wife, unable to maintain herself, or
> (b) …
> (c) …
> (d) …
>
> a magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife… at such monthly rate, as such magistrate thinks fit, and to pay the same to such person as the magistrate may from time to time direct
>
> …
>
> Provided … that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife …, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct
>
> Explanation: For the purpose of this chapter …
>
> (a) …
> (b) "Wife" includes a woman who has been divorced or has obtained a divorce, from her husband and has not remarried.
>
> (2) Any such allowance for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of the order or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.
>
> (3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:
>
> Provided that no warrant shall be issued for the recovery of any amount due under this Section unless application be made to the court to levy such amount within a period of one year from the date on which it became due:
>
> Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider

any grounds of refusal stated by her, and may make an order under this Section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation: If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive an allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, from her husband under this Section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favor an order has been made under this Section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.'

The salient features of s 125 CrPC may be summarised as hereunder:

'(i) A wife includes a divorced wife.
(ii) Only lawful wife is entitled to maintenance under this Section.
(iii) A wife may seek maintenance even without any matrimonial litigation.
(iv) She may stay separate if there are sufficient grounds justifying that and yet get maintenance.
(v) There must be neglect or refusal on part of husband to maintain her.
(vi) Wife must be unable to maintain herself.
(vii) The court can grant interim maintenance also.
(viii) The amount maybe varied or cancelled if there is change in circumstances.
(ix) In certain situations a wife may be debarred from claiming maintenance.
(x) Her right terminates on remarriage.
(xi) The proceedings are summary and expeditious.'

VIII SOME RECENT DECISIONS OF INDIAN COURTS ON ALIMONY

A compilation of some recent decisions are given here in cases where parties have either settled or have been directed to pay lump sum alimony or an agreed negotiated amount towards parting by a decree of divorce or consensual termination.

(a) In *Sarla Singh v Kr Ajay Partap Singh*,[23] the High Court of Punjab and Haryana held as follows:

> 'It is settled law, that in estimating the amount of permanent alimony or permanent maintenance, the Court, while dealing with the fact of income, is not to focus its attention only on the disposable income of a spouse in the

[23] *Sarla Singh v Kr Ajay Partap Singh* 2011 (2) Marriage Law Journal 372.

> year of proceedings the making of the order, but would also normally have regard to the earnings in the previous years and probable earnings in the future. The Court is also to look into the position and the status of parties and in absence of any reliable data on the point of income, the Court is to take into consideration overall financial position of the spouses and their necessities having regards not merely to their income but their properties, debts and liabilities.
>
> It is well settled that the wife besides maintenance is now also entitled to right of residence with the equal status as that of husband. Even a flat of two rooms is worth more than Rs.80 lacs (Rupees eighty lac only). However, the right of residence along with right to maintenance is assessed at Rs.1,00,000,00/ (Rupees one crore only), if paid in lump sum.
>
> For the reasons stated, this appeal is allowed, the permanent alimony payable is enhanced to Rs.40,000/ (Rupees forty thousand only) per month with right of residence or in the alternative a sum of Rs.1,00,000,00/ (Rupees one crore only) as one time alimony which would not represent even 1/10th of the property owned by the respondent.

Hence, in this decision, the High Court held that the wife besides maintenance is also entitled to a right of residence with status equal to that of the husband which on the facts was quantified to Indian rupees 100,000, if paid in lump sum as one time alimony.

(b) In *Vinny Parmvir Parmar v Parmvir Parmar*,[24] the Supreme Court held as follows in a case to determine what would be the reasonable amount the wife was entitled to by way of maintenance from the husband under s 25 of the HMA:

> '12. As per Section 25, while considering the claim for permanent alimony and maintenance of either spouse, the respondent's own income and other property, and the income and other property of the applicant are all relevant material in addition to the conduct of the parties and other circumstances of the case. It is further seen that the court considering such claim has to consider all the above relevant materials and determine the amount which is to be just for living standard. No fixed formula can be laid for fixing the amount of maintenance. It has to be in the nature of things which depend on various facts and circumstances of each case. The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay, having regard to reasonable expenses for his own maintenance and others whom he is obliged to maintain under the law and statute. The courts also have to take note of the fact that the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and mode of life she was used to live when she lived with her husband. At the same time, the amount so fixed cannot be excessive or affect the living condition of the other party. These are all the broad principles courts have to be kept in mind while determining maintenance or permanent alimony.
>
> …

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[24] *Vinny Parmvir Parmar v Parmvir Parmar* (2011) 13 Supreme Court Cases.

> 15. … It is not in dispute that before her marriage with the respondent, she was working as an Air Hostess in Cathay Pacific Airlines and after marriage she resigned from the said post. Considering the conditions prescribed in Section 25 of the Act relating to claim of permanent alimony/maintenance and the fact that the appellant is not permanently employed as on date and residing with her sister at Mumbai, taking note of the respondent's income from salary as Sr. Commander in Air India, other properties standing in his name, age being 42 years, future employment prospects and also considering the fact that the respondent re-married, having a child and also to look after his parents, we feel that the ends of justice would be met by fixing maintenance at the rate of Rs.40,000/- per month instead of Rs.20,000/ per month as fixed by the Family Court and affirmed by the High Court. The same shall be payable from the date of her application and continue to pay in terms of Section 25 of the Act. The respondent is granted one year time from 01.08.2011 to pay all the arrears payable in six equal instalments. It is made clear that if there is any change in the circumstance of either party, they are free to approach the Court concerned to modify or rescind. As suggested and fixed by the High Court, in the alternative, we fix the amount of permanent alimony/maintenance at Rs. 40 lakhs in lump sum to be paid by the respondent within a period of six months from 01.08.2011 which will forfeit all her claims. The respondent is free to opt any one mode to comply with the same. If the respondent opts the first method, the same is subject to the conditions prescribed in sub-section (3) of Section 25 of the Act. The appeals are allowed to the extent mentioned hereinabove. No order as to costs.'

In this case, the Supreme Court, while holding that no fixed formula can be laid down for the amount of permanent alimony, fixed the amount of permanent maintenance quantified at Indian rupees 400,000 (Rs 40 lacs) to be paid in lump sum, which would forfeit all the claims of the respondent wife as a one-time payment or be paid Indian rupees 40,000/ per month during her life time.

(c) In *Vishwanath v Sau Sarla Vishwanath Agrawal*,[25] while deciding permanent alimony, it was held:

> '41. Presently, we shall deal with the aspect pertaining to the grant of permanent alimony. The court of first instance has rejected the application filed by the respondent-wife as no decree for divorce was granted and there was no severance of marital status. We refrain from commenting on the said view as we have opined that the husband is entitled to a decree for divorce. Permanent alimony is to be granted taking into consideration the social status, the conduct of the parties, the way of living of the spouse and such other ancillary aspects. During the course of hearing of the matter, we have heard the learned counsel for the parties on this aspect. After taking instructions from the respective parties, they have addressed us. The learned senior counsel for the appellant has submitted that till 21.2.2012, an amount of Rs. 17,60,000/ has been paid towards maintenance to the wife as directed by the courts below and hence, that should be deducted from the amount to be fixed. He has further submitted that the permanent alimony should be fixed at Rs. 25 lacs. The learned counsel for the respondent, while insisting

[25] *Vishwanath v Sau Sarla Vishwanath Agrawal* 2012 (7) Supreme Court Cases 288.

> for affirmance of the decisions of the High Court as well as by the courts below, has submitted that the amount that has already been paid should not be taken into consideration as the same has been paid within a span of number of years and the deduction would affect the future sustenance. He has emphasised on the income of the husband, the progress in the business, the inflation in the cost of living and the way of life the respondent is expected to lead. He has also canvassed that the age factor and the medical aid and assistance that are likely to be needed should be considered and the permanent alimony should be fixed at Rs. 75 lacs.
>
> 42. In our considered opinion, the amount that has already been paid to the respondent wife towards alimony is to be ignored as the same had been paid by virtue of the interim orders passed by the courts. It is not expected that the respondent wife has sustained herself without spending the said money. Keeping in view the totality of the circumstances and the social strata from which the parties come from and regard being had to the business prospects of the appellant, permanent alimony of Rs. 50 lacs (rupees fifty lacs only) should be fixed and, accordingly, we so do. The said amount of Rs. 50 lacs (rupees fifty lacs only) shall be deposited by way of bank draft before the trial court within a period of four months and the same shall be handed over to the respondent-wife on proper identification.'

In this decision, the court, keeping in mind inflation and the cost of living besides the life the respondent wife was expected to lead but also ignoring earlier amounts paid, held that keeping in view the social strata of the parties, a permanent alimony of Indian rupees 500,000 (Rs 50 lacs) be paid as a lump sum settlement to the wife.

(d) In *U Sree v U Srinivas*,[26] the Apex Court, holding that no arithmetical formula was possible to be devised in calculating permanent maintenance, held as follows:

> '33. We have reproduced the aforesaid orders to highlight that the husband had agreed to buy a flat at Hyderabad. However, when the matter was listed thereafter, there was disagreement with regard to the locality of the flat arranged by the husband and, therefore, the matter was heard on merits. We have already opined that the husband has made out a case for divorce by proving mental cruelty. As a decree is passed, the wife is entitled to permanent alimony for her sustenance. Be it stated, while granting permanent alimony, no arithmetic formula can be adopted as there cannot be mathematical exactitude. It shall depend upon the status of the parties, their respective social needs, the financial capacity of the husband and other obligations. In *Vinny Parmvir Parmar v. Parmvir Parmar*, 2011(3) R.C.R.(Civil) 900 : 2011(4) Recent Apex Judgments (R.A.J.) 357 : (2011)13 SCC 112, while dealing with the concept of permanent alimony , this Court has observed that while granting permanent alimony , the Court is required to take note of the fact that the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status

[26] *U Sree v U Srinivas* All India Reporter 2013 Supreme Court 41.

> and the mode of life she was used to when she lived with her husband. At the same time, the amount so fixed cannot be excessive or affect the living condition of the other party.
>
> 34. Keeping in mind the aforesaid broad principles, we may proceed to address the issue. The respondent himself has asserted that he has earned name and fame in the world of music and has been performing concerts in various parts of India and abroad. He had agreed to buy a flat in Hyderabad though it did not materialise because of the demand of the wife to have a flat in a different locality where the price of the flat is extremely high. Be that as it may, it is the duty of the Court to see that the wife lives with dignity and comfort and not in penury. The living need not be luxurious but simultaneously she should not be left to live in discomfort. The Court has to act with pragmatic sensibility to such an issue so that the wife does not meet any kind of man-made misfortune. Regard being had to the status of the husband, the social strata to which the parties belong and further taking note of the orders of this Court on earlier occasions, we think it appropriate to fix the permanent alimony at Rs 50 lacs which shall be deposited before the learned Family Judge within a period of four months out of which Rs 20 lacs shall be kept in a fixed deposit in the name of the son in a nationalized bank which would be utilised for his benefit. The deposit shall be made in such a manner so that the respondent wife would be in a position to draw maximum quarterly interest. We may want to clarify that any amount deposited earlier shall stand excluded.'

In this decision, it was held that the wife was entitled to a status depending on the financial capability of the husband. Further, it was held that no arithmetical formula can be adopted as there cannot be a mathematical exactitude. The court awarded a sum of Indian Rupees 500,000 (Rs 50 lacs) as permanent alimony, out of which Indian Rupees 200,000 (Rs 20 lacs) were to be kept in the name of the son in a fixed deposit to be utilised for his benefit.

(e) In *Biswajit Dash v Milan Dash*,[27] interpreting s 25 of the Hindu Marriage Act dealing with permanent alimony, it was held by the Orissa High Court as follows:

> 'A perusal of the above provision makes it clear that any Court exercising jurisdiction under the Hindu Marriage Act, before granting permanent alimony under Section 25 of the Act, is required to consider the following:
>
> (a) that the order granting permanent alimony is made at the time of passing any decree under the Act, 1955 or at any time subsequent thereto,
> (b) the income and other property of the applicant,
> (c) the respondent's own income and other property,
> (d) the conduct of the parties, and
> (e) other circumstances of the case.

[27] *Biswajit Dash v. Milan Dash* 2014 (134) All India Cases (AIC) 333.

12. The Apex Court in *Vinny Parmvir Parmar v. Parmvir Parmar*, AIR 2011 SC 2748 held as follows:

"It is further seen that the court considering such claim has to consider all the above relevant materials and determine the amount which is to be just for living standard. No fixed formula can be laid for fixing the amount of maintenance. It has to be in the nature of things which depend on various facts and circumstances of each case. The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay, having regard to reasonable expenses for his own maintenance and others whom he is obliged to maintain under the law and statute. The courts also have to take note of the fact that the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort was used to live when she lived with her husband. At the same time, the amount so fixed cannot be excessive or affect the living condition of the other party. These are all the broad principles courts have to be kept in mind while determining maintenance or permanent alimony."

13. In *Vishwanath Sitaram Agrawal v. Sau. Sarla Vishwanath Agrawal*, reported in 2012 (117) AIC 111 (SC) : AIR 2012 SC 2586 the Apex Court while granting permanent alimony has observed that the amount that has already been paid to the respondent wife towards alimony is to be ignored as the same had been paid by virtue of the interim orders passed by the courts. It is not expected that the respondent wife has sustained herself without spending the said money.

14. In *U. Sree v. U. Srinivas*, AIR 2013 SC 415, the Apex Court while dealing with Section 25 of the Act has observed as follows:

"… while granting permanent alimony , no arithmetic formula can be adopted as *there* can not be mathematical exactitude. It shall depend upon the status of the parties their respective social needs, the financial capacity of the husband and other obligations."'

In the said judgment the Apex Court has also observed that 'it is the duty of the court to see that the wife lives with dignity and comfort and not in penury. The living need not be luxurious but simultaneously she should not be left to live in discomfort. The court has to act with pragmatic sensibility to such an issue so that the wife does not meet any kind of man made misfortune.'

Hence, summarising the position of law as elucidated by the Supreme Court, the High Court laid down general principles for grant of permanent alimony to the wife.

(f) In another unique financial settlement between parties for agreeing to a divorce by mutual consent, which was decided by the 8th Court of the Additional District Judge, Alipore, Calcutta (India) in *Matrimonial Suit no 104 of 2013*, in *Aritra Sarkar v Alison Gansell Sarkar*, *decided on 18*

December 2013,[28] the parties negotiated and settled terms for grant of a divorce by mutual consent under s 13(B) of the Hindu Marriage Act 1955. The parties mutually settled that the husband would pay to the wife a sum of 2 million USD as a one-time payment of permanent alimony as stated in sch B, Part I, besides giving to the wife all the 50 items of jewellery and ornaments mentioned in sch B, Part II, besides also giving the Ganesh Pyne Painting mentioned in sch B, Part III of the Deed of Settlement. This agreement between the parties was arrived at by mutual negotiation and settlement after parties had amicably decided to divorce by mutual consent. The transfer of the permanent alimony was done in US dollars to enable the wife to have the alimony given to her in the USA along with all other jewellery items and the painting.

IX MAINTENANCE OF CHILDREN UNDER FAMILY LAWS IN INDIA

(a) Maintenance under Personal Laws and Special Marriage Act

The obligation of parents to maintain minor children arises both out of blood relationships as well as moral duty, which is reinforced by statutory provisions. Almost every society recognises the duty of a parent to maintain his minor child so long as he is a minor or unable to maintain himself. The degree and extent of such obligation varies from society to society and from time to time.

Minor children in India are entitled to be maintained under two sets of laws, viz, (i) their personal law and (ii) the secular law, which is the Code of Criminal Procedure 1973. It may be added that under s 38 of the Special Marriage Act 1954, in any proceeding under the Act the Court can pass both interim and final orders for the custody, maintenance and education of minor children consistently with their wishes wherever possible and may make further orders if so required.

(b) Hindu Law for maintenance of children

There are two personal law statutes amongst the Hindus where under children are entitled to claim maintenance. These are the Hindu Marriage Act 1955 and the Hindu Adoptions and Maintenance Act 1956. The Hindu Marriage Act 1955 is primarily a statute governing matrimonial relations and providing relief to parties but children being an integral component of matrimony, the Act makes provisions to safeguard the interests of the minor children of marriage. Section 26 of the Act says:

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[28] *Matrimonial Suit no.104 of 2013*, in *Aritra Sarkar v. Alison Gansell Sarkar*, 18 December 2013.

> 'Section 26. Custody of Children. In any proceeding /under this Act, the court may, from time to time pass such interim orders and make such provisions… as it may deem just and proper with respect to the custody, maintenance and education of minor children …'

Apart from s 26, the court may grant maintenance for minor children also on an application by the wife under s 24 and 25 of the Act.

A relevant extract of s 20 Hindu Adoptions and Maintenance Act 1956 providing for maintenance of children is as reproduced here:

> 'Section 20. Maintenance of Children and aged parents. (1) … a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children …
>
> (2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is minor.
>
> (3) The obligation of a person to maintain his or her daughter who is unmarried extends in so far as … the unmarried daughter … is unable to maintain … herself out of … her own earnings or other property.'

'Maintenance', under s 3(b) of the Act includes:

> '(i) in all cases, provision for food, clothing, residence, education and medical attendance and treatment;
>
> (ii) in the case of unmarried daughter, also the reasonable expenses of an incident to her marriage.'

A reading of the above enactments leads to the following conclusions:

(a) the children are to be maintained by both the mother and the father;
(b) children, legitimate or illegitimate, have a right to maintenance;
(c) children have a right of maintenance until they attain the age of 18 years;
(d) however, an unmarried daughter is entitled to maintenance beyond the age of 18 years, if she is not in a position to maintain herself;
(e) the responsibility of maintaining minor children does not depend on the parents possessing any property or assets and it is an absolute personal right of the minor children;
(f) the scope for maintenance is much larger under the Hindu Adoptions and Maintenance Act as it does not require any pending or existing litigation between the parents;
(g) under the Hindu Marriage Act, the right of maintenance is an ancillary relief in a pending proceeding between parents for some matrimonial relief; and

(h) there is no scope for maintenance of an unmarried adult daughter under the Hindu Marriage Act since it provides maintenance only for minor children.

(c) Other Personal Laws for maintenance of children

Section 49 of the Parsi Marriage and Divorce Act 1936 provides maintenance for children, as also ss 41–44 of the Indian Divorce Act 1869 deal with provisions for custody, maintenance and education of minor Christian children. Similarly, under s 38 of the Special Marriage Act 1954, issues of maintenance, custody and education of children regardless of their religion are dealt with. Like the Hindu Marriage Act 1955, these provisions provide for maintenance when there is a pending matrimonial litigation between their parents. However, the Hindu Adoptions and Maintenance Act 1956 does not require any pending litigation between parents as a requirement for a claim for maintenance by the children against the parents.

(d) Muslim Law for maintenance of children

Muslim law has different provisions for maintenance of sons and daughters. Sons are entitled to maintenance until the age of 15 and daughters are entitled to maintenance until they are married. The children have a right of maintenance irrespective of the fact that they are in the custody of their mother. However, the children who are in a position of being maintained out of property with them, would not be entitled to maintenance from their father.

(e) Provision for maintenance of children under the Code of Criminal Procedure 1973

Under ss 125–128 of the Criminal Procedure Code, other than wives and parents, children have a right of maintenance regardless of their religion. The relevant extract of s 125 of the Criminal Procedure Code reads in the following terms:

> 'Section 125. Order for maintenance of wives, children, and parents. (1) If any person having sufficient means neglects or refuses to maintain–
>
> (a) …
>
> (b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
>
> (c) his legitimate or illegitimate child (not being a married daughter)who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or
>
> (d) …

> A Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance … of such child … at such monthly rate as such Magistrate thinks fit …'

It may be added here that the provisions of s 125 of the Criminal Procedure Code can be invoked irrespective of any existing proceedings between the parents and the children. Further, a claim for maintenance under this provision is not dependent on the award of any maintenance under the provisions of any proceedings or amount awarded under the Hindu Marriage Act or the Hindu Adoption and Maintenance Act or any other personal law applicable to the parties.

(f) Conclusions on the issue of maintenance of children

(i) The rights of maintenance for children in pending proceedings are available by way of ancillary relief under all personal laws of parties as also under the Special Marriage Act 1954.

(ii) Under the Hindu Adoptions and Maintenance Act 1956, maintenance of minor children does not depend on any previous proceedings or any existing or pending litigation between the parents.

(iii) Maintenance for children under s 125 of the Criminal Procedure Code does not depend on any maintenance awarded under any personal laws and is an independent provision regardless of the pendency of any pending proceedings between the parents under their personal laws.

(iv) The responsibility to maintain children is absolute irrespective of the financial status of the parents and is confined to minor children only, under personal laws of the parties.

X DISPOSAL OF MATRIMONIAL PROPERTY AND CLAIM FOR RIGHTS OF RESIDENCE

Section 27 of the Hindu Marriage Act provides that, in any proceedings under the Act, the Court may make such provisions as it deems fit with respect to any property presented at or about the time of marriage, which may belong jointly to both the husband and the wife. The Supreme Court in *BR Kadam v SB Kadam*[29] interpreted the expression 'at or about the time of marriage' to mean and include even the property given before or after marriage so long as it is related to the marriage. The right of residence of an estranged wife is part of a maintenance rights as there is no separate provision in the Hindu Marriage Act for rights of residence. As held by the Supreme Court in *Komalam Amma v Kumara Pilla*i,[30] maintenance includes rights to matrimonial assets. Under the HMA, the estranged wife cannot be denied the right of residence in the matrimonial home.

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[29] *BR Kadam v SB Kadam* AIR 1997 SC 3562.

[30] *Komalam Amma v Kumara Pillai* AIR 2009 SC 636.

It may also be added that under s 3(b) of the Hindu Adoptions and Maintenance Act 1956, read with s 18, a Hindu wife is entitled to live separately from her husband, without forfeiting her claim to maintenance, if her husband is guilty of any matrimonial wrong. Section 3(b) defines maintenance by including provisions for residence. Thus, the right of maintenance and separate residence under s 18 is a substantive right, and not dependent on any existing proceedings, unlike the Hindu Marriage Act.

Under Section 37 of the Special Marriage Act 1954, permanent alimony and maintenance is available to the wife at the time of passing any decree or subsequent thereto. This would include a charge on the husband's property for such gross sum or monthly or periodical payment, as the court may deem fit to award. Therefore, under the SMA, the right of residence in the matrimonial home would be a part of her right to maintenance to be adjudicated under s 37 of the Act.

Under s 17 and 19 of the Protection of Women from Domestic Violence Act 2005, every woman in a domestic violence has the right to reside in a shared household, whether or not she has any right, title or beneficial interest in the same. Residence orders can be obtained by the wife against the husband under s 19 of the Act. In *SR Batra v Tarun Batra*,[31] it was held that the estranged wife cannot claim any rights under this Act against the father-in-law, mother-in-law and other relatives. It was further held that shared household accommodation, owned by the mother-in-law, does not become a shared household of the husband and wife for the purposes of the Act. Hence, it was held that a claim for a right to alternative accommodation can be made against the husband only in respect of a house owned or taken on rent by the husband or a house that belongs to the joint family of which the husband is a member.

In a unique unreported case, *Pamela Sharda v Rama Sharda*,[32] the Supreme Court upheld a settlement arrived at between the parties at the Supreme Court Mediation Centre. It may be mentioned that this Centre assists parties for resolution of disputes through the process of mediation. Clauses 2, 5, 7 and 9 of the Settlement between parties read as follows:

> '2. That the First Party shall pay a sum of Rs.45,00,000/ (Rupees Forty Five Lakhs only) to the Third Party in full and final settlement of her claims towards *Istridhan*, maintenance *pendente lite*, alimony temporary and permanent and pursuant to the receipt of Rs.45,00,000/ (Rupees Forty Five Lakhs only) the Third Party shall have no claim whatsoever against the First Party. The Third Party shall also make no claim in future qua the rights of residence as envisaged under Section 19 of the Domestic Violence Act, Hindu Adoption and Maintenance Act,1956 and Hindu Marriage Act, 1956 or under any other statutory enactment and all her statutory rights, claims qua the First Party shall stand extinguished upon the payment of Rs.45,00,000/ (Rupees Forty Five Lakhs only).

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31 *SR Batra v Tarun Batra* AIR 2007 SC 118.

32 *Pamela Sharda v Rama Sharda*, a petition for *Special Leave to Appeal (Civil) No 11714 of 2012*, judgment 15 July 2013 (against a judgment of the High Court of Delhi).

> 5. That it has been agreed between the First Party and the Third Party that the amount received by the Third Party from the First Party shall not be considered as an amount towards dissolution of marriage as permanent alimony. Further the First Party had assured the Third Party that he shall not file any proceedings for obtaining divorce on any ground and in lieu of that assurance the Third Party has undertaken that she will not claim any maintenance past, present or future or permanent alimony or expenses of the proceedings, costs, etc., from the First Party in any form whatsoever or under any statutory enactment.
>
> 7. That pursuant to the receipt of Rs.45,00,000/ (Rupees Forty Five Lakhs only) from the First Party the Third Party shall cease to have any right to reside with the First Party nor shall claim any right of residence from the First Party nor claim any restitution of conjugal rights or any form of matrimonial relationship with the First Party before any Court, Tribunal or Forum. The Third Party shall have no right to stay with the First and the Second Parties and shall not cause any disturbance in the normal day to day life of the First and the Second Parties and in the event the Third Party tries to invade the privacy of the First and the Second Party, then in that event, the First and the Second Party shall be entitled to seek injunction against the third party. However, it is agreed that for the three months i.e August, September and October, 2013 the first party shall pay maintenance of Rs. 15,000/ per month to the third party and thereafter all the rights of the third party to claim any maintenance, permanent alimony, *istridhan* shall stand extinguished in law, against the first party.
>
> 9. That pursuant to the receipt of the amount of Rs.45,00,000/ (Rupees Forty Five Lakhs only) the Third Party shall have no right, title or interest in the said property or any other property belonging to the First and the Second Parties and further undertakes that she shall not file any claim, case or action against the First and the Second Parties nor shall stake any claim qua the movable and immovable properties of the First and the Second Parties and even upon the demise of the first and second party, the third party shall not claim any right, title or interest over the said property or over any movable or immovable properties of the first and the second party, including the said property.'

The Supreme Court, accepting the tripartite settlement deed executed between the wife, husband and his mother through mediation, permitted the parties to part ways upon a one-time payment of Indian Rupees 450,000 (Rs 45 lacs) to the wife with the condition that both would not seek divorce on any ground. The couple married for 30 years agreed to withdraw all their pending litigation and the wife agreed not to cause any disturbance or invade the privacy of her husband and his 83-year-old mother living in their household property. The sum of Indian Rupees 450,000 (Rs 45 lacs) paid in full and final settlement to the wife was towards all her financial claims. Both parties, living separately since 2009, agreed that they should have nothing to do with each other's lives and would not undergo any divorce proceedings. The wife would also not claim restitution of conjugal rights or rights of residence in the household. However, in the event of remarriage of the husband, the agreement would stand terminated and the wife would be entitled to revive her claim maintenance or alimony for the present and future, since the sum of Indian Rupees 450,000 (Rs 45 lacs) would not be considered as an amount towards dissolution of marriage and payment of permanent alimony. The Apex Court, accepting the Settlement

Deed and the Undertakings of the parties, disposed of the matter and permitted the parties to file the same before all courts where litigations was pending, with liberty to invoke the provisions of the Contempt of Courts Act 1971 upon breach. Hence, prior to divorce or at the time of settlement of permanent alimony upon divorce, the wife could claim her right of residence in a property owned by the husband or demand an equivalent share to compensate her for her right to residence so that the wife and her children could have suitable living accommodation as per the standard they were living in when the parties were married and were enjoying residential facilities jointly.

XI CONCLUSION: NEED-BASED ASSESSMENT, NO ARITHMETICAL FORMULA

Hence, all personal laws provide for maintenance of women and children. The Special Marriage Act, as a secular law, also provides for maintenance, alimony and support for both women and children. The provisions of the Criminal Procedure Code can be invoked irrespective of religion by both women and children regardless of the pendency of any matrimonial litigation between the parties. The Protection of Women from Domestic Violence Act provides rights to reside in a shared household. The quantum of maintenance under all laws is a need based means requirement depending upon the status of parties, and maintenance can be claimed simultaneously under personal laws and the CrPC, though the quantum may be reduced in such parallel claims.

A Hindu wife has an added advantage of invoking a right to claim maintenance under the Hindu Adoptions and Maintenance Act 1956 for which there is no requirement of any matrimonial litigation and can be availed of irrespective of maintenance under other laws. However, the quantum of maintenance may be reduced if parallel claims are made under different laws.

Permanent alimony, right of residence and maintenance are determined by Indian courts depending upon the income and properties of both parties, status of parties, their respective needs, standards or amenities the wife is entitled to as per facilities enjoyed by the husband when she lived with the husband, and their respective lifestyles as also the conduct of both parties. The courts will consider not only consider present income of the earning spouse, but will also look at previous and probable future earnings. Overall financial position, properties owned, debts, liabilities, future earnings, pensions, rents, and other accruals will also fall in the zone of consideration. Thus, no fixed or arithmetical formula in general can be laid down for calculating maintenance which would vary in the individual facts and circumstances of each case. Right of residence is a component of the wife's right to maintenance. Besides, the wife would also have right of residence in the matrimonial home under the Protection of Women from Domestic Violence Act 2005.

Based on the precedent of various courts, the factors and remedies which merit consideration in an application for maintenance and alimony and also a right of

residence sought by the wife as also her children can now be broadly identified. A court is likely to ascertain a monthly or lump sum amount on a need based formula with a means test, to be evaluated after assessing the following factors:

(a) On termination of marriage, a spouse can claim permanent maintenance and alimony including a right of residence as part of maintenance. This claim can be made by a spouse under s 25 of the Hindu Marriage Act 1955 (for Hindus), s 37 of the Special Marriage Act 1954 (for all persons), Section 40 of the Parsi Marriage and Divorce Act 1936 (for Parsis), or s 37 of the Indian Divorce Act 1869 as amended in 2001 (for Christians) and s 3 and 4 of the Muslim Women (Protection of Rights on Divorce) Act 1986 (for Muslims), depending on the applicability of the relevant law to the parties based on their religion, or application of Special Marriage Act 1954 if parties do not invoke their personal laws. Besides, independent of these provisions, there are also remedies available under s 125 of the Criminal Procedure Code and also under s 17 and 18 of the Protection of Women from Domestic Violence Act 2005.

(b) Under all statutory provisions of different religious communities (except Muslims) as also under the provisions of the Special Marriage Act 1954, the factors and considerations weighing with a court in making an order for financial relief in the nature of permanent alimony and maintenance are by and large uniform and consistent as they follow a need-based requirement. In Indian jurisprudence and interpretation of matrimonial laws in giving financial relief, the practice of making individual or distinct capital orders by way of property adjustment or sharing of pensions has not been noticed in precedents. Instead, the courts estimate the value of all the assets of spouses to proportionately determine on a need-based means test, the lump sum amount of maintenance to be awarded to the non-earning spouse. In most matters, when the claim for permanent maintenance and alimony is made by the wife, courts consolidate the value of all the assets of the husband by including his income, properties, other assets, future earnings etc to assess the net worth. The practice of making pension sharing orders separately is not adopted in the Indian jurisdiction. Insofar as property adjustment is concerned, it is made a part of lump sum maintenance, unless the parties chose to separately make a property arrangement. However, there is no such statutory requirement and any such arrangement is purely on the volition of the parties. Accordingly, maintenance and alimony include all assets to form one composite figure from which the court decides lump sum maintenance on a need-based requirement which may be paid in one or separate instalments. Once a consolidated figure of the total income and assets of the earning spouse is arrived at, the court awards a proportionate amount as lump sum alimony after determining the need based requirement on the means test basis for granting this lump sum amount without any separate or segregated arrangements.

(c) It may be stated that once courts arrive at a consolidated figure for lump sum maintenance or alimony, they lay down a lump sum package or a monthly ongoing payment plan after fixing the lump sum amount. It may

be the option of the wife, ie the receiving spouse invariably to make her choice upon a request to the court, depending on the need-based requirements varying from the facts and circumstances in an individual case. There is no statutory rule or mandate in any enactment for any lump sum or monthly payment process and it is the discretion of the court adjudicating any such matter to make an appropriate decision upon the request of parties, keeping in mind the need-based requirement in a specific case. There is no hard and fast rule to make an ongoing monthly payment or lump sum payment once the consolidated figure of permanent alimony is settled. The payment will subsist only to the extent of the amount payable as agreed and settled and the husband's estate cannot be burdened beyond the settled amount after his death. A decree for maintenance does not get extinguished with the death of the husband and the decree of maintenance would have to be satisfied first and thereafter the legal heirs would succeed to his property from the amount remaining after such satisfaction of a matrimonial decree. Hence, any ongoing monthly payment would subsist after the death of the husband until the lump sum decretal amount is settled but would not go beyond it. In so far as remarriage is concerned, most courts invariably hold upon awarding a lump sum or monthly amount that no maintenance shall be payable on remarriage of a spouse. The logic clearly is that maintenance is a need-based requirement and upon remarriage the need-based requirement ceases. Furthermore, even on the death of the wife, the maintenance for the wife would be not payable in the case of a monthly payment plan to the extent to which it remains unpaid until death of the wife. However, if paid in a lump sum, no refunds are possible on the death or the remarriage of the wife as lump sum payments cannot be refunded.

(d) It may be stated that there are no statutory criteria or principles laid down in any of the enactments to guide the award of maintenance, which is purely discretionary depending on the facts of each case. The underlining basic principle for all these factors is a need-based means test or requirement of the spouse claiming maintenance and alimony. A number of factors and considerations can be possibly termed as guiding sub-principles to understand and appreciate the import of the basic need-based test principle as everything revolves around this basic primary test. The general principles and grounds on which the claims for maintenance and permanent alimony are awarded by courts generally have been identified on the basis of the large number of precedents cited and relied upon over a period of time.

(e) There is no statutory law in matrimonial jurisprudence for any separate maintenance or other benefits to be paid to adult children. Hence, any award of ongoing financial support to adult children for higher education on a need basis would require special facts and circumstances to be pleaded before a court to merit any attention. Thereafter, it is in the total discretion of the court, in the special situation of a given case, to award maintenance and financial support to adult children for higher education or other specified purposes. This would require special pleadings, specific evidence and documentary proof to enable the court to be satisfied of any

such special need. However, there is no specific bar to disentitle adult children from receiving any such benefits and it is purely the discretion of the court to make an award. This may require the court to give reasons and justification for doing so. However, nothing prevents the parties from giving benefits to adult children for higher education or for other situations like medical treatment or special facilities, or in cases of adult children having special needs due to disabilities or medical conditions.

(f) Gross income of the husband for a period of 3–5 years before filing of the divorce petition as well as the application for permanent alimony and maintenance is considered. Earnings of previous years may also be examined by the court, for a better assessment. The income of the husband will be examined in a foreign currency if he is earning abroad and if the wife is also abroad.

(g) Future earnings prospects of the husband from salary and other benefits, rents, accruals, profits, annuities, pension or any other income from any other capital movable and immovable assets will fall in the zone of consideration to assess the net value of the wealth of the husband. Income, assets, properties and all financial gains of the wife may be kept in mind by the court to make a need based assessment of maintenance for her.

(h) If the husband has property abroad and a pension in a foreign country, which are substantial assets, a court in India in every likelihood would take into consideration these assets in deciding the permanent alimony of the wife as the wife would certainly make a claim on these foreign-based assets considering that she is resident overseas and would need funds in the foreign currency. The foreign-based pension or other assets of the husband would certainly be relied upon by the wife and therefore be considered by an Indian court as an asset of the husband to determine permanent alimony to be paid to the wife.

(i) It may be the claim of the wife that the property of the husband located abroad was their former 'matrimonial home'; this however may be disputed by the husband who claims that the 'matrimonial home' of the parties is in India where parties may have lived together as husband and wife. Be that as it may, the wife has a right of residence after divorce, irrespective of where the parties last resided or had their 'matrimonial home'. Therefore, the wife would have to be either given a right of residence in a foreign country in a property owned by the husband commensurate to the status the parties had when they were living as a family, and if that is not possible, the wife would have to be compensated monetarily to live in the foreign country with the children (if they are still living with the mother in the foreign country) in accordance with the standards the wife and children enjoyed when they lived as a family.

(j) Previous employment of the wife, her current position of non-employment and any other possible source of income of the wife may also be looked into by the court in making an assessment of her dependency on the husband.

(k) Since the wife has a right of residence in a property owned by the husband, the wife would be entitled to a proportionate share in case she is

not provided with suitable accommodation in the foreign country. If no residence is made available by the husband, he will have to compensate the wife with a monetary compensation so that the wife would have as comfortable accommodation as the husband enjoys.

(l) The permanent alimony will be determined in accordance with expenses commensurate to the standards of living the wife would have been entitled to had she been living with the husband keeping in mind the status of the parties, their respective social and family needs as also other obligations.

(m) The permanent alimony would be assessed in accordance with standards by which the wife can live in reasonable comfort and the mode of life she was used to when she lived with her husband.

(n) The conduct of both parties, ie husband and wife, will be relevant for determining permanent alimony, although for interim maintenance, the conduct of parties is not to be kept in mind by the court at these initial stages of proceedings.

(o) If the parties have any children, their maintenance and education expenses as also any other upbringing costs may have to be borne in mind in calculating the monthly or lump sum payment of alimony for the wife and children. The court may segregate the amounts or determine a lump sum. However, since statutory provisions only provide for maintenance and education of minor children, the grant of any financial benefit or support to adult children may be totally discretionary.

(p) If the wife resides in a foreign jurisdiction and all her expenses, living costs, funds (if any) for adult children and other maintenance claims would be in a foreign currency, as also keeping in mind that the husband has assets, income, property and other wealth in that foreign jurisdiction, the court in India is likely to award a lump sum monthly or total amount in the currency of that foreign jurisdiction and not in Indian Rupees.

(q) Rising costs due to inflation, escalating living costs, future expenses of adult children towards higher education and medical expenses of the wife will also be kept in mind by an Indian court for assessing permanent alimony.

(r) Under Indian law there is no mathematical or set formula for determining the amount payable towards permanent alimony, maintenance and right of residence from the collective earnings of the husband. The court makes its own need-based assessment by a means test and then arrives at a figure by which lump sum permanent alimony can be paid either on a monthly basis or a one-time single payment.

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IRELAND

MARRIAGE EQUALITY: A SEISMIC SHIFT FOR FAMILY LAW IN IRELAND?

Maebh Harding[*]

Résumé

Le 22 mai 2015 le peuple irlandais a voté en faveur de l'égalité en mariage, changeant la définition constitutionnelle de cette institution pour y inclure les couples de même sexe. Le référendum a eu un appui populaire massif et a été tenu dans toutes les circonscriptions électorales à l'exception d'une seule. Le Marriage Equality Amendment modifie non seulement la définition du mariage dans la constitution irlandaise mais également la conception jusqu'alors restrictive de la notion de famille qui constituait un obstacle à l'évolution progressiste du droit de la famille en Irlande. Le présent chapitre fait état, dans les grandes lignes, des évolutions du droit qui ont mené au référendum, des principaux arguments avancés au cours de la campagne référendaire ainsi que des défis posés par le résultat de cette consultation populaire. Il poursuit en traitant dans le détail de la mise en œuvre juridique du principe d'égalité en mariage et en mettant en lumière les différentes situations où il s'agira de savoir si l'actuelle jurisprudence en matière de mariage s'applique telle quelle aux couples de même sexe. Le texte fait également état du statut potentiellement problématique de certaines unions, en raison des nouvelles règles relatives à la reconnaissance des mariages étrangers. Le texte conclut en reconnaissant tout le chemin parcouru par le droit irlandais dans le domaine du mariage, mais en notant aussi que plusieurs aspects conservateurs demeurent bien présents, particulièrement au chapitre du divorce.

I INTRODUCTION

On 22 May 2015, the Irish people voted in favour of marriage equality, changing the constitutional definition of marriage to include same-sex couples. The referendum was widely supported and was carried in all but one electoral constituency. The Marriage Equality amendment[1] changes both the definition of marriage in the Irish Constitution and, by extension, the limited understanding of the 'family' which had long posed an obstacle to the progressive reform of Irish family law. This chapter outlines the legal changes

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1 Thirty-fourth Amendment of the Constitution (Marriage Equality) Act 2015.

leading up to the referendum to discuss whether definitional change at constitutional level was necessary. The key arguments of the referendum campaign and subsequent challenges to the result are outlined in an effort to show how the question of marriage equality was understood by different sectors of the Irish voting public. The legal implementation of marriage equality is discussed in detail, highlighting areas where interpretative questions arise about the extension of existing marriage law jurisprudence to marriage between same-sex spouses. Potential problems relating to limping marital status caused by new rules relating to the recognition of foreign marriages between same-sex spouses and foreign same-sex partnerships are outlined. The chapter ends with a consideration of how far Irish marriage law has come but notes that conservative aspects of marriage regulation still remain particularly in relation to divorce.

II THE TRADITIONAL UNDERSTANDING OF MARRIAGE IN IRISH LAW

Although not expressly defined at legislative or constitutional level, marriage had been understood as a relationship between a man and a woman in Irish case-law. For example, in *Griffith v Griffith,* Haugh, J proclaimed: 'The state regards marriage as "the voluntary union for life of one man and one woman to the exclusion of all others" per Lord Penzance in *Hyde v Hyde*'.[2] Similarly, in *Foy v Ireland*, McKechnie J declared that 'marriage as understood by the Constitution, by statute and by case-law refers to the union of a biological man with a biological woman'.[3] However, these judicial proclamations about the definition of marriage were made in contexts where the heterosexual nature of marriage was not in dispute.

Statutes regulating entry into marriage did not expressly set out the requirement that both parties had to be of different sexes until the Civil Registration Act 2004, which created an impediment to marriage if both parties were of the same sex,[4] seemingly on the understanding that this consolidated existing law at the time.[5] This provision precluded same-sex couples from marrying in Ireland, but did not enunciate the legal status of such a marriage should the courts be required to determine its status.[6]

Under art 41.3.1 of the Irish Constitution 'the State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack'. Marriage is essential to the understanding of family

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2 *Griffith v Griffith* [1944] IR 35, 40.

3 *Foy v An tArd Chláraitheoir & Ors* [2002] IEHC 116, [175]. See also *B v R* [1996] 3 IR 549, 554; *TF v Ireland* [1995] 1 IR 321, 373.

4 Civil Registration Act 2004, s 2(2)(e).

5 B Tobin, 'Same-Sex Marriage in Ireland: The Rocky Road to Recognition' (2012) 15 *Irish Journal of Family Law* 102–106.

6 A matter for the courts under the Family Law Act 1995, s 29.

within the Constitution.[7] The original text of art 41 focused on the permanency of marriage, rather than its definition, precluding any legal right to divorce until changes were made by constitutional referendum in 1995.[8] It is clear, however, that the framers' idea of marriage was as the appropriate place to have children and involved traditional gender roles. Article 41.2 expressly refers to the woman's life within the home and her duties as a mother in the home whereas art 42.1[9] acknowledges the marital family as the primary and natural educator of children.

Articles 41 and 42 protect the marital family as a unit, from unwarranted interference by the state. Although preferential treatment of the marital family is not constitutionally required, the state is permitted to make policies that favour the marital family over other family forms.[10] Constitutional jurisprudence has established that the state cannot disadvantage the marital family as compared to other family forms.[11] However, this institutional protection of marriage is subject to the common good[12] and can be affected by other constitutional rights.[13]

III LEGAL CHANGES PRE-DATING THE MARRIAGE EQUALITY REFERENDUM

Legislative policy prior to the marriage equality referendum rested on an assumption that art 41 of the Constitution should be interpreted as an implicit prohibition on marriage between same-sex partners. However, while this was the position taken by the Irish High Court, the question was never considered by the ultimate interpretative authority; the Irish Supreme Court. As a result of this assumed interpretation, legislative provision was made for civil partnership as a marriage equivalent for same-sex couples.

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7 Article 41.1.1 'The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.' Article 41.3.3.1 'The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.'

8 Fifteenth Amendment of the Constitution Act 1995.

9 Article 42.1. 'The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.'

10 *O'B v S* [1984] IR 316.

11 *Murphy v Attorney General* [1982] IR 241; *Muckley v Ireland* [1985] IR 472; *Hyland v Minister for Social Welfare* [1989] IR 624; *Greene v Minister for Agriculture* [1990] 2 IR 17.

12 *TF v Ireland* [1995] 1 IR 321.

13 *O'Shea v Ireland* [2007] 2 IR 313.

(a) *Zappone v Revenue Commissioners*

The non-recognition of overseas marriage between two same-sex spouses in Ireland was directly challenged in *Zappone v Revenue Commissioners*.[14] In this case, the couple, both Irish citizens, had married in Vancouver, Canada in 2003. They had been refused certain tax reliefs offered to married couples after forwarding their Canadian marriage certificate to the Irish Revenue Commissioners.[15] They were treated like a cohabiting couple for tax purposes. The couple argued that the failure to recognise their Canadian marriage discriminated against them on the basis of their gender or sexual orientation and that their art 8 and art 12 rights under the European Convention of Human Rights had been violated. The couple also advanced the argument that the right to marry, recognised as a personal right of the citizen under art 40.3.1 of the Irish Constitution, should be interpreted as embracing the concept of same-sex marriage if a 'living document' approach was taken to determining the scope of unenumerated rights.

In the High Court, Dunne J dismissed the claim, holding that marriage as understood by the Irish Constitution was confined to persons of the opposite sex and could not be redefined by the courts. She held that there no discrimination existed as the couple were treated in law in the same way as any non-married heterosexual couple.[16] In the alterative, she suggested that, if any form of discrimination between opposite and same-sex couples existed, then this could be justified by the constitutional duty to protect the institution of marriage under art 41 of the Constitution or the imperative of ensuring the welfare of children. Dunne J did call for legislative changes to protect both opposite sex and same-sex cohabiting couples.[17]

Dunne J constructed the constitutional right to marry as implicitly stemming from art 41 rather than following previous case-law which located the right as stemming from the protections in art 40.3.1. She found that as an implicit right, the right to marry was clearly understood in the Constitution as adopted in 1937 as being limited to marriage between a man and a woman.[18] The court was not being asked to determine the meaning of an unenumerated right as part of the general protection of the citizen under art 40.3.1 where contemporary prevailing norms might have been more influential.

In any event, Dunne J found little evidence of a 'changing consensus' in relation to the acceptance of same-sex marriage[19] and noted that the traditional opposite-sex definition had been reiterated in Irish case-law as recently as

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[14] *Zappone v Revenue Commissioners* [2008] 2 IR 417.
[15] The motivations of the couple and their experiences of the case are expressed in their own words in AL Gilligan and K Zappone, *Our Lives Out Loud* (The O'Brien Press, Dublin, 2009).
[16] *Zappone v Revenue Commissioners* [2008] 2 IR 417, 507.
[17] Ibid 513.
[18] Ibid 505.
[19] Ibid 506.

2003.[20] (Although, of course, the gendered aspect of the definition had not been challenged in any of these cases.) She viewed the enactment of s 2(2)(e) of the Civil Registration Act 2004 as an indication of the prevailing legal consensus of what marriage was and how it could be defined.[21]

The decision has been criticised as being inconsistent with previous Irish constitutional jurisprudence on the right to marry.[22] However, as unenumerated rights can be regulated by law in accordance with the common good,[23] understanding the right to marry as stemming from art 40.3.1 rather than art 41 might not have affected the outcome.[24]

Outside the semantics of Irish constitutional jurisprudence it is clear that the normality of homosexuality itself was on trial in this case. The court heard evidence on whether or not homosexuality was normal and also whether children were harmed by being in such families,[25] although the applicants had no children. Dunne J held that the state was 'entitled to adopt a cautious approach to changing the capacity to marry *albeit* that there is no evidence of any adverse impact on welfare'.[26] It is difficult to imagine such a hostile approach being taken today.

(b) Civil partnership

The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Civil Partnership Act 2010) came into force on 1 January 2011.[27] This Act created a new statutory institution of civil partnership and also provided legislative protection for cohabiting couples. The Act was drafted on the assumption that same-sex marriage was not part of the constitutional definition of marriage. Court interpretation of the protections of art 41 precludes the state from conferring equal constitutional protection on a family based on a non-marital union.[28] Therefore civil partners did not enjoy the constitutional status of 'family'. Moreover, the institution of civil partnership was deliberately limited to same-sex couples so that it could not be seen as a constitutionally impermissible competitor to marriage.[29]

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[20] Citing *Murray v Ireland* [1985] IR 532; *TF v Ireland* [1995] 1 IR 321; *DT v CT (Divorce: Ample resources)* [2002] 3 IR 334.

[21] *Zappone v Revenue Commissioners* [2008] 2 IR 417, 506.

[22] M Harding, 'A Softening of the Marital Paradigm' in B Atkin (ed), *International Survey of Family Law 2012 Edition* (Family Law, Bristol, 2012) 151–169.

[23] *O'Shea v Ireland* [2007] 2 IR 313, 323–324.

[24] See F de Londras, *'Zappone & Gilligan v Revenue Commissioners & Ors'* in M Enright, J McCandless and A O'Donoghue, *Northern/Irish Feminist Judgments* (Hart Publishing, Oxford, 2016) (forthcoming).

[25] For a discussion of the relevance of children in the case see B Tobin, 'Law, Politics and the Child-Centric Approach to Marriage in Ireland' (2012) 47 *The Irish Jurist* 210–225.

[26] *Zappone v Revenue Commissioners* [2008] 2 IR 417, 507.

[27] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Commencement) Order 2010, SI 2010/648.

[28] *State (Nicolaou) v An Bord Uchtála* [1966] IR 567, 622; *Ennis v Butterly* [1996] 1 IR 426.

[29] J Mee, 'Cohabitation, Civil partnership and the Constitution' in W Binchy and O Doyle (eds),

Civil partnership carried many of the same advantages as marriage. Civil partners enjoyed a right to remain in a shared home regardless of legal ownership,[30] the same entitlements to protected tenancies[31] and the same maintenance obligations in respect of their civil partners as spouses had towards each other.[32] Civil partners enjoyed the same rights on intestacy as spouses,[33] the right to challenge their partner's will[34] and the same level of protection from domestic violence as that granted to spouses.[35] The Finance (No 3) Act 2011 afforded civil partners the same tax treatment as married couples in respect of income tax, stamp duty, capital acquisitions tax, capital gains tax and VAT, resolving the difference in treatment underpinning the *Zappone* challenge.

However, there were a number of notable differences between civil partnership and marriage. Civil partnership could only be entered into through a civil ceremony[36] whereas marriage could be entered into by a religious ceremony also.[37] Eligibility requirements were also different. The prohibited degrees for civil partnership were limited to a much smaller category than those outlined for marriage[38] reflecting a policy desire to reduce the prohibited degrees.[39] The grounds for nullity[40] were less extensive than for marriage. A decree of nullity could be granted only where the parties lacked capacity, where formalities were not respected, where consent was considered invalid by reason of mental incapacity, duress or undue influence or, where parties were within the prohibited degrees, or, not of the same sex. The process for dissolution of civil partnership was similar to that for divorce but the pre-requisites were less onerous.[41] Parties had to live apart for 2 years out of the previous 3 years rather than the 4-year period of separation that is constitutionally imposed for divorcing couples.[42] While civil partners could execute a deed of separation, no provision was made for judicial separation.

Committed Relationships and the Law (Four Courts Press, Dublin, 2007), 210. See Una Mullally, *In the Name of Love* (The History Press, Dublin, 2014), Chs 19–23.

30 Civil Partnership Act 2010, Part 4.

31 Civil Partnership Act 2010, ss 40–41.

32 Civil Partnership Act 2010, Part 5.

33 Succession Act 1965, s 67A, as inserted by the Civil Partnership Act 2010, s 73.

34 Succession Act 1965, s 111A as inserted by the Civil Partnership Act 2010, s 81. For the scope of this right see, J Mee 'Succession and the Civil Partnership Bill' (2009) 14 *Conveyancing and Property Law Journal* 86–88.

35 Domestic Violence Act 1996 as amended by the Civil Partnership Act 2010, Part 9.

36 Civil Registration Act 2004, Part 7A, as inserted by the Civil Partnership Act 2010, s 16.

37 Or a secular ceremony following the creation of a third category of solemnisers by the Civil Registration (Amendment) Act 2012.

38 Civil Registration Act 2004, Sch 3, as inserted by the Civil Partnership Act 2010, s 26.

39 M Harding, 'The curious incident of the Marriage Act (No.2) 1537 and the Irish Statute Book' (2012) 32 *Legal Studies* 78–108; J Mee, 'Marriage, Civil Partnership and the Prohibited Degrees of Relationship' (2009) 27 *Irish Law Times*, 259–264.

40 Civil Partnership Act 2010, s 107.

41 Civil Partnership Act 2010, Part 12.

42 Civil Partnership Act 2010, s 110.

Civil partnership was open to a larger class of individuals than marriage, was less easy to annul and was easier to dissolve. It could be argued that these differences represented a more progressive approach to regulating adult relationships than marriage, which remains constrained by outdated jurisprudence and constitutional restrictions. In the campaign for equal marriage, these differences, while recognised as 'sensible',[43] were also construed as evidence that civil partnership was a second-class status for same-sex couples who should be permitted to enter marriage on equal terms to opposite-sex couples. Ryan argues that broader approach to eligibility and the more limited approach to nullity could be interpreted as setting a lower threshold for entering a civil partnership as opposed to marriage, implying that the status was not equivalent to the 'gold standard' of marriage.[44]

The most significant differences between the rights enjoyed by married couples and those enjoyed by civil partners related to their relationships with their children. Irish law conceptualised parenthood as a matter of biology, either based on genetic links between parent and child[45] or, in the case of surrogacy, gestation.[46] As the law stood, only parents, (not step-parents) had the opportunity to exercise guardianship,[47] or have custody and access rights over their children. While married couples could adopt jointly, allowing both spouses to become legal parents of a non-biologically related child and potentially regularising the position of a step-parent, civil partners could only adopt as individuals.[48] As a result, the relationship between a child and their biological parent's civil partner had no legal recognition. The Civil Partnership Act 2010 was condemned as a missed opportunity to regulate the legal position of children living with same-sex couples.[49] The lack of legal status given to non-biological parents posed numerous day-to-day problems for same-sex families.[50]

The Civil Partnership Act 2010 did not impose maintenance obligations on civil partners who acted *in loco parentis* to their partner's biological children even though such obligations were imposed on step-parents.[51] The right of a child to

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43 Marriage Equality, *Missing Pieces* (2011), 23 available online at www.marriagequality.ie/getinformed/me_publications/missing-pieces.

44 F Ryan, 'The General Scheme of the Civil Partnership Bill 2008: Brave New Dawn or Missed Opportunity?' (2008) 11 *Irish Journal of Family Law* 51–57; Marriage Equality, *Missing Pieces* (2011), 22–24 available online at www.marriagequality.ie/getinformed/me_publications/missing-pieces.

45 *McD v L & Anor.* [2009] IESC 81; Status of Children Act 1987, Part VII.

46 *MR & DR v An tArd Chláraitheoir & Ors* [2014] IESC 60.

47 Guardianship of Infants Act 1964, s 8.

48 Adoption Act 2010, s 33.

49 F Ryan, 'The General Scheme of the Civil Partnership Bill 2008: Brave New Dawn or Missed Opportunity?' (2008) 11 *Irish Journal of Family Law* 51–57; Aoife Daly, 'Ignoring Reality: Children and the Civil Partnership Act in Ireland' (2008) 11 *Irish Journal of Family Law* 82–86.

50 I Elliot, *Voices of Children: Report on Initial Research with Children of LGBT Parents* (Marriage Equality, 2010), 16–23.

51 Family Law (Maintenance of Spouses and Children) Act, 1976, s 3(1); Family Law Act, 1995, s 2(1); Family Law (Divorce) Act, 1996, s 2(1).

challenge their step-parent's will on the basis that proper provision had not been made was not extended to include the civil partners of parents.[52]

Many of these differences in treatment relating to children are now remedied by the Children and Family Relationships Act 2015, although most of the Act has yet to come into operation.[53] Section 5 allows a civil partner to become the second legal parent of any child born during the civil partnership following DAHR (Donor Assisted Human Reproduction occurring in Ireland)[54] although surrogacy remains unregulated under the Act. Civil partners are also permitted adopt jointly as a couple.[55] More broadly, the Act allows non-parents to become the legal guardians of children and apply for custody and access.[56]

The Children and Family Relationships Act 2015 also imposes an obligation of maintenance on civil partners for 'any dependant child of the civil partners'[57] and allows such children to challenge the will of either civil partner.[58]

The introduction of civil partnership potentially undermined the argument for a constitutional imperative for same-sex marriage pending in *Zappone*. It was possible that the Supreme Court on appeal would refuse to expand the constitutional understanding of marriage because many of the benefits of marriage had been extended to same-sex couples by legislation.[59] Following their loss in the High Court, the couple in *Zappone* sought to introduce new arguments relating to the Civil Registration Act 2004 and the Civil Partnership Act 2010 for their Supreme Court appeal but this was unsuccessful.[60] A fresh legal challenge was issued at High Court level in 2012, but no hearing date was set before the Constitutional Convention in 2013.

(c) The constitutional convention

In 2012, the Irish Parliament called for a convention on the Constitution to make recommendations in relation to a number of proposed constitutional

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52 Succession Act 1965, s 117.

53 Children and Family Relationships Act 2015 (Commencement of Certain Provisions) Order 2016, SI 2016/12.

54 Children and Family Relationships Act 2015, s 5.

55 Children and Family Relationships Act 2015, s 114, amending the Adoption Act 2010, s 33.

56 Children and Family Relationships Act 2015, s 49, inserting s 6c into the Guardianship of Children Act 1964. See further, M Harding, 'Teetering on the brink of meaningful change?' in B Atkin (ed), *International Survey of Family Law 2015 Edition* (Family Law, Bristol, 2015) 161–181.

57 Civil Partnership Act 2010, s 45 amended by the Children and Family Relationships Act 2015, s 140.

58 Succession Act 1965, s 117 as amended by the Children and Family Relationships Act 2015, s 69.

59 B Tobin, 'Same-Sex Couples and the Law: Recent Developments in the British Isles' (2009) 23 *International Journal of Law Policy and the Family* 309–330.

60 B Tobin, 'Same-Sex Marriage in Ireland: The Rocky Road to Recognition' (2012) 15 *Irish Journal of Family Law* 102–106.

reforms, including provision for same-sex marriage. The convention was made up of 100 people, including 66 citizens recruited as being representative of the voting population of Ireland.[61]

These representatives heard legal arguments and presentations by family therapists and advocacy groups. They also received 1,077 submissions from members of the public and advocacy groups in relation to the issue of same-sex marriage.[62] In April 2013, 78% of the constitutional convention voted in favour of amending the Constitution to oblige the state to enact laws providing for same-sex marriage.[63] 81% also recommended additional laws to provide for the relationship between a child and the non-genetic parent in a same-sex family should marriage laws be changed.

IV THE MARRIAGE EQUALITY REFERENDUM

The Marriage Equality referendum[64] was put to the people on 22 May 2015. The referendum was passed by 1,201,607 votes in favour (62%) and 734,300 against (38%). There was a high turnout[65] (60.5%) and the margin was more decisive than in previous referendums on family law issues.[66] All but one constituency (Roscommon-South Leitrim) voted yes and even there the margin was slim.[67] The margins were greater in Dublin than in constituencies outside Dublin, indicating greater conservatism in rural areas, something which has been observed in previous referendums.[68] Whether or not a referendum was actually needed to introduce marriage equality or whether the Supreme Court would have ruled in *Zappone* to include same-sex couples in the definition of marriage[69] is now a moot point.

The Children and Family Relationships Act 2015, which dealt with many controversial issues relating to children in same-sex families, was signed into

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61 Selection was based on geographic spread, age, gender, socio-economic status and working status. See www.constitution.ie/Documents/BehaviourAndAttitudes.pdf.

62 See further Healy et al, *Ireland Says Yes* (Merrion Press, Dublin, 2016) Ch 1.

63 *Third Report of the Convention on the Constitution Amending the Constitution to provide for same-sex marriage*, (June 2013), [2] available online at www.constitution.ie/AttachmentDownload.ashx?mid=c90ab08b-ece2-e211-a5a0-005056a32ee4.

64 Thirty-fourth Amendment of the Constitution (Marriage Equality) Act 2015.

65 For example the Children's Rights referendum (Thirty-First Amendment of the Constitution (Children) Act 2012) had a turnout of only 33.49%, while the highest ever turnout at a constitutional referendum was 70.88% in 1972 in relation to Ireland's membership of the EEC (Third Amendment of the Constitution Act 1972).

66 The Divorce referendum (Fifteenth Amendment of the Constitution Act 1995) was approved by a margin of only 0.56% whereas the Children's Rights referendum (Thirty-First Amendment of the Constitution (Children) Act 2012) was passed by a margin of 16.02%.

67 17,615 (48.5%) in favour and 18,644 (51.4%) against.

68 For a detailed breakdown of the results see *Iris Ofigiúil;* 26 May 2015, issue 42, 1067.

69 C O'Mahony, 'Principled Expediency: How the Irish Courts can Compromise on Same-Sex Marriage' (2012) 35 *Dublin University Law Journal* 199–228; E Geany, 'Same Sex Marriage' (2012) 11 *Hibernian Law Journal* 181–202.

force just before the referendum on 6 April[70] but this did not prevent the question of whether children should be brought up in same-sex families from becoming a central issue in referendum campaigns.

Advocates for a yes vote focused on equality, tackling discrimination against LGBT people in Ireland and individual freedom.[71] A large number of Irish celebrities endorsed the Yes vote campaign including, for example, Hollywood actor Colin Farrell. The No vote campaign focused on religious and moral objections to homosexuality.[72] The Irish Catholic Bishops Association announced that it was considering refusing to sign the civil marriage registration form for any marriage, if the marriage equality referendum was ratified.[73] Other No campaigns were based on the welfare of children who, it was argued, should be brought up in a family with both a mother and a father.[74] It was also claimed that a Yes vote would require the legalisation of surrogacy[75] and lead to the erosion of social values ultimately mandating the legalisation of polygamy and according to some extreme views, paedophilia.

Under the Broadcasting Act 2009, Irish radio and television services must treat current affairs in an objective and impartial manner without adopting a particular view. What constituted impartial discussion of referendum issues became a highly contested issue throughout the campaign. A number[76] of formal complaints were made by the No campaign in relation to the need to 'balance' arguments and personal stories promoting a Yes vote, with an equal number promoting a No vote. It was also argued that presenters did not properly accommodate speakers with extremely conservative views. None of these complaints were ultimately upheld.[77]

Members of the No campaign continued to contest the referendum after the public vote.[78] Two referendum petitions were lodged, both by lay litigants.

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70 Although many provisions are not yet implemented.

71 See further Healy et al, *Ireland Says Yes* (Merrion Press, Dublin, 2016) Ch 2.

72 See U Mullally, *In the Name of Love* (The History Press, Dublin, 2014) Ch 25.

73 P McGarry, 'Bishops yet to make decision on civil duties if referendum passes' *Irish Times,* 13 April 2015.

74 Iona Institute, *Made For Children* (2010) available online at www.ionainstitute.ie/wp-content/uploads/2014/11/MADE-FOR-CHILDREN_web.pdf. Some of these concerns are refuted in B Tobin, '"First comes love, then comes marriage …"—Allaying Reservations Surrounding Marriage Equality and Same-sex Parenting in Ireland' (2015) 18 Irish Journal of Family Law 9–13

75 M Collins and P Brady, *Query in respect of possible legal effects of proposed Thirty-fourth Amendment of the Constitution (Marriage referendum)*(2015) available at www.ionainstitute.ie/wp-content/uploads/2015/12/Legal-opinion-Marriage-and-Family.pdf.

76 At least seven such claims were made and dismissed by the Broadcasting Authority of Ireland between June 2015 and January 2016. See www.bai.ie/index.php/broadcasting-complaints/decisions.

77 The Broadcasting Authority of Ireland Guidelines in Respect of Coverage of Referenda (March 2015) stipulated that equality of airtime was neither the sole nor final test of equity in coverage. Available online at www.bai.ie/index.php/broadcasting-complaints/decisions.

78 A referendum certificate only becomes final when the Master of the High Court informs the Referendum Returning officer that referendum petitions questioning the validity of the referendum have become null and void. Referendum Act 1994, s 41.

Walshe suggested that the wording of the marriage referendum itself was misleading, and that the public, when asked to vote 'yes for equality' or 'no for inequality', may have believed that this referred to gender roles within heterosexual marriage. He also claimed that state resources had been misused to promote a Yes campaign but these allegations lacked evidential support. Lyons alleged that the subject matter of the referendum was impermissibly repugnant to the Christian ethos of the Irish constitution. He also argued that a majority of registered voters was required to pass a referendum rather than just the majority of the votes cast. He asserted that non-voting registered voters had deemed the proposal not worthy of consideration.

The legal test to impugn a referendum passed by popular vote had been explored in challenges to the Children's Rights referendum.[79] Petitioners are required to show than an irregularity or interference with the referendum affected the result to the extent that a reasonable person could be in doubt about, and no longer trust, the provisional outcome.[80] The High Court refused to grant Walshe and Lyons leave to present their petitions.[81] This refusal was appealed to the Court of Appeal[82] and dismissed, and also dismissed by the Supreme Court in September 2015.[83]

The technical legal basis for dismissing both appeals to the Supreme Court was that the provisional referendum certificate had by that stage become final, and so there was no further right under statute to question its validity.[84] Neither lay applicant had applied for a stay to prevent the Master of High Court from finalising the referendum certificate after the ruling of the Court of Appeal. This meant that the referendum was promulgated on 1 September[85] before the final Supreme Court appeal on 16 September. The Supreme Court warned that this *fait accompli* could have had serious consequences if the applications had had merit.[86] While the High Court may have been premature in certifying the referendum, as can been seen in the Children's Rights amendment litigation, which delayed the ratification of the amendment for 2-and-a-half years, petitions lacking merit can cause serious delay to the implementation of democratically mandated constitutional rights. In September 2015, a Private Members Bill[87] was published to allow future referendum petitions to proceed more quickly to the Supreme Court but it did not progress before the end of the government.

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79 *McCrystal v Minister for Children and Youth Affairs* [2012] IESC 53; *Jordan v Minister for Children and Youth Affairs* [2015] IESC 33.

80 *Jordan v Minister for Children and Youth Affairs* [2015] IESC 33, [7].

81 *Walshe v Ireland* (2015) Kearns, P, *ex tempore*, 5 June 2015; *Lyons v Ireland* (2015) Kearns, P, *ex tempore*, 5.

82 *Walshe v Ireland, Lyons v Ireland* (2015) Court of Appeal, *ex tempore*, 30 July 2015.

83 *Walshe v Ireland* [2015] IESCDET 37; *Lyons v Ireland* [2015] IESCDET 38.

84 *Walshe v Ireland* [2015] IESCDET 37 [24]; See further, B Clarke, 'Appeals to the Supreme Court and the new Appellate Regime' (2015) 20 *The Bar Review* 98-102.

85 *Iris Ofigiúil;* 1 September 2015, issue 70, 1462.

86 *Walshe v Ireland* [2015] IESCDET 37, [28].

87 Referendum (Amendment) Bill 2015 [PMB].

V IMPLEMENTATION OF MARRIAGE EQUALITY

The Thirty-fourth Amendment of the Constitution (Marriage Equality) Act 2015 does not change the pre-existing text of art 41, but adds an additional subsection:

> 'Marriage may be contracted in accordance with law by two persons without distinction as to their sex.'

The provision is self-executing in removing restrictions to same-sex couples getting married[88] and renders existing legislative barriers prima facie unconstitutional. The amendment leaves other rules relating to capacity to enter into marriage, and the consequences of marriage up to statute and case-law. The Marriage Act 2015 which makes changes to existing legislation to facilitate marriage equality, came into force on 16 November 2015.[89] The first marriage ceremony took place the next day in Clonmel, County Tipperary and 91 such marriages took place before the end of 2015.[90]

The Marriage Act 2015 prospectively abolishes civil partnership and amends existing marriage legislation to accommodate same-sex spouses. Some of the more difficult issues of interpretation relate to aspects of marriage that are currently regulated by common law principles and not statute. These issues are left for the future determination of the courts. Ryan argues that, although exceptional contexts may still exist in which the courts will have to lapse from equality, and may not be able to treat same-sex spouses in exactly the same way as opposite-sex spouses, exceptions should be 'unavoidable, proportionate and strictly necessary'.[91]

(a) Civil partnership phased out

The Marriage Act 2015 prevents the creation of new civil partnerships in Ireland after 16 November 2015.[92] Existing civil partnerships remain legally valid but civil partners may convert their relationship to marriage if they wish.

As marriage is now open to same-sex couples, retaining civil partnership could have created a disincentive for same-sex couples to marry. Couples might have opted for civil partnership over marriage on ideological grounds, perhaps because civil partnership did not have the social baggage of marriage, or for practical reasons; dissolution of civil partnership is available on less onerous grounds than marriage and a couple might be permitted to form a civil

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88 C O'Mahony, 'Same sex marriage referendum: a legal review', *Irish Times*, 22 January, 2015.

89 Marriage Act 2015 (Commencement) Order 2015, SI 2015/504.

90 Central Statistics Office, *Marriage and Civil Partnership Statistical Release 2015* available online at http://cso.ie/en/releasesandpublications/er/mcp/marriagesandcivilpartnerships2015.

91 F Ryan, 'Same-Sex Couples and the Marriage Act 2015: Implications for Practice' (27 November 2015) 3 available at SSRN http://ssrn.com/abstract=2700626.

92 Part 7A of the Civil Registration Act 2004 which provided the mechanism for entry into civil partnership is abolished by the Marriage Act 2015, s 8.

partnership, but be ineligible to marry due to the wider class of prohibited degrees that apply to marriage.[93] The abolition of civil partnership was viewed by the government as constitutionally necessary[94] but this is not an unchallenged position. Without empirical evidence of the intentions of same-sex couples, the idea that retaining civil partnership would have, in fact, undermined marriage is pure conjecture. Dunne argues that the mere existence of an alternative family structure could not, in itself, constitute an inducement not to marry, otherwise existing legislative provisions for cohabitants would be unconstitutional.[95] In order to constitute an inducement not to marry, the alternative family structure must be viewed by those who might marry as better than, or as good as, marriage. Dunne suggests that it is arguable that same-sex couples who would have chosen civil partnership might not choose to marry at all. He also suggests that it is feasible that civil partnership might continue to be viewed by same-sex couples as a lesser commitment to marriage because of its history as a second class status and its more liberal dissolution regime.[96]

A subsisting civil partnership does not create an impediment to marriage to one's civil partner.[97] This makes it clear that couples who entered into a civil partnership in Ireland and those whose overseas partnerships continue to be recognised in Ireland as civil partnership[98] may simply marry if they want to upgrade their relationship. For those who entered into a civil partnership in Ireland, the normal 3-month notice period[99] for marriage does not apply.[100] Once civil partners marry, the subsisting civil partnership is dissolved[101] and effectively changed into marriage by the ceremony.

2,071 same-sex couples entered into a civil partnership in Ireland between 2011 and 2016.[102] Nine of these civil partnerships appear to have been dissolved.[103] It remains to be seen how many will convert into marriages. The retention of civil partnership and its extension to opposite-sex couples would have provided

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93 However in England and Wales where civil partnership was retained following the introduction of marriage equality the number of civil partnership fell by 70% in 2014. ONS, *Civil Partnership in England and Wales: 2014* (2015) available online at www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/bulletins/civilpartnershipsinenglandandwales/2015-10-20.

94 F Ryan, 'Same-Sex Couples and the Marriage Act 2015: Implications for Practice' (27 November 2015) 8 available at SSRN http://ssrn.com/abstract=2700626.

95 P Dunne, 'Civil Partnership in an Ireland of Equal Marriage Rights' (2015) 53 *The Irish Jurist* 82.

96 Ibid, 90.

97 Civil Registration Act 2004, s 2B as inserted by the Marriage Act 2015, s 6.

98 See below 'Conflicts of Law Issues'.

99 Civil Registration Act 2004, s 46.

100 Marriage Act 2015, s 9.

101 Civil Partnership Act 2010, s 109A as inserted the Marriage Act 2015, s 11.

102 Central Statistics Office, *Marriage and Civil Partnership Statistical Releases 2011–2015* available online at www.cso.ie/en/statistics/birthsdeathsandmarriages/archive.

103 In 2014, there were 41 applications for dissolution of civil partnership in the Circuit Court and 9 were resolved; Courts Service, *Annual Report 2014* 45 available www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/76D5C7C737385EFF80257E91002F3D7A/$FILE/Courts%20Service%20Annual%20Report%202014.pdf.

an option for couples who do not believe in marriage, increasing diversity of legally protected family forms in Ireland. As Dunne argues, the Irish state provides a strange sort of 'protection' to marriage by encouraging couples who would otherwise reject marriage into marital unions simply because they now have no other way of achieving state recognition of their relationship.[104] Some statutory protection is provided for vehement objectors to marriage who cohabit, under Part 15 of the Civil Partnership Act 2010 but they are not recognised by the Irish constitution as being a family.[105]

(b) Getting married

In order for a marriage to have legal effect in Ireland it must be carried out by a registered solemniser.[106] There are three different types of solemnisers, civil celebrants who are employees of the state,[107] religious celebrants who are part of a body that meets regularly for common religious worship[108] and secular celebrants who must be part of a secular, ethical and humanist organisation as well as fulfilling several other criteria.[109] Section 7 of the Marriage Act 2015 provides a conscience clause for religious solemnisers who are not required to carry out marriages between two people of the same sex nor are religious bodies required to recognise such marriages. A number of religious organisations in Ireland have indicated strong opposition to the idea of carrying out such marriages and are likely to exercise the conscience clause.[110] However, religious solemnisers are not precluded from carrying out marriage between same-sex couples and more liberal religions such as the Unitarians do offer such ceremonies.

Section 4 of the Marriage Act 2015 formally deletes the statutory requirement for parties to a marriage to be of the opposite sex.[111] The wording of the constitutional amendment itself seems to render legal sex irrelevant to marriage. Ireland's Gender Recognition Act 2015, which came into force in September 2015, now allows self-determination of legal sex without requiring transgender people to undergo medical treatment. The text of the Act pre-dated marriage equality and would have limited gender recognition to people who were not married or in a civil partnership,[112] but as a result of the referendum these sections were never brought into force.[113]

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[104] P Dunne, 'Civil Partnership in an Ireland of Equal Marriage Rights' (2015) 53 *The Irish Jurist* 90.

[105] M Harding 'A Softening of the Marital Paradigm' in B Atkin (ed), *International Survey of Family Law 2012 Edition* (Family Law, Bristol, 2012) 151–169.

[106] Civil Registration Act 2004, s 51 as amended.

[107] In practice, employees of the Health Services Executive.

[108] Civil Registration Act 2004, s 45.

[109] Introduced by the Civil Registration (Amendment) Act 2012.

[110] F Ó Cionnaith, 'Religions unite against referendum' *Irish Examiner*, 15 April 2015.

[111] Civil Registration Act 2004, s 2(2)(e).

[112] Gender Recognition Act 2015, s 10(1)(f)(i) and s 18(3).

[113] The Gender Recognition Act 2015 (Commencement) Order 2015, SI 2015/369.

The Marriage Act 2015 confirms marriages cannot be formed between people within the prohibited degrees of relationship. Section 2A states that 'any prohibition in this Act or any other enactment or rule of law on marriage between two persons of the opposite sex arising by virtue of a relationship of consanguinity or affinity between them, shall, subject to any necessary modifications, apply to marriage between two persons of the same sex as it applies to marriage between two persons of the opposite sex'.[114] For the purpose of marriage, the prohibited degrees date from Tudor legislation that is still in force in Ireland and their exact scope is not clear.[115] While prohibitions based on consanguinity can easily be extended to same-sex couples – if you are precluded from marrying your sister, the correlation is that you are now precluded from marrying your brother also. However, prohibitions based on affinity pose more of a challenge. These are created either through marriage[116] or through 'carnal knowledge'.[117] If the 'carnal knowledge' approach is taken, it will create interpretational problems in relation to same-sex couples. However, the issue is unlikely to be raised in practice as the Irish Civil Registration Service refers couples to a table of 22 relatives based on Archbishop Parker's Table traditionally used by the Anglican Church.[118] In cases where individual restrictions based on affinity have been legally challenged, they have been stuck out as unconstitutional restrictions on the right to marry.[119]

On any interpretation, the prohibited degrees for marriage comprise a larger category of individuals than the table of nine relatives precluded from becoming civil partners.[120] As noted by Ryan, this means that there is a very small possibility that some of those in existing civil partnerships might not be able to convert to marriage.[121] It also means that individuals in these sorts of relationships, who would have been able to make use of civil partnership, will not be able to marry and have to rely on statutory protections given to cohabitants to regulate their relationships.

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[114] Civil Registration Act 2004, s 2A as inserted by the Marriage Act 2015, s 5.

[115] The Marriage Act 1542 refers to the 'Levitical degrees' but these are differently interpreted in the Marriage Act (No 1) 1537 and the Marriage Act (No 2) 1537. This conflict has never been resolved. M Harding, 'The curious incident of the Marriage Act (No 2) 1537 and the Irish Statute Book' (2012) 32 *Legal Studies* 78–108.

[116] The Marriage Act (No 1) 1537.

[117] The Marriage Act (No 2) 1537.

[118] Archbishop Parker's table was approved in *The Queen v Maddern* (1843) Tullamore Spring Assizes, 731; the current table can be found at: www.welfare.ie/en/Pages/Getting_Married.aspx.

[119] *O'Shea v Ireland* [2007] 2 IR 313; *Irish Times* 'Woman told her marriage 29 years ago was lawful' 28 June 2001 outlining an *ex tempore* High Court order by Mr Justice Smyth declaring a marriage between a woman and her deceased aunt's husband to be valid.

[120] Civil Registration Act 2004, Sch 3, as inserted by the Civil Partnership Act 2010, s 26.

[121] F Ryan, 'Same-Sex Couples and the Marriage Act 2015: Implications for Practice' (27 November 2015) 5 available at SSRN: http://ssrn.com/abstract=2700626.

(c) Being married

The most important effect of the marriage referendum is that married same-sex couples are now recognised as families under the constitution. Their marital families will enjoy institutional protection under art 41. Legislation that discriminates against married same-sex couples will be *prima facie* unconstitutional. Same-sex spouses will enjoy all the benefits of marital status, for example, in areas such as property, succession and maintenance.

The relationship between children and their non-biologically related same-sex parent will be regulated by the Children and Family Relationships Act 2015 (once implemented) allowing both members of a same-sex couple to be recognised as legal parents where their child is conceived through DAHR in Ireland[122] or where they jointly adopt. These children will be marital children.

Marital children are still treated differently to non-marital children when it comes to eligibility for adoption and in custody disputes between a marital parent and a non-parent.[123] Although the changes made to the Irish Constitution to provide for equal treatment of marital and non-marital children came into force in April 2015[124] these changes require provision to be made by statutory law which has not yet come into operation.[125] At the moment there is no statutory mechanism for the voluntary adoption of marital children[126] and the test for involuntary adoption of marital children laid out under s 3 of the Adoption Act 1988 requires parents to have failed in their constitutional duties towards the child and the likelihood that the failure will continue until the child reaches 18. A general scheme for draft legislation to amend the Adoption Act 2010 to allow for the equal treatment of marital and non-marital children in the adoption process was published in 2012 but has not progressed to legislation. At the time of writing, Ireland has been without a government for over 6 weeks following the indecisive result of the Irish General Election in February 2016 and so swift resolution of the issue appears unlikely.

(d) Ending marriage

Parties to a marriage may seek to end that marriage through a petition for nullity, divorce or judicial separation.

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122 Children and Families Act 2015, Part 5.

123 M Harding, 'Constitutional Recognition of Children's Rights and Paramountcy of Welfare' in B Atkin (ed), *International Survey of Family Law 2013 Edition* (Family Law, Bristol, 2013) 175–194.

124 Thirty-first Amendment of the Constitution Act 2012 which came into force on 28 April 2015.

125 Children and Families Act 2015, s 45 inserts a new s 3 into the Guardianship of Infants Act 1964 which provides that the best interests of the child is to be paramount consideration but at the time of writing this had not yet commenced.

126 Adoption Act 2010, s 23 requires children placed for adoption to be orphans or children of parents who are not married to each other.

While the grounds for nullity of civil partnership were codified and limited, the grounds for nullity of marriage in Ireland are common-law based.[127] Marriages are *void ab initio* for lack of capacity, non-observance of required legal formalities and absence of consent. Marriages are *voidable* for non-consummation and lack of capacity 'to enter into and sustain a normal marital relationship', a ground developed before the introduction of divorce in 1995, when the courts took a very flexible approach to nullity.[128] The Marriage Act 2015 makes no modification to the law of nullity for same-sex spouses creating a number of interpretative challenges for the courts.

Marriages are traditionally voidable for non-consummation where the couple have not engaged in penetrative heterosexual intercourse.[129] In *UF (orse C) v JC*,[130] a marriage was avoided where the husband had an 'inherent and unalterable homosexual nature' and the wife was unaware of this at the time of the marriage. He was considered to lack the capacity to enter into and sustain a normal marital relationship.

Whether these cases will really present problems for marriages between same-sex spouses remains to be seen. In recent years, the courts have taken a much stricter stance on nullity requiring strong evidence before avoiding marriages.[131] Nullity petitions based on voidable grounds may be refused on the basis of approbation.[132] Same-sex couples will presumably be well aware that physical heterosexual intercourse will not be a normal part of their marital relationship. Alternatively, the comments by Costello J in *D v C*,[133] that there is more to marriage than physical consummation, may allow for a broader approach to non-consummation embracing different types of physical and emotional intimacy.

Divorce law in Ireland is subject to constitutional safeguards which are more onerous than the statutory provisions for the dissolution of civil partnership.[134] Article 41.3.2[135] of the Irish Constitution requires a couple to have lived apart for 4 years out of the previous 5 years at the time of instituting divorce proceedings and for there to be no reasonable prospect of reconciliation between the spouses. Before a divorce can be granted, proper provision must be made for spouses and children.[136] As a result of these stringent requirements, it can take an extremely long time to get divorced even if spouses are in full agreement. Perhaps as a result of this, in 2012, Ireland had the lowest divorce

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[127] The Matrimonial Causes and Marriage Law (Amendment) Act 1870, s 13 allows the High Court to administer the grounds of nullity previously recognised in ecclesiastical law.
[128] M Harding, 'A "catholic" approach to Irish nullity law' in E Orucu and Mair (eds), *The Place of Religion in Family Law: A Comparative Search* (Intersentia Antwerp, 2011) 161–185.
[129] *MM (Otherwise G) v PM* [1986] ILRM 515 (IEHC).
[130] [1991] 2 IR 330.
[131] *LB v T MacC* [2009] IESC 21.
[132] See further *SB (formerly known as SM) v FL* [2011] 1 IR 521.
[133] [1984] ILRM 173.
[134] Civil Partnership Act 2010, Part 12.
[135] As amended by the Fifteenth Amendment of the Constitution Act 1995.
[136] Divorce process is governed by the Family Law (Divorce) Act 1996.

rate in Europe at 0.6 divorces per 1,000 population.[137] Parties to an overseas same-sex marriage recognised in Ireland could previously dissolve that relationship as a civil partnership by living apart for 3 years out of the previous 4. Such relationships are now recognised as marriage, so a period of living apart for 4 years out of the previous five will now be imposed. Section 12 of the Marriage 2015 Act allows time already spent living apart prior to the recognition of the overseas marriage of a same-sex couple as a marriage[138] to be counted in divorce and judicial separation proceedings.

Judicial separation allows spouses to regularise the breakdown of their relationship without ending the marital status. Adultery is one of the six grounds for granting a decree of judicial separation.[139] Although the concept of adultery has only been applied to heterosexual activity in reported cases[140] the precise meaning of the phrase under the Act has not be judicially scrutinised. It is open to the courts to interpret the provisions to embrace a broader category of sexual activity.[141]

(e) Conflicts of law issues

The prospective abolition of civil partnership and the extension of marriage to same-sex couples raises a number of complicated conflicts of law issues. This section will look at how foreign marriages and foreign same-sex partnerships are now recognised in Ireland and highlight potential problems relating to limping marital status.

Section 5 of the Civil Partnership Act 2010 recognised both foreign same-sex marriages and other marriage-equivalent registered statuses[142] as civil partnerships in Ireland. Unlike equivalent English legislation there was no provision for a case-by-case approach to this issue. Legal relationships must have been declared legally equivalent to civil partnership by ministerial order. Five such orders[143] were made under the Act and included marriage in 36 states as well as different types of registered partnership from 21 states such as English civil partnership, Austrian Eingetragene Partnerschaft-Gesetz and Norwegian Registrert partnerskap. The relationships were recognised in Ireland

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[137] CSO, *Measuring Ireland's Progress 2013* (2015).[1.7] available http://www.cso.ie/en/releasesandpublications/ep/p-mip/measuringirelandsprogress2013.

[138] See below, next section.

[139] Judicial Separation and Family Law Reform Act 1989, s 2(1)(a)–(f).

[140] Eg *BL v LL* [1992] 2 IR 77; *PD v RD* [2015] IEHC 174.

[141] Unlike the heterosexual definition of adultery imposed by Marriage (Same-sex Couples) Act 2013, Sch 4, Pt 3 in England and Wales.

[142] Registered statuses which are substantially less than marriage such as the French *pacte civil de solidarité* were not included.

[143] Civil Partnership (Recognition of Registered Foreign Relationships) Order 2010, SI 2010/649; Civil Partnership (Recognition of Registered Foreign Relationships) Order 2011, SI 2011/642; Civil Partnership (Recognition of Registered Foreign Relationships) Order 2012, SI 2012/505; Civil Partnership (Recognition of Registered Foreign Relationships) Order 2013, SI 2013/490; The Civil Partnership (Recognition of Registered Foreign Relationships) Order 2014, SI 2014/212.

as long as they were validly entered into in the relevant jurisdiction by parties of the same sex. In addition, particular relationships between partners within the Irish prohibited degrees of relationship for civil partners were excluded from legal recognition.[144]

Under s 12(1) of the Marriage Act 2015, foreign marriages are no longer precluded from being recognised in Ireland as a marriage, merely by reason of the sex of the parties. The Marriage Act 2015 does not repeal s 5 in its entirety. Instead the ministerial orders are modified to remove marriages from the list of relationships recognised as civil partnerships.[145] The idea is that foreign marriages, even those pre-dating the Marriage Act 2015, will now be recognised in Ireland as marriages, not civil partnerships. The remaining types of registered partnership entered into up to 6 months after the coming into force of the Marriage Act 2015[146] will continue to be recognised as civil partnerships in Ireland but may be upgraded to marriage by the parties. Such relationships entered into after that time will not be recognised, but it will be open to these couples to marry in Ireland if they comply with the eligibility requirements and state formalities.

It may seem that overseas marriages are now given stronger legal recognition in Ireland than was previously the case when they were recognised as mere civil partnerships. However, s 12(1) does not grant such marriages automatic recognition. It merely precludes their lack of recognition on the basis that the spouses are of the same sex. The recognition of such marriages as marriages in Ireland will be determined by the courts using the rather ignored and undeveloped Irish rules of conflicts of law.[147] In Irish law this means that formal validity will be determined by the place of celebration but capacity of the parties to marry will be determined by the dual domicile rule.[148] This rule leans toward non-recognition and requires both parties to have capacity to marry in the law of their pre-marriage domicile. This creates a potential problem for some non-Irish domiciliaries who have married outside Ireland. For example, a marriage between a Polish domiciliary and an Irish domiciliary entered into in British Columbia now has uncertain status in Irish law. Such a marriage would have had more certain recognition as civil partnership under the Civil Partnership Act 2010 which merely required compliance with the law of the place of celebration.[149] There are some limited common law exceptions to the dual domicile rule which might be utilised by the Irish courts to avoid

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144 Civil Partnership Act 2010, s 5(3).

145 Marriage Act 2015, s 12(6)–(10).

146 Marriage Act 2015, s 13 inserting s 5A into the Civil Partnership Act 2010.

147 M Ní Shúilleabhain, 'Marriage, Divorce and Stagnation in the Irish Conflict Of Laws' (2014) 52 *The Irish Jurist* 68–89.

148 Eg *McG v W* [2000] 1 ILRM 107; but note that role of conflict of Law rules has been marginalised in recent High Court family reunification case. See also W Binchy, *Irish Conflict of Laws* (Dublin: Butterworths, 1988) Chs 10–11.

149 Of course this raised the spectre of *renvoi* if that country referred to the law of another country to determine capacity. See Bailey, 'Tourist Marriages, Separation Agreements and Polygamy' in Bill Atkin (ed), *The International Survey of Family Law 2012 Edition* (Family Law, Bristol, 2013) 43–48.

non-recognition of overseas marriages on public policy grounds, particularly where one party is an Irish domiciliary and the marriage takes place in Ireland.[150]

With the continued efforts of Tourism Ireland, it is possible that Ireland will become a marriage destination for same-sex couples.[151] There is no formal residency requirement in order to marry in Ireland and last year 11.9% of marriages involved couples who were not previously resident in Ireland.[152] Couples must, however, attend an appointment with a Registrar in person at least 3 months in advance of the wedding in order to give notice, make a declaration of no known impediment and be issued a marriage registration form.[153] Non-nationals may also be required to give evidence of immigration status.[154]

Same-sex couples who travel to Ireland to marry from countries in which same-sex marriage is not recognised may create a limping marriage status which will not be recognised in their country of origin and may also be uncertain if challenged in Ireland under the dual domicile rule. This may cause problems if the couple seek to formally end this status in future years, as the Irish courts may not have jurisdiction to grant a divorce unless at least one of the spouses maintains a connection with Ireland.[155] It must be pointed out that the onerous substantive grounds of Irish divorce law may render Ireland very undesirable as a divorce destination. It is, however, unfortunate that Irish law makers have not considered the need to provide a jurisdiction of necessity to end a limping status that Irish law now allows to be created. This issue has been addressed in Canada[156] and in England and Wales[157] following the introduction of marriage equality in both jurisdictions.

As Ní Shúilleabhain cautions, the uncertainty and irrationality of conflicts of law principles as applied to marriage in Ireland law may result in denial of legal entitlements to those who reasonably assumed that their overseas marriage or

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150 *Sottomayor v de Barros (No 2)* (1879) 5 PD 94.

151 The historical Lisdoonvarna match-making festival has included an LGBT outshoot since 2012 and was heavily promoted by Tourism Ireland after the Marriage referendum. See www.tourismireland.com/Press-Releases/2015/October/Tourism-Ireland-invites-LGBT-couples-around-the-wo.

152 Central Statistics Office, *Marriage and Civil Partnership Statistical Release 2015* available online at http://cso.ie/en/releasesandpublications/er/mcp/marriagesandcivilpartnerships2015.

153 Civil Registration Act 2004, s 46.

154 Civil Registration Act 2004, ss 46 and 58 as amended by the Civil Registration (Amendment) Act 2014.

155 Under art 3 of Council Regulation (EC) No 2201/2003 at least one of the spouses will have to be habitual resident in Ireland. Residual jurisdiction is determined by s 39 of the Family Law (Divorce) Act 1996 which requires at least one of the spouses to be domiciled in Ireland or to have been ordinarily resident there for a least one year.

156 Civil Law Marriage Act 2005, Part 1 as amended by the Civil Marriage of Non-residents Act. 2013.

157 Domicile and Matrimonial Proceeding Act 1973, Sch A1 as inserted by the Marriage (Same Sex Couples) Act 2013, Sch 4, Part 4.

civil partnership would be valid in Ireland.[158] It is unfortunate that Ireland did not take heed of the Canadian experience to rethink the application of the dual domicile rule and consider the need for a jurisdiction of necessity for divorce.

VI CONCLUSION

In the last year, Irish family law has experienced radical and welcome change. At legislative level, the Gender Recognition Act 2015 provides a progressive and modern scheme to allow transgender people to determine their own legal sex. The Children and Family Relationships Act 2015 provides flexible rules to recognise parent–child relationships in different family forms. The Children's Rights referendum of 2012 was finally ratified[159] permitting future adoption reform and allowing the state to intervene into the family, whether marital or non-marital, where the safety or welfare of children is prejudicially affected. However, the introduction of marriage equality stands above these major achievements because it means that 'the family' as a constitutional construct has finally been extended.[160] It is clear that the whole approach to Irish family law has shifted from the conservative, gendered, Catholic-doctrine-inspired paradigm envisaged by the framers of the Irish constitution in 1937. However, it should be pointed out that the constitutional understanding of 'family' is still limited to married couples, privileging marriage above other family forms and excluding single parents, cohabitants, and wider kinship groups.[161]

The Marriage Act 2015 is not perfect. It leaves a number of tricky issues for the courts to resolve in the coming years in relation to nullity, prohibited degrees, adultery and conflicts of law rules but perhaps it is most appropriate that issues are resolved within a practical context.

The prospective abolition of civil partnership leaves only two family forms in Irish law – marriage or cohabitation. It is argued that, in some respects, civil partnership was more progressive than marriage as a family form having less onerous dissolution requirements and a more rational category of prohibited degrees.[162] Being a legislative family form, it could easily have been changed and developed to suit the evolving needs of Irish society. Marriage, being regulated at a constitutional level, is more difficult to adapt. It is hoped that the campaign for equality which highlighted some of the conservative aspects of marriage as meaningful differences to civil partnership, is not interpreted as suggesting that these rules are desirable or essential to marriage regulation in

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158 M Ní Shúilleabhain, 'Marriage, Divorce and Stagnation in the Irish Conflict of Laws' (2014) 52 *The Irish Jurist* 68.

159 Thirty-First Amendment of the Constitution (Children) Act 2012.

160 M MacMahon, 'All Changed, Changed Utterly: The Marriage Equality Referendum and the Children and Family Relationships Act 2015' (2015) 18 *Irish Journal of Family Law* 95–100.

161 F Ryan, 'Editorial' (2015) 18 *Irish Journal of Family Law* 49–51.

162 F Ryan, 'Same-Sex Couples and the Marriage Act 2015: Implications for Practice' (27 November 2015) 5 available at SSRN: http://ssrn.com/abstract=2700626; M Harding 'A Softening of the Marital Paradigm' in B Atkin (ed), *International Survey of Family Law 2012 Edition* (Family Law, Bristol, 2012) 151–169.

Ireland. It would be sad if a successful campaign for flexibility in relation to entry to marriage, to reflect the modern needs and wishes of Irish society, resulted in reinforcing the rigidity of Irish divorce law and discouraging future reform.

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ITALY

AN OVERVIEW ON THE ITALIAN PANORAMA: FAMILY LAW FACES SOCIAL CHANGES

Cinzia Valente[*]

Résumé

L'objet de ce chapitre est de faire état des plus importantes réformes législatives des dernières décennies et d'en analyser la conformité avec les instruments européens et internationaux. Parmi les sujets abordés, il sera question de l'abolition de l'illégitimité, de l'introduction du concept de responsabilité parentale, de coparentalité, de divorce «faites-le-vous-même», ainsi que de conjugalité hors mariage et entre personnes de même sexe. Le droit a dû s'adapter aux changements sociétaux et le droit moderne de la famille, plus complexe et flexible que dans le passé, reconnaît désormais une pluralité de modèles familiaux.

I INTRODUCTION

The area of family law has been the object of important reforms in Italian legislation and numerous adjustments to adapt the legal regime to social developments.

Regulating family relationships is typically the responsibility of the legislative power but the 'interference' of the judicial representative has contributed to a process of renewal, when historic changes require an immediate response to family needs. As is known, the family branch is particularly sensitive to social evolution and subject to the pressure of meta-juridical influences at a specific historical moment. Without a doubt the family is the institution in which the needs and the exigencies of all its members are hosted independently from a legalised form or a mere *de facto* relationship; the identification of a 'family' and the legal consequences of its constitution and/or its break-up would be the first step in the approaching this legal sector. But, unlike other civil areas, the immobilisation of the family's significance[1] is impossible to realise as the

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1 The most eminent Italian dictionary, Treccani Enciclopedia, gives the following definition of family: 'Fundamental institution in any human society, through which the society reproduces

continuous evolutions represent the essential characteristic of the familiar 'society'. We do not ignore the fact that a universal definition of family is not traceable either in domestic law or in international sources; at most, we can identify a common denominator in a specific time period linked to those customs and beliefs.

We have witnessed a succession of various family models: from the patriarchal archetype to the nuclear type to the modern 'version', which is impossible to classify in a preordained and fixed category. In the ancient era, family included a certain numbers of individuals living in the same home and joined together by marriage or by relative ties, sometimes involving servants. In this model the women and the children belonged to the *pater familias* who had legal and representative power. The transition[2] to the succeeding nuclear model, restricted to parents and children, represented the starting point of the modern evolution for family law, where female emancipation has assumed the major role in the familial relationship: from the recognition of her full legal capacity to economic independence through the liberation from any legal and social limitations.[3]

The pre-eminence of the child's welfare and the acknowledgment of the child's *status,* by virtue of which he or she is an active subject (no more a passive object) in relationships, marks the successive evolution to the current season, where political intervention has registered dramatic debates in relation to a delicate scenario. This involves a wider framework where gender problems appear and require a solution to fill a legal gap. The reference is, particularly, to homosexual unions and the consequences of their recognition for adoption. We do not ignore other 'classical' critical points about the legal relevance of cohabitation (always more frequently used in a pre-nuptial form) or mono-parental families as well as reconstructed families[4] and the recent phenomenon of cross-border families.

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itself and perpetuates, both on a biological and cultural level. The functions of the family include the satisfaction of the sexual and affectivity needs, procreation, upbringing, education and socialisation of children, production and consumption of goods. However, despite its universality, family assumes in the different social and cultural backgrounds an extraordinary variety of forms making it difficult to identify an element that characterises it in all circumstances': see http://www.treccani.it/enciclopedia/famiglia/.

2 Some authors have underlined that the patriarchal model, with its asymmetrical characteristic, reflected an 'external' conception in which the duties and rights of family members had legal relevance in the relationship with the institutional power; on the other hand, the contemporary model reestablishes due value for personal ties, turning towards a symmetrical relationship in respect to a family ideal type that does not exist. Cf: G. Ferrando, M. Fortini, F. Ruscello, *Famiglia e matrimonio*, in *Trattato di diritto di famiglia* (P. Zatti ed.), I, Giuffrè, Milano, p 307. On the social function of the institution of the family, see: R. Bin, *La famiglia: alla radice di un ossimoro*, in *Studium Juris*, 2000, 10, p 1066 et seq.

3 See: A. Torrente, and P. Schlesinger, *Manuale di diritto privato*, Giuffrè, Milano, 2015, p 1195 et seq.

4 Statistical data published in February 2013 (see www.istat.it) reveals the characteristics of the familial models and the trends to an increase of mono-parental and cohabitant families. In 2009, the married couple represented 36.4% of all families while in 1998 they were 46.2%; monoparental families and reconstituted families together with cohabitants passed from 16.9%

The aim of the present chapter is to point out the most significant reforms carried out by Italian legislation in the last decades, inserting them into the international and European context to verify the effectiveness of the domestic law.

II THE FIRST STEP TOWARD THE REFORM OF THE FAMILY RELATIONSHIP

The instances of reform emerged after the introduction of the constitutional law (1948) as the civil code (1942)[5] declared principles immediately contrasting with the Constitution. Even if the new discipline promoted principles of liberalism (as in the contractual matters and the property area) the hierarchical system characterised the family model, and children and wives remained in subordinating positions.

Despite women acquiring legal capacity, the power of the husband was realised through the recognition of the *pater familias potestas* both in personal and patrimonial rights. The duty of the husband to maintain the other members of the family was the demonstration of a patrimonial supremacy in the domestic relationship.[6] The right to make any decisions about children and the management (also in economic sense) of the family, including the residence, completed the regulatory framework in the civil code.[7] The concept of the 'unbreakableness' of the marriage completed the family structure, in which separation was allowed in required cases such as adultery, desertion, torture or injury. The woman's position was, again, disadvantageous because the adultery of the man had legal relevance only if coupled with injury.

The legislation was based on the need to preserve the familial properties and to guarantee the inter-generational transmission of the assets, ignoring any personal rights of family members[8] based on the marriage. To guarantee this, the civil code distinguished between the legitimate child (born in a marriage)

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to 28% and if we analysed individual data the growth appears most relevant as almost all items had doubled in 2009 the percentage of 1998. The analysis has been conducted to measure the socio-demographic characteristics of Italian families in the decade 1998–2009: Istat, *Famiglia e soggetti sociali*, February 2013, available on: http://www.istat.it/it/archivio/81546.

5 Probably the discipline of Italian family law should be correctly located in the 1865 Civil Code.

6 The reference is the original formulation of arts 143, 144, 145 of the Civil Code. In that context the dowry reflected a similar conception as the wife (and her family of origin) had the duty to contribute to familial needs. See: C. Fayer, *Sponsalia, matrimonio e dote*, Roma, L'Erma di Bretschneider, 2005.

7 A connected problem was the recognition of inheritance rights for legitimate children with the exclusion of natural children born out of marriage.

8 The hierarchical structure of the family system reflected in, and was coherent with, the patrimonial ideology which dominated the residual part in the civil code; on this matter see G. Giacobbe, *La famiglia dal codice civile alla legge di riforma*, in *Justitia*, 1999, p 242 in which the author investigates the question concerning the public or private nature of the familial relationship.

who had full protection and illegitimate minors born out marriage,[9] for whom the law saved a worse fate. Legal recognition was allowed under particular conditions and with particular consequences, also in the economic sense. These were significant, as the child remained without legal protection (education, maintenance, right to a family name, etc.) and did not acquire inheritance rights.

The civil code adopted a family model which was already old for that particular period. Although society had seen the growing of the *de facto* family whose relationship remained informal, the legislator privileged the legitimate couple, considering the family to be the prerogative of the public power because the protection of its members was not considered a completely private 'affair'. In other words, the law considered the family nucleus 'under protection' but the appropriate approach was 'protection for the family' (and its member).[10]

On the other hand, the Italian constitutional charter was thought up with the aim of giving value to human necessity, above all from a subjective perspective. Thus the recognition of inviolable human rights and particularly the principle of equality dominate the entire constitutional text and the provisions regarding the family.

The main rules to be considered are arts 29[11] and 30[12] specifically dedicated to the family; their significance cannot overlook the interaction with arts 2[13] and 3[14] of the same fundamental charter. The first recognises the rights of the family as a natural society based on marriage, in which the spouses have the same

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9 Among illegitimate children the sub-categories are represented by minors born in an adulterous relationship and the child born from incest. While the adulterous minors could be recognised only by the parent who was not married, in the second case the child was denied recognition with the sole exception when the parents without negligence did not know of the relative tie. Obviously the lack of legitimation had significant consequences on their position as they lost the right to a family in general and patrimonial and affective 'rights'.

10 In this sense: M. Bessone, G. Alpa, A. D'Angelo, G. Ferrando, *La famiglia nel nuovo diritto. Dai principi della costitutzione alla riforma del codice civile*, 3rd edn, Zanichelli, Bologna, 1986.

11 'The Republic recognises the rights of the family as a natural society based on marriage. Marriage is built on the moral and legal equality of the spouses with the limits established by the law to guarantee family unity.'

12 'It is the duty and right of parents to support, raise and educate their children, even those born outside of marriage.
In cases of incapacity of the parents, the law provides for the fulfillment of their responsabilities.
The law ensures to children born outside of marriage full legal and social protection, compatible with the rights of the legitimate family members. The law lays down the rules and limitations for the determination of paternity'.

13 'The Republic recognises and guarantees the inviolable rights of man, as an individual, and in the social groups where he expresses his personality, and demands the fulfillment of the mandatory duties of political solidarity, economic and social.'

14 'All citizens have equal social status and are equal before the law, without distinction of sex, race, language or religion, political opinion, personal and social conditions. It is the duty of the Republic to remove all economic and social obstacles which, by limiting the freedom and equality of citizens, prevent the full development of the human person and the effective participation of all workers in the political, economic and social of the country.'

rights and duties; the second assures to the children the right to be maintained and educated by the parents and at the same time extends this protection to the child born out wedlock, if compatible with the legitimate family. It is evident that the civil code expressed opposite and irreconcilable values in family law compared to the Constitution and social development.

An important contribution to modernisation and adjustment came from the work of the Constitutional Court, which intervened on several occasions by formally asking for a legislative modification[15] and revealing in advance the necessary 'corrections'. The efforts of that court had contributed to solving some specific cases and also to translating in 'living' principles some social exigencies that the succeeding reform introduced. Its intervention finally guaranteed the equal protection respectively between the wife and the husband, the legitimate and natural child and the legitimate family and cohabitant relationship.

At first the supreme tribunal acknowledged that the women's subjection to marital power did not correspond to her real position in the family and in the social context;[16] on this premise and in consideration of the growing importance of feminine work, the jurisprudence has enhanced the role of the wife. Actually, the scope was to put both members always in the same position with the sole exception in the case in which the familial union could be damaged by this approach. The changed concept of the woman's position and her recognised power, capacity and 'ability' produced the declaration of unconstitutionality of the rule that obliged the man to maintain his wife, independently of her economic condition, in separation proceedings. The disparity emerged when, in the reverse situation, the husband received economic assistance in relation to his financial condition.[17]

Another substantial transformation of the legal approach to family occurred through the declaration of unconstitutionality of some rules regarding the different treatment of legitimate and illegitimate children in relation to inheritance rights.

A decision worthy of being mentioned concerns the elimination of any discrimination with reference to the quota reserved to a natural child in the liquidation of inherited properties:[18] in the absence of legitimate descendents the natural child has concurrent inheritance rights with the ascendant in the same manner as if legitimate. In other words the protection of offspring born out marriage was granted when it did not clash with the legitimate family[19] (thus called 'compatible clause').[20]

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15 Constitutional Court, 15 December 1967, n. 144.
16 Constitutional Court, 15 December 1967, n. 143.
17 Constitutional Court, 23 May 1966, n. 46.
18 Constitutional Court 30 April 1973, n. 50.
19 Constitutional Court 27 March 1974, n. 82.
20 See G. Vassallo, *La riforma del diritto di famiglia ed il nuovo regolamento sulla filiazione*, in G. Cassano, *La famiglia dopo le riforme*, Giuffrè, Milano, 2015, p 29.

Regarding the cohabitation phenomenon, we registered the inauguration of a new trend, the relevance of which is admittedly open; but the court's approach was incoherent. After the decision that eliminated the concubinage crime,[21] the court ordered a legislative intervention to grant an appropriate regulation on the consideration of art 2 Const. (that assured the inviolable right of the man in any social 'structure'). On the other hand, in the specific case it denied any protection: we can remember the refusal to extend the validity of a lease contract to the surviving cohabitant (as happened also in the case of married persons).[22]

The civil and criminal jurisprudence took on the responsibility of adapting intensely to the reality, as occurred in the case of domestic violence, when the tribunals recognised the same protection[23] to cohabitants and spouses. The need to preserve the choice of the parties to be free from legal ties had to be balanced with a minimum defence when the public interest emerged. This could not ignore the significance of factors like stability and certainty which are elements to consider for the legal relevance of the relationship. The *favor matrimonii* which characterised the Italian doctrinal tendency plus the necessity to follow the equality principle, as well as the awareness of the varied social phenomena, made it difficult to find a long term, fair and final solution. The result was a fluctuating interpretation of the law.

All the subjects which arose in the case-law and all the 'recommendations' of the judges were received by the legislator, which in the 1970s[24] promulgated a relevant reform. This ratified equality between the husband and wife, with the promotion of the principles of mutual assistance, solidarity and cooperation for granting of the familial interest.[25] The new perspective also governed the grounds for separation as the fault system was replaced by the general criteria of intolerable cohabitation.

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21 Constitutional Court 3 December 1969, n. 147.

22 Constitutional Court 14 April 1980, n. 45.

23 Cass. pen., 13 November 1985, in *Riv. Pen*., 1986, 693. A large contribution on the criminal relevance of the definition of 'family' is in F.R. Fantuzzi, *Famiglia (delitti contro la),* in *Enciclopedia giuridica Treccani*, Treccani, Torino, 2008, 3.

24 We allude to the Law 19 May 1975 ,n. 151. The process for the proclamation of the law was characterised by a parliamentary journey that lasted almost 20 years; this was because the exigences of reforming family law was born as a social request before the legislative initiative. The divergence between effective social dynamics and the legislative regulation was, over a long term, the subject of burning discussion in political and doctrinal forums. Another important result was the adoption of the Law 1 December 1970 n. 898 and even before that the Law 5 June 1967, n. 431 (on adoption) and the Law 31 October 1955, n. 1064 (on the registration of maternity and paternity in the public records).

25 In a patrimonial sense the new approach was transformed, with the inversion of the matrimonial regime; before the reform the ordinary regime was the separation of the assets, that privileged the marital position as in the majority of cases there was a sole working member; under the new regulation the ordinary regime became the joint property of all assets (with some exceptions regarding specific chattels acquired from donations, inheritance, compensation, etc.) that helped to improve the wife's position and to enhance the working contribution of the woman also in a domestic sense. The system just described, actually even now, does not restrict the autonomy of the parties who can choose an alternative regime.

Even if the position of the child born out of the marriage was formally ameliorated with the removal of the term 'illegitimate', its substitution with the 'natural' adjective did not correspond to an effective recognition of the same rights in all its forms.[26] On the one hand, the new dispositions allowed the legitimation of a natural child by parents married to third persons and permitted the child's integration into the legitimate family. The rule regarding the child's legitimation was overturned, allowing for a legal action for paternity or maternity with few compulsory exceptions. The main innovation was represented by the provision that parents had the same duties and rights as were already established for legitimate minors. The abolition of the *patria potestas* and its replacement with *parental potestas* marked a break with the past, as the legislative change is the background to the current regulation. However, on the other hand, the impossibility of legitimating a child born in an incestuous relationship and, above all, the general rule that prevents the recognition of the natural minor when that child is in conflict with the legitimate family means that a discriminatory approach is maintained.

The previous regulation described a family model based on patriarchal assets with an asymmetric organisation, a robust and rigid regulation of the external relationship in which the family institution prevailed in general. On the other hand, the new model formally abolished the marital advantages and in theory established the equal position of husband and wife (symmetric structure), returning the family relationship to its appropriate role, and privileging the interest of the each member rather than the public one.[27] The aim was to realise the goal identified in the constitutional charter,[28] which guarantees the inviolable right of the individual, in society and above all in the family context. Respect for the constitutional precept led to a new regulation of the mutual obligations in marriage. After the reform of the duty of fidelity,[29] the loss of the original sexual connotation (violation of which had criminal relevance) indicates a respect for the common aims of life and constitutes the essential element of the union to which the others are connected.

The concept of mutual care assumes concrete significance with the adjectives 'moral and material' and serves to create a unifying element in the couple. The third obligation of the spouses is cooperation in the interest of the family and signifies an absolute innovation which recalls the idea of commonality, sharing of intent and communication.[30] In a coherent manner the duty of cohabitation

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[26] We have to underline also the elimination of the definition 'figlio n.n.' (child of unknown parents).

[27] In this sense, see M. Marzario, *Il diritto di famiglia, il diritto nella famiglia di oggi*, in *Diritto civile e commerciale*, 2014.

[28] In particular the reference is to art 2 Const.

[29] The Constitutional Court, before the reform but in a coherent manner, declared the illegitimacy of the rule that imposed the duty of fidelity after separation; the judge declared that the interruption of cohabitation and the common life in general could not permit the imposition of any restrictions: Constitutional Court, 18 April 1974, n. 99.

[30] In this context remuneration for housework occurs through recognition of the family business (art 230 *bis* c.c.) and the elimination of the institution of dowry.

not only refers to the common home but also to the necessity to live together in a place where the familial plan is to be carried out.

A residual trace of the previous structure allowed the father to make urgent and non-deferrable decisions concerning the offspring in the case of conflict between the parents. At the same time the provision that permitted the wife to add the family name of the husband shows the persistent ideology of the civil regulation, despite the restructuring. Nevertheless, the reform represented the most important change[31] in the family area consisting of the declaration of the equal position of family members and the affirmation of parental responsibility towards children. However the will to systematically organise family matters was lacking and the process of development had to be completed.

III THE EVANESCENT CONSISTENCY OF THE STATUS OF LEGITIMACY

In following years the reform mentioned above was not free from criticism and judicial correction. Again, the task of intervening was assumed by the Constitutional Court with the limitations related to its function that inhibited the introduction of a new form of protection, which was different from the decision about illegitimacy.[32]

The area mainly analysed was inheritance, as the theoretical equalisation of natural and legitimate children presented a gap with regard to the relatives. The legal action finally recognising offspring born out of marriage had effects on children and parents, but no tie could be assigned towards the other family members. The judicial intervention highlighted the approach as discriminatory and more time was required to fulfil the need of an exhaustive reform as:

> '… after twenty years from the reform of family law, the rule which excludes inheritance rights of natural brothers and sisters for the benefit of legitimate distant relatives to the sixth degree seems less plausible. The legislator should take note of the significant increase of births outside marriage and the parallel phenomenon of de facto families that have occurred in the meantime …. This sociological data and its value should be taken into account in the balancing of interests that guide the implementation of the constitutional directive mentioned: the balancing of those interests involves a complex assessment exceeding the powers of this Court, as the plurality of solutions and the possible presence of new cases involves a choice that belongs to the discretion of the legislature.'[33]

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[31] The approach of the reform had been extremely serious in its evaluation of marriages which could be celebrated between persons of 18 years old to ensure full awareness in the establishment of the legal tie.

[32] In other words the role of the Constitutional Court in the Italian system is limited to the declaration of unconstitutionality of the rules, without any power to make an additional reformulation of the regulation, which belongs to the legislative authority. On the respective functions see P. Caretti, U. De Siervo, *Diritto costituzionale e pubblico*, 2 ed., Giappichelli, Torino, 2014.

[33] Constitutional Court, 7 November 1994, n. 377.

This is because the identification of inheritance rights in the absence of a will is the expression of a legislative choice, exercised in diverse systems in different ways. This cannot be object of constitutional control as it is completely delegated to political discretion:

> '… in this regard, the Court has previously observed (judgments no. 377 of 1994 and no. 184, 1990) that art. 30 Cost. does not refer to the full equalisation of natural and legitimate family. It can be said, however, that a concept of "natural kinship" was not accepted by the constituent legislator, who provided for natural filiation and established its equivalence to the legitimate one, however, with the compatibility clause. Such treatment, therefore, is fundamentally about the relationship between the parent who has provided recognition of the natural child (or in respect of whom paternity or maternity has been judicially ascertained) and the child itself. The relationship between the natural offspring and relatives of the parent, however, finds no reference in the constitutional charter ….'[34]

A demonstration of the grave divergence in the protection of a natural child was the codified right of 'commutation' which allowed the legitimate offspring to liquidate the natural minor's quota with a sum of money or a particular chattel. The reason was to ensure that the family assets remained in the hands of those in a legitimate relationship, without interference. The jurisprudence, despite considering the increase of natural filiation resulting from frequent separation proceedings, declared that this principle was a direct application of the compatible clause, which was of a constitutional nature.

A relevant fact to underline is the tendency registered (in the concrete application of the law) to preserve the position of natural children, trying to put a reasonable and fair solution into effect. We had to await the reform of 2006[35] to overcome additional hurdles for there to be effective equality in the legislative context. The question was faced incidentally and managed with the express extension of the same rules to natural filiation in separation and divorce proceedings with regards to shared custody[36] (as a general rule) on the break-up of the family, as well as the criteria for the maintenance of the child and the right to be heard in family proceedings.

Once again the legislative power was exercised in a fragmentary way without creating a systematic organisation of the topic. Some exceptions, in effect, remained. These included the assignment of the paternal family name (automatic procedure only for legitimate child),[37] the admission into the family

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[34] Consitutional Court, 23 November 2000, n. 532.

[35] Law 8 February 2006, n. 54.

[36] The previous attempt to regulate the care of offspring (with the law 1 December 1970, n. 898 as amended with law 6 March 1987, n. 74) in a different manner such as the alternating custody failed. The welfare of the children again led to the substantial abandonment of the idea that offspring could pass from the paternal to the maternal residence with alternating days or weeks; also nowadays this regime is applied in a restricted manner; see Trib. Ravenna 21 January 2015 in Guida al diritto 2015, 14, 55; Trib. Savona 11 June 2014 *in jurisdata* online 2016.

[37] Next to that problem was the conservation of the maternal family name in cases of later recognition by the father; on the topic see Cass. 26 May 2006 n. 12641 in which the court

of a natural child (conditioned on the interest of legitimate family), and the unclear position of natural offspring with respect to the relationship to relatives.

Beside the above-mentioned problems, there were also procedural incongruities, as the organisation of the Italian judiciary provided for a parallel system: the ordinary Tribunal and the Juvenile Court.[38] This structure contributed to the development of a complex situation in which the powers were often confused, with detrimental effects on the minors, and supporting different treatment for analogous cases.

We note a significant evolution with the introduction of the Law 10 December 2012 n. 219.[39] The legislature finally took measures on the old questions. The law declared that all children have the same status. Thus the adjectives 'legitimate', 'natural' (and also 'adoptive') have been abandoned, as the rules concerning the relationship between children and parents have been gathered into a unique section of the civil code. This takes into account both the physiological and pathological evolution of the parental relationship, with the indirect abolition of any distinction in inheritance rights; parental responsibility

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declared the right of the offspring to decide in order to the name also to protect his or her own identity in the social context. See also G. Autorino Stanzione, *Le unioni di fatto, il cognome familiare, l'affido condiviso, il patto di famiglia, gli atti di destinazione familiare (art. 2645 ter c.c.): riforme e prospettive*, 2007, Giappichelli, Torino; A. Costanzo, *Stato civile*, in *Il diritto privato nella giurisprudenza, Famiglia e Persone*, I, edited by P. Cendon, 2008, Utet, Milano, p 38 et seq.

[38] The distinction is not immediate: in general, we can say that the first was competent to decide questions concerning filiation in separation and divorce proceedings and now also for maintenance claims concerning natural children; the competence of the second institution was extended to questions about parental responsibility and the management of the natural child or the parental responsibility arising out of a separation proceeding. For a complete examination of the matter see: D. Apicella, G. Autorino Stanzione, V. Barela, V. D'Antonio, M. G. Ivone, P. Matera, F. Naddeo, G. M. Riccio, G. Sciancalepore, *La filiazione. La potestà dei genitori. Gli istituti di protezione del minore*, 2011, Giappichelli, Torino; G. Campanato, V. Rossi, S. Rossi, *La tutela giuridica del minore: diritto sostanziale e processuale*, 2005, Cedam, Padova; A. Arcieri, *Minori e volontaria giurisdizione*, 2012, Giuffrè, Milano; A. Loffredo, *Profili processuali della nuova filiazione*, in *Nuove frontiere della famiglia*, (edited by R. Pane), Edizioni scientifiche italiane, 2014, Napoli, p 209.

[39] Law 10 December 2012, n. 219; the regulation has been implemented with the legislative decree 28 December 2013, n. 154. The new regulation covers numerous aspects: the action for the recognition of a parental relationship, the right of the ascendent to maintain a relationship with the minors, the reconstruction of the consequences of the relative tie, and foster care. Attention to the children's needs is also provided by the recognised right to be heard in the procedure in which the child is involved (S. A.R. Galluzzo, *La riforma della filiazione*, Dike Giuridica Editrice, Roma, 2014, p 20). Also in this case the provision has been introduced under the double pressure coming from the social change in the approach to children's needs and international legislation. The importance of the child's opinion was expressed in different supranational acts (United Nations Convention on the Rights of the Child 1989, the Hague Convention 1980, the Council regulation (EC) No 2201/2003) and the Council of Europe has promoted diverse initiatives on the matter including the project Child Friendly Justice (see: http://www.coe.int/en/web/children/child-friendly-justice) for the creation of various standards and guidelines with the aim of adapting the justice system to the specific needs of children.

substitutes the potestas.[40] The reform leaves the 'procedure' to acquire the *status filiationis* unchanged but eliminates the qualification on obtaining the same rights for all the minors. It is important to underline that the institution of status in not modified as the child could be recognised both in an automatic way (if born in wedlock) or in an indirect manner (legal recognition by both parents not married or by only one parent, or by the adoption procedure). The mere existence of a biological tie does not assume relevance in a legal sense if it is not followed by recognition. In other words, the system allows for the figure of a child without status who could be recognised;[41] the consequences correlating to the procedure are clearly important, as in specific circumstances the consent of the minor is required.[42]

The pre-eminence of children's welfare specifically becomes the guiding principle, which finds concrete support in parental responsibility.[43] The obligations (and the rights) of the parents constitute the essence of the children's welfare and, in a similar way, the determination of obligations cannot be considered one of rigid application. In other words, limiting the extension of the protection to the literal sense of the law risks depriving the child of an efficient safeguard. The law, in family law matters, has to be generic in order to be reasonably applied in diverse contexts and to guarantee fair treatment. The legislator must provide for wide protection without limiting the capacity of the law to be efficient in the ex post analysis. The interpretation of the meta-juridical criteria, pointed out in the civil code, allows the law to be

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40 Some authors have underlined the imperfect equivalence between the two concepts; see R. E. Guidorsi, *Responsabilità genitoriale alla luce della riforma e nuovi orientamenti. Diritti e doveri dei figli,* in G. Cassano, *La famiglia dopo le riforme*, Giuffrè, Milano, 2015, p 126.

41 See: A. Figone, *La riforma della filiazione e della responsabilità genitoriale. Testo aggiornato al d. lgs. 28 dicembre 2013 n. 154*, Giappichelli, Torino, 2014, p 17.

42 Generally the minor at the age of 14 has to be consulted, art 250 c.c.

43 The Italian legislature has accepted that the instances came from social changes and the international regulation. Among the latter we have to remember the Universal Declaration of Human Rights 1924 which defends maternity and the expressly speaks about the fact that 'All children, whether born in or out of wedlock, shall enjoy the same social protection', art. 25. The right to an adequate standard of living, the protection of the well-being of children, the need for a family and their care are the purposes of the law. The same and major guarantees we find in the Declaration on the Rights of the Child 1989 that despite its non-mandatory nature has an important impact in the international scene as all participating nation were obliged to observe it. We have to expect the United Nations Convention on the Rights of the Child 1989 to determine a picture of all the civil, political, economic, social, health and cultural rights of children. On a European level, the regulation is widespread and specific; at a general level the European Convention on Human Rights 1948 and the Charter of Fundamental Rights of the European Union 2000 could be integrated with the European Convention on the Exercise of Children's Rights 1996 and the work of the Hague Conference about child abduction, adoption, maintenance and the protection of children in general. A complete and thorough list is on the following website: https://www.hcch.net/en/home, which includes all the projects now in progress. On the other hand the European Commission is an active organism in matters of the protection of children: Council regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [and implemented by the Council Regulation (CE) n. 2116/2004].

adapted to the minor's interests, as happens with reference to the right to receive moral assistance. The concept is intentionally vague to include all the affective exigencies of the child.

The change is important from the child's point of view, as the child has acquired the function of 'subject' of his or her life; from another point of view, the child's duties also have been focused on: the obligation to respect the parents, and the need to contribute to the family economy. This circumstance has brought a gradual decrease in parental responsibilities, which correspond to an increase of the personal responsibility of the minor when approaching the age of majority. At the same time, the child's psychological development gains legal recognition when the law allows a right to be heard in the process in which the child is involved, and with the obligation of the parents to take into account the child's desires.

It is also true that the legal age does not automatically determine the end of the responsibilities;[44] this is another corollary of the new conception of family as a place in which the financial and affective solidarity reigns. Some authors[45] criticise the supine transposition of the international formula into the domestic context and its automatic substitution of the term 'potestas', without any specific adjustment[46] as this responsibility could represent one aspect of the exercise of the 'potestas'.[47] Emphasising the obligations of the parents could allow for the further consideration of a child-based 'philosophy'. A more accurate analysis of the reform led to another conclusion: the parents' duties and rights correspond to analogous prerogatives and obligations of the offspring. The burden of solidarity must be distributed to all the family members so conjugal solidarity has been substituted with familial solidarity, where the child is at the same time an object and a subject of the new family model and obliged to cooperate and collaborate to provide for the wellbeing of the family. In this context, the violation of those obligations also has the effect of producing, beyond the typical consequences (such as the loss of parental responsibility, or the order to leave the family home, etc.), an obligation to pay damages.

For a long time the jurisprudence tried to introduce a similar right when the parent was defaulting on his or her obligations, with the double ambition of sanctioning the illegitimate conduct and of introducing a deterrent function. The Supreme Court never specifically expressed a view on the issue, but incidentally furnished some elements to justify the claim. In a case in which the

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44 In this sense Cass. 9 May 2013, n. 11020.

45 According to some of the scholarship, the reform is already obsolete as social development runs with more rapidity in respect of the legislative intervention: R. Amagliani, L'unicità dello stato giuridico di figlio, in Rivista di Diritto Civile, 2015, 3, 554.

46 On this topic: F. Ruscello, *Autonomia dei genitori, responsabilità genitoriale e intervento 'pubblico'*, in *Nuova Giurisprudenza Civile Commentata*, 2015, II, p 717.

47 A. Figone, *La riforma della filiazione e della responsabilità genitoriale. Testo aggiornato al d. lgs. 28 dicembre 2013 n. 154*, above n 41, p 68; M. Dossetti, M. Moretti, C. Moretti, *La riforma della filiazione. Aspetti processuali, successori e processuali. L. 10 dicembre 2012, n. 219*, Zanichelli, Bologna, 2013, p 51.

offspring required the payment of compensation for medical negligence, the court recognised damage for 'parental loss'.[48]

When the relatives are victims of a violation in the area of affection, the consequences of the loss of reciprocal and mutual solidarity (which characterise the family life) have to be compensated. The principle was adapted in the tribunals[49] to extend its effectiveness, by identifying the 'loss' as lack of parental relationship, which could be compensated. Afterwards the Supreme Court clarified that the breach of familial obligations includes the violation of constitutional values in addition to the civil regulations with the consequent duty to repair the damage. Thus, all the precepts connected to parental responsibility are sanctioned: from unjustified refusal, to the recognition of the child,[50] to the non-payment of maintenance, from the missed exercise of visiting rights to the failure of any moral support of the offspring.

The enunciation of that principle was recently confirmed, so that the violation occurs when the parent:

> '… failed to comply with the obligations under the parent-child relationship, deprived children of the father's affections demonstrating complete insensitivity towards them, as demonstrated by the refusal to pay maintenance and denying them any help, not only economically, resulting in violation of the constitutional importance of primary rights.'[51]

The unification of 'status' and the introduction of parental responsibility are the essential elements of the recent reforms, which constitute the fulcrum of the modern family law, which is able to balance the interests of all members of the family and to furnish a guarantee coherent with constitutional principles.

IV THE PRIVATISATION OF THE DISSOLUTION OF MARRIAGE: SELF-MADE DIVORCE

Important reforms, introduced in the last few years, aim to simplify the procedure and reduce the time to obtain the dissolution of marriage, with

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48 'The intangibility of the sphere of affection and mutual solidarity and the inviolability of free and full development of the human personality in the family (intended as a social institution) are interests invoked and protected in cases of damage for parental loss according to the articles 2, 29 and 30 of the Constitution' (Cass. 31 May 2003 n. 8827).

49 Trib. Sulmona 26 November 2012 n. 490 and among the most recent Trib. Milano, 23 July, 2014 in jurisdata on line 2016.

50 Cass. 10 April 2012, n. 5652.

51 Cass. 22 July 2014, n. 16657; the decision adds 'This court has had occasion to point out that the violation of maintenance duties, education and care by parents towards their offspring, because of the lack of interest shown towards their children for many years, may well invoke liability in torts, causing injury to constitutionally protected rights, and give rise to unilateral action by the same children for compensation for non-pecuniary damage in accordance with art 2059 civil code. Depriving the children of a father figure, who is a fundamental point of reference especially in the phase of growth, is a sign of parental responsibility suitable to invoke tort liability'. To the same effect, also Cass. 16 February 2015, n. 3079.

significant financial consequences. Understanding the essence of the reform presumes a brief legal framework of the Italian procedure on the issue of separation and divorce, and its connections.[52]

The national system provides for a two-phase procedure to obtain the dissolution of a marriage. Generally the divorce petition has to be preceded by a separation proceeding. When cohabitation becomes intolerable, each member can make a claim for separation in a consensual or adversarial process in which the personal and financial questions are proposed and solved. The agreement of the parties, if coherent with the children's welfare, can be approved by the court and some effects of the marriage are restricted (financial aspects, duties and obligations between the parties, etc.). The procedure is concentrated in a sole hearing, in front of the President of the Civil Court, with the presence of the parties who have to confirm their desire to separate and on the agreed facts. The formal approval of the agreement is delegated to a competent body with the participation of the state's attorney. In the case of an adversarial proceeding, the parties can immediately obtain the decision on their status. The process concerning the responsibility for the failure of the common life together with the financial aspects and child custody may continue[53] for some years.

The dissolution of the marriage[54] can be obtained with a specific petition when particular requirements are respected. Aside from reasons of criminal relevance, the general condition justifying the petition[55] is the impossibility of

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[52] The topic is very complex; for a detailed analysis see: A. Graziosi, *I processi di separazione e divorzio*, Giappichelli, Torino, 2011; M. Marino, *Separazione e divorzio. Normativa e giurisprudenza a confronto*, Ilsole24ore, Milano, 2012; M. Dogliotti, A. Figone, *I procedimenti di separazione e divorzio*, Giuffrè, Milano, 2001; G. Ferrando, *Il divorzio breve: un importante novità legislativa nel solco della tradizione*, in *Corriere Giuridico*, 8–9, 2015, p 1041.

[53] We have to note that the procedure is bi-phasic: in the first step (presidential phase) the judge examines the possibility of conciliation between the parties and in the case of failure the judge orders urgent and provisory provisions concerning child custody, assignment of the family home and maintenance measures. It is necessary to underline that remedies are revocable at any time when the conditions of the parties change and are not binding on the final decision. On the theme see: F. Danovi, *Il processo di separazione divorzio*, in *Trattato di diritto civile e commerciale*, IV, Giuffrè, Milano 2015; G. Oberto, *Gli aspetti di separazione e divorzio nella famiglia*, Cedam, Padova, 2012; G. Cassano, *Separazione, divorzio, invalidità del matrimonio. Il sistema delle tutele sostanziali e processuali*, Cedam, Padova, 2009.

[54] Law 1 December 1970, n. 898.

[55] Article 3, L. 898/70 as amended in 1987 (but before the current reform): 'The dissolution or termination of the civil effects of marriage can be claimed by either spouse:
1) when, after the celebration of the marriage, the other spouse is condemned as guilty by a final judgment, even for acts committed before:
a) to life imprisonment or to a more than 15-year sentence, even with more judgments, for one or more intentional offences, excluding political crimes and those committed for reasons of a particular moral and social value;
b) to detention for the crime under art 564 of the Criminal Code and one of the crimes referred to in arts 519, 521, 523 and 524 of the Criminal Code, or by induction, coercion, exploitation or aiding prostitution;
c) punishment for wilful murder of a child or for attempted murder to the detriment of the spouse or child;
d) to detention, with two or more decisions for crimes in art 582, with the aggravating circumstance referred to in the second paragraph of art 583, and arts 570, 572 and 643 of the

reconstructing the spiritual and financial union. In the case of prior separation (the most common situation) the judicial procedure can be started after a certain number of years (5 in the original text, before the reform) after the separation hearing in front of the President of the civil court. It is necessary that the parties do not reconcile. At this point each member of the family can choose a consensual procedure or an adversarial one, with the same characteristics as the separation process. In the first case, the agreement of the parties is transposed into the final decision if the conditions respect the children's welfare. A new two-phase procedure analogous to separation could begin in the case of conflict between the parties. The peculiarity – and its dramatic disadvantage – is the potential overlapping of the separation and divorce procedures. Diverse judges are involved, simultaneously, on the same questions concerning child custody, maintenance, etc. with clear problems of contrasting decisions.

Following this brief outline, it is important to underline that the introduction of divorce in Italy has been through a tormented sequence of events (immediately after its promulgation the law was the object of a referendum for its abrogation) and the need to reform the law has appeared cyclically.

A partial innovation was introduced in 1987[56] when the legislator provided for the consensual procedure and reduced to 3 years the time necessary to get a dissolution after the separation proceeding. Despite that reduction, society asked for an additional reform which would take into account the requests of

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Criminal Code, to the detriment of the spouse or a child.
In cases provided for in subparagraph d) the court competent to pronounce the dissolution or termination of the civil effects of marriage ensures, also in view of the subsequent behaviour of the defendant, that the defendant is unfit to maintain or restore the family life. For all the cases envisaged in n. 1) of this Article, the question cannot be proposed by the spouse who has been convicted of the crime or when conjugal life is taken;
2) in cases where:
a) the other spouse has been acquitted for incapacity in the criminal procedures listed in paragraphs b) and c) of number 1) of this Article, where the court competent to pronounce the dissolution or termination of the civil effects of marriage ascertains the inability of the defendant to maintain or restore the family life;
b) the decision concerning the judicial separation of spouses or the approval of consensual separation have been pronounced with definitive effect or intervened de facto separation when the separation started at least two years before the December 18, 1970.
c) In all the above cases, for bringing the question of dissolution or termination of the civil effects of marriage, separation must have lasted continuously for at least three years from the hearing before the President of the court in the separation procedure even when the litigation judgment has become consensual. Any interruption of the separation must be asserted by the defendant;
d) the criminal proceedings for offences under letters b) and c) of no. 1) of this Article concluded for the prescription of the crime, when the court competent to pronounce the dissolution or termination of the civil effects of marriage believes that the elements and conditions are criminally relevant;the criminal case of incest ended with acquittal or absolution declaring the person not punishable because of lack of public scandal;
e) the other spouse, a foreign national, has obtained a cancellation abroad or dissolution of the marriage or has contracted a new marriage abroad;
f) the marriage is not consummated;
g) is a final judgment of rectification of attribution of sex under the law 14 April 1982, n. 164'.

[56] Law 6 March 1987, n. 74.

the spouses wishing to reconstruct another family and above all aspiring to define a new life's phase. Similar needs could be met only with another adjustment concerning the simplification of the procedure.

The models of the dissolution of marriage adopted in the international panorama and the introduction of European regulation concerning this topic risked favouring forum shopping,[57] with the aim of obtaining a fast and fair solution to separation and divorce proceedings. An urgent change was required as the double procedure (divorce preceded by separation with a two-phase proceeding) represents a duplication of costs, and an unacceptable use of resources even of an emotional nature. Above all, the entire procedure could require some years for a definitive conclusion. These issues have been partially addressed in the recent reform with the Law 6 May 2015 n. 55 coordinated with the decree 12 September 2014 n. 132 converted into Law 10 November 2014 n. 162. The need to preserve separation as an intermediate phase of the dissolution of marriage prevailed;[58] intervention on the time requirements and the introduction of simplified procedures represent the alternatives pursued.

The legislator has diversified the time limit for the petition of divorce; in the case of consensual separation the divorce petition can be filed 6 months after the Presidential hearing. In the case of adversarial separation the period is 12 months. The reason is the need to guarantee a consistent period of reflection for the members to consider the reconstruction of the family nucleus, as opposed to its failure. On the other hand,[59] the desire to support the autonomy of the parties, along with a process of involvement of the spouses, has led to the introduction of an 'administrative' procedure in the form of assisted negotiation,[60] and to the consensual claim in front of the Mayor or a delegate (Registar).[61]

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[57] See M. Blasi, *Divorzio breve e facile. La riforma della l. 6 maggio 2015 n. 55 coordinata con il d.l. n. 132/2014, convertito in l. 162/2014*, Giappichelli, Torino, 2015, p 17; G. Buffone, *Il cd. divorzio breve (l. 6 maggio 2015 n. 55),* in *Diritto della famiglia e dei minori*, 2015, p 1 et seq.

[58] The italian legislator does not accept the idea of direct divorce, eliminating the separation phase, as the national model would be based on the inclusive family; the anglosaxon and American examples with brief marriage and instant divorce tend to segment the family experience in an inacceptable manner; in this respect, see M. Blasi, op. cit., p 39.

[59] P. Morozzo Della Rocca, *Le nuove discipline della separazione e del divorzio*, Maggioli, Sant'Arcangelo di Romagna, 2015.

[60] See G. Buffone, *Processo civile: tutte le novità (d.l. 132/2014, conv. con mod., in l. 162/2014)*, in *Il civilista*, 2014, 41; F. Tommaseo, *La tutela dell'interesse dei minori dalla riforma della filiazione alla negoziazione assistita delle crisi coniugali*, in *Famiglia e diritto*, 2015, 157; M. A. Lupoi, *Separazione e divorzio all'epoca della degiurisdizionalizzazione,* in *Questioni di diritto di famiglia*, 2015.

[61] See: D. Dalfino, *Misure urgenti per la funzionalità e l'efficienza della giustizia civile*, Giappichelli, Torino, 2015; C. Consolo, *Un d.l. processuale in bianco e nerofumo sullo equivoco della 'degiurisdizionalizzazione'*, in *Corriere giuridico,* 2014, 1173; F. P. Luiso, *Processo civile efficiente e riduzione arretrato. Commento al d.l. n. 132 /2014 convertito in l. n. 162 /2014*, Giappichelli, Torino, 2014; C. Cariglia, *Separazione, divorzio e modifiche innanzi al Sindaco*, in *Giurisprudenza Italiana,* 2015, 7, 1739; B. Poliseno, *La convenzione di negoziazione assistita per le soluzioni consensuali di separazione e divorzio*, in *Foro Italiano*, 2015, V, 1.

In relation to the first idea, the parties, with the assistance of lawyers, can try to reach an agreement on the conditions of divorce. If an accord is reached, the draft has to be analysed by the public prosecutor.[62] When the family includes children or adult offspring not economically independent or disabled, the supervision by the state's attorney is substantial[63] as he or she must grant the welfare of the offspring, and eventually authorise the agreement. In the absence of those 'protected' categories, the supervision is formal. The contract[64] has the effect of a judicial order when it is annotated in the public register.

In relation to the second idea, the privatisation of the procedure can reach maximum effect as the agreement of the spouses is removed from any judicial control.[65] The participation of the lawyer is also optional. This is allowed in a few cases when the couple do not have children or have offspring not economically independent or disabled; moreover the agreement cannot include the transfer of family assets but in a recent doctrinal opinion this does not prevent a maintenance clause. The registrar cannot analyse the content of the contract but has only formal control (data of the parties, the presence of all documents, the absence of precluded requirements). The Registrar fixes a meeting with the parties 30 days after receipt of the request. If the assessment gives a negative result, the Register will refuse the annotation.[66]

It is evident that the aim of the legislature was the deflective effect of these remedies, to relieve the pressure on the tribunal and to encourage the autonomy of the parties in a sector where privatisation allows for better results. The forms

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[62] In this procedure a mediation process can be added; the aim of the two remedies is obviously different as mediation represents a way to solve problems concerning parental responsibility, the visiting rights, etc. A coordination problem concerns the duration of the process as the negotiation must be concluded in 3 months (extendable for 1 month); on the other hand the mediation procedure can last 4 months or more. Generally in family mediation proceedings the parties need a period to test the efficacy of the remedies suggested by the specialist, so the time required is relatively long. It is not clear if the time limit for negotiation can be deducted. See P. Farina, *La negoziazione assistita dagli avvocati*, in *Rivista di diritto processuale*, 2015, p 514 ss.; A. Carratta, *Le nuove procedure negoziate e stragiudiziali in materia matrimoniale*, in *Giurisprudenza italiana*, 2015, p 1287.

[63] The public prosecutor is endowed with a power of inspection, using all the instruments at his or her disposal. If the assessment gives a negative result the question is devolved to a judicial authority. This event represents a problematic question because the devolution to a judicial authority risks being without effect as the parties did not formally ask for a decision about the ratification of an agreement; the alternative is the proposal of a new claim for a consensual proceeding (in this sense Tribunal Torino, 15 January 2015 in *Ilfamiliarista*.it 2015, 2015, in a separation proceeding, and in divorce procedure see Tribunal Torino, 20 aprile 2015 in *Diritto di Famiglia e delle Persone*, 2015, 4, I, 1385). See: D. Borghesi, *La delocalizzazione del contenzioso civile: sulla giustizia sventola bandiera bianca?*, in www.judicium.it, 2016.

[64] We have to point out that the role of lawyers is very important: on the one hand the specialist can suggest the best solution and on the other side they have to verify the efficacy of the conditions and attest their validity.

[65] On the topic: M. A. Lupoi, *Come separarsi o divorziare senza entrare in tribunale, tra accordi negoziati e accordi autogestiti*, in http://unibo.academia.edu/MicheleAngeloLupoi/Activity, 2016.

[66] The refusal authorises the parties to make a judicial claim; the judge orders the appearance of the parties and asks for the opinion of the public prosecutor. The decision is published in the civil register.

of 'self-made' divorce, in theory, appear adequate to satisfy the needs of family members, thus avoiding the winner–loser system, typical of the judicial proceedings, and saves the costs of the judicial procedure. The reshaping of judicial intervention and the public control characterises the reform; it seems that the role of the lawyer assumes growing importance as in assisted negotiation. The lawyer has the predominant task of moving the parties towards a fair and equal solution suitable for recognition. The reform is very recent and we do not have data on the use of such 'alternative' dispute resolution, to test the usefulness of the remedies, but we do not ignore that similar instruments presume the willingness of the parties to reach an agreement. In that context the question about the effective utility and efficacy of the reform does not have a clear answer.[67]

V HETEROSEXUAL COUPLES AND HOMOSEXUAL RELATIONSHIPS: COHABITATION AND MARRIAGE

The *more uxorio* relationship is still a matter without specific regulation in the national system despite the widespread phenomenon; the secularisation of marriage, social changes and libertarian principles, affirmed in the last century, together with the promotion of individual demands have favoured the growth of the un-married couples. The phenomenon includes heterosexual and homosexual relationships, but their legal relevance in the domestic system is different. The regulation of homosexual relationships is absorbing the political debate in the days when we are writing. The issues of the introduction of gay marriage, the right to adopt a child, and to be, in general, parents are nowadays urgent because of the lack of any regulation.

As to the heterosexual couple, the Italian regulation[68] is fragmentary, as the legislative intervention has been limited to specific areas:[69] the protection of maternity, the requirements for adoption, organ donation, assisted reproduction, and health insurance. A negative definition of 'concubinage' has been substituted for the *more uxorio* relationship and the most recent *de facto* family or cohabitant couple; the evolution in the terminology has corresponded

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[67] See: G. Frezza, *«Desgiurisdizionalizzazione», negoziazione assistita e trascrizione*, in *Nuove leggi civili commentate*, 2015, p 18; M.N. Bugetti, *Separazione e divorzio senza giudice: negoziazione assistita da avvocati e separazione e divorzio davanti al Sindaco*, in *Corriere giuridico*, 2015, p 523; G. Casaburi, *Separazione e divorzio innanzi al Sindaco: ricadute sostanziali e processuali*, in *Foro Italiano*, 2015, V, c. 44.

[68] On the topic see: R. Bassetti, *Contratti di convivenza e unione civile*, Giappichelli, Torino, 2014; F. R. Fantetti, *Responsabilità genitoriale e riforma della filiazione. Commento al d. lgs. 154/2013 (in G.U. n. 5 del 8/01/2014)*, Maggioli, Bologna, 2014, p 58 et seq.; G. A. Stanzione, *Il matrimonio. Le unioni di fatto. I rapporti personali*, Giappichelli, Torino, 2011; C. S. Pastore, *La famiglia di fatto. Analisi e disciplina di un modello familiare attuale e diffuso*, Utet, Milano, 2007; S. Asprea, *Famiglia di fatto*, Giuffrè, Milano, 2003.

[69] Law 29 July, 1975, n. 405 (family counselling); Law 4 May 1983 n.184 (adoption); Law 1 April 1999 n. 91, Law 19 February 2004 n. 40 (artificial insemination); d.lgs. 7 Semptember 2005 n. 209 (insurance matters). We think of the recent extension of the protection prescribed in cases of familial abuse for married couples also to cohabitants (L. 5 April 2001 n. 154).

to the amelioration of their position, also due to the involvement of the courts. We noted that cohabitants were not legally bound by the conjugal obligations concerning fidelity, moral and material assistance and cohabitation. So, in theory, a partner could not complain about the violation of those obligations, unlike the marriage status. And yet, judicial intervention has often produced some remedies when the conduct of a party appears unfair; generally, the involvement of the judiciary is required for financial remedies when the relationship breaks down. Regarding the maintenance duty, for example, the court has often found the existence of a 'natural' obligation for granting support to the partner. The remedy is considered a moral and social duty to support the family member,[70] and consists of the recognition of a sort of family solidarity as for the married couple.

On the break-up of the relationship, the member is devoid of any legislative protection because cohabitation is characterised by freedom and a voluntary tie. The classic remedies prescribed by contract and property law will help the cohabitant, but the legislative system does not recognise any specific protection. Sometimes an indirect defence is granted by the presence of a child, with reference to the assignment of the family home; the children's welfare and the necessity to preserve the familiar habitat for the offspring privileges the parent with whom children lives,[71] independently of any property title. In other words, the jurisprudence has gradually worked towards guaranteeing an equal balance of the interests, when the law is, intentionally or accidentally, incomplete.

On the other hand, discussion about homosexual relationships has recently regained the attention of politicians and jurists; this is in consideration of the fact that a similar couple does not have any choice in their actual domestic arrangement, which is different from the heterosexual couple, who can accept the matrimonial option.

The occasion for this was the decision of the Constitutional Court in 2010,[72] followed by diverse plans for the proclamation of a specific law. The verdict was interlocutory: the approach of the judges took into account social changes, but avoided any form of innovation in the civil regulation. The value of such a decision has been the acceptance of the same-sex relationship as a stable form of cohabitation, which needs recognition of its legal effect; the result is the establishment of duties and rights 'of which the legislator will determine the manner and the limits'. The main question was the compatibility of homosexual marriage with art 29 of the Constitution, which assures the right to a family (in a conjugal relationship) and the art 3 of the Constitution concerning the equality principle. The plaintiff asked for an evolutionary interpretation of the constitutional charter, which compared the position of heterosexual and homosexual couples. The reasoning of the court was complex

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70 Cass., 25 January 2016 n. 1266; Cass., 22 January 2014, n. 1277.

71 On the financial aspect see: E. Al Mureden, *Nuove prospettive di tutela del coniuge debole. Funzione perequativa dell'assegno divorzile e famiglia destrutturata*, Wolters Kluwer Italia, Bologna, 2007.

72 Constitutional Court 14 April 2010, n. 138.

and articulate; the starting point was the impossibility of considering the homosexual and the heterosexual liaison homogeneous because only in the opposite sex relationship do we find the power to procreate; in this sense the differing treatment does not appear unreasonable.[73] The reference to the international law (arts 8 and 14 ECHR and arts 7 and 21 Charter of Fundamental Rights of the European Union 2000 (declared in Nice) (Nizza Charter) did not help the homosexual phenomenon since the Conventions confer on the national legislator the power to regulate family matters in detail. The decision opted for the dismissal of the claim. However, the arguments used did not impede the court from admonishing the legislator with the aim of favouring an intervention to guarantee homosexuals the same judicial rights (and duties) as heterosexuals, through the admission to marriage or another similar solutions.

An unresolved dilemma is the constitutionality of homosexual marriage, which the court did not clarify[74] even if the *obiter dicta* of the decision (and the successive verdicts of jurisprudence) opt for a position based on the freedom recognised in all individuals to live in a stable relationship. The innovation is the stabilisation of a process which has begun with the recognition of the personal freedom to be homosexual and has culminated in the acceptance of homosexual couples.[75] In this regard, the civil judges have acquired a substitute role (of the legislature), reconstructing in a fragmentary way some pieces of the puzzle for ameliorating the position of homosexuals.[76] The incentive has

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[73] An important critique of that analysis was the consideration of the different position concerning the transsexual who is admitted to marriage after a change of sex. Such a situation for some authors constitutes a paradoxal solution as the union is formally heterosexual but biologically homosexual. See P. Veronesi, *Il paradigma eterosessuale del matrimonio e le aporie del giudice delle leggi*, in *Studium Juris*, 2010, 10, 1005. The problem concerns also the automatic dissolutin of that marriage; some authors speak about 'imposed divorce' as declared in Cass., 6 June 2013 n. 14329. On this topic we cannot ignore the leading case of the European Court of Human Rights, 11 July 2002, *Goodwin v UK*, 35, EHRR, 18 which declared the right to marry independently of biological sexual orientation. An overview on the theme is in K. Bole Woelki, A. Fuch, *Legal recognition of same sex relationships in Europe. National, cross-border and European perspectives*, Intersentia, Cambridge – Antwerp – Portland, 2012.

[74] It is necessary to underline that the above-mentioned decision declared the claim inadmissible for formal reasons but it does not expressly prohibit eventual legal recogniton; the question has to be resolved at the discretion of the legislature. See: F. Mannella, *I diritti delle unioni omosessuali. Aspetti problematici e casistica giurisprudenziale*, Editoriale Scientifica, Napoli, 2013, p 29.

[75] R. Torino, *La tutela della vita familiare delle coppie omosessuali nel diritto comparato, europeo e italiano*, Giappichelli, Torino, 2012, p 223.

[76] The examples of that approach are numerous and dated: Tribunal Roma, 20 November 2982 (in jurisdata on line 2016) in which the equalisation of homosexual and heterosexual is declared; Tribunal Milano 13 November 2009 (in Resp. civ. e prev. 2010, 2, 409), concerning the right of the homosexual party to require compensation in criminal proceedings against the person responsible for the death of the partner; on this issue also, L. Balestra, *Profili di rilevanza della convivenza more uxorio, Le nuove famiglie e la parificazione degli status di filiazione ad opera della L. 219/2012*, edited by Fondazione Italiana del Notariato, Milano, 2015, p 16. A peculiar question concerns the immigration area, in which the equalisation of the legitimate family and more uxorio-relationship is discussed; on the issue see F. Macario, *Diritto di famiglia. Questioni giurisprudenziali*, Giappichelli, Torino, 2011, p 7 et seq. An opposite

probably been the international[77] and foreign attitudes giving relevance to this phenomenon; the PACS model or the civil registered union in England can be cited. On the other hand, the verdicts of the European Court[78] favoured the progressive approach of the national courts in specific cases where the obstacle, coming from the same-sex phenomenon, seems to be removed in the field of patrimonial rights and removable in the institution of marriage. The judges have assumed an important role in the evolution of that unsatisfactory situation by pressing for a decisive intervention; sometimes international rules helped judges to bypass the position of the Supreme Court, when the need to respect foreign legislation and European regulations has caused the recognition of a homosexual marriage celebrated abroad.[79]

Recently the case-law has shown a prudent approach, perhaps due to political interference and waiting for the intervention of the legislator, which has confirmed the previous situation although the international panorama opts for a more 'modern' attitude. The explanation is summarised in the following paragraph about the application of the ECHR principles:

> 'Article 12, even though formally limited to heterosexual marriage union, does not prevent Member States from extending the model to the same sex couple, but at the same time does not contain any obligation in this regard. Art. 8, which enshrines the right to private and family life, certainly contains the right to live in a loving relationship between persons of the same sex protected by law, but not necessarily through the marriage option for such unions.'[80]

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trend is introduced by the Constitutional Court, 3 November 2000 n. 46 in which the judge believed impossible the equalisation of cohabitation and conjugal relationships concerning the reversibility pension. The reason was the daily choice, always revocable, that characterised cohabitation and the lack of any duty and obligation.

77 On the impact of European human rights in the national context see: S. Choudhry, J. Herring, *European Human Rights and Family Law*, Hart Publishing, Oxford, Portland, Oregon, 2010.

78 European Court of Human Rights, *Schalk and Kopf v. Austria*, (n. 30141/04), 24 June 2010; the decision does not impose an obligation on the national legislator to recognise the homosexual but an important step is the declaration that '… it cannot be said that Article 12 is inapplicable to the applicants' complaint'.

79 Court of Appeal Napoli, 13 March, 2015 *in jurisdata* online 2016 'The marriage of a French gay couple legally married according to the State of the national law must be recognised otherwise the conventional norm (art 12 of the Strasbourg Act) which includes the right to marry a same sex person under the law of the State of affiliation (or which has acquired the citizenship), as well as the conventional standard (art 14), which also includes the right of a homosexual couple to a "family life", a right that cannot fade with the transition from a State to another member of the Union, will be disregarded in Italy)'. An opposite position is declared in Court of Appeal Milano, 6 November 2015, n. 2286: 'Same-sex marriage celebrated abroad is "existing and valid", but not "capable of producing legal effects in our system,' because of the lack of any legislative provision, and thus is not even transcribed". It is interesting to underline that the decision continues proclaiming that "… the forecast of same-sex marriage is concrete recognition of the principles of equality and non-discrimination and the fact that same-sex couples access to marriage is allowed by many countries of the European Union, and also by European states outside the Union, suggests that the effects of same-sex marriage are not in conflict with international public policy …"'.

80 Cass., 9 February 2015, n. 2400.

The court declared the impossibility, at that historic moment, of celebrating a homosexual marriage or recognising its validity, if it was celebrated in a foreign country. The implicit reasoning is the idea that the Italian system does not prevent an eventual and formal admission to marriage for homosexual couples if the legislature would opt for a reform in this direction.

In any case, the aforementioned approach allows the civil jurisprudence to act with a certain discretion to meet the needs of homosexual couples; generally, the area in which their rights have been established does not contrast with binding principles, such as inheritance rights, etc. In other words, the activity of the judges has extended to homosexuals some guarantees of the heterosexual couple in specific areas: criminal liability, loan contracts, welfare matters, and some administrative effects. Thus a homosexual person acquired, in consequence of the partner's death, the right to compensation in the case of a road accident.[81] The right to succession in a loan contract,[82] and the right to be beneficiary for welfare assistance[83] (in the cooperative bank sector).

Another judicial trend,[84] worthy of being mentioned, is the recognition of some effects of homosexual marriage celebrated abroad; but these are limited to administrative areas in the field of the right to family reunification. The defence of the liberty of movement of the homosexual couple cannot be limited by the domestic law with regard to the bureaucratic effects, because, far from recognising a marriage, the solution adopted appears respectful of the 'fundamental right to live freely in a couple relationship' according to the Constitutional principle.

In the last decade, the Italian government has been active, presenting different bills; none of them has obtained legislative consensus. Despite the diverse classification of the family model, the drafts have contemplated two hypotheses: the extension of marriage and the cohabitation contract. The first category includes very concise proposals in which the extension of the law already provided for the heterosexual couple is suggested also for the homosexual one. This avoids the resolution on any questions concerning children;[85] other drafts lead to a more complete law,[86] which allows for adoption or the ability to use the in vitro fertilisation technique. The second

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81 Tribunal Milano, 12 September 2011, n. 9965; and to the same effect Cass., 7 June 2012, n. 12278.

82 On this subject the national approach had been primarly directed towards the recognition of succession for the heterosexual couple by virtue of the Constitional Court 7 April 1988, n. 404; the extension to the homosexual relationship is due to the European Court of Human Rights, *Kozac v Polonia*, 2 March 2010 (n. 13102/02).

83 Court of Appeal Milano, 31 August 2012, n. 7176.

84 Tribunal Reggio Emilia, 13 February 2012 in *jurisdata on line* 2016, consistent with the decision: Cass., 15 March 2012, n. 4184.

85 Bill, s 5, presented 15 March 2013 'Regulation against matrimonial discrimination'. Even before that, we remember the bill presented 8 February 2007 'Duties and rights of cohabitants'.

86 Bill, s 204, presented 15 March 2013 'Regulation to protect equal access to marriage for homosexual couples' and Bill, n. 393, presented 3 April 2013 'Modification to the civil code to protect the equal access to marriage for homosexual couples'. One particular scheme provides

option[87] provides for the regulation of cohabitation through a registered agreement (with consequential financial provisions concerning breach of the contract) or the registration of a mere declaration about the status of the cohabitees.[88]

Nowadays, a discussion concerns the introduction of the 'civil union';[89] it refers to the relationship between two persons of the opposite or same sex who have a common life and want to acquire some protection. Regulation has become urgent after the recent position of the Strasbourg Court[90] which condemned the nation for the violation of art. 8 ECHR. The European Court established that the homosexual relationship requires recognition and protection, as the affective tie is similar to the heterosexual one, as previously declared in numerous decisions. In the reasoning of the court, an analysis of the Italian system leads to an important reflection: that possibility to regulate some (financial) aspects with a 'general' contract[91] and the creation of a register in some districts are not sufficient. This because contracts 'fail to provide for some basic needs which are fundamental to the regulation of a relationship between a couple in a stable and committed relationship, such as, inter alia, mutual rights and obligations they have towards each other, including moral and material support, maintenance obligations and inheritance rights'. With reference to the registers of civil unions, the court considered their symbolic character as insufficient protection. Moreover, the court pointed out that, on the one hand, registration is not valid for legal actions; on the other hand, the lack of specific regulation does not prevent judicial intervention.

Particular attention was dedicated to the concrete Italian situation. The impact of the homosexual phenomenon was considered relevant in a society which has demonstrated an acceptance of those experiences, requiring urgent regulation. The court did not ignore the recommendations of the Italian judges who, on diverse occasions, have criticised the lack of regulation and suggested a legislative solution. In the absence of specific public interests legitimising the restriction of the homosexual 'requests', the claim of the appellant was accepted and the Italian government condemned.

Obviously the discussion about homosexual rights has renewed the debate about the general reform of cohabitation couples both homosexual and

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for the creation of a third genus named 'homo-affective union' the effects of which are similar to the institution of marriage (Bill, c. 1115, presented 30 May 2013, 'Regulation of the homo-affective union').

87 Bill, s 197, presented 15 March 2013, 'Modification to the civil code concerning the cohabitation contract'.

88 Bill, s 684, presented 9 April 2013, 'Recognition of legal rights, responsibilities and powers for *more uxorio* couple'.

89 Bill, DDL 14, presented 25 February 2016, 'Regulation of the civil union and de facto relationship'.

90 European Court of Human Rights, *Oliari et al. v Italia* (n. 18766/11 e 36030/11), 21 July 2015.

91 On the validity of the cohabitation agreement, see G. Oberto, *I diritti dei conviventi. Realtà e prospettive in Italia ed Europa*, Cedam, Padova, 2012, p 81.

heterosexual. The debate is affected by three fundamental orientations:[92] on the one hand, the desire to completely assimilate the family based on marriage and that based on cohabitation. On the other hand, there is the awareness that the two models are intensely different as cohabitation is characterised by the autonomy of the parties. Thus the legislative intervention has to be restricted and specific. In the middle, we find the idea of the creation of a common core of rules equal for marriage and cohabitation. While we are writing, the legislative proceedings has not been concluded and the amendments proposed to the bill are numerous and mainly concentrated on the children's welfare.[93]

VI THE 'MODERN' FAMILY LAW

Heterosexual unions (with or without children), homosexual relationships (with or without offspring), married couples and cohabitant ones, mono-parent realities, reconstructed couples (with children of one or both members), unions with adopted children or minors born with the in vitro fertilisation procedure: these are multiform models of the modern family. Perhaps we have to speak about 'families' to identify the current situation.The evolution of society has stimulated the affirmation of different family models, which correspond to distinct reactions by the legal system. These go from a specific regulation, to a general law, to a voluntary lack of any rules.

A definition of family does not exist[94] as it is strictly linked to a particular historic context and political environment. Sometimes it acquires a concrete significance in specific situations when the system privileges some aspects for a certain need[95] (for example in the field of social security, family business,

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92 M. Sesta, *Le convivenze tra persone dello stesso sesso: diritti europei e diritto interno a confronto*, in M. C. Andrini, *Un nuovo diritto di famiglia europeo*, Cedam, Padova, 2007, p 187; M. Segni, Unioni civili: non tiriamo in ballo la costituzione, in Nuova giurisprudenza civile commentata, II, 12, 2015, p 707.

93 A delicate problem is the regulation of stepchild adoption with reference to the homosexual couple where it is possible for one homosexual member to adopt the child of his or her cohabitee. This theme has been the object of numerous judicial interventions concerning the legal recognition of adoptions obtained in a foreign country. Recently we have to point out the decision of the Court of Appeal Milano, 16 October 2015 (in www.altalex.it) in which the judges conclude '… there is no reason to believe a foreign adoption in favour of a non-married person concerning a child recognised by the partner, including same sex, to be contrary to the public order, once it is assessed specifically that the recognition of the adoption, and thus the recognition of all the rights and obligations arising from such a relationship, match the interests of the child to the maintenance of family life with both parental figures …'. A significant and relevant point, in this matter, comes from the approach of the Supreme Court that in a similar case clarified that damage to a child adopted by a homosexual couple is an inadmissible preconception (Cass., 11 January 2013, n. 601). In this sense, recently, also Tribunal Palermo, 13 April 2015 in *Diritto di Famiglia e delle Persone*, 2015, 2, I, 616.

94 Some authors wonder if family law has lost its ordinary function and is being forced to chase the new phenomena for offering stable solutions; see S. Patti, *Note sulla formazione del diritto europeo della famiglia*, in M. C. Andrini, *Un nuovo diritto di famiglia europeo*, Cedam, Padova, 2007, p 166.

95 To this effect also the European Human Court: V. Zagrebelsky, *Famiglia e vita familiare nella Convenzione Europea dei Diritti Umani*, in M. C. Andrini, above n 92, p 115.

procedure for support of those with disabilities, etc.) where the confines of the family institution are variable and uncertain, including or excluding some subjects depending on the specific target of the protection.

The complexity of the phenomenon and the likewise disparate decisions (of both the legislative and jurisprudential matrix) make this area very dynamic and dense with social and sociological influences; these influence the application of the law making it more flexible. The real problem is the identification of what remains irrelevant. That specification is necessary if we think about a custom recently noted in the national and foreign panorama and named 'co-parenting';[96] adults (of opposite or same sex) make an agreement to give birth to a child without any intention of creating a family. The reason for the accord is the desire to satisfy the maternity and/or paternity instinct without sentimental implications (for each other). The autonomy[97] of the parties explicitly excludes the idea of family; but an unquestionable fact is the legal relevance of the tie created by each parent and the child as a sort of a planned parenthood. The consequences are various, which could extend from the mere identification of a sperm donor or surrogate mother (in the form of an 'open' fertilisation technique) to the consistent involvement of the two biological parents in the growth of the child. From a legal perspective, the relevant aspect concerns the content of the agreement on the care and education of the minor, as private interests could oppose 'public' ones.

The phenomenon merits being investigated, and its success gives testimony to the potential undesirable formations that the unconditional and uncontrolled abuse of rights may provoke. That situation does not match a married or a cohabitation relationship; nor could a break-up of the couple be seen as similar, as the sole desire of the parties is sharing the parental experience. Nevertheless, in the Italian system, the abolition of the legitimate and illegitimate status[98] will allow for the protection the offspring by an egalitarian approach. We have no doubt that the protection of the children is granted at all costs; the relationship

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[96] The phenomenon is not very common in the Italian system but abroad it begins to appear consistent; interested people can find a 'partner' on specific websites (see: https://www.co-parentmatch.com/; http://modamily.com/, 3w.co-genitori.it).

[97] On the privatisation of the family relationship, see: G. Ferrando, *Diritto di famiglia*, Zanichelli, Bologna, 2013, p 20 et seq.

[98] However, some authors (M. Sesta, *L'accertamento dello stato di figlio dopo il decreto legislativo n. 154/2013*, in *Famiglia e diritto*, 2014, 455) affirmed that the Italian reform has substituted the objectives 'legitimate and illegitimate' with another distinction: child born in marriage and child born out of marriage. That doubt is anchored in the consideration that, even if the legislator and the jurisprudence cooperate for eliminating any discriminations, some residual elements remain in our system; for example the abrogation of the 'legittimazione' (legitimation) procedure which has been brought in with the aim of privileging the favor veritatis (See R. Senigaglia, *Status filiationis e dimensione relazionale dei rapporti di famiglia*, Jovene Editore, Napoli, 2013, p 9) did not have the effect of equalizing completely the position of the child born in marriage and out of marriage. The first benefits the conjugal relationship of the parents which confers a presumption of the father's status and automatically recognises legal consequences; the latter needs formal recognition from the mother and/or the father to be a beneficiary of the same effects.

between the parents is irrelevant as art 315 *bis* c.c. states, after the reform,[99] in the 'charter' of the rights of the child.[100]

In the last decade, the entire defence of children became a fundamental point in the domestic law; the development of the Italian law has been characterised by a growing interest in the protection of the weaker parties of the family: from the women's position to the offspring's condition following the sociological processes of change. The political and legal discussion has moved from the tireless defence of the institution of marriage to the safeguarding of the individuals composing the family.

The acquired autonomy and independence (also financial) of the female member has led to important reflections on the family model. These elements, together with the declared goal of equalisation, influenced the survival of marriage. For a long time, the institution has lost its monopoly on familial relationships as it no longer appears a 'placement' for the woman, who was free to begin an unofficial relationship and to request the dissolution of the union, if celebrated.

The secularisation of marriage and the approval of divorce signified the important passage towards the modern situation in which the position of the children becomes central; the abolition of the fault system in separation proceedings contributed to a design of the familial structure in which the needs of the parties are central and merit consideration. The intervention of the State is limited, as the public interest cannot prevail over the individual's;[101] the family (and marriage) does not represent the transposition of the organisation of the State (as in the last century), but a private affair where the guiding principles are the equal position of the parties and the children's welfare.

The current vision of the reality of the family shows the growing stabilisation of the child-parent relationship, which can correspond to the uncertainty or absence of empathy between the parents. The same result is assured in the collapse of the family, in which parental responsibility is shared in the interest of the children.

It is to be emphasised that the autonomy of the parties is decisive. The recent reform has tried to grant a rapid and fair solution, offering diverse alternatives to 'traditional' judicial proceedings: a modern idea of family solidarity,[102]

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[99] See on the theme B. Marucci, *Famiglia legittima e famiglia naturale. Un percorso verso la parificazione*, Edizioni Scientifiche Italiane, Napoli, 2012, p 57 ss.; the author stresses the residual elements of discrimination between the condition of the 'natural' child and the legitimate one (essentially attributable to the need to recognise the child born out of marriage).

[100] A. Figone, *La riforma della filiazione e della responsabilità genitoriale. Testo aggiornato al d. lgs. 28 dicembre 2013 n. 154*, above n 41, p 70.

[101] In this context the promulgation of the Law 22 May 1978, n. 194 on abortion contributed to recognising a relevant role for the position and rights of women. See: P. Donati, *La famiglia nella società relazionale. Nuove reti e nuove regole*, Franco Angeli, Milano, 1994, G. Berlinguer, *La legge sull'aborto*, Editori Riuniti, Roma, 1978.

[102] On the topic an interesting interdisciplary paper: R. Ter Meulen and K Wright, *The role of*

imposing a quick resolution of the financial aspects and the welfare principle, which reduces the tension between the parents.

The realisation of those results is due to the partial intervention of the legislature and the substantial involvement of the judiciary. In particular, the work of the Constitutional Court[103] has adapted the rules of the judicial system to social changes. The open character of the constitutional principles allowed for an evolutionary adaptation, together with the presence, in the civil code, of general clauses; those adjustments, sometimes, have preceeded a legislative intervention. We do not ignore the frequent involvement of the Supreme Court that on some occasions contributed to the abolition of obsolete rules[104] and has assumed the role of guaranteeing protection for the weaker party, above all in the field of the financial remedies in favour of the cohabitant. The jurisprudential efforts added value to the individual needs, even prior to the European admonishment.

The essence of the 'modern' family is to realise various interests: from the individual rights to the interests of the group where the 'public' dimension assumes relevance in the protection of the weaker parties and the safeguarding of the general principles. Thus, the qualification of the phenomenon becomes irrelevant, preferring instead the concept in which all the family members develop their personalities in different manners.[105]

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family solidarity: ethical and social issues, in *CESifo DICE Report*, 2/2010, p 13 et seq.; H. Fulchiron (ed), *Les solidarités entre generations*, Bruylant, Bruxelles, 2013; K. Boele-Woelki, F. Ferrand, C. Gonzales Beilfuss, M. Jantera Jareborg, N. Lowe, D. Martiny and W. Pintens, *Principles of European family law regarding divorce and maintenance between former spouses* Antwerp – Oxford, Intersentia, 2004.

[103] The interventions are numerous (in addition to those signalled in the previous paragraphs): from the right to the surname (Constitutional Court, 3 February 1994, n. 13) to the right to identity (Constitutional Court, 23 July 1996, n. 297); from citizenship (Constitutional Court, 16 April 1975, n. 87) to parental leave (Constitutional Court 19 January 1987, n. 1).

[104] We allude to the work carried out for the elimination of the preventive judicial phase for the admissibility of the legitimacy claim: Cass. 26 November 2004, n. 22351.

[105] Some authors speak about the 'death' of the family; we think this suggestion is compromised by the traditional definition of family. A correct vision must consider the transformation of the institution; see R. Pane, Il *nuovo diritto di filiazione tra modernità e tradizione*, in *Nuove frontiere della famiglia. La riforma della filiazione*, above n 38, p 27. We do not ignore that the development of family law feels the effects of international and European moves towards unification; see on the topic: N. Lowe and G. Douglas, *The Continuing Evolution of Family Law*, Family Law, Bristol, 2009, p 261 et seq.

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LITHUANIA

CHILDREN'S MAINTENANCE FUND IN LITHUANIA: LEGAL AND SOCIOLOGICAL ASPECTS OF ITS ACTIVITIES

Inga Kudinavičiūtė-Michailovienė and Aušra Maslauskaitė[*]

Résumé

L'entretien des enfants est une obligation dans la plupart des pays de l'UE quel que soit le le modèle familial. En Lituanie, le non-respect de cette obligation par les parents déclenche l'intervention de l'Etat qui prend le relais à l'aide d'un dispositif spécial appelé : "Fonds d'entretien des enfants". Ce Fonds met en œuvre l'obligation subsidiaire de l'État d'assurer l'entretien des enfants à la place de ceux qui sont qui sont normalement tenus de cette obligation. Le présent chapitre examine le rôle de l'Etat Lituanien dans la garantie du droit de l'enfant à obtenir les ressources nécessaires à son entretien. Il analyse la législation et présente les résultats d'une enquête sociologique relative aux mères célibataires. L'analyse suggère que le Fonds d'entretien des enfants ne répond qu'en partie aux besoins des enfants pris en charge par l'État lorsque les parents ne sont pas en mesure d'assumer leur obligation d'entretien. Les dispositions relatives à la responsabilité des parents en cas de non-respect de leur obligation ne sont pas très efficaces, elles laissent subsister des possibilités de violation des droits de l'enfant et de dépenses inutiles de l'argent public.

I INTRODUCTION

The state of Lithuania recognises that the family is the basic element of society and the state, serving as a natural environment for the development and well-being of children, and that children require special protection and care both before and after birth. The Constitution of the Republic of Lithuania[1] (point 6 of arts 38 and 39) establishes that both parents shall be responsible for maintaining their underage children and the state shall provide adequate conditions for them to perform their parental duties. On the other hand, under certain circumstances, the state undertakes to support children who do not

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1 Constitution of the Republic of Lithuania, 1993. Vilnius: LWUP edition.

receive maintenance from their parents. The latter obligation is specified in the Civil Code of the Republic of Lithuania[2] (arts 3.192–3.204), which presents the legal principles governing child maintenance, its forms and amount calculation criteria as well as definitions of its use and controls. The issue of child maintenance becomes especially relevant in cases when parents dissolve their marriage or partnership. Lithuania is among those European states where divorce rates have been high for several decades[3] and this undoubtedly has certain implications for the enforcement of child maintenance obligations.

The state has assumed the obligation to take care of families raising and bringing up children at home and to render them support (art 39 para 1 of the Constitution). It seems appropriate then that when the parents of a child, or one of them, are unable to completely meet their obligation to maintain their children, the constitutional guarantees of child rights commit the state to secure a prompt provision of the necessary financial support from other sources.[4] To that end, on 26 December 2006, the Parliament of the Republic of Lithuania (Seimas) adopted the Law on Children's Maintenance Fund of the Republic of Lithuania. The main purpose of the Law is to ensure the child's right to social security and to guarantee the state's commitment to pay a fixed maintenance allowance to a child in the presence of the grounds stipulated therein. The state thereby acquires the right to demand that the persons obliged to provide child maintenance repay the child maintenance allowance paid by the state. The above-mentioned Law established a Children's Maintenance Fund as of 1 January 2008, the Fund being a state budgetary appropriation used to pay out the allowances covered by Children's Maintenance Fund in accordance with the Law. Within the period of 2008–2015, the total of 51,000 applications for the Fund's allowances had been received. In 2015, the administration of the Fund received on the average 260 new support applications per month and has paid allowances to some 23,500 children. Over €14m were paid by the Fund in 2015 in the form of maintenance allowances. However, the rate of recovery was only at the level of some €0.5m. In Latvia, the debtors of an analogous fund are also considered as debtors to the state. However, there the alimony recovery rate reaches about 90%. It is obvious therefore that legal regulation in Lithuania is

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2 Civil Code of the Republic of Lithuania Official Gazette, 2000, No 74.

3 In 2014, the crude divorce rate in Lithuania was 3.3. The total divorce rate was 0.43, which indicates that the probability of divorce reaches 43%. In 2014, over a half (54.2%) of all divorced couples had common children under 17 years of age. Following the divorce, 7,400 children were left in single parent (mostly single mother) families. *Demographic Yearbook* 2014, 106–110.

4 In cases of non-payment of child maintenance by the non-custodial parent, child support is guaranteed directly by the state in Austria, Estonia, Germany, Hungary, Italy and Sweden. It is guaranteed by special bodies indirectly governed by the state in France, Slovakia and Belgium. It is guaranteed by local authorities in the Czech Republic, Denmark and Finland. It is guaranteed by special funds in Latvia, Lithuania, Luxembourg, Poland and Portugal. It is guaranteed by special agencies in the Netherlands and in the UK. Beaumont, K, Mason, P, *Child Maintenance Systems in EU Member States from a Gender Perspective* (European Parliament, Directorate-General for Internal Policies, Brussels, 2014).

not sufficiently clear and complete, resulting in indisputable implications for the efficient enforcement of the child's right to maintenance and, correspondingly, in waste of public money.

The aim of this chapter is to present the role of the state of Lithuania in the enforcement of the child's right to maintenance on the basis of legal analysis and a sociological survey, and to reveal various aspects of parental liability in cases of their failure to fulfil their maintenance obligations. The chapter consists of three parts: the first part discusses general legal provisions governing child maintenance obligations; the second part presents the legal mechanism and specific aspects of Children's Maintenance Fund operating in Lithuania by way of legal analysis; finally, the third part uses the findings of a sociological survey in order to analyse how actively different applicant groups approach the Children's Maintenance Fund for support and which factors influence their activity levels.

II GENERAL RULES OF CHILD MAINTENANCE IN LITHUANIA

The Civil Code of the Republic of Lithuania (art 3.192) stipulates that parents are obliged to maintain their underage children, whether or not they live in matrimony or separately, the marriage has been dissolved, children separated from their parents or parental authority restricted. Child maintenance is adjudged to be payable until the child reaches majority. There are three ways to adjudge maintenance, according to the legal regulation thereof: in the form of regular contributions, by assessing a specific amount payable (a lump sum payment), or by assigning certain property to the child (CC, art 3.196). It should be noted that methodologies of calculating the amounts of child maintenance allowances differ between countries (eg systems based on income percentage, balance of needs and capabilities, expenditure sharing, etc), and there is no clearly prevailing opinion as to which system is the most positive and serves the best interests of the child. Besides, in the context of ever-intensifying free movement of people within the EU, more and more often the amount of child maintenance allowance is linked with the time dedicated by each of the parents to communication with and upbringing of the child. And although some legal systems reject the link between child maintenance and the time spent with the child (the number of contact hours), in reality this link does exist beyond any doubt.[5] Lithuania is among those countries that do not link the amount of child maintenance contributions and the intensity of contact with the child.

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[5] B Rešetar, 'The Link Between Child Maintenance and Contact' in K Boele-Woelki, J Miles and JM Scherpe (eds), *The Future of Family Property in Europe* (European Family Law Series vol 29) (Intersentia. Antwerp-Oxford-Portland, 2011), 279–295.

Moreover, since 1 July 2001,[6] Lithuania no longer applies a minimum or maximum (fixed) maintenance contribution, ie the legislators chose not to set a minimum threshold of child maintenance in the Civil Code,[7] based on the argument that the amount of maintenance should be proportional to the needs of underage children and wealth status of their parents (the 'balance of needs and capabilities' approach), so as to ensure the necessary conditions for child's development.

What amount of maintenance contributions is sufficient to ensure the necessary conditions for child's development is determined by the court in each particular case taking into consideration specific circumstances. The case-law of the Court of Cassation[8] recognises that the guiding criterion in adjudging maintenance deemed necessary to meet the basic needs of a child is the amount of minimal monthly salary (equal to €350 as of 1 January 2016). This criterion, however, is only advisory and is applied with consideration of the specific circumstances of individual case. The Court of Cassation points out that the law does not specify any particular amount of child maintenance to be provided by the parents, and the case-law can only be used to standardise individual criteria deemed important for the establishment of the amount and form of maintenance as well as for the application of the principle of proportionality to balancing the child needs on one hand, and wealth status and capabilities of parents on the other hand. The fact that the amount of maintenance contributions for children living in Lithuania is usually established on the basis of the minimum salary does not mean that this is an established and recommended practice, because the amount of maintenance is established on case-by-case basis.[9] Besides, when a court issues a ruling on the amount of child maintenance, it also must ensure the enforceability of the ruling, ie the court cannot order such child maintenance that objectively exceeds the payment capacity allowed by the wealth status of the parents.[10] In other words, both parents must contribute to child maintenance in proportion with their corresponding levels of wealth. According

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6 The Marriage and Family Code, which was abolished on 1 July 2001, had included the system of an interest-bearing part of income, ie one-quarter (or 25%) of all received income for one child, one-third of all received income for two children, etc. Quod vide. Marriage and Family Code of the Republic of Lithuania. Official Gazette, 1969, No 21–186.

7 The provisions of the Civil Code, which came into force in 2001, in general, do not establish the minimum amount of maintenance but leave it to the discretion of the court. This position of the law is regarded as controversial: Kudinavičiūtė-Michailovienė, I, Vėgelienė, J, *Child Maintenance: Several Topical Theoretical and Practical Aspects* Jurisprudence: research paper/Mykolas Romeris University, Vilnius, 2012, No 19(1), 214–217; Sagatys G, 'The Pre-Harmonization Area: A Comparison of Lithuanian, Latvian and Estonian Child Maintenance Laws' in K Boele-Woelki, J Miles and JM Scherpe (eds), *The Future of Family Property in Europe* (European Family Law Series vol 29). (Intersentia, Antwerp-Oxford-Portland, 2011) 324; I Kudinavičiūtė, *Civilinio kodekso normų, susijusių su šeimos narių teisių apsauga, įgyvendinimo problemos* [Realization of Civil Code Norms Related with the Defence of the Family Members' Rights], Jurisprudencija: LTU mokslo darbai, 2002, T 28 (20).

8 Ruling of SCL of 26 April 2004 in civil case No 3K-3-259/2004; Ruling of SCL of 10 November 2009 in civil case No 3K-3-495/2009.

9 Ruling of SCL of 3 February 2016 in civil case No 3K-3-16-706/20166.

10 Ruling of SCL of 8 February 2016 in civil case No 3K-3-37/2010.

to the principle of proportionality, the parent receiving the higher income must assume a bigger share of the expenses necessary for the maintenance of the child.[11]

The state has not imposed effective liability[12] on parents who avoid their child maintenance obligations. Doing so would prevent such avoidance and encourage them to fulfil their duties. The Supreme Court of Lithuania has expressed an opinion that the power to restrict parental authority (CC, arts 3.180–3.183) performs not only punitive but also educational and preventative functions. Therefore the restriction of parental authority can be applied as a preventative measure aimed at encouraging parents to change their behaviour or lifestyle, as well as a means to protect a child from potential damage before such damage is actually inflicted.[13] On the other hand, the restriction of parental authority when the parents (or one of them) fail to provide maintenance for the child does not bring about positive outcome or substantial improvement of the child's material well-being. It can be presumed that, although parental responsibility to provide for their children continues to apply, child maintenance is not provided, resulting in registered arrears.[14] We can make an assumption that the strictest liability of parents evading child support is set forth in the Criminal Code of the Republic of Lithuania,[15] art 164 of which states that evasion of the duty to maintain a child, pay for the maintenance of the child or provide another required support to the child, as established by a court decision, is punishable by community service or by restriction of liberty, or by arrest, or by imprisonment for a term of up to 2 years. Such liability, however, is seldom applied in practice, although as many as 587 requests for pre-trial investigation in relation to the evasion of child support duties were prepared and filed with the investigative authorities in 2012, and as many as 110 requests[16] in 2015. Usually the cases are discontinued for lack of *corpus delicti*.

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11 *Šeimos bylų nagrinėjimo ir teismo sprendimų vykdymo ypatumai. Mokslo studija* (Vilnius: MRU, 2013) 80–87. *Family Cases: Adjudication and Enforcement. Scientific study*, edited by E Tamošiūnienė, I Kudinavičiūtė-Michailovienė (Vilnius: Mykolas Romeris University, 2013).

12 The application of administrative responsibility against the failure or misuse of parental authority, in opposition to interests of children, does not lead to positive results because the penalties for these offences is a warning and, for repeated violation, a fine of €115 (art 181). Code of Administrative Offences of the Republic of Lithuania. Official Gazette 1985, No 1-1 (current edition since 1 January 2016).

13 Ruling of SCL of 19 October 2005 in civil case *Chief Prosecutor of Kaunas City District v GN* No 3K-3-492/2005.

14 If the court has issued the order on the maintenance of an underage child and he lives in a care institution, the parents are not exempted from the obligation to provide the maintenance. Therefore, if the obligation is not prosecuted and the maintenance is not provided, a reason to calculate the debt appears. The recovery of the debt is regulated in art 3.200 of the Civil Code. Ruling of SCL of 25 January 2011 in civil case No 3K-3-8/2011.

15 The Criminal Code of the Republic of Lithuania. Official Gazette 2000, No 89–2741.

16 Children's Maintenance Fund of the Republic of Lithuania [interactive], www.vif.lt.

III THE ROLE OF THE STATE IN SECURING THE RIGHT OF A CHILD/CHILDREN TO MAINTENANCE (THE CHILDREN'S MAINTENANCE FUND)

In the 20th century, a prevailing opinion was that alimony is a surrogate for social security and that the development of social security system will eventually lead to the disappearance of maintenance obligations. This theory was later disproved. However, a relationship between alimony obligations and social security does exist because both of them have a common aim: to provide maintenance for the individuals incapable of working who are in need thereof.[17] It can be presumed therefore that a close link exists between maintenance obligations, social policy of the state and protection of child welfare. On the other hand, the concept of social support cannot be equated with child maintenance[18] because quite often a family where children are supported by both parents may still be eligible for social benefits.[19] On the other hand, maintenance is ordered for the benefit of a child and remains the child's property to be used in his or her exclusive interest. It can be presumed that the state receives an obligation to secure the fulfilment of the basic needs of a child only in cases when the persons subject to these obligations fail to meet them. Such obligation of the state was recommended for transposition into the national law by the Committee of Ministers of the Council of Europe as early as in 1982.[20]

Bearing in mind that many children are deprived of the maintenance that they are legally eligible to (according to the data for 2011, some 84,000 parents in Lithuania failed to pay child maintenance obligations)[21] and following the provisions of article 27 of the Law on the Approval, Entry into Force and Enforcement of the Civil Code,[22] the Seimas of the Republic of Lithuania adopted the Law on Children's Maintenance Fund,[23] albeit disappointingly late, on 26 December 2006. The main purpose of the Law is to ensure the child's right to social security and to guarantee the state's commitment to pay a fixed maintenance allowance to a child in the presence of the grounds stipulated

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17 M V Antokolskaja, *Semeinoje pravo* [Family Law] (Moskva: Jurist, 2000) 231.

18 The concept of support is more extensive and maintenance (alimony) is interpreted as a type of support with distinctive legal nature. A M Nečajava, *Semeinoje pravo* [Family Law] (Moskva: Jurist, 2005) 247.

19 Law on Financial Social Assistance for Low-Income Families (Single Residents), Official Gazette, 2006, No 130–4889; Law on Disbursements for Children. Official Gazette 1994, No 89–1706; 2004, No 88–3208, 152–5534; Law on Social Support for Schoolchildren. Official Gazette, 2006, No 73–2755; 2008, No 63–2382, etc.

20 Payment by the State of advances on child maintenance: Recommendation No R(82)2 adopted by the Committee of Ministers of the Council of Europe on 4 February 1982 and Explanatory memorandum. Strasbourg, 1982, www.kekidatabank.be/opac/doc_num.php?explnum_id=61.

21 Web article: 'Publicity will be applied to discipline non-custodial parents who have become debtors to the state', www.sos03.lt/Naujienos/Lietuvoje/Valstybes_skolininkus_netevelius_drausmins_viesumas.

22 Law on the Approval, Entry into Force and Enforcement of the Civil Code of the Republic of Lithuania, Official Gazette, 2000, No 74–2262.

23 Law on Children's Maintenance Fund of the Republic of Lithuania, Official Gazette, 2006, No 144–5464.

therein. The state thereby acquires the right to demand that the persons obliged to provide child maintenance repay the amount of the child maintenance allowance paid by the state. On the basis of the above-mentioned Law, Children's Maintenance Fund (CMF) was established, again only in 2008. The Fund supports some 25,000 children annually,[24] when one of the parents fails to pay maintenance contributions.

By its nature, Children's Maintenance Fund is a state budgetary programme and should not be considered a legal entity, ie this Fund cannot be considered a state monetary fund as described by Part 7 of art 2 of the Law on State Treasury of the Republic of Lithuania.[25] According to the legal provisions, the Fund allowances are periodic and payable once a month, and a single allowance per child cannot exceed 1.5 of the basic social allowance (€57). Similar allowances are paid in Latvia, ie the minimal amount of the Maintenance Guarantee is €71.14 per each child under 7 years of age and €78.26 per each child between 7 and 18 years of age.[26] To be eligible for a maintenance allowance, a child must meet certain criteria, ie to be no older than 18 and to have permanent residence in the Republic of Lithuania. In addition to that, the Law establishes the grounds and the order of allowance payments. Interpretation of the provisions of the Law leads to the conclusion that allowances are paid from the Fund only in the presence of the following grounds: (1) the maintenance is assigned to the child by a court decision or is set out in an agreement on child maintenance approved by the court; (2) the maintenance contributions are payable on a monthly basis, in accordance with a court decision or agreement between the parents; (3) the child has not received the maintenance contribution established by the court as specified in the agreement between the parents for more than a month, or has received only a part thereof. The applicant for child maintenance allowance can be only one of the parents, the one with whom the child lives according to the child arrangement order issued by the court, or a legal custodian of the child.

Children's Maintenance Fund is an intermediary paying out from the state budgeted part of the alimony ordered by the court for the benefit of the child and recovering these costs from the debtors for the benefit of the state with a 5% interest rate.[27] According to the regulations of Children's Maintenance Fund, the debtor is a person who is obliged to pay monthly child maintenance contributions in accordance with a court decision or court approved agreement

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[24] Information of Children's Maintenance Fund of the Republic of Lithuania [interactive], www.vif.lt.

[25] Law on State Treasury of the Republic of Lithuania, Official Gazette, No 1999-04-14, No 33–945.

[26] The EU Mutual Learning Programme in Gender Equality Support to lone parents, Comments Paper – Latvia, France, 21–22 October 2015.

[27] The state acquires this right only if persons obliged to maintain the child have failed to meet this obligation for reasons which are declared as irrelevant by the court. If the reasons are relevant the state does not acquire the right of recourse. Only objective circumstances may be identified as relevant reasons – serious illness, unemployment and similar, ie reasons that originated despite the person's blame. V Mikelėnas, *Šeimos teisė* [Family Law] (Vilnius: Justitia, 2009) 406.

between the parents, but ignores the court decision, or fails to pay the amount established thereby. Thus the debtor, contrary to the beneficiary, is not subject to any nationality or residence criteria. It should be noted that recovery of child maintenance from debtors resident in the EU member states is facilitated by several EU legal instruments, eg Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (applicable only as of June 2011 and substituting Brussels I Regulation[28] with regard to maintenance obligations), as well as the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance.[29]

Children's Maintenance Fund acts as the central authority responsible for the performance of functions set forth by both the Regulation and the Convention.[30] With this in mind, in 2015 the Fund administration had received and evaluated 331 applications for the enforcement of the Regulation and 40 applications for the enforcement of the Convention.[31] Unfortunately, within first 2 years of the Fund's activities, the rate of recovery of the payouts from debtors in Lithuania had reached merely 0.39%,[32] while in Latvia, for example, the debtors of the analogous fund are considered as debtors to the state and the debt recovery rate reaches almost 90%.

According to part 2 of art 10 of the Law on Children's Maintenance Fund, the Fund is authorised to request a pre-trial investigation regarding criminal liability of a debtor due to evasion of payment of maintenance contributions, and it also regularly posts lists of debtors evading their obligations. Since the beginning of the initiation of pre-trial investigations regarding criminal liability of a debtor due to evasion of the payment of maintenance contributions, a noticeable trend emerged among debtors to voluntarily approach the Fund administration and to settle the debts or at least parts thereof, in order to avoid prosecution for the alleged offence and a possible criminal record. It is worth

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28 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32001R0044.

29 Supplementation of the Law on the enforcement of the European Union and international legislation regulating civil procedure of the Republic of Lithuania with Chapters nine[1] and nine[2]: Civil Procedure Code of the Republic of Lithuania, Official Gazette, 2002, No 36–1340 (current edition since 1 January 2016).

30 The Fund administration performs the functions defined by the Regulation when the applications concern maintenance obligations towards persons younger than 21 years, occurring as a consequence of relations between the parents and the child. The Fund administration also functions as the central authority in the sense of article 6 of the Convention. Norway, Ukraine, Albania and Bosnia and Herzegovina are also parties to this Convention.

31 Activity report of Children's Maintenance Fund of the Republic of Lithuania for 2015 [interactive], www.vif.lt.

32 During the period of almost 4 years (since 1 January 2008 till 30 September 2011) the total amount of 119.646 million Litas has been paid out. Explanatory notes to the Act Repealing Bill on repealing the Law on Children's Maintenance Fund, prepared on 6 December 2011 by Ministry of Social Security and Labour of LR, No XIP-3927 [interactive], www.lrs.lt.

noting that in both situations regulated by art 3.202 (Enforcement of maintenance to a child placed under guardianship [curatorship]) and art 3.204 (Children maintained by the state) of the Civil Code, debtors failing to pay child maintenance contributions (parents, etc) are held liable to provide maintenance for the child. The difference lies in the fact that, when a child is placed in a child care facility financed by the state (local authorities), the maintenance costs are recovered, albeit through the care facility, as the child's legal representative under the law, for the benefit of the child and on behalf of the child, and are used in the exclusive interest of the child. In this case, no right of recourse is involved, because the child remains a creditor, even though he or she is provided for by the care facility.

In the cases covered by article 3.204 of the Civil Code, where child maintenance is provided by the state directly, the state retains the right of recourse to recover from the debtor who failed to support the child the amount of maintenance provided to the child. Thus the state becomes a creditor.

On the other hand, another increasing trend is abuse by the applicants of their right to an allowance paid by the Fund. Normally, the applicant is obliged to notify the Fund administration in writing within 3 days about any circumstances that may affect the decision to discontinue the maintenance allowance (eg when the debtor resumed his or her own payment of maintenance contributions, or when the place of residence of the child has changed, etc). Unfortunately, some applicants intentionally ignore this obligation by choosing not to send such notification or to send it much later. In the face of such circumstances, according to part 1 of article 12 of the Law, the Fund administration has the right to recover unjustified payouts from applicants who had requested an allowance from the Fund. The Fund prepares and files requests with the courts for court orders with respect to the indebted applicants, and with investigating authorities for launching pre-trial investigations into fraud according to part 1 of article 182 of the Criminal Code (fraudulent acquisition of another's property for own benefit, ie swindle). For instance, it has been established in many cases that applicants who requested child allowances from the Fund later do not inform the Fund that, for instance, the father of the child started (or resumed) paying maintenance contributions in compliance with the court decision or agreement between the parents. This renders the receipt of allowances from the Fund unlawful (unjustified). Usually such cases are concluded by issuing a criminal order and agreement for the convicted persons to serve the sentence and to compensate for the damage inflicted by their offence to the Fund, or such persons may be sentenced to imprisonment.[33]

Despite the fact that the Fund provides only symbolic material maintenance, it was proposed to abolish it during the last economic crisis, 'taking into consideration the economic difficulties faced by the state and severe shortage of

[33] Emphasis added. Judgment of district court of Ukmergė of 1 February 2016 in criminal case No 1-30-517/2016; Judgment of district court of Marijampolė of 6 January 2015 in case No 1-52-537/2015.

public finance, and bearing in mind that the state already supports families, *especially* the poor ones, in the form of social allowances, and material well-being of children in poor families should not deteriorate as a consequence of the abolition of maintenance allowances'.[34] This proposal and its justification should be viewed in a negative light, because the very attempt to classify families (or children) into wealthy and poor or extremely poor is highly questionable, and a proposal to eliminate any material support to children who do not receive maintenance from their parents (or one of them) cannot be tolerated, as going against the best interests of the child. However, this attempt to abolish Children's Maintenance Fund by certain political groups has failed and, quite to the contrary, a new bill amending the Law on Children's Maintenance Fund has been drafted and is currently under consideration along with an entire package of related secondary legislation.[35] The aim of the bill is to specify the grounds for discontinuation of maintenance allowances with a view to improving the efficiency of budgetary appropriations management and the optimisation of the administration of allowance payments. It also seeks to establish the minimum amount of the allowance and to introduce a provision that the debt recovery procedure can be started at an early stage of the payment of the allowance, which should contribute to the optimisation of the allowance payment process and efficient management of the sovereign debt.[36]

IV ACTIVITIES OF CHILDREN'S MAINTENANCE FUND AND SINGLE MOTHER FAMILIES: A SOCIOLOGICAL APPROACH

In this part of the chapter, we present an assessment of the efficiency and adequacy of the services provided by Children's Maintenance Fund (CMF) in Lithuania. We are going to discuss how actively this instrument is used by single mothers and what other socio-economic factors contribute to using or failing to use this state support instrument, on the basis of the findings of a representative survey 'Single mothers and social exclusion in Lithuania'.[37] This survey is the first, and so far the only, targeted study of this social group, giving insights into

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[34] Explanatory notes to the Act Repealing Bill on repealing the Law on Children's Maintenance Fund, prepared on 6 December 2011 by Ministry of Social Security and Labour of LR, No XIP-3927 [interactive], www.vif.lt.

[35] Bill on the amendment of the Law on Children's Maintenance Fund of the Republic of Lithuania No X-987, No 15–7756(3), https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/58c4b600aed211e59010bea026bdb259?positionInSearchResults=1&searchModelUUID=a872924d-825e-4937-9135-495a0bd40aab.

[36] Explanatory note to the Bill on the amendment of the Law on Children's Maintenance Fund of the Republic of Lithuania No X-987.

[37] The representative sociological survey 'Single mothers and social exclusion in Lithuania' was carried out in May 2014 by UAB 'Baltijos tyrimai'. The survey was performed in the framework of the project 'Social exclusion and social participation in the changing Lithuania' (VP1-3.1_ŠMM-07-K-02-045). The sampling method was quota sampling, the quotas were defined on the basis of the 2011 national census of residents and residencies, taking into account the territorial distribution of single mothers by county. The total sample consisted of 603 respondents.

the performance of parental duties and maintenance obligations by fathers after the dissolution of the parental partnership.

The results of the survey among single mothers with children show that 40.1% of single mother families in Lithuania receive regular and continuous alimony payments from the dissolved partnership/marriage. The remaining part (59.9%) of single mothers, ie more than half of the sample, reported irregular payments or non-payment: 26.5% of the respondents indicated that the father has been more likely to pay than not to pay the maintenance contribution during the entire period following the divorce; 17.3% stated that the father has been less likely to pay, and 16.1% admitted that the father has never paid alimony. Thus 43.8% of single mother families in Lithuania were receiving irregular child maintenance contributions, while 16.1% were not receiving them at all. These results suggest that an estimated 60% of all single mothers with underage children in Lithuania are potential clients of CMF, eligible to apply for CMF allowances in accordance with the existing regulations.

Nonetheless, as revealed by the survey, only 37% of all single mothers, whose children have been receiving irregular or no maintenance contributions from their fathers, and who are eligible for CMF allowances, have actually applied to the Fund, while 63% have never approached CMF. It seems obvious that the pools of potential and actual CMF clients differ significantly, and that a significant share of single mothers, despite being eligible, fail to benefit from this instrument of state support which could increase their income and provide additional well-being to them and their children. After all, many studies suggest that a significant percentage of single mothers run the risk of material deprivation and poverty,[38] which has a negative effect not only on their personal well-being but also on academic achievements and future possibilities for their children.[39] It is evident, that CMF, created as a social support instrument aimed at the reduction of poverty and socio-economic vulnerability of single mother families, is not efficient in terms of reaching its entire target group. Therefore it is deemed natural, and relevant from the viewpoint of social policy, to investigate what factors lead to this situation.

(a) Factors affecting the probability of single mothers applying for CMF allowances

Application for institutional support is a rational personal act preceded by individual cost-benefit analysis. It is understood that these 'calculations' performed by single mothers include the economic, time and emotional costs of applying to CMF and potential benefits thereof. These 'calculations' and their result – a corresponding decision – reflect not only the specific circumstances of

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[38] H-J Andress, D Hummelsheim, 'When Marriage Ends: Results and Conclusions' in H-J Andress and D Hummelsheim (eds), *Economic and Social Consequences of Partnership Dissolution* (Edward Elgar, 2009), 361–387.

[39] J Härkönen, *Divorce: Trends, Patterns and Consequences* (Stockholm University Research Reports in Demography, 2013), 7.

a single mother (relations with the father of the children, etc) and resources at her disposal (time, material wealth, etc), but also the institutional context determining the adequacy of the CMF support instrument to the needs of single mother families, and performance efficiency of the instrument.

Although application to CMF is related to economic benefit, this benefit is relative and its actual value consists of a whole range of individual, partnership and institutional factors. Thus, for instance, complicated bureaucratic procedures – be they objective or subjectively perceived – may become a discouraging factor and the reason for not applying to CMF, especially, if the expected economic benefit is subjectively seen as a non-essential improvement of the family material wealth. Bureaucratic procedures and related time costs, as well as negative emotions associated with the application to institutional support agencies, which are often seen as arenas for involuntary display of social vulnerability, can also diminish the subjective evaluation of the relative economic benefit. Potential economic gain might be deemed as insufficient also in cases when the relations between a single mother, her children and their father are characterised by a low conflict rate and regular contacts. In such a setting, the mother is likely to postpone her application to CMF even when irregularities in maintenance contributions occur, because that could lead to the father becoming a debtor to the state and possible deterioration of the relationship.

The results of the survey allow us to directly or indirectly assess the impact of the earlier-mentioned economic, emotional and social factors on the choice of single mothers to use or not to use the CMF support instrument.

The results of the descriptive statistical analysis presented in Table 1 suggest that subjectively assessed material wealth of single mothers is an important factor for mothers receiving irregular or no child maintenance contributions when they have to decide whether to apply to CMF. Two subjective indicators of material well-being used in the study reveal that poor assessment of material wealth is related to higher probability of applying to CMF. As many as 54% of single mothers, who characterised their material wealth as 'hardly making the ends meet', have filed an application for a CMF allowance, whereas only 22% of single mothers, describing their material wealth as good, have done the same. Another subjective indicator of material wealth also suggests that an especially poor material situation increases the likelihood of approaching CMF for support. Institutional maintenance offered by CMF was used by 63% of single mothers who assessed the financial standing of their family as insufficient even to buy food. The mothers who chose at least a one-step higher assessment showed significant decline in their application rates. Only about a third of women (36%), who stated that they had enough money for food but could hardly afford to buy clothing, applied to CMF. A similar application rate was registered also among the mothers who had even more positive views on their financial standing. It appears obvious that the economic benefit gained through the institutional support managed by CMF appears significant only to extremely poor single mothers. To those with somewhat higher esteem of the

material well-being of their family, the time, emotional and other costs related with the application to CMF seem to surpass the economic benefit. Consequently, the likely applicants for child support provided by the state are marginally poor women who see a substantial economic benefit in the relatively modest CMF allowances.

Structural characteristics of single mothers, such as education and place of residence, which are linked with their material well-being through employment possibilities, type of job and related salary, also indicate that single mothers who are more economically vulnerable are more predisposed to apply to CMF. Within the low education group, 40% of single mothers had approached CMF, while among the women with higher education the rate was only 27%. Nonetheless, while assessing the correlation between education of single mothers and the probability of their application to CMF, one should bear in mind that the correlation between education and material well-being is not necessarily linear. The pattern of the Lithuanian economy and irregularities within the labour market explain the fact that relatively many positions that require higher education are, nevertheless, rather low paid, while structural gender inequalities within the labour market result in lower positions and lower salaries for women, even within the high-wage sector. The place of residence of a single mother does not seem to be a determining factor with regard to the decision to apply or not to apply to CMF. The share of single mothers who filed an application for support was similar in rural, urban and large city areas of Lithuania.

Yet another important factor shaping the decision to apply for institutional support to CMF was the single mother family composition, and, in particular, the number of underage children. Single mothers with three and more children applied to CMF significantly more often (67%) than those with fewer children (35%). It is clear that the number of dependent children to be supported by the mother is related to the material well-being of the family: more children increase the necessary expenses, leading to material shortages, and the economic benefit of CMF allowances becomes more important to the survival of the family.

Table 1: Percentages of single mothers receiving irregular or no child maintenance contributions who filed applications with CMF

	Mother has applied for CMF allowance	Mother has not applied for CMF allowance	Total
Subjective assessment of material wealth: 'Hardly making the ends meet'			

	Mother has applied for CMF allowance	Mother has not applied for CMF allowance	Total
Agree	54	46	100
Neither agree, nor disagree	29	71	100
Disagree	22	78	100
Assessment of financial standing of the family			
We are short of money, even for food	63	37	100
We have enough money for food but buying clothing is a luxury	36	63	100
We can afford food and clothing, and we make some modest savings, but these would not be enough for any substantial acquisition	36	64	100
We can afford some expensive articles	23	77	100
Education level of the mother			
Low (secondary, incomplete secondary, vocational)	40	60	100
Middle (high school, non-university higher education)	41	59	100
High (university level higher education)	27	73	100
Place of residence of the family			
Rural	36	67	100
Urban	33	67	100
Major city	41	59	100
Number of under-age children living together			
One	35	65	100

	Mother has applied for CMF allowance	Mother has not applied for CMF allowance	Total
Two	35	65	100
Three and more	67	33	100
Following the divorce/separation, the father has … child maintenance contributions			
Usually paid	18	82	100
Usually failed to pay	47	53	100
Never paid	34	66	100
Frequency of meetings between the father (who has been paying regular, irregular or no contributions) and the child/children			
At least once per week or month	20	80	100
At least once per 3 months or more	34	64	100
Never	41	59	100
Quota sample	117	194	

An irregular pattern of maintenance contributions paid by the father and frequency of contact with him also influence the decision to apply to CMF. Women receiving irregular maintenance contributions from the fathers were reluctant to approach CMF if the father's involvement in alimony payment was assessed more positively ('usually paid') and more inclined to apply for allowances when the assessment was more negative ('usually failed to pay'). In the first case, the percentage of CMF applicants among mothers was only 18%, while in the second – as high as 47%, ie almost a half. An interesting observation was the fact that mothers receiving no alimony whatsoever were less likely to apply to the Fund than the latter group.

An important factor for mothers' decision to apply to CMF was also the frequency of meetings between the fathers paying alimony irregularly and their children. Mothers were more likely to apply for institutional support in cases where the fathers were demonstrating the least interest in contacting their children, and the more often the father, albeit paying irregularly, was meeting

his child (or children), the less likely the mother was to apply for support and to be disposed to initiate the procedure rendering the father a debtor to the state.

In seeking a more precise response to the question about the factors determining the choice to apply or not to apply to CMF, we applied a logistic regression analysis procedure which allows for elimination of composite influences of individual factors. The dependent variable in this analysis is the act of applying to CMF (1 – application submitted, 0 – no application submitted). A range of independent variables was used in the model, characterising the material wealth of single mother families, structural characteristics of the families, father's relationship with his children and participation in child maintenance, etc. When some variables demonstrated a strong correlation, one of them was excluded from the model, leaving the one that had better explanatory value. Thus, only one of the variables based on a subjective assessment of material well-being was used in the model. Since education levels strongly correlated with subjective assessment of material well-being, it was also excluded from the model.

Regression analysis basically supports the results of descriptive statistical analysis and reveals significant factors related to the family structure, material well-being and the father's involvement in the upbringing of the child (or children). Taking into consideration all independent variables used in the model, we could assert that one of the most statistically important factors was the size of a single mother family. Compared to the single mothers with three or more children, the mothers with one or two children were significantly less likely to apply to CMF: the relative risk of the latter groups applying to the Fund is by 87 percentage points lower than that of single mothers with three or more children. The higher relative risk of applying to CMF is also associated with single mothers who showed lower assessment of the material well-being of their families. In this case, the relative risk of applying for a state allowance among the group of mothers describing their material situation as good was by almost 60 percentage points lower than in the group of mothers claiming to be in a poor material situation. The frequency of contact between the father and the child (or children) was also a statistically significant factor determining the likelihood of a single mother applying to CMF. Compared to the mothers whose children meet their fathers at least once a month or more often, the other groups of mothers demonstrated a several times higher relative risk of approaching CMF. The probability of single mothers whose children never meet their fathers applying to the Fund was almost three times higher than that of mothers whose children meet their fathers once a month or a week.

Table 2: Probabilities of applying to Children's Maintenance Fund

	Exp (B)
Number of children in the family	
Three and more (ref)	1

	Exp (B)
One	0.13***
Two	0.13***
Subjective assessment of material well-being	
Poor	1
Average	0.42
Good	0.41*
Frequency of contacts between the father and the child	
At least once per week or month	1
At least once per 3 months or more	1.74
Never	2.7*
Chi-square test statistic	33
p	<0.001

Notes: ***p<0.01, **p<0.05, *p<0.1. Model characteristics: R squared 0.21, the model classifies 92% of non-applicants and 35 per cent of applicants to Children's Maintenance Fund, total variance 74%. In addition the model included an additional independent variable, the place of residence. However, the variable was not statistically significant, and it was left in the model merely to increase the percentage of correct classifications.

In conclusion, the results of sociological survey indicate that the role of the state in protecting the child's right to maintenance in Lithuania is diminished by lack of efficiency and adequacy. Only a limited percentage of single mothers, who would be eligible because of the father's failure to fulfil his child maintenance obligations or his partial only fulfilment thereof, actually apply to the Children's Maintenance Fund. More than a half of potential applicants choose not to use this instrument. Therefore a significant portion of underage children in Lithuania, whose parents have dissolved their partnership, are deprived of the right to receive maintenance from both parents. The current situation suggests that the state's role in protecting the child's right to maintenance is inefficient. Moreover, the role of the state in protecting the child's right to maintenance is selective rather than universal, because it is actually oriented only towards children growing in single mother families that are extremely vulnerable economically. The reluctance of single mothers to use the Children's Maintenance Fund support is largely caused by the relatively low economic benefit offered by the state allowance. The low amounts of the maintenance

allowances guaranteed by the state result in a significant share of single mothers, whose economic standing is slightly above the minimum, choosing not to apply to the Children's Maintenance Fund, because the potential economic benefit is subjectively perceived as low against all the costs related to the application process. This means that the role of the state in ensuring child support via the Children's Maintenance Fund is not adequate for the needs of children and cannot guarantee the right to maintenance and, subsequently, the improvement of the material well-being and future prospects for all children whose parents have dissolved their partnership.

V CONCLUSIONS

The law of maintenance rights, as such, is no longer perceived of as a new legal institution. However, child maintenance remains at the core of it. The prospects for improvement of the child maintenance mechanisms presuppose the search for specific models/approaches and the development of standardised methods, capable of ensuring an efficient enforcement of the right to maintenance and optimal compliance of the persons subject to maintenance obligations.

The role of the state of Lithuania in ensuring child support via the Children's Maintenance Fund is not adequate for the needs of children and cannot secure the right to maintenance for all children whose parents have dissolved their partnership. On the other hand, the state cannot be considered as a debtor with regard to child maintenance obligations. However, according to the UN Convention on the Rights of the Child, the state is obliged to secure proper enforcement of the child's right to maintenance. In this context, such state programmes as CMF can be considered as positive. However, the mechanisms of debt recovery and legal regulation of the debtor's liability call for revision and improvement.

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NEW ZEALAND

PAST, PRESENT, AND FUTURE NEW ZEALAND DEVELOPMENTS: THE FAMILY COURT SYSTEM, ADOPTION, AND RELATIONSHIP PROPERTY

Mark Henaghan and Ruth Ballantyne[*]

Résumé

Le droit de la famille néozélandais se trouve au milieu d'une période de changements résultant d'évolutions passées, présentes et futures. Ce chapitre s'intéresse à la progression, deux ans après leur mise en place, des vastes réformes du système judiciaire de droit de la famille entrées en vigueur le 31 mars 2014, et particulièrement au regard des usagers et des acteurs du système. Trois arrêts d'avant-garde seront également étudiés : l'un rendu par le Human Rights Review Tribunal (le Tribunal des Droits de l'Homme) considère comme discriminatoire toute une série de dispositions relatives à l'adoption ; les deux autres, rendus par la Cour Suprême, concernent les *trusts* ainsi que le partage des biens du couple en vertu du Property (Relationship) Act 1976 (PRA) et du Family Proceedings Act 1980 (FPA). Si ces deux derniers cas viennent adoucir l'iniquité du transfert des biens en *trust*, il n'en demeure pas moins qu'une réforme législative est nécessaire.

I INTRODUCTION

New Zealand family law is in the midst of a period of change as a result of past, present, and future developments. This chapter will assess how the extensive reforms of the Family Court system that came into force on 31 March 2014 are progressing 2 years on from their implementation, focusing primarily on the experiences of those using and delivering the system.[1] This chapter will also

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1 For more information about the 2014 Family Court reforms see Mark Henaghan 'The Changing Politics of Family Law in New Zealand' in Bill Atkin (ed) *The International Survey of Family Law: 2012 Edition* (Jordan Publishing Ltd, Bristol, 2012) 253 and Mark Henaghan and Ruth Ballantyne '2013: A Time of Change in New Zealand – Marriage Equality, International Surrogacy and Ongoing Changes to the Family Court' in Bill Atkin (ed) *The International Survey of Family Law: 2013 Edition* (Jordan Publishing, Bristol, 2013) 291.

consider several ground-breaking current developments that revolve around three important cases: one by the Human Rights Review Tribunal declaring that a variety of provisions of the Adoption Act 1955 (and one from the Adult Adoption Information Act 1985) are discriminatory,[2] and two judgments of the Supreme Court of New Zealand about trusts and the division of relationship property under the Property (Relationships) Act 1976 (the PRA) and the Family Proceedings Act 1980 (the FPA).[3] This chapter will examine these decisions closely and discuss the ramifications of these developments for the future of family law.

After statutory family law reforms have taken place, it is important to assess whether the changes are meeting the desired goals and objectives that prompted the amendments in the first place. To that end, the 2014 overhaul of the Family Court system, which introduced reforms minimising legal advice and processes and focusing on resolving disputes about children outside of the Family Court via Family Dispute Resolution (FDR), is assessed to see how well the new system is functioning for those who use and deliver it.

Values about familial relationships change over time in society. Family law is supposed to adapt and develop to accommodate such social changes. However, sometimes family law simply fails to keep up. New Zealand's outdated adoption laws are a pertinent example of what happens when societal developments leave the relevant legislation in their wake. The Adoption Act 1955 came into force on 27 October 1955. Since that time, there have been many efforts to reform New Zealand's adoption laws to ensure they are consistent with other areas of family law. Apart from the Adult Adoption Information Act 1985, which finally recognised the needs of adopted children to have access to information about their biological parents, the Adoption Act 1955 has not been substantially amended since it was enacted. A recent ruling by the Human Rights Review Tribunal, which found that the Act was in breach of the New Zealand Bill of Rights Act 1990 (the NZBORA), will hopefully put pressure on the government to finally reform the Adoption Act 1955 in the future to remove the extensive discrimination that currently exists in the Act.[4]

The PRA, which expanded upon the Matrimonial Property Act 1976, was passed to ensure a fair and equitable division of assets acquired during a

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2 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113. For more information about New Zealand's outdated adoption laws and the pressing need for reform in this area see Mark Henaghan 'Discretion, Status and Money: The Essence of Family Law in New Zealand' in Bill Atkin (ed) *The International Survey of Family Law: 2011 Edition* (Jordan Publishing, Bristol, 2011) 281.

3 *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 and *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189. For more information about the earlier Court of Appeal *Clayton v Clayton* decision see Mark Henaghan and Ruth Ballantyne 'Recent Changes to the Division of Relationship Property in New Zealand: A New Way Forward' in Bill Atkin (ed) *The International Survey of Family Law: 2015 Edition* (Jordan Publishing, Bristol, 2015) 229.

4 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113.

marriage or relationship. As a result of the massive increase in putting assets into trust for a variety of business and personal reasons in New Zealand, the goals of the PRA have been undermined.[5] To combat this issue the Supreme Court recently released two judgments in the *Clayton v Clayton* case,[6] despite the fact that the parties had already settled the case out of court. The first case revolved around whether Mr Clayton's powers under the Vaughan Road Property Trust (which he claimed he did not control) could be counted as relationship property under the PRA and whether the trust was a sham or invalid.[7] The second case focused on whether the Claymark Trust (which Mr Clayton claimed as his own separate property) could be a nuptial settlement under s 182 of the FPA, which provides some relief in certain circumstances for an individual (who was formerly married or in a civil union) where their assets are in trust.[8] Both of the *Clayton v Clayton* decisions provide evidence that tension between trusts and the social goals of the PRA and the FPA need to be ironed out through future legislative reform.

II 2014 FAMILY COURT REFORMS

The Family Court reforms were introduced to provide a modern family justice system that is accessible and responsive to children and vulnerable people. The new system was to make the court more efficient, effective, and sustainable, with less emphasis on adversarial proceedings.[9]

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5 It is unknown exactly how many trusts there are in New Zealand. However the Law Commission estimates that there are between 300,000 to 500,000 trusts in New Zealand. As the Law Commission states: 'Trusts form an important part of New Zealand's economic and social life. While the exact number of trusts is unknown, and probably unknowable, we have heard throughout this review that there may be anything between 300,000 to 500,000 trusts currently in New Zealand. The uses of trusts reach from holding the family home to high finance. Trusts are an important mechanism for the holding of Māori land, and have been extensively used by iwi as way to hold, and provide governance, for assets from the Treaty settlement process. The trust is the mechanism which the Government prefers iwi to use as 'post settlement governance entities'. This makes New Zealand heavily dependent on the trust mechanism for the holding and governing of a large amount of its wealth, and consequently trusts are an important component of the economy.'
See Law Commission *Review Of The Law Of Trusts: A Trusts Act For New Zealand* (NZLC R130, 2013) at 6 and 55.

6 *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 and *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189.

7 *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230.

8 Section 182(1) of the Family Proceedings Act 1980 allows the court to inquire into 'any ante-nuptial or post-nuptial settlement made on the parties' and 'may make such orders with reference to the application of the whole or any part of any property settled or the variation of the terms of any such agreement or settlement, either for the benefit of the children of the marriage or civil union or of the parties to the marriage or civil union or either of them, as the court thinks fit.' In exercising this power the court may, under s 182(3), take the parties' circumstances (and any changes to those circumstances) into account and 'any other matters which the court considers relevant.' Section 182(4) makes it clear that the court may exercise its discretion regardless of whether the parties to the marriage or civil union have children.

9 See Judith Collins 'Children's Needs Must Be First Priority of Family Court' *The New Zealand Herald* (online ed, Auckland, 14 February 2013).

The philosophy of the reforms was that family law disputes are private and should be dealt with by the parties themselves without support from the State. They key purpose of the reforms was to save money as family law proceedings were seen as a large and unnecessary cost for the state.[10]

The major thrust of the reforms was to make Family Dispute Resolution (FDR) mandatory (unless the parties meet one of the narrow exceptions that are discussed in more detail below) before parties can access the Family Court.[11] FDR is a process whereby the parties are given the opportunity to work out the best agreement for their children with a FDR facilitator. The emphasis is on reaching a mediated parenting agreement without having to resort to a hearing in the Family Court.

The reforms have also put restrictions on legal representation in a variety of court proceedings. In what is termed a 'standard track' case, in which parents cannot agree about parenting and/or guardianship matters affecting their children, the parties must generally appear without their lawyer present (unless the matter proceeds to a hearing or a settlement conference).[12] Likewise in a 'simple track' case, where the matter is not contested between the parties, such where a parenting order is to be made by consent, lawyers will not ordinarily be involved.[13] It is only on the 'without notice track', which generally involves

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[10] In 2013 Judith Collins, the then Minster of Justice, said that the cost of running the Family Court in 2010/2011 was $142 million. See Judith Collins 'Children's Needs Must Be First Priority of Family Court' *The New Zealand Herald* (online ed, Auckland, 14 February 2013).

[11] Care of Children Act 2004, ss 46E and 46F. Note that according to s 46E(4) of the Care of Children Act 2004 parties are exempt from FDR if (amongst other possible exceptions) their application is made without notice, or if their application is accompanied by an affidavit providing evidence that 'at least 1 of the parties to the family dispute is unable to participate effectively in family dispute resolution', or that 'at least 1 of the parties to the family dispute, or a child of one of the parties, has been subject to domestic violence by one of the other parties to the dispute.'

[12] In the first instance, a judge will determine an application under the 'standard track' on the papers in chambers (without the parties or legal representation being present). After considering the matter, the judge 'may make whatever orders and directions he or she thinks fit' and, unless the parties are directed to do FDR, the judge must convene an issues conference (where lawyers are not present), or a settlement conference (where lawyers can only be present if allowed by the judge), or direct that the matter proceed to a hearing (where lawyers can be present). See Care of Children Act 2004, s 7A. See also Family Court Rules 2002, rr 416C, 416D, 416S, 416W, 416X, 416Y, 416ZD, and 416ZE. As is made clear by s 7A(9) of the Care of Children Act 2004, nothing prevents parties from seeking private legal advice (at their own cost) prior to making their application.

[13] In the first instance, a judge will determine an application under the 'simple track' on the papers in chambers (without the parties or their legal representation being present). If it is not possible to dispose of the matter in this way the judge can direct the parties to attend an issues conference (where lawyers are not present), or the application will proceed to a formal proof hearing (where lawyers can be present), or the matter will proceed onto the 'standard track' (where lawyers are not usually present at least initially). See Care of Children Act 2004, s 7A. See also Family Court Rules 2002, rr 416C, 416D, 416V, 416W, 416X, 416ZD, and 416ZH. As is made clear by s 7A(9) of the Care of Children Act 2004, nothing prevents parties from seeking private legal advice (at their own cost) prior to making their application.

urgent domestic violence related matters or international child abduction, that parties can be represented by lawyers immediately.[14]

The lack of legal representation during parts of this process is one of the concerns raised by a recent Ministry of Justice report.[15] The report evaluates FDR from the perspective of the participants and professionals involved in the new system to assess how successfully the new FDR proceedings are working.[16] The Ministry of Justice interviewed 67 parents 'who had been to at least one session of FDR mediation' between March and July 2015, alongside 28 FDR mediators, 11 Family Legal Advice Service lawyers, and 11 FDR organisation representatives.[17] The Ministry of Justice rightly acknowledged that the small sample size meant that the resulting data could not be 'generalised across all parties and practitioners' in New Zealand's family justice system.[18] However, the report does provide a significant degree of insight into the participants' and professionals' experiences thus far.

The compulsory nature of FDR and the limited degree of legal representation available to parents involved in disputes about their children was criticised by many FDR professionals interviewed in the report. As the Ministry of Justice said:[19]

> 'Most Family Court Judges and court staff members expressed concern about the concept of mandatory self-representation. More specifically, several Family Court Judges and court staff members felt that it was unreasonable to require parents to represent themselves in some proceedings without a lawyer. Separating parents are usually in a heightened emotional state when they enter court and are thought by judges to lack objectivity. Legal/court professionals indicated that power imbalances could be played out in court due to differences in the litigants' confidence, verbal communication skills and access to legal advice.'

Such power imbalances between parties, which are amplified by a lack of legal representation, raise wider concerns about the appropriateness of compulsory

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14 On the 'without notice track' the judge will firstly determine the application on the papers in chambers (without the parties or their legal representation being present). As a result of this process the judge will then make an interim or final order, or direct that the matter proceed to a hearing (where lawyers can be present), or that the matter be treated as though it had been made on notice on the 'standard track' (where lawyers will not generally be required). If the matter is to proceed straight to a hearing, the judge must convene a directions conference (which lawyers may attend) before the hearing. See Care of Children Act, s 7A. See also Family Court Rules 2002, rr 416C, 416D, 416H, 416HA, 416J, 416U, 416W, 416Z, 416ZA, and 416ZD.

15 Ministry of Justice Research and Evaluation Team *Evaluation of Family Dispute Resolution Service and Mandatory Self-Representation* (Ministry of Justice, Wellington, 2015) at 33.

16 Ministry of Justice Research and Evaluation Team *Evaluation of Family Dispute Resolution Service and Mandatory Self-Representation* (Ministry of Justice, Wellington, 2015).

17 Ministry of Justice Research and Evaluation Team *Evaluation of Family Dispute Resolution Service and Mandatory Self-Representation* (Ministry of Justice, Wellington, 2015) at 4.

18 Ministry of Justice Research and Evaluation Team *Evaluation of Family Dispute Resolution Service and Mandatory Self-Representation* (Ministry of Justice, Wellington, 2015) at 5.

19 Ministry of Justice Research and Evaluation Team *Evaluation of Family Dispute Resolution Service and Mandatory Self-Representation* (Ministry of Justice, Wellington, 2015) at 33.

FDR processes in the first place. This is consistent with Australian research about the fairness of mediation and FDR processes, which found that compulsory mediation could exploit significant power imbalances between parties and leave some parties without adequate legal protection.[20] As Becky Batagol and Thea Brown state:[21]

> 'Our research suggest that the protection provided by legal principles is only patchy at best in family mediation, and is entirely dependent upon the ease of obtaining a legal remedy through court. Thus parties who are reluctant or unable to use court processes may find themselves without the protection of law in family dispute resolution.'

Of course, FDR is not entirely mandatory in New Zealand. FDR is not required if an individual's application is accompanied by an affidavit providing evidence either that 'at least 1 of the parties to the family dispute is unable to participate effectively in family dispute resolution', or that 'at least 1 of the parties to the family dispute, or a child of one of the parties, has been subject to domestic violence by one of the other parties to the dispute.'[22] FDR is also not required if the application proceeds on the 'without notice track.' An application cannot be made without notice unless the Care of Children Act 2004 specifically allows for this, or if 'the delay caused by making the application on notice would or might entail serious injury or undue hardship or risk to the personal safety of the applicant or any child of the applicant's family, or both'.[23]

Given the legal representation privileges that come with applications made without notice, it is not surprising that the amount of without notice applications have increased significantly since the introduction of the new FDR process. According to Principal Family Court Judge Ryan, 86% of all applications under the Care of Children Act 2004 are now made without notice, which permits (and provide legal aid for) much more expansive legal representation.[24] Prior to the introduction of FDR, without notice applications made up approximately 50% of all Care of Children Act 2004 matters.[25] As Judge Ryan states:[26]

> 'Just at the end of February, it's quite astounding, 86 [%] of Care of Children Act applications now commence by way of a without notice application and it used to be slightly below 50 [%] prior to the reforms.'

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20 Becky Batagol and Thea Brown *Bargaining in the Shadow of the Law: The Case of Family Mediation* (Themis Press, Sydney, 2011) 180–218.

21 Becky Batagol and Thea Brown *Bargaining in the Shadow of the Law: The Case of Family Mediation* (Themis Press, Sydney, 2011) at 199.

22 Care of Children Act 2004, s 46E(4).

23 Family Court Rules 2002, r 416H.

24 As at 1 March 2016, 86 per cent of all applications under the Care of Children Act 2004 were made without notice. Catherine Hutton 'Family Court Reform Appears to Have Failed' *Radio New Zealand* (online ed, Wellington, 2 March 2016).

25 Catherine Hutton 'Family Court Reform Appears to Have Failed' *Radio New Zealand* (online ed, Wellington, 2 March 2016).

26 Catherine Hutton 'Family Court Reform Appears to Have Failed' *Radio New Zealand* (online ed, Wellington, 2 March 2016).

This significant increase in without notice applications causes obvious difficulties for the efficient administration of the Family Court, but more importantly, is symptomatic of the need for parties to have a lawyer to represent their interests in what is often the most stressful time in their lives.

It is also interesting to note that the numbers of applications for assistance in resolving care of children disputes are down significantly across the country. For example, there were 8,501 less new applications for the 12-month period ending 30 June 2015, than there were for the 12-month period ending 30 June 2011.[27] This suggests that there are large numbers of individuals whose family law disputes are left unresolved. As Judge Ryan states:[28]

> 'There are a large, a significant, number of people who are assessed as suitable for mediation but do not go through mediation, and they disappear […] We don't know what's happening to this large group of people who haven't resolved their disputes but haven't come to court. We don't know what's happened to them and we are talking about thousands of people.'

Some of these individuals may well have been able to negotiate a successful resolution of their care of children issues between themselves. However, the power imbalances frequently inherent in family law, as discussed above, will undoubtedly have had a negative impact on many parties and their children who may have been disadvantaged by the agreement reached, or simply have had no real say at all. There are also no checks and balances on private agreements that have not been made into formal parenting orders by the court in terms of the welfare and best interests of the children involved, or their safety. Leaving parties to their own devices is not the best way to protect children and provide for their ongoing care. It certainly does not 'put the needs of children first', which was one of Judith Collin's primary justification for the Family Court reforms in the first place.[29]

The Ministry of Justice report also provided some alarming figures about the number of participants in FDR who felt forced into making an agreement at all costs.[30] Of the 67 parents interviewed, 27 of them (40% of the total parents interviewed) felt pressured into reaching a parenting agreement.[31] The pressure

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27 These figures were obtained from Courts of New Zealand 'Family Court Application Workload Statistics for the 12 Months Ending 30 June 2011' www.courtsofnz.govt.nz and Courts of New Zealand 'Family Court Application Workload Statistics for the 12 Months Ending 30 June 2015' www.courtsofnz.govt.nz/.

28 Catherine Hutton 'Family Court Reform Appears to Have Failed' *Radio New Zealand* (online ed, Wellington, 2 March 2016).

29 Judith Collins 'Children's Needs Must Be First Priority of Family Court' *The New Zealand Herald* (online ed, Auckland, 14 February 2013).

30 Ministry of Justice Research and Evaluation Team *Evaluation of Family Dispute Resolution Service and Mandatory Self-Representation* (Ministry of Justice, Wellington, 2015) at 5.

31 Ministry of Justice Research and Evaluation Team *Evaluation of Family Dispute Resolution Service and Mandatory Self-Representation* (Ministry of Justice, Wellington, 2015) at 22.

came from either the excessive duration of the mediation process, or the mediator's desire to reach an agreement.[32] As parents in the Ministry of Justice study said:[33]

> 'The mediation took over five hours. By the end of it we were exhausted and pressured into agreeing on an outcome so we could get out of there. (FDR parent)
>
> The mediator wanted an outcome and didn't care about the actual content of the document. She just wanted to get the mediation out of the way and get out. (FDR parent)'

Nineteen of the 27 parents (70%) who had felt pressurised into making an agreement they did not necessarily believe in said that their agreements had broken down, at least in part, after the mediation process.[34]

These findings are consistent with international studies investigating FDR (encompassing mediation and conciliation processes) in the family justice realm. Liz Trinder and Joanne Kellett, who interviewed 117 parents who had participated in the United Kingdom's compulsory family justice in-court conciliation process, found that two years on, the resulting agreements were not particularly durable.[35] As Trinder and Kellett state, a 'majority of parents had required further professional intervention and 40 [%] had been involved in further litigation'.[36] They also discovered that 60% of the original agreements had been abandoned or had broken down, which 'suggests that conciliation is not equipping large number of parents to be able to renegotiate agreements by themselves'.[37] This had a significant effect on the children involved, who had the same high level of psychological distress two years after the original agreements were made, as they did when the original agreements were made, even though the adults involved experienced a 'significant and marked improvement' in their wellbeing' 2 years after the conciliation process.[38]

One of the other problems with the current FDR system, as highlighted by the Ministry of Justice report, is the lack of children's voices during FDR. As one FDR organisation representative said:[39]

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[32] Ministry of Justice Research and Evaluation Team *Evaluation of Family Dispute Resolution Service and Mandatory Self-Representation* (Ministry of Justice, Wellington, 2015) at 22.

[33] Ministry of Justice Research and Evaluation Team *Evaluation of Family Dispute Resolution Service and Mandatory Self-Representation* (Ministry of Justice, Wellington, 2015) at 22.

[34] Ministry of Justice Research and Evaluation Team *Evaluation of Family Dispute Resolution Service and Mandatory Self-Representation* (Ministry of Justice, Wellington, 2015) at 22.

[35] Liz Trinder and Joanne Kellett *The Longer-Term Outcomes of In-Court Conciliation: Ministry of Justice Research Series 15/07* (Ministry of Justice, London, 2007) at 6 and 15.

[36] Liz Trinder and Joanne Kellett *The Longer-Term Outcomes of In-Court Conciliation: Ministry of Justice Research Series 15/07* (Ministry of Justice, London, 2007) at 15.

[37] Liz Trinder and Joanne Kellett *The Longer-Term Outcomes of In-Court Conciliation: Ministry of Justice Research Series 15/07* (Ministry of Justice, London, 2007) at 15.

[38] Liz Trinder and Joanne Kellett *The Longer-Term Outcomes of In-Court Conciliation: Ministry of Justice Research Series 15/07* (Ministry of Justice, London, 2007) at 30–32.

[39] Ministry of Justice Research and Evaluation Team *Evaluation of Family Dispute Resolution Service and Mandatory Self-Representation* (Ministry of Justice, Wellington, 2015) at 25.

> 'The current system really neither facilitates or precludes involvement of children in the mediation … I thinks it's an area that really does need to be explored more … they key thing is it needs to be really carefully considered and really skilfully handled but I think it is the missing part of the system.'

There is currently no requirement for children's views to be taken into account at all and no standardised way for their views to be ascertained independently by the FDR provider. Rather, the children's views are usually just provided by their parents, who most likely have differing opinions as to what their children's view actually are. The parents' adult-focussed issues may also distort their perspective of what the children want. Section 6 of the Care of Children Act 2004 requires a court to ascertain children's views and take them into account when deciding what is best for children under the Act. An equivalent provision needs to be incorporated into the FDR process.

There are some positive aspects of the current FDR system that the Ministry of Justice Report highlights. For example, the majority (66%) of the mediation events undertaken resulted in all of the parties' issues being resolved.[40] This is a positive starting point, but as discussed above, 40% of the total participants felt they were pressured into making an agreement and 70% of such agreements broke down some time after FDR.[41] Thus merely celebrating the fact that a majority of parties resolved their care of children matters during FDR does not provide the complete picture. Future research in this area needs to continually address this disconnect.

Another encouraging aspect of the research was the fact that most of the parents interviewed as part of the report at least believed in the concept and self-help aspects of FDR. As the report states:[42]

> 'Most of the FDR parents believed that taking part in out-of-court mediation was preferable to going to the Family Court. This was because court proceedings were perceived as daunting, lengthy and costly. FDR parents believed they would benefit from having an independent mediator who could facilitate discussion in a neutral space, help manage emotions and assist the parents to reach an agreement.'

Most parents also generally 'felt they were able to have their say and felt they were listened to' during the process, even if the result reached was not exactly what they wanted.[43] As one parent said:[44]

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40 Ministry of Justice Research and Evaluation Team *Evaluation of Family Dispute Resolution Service and Mandatory Self-Representation* (Ministry of Justice, Wellington, 2015) at 11.

41 Ministry of Justice Research and Evaluation Team *Evaluation of Family Dispute Resolution Service and Mandatory Self-Representation* (Ministry of Justice, Wellington, 2015) at 22.

42 Ministry of Justice Research and Evaluation Team *Evaluation of Family Dispute Resolution Service and Mandatory Self-Representation* (Ministry of Justice, Wellington, 2015) at 12.

43 Ministry of Justice Research and Evaluation Team *Evaluation of Family Dispute Resolution Service and Mandatory Self-Representation* (Ministry of Justice, Wellington, 2015) at 21.

44 Ministry of Justice Research and Evaluation Team *Evaluation of Family Dispute Resolution Service and Mandatory Self-Representation* (Ministry of Justice, Wellington, 2015) at 21.

> 'I thought the mediation was really fair. I was definitely heard; my concerns were definitely addressed and acknowledged by the mediator. I felt safe to talk and it was very controlled and very much kept to what the issues were.'

Most parents also believed the mediator 'ensured that each parent had time to speak, managed interruptions and calmed heightened emotions'.[45]

Ultimately, the Ministry of Justice report is the first formal evaluation of FDR thus far, and more research is needed to categorically determine its effectiveness (or otherwise) as the starting point of the majority of care of children disputes. Some positive aspects of FDR are noted. However, the report clearly signals the disadvantages of FDR in terms of the lack of legal representation (which allows power imbalances to continue unchecked), the dramatic increase in without notice applications, a large proportion of parents feeling forced into making an agreement at all costs, and the exclusion of children's voices and views from the process. These factors need to be closely monitored in future FDR research and, if these negative outcomes are sustained, change is required to ensure the family justice system is fair and just for all individuals (especially children) needing assistance to resolve their family disputes.

III ADOPTION REFORM

New Zealand's current adoption legislation, the Adoption Act 1955, came into force on 27 October 1955. It has been largely untouched since that time, despite two significant Law Commission reports recommending substantial reforms.[46] The Act has been outdated for some time. As the Law Commission said in 2000:[47]

> 'New Zealand society today is quite different from that in the 1950s. Adoption law and practice have had to cope with modern challenges that legislators in 1955 would have been hard-pressed to predict. The traditional ideals of the "nuclear" family and "legitimate" children have been challenged by de facto relationships, same-sex relationships, reconstituted families after relationship breakdowns, "single" parenthood and the rapid development of artificial reproductive technologies (ART).'

One of the only major modifications to the Act in recent times has been via statutory interpretation (rather than legislative reform) when the High Court

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[45] Ministry of Justice Research and Evaluation Team *Evaluation of Family Dispute Resolution Service and Mandatory Self-Representation* (Ministry of Justice, Wellington, 2015) at 21.

[46] See Law Commission *Adoption: Options for Reform* (NZLC PP38, 1999) and Law Commission *Adoption and its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000). A complete list of recommendations for reform can be found at Law Commission *Adoption and its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000) 216–226.

[47] Law Commission *Adoption and its Alternatives: A Different Approach and a New Framework* (NZLC R65, 2000) at 2.

determined that the word 'spouse' in the original Act, which had previously only encompassed married couples, could include heterosexual de facto couples.[48]

Concerned about the outdated nature of the Adoption Act 1995 and the Adult Adoption Information Act 1985, and the ways these Acts discriminated against certain classes of individuals, Adoption Action Inc (Adoption Action) took a claim in 2011 to the Human Rights Review Tribunal (the Tribunal) under Part 1A of the Human Rights Act 1993.[49] Adoption Action is an incorporated society focusing on proposing and promoting changes to adoption laws, policies and practices to 'enhance the rights and wellbeing of children affected by adoption', 'eliminate the discriminatory provisions in current New Zealand adoption laws', and 'introduce new laws which will reflect current social attitudes and values and will accord with national and international human rights standards'.[50]

In essence, Adoption Action's claim was that the Adoption Act 1995 and the Adult Adoption Information Act 1985 discriminated 'against certain persons and classes of persons' in eight different ways on the following six prohibited grounds of discrimination under the Human Rights Act 1993: race, sex; sex and marital status; marital status and sexual orientation; disability; and age.[51] The remedy sought was a declaration under s 92J of the Human Rights Act 1993 that the provisions in question were 'inconsistent with the right to freedom from discrimination affirmed by s 19 of the New Zealand Bill of Rights Act 1990.'[52] This is the only remedy 'within the Tribunal's jurisdiction'.[53] Section 19(1) of the NZBORA states that '[e]veryone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993'.[54] The prohibited grounds of discrimination listed in s 21 of the Human Rights Act 1993 include all of those argued by Adoption Action. Each of the alleged grounds of discrimination, and the Tribunal's response to it, will be discussed below in turn.

(a) Race: indirect discrimination of adopted Māori children

Adoption Action claimed that the operation of the Adoption Act 1955 creates indirect discrimination against adopted Māori children on the basis of their race. The claim was based on the notion that the cutting of legal ties resulting from a traditional adoption is indirectly discriminatory because it does not consider the importance of whakapapa and knowing one's lineage, which is of

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48 *Re AMM* [2010] NZFLR 629 (HC).
49 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [7].
50 Adoption Action Inc 'Aims and Objectives' http://adoptionaction.co.nz.
51 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [7] and [23] to [31].
52 Human Rights Act 1993, s 92J.
53 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [7].
54 New Zealand Bill of Rights Act 1990, s 19.

particular significance in Māori culture.[55] However the Tribunal dismissed this claim at the beginning of their decision stating that the 'importance of whānau, hapū and iwi in the rearing of Māori children, while undisputed, is insufficient of itself to establish a claim of indirect discrimination'.[56] The Tribunal was careful to explain that the claim on this ground was only dismissed because of a lack of evidence, rather than because the Tribunal had found that the Adoption Act 1955 did not indirectly discriminate against Māori children on the basis of race.

(b) Sex: male adopting female child

Adoption Action then claimed that s 4(2) of the Adoption Act 1955 discriminates against sole applicant men wishing to adopt female children. Section 4(2) of the Adoption Act 1955 states that:

> 'An adoption order shall not be made in respect of a child who is a female in favour of a sole applicant who is a male unless the court is satisfied that the applicant is the father of the child or that there are special circumstances which justify the making of an adoption order.'

This is claimed to be discrimination on the basis of sex because a 'sole male applicant wanting to adopt a female child must prove special circumstances' whereas a 'sole female applicant wanting to adopt a female child does not have to prove special circumstances.'[57] The Crown unsuccessfully argued that 'special circumstances' could be amalgamated with 'the best interests of the child' standard, but the Tribunal said that it was 'not reasonably possible or tenable to conflate two explicit statutory stipulations'.[58] Ultimately, the Tribunal found that 'the ordinary meaning of s 4(2) of the Adoption Act is inconsistent with the right to be free from discrimination based on sex',[59] and made a declaration to that effect.[60]

(c) Sex and marital status: consent of birth father to adoption order

Section 7(3)(b) of the Adoption Act 1955 was also claimed to be discriminatory on the basis of sex and marital status because a birth father who is not married to the birth mother, and who is not otherwise a guardian, does not have to provide his consent to his child being adopted unless the court thinks it 'expedient' to require the birth father to consent.[61] Whereas a birth mother always has to provide her consent to the adoption, regardless of her marital

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55 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [30].
56 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [47].
57 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [81].
58 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [93] and [96].
59 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [91].
60 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [277].
61 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [98].

status, unless her consent can be dispensed with under s 8(1)(a) of the Adoption Act 1955 (if for example she has abandoned the child, or failed to exercise her parental duties).[62] The Crown argued that this provision did not apply to a significant number of fathers.[63] However, the Tribunal did not accept this argument and said, 'whatever the size of the group […] it should not be presumed the birth father does not have anything of value to offer the child'.[64] Ultimately the Tribunal held that the ascertained meaning of the provision was inconsistent with the right to be free from discrimination on the basis of sex and marital status,[65] and that the discrimination was 'not a justified limitation' within the parameters of s 5 of the NZBORA.[66] The Tribunal then made a declaration to that effect.[67]

(d) Marital status: adopting jointly as a couple

The fourth claim of discrimination under the Adoption Act 1955 concerned marital status. Under s 3(2) of the Adoption Act an 'adoption order may be made in respect of the adoption of a child by the mother or father of the child, either alone or jointly with his or her spouse.'[68] Historically, 'spouse' had only included an individual's husband or wife. Civil union and de facto partners (both heterosexual and same sex) were not permitted to adopt a child jointly as a couple. However, in *Re AMM* the High Court allowed a heterosexual de facto couple to adopt a child together by determining that the term 'spouse' could include a heterosexual de facto partner.[69] This finding was a significant inroad into addressing the marital status discrimination present in the Adoption Act 1955. However, significant discrimination remained, because the decision expressly excluded civil union couples (heterosexual or same sex) and same sex de facto couples.[70] Further progress was made after the commencement of s 5 of the Marriage (Definition of Marriage) Amendment Act 2013 on 19 August 2013, which amended the Marriage Act 1955 to allow couples to marry 'regardless of their sex, sexual orientation, or gender identity'.[71] This permitted same sex couples to marry and therefore to adopt a child jointly as a couple in the same way as married heterosexual couples. However, civil union couples (both heterosexual and same sex) and same sex de facto couples are still excluded from adopting children jointly as a couple.

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62 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [98].
63 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [99] to [104].
64 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [104].
65 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [117].
66 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [124].
67 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [277].
68 Adoption Act 1955, s 3(2).
69 *Re AMM* [2010] NZFLR 629 (HC) at [73].
70 *Re AMM* [2010] NZFLR 629 (HC) at [38] and [39].
71 Marriage Act 1955, s 2(1).

It was on this basis that Adoption Action argued that the Adoption Act 1955 was discriminatory.[72] The Crown accepted that 'in practice civil union couples and de facto couples are not treated equally to married couples as prospective parents [and] are warned of the uncertainty [as to] whether their form of relationship is included'.[73] The Tribunal concluded that the interpretation of the term 'spouses' was 'inconsistent with the right to be free from discrimination based on marital status'.[74] As the Tribunal said:[75]

> 'The exclusion of civil union couples (opposite and same sex) and of same sex de facto couples from eligibility to adopt is inconsistent with the right to freedom from discrimination. There is differential treatment between such couples compared to those who are married and those who are in an opposite sex de facto relationship. The material disadvantage is their statutory ineligibility to adopt a child'.

This discriminatory effect of the Adoption Act 1955 was not found to be justifiable in terms of s 5 of the NZBORA, despite the Crown attempting to argue that the different in treatment in terms of marital status was 'demonstrably justified under s 5 of the [NZBORA] because being married is used as a legitimate proxy for sufficient commitment to ensure a stable family unit for the jointly adoptable child.[76] Ultimately, the Tribunal made a declaration that section 3(2) of the Act was 'inconsistent with the right to freedom from discrimination' affirmed by s 19 of the NZBORA.[77]

(e) Marital status and sexual orientation: consent of spouse to adoption application

The next claim revolves around when a person in a relationship with a person adopting a child as a sole applicant has to consent to the adoption. Under s 7(2)(b) of the Adoption Act 1955, when a married individual (either heterosexual or same-sex) wants to adopt a child as an individual applicant their spouse must provide their consent before the adoption can proceed. However, because of the agreed interpretation of the term 'spouse' (which include a heterosexual de facto couple as discussed in more detail above) the consent of an unmarried partner (who is in a heterosexual or same sex civil union or a same sex de facto relationship with the person seeking to adopt) is

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72 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [129] to [138].
73 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [141].
74 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [149].
75 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [148].
76 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [150] to [153].
77 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [277].

not required. Adoption Action claims that this differential treatment is discrimination on the basis of marital status and sexual orientation.[78] The Tribunal agreed saying:[79]

> '[T]he exclusion of civil union couples (opposite and same sex) and of same sex de facto couples from the s 7(2)(b) requirement that the non-applicant partner give his or her consent to the making of the adoption order is inconsistent with the right to freedom from discrimination. There is differential treatment between such couples compared to those who are married or in an opposite sex de facto relationship.'

The Tribunal found that the discrimination was not based on any justifiable reason, but rather exists simply 'because times have moved on and the Act has not kept pace'.[80] Consequently, the Tribunal made a declaration that s 7(2)(b) was inconsistent with the freedoms provided by the NZBORA.[81]

(f) Disability: dispensing with parental consent

Adoption Action also claims that the Adoption Act 19955 unfairly discriminates against birth parents with a physical or mental disability. Section 8 of the Adoption Act 1955 sets out when a birth parent's consent to an adoption can be 'dispensed with'. A birth parent's consent to the adoption of their child may be dispensed with under s 8(1)(a) of the Act 'if the court is satisfied' that the parent has 'abandoned, neglected, persistently failed to maintain, or persistently ill-treated the child', or if they have 'failed to exercise the normal duty and care of parenthood in respect of the child', and the parent has had 'reasonable notice of the application'.[82] However, a birth parent with a physical or mental disability can also have their consent to the adoption of their child dispensed with under s 8(1)(b) 'if the court is satisfied that the parent or guardian is unfit, by reason of any physical or mental incapacity, to have the care and control of the child', and that the birth parent's 'unfitness is likely to continue indefinitely', and they have been given 'reasonable notice of the application for an adoption order'.[83] The Tribunal characterised this as a type of 'double jeopardy' in that a disabled parent's consent may be dispensed with under both ss 8(1)(a) and 8(1)(b).[84]

The Crown claimed that even if the Tribunal could find that the wording of the provision 'constitutes differential treatment on the ground of disability […]

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78 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [159].
79 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [165].
80 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [168].
81 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [277].
82 Adoption Act 1955, s 8(1)(a).
83 Adoption Act 1955, s 8(1)(b).
84 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [193].

such discrimination is justified as being in the best interests of the child.'[85] However, the Tribunal disagreed with the Crown's arguments in this regard and found that the provision:[86]

> '[I]mpairs the right to be free from discrimination more than is reasonably necessary to achieve the purpose (protection of the best interests of the child as a paramount consideration) and the provision is entirely disproportionate to the importance of the protection of the child's interests.'

Ultimately, the Tribunal made a declaration that s 8(1)(b) was 'inconsistent with the right to freedom from discrimination' guaranteed by s 19 of the NZBORA.[87]

(g) Age: applicant must be 25 or older to adopt

Adoption Action also claims that the Adoption Act 1955 discriminates against individuals on the basis of age.[88] Section 4(1)(a) of the Adoption Act 1955 states as follows:

> '(1)Except in special circumstances, an adoption order shall not be made in respect of a child unless the applicant or, in the case of a joint application, one of the applicants—
>
> (a) has attained the age of 25 years and is at least 20 years older than the child'

This is discriminatory because individuals who are 25 years or older can adopt a child so long as they meet the general adoption criteria. However, an individual under the age of 25 cannot adopt, unless they can prove special circumstances, even if they have met all the other adoption requirements. The Crown argued that this differential treatment was justifiable because:[89]

> 'In general, people over 25 will have had more opportunity to get themselves settled, to establish a career, to have a stable relationship that has stood the test of time (if they are in a relationship), to have a place in society and to understand that place.'

However, Adoption Action asserted that the 'age restriction was arbitrary' and based on an 'unjustified' assumption that young adults 'lack the maturity and skills necessary to care for a child as an adoptive parent'.[90] The Tribunal agreed

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85 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [181].
86 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [198].
87 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [277].
88 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [204].
89 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [207].
90 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [208].

with Adoption Action that s 4(1)(a) of the Adoption Act 1955 was unjustifiably 'inconsistent with the right to be free from discrimination based on age',[91] and made a declaration to that effect.[92]

(h) Age: applicant must be 20 or older to receive birth certificate

The Tribunal also agreed with Adoption Action's final claim that the Adult Adoption Information Act 1985 is unjustifiably discriminatory on the basis of age. Section 4(1) of the Adult Adoption Information Act 1985 allows an 'adult' to 'make a written application to the Registrar-General for an original birth certificate. However, 'adult' is defined in s 2 as a 'person who has attained the age of 20 years'.[93] This prevents young people under the age of 20 from being able to access their original birth certificates. As the Tribunal states:[94]

> 'Adopted persons who have not attained the age of 20 years are treated differently in that they are denied the opportunity to access their original birth certificate and through it information about their biological parents. This is clearly a material disadvantage.'

The Tribunal ultimately found that the age restriction did not 'serve a purpose sufficiently important to justify curtailment of the right to be free from discrimination based on age'[95] and made a declaration that s 4(1) of the Adult Adoption Information Act 1985 was 'inconsistent with the right to freedom from discrimination affirmed by s 19 of the New Zealand Bill of Rights Act 1990'.[96]

(i) What happens next?

Ultimately, Adoption Action succeeded in obtaining a declaration that six provisions of the Adoption Act 1955 and one provision of the Adult Adoption Information Act 1985 were inconsistent with the right to freedom from discrimination on the basis of sex, sex and marital status, marital status and sexual orientation, disability, and age as affirmed by s 19 of the NZBORA and s 21 of the Human Rights Act 1993. The Tribunal's declaration to the effect was the only remedy available under 92J of the Human Rights Act 1993. Such a declaration does not affect the validity of the Adoption Act 1955, not does it prevent the continuation of adoptions under the Act. However, the Minister of Justice is now required to advise Parliament of the declaration 'so that Parliament may consider what steps should be taken to remedy these

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91 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [228].
92 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [277].
93 Adult Adoption Information Act 1985, s 2.
94 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [250].
95 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [252].
96 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [278].

discriminatory provisions'.[97] This is a significant step towards the long overdue and much needed reform of New Zealand's outdated and discriminatory adoption laws.

IV TRUSTS, RELATIONSHIP PROPERTY, AND NUPTIAL SETTLEMENTS

New Zealand may be a small country, but it has a great number of trusts.[98] They are predominantly set up to protect assets from relationship creditors and to ease tax burdens.[99] For a trust to exist two essential elements are required. There must be a transfer of ownership of assets from an individual (or a company) to a trust and the creation of a relationship based on rights and responsibilities between one or more trustees and one or more beneficiaries. As Jessica Palmer and Nicola Peart state:[100]

> 'The trust, at its most basic and most fundamental, has two important aspects to it: first, it is the alienation of property away from the personal estate of the settlor for the benefit of the beneficiaries; and, secondly, it is the formation of a relationship of correlative obligation and right respectively between the trustee, as the legal owner of the property, and the beneficiaries whom the property is intended to benefit.'

The 'alienation of property' aspect of trusts can be extremely complicated in the context of relationship property disputes because the transfer of relationship property to a trust can defeat a qualifying spouse or partner's right to an equal division of the parties' relationship property. Sections 44 and 44C of the Property (Relationships) Act 1976 (the PRA) provide some limited protection to a spouse or partner in such a situation.[101] However, the recent Supreme

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[97] Adoption Action Inc 'Major Victory for those Seeking Adoption Reform' (press release, 8 March 2016).

[98] In 2013 the Law Commission estimated that there were between 300,000 to 500,000 trusts in New Zealand. The figure could in fact be much greater. Law Commission *Review Of The Law Of Trusts: A Trusts Act For New Zealand* (NZLC R130, 2013) at 6 and 55.

[99] As Nicola Peart, Mark Henaghan, and Greg Kelly state, '[p]rotecting assets against creditors, providing for future generations, tax advantages, preserving the viability of farms, and other family businesses, as well as charitable trusts are standard reasons for setting up trusts.' See Nicola Peart, Mark Henaghan, and Greg Kelly 'Trusts and Relationship Property in New Zealand' (2011) 17(9) Trusts and Trustees 866 at 866.

[100] Jessica Palmer and Nicola Peart 'Double Trouble: The Power to Add and Remove Beneficiaries and the Power to Appoint and Remove Trustees' (paper presented to the New Zealand Law Society Continuing Legal Education Trusts Conference, Wellington, June 2015) 35 at 39.

[101] Section 44 of the PRA has a significant amount of power to open up a trust and redistribute the assets within it. However, it is difficult to prove because it is only triggered where it can be proven that a disposition of property was made to a trust 'in order to defeat the claim or rights of any person'. It essentially requires proof that there was an intent to defraud the other party out of their share of relationship property at the time the trust was established. This is particularly difficult to demonstrate when most of the time the trusts concerned had been set up to protect family assets from business creditors.
Section 44C of the PRA is wider in its jurisdictional requirements, but narrower in the remedy that it provides. Jurisdiction is established if it can be shown that one or more of the spouses or

Court decisions in *Clayton v Clayton*[102] provide such spouses or partners with some additional options, which will be discussed in turn below.

(a) Background to *Clayton v Clayton*

Mr and Mrs Clayton were married for 17 years (from 1989–2006) and had two children together.[103] The parties' relationship property dispute primarily centred around four discretionary trusts that Mr Clayton had settled during the parties' marriage,[104] and four discretionary trusts settled by him after the parties had separated.[105] At the time of the Family Court hearing in 2011 the parties' property pool (including the assets in the trusts) was estimated to be $28,831,000.[106] The parties fundamentally disagreed about the division of their property. Mr Clayton believed that Mrs Clayton was only entitled to her share of the family home and chattels (valued at $850,000 in March 2011) and was not entitled to any of the value of the trust assets.[107] However, Mrs Clayton wanted half of the total value of the entire property pool including half of all of the business and trust assets.[108]

Their case traversed the Family Court, the High Court, the Court of Appeal, and the Supreme Court over 7 years.[109] In December 2015 (after the Supreme Court hearing had taken place) the parties reached a private settlement. However, the parties and the Court determined that it was still 'appropriate' to deliver their judgment given the important issues involved.[110]

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partners 'have disposed of relationship property to a trust' since their marriage, civil union, or de facto relationship began, and 'that the disposition has the effect of defeating the claim or rights of one of the spouses or partners'. No intent to defraud the other party is required. However, the section does not allow redistribution of the property in the trust. It only allows compensation from other relationship property (if there is any), separate property (if there is any), or compensation from income from the trust (if there is any).

102 *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 and *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189.

103 *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [6].

104 The trusts settled by Mr Clayton during the parties' marriage were: the Claymark Trust, the Vaughan Road Property Trust, and two separate Education Trusts for the parties' children. See *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [11].

105 The trusts settled by Mr Clayton after the parties had separated were: the Denarau Resort Trust, the Sophia No 7 Trust, the Chelmsford Trust, and the Lighter Quay 5B Trust. See *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [13].

106 *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [16].

107 *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [15].

108 *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [16].

109 For more detailed information about the factual background of the case and the Court of Appeal's classification of all eight of the trusts settled by Mr Clayton see generally *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293.

110 *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [3].

The Supreme Court appeal centred on two of the trusts settled by Mr Clayton: the Vaughan Road Property Trust, and the Claymark Trust. Each trust formed the basis of a separate Supreme Court decision.[111]

(b) The grounds of appeal

The Court of Appeal made the following findings in terms of the Vaughan Road Property Trust and the Claymark Trust, which the parties challenged on appeal (and cross-appeal respectively) in the Supreme Court:

- Mr Clayton's power of appointment under clause 7.1 of the Vaughan Road Property Trust deed amounted to relationship property.[112] Mr Clayton appealed this finding to the Supreme Court.[113] Mrs Clayton also cross-appealed this finding arguing that the 'bundle of rights and powers' held by Mr Clayton under the Vaughan Road Property Trust deed (not just cl 7.1) was relationship property for the purposes of the PRA.[114]
- The Vaughan Road Property Trust was neither a sham, nor an illusory trust.[115] Mrs Clayton cross-appealed this finding in the Supreme Court.[116]
- Section 182 of the FPA did not apply to the Claymark Trust.[117] Mrs Clayton cross-appealed this finding in the Supreme Court.[118]

The Supreme Court's findings on these issues will be discussed below in turn.

(c) Does Mr Clayton's power of appointment under cl 7.1 of the Vaughan Road Property Trust Deed (or other powers under the deed) amount to 'relationship property'?

(i) 'Property' under the PRA

For Mr Clayton's powers under the Vaughan Road Property Trust deed to be classified as relationship property, they must first be property. The definition of 'property' in s 2 of the PRA incorporates real and personal property, any estate or interest in real or personal property, any debt or anything in action, as well as 'any other right or interest'.[119] The Supreme Court states that this definition is 'essentially an inclusive definition, with, arguably, an extension of the normal

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[111] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 and *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189.
[112] *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [111].
[113] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [4].
[114] *Clayton v Clayton (Vaughan Road Property Trust*) [2016] NZSC 29, [2016] NZFLR 230 at [4].
[115] *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [70] and [85].
[116] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [4].
[117] *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [178].
[118] *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189 at [3].
[119] Property (Relationships) Act 1976, s 2.

concept of property to include a 'right' or an 'interest', even if it is not a right or interests *in property*.'[120] This was justified by reference to the Insolvency Act 2006 and the Companies Act 1993 which qualify the phrase 'right or interest' by the words 'in relation to property'.[121]

Mrs Clayton claimed that the PRA is 'social legislation' which justifies a 'broader approach to concepts of property than may be appropriate in relation to laws dealing with the property of strangers'.[122] Mrs Clayton emphasised the purposes and principles of the PRA and said that in this context the concept of property should 'be regarded as having a degree of fluidity and as having the capacity to change to meet social conditions'.[123]

The Supreme Court accepted Mrs Clayton's argument that the notion of property in relationship property disputes should reflect the 'statutory context' of the PRA.[124] As the Supreme Court said:[125]

> 'We see the reference to "any other right or interest" when interpreted in the context of social legislation, as the PRA is, as broadening traditional concepts of property and as potentially inclusive of rights and interests that may not, in other contexts, be regarded as property rights or property interests.'

This means that it is perfectly permissible to use the social and statutory contexts of the PRA to determine what constitutes 'property' in the particular circumstances of the case. There is no magic formula. Rather, 'property' under the PRA is a fluid concept and is not limited to the narrower ways 'property' may be used in other contexts.

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[120] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [27].

[121] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [27].

[122] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [29].

[123] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [29]. In making this argument Mrs Clayton drew on the Court of Appeal's decision in *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) where the concept of property was discussed in terms of the then Matrimonial Property Act 1976 (whereby an interest in a partnership in a large accounting firm was classified as property under that Act). The Court of Appeal accepted that 'property' in that context was a 'fluid concept' that could be 'extended to include interests which might not earlier have been covered'. *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [30]. See also *Walker v Walker* [2007] NZCA 30, [2007] NZFLR 772 where the Court of Appeal made an obiter comment suggesting that rights within the context of a trust could be classified as property, and indeed, as relationship property. *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [31].

[124] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [38].

[125] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [38].

(ii) Powers in a trust that amount to 'property'

The Supreme Court then had to ascertain whether Mr Clayton's power of appointment under cl 7.1 of the Vaughan Road Property Trust deed constituted a property right for the purposes of the PRA. Clause 7.1 of the deed said:[126]

> **'7. APPOINTMENT AND REMOVAL OF DISCRETIONARY BENEFICIARIES**
>
> 7.1 **Power to appoint and remove Beneficiaries:** The Principal Family Member may, by deed, before the expiry of the Trust Period:
>
> (a) appoint any person to become a member of the class of Discretionary Beneficiaries …
> (b) Remove any person from the class of Discretionary Beneficiaries …'

The Court of Appeal had found that Mr Clayton's power of appointment counted as 'property' under the PRA.[127] In making this determination, the Court of Appeal relied on the Privy Council decision in *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank & Trust Co (Cayman) Ltd*,[128] and found that:[129]

> 'There was no practical distinction between the power to revoke the trust subject to the decision in [*Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank & Trust Co (Cayman) Ltd]* and Mr Clayton's power to appoint himself as the sole beneficiary of the [Vaughan Road Property Trust]. If Mr Clayton had exercised the power he would effectively have revoked the trust.'

The Supreme Court agreed that if Mr Clayton had the power under the deed to make himself 'the sole beneficiary' of the trust 'the effect of the exercise of that power would be analogous' to Mr Clayton being able to revoke the Vaughan Road Property Trust in a similar way to the settlor having the power to revoke the trusts in *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank & Trust Co (Cayman) Ltd*.[130]

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[126] See the appendix of *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230.

[127] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [39].

[128] *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank & Trust Co (Cayman) Ltd* [2011] UKPC 17, [2012] 1 WLR 1721. This bankruptcy case (under the law of Turkey) was about whether the settlor's general power to revoke two discretionary trusts (containing assets worth more than US$24 million) could be considered a property right the settlor 'could be required to delegate to the receivers in his bankruptcy, allowing them to exercise the power and obtain access to the assets of the trusts for the benefit of [the] creditors.' The Privy Council held that the settlor's power of revocation of the trust was 'tantamount to ownership' and ordered the settlor to delegate his power of revocation to the receivers. See *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [39] to [43].

[129] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [43].

[130] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [44].

However, the Supreme Court found that the Court of Appeal had erred in its interpretation of the Vaughan Road Property Trust deed. Mr Clayton's power under cl 7.1 of the deed did give Mr Clayton the power to remove 'Discretionary Beneficiaries'. However, cl 7.1 did not give Mr Clayton the ability to remove the 'Final Beneficiaries' of the trust (Mr Clayton's children). As the Supreme Court said:[131]

> 'We accept that, in light of the error in the Court of Appeal's interpretation of cl 7.1 of the VRPT deed, it cannot be said that cl 7.1 on its own gives Mr Clayton a power that is analogous to a power to revoke the VRPT.'

However, this finding was not 'fatal to Mrs Clayton's claim' because,[132] as Mrs Clayton pointed out, the deed contained a number of provisions that empowered Mr Clayton 'to appoint all of the trust capital and income to himself'.[133] The Supreme Court found that three provisions of the deed were 'decisive' in this regard.[134]

Clause 6.1(a) of the trust deed states that a trustee 'may at any time pay or apply all or any part of the capital of the Trust Fund to or for such one or more of the Discretionary Beneficiaries who are then living or in existence'.[135] As Mr Clayton is the sole trustee of the trust, and also a discretionary beneficiary, he has the power to pay all of the trust capital to himself at any time.

Clause 10 of the trust deed provides for the distribution of the trust capital on the vesting day (which is either 80 years after the deed expires, or on any earlier date chosen by the trustee).[136] The trust is to be distributed to any one or more

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[131] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [49].

[132] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [50].

[133] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [51].

[134] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [52].

[135] Clause 6.1(a) of the Vaughan Road Property Trust deed states as follows:
'**6. DISTRIBUTION OF CAPITAL BEFORE THE VESTING DAY**
6.1 The Trustees may at any time:
(a) pay or apply all or any part of the capital of the Trust Fund to or for such one or more of the Discretionary Beneficiaries who are then living or in existence.'
See the appendix of *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230. See also *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [53].

[136] Clause 10 of the Vaughan Road Property Trust deed states as follows:
'**10. DISTRIBUTION ON THE VESTING DAY**
10.1 Distribution of capital: The Trustees shall hold the Trust Fund on the Vesting Day upon trust:
(a) for such of the Discretionary Beneficiaries or such one or more of them to the exclusion of the other or others of them in such shares as the Trustees may by deed appoint on or before the Vesting Day;
(b) in respect of such of the Trust Fund as may not be validly appointed on or before the Vesting Day, for such of the Final Beneficiaries who are then living, and, if more than one, as tenants in common in equal shares and if any Final Beneficiary dies before the Vesting Day

of the discretionary beneficiaries in such amounts as determined by the trustee. Any remaining capital can be distributed to the final beneficiaries. Mr Clayton as the sole trustee can choose to appoint the entire trust capital to himself as a discretionary beneficiary to the exclusion of all of the other discretionary beneficiaries and the final beneficiaries. This would give him both 'legal and beneficial ownership of the trust capital and the VRPT would be at an end'.[137]

Clause 8.1 of the trust deed allows the trustee to resettle the trust fund upon the trustees of any trust (including one or more of the discretionary beneficiaries).[138] As Mr Clayton is the sole trustee and a discretionary beneficiary 'this would allow Mr Clayton to resettle the trust capital on the Trustee of a trust of which he was a (or the) beneficiary'.[139]

Mr Clayton tried to argue that his fiduciary obligations to the final beneficiaries constrained him from exercising the above powers in his favour. However, the Supreme Court did not accept this argument because several clauses in the deed limited the duties imposed on Mr Clayton as a trustee. For example, cl 14.1 of the deed allowed Mr Clayton (as a trustee who is also a beneficiary) to 'exercise any power or discretion vested in the Trustee in his own favour'.[140] Likewise, cl 11.1 of the deed allows Mr Clayton (as the sole trustee) 'to exercise a power or discretion conferred on the Trustee even though the interests of all beneficiaries are not considered by the Trustee' regardless of the fact that the exercise 'would or might be contrary to the interests of any present or future Beneficiary' and 'results in the whole of the trust capital or income being distributed to one

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leaving issue living on the Vesting Day such issue shall take per stirpes and, if more than one, as tenants in common in equal shares all the interest in the Trust Fund which such deceased Final Beneficiary would have taken had such deceased Final Beneficiary been living on the Vesting Day;

(c) if none of the Final Beneficiaries nor any of their issue are living on the Vesting Day, for such person or persons living who would be entitled, in accordance with the applicable law governing the distribution of the estates of intestates, to the estate of the Principal Family Member if the Principal Family Member were to die intestate on the Vesting Day and, if there is more than one such person, as tenants in common in such shares as they would have been so entitled.'

See the appendix of *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230. See also *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [54].

137 *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [54].

138 Clause 8.1 of the Vaughan Road Property Trust deed states as follows:

'8 RESETTLEMENT OF TRUST FUND

8.1 The Trustees may at any time resettle by deed all or any part of the Trust Fund upon the Trustees of any trust … which includes … any one or more of the Discretionary Beneficiaries.'

See the appendix of *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230. See also *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [55].

139 *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [55].

140 *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [56].

Beneficiary to the exclusion of others'.[141] Clause 19.1(c) of the trust deed was equally as explicit in allowing Mr Clayton (as the sole trustee) 'to exercise any power or discretion notwithstanding that the interests of the Trustee may conflict with the duty of the Trustee to the Beneficiaries or any of them'.[142] The Supreme Court concluded that, when exercising his powers under the deed in his own favour, Mr Clayton was not constrained by any fiduciary duty to the beneficiaries of the trust and that this 'combination of powers and entitlements of Mr Clayton as Principal Family Member, Trustee and Discretionary Beneficiary of the VRPT amount in effect to a general power of appointment in relation to the assets of the VRPT'.[143]

The Supreme Court then applied a 'worldly realism' test to conclude that Mr Clayton's powers,[144] as bestowed on him by the deed, were 'rights' that gave him an 'interest in the VRPT and its assets'.[145] This approach was based on interpreting the definition of property 'in light of its context in relationship property legislation and in a manner calculated to conform with the purposes and principles of that legislation.'[146] This contextual approach (as discussed in more detail above) is consistent with the method employed by the High Court of Australia in *Kennon v Spry*.[147] The Supreme Court left open as to whether 'less extensive' powers would amount to property.[148]

(iii) Powers in a trust that amount to 'relationship property'

Mr Clayton argued that even if his powers under the trust deed were indeed property, they should be classified as his own separate property rather than relationship property.[149] However, as Mr Clayton's powers were 'acquired' during the parties' marriage the Supreme Court held that 'they are relationship

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[141] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [56].

[142] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [56].

[143] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [67] and [68].

[144] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [79].

[145] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [80].

[146] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [73].

[147] *Kennon v Spry* [2008] HCA 56, (2008) 238 CLR 366. The Supreme Court acknowledged that the definition of property differs between New Zealand and Australia but found that such differences do not diminish 'the importance of *Kennon v Spry* for the proposition that the definition of property must be interpreted in the context of the relationship property legislation.' The Supreme Court were careful not to indicate whether the same decision as was made in *Kennon v Spry* could be made by a New Zealand court, saying it was 'not something we need to decide.' See *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [74].

[148] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [80].

[149] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [85].

property under s 8(1)(e) of the PRA'.[150] Section 8(1)(e) of the PRA states that '[r]elationship property shall consist of […] all property acquired by either spouse or partner after their marriage, civil union, or de facto relationship began'.[151]

The Supreme Court accepted that if all the assets in the Vaughan Road Property Trust were the separate property of Mr Clayton, then it would be unfair to classify Mr Clayton's powers under the deed as relationship property.[152] As the Supreme Court said:[153]

> 'If the underlying assets of the VRPT were all such that they would have been separate property but for having been settled on trust, it may have been necessary to consider whether s 13 of the PRA should be invoked, but there is clearly no basis to do so in this case.'

Even if the assets had been deemed to be Mr Clayton's separate property, if the assets had increased in value during the relationship due to the application of relationship property or were attributable to Mrs Clayton's actions, it would have been unfair not to recognise Mrs Clayton's contribution to the increase in value.[154]

(iv) The valuation of the 'powers'

The Court of Appeal had determined that Mr Clayton's powers of appointment were such that they represented 'an amount equal to the net value of the assets of the VRPT'.[155] As a result, the parties agreed that 'the calculation of this value should be remitted to the High Court for determination'.[156] However, because the parties reached a private agreement in December 2015 the specific valuation exercise was no longer required.[157] For the sake of completeness, the

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[150] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [86].

[151] Property (Relationships) Act 1976, s 8(1)(e).

[152] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [87].

[153] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [89]. Section 13(1) of the PRA states as follows:
'If the court considers that there are extraordinary circumstances that make equal sharing of property or money under section 11 or section 11A or section 11B or section 12 repugnant to justice, the share of each spouse or partner in that property or money is to be determined in accordance with the contribution of each spouse to the marriage or of each civil union partner to the civil union or of each de facto partner to the de facto relationship.'

[154] Property (Relationships) Act 1976, ss 9A(1) and 9A(2).

[155] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [99].

[156] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [99].

[157] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [99].

Supreme Court agreed with the Court of Appeal that 'the value of the VRPT powers [was] equal to the value of the net assets of the VRPT'.[158]

(d) Was the Vaughan Road Property Trust a 'sham' or an 'illusory trust'?

(i) Was the Vaughan Road Property Trust a 'sham' trust?

The Supreme Court held that the trust was not a sham, even though Mr Clayton essentially had total control of the trust's assets via the extensive powers granted to him under the deed. This finding was based on the view that 'Mr Clayton's reliance on his advisors does not indicate any lack of intent on his part to create a trust, nor does his lack of knowledge of the legal detail' and that when the Vaughan Road Property Trust deed was created Mr Clayton did not intend to 'create a structure different from that set out in the terms of the VRPT deed itself'.[159]

This is a very narrow definition of a sham. Essentially the Supreme Court is saying that, although Mr Clayton had no real understanding about the meaning of the Vaughan Road Property Trust deed, especially in terms of the power granted to him under the deed, and that he treated the property in the trust as if it was his own, the trust was not a sham because, at the very least, Mr Clayton intended to set up a trust.

(ii) Was the Vaughan Road Property Trust an 'illusory trust'?

The Supreme Court accepted that a finding that a trust deed is not a sham does not 'preclude a finding that the attempt to create a trust failed and that no valid trust has come into existence'.[160] However, the Supreme Court disapproved of the label 'illusory trust' (which the Family and High Courts had found on the facts). As the Supreme Court said, 'we do not see any value in using the 'illusory' label: if there is no valid trust, that is all that needs to be said'.[161]

In terms of the validity (or otherwise) of the Vaughan Road Property Trust, the Supreme Court could not reach a unanimous verdict.[162] Two lines of argument were put forward. One was that the broad powers in the Vaughan Road Property Trust deed meant that Mr Clayton did not dispose of the property 'in

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[158] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [107].
[159] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [115].
[160] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [123].
[161] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [123].
[162] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [127].

favour of another', and that therefore the trust was not valid.[163] The breath of the powers given to Mr Clayton in the trust deed brought 'into question whether the irreducible core of Trustee obligations […] apply to Mr Clayton'.[164] However, there is also the possibility that 'a valid trust may come into existence at some time in the future, for example, if Mr Clayton were to be replaced by a new Trustee'.[165] The Supreme Court's second line of argument was that even though the Vaughan Road Property Trust was 'effectively defeasible' the trust remains valid until Mr Clayton exercises his extensive powers.[166]

The Supreme Court ultimately decided not to determine whether the Vaughan Road Property Trust was valid or not. As the Supreme Court said:[167]

> 'Determining which of these two lines of analysis is correct is a matter of some complexity on which the Court does not have a concluded unanimous view. In light of that, we do not intend to determine the issue because the settlement of the proceedings makes it unnecessary to do so and, given the very unusual terms of the VRPT deed, the issue is unlikely to arise in future cases.'

With respect, the Supreme Court should have determined that the trust was indeed invalid. The speculative arguments that a new trustee may be appointed in the future, or that Mr Clayton may choose not to exercise his powers under the deed do not adequately capture the reality of the situation in this case. Practically speaking, Mr Clayton had total control over all the assets in the Vaughan Road Property Trust via the power vested in him under the deed. He could choose to exercise these powers at any time. By denying Mrs Clayton's claim to the assets in the trust, Mr Clayton demonstrated his desire to control the assets in the trust to his own ends. In reality, the property was his to control. Therefore the trust should have been declared to be invalid.

(iii) A need for reform

Such finely tuned arguments (as in *Clayton v Clayton*) would not be necessary if s 44C of the PRA was amended. As discussed above, s 44C of the PRA applies where it can be shown that one or more of the spouses or partners 'have disposed of relationship property to a trust' since their marriage, civil union, or

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[163] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [124].

[164] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [124]. See Jessica Palmer and Nicola Peart 'Double Trouble: The Power to Add and Remove Beneficiaries and the Power to Appoint and Remove Trustees' (paper presented to the New Zealand Law Society Continuing Legal Education Trusts Conference, Wellington, June 2015) 35 at 37–40.

[165] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [124].

[166] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [125].

[167] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [127].

de facto relationship began, and 'that the disposition has the effect of defeating the claim or rights of one of the spouses or partners'.[168] No intention to defraud is required.

The application of this section is sufficient in terms of jurisdiction, but the section does not allow for the property in the trust to be redistributed. The limited compensatory remedies provided are inconsistent with the spirit of the PRA. Indeed the whole reason this provision was added to the PRA was to uphold the 'social purposes' of relationship property law.[169] As the Law Commission said:[170]

> 'Section 44C was added by the Property (Relationships) Amendment Act 2001, on the recommendation of the Working Group on Matrimonial Property and Family Protection. The Group noted that the difficulty of proving the required intention under section 44 and the increasing use of trusts and companies had the effect of placing large amounts of relationship property beyond the reach of the courts, often to the detriment of one of the spouses or partners. The social purposes of the relationship property law were thereby lost. The aim of section 44C was therefore to strengthen the Act where dispositions to trusts had the effect of defeating one of the party's rights, but where intention to defeat a party's rights could not be shown.'

The remedy provided by s 44C of the Act should be access to the property held by the trust that, if not for the trust, would otherwise be relationship property. As the Law Commission said:[171]

> 'Courts should have the power to make an order requiring the trustees to pay a specified sum or transfer property of the trust to compensate the partner whose rights were defeated by the disposition of relationship property to the trust. That power to order compensation should be restricted to the value of the relationship property that was transferred to the trust.'

This would be consistent with other legislation such as the Child Support Act 1991, the Legal Services Regulations 2011, the Criminal Proceeds (Recovery) Act 2009, and the Social Security Act 1964 which allow courts to treat property held in trust as the individual's property for the purposes of those pieces of legislation.[172] It is a matter of prioritising the social goals of relationship property law over the sanctity of trusts. This means 'that dispositions of relationship property to a trust will be unreliable and vulnerable

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[168] Property (Relationships) Act 1976, s 44C.

[169] Law Commission *Some Issues With the Use of Trusts in New Zealand: Review of the Law of Trusts* (NZLC IP20, 2010) at 23.

[170] Law Commission *Some Issues With the Use of Trusts in New Zealand: Review of the Law of Trusts* (NZLC IP20, 2010) at 23.

[171] Law Commission *Review Of The Law Of Trusts: A Trusts Act For New Zealand* (NZLC R130, 2013) at 236.

[172] *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] NZFLR 230 at [28].

to recovery from the trust to satisfy a PRA claim'.[173] All dispositions of property (that would otherwise be relationship property) to a trust 'would potentially be available as compensation'.[174] So it should. Why should one individual have to divide their relationship property equally, when another individual does not have to, simply because the second individual has put what would otherwise be relationship property into a trust? In the interests of fairness, both individuals should have to share their relationship property equally with their qualifying spouses.

Where children are beneficiaries to a trust, their interests can be dealt with under s 26 of the PRA, which requires the court to have regard to the 'interests of any minor or dependent children of the marriage, civil union, or de facto relationship and, if it considers it just, may make an order settling the relationship property or any part of that property for the benefit of the children'.[175]

(e) Was the Claymark Trust a 'nuptial settlement'?

In a separate *Clayton v Clayton* decision,[176] the Supreme Court had to determine whether or not the Claymark Trust was a nuptial settlement under s 182 of the FPA, and whether the court should make orders varying the settlement for the benefit 'of the parties to the marriage'.[177] The Family Court, the High Court, and the Court of Appeal respectively had all found that the Claymark Trust was not a nuptial settlement because the expectations of the parties were that it was formed for 'business purposes'.[178]

The purpose of s 182 of the FPA is to allow the court to examine nuptial settlements and modify them where required in the particular case. As the majority of the Supreme Court (Young, Glazebrook, Arnold, and O'Regan JJ) said:[179]

> 'Nuptial settlements are premised on the continuation of the marriage or civil union. The purpose of s 182 is to empower the courts to review a settlement and make orders to remedy the consequences of the failure of the premise on which the settlement was made. Each case will require individual consideration.'

To be a nuptial settlement, there must be:[180]

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[173] Law Commission *Review Of The Law Of Trusts: A Trusts Act For New Zealand* (NZLC R130, 2013) at 237.
[174] Law Commission *Review Of The Law Of Trusts: A Trusts Act For New Zealand* (NZLC R130, 2013) at 237.
[175] Property (Relationships) Act 1976, s 26(1).
[176] *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189.
[177] Family Proceedings Act 1980, s 180(1).
[178] See *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189 at [21] to [26].
[179] *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189 at [60].
[180] *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189 at [34].

> '[A] connection or proximity between the settlement and the marriage. Where there is a family trust (whether discretionary or otherwise) set up during the currency of a marriage with either or both parties to the marriage as beneficiaries, there will almost inevitably be that connection.'

This wide definition usually applies to all family trusts made during marriage or in contemplation of marriage unless 'the trust is set up by a third party and there are substantial other beneficiaries apart from the parties to the marriage and their children' or 'a settlement is made before marriage and a future spouse is named as a possible beneficiary but, at the time of settlement, there is no particular spouse in contemplation'.[181]

The Supreme Court made it clear that the possible exercise of discretion under s 182 of the FPA is wide and is not limited to the situation at the time the deed was signed (which the lower courts had focused on).[182] As the court said, the 'language of s 182(3) makes it clear that any change in circumstances since the settlement is generally relevant to the exercise of the discretion'.[183] The court provides the example that if one of the parties becomes 'ill in the course of the marriage' then the 's 182 discretion could well be exercised differently than it would have been had both parties remained in perfect health'.[184]

In terms of factors to be considered, the Supreme Court noted that 'particular attention must be paid to the interests of dependent children'.[185] The Court also said that 'while need is not a prerequisite, it can be taken into account in the exercise of the discretion'.[186] The Court went on to say that the length of the marriage was also a relevant factor.[187]

In this case, the fact that the settlement was a discretionary family trust was also relevant. The Supreme Court found that in such cases the parties' 'situation must be considered from the perspective of the family unit, assuming a continuing marriage, and compared to the position under the dissolved marriage'.[188] The court concluded that:[189]

> 'Where, as here, a trust is settled during marriage and contains or is sustained by assets accumulated by one or both of the spouses only during the marriage, it may well be that the discretion will result in equal sharing, absent other countervailing circumstances.'

The interests of the children are given particular emphasis and in such circumstances it is suggested that creating two trusts would best retain 'the

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[181] *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189 at [35] and [36].
[182] *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189 at [53] to [55].
[183] *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189 at [55].
[184] *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189 at [56].
[185] *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189 at [58].
[186] *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189 at [59].
[187] *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189 at [59].
[188] *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189 at [66].
[189] *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189 at [67].

integrity of the trust structure for the benefit of all the beneficiaries and avoids interfering too much with the settlement'.[190]

In terms of the court's wide discretion to make an order, the court may also take other factors into account such as the terms of the settlement, how the trustees are exercising their powers, who established the trust, and what assets have been vested in the trust.[191] Assets placed in the trust for a third party, or out of separate property 'may be a relevant factor in the exercise of the discretion but it would not necessarily be decisive or even material in all cases'.[192] This is because the assets are still part of the nuptial settlement.

Regarding the level of award under s 182 of the FPA, the court agreed that the principles of the PRA do not underpin this provision and there is therefore no 'entitlement, or presumption, as to a 50/50 split or any other fractional division of the trust property'.[193] Indeed as the Supreme Court said 'characteristics of settlements [under s 182] are so disparate, as are the particular circumstances of the parties, that any type of presumption would be inappropriate'.[194] However, the Supreme Court was clear that 's 182 has to be applied in the twenty-first century' and that in the 'current social context it is recognised that parties to a marriage contribute in sometimes different but equal ways to the marriage and to the accumulation of assets during the marriage'.[195] In Elias CJ's separate but concurring judgment she emphasised that the jurisdiction is not limited to the expectations of the parties and held that the enquiry in s 182 is a broad one to 'make the orders the court thinks fit in the altered circumstances of the failure of the marriage which prompted the settlement or agreement'.[196]

The Supreme Court ultimately found that the Claymark Trust was a nuptial settlement. However, no order was made because the parties had already reached a private settlement on the issue.[197] The court said that if the matter had not settled, they 'would have made orders similar to those in *Ward* to split the trust equally into two separate trusts'.[198] Despite the private settlement, a judgement was issued because 'the appeal was fully argued and the issues involved are of wider public interest'.[199] The parties also agreed 'that a judgment should be issued'.[200]

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[190] *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189 at [67].
[191] *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189 at [58].
[192] *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189 at [68].
[193] *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189 at [65].
[194] *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189 at [65].
[195] *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189 at [66].
[196] *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189 at [132].
[197] *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189 at [93] and [94].
[198] *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189 at [83].
[199] *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189 at [93].
[200] *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] NZFLR 189 at [93].

(f) A need for reform?

Section 182 of the FPA only applies to dissolved marriages and civil unions. It does not apply to de facto relationships. The Law Commission have rightly recommended that s 182 of the FPA should apply to de facto couples. As the Law Commission states:[201]

> '[Section 182] applies only to married and civil union couples. It does not apply to de facto relationships so rather unfairly only provides a remedy for some couples and not for others. We consider that this inconsistency in the treatment of de facto couples is now an anomaly that should be addressed.'

Extending s 182 of the FPA to de facto couples would create some difficulties, in that it is more difficult to ascertain when a de facto relationship began than it is to prove when a marriage or civil union began. However, the jurisprudence on when a de facto relationship has begun (based on s 2D of the PRA) is developing, and whilst not as clear-cut as the beginning of a marriage or civil union, is sufficient to allow for the inclusion of such relationships.[202]

V CONCLUSION

Family law perpetually exists in a state of flux. Between legislative reform, societal developments, and ground-breaking cases change is an unavoidable part of family law that needs to be embraced by practitioners and academics alike. This chapter has focused on three significant recent developments.

Firstly, this chapter examined how the 2014 Family Court reforms have been working in practice for those using and delivering the new system. Such significant family law changes involving children need to be monitored closely to ensure that the changes meet the prescribed goals and objectives of the reforms, and, above all else, that new provisions continue to ensure that the welfare and best interests of children, the most vulnerable participants in the family justice system, are the first and paramount consideration. Two years on, early research suggests that FDR and the new family justice processes introduced do not sufficiently take children's views into account and that some parties feel forced into making agreements at all costs. Forced agreements are particularly common where power imbalances exist between the parties involved. Unsurprisingly the majority of such agreements are insufficiently durable and break down soon after mediation. Several providers of the new family justice system agree that more legal representation is also required throughout the process. If such negative outcomes persist, change will be necessary to ensure individuals needing assistance to make the best decisions about their children have access to a fair, safe, and user-friendly family justice system that is responsive to the needs of children.

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[201] Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at 240.

[202] See the criteria provided in ss 2C and 2D of the PRA.

The March 2016 decision of Human Rights Review Tribunal, which declared that six provisions of the Adoption Act 1955 and one provision of the Adult Adoption Information Act 1985 were discriminatory on the basis of sex, sex and marital status, marital status and sexual orientation, disability, and age was also closely analysed. This decision plainly demonstrates that New Zealand's adoption legislation is well overdue for substantive reform. Parliament needs to prioritise fundamental statutory changes in this area to bring New Zealand's adoption laws into line with international and national human rights principles and to ensure that individuals and couples seeking to adopt (or consenting to an adoption) are treated equally.

Likewise, the PRA needs to be reformed so that individuals cannot unfairly disadvantage their former spouses and partners by disposing of relationship property to trusts. Such actions defeat the equal division of relationship property between the parties, which goes against the very important social goals of the PRA. The Supreme Court's judgments in *Clayton v Clayton* goes someway to alleviating this unfairness in the PRA (as well as prescribing a generous approach to be taken to nuptial settlements under the FPA). However, it is now for Parliament to continue this work. The FPA also needs to be extended to cover de facto couples to ensure couples are no longer discriminated against on the basis of their marital status.

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NORWAY

THE APPLICATION OF THE NON-DISCRIMINATION GUARANTEE IN MUSLIM WOMEN'S PROCESSES OF DIVORCE IN NORWAY

Tone Linn Wærstad[*]

Résumé

Ce texte examine certaines règles et traditions du droit musulman de la famille dans leur impact sur les femmes qui veulent divorcer en Norvège. Il s'intéresse aux problèmes complexes auxquels ces femmes dont face et qui peuvent représenter autant d'obstacles à leur accès égal au divorce. Il existe dans la loi norvégienne sur le mariage une disposition précise dont le but est de lever ces obstacles, mais elle s'est avérée peu efficace en raison des pratiques sociales et des lois étrangères en matière de divorce. Il existe également des problèmes quant à la reconnaissance en Norvège des répudiations prononcées à l'étranger. Une meilleure coopération et un échange d'information plus efficace, de même qu'une plus grande prise en considération des principes en matière de dissolution du mariage reconnus par la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes, sont nécessaires dans la manière dont l'Administration norvégienne gère les dossiers de divorce transnationaux.

I INTRODUCTION

(a) The impact of Muslim family laws and traditions on Norwegian divorces

This chapter will examine certain aspects of Muslim family law and its traditions and impact upon women's divorces in a Norwegian context.[1] The aim, therefore, is to offer a look into the 'invisible' and perhaps unintended consequences and outcomes of applying Norwegian family laws that are

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1 The chapter provides an overview of some of the themes that were examined in the author's PhD dissertation of November 2015. The title of the PhD thesis is 'Protecting Muslim Minority Women's Human Rights at Divorce: Application of the Protection against Discrimination Guarantee in Norwegian Domestic Law, Private International Law and Human Rights Law', Series of dissertations submitted to the Faculty of Law, University of Oslo, No 91, 2015 (hereinafter, Wærstad, 2015).

supposed to either be gender neutral or favourable to women, but that in actual terms may have unintended consequences or even be disadvantageous to Muslim women in their divorce proceedings.

The PhD study, upon which the chapter is based, applied a primary focus upon the relatively new incorporation – with precedence over other domestic law – of the Convention on the Elimination of All Forms of Discrimination against Women in the Norwegian Human Rights Act.[2] The protection against discrimination guarantee in Norwegian law and its actual implications in Norwegian private international law and domestic law towards problems concerning Muslim minority women is the focus of the chapter.

Rather than aiming to provide an exhaustive analysis of factors that obstruct Muslim minority women's protection against discrimination in divorce proceedings, certain elements found in traditional Muslim family laws were chosen due to their special relevance in a Norwegian setting. Two themes from the PhD study will be explored here.

First, the complex problems Muslim minority women may meet that bar their equal access to divorce are presented. Then, a provision in the Norwegian Marriage Act (s 7(l)) – that aimed to remedy these problems for Muslim women in Norway – is examined.[3] The provision required that anyone entering into a marriage must declare his or her recognition of his or her spouse's equal right to divorce, thereby aiming to secure the wife's right to later dissolve the marriage.

Secondly, the regulation and practice concerning the *recognition* of foreign Muslim *talaq* divorces in Norway are examined. Here, focus is directed towards women's rights to protection against discrimination when the *husband* pursues a divorce in a foreign country. This section examines how the recognition of *talaq* divorces – with a special focus upon divorces originating from Pakistan – in a Norwegian setting should be regarded in the light of relevant human rights regulations.

The challenges that will be presented in the chapter all arise from a complex interplay between the reality of transnational marriages, aspects of foreign legal systems that the Norwegian legal system and authorities are not aware of, the uneasy relationship between different branches of law such as private international law and human rights law and the complex reality of the lives of

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[2] Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, entry into force 3 September 1981 (hereinafter CEDAW or the Women's Convention). Lov 21 mai 1999 nr 30 om styrking av menneskerettighetenes stilling i norsk rett (hereinafter 'The Human Rights Act') s 3.

[3] Dok nr 8: 122 (2002–03), hereafter referred to as a 'Document 8 proposal'. A Document 8 proposal (also known as a 'private member's motion') is a private proposal from a Member of Parliament to Parliament, regulated by Parliament's Rules of Procedure. The Rules of Procedure are decided by Parliament itself according to the Constitution of the Kingdom of Norway of 17 May 1814 s 66. The proposal was made by all the members of the Parliament's Standing Committee on Local Government.

the people who are involved. This merits developments in legal analysis that reflect this complexity and the legal questions that thereby arise.

(b) Focus directed towards Pakistani immigrant women in vulnerable positions

The PhD study took its empirical starting point in the demographic features of women in the oldest and up until recently largest Muslim immigrant group in Norway: immigrant women with a background from Pakistan – and this will also provide a basis for the chapter.[4]

Data from Statistics Norway (SN) show that these women have a much closer attachment to their homes and their families than both their husbands and the female population in general and are also more dependent upon their families for financial support. Female immigrants from Pakistan have a lower educational level than the female population at large, as well as that of male immigrants from Pakistan.[5] Their connection to the labour market is weak. Only 31% of Pakistani immigrant women are employed, whereas the employment rate of immigrant men of Pakistani origin is twice as high.[6] As a consequence of the low employment rates, their salaries and income from wages are low and on average less than a third of their male counterparts.[7]

Moreover, immigrant women from Pakistan are at the top among all immigrant groups in Norway in receiving what is known as 'cash-for-care' benefits; which is an arrangement whereby parents receive a cash benefit if their children do not attend crèche/kindergarten.[8] Receipt of these benefits makes female participation in the labour market less likely.

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[4] The statistics in this section build on administrative data from Statistics Norway. These data have information about country of birth, but religious affiliation is not included. However, the data are supplemented by survey data that show that as many as 98 per cent of Pakistani immigrants living in Norway declare themselves as Muslims (Kristian Rose Tronstad, Levekår blant innvandrere i Norge 2005/2006, Rapporter 2008/5, Statistisk sentralbyrå (SSB), chapter 8). Thus, it is assumed in the study that the overall majority of women with a Pakistani background are Muslims. The same study also shows that of the major immigrant groups in Norway, Pakistanis, together with the Somalis, have the highest share of respondents who declare that religion is of 'significant importance' in their daily lives.

[5] Kristin Henriksen, Lars Østby and Dag Ellingsen, *Immigration and immigrants 2010. Statistical Analyses*, 122/2011, Statistisk sentralbyrå. For descendants of Pakistani migrants however, we see a different trend, where female descendants have a higher overall education level than their male counterparts and the share who take higher education is close to the level among all women in Norway.

[6] SN 2013, Register-based employment statistics, 2012, 4th quarter, Statistics Norway.

[7] Kristian Tronstad, *Fordelingen av økonomiske ressurser mellom kvinner og men*, Rapporter 1/2007, Statistisk sentralbyrå.

[8] Kristin Egge-Hoveid, *Kontantstøtte blant innvandrere. Fortsatt nedgang i kontantstøtten*, Artikler, published 2 May 2014, Statistisk sentralbyrå. Three out of four children with Pakistani background received cash for care benefits in 2012 compared to around half of all children with immigrant background and less than a third for the population in general.

Few are divorced. In total 580 immigrant women of Pakistani origin are divorced, compared to 6,692 who are married, which constitutes a small proportion compared to women without an immigrant background.[9] Annual figures also indicate a low divorce rate in this group.[10] A low divorce rate in itself does not give information concerning access for women to divorce, but may be an indication of such challenges when supported by other data.

Furthermore, there is within the Pakistani group a tendency to marry someone from the country of origin, ie to enter into transnational marriages.[11] Those who immigrate to Norway through such marriages are naturally more likely to become dependent upon their spouses and their family.

Lastly, there is a prevalent pattern to live in the capital region and some other urban districts. Several of the informants interviewed for the PhD study referred to problems that they experienced concerning social control within their background community.[12] More than 8 out of 10 migrants with a Pakistani background in Norway live in Oslo and the neighbouring county Akershus.[13] This is one of the highest residential concentrations of all immigrant groups and provides the possibility for close-knit societies, where internal control and surveillance may be exercised.

Consequently, these data on demography and living conditions indicate that Pakistani women may have more limited access to decide freely over their marriage and family life. Women who according to these data are more vulnerable when rights are to be secured are the focus of this chapter, and thus *not* Muslims in general.[14] The study rested upon a notion that there is a great variety regarding the interpretation and practice of religious norms. However, the project was directed towards those practices within this variety, whereby women's rights may be violated or are at risk of being violated. Women who risk the violation of their rights, as guaranteed by the Women's Convention, are thereby the main focus of the chapter.

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9 SN 2014, Population statistics 2014, Statistics Bank, accessed on request to SN on 27 May 2014: Table 01451: Population by immigrant category, country background, sex, age and marital status. For women without immigrant background the corresponding numbers are 694,545 who are married and 186,161 who are divorced. The same statistics also show that the share of Pakistanis who are married are of the highest of all immigrant groups – and much higher than the general Norwegian population, the share of persons who never married is correspondingly low.

10 Torild Sandnes, *Familieinnvandring og ekteskapsmønster* 1990–2012, Rapporter 2014/11, Statistisk sentralbyrå.

11 Ibid. At the same time we see a trend where the marriage age is increasing for the descendants of Pakistani migrants, something which could indicate more independence from traditional family habits for the next generation.

12 See Wærstad 2015, above n 1, Chapter 2.3.2.

13 SN 2014, Population statistics 2014, Statistics Bank, accessed 27 May 2014: Table 01451: Population by immigrant category, county, country background, sex, age and marital status.

14 It should be noted that elements of the same patterns on living conditions and demography can be found among immigrant women also from groups with a background that are not Muslim majority countries, see for instance Henriksen et al, 2011, above n 5.

II WOMEN'S EQUAL RIGHT TO ACCESS DIVORCE

(a) Introduction

Women's equal right to access divorce raises several distinct and complex questions in a Norwegian context.

Norwegian divorce laws are generally well in line with the formal demands in CEDAW.[15] Separation and divorce are regulated in one, uniform Act providing for unilateral, no-fault divorce that is equally accessible to men and women. According to the Marriage Act, s 20, a 'spouse who finds that he or she cannot continue cohabitation may demand a separation'.[16] Pursuant to such separation of one year (regulated in s 20), the marriage will be dissolved by divorce according to s 19. A divorce without a prior separation is also possible under certain circumstances, those being if the couple has not lived together for more than 2 years (s 21), upon one of the partners' abuse of the other, or if the marriage was not contracted by the free will of both parties (s 22), and last if the marriage was contracted contrary to the prohibition in s 3 of marriage between close relatives or s 4 regarding polygamy.[17]

The questions that *do* arise relating to the protection against discrimination are, first, whether access to a Norwegian divorce is hindered by other factors that discriminate against women, and where duties to respect, protect and fulfil rights in CEDAW therefore arise.

The PhD study examined factors that facilitate or obstruct Muslim minority women's access to divorce in Norway. Interview data – albeit from a small sample – indicated that some Muslim women of immigrant background in Norway have profound problems with accessing a divorce. The data pointed to problems the women faced that – in certain respects – were of a general nature in the communities they were part of. These were mainly close-knit communities consisting of Afghani and Pakistani descendants, tied together – among other factors – by a Muslim identity. These difficulties were a combination of the women's dependency upon their husbands and families, coupled with strong demands that they should uphold the marriage almost at any cost. Furthermore, the women were impacted by norms stating that they could not decide themselves whether to stay in the marriage or not, or by duties to mediate disputes concerning the marriage, as well as by demands that the parties must first reunite and give the marriage another try before a divorce would be accepted.

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[15] See Wærstad, 2015, above n 1, Chapter 5.

[16] Lov om ekteskap 4 July 1991, No 47. Hereinafter 'the Marriage Act'.

[17] For dissolution of marriages with an international character certain specific questions arise. Firstly, there is the question of jurisdiction: in order for a divorce to take place in Norway, the Norwegian county governor or court must have jurisdiction over the case. Second, there is the question of which country's law is applicable.

In addition to this came problems in society at large, such as little contact with and little familiarity with public services, and in certain respects a lack of understanding of these women's situations by the public administration.

Secondly, questions arise regarding a situation where a Norwegian divorce is in effect, but where this – in one way or another – does not relieve the woman of her marital obligations. This may happen either as part of informal law or formal foreign law or a combination of these. This is what is known as 'limping marriages'.[18]

The concept of a limping marriage denotes that a civil divorce is not recognised as valid by the *formal* legal system in a relevant background country, nor *socially* recognised by the woman's family or community. The lack of recognition in these two spheres has different legal status and consequences that will be explained in this section.

A lack of *formal* recognition of a Norwegian divorce *in another country* would imply that the woman would still be recognised as married in the other country, which would mean that the rights and duties following from the marriage would still exist. One obvious example would be that the woman could not remarry legally, but an array of different implications could arise relating to, eg, status rights, economic rights and rights regarding the children.

A lack of *social recognition* of the Norwegian divorce, however, would have quite different implications. In this case the woman would *not* be *legally* bound by the rights and duties imposed by the marriage. However, a social recognition might still be of great importance to her. Examples from the PhD study were that the ex-husband might simply not accept the divorce, but insist he had a right to demand to live with his ex-wife or threaten to hurt or kill her because of the divorce. There might be social stigmatisation from the family and community, ranging from the severing of all ties to milder forms of sanctions, such as not welcoming the woman's children to activities in the mosque.

It is necessary to see these dimensions – the legal and social – together, as they often operate in tandem and influence each other. For instance, a lack of legal recognition of a Norwegian divorce in a background country is often based on a different notion of what are reasonable grounds for a divorce. It is likely that these underlying notions might be representative for the social recognition of the social group that has emigrated from the same country. Another example might be that the actual support a woman would need in order to get a Norwegian divorce recognised in the background country, such as legal expertise, language proficiency and money to pay for the proceedings, is not provided for by her family as they opposed the divorce.

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[18] Limping marriages may naturally also be the result of discrepancies between other types of divorce regulation than Muslim family laws. The most well-known examples are perhaps that of Jewish women who have a civil divorce, but stay married religiously because their husbands refuse to give them a Jewish divorce – *the get* – which is the husband's prerogative in traditional Jewish law.

It is therefore important to see the barriers to *accessing* a divorce together with the *lack of recognition* of a divorce, as these are often expressions of the same underlying values and norms within the women's families and communities, which may have similar effects upon the situation of the woman in question.

Lastly, there is a need to question the normal division between religious and civil aspects of divorce as these may be intertwined in ways that may impact upon how the divorce should be understood in a legal sense.

(b) Integrating the delegation of *talaq* divorces into Norwegian marriage law

In 2003 there was a legislative process in Norway with the aim of securing Muslim women's equal right to divorce through the internal Norwegian family law.[19] The proposals were given with the specific aim of fulfilling Muslim women's rights to be protected from discrimination in accessing divorce.[20] The process resulted in a new section in the Norwegian Marriage Act – adopted by a unanimous Norwegian Parliament – s 7(l), which made it compulsory for anyone entering into a marriage to declare recognition of his or her spouse's equal right to divorce.[21]

The proposal was made to ensure the *delegation of the Muslim 'talaq' divorce* from Muslim men to their wives when these were married in Norway. The *talaq* divorce modality is an exclusive and unilateral right for the husband to repudiate his wife, without judicial proceedings.[22] The right to the *talaq* divorce may however be delegated – through contract – from the husband to the wife, ensuring her access to this type of divorce. Normally this is done as part of negotiations prior to the marriage and is specifically stated in the marital contract.

In this way the new legislation was an effort to integrate Muslim family law into the Norwegian Marriage Act, with an aim to increase Muslim women's access to religious and foreign divorces. But the provision was still only a requirement for entering into a valid *Norwegian* marriage. The assumption of the members of Parliament, that this requirement would be sufficient to provide the wife with a means to dissolve a foreign marriage as well as to get recognition for the divorce in her family and community, proved to be based on

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19 Dok nr 8: 122 (2002–03).

20 Dok nr 8: 122 (2002–03) p 2.

21 The new provision had this wording: 'Each of the parties to the marriage shall individually solemnly declare that they are contracting the marriage of their own free will, and that they recognize each other's equal right to divorce.' The declaration that spouses had to sign in order to marry in Norway was amended accordingly to reflect this new requirement in the Marriage Act.

22 WB Hallaq, *Sharī'a: Theory, Practice, Transformations* (Cambridge University Press, 2009), 280–281.

an overly optimistic and under-developed understanding of Muslim divorce law as well as on how Muslim women are actually hindered in their pursuits of divorce.

Several aspects of the provision are problematic when compared to Muslim family law and the actual problems experienced by women in limping marriages.

The proposers' continued claim, that a delegation of the *talaq* divorce would give the wife an equal right to divorce, was mistaken. The access is delegated and is therefore, within Muslim family law, not regarded as an equal right for the wife. Any wording of Norwegian law therefore that implies such equality between the parties will not be valid in a Muslim context. The wording of the Marriage Act s 7(l) states that the spouses shall declare 'that they acknowledge each other having equal formal rights to divorce'.[23] The intention was that such an amendment to the Norwegian marital contract could be used by the wife in the background country in order to support the claim that she had such a delegated right to divorce, but this would clearly not succeed. The husband can simply not grant the wife the same formal, equal right to divorce; he can merely delegate his right to divorce.

Furthermore, a change was made in 2006 to the actual *declaration* that the spouses must sign in order to be allowed to enter into a valid marriage, that withdrew the direct reference to divorce. Even though the Marriage Act, s 7(1) still has the same wording, the actual declaration the spouses must sign merely states that they recognise each other's 'equal rights according to Norwegian law'. As a result it is even more evident that the declaration could not be seen as delegation of the *talaq* divorce. The Norwegian marriage certificate would therefore not be in accordance with the Pakistani requirements for a delegated divorce. Hence the legal arrangement of declaring each other equal right to divorce would not have the legal effect of securing women with rights to a *talaq* divorce, as it would not fulfil the legal requirements to a delegation of the *talaq* divorce.

Furthermore, the proposers overestimated the effects the requirement would have upon the social recognition of divorce. It is clear that divorce in general, whether initiated by the husband or the wife, is met with disapproval in certain Muslim communities in Norway and that this is also widespread in the Muslim world, for example in Pakistan. Furthermore, a divorce initiated by a woman is met with less recognition than a divorce initiated by a man.[24] Such disapproval

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[23] Author's italics.

[24] Ali Shaheen Sardar, *An Analysis of the Trends of the Superior Courts of Pakistan in Matters relating to Marriage, Dower, Divorce* (Working Paper for the Women and Law project, Women Living Under Muslim Laws, 1993). For empirical evidence supporting this in a Norwegian context see Farhat Taj, *Legal Pluralism, Human Rights and Islam in Norway: Making Norwegian Law Available, Acceptable and Accessible to Women in a Multicultural Setting* (Series of dissertations submitted to the Faculty of Law, University of Oslo No 58, 2013). Tone Linn Wærstad, *Retten til ikke å bli diskriminert ved skilsmisse. En rettsantropologisk studie av*

will of course not disappear merely because there is a delegation of the *talaq* divorce in the marriage contract. In my study from 2006 there is one clear example of this: the woman in question had a delegated right to divorce in her marriage contract, but, in order to get recognition for a divorce from the mosque she belonged to here in Norway, she still had to reconcile with her husband twice even though he was both violent towards her and unfaithful. The delegated divorce right did not play any part in the negotiations at the mosque.[25]

An additional negative feature surrounding the new amendment to the Marriage Act was that the expert examinations, which were appointed to inquire into the problem of limping marriages in Norway in relation to the legislative process, did not give the situations of those experiencing the problem sufficient scrutiny. No women with relevant experiences were interviewed and the questions arising concerning human rights were not addressed. Instead leaders from different religious communities in Norway were given a prominent position within the examination procedure. The issue of limping marriages is, as explained above, indeed complicated and complex in ways that entail a high consciousness of the nature of the problem, and the result, not surprisingly, did not lead to any improvements for Muslim women in Norway.

A key finding from the study was therefore that examinations concerning this issue should give the original problem close inquiry and furthermore that issues like these are not easily solved merely by adding new formal legislation that does not reflect the problem in hand. A better mandate for such a process would possibly be, in light of human rights law, to examine possible solutions to the actual problems of limping marriages from a women's law perspective by means of interdisciplinary approaches that involve legal, religious and sociological expertise. A better understanding of how human rights are violated through the interaction between the individual, community, informal and formal laws would have enhanced the chances of finding a result that better served the different human rights interests that arose in the process.

III RECOGNITION OF *TALAQ* DIVORCES IN NORWAY

(a) Introduction

Violations of women's human rights in relation to divorce may occur also outside the context of women seeking dissolution of their marriage – as was the focus of the preceding Part II. A divorce may also *cause* human rights violations towards women and this is the theme towards which I now turn.

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skilte muslimske innvandrerkvinner i Norge (Kvinnerettslig skriftserie 64, Universitetet i Oslo, 2006); Wærstad, 2015, above n 1, and Camilla Kayed, *Rett, religion og byråkrati. En studie av skilsmisse blant muslimer i Norge* (Hovedoppgave i sosialantropologi, Universitetet i Oslo, 1999).

[25] Wærstad 2006, above n 24, 120.

In a global context it is undisputed that unequal access for men and women as well as negative consequences for divorced women based on their gender constitute human rights violations.[26] In a Norwegian context the most relevant questions arising from this perspective of protection against human rights violations caused by divorce proceedings are mainly related to transnational aspects. The study examined the problems women encounter when they are divorced abroad under proceedings that may violate their right to protection against discrimination, as well as their rights to a fair trial, and when in turn the results of such proceedings are recognised in Norway.

The study examined specifically a phenomenon where women, who immigrate on the basis of family reunification to Norway, later are taken back to the country of origin when the marital life becomes difficult and left there against their will.

Four of the women whom I interviewed for the study experienced being taken back to the country of origin under the pretence that they were going for a vacation, while the true intention of their husbands was to get rid of them. Their stories are those of great challenges and vulnerabilities.[27] Their accounts illustrate some typical difficulties that women who are left in their country of origin against their will are exposed to, and that Norwegian authorities possibly should pay more attention to when deciding cases of recognition of foreign divorces.

It appears from other sources that the phenomenon of dumping women in this way, and particularly the problems following from *talaq*-divorces, is widespread.[28] Despite this, it is a theme that has not received much scholarly or public attention and this lack of knowledge about this phenomenon in Norway and elsewhere indicates that it merits further research.

This need for more knowledge and a higher consciousness of this theme was also underlined when I examined the actual administrative practice of the recognition of foreign divorces by the County Governor of Oslo and Akershus (CGOA).[29] From the case material it appeared that the lack of knowledge of the situation of the wife may lead to incorrect assessments of the legislation upon

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[26] See Wærstad 2015, above n 1, Chapter 5.

[27] All of these four women were able to come back to Norway through the help of their families, friends, social welfare workers and Norwegian embassies. One of them was a Norwegian citizen and the three others were in the end granted permits to stay in Norway based upon the regulations that give an independent right to stay when spouse or children have been exposed to violence within the marriage, which is regulated in Lov 15 mai 2008 nr 35 om utlendingers adgang til riket og deres opphold her (hereinafter the Immigration Act), s 53.

[28] Red Cross Oslo 2012, *Røde Kors-telefonen om tvangsekteskap og kjønnslemlestelse* 815 55 201, Rapport for 2012, www.rodekors.no/Global/DK/DK-Oslo/Dokumenter/130218_RK-telefonen_rapport2012_TRYKKFIL.pdf. The Directorate of Integration and Diversity (IMDi), *A Transnational Approach: The work against forced marriage and female genital mutilation at four Norwegian foreign service missions*, 2013: www.imdi.no/Documents/Rapporter/Paa_tvers_av_landegrenser_eng.pdf. Taj, 2013, 168 and 183–184.

[29] The authority to decide whether a foreign divorce is valid or not in Norway is under the responsibility of the County Governors. The responsible ministry is the Ministry of Children,

this area in Norway. This relates to both the application of the Norwegian Foreign Divorce Act, the Public Administration Act[30] and not least the Human Rights Act.

The main research was done by examining all case files of recognition of divorces that had been decided at the CGOA over the last 5 years. The cases relating to Pakistani divorces are few; approximately two each year of a total case load of approximately 400 annual cases that are decided by the County Governor. However, these cases raise central questions related to the guarantee of protection against discrimination.

(b) Regulation of foreign divorces in Norwegian law, the example of the *talaq* divorce

A case of recognition of a foreign divorce in Norway would appear when a marriage – that either has been contracted or recognised in Norway – has been dissolved in a foreign country and the divorce is sought to be recognised in Norway.[31]

The starting point in Norwegian law is that a foreign divorce is recognised.[32] This general, unwritten rule was codified specifically regarding foreign divorces in 1978, through the Foreign Divorce Act.[33] According to s 1, a divorce or separation obtained in a foreign country that has binding force there is valid also in Norway, in so far as at least one of the spouses either had domicile, residence or citizenship in the foreign state when the case for divorce was admitted there.[34] As regards the Foreign Divorce Act, s 1 therefore, a valid *talaq* divorce from a foreign country would be valid as long as the attachment requirements in s 1 are fulfilled. The main rule in s 1 is modified in s 2, which states that a '[f]oreign divorce is not valid in the realm if this would appear manifestly offensive to Norwegian public policy (ordre public)'.[35] The main question is therefore whether the *talaq* divorce, cannot still be recognised because it is 'manifestly offensive' to the ordre public reservation.

Equality and Social Inclusion, that has delegated the authority from the County Governors, through decision 292 of 27 March 1992 (in force 1 January 1993).

30 The Public Administration Act, Lov 10 February 1967 om behandlingsmåten i forvaltningssaker (hereinafter the Public Administration Act).

31 In accordance with the Marriage Act, s 18.

32 Helge Johan Thue, *Internasjonal privatrett: personrett, familierett og arverett* (Gyldendal akademisk, 2002) 369, footnote 263.

33 Lov 2 juni 1978 nr 38 om anerkjennelse av utenlandske skilsmisser og separasjoner (hereinafter the Foreign Divorce Act). The law was a result of the ratification of the Hague Convention on the Recognition of Divorces and Legal Separations of 1970.

34 (My translation). As far as I know there are no formal translations of the Act into English. All quotes from the Act will therefore be my own.

35 However, if one of the parties has remarried, the divorce will according to s 3 still be valid without fulfilling the requirements of ss 1 and 2, unless the other party can prove that the remarried spouse obtained the divorce in a 'fraudulent manner'. This raises interesting questions related to who are then protected by the law, but because of the scope of this chapter only the general ordre public reservation in s 2 of the Foreign Divorce Act is discussed.

As presented above, the *talaq* divorce modality is an exclusive and unilateral right for the husband to repudiate his wife, without judicial proceedings.[36] As is often the case with religious law it can manifest in different ways, where some may be problematic from a women's perspective. This is also true of the *talaq* divorce, which is practised differently in different countries.[37] Women in Pakistan however do not have equal access to divorce as men; they have to go through judicial proceedings by petitioning for dissolution on certain specified grounds.[38] In addition to the unequal formal regulation of divorce in Pakistan, there are practical barriers to women's access to formal rights. Pakistani lawyers report cases where the wife does not gain knowledge of the *talaq* divorce. The notice may, in line with the law, be given to members of her close family and there are incidents where the family refuses to accept any notice for fear that it may be a notice of a *talaq* divorce.[39] These barriers must be seen in a context where divorce in general is seen as shameful for women, thereby making claims for equality and the rights to a fair trial even harder to pursue in practice.[40]

In a Norwegian context the main conclusion from an examination of the regulation and practice of the *talaq* divorce in the Pakistani legal system is that there is definite insecurity relating to women's rights to protection against discrimination and the right to a fair trial in *talaq* divorce proceedings. There are furthermore practical barriers for women to divorce, and certain problematic features of the procedure of divorce.[41]

From the examination of recognition cases of Pakistani *talaq* divorces there are two elements that especially appear problematic in light of the guarantee of protection against discrimination.

First, there is too strong a focus on the parties' *attachment* to Norway in deciding upon whether the ordre public reservation should result in non-recognition of the divorce: when there is an (assumed) weak attachment to Norway the divorce will therefore be recognised.

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[36] WB Hallaq, *Sharī'a: Theory, Practice, Transformations* (Cambridge University Press, 2009), 280–281.

[37] See for instance P Kruiniger, 'Article 16 of the Women's Convention and the Status of Muslim Women at Divorce' in Ingrid Westendorp (ed), *The Women's Convention Turned 30: Achievements, Setbacks and Prospects* (Intersentia, Cambridge, 2012).

[38] Under the Pakistani Dissolution of Muslim Marriages Act, 1939.

[39] Mumtaz & Associates, *Divorce Laws in Pakistan*, 2015: www.ma-law.org.pk/Divorce_Laws_Divorce_Lawyer_in_Karachi_divorce_Lawyer_in_Lahore_divorce_law_firms_in_Pakistan.html.

[40] For reviews of customary practices that bar women's rights in Pakistan, see SS Ali, *Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man?* (Kluwer Law International. The Hague, 2000), chapter V. L Holden, 'Interpreting Women's Right of Divorce in Present Day Islamic Family Laws' in R. Mehdi et al (eds), *Interpreting Divorce Laws in Islam* (DJØF Publishing, Copenhagen, 2012). Farida Shaheed, 'Contested Identities: gendered politics, gendered religion in Pakistan' (2010) 31(6) *Third World Quarterly* 851–867.

[41] See Wærstad 2015, above n 1, Chapter 10.

Secondly, the *legal rights of a party* to an administrative case, of which the recognition cases are examples, are severely limited when it comes to the other spouse in cases of recognition of foreign divorces. The exemptions from these rights are not in line with the requirements for when such exemptions may be made under the Public Administration Act and nor are they in line with certain human rights guarantees that follow from the Human Rights Act.

These two elements will be discussed in the following section.[42]

(c) The attachment requirement

In Circular Q-19/2004, which provides guidelines from the responsible ministry to the CGOA for recognition cases – and this is supported by legal scholarship – the attachment the parties have to Norway is considered the most important factor when deciding whether a *talaq* divorce should not be recognised due to Norwegian ordre public.[43] A strong attachment indicates that the *talaq* divorce must be struck down as contradictory to Norwegian ordre public, whereas a weak attachment points towards its recognition. It is furthermore stated that every case must be considered from different aspects, of which it is difficult to make an exhaustive list, but a factor such as how long the spouses have lived in Norway and Pakistan is seen to be decisive.[44]

In general, such an explicit and overarching focus upon attachment does not correspond well with the basic idea that those who are most vulnerable must receive extra attention in order for their rights to be secured adequately.[45] The longer a woman has stayed in Norway, the more likely it is that she speaks Norwegian and is acquainted with her rights according to the Norwegian legal system and society. In view of such a picture, and in view of the state obligation to fulfil the human rights of women without discrimination based upon gender, the decisiveness of the attachment criterion in the assessment of the ordre public reservation in s 2 of the Foreign Divorce Act appears problematic.

Norway as a state party to different human rights conventions has responsibility for its actions even when these actions have consequences outside of Norway. Most relevant to the issue in hand are CEDAW article 2 and ICCPR article 2 concerning state obligations. The CEDAW Committee's General Recommendation No 28 (2010), para 12, states:

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42 For some additional topics that arise regarding recognition procedures of *talaq* divorces in Norway see Wærstad, 2015, above n 1, Chapter 10.

43 Rundskriv Q-19/2004, (hereinafter 'Circular 19/2004'). Circulars are guidelines from the governing ministry regarding the interpretation of laws and regulations. The circulars have little interpretative weight as such, but may at the same time have considerable impact upon the administrative practice concerning the laws and regulations in practice. Regarding the attachments requirement see also Thue, 2002, above n 32, 377.

44 Circular 19/2004, 12–13.

45 See Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, Oxford, 2008), 77–78, and Wærstad, 2015, above n 1, Chapter 4.5.

> 'States parties are responsible for all their actions affecting human rights, regardless of whether the affected persons are in their territory.'

This is also the understanding of the HRC concerning the ICCPR as stated in the General Comment No 31.[46]

Furthermore, as will be explained in the following section, an additional problem occurs in relation to the correctness of the assessment of the wife's attachment to Norway, because of the lack of knowledge of the actual situation of the wife.

(d) The exemption of party rights in the Public Administration Act

The Public Administration Act contains specific procedural requirements concerning party rights, such as for instance the parties' right to advance notification, the right to acquaint themselves with the documents in the case, the right to be notified about the administrative decision and the right to appeal. However, these rights are severely limited when it comes to the other spouse in cases of recognition of foreign divorces.

In the Circular 19/2004 it is simply stated that it is seen as 'obviously unnecessary' to notify the other spouse when the divorce in question is final in the country where it has been issued, as is possible through the Public Administration Act, s 16(1)(c).[47] Furthermore, it is stated that it has not normally been seen as necessary to notify the decision either, as is the normal procedure according to Public Administration Act, s 27(1), first alternative. This is due to the fact that it has been seen to be in line with the exemption that applies when it is 'obviously unnecessary and the decision does not cause any harm or inconvenience to the party concerned'.[48] There is no reasoning given by the responsible ministry for applying these exemptions to party rights.

This means that the wife is in practice not able to challenge the foreign case when it 'travels' to Norway as an acknowledgment case. Indeed she will have no notification of the case whatsoever. This in turn withdraws the means by which Norwegian authorities can review whether the ordre public reservation in the Foreign Divorce Act should be enacted or not. As earlier noted, often the divorce is not struck down as contradictory to ordre public because of the assumed lack of attachment of the wife to Norway. She is regarded as having made a change of domicile due to the move back to Pakistan, whereas in reality – as stated above – there may have been no change of domicile, as the move may not have happened voluntarily. Thus, the lack of information concerning

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[46] Para 10 states that 'This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.'

[47] Circular 19/2004, 18.

[48] The Public Administration Act, s 27(1), seventh alternative.

the situation of the wife may also result in an incorrect assessment of the ordre public reservation as follows from the original guidelines of the circular upon this matter.

Furthermore, a notification of the case would enable the wife to pursue rights she has according to Norwegian law. A notification of the case would enable the wife to come in contact with the County Governor officials, who, under the general duty to provide guidance as codified in the Public Administration Act, s 11, would have an independent duty to guide her towards safeguarding her own interests in the best possible way. These may be questions regarding her rights to come back to Norway, to get an independent stay permit, rights regarding the partition of assets in the Norwegian legal system, and opportunities to get in contact with the police or other help agencies, for instance to report violence etc. The County Governor could thereby direct her towards other government agencies or branches that could provide her with assistance and information of her rights, such as the Norwegian embassy in Pakistan and the Directorate of Immigration (UDI).

(e) Summary

The results of these cases, as explained above, may be a violation of women's human rights both in the foreign country and in Norway. As regards the general ordre public reservation, this study indicates that the present legal situation is not adequately sensitive to the fact that the Pakistani *talaq* divorce may be informed by procedural and material rules that in varying degrees discriminate against women. By applying an overarching focus upon the attachment the couple has to Norway, as well as omitting all party rights from the Public Administration Act, the County Governor's office lacks the means to look at the situation of a vulnerable party on an independent basis, when the party is assumed not to have the 'required' connection to Norway. Such differentiated protection based on attachment, combined with a lack of affording party rights in the proceedings, is difficult to reconcile with the human rights protection against discrimination as stated in the Norwegian Human Rights Act.

IV CONCLUDING REMARKS

With a basis in the author's PhD dissertation, this chapter discussed the Muslim minority women's rights to protection against discrimination on the dissolution of marriage in Norway, particularly on two accounts.

First, problems of equal access to divorce for Muslim women in Norway were explored. An amendment to the Norwegian Marriage Act, that aimed to remedy Muslim women's problems with limping marriages, was examined. The analysis showed inadequacies in the examination process of the proposal, as regards the need to reflect the problem in hand and the legal issues that arise concerning limping marriages in Norway related to the legal guarantee of

non-discrimination. Furthermore the analysis suggested that social practices as well as foreign divorce law, which negatively impact upon women's access to divorce in Norway, are not something that may easily be solved merely through the new regulation in the formal Norwegian law.

Secondly, the right of women in Norway to be protected from the effects of discriminatory divorce law in a foreign country, related specifically to the recognition in Norway of foreign *talaq* divorces, was investigated. The study suggests possible non-compliance with national administrative law as well as international human rights law in these cases, mainly due to a lack of relevant information as well of awareness of possible violations of women's human rights in these cases in different parts of the public administration. The chapter therefore indicates a need for closer cooperation and a better information flow, as well as increased awareness of the regulation of divorce in CEDAW, in different branches of the Norwegian public administration's handling of transnational divorce cases.

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POLAND

POLISH FAMILY LAW: SOCIALIST ROOTS, ASTONISHING EVOLUTION

Piotr Fiedorczyk and Dr Agnieszka Zemke-Górecka[*]

Résumé

Le Code polonais de la famille et de la responsabilité parentale de 1964 est toujours en vigueur mais il a subi des modifications à plus de dix reprises depuis 1989 (la fin du communisme). Sa pérennité s'explique en partie par le fait qu'il n'a jamais été aussi résolument «socialiste» que l'étaient les autres codes de la famille dans les pays de l'Est. Même si le droit de la famille fait partie du droit civil, il y a une forte opposition à son inclusion dans un nouveau code civil. Il semblerait que l'influence de l'héritage communiste soit encore importante à cet égard. Le régime légal de la communauté, mis en place en 1949 selon le modèle soviétique, est la plus importante institution ayant survécu. Après les bouleversements de 1989 il fut en effet décidé de maintenir ce régime. Les règles du divorce n'avaient pas changé depuis 1964, alors que plusieurs les considéraient trop conservatrices à l'époque. Pourtant, les propositions visant à les libéraliser ne trouvent que peu de partisans aujourd'hui. En décembre 2015 l'actuel ministre de la Justice a, pour des raisons politiques, aboli la Commission de réforme du droit civil. Le processus de recodification du droit polonais de la famille est donc à l'arrêt et probablement pour longtemps.

I BACKGROUND TO FAMILY LAW REFORMS

The Polish Family and Guardianship Code came into force on 1 January 1965; so now we are celebrating 50 years of its validity. The history of Polish family law during communism was quite complicated.[1] In 1945–46 the civil law (including family law) was unified by decrees prepared on the basis of pre-war projects. Then, in 1948–50 a common Polish and Czechoslovakian project on family law was developed and it became law in both countries. It was based on the Soviet doctrine of family law[2] and in large part repeated the solutions of the Soviet Family and Marriage Code of 1926. The family law of the years

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1 P Fiedorczyk, 'Family Law in 20th Century Poland: between Soviet Patterns and European Legal Tradition', in LD Wardle and CS Williams (eds), *Family Law: Balancing Interests and Pursuing Priorities* (William S Hein & Co, Inc, Buffalo-New York, 2007) 58–61.

2 P Fiedorczyk, 'The Principles of the Soviet Family Law and the Ways of its Reception in the

1949–50 was an attempt to impose Soviet solutions on two countries of so-called 'people's democracy'.[3] Both in Poland and Czechoslovakia quite quickly the common family law was replaced by separate codes in the first half of the 1960s. The Polish Family and Guardianship Code was a result of the work of the Codification Committee which was created in 1956,[4] and quite commonly is regarded as legal work on a high legislative level, although based on the basic principles of the Soviet family law.[5]

The state of civil law inherited from the past political system is still characterised by the existence of two parallel codes from 1964 – the Civil Code, as well as the Family and Guardianship Code. This situation, in which family law is separate from civil law, was the result of the impact of the Soviet legal doctrine, which, in the communist times, indicated the path of development for the entire legal system.[6] It is only obvious to say that Soviet influence was not limited to the formal shape of the law but it extended to the formulation of the merits. An example of such an impact in the area of family law is, inter alia, the law-based system of the marital joint property regime in existence in all countries of the Eastern Block.

The Polish Family and Guardianship Code after 1989 did not require speedy amendments, as was the need in case of the Civil Code.[7] The reason for the situation was that the code did not include any regulations which explicitly expressed the communist ideology obligatory thus far, since the Act had no general introductory part, typical of modern codes, which was the usual place for the inclusion of such expressions. It should also be noted that the two main principles of family law, which are the basis for code regulations, ie the best interest of the child and the equal rights of women in a family, were in line with the general direction of the development of family law in democratic Europe.[8] Despite the fact that in the early 1990s a proposal for fast recodification of

Legislation of Socialist Countries', in M Frýdek and J Tauchen (eds), *Pocta Karlu Schellemu k 60. narozeninám* (KEY Publishing, Ostrava, 2012) 244–253.

3 For more information see: P Fiedorczyk, 'Počátky socialistického rodinného práva (The Beginnings of the Socialist Family Law)', in L Vojáček, K Schelle and J Tauchen (eds), *Vývoj soukromého práva na území českých zemí (The Development of Private Law on Czech Territories)* (Masarykova iniverzita, Brno, 2012) I díl, 549–600.

4 P Fiedorczyk, *Unifikacja i kodyfikacja prawa rodzinnego w Polsce (1945–1964) (The Unification and Codification of Family Law in Poland (1945–1964)* (Wydawnictwo Uniwersytetu w Białymstoku, Białystok, 2014) 285–741.

5 'Polish society has been re-modelled on the Soviet pattern and the socio-economic basis of the law (to follow the Marxist Jargon) is unquestionably Marxist. Yet within this context the craftsmanship of the law is undoubtedly Polish and the ingenuity of the Polish lawyer is evident'; D Lasok, *Polish Family Law* (A W Sijthoff, Leyden, 1968) 21.

6 A Lityński, *Historia prawa Polski Ludowe j (History of Law of the Polish People's Republic)* (LexisNexis, Warsaw, 2013) 206–208.

7 Fundamental amendments to the Civil Code were made relatively fast. The Act of 28 June 1990 removed code provisions regarding, inter alia, the interpretation of civil law norms in line with the objectives of the socialist state, the differentiation of forms of ownership and the degree of its protection (particular protection of the socialist public ownership), as well as specific characteristics of commercial transactions between state enterprises.

8 M Nazar, *Problemy nowelizacji prawa rodzinnego (Problems with the Revision of Family Law)* ('Rejent', 2005) No 9, 81–82.

family law emerged, which would be based on including this area in the civil code, this opinion was rather isolated.[9] The prevailing position has been to the contrary – amendments to family law should be proceeded with slowly, partially and only as a last resort, ie only when there is no possibility of achieving positive results by means of changes in the jurisprudence. Such a view impacts on the development of Polish family law, which, also due to sluggish introduction of solutions stemming from European law, is becoming even more conservative in comparison to other systems.

The opinion presented above does not mean, however, that the scope of changes in Polish family law is small. On the contrary, at least five out of 17 amendments to the Family Code after 1989 are of fundamental significance.[10] It should also be mentioned that before 1989 the Code had been revised only twice (a particularly important amendment was introduced in 1975).

When revising civil law (family law included), an important role is played by the Civil Law Codification Commission, functioning at the Ministry of Justice since 1996. The Commission was headed by the late Professor Zbigniew Radwański (from March 2015 Professor Tadeusz Ereciński) and the body itself includes a working team on family law. The composition of the team is subject to frequent rotations.[11] In reforming civil law the Commission functions as the initiator by developing draft legislative amendments. Among the amendments to the Family Code the three most important ones were put forward by the Commission and only in one case was the Commission's proposal significantly changed by the Parliament; all other ones were adopted in a shape very similar to the original form proposed by the Commission.[12]

The aim of the first two revisions of the Family Code after 1989 was first of all to adapt Polish family law to all the international conventions ratified by Poland. The most important of these was the Convention on the Rights of the Child,[13] adopted by the General Assembly of the United Nations in 1989, which determined, among other issues, the rules for foreign adoption. In this context a provision of particular importance is the new art 114 of the code

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[9] Such a proposal was formulated by the Nestor of Polish civil lawyers S Grzybowski, 'Z problematyki usytuowania prawa rodzinnego w systemie prawa cywilnego (zagadnienie przepisów części ogólnej oraz oświadczeń o wstąpieniu w związek małżeński)' ('On the Issues of Locating Family Law within the System of Civil Law (the question of the general part as well as declarations on entering marriage)'), in *Księga pamiątkowa ku czci prof. T. Dybowskiego,* 'Studia Iuridica' 1994, vol XXI, 206ff.

[10] See important overview of these changes: K Jadach, K Perzanowska and A Urbańska-Łukaszewicz, *Kodeks rodzinny i opiekuńczy po wielkich nowelizacjach (Family and Guardianship Code After Great Amendments)*, ('Rodzina i Prawo', 2014) No 29, 5–25.

[11] The team was at the beginning composed of professors Andrzej Mączyński, Tadeusz Smyczyński, Mirosław Nazar, Janina Panowicz–Lipska. See: Nazar, above n 8, at 94.

[12] Nazar, above n 8, at 83–84.

[13] For more see: T Smyczyński, 'Reforma kodeksu rodzinnego i opiekuńczego w świetle Konwencji o prawach dziecka' ('Reform of the Family and Guardianship Code in Light of the Convention on the Rights of Children'), in M Bączyk et al (eds), *Księga pamiątkowa ku czci Profesora Leopolda Steckiego)* (TNOIK, Toruń, 1997) 293–303.

which permits foreign adoption if this is the only way to provide the adoptee with a proper surrogate family environment.

A very important revision took place in 1998, with an amendment to the provisions stipulating the forms of entering marriage,[14] which was related to the ratification of the concordat with the Holy See. The amendment introduced an optional form of concluding marriage, which allowed the couple to choose between a civil and canonical marriage (the so-called 'concordat marriage').[15] A canonical marriage now leads to civil legal consequences, without the need for a separate civil marriage. It should also be noted that the denominational form of marriage leading to civil legal results is not limited to the Catholic church but can also take place in the case of other denominations: Orthodox, Protestant (Auxburg Evangelical and Reformed Evangelical), Methodist, as well as Adventists of the Seventh Day.[16] The introduction of this regulation was a response to the expectations voiced by the majority of society. However, it should be stressed that this solution can lead to certain problems in its application in practice.

Proposals from the religious part of society led to yet another revision in 1999.[17] The new amendment was related to the institution of the separation of spouses. In light of the new provisions added to the Code, spouses can file for separation despite the conditions for divorce being satisfied. It should be noted that the formulation of these regulations reveals a restorative form of separation, which means that the spouses are free to resume cohabitation at any time. The introduction of this institution to the Code was highly desired as it makes it easier for the separated spouses to function in society – eg accepting different liabilities, starting up their own business – due to the fact that the decision on separation issued by the court revokes the joint property between them. One could ask, however, whether from the point of view of the interest of the state it is justified to provide for marriages which are actually non-existent.

The fact that there was no optional form of entering a marriage and no institution of legal separation was seen in the circumstances of the Polish reality as a means of repression of the Catholic Church.[18] Hence, the restitution of these provisions was met with great social approval and was positively assessed

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[14] Law of 24 July 1998 on the amendment to the law – Family and Guardianship Code, Code of civil procedure, Law on marital status acts, acts on the relationship of the State to the Catholic Church in the Republic of Poland as well as other laws (*Dziennik Ustaw* – Journal of Laws No 117, item 757).

[15] See the basic publication on the topic: W Góralski, *Zawarcie małżeństwa konkordatowego w Polsce (Concluding of Concordat Marriage in Poland)* (Wydawnictwo ATK, Warsaw, 1998).

[16] M Lech-Chełmińska and V Przybyła, *Kodeks rodzinny i opiekuńczy. Praktyczny komentarz z orzecznictwem (Family and Guardianship Code. Practical Commentary with Jurisprudence)* (3rd edn, Wydawnictwo Zrzeszenia Prawników Polskich, Warsaw, 2006) 20–21.

[17] Law of 21.05.1999 on amendments to the Family and Guardianship Code, Civil Code, Civil Procedure Code and a number of other laws (Journal of Laws No 52, item 532).

[18] Both institutions were eliminated from the Polish legal system by means of the decree of 1945, which unified the personal marital law. See: P Fiedorczyk, *Z prac nad unifikacją osobowego prawa małżeńskiego w 1945 r. (On the Efforts to Unify Personal Marital Law in 1945)* ('Miscellanea Historico – Iuridica', 2003) vol I, 80.

by legal scholars.[19] One other amendment should be taken note of – the so-called 'small revision' of the Code of 2000. It was aimed at creating a legal basis for the support of the natural family of a child who had been placed with a foster family or referred to an instructional and educational institution, hence improving the chance for the child's speedy return to his or her natural parents. Furthermore, the revision made it possible to accelerate the process of adoption where dysfunction is present in the natural family.

An important change in the Code came with the Act of 6 November 2008, which has changed the provisions regarding the child's origin. It added provisions dealing with acknowledgement and determination of maternity and changed the provisions on determination of paternity, acknowledgement of paternity and voidance of acknowledgement of paternity, as well as general provisions regulating relations between parents and children, parental responsibility, contacts with children, maintenance obligations and custody or guardianship. The last of the extensive reforms took place in 2011 and concerned provisions on adoption, especially the procedures in cases of adoption and foster care.[20] The remaining changes do not make that big a difference in the everyday functioning of the society.

As a result of the changes the number of articles of the Code increased from 180 up to about 220, and so the new official version of the Code was published in 2012.[21] It has to be stressed that the changes modernise the Code, correspond well with social needs (including the demands of religious circles), so that there is no need to create a new legal Act in the near future. It has to be recognised that the legal situation of children and their relationship with their parents has been consistently improved. This part of the Code has been changed the most, which is compatible with European and world tendencies.

II IS THERE ANY NEED FOR A SEPARATE FAMILY CODE?

The evolution of the provisions of the Family and Guardianship Code should not overshadow the basic fact that in family law the Code that was derived from the era of 'real socialism' is still in force. It means not only that there are provisions still in force (however, there are many) but also that there is justification for the specific legislation. An example of such historically rooted legislation may serve for the purposes of discussion of whether family law should be included in the Civil Code as one of its five books. It would refer to a traditional pandect layout of the Code. As is well known, the Soviet (and the Stalinist system in particular) doctrine of family law was based on the

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[19] Nazar, above n 8, at 84.

[20] P Fiedorczyk, 'New Solutions in Polish Adoption Law and Proceedings', in MD Panforti (ed), *Parents and Children in a Narrowing World. Issues on Adoption* (Mucchi Editore, Modena, 2014) 109–117.

[21] Dz. U. 2012, poz. 788 (Journal of Laws 2012, item 788). It should be noted that after 2012 the Code has been amended three times up until the time of writing.

assumption that family law is a separate branch of law from the civil law branch. It was legitimised by the statement that in civil law the property regime prevails, whereas in family law the most predominant element is a personal one and property issues are less important. It was the way to stress that a socialist marriage should liberate itself from the dependence on the property regime, which would be reflected in the separate family codes. This basic argument was complemented by many others.[22] Consequently, all socialist countries, including Poland, had separate family codes. At the same time, as in Poland, a lot of representatives of the doctrine still regarded family law as part of civil law and did not accept the argument of code distinctness as crucial.

In the new situation after 1989, practically no one says that family law is a separate branch of law. Therefore, the Codification Committee unequivocally spoke up in favour of including family law in the Civil Code,[23] and its then chairperson, Z Radwański, left no doubt that the Soviet standards should be rejected.[24] It appeared, though, that the idea of preserving the separate family codification also has its supporters. The decisive argument here is the high position of family relations, which require separate regulation. It is being alleged that the existence of the Code establishes the perception of the importance of family law, and 60-year-long tradition of a separate codification cannot be neglected. Again, the argument of non-material specificity of family law is raised.[25] In particular, the defenders of a separate codification were judges of family courts, who believe that a uniform civil codification may lead to the closing down of family courts as specialised judicial facilities, which were created in the late 1970s.[26] Not denying the importance of family courts and the specifics of family law within civil law, it is hard not to see that the position of family judges emerges from the fear of spreading their judicial function to other civil law departments. In that way judges in democratic Poland became defenders of solutions originating from Stalinist times. The paradox consists in the fact that, during work on the Family and Guardianship Code in socialist

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[22] Fiedorczyk, above n 2, at 244–253.

[23] *Zielona księga. Optymalna wizja Kodeksu cywilnego w Rzeczypospolitej Polskiej (The Green Book. The Optimal Vision of the Civil Code of the Republic of Poland)*, ed Z Radwański (Oficyna Wydawnicza Ministerstwa Sprawiedliwości, Warszawa, 2006) 31–33.

[24] Z Radwański, *Miejsce prawa rodzinnego w systemie prawa (The Position of Family Law in the System of Law)* ('Państwo i Prawo', 2008), No 1, 3–15.

[25] Nazar, above n 8, at 81f.

[26] *Uchwała Stowarzyszenia Sędziów Rodzinnych w Polsce. Zakopane, dnia 4 października 2007 r. (Resolution of Family Judges' Association in Poland, Zakopane 4th October 2007)*, in 'Zeszyty Prawnicze UKSW' 2008, vol 8.1, 302–303; and also, but more firmly: *Uchwała Stowarzyszenia Sędziów Rodzinnych w Polsce. Zakopane, dnia 3 października 2008 r. (Resolution of Family Judges' Association in Poland, Zakopane, 3 October 2008)*, in 'Rodzina i Prawo' 2009, No 11, 106. See also: E Holewińska – Łapińska, *Opinia sędziów na temat przedstawionego w 'Zielonej Księdze' usytuowania prawa rodzinnego w przyszłej kodyfikacji (Judges' opinion on position of family law in the future codification, presented in the 'Green Book)* ('Rodzina i Prawo', 2008), No 9–10, 17–34; E Holewińska-Łapińska, 'Uwagi na temat przedstawionego w "Zielonej Księdze" usytuowania prawa rodzinnego w przyszłej kodyfikacji' ('Comments on position of family law in the future codification'), in: J Wroceński and J Krajczyński (eds), *Finis legis Christus. Księga pamiątkowa dedykowana księdzu profesorowi Wojciechowi Góralskiemu w okazji siedemdziesiątej rocznicy urodzin*, vol 2 (Wydawnictwo UKSW, Warszawa, 2009) 1021–1035.

era, the judges of the Supreme Court were definitely in favour of one civil code, with family law as one of its five books, in which they saw major advantages for achieving a uniform civil case-law.[27]

Such a situation can be summed up in the following way: in order to provide high-level family law, there is no need for a separate code. However, there is the need for proper legal regulations and sufficient institutional guarantees (including specialised organisational units with jurisdiction in civil proceedings). It is interesting that supporters of a separate legal Act governing family relations do not suggest creating a family law code of such a nature that it would cover the regulatory regime for the administrative and legal aspects of family functioning (eg family allowances). This vision of family law might be worth considering in the future. In this context I agree with the opinion that the issue of incorporating family law into a future civil code or not is of tertiary importance.[28] It is the quality of the possible regulation that counts. The discussion itself is a result of the legal position that existed after the socialist era.

III MARITAL PROPERTY

The provisions on marital joint property thus far, typical for socialist countries, were justified by the specific character of the economic system. 'The application of the model of marital property relations, common to all states of real socialism, was rationally justified by the structure of Polish society then. The reason was that the system of gained property of spouses was in adamant protection of the wife (and, indirectly, the child), while its downsides did not play that big a role in the state, the citizens of which had the role of consumers and not business entities', says a distinguished expert of the topic.[29] It should be underlined, however, that even in the conditions of the old economic system there did appear certain issues of interpretation, particularly in relation to the management of joint property, especially in cases exceeding the so-called 'ordinary' (common) management. In the conditions of a market economy the ambiguities in the form of property relations were made even more visible and, for example, manifested themselves in the practice of concluding prenuptial property agreements by spouses with the exclusion of statutory joint property. The binding character of these agreements in respect to third persons is, however, limited. Another phenomenon that gained popularity was the practice of revoking the statutory joint property of spouses by means of a court decision with a past date. Spouses who had a joint business often resorted to this

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27 Fiedorczyk, above n 4, at 472.

28 J Mazurkiewicz, 'Rodzinne do remontu! Czyli o potrzebie wielkiej reformy prawa rodzinnego' ('Family Law to Be Reformed! In Other Words, on the Need for Major Reform of Family Law'), in P Stec and M Załucki (eds), *50 lat kodeksu cywilnego. Perspektywy rekodyfikacji (50 Years of the Civil Code. The Perspectives of Re-Codification)* (Wolters Kluwer, Warszawa 2015) 301.

29 Z Radwański, *Prawo cywilne PRL (Civil Law of the Polish People's Republic)*, 'Czasopismo Prawno – Historyczne' 1995, vol XLVII, issue 1–2, 30.

measure so as to avoid liability to creditors in terms of the more valuable components of the property. Such a situation could be aggrieving to creditors.[30]

The phenomena presented above clearly proved the need to revise the Code.[31] Hence the amendments to marital resolutions on property regimes were seen as a priority for the Codification Commission from the very start.[32] Work on the draft was started in 1997, however was not carried out continuously as the Commission had to focus on the provisions related to the concordat and the institution of separation. The final draft (after consultation first with the legal community) reached the Sejm, i e the lower chamber of the Polish Parliament, in 2003 and, having been adopted by the MPs almost unanimously,[33] entered into force in January 2005.

In light of the amendments introduced, the new regulations pertaining to property relations were incorporated in chapter III of title I of the Code – under a changed heading: 'Marital property regimes' (arts 31–54). The new title accentuates the introduction of a pluralism in marital property regimes. The chapter includes provisions standardising the statutory regime, with three contractual regimes: joint property, the regime of separate estates in matrimony, and the new type called the regime of separate estates in matrimony with the equalising of gained property. The last three articles regulate the compulsory property regime. The regime stipulated in the Code will be subject to further deliberation later on in this article, when new regulations are presented.

The basic problem related to the revision was the choice of the appropriate statutory property regime. It is a known fact that, even in the developed societies, the number of marital contracts is lower than the number of marriages which apply provisions of the law. Advocates of the joint property regime – regardless of the time and place or the conditions of the system – have raised the point that this type of system is the most compliant with the notion of marriage as a strict personal and property union. Opponents of the regime, on the other hand, point to the conflicts that such a solution can evoke – e g in relation to the management of joint property, as well as with respect to the liability of spouses for debts. This does not change the fact, however, that the joint property regime is the statutory one (and in some cases has been so for a very long time) in many of the developed European countries (France, Italy, the

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30 T Smyczyński, *Kierunki reformy kodeksu rodzinnego i opiekuńczego (Directions of Reform of the Family and Guardianship Code* ('Kwartalnik Prawa Prywatnego', 1999) vol 2, 313.

31 Text hereunder (in the part regarding matrimonial property regime) I use my previous and broader paper: P Fiedorczyk, 'Revisions of Family Law in Poland after 1989 with Particular Focus on Property Relations Between Spouses', in LD Wardle and A Scott Loveless (eds), *Marriage and Quasi-Marital Relationships in Central and Eastern Europe* (BYU Academic Publishing, Provo, 2008), 143–153.

32 *Komisja Kodyfikacyjna Prawa Cywilnego. Założenia i ogólny kierunek zmian w prawie cywilnym, prawie rodzinnym i gospodarczym oraz postępowaniu cywilnym (Civil Law Codification Commission. Assumptions and Main Direction of Changes in Civil Law, Family Law and Commercial Law, as well as in Civil Procedure)*, 'Kwartalnik Prawa Prywatnego', 1997, issue 2, 323.

33 The course of works has been presented by Nazar, above n 8, at 94–97.

Netherlands). Functioning in the conditions of a market economy, it neither weakens the confidence and speed of commercial dealings, nor does it limit private autonomy and the freedom of activity of the spouses, particularly in the sphere of economy.[34]

It should also be mentioned that the standards of European law do not restrict the choice of marital property regime. In the course of the work of the Commission some of the members opted for amending the statutory regime by replacing it with a system of separate estates in matrimony with compensation for possessions gained.[35] Such a system had been functioning in Poland until 1950. It should also be stressed that the system of separate estates in matrimony had had a long-standing tradition in Poland, reaching back to the times from before the partitions. It had been rooted in Polish territories by means of the ABGB, BGB provisions, as well as the Set of Laws of the Russian Empire (*Svod Zakonov*).[36] In the end, however, the opinion that prevailed was such that the experience stemming from the practical application of the statutory joint property model presently functioning did not provide sufficient arguments for the withdrawal of the current solution. It has been decided that, in order to secure the due interests of spouses in the new social and economic circumstances, amending the statutory regime is not indispensable, as it would mean a revolution of a sort in the sphere of property relations, not only for the future but also with regard to the marriages already in existence.[37] The old socialist statutory marital regime was therefore maintained, having been modified pursuant to the following assumptions. First, joint marital property should not lead to excessive limitation of the personal and property freedom of spouses, nor should it hinder the speed of commercial transactions and weaken their confidence. Furthermore, new solutions are to guarantee a balance between the interests of the spouses, family, as well as third parties having legal relations with the spouses. Finally, the amended regulations in the field of joint property management are based on the assumption that spouses perform their duties in a proper and accommodating manner and not – as was the case before the revision – on the assumption of a possible conflict of interests between them.[38]

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[34] See: 'Motives for the draft law' in *Z prac Komisji Kodyfikacyjnej Prawa Cywilnego (On the Work of the Civil Law Codification Commission)*, 'Przegląd Legislacyjny', 2000, No 2, 179–180.

[35] T Smyczyński seems to be a supporter of this approach, *Projekt ustawy zmieniającej małżeńskie prawo majątkowe (Draft Law Amending Marital Property Law)*, 'Studia Prawnicze', 2000, issue 3–4, 154–155.

[36] P Fiedorczyk. 'Z badań nad małżeńskimi ustrojami majątkowymi w powojennym ustawodawstwie polskim' ('Research on Marital Property Regimes in Post-War Polish Legislation'), in D Bogacz and M Tkaczuk (eds), *Podstawy materialne państwa. Zagadnienia prawno – historyczne (Material Grounds of State. Historical and Legal Issues)* (Wydawnictwo Naukowe Uniwersytetu Szczecińskiego, Szczecin, 2006) 752–753.

[37] This argument could be seen as dubious as there was the possibility of determining appropriate adaptation periods (*vacatio legis*).

[38] *Motives*, above n 34, at 180–181.

Pursuant to the assumptions above, the legislator has made a distinction between two types of property: joint property of spouses (before: gained property) and personal property (before: separate) of each of the spouses. The catalogue of the components of joint property has remained relatively unchanged (with the addition of funds saved on pension fund accounts), but an important change was made to the components of personal property, which was the introduction of substitution. The solution, based on including in the personal property those elements of property which had been gained in lieu of components of personal property, should be seen as profoundly justified. Thus a departure has taken place from those solutions, which by means of the current narrow scope of substitution led to the effect which was typical of the statutory regime of the general joint property. The financial element is also important here – the new regulation does not discourage investing one's own funds. It eliminates the fear that material objects would become part of joint property. Furthermore, the introduction of full substitution improves the situation of creditors, as it facilitates the claim procedure in relation to the personal property of the debtor and not the joint property of spouses.[39]

A very important change in the statutory system of joint marital property was the determination of totally new rules in terms of joint property management,[40] as the division between ordinary management and activities exceeding such management has been eliminated. Pursuant to the code-based assumption on the agreeable and loyal cooperation of the spouses for the good of the family, it has been decided that each spouse has the right to independently manage the joint property. Hence another regulation was added which imposed on each of the spouses the duty to provide to each other information on the state of the joint property, management of the joint property and liabilities encumbering the joint property. Failure to perform this duty can result in the limitation or deprivation of the right to independent management of joint property, or to the institution of a compulsory separation of estates in matrimony.

The revised regulations provide for two exceptions from the rule of independent management of joint estate by both spouses. The first one, which is of less significance, provides for the spouse, who is active professionally or who carries out business activities, the right to independently manage the material objects which are used in these business activities. The second derogation carries much more weight. The other spouse has to declare permission for legal actions aimed at or resulting in the sale, encumbrance, paid purchase or handing over for use of realty. Similar regulations apply in relation to law on real property, the subject of which is a building, office space,

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[39] J Strzebińczyk, *Nowelizacja przepisów kodeksu rodzinnego i opiekuńczego w zakresie małżeńskiego praw majątkowego (cz. I))(Revision of the Provisions of the Family and Guardianship Code in Regard to Marital Property Law, Part I)* ('Rejent', 2004) No 8, 149; and A Kozioł, *Ustroje majątkowe małżeńskie po nowelizacji Kodeksu rodzinnego i opiekuńczego (Marital Property Regimes upon the Revision of Family and Guardianship Code)* ('Monitor Prawniczy', 2005) No 15, 742.

[40] See: P Wójcik, *Zarząd majątkiem wspólnym małżonków(Management of Joint Property of Spouses)* ('Monitor Prawniczy', 2006) No 1, 28–33.

businesses, and farmsteads. Moreover, it is necessary to obtain the permission of the other spouse in order to make a donation from the joint property, with the exception of small donations commonly accepted. The above regulations are justified not only due to the significant value of the material objects of the property, but also due to their business significance and, in the case of donations, due to the fact that their being free of charge. Professional literature talks about the fact that the catalogue of actions requiring permission is too narrow as it does not include the waiver of property ownership and other rights.[41] If the agreement was concluded without the consent of one of the spouses, then the validity of the agreement depends on the confirmation of the agreement by the other spouse. The other party can give the spouse a deadline for the confirmation of the agreement and, upon its ineffective expiry, the agreement is released from being binding. It should also be noted that multilateral legal activity performed without the consent of the other spouse is invalid.

An important supplement to the above provisions is the right of objection of a spouse against the actions of joint property management intended by the other spouse. The objection is effective in relation to a third party, provided the party had the opportunity to get acquainted with it before the action was undertaken. However, the objection does not apply in relation to daily life issues nor in the case of activities with the intention of satisfying the ordinary needs of the family, nor those which are carried out as part of business endeavours. The provision gives the spouses a sense of legal security against disloyal or careless behaviour of their partner.

A change of great importance is the completely new approach to the problem of satisfying the creditor by means of the joint property of spouses, when only one of the spouses is the debtor.[42] The deciding factor here lies in the consent of a spouse given at the time of making a debt. For that reason the creditor can demand payment from the joint property of the spouses. On the other hand, lack of such consent limits the possibilities of the creditor's claims being met from personal property, remuneration for work or other paid-for activities or to copyright and other related rights. Identical principles (as in the case of lack of consent) refer to the liability in tort of one of the spouses. The clear reference to the awareness and will of the indebted spouse at the moment of generating the debt protects the family and confidence in economic transactions. In light of the new provisions the position of the creditor has deteriorated as the present stipulation means the need to obtain the consent of the spouse of one's contractor – otherwise the settlement of debt from joint property is not possible.

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41 K Pietrzykowski, *Nowe przepisy o małżeńskich ustrojach majątkowych (New Regulations on Marital Property Regimes)* ('Palestra', 2005) No 3–4, p 26.

42 The issue is discussed in great detail by A Lutkiewicz-Rucińska, *Uwagi do art. 41 kodeksu rodzinnego i opiekuńczego po reformie małżeńskiego prawa majątkowego (Comments on Art. 41 of the Family and Guardianship Code upon the Reform of the Marital Property Law)* ('Rejent', 2005) No 12, 92–112.

The new regulation of the matrimonial property regimes also relates to the contractual marital regimes. The socialist doctrine of family law excluded the possibility of concluding marriage contracts, so it was an example of Polish distinctiveness that under the Family and Guardianship Code such contracts were allowed, with certain limits, though.[43] This amendment significantly broadened the scope of the freedom of spouses in the area of concluding marital contracts. It does not mean, however, that there are no limitations here. First of all, the catalogue of property contracts is restricted to four types of agreements. Parties can, by means of a notary act, broaden the scope of joint marital property, limit its scope, provide for a system of separate estates in matrimony or a system of separate estates in matrimony with the equalisation of gained property. Any other contract is impossible, nor is it possible to merge elements of two different agreements, eg a partial extension of the joint property as to some of the elements of the property and a partial restriction of the contract in relation to others. Furthermore, in the case of a marital contract providing for the extension or limitation of joint marital property, the parties cannot regulate the principles of joint property management which would be in contrast to the principles provided for in the statutory regime. They can, however, establish unequal shares in joint property at the moment of the joint property being terminated. Nor is it possible for the marital contract to include provisions related to other contracts, eg on the distribution of inheritance, cancellation of joint property – if third persons are party to these contracts. The aforementioned most important restrictions are not exhaustive.[44] It should also be remembered that the effectiveness of a marital contract vis-à-vis third persons is limited, as a spouse can invoke the marital property agreement before third persons provided that the conclusion and type of this agreement were known to these persons.

In the case of a contract extending joint property, the most important thing is to determine the catalogue of material items of property which cannot be included in the prenuptial agreement for that reason. The catalogue differs from the old legal state and has now been enlarged to five categories of items.[45]

The biggest innovation in the area of contractual marital property regimes is the introduction of the regime of separate estates in matrimony with compensation for possessions gained. The system has had an interesting history in Poland. As far back as before World War II a proposal was drafted by the Codification Commission of a marital property law which provided for such a regime to be the statutory solution (pursuant to the Swedish model). In 1946, as part of the unification of civil law, the regime entered into force as the statutory one. The

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[43] JS Piątowski, 'Inne ustroje majątkowe' ('Other Matrimonial Property Regimes'), in JS Piątowski (ed), *System prawa rodzinnego i opiekuńczego (The System of Family and Guardianship Law)*, part I (Ossolineum, 1985) 512–515.

[44] As presented by G Bieniek, *Umowne ustroje majątkowe (Contractual Property Regimes)* ('Rejent', 2005) No 9, 114–117.

[45] As discussed by J Strzebińczyk, *Nowelizacja przepisów kodeksu rodzinnego i opiekuńczego w zakresie małżeńskiego prawa majątkowego (cz. II)(Revision of the Provisions of Family and Guardianship Code in the Scope of Marital Property Law, Part II)* ('Rejent', 2004) No 9, 90–91.

fact it was chosen stemmed from a compromise reached by the supporters of the system of separate estates in matrimony and those in favour of the system of joint gained property. Experience from applying the decree must have been positive as already in 1948 the regime was maintained as the statutory one in the draft civil code, introducing minor modifications such as the introduction of the instrument of a claim for the equalisation of gained property. The current form of regulations recalls those from 1948 which had not constituted the law in force due to the process of 'Stalinization' (this was the era of the Stalinist totalitarian rule).[46] Hence the reinstitution of the regime (despite the fact that it is now a contractual one) is of a symbolic meaning, as it is a return to old family relations. It should also be stressed that when work was carried out on the revision of the Code, it was proposed that the regime become the statutory one,[47] as it combines the assets of both the system of separate estates in matrimony, as well as joint property. Each of the spouses maintains his or her property from before marriage and the property gained during marriage. A spouse is entitled to independent management and is liable for the debts relating to his or her own property. At the same time, the regime ensures equal rights of spouses to the property gained during marriage, providing for the possibility of equalisation of gained properties if the regime is terminated.[48] The advantages of such a system are proved by the fact that in many European countries this solution has a statutory status (Finland, Switzerland, Germany).[49] One must not forget, however, that the functioning of this regime in Poland will be limited as more common use of marital property contracts should not be expected. A question thus arises about the reasons for the legislator's withdrawing the obligation to register contracts – which used to exist in Polish law in the past and is now in existence in countries such as the Netherlands, Greece, Estonia, Germany, Norway, and France.[50]

A few remarks should be made about the so-called 'compulsory property regime'. This term, new to the code, had been thus far used in the legal language of the doctrine and jurisprudence in reference to the regime of separate estates in matrimony introduced pursuant to the decisions of the court. This construction was used in the aforementioned decree of 1946. The current state of the regulations has an explicit reference to it. The compulsory marital regime is aimed at protecting one of the spouses against the adverse actions of

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46 Fiedorczyk, above n 36, at 760–762.

47 This position was, for example, adopted by the Legislative Council to the Prime Minister in 1996. See *Stanowisko Rady Legislacyjnej w sprawie ustawodawstwa regulującego sytuację majątkową członków rodziny (Position of the Legislative Council on the Issue of Legislation Regulating the Property Situation of Family Members)* ('Kwartalnik Prawa Prywatnego', 1996) issue 4, 781.

48 M Łączkowska, 'Propozycje zmian regulacji ustawowego małżeńskiego ustroju majątkowego' ('Proposals of Amendments to the Statutory Marital Property Regime'), in P Wiliński (ed), *Prawo wobec wyzwań współczesności (The Law and the Challenges of Present Times)* (PRINTER, Poznań, 2004), 89.

49 M Szydłowska, *Ustrój rozdzielności majątkowej z wyrównaniem dorobków (The System of Separate Estates in Matrimony with Levelling of Gained Property)* ('Monitor Prawniczy', 2005) No 3, 145–146.

50 Smyczyński, above n 30, at 314–315; Szydłowska, above n 49, at 144.

the other, particularly in reference to the management of joint property. The 'compulsory' nature of the mechanism is such that the separate estates in matrimony are not the result of the will of the spouses but of the law (incapacitation or bankruptcy of a spouse) or a decision of the court (separation, as well as 'for important reasons' indicated by a spouse).[51]

The revision of the Family and Guardianship Code presented above has been one of the biggest changes after 1989 so far. It should be stressed that the amendments introduced are of fundamental nature for the functioning of family and society. However, it is difficult to agree with the individually voiced opinion about a 'true revolution' in family law.[52] On the contrary, the time it took to carry out the revision (15 years after the change of the system), its scope and, most importantly, the solutions adopted serve as a clear indication of the evolutionary manner of changes chosen by the Polish legislator. I believe it is justified to stress that the revision has been somewhat late. It does not change the fact, however, that the exercise is commonly extremely positively perceived. The few critical opinions refer to the specific solutions,[53] but not to the entirety of the regulation. In this way the old matrimonial regime, originating in socialist times, survived modifications. It is also worth noting, that the contractual matrimonial regimes, which were added to the Code, clearly refer to previous Polish regulations in the unification decree of 1946.

IV DIVORCE

Probably the greatest phenomenon relating to the continuation of the Family and Guardianship Code is keeping unchanged the provisions on divorce. Article 56 provided and still provides as follows:[54]

> '§ 1. If there has been an irretrievable and complete breakdown of matrimonial life between the spouses, either spouse may request the court to order the marriage dissolved by divorce
>
> § 2. However, despite the irretrievable and complete breakdown of matrimonial life, divorce is not permitted if it would be detrimental to the welfare of the minor children of both spouses, or if there are other reasons why the decision to divorce is contrary to the principles of social coexistence

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[51] These solutions are discussed by M Sychowicz, *Przymusowy małżeński ustrój majątkowy (Compulsory Marital Property Regime)* ('Przegląd Sądowy', 2006) No 1, 23–33.

[52] K Gromek, *Rewolucja w rodzinnym – co przyniosła nowela czerwcowa? (Revolution in Family Law – What Has the June Amendment Brought About?)* ('Edukacja Prawnicza', 2005) No 1, 16.

[53] Eg E Skowrońska-Bocian, *Rozliczenia majątkowe małżonków w stosunkach wzajemnych i wobec osób trzecich (Settlement of Accounts of Spouses in Mutual Relations and in Reference to Third Parties)*, issue 3, (Warsaw, 2005) 235–236 indicates the ambiguities which the amendment has not removed in terms of the spouse's liability to third parties.

[54] Translated by N Faulkner, *The Family and Guardianship Code* (CH Beck, Warszawa, 2010) 41.

> § 3. A divorce is not permitted, if it has been requested by the spouse who is the sole guilty party for the breakdown, unless the other spouse consents to the divorce, or the refusal to consent to the divorce is, in the given circumstances, contrary to the principles of social coexistence.'

Similarly, art 57 of the code has not been changed:

> 'Art. 57 § 1. In its ruling on divorce, the court rules on whether and which spouse is at fault for the breakdown.
>
> § 2. However, at a joint motion of the spouses, the court may waive a ruling on fault. In this case, this has the effect as if neither of the spouses is considered at fault.'

Over 50 years of validity of those provisions (in reality even longer, as the institution was similarly regulated in a unification decree in 1945 and in the family code of 1950[55]) allows us to raise a question about what the reasons for such a situation were. It is worth noticing that already in 1948 and then in 1963 Polish codifiers proposed to introduce a provision which would allow a decree of divorce to be pronounced on the joint application of the parties after 5 years of marriage, where the marriage was childless. This proposal was rejected first by the government, and then during parliamentary work.[56] The demands of liberalisation were also presented after the transformation in 1989. In 1995 Sejm rejected the relevant amendment. In such circumstances the old 'revolutionary' solutions based on Soviet law have now become a conservative anachronism.[57]

V CONCLUSION

The process of adapting the family code to the conditions of a modern society obviously does not end with the revisions discussed. Although it is stressed that the assessment of the compliance of the code regulations against the Constitution and standards of the Council of Europe is generally positive,[58] there are still many issues which call for discussion. The decisive role is played by the aforementioned Civil Law Codification Commission. Its former president, Z Radwański, whose term in office was for the years 2002–2010, has on numerous occasions underlined that the first role of the Commission is not to create a new civil code (which would require many years) but only to

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55 See more on the subject: J Winiarz, *Rozwód (Divorce)*, in: Piątowski (ed), above n 43, at 547–554.

56 Fiedorczyk, above n 4, at 644 and 664.

57 A Pacholska, *Rozwód a zgodna wola rozwiązania związku w prawie polskim na tle praw wybranych państw europejskich (The Divorce and the Consent on the Dissolution of Marriage in Polish Law and in Law of Selected European Countries)* ('Rodzina i Prawo', 2012) No 23, pp 21–24.

58 K Pietrzykowski, *Ocena stanu prawa rodzinnego w Polsce (Assessment of the State of Family Law in Poland)* ('Przegląd Legislacyjny', 2001) No 3, 178.

develop its assumptions.[59] According to the report of the Commission for the year 2014, work on the new civil code is more and more advanced. However, the end of that work is not close.

As for family law, a draft project to elaborate on it as one of the code books has just been commenced. One of the tasks is to determine whether family law is to be a part of the new code or whether it should remain a separate codification – with a general part added, of course. However, even this problem has not yet been solved, which, to my mind, is indicative of the advancement of efforts undertaken to create the new code. Although the so-called 'Green Book' was published on the expiry of the term in office of the 2002–2006 Commission, containing *de lege ferenda* proposals,[60] it must be remembered that this is still the very beginning. What is more, during the conference on the 50th anniversary of the Civil Code, which took place in Cracow in 2014, the resistance to quick changes was noticeable, and the participants did not see the need for urgent recodification. Even the situation of the matrimonial property regime, which was described earlier and is considered insufficient, is treated as less harmful in comparison to ill-conceived new regulation.[61] The necessity of changes does not raise any concerns, especially in divorce law. To support this idea, some refer to the modern Russian model of divorce law (sic!).[62] In this way history makes a circle: the old obligatory reception of Soviet models in the countries of the Eastern bloc loses ground to modern comparative law.[63]

Last but not least: in December 2015 the Civil Law Codification Commission was dismissed by the present Justice Minister for political reasons. The result of this decision is obvious: the process of re-codification of Polish family law is probably stopped for a long time.

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[59] Z Radwański, *Założenia dalszych prac kodyfikacyjnych na obszarze prawa cywilnego (Assumptions for Further Codification Efforts in the Area of Civil Law)* ('Państwo i Prawo', 2004) No 3, 7.

[60] *Zielona księga*, above n 23.

[61] R Frey, *Zasadność zmiany ustawowego ustroju majątkowego małżeńskiego (Legitimacy of Changing the Statutory Matrimonial Property Regime)*, in Stec and Załucki (eds), above n 28, at 346–347.

[62] Mazurkiewicz, above n 28, at 309–310.

[63] I would like to stress that I do not share the opinions presented in the work of J Quigley, *Soviet Legal Innovation and the Law of the Western World* (Cambridge, 2007) 103–107. The author tries to prove that Soviet family law, which he claims to be a progressive one, was a factor influencing the changes in family law in the West. See my review of the book: P Fiedorczyk, *Recenzja pracy: John Quigley, Soviet Legal Innovation and the Law of the Western World* ('Miscellanea Historico-Iuridica', 2009) vol VII, 264–268.

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PORTUGAL

AN ONGOING (R)EVOLUTION UNFOLDED STEP-BY-STEP: REDEFINITION OF THE LEGAL CONCEPT OF PARENTAGE AND PROMOTION OF CHILDREN'S AUTONOMY – AN OVERVIEW OF THE CURRENT DEVELOPMENTS IN THE PORTUGUESE LAW REGARDING CHILDREN'S RIGHTS AND AFFILIATION

Rute Teixeira Pedro[*]

Résumé

Les derniers mois ont connu une accélération des réformes législatives au Portugal concernant les enfants, les jeunes adultes et le droit de la filiation. L'objectif de cet article est d'examiner les changements engendrés par une cascade de lois adoptées au cours de cette période et de montrer les liens entre les réformes et les tendances jurisprudentielles dans ces domaines. Les éléments centraux de ces réformes seront mis en évidence, telle la mutation de la filiation légale qui subit un rééquilibrage entre vérité biologique et vérité sociologique ou, encore, l'élargissement de l'autonomie des enfants et de leur capacité décisionnelle. Parallèlement aux changements légaux, le rôle joué par les tribunaux portugais sur ces questions doit être souligné. De la séquence de ces événements, on peut déduire qu'une révolution est en cours et que de nouveaux développements pourraient se produire bientôt.

I INTRODUCTORY REMARKS

In the field of family law, after a period of changes concerning the marital legal framework[1] in the first decade of the twenty-first century, Portuguese

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1 On the one hand, changes in this field of family law took place through the amendments to the legal framework governing divorce in 2008. Divorce based on the fault of one spouse was eradicated from the Portuguese legal system by Law no 61/2008, dated 31 October 2008. As a consequence of this change of paradigm, besides mutual consent divorce, a new model of

lawmakers focused their attention on the Law concerning Children and Young Adults.[2] Indeed, in 2015 and 2016, several Laws were enacted in Portugal regarding many matters in that area of the law. In particular, in a short period of time – from September 2015[3] until March 2016[4] – some important changes took place, as a consequence of the entry into force of the following Laws: Law no 122/2015, dated 1 September 2015, which reshaped some aspects of the rules regulating financial support to adult or emancipated children;[5] Law no 137/2015, dated 7 September 2015, which extended the range of persons who are entitled to exercise parental responsibilities; Law no 141/2015, dated 8 September 2015, which introduced a new General Legal Procedure governing Civil Guardianship ('*Regime Geral do Processo Tutelar Cível*') and made the first amendment to the legal framework governing foster relationships ('*Apadrinhamento civil*') created by Law no 103/2009, dated 11 September 2009; Law no 142/2015, dated 8 September 2015, which introduced significant amendments to the Law on the Protection of Children and Young Adults exposed to danger enacted in 1999 (Law no 147/99, 1 September 1999); Law no 143/2015, dated 8 September 2015, which introduced a wholly revised legal framework concerning adoption, and, finally, the most recent Law no 2/2016,

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divorce – where the sole condition to obtain divorce is proof of the 'the irretrievable breakdown of marriage' (art 1781 of Portuguese Civil Code, hereafter referred as PCC), and where fault did not play a role as a factor that shaped or adjusted the economic consequences of divorce, as had happened in the past – came into force. Additionally, the same law marginally modified the rules governing the obligation of maintenance between former spouses, as well as the exercise of parental responsibilities. (Regarding the former, consider the brief overview in my work 'Family Solidarity and the Principle of Self-sufficiency – The Role Played by the Obligation of Spousal Maintenance: An Overview of the Portuguese Law' in *International Journal of Law, Policy and the Family*, Oxford Journals, Oxford University Press, Vol 25, Issue 2, August 2011, 244ff and 'doi: 10.1093/lawfam/ebr006'; regarding the latter, see below n 12. On the other hand, an important change took place in 2010, as the celebration of same-sex marriage was allowed by Law no 9/2010 of 31 May (for additional observations, see below Part II (b)).

2 This trend can be understood as a sign of a movement 'from partners to parents', to use the words of June Carbone, *From Partners to Parents. The Second Revolution in Family Law* (Columbia University Press, 2000).

3 Besides the changes we will refer to in this work, in January 2015, there was an amendment to the legal framework applicable to minors from 12 up to 16 years of age who practise an act qualified as a crime by the law (Law no 4/2015, dated 15 January 2015). An educative measure may be ordered for children and young adults in these circumstances to educate and reintegrate them into community life.

4 As Law no 2/2016, dated 29 February 2016, the most recent law we will refer to below, only came into force on the 1 March 2016.

5 The enactment of this law has put an end to dissenting interpretations about some material and procedural questions concerning financial support to young adults. Now it is expressly stated that the payment of financial support by a parent to a child, when it has been ordered during minority, will persist after the achievement of majority till the age of 25 years old, unless the education or training process of the child has already been completed before that date, or if it has been freely interrupted or if, in any case, it is proven – by the debtor – that the demand of support is unreasonable (art 1905, no 2 PCC). At the same time, it became clear that the parent who exclusively maintains an adult child – who is unable to be self-sufficient – has the right to judicially demand from the other parent a contribution to the maintenance and education of the common child, as it is expressed in the amended art 989, no 3 of the Portuguese Civil Procedure Code.

dated 29 February 2016 which, as is expressly declared, 'eliminates discrimination in access to adoption, to foster relationships and to the other family relationships'.

From this cascade of laws two major trends may be inferred, which will be considered in the next two parts of this work: on one hand, the emergence of a new concept of legal parentage (Part II), and on the other hand, the reinforcement of the autonomy and self-determination faculties of children (Part III).

In this overview of the latest developments in the Portuguese legal system, jurisprudence cannot be neglected. In point of fact, in recent years, important new tendencies have been noticed in family law in action, and, for the purpose of this chapter,[6] we will consider those which concern the visitation right and the adjudication of parenthood. As a consequence, we must consider the significant role courts are playing in the reinterpretation of existing frameworks, potentially illuminating the path for possible further legal changes (Part IV).

II THE DAWN OF A NEW CONCEPT OF LEGAL PARENTAGE

Besides biological parentage – rooted in blood ties that link persons who descend from each other or descend from a common ancestor (art 1578 PCC) – traditionally, the Portuguese legal system recognised only adoptive parentage – rooted in a sociological and volitional truth acknowledged by a judicial decision (art 1586 PCC). Since 2006, this 'intentional parentage', solely based on the intention 'to assume a parental role' for a child,[7] could also be based on

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[6] Beyond the limits of this chapter, there was an important decision adopted by the Portuguese Supreme Court in the area of family law, regarding matrimonial matters. By a leading decision dated 2 July 2015, this Court stated that, under the default regime of community of acquired property, the omission of the legal requirement established in art 1723 (c) PCC (intervention of the other spouse, in the purchasing document, to attest the origin of the resources used to pay the price of the acquisition) does not prevent the possibility of qualifying an asset onerously acquired, during marriage, as an asset owned only by one spouse, against the rule stated in artº 1724 PCC. It may be proven that a common asset was acquired only with resources of one spouse, even if the condition determined in art 1723 (c) was not met. As a consequence, the success in satisfying that burden of proof will dictate the change of the qualification of the asset: instead of being qualified as a common asset (as would be the case in the circumstance of omission of the above-mentioned requirement, in a literal approach to art 1723 (c)), it will be qualified as an asset owned only by one spouse (as was already articulated by some authors and judges, in the light of a teleological interpretation). This possibility is recognised on the grounds that no interest of a third person will be at stake. This decision, adopted with the aim of overcoming the divergence that existed about this issue (it is a so-called '*Acórdão de Uniformização de Jurisprudência*', no 12/2015), has a reinforced authority, as it is applicable to other cases that will be judged by Portuguese courts in the future (unless courts expressly state the reason for the deviation from the content of that decision).

[7] As is expressively summed up by Ingeborg Schwenzer, *Tensions Between Legal, Biological and Social Conceptions of Parentage* (Antwerpen-Oxford, Intersentia, 2007) 11.

the use of medically assisted techniques allowed by Law no 32/2006, dated 26 July 2006. But, in the light of the traditional framework applicable to these institutions, the family link built either through adoption or through non-natural procreation aimed to replicate biological parentage, as was evidenced in the conditions demanded for access to these relations. This scenario has recently been changing, as there has been a perceptible but gradual continuing replacement of the prominent biological approach by a model where the will to embrace a parental role and the effective performance of the tasks of caring for and raising a child play an increasingly important role.[8]

(a) Redefinition of the balances between biological and legal/sociological parentage in the amended rules on adoption

The Portuguese legal regulation of adoption has seen substantial changes in the past few months, which happened at two different moments. The first part of this legal transition took place with the enactment of Law no 143/2015 dated 8 September 2015.

In this initial intervention, lawmakers reshaped the structure of the institution of adoption. Indeed, prior to this law, two types of adoption were recognised in Portugal: full adoption ('*adoção plena*') and simple or restricted adoption ('*adoção restrita*'). In the former type, following the Latin aphorism '*adoptio naturam imitator*', the adoptee acquired the legal status of child of the adopters and, with her or his offspring became a member of the family of the adopters, and simultaneously the legal links to the biological family were cut.[9] However, if an adoption of the second type was decreed, these links were not cut, even if a new relationship was created with the adopter or adopters, who would exercise parental responsibilities. As a consequence, there would be legal coexistence of relations with both the biological and the adoptive families.

In 2015, lawmakers replaced this previous two-folded approach by a 'one-size-fits-all' solution, concerning adoption. Nowadays, adoption always produces the legal effects, mentioned above, of what was formerly known as full adoption. As a result, in all future adoptions, an adoptee will be legally treated as a child of the adopter(s)[10] and the previous links to the biological family are legally broken, with the only exception being the adoption of the

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[8] Considering a comprehensive analysis of the evolution of the legal grounds to establish parenthood from a comparative perspective, Guilherme de Oliveira unveils the 'fragilities' of the biological approach and stresses the presence of the above – in the text – mentioned new trends in the latest developments within the Portuguese legal system. See the noteworthy article by this Portuguese Professor, 'Critérios Jurídicos da Parentalidade', in Guilherme de Oliveira (ed), *Textos de Direito da Família para Francisco Pereira Coelho* (Coimbra, Imprensa da Universidade de Coimbra, 2016) at 278ff.

[9] An exception to this extinctive effect would occur if the adoptee was a child of the spouse of the adopter. This exception still applies within the present framework, where there is only one kind of adoption (as we will later explain).

[10] The Portuguese legal system recognises adoption by a single person and adoption by two persons forming a married or cohabiting couple. We will consider this point later in Part II (b) of this work.

stepchild by a married or cohabiting partner. In the light of the amendments to these regulations, the creation of an adoptive parentage implies the exclusion of the persistence of biological parentage, and it could be understood that now it represents an absolute and total predominance of the former over the latter, in contrast to what previously happened in the case of simple or restricted adoption. Notwithstanding, lawmakers introduced some flexibility into this radical approach, with the best interest of the child (adoptee) in mind. As it is laid down in the newly introduced article 1986, no 3 PCC, considering all the relevant details of the concrete circumstances (namely the age of the adoptee, her/his biological family situation), it is possible for the court to decide in favour of the maintenance of some kind of personal contact between the adoptee (or the adoptee and the adoptive family) and some members of the biological family, especially the pre-existing brothers and sisters. However, this possibility depends on the consent of the adoptive parents. As a consequence, it is clear that a new balance has been reached between biological and legal/sociological parentage in the amended rules on adoption.

At the same time, Law no 143/2015, dated 8 September 2015 approved 'the Legal Framework for Adoption Procedure' (the so-called '*Regime Jurídico do Processo de adoção*'). This completely new Act contains a considerable number of provisions governing the procedure to be followed in order to create a legal adoption relationship between adopter and adoptee. Although the *iter processualis* is similar to the previous one, lawmakers redesigned the overall structure, renaming the phases that the process involves, shortening the duration of some of those phases, establishing efficient tools to clearly identify the children who may be adopted and the adult who have expressed the desire to adopt, promoting cooperation between the courts, administrative authorities and other entities with responsibilities in this area of activity, and creating a mechanism for monitoring the relationship after its creation. As a consequence, the regulation has become clearer and is now in greater harmony with other legal solutions regulated in other laws. An example of this is the case of the measures aimed to promote the protection of children and young adults exposed to danger, also amended, in the same reformist wave of last year. As far as the efficiency and coherence of the system are concerned, the new framework may be regarded as a positive step.

Some months later, new changes were added to the ones produced in September 2015. The following section of this chapter will deal with the second part of the legal intervention in the legal framework governing adoption.

(b) Recognition of (almost complete) gender neutrality regarding the concept of parentage

In spite of the amendments introduced in September 2015, the conditions to be met by the adopters remained unchanged. As a consequence, in the case of joint adoption, the possibility of embracing a common parental project remained restricted to a married or cohabiting couple formed by a man and a woman.

Same-sex couples were not allowed to adopt, although a significant change took place in 2010, as the celebration of same-sex marriage was allowed by Law no 9/2010, dated 31 May 2010 following the previous recognition – in 2001, by Law no 7/2001, dated 11 May 2001 – of the legal effects of same-sex de facto unions. The only exception recognised in those two laws by Portuguese lawmakers to this movement towards equality of treatment between homosexual and heterosexual couples was, indeed, adoption (see art 3 of the Law no 9/2010, dated 31 May and art 7 of Law no 7/2001, dated 11 May 2001): neither married same-sex couples, nor cohabiting same-sex couples were entitled to simultaneously adopt a child.

In the context of the 2015 intervention in the legal framework of adoption, the majority of the members of the Portuguese Parliament opposed the removal of that prohibition.[11] A smaller, yet significant, change was produced by Law no 137/2015, dated 7 September 2015 that expressly broadened the circle of persons entitled to exercise parental responsibilities.[12] By the amendment of two articles (arts 1903 and 1904) and the introduction of a new article (art 1904-A) in the Portuguese Civil Code, it became clear that the spouse or companion of a parent could exercise parental responsibilities of a non-common child in the case of the decease, absence, inability or any other judicially decreed impediment of both biological parents. This right was recognised irrespective of the gender of the spouse or companion (even if she or he was a member of a same-sex couple), and priority was given to this solution to the detriment of attributing the exercise of parental responsibilities to a member of the (biological) family of the parents. This legal option was sought to better satisfy the best interest of the child, as it avoided the need for a bigger change to the environment in which the child had been living.

A new step was soon to be taken, as at the end of that year, elections were held and a new Parliament was elected, which was mainly in favour of the exclusion of the legal impediment of same-sex couples to adopt.[13] As a consequence, Law no 2/2016, enacted on 29 February 2016, which came into force the following day, eliminated discrimination in access to any family relationships. This law not only allowed same-sex couples to adopt but it also allowed them to demand

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[11] There had been a previous attempt in 2013. The concrete provisions of the law, already approved in general, were about to be submitted to the vote of the Members of the Portuguese Parliament, when it was decided, by majority, to hold a referendum, consulting the Portuguese people on the subject. The Portuguese Constitutional Court ruled that the holding of the referendum, in the exact terms which were proposed, infringed the rules and principles of the Portuguese Constitution (Decision no 176/2014, in www.tribunalconstitucional.pt/tc/acordaos/20140176.html).

[12] Since the Reform of 2008 (see n 1), as a general rule, the joint exercise of parental responsibilities applies, irrespective of parents being married (art 1901 PCC), cohabiting (art 1911 PCC), divorced (art 1905 PCC) or non-cohabiting (art 1922 PCC), in spite of some differences that still persist.

[13] Almost immediately, the parties on the left presented proposals to change the law, allowing same-sex couples to jointly adopt. Some of them also included provisions concerning medically assisted procreation, the process of discussion of which was separate. This discussion in detail has not yet taken place in Parliament, due to the need for further research and consultations.

the establishment of a foster relationship with a child, in the exact same circumstances applied to heterosexual couples.[14]

Even if Law no 2/2016, as is expressly stated in its text, provides for the elimination of gender discrimination in the access to any family relationships, differences in treatment still persist. Access to medically assisted procreation continues to be denied to same-sex couples, as no amendments were introduced to Law no 32/2006, dated 26 July 2006, which governs that matter. In Portugal, this method of reproduction obeys the principle of subsidiarity and it is still only accessible to married heterosexual couples or cohabiting heterosexual couples, if, in the latter case, they started to live together at least 2 years previously. It is highly likely that there will be a change regarding these regulations as five parties presented proposals for amendments to the medically assisted procreation regulations, in order to broaden access to medically assisted methods of procreation not only to same-sex couples but also to single persons.

Envisaging the transition that has already been gradually happening, in different moments in time, and through diverse means (not only through the constitution of an adoptive link, but also through the entitlement to the exercise of parental responsibilities and the creation of other family relationships,[15] such as fostering relationships), on one hand, and the foreseeable future developments,[16] on the other hand, we may conclude that a revolution in the legal concept of parentage is under way. The manifold steps taken by Portuguese lawmakers do not make apparent the major importance of the sequence of legal events that have already taken place and the great significance of the overall result of the complete process when it is concluded.[17]

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[14] In the case of joint adoption by cohabiting couples, cohabitation has to have lasted at least 4 years at the moment of the application for adoption (art 1989 PCC).

[15] Many Portuguese authors still refer to this kind of relationship as similar to family (in Portuguese '*relações parafamiliares*'), and but not as family. This perspective is inspired by the provision of art 1576 of the Civil Code. In the light of this article, which dates back to 1966 (the date of the enactment of the Portuguese Civil Code) and has remained unchanged since then, a family is a community composed of people linked by marriage, kinship and adoption. Consequently, any other relationship that falls outside this perimeter drawn up by lawmaker in the Civil Code does not qualify as family, in spite of the legal recognition that has potentially been awarded to it in recent decades. It is the case of a 'de-facto union' (civil cohabitation), in spite of the increasingly wide legal effects attached to it. The Constitution of the Portuguese Republic allows a different approach, considering the broad provision of art 36, no 1 (that enshrines the right to form a family, without giving a *numerus clausus* of types of family) and the normative potential that can be derived from the recognition of the right to development of personality in art 26, no 1.

[16] Indeed, the process to enact new provisions concerning medically assisted procreation is already under way in order to enlarge the circle of persons who may benefit from these medical techniques (encompassing every person older than 18 years old and capable of exercising her or his rights). Consequently, it is predictable that in Portugal, in the near future, the principle of subsidiarity of medically assisted procreation will be removed and replaced by the complementary or alternative principle of these reproduction methods. See observations in n 13.

[17] In the study mentioned above in n 8, Guilherme de Oliveira not only describes the evolution that has already happened in Portugal, but also notes that the Portuguese legal system 'contains

III PROMOTION OF AUTONOMY AND SELF-DETERMINATION FACULTIES OF CHILDREN

In recent years, the transformation of the concept of child has been evident in the Portuguese legal system, in line with the principles and rules laid down in some important international treaties, as is the case of the 1989 United Nations Convention on the Rights of the Child[18] and the 1996 European Convention on the Exercise of Children's Rights.[19] As a consequence, the legal framework was increasingly pervaded by the idea that children are legal subjects entitled to exercise (fundamental) rights in a gradually more autonomous way in accordance with their age and maturity.[20]

This change became apparent in the terminology options adopted by lawmakers in 2008. By the force of Law 61/2008, dated 31 October 2008, legal expressions such as 'minor' ('*menor*') or '*patria potestas*' ('*poder paternal*') were respectively replaced by expressions such as 'child'/'child and young adult' ('*criança*'/'*criança e jovem*') and 'parental responsibilities' ('*responsabilidades parentais*'). But a lot remained to be done.

(a) Children's rights to be consulted and listened to

As a corollary to the new conception of children, it is required that children should be put in 'a decisional position on important issues'.[21] Therefore, in accordance with art 12 of the Convention on the Rights of the Child and to art 6(b) and (c) and art 12, 2(d) of the European Convention on the Exercise of Children's Rights, Portuguese Law recognises that children have the right to be consulted and to express their views on relevant matters that affect their lives, and that these views must be taken into account in the definition of their best interests.

As a consequence, 'consultation and participation of the child' is one major guiding principle of the decision-making process of public authorities (judicial and administrative) within the proceedings affecting a child, as is stated in art 4, 1(c) of the Law no 141/2015, dated 8 September 2015 that introduced a new General Legal Procedure Governing Civil Guardianship ('*Regime Geral do Processo Tutelar Cível*') and in art 4(j) of the law that contains the provisions governing the measures to protect Children and Young Adults exposed to

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the typical ingredients' for further evolution (visible in other legal systems), where parenthood is even more detached from the traditional biological link (for instance, by recognising multiple parenthood). Above n 8, 303 and 304.

18 It came into force in the Portuguese legal system on 21 October 1990.

19 It came into force in the Portuguese legal system on 1 July 2014.

20 On this 'gradualist model' that replaced the 'general inability model' concerning children, see Clara Sottomayor, 'O direito das Crianças – um novo ramo de direito', in *Temas de Direito das Crianças* (Coimbra, Almedina, 2014) 58ff.

21 Richard Blauwhoff, *Foundational Facts, Relative truths. A Comparative Law Study on Children's Right to Know their Genetic Origins* (Antwerpen-Oxford, Intersentia, 2009) 5.

danger enacted in 1999 (Law no 147/99 dated 1 September 1999, amended by Law no 142/2015 dated 8 September 2015).

Even if it is not an innovation introduced by the reforms of 2015, it must be highlighted that lawmakers took the opportunity to elaborate on the conditions of the exercise of that right, in art 5 of the Law no 141/2015 dated 8 September 2015. The proceedings to hear the child, which may happen in a specially arranged judicial session, should be preceded by the provision to the child of clear information about the meaning and scope of those proceedings (art 5, no 2 and no 3). This hearing must take place in harmony with her or his specific situation, providing suitable conditions for that purpose to ensure, inter alia, the spontaneity and the authenticity of the responses obtained. With regard to space and ambiance, the place where the child will be heard has to be informal, friendly and non-intimidating to a child of her or his age and particular personal characteristics (art 5, no 4 and no 7). Lawmakers state a preference for the non-use of professional organisations by the persons participating in the proceeding (art 5, no 5). The child may be assisted by a specialised professional during the proceedings. The examination is undertaken by the judge, and the Public Officer or the lawyers are allowed to ask further questions (art 5, no 7).

(b) The autonomous right of children procedurally to act on their own initiative

Since 1977, in compliance (*avant la lettre*) with art 9 of the European Convention on the Exercise of Children's Rights, art 1881, no 2 of the PCC states that the child may be appointed a special representative, in proceedings affecting her or him, whenever the holders of parental responsibilities are precluded from representing the child as a result of a conflict of interest between them and the child, or between the child and her or his brothers or sisters.

Further innovative steps were taken in the same direction in 2015 in the new General Legal Procedure governing Civil Guardianship. On the one hand, it is stated that the judicial authority must appoint a separate lawyer to represent the child, whenever she or he, having the appropriate maturity, makes that request to the Court (final part of art 18, no 2 of the Law no 141/2015 dated 8 September 2015). On the other hand, legislators recognised a procedural right in a child older than 12 to act on his or her own initiative, alongside the recognition of a similar right in the child's ascendants, brothers/sisters, legal representative and the Public Prosecutors' Office. This possibility of acting per se, on her or his behalf, within Legal Procedures governing Civil Guardianship represents an exception to the rule stating that persons under 18 years old are unable to exercise their rights (art 122 and art 123 PCC) and constitutes a sign of a gradual acquisition of that ability. As far as this faculty of self-determination is concerned, there are still some unclear areas. How will it be operated? The law is silent about the details of the newly introduced faculty. May a child older than 12 act alone in the judicial proceedings or should there

be a special representative? The latter solution was expressly adopted in a similar circumstance in a different law.[22] What is the meaning of the lack of an equivalent provision in Law no 141/2015 dated 8 September 2015? Is this a case of negligent inaccuracy by the lawmaker or intentional omission, allowing the child the chance to act alone? The answer will be discovered as the law is developed by the jurisprudence.

(c) Children's right to know their genetic origins

Finally, as it is an important issue for their future life, it is argued that children should be given the opportunity to decide how to conduct their choices and actions regarding the identification of their biological parents, provided that some conditions are met.

Indeed, in line with international human rights treaties,[23] in Portugal there is widespread consensus that the 'right to know one's origins' exists and deserves constitutional and legal protection. In that sense, some fundamental rights are invoked: from the right to form a family that encompasses the right to legally establish the corresponding family bonds (art 36, no 1 of the Constitution of the Portuguese Republic, ie CPR), the right to personal integrity (art 25 CPR) and personal identity (art 26, no 1 CPR), and, finally, the right to the development of personality (art 26, no 1 CPR).

Nevertheless, the rule, within the frameworks of adoption and medically assisted procreation, is quite the opposite, as the legal solutions in those cases did not award children or adults a general right to know their genetic origins.[24] As far as 'full adoption' was concerned a strict rule of confidentiality applied (art 1985 PCC) and the adoptee could not seek to obtain information about her or his biological parents. Likewise, in the light of art 15, no 2 of Law no 32/2006, dated 26 July 2006, a child who has been born as a result of a heterological medically assisted process may have access to her or his genetic information, except for the identification of the gamete or embryo donor(s). As a consequence, all the participants in the process are obliged to respect the confidentiality of the identity of the donor as well as of the medically assisted

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[22] That is the solution adopted in art 10, no 2 of Law no 103/2009 dated 11 September 2008 regulating foster relationships ('*Apadrinhamento civil*').

[23] For this purpose, art 8 of the European Convention of Human Rights (which came into force in the Portuguese legal system on 9 November 1978) and art 7 of the United Nations Convention on the Rights of the Child should be considered.

[24] Apart from the two situations referred to in the text (adoption and medically assisted procreation), in other circumstances, such as the case of 'misattributed' fatherhood or motherhood, it is possible to challenge established fatherhood or motherhood, and afterwards to request the judicial adjudication of the biologically true parenthood. The provisions governing these possibilities have been integrated into the Portuguese Civil Code since its enactment (in 1966), although they were amended in 1977, in order to broaden the scope of the right to challenge established (and mostly, 'legitimate', as it was based on the 'wed-lock birth' rule) fatherhood and motherhood. There are still some time obstacles to the exercise of these rights. These obstacles are presently under discussion by Portuguese authors and there is a noticeable divergence in case-law about them (see below Part IV(b) of this chapter).

reproduction process itself, and the birth certificate may not contain any reference to that reality (art 15, no 5). Notwithstanding the preceding rule, information on whether there are legal impediments to a planned marriage[25] may be requested from the National Council of medically assisted procreation. This information is provided to the potential spouses, with respect to the principle of confidentiality regarding the identity of the donor, unless she or he expressly states otherwise. A safeguard clause was included in art 15, no 4, acknowledging the exceptional possibility of waiving the confidentiality principle and obtaining this information irrespective of a concrete intention to marry and regardless of the consent of the donor: the demand must be formulated in a judicial action and the court may authorise that the information may be given, bearing in mind the grounds presented for that request.[26]

In the reform movement at the end of 2015, signs of greater protection of children's right to know their origins are evident within the adoption framework. Indeed, law no 143/2015 dated 8 September 2015 contains a provision (art 6) regulating access to that information by the adoptee. In number 6 the possibility is acknowledged that, in exceptional cases and based on serious reasons – especially when health reasons are concerned – a court may allow access to some elements of the personal history of the adoptee, upon request of the adoptive parents and after the consultation of the Public Prosecutors' Office Magistrate. Additionally, as is stated in the following number, this Magistrate may also solicit, ex officio, from the court that kind of information specifically when questions of health are at stake. In both cases, several conditions have to be met:

(a) a request must be formulated by a legitimate person (adopters, legal representatives, in the first case, or Public Prosecutors' Magistrate, in the second case) who is not the adoptee;
(b) serious reasons (not specified in the first case, limited to health reasons in the second case) must be presented to justify the informational need; and
(c) a judicial evaluation is required and an order of a court has to be issued, in order to make genetic information available.

Furthermore, there is another important rule regarding this subject that must be stressed. In point of fact, the new solution laid down in art 6, no 1 and no 2 represents the reversion of the principle applicable to this issue, allowing the disclosure of genetic information (without exception) to children over a

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[25] In the light of art 1602 and 1604 PCC, biological descendants and ascendants and some collateral relatives (brothers and sisters) cannot marry each other and some other biological collateral relatives (uncles/aunts and nieces/ nephews) may marry only if due authorisation is obtained.

[26] Rafael Vale e Reis is the author of a comprehensive study in Portuguese on the subject of the right to know one's own origins, in the light of the regime prior to the 2015 amendments. For a brief analysis in English of that regime, see the comparative study by the same author, 'The Right to Know One's Genetic Origins: Portuguese Solutions in a Comparative Perspective' (2008) 16 European Review of Private Law 5, Kluwer Law International, 779ff.

legally-decided age. Once the adoptee is older than 16, she or he may expressly request information about her or his biological origins and public authorities (social security agencies) have the duty to deliver it, simultaneously granting the appropriate advice and technical support in that process. In cases in which the adoptee over 16 is still under 18 years old, the consent of the adoptive parents or the legal representative is required and professional support is mandatory. It must be highlighted that this right does not depend on the presentation of any reasons, nor on the evaluation of its reasonability by any authority. It is a right that may be exercised *ad nutum* by a child older than 16 and freely without any further conditions, after the age of 18.

Despite the significance of this rule, it must be emphasised that the legal strength of the right to know one's genetic origins differs within Portuguese law, varying in accordance with the concrete context within which it is considered.

IV THE FUNDAMENTAL ROLE PLAYED BY JURISPRUDENCE IN THE CURRENT DEVELOPMENT OF THE LAW: A SIGN OF FURTHER LEGAL CHANGES?

Not only has the 'law in books' changed in the past few months, but jurisprudence has also been actively contributing to the evolution of the legal solutions applicable in the family field, especially regarding children and affiliation. Although the limits of this chapter do not allow either an in-depth or an extensive overview, we will highlight two major trends that are evident in recent Portuguese case-law concerning the matter under discussion.

(a) Broadening legal boundaries to the recognition of a right to personal contact between children and other persons

As is stated in art 1887-A of the Portuguese Civil Code, parents cannot unjustifiably deprive children of having contact with their sisters or brothers and ancestors. This provision was added to the Civil Code, by Law 84/95, dated 31 August 1995 and it is envisaged as a legal attempt to protect the family beyond the nuclear unit formed by parents and children, recognising the importance of other persons for the harmonious and complete development of children, especially in a sociological context where the number of divorces and split families is increasing. Manifold questions have arisen from this simple provision.

First, it can be asked: should this rule be envisaged as a mere limit to the exercise of parental responsibilities and to the ability with which parents are empowered to control and to decide with whom their children may be in contact? Or does it award a right to the children, on the one hand, and a right to the grandparents and brothers/sisters, on the other, to be in contact with each other? Judicial decisions are tending to move from the acceptance of the first approach to the adoption of the second perspective, recognising the entitlement

of those persons to a right to visit the children. Consequently, they accept the procedural legitimacy of those persons, namely to intervene in the judicial action regarding the regulation of the exercise of parental responsibilities, in order to regulate the exercise of that visitation right in a similar way as the visitation right of a parent who does not cohabit with her or his child.[27] It goes without saying that the guiding principle in this issue, as in any other matters concerning children, is the best interest of the child: whenever this interest is at stake, the visitation right is removed from those persons.

Secondly, it has been discussed in Portuguese jurisprudence whether this provision exhaustively defines the persons to whom the rule is applicable or whether it allows an interpretation that legitimates the inclusion of other persons in its normative solution, as long as those other persons have significant importance to the child. In line with the jurisprudence of the European Court of Human Rights concerning the respect for 'family life' enshrined in art 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms,[28] Portuguese courts lean towards the second perspective. As a consequence, there are judicial decisions that apply art 1887 PCC to persons who are neither ascendants nor brothers or sisters of the child, irrespective of the existence of a biological link between them. In the light of this approach, not only may other blood-relatives such as an uncle or aunt be entitled to visit the child, but also non-relatives, when they are considered a primary reference to the child.[29]

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[27] Consider, for instance, the decision of the Court of the Second Instance of Coimbra dated 14 January 2014 (www.dgsi.pt/jtrc.nsf/c3fb530030ea1c61802568d9005cd5bb/949e885bd730306b80257c66003c3323?OpenDocument), the Decisions of the Court of the Second Instance of Lisbon dated 2 December 2009 (www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/8cd4a7c9dd119a0180257693004e66a5?OpenDocument&Highlight=0,1887-A) and 8 July 2004 (www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/c993199e07028ca680256f420054c523?OpenDocument&Highlight=0,1887-A) and, finally, the leading and often cited decision (which even if it is not generally binding has inspired many other decisions later adopted by different Portuguese courts, as is expressly recognised in their texts) of the Portuguese Supreme Court of Justice dated 3 March 1998 (www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/87bb42a7f2cf6b24802568fc003b7d93?OpenDocument&Highlight=0,1887-A,Direito,de, visita).

[28] See, for instance, the Decision of the Court of Second Instance of Porto dated 7 January 2013 (www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/b8d307bda3e9296d80257afc004fc804?OpenDocument).

[29] See, for example, the decision of the Court of the Second Instance of Coimbra dated 20 June 2012 (www.dgsi.pt/jtrc.nsf/c3fb530030ea1c61802568d9005cd5bb/94d01a78963e00ea80257a370048565d?OpenDocument) that awarded the right to visit to a 'godfather', who had been taking care of the child and, consequently, should be qualified as her 'primary caretaker'.

(b) Overcoming time obstacles to the adjudication of parenthood: judicial thinking outside the box?

In the field of affiliation law, many issues give rise to significant judicial divergence,[30] but within the scope of this work we will consider solely the question concerning the existence of time limits to the exercise of the right to judicially request the adjudication of parenthood.

In Portugal, except for the challenging of motherhood (art 1807 PCC), the law stipulates deadlines that must be observed when an affiliation action is commenced (art 1817 PCC, concerning proceedings for the adjudication of motherhood and fatherhood, and art 1842 PCC, concerning the action for the challenge of the presumed fatherhood in the light of the presumption *pater is est*). Although Law no 14/2009, dated 1 April 2009 amended arts 1817 and 1842,[31] in order to extend the time period in which parenthood may be established or challenged, the new framework did not silence critics. Indeed, there are still significant divergences within the Constitutional Court and the Supreme Court of Justice regarding the conformity of the new solutions to the Constitution of the Portuguese Republic. There are many recent decisions in which these courts judge the amended articles as being in contradiction to the constitutional rules and principles,[32] as it is considered that the stipulation of

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[30] One controversial question that remains unanswered is concerned with the legitimacy of the use of compulsion in DNA testing. Legal texts do not provide an express provision governing that issue. Portuguese courts do not adopt a uniform reaction to the refusal to submit to those scientific tests. Usually they do not order the use of force to compel a person to undergo the exam (during the 1990s, some decisions decreed compulsion in blood testing). Instead, judges evaluate the meaning of the refusal and by that fact they may be convinced of the truth of the disputed fatherhood or motherhood. Sometimes they reverse the burden of proof, in the light of art 344, no 2 PCC, demanding that the person under investigation should demonstrate she or he is not the mother/father, otherwise the question of motherhood or fatherhood will be judicially adjudicated against that person.

[31] This amendment took place as a consequence of the decision of the Constitutional Court no 23/2006, dated 8 February 2006, in which the Court declared the unconstitutionality of the rule contained in art 1817 PCC, in so far as it limited the exercise of the right to investigate parenthood to a period of 2 years after attainment of the age of majority as it represented a restriction of arts 16, no 1 (regarding scope and interpretation of fundamental rights), 36, no 1 (right to form a family) and 18, no 2 (that enshrines the principle of proportionality that must be observed when the restriction of a fundamental right is needed to safeguard other constitutionally protected rights and interests) of the Constitution of the Portuguese Republic. As binding force is generally granted to this kind of decision of the Constitutional Court, the legal provision could no longer be applied. Consequently, there was a period (between the dates of entry into force of this decision of the Constitutional Court and the Law 14/2009, dated 1 April 2009) in which no deadline was applied.

[32] For some examples of Decisions that judged the new legal framework enshrined in arts 1817 and 1842 PCC to be unconstitutional, consider the Decisions of the Constitutional Court no 323/2013, dated 31 May 2013, no 78/2012, dated 9 February 2012 and no 24/2012, dated 17 January 2012, regarding its application to actions already presented to the court at the time of the entry into force of the Law 14/2009 (all available on the site of this court at www.tribunalconstitucional.pt/tc/acordaos, searching by the number of the decision); and the decisions of the Supreme Court of Justice dated 16 September 2014, 14 January 2014, 27 January 2011, 8 June 2010 and 7 July 2009 (available at www.dgsi.pt/jstj.nsf/Pesquisa+Campo?OpenForm, searching by the date of the decision). All these decisions have a restricted

the deadlines, as they were enshrined with a short time length, represent an unconstitutional restriction to the fundamental rights to form a family, to personal identity, to personal integrity and to the development of personality (arts 36, no 1, 25, and 26, no 1 of the CPR, correspondingly) of the child.[33]

A recent decision of the Portuguese Supreme Court of Justice (dated 18 February 2015[34]) must be highlighted, where this court expresses its acceptance of an innovative and non-orthodox approach as an answer to this challenging question:[35] it admits that in certain cases, where the well-timed exercise of the right to investigate and to establish the links of parenthood may be regarded as abusive (if it happens only after an improvement to the financial fortune of the father or mother investigated), and even if the parenthood may be judicially adjudicated (if there is convincing proof in that sense), the court may limit the legal effects attached to that adjudication. Thus, in spite of the recognition of parenthood, it will not produce any material advantages (namely within succession law) in favour of the child, as the entitlement to economic rights associated with the legal status of child will be excluded. The acceptance of this solution, in the absence of any legal change, would represent a revolution as it would imply a deviation from the general principle of the unity of the personal state of each person, which dictates that whoever is recognised as the child of another person is entitled to that particular *status* for all legal effects, including patrimonial effects.

V CONCLUDING REMARKS

In Portugal, in the past few months a renewed focus on the legal framework concerning children, young adults and affiliation has been noticed. From the brief overview of the current developments of the Portuguese Law, it may be concluded that major changes have been taking place in a gradual process composed of alterations in the law and variations in the way the law is interpreted and applied. New balances between biological and sociological parentage have been reached, higher degrees of autonomy, informational possibilities and decisional faculties have been awarded to the children, and

binding force, as they only apply to the case for which they were adopted. In spite of the numerous decisions cited above, there are also many decisions that adopt the opposite point of view (see next footnote).

33 There are many decisions that may be cited to illustrate the opposite perspective, in which the courts did not judge that there was any contradiction regarding the Constitution in those provisions. Consider, for instance, the Decisions of the Constitutional Court no 302/2015, dated 2 June 2015, no 547/2014, dated 15 July 2014, no 441/2013, dated 15 July 2013, no 515/2012, dated 6 November 2012 and no 401/2011, dated 22 September 2011 (all available on the site of this Court at www.tribunalconstitucional.pt/tc/acordaos, by searching for the number of the decision), and the decisions of the Supreme Court of Justice dated 22 October 2015 and 28 May 2015 (available at www.dgsi.pt/jstj.nsf/Pesquisa+Campo?OpenForm, by searching for the date of the decision).

34 www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/b6da6b6989aa04b780257df0004dc1e6?OpenDocument.

35 The Portuguese Supreme Court of Justice expressly reveals that its source of inspiration is the provision in the Macao Civil Code.

past differentiations are being abolished. Alongside a cascade of laws enacted in the last months, the role played by Portuguese courts was emphasised. From the sequence of events it may be inferred that a revolution is in course, and, as new amendments may be foreseen, it may be said that it is an ongoing revolution.

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PUERTO RICO

SAME-SEX MARRIAGES AND OTHER ISSUES

Pedro F Silva-Ruiz[*]

Résumé

La question du mariage pour tous a suscité la controverse à Porto Rico, l'opposition venant principalement de l'Église catholique. Quoi qu'il en soit, le droit de Porto Rico dépend ultimement des décisions de la Cour suprême des États-Unis. C'est ainsi que la décision de cette Cour dans *Obergefell c. Hodges*, favorable au mariage entre personnes de même sexe, s'applique à Porto Rico. Non seulement n'y a-t-il plus d'obstacle à de telles unions, mais il n'y a désormais aucune base légale qui permettrait à un état de refuser un mariage entre personnes de mêmes sexe qui a été célébré légalement dans un autre état. Le présent texte s'attarde également à quelques modifications au Code civil, incluant les nouveaux frais judiciaires qui s'appliquent, notamment, aux affaires familiales.

I INTRODUCTION

This report about family law in Puerto Rico in 2015 mainly covers the subject of gay marriage or same-sex marriage.

II GAY MARRIAGE OR SAME-SEX MARRIAGE

As mentioned in the report for the year 2014 (published in 2015[1]), on 16 January 2015 the US Supreme Court granted a petition for a writ of certiorari to review a federal appeals court decision upholding Michigan's ban on marriage for same-sex couples. The petition was filed by a female couple. The Supreme Court of the United States of America decided, 26 June 2015, the case of *Obergefell v Hodges, Director, Ohio Department of Health*[2] by a 5-4 vote.[3]

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1 Pedro F Silva-Ruiz 'Support, Lesbian Adoption, Same-Sex Marriage and Child Abuse' in Bill Atkin (ed) *The International Survey of Family Law 2015 Edition* (Jordans, Bristol, 2015) 259.

2 *Obergefell v Hodges, Director, Ohio Department of Health* 135 S Ct 2584, 192 L Ed 2d 609, 576 US ____ (2015). Together with *Tanco v Haslam, Governor of Tennessee; Deboer v Snyder, Governor of Michigan; Bourke v Beshear, Governor of Kentucky*, also on certiorari.

3 Associate Justice Kennedy delivered the opinion of the court, in which Ginsburg, Breyer,

The states of Michigan, Kentucky, Ohio and Tennessee define marriage as a union between one man and one woman. The petitions, 14 same-sex couples and two men whose same-sex partners are deceased, filed suits in their home states in the Federal District Courts. All of them claimed that respondent state officials violated the Fourteenth Amendment of the US Constitution by denying them the right to marriage or to have marriages lawfully performed in another state given full recognition. Each District Court ruled in the petitioners' favour. The Sixth Circuit consolidated the cases and reversed.[4] The Supreme Court stated:[5]

> 'These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. *Baker v Nelson* must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalided to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.'

Thus, there is no lawful basis for a state to refuse to recognise a lawful same-sex marriage performed in another state on the ground of its same-sex character.[6]

The case brought on appeal from the US District Court of Puerto Rico before the US Court of Appeals for the First Circuit, *Conde Vidal, et al v Ruis-Armendáriz, Secretary of Health of the Commonwealth of Puerto Rico*,[7] needs no particular attention any longer as *Obergefell v Hodges* takes care of it: same-sex marriage is lawful.

The Department (Ministry) of the Family of the Commonwealth of Puerto Rico issued an Administrative Order (no 2016-01) (July 2015) stating that it can no longer discriminate against same-sex couples who want to *adopt* children.[8] On

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Sotomayor, and Kagan, JJ, joined. Chief Justice Roberts filed a dissenting opinion, in which Scalia and Thomas, JJ, joined. Scalia, J, filed a dissenting opinion, in which Scalia, J, joined. Alito, J, filed a dissenting opinion, in which Scalia and Thomas, JJ, joined.

4 772 F 3d 388, reversed.

5 *Obergefell v Hodges, Director, Ohio Department of Health* 135 S Ct 2584, 192 L Ed 2d 609, at 631.

6 At 192 L Ed 2d 609, 631 of the Opinion of the Court; 'the Court … holds same-sex couples may exercise the fundamental right to marry in all States.'

7 Appeal no 14–2184. Judgment: entered 8 July 2015; 'we [US Court of Appeals for the First Circuit] vacate the District Court's Judgment in this case and remand the matter for further consideration in light of *Obergefell v Hodges* …, 2015 WL 2473451 … we agree with the parties' join position that the ban is unconstitutional. Mandate to issue forthwith.' Mandate: 18 July 2015; '… this constitutes the formal mandate of this court'.

8 'Family Dept. Clears Way for Same-Sex Couples Seeking to Adopt' *San Juan Star* (newspaper), Puerto Rico, 14 July 2015. In all civil judicial processes of adoption the appearance of the Department of the Family of the Government of Puerto Rico is indispensable.

the other hand, the Permanent Commission of the Conference of the Catholic Bishops criticised the decision rendered by the US Supreme Court decision on same-sex marriage (*Obergefell*).[9]

III THE CIVIL CODE

During the last part of the month of November 2015, the President of the Senate of Puerto Rico announced that in December of the same year, a revised Civil Code[10] would be introduced for the consideration of the legislative assembly. In the end, it was not filed.

IV NEW RATES (ARANCELES) TO BE PAID AT THE MOMENT OF FILING A NEW CASE OR FOR SPECIAL SERVICES RENDERED

A few months ago during 2015,[11] the Supreme Court approved new rates, family law cases included, to be paid at the moment of filing a new case or for special services rendered. Some judges filed dissenting opinions:[12]

> 'Access to justice has been defined as the set of conditions that allow the equal use of laws and procedural mechanisms to prevent the violation of rights, to secure legal remedies and to resolve controversies. There can't be access to justice if you can't even get a court to hear your case nor if you don't even know that such a thing is possible.'

As the legislative assembly did not act, upon the notification of the Supreme Court the new rates are now in force.

V CASE-LAW

Act no 2015 of 29 December 2009 (Senate Bill 1195) amended arts 113, 114, 115, 116 and 117 of the Civil Code,[13] as amended, 'in order to establish the presumptions of paternity and maternity, and the right to challenge them;

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9 'CEP afirma determinación del Tribunal Supremo de E.U. atenta contra valores de P.R.', published in *El Visitante* (the newspaper of the Roman Catholic Church) San Juan, Puerto Rico, 5–11 July 2015.

10 One of the books of the Civil Code deals with the family, including marriage (now allowed to persons of same sex).

11 2015 TSPR 21 (9 March 2015).

12 L Fiol Matta *Access to Justice and the Courts* (Trinity Washington University) pp 12–13, http://www.ramajudicial.pr/Prensa/Galerias/2015/02-04-15c/doc/Access-Justice-Courts.pdf. See the dissenting vote of Pabón Charneco, J; two other Associate justices joined. In my opinion, the dissenters are correct.

13 31 LPRA 461, 462, 463, 464 and 465.

indicate who can commence a proceeding to challenge; fix the term to exercise such right; and to provide the retroactive effect of the Act in cases before the consideration of the court'.[14]

They read:

'1. Art. 113 [sect. 461] – amended to read as follows:

"Presumption of Paternity and Maternity

A man is presumed to be the father when he and the mother of the children are married to each other and the children are born during the marriage, and when the children are born within three hundred days after the marriage is terminated.

Voluntary acknowledgment creates a presumption of paternity in favor of the recognizer.

Child delivery determines maternity."

2. Art. 114 [sect. 462] – amended to read as follows:

"Persons entitled to challenge paternity

The following persons are entitled to challenge paternity:

(1) The presumed father;

(2) The biological father;

(3) The mother; and

(4) The child, *pro se* or through his/her legal representative."

3. Art. 115 [art. 463] – amended to read as follows:

"Persons entitled to challenge maternity

The presumption of maternity may be challenged, be it due to simulated delivery or due to an inadvertent switch of the child during or after childbirth. The following persons are entitled to challenge the presumption of maternity:

(1) The presumed mother;

(2) The biological mother;

(3) The child, *pro se* or through his/her legal representative;

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[14] Official translation.

(4) The presumed father."

4. Art. 116 [art. 464] – amended to read as follows:

"Challenge by heirs

The heirs of any person entitled to challenge the presumption of paternity or maternity may only challenge the legitimacy of the child in the following instances:

(1) If the person entitled to challenge has died before the expiration of the period fixed for initiating his/her action in court.

(2) If he/she shall have died after filing his/her action without having desisted from it.

(3) If the child was born after the death of the husband."

5. Art. 117 [sect. 465] – amended to read as follows:

"An action to challenge presumption of paternity or maternity by the legal father shall be filed within a prescriptive term of six months from the date that he learns of the inaccuracy of the filiations or from the date of approval of this Act, whichever is later.

If the action to challenge the presumption of paternity or maternity by the biological father or mother, as well as by the legal mother, shall be filed within a prescriptive term of one year counted from the date the birth of the child is registered in the Vital Statistics Registry.

When the action for challenge involves a child that has not reach legal age, the Court shall safeguard the priority interest of the State to protect children over the interest of the presumed father or the presumed mother to conform legal reality to biological reality."

6. Sect. 6 of the Act ordered that 'all actions to challenge parentage pending before the court shall fall under the application of the provisions of this Act'.

7. Sect. 7 (effectiveness). 'This Act shall take effect thirty (30) days after its approval.'

In the case of *Rodriguez-Quintana v Rivera-Estrada*,[15] the Supreme Court stated that the issue is when the term of caducity[16] of 6 months to exercise an action that challenges (impugna) paternity starts. The Supreme Court ruled that

[15] 2015 DTS 036; 2015 TSPR 036 (9 April 2015).

[16] The official English translation of Act (Law) 215 of December 29, 2009 use the term 'prescription', while the Spanish version of the law uses 'caducity'. The law was originally approved in Spanish. Then the term to be used is 'caducity' ('caducidad'), not 'prescription'. A term of prescription can be interrupted; caducity cannot be interrupted. According to Black's Law Dictionary (West Group, second pocket edition, 2001) 'prescription – the effect of the lapse of time in creating and destroying rights…' (p 547); 'caducity' is not defined.

article 117 of the Civil Code, 31 LPRA 465, as amended by Act 215 of 2009, establishes a term of caducity of 6 months to file a civil case challenging paternity. It also ruled that as the Act takes effect 30 days after its approval, the 6-month caducity term starts once the Act became effectively (30 days after its approval).

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SLOVENIA

CHILD MAINTENANCE FOR ADULT CHILDREN WHO ARE STUDYING: SLOVENIAN LEGAL REGULATION AND THE CONTEMPORARY CASE-LAW

*Suzana Kraljić and Lina Burkelc Juras**

Résumé

Les auteurs traitent des possibilités de l'entretien des enfants adultes qui poursuivent leurs études. Les enfants adultes qui étudient encore de manière assidue bénéficient d'une pension alimentaire de leurs parents en vertu de la législation slovène. Cependant, ils perdent ce droit dès qu'ils ont atteint l'âge de 26 ans. La pension alimentaire doit être déterminée proportionnellement et conformément aux besoins du créancier – l'enfant adulte – et aux ressources du débiteur, c'est-à-dire le père et la mère. Le droit de l'enfant à une pension alimentaire peut être un droit acquis alors que l'enfant était encore mineur. Ce droit d'exiger le paiement ne prend pas automatiquement fin quand un étudiant atteint l'âge de 18 ans. Toutefois, afin d'obtenir le maintien de cette pension après 18 ans, l'enfant devenu adulte doit agir personnellement. Il peut soit conclure un accord portant sur l'obligation alimentaire en la forme notariée, soit intenter une action devant le tribunal. Les auteurs discutent de ces questions à la lumière de l'ordre juridique slovène et de la jurisprudence pertinente.

I INTRODUCTION

Parents have a parental right which imposes certain rights and duties on them. They need to care for their children, provide for their successful physical and mental development with their work and activity, and enable their children to enjoy the conditions for healthy growth, well-adjusted personal development and qualifying themselves for independent life and work. They also have the duty of maintaining their children and doing everything in their power to take care of the child's education, suitable to the child's abilities, predispositions and wishes. The parental right and with it also the right to child maintenance would usually be terminated when a child reaches the age of majority. But in recent

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years plenty of children continue regularly studying way after they are 18 years old, since the time needed to get some sort of education seems to have been getting longer in recent years. That led the legislature to extend the right to child maintenance also to adult children who are still in the process of studying – regularly studying. Considering the large number of children who continue studying after they reach the legal age, the number of children that are still economically dependent on their parents also enlarged. Plenty of parents maintain their children after they reach the age of majority without any action necessary on the children's side. Yet, if they do not, adult children can enforce their right to child maintenance through the courts.

II GENERAL COMMENTS ABOUT CHILD MAINTENANCE

The Constitution of the Republic of Slovenia (hereinafter CRS)[1] provides that parents have the right and duty to maintain, educate and raise their children (Art 54(1) CRS). It is therefore clear that the parents' right and duty to maintain their children can be identified as a constitutional category. However, following the definition of a child, as stated in Art 1 of the Convention on the Rights of the Child (hereinafter CRC)[2] 'a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier', we can establish that Art 54(1) CRS is not aimed at adult children (children over 18 years old).

Concretisation of the legal regulation of child maintenance is governed by the Marriage and Family Relations Act (hereinafter MFRA),[3] which determines the legal framework for children's right to child maintenance and the right and duty of parents to maintain their children. In accordance with CRC this field of family law needs to be in line with the principle of the protection of children's rights (Art 3 CRC). The main intention of maintenance is to provide material and cognitive prerequisites necessary for a child's development. The obligation to maintain a child has a personal nature according to MFRA, since we are dealing with a non-transferable right or duty.

This right and duty of parents to maintain their children usually lasts until the children turn 18. That is when they *ipso iure* emancipate, become adults and gain complete legal capacity. Children can independently enter, change or stop legal relationships and the rights and duties that derive from them when they

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1 Ustava Republike Slovenije, Constitution of the Republic of Slovenia (CRS): Uradni list (Official Gazette) RS, no 33I/1991-I; 42/1997; 66/2000; 24/2003; 69/2004; 69/2004; 69/2004; 68/2006.

2 Konvencija o otrokovih pravicah, Convention on the Rights of the Child (CRC): Uradni list SFRJ, no 15/1990; Uradni list RS, no 35/1992, MP, no 9/1992.

3 Zakon o zakonski zvezi in družinskih razmerjih, Marriage and Family Relations Act (MFRA): Uradni list SRS, no 15/1976; 69/2004 (Officially Consolidated Version – OCV 1); 101/2007 – Odl US; 90/2011 – Odl US; 84/2012 – Odl US.

gain their legal capacity.[4] At the same time, when children reach the age of majority, the parental right and the right and duty to maintain their children are terminated. However, due to the fact that financial independence on plenty of occasions does not coincide with being legally independent (gaining legal capacity), the parents' right and duty to maintain their children can also continue well after they are 18 years old if the requirements stated in the MFRA are met. Taking into account the above, we can notice the dynamic nature of the right and duty of the parents to maintain their children, which changes with the age and experience of the child. The more mature the child, the lesser are the rights and duties of the parents. Yet, a child's reaching 18 years is without a doubt the biggest barrier. That is so due to the fact that some of the parents' rights and duties are terminated when a child turns 18, although this is not so for the right and duty to maintain a child if certain requirements are met.[5] The MFRA determines the requirements for maintenance of an adult child that need to be fulfilled at the same time for the child to be entitled to child maintenance:

(a) the study cannot last beyond an adult child's turning 26;
(b) the adult child needs to regularly fulfil the study obligations;
(c) parents need to be capable of maintaining the child;
(d) the adult child needs to enforce the right to child maintenance.

III THE IMPORTANCE OF THE TIME FACTOR IN CHILD MAINTENANCE

The original version of MFRA from 1976 equated the age limit for child maintenance with the child turning 18 and the termination of the parental right. This kind of regulation did not seem appropriate any more after the number of children who are still schooled after reaching their legal age considerably enlarged. That is why a new age barrier of 26 years was set in the MFRA-C in 2004.[6] The reason for extending the age barrier was the need of a child to achieve the required qualifications to perform a certain job or activity and in that way provide for him or herself and others (eg the child's own offspring).[7] Nonetheless, it needs to be stressed that the age barrier of 26 years can also be problematic, since some of the study programmes last 6 years (eg medicine, dental medicine) and others only 3 years. An important aspect is also the fact that the conclusion of a study programme does not automatically mean that the now adult child can be financially independent. It is hard to look for a job in this place at that time, where the 19.1% rate of unemployment

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4 S Kraljić, Nadstarševstvo ali qui vadis sodobno starševstvo, *Zbornik v čast Karla Zupančiča* (Pravna Fakulteta: Ljubljana, 2014), 133–6.
5 Judgment of the Supreme Court of the RS II Ips 183/2000 (29.6.2000).
6 Marriage and Family Relations Act – C, Uradni list RS, no 16/2004 (MFRA – C).
7 S Bubić and N Traljić, *Roditeljsko i starateljsko pravo* (Pravni fakultet Univerziteta u Sarajevu: Sarajevo, 2007), 159.

among young people (aged 15–29) in Slovenia in 2013[8] additionally shows the negative points of the unfavourable regulation of maintaining children who are studying.[9]

On the one hand we can compare the maintenance of students to that of underage children, since neither has the duty to maintain themselves while they are in school or studying. On the other hand we equate adult children who are studying with adults who still have the right to be maintained, since we use certain criteria when determining whether the parents still have the right and duty to maintain their children. The criteria are for example whether the parents are still capable of maintaining the child or if the child's study obligations are regularly fulfilled.[10] That is not possible when we are dealing with the maintenance of children under the age 18. Parents still have the right and duty to maintain a child who quits school while still underage (age 16 for example). This right and duty is not terminated until the child reaches the age of majority.

IV THE REQUIREMENT OF REGULAR STUDYING

Article 123 MFRA is the foundation for the duty and right of parents to maintain their children. Parents are obliged to maintain their children until they turn 18. They must support them by providing the living conditions needed for a child's development, according to their abilities and capacities (Art 123(1) MFRA). If a child regularly fulfils study obligations, even if it is a special form of paid study, the parents still have the right and duty to maintain the child until the age of 18, but not after the age of 26 (Art 123(2) MFRA). Maintaining adult children is limited to parents.[11]

It must be noted that parents still have the right and duty to maintain their adult child who is still studying despite the child's getting married or living in a domestic partnership, but this is only true if the partner is not capable of

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8 Source: www.stat.si (14.2.2016).

9 The legal order of the Republic of Croatia has a more appropriate regulation, which prolongs the duty to maintain adult children for a year after they finish studying, but not after they turn 26. This way of regulating child maintenance allows them a year after the conclusion of their studies to find an appropriate job and adjust to the new circumstances in their lives. That should also lead them to financial independence. More in S Winker, (2014): O uzdržavanju punoljezne djece. *Zb. Prav. fak. Sveuč. Rij. (1991).*

10 D Schwab, Die Begründung und die Grenzen der Unterhaltspflicht unter Verwandten im europäischen Vergleich. Beiträge zum europäischen Familienrecht: Das deutsche Recht. V: D Schwab and D Henrich (Hrsg), *Familiäre Solidarität – die Begründung und die Grenzen der Unterhaltspflicht unter Verwandten im europäischen Vergleich. Beiträge zum europäischen Familienrecht* (Gieseking: Bielefeld, 1997), 47.

11 Article 150(3). Porodičnog zakona of Serbia, contrary to the Slovenian regulation, determines that the adult child, who is regularly studying, has a right to receive child maintenance not only from his or her parents, but also from other blood relatives (grandparents, great grandparents, etc) if the parents passed away or do not have the resources to provide for the adult child. We can therefore establish that the Slovenian MFRA provides for a stricter regulation of who still has the subsidiary right and duty to pay child maintenance.

maintaining the child (Art 123(3) MFRA). This is the so-called subsidiary right and duty of the parents to maintain their children.[12] Despite the acceptance of the Same Sex Registered Partnership Act (hereinafter SSRPA),[13] which regulates the right and duty to maintenance between registered same-sex partners, the MFRA does not acknowledge its existence. In this regard the regulation under the MFRA discriminates against same-sex partners, since it does not establish the parent's right and duty to maintain a child who is still studying if the child cannot be maintained by his or her registered same-sex partner.

The parents usually maintain their underage child in a common household, since they also have the duty to take care of the safety of the child. When that is not possible for certain reasons and parents and children do not live together, the parent who does not live with the child usually contributes by paying child maintenance in cash.[14] Parents cannot demand that an adult child who still studies moves back into their household in order that they would not have to pay child maintenance in money. Adult children who still study and try to emancipate themselves by deciding to live away from their parents can therefore demand that their parents support them in cash and parents have a duty to maintain them just as they would if they lived with them.[15]

The fulfilment of the requirement of regular studying is thus the basis for determining child maintenance for adult children until they reach the age of 26.[16] The notion of regular studying represents a legal standard, an indefinite legal concept used by the legislature when trying to regulate similar situations that differ just enough that it is not possible to regulate them with specifically determined legal terms.[17] That is only a problem when legal practice understands the indefinite legal standard in different ways. There are different understandings possible when determining the term 'regular studying', which is why we need to turn to the relevant case-law to determine which form of studying can be considered as regular studying and when studying is considered as finished.

The relevant case-law lays out the criteria for defining the indefinite legal concept of regular studying and specifies its meaning.[18] The courts depend on the regulation of primary and university education and take into account all the circumstances of a specific case when defining the scope of the term 'regular studying'. A student who is enrolled in a study programme but does not regularly fulfil the study obligations is not considered a 'regular' or a full-time student still entitled to child maintenance, yet a student who does fulfil the

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12 K Zupančič, Družinsko pravo (Uradni list Republike Slovenije: Ljubljana, 1999), 160. See also V Rijavec and S Kraljić, 'The Maintenance of the Children: Alimony Fund as Saving Grace?' in B Verschraegen (ed), *Family Finances* (Jan Sramek Verlag: Vienna, 2009), 650.

13 Zakon o registraciji istospolnih partnerskih skupnostih, Same Sex Registered Partnership Act (SSRPA): Uradni list RS, no 65/2005 with modifications.

14 Zupančič (1999) above n 12, at 159.

15 Judgment of the Supreme Court of the RS II Ips 183/2000 (29.6.2000).

16 Judgment of the Supreme Court of the RS II Ips 839/2006 (31.5.2006).

17 Decision of the Supreme Court of the RS II Ips 633/2001 (19.12.2001).

18 Judgment of the High Court of Ljubljana VSL IV Cp 410/2015 (11.3.2015).

study obligations and also keeps some sort of a job can still be entitled to child maintenance for adult children who are studying.[19] The deciding factor when determining whether a certain situation fulfils the criteria for being regarded as 'regular studying' therefore is not the formal legal status of the person who is still in the process of studying, but the actual fulfilment of their study obligations.[20] It is important that the study leads the adult child to complete a publicly recognised programme of education, since the acquisition of a degree or a profession to provide an adult child with a chance for financial independence can be considered as the purpose of regular studying. The legal standard of regular studying therefore cannot always be understood literally, not limited to meaning that every adult child who is formally still in school or enrolled in a university has the right to child maintenance. Even participation in a form of education for adults can be regarded as regular studying, since it is not the programme that is important, but the regular fulfilling of study obligations. Continuing studying after finishing a certain level of study that could already allow for some sort of employment for the adult child can also still be regarded as regular studying, eg where the child has concluded technical faculty education and is continuing on a university level.[21] Children have the right to try and get a higher education and better options for employment and consequently also better options to maintain themselves and to take care of their own livelihood. Everyone can freely choose their education and their profession.

If we are dealing with acquiring a higher degree of education, that is also something that the child should be able to do. If we take a boy who did not get into a university after finishing middle school, for example, he would be in a far worse position if he could not enrol in some different form of education for that year that he needs to wait to get into a university. If he did not have this chance, he could lose the possibility of enforcing his right to child maintenance through the courts in that one year when he would not regularly participate in an education process or he repeated a year of the previous level of education.[22] However, we need to distinguish between the old diploma programme and the bologna programme that is currently being implemented in Slovenia. In the newer case-law of the Slovenian courts we can detect a stance that adult children are independent enough after finishing their studies under the old diploma programme, but, when dealing with the students who are studying in a bologna programme, the courts agree that a bachelor programme, ie post-graduate studies, can still be considered a part of regular studying. From

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19 Bubić & Traljić (2007), above n 7, at 158.

20 Judgment of the Supreme Court of the RS I Ips 337/2008 (19.2.2009).

21 The court confirmed the stance that even an adult child who has already studied for two professions is still entitled to child maintenance. Next to the primary intention of studying, which is gaining enough education or a profession to provide for him or herself, the wishes and needs of the child also need to be taken into account. Every limitation of the child's wishes for studying contradicts the rules that provide for the child's interests and the principle stating that education needs to be suitable to the child's abilities, physical and mental predispositions and wishes – judgment the High Court of Ljubljana VSL IV Cp 4003/2010 (10.11.2010).

22 Decision of the Supreme Court of the RS II Ips 436/2002 (21.11.2002); judgment of the High Court of Ljubljana VSL I Cp 1006/2002 (21.2.2002).

that point on, parents do not have the right and duty to maintain their children, but they can still contribute in any way they wish to. To take a different stance would, in the opinion of the Slovenian courts, represent passing the burden of the employment (or, better said, unemployment) of young people on the backs of Slovenian parents, which could not have been the legislator's intent.[23]

The parents' right and duty to maintain their children is not terminated even in situations where an adult child regularly fulfils the obligations of a study programme to develop skills for a certain profession, despite the child's already finishing a study on the same level for a different profession. Once again the stance that the right to child maintenance is tied to regular studying and not to a specific type of studying, for example studying on a higher level than that already achieved, prevails.[24] Article 102 MFRA, which determines that parents must create the conditions for their children's healthy growth, well-adjusted personal development and qualifying themselves for independent life and work, Art 54(1) CRS, which determines that parents have the right and duty to maintain, educate and raise their children, and Art 29(1)(a) CRC, which determines the necessity to focus a child's education on the complete development of the child's personality and mental and physical development show us that parents cannot determine the future study path of a child on their own. Even more, they need to support the child even if it turns out that the child made a mistake when first choosing a study programme. Even adults sometimes make a wrong decision and that can easily also happen to a child.[25]

A special problem can arise when adult children misleadingly enrol into different study programmes just to keep their status as a student and the benefits that come with it. In these situations we are dealing with pure manipulation and these enrolments do not meet the criteria for the legal standard of regular studying. Despite that, it must be mentioned that even in these situations such enrolments can be regarded as a link to the next phase of a child's education which allows the child to protect the rights that are connected to the status of being a student. This is only true when there are justifiable reasons present in a certain situation and these reasons lead the adult child to a fictitious enrolment in a study programme merely to keep the status as a student.[26] Any conclusion about the fulfilment of the criteria of regular studying thus needs to be made considering all the circumstances of a specific situation. A second enrolment in the same year of study does not automatically mean that we cannot consider the activity as regular studying. The reason for this recurrent enrolment in the same year of study is also important.[27] Admissible reasons for the impediment in someone's studies are, for example:[28]

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23 Decision of the High Court of Ljubljana VSL IV Cp 410/2015 (11.3.2015).
24 Judgment of the High Court of Celja VSC Cp 1543/2004 (31.8.2005).
25 Judgment of the Supreme Court of the RS II Ips 134/2002 (16.5.2002).
26 Judgment of the Supreme Court of the RS I Ips 337/2008 (19.2.2009).
27 Decision of the Supreme Court of the RS II Ips 821/2007 (15.11.2007).
28 Judgment of the Supreme Court of the RS II Ips 254/1998 (23.7.1998).

- health problems: plenty of different medical examinations, ordered bed rest,[29] operations (eg cervical cancer) and other acute diseases;[30]
- intolerable conditions at home and moving away from home;[31]
- pregnancy, child birth;[32] and
- offering help to sick family members.

Case-law also considers the requirements set out in Art 123 MFRA as fulfilled if a child quits studying and then starts studying again and this time fulfils the study obligations regularly.[33]

Trouble may arise when children do not want to submit their study confirmation to their parents, since parents do not have an insight into their children's studies. The parents consequently cannot be sure that their children regularly fulfil their study obligations. For that reason they have an option to demand confirmation of the child's enrolment. Unfortunately this still does not provide them with a specific enough insight to know for sure that a child is fulfilling the study obligations, since it was clearly determined through case-law that the mere proof of enrolment is not enough to prove that a child is regularly studying. The adult child who claims to be regularly studying needs to prove that, and also needs to support claims of the existence of justified reasons for the impediment in regular studying with sufficient proofs. The enforcement right is therefore still valid.[34]

V THE REQUIREMENT OF PROPORTIONALITY BETWEEN A CHILD'S NEEDS AND THE CAPABILITY OF THE PARENTS

The maintenance of an adult/child relationship represents an *intuitu personae* relationship. That is a relationship between a specific adult child and that child's parents in which the child represents the creditor and parents the debtor. There are two persons usually appearing on the debtor's side – the mother and the father, while on the side of the creditor there is just one person – the child, since this is an individual relationship.[35] The parental right is terminated with the child turning 18 and with it also their duty to protect, raise and represent the child. The only thing left is the right and duty to maintain the child, and

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29 Judgment of the Supreme Court of the RS II Ips 149/2006 (16.3.2006).
30 Judgment of the Supreme Court of the RS I Ips 337/2008 (19.2.2009).
31 Decision of the Supreme Court of the RS II Ips 821/2007 (15.11.2007).
32 Judgment of the Supreme Court of the RS II Ips 268/1999 (30.6.1999).
33 Judgment of the High Court of Ljubljana VSL IV Cp 3804/2005 (18.8.2005).
34 Decision of the High Court of Ljubljana II Ips 4381/2014 (3.12.2014).
35 Source: www.informator.rs/izdrzavanje-punoletnog-deteta-sa-primerima-iz-sudske-prakse.html (10.1.2015). See also W Breemhaar, 'Familiäre Solidarität in den Niederlanden. Einige Bemerkungen zum Unterhaltsrecht und seinem Verhältnis zum Sozialhilferecht' in D Schwab and D Henrich (Hrsg), *Familiäre Solidarität – die Begründung und die Grenzen der Unterhaltspflicht unter Verwandten im europäischen Vergleich. Beiträge zum europäischen Familienrecht* (Gieseking: Bielefeld, 1997), 134.

even this one only if the legal requirements are fulfilled. The right and duty of maintaining adult children is therefore subsidiary in its nature, since it only comes into effect if the adult child fulfils the requirement of regular studying.

Child maintenance is always determined individually, considering all the circumstances of the specific situation, the needs of the obligee and the capabilities of the obligor (Art 129 MFRA). The maintenance must be appropriate to provide for a successful physical and mental development of a child and needs to also be sufficient to cover all the costs of the child's livelihood, especially the costs of lodging, food, clothing, footwear, care, education, upbringing, recreation, leisure and other special needs of the child (Art 129(a) MFRA). The expenses are divided between both parents considering their financial abilities, since both parents have the right and duty to maintain the child (Art 126 MFRA). When determining the amount of child maintenance the courts take into account the income of the obligor – their regular pay cheque and also all other financial sources, regular and exceptional incomes, and also their general financial condition.[36] The financial capabilities of the obligor are therefore determined considering all the obligor's property, income and capability of getting a new source of extra income.[37] Receiving child support does not lessen the obligor's right and duty to pay the child maintenance.[38]

However, the important difference in maintaining adult children who are still studying is that they are entitled to bring an action before the court to enforce their rights independently[39] and they can also demand changes (usually an increase) of the already determined child maintenance.[40] If a child does not want to file an action for child maintenance against a parent, the action cannot be filed by the other parent, who is currently taking care of the child's living situation or is the one whom the child lives with. Nonetheless, the other parent does have an option[41] to demand the return of a certain part of the expenditure

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36 M Končina Peternel, 'Nekatera vprašanja v zvezi z družinskopravnimi spori' *Pravosodni bilten*, letnik 2005, no 1, 48.

37 Judgment of the High Court of Ljubljana IV Cp 1651/2014 (16.7.2014).

38 Decision of the High Court of Ljubljana VSL IV Cp 1211/2015 (13.5.2015).

39 See also the judgment of the High Court of Ljubljana IV Cp 804/2015 (8.4.2015). The court emphasised that parents are no longer the legal caretakers of their children after the children reach the age of majority. For that reason they cannot enforce the child's right to child maintenance. The only one who can enforce the right to maintenance when a child turns 18 is the child as such.

40 A new action based on the change of circumstances needs to be filed before the court if the circumstances of the situation change (*rebus sic stantibus*) in such a way that they could affect the amount that was determined as child maintenance (on the side of the parents or on the side of the child). On the one side parents usually claim that there was a change of circumstances that leads to lowering or the termination of their right and duty to maintain their child and on the other side the adult children usually state that there was a change in circumstances and that they are now regularly studying which is why child maintenance should be reinstated. See also B Novak, *Družinsko pravo* (Ljubljana: Uradni list Republike Slovenije, 2014), 233.

41 The opinion of the Supreme Court of the RS, no VS034373 (16.6.1998).

incurred when maintaining their adult child under Art 133 MFRA.[42] The parent can file an action for the return of the expenses from the person who is also bound to support the child, in so far as these expenses were necessary. In this way some legal security is also given to the parent who still directly cares for the adult child and who does not need to cover all the expenses for the adult child's care just because the child decided to stay passive and did not take the important step to enforce the right to child maintenance through the courts. The claim for the partial return of the expenses is not statute-barred for 5 years, which stems from Art 346 of the Code of Obligation (hereinafter: CO)[43] and the child's right to child maintenance does not have any statute of limitation (comp Art 348(3) CO). Yet, the MFRA does not determine the solidarity duty of maintaining, because child maintenance is determined for every parent as an obligor individually. An adult child is entitled to demand only the sum that has been determined as the child maintenance for an individual parent from each of the parents and not the whole child maintenance.[44] It is also worth mentioning that, if the court decides to lower the amount set as child maintenance, it may do so from the moment of filing the lawsuit and not before that.[45] We can conclude that same goes also for termination of the right and duty to maintain the child.

Parents need to provide at least the minimum for the child to exist on. When trying to reach this goal they need to try very hard and make use of all the possibilities of obtaining extra income. They need to do everything in their power to gain the necessary means and only allow themselves to follow their personal goals and ambitions when and to the extent that they do not harm the rights of the children to have a decent and appropriate life.[46] The established view is that the demand for the parents to give up their ambitions at least partly to provide for their adult child is not entirely misguided.[47] Even parents of adult children must do everything that can reasonably be expected from them to provide their adult children with the education that matches their talents and their mental and physical abilities.[48]

Case-law and legal theory have created an opinion that the needs of the child cannot be determined by simple math, since we are not dealing with a simple mathematical task. To address this issue in a mathematical way would mistakenly lead us to think that it is quite simple to determine all the expenses

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42 Art 133 MFRA: 'Anyone who has expenses because of any person may file suit for the return of the expenses from the person who is bound to support them, in so far as these expenses have been necessary.'

43 Code of Obligations (CO): Uradni list RS, no 97/2007 OCT1.

44 Novak (2014) above n 40, at p 229.

45 Decision of the High Court of Ljubljana VSL IV Cp 102/2015.

46 Zupančič (1999) above n 12, at 159–160.

47 German case-law shows us that the living standard of a child stems from the standard of the parents. However, that does not automatically mean that for example the child of a millionaire has a right to have an expensive car if the father has it. It is not the goal of child maintenance to provide the child with the same luxurious life style as the parents have – Schwab (1997) above n 10, at 47–48.

48 Judgment of the Supreme Court of the RS II Ips 236/2003 (10.7.2003).

of a child's life in the court procedure and then simply calculate what the monthly sum of the child maintenance should be.[49] The virtue of life cannot simply be translated into the numeric world of math and numbers, since also specific factors of a completely immaterial nature need to be taken into account (eg the fact that one of the parents cares for and raises the child). The needs of a child are also not permanent; they are quite changeable, since they can be different every day or month. Even the prices for the life's necessities vary.[50] The courts need to use numbers as a foundation for the sum they determine as child maintenance, but they only use the numbers to determine some sort of a framework to prevent the judgment from being arbitrary.[51] The needs can only be met by the figure that fits the income of the parents, since determining child maintenance actually involves the precise evaluation of the needs of the child adapted to the capabilities of the parents. The final determined amount of child maintenance is therefore only an evaluation. The Civil Procedure Act (hereinafter 'CPA')[52] gives the courts discretion when evaluating the needs of the child.[53] It is then the court's task to find a proper balance between the urgency of child's specific needs on the one side and the load that the child maintenance means for the parent on the other side.[54]

Evaluating a child's needs can actually be seen as a triangle, the corners of which are represented by three legally relevant factors: the needs of the child, the maintaining capabilities of the mother and those of the father. The court needs to fill in this triangle with the relevant circumstances of the specific case and then find a point in this triangle that equally balances all the relevant corners.[55] The level of satisfying a child's needs therefore needs to be adjusted to the financial abilities of the parents.

The adult children have a right to gain some independence and live away from their parents. However, that can lead to higher living costs (especially in connection with living arrangements and the food). Parents need to provide for the child just as they would if the child still lived with them, even if it is not their fault that the adult child decided to live outside their common home. In these cases Art 131 MFRA clearly loses its effect, since it determines that parents maintain their children within their own household, unless that contradicts the interests of the child.[56] That goes especially for adult children who were put in a foster home when they were still underage and continued their independent life when they turned 18.[57]

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49 T Pavčnik, Narava, Ustava in nekatera preživninska vprašanja. *Pravna praksa*, 2014, no 10, 11; see also Judgment of the High Court of Ljubljana IV Cp 3222/2014 (3.12.2014).

50 Judgment of the High Court of Ljubljana VSL IV Cp 2972/2013 (18.12.2013).

51 Pavčnik (2014) above n 49, at 11, 12.

52 Civil Procedure Act (CPA): Uradni list RS, no 73/2007 OCT with modifications.

53 Judgment of the High Court of Ljubljana VSL IV Cp 642/2012 (14.3.2012).

54 Judgment of the High Court of Ljubljana VSL IV Cp 2972/2013 (18.12.2013).

55 Pavčnik (2014) above n 49, at 12.

56 Končina Peternel (2005) above n 36, at 49.

57 Judgment of the Supreme Court of the RS II Ips 823/2006 (22.2.2007).

Child maintenance for adult children who are still studying is mainly dedicated to helping the children finish their study successfully. The purpose of child maintenance would be defeated if the child was forced to work and regularly attend school at the same time or to provide for him or herself at least partially to lower the amount of child maintenance, since that would endanger the goal of successful conclusion of the study.[58] It is commonly accepted that an additional workload for the child could threaten those studies[59] and even the existence of the opportunity to work does not mean that the child should do so.[60] However, if an adult child does have some property (savings, scholarship, real estate), the court can also consider their value when determining the amount of child maintenance. In these cases the child can at least partially provide for him or herself.[61] On the other hand, a possible contribution towards the maintenance of the child by grandparents does not lower the amount of child maintenance that needs to be paid by the parents.[62]

VI ENFORCING THE RIGHT TO CHILD MAINTENANCE

Child support is determined by way of a monthly sum and payable in advance (*pro futuro*). It can be demanded from the moment the lawsuit for child maintenance was filed (Art 131(c) MFRA). The principle of *nemo pro praetorio alitur* therefore applies when enforcing the right to child maintenance.[63] Article 306(2)[64] CPA gives the courts an option to allow an adult child who cannot suggest the issuing of an order about maintenance in a non-contentious procedure to get involved in the court settlement concluded between the child's parents.

When deciding on the child maintenance for adult children that fulfils the requirements set in Art 123 MFRA, the court does not follow the procedure according to Chapter 27 CPA, which governs special proceedings for conflicts relating to marriage and relations between parents and children. Article 406(2) CPA determines that conflicts over child maintenance for adult children[65] do not fall into the same category as conflicts between parents and children, as do for example conflicts over child maintenance for underage children or adult children whose parents still have the parental right and duty.[66]

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58 Decision of the High Court of Ljubljana VSL IV Cp 399/2013 (27.2.2013).

59 Judgment of the High Court of Maribor VSM III Cp 681/2014 (13.8.2014).

60 Judgment of the Supreme Court of the RS II Ips 174/2007 (18.4.2007).

61 Judgment of the High Court of Maribor VSM III Cp 681/2014 (13.8.2014).

62 Judgment of the High Court of Ljubljana IV Cp 1211/2015 (13.5.2015).

63 S Aras, *Uzdržavanje djece – sudski alimentacijski postupci u domačem i poredbenom pravu* (Sveučilištna tiskara: Zagreb, 2013), 24.

64 Art 306(2) CPA: 'A settlement can cover the whole claim or only parts of it and it can also settle other conflicts between the parties. A person who is not even a party to the procedure can also be joined to the settlement.'

65 N Betetto, Analiza novele Zakona o zakonski zvezi in družinskih razmerij – postopkovni problemi, Pravosodni bilten, letnik 2005, no 1, 57.

66 Up to 2005, when the MFRA was changed, some parents also had the right and duty to maintain their adult children on an extended basis. Extension of the parental right and duty

Consequently, courts use the general rules of civil procedure when deciding child maintenance for an adult child[67] and do not use the principle of investigation. They are tied to the claims and proofs of the parties (Art 212 CPA in connection with Art 7 CPA). The court therefore decides on the basis of the claims that were made by the parties and in that way the principle of 'officiality' is also excluded, since the court does not pay special attention to the protection of the adult children *ex officio*, as it does for underage children under Art 408 CPA.[68]

The enforcement right is terminated when the requirement of regular studying is not fulfilled on the basis of Art 123(2) MFRA.[69] If an adult child starts going back to school, that provides the foundation for enforcing the right to child maintenance with a new action before the court.[70] But not every interruption in studying is sufficient to assume that the enforcement entitlement is no longer valid. Some sorts of interruptions in studying are possible when certain justified reasons are present, but these need to be claimed and proved before the court by the adult child.[71] This further assessment of whether the study was halted or not demands certain actual findings and the relevant legal regulation needs to be interpreted restrictively.[72]

Slovenian law does not acknowledge child maintenance being obviously unfair to the child's parents as a reason for the termination of their right and duty to maintain adult children.[73] In Serbian law, for example, parents can be excused from paying child maintenance to an adult child who is already in school and regularly fulfils study obligations if that child does not act appropriately towards the parents. That requirement is fulfilled if the child severely breaks his or her moral duty to respect the parents.[74]

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was possible when a child was physically or mentally disabled, could not take care of him or herself or could not enforce his or her rights and interests. The change to the MFRA eliminated the right and duty of those parents to maintain their adult children. In this way, the position provided for the parents of children with extended parental rights in comparison to the parents of healthy children became equal – Judgment of the High Labour and Social Court Psp 646/2014 (26.3.2015) and Judgment of the High Labour and Social Court Psp 583/2014 (19.2.2014). Choosing this way of regulating the issue exchanged the family solidarity with state solidarity – Judgment of the High Labour and Social Court Psp 515/2014 (15.1.2014). For more on prolongation of parental right see also S Kraljić and V Rijavec, *Slovenia International Encyclopaedia of Laws*, Suppl 68 (Alphen aan den Rijn: Wolters Kluwer Law International, 2014).

67 M Končina Peternel, Aktualna vprašanja s področja družinskega prava, *Pravosodni bilten, 2013*, no 4, 223.

68 V Rijavec and L Ude et al, *Pravdni postopek : zakon s komentarjem* 3, book (Ljubljana: Uradni list RS, GV Založba, 2009), 616–620.

69 Končina Peternel (2005) above n 67, at 49, 50.

70 Decision of the Supreme Court of the RS II Ips 371/2000 (13.12.2000) and decision of the High Court of Ljubljana VSL III Cp 1225/2001 (4.7.2001).

71 Decision of the High Court of Ljubljana VSL IV Cp 3713/2005 (7.9.2005).

72 Decision of the Supreme Court of the RS II Ips 371/2000 (13.12.2000).

73 Such regulation can be found for example in Art 155(4) Porodični zakon Srbije (Family Code of Serbia).

74 M Draškić, *Porodično pravo i prava deteta* (Čigoja štampa, Beograd, 2005), 389.

The court decides child maintenance and the care and raising of underage children when the parents get divorced or they file for the annulment of their marriage – even if there was no special claim made by the parents for the courts to do so. Even if only a claim to determine contact time and reallocation of the child is made, the court still also always decides child maintenance.[75] If we are dealing with a divorce settlement agreement, the court inserts into the agreement provisions relating to child maintenance of the common children (Art 421 CPA). The court also needs to *ex officio* decide about child maintenance when deciding fatherhood or maternity (Art 408(2) CPA in connection with Art 421 CPA). Parents can also reach an agreement over the amount of child maintenance when dealing with an underage child and ask the court to issue an order in a non-contentious procedure. The court can reject such a proposal if it finds that the suggested agreement is not in accordance with the interests of the child (Art 130 MFRA). When parents cannot reach an agreement on maintenance the court gives a judgment, with which it decides the amount of child maintenance and it is not bound by the claims that were made by the parties.[76] These enforcement rights can stem from the time when a child was still underage. If an enforcement right already exists it does not become invalid just because the child reached the age of majority. It still has effect.[77] That is of course only true if other requirements stated in Art 123 MFRA are fulfilled. The fact that a child turns 18 is not sufficient for the enforcement entitlement and the right and duty of the parents to maintain their children to be terminated. They can, however, lose their enforcement rights if the child is not regularly in school.[78] A contract, concluded by the representative of someone in the name of that person and in line with the authorisation, binds that person (Art 70 CO) and is not terminated when the represented person gains legal capacity (when the child reaches the age of majority – in Slovenia that means turning 18).[79]

Still, an adult child also needs an enforcement entitlement or other legal foundation to claim child maintenance from their parents, if they do not regularly fulfil their right and duty to maintain the child. If maintenance is first being dealt with when the child has already turned 18 or perhaps the previous enforcement right was not valid because for some reason (eg interruption in the studies), the adult child personally needs to make sure that this relationship is taken care of. The child now has two options: the option of concluding a written agreement on child maintenance in the form of an enforceable notarial deed in front of a notary, or the option of enforcing rights through filing an action with the court to determine child maintenance.[80] Only exceptionally can an agreement also be concluded before the court – the adult child can be joined

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75 Decision of the High Court of Maribor VSM III Cp 796/2015.

76 Art 408(2) CPA. See also Ministrstvo za delo, družino, socialne zadeve in enake možnosti.

77 The High Court of Ljubljana decided in its judgment IV Cp 3251/2005 (7.9.2005) that an agreement on maintenance (together with the notifications of yearly regulations of the child maintenance) remains a valid enforcement right the whole time while the child is regularly studying.

78 Decision of the Supreme Court of the RS II Ips 371/2000 (13.12.2000).

79 Judgment of the High Court of Ljubljana VSL IV Cp 3251/2005 (7.9.2005).

80 See also Novak (2014) above n 40, at 226.

in the proceedings of the parents on the basis of Art 306 CPA if parents in their procedure (eg divorce in which the court also decides the right of an underage child) reach a court settlement. If an agreement between the parties is not possible because the obligor and obligee cannot find any common ground on the amount of the child maintenance, the adult child needs to file an action for child maintenance.

VII CONCLUSION

Parental rights are usually terminated when a child turns 18 and the child becomes *ipso iure* independent. However, in recent years that seems no longer to be true. Legal independence does not also necessarily bring the child financial independence and, since there is a noticeable increase in adult children studying after they turn 18, the Slovenian MFRA determines a right to child maintenance even after turning 18 if the adult child still regularly studies. By studying after reaching the legal age the child usually craves to reach a higher level of education that could allow for a profession that would make the child independent of parents. To provide the adult children with the possibility to do so, to provide them with a chance to completely devote themselves to fulfilling their study obligations, the parents still have the right and duty to maintain their children after they turn 18. However, that right and duty are reduced a bit when compared to the maintenance of underage children. An underage child is entitled to child maintenance even if no longer in school whereas the MFRA ties the adult child's right to child maintenance to the requirement of regular studying – in practice meaning regular fulfilling of all the study obligations. When observing this legal standard we can detect some weaknesses in the Slovenian legal regulation. The legislator did not take into account that some study programmes last longer than others (eg 6 years) or that finishing the studies does not necessarily bring a child financial independence. For that reason it might be sensible to give some thought to possible changes and updates to achieve equality regarding the duration of the study. With some changes, perhaps a child could finish studying without feeling under constant pressure (for knowing that the day when studies are concluded also means the day the adult child is no longer entitled to receive child maintenance) and a child could have some time to find a proper job.

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SOLOMON ISLANDS

NEGOTIATING THE PLURALISTIC FAMILY LAW REGIMES IN THE SOLOMON ISLANDS

Jennifer Corrin and Benjamin Teng[*]

Résumé

Le droit de la famille dans le Pacifique est souvent composé de tout un patchwork de lois et règlements internes, de lois étrangères, d'ordres coloniaux et d'ordonnances locales, conjugués au droit coutumier, à la *Common Law* et à l'*equity*. Mettant l'accent sur le mariage et le divorce, tout en faisant également référence aux institutions voisines, ce chapitre est consacré aux différentes sources du droit de la famille dans les îles Salomon. Certains enjeux nés de ce pluralisme complexe seront examinés à la lumière de la jurisprudence. Ce chapitre se conclut par des suggestions visant à résoudre ces problèmes sans pour autant remettre en cause la supériorité de la loi étatique.

I INTRODUCTION

Discussions of family laws in Pacific Island countries generally draw a distinction between the State law regime and the customary law regime. However, behind this obvious division lurk additional layers of intricacy. Firstly, family laws are often contained in a labyrinthine patchwork of domestic legislation and regulations, foreign legislation, colonial orders, and local government ordinances, together with common law and equity.[1] Some of these laws were made during the colonial era either for the colonies generally, or specifically for a Pacific country or group of countries. Gaps in the legislative framework are often filled by laws of the former colonising country, which have been adopted locally. In some countries of the region, State law also has to be divided into laws applying to indigenous people and those applying to other residents. Secondly, customary laws do not constitute a homogenous body of

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1 Civil laws apply in some South Pacific countries, but this chapter concentrates on Solomon Islands, which is a common law country.

laws or processes, but differ from area to area and sometimes village to village. Thirdly, in some cases, customary laws may be endorsed by the State, giving rise to hybrid laws and processes, which do not fit neatly within either system. Finally, there are other non-government organisations involved in family law, with their own norms and procedures. The most notable of these organisations is the Church.

Using Solomon Islands as an example, but with some reference to neighbouring jurisdictions, this chapter explains the various sources of family law, focussing on marriage and divorce. It examines some of the issues arising from this complex pluralism, and discusses the surrounding case-law. The chapter concludes by putting forward some suggestions for addressing these issues without assuming the superiority of State law.

II BACKGROUND

(a) Background of the country

Solomon Island has a land area of 28,000 sq km, made up of 26 islands and hundreds of islets spread over 1360 km in a double chain in the South West Pacific. It lies about 1,600 km to the north-east of Australia within a sea area of 1,340,000 sq km.[2] The country has a population of about 622,000, with about 80% of the population living in rural areas.[3] Culture and traditions vary from island to island and even from village to village. This diversity is reflected in the fact that there are about 70 vernacular languages spoken.[4]

In recent times, social and economic changes have had a profound impact on Solomon Islands' society. Increased mobility and improvements in communication both domestically and with overseas countries have also influenced customs and culture. In particular, this has posed challenges for traditional ways of life; arranged marriages may not always be acceptable to the younger generation and divorce both customary and under State law is on the increase.[5]

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2 *Solomon Islands* (2016) Pacific Community: Geoscience Division http://gsd.spc.int/member-countries/solomon-islands.

3 *Australia-Oceania: Solomon Islands* (25 February 2016) Central Intelligence Agency: The World Factbook https://www.cia.gov/library/publications/the-world-factbook/geos/bp.html.

4 This information was supplied by Professor John Lynch, former Head of the Pacific Languages Unit, Department of Literature and Language, School of Humanities, the University of the South Pacific.

5 In 2009 there were 1,455 divorcees living in Solomon Islands and a further 3,260 were separated: Solomon Islands National Statistic Office, Solomon Islands Government, *2009 Population and Housing Census: National Report* (2009) vol 2, 75. While directly comparable historical statistics are not available, this may be contrasted with the fact that between 1971 and 1980, the High Court of Solomon Islands issued only 67 divorce decrees: Mere Pulea, *The Family, law and population in the Pacific Islands* (Institute of Pacific Studies of the University of the South Pacific, 1986) 138–139.

(b) Background of the legal system

(i) Sources of law

Prior to the arrival of Europeans, family relationships between Solomon Islanders were governed by customary laws. After Solomon Islands became a British Protectorate in 1893[6] customary laws were tolerated provided they were not 'repugnant to natural justice and humanity'.[7] Despite this limited acceptance, customary laws survived the colonial era and continued to play a vital role in governing family relationships.[8]

At independence in 1978, the new Constitution recognised customary laws as part of State law.[9] The Constitution also provided that particular regard should be paid by Parliament to the 'customs, values and aspirations of the people of Solomon Islands' when providing for the application of laws.[10] In addition, United Kingdom (UK) statutes 'of general application', and common law and equity (referred to in this chapter as 'introduced law'), were continued in force.[11] For United Kingdom statutes, a 'cut-off' date of 1 January 1961 was imposed, reflecting the fact that these laws were intended to fill the gap until Solomon Islands Parliament enacted its own laws.

Colonial laws were also kept in force by the Constitution. These came in two forms; first, Orders in Council and legislation made in the United Kingdom (UK) for Solomon Islands or British dependencies more generally. Secondly, locally made regulations, issued by the British High Commissioner, and Ordinances, made by legislative council.[12]

Schedule 3 of the Constitution provides that customary laws are superior to common law and equity, but inferior to the Constitution and Acts of Parliament.[13] The term 'Act of Parliament' has been interpreted as meaning an Act of Solomon Islands Parliament, so, in theory, the courts should apply customary laws even if they are inconsistent with an Act of the United Kingdom Parliament.[14] However, at least in the context of custody proceedings, the High Court of Solomon Islands has suggested that the two sources of law rank

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6 Pacific Order in Council 1893, No 78 (UK) Part XV.
7 Native Courts Act, cap 33, s 18.
8 Kenneth Brown, *Reconciling Customary Law and Received Law in Melanesia: the Post-Independence Experience in Solomon Islands and Vanuatu* (Charles Darwin University Press, 2005) 16.
9 Constitution of Solomon Islands 1978, s 76 and sch 3.
10 Ibid, s 75.
11 Ibid, s 76 and Sch 3.
12 See further Jennifer Corrin and Don Patterson, *Introduction to South Pacific Law* (Palgrave MacMillan, 3rd ed, 2011) 13–15.
13 Constitution of Solomon Islands 1978, s 76(2)(1).
14 *R v Ngena* [1983] SILR 1; Jennifer Corrin and Don Patterson, *Introduction to South Pacific Law* (Palgrave MacMillan, 3rd edn, 2011) 47.

equally. Which will prevail will be determined on a case-by-case basis, taking into account public policy and the circumstances of each particular case.[15]

In spite of the superior status given to customary laws, in practice, common law is often applied as a matter of course.[16] Where parties to a marital dispute are from different areas, the Customs Recognition Act 2000 makes provision for resolving any conflict of laws. However, as discussed later in this chapter (Part V), this Act is not yet in force,[17] and difficulties in determining the applicable law continue to offer an excuse for a court to prefer the common law.[18]

(ii) The courts

The Constitution establishes the High Court as a court of unlimited original jurisdiction.[19] It is vested with exclusive jurisdiction to hear petitions for divorce, nullity of marriage or judicial separation under the Islanders Divorce Act[20] or the 'applied' law, that is, the Orders in Council.[21] Ancillary claims are heard in the High Court or the Magistrates Court.[22] The High Court deals with appeals from the Magistrates' Court and there is a right of appeal from the High Court to the Court of Appeal.[23]

The local courts, which were established to deal with minor cases and customary disputes,[24] do not have jurisdiction to deal with dissolution of marriage. However, they would appear to have jurisdiction to deal with ancillary claims for the return of goods or money up to the limit specified in the warrant by which they are established, which is usually $1,000.[25] For example, the Honiara local court has specific jurisdiction to hear any case under Part II of the Affiliation Separation and Maintenance Act[26] provided not more than

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15 *K v T* [1985–1986] SILR 49. This case involved a custody dispute, and accordingly is arguably of questionable relevance to the interpretation of the phrase outside this area of law.

16 See further, Jennifer Corrin, 'Accommodating Legal Pluralism in Pacific Courts: Problems of Proof of Customary Law' (2010) 15 *International Journal of Evidence & Proof* 1, 2.

17 Customs Recognition Act 2000, s 10 provides that, in the case of a conflict of customary laws, the court 'shall consider all the circumstances and may adopt the system that it is satisfied the justice of the case requires'.

18 Jennifer Corrin, 'A Question of Identity: Complexities of State Law Pluralism in the South Pacific' (2010) 61 *Journal of Legal Pluralism* 145, 147.

19 Constitution of Solomon Islands 1978, s 77.

20 Solomon Islands Courts (Civil Procedure) Rules 2007 (Solomon Islands), R15.2.2.

21 Ibid R15.2.3.

22 The Magistrates' Court also has jurisdiction to deal with custody and guardianship matters: see, eg, *Sasango v Beliga* [1987] SILR 91.

23 Constitution of Solomon Islands 1978, s 85(1).

24 Local Courts Act, cap 19, ss 2(1), 16.

25 See, e g Warrant Establishing the Bauro Local Court LN61/1986, para 5.

26 Schedule in the Local Courts Act, cap 19, 'Warrant establishing the Honiara Local Court' Warrant dated 1 July 1986, cap 1 s 5.

$1000 is claimed by way of lump sum.[27] It also has jurisdiction to deal with bride price cases whatever the value of the subject-matter is in dispute.[28]

Additionally, in many areas 'traditional' forums hear customary disputes at a village level. These frequently involve family matters, including questions relating to marriage, separation, dissolution, adoption and custody of children, and other ancillary matters. In contrast to the state courts, these bodies are not statutory creations and are not bound by strict rules of procedure or evidence,[29] although there may be protocols to follow. There is no distinction between civil and criminal jurisdiction,[30] and parties are not restricted to bringing actions or claims against individual victims or offenders. Indeed, complaints are not considered in isolation; rather they are dealt with holistically, taking into account all of the surrounding circumstances.

III MARRIAGE REGIMES

There are three separate legal regimes governing marriage in Solomon Islands: the State regime, consisting of domestic legislation and colonial laws; the customary regime; and the hybrid regime, arising when customary laws have been endorsed by the State. United Kingdom Acts of general application do not play a role in this area of family law, as domestic and colonial legislation do not leave a gap to be filled.

(a) State laws

(i) Solomon Islands statutes

The local statutory regime is regulated by the Islanders' Marriage Act,[31] which provides as follows:

> 'No marriage between Islanders celebrated after the coming into operation of this Act, save and except a marriage celebrated in accordance with the custom of Islanders or in accordance with the provisions of the Pacific Islands Civil Marriages Order in Council 1907 shall be valid unless celebrated –
>
> (a) before a minister of religion; or

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27 See, eg, 'Warrant Establishing the Honiara Local Court' LN48/1986, LN54/1989, para 5.

28 'Warrant Establishing the Honiara Local Court' LN48/1986, para 6. See further *To'ofilu v Oimae* (Unreported, High Court of Solomon Islands, Palmer J, 19 June 1997), accessible via www.paclii.org at [1997] SBHC 33, discussed in Jennifer Corrin, 'Case Note on *John To'ofilu v Oimae*' (June 1999) 13(1) *Commonwealth Law Journal* 33.

29 In disputes involving land, these customary forums adopt a more state-like procedure and, in effect, become customary courts: Allan Report, 242; Matthew Allen et al, 'Justice Delivered Locally: Systems, Challenges and Innovations in Solomon Islands', 2013, World Bank: Washington DC, 39.

30 Ian Hogbin, *Native Councils and Native Courts in the Solomon Islands*, 1944, 14(4) Oceania 257, 267–71.

31 Cap 171. This Act originated as the Native Marriage Ordinance 1945. It was kept in force by Solomon Islands Independence Order 1978, s 5.

(b) before a District Registrar.'[32]

In effect, this provision allows Solomon Islanders to marry in four ways:

(i) through a religious ceremony;
(ii) through a civil ceremony;
(iii) under a specified colonial Order;
(iv) under customary laws.

Pathways (iii) and (iv) are discussed further below. The Islanders' Marriage Act[33] also provides that, if both parties wish, a customary marriage may be registered under the Act, and this is also discussed below under hybrids.[34]

(ii) Colonial Law

The colonial marriage regime is governed by two United Kingdom Orders. The first of these Orders is the Pacific Order 1893 (UK).[35] This provides for a religious ceremony to be conducted by a minister for religion registered under the Births, Marriages and Deaths Act.[36] The second is the Pacific Islands Civil Marriages Order 1907 (UK) which allows for a civil ceremony to be conducted by the district Registrar.[37] Although these Orders are predominantly used where one or both parties are expatriates residing in Solomon Islands, Islanders may also marry under either Order.

Marriages under the Pacific Order 1893 are rare. Originally, it was necessary for at least one party to be a British subject,[38] but this requirement was abolished by the Births, Marriages and Deaths Registration Act.[39] However, it is still necessary for both parties to be competent to marry under English law[40] and the celebrant must also be a British subject who is legally competent to conduct a marriage ceremony under the religion in question. The celebrant must also be registered as a minister for marriage with the British High Commissioner in Solomon Islands.[41]

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[32] Section 4. The District Registrar is the magistrate appointed for the district or, in the absence of a magistrate a person appointed by the minister: Islander's Marriage Act cap 171, s 3.
[33] Cap 171.
[34] Section 18.
[35] Pacific Order 1893, No 78 (UK). The Order required one party to be a British subject (art 121), but the Births, Marriages and Deaths Act, cap 169 extends the Act so that it is only necessary for the parties to be competent to marry in England: s 5.
[36] 1996, cap 169, s 5.
[37] Pacific Islands Civil Marriages Order 1907, No 543 (UK). Islanders married under the 1907 Order were taken to adopt the state regime; one consequence was that on dying intestate inheritance, except in relation to customary land and the rules relating to property passing bona vacantia, was in accordance with the law of England. See further *Mahlon v Mahlon* [1984] SILR 86.
[38] Pacific Order 1893, No 78 (UK) s 121.
[39] Cap 169, s 5.
[40] Pacific Order 1893 No 78 (UK) s 121.
[41] Ibid ss 118, 121.

Under the Pacific Islands Civil Marriages Order 1907, both parties must be at least 21 years of age and at least one of them must have resided 'within the district in which the marriage is intended to be celebrated' for at least 15 days.[42]

(b) Customary laws

As discussed above in Part II above, customary laws are recognised by the State. More specific recognition of customary marriages is conferred by the Islanders' Marriage Act.[43] As in other parts of Melanesia, customary laws in Solomon Islands are not homogenous.[44] The rules relating to customary marriage differ from island to island and often from village to village.[45] Consequently, it is not possible to provide a comprehensive list of the ingredients of a valid customary marriage. There are, however, some common requirements, such as negotiations between the relatives of each party, which often take place prior to the marriage, together with some form of betrothal. One or more ceremonies are usually involved, commonly including the exchange of gifts and bride price which is given by the husband's family to the bride's.[46] As stated by Jessep and Luluaki, at least in the context of Papua New Guinea, 'the formation of a customary marriage may appear more as a process than an event'.[47]

The more common requirements of a legally valid customary marriage were explored by Kabui J in *Rebitai v Chow*.[48] These include the need for the marriage to be public, preceded by some form of preliminary negotiation, and payment of bride price and exchange of gifts. This case is discussed further in Part V below.

An example of a less common requirement can be found in one area of Solomon Islands, the Are-Are region, where both parties to the marriage must disclose any information about their sex life prior to her marriage to the other party. Failing to do so is as an offence.[49]

(c) Hybrids

As mentioned at the outset, in some cases, customary laws have been incorporated into the State system, giving rise to 'hybrids'. This section

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42 Pacific Islands Civil Marriages Order 1907 No 543 (UK) s 10.

43 Cap 171.

44 For a Papua New Guinean perspective, see, eg *Mura v Gigmai* (Unreported, National Court of Papua New Guinea, Injia J, 9 May 1997), accessible via www.paclii.org at [2003] PGNC 59 where Injia J outlines the requirements of a customary marriage.

45 *Rebitai v Chow* [2002] 4 LRC 226, 233.

46 [2002] 4 LRC 226, 233–35.

47 Owen Jessep and John Luluaki, *Principles of Family Law in Papua New Guinea* (Port Moresby: UPNG Press, 2nd edn, 1994) 8.

48 [2002] 4 LRC 226.

49 Are-Are Guidelines traditional code 13 and 18.

discusses two different means of incorporation of customary marriages: the first by registration and the second by incorporation in legislation.

(i) Registered customary marriages

The Islanders' Marriage Act[50] provides that, if both parties wish, a customary marriage may be registered under the Act.[51] Once registered, the marriage is treated as if it were a marriage under the Act for the purposes of divorce and the law of bigamy.[52] As discussed further below, other consequences of registration exist but are not so clear.

(ii) Moli Ward Chiefs Council Ordinance

The Moli Wards Chiefs Council Ordinance 2010 was passed by the provincial government,[53] rather than the national Parliament. Although it is delegated legislation, it does not fit neatly into the category of State law. The Ordinance seeks to give recognition to the Moli Ward Chiefs, in respect of both their law making and dispute resolution power. The rules it contains are based on customary laws and local culture, rather than the common law. However, the Ordinance also upholds State law by barring any marriage which would be unlawful not only under the Ordinance but also under any other relevant laws of Solomon Islands.[54]

The Ordinance sets up a Chiefs Council, which is not a traditional institution, but draws on the chiefly system in the area. Council members are elected by secret ballot at a meeting presided over by the Provincial Member for Moli Ward,[55] who is a state official.[56] The executive consists of elected members and two Paramount Chiefs (one for each House of Chiefs).[57]

The Ordinance regulates the traditional practice of giving and receiving bride price during a marriage ceremony in Moli Ward.[58] It provides that the families of the parties to the marriage must have agreed upon the bride price prior to the ceremony.[59] The amount of the bride price is also stipulated being:

(a) for a virgin bride, one chausangavulu,[60] two chauvati[61] and $1000;

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50 Cap 171.
51 Section 18.
52 Section 19. For the offence of bigamy see Penal Code cap 26, s 170.
53 Regulated by the Provincial Government Act cap 118.
54 Ibid s 43(1)(d).
55 Moli Wards Chiefs Council Ordinance 2010 s 3(2).
56 Provincial Government Act cap 118, ss 12, 21, 22.
57 Moli Wards Chiefs Council Ordinance 2010 s 3(1).
58 Ibid 35(1).
59 Ibid s 35(3).
60 "Chausangavulu' means ten string shell money of one fathom each string in length': Moli Wards Chiefs Council Ordinance 2010, s 2(1).
61 "Chauvati' means the common four string shell money of one fathom each string in length': Moli Wards Chiefs Council Ordinance 2010 s 2(1).

(b) for a bride who, prior to marriage, has a child fathered by a person other than her groom; two chauvati and $500;
(c) for a bride who has been separated from an earlier marriage; one chauvati and $300.[62]

Eloping without adhering to these requirements is an offence and makes the eloping couple liable to the following penalties:

(a) a fine of one chausangavulu; or
(b) two pigs; and
(c) three chauvatis.[63]

Further, the Ordinance endorses the following customs which apply to arranged marriages:

(a) the marriage is to be arranged by parents or relatives of the bride and the groom;
(b) the parties shall exchange gifts as a security to the arrangement;
(c) where a pre-arranged marriage is made between the two parties the children are bound to abide by the agreement;
(d) the parties to a pre-arrange(d) marriage agreement may agree to cancel the agreement.[64]

A party who breaks the pre-arranged marriage agreement without the approval of the other party is liable to pay one chauvati and one pig as compensation, and must return the chauvati and pig given during the exchange of gifts.[65]

The Ordinance bars parties from the same tribe marrying or having sexual intercourse with each other and the following penalties apply for contravening this rule:

(a) a fine not exceeding 1000 penalty units; and
(b) one pig, one ten-string shell money, and one chupu.[66]

It also endorses customary bars to marriage. It specifies that the following people may not marry:

(a) a child;
(b) persons of the same sex;
(c) a person who is already married;[67]

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[62] Ibid s 35(4).
[63] Ibid s 36(1).
[64] Ibid s 38(1).
[65] Ibid s 38(1).
[66] Ibid s 38(2).
[67] Ibid s 44(3).

(d) a person from Guadacanal Province if the marriage is chio.[68]

Knowingly assisting with a marriage which is in breach of these prohibitions is an offence punishable by a fine not exceeding 500 penalty units and payment of one pig, one chauvati and one chupu,[69] except in the case of (d) where 1000 penalty points are payable.[70]

IV REGIMES FOR DISSOLUTION OF MARRIAGE

As in the case of marriage, there are three legal regimes applying to divorce. However, the State law regime is made up of different sources: domestic legislation applies, but colonial Orders do not. Instead United Kingdom Acts of general application come into play. The other two regimes are customary laws and hybrid.

(a) State laws

(i) Solomon Islands statutes

Divorce

Where both parties to a marriage are Solomon Islanders, divorce is governed by the Islanders' Divorce Act.[71] Section 3 provides that:

> 'This Act shall apply only to marriages between two Islanders who have been married by a minister of religion, or by a District Registrar, or under the provisions of the Pacific Islands Civil Marriages Order in Council 1907 … and where the husband is an Islander domiciled in Solomon Islands and in such cases the marriage may only be dissolved, annulled or judicial separation ordered by the Court as hereinafter provided.'

Accordingly, both parties must be 'Islanders' and the husband must be domiciled in Solomon Islands in order for either party to be permitted to file a petition.[72] As discussed in the issues section below (Part V), these requirements are not as straightforward as they seem.

The grounds of divorce under the Islanders' Divorce Act are largely fault-based. The two grounds most frequently relied on[73] are adultery and cruelty.[74]

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68 Ibid s 45(1). '"Chio" means a sexual intercourse between two persons of the same tribe or marriage between a man and a woman of the same tribe': *Moli Wards Chiefs Council Ordinance 2010,* s 2(1).

69 Ibid s 43(2) and (3). 'Chupu' is not defined in the Ordinance but generally means traditional gifts': Moli Wards Chiefs Council Ordinance 2010, s 2(1).

70 Ibid s 45(6).

71 Cap 170, s 3.

72 Ibid s 3.

73 Mere Pulea, *The Family, law and population in the Pacific Islands* (Institute of Pacific Studies of the University of the South Pacific, 1986) 139.

Desertion for at least 3 years is also quite commonly relied on.[75] Grounds also exist if the respondent is of incurably unsound mind and has been detained under the Mental Treatment Act[76] for at least 5 years prior to the presentation of the petition,[77] but this ground is uncommon, perhaps due to the lack of facilities for treatment of mental illness in Solomon Islands.[78] A wife may petition on the basis that her husband has been convicted of rape, sodomy or bestiality after the celebration of the marriage.[79]

In 1998 a single no-fault ground was introduced, based on the parties having lived apart for a continuous period of 5 years immediately preceding the petition. The court must also be satisfied that the marriage has broken down irretrievably.[80] Where this is established the court will not explore a fault-based ground.[81]

In a petition based on adultery, a husband may also claim damages against any person, normally the co-respondent.[82] This avenue is not available to a wife in respect of her husband's adultery. In *Waneria v Waneria*[83] the petitioning husband sought damages from the co-respondent, who paid him $19,000 out of court. After four adjournments at the request of the petitioner, the court granted a decree absolute without further consideration of whether additional damages should be paid.

Nullity

In addition to providing grounds for divorce, the Islanders' Divorce Act provides for a marriage to be declared void if any of the following grounds are proved:

(a) An existing and subsisting marriage;
(b) Duress or mistake;

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74 Islanders' Divorce Act cap 170, s 5(1)(a) and (c); Matrimonial Causes Act 1950 (UK) s 1(1)(a) and (c).

75 Islanders' Divorce Act cap 170, s 5(1)(b); Matrimonial Causes Act 1950 (UK) s 1(1)(b).

76 Mental Treatment Act cap 103. Under the Matrimonial Causes Act 1950 (UK) the equivalent legislation was the Lunacy and Mental Treatment Acts 1890–1930 (UK).

77 Islanders' Divorce Act cap 170, s 5(1)(e) and (2); Matrimonial Causes Act 1950 (UK) s 1(1)(d), and (2).

78 Solomon Islands does not have an officially approved mental health policy, nor is mental health 'specifically mentioned in the general health policy'. There is only one mental hospital in the Solomon Islands and there are only 0.19 'health professionals working in the mental health sector' per 100,000 members of the population: World Health Organisation Department of Mental Health and Substance Abuse, *Solomon Islands* (2011) Mental Health Atlas http://www.who.int/mental_health/evidence/atlas/profiles/sib_mh_profile.pdf.

79 Islanders' Divorce Act cap 170, s 5(1); Matrimonial Causes Act 1950 (UK) s 1(1).

80 Islanders' Divorce (Amendment) Act 1998 (Solomon Islands) s 3(b)(ii).

81 *Boso v Tonavido* (Unreported, High Court of Solomon Islands, Kabui J, 6 February 2003), accessible via www.paclii.org at [2003] SBHC 14.

82 Islanders' Divorce Act cap 170, s 18(1); Matrimonial Causes Act 1950 (UK) s 30(1).

83 (Unreported, High Court of Solomon Islands, Mwanesalua J, 28 May 2014), accessible via www.paclii.org at [2014] SBHC 57.

(c) Insanity;
(d) Parties are within the prohibited degrees of relationship of consanguinity or affinity;[84] or
(e) Lack of form.[85]

The Act also provides that a marriage is voidable on any of the following grounds:

(a) Refusal or inability to consummate on the part of the respondent;[86]
(b) Unsound mind or recurrent fits of insanity or epilepsy;
(c) The respondent was suffering from venereal disease in a communicable form at the time of the marriage;
(d) The respondent was pregnant by a person other than the petitioner at the time of the marriage.[87]

Judicial separation

A decree of judicial separation releases the petitioner from all legal obligation to cohabit with the respondent. The grounds for application for judicial separation under the Islanders' Divorce Act are the same as those for divorce,[88] and a decree does not prevent a subsequent application for divorce.[89]

(iii) United Kingdom Acts

Unlike the formation of marriages, there is no colonial law governing dissolution. However, United Kingdom legislation does step in to provide an avenue for dissolution to those who are formally married, but do not qualify to apply under the Islanders' Divorce Act. Applications for divorce in such cases are governed by the Matrimonial Causes Act 1950 (UK), which applies to:

(a) marriages celebrated outside Solomon Islands;
(b) marriages between two non-islanders or an islander and a non-islander, under the Pacific Islands Civil Marriages Order in Council 1907;[90]
(c) marriages between two islanders if the husband is not domiciled in Solomon Islands; and

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84 The degrees are not specified in the Act, so presumably the English law on point applies.
85 Islanders' Divorce Act cap 170 s 12. See also *Riumana v Riumana* (Unreported, High Court of Solomon Islands, Cameron PJ, 31 July 2009), accessible via www.paclii.org at [2009] SBHC 35 where Cameron PJ unequivocally states that, per the Act, if a marriage is not celebrated in due form, it is void.
86 See, eg, *HK v KK* (Unreported, High Court of Solomon Islands, Kabui J, 18 July 2003), accessible via www.paclii.org at [2003] SBHC 143.
87 Islanders' Divorce Act cap 170, s 13.
88 Ibid s 16.
89 Ibid s 17.
90 This Order governs civil marriages between Islanders, non-Islanders and an Islander and non-Islander.

(d) marriages celebrated under the Pacific Order 1893.[91]

Since this is the parent to the Solomon Islands' legislation, the grounds for divorce under the Matrimonial Causes Act are almost the same as those under the Islanders' Divorce Act.[92] Notably, in the United Kingdom, the Act has been repealed and divorce is now granted on the basis of irretrievable breakdown or a period of separation.[93] However, these reforms have no effect in Solomon Islands; as discussed above, there is a 'cut-off' date of 1 January 1961 for the application of United Kingdom Acts.[94] Accordingly, the 1950 Act still applies.

Nullity

Those entitled to apply for a divorce under the Matrimonial Causes Act may also apply for a decree of nullity. Again, the available grounds are similar to those under the Islanders' Divorce Act.[95] Notable differences are that only the Islanders' Divorce Act allows a decree of nullity to be granted on the basis that one party is incapable of understanding the nature of the ceremony due to being of unsound mind.[96] Conversely, only the Matrimonial Causes Act provides for a decree of nullity where the parties to a marriage are not male and female.[97]

Judicial separation

A decree of judicial separation may also be granted under the Matrimonial Causes Act to those entitled to apply under the Act.[98] The available grounds are the same as for divorce.[99]

A decree of judicial separation prevents a suit for loss of conjugal rights, which would otherwise be available to a party to whom the Matrimonial Causes Act applies.[100] Such an order forces the respondent to return to the matrimonial home and resume marital relations. No such order appears to have ever been made under the 1950 Act and such orders cannot be sought under the local Islanders' Divorce Act.[101]

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91 Pacific Order in Council 1893 (UK).
92 Matrimonial Causes Act 1950 (UK) s 1(2).
93 Matrimonial Causes Act 1973 (formerly the Divorce Reform Act 1969) (UK) s 1.
94 *Constitution of Solomon Islands* 1978 sch 3(1).
95 Matrimonial Causes Act 1950 (UK) s 11.
96 Islanders' Divorce Act cap 170 s 12(c).
97 Matrimonial Causes Act 1950 (UK) s 11(c).
98 Ibid s 17.
99 Ibid s 17(1).
100 Ibid s 15.
101 Women have, however, been pressured into returning to their husbands under customary law. For a graphic example from Vanuatu: see *Public Prosecutor v Kota* [1980–1994] Van LR 661.

(b) Customary laws

The terms 'divorce' and 'nullity' have no precise parallels under customary laws.[102] Accordingly, here, the term dissolution is used to encompass all the processes that lead to marriage breakdown in custom. If parties are married under the customary regime, dissolution must be in accordance with customary law.[103] However, if the customary marriage is registered or if parties also contract a marriage under State law, they are regarded as married under the statutory regime,[104] and the State sanction will be required to terminate the marriage through divorce or a decree of nullity.[105] As discussed further below, it is not so clear whether, in such circumstances, some form of customary termination would also be required.

In contrast to the State's strict and comparably unambiguous system of fault-based divorce, in custom, the process that leads to the public acceptance of a marriage breakdown is likely to be multi-dimensional.[106] There are no specific 'grounds' for dissolution and it is difficult to state general rules governing these processes. As stated by Epstein, '[t]he view that custom can be translated into a series of clear-cut statements of rules of law can easily lead to the method that has been dubbed as "looking for the wise old men of the village"'.[107]

Further, as previously mentioned, customary laws differ from place to place.[108] The circumstances that may justify termination depend on the customs of the group to which the parties belong. Customary marriages are embedded in a societal structure based on reciprocal obligations within a wide network of familial relationships. In the same way that customary marriages are usually arranged by relatives rather than the parties, dissolution is unlikely to be a matter of individual choice. The views of relatives and village leaders will be pivotal and the outcome may be a negotiated solution rather than some predetermined result.[109] Questions regarding the return of any bride price and compensation are likely to be at least as important as the conduct and wishes of the parties.[110]

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[102] Brown, above n 9, 117.

[103] Islanders' Divorce Act (Solomon Islands) cap 170, s 4.

[104] The church marriage will subject the parties to the formal regime of divorce and ancillary relief, which may not be their intention. See further, *Rebitai v Chow* [2002] 4 LRC 226, 232–33. See also *Salumata v Kelly* (Unreported, High Court of Solomon Islands, Kabui J, 5 November 1999), accessible via www.paclii.org at [1999] SBHC 129, which implies that where a formal marriage is void ab initio a customary marriage only lies dormant and revives when the marriage is declared void and a decree of nullity pronounced.

[105] Islanders' Marriage Act (Solomon Islands) cap 171, s 19(1).

[106] See the example outlined in Arnold Epstein 'Procedure in the Study of Customary Law' (1970) 1 *Melanesian Law Journal* 51, 53–54. See further Jessep and Luluaki, above n 48, 58–59.

[107] Arnold Epstein, 'Procedure in The Study of Customary Law' (1970) 1 *Melanesian Law Journal* 51, 52.

[108] *Rebitai v Chow and Others* [2002] 4 LRC 226, 233.

[109] See, eg, *Re B* [1993] SILR 223.

[110] See, eg, *To'ofilu v Oimae* (Unreported, High Court of Solomon Islands, Palmer J, 19 June

Unlike the position under the state regime, in most areas of the country, adultery will not necessarily result in divorce. It is more likely to be an offence. For example, in the Are-Are area the Guidelines provide that adultery is an offence and stipulate a penalty of up to SI$120,[111] or in the case of adultery by a married man up to SI$90.[112] It is also an offence to incite an act of adultery, the penalty being SI$90.[113] In other areas, compensation can be demanded by the husband (and in some areas, by the wife) from the adulterer.[114] Compensation will usually take the form of shell money or custom goods, such as mats,[115] but may also include cash.

In some areas, a husband may reject his wife if he discovers that she was not a virgin at the time of marriage, if this was not disclosed during the bride price negotiations.[116] At least half the bride price must be repaid.[117] As mentioned above, in Are-Are, a party who fails to disclose any information about their sex life to the other party prior to marriage[118] commits an offence, although this will not render the marriage void. A woman who is found guilty of this offence becomes liable to pay compensation not exceeding $60.00.[119] For a man the penalty is slightly higher; compensation may not exceed $72.00.[120]

A wife may not always be entitled to terminate the marriage on the basis of physical violence.[121] In some areas, this may justify the wife returning to live

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1997), accessible via www.paclii.org at [1997] SBHC 33, discussed in Jennifer Corrin, 'Case Note on *John To'ofilu v Oimae*' (June 1999) 13(1) *Commonwealth Law Journal* 33.

111 Are-Are Guidelines traditional code 17.

112 Ibid traditional code 22.

113 Ibid traditional code 21.

114 In relation to Papua New Guineas, see Law Reform Commission of Papua New Guinea Report on Adultery (Report No 5, 1977) 3.

115 See also the Adultery and Enticement Act 1988 (Papua New Guinea) s 17, which empowers the Village Court to order compensation for adultery in cash, goods or a mixture of both.

116 *To'ofilu v Oimae* (Unreported, High Court of Solomon Islands, Palmer J, 19 June 1997), accessible via www.paclii.org at [1997] SBHC 33.

117 Ibid. The submission that only half was repayable if the husband rejected the wife, rather than the other way round was made from the bar in the High Court, but not supported by evidence. However, the submission seems to have been accepted by the magistrates.

118 Are-Are Guidelines traditional code 13 and 18.

119 Ibid traditional code 13.

120 Ibid traditional code 18.

121 In some areas physical violence alone will be enough. See Law Reform Commission *Customary Marriage and Divorce in Selected Areas of Papua New Guinea* (Occasional Paper No 5, 1975) 35.

with her parents, but if the husband pays compensation to her parents she may be obliged to return to him.[122] However, extreme violence may justify dissolution in custom.[123]

According to the Are-Are Guidelines, it is an offence for a married man to desert his wife for paid employment outside their village for any period of time. The penalty is up to SI$90.[124] This type of rule is unlikely to apply in areas of the country with a strong patriarchal culture. In neighbouring Papua New Guinea, a wife who entered into a relationship with another man after her husband had been away in another Province for employment for a number of years was fined by the Village Court after her husband's relatives complained. When she failed to pay she was imprisoned.[125]

(c) Hybrid Laws

(i) Moli Ward Chiefs Council Ordinance

As mentioned above (Part III), the Moli Wards Chiefs Council Ordinance 2010 recognises both the law making and dispute resolution powers of the Moli Ward Chiefs. In relation to dissolution, the Ordinance provides two fault-based grounds for dissolving a customary marriage:

> '(5) A spouse to a marriage may apply for termination of marriage if the other spouse –
>
> (a) has left the matrimonial home for more than 2 years; or
> (b) is living in a de-facto relationship with another person.'[126]

Perhaps surprisingly, adultery (Kibogha) is not a specified ground for divorce, but, as is common under customary laws,[127] it is an offence. Both parties to an

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[122] Bernard Narakobi 'There's No Need for Women's Lib Here, because "Melanesian Women are already Equal"' in H Olela (ed) *The Melanesian Way* (Institute of Papua New Guinea Studies Boroko, Institute of Pacific Studies Suva 1983) 70, 71. Compare *State v Kopilyo Kipungi* (Unreported, National Court of Papua New Guinea, Los AJ, 18 October 1983), accessible via www.paclii.org at [1983] PGNC 13, where Los J stated '[a]lthough the equality of sexes is now a constitutional principle in Papua New Guinea, at this stage it is more a matter of books, rather than practice. The character of all aspects of life is male dominance' is probably a more accurate statement of the true position. See also *Habe v Melzear* [1982] SILR 1, where the wife, married under the statutory regime, ran away from her husband on five occasions due to his violence. On each occasion she was persuaded to go back to him for 'custom reasons'.

[123] For an example under Papua New Guinean customary law, see *Mamando v Goiya* (Unreported, National Court of Papua New Guinea, Woods J, 1 June 1992), accessible via www.paclii.org at [1992] PGNC 13 where there was a history of assaults by the husband, and where, during the final assault, he bit off his wife's nose.

[124] Are-Are Guidelines traditional code 15.

[125] *Re Wagi Non* [1991] PNGLR 84. See also *Re Kaka Ruk* [1991] PNGLR Rep 105.

[126] Moli Wards Chiefs Council Ordinance 2010, s 33(5).

[127] Moli Wards Chiefs Council Ordinance 2010, s 40. See also Are-Are Guidelines traditional code 17.

act of adultery are liable, to a fine of two pigs, two chausangavulu and four chauvatis, to be divided between the Council and the spouse.[128]

The Council may also grant a temporary separation order on application by either party to a custom marriage.[129] However, the Ordinance specifically states that the Council is not empowered to make a separation order in relation to a State marriage.[130]

V ISSUES ARISING FROM PLURALISM

A problem with plural regimes is that there may be inequality for parties who do not have access to the most favourable pathway. There are also issues concerning lack of clarity caused by the complex interaction of the three diverse regimes. In this section, a selection of the issues arising from the plurality prevailing in Solomon Islands is explored.

(a) Issues relating to marriage

(i) The age of consent

The age of consent in Solomon Islands varies between the different marriage regimes. For Solomon Islanders,[131] the minimum age of consent to marry under State law is 18, or 15 with the consent of the father.[132] If the father is not available, the child's mother may consent or, in her absence, the child's guardian.[133]

For non-Solomon Islanders, the minimum age of consent under the State regime is unclear. Under the Marriage Act 1949 (UK) the minimum age is 16.[134] However, the High Court has held that this Act does not apply as its 'complicated statutory framework' prevents it from applying in Solomon Islands as an Act of general application.[135] The current State law for children who are not Solomon Islanders would therefore appear to be contained in the common law, which imports a minimum age of consent of 14 for a male and 12 for a girl.[136]

As far as customary marriage is concerned, it is difficult, if not impossible, to state definitively what the minimum age of consent might be. As is the case with

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[128] Moli Wards Chiefs Council Ordinance 2010, s 40(1).
[129] Ibid, s 34(1).
[130] Ibid, s 34(5).
[131] This is discussed further at 5.1.2. See further Jennifer Corrin, 'A Question of Identity: Complexities of State Law Pluralism in the South Pacific' (2011) 61(1) *Journal of Legal Pluralism and Unofficial Law* 143–169.
[132] Islanders Marriage Act (Solomon Islands) cap 171, s 10.
[133] Ibid.
[134] Marriage Act 1929 (UK), s 2.
[135] *Mahlon v Mahlon* [1984] SILR 86, 87–88.
[136] *Arnold v Earle* (1758) 2 Lee 529.

the various customary laws governing marriage and divorce, it is likely that it varies from custom to custom. The Moli Ward Chiefs Council Ordinance does not answer the question directly, but the marriageable age is in effect 18, as marriage involving a child is unlawful, and a child is defined as someone under 18.[137]

In neighbouring Papua New Guinea, the courts have endorsed the notion that, in custom, one's maturity and consequently the ability to consent ought to be grounded in physical development rather than their chronological age. In *R v Boike Ulel*[138] Clarkson J held that:

> 'Regard must be held for the society in which the parties lived and for the fact that one could not expect a person in that society to have any real appreciation of chronological age as opposed to apparent physical maturity as a test of maturity.'

While this particular case was one of unlawful carnal knowledge, the reasoning would appear equally applicable to the general age of consent.

The CRC Committee has recommended that the age of consent for all marriages be raised in Solomon Islands.[139] Solomon Islands' Law Reform Commission (SILRC) has recommended that:

> '…the minimum age for customary marriage, which is currently regulated by the customary law pertaining to the parties to the marriage, should be regulated to fall in line with the minimum age for marriage under State law, subject to a lower age applying in exceptional circumstances, including pregnancy where marriage is in the best interests of the unborn child.'[140]

Whilst this is a more nuanced suggestion, given that the minimum age of consent can be as low as 12 under State law, a more robust approach than that advocated by the SILRC appears to be called for. Raising the age of consent to 18 for all children in Solomon Islands would give some protection against arranged or forced marriages,[141] while assisting to uphold the rights expressed in the Convention on the Rights of the Child, to which Solomon Islands is a party.[142] It would also avoid the current discrimination by State laws on the grounds of gender, which may be unconstitutional.[143]

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137 Moli Ward Chiefs Council Ordinance s 43.

138 [1973] PNGLR 254.

139 Convention on the Rights of the Child, Consideration of Reports Submitted by States under Article 44 of the Convention, para 19(b) available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f15%2fAdd.208&Lang=en [accessed 17 February 2016].

140 LRC, Review of the Penal Code and Criminal Procedure Code: Second Interim Report Sexual Offences, 2013, recommendation 13a.

141 Kenneth Brown, Jennifer Corrin Care 'Putting Asunder: Divorce and financial relief in Solomon Islands' 2005 Oxford University Commonwealth Law Journal 96.

142 Convention on the Rights of the Child, 1577 UNTS 3 (ratified 10 April 1995).

143 Constitution of Solomon Islands 1978 (SI), s 15(1). Such provision is not unconstitutional in the case of non-citizens: s 15(5)(b) and (c).

(ii) Who is an 'Islander'?

As discussed above, the domestic legislation only provides for marriages between 'Islanders'.[144] The question of who is an islander is a complex one.[145] There is no definition in the Islanders' Marriage Act, but the Interpretation and General Provisions Act provides:[146]

> 'Islander' means –
>
> (a) any person both of whose parents are or were members of a group, tribe or line indigenous to Solomon Islands; or
> (b) any other person at least one of whose parents or ancestors was a member of a race, group, tribe or line indigenous to any island in Melanesia, Micronesia or Polynesia and who is living in Solomon Islands in the customary mode of life of any such race, group, tribe or line.'

The meaning of the word 'islander' was discussed in *Kevisi v Mergozzi.*[147] On a petition for divorce on the grounds of adultery, the respondent applied to have the marriage declared a nullity on the basis that the formalities required by the Islanders' Marriage Act[148] had not been complied with.[149] A question arose as to whether the respondent, who was born in Switzerland and was a naturalised Australian citizen, qualified as an 'Islander' so as to come within the jurisdiction of the Act. Cameron LJ drew on the reasoning in *Luaseuta v Luaseuta,*[150] which had been decided at a time when no definition was in force. In that case, it had been concluded that for the purposes of the Islanders' Divorce Act 'an Islander' meant anyone domiciled in Solomon Islands. Cameron LJ held that the same meaning applied to the Islanders' Marriage Act. What was overlooked by the court in this case was the definition of 'Islander' inserted by the Interpretation and General Provisions (Amendment) Act in 1987,[151] after the decisions in *Luaseuta v Luaseuta*.[152] The statutory definition requires indigenous lineage rather than domicile in order to qualify for 'Islander' status and, accordingly, the decision is arguably per incuriam.

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144 Islanders' Marriage Act cap 171, s 4.
145 See further, Jennifer Corrin, 'A Question of Identity: Complexities of State Law Pluralism in the South Pacific', (2011) 61 (1) *Journal of Legal Pluralism and Unofficial Law* 143.
146 1996, cap 85, s 17(1).
147 (Unreported, High Court of Solomon Islands, Cameron LJ, 18 March 2008), accessible via www.paclii.org at [2008] SBHC 13.
148 Cap 171.
149 The main objection was that the notice of the intended marriage had not been given and the marriage had not been celebrated in a church.
150 See also *Mahlon v Mahlon* [1984] SILR 86.
151 Act 15 of 1987.
152 Unreported, High Court of Solomon Islands, Davis CJ, Civ Cas 34/1978.

(c) Intermarriage under customary laws

It is clear that Islanders cannot marry non-Islanders under the local Act,[153] but may celebrate their marriage under either of the colonial Orders.[154] A more ambiguous question is whether or not an Islander may enter into a customary marriage with a non-Islander. This complex issue was addressed in *Rebitai v Chow*.[155] In that case, the plaintiff was an indigenous Islander from Makira. In 1971, she met Chow, the first defendant, who was of Chinese descent but had been born in Solomon Islands. They began to live together in Rebitai's house in 1972, but did not marry. In 1974, Chow married a Chinese woman in Hong Kong and brought her back to Solomon Islands. However, the marriage was dissolved in 1975, after Chow left his Chinese wife and went back to live with Rebitai. The parties continued to live together and had five children. In 1996 their relationship broke down. The plaintiff claimed that they were validly married in custom. However, the first defendant denied this, contending that s 4 of the Islanders' Marriage Act only provided for customary marriage between Islanders. Kabui J did not answer this proposition directly but said he could find no custom that prohibited a customary marriage between an indigene and a person of another race. An examination of s 4 reveals that it is worded permissively rather than as a prohibition; in other words, it allows Islanders to marry in custom but nowhere bars non-Islanders from doing so.

One question not explored in *Rebitai v Chow* was the relevance of lifestyle to choice of law. Could the respondent have argued that he had not chosen customary laws as his personal law, and pointed to the fact that he had not adopted a customary lifestyle as evidence of this?[156] Section 17(1)(b) of the Interpretation and General Provisions Act supports this view, as it requires parties from other parts of Melanesia, Micronesia or Polynesia to be living 'in the customary mode of life' in order to qualify as 'Islanders'. Those who live and work in an urban centre and adopt a western style of living arguably do not live 'in a customary mode of life' and thus cannot qualify as 'Islanders' for the purposes of the Act.

Another issue regarding intermarriage is endogamy, which is a common concern in customary societies. The Moli Ward Chiefs Council Ordinance addresses this issue by specifically endorsing the right to marry a person from outside Guadalcanal Province, where Moli Ward is situated, and prohibiting marriage to a person from the same tribe.[157] As mentioned above, under State law, marriage within the prohibited degrees of relationship of consanguinity or affinity renders a marriage void.[158]

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[153] See section 4 above and *Mahlon v Mahlon* [1984] SILR 86.
[154] *Victoria Government Gazette* published by authority, No 165, Friday 27 December 1907, 1–2.
[155] [2002] 4 LRC 226.
[156] As to choice of law issues in Africa, see Antony Allott, *New Essays in African Law* (Butterworths, 1970) ch 6.
[157] Moli Wards Chiefs Council Ordinance 2010 s 45(1).
[158] Islanders' Divorce Act cap 170, s 12.

(d) Marriage of Islanders from different customary groups

The issue of marrying outside the tribe gives rise to another question. Where a customary marriage takes place between Islanders from different customary groups the question of which customary laws will govern the marriage arises, if their respective laws differ? The customary laws in question may supply an answer, for example, both sets of laws may acknowledge that the custom of the husband's group will prevail. However, if that is not the case, the position under State law is unclear. The Constitution leaves it to Parliament to 'provide for the resolution of conflicts of customary law'.[159] The legislature has been slow to act on this mandate. In 2000, it finally passed the Customs Recognition Act which contains guidelines for the application of customary laws in State courts, but is badly drafted and has never been brought into force.[160] The legislation, which specifically applies to customary marriage and divorce,[161] provides for the position where a court is faced with conflicting systems of custom and is not satisfied that one has precedence over the other. In that case, the court must consider all the circumstances and may adopt the system that it is satisfied the justice of the case requires.[162]

As the Customs Recognition Act is not in force, the courts might find some guidance from neighbouring Melanesian countries. In Papua New Guinea, the Underlying Law Act 2000, which replaced the Customs Recognition Act (PNG) on which the Solomon Islands Act was modelled, directs the court to use whichever customary laws the parties intended to be applied. If no such intention can be discovered, the court is directed to use 'the customary law that is, in the opinion of the court, most appropriate to the subject matter'.[163] The Act itself does not explain what is meant by 'appropriate to the subject matter.' However, the Law Reform Commission's Report on which the Act is based states that, in deciding which law is appropriate, the place and nature of the transaction and the place and nature of the residence of the parties are relevant factors.[164]

(e) The Form of Customary Marriages

In *Rebitai v Chow*[165] the court was presented with the alternative argument that the marriage was invalid because the requirements of custom had not been observed. The main points in contention were whether bride price was a

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[159] Schedule 3, para 3(3)(c).

[160] See further, J Zorn and J Corrin Care, *Proving Customary Law in the Common Law Courts of the South Pacific,* London (The British Institute of International & Comparative Law, 2002).

[161] Section 8.

[162] Section 10. A similar approach was suggested in the Vanuatu case of *Waiwo v Waiwo* (Unreported, Magistrates Court, Vanuatu, Senior Magistrate Vincent Lunabek, 28 February 1996), accessible via www.paclii.org at [1996] VUMC 1. The decision was reversed on appeal in *Banga v Waiwo*, (Unreported, Supreme Court, Vanuatu, d'Imecourt CJ, 17 June 1996), accessible via www.paclii.org at [1996] VUSC 5.

[163] Underlying Law Act 2000 (Papua New Guinea) s 17.

[164] Law Reform Commission of Papua New Guinea, Annual Report 1977, (1977).

[165] [2002] 4 LRC 226.

necessary prerequisite[166] and whether particular ceremonies were required. The plaintiff admitted that no bride price had ever been paid owing to the fact that the first defendant had no money. In some areas of Solomon Islands, bride price is a determining factor in custody disputes according to customary law.[167] This could support the view that bride price is a necessary part of the marriage process. Alternatively, the fact that rights relating to custody differ according to whether or not bride price has been paid could indicate that payment is not essential.[168]

The plaintiff in *Rebitai v Chow* also admitted that no customary ceremony had been performed. However, she maintained that the marriage was valid because the union was accepted as a customary marriage by her parents and the community.[169] The plaintiff's expert witness gave evidence that certain preliminary ceremonies, such as payment of bride price and the exchange of food and gifts, usually formed part of the process of a customary marriage. However, he added that the 'changing life and cultural patterns in [the] modern era' had led to inconsistency in traditional practices,[170] and that the critical factor was the acceptance of the relationship and the parties' children by the bride's parents and the local community.[171]

The husband's expert witness, on the other hand, deposed that certain formalities were essential to a marriage in the applicable Arosi custom. These were:

> '(a) the asking of the bride and the consent for her to get married to the groom;
> (b) the giving of the engagement or commitment payment, which would normally be custom shell money and, nowadays, may be with some cash payments;
> (c) after this engagement or commitment stage, the girl may go and live with the groom and … [they] may [have] children; and
> (d) the holding of the marriage feast called 'ha'ahe'iwai which is the final stage at which the bride's party bring pigs and food to be exchanged for money with the people from the groom's family.'[172]

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[166] For a discussion of the controversies surrounding bride price, see Kenneth Brown and Jennifer Corrin, 'Marit Long Kastom: Marriage in the Solomon Islands' (2004) 18 *International Journal of Law Policy and the Family* 52–75.

[167] See *Sasango v Beliga* [1987] SILR 91; *Re B* [1983] SILR 33.

[168] State courts have applied 'best interests' principle rather than the principles of customary law in determining custody disputes. However customary laws have been taken into account as a factor in determining where those interests lie: *Sukutaona v Houanihou* [1982] SILR 12.

[169] The notion that community acceptance is or should be a salient feature to consider when assessing the validity of a customary marriage appears to have been unofficially endorsed by the 2nd Draft Constitution of Solomon Islands, which provides that '"Spouse" means a person who … is, and has been for a period of at least one year, living in a de facto relationship with another person, and recognised by relatives in custom': *2nd Draft Constitution of Solomon Islands 2014* (Solomon Islands) sch 9, s 1(3)(g).

[170] *Rebitai v Chow* [2002] 4 LRC 226, 235.

[171] *Rebitai v Chow* [2002] 4 LRC 226, 235–6.

[172] *Rebitai v Chow* [2002] 4 LRC 226, 236–7.

As there had been no 'ha'ahe'iwai' in this case, the witness was of the opinion that no marriage had been concluded in custom, and the relationship could be terminated at any time 'without anyone raising an issue'.[173]

In spite of this evidence, it was held that a valid marriage had taken place. The critical factors influencing the decision were said to be that:

(i) The parties had agreed to be married;
(ii) The family and relatives of the plaintiff and the Arosi community regarded the parties as married;
(iii) This agreement was confirmed by their living together for 24 years and having children and grandchildren;
(iv) The children and grandchildren had become members of the plaintiff's tribe and were entitled to land rights under custom.[174]

It was also stated that customary marriage could not be a secret affair and that some form of preliminary negotiation and payment of bride price and exchange of gifts usually took place. His Lordship also stressed that customary law, like common law, presumed in favour of marriage.[175] This approach avoids the bastardisation of children and their dislocation from their customary land rights.

Whilst the lack of ceremony did not invalidate the marriage in this case, it cannot be taken that this will be the case in all areas of Solomon Islands. The court specifically noted that the requirements for a valid customary marriage varied from community to community.[176] In Moli Ward, for example, the Moli Wards Chiefs Council Ordinance stipulates the required formalities.[177] As discussed above, in that area, the marriage is to be arranged by parents or relatives of the parties;[178] the parties' families must agree on the bride price prior to the ceremony;[179] and the parties must exchange gifts.[180] However, although it is clear that a ceremony is required in Moli Ward, the Ordinance does not answer the question as to the precise nature of the ceremony.

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[173] *Rebitai v Chow* [2002] 4 LRC 226, 237.
[174] *Rebitai v Chow* [2002] 4 LRC 226, 237–8.
[175] The application of the presumption in Solomon Islands was confirmed in *Salumata v Kelly* (Unreported, High Court of Solomon Islands, Kabui J, 5 November 1999), accessible via www.paclii.org at [1999] SBHC 129 and *Koru v Official Administrator of Unrepresented Estates* [1985/6] SILR 132.
[176] See also *Igola v Ita* [1983] SILR 56 at 59, where the importance of ceremony in custom in a different part of the country was stressed, albeit in a different context.
[177] Moli Wards Chiefs Council Ordinance 2010, pt 8.
[178] Ibid, s 38(1)(a).
[179] Ibid, s 35(3).
[180] Ibid, s 36(3).

(f) Registration of customary marriages

Solomon Islanders married in accordance with custom may opt to register their marriage under the Islanders' Marriage Act.[181] Once registered, the marriage is treated as if it were a marriage under the Act for the purpose of divorce and the law of bigamy.[182] This 'opting-in' scheme is contentious. The United Nations Convention on the Elimination of All Forms of Discrimination against Women 1979[183] promotes compulsory registration of all marriages.[184] There are two clear advantages of registration for women: ease of proof of the marriage, and automatic access to State laws on ancillary matters such as custody, financial relief and domestic violence. However, once a customary marriage is registered, it is subsumed into the State legal regime, the consequences of which may not have been anticipated by the parties.[185] A detailed discussion of the benefits and drawbacks of compulsory registration is contained in the Solomon Islands Law Reform Commission's Working Paper on the Law of Marriage.[186] The Paper also makes the convincing point that in developing nations with limited resources, a large rural population and a poor communications infrastructure, effective registration may be impractical for many members of society.

It may also be difficult to say exactly when compulsory registration should occur,[187] as marriage in custom may sometimes be more of a process than an event that occurs in an orderly way at a fixed point in time. Further, the Act decrees that parties to a customary marriage who register their union are treated as if they are married under a State law.[188] Once registered the parties cannot 'opt out' of the statutory regime. The question then arises whether parties who elect to register and, by implication, opt out of the customary regime, should also be given the right to opt out of the statutory regime if they both wish to do so. However, nothing in the Act or any other law provides that the statutory regime extends beyond the spouses themselves. Consequently, in the event of dissolution of the marriage, customary laws may arguably apply to any dispute between the respective families over the possible return of the bride price and custody claims by the extended family.[189]

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[181] Cap 171, s 18.

[182] Section 14 and 19(1). For the offence of bigamy see Penal Code cap 26, s 170.

[183] Solomon Islands became a State Party to the Convention on 6 May 2002. Available at http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf [accessed 9 May 2016].

[184] Article 16(2) enjoins State Parties to, 'to make the registration of marriages in an official registry compulsory'.

[185] Registration may be the result of pressure from the church or for the purposes of obtaining State documentation. The legal consequences of registration may not be uppermost in the parties minds; for comments to this effect in respect of parties who marry in church after customary marriage see *Rebitai v Chow and Others* [2002] 4 LRC 226, 233–234.

[186] Law Reform Commission of Solomon Islands, *Working Paper on the Law of Marriage* (1997) 29–45. See also Brown and Corrin, n 167 above, 52–75.

[187] See the material referred to in Tom Bennett, *A Sourcebook of African Customary Law for Southern Africa* (Juta & Co Cape Town, 1st ed, 1991) 217–223.

[188] Islanders' Marriage Act (Solomon Islands) cap 171, ss 14 and 19(1).

[189] For discussion of a case involving a dispute as to the return of bride price, see Jennifer Corrin 'Case note on *John To'ofilu v Oimae*' (1999) 13 Commonwealth Judicial Journal 33.

(b) Problems relating to divorce

(i) Fault-based divorce

The Islanders' Divorce Act began life as the Native Divorce Ordinance, passed in 1960. As a result of this, and the fact that the 'cut-off' date for the application of English legislation is 1 January 1961,[190] Solomon Islands does not have the benefit of the Divorce Reform Act 1969 (UK). Accordingly, the grounds for divorce are largely fault-based. Whilst fault-based divorce has not caused any local controversy, and, given the local influence of the church,[191] may even reflect local values, in western terms it is antiquated.[192] The insistence on proof of fault may exacerbate a bad relationship, which may make amicable and fair agreements on custody of and access to children and property division less likely.

In neighbouring South Pacific island countries, only Fiji and Samoa have a purely no-fault system, although in Cook Islands,[193] Nauru,[194] Niue,[195] Solomon Islands, Tokelau,[196] Tonga,[197] Tuvalu[198] and, in some cases, in Kiribati,[199] a petition may be based on fault or a no-fault ground. Many other common law countries have moved away from the fault-based system, and divorce is usually available on the ground that the marriage has irretrievably broken down.[200]

A change to no-fault divorce would be controversial in Solomon Islands, where the church is a powerful presence. The five established churches (the Church of Melanesia or Anglican Church; Roman Catholic Church; South Seas Evangelical Church; United Church; and Seventh Day Adventist Church)[201] are extremely influential. In the last census, 32% of the population declared

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[190] Constitution of Solomon Islands 1978, sch 3(1).

[191] This influence has extended so far as to affect judicial reasoning. See, eg, *Nomisa v Nomisa* (Unreported, High Court of Solomon Islands, Palmer J, 27 September 2002), accessible via www.paclii.org at [2002] SBHC 126, where Palmer J states that 'Christians therefore have no option but to work at their marriage relationships. Instead of finding excuses and reasons to break away and tear the marriage relationship apart they have a duty to work in building the marriage up'.

[192] There is no empirical evidence available as to whether Solomon Islanders view the system as anachronistic. Given the strong influence of the church they probably do not.

[193] Matrimonial Proceedings Act 1963 (NZ), s 21(1).

[194] Matrimonial Causes Act 1973 (Nauru), ss 8, 9.

[195] Family Law Code 2007 (Niue), s 19.

[196] Divorce Regulations 1987 (Tokelau) reg 3.

[197] Divorce Act cap 29 (Tonga) s 3. For a detailed examination of Tongan divorce law see Corrin J, 'For better or worse: Marriage and divorce laws in the Kingdom of Tonga' in Bill Atkin (ed), *International Survey of Family Law* (Jordan Publishing, Bristol, 2007), p 291.

[198] Matrimonial Proceedings Act cap 21 (Tuvalu), ss 8, 9.

[199] Divorce between i-Kiribati: Native Divorce Ordinance cap 60 (Kiribati) s 4.

[200] See, eg, Matrimonial Causes Act 1973 (formerly Divorce Reform Act 1969) (UK), s 1: fault is still relevant to the proof of irretrievable breakdown unless the parties have lived apart for 2 years and the respondent consents to the divorce or, in the absence of consent, have lived apart for 5 years: s 2; Family Law Act 1975 (Australia), s 48(1); Family Proceedings Act 1980 (New Zealand), s 39(1).

[201] Solomon Islands National Statistic Office, above n 6, 81.

themselves as members of the Church of Melanesia; 20% were stated to be members of the Roman Catholic Church.[202] The churches and their umbrella organization, the Solomon Islands Christian Association, constitute a hurdle for divorce reform, since they appear to view divorce as undermining the institution of marriage.[203]

Another sub-issue relating to the fault-based ground of adultery is that, as discussed above (Part IV), only a husband may claim damages for adultery.[204] This could be seen as offending the constitutional guarantee of freedom from discrimination on the grounds of sex.[205] However, a claim for compensation for adultery may still be available under customary laws, which are exempt from the non-discrimination provisions.[206] In England, the right to claim damages for adultery was abolished in 1970.[207]

(ii) Termination of customary marriages

The Islanders' Divorce Act provides that marriages celebrated under the customary regime must be dissolved in accordance with customary laws. Section 4 provides:

> 'When two Islanders have been married by the custom of Islanders, and such marriage has not been registered in accordance with section 18 of the Islanders' Marriage Act, the marriage may only be dissolved, annulled or separation ordered in accordance with the custom of Islanders.'

The use of the terms 'dissolution', 'annulled' and 'separation ordered' provide a good example of the lack of accommodation of cultural difference by the State system. The terms incorporate the western notion that marriage is ended at a precise moment by some official body, which, as discussed, is not the case in the customary system.[208] The wording of s 4 also raised two questions concerning non-registered customary marriages.

Firstly, does the customary law model apply only to the divorce itself or is it also applicable to ancillary claims? It seems doubtful whether the drafters of the Islanders' Divorce Act considered this question; at the time it was enacted most Islanders in customary marriages lived in a subsistence economy in closely-knit societies where maintenance and property division were never an issue. Since

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[202] Ibid xxvii.
[203] See n 192 above.
[204] Islanders' Divorce Act, cap 170, s 18(1); Matrimonial Causes Act 1950 (UK), s 30(1). See, eg, *Waneria v Waneria* (Unreported, High Court of Solomon Islands, Mwanesalua J, 28 May 2014), accessible via www.paclii.org at [2014] SBHC 57.
[205] Constitution of Solomon Islands 1978, s 15. See *Revathi v Union of India* [1989] LRC (Const) 628 for a case involving a challenge to a similar provision in India.
[206] Constitution of Solomon Islands 1978, s 15(5)(d).
[207] Law Reform (Miscellaneous Provisions) Act 1970 (UK).
[208] Brown and Corrin Care, above n 142, 66.

customary marriage is a union of families or kin groups rather than individuals, it would not seem appropriate for a regime designed for western marriages to apply to its dissolution.

The second issue arises if the parties are governed by different customary regimes: which one is to regulate the breakdown? Again, this question was probably not anticipated when the section was drafted, as at that time most marriages would have been between parties governed by a common customary law. With increased mobility, 'mixed' unions are now common. As discussed above (Part II), the Customs Recognition Act 2000, which might have provided some guidance is not in force and there does not appear to be any judicial guidance on point. The courts will no doubt try to find underlying commonalities, but in situations where one party is resisting the dissolution of the marriage difficult dilemmas arises.[209]

Another issue arises if a customary marriage is registered or the marriage has also been celebrated under State law.[210] As discussed above, it is clear that such a marriage must be dissolved in accordance with statute. However, it is not so clear whether some form of customary termination is also required. The answer would seem to depend on whether the customary laws applying to the parties require this.

(iii) Financial relief

Whilst financial relief is generally outside the scope of this chapter, it must be mentioned that applications under some regimes are much more advantageous than others in relation to ancillary financial relief. In particular, parties to unregistered customary marriages have no right to apply for a share of matrimonial property or a lump sum and, as matrimonial property claims are a statutory creation, courts have no inherent jurisdiction to intervene.

The only possible regime under which relief can be pursued is that of section 17 of the Married Women's Property Act 1882, applying as a United Kingdom Act of general application.[211] Current authority suggests that 'married woman' in the 1882 Act includes a woman in an unregistered customary marriage.[212] However, the applicant must be able to establish an existing property right, as the Act does not give the court any authority to create new rights.[213] Until

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[209] *Kere v Timon* [1990] PNGLR 103 offers a pragmatic solution to this issue, adopting a broad concept of fairness.

[210] This is a common occurrence: see, eg, *Kevisi v Mergozzi* (Unreported, High Court of Solomon Islands, Cameron J, 18 March 2008), accessible via www.paclii.org at [2008] SBHC 13.

[211] On the meaning of the term 'general application', see J Corrin Care 'Colonial Legacies? A Study of Received and Adopted Legislation applying in the University of the South Pacific Region' (1997) 21 *Journal of Pacific Studies* 33, 44–46.

[212] *Balou v Kokosi* [1982] SILR 94.

[213] *Pettitt v Pettitt* [1970] AC 777 (AC), approved and followed in *Tavake v Tavake* (Unreported, High Court of Solomon Islands, Kabui J, 19 August 1998), accessible via www.paclii.org

legislation is enacted to establish proper channels to attain matrimonial property relief, customary spouses must continue to rely on judicial activism.[214]

VI CONCLUSION

The legal regimes governing marriage and its dissolution in Solomon Islands form a complex network of laws, which gives rise to numerous issues, a number of which have been traversed in this chapter. As discussed, it is no longer merely State and customary regimes which are at play, but also the hybrids which have arisen from the interaction of these two sources. When the parties to a marriage only encounter one source of law, the situation may be straightforward. However, as discussed in this chapter, marriage and dissolution may be governed by laws from different sources. These laws may be from different regimes, or from sources within the same regime, such as domestic legislation and foreign legislation or colonial orders within the State regime, or conflicting customary laws from different areas of the country within the customary regime. In either case, the position can be extremely complex. Further, even where parties are only subject to laws from one source, those laws may not produce the best outcome for a party.

Reform is required to provide a system which is easy for residents, and citizens of Solomon Islands, and in the case of marriages even visitors, to negotiate. Leaving marriage laws to be dealt with in colonial orders and divorce and ancillary matters to be governed by outdated United Kingdom legislation detracts from Solomon Islands' independent status. However, reform is not such a simple matter when the regimes have such different origins and have become intertwined in such a complex fashion.

Such a major reform project is unlikely to be high on the government's agenda. Indeed, it has been 20 years since Solomon Islands Law Reform Commission published its working paper on marriage,[215] without any major action being taken. Should the current draft of Solomon Islands' new constitution become law then reform may become more pressing, as it confers on parties to a marriage 'equality of status, rights and responsibilities before, during, and at the dissolution of marriage'.[216] What is required is a regime to govern marriage, divorce and ancillary matters, which is responsive to the broad variety of social circumstances in Solomon Islands today. It is certainly not desirable for customary laws to be subsumed by the State system or for existing legislation to

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at [1998] SBHC 118; *Pusau v Pusau* (Unreported, High Court of Solomon Islands, Frank O. and Kabui J, 28 November 2001), accessible via www.paclii.org at [2001] SBHC 86. See also *Gissing v Gissing* [1971] AC 886 (AC).

214 See further, Kenneth Brown, Jennifer Corrin Care 'Putting Asunder: Divorce and financial relief in Solomon Islands' 2005 *Oxford University Commonwealth Law Journal* 96.

215 Solomon Islands Law Reform Commission, 'Working paper on the Law of Marriage in Solomon Islands', 1997, Solomon Islands Law Reform Commission: Honiara.

216 2nd Draft Constitution of Solomon Islands 2014 (Solomon Islands) s 43(5). This right is subject to customary laws relating to land ownership and land usage.

be replaced with laws transplanted from overseas. Local values and practical considerations may demand very different solutions to those adopted in other parts of the world.[217] As stated by Brown, '[t]here are no easy solutions … The problem of knitting together the diffuse strands of law in a plural society requires patience and the sensitive consideration of the interests of all groups.'[218]

[217] See, eg, the attitudes expressed by the court in *Nomisa v Nomisa* (Unreported, High Court of Solomon Islands, Palmer J, 27 September 2002), accessible via www.paclii.org at [2002] SBHC 126.

[218] Kenneth Brown, *Reconciling Customary Law and Received Law in Melanesia: the Post-Independence Experience in Solomon Islands and Vanuatu* (Charles Darwin University Press, 2005) 214.

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SOUTH AFRICA

ISLAMIC LAW MODE OF ESTATE DISTRIBUTION IN SOUTH AFRICA

*Muneer Abduroaf and Najma Moosa**

Résumé

Cette étude porte sur l'application, en matière successorale, de la loi islamique en Afrique du sud. Si la législation nationale ne prescrit aucunement le recours à la loi islamique, cette dernière peut néanmoins devenir efficiente, par exemple lorsqu'un testateur le prévoit. De même, les héritiers régime juridique découlant de l'application de cette loi est rendu difficile par de succession ab intestat peuvent consentir à l'application de loi islamique. Un examen approfondi du l'existence d'écoles de pensée différentes. L'analyse montre qu'il y existe des situations dans lesquelles les droits successoraux reconnus aux femmes, le sont de façon moins favorable que s'il s'agissait d'hommes. L'on peut même dire que ceci est la règle générale. Mais cette étude montre aussi que la loi n'est pas cohérente et qu'il y a des cas où les femmes et les hommes de même rang héritent de façon égalitaire, voire, parfois, où les femmes sont favorisées.

I INTRODUCTION

It has been argued by some academics that the Islamic law of intestate succession discriminates against females due to its unequal distribution of shares in favour of males.[1] The general example used in this regard is when a son inherits double the share of a daughter.[2] The question as to whether the unequal distribution is consistent throughout the Islamic law of intestate succession is an important one and is further investigated herein. This chapter examines the mode of distribution of deceased estates in terms of Islamic law as currently applied in South Africa. Estate liability claims are first looked at by

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1 C Rautenbach, NMI Goolam and N Moosa, 'Religious Legal Systems: Constitutional Analysis' in C Rautenbach, JC Bekker and NMI Goolam, *Introduction to Legal Pluralism in South Africa* (3rd edn, LexisNexis, Durban, 2010) 211.

2 See MT Al Hilali and MM Khan, *Translation of the meanings of the Noble Qur'an in the English Language* (King Fahd Complex for the printing of the Holy Qur'an, Madeenah, 1417) 4: 11. The number before the colon refers to the chapter number in the Quraan. The number after the colon refers to the verse.

way of introduction.[3] The law of testate succession is thereafter looked at with a focus on the limitations placed on freedom of testation. The law of intestate succession is then investigated with a specific focus on the position of females. The findings of this chapter are briefly examined and concluding remarks are then made.

The scenario that is looked at throughout this chapter is when a South African Muslim dies leaving behind a gross estate located wholly within the South African borders. This chapter looks at various examples of how the estate could devolve. It only looks at the position of natural persons within the laws of estate distribution. The position of juristic persons is not discussed. This is done for practical reasons.

The religion of Islaam was introduced into South Africa in the seventeenth century AD. The first Muslim recorded to have stepped onto the South African shores was in 1654.[4] There are approximately over three-quarter of a million Muslims living in South Africa today.[5] South African Muslims do not generally deduce fiqh opinions directly from the Sharee'ah but rather follow the schools of thought that were introduced into South Africa.[6] There are generally two classes of jurists who deduce fiqh opinions from the Sharee'ah. These jurists could be referred to as Sunnee and Shee'ee. This chapter primarily focuses on the fiqh opinions of Sunnee jurists as those opinions are dominantly followed within the South African borders. It should be noted that there are two dominant Sunnee Schools of thought found within the South African context.[7] These Schools could be referred to as the Shaafi'ee and Hanafee Schools of thought.[8] The other less dominant Schools of thought found within the South African context would be the Maalikee and Shee'ee.[9] It should be noted that the Islamic laws of estate distribution have to date not been incorporated into the South African legal system and thus has no legal recognition. These rules do however apply when a testator or testatrix incorporates this in a will based on the notion of freedom of testation.

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3 This refers to the gross estate of the deceased prior to any deductions.

4 The first recorded Muslim said to have stepped foot on South African soil was in 1654. See EM Mahida, *History of Muslims in South Africa: A chronology* (Arabic Study Circle, Durban, 1993) 1.

5 Statistics South Africa 'Census 2001 Primary Tables South Africa 96 and 2001 compared' available at www.statssa.gov.za/census01/html/RSAPrimary.pdf (accessed 3 January 2015). It should be noted that religion has not formed part of the published censuses since 2001.

6 See N Moosa, *Unveiling the Mind – The legal position of women in Islam – A South African context* (2nd edn, Juta, Cape Town, 2011) 151 where the author states that the South Muslim population essentially follows two of the four Sunnee based schools called the Shaafi'ee and Ḥanafee schools.

7 The founder of Shaafi'ee School is known as Imaam Al-Shaafi'ee. His name was Muḥammad bin Idrees Ash-Shaafi'ee. See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 276–277.

8 N Moosa, *Unveiling the Mind – The legal position of women in Islam – A South African context* (2nd edn, Juta, Cape Town, 2011) 151.

9 W Amien, 'Overcoming the conflict between the right to freedom of religion and women's rights to equality: A South African case study of Muslim marriages' (2006) 28 *Human Rights Quarterly* 731.

This chapter examines the religion of Islaam as revealed to the Prophet Muhammad PBUH and primarily examines the fiqh opinions as provided in the Sunnee based Shaafi'ee and Hanafee Schools of thought. Other Schools are referred to only where relevant and the founders of these opinions are clearly stated. The fiqh opinions referred to are taken from reliable primary and secondary written sources that confirm the accepted opinions within the said schools of thought.

The term 'Islamic law' is used hereafter as a general term to refer to both the Sharee'ah as well as the fiqh opinions. The term 'Sharee'ah' is used to refer to 'Sharee'ah provisions'. The term 'opinion' is used to refer to a 'fiqh opinion'. The term 'school' is used to refer to a 'school of thought'. The term 'both schools' is used to refer to the Shaafi'ee and the Ḥanafee Schools. This is done to avoid repetition. The opinions that are referred to are according to both schools except where expressly mentioned otherwise. Opinions within other schools are referred to only where relevant.

This chapter analyses Islamic law fiqh opinions as found within the Shaafi'ee and Ḥanafee Sunnee based Schools of law as these opinions are dominantly followed within South Africa.[10] The term 'both Schools' is used hereafter to refer to these two Schools. The provisions referred to are in terms of both Schools unless the contrary is clearly indicated. The opinions found within other Schools are referred to only when relevant. The founders of these opinions are then clearly stated.[11] It should be noted that the beneficiaries referred to in this chapter are in relation to the deceased. The words 'of the deceased' is therefore implied but not repeated hereafter.

II ISLAMIC LAW MODE OF ESTATE DISTRIBUTION

(a) Claims against the gross estate

The estate left behind by a deceased prior to any deductions is referred to hereafter as the gross estate (tarikah).[12] The order of priority of claims against this estate is estate liability claims, testate succession claims (al-waṣiyyah), and then intestate succession claims (meeraath).[13] The last two claims form the

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[10] See N Moosa, *Unveiling the Mind – The legal position of women in Islam – A South African context* (2nd edn, Juta, Cape Town, 2011) 151 where the author states that the South Muslim population essentially follows two of the four Sunnee based schools called the Shaafi'ee and Ḥanafee schools.

[11] Examples of these Schools would be the Maalikee and Ḥanbalee Schools of law.

[12] Both the Shaafi'ee and Ḥanafee Schools are of the opinion that the gross estate must only be administered after its owner had died or had been declared dead by a religious court. M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 274. See also MS Omar, *The Islamic Law of Succession and its Application in South Africa* (Butterworths, Durban, 1988) 11–12.

[13] I Al-Ḥakamee, *Tahdheeb Al-Aḥaadeeth Fee 'Ilm Al-Mawaareeth: Sharḥ limandHoomah Ar-Raḥbiyyah Al-Musammaah: Bughyah Al-Baaḥitheen 'An Jumal Al-Mawaareeth* (Maktabah Malik Fahad, Riyadh, 2004) 67–68.

main focus of this chapter. The first claim is mentioned for the sake of completeness.[14] Estate liability claims comprise funeral expenses (muan-at-tajheez) and debt (dayn).[15] These claims constitute the first claims against the gross estate. Funeral expenses are restricted to those expenses that are reasonably necessary in order to have the deceased buried. This would include the shroud and the grave plot that is required to bury the deceased in.

The Schools differ in their opinions as to who is liable to pay for the burial expenses of a deceased female.[16] The Shaafi'ee School is of the opinion that the widower must (from his own wealth) settle the funeral expenses of his deceased spouse if he has the means to do so (moosir). The aforementioned obligation does not apply when the widower does not have the means (mu'sir).[17] The funeral expenses should then be deducted from the gross estate. The Ḥanafee School is of the opinion that both classes of widowers must settle the funeral expenses irrespective of their financial position. It should be noted that the funeral expenses of a deceased male are always deducted from the gross estate.

Debt is divided into secured debt (ad-dayn-al-muta'alliqah-bi'ayn-at-tarikah) and unsecured debt (ad-dayn-al-mursalah). A mortgaged bond that is registered against property in the gross estate would be an example of a secured debt. This debt takes priority over unsecured debt. Unsecured is divided into debt owing to God Almighty (ḥuqooq-ul-laah) and debt owing to individuals (huqooq-ul-'ibaad). Unpaid Islamic tax (zakaah) is an example of a debt owing to God Almighty. An unpaid dower (mahr) is an example of a debt owing to an individual.[18] The Shaafi'ee School is of the opinion that unsecured debt owing to God Almighty takes priority over debt owing to individuals. The Ḥanafee School however is of the opinion that unsecured debt owing to individuals takes priority over debt owing to God Almighty.

It is interesting to note that the Ḥanafee School is of the opinion that a widow is entitled to remain in the house that she is staying at (free accommodation) for

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[14] It is quite interesting to note that the proceeds of a pension fund do not form part of the gross estate. See Mufti Muhammad Taqi Usmani 'Entitlement to death benefits payable by pension funds' where he states that the grants given to the dependants of a deceased in terms of the Pension Funds Act 24 of 1956 are not subject to the rules of inheritance. Available at www.muftitaqiusmani.com/index.php?option=com_contentandview=articleandid=54:entitlement-to-death-benefits-payable-by-pension-fundsandcatid=10:economicsandItemid=17 (accessed 11 January 2015). See also s 37C of the Pension Funds Act 24 of 1956 that specifically provides that the death benefits in favour of the dependants of the deceased does not form part of a deceased's estate.

[15] I Al-Ḥakamee, *Tahdheeb Al-Aḥaadeeth Fee 'Ilm Al-Mawaareeth: Sharḥ limandHoomah Ar-Raḥbiyyah Al-Musammaah: Bughyah Al-Baaḥitheen 'An Jumal Al-Mawaareeth* (Maktabah Malik Fahad, Riyadh, 2004) 67–68.

[16] These claims are briefly looked at as they have a bearing on the value of the estate that would remain for testacy and inheritance distribution.

[17] See S Al-Fawzaan, *At-Taḥqeeqaat Al-Marḍiyyah Fil Mabaaḥith Al-Farḍiyyah* (Al-Ma'aarif, Riyadh, 1999) 19–28. See also M Al-Khin and M Al Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Al-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 272–273.

[18] M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee Alaa Madh-hab Al-Imaam Al-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 273.

the duration of her waiting period ('iddah) if the house forms part of the gross estate.[19] She would also be entitled to remain in the house (free accommodation) if it was leased by her deceased spouse and rent for the duration of her waiting period has already been paid in full. She would not be entitled to free accommodation if any of the aforementioned conditions were not met.[20]

III ISLAMIC LAW OF TESTATE SUCCESSION

Testate succession claims are deducted from the remainder of the gross estate after all estate liability claims have been satisfied. This residue is hereafter referred to as the net estate and up to a limited portion thereof may be distributed in terms of a will (if any).[21] Drafting a will is optional and the net estate must be distributed in terms of the Islamic law of intestate succession when a person dies intestate (without a will).[22] There are a number of requirements that must be met in order for a will to be valid. It should be noted that the provisions referred to in this section (testate succession) apply to the estates of both male and female deceased. A will must be executed orally or in writing by a testator (male) or testatrix (female). An oral will must be witnessed by at least two males or one male and two females.[23] These witnesses are required for evidentiary purposes to confirm that the will is that of the deceased. There are no witnesses required when executing a handwritten will.[24] Confirming the handwriting would be sufficient evidence in proving that a document is the will of the deceased.

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19 This is the period in which she undergoes mourning of her deceased husband and is inter alia not allowed to enter into a marriage contract. The waiting period is normally 4 months and 10 days.

20 The widow would be entitled to remain in the house for the remainder of her life if her deceased spouse registered a lifelong usufruct as a gift ('umraa) in her favour prior to his death. The usufruct may not be registered in her favour as a testate succession benefit. The usufruct may be registered in favour of any person being a testate/intestate beneficiary or non-testate/intestate beneficiary as long as these conditions are met. A widower would thus be entitled to remain in the house for the remainder of his life if his deceased spouse registered a usufruct in his favour. The usufruct is allowed in terms of the Maalikee School of law.

21 A Muslim person is only allowed to bequeath up to one-third of the net estate. A person dies partly intestate when he or she bequeaths less than one-third of the net estate in a will. The remaining two-thirds must be distributed in terms of the laws of intestate succession. The complete three-thirds of net estate is distributed in terms of the laws of intestate succession when there is no will.

22 This means that the deceased died without executing a will.

23 See MT Al Hilali and MM Khan, *Translation of the meanings of the Noble Qur'an in the English Language* (King Fahd Complex for the printing of the Holy Qur'an, Madeenah, 1417) 4: 11 and 12; A Al-Bukhaaree, *Ṣaḥeeḥ Al-Bukhaaree* (Resaalah Publishers, Beirut, 2008) 489 ḥadeeth 2744; A Muslim, *Ṣaḥeeḥ Muslim* (Darussalam, Riyadh, 2000) 714 ḥadeeth 4209.

24 A Muslim, *Ṣaḥeeḥ Muslim* (Darussalam, Riyadh, 2000) 713 ḥadeeth 4205; A Al-Bukhaaree, *Ṣaḥeeḥ Al-Bukhaaree* (Resaalah Publishers, 2008) 488 ḥadeeth 2738. It should be noted that computer printed documents containing the will of a testator were not present at the time when the primary sources were revealed as computers and printers were not yet invented. There is thus no indication in the primary sources as to the validity of an unsigned computer printed will. It would almost be impossible to prove that the said document contains the will of the

Each of the persons involved in executing a will must have legal capacity (takleef).[25] These persons are the testator or testatrix and the witnesses.[26] The person appointed to administer the terms of a will is referred to as an executor (male) or executrix (female). The appointment could be made by the testator or testatrix prior to his or her demise. The appointment could also be made by a judge when no appointment was made by the testator or testatrix. The appointed person must be Muslim.[27] The beneficiaries that are appointed to inherit in terms of a will are referred to hereafter as testate beneficiaries.

(a) Adiation, repudiation, disqualification, and collation

A testate beneficiary becomes the owner of a benefit upon adiation (acceptance) thereof. The adiation must take place subsequent to the death of the testator or testatrix for ownership to pass. The Shaafi'ee School is of the opinion that ownership only passes upon express adiation. An example of this would be when a testate beneficiary says that he accepts the benefit. The Ḥanafee School is of the opinion that ownership also passes upon implied adiation. An example of this would be when a testator bequeaths a car in favour of X. X does not orally accept the benefit but he drives the car as if it is his. Non-adiation is not equivalent to implied adiation. An example of this would be when a testator bequeaths a car in favour or X. X is unaware of the bequest and dies 2 days later. There would neither be express nor implied adiation on the part of X. The testate benefit must be redirected into the deceased's original estate and distributed in terms of the laws of intestate succession. The same would apply when a testator or testatrix repudiates the benefit.

A testate beneficiary is not entitled to inherit when he or she is disqualified. The testate benefit of a disqualified testate beneficiary must be redirected into the deceased estate and distributed in terms of the Islamic law of succession. Testate beneficiaries must have been conceived prior to the death of the testator or testatrix in order to be entitled to a testate benefit. A testate beneficiary would be disqualified from inheriting if he or she was conceived after the death of the testator or testatrix. He or she would also be disqualified if he or she predeceased the testator or testatrix. Killing the testator or testatrix (qatl) is an

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deceased. A signature by the testator or testatrix at the end of the document should (in the opinion of the author of this chapter) be sufficient evidence as to the execution of the will. Attestation by witnesses would constitute extra confirmation.

[25] The requirements are that they should each have reached the age of puberty and should also be of sound mind. See Aṣ-Ṣubaa'ee *Sharḥ Al Qaanoon Al Aḥwaal Al Shakhshiyyah* vol 2 (Daar ul-Waraq, Riyadh, 2000) 65–66.

[26] See Aṣ-Ṣubaa'ee *Sharḥ Al Qaanoon Al-Aḥwaal Ash-Shakhshiyyah* M vol 2 (Daar ul-Waraq, Riyadh, 2000) 81.

[27] The appointment may be done orally, in writing, or by a court of law. The executor of a Muslim must be a Muslim person, whereas that of a non-Muslim may be Muslim or non-Muslim. See M Aṣ-Ṣubaa'ee, *Sharḥ Al Qaanoon Al-Aḥwaal Ash-Shakhshiyyah* vol 2 (Daar ul-Waraq, Riyadh, 2000) 35–36.

example of a disqualification in terms of the Ḥanafee School.[28] It is however not a disqualification in terms of the Shaafi'ee School.[29]

Collation does not apply in terms of the Islamic law of testate succession. A testate beneficiary would always inherit the complete inheritance even if he or she received a gift from the deceased prior to his or her death. An example of this would be when a deceased leaves behind a net estate of R6,000.00, and bequeaths one-third of this estate in favour of his full brother and full sister to be inherited in equal shares. The deceased bought his full brother a car worth R50,000.00 a few days prior to his death. The full sister is not entitled to call for collation to apply and the full brother and sister would each inherit R100,000.00. The full brother would have inherited R50,000.00 and the full sister would have inherit R150,000.00 if collation had applied.

(b) Limitations within the law of testate succession

There are two limitations placed on freedom of testation in terms of Islamic law. A testator or testatrix may not execute a will in excess of one-third of the net estate. He or she may also not execute a will in favour of his or her intestate beneficiaries.[30] Provisions found in a will that are in contravention of either of these limitations have no binding effect.[31] A non-Muslim spouse is not an intestate beneficiary and may therefore inherit as a testate beneficiary.[32] There are however some exceptions to these limitations.

The Ḥanafee School is of the opinion that the one-third limitation does not apply when there are no intestate beneficiaries. The testator or testatrix may then bequeath the complete net estate in favour his or her testate beneficiaries.[33] Intestate beneficiaries may also consent to the lifting of the one-third limitation.

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[28] See M Aṣ-Ṣubaa'ee, *Sharḥ Al-Qaanoon Al-Aḥwaal Ash-Shakhshiyyah* vol 2 (Daar ul-Waraq, Riyadh, 2000) 75–76.

[29] This is the opinion within the Shaafi'ee School. See Aṣ-Ṣubaa'ee *Sharḥ Al-Qaanoon Al-Aḥwaal Ash-Shakhṣiyyah* vol 2 (Daar ul-Waraq, Riyadh, 2000) 75–77.

[30] A son may therefore not inherit as a testate beneficiary as he is already an intestate beneficiary.

[31] N Goolam, 'Muslim law' in C Rautenbach, JC Bekker and NMI Goolam, *Introduction to Legal Pluralism* (3rd edn, LexisNexis, Durban, 2010) 343. See also M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar ul-Waraq, Damascus, 2000) 261–265 for a detailed discussion on the Islamic law that concerns the executor.

[32] See N Goolam, 'Muslim Law' in C Rautenbach, JC Bekker and NMI Goolam, *Introduction to Legal Pluralism* (3rd edn, Lexis Nexis, Durban, 2010) 343 for a discussion of this issue. The question as to whether a non-Muslim spouse should be entitled to a bequest exceeding one-third is also discussed in the said section.

[33] The Ḥanafee School is of the opinion that a bequest could possibly exceed one-third of the net estate when there are no sharer heirs (aṣḥaab-ul-furoodh), no residuary heirs ('asabah), and no distant kindred heirs (*dhawil-arḥaam*). The recipient of the bequest would then be regarded as a universal legatee. The universal legatee concept does not apply in terms of the Shaafi'ee School. See W Az-Zuḥaylee, *Al-Fiqhul Al-Islaamee Wa Adillatuhoo* vol 8 (Daar-ul-Fikr, Damascus, 1989) 15–16.

The consent must be given subsequent to the testator or testatrix having died.[34] Prior consent is neither valid nor enforceable.[35]

IV ISLAMIC LAW OF INTESTATE SUCCESSION

Intestate succession claims are deducted from the remainder of the net estate after all testate succession claims have been satisfied. The residue is referred to hereafter as the gross inheritance.[36] The recipients of this inheritance are referred to hereafter as intestate beneficiaries. These beneficiaries are related to the deceased through intestate inheritance tie. An intestate beneficiary only inherits when he or she is neither disqualified through a disqualification (ḥajb-awṣaaf) nor totally excluded through a total exclusion (ḥajab-ḥirmaan). Intestate beneficiaries comprise males and females and may not be disinherited through testacy.[37] It is for this reason that these beneficiaries could be referred to as compulsory beneficiaries. It should be noted that the rules referred to in this section (intestate succession) apply to the estates of both male and female deceased.

It has been stated earlier that some academics argue that the Islamic law of intestate succession discriminates against females due to the unequal distribution of shares.[38] A practical example of this would be when a deceased leaves behind a gross inheritance of R600,000.00 and a son and a daughter as the only intestate beneficiaries. The son would inherit R400,000.00 and the daughter would inherit R200,000.00.[39] The question as to whether the

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[34] See Aṣ-Ṣubaa'ee *Sharḥ Al Qaanoon Al-Aḥwaal Ash-Shakhshiyyah* M vol 2 (Daar ul-Waraq, Riyadh, 2000) 74–75.

[35] The Maalikee School provides that consent given prior to the demise of the testator is valid and enforceable in the event where the consent was given by the heir on his death bed (terminal illness). See Aṣ-Ṣubaa'ee *Sharḥ Al Qaanoon Al-Aḥwaal Ash-Shakhshiyyah* M vol 2 (Daar ul-Waraq, Riyadh, 2000) 75.

[36] M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar ul-Waraq, Damascus, Riyadh, 2000) 268. There are 35 Quranic verses that refer to succession. See MT Al Hilali and MM Khan, *Translation of the meanings of the Noble Qur'an in the English Language* (King Fahd Complex for the printing of the Holy Qur'an, Madeenah, 1417) 4: 11, 12 and 176. See also A Hussain, *The Islamic Law of Succession* (Darussalam, Riyadh, 2005) 29. However, only three of these verses provide specific details of intestate succession laws. The prophetic traditions elaborate and clarify how the verses should be interpreted and applied. See A Hussain, *The Islamic Law of Succession* (Darussalam, Riyadh, 2005) 29.

[37] See MT Al Hilali and MM Khan, *Translation of the meanings of the Noble Qur'an in the English Language* (King Fahd Complex for the printing of the Holy Qur'an, Madeenah, 1417) 4: 11 mentions the laws that govern the inheritance of the son, daughter, mother and father, and 4:12 mentions the laws that govern the inheritance of the widow, widower and uterine siblings. 4: 176 mentions the laws that governs the inheritance of full and consanguine siblings.

[38] C Rautenbach, NMI Goolam and N Moosa, 'Religious Legal Systems: Constitutional Analysis' in C Rautenbach, JC Bekker and NMI Goolam, *Introduction to Legal Pluralism* 3 ed (LexisNexis, Durban, 2010) 211. It should be noted that sex is biological whereas gender is cultural.

[39] This would apply in the example when a deceased leaves behind a son and daughter as the only intestate beneficiaries. See MT Al Hilali and MM Khan, *Translation of the meanings of the*

discrimination is constant throughout the Islamic law of intestate succession is important and is investigated in the following sections.

It should be noted that the shares of intestate beneficiaries are prescribed by law. There is however nothing that prevents these beneficiaries from consenting to a redistribution of the gross inheritance. The consent must be given after the person (from whom the beneficiaries are inheriting) has died. Consent given prior to this moment is neither valid nor enforceable. An example of the consent rule would be when a deceased leaves behind a gross inheritance of R600,000.00, and a son, and a daughter as the only intestate beneficiaries. The son would inherit double the share of the daughter. The son would inherit R400,000.00 and the daughter would inherit R200,000.00. There is nothing that prevents the son and daughter from consenting to a redistribution of the gross inheritance that has the effect of each of them inheriting equal shares. This would mean that the son and daughter would each inherit R300,000.00.

(a) Intestate inheritance tie

The Schools differ in their opinions as to what constitutes intestate inheritance tie. Both Schools recognise consanguinity and affinity as inheritance tie.[40] A son inherits from his deceased father through consanguinity whereas a widower inherits from his deceased spouse through affinity. The Shaafi'ee School further recognises an intestate inheritance tie based on common religion. The inheritance would be deposited into and administered by the public treasury (bayt-ul-maal) in this instance for the benefit of Muslims.[41] The Ḥanafee School further recognises an intestate inheritance tie based on contract ('aqd).[42] It is interesting to note that an intestate inheritance tie exists between a child conceived as a result of adultery and the person who was the husband of the adulteress at the time when the child was conceived.[43] This tie would cease to

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Noble Qur'an in the English Language (King Fahd Complex for the printing of the Holy Qur'an, Madeenah, 1417) 4: 11 and 176 for an example of where this rule finds application. The number in the brackets refers to the chapter number. The numbers outside the brackets refer to the verses.

40 M Ar-Raḥbee, *Bughyah Al-Baaḥith* (2nd edn, Daar-ul-Fikr, Damascus, 1988) 6. See also M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 275–276.

41 This is an inheritance tie according to the Shaafi'ee School but not according to the Ḥanafee School. The property would be distributed to an established public treasury for the benefit of Muslims based on the said intestate inheritance tie. The property should not be given to a public treasury that is not an established one. See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 276. See also N Al-Ghaamidee, *Al-Khulaaṣah Fee' Ilm Al-Faraaiḍ* (4th edn, Daarut-Tayyibah, Makkah, 1426 H) 120.

42 An example of such a contract would be when the parties enter into an agreement to inherit from each other. The contract would only be valid if no sharer heirs, no residuary heirs, and no distant kindred heirs are present.

43 See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 145–146. See also A Al-Nafaaḍ *Al Jaami Fee Ahkaam Al Abnaa Ghair Al Shar'iyeen* (Daar Muayyid, Riyadh 2007) 75–76.

exist if the child is disqualified from inheriting due to imprecation. This issue is further discussed in the next section where disqualifications are looked at in more detail.

Both Schools recognise emancipation (freeing a slave) as an intestate inheritance tie. This specific tie and all laws related to it are not discussed any further as they are not applicable within the South African context. This chapter focuses on affinity and consanguinity as it is in this context that the unequal distribution applies.

(b) Adiation, repudiation, disqualification, exclusion, and collation

An intestate beneficiary automatically becomes the owner of the inheritance at the moment when the person from whom he or she would inherit dies. An example of this would be when a person dies on 1 January 2015 at 10 am and leaves behind a gross inheritance of R500,000.00, and a son as the only intestate beneficiary. The son then dies at 10:01 am. The R500,000.00 would automatically pass to the estate of the deceased son and must then be distributed in terms of the Islamic law of estate distribution. Ownership would pass even if the son was not aware of the death of his father. Adiation is therefore not a requirement for ownership to pass. It is for this reason that repudiation does not apply in terms of Islamic law of intestate succession as an intestate beneficiary automatically becomes the owner of the property.

It has been alluded to earlier that intestate beneficiaries are not entitled to inherit when disqualified or totally excluded from inheriting. This section analyses the various forms of disqualification and exclusion. It should be noted that there is a distinct difference between how disqualification and exclusion affect the distribution of inheritance. The difference is discussed below. The five classes of disqualification that are looked at in this section are divorce, imprecation, illegitimacy, religion, and killing.

A spouse would be disqualified from inheriting subsequent to the moment when an irrevocable divorce (ṭalaaq-baa-in) is issued by her husband or subsequent to the moment when a judicial divorce (tafreeq) in the form of a faskh is issued by a religious tribunal.[44] The Ḥanafee School is of the opinion that an irrevocable divorce issued by a husband during his terminal illness does not immediately disqualify his divorced spouse from inheriting as an intestate beneficiary.[45] She would however be disqualified upon expiration of her waiting period (‘iddah).[46]

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[44] A ṭalaaq is issued by a husband whereas a faskh is issued by a religious tribunal. The tribunal is competent to issue a judicial ṭalaaq according to the Maalikee School. The term ‘divorce’ is used here as a general term to refer to both the ṭalaaq and/or faskh.

[45] A terminal illness is the illness that caused his death.

[46] A waiting period (in this context) is the period of time subsequent to a divorce that a wife may not (among other things) enter into a marriage contract.

A spouse is disqualified from inheriting when imprecation (li'aan) has been performed. This is a unique judicial procedure when a husband accuses his wife of having committed adultery. He alleges that the child that his wife is carrying is a product of an adulterous act. Completion of the procedure results in an irrevocable divorce between the couple. It should be noted that the child in this scenario would then be disqualified from inheriting from his alleged 'non-biological father' and vice versa.

A biological child is disqualified from inheriting when conceived out of wedlock. The disqualification only applies to the biological father but not to the biological mother. The Ḥanafee School is of the opinion that the child would not be disqualified if the biological father acknowledges paternity and marries the biological mother at least 6 months prior to the child's birth.[47] The Shaafi'ee School provides a rebuttable presumption in favour of a child having been conceived in wedlock when two conditions are met. It is required that both biological parents must have married each other prior to the birth of the child. It is further required that the child must have been born at least 6 months subsequent to the moment when actual consummation of their marriage was possible.[48] The presumption may be rebutted through evidence that proves illegitimacy.

An example of the difference between the Shaafi'ee and Ḥanafee position would be when a man (X who is living in South Africa) appoints an agent (Y who is living in Germany) to conclude a marriage contract in Germany with a woman (Z who is living in Germany) on his behalf. The marriage is successfully concluded in Germany in terms of Islamic law on 1 January 2015.[49] X and Y meet for the first time (after conclusion of the marriage contract) on 1 July 2015 and X dies a few days later. Y gives birth to a son on 1 August 2015. The son would be entitled to inherit from X in terms of the Ḥanafee School as he was born at least 6 months after 1 January 2015 (date of marriage contract). He would not be entitled to inherit from the deceased in terms of the Shaafi'ee School as he was not born at least 6 months after 1 July 2015 (date of possible consummation). It is further required by the Ḥanafee School that the father acknowledged paternity. This is not a requirement in terms of the Shaafi'ee School as there would be a rebuttable presumption present.

An intestate beneficiary is disqualified from inheriting if he or she observes a different religion to that of the deceased.[50] It has already been mentioned that a widow is not entitled to inherit from her deceased husband if she observes a different religion to him. It should be noted that this rule only applies to

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47 N Al-Ghaamidee, *Al-Khulaaṣah Fee' Ilm Al-Faraaiḍ* (4th edn, Daarut-Tayyibah, Makkah, 1426 H) 583. See also A Al-Nafaaḍ, *Al-Jaami' Fee Aḥkaam Al-Abnaa Ghair Ash-Shar'iyeen* (Daar Muayyid, Riyadh, 2007) 84–90.

48 Ibid.

49 X and Y would be lawfully married even though X has not met Y as marriage by proxy is allowed in terms of Islamic law.

50 See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 278–279.

widows (and not widowers) as Muslim females are not allowed to marry non-Muslim men.[51] An example of this disqualification would be when a deceased leaves behind a gross inheritance of R800,000.00, and a Muslim widow, a non-Muslim widow, and a son as the only intestate beneficiaries. The Muslim widow would inherit one-eighth and the son would inherit the remaining seven-eighths.[52] The Muslim widow would inherit R100,000.00 and the son would inherit R700,000.00. The disqualified widow (due to religion) may however inherit in terms of the laws of testacy if such provision was made by her deceased husband. The testate benefit would then be deducted from the net estate.

The Schools differ in their opinions as to which killings disqualify intestate beneficiaries from inheriting.[53] The Shaafi'ee School is of the opinion that all killings disqualify intestate beneficiaries from inheriting. The Ḥanafee School is of the opinion that only unlawful killings disqualify intestate beneficiaries from inheriting. An example of a lawful killing would be when an Islamic judge legally orders that the beneficiary's own father (biological father of the judge) be given the death penalty. This could be due to any crime committed by his father that requires the death penalty to be executed. The son (judge) would then be entitled to inherit from his deceased father in terms of the Ḥanafee School but not in terms of the Shaafi'ee School.

Exclusions (ḥajb-ashkhaaṣ) are divided into partial exclusion (ḥajab-nuqṣaan) and total exclusion (ḥajb-ḥirmaan).[54] Partial exclusion applies when an intestate beneficiary inherits a lesser share due to the presence of other intestate beneficiaries. An example of this would be when a widower inherits one-quarter instead of one-half due to the presence of a son.[55] Total exclusion applies when an intestate beneficiary does not inherit at all due to the presence of other intestate beneficiaries. An example of this would be when a brother does not inherit (totally excluded) due to the presence of a son.

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51 This raises the issue of discrimination based on religion.

52 This also raises the issue of discrimination based on religion.

53 The rules regarding this disqualification are quite complicated. There will be no further investigation of this issue as it does not form part of the main theme of this chapter. For further reading on this disqualification see M Al-Raḥbee, *Bughyah Al-Baaḥith* (2nd edn, Daar-ul-Fikr, Damascus, 1988) 30 and M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 278. A Muslim cannot inherit from a non-Muslim and vice versa. M Ar-Raḥbee, *Bughyah Al-Baaḥith* (2nd edn, Daar-ul-Fikr, Damascus, 1988) 6. See also M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 277–279. All forms of killing are disqualifications in terms of the Shaafi'ee School. This would include intentional, unintentional, and accidental killings. See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 278; A Aboo Daawood, *Sunan-Aboo-Daawood* vol 4 ḥadeeth 4564 (Daar-ul-Ḥadeeth, Riyadh 1999) 1956.

54 See M Al-Raḥbee, *Bughyah Al-Baaḥith* (2nd edn, Daar-ul-Fikr, Damascus, 1988) 17–20 for the rules of exclusion.

55 See MT Al Hilali and MM Khan, *Translation of the meanings of the Noble Qur'an in the English Language* (King Fahd Complex for the printing of the Holy Qur'an, Madeenah, 1417) 4: 12. See also M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 306.

Disqualification and total exclusion have the same effect of preventing intestate beneficiaries from inheriting. An intestate beneficiary subject to disqualification does not affect the inheritance shares of the remaining intestate beneficiaries.[56] An intestate beneficiary subjected to total exclusion could however affect the inheritance shares of the remaining intestate beneficiaries. This could be illustrated by way of an example when a deceased leaves behind a mother, a son, and two full brothers as the only intestate beneficiaries. The two brothers would partially exclude the mother from inheriting one-third if they are totally excluded from inheriting.[57] They would however not partially exclude the mother from inheriting one-third if they are disqualified from inheriting.[58] The mother would inherit the complete one-third in the latter situation and one-sixth in the former situation.

Collation does not apply in terms of the Islamic law of intestate succession. An intestate beneficiary would inherit the complete inheritance even if he or she received a gift from the deceased prior to his or her death. An example of this would be when a deceased leaves behind a gross inheritance of R600,000.00, and a son, and daughter as the only intestate beneficiaries. The deceased bought his son a car worth R200,000.00 a few days prior to his death. The daughter is not entitled to call for collation to apply and the son would therefore inherit R400,000.00 and the daughter would inherit R200,000.00.

(c) Classes of intestate beneficiaries and their shares

The Shaafi'ee School recognises four classes of intestate beneficiaries whereas the Ḥanafee School recognises seven.[59] This section analyses the three classes that are common to both Schools. These classes in order of priority are sharer beneficiaries, residuary beneficiaries, and distant kindred beneficiaries.[60] The unequal distribution of shares applies only within these three classes.

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[56] See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 312.

[57] The mother would only inherit one-sixth.

[58] See MT Al Hilali and MM Khan, *Translation of the meanings of the Noble Qur'an in the English Language* (King Fahd Complex for the printing of the Holy Qur'an, Madeenah, 1417) 4: 11 for the verse that refers to the inheritance of a mother.

[59] The four classes of intestate beneficiaries according to the Shaafi'ee School are sharer beneficiaries, residuary beneficiaries, the government treasury as a beneficiary, and distant kindred beneficiaries. The Ḥanafee School further recognises contractual beneficiaries, acknowledged kinsmen beneficiaries, and universal legatee beneficiaries. The order of priority intestate claims according to the Shaafi'ee School are the sharer beneficiaries claims, the residuary beneficiary claims, the government treasury claim, the sharer beneficiary claims in terms of the doctrine of return, and then the distant kindred beneficiary claims. The order of priority intestate claims according to the Ḥanafee School are the sharer beneficiary claims, the residuary beneficiary claims, the sharer beneficiary claims in terms of the doctrine of return, the distant kindred distant beneficiary claims, the contractual beneficiary claims, the acknowledged kinsmen beneficiary claims, and then the universal legatee beneficiary claims. See MM Muhammad, 'Distribution of Heritage Sunni (*Ḥanafi*) Law' in MM Muhammad, *The Islamic Law of Inheritance – A New Approach* (Fine Art Press, New Delhi, 1989) 56–57.

[60] See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al Manhajee 'Alaa Madh-hab Al-Imaam*

It should be noted that the inheritance share of an intestate beneficiary is not restricted to only one of these classes. An example of this would be when a deceased leaves behind a gross inheritance of R600,000.00, and a daughter, and both biological parents as the only intestate beneficiaries. The father would inherit one-sixth (as a sharer beneficiary), the mother would inherit one-sixth (as a sharer beneficiary), the daughter would three-sixths or one-half (as a sharer beneficiary), and the father would also inherit the remaining one-sixth (as a residuary beneficiary). The father would inherit R200,000.00, the mother would inherit R100,000.00, and the daughter would inherit R300,000.00.

There are six categories of beneficiaries within the three classes of intestate beneficiaries that always inherit unless they are disqualified. These beneficiaries are referred to hereafter as primary beneficiaries and comprise three of males and three of females.[61] Five of the six categories are sharer beneficiaries and the remaining one is a residuary beneficiary. An example of where the primary beneficiaries inherit collectively would be when a deceased leaves behind a gross inheritance of R720,000.00 and a mother, a father, a widower, a son, and a daughter as the only intestate beneficiaries. The mother would inherit one-sixth ($^{12}/_{72}$), the father would inherit one-sixth ($^{12}/_{72}$), the widow would inherit one-eighth ($^{9}/_{72}$) and the remainder of $^{39}/_{72}$ would be inherited by the son and daughter. The son would inherit double the share of the daughter. The son would therefore inherit $^{26}/_{72}$ and the daughter would inherit $^{13}/_{72}$. The mother would inherit R120,0000.00, the father would inherit R120,000.00, the widow would inherit R90,000.00, the son would inherit R260,000.00, and the daughter would inherit R130,000.00.

There are two doctrines that find application within the three classes of intestate beneficiaries. They are referred to as the doctrine of increase ('awl) and the doctrine of return (radd). These doctrines do not apply to residuary beneficiaries but do apply to sharer beneficiaries and/or distant kindred beneficiaries. The doctrine of increase (when applied) reduces the fixed inheritance share of an intestate beneficiary.[62] This would apply in situations when the shares of the entitled intestate beneficiaries add up to more than one unit.[63] An example of this would be when a deceased leaves behind a gross inheritance of R800,000.00, and a mother, a widower, and a full sister as the only intestate beneficiaries. The mother would inherit one-third or two-sixths, the widower would inherit one-half or three-sixths, and the full sister would inherit one-half or three-sixths. The total would be eight-sixths. The denominator would now have to be increased to 8. The shares of all three sharer beneficiaries would then be reduced accordingly. The mother would now

Ash-Shaafi'ee vol 2 (Daar-ul-Qalam, Damascus, 2000) 282–284. See also M Ar-Raḥbee, *Bughyah Al-Baaḥith* (2nd edn, Muassasah Fuad, Riyadh, 1988) 7–8 for the classes of sharer beneficiaries and residuary beneficiaries.

61 See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* volume 2 (Daar-ul-Qalam, Damascus, 2000) 306.

62 See M Az-Zuḥaylee, *Al Mu'tamad Fee Al-Fiqh Al-Shaafi'ee* vol 4 (Daar-ul-Qalam, Damascus, 2010) 435–442 for a detailed discussion of the doctrine of increase.

63 See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 282.

inherit two-eighths, the widower would inherit three-eighths, and the full sister would inherit three-eighths. It should be noted that the doctrine is gender neutral. The mother would inherit R200,000.00, the widower would inherit R300,000.00, and the full sister would inherit R300,000.00.

The doctrine of return (when applied) increases the fixed share of a sharer beneficiary. An example of this would be when a deceased leaves behind a gross inheritance of R800,000.00, and a daughter as the only intestate beneficiary.[64] The daughter would inherit one-half as a sharer beneficiary, and would also inherit the remaining one-half through the application of the doctrine. She would inherit the complete R800,000.00. It should be noted that the doctrine of return does not apply to surviving spouses. An example of this would be when a deceased leaves behind a gross inheritance of R800,000.00, and a widow and a daughter as the only intestate beneficiaries. The widow would inherit one-eighth and the daughter would inherit one-half or four-eighths. The daughter (but not the widow) would inherit the remaining three-eighths due to the application of the doctrine of return. The widow would inherit R100,000.00 and the daughter would inherit R700,000.00.

There are certain terminologies that must be understood before reading the next section. The first set of terminology applies to descendants whereas the second set applies to siblings. An agnate descendant is related to the deceased through males only. An agnate grandson (son's son) would be an example of such a descendant. A cognate descendant is related to the deceased through males and/or females. A cognate granddaughter (daughter's daughter) would be an example of such a descendant. A full sibling is related to the deceased through the same father and mother. A consanguine sibling is related to the deceased through the same father but different mother. A uterine sibling is related to the deceased through the same mother but different father.

(d) An analysis of the sharer beneficiaries

Sharer beneficiaries are first in line to inherit from the gross inheritance. They constitute 12 categories of intestate beneficiaries of which eight are of females.[65] Five of these categories are primary beneficiaries. These beneficiaries constitute two of males and three of females.[66] A beneficiary within any of the 12 categories is only entitled to inherit one of the seven shares when neither

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[64] The daughter would then inherit one-half as a sharer heir and the remaining one-half through the application of the doctrine of return. The doctrine applies to all the classes of sharer heirs with the exception of spouses. It should be noted that the doctrine is also gender neutral. The Shaafi'ee School is of the opinion that the doctrine of return would only apply in the absence of an established public treasury.

[65] The 12 classes of sharer beneficiaries are the husband, the wife, the father, the mother, the true grandfather, the true grandmother, the daughter, the agnate female descendants, the full sister, the consanguine sister, the uterine sister, and the uterine brother. It should be noted that the word 'true' is put in front of certain intestate beneficiaries to denote that certain requirements need to be met before the said beneficiary can inherit. A cognate granddaughter would not constitute a true granddaughter but an agnate granddaughter would.

[66] These heirs comprise the mother, father, widower, widow(s), and the daughter.

disqualified nor totally excluded from inheriting.[67] It should be noted that the inheritance share of a sharer beneficiary changes when the doctrine of increase or the doctrine of return finds application.

This section focuses on the position of female sharer beneficiaries in relation to their male counterparts. Three situations will now be looked at. The first situation is when a female sharer beneficiary indirectly inherits more favourably than her male counterpart. The second situation is when a female sharer beneficiary and her male counterpart inherit equally. The third situation is when a female sharer beneficiary inherits less favourably than her male counterpart. The situations are also briefly discussed herein.

The first situation is when a female sharer beneficiary indirectly inherits more favourably than her male counterpart. This would apply in the example where a deceased leaves behind a gross inheritance of R240,000.00, and a full sister, a widower, and a mother as the only intestate beneficiaries. The full sister would inherit one-half, the widower would inherit one-half, and the mother would inherit one-third. The lowest common denominator would be six. The three shares would be one-half or three-sixths for the full sister, one-third or two-sixths for the mother, and one-half or three-sixths for the widower. The total adds up to eight-sixths. The doctrine of increase would apply in this example. Application of the doctrine would mean that the new lowest common denominator would be eight. The modified shares would be three-eighths for the widower, two-eighths for the mother, and three-eighths for the full sister. The widower would inherit $^{3}/_{8}$ x 240 000.00 = R90 000.00, the mother would inherit $^{2}/_{8}$ x R240,000.00 = R60,000.00, and $^{3}/_{8}$ x R240,000.00 = R90,000.00 for the full sister.

The same example will now be looked at save for the full sister being substituted by a full brother. The widower would inherit one-half, the mother would inherit one-third, and the full brother would inherit the remainder. The lowest common denominator would be six. The widower would inherit one-half or three-sixths, the mother would inherit one-third or two-sixths, and the full brother would inherit the remainder, which would be one-sixth. The total adds up to six-sixths.The doctrine of would not apply in this example. The widower would inherit $^{3}/_{6}$ x R240,000.00 = R120,000.00, the mother would inherit $^{2}/_{6}$ x R240,000.00 = R80,000.00, and the full brother would inherit the remainder which would be $^{1}/_{6}$ x R240,000.00 = R40,000.00. It should be noted

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[67] These shares are the one-eighth, one-sixth, one-quarter, one-half, one-third and the two-thirds shares. See MT Al Hilali and MM Khan, *Translation of the meanings of the Noble Qur'an in the English Language* (King Fahd Complex for the printing of the Holy Qur'an, Madeenah, 1417) 4: 11, 12 and 176. The seventh share was introduced into the Islamic law through deduction. The latter share constitutes one-third of the nett inheritance. See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 282–283. The schools differ in their opinions regarding the legality of the seventh share. The Shaafi'ee School allows for its application. See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 283.

that the R90,000.00 that would be inherited by the full sister is clearly more than the R40,000.00 that would be inherited by the full brother.

The second situation is when a female sharer beneficiary and her male counterpart inherit equal shares. This would apply in the example where a deceased leaves behind a gross inheritance of R600,000.00, and a uterine sister, a uterine brother, and a son as the only intestate beneficiaries. Both uterine siblings would inherit one-sixth each, and the son would inherit the remaining four-sixths. The uterine sister would inherit R100,000.00, the uterine brother would inherit R100,000.00, and the son would inherit R400,000.00.

The third situation is when a female sharer beneficiary inherits less favourably than her male counterpart. This would apply in the example where a deceased leaves behind a gross inheritance of R600,000.00, a mother, and a father as the only intestate beneficiaries. The mother would inherit one-third, and the father would inherit the remaining two-thirds. The mother would inherit R200,000.00, and the father would inherit the remaining R400,000.00. It should however be noted that the father inherits as a residuary beneficiary in this example and not as a sharer beneficiary.

(e) An analysis of the residuary beneficiaries

Residuary beneficiaries are second in line to inherit from the gross inheritance. They inherit the residue (if any) after the sharer beneficiary claims have been deducted.[68] The residue is hereafter referred to as the net inheritance. This inheritance is distributed amongst the most eligible beneficiaries within this category. A son is primary intestate beneficiary within this class. It should be noted that the doctrines of return and increase do not apply to these beneficiaries. There are three classes of residuary beneficiaries. They are referred to as residuary beneficiaries in their own right (‘aṣabah-bin-nafs), residuary beneficiaries with another (‘aṣabah-ma-al-ghair) and residuary beneficiaries through another (‘aṣabah-bil-ghair). Residuary beneficiaries in their own right are all of males, whereas residuary beneficiaries with another and residuary beneficiaries through another are all of females.[69]

This section focuses on the position of female residuary beneficiaries. Four situations are looked at in this regard. The first situation is when a female residuary beneficiary inherits more favourably and to the exclusion of all other male intestate beneficiaries. This would apply in the example when a deceased leaves behind a gross estate of R100,000.00, and a daughter, a full sister, and a consanguine brother as the only intestate beneficiaries.[70] The daughter would

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[68] See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee ‘Alaa Madh-hab Al-Imaam Ash-Shaafi’ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 297.

[69] See M Ar-Raḥbee, *Bughyah Al-Baaḥith* (2nd edn, Muassasah Fuad, Riyadh, 1988) 17–18. See also M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee Alaa Madh-hab Al-Imaam Ash-Shaafi’ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 298.

[70] These relatives would be the full sisters and consanguine sisters. See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee Alaa Madh-hab Al-Imaam Ash-Shaafi’ee* vol 2

inherit one-half, and the full sister would inherit the remaining one-half. The daughter would inherit R50,000.00, and the full sister would inherit the remaining R50,000.00. The consanguine brothers would not inherit at all as they are totally excluded by the full sister.[71]

The second situation is when a female residuary beneficiary and her male counterpart inherit equally. This would apply in the example when a deceased leaves behind a gross inheritance of R600,000.00, and a widower, a mother, a uterine brother, a uterine sister, a full brother, and a full sister as the only intestate beneficiaries. The widower would inherit one-half or three-sixths, and the mother would inherit one-sixth. The widower would inherit R300,000.00 and the mother would inherit R100,000.00. The position of the siblings remains problematic. The Shaafi'ee School is of the opinion that the uterine brother, the uterine sister, the full sister, and full brother must all equally share the one-third. Each of the four siblings would then inherit R50,000.00.[72] The Ḥanafee School is of the opinion that the uterine brother and uterine sister must equally share the one-third to the exclusion of the full siblings. Each of the uterine siblings would then inherit R100,000.00.

The third situation is when a female residuary beneficiary inherits less favourably than her male counterpart. This would apply in the example when a deceased leaves behind a gross inheritance of R600,000.00, and an agnate granddaughter, an agnate grandson, a cognate grandson, and a cognate granddaughter as the only intestate beneficiaries. The agnate granddaughter would inherit half the share of the agnate grandson.[73] The agnate granddaughter would inherit R200,000.00 and the agnate grandson would inherit R400,000.00. It is quite interesting to note that the cognate grandchildren do not inherit in this example as they are totally excluded by the agnate grandchildren. This is due to the fact that only agnate grandchildren (however remote) constitute residuary beneficiaries.

The fourth situation is when a male residuary beneficiary inherits to the exclusion of his female counterpart. This would apply in the example when a deceased leaves a gross inheritance of R500,000.00, and a son of a full brother, and a daughter of a full brother as the only intestate beneficiaries. The son of the full brother would inherit the complete net inheritance to the exclusion of the daughter of the full brother. The son of the full brother would inherit

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(Daar-ul-Qalam, Damascus, 2000) 301–302. See also S Al-Bukhaaree (Resaalah Publishers, Beirut, 2008) 1160 ḥadeeth 6736 for an example in this regard.

71 See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 301–302 for an explanation of how residuary heirs with another inherit.

72 It should be noted that the opinion of the Shaafi'ee School is based on deduction. This question is referred to as the musharrakah case as the one-third is shared between the various classes of siblings. It should be noted that a full brother is generally a residuary beneficiary.

73 Residuary beneficiaries through another comprise the daughters, the female agnate descendants howsoever remote, the full sisters, and the consanguine sisters. See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 300–301.

R500,000.00 and the daughter of the full brother would not inherit. The daughter of the full brother would not inherit as she is totally excluded by the son of the full brother.

(f) An analysis of the distant kindred beneficiaries

Distant kindred beneficiaries are the remaining blood relatives who are neither sharer nor residuary beneficiaries.[74] The Shaafi'ee School is of the opinion that they would be fifth in line to inherit.[75] The Ḥanafee School is of the opinion that they are fourth in line to inherit.[76] A cognate (daughter's son) grandson is an example of a distant kindred beneficiary. This section focuses on the position of female distant kindred beneficiaries. It should be noted that the schools differ as to how they should inherit.

The Shaafi'ee School is of the opinion that distant kindred beneficiaries must inherit by way of representation.[77] The doctrine of increase and return (according to this School) would only apply to these beneficiaries if it would have been applicable to those whom they represent. The Ḥanafee School is of the opinion that they must inherit similar to the way residuary beneficiaries inherit. The doctrine of increase and return (according to this School) would not apply to these beneficiaries as it is not applicable to residuary beneficiaries.

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[74] See S Al-Fawzaan, *At-Taḥqeeqaat Al-Marḍiyyah Fee Al-Mabaaḥith Al-Farḍiyyah* (Al-Ma'aarif, Riyadh, 1999) 263–264; N Al-Ghaamidee, *Al-Khulaaṣah Fee 'Ilm Al-Faraaiḍ* (4th edn, Daarut-Tayyibah, Makkah, 1426 H) 532–546; M Aṣ-Ṣubaa'ee, vol 3 (Daar ul-Waraq, Riyadh, 2000) 52 and 115; MS Omar (Butterworths, Durban, 1988) 69; M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 390 for detailed discussion of distant kindred beneficiaries.

[75] The founder of the Shaafi'ee School was of the opinion that the estate should be deposited into a state department referred to as the public treasury (bayt-ul-maal) when there are neither sharer beneficiaries nor residuary beneficiaries. The funds would then be used for the benefit of the community in accordance with Islamic law provisions. The contemporary Shaafi'ee jurists are of the opinion that the estate should be inherited by the distant kindred beneficiaries in the event where the public treasury is properly established. See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 276–277. See also S Al-Fawzaan, *At-Taḥqeeqaat Al-Marḍiyyah Fee Al-Mabaaḥith Al-Farḍiyyah* (Al-Ma'aarif, Riyadh, 1999) 263–264); N Al-Ghaamidee, *Al Khulaṣah Fee 'Ilm Al Faraaiḍ* (4th edn, Daarut-Tayyibah, Makkah, 1426 H) 535–546; M As-Subaa'ee, *Sharḥ Qaanoon Al-Aḥwaal Ash-Shakhshiyyah* vol 3 (7th edn, Daar ul-Waraq, Riyadh, 2000) 115–117.

[76] The Shaafi'ee School is of the opinion that the order of priority should be: first the sharer heirs (aṣḥaab-ul-furooḍ), then the residuary heirs ('aṣabah), then the public treasury (bayt-ul-maal), then application of the doctrine of return to the sharer heirs (radd), and then distant kindred heirs (dhawil-arḥaam). The Ḥanafee School is of the opinion that the order of priority should be: first the sharer heirs, then the residuary heirs, then application of the doctrine of return to the sharer heirs, then the distant kindred heirs, then the contractual heirs, then the acknowledged kinsmen, and then the universal legatees. See MM Muhammad, 'Distribution of Heritage Sunni (*Ḥanafi*) Law' in MM Muhammad, *The Islamic Law of Inheritance – A New Approach* (Fine Art Press, New Delhi, 1989) 56–57.

[77] N Al-Ghaamidee, *Al-Khulaaṣah Fee 'Ilm Al-Faraaiḍ* (4th edn, Daarut-Tayyibah, Makkah, 1426 H) 547–571.

Three situations are looked at within the Shaafi'ee School. This is followed by a further two situations within the Ḥanafee School. The first situation is within the Shaafi'ee School is when a female distant kindred beneficiary inherits to the exclusion of all other male distant kindred beneficiaries. This would apply in the example when a deceased leaves behind a gross inheritance of R500,000.00, and a cognate granddaughter and a cognate great-grandson as the only intestate beneficiaries. The granddaughter would inherit the entire gross of R500,000.00 estate to the exclusion of the cognate great-grandson. The second situation is when a female distant kindred beneficiary inherits less favourably than her male counterpart. This would apply in the example when a deceased leaves behind a gross inheritance of R600,000.00, and a cognate granddaughter and a cognate grandson as the only intestate beneficiaries. The granddaughter would inherit half the share of the grandson. The cognate granddaughter would inherit R200,000.00 and the cognate grandson would inherit R400,000.00. The third situation is when a female distant kindred beneficiary and her male counterpart inherit equally. This would apply in the example where a deceased leaves behind a gross inheritance of R600,000.00, and a daughter of a uterine sister, and a son of the same uterine sister as the only intestate beneficiaries. Both children of the uterine sister would inherit equal shares. The uterine brother would inherit R300,000.00 and the uterine sister would inherit R300,000.00.

The first situation within the Ḥanafee School is when a female distant kindred beneficiary inherits to the exclusion of all other male distant kindred heirs. This would apply in the example when a deceased leaves behind a gross inheritance of R500,000.00, and a cognate granddaughter, and a cognate great-grandson as the only intestate beneficiaries. The cognate granddaughter would inherit the complete gross inheritance to the exclusion of the cognate great-grandson. The cognate granddaughter would inherit the complete R600,000.00 to the exclusion of the cognate great grandson. The second situation is when a female distant kindred beneficiary inherits less favourably than her male counterpart. This would apply in the example when a deceased leaves behind a gross estate of R600,000.00, and a cognate granddaughter, and a cognate grandson as the only intestate beneficiaries. The cognate granddaughter would inherit half the share of the cognate grandson. The cognate granddaughter would inherit R200,000.00, and the cognate grandson would inherit R400,000.00. It should be noted that there are no examples of cases within the Ḥanafee School when the male and female distant-kindred beneficiaries inherit equally.

(g) Problematic intestate succession situations

There are four problematic intestate succession situations that are looked at in this section. These situations are looked at for the sake of completeness. It should be noted that the rules referred to in this section apply to the estates of both male and female deceased. The first problematic situation is when the sex of an unborn (ḥaml) intestate beneficiary cannot be confirmed. An example of this would be when a deceased leaves behind a gross inheritance of R240,000.00, a widow, a mother, a father, and an unborn child as the only intestate beneficiaries. The unborn child could be a son or daughter. The most

favourable share should be calculated in favour of the unborn child and kept in trust until he or she is born. The widow would inherit one-eighth or $^{3}/_{24}$, the mother would inherit one-sixth or $^{4}/_{24}$, the father would inherit one-sixth or $^{4}/_{24}$, and the unborn child would inherit the remaining $^{13}/_{24}$ if it is a male. The widow would inherit R30,000.00, the mother would inherit R40,000.00, the father would inherit R40,000.00, and the unborn child would inherit R130,000.00.

The shares would be different if the unborn is confirmed to be a female. The widow would inherit one-eighth or $^{3}/_{24}$, the mother would inherit one-sixth or $^{4}/_{24}$, the father would inherit one-sixth or $^{4}/_{24}$ as a sharer beneficiary and the remainder of $^{1}/_{24}$ as a residuary beneficiary. The widow would inherit R30,000.00, the mother would inherit R40,000.00, the father would inherit R50,000.00, and the unborn child would inherit R120,000.00. It can clearly be seen in this example that the share of a male would be more favourable. The R120,000.00 must therefore be kept in trust until the child is born.[78] The R10,000.00 must be redistributed to the father if it is a female. The unborn child would only inherit if ultimately born alive.[79] The inheritance share must be redirected to the remaining intestate beneficiaries if the child is born dead. The widow would then inherit one-quarter or $^{3}/_{12}$, the mother would inherit one-third or $^{4}/_{14}$, the father would inherit the remaining $^{5}/_{12}$. The widow would inherit R60,000.00, the mother would inherit R80,000.00, the father would inherit R100,000.00.

The second problematic situation is when an intestate beneficiary is a hermaphrodite (khunthaa). An example of this would be where a deceased leaves behind a gross inheritance of R600,000.00 and a father and a hermaphrodite as the only intestate beneficiaries. The most favourable inheritance share that the hermaphrodite could inherit must be calculated and kept in trust until his or her sex is confirmed.[80] The father would inherit one-sixth and the hermaphrodite would inherit the remaining five-sixths if it is confirmed that the child is a male. The father would inherit R100,000.00 and the son would then inherit R500,000.00. The shares would be different if the hermaphrodite is confirmed to be a female. The father would inherit one-sixth, the daughter would inherit one-half or three-sixths, and the father would inheriting the remaining two-sixths as a residuary beneficiary. The father would inherit R300,000.00 and the daughter would then inherit R300,000.00.

The third problematic situation is when the whereabouts of an intestate beneficiary is unknown (mafqood). The inheritance of this person must be kept in trust until he or she is found alive, the date of his or her death is confirmed,

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78 This is the more favourable share.

79 See M Ar-Raḥbee, *Bughyah Al-Baaḥith* (2nd edn, Daar-ul-Fikr, Damascus, 1988) 30.

80 Ibid. The various ways of confirming the sex of the child are not discussed in this thesis. See M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 327–330 for an explanation of how the sex is confirmed.

or he or she is declared to be dead by a religious tribunal.[81] An example of this would be when a deceased leaves behind a gross inheritance of R500,000.00, and a full brother and a missing daughter as the only intestate beneficiaries. The daughter would inherit one-half and the full brother would inherit the remainder. The daughter is therefore entitled to inherit R250,000.00 and the full brother is entitled to inherit the remaining R250,000.00. The R250,000.00 of the daughter must be kept in trust and given to her upon her return. The full brother would also inherit the remaining R250,000.00 if it is later confirmed that the daughter died before her deceased parent. The R250,000.00 must be deposited into the daughters estate and distributed in terms of the Islamic law of estate distribution if it is confirmed that she died after her deceased parent.

The fourth situation is when a group of persons entitled to inherit from one another die collectively (gharqaa or hadmaa). An example of how this would be is when a father (X) and a son (Y) die collectively in a car collision. Both persons are primary beneficiaries of each other. The estate of X would inherit from the estate of Y if it is confirmed that the Y predeceased X. The estate of Y would inherit from the estate of the X if it is confirmed that the X predeceased the Y. Neither of the deceased estates would benefit from the other if the moment of each person's death cannot be confirmed. There is a presumption in favour of simultaneous death if the moment of death cannot be confirmed.[82]

The estate of Y will now be looked at for purposes of this example. X leaves behind a gross inheritance of R600,000.00, and a mother, a father (X), and a son as the only intestate beneficiaries. The mother would inherit one-sixth, X would provisionally inherit one-sixth, and the son would inherit the remaining four-sixths. The mother would inherit R100,000.00, X would provisionally inherit R100,000.00, and the son would inherit R400,000.00. The inheritance of X must be kept in trust until the moment of his death is confirmed. The R100,000.00 must be deposited into X's deceased estate if it is confirmed that he died after Y. The R100,000.00 must be redirected into Y's estate if it is confirmed that X predeceased Y. The R100,000.00 must also be redirected into Y's if the moment of X's death cannot be confirmed as simultaneous death would be presumed.

V CONCLUSION

The question posed at the beginning of this chapter was whether the discrimination against females is consistent throughout the Islamic law of inheritance. The analysis has shown that there are definitely situations where

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[81] The death may actual or by decree of court. M Ar-Raḥbee, *Bughyah Al-Baaḥith* (2nd edn, Daar-ul-Fikr, Damascus, 1988) 30. See also M Al-Khin and M Al-Bughaa, *Al-Fiqh Al-Manhajee 'Alaa Madh-hab Al-Imaam Ash-Shaafi'ee* vol 2 (Daar-ul-Qalam, Damascus, 2000) 327–332.

[82] M Al-Raḥbee, *Bughyah Al-Baaḥith* (2nd edn, Daar-ul-Fikr, Damascus, 1988) 30–31. See also N Al-Ghaamidee, *Al Khulaṣah Fee 'Ilm Al Faraaiḍ* (Daarut-Tayyibah, Makkah, 1426 H) 516–517.

females inherit less favourably than males. This could even be said to be the general rule. It has also been shown that the discrimination is not consistent throughout the Islamic law of intestate succession. The findings have shown that there are situations where females and their male counterparts inherit equally and also that there are situations where females inherit more favourably both directly and indirectly.

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SOUTH KOREA

RECENT DEVELOPMENTS IN KOREAN ADULT GUARDIANSHIP LAW

Cheolung Je[*]

Résumé

La forme traditionnelle de la tutelle des majeurs en Corée s'étant avérée impopulaire, le système a été réformé en 2011. Les pouvoirs du tribunal de la famille ont été élargis et les types de tutelle ont été diversifiés. Le principal objectif de cette réforme était de protéger les droits et les intérêts des adultes concernés. Toutefois, le présent article montre que le nouveau système est déficient. Par exemple la tutelle est parfois utilisée pour des questions mineures, alors que d'autres alternatives plus légères seraient préférables. En outre, les nouvelles règles ne permettent pas à la personne concernée de participer aux procédures. Il reste à voir si ces lacunes seront comblées par une nouvelle réforme.

I INTRODUCTION

Just after independence from Japan in August 1945, South Korea adopted a democratic political system with a market economy and the rule of law. In the realm of private law, all the rights and obligations belong to individual legal entities, namely natural persons and legal persons such as companies, corporations and foundations;[1] the distribution of goods and services shall in principle be made by contracts between legal entities. Natural persons can personally participate in making those contracts as long as they have mental capacity to do so. Otherwise, the contracts they make become invalid, irrespective of whether or not the counter-parties to the contracts knew or could know of their incapacity.[2] Such a rule applies to other juristic acts such as consent to medical treatments and so on.[3] That being said, natural persons who

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1 See Minbop, which is the Civil Code of Republic of Korea, [Duration of Legal Capacity to Hold Rights and Obligations] Art 3; [Legal Capacity of Legal Persons to Hold Rights and Obligations], Art 34.

2 See Korean Supreme Court decision 2008DA58367 decided 15 January 2009 [Confirmation of Non-Existence of Debts].

3 Korean Supreme Court decision 2013DO1228 decided 13 January 2014 [consent by a guardian of a minor to blood collection] ruled that consent to medical treatments or similar treatments cannot be represented by a guardian unless the authority to do so is granted to the guardian or the law allows the guardian to do so.

lack mental capacity to do legal transactions can participate in legal transactions either through adult guardians or through representatives appointed by them.[4]

Adults with impairments to decision-making abilities (hereinafter 'mentally disabled adults') are such persons who need adult guardians or agents to participate in legal transactions. Among them, some are mentally incapacitated, whereas others suffer difficulties in doing legal transactions unless there are special measures for supported decision-making. Those persons are namely persons with mental or intellectual disabilities and persons with dementia, shown in Table 1.

Table 1: The number of persons with impaired decision making abilities in Korea

Number/ Type	Persons with dementia	Persons with brain injury	Persons with developmental disabilities	Persons with mental illness
Registered number	540,755	257,797	190,163	94,638

Source: The Korean Ministry of Health and Welfare, '2013 Statistics on Disabilities' and Central Dementia Center, '2013 statistics on Dementia'

As shown above in Table 1, more than a million adults have had mental illness, developmental disabilities, brain injuries or dementia. Because a common thing for them is that they have suffered some kind of difficulties in decision-making, it might follow that a considerable number of mentally disabled adults might have been either under guardianship or under agency. The reality is, however, to the contrary. Before the reform of the adult guardianship system, which was legislated in 2011 by the enactment of 'the Revising Some Part of Minbop Act' (Law Number 10429),[5] few adults had been under guardianship, as shown in Table 2; moreover few had granted agency for the time of incapacity.

Table 2: The number of applications for, and permissions of, adult guardianship

Year	Applications	Permissions	Year	Applications	Permissions
2001	323	176	2007	747	334

[4] Because agency is valid even though the principals become incapacitated (see Minbop [Extinction of Agency], Art 127), agents appointed at the time when principals had capacity to grant them with the authority of representation for the time of incapacity are very similar to attorneys of an enduring power of attorney in terms of their function.

[5] Since the main purpose of Law No 10429 is the reformation of adult guardianship, that law is called 'the Adult Guardianship Act 2011'.

Year	Applications	Permissions	Year	Applications	Permissions
2002	421	208	2008	804	391
2003	433	250	2009	944	493
2004	473	274	2010	1,024	515
2005	529	291	2011	1,290	617
2006	663	303	2012	1,342	705
Total	8,993		Total	4,310	

Source: The Korean Supreme Court, 'Judicial Statistics 2002-2013'

The new Korean guardianship system came into force as from 1 July 2013, whereas the traditional guardianship system co-exists and will terminate on 30 June 2018. This chapter explains the background of the reform of the adult guardianship system and its main features.

II BACKGROUND TO THE REFORM OF THE ADULT GUARDIANSHIP SYSTEM IN KOREA

(a) Unpopularity of the traditional adult guardianship

Traditionally a family was responsible for the maintenance and protection of its mentally disabled adult members as well as its child members. If there were not any proper parents or adult children of such adults, extended family members such as siblings, uncles and aunts, or cousins were responsible for them.[6]

It could be closely related to the structure and function of the traditional Korean family institution. The traditional Korean family was based on primogenitureship, with a two or three generation family structure, composed of grandparents, parents, spouses and their children; the married eldest son lived together with his parents, whereas other married sons became independent of their parents and kept their own households;[7] that being said, descendants of living ancestors, two-generation-relatives by and large, gathered together for ancestral rites on the date of ancestors' death, and four generation

[6] Former Minbop [Order of a Minor Guardian], Art 932, revised by Law no 10429, provided that a relative automatically became the guardian of a minor without parents; when mentally disabled adults were declared to be legally incapacitated, former Minbop [Order of an Adult Guardian], Art 933, revised by Law no 10429, provided that a relative automatically became a guardian. Thereby relatives' responsibility for children without parents and mentally disabled adults was legally supported.

[7] About elders living in Korean, see Gene-Woong Chung, 'Elders in the Family and the Strain of Discourse of Filial Piety', Korean Journal/Winter 2001, 146.

relatives gathered together for their ancestral rites usually held at national holidays.[8] Attendance at ancestral rites was not a legal duty, but a strong moral obligation. Moreover, persons stemming from a same male ancestor, which is a kind of clan, and which can be discerned by family name and its origin (*Bon-Gwan*), were not allowed to marry each other.[9]

The family culture arising from the close relations of extended family members has contributed to the shaping of social consciousness that a family or an extended family should be responsible for the maintenance and protection of mentally disabled adults. It has been reflected in family law and criminal law as well: first, remote relatives within eighth degree of kinship have had rights to intervene in very personal affairs such as marriage[10] and adoption;[11] second, close relatives have been responsible for maintenance of their relatives in poverty;[12] third, relatives have had power to admit relatives who are under their maintenance and who are mentally ill to psychiatric hospitals or facilities without their consent;[13] lastly, relatives are immune from criminal prosecution: for instance, deceit, theft, and misappropriation of property between close relatives cannot be convicted, and such a crime between remote relatives can be prosecuted only with direct complaint from victims.[14]

Such a great power of relatives and their obligation of maintenance and protection have led to the shaping of a wrong conception among lay Koreans that they have authority to represent their mentally disabled relatives, even though they were not granted such an authority either by their mentally

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8 About Korean kinship and ancestral rites, see Song-Chul Kim, 'Kinship in Contemporary Korea: Normative Model versus Practice', Korean Journal/Autumn 1998, 135; Okpyo Moon, 'Ancestors Becoming Children of God: Ritual Clashes between Confucian Tradition and Christianity in Contemporary Korea', Korean Journal/Autumn 1998, 151.

9 Former Minbop Art 809, revised by Law no 7427, provided that marriage between males and females with the same family name and same origin (*Bon-Gwan*) was prohibited. This provision was in the year of 1997 declared to be unconstitutional by the decision 95heonga6 ~17 of the Constitutional Court.

10 Close relatives within the fourth degree of kinship are eligible to apply to a competent family court for cancellation of double marriage. Minbop [Claimant for Annulment of Marriage in Violation of Marriageable Age, etc], Art 817 (RO Korea). They may also apply for cancellation of a marriage between relatives. Minbop [Claimant for Annulment of Bigamy], Art 818 (RO Korea).

11 Lineal blood relatives and their spouses among lineal blood of immediate kinship are eligible to apply to a competent family court for cancellation of adoption. Minbop [Affiliation], Art 885 (RO Korea). Even remote relatives are eligible to apply for revocation of adoption. Minbop [Person Entitled to Claim for Dissolution of Adoptive Relationship], Art 906 (RO Korea).

12 Lineal blood relatives and their spouses are responsible for maintenance of each other in poverty. Minbop [Duty to Furnish Support], Art 974 (RO Korea).

13 See Jeongsinbogeonbop, which is the Korean Mental Health Act, [Involuntary Admission], Art 24 (RO Korea). See also Cheolung Je, Korean 'Guardianship', in: Kimberly Dayton ed, *Contemporary Perspectives on Adult Guardianship* (Carolina Academic Press, Durham, North Carolina, 2014) p 195.

14 Hyongbop, which is the Korean Criminal Act, Art 328 provides that such an immunity or privilege is extended to the crime of obstructing another's exercising of the rights. Hyongbop, Art 344 328 (RO Korea) provides the same privilege to the crime of larceny and robbery. Hyongbop Art 354 (RO Korea) extends it to the crime of fraud, unlawful profit, and extortion. Lastly Art 361 extends it to the crime of embezzlement and breach of fiduciary duty.

disabled relatives or by law. On the other hand, the parties with whom relatives made contracts on behalf of mentally disabled adults tended to believe that the relatives of their counter-parties had legal authority to act as representatives, because they had counter-parties' seals and acted on the latter's behalf. Even though it was not the case, they tended to believe that they would be unlikely to be exposed to legal disputes, because their counter-parties' relatives were usually legal heirs and the relatives, and would be eventually the persons who would take responsibility for those legal transactions. Therefore, it became a customary wrong belief among lay Koreans that relatives of mentally disabled adults could represent the latter.

Moreover, the deficiency of *Minsasosongbop*, which is the Korean Civil Procedure Act, has contributed to such a wrong belief. According to Art 55, a ward could bring a lawsuit only through his or her guardian; *Minsasosongbop* Art 62 provides that in the case of lawsuits against a guardian, a special litigation representative is indispensable, for which appointment relatives in turn are eligible to apply to the court before which a lawsuit was brought;[15] by analogy with *Minsasosongbop* Art 62, mentally incapacitated persons could bring lawsuits only through a special litigation representative. It means that where relatives represented mentally disabled adults, lawsuits by those mentally disabled adults against relatives and their counter-parties could scarcely be imagined, because it is very difficult to find eligible relatives who can apply for the appointment as a special litigation representative.[16]

On the other hand, the legal transactions either done or represented by unauthorised relatives could be done under the non-transparent financial and property market environment where a non-identified principal could buy and sell financial goods and real property. It was, for instance, reflected in the court decisions: before the laws on transparency of financial transactions were enacted in 1990s,[17] the Korean Supreme Court ruled that 'a bank account belongs to the person who put his or her money in and controls it, regardless of who created that bank account'.[18] Such a ruling signalled that any persons could withdraw money from their relatives' or close friends' bank accounts

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15 Besides relatives, public prosecutors and persons with interests are eligible to make such an application. In reality, public prosecutors have rarely applied for appointment as a special representative.

16 To overcome such drawbacks, Art 55 and Art 62 relevant to the adult guardianship system were revised in February 2016 by Law no 13952 and revised Arts 55 and 62 will come into force as from February 2017.

17 However, the environment for non-transparent property transactions has been improved by legislative reformation since the 1990s: Act on the Registration of Real Estate under Actual Titleholder's Name (Law no 10682, 1995) (RO Korea); Act on Real Name Financial Transactions and Confidentiality (Law no 12711, 1997) (RO Korea); Act on Special Cases Concerning the Prevention of Illegal Trafficking in Narcotics Etc. (Law no 10854, 1995) (RO Korea); Act on Reporting and Using Specified Financial Transaction Information (Law no 11411, 2001) (RO Korea); Act on Regulation of Punishment of Criminal Proceeds Concealment (Law no 12842, 2001) (RO Korea); Act on Prohibition against the Financing of Terrorism (Amended by Presidential Decree No 24083, 2012).

18 See Supreme Court decision 94Da59042, decided 22 August 1995 [Withdrawal of a Bank Account].

without any authority to represent them, so long as they could secure the owner's seals or pin numbers and claim that they put their money into those bank accounts.

Taking into consideration the social and legal environment mentioned above, it is very natural that relatives used to be reluctant to resort to adult guardianship, except that there were conflicts between relatives who were responsible for the maintenance and protection of mentally disabled adults. Even in the latter case, family members tried to avoid resorting to guardianship as far as they could, because the commencement of guardianship was registered at a family relation registry and made public, resulting in the stigma that other family members were in a like manner susceptible to mental disabilities as well.

(b) Change of social and legal environment surrounding the adult guardianship system

Since the 1970s when industrialisation and urbanisation began on a large scale, the Korean family structure has rapidly changed to that of the nuclear family with spouses and/or their young children, as shown in Table 3. A more conspicuous thing is that the number of one-person households has been increasing and will be expected to increase to 34.3% by 2035.

Table 3: Changes in household types (unit: %)

	1960	2000	2010
One-generation	5.4	14.2	15.4
Two-generation	64.0	60.8	46.2
Three- and more-generation	28.5	8.4	6.2
One person	2.3 (1966)	15.5	23.9
Other types[19]			7.1
Not blood related	2.1	1.1	1.2

Source: KNSO 2000(b) and 2010

Changes in household types led to the traditional family function of maintaining and protecting mentally disabled adults having become considerably diminished. The fact that many mentally disabled adults have

[19] 'Other types' means a household of spouses and their unmarried siblings or relatives, that of a head of household and unmarried siblings or other relatives, that of spouses and their one parent, that of spouses, their siblings and unmarried children, and that of grandparent(s) and unmarried grandchildren and so on.

recently resided in residence institutions such as nursing homes, psychiatric hospitals and disability residence homes rather than their own homes might reflect the weakening of the family function. Most mentally disabled persons, whose number was 94,683 in 2013, seem to reside at psychiatric hospitals and psychiatric care homes, as shown in Table 4; nearly 10 per cent of intellectually disabled adults, whose number was about 12,000 in 2013, reside at disability residence homes, as shown in Table 5; nearly half of elderly persons with dementia reside at care homes and nursing homes.

Table 4: Yearly trends of the number of patients involuntarily admitted into psychiatric hospitals and institutions (unit: person)

	2005	**2006**	**2007**	**2008**
Psychiatric hospitals	58,150	63,760	68,253	69,702
Psychiatric Institutions	14,049	14,296	14,609	14,235
Total	72,199	78,056	82,862	93,937

Source: The Korean National Mental Health Commission, Statistics of mental Health

Table 5: Yearly trends of the number of persons with intellectual disabilities accommodated in institutions

	2007	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**
Institutions	131	144	172	196	226	278	293
Inhabitants	9,325	9,192	9,539	14,338	10,788	11,748	12,001

Source: Korean Ministry of Health and Welfare, Statistics on Disability Institution

Table 6: Number of institutions for elderly in 2014

	Elderly care hospital	**Elderly nursing home**	**Share homes for elderly care**
Number	Hospitals beds	Homes inhabitants	Homes inhabitants
	1,356 214,214	2,707 110,479	2,134 16,877

Source: Korean Ministry of Health and Welfare (2015), Current Situation on Elderly Welfare Institutions

The tables show that, whereas the family's function of the protection of mentally disabled adults has weakened, social welfare agencies or medical institutions have partially taken over the protection function. On the other hand, mentally disabled adults, who live in communities, seem to be exposed to much more abuse and neglect than ever, because they live alone in the communities without proper protection by family members; where they live together with family members, the latter's burden has become much greater than ever, which leads to abuse and neglect by family members. The voice for the intervention of the state and society for the protection of mentally disabled adults has therefore become louder. It leads to the reformation of the traditional adult guardianship system in Korea.

On the other hand, the United Nations Convention on the Rights of Persons with Disabilities and reform of the adult guardianship system in foreign countries such as United Kingdom, Germany and Japan and so on have influenced Korean policy makers and practitioners working for mentally disabled adults with respect to the direction of the reformation of the adult guardianship system.

III CURRENT ADULT GUARDIANSHIP SYSTEM

The main features of the new adult guardianship system are as follows.

(a) Enlargement of family court's power

The policy aim of the new adult guardianship system is to overcome the drawbacks of the traditional guardianship system. Under the traditional guardianship system, a guardian was statutorily determined, upon the declaration by a family court of full or limited incapacity, in the following order: a spouse if the person in the case is married, his or her parents, brothers and sisters, uncle and aunt, or cousins; if there was two or more eligible candidates in the same degree of kinship, the eldest had priority;[20] in an exceptional case where there was no statutory candidate, the competent family court had power to appoint a proper person as a guardian.[21] Many policy makers found the drawbacks of the traditional guardianship system in the fact that the guardianship service quality of guardians was not effectively controlled by family councils[22] because guardians were statutorily determined among relatives and family council members also came from among same relatives.

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[20] See Minbop [Order of a Guardian], Art 935, which was abolished by Law no 10429, 2011.

[21] See Minbop [Appointment by a Court of a Guardian], Art 936, which was abolished by Law no 10429, 2011.

[22] Under the traditional adult guardianship system, family councils composed of relatives were responsible for the supervision of a guardian (see Minbop [Appointment of Family Council

Therefore, they expected to achieve the policy aim by enlarging the power of family courts. In other words, the new adult guardianship system equips a family court with the power to appoint a guardian and a supervisory guardian from relatives and third parties.

Under the new system, eligible applicants apply for the commencement of guardianship,[23] instead of application for a declaration of legally full and limited incapacity. If a competent family court is satisfied that the requirements for guardianship are met, it has to appoint any person or legal entity as a guardian or guardians at the same time when it orders the commencement of guardianship.[24] In this regard, it has a discretion to appoint any person or legal entity as a guardian or guardians. However, it has regard to health, living conditions, current finances and properties of the person in the case for whom a court orders the commencement of guardianship (hereinafter 'the person in the case'), job and experience of the recommended guardian candidates, conflicts of interest between the person in the case and the recommended candidates and so on.[25] In this sense a guardian appointed by a family court is called a judicial guardian.

Moreover, a competent family court, if it finds it necessary, can appoint a supervisory guardian on its own motion, which can replace the function of a family council under the traditional system of legal incapacity.

(b) Diversification of guardianship types

Under the traditional guardianship system, a guardian was statutorily determined after a competent family court[26] declared that the person in the case was either in full incapacity or in limited incapacity, depending on the degree of deterioration of his or her mental capacity. Therefore, there were only two types of guardians, who served as guardian for the person in full legal incapacity and the person in limited legal incapacity. One of the most conspicuous features of the new adult guardianship system is diversification of guardianship types.

To respect the autonomy and self-determination of mentally disabled adults, the new adult guardianship system introduces a type of contractual guardianship. Contrary to the traditional guardian, anyone can serve as a contractual

Members] Art 963), but criticised for their malfunction in reality. The family council is abolished under the new adult guardianship system.

23 See Minbop [Order for the Commencement of Full Guardianship] Art 9, [Order for the Commencement of Limited Guardianship] Art 12, [Order for the Commencement of Specific Guardianship] 14–2.

24 See Minbop [Appointment of Full Guardians], Art 936(1).

25 See Minbop [Appointment of Full Guardians], Art 936(4).

26 A case relating to the declaration of legal incapacity was under the jurisdiction of family court, the function of which was discharged by five Family Courts, other District Courts and Branch Courts at the first instance. Under the new adult guardianship law, guardianship cases are under the jurisdiction of the family court as well. See Family Litigation Act, Art 2 (Law no 11949, 1990).

guardian by a contract between a principal and a prospective contractual guardian. The power and authority of representation shall be determined by the contractual guardianship contract. In this regard, that contract is similar to the mandate contract, but the difference is that a contractual guardian can make substituted decisions in relation to personal welfare and medical treatments, which have traditionally been beyond the authority of representation on behalf of adults unless special laws permit agents to exercise such authority. The process of anyone becoming a contractual guardian is as follows:

(1) Making a contract in a notarial deed between a principal and a prospective contractual guardian;
(2) Registration of the notarial deed at a competent family court;
(3) Application for the appointment by a competent family court of a supervisory guardian; and
(4) Upon the appointment of a supervisory guardian, a contractual guardian begins to serve

After registration of a notarial contractual guardianship contract, any eligible applicant[27] can apply to a competent family court for the appointment of a supervisory guardian. The competent family court shall appoint a supervisory guardian when it is satisfied that the principal has insufficient capacity to deal with finance and property affairs and/or personal affairs, which are the subject matter of the contractual guardianship contract. Then, the guardianship contract comes into effect, until when its effect has been suspended. Even though the principal can express his or her own wishes and preferences regarding a supervisory guardian, those wishes and preference do not have any binding effect. That being said, a family court has to respect such wishes and preference.

Despite the application for a supervisory guardian, the family court shall refuse to appoint a supervisory guardian in cases where the prospective contractual guardian is a person to whom the disqualification provision, Minbop Art 937,[28] could apply, ie if he or she was a guardian appointed by a family court, or who has engaged in considerable misconduct, or who is not a proper person to discharge the responsibilities of a contractual guardian. In the case of such a refusal, the effect of the guardianship contract will still be suspended.

A guardianship contract is void if the contract was made when a principal lacked capacity to make that contract, which cannot be healed by the appointment by a family court of a supervisory guardian. Whether or not it is void can be disputed in lawsuits other than in a case for the appointment of a

[27] The Principal, his or her spouse, relatives within fourth degree of kinship, the prospective contractual guardian, public prosecutors and the heads of local authorities are eligible to apply. See Minbop [Appointment of Supervisory Guardians], Art 959–15.

[28] Disqualified persons are minors, persons under any kind of guardianship, bankrupt persons, persons under a sentence of more than a disqualification criminal punishment, a revoked guardian, a revoked legal representative, a missing person, a person suing the person under guardianship, his or her spouse, or a relative of direct blood kinship.

supervisory guardian. On the other hand, the contractual guardianship contract can be terminated by the notarial withdrawal of the offer and acceptance of the contract at any time before the appointment of a supervisory guardian. After the appointment of a supervisory guardian, the principal or the contractual guardian cannot terminate it without the family court's permission.[29]

The new adult guardianship system also diversifies the traditional guardianship so that there shall be three types of guardianship, namely full guardianship, limited guardianship and specific guardianship. Moreover, the new law actually reforms the traditional guardianship system.

Whereas a person with full legal incapacity under the traditional guardianship system could not do any legal transactions because he or she was deprived of legal capacity by the court declaration, the scope of deprivation of legal capacity in the case of full guardianship can be narrowed by a competent family court decision. Then, a person under full guardianship is not prevented from doing those legal transactions which a competent family court allows. In that case, whether or not a contract by the person under full guardianship is void depends on whether he or she has capacity to do the transactions in dispute. In other cases, any contract by that person under full guardianship is voidable, irrespective of whether or not he or she had capacity to make that contract. Moreover, the transactions of purchase of necessities done by that person under full guardianship cannot be cancelled up to small amount of value, irrespective of whether or not his or her legal capacity to do such a transaction is lacking, unless the price is unreasonable.[30] On the other hand, the person can make decisions by him or herself in relation to personal welfare matters, such as medical treatment, residence, personal contact with others, and daily life matters,[31] except marriage, divorce, adoption and other important family related decisions.[32] Any substituted decision-making by a full guardian in relation to such matters can be permitted only if a guardian reasonably believes that the person actually lacks capacity to make relevant decisions.

Whereas a person with limited legal incapacity under the traditional guardianship system was reduced to a minor in terms of his or her legal capacity, a person under limited guardianship under the new guardianship system is not prevented from doing legal transactions unless a competent family court grants the power of consent to certain contracts to the limited guardian; in those cases, if a person under limited guardianship makes contracts without guardian's consent, those contracts can be cancelled. However, a person under limited guardianship without reservation of the power of consent with a limited

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[29] See Minbop [The Termination of a Contractual Guardianship Contract], Art 959–18.

[30] See Minbop [Juristic Act of the Person under Full Guardianship and its Cancellation], Art 10(4).

[31] See Minbop [Decision Making etc by the Person under Full Guardianship in Relation to Personal Matters], Art 947–2.

[32] Just like a guardian for a person in full incapacity under the legal incapacity regime, a full guardian has power to consent to such personal decision-making by the person under full guardianship.

guardian can make valid contracts unless he or she lacks capacity to make those specific contracts. In judicial praxis, the extent of the power of consent and that of the authority to represent tend to go in parallel.[33]

On the other hand, either full, or limited, guardianship lasts until the persons under guardianship die unless a family court terminates the full or limited guardianship. Family courts can terminate full or limited guardianship when they are satisfied that the requirements for the commencement of guardianship no longer exist. Those requirements consist of two elements, namely mental disabilities or aging of the persons in the case and their impossibility in dealing with finance and property affairs or personal affairs (in the case of full guardianship), or insufficiency in doing so (in the case of limited guardianship). The first requirement of either mental disabilities such as dementia, developmental disabilities, brain injuries or mental illness or aging is very hard to recover from, so that the full guardianship or limited guardianship is hardly ever terminated in reality.

Regarding specific guardianship, it can be commenced only for predetermined short periods, eg for 1 year to 5 years, to do predetermined tasks.[34] The main function of a specific guardian is to support decision-making by the person under specific guardianship, besides which the specific guardian can be granted by a family court with authority of representation for specific transactions, if it finds it necessary.[35] In this regard, the authority of representation by the specific guardian for important transactions can be granted on the condition that the person under specific guardianship should be represented only with the consent of the competent family court. For instance, a specific guardian can represent the ward in a compromise contract against a tortfeasor with the court's consent.[36] On the other hand, a competent family court can make a specific order rather than appointment of a specific guardian, whereby the order replaces the decision-making of the person in the case required to complete legal transactions.

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[33] In the case of the Uijeongbu District Court 2014Neudan222 [Limited Guardianship Case], for instance, the power to consent to legal transactions that a limited guardian power has is enumerated as legal transactions related to real property, banking, insurance, management of periodical income and payments such as rent and pensions, admission to a care home and litigation, whereas the guardian has the authority of representation to the nearly same extent. In the case of Hongseong Branch Court 2013Neudan420 [Limited Guardianship Case], the power of a limited guardian to consent goes nearly in parallel with the authority of representation.

[34] See Minbop [The Authority of Specific Guardians in relation to Representation], Art 959–11 (1).

[35] See Minbop [Appointment etc of Specific Guardians], Art 959–9 (1).

[36] In the case of Goyang Branch Court 2013Neudan1488 [Specific Guardianship Case], for instance, a specific guardian is granted with authority to represent the ward in relation to a settlement contract through ADR on the condition that the guardian should in advance get permission about the amount of damages from the competent judge.

(c) Correlation between various types of guardianship

Among judicial guardianship, any two types of guardianship cannot be compatible. A full guardianship is to be terminated if a limited guardianship is commenced for the person under full guardianship, and vice versa.[37] That being said, the power and authority of limited guardianship and full guardianship can be either narrowed or expanded by a family court order without termination of any type of guardianship and the commencement of another type of guardianship. Nevertheless, the power and authority of specific guardianship cannot be either narrowed or expanded; if more power and authority are necessary for a specific guardian to serve properly, any eligible applicant has to make an application for another specific guardianship.

Where a guardianship contract is registered at a competent family court or where a contractual guardian begins to act after the appointment of a supervisory guardian, any judicial guardianship can be commenced only if the contractual guardian or the supervisory guardian applies for judicial guardianship and the competent court is satisfied that judicial guardianship is necessary to promote the principal's interests. In that case, the contractual guardianship is to be terminated if a full guardian or limited guardian is appointed. However, the contractual guardianship remains compatible with specific guardianship.

Where any judicial guardianship has already been commenced, but an application for the appointment of a supervisory guardian has been made in accordance with a valid guardianship contract, a competent family court may appoint a supervisory guardian and it will order that the judicial guardianship shall terminate at the same time. If the competent family court is satisfied that it fits the best interest of the person under limited guardianship or full guardianship to let that guardianship continue, it can refuse to appoint a supervisory guardian, meaning that the effect of the guardianship contract is still suspended.

(d) Registration of judicial guardianship and contractual guardianship

Guardianship registration is regulated by the Guardianship Registration Act (Law no 11732). A guardianship contract and some court orders relating to both judicial guardianship and contractual guardianship are to be registered at the competent family court. The registry shall contain the name of the guardian or supervisory guardian and the person under guardianship, the power and authority of the guardian including the power to consent, the scope of non-deprived legal capacity of the person under full guardianship, the duration of specific guardianship, and the revocation and termination of guardianship. The registry is not available to the public, in that only a limited range of

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[37] Minbop [Relationship between Orders of Guardianship], Art 14–3.

persons[38] can apply for the issuance of a copy of the guardianship registration (Art 15 of the Guardianship Registration Act). Even though the purpose of registration is to ensure that any legal transactions related to persons under guardianship are to be validly made, that purpose cannot be perfectly achieved, because those who enter contracts with persons under guardianship themselves are likely to fail to notice that those persons have been deprived of or have restricted legal capacity. Where a contract is made by a person under full guardianship but who is not allowed to validly make legal transactions of such types of contracts, it is voidable, irrespective of whether or not the person had capacity to make that intended contract. Legislators intended that the price be paid for the protection of the privacy of persons under guardianship.

(e) Procedure relating to guardianship

The procedure related to guardianship is regulated by *Gasasosongbop* (Law no 11725), which is the Family Law Procedure Act.[39] Which family court has jurisdiction over a guardianship case is determined by the domicile of the person in the case.[40] The guardianship procedure can be started only by eligible applicants.[41] Any person having a legal interest can participate in the case with the court's permission, and the court can have those persons participate in the case. The competent family court has to hear the person in the case. Only the applicant can appeal against the court's decision to reject the application, whereas the applicant and participants can appeal against the court's decision to make an order. Except where a person in the case himself or herself applies for the commencement of guardianship or the appointment of a supervisory guardian in relation to a contractual guardianship, the person in the case does not have any standing in the case, because he or she is neither an applicant nor a participant. Before the court decision, the family court shall have the person in the case examined by psychiatrists, which is mandatory in the case of applications for full or limited guardianship, unless there are sufficient materials on the degree of deterioration of the person's mental capacity. In cases related to specific guardianship and contractual guardianship, the court shall refer to the opinion of a doctor or other experts regarding the person's mental capacity. In this regard, because there is no statutory guideline about the criteria of how to assess mental capacity, the examination by psychiatrists is likely to lead to confirmation of the general status of mental capacity, which is irrelevant to the necessity or motive for applying for the appointment of a guardian. It is,

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[38] Those persons are guardians, persons under guardianship, statutory representatives regulated by Minbop, state and local authorities, parties in law suits who are required to submit a registry copy, persons required by other statutes to submit a registry copy, and persons having legitimate interests who are acknowledged by the relevant regulation of the Supreme Court.

[39] It can be translated as the Family Litigation Act as well.

[40] A guardianship case shall be subject to the jurisdiction of a family court which is in the domicile of the person in the case. See Gasasosongbop [Jurisdiction] Art 44.

[41] Eligible applicants are enumerated in respective cases relating to guardianship. For instance, the commencement of guardianship can be applied for by the person in the case him or herself, his or her spouse, relatives within fourth degree of kinship, a guardian who applies for a type of guardianship other than the current guardianship, public prosecutors and heads of local authorities.

therefore, not uncommon in practice that full guardians are appointed for the persons on whose behalf substituted decision-making is sought only in relation to the withdrawal of small amounts of money from his or her bank account, on the ground that his or her mental capacity has seriously deteriorated.

(f) Involvement of local authorities in the operation of the guardianship system

Another reform for the protection of mentally disabled adults is that local authorities get the status of being eligible to apply for adult guardianship. According to *Jibangjachibop*, which is the Local Government Act, Art 9(2)2, the improvement of the welfare of inhabitants under the jurisdiction of the relevant local authorities is one of their main tasks. Local authorities are therefore responsible for the protection of mentally disabled adults through the social benefits and services delivery system.[42] Qualifying to be eligible to apply for guardianship can help local authorities to more efficiently deliver social benefits and services to mentally disabled adults, in that local authorities can initiate guardianship procedure so as to provide guardianship services for those who do not have either any relatives or appropriate relatives willing to act as a guardian. Thus, local authorities can assist guardians to manage social benefits and services for the interests of mentally disabled adults.

Table 7 below shows the number of guardians appointed under the new adult guardian system and their types and composition. Most guardians have so far been appointed from among family members: relatives account for more or less 85% of appointed guardians. However, what is conspicuous is that the number of appointments of specific guardians is much more than that of limited guardians. This is because local authorities have applied for the commencement of specific guardianship for persons with intellectual disabilities and autism, who have no relatives or appropriate relatives willing to help them to manage social benefits and services. Thereby, specific guardians can help persons with intellectual disabilities and autism to be integrated into their communities. Local authorities' engagement in the guardianship application has been based on the Protection and Assistance of Persons with Developmental Disabilities Act (Law no 12618), which came into force as of November 2015.

Table 7: Composition of guardians appointed after the implementation of the new Adult Guardianship Act (unit: persons, %)

[42] Eg the National Basic Living Security Act Art 21–27; the Act on Welfare of Persons with Disabilities Art 32–50; the Act on Long-term Insurance for the Aged Art 31–37; the Basic Pension Act Art 10–14.

1/7/13 to 30/6/14	Full guardians	Limited guardians	Specific guardians	Contractual guardians	Total
Total number of appointment	1,613	192	358	3	2,166
Relatives	1,542 (95.6%)	182 (94.8%)	114 (31.8%)	1 (33.3%)	1,839 (84.9%)
Professionals	48 (3 %)	7 (3.6%)	20 (5.6%)		75 (3.5%)
Citizens	23 (1.4%)	3 (1.6%)	224 (62.6%)	2 (66.7%)	252 (11.6%)

Source: Judicial statistics on adult guardianship from 1 July 2013 to 30 June 2014

Some members of the Korean Parliament and experts on guardianship law and practice have sought to extend local authorities' engagement in guardianship applications to persons with dementia by revising the Welfare of Elderly Act and the Management of Dementia Act so that local authorities can apply for guardianship to help persons with dementia with no appropriate relatives to efficiently use medical treatments and care services.

IV CONCLUSION

The main purpose of the reform of the adult guardianship system was the protection of the rights and interests of mentally disabled adults, which was believed to be realised by the appointment and supervision by family courts of guardians. During the legislative process, it seems that respect for their human rights has been overlooked, even though experts engaging in the legislative process had regard to the UN Convention on the Rights of Persons with Disabilities. In this regard, two aspects can be mentioned. First, the requirements for the commencement of both full and limited guardianship focus on the degree of deterioration of a person's mental capacity rather than the motive and necessity of resorting to guardianship. If the motive and necessity had been the most important requirement, guardianship would have been commenced only in cases and for the period when alternatives to guardianship, which are less restrictive of human rights, are not available. For instance, a full guardian could not have been appointed to withdraw money from bank accounts for living expenses available to mentally disabled adults, even though their mental capacity had seriously deteriorated. Second, sufficient regard was not paid to the advocacy and protection of mentally disabled adults.

First of all, it is reflected in their status during guardianship procedure. Current legal provisions of *Gasasosongbop*, the Family Law Procedure Act, do not allow persons in the case to participate in guardianship procedures as a party or participant so that the opportunity for litigation friends to represent their wishes and preferences or to advocate their best interests under the guardianship procedures is absent. Moreover, more than 300 legal provisions disqualify persons under full guardianship and limited guardianship from being citizens and members of communities rather than advocating and supporting them to participate in the decision-making processes of the state and communities.

The deficiencies arising from the new adult guardianship system have however been criticised since the implementation of the new Adult Guardianship Act 2011, which has been influenced by the disability movement in Korea. It remains to be seen whether those deficiencies will be fixed by further reform legislation.

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SWITZERLAND

FINANCIAL SUPPORT FOR CHILDCARE – THE REFORM OF SWISS LAW ON CHILD SUPPORT

Andrea Büchler[*]

Résumé

En Suisse, la réforme de la législation relative à la pension alimentaire contient de nombreuses innovations importantes. Bien que le législateur ait laissé plusieurs questions importantes sans réponse, trois principes clairs ont été établis, à savoir que la pension alimentaire doit inclure les frais de garde d'enfants, qu'elle est payable indépendamment du statut matrimonial des parents, et qu'elle est accordée en priorité par rapport à tous les autres droits d'entretien. Cela rapproche considérablement la situation juridique des enfants de couples non mariés de celle des enfants de couples mariés. Cela signifie également que les parents séparés qui sont tous deux habilités à exercer l'autorité parentale relativement à leur enfant et qui n'ont jamais été mariés ensemble auront désormais la possibilité de s'occuper leur enfant eux-mêmes pour un temps déterminé. En ce qui concerne les services de garde et l'emploi, la Suisse a encore beaucoup à faire. Afin que les femmes puissent participer au marché de l'emploi sur un pied d'égalité avec les hommes, il est essentiel que les structures de garde existantes soient élargies.

I INTRODUCTION

Child law in Switzerland is undergoing a fundamental transformation. Under the revised legislation on parental responsibility which came into force in 2014, joint parental responsibility was introduced for all parents irrespective of their

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marital status.[1] From January 2017 onwards, childcare support will become part of child support and thus payable to the parent to whom principal care has been assigned irrespective of the marital status of the parents.[2] These reforms have been enacted to serve the best interests of the child, which are the paramount principles guiding Swiss child law (cf art 301, para 1 of the Swiss Civil Code, hereinafter 'SCC'), have the status of a constitutional provision (cf art 11, para 1 of the Swiss Constitution)[3] and are founded in international law (cf Art 27, para 1 of the UN Convention on the Rights of the Child). The objective of the reforms is to ensure that every child receives the best possible care.

II APPLICATION OF THE LAW

To facilitate a proper assessment of the impact of these changes to child support law, this chapter will begin with a few observations on the situation of the family in Switzerland.

As in many other countries, Swiss society is moving away from the traditional image of the family (comprising a married couple with children, with the father in full-time employment and the mother looking after the household and the children) towards new family constellations. In Switzerland today, more than one in five children (21.7%) has unmarried parents[4] and ever-increasing numbers of women pursue gainful employment. Despite this, traditional patterns of childcare remain firmly entrenched.

(a) Couples sharing the same household

Whereas both partners in nearly 40% of households with no children are in full-time employment, this pattern changes once a child is born. Generally speaking, the woman then either works less or gives up work completely so as to look after the child, while the man continues to work.

Regardless of the age of the child, in over 85% of households with one or more children the man works full time and the woman works part time.[5] The number of families in which one parent does not work is around 20%.[6] The pattern of

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1 Pamphlet on Parental Responsibility, Federal Gazette 2011 9077, 9078; under the terms of the revised art 296, para 2, SCC, parental responsibility is conferred by law on the mother and the father at the time of the child's birth.

2 Pamphlet on Child Maintenance, Federal Gazette 2014 529, 530.

3 SFCD 129 III 250, 256, E. 3.4.2.

4 Cf 'Proportion of live births outside marriage' Swiss Federal Statistical Office www.bfs.admin.ch/bfs/portal/en/index/themen/01/06/blank/key/02/03.html.

5 Cf 'Employment models in couple households' Swiss Federal Statistical Office www.bfs.admin.ch/bfs/portal/de/index/themen/20/05/blank/key/Vereinbarkeit/03.html; cf also 'Economic activity of mothers and fathers' Swiss Federal Statistical Office www.bfs.admin.ch/bfs/portal/de/index/themen/20/05/blank/key/Vereinbarkeit/01.html.

6 Cf 'Economic activity of mothers and fathers' (n 5 above).

both parents working part time is found in 7.4% of families with a child aged 6 or less, and this percentage then gradually declines to around 4% as the child gets older. In one in ten households with children aged 18 or less both parents are in full-time employment. Very few couples opt for the model in which the father either does not work or works part time and the mother works full time.[7]

(b) Single mothers

Compared to mothers living in a couple, single mothers are more likely to work and generally work to a greater extent. Some 45% of single mothers, irrespective of the age of their child, are in part-time employment, while approximately 24% of single mothers with children aged 14 or less work full time. The proportion of single mothers not in gainful employment decreases as the child gets older – from around 17% of single mothers with a child aged 6 or less to around 10% of single mothers with a child aged between 15 and 24.[8] Poverty is especially prevalent among single-parent families.[9]

(c) Childcare

One prerequisite for parents to pursue gainful employment is that appropriate childcare arrangements are in place.[10] Some 30% of couples with children both work and look after their children on weekdays. About 20% of parents report that these childcare arrangements constrain the amount of time they devote to gainful employment.[11] It is well known that Switzerland does not have enough affordable third-party childcare places available, especially for very young children, and that this makes it difficult for parents to combine caring for their children with gainful employment. Childcare for nearly one in three children (32%) aged 3 or less is provided solely by the parents themselves. By way of comparison, in Denmark some 70% of children are looked after in a state day-care centre, while the figure for Sweden is 5%. In Switzerland, 12% of children aged between 3 and 6 are solely looked after by their parents, versus only 2% in Denmark and Belgium.[12] Compared to the average duration of weekly third-party childcare for 3- to 6-year-olds across all 28 EU member states (30 hours) as well as to the leading country Iceland (with 40 hours), the

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7 Cf 'Employment models in couple households' (n 5 above).

8 Cf 'Economic activity of mothers and fathers' (n 5 above).

9 Cf 'Poverty' Swiss Federal Statistical Office www.bfs.admin.ch/bfs/portal/en/index/themen/20/03/blank/key/07/01.html.

10 Cf 'Erwerbsmodelle, Arbeitsteilung und Kinderbetreuung in Paarhaushalten', Swiss Federal Statistical Office www.bfs.admin.ch/bfs/portal/de/index/news/publikationen.html?publicationID=3717, 15; for an in-depth evaluation of the availability of childcare in Switzerland, cf Diezi 'Nachlebensgemeinschaftlicher Unterhalt: Grundlagen und Rechtfertigungen vor dem Hintergrund der rechtlichen Erfassung der Lebensgemeinschaft' in Schwenzer, Büchler, Cottier (eds) *Schriftenreihe zum Familienrecht* Vol 20 (Stämpfli Verlag, Bern, 2014), N 886.

11 Cf 'Vereinbarkeit von Beruf und Familie' Swiss Federal Statistical Office www.bfs.admin.ch/bfs/portal/de/index/news/publikationen.html?publicationID=5727, 3.

12 Cf 'Formal child care by duration and age group' Eurostat http://ec.europa.eu/eurostat/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=tps00185&language=en.

figure for Switzerland is very low, at 12 hours.[13] As these examples demonstrate, the model of traditional childcare provided by the parents is still common in Switzerland, which is why the introduction of childcare support is particularly important.

III CURRENT LAW

(a) General remarks

In order to develop properly, a child's most important needs are the love and attention received from his or her parents, financial security and dependable and effective childcare. The parents have a duty to provide for the child's maintenance. As a rule, this duty ends when the child reaches the age of majority. If, on reaching the age of majority, the child has not yet completed a suitable education, the parents must pay for his or her maintenance, to the extent that this can be expected in the overall circumstances (art 277, para 2, SCC). Article 276, para 2 of the SCC states that the parents' duty of maintenance towards their child is not limited to maintenance in kind (which includes caring for and raising the child) but also includes a financial contribution (so-called monetary maintenance).[14]

The duty of maintenance for a child primarily lies with both his or her parents (art 276, para 1, SCC). This responsibility is based on the child's relationship with each of the parents.[15] Because it is in no way linked to whether their relationship with each other continues or not, the parents' duty to provide for the maintenance of their child is a long-lasting one,[16] which does not cease in the event of their separation or divorce.

The costs of child maintenance depend on the needs of the child. The calculation of these costs must include all direct expenses relating to the child (such as those for food and clothing). If the child is looked after by a third party, these costs must also be included as a direct expense in determining the cost of child maintenance.[17]

When a child is looked after by one of his or her or parents, this care is not included in the calculation of direct child maintenance costs. As a result, under

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[13] Cf 'Median number of weekly hours of formal care by age group' Eurostat http://ec.europa.eu/eurostat/web/income-and-living-conditions/data/database.

[14] Hausheer and Spycher *Handbuch des Unterhaltsrechts* (2nd edn, Stämpfli Verlag, Bern, 2010), N 06.26 ff.

[15] For a more detailed description of the basis of the parent-child relationship, cf Hausheer, Geiser and Aebi-Müller *Das Familienrecht des Schweizerischen Zivilgesetzbuches* (4th edn, Stämpfli Verlag, Bern, 2010), N 16.08 ff; for a more detailed description of the basis duty of maintenance towards a child, cf Hausheer and Spycher (n 14 above), N 06.32 f.

[16] Cf Pamphlet on Child Maintenance (n 2 above), 530; cf also Rumo-Jungo 'Betreuungsunterhalt bei getrennt lebenden nicht verheirateten Eltern – ein Denkanstoss' *recht* (Stämpfli Verlag, Bern, 2008), 27, 28; cf also Diezi (n 10 above), N 889.

[17] Cf Pamphlet on Child Maintenance (n 2 above), 540 f.

the law as it currently still applies, no account is taken of any financial shortfall affecting the parent who looks after the child.[18] Thus, as far as child maintenance is concerned, the children of married parents are treated differently from those of unmarried parents.

(b) Married couples living together

Marriage is an economic union.[19] If both spouses worked while they were married, divorce does not result in any marked deterioration in the standard of living of either spouse. However, if one of the spouses gave up their employment, partially or totally, during the marriage, the question arises as to how maintenance can be provided for after divorce. The primary responsibility of a divorced spouse is to provide for his or her own maintenance. Where this is not possible or cannot reasonably be expected, one spouse can require the other spouse to make an appropriate contribution (art 1, para 1, SCC). A divorced spouse's duty to provide for his or her own maintenance is suspended for as long as that spouse has a child to look after (art 125, para 2, point 6, SCC), in which case he or she is entitled to post-marital maintenance so as to be able to look after the child. The Federal Supreme Court's jurisprudence applies a so-called 10/16 rule. Under this rule, a divorced spouse caring for the children cannot reasonably be expected to work part time until the youngest child has completed his or her early childhood at the age of 10, and cannot be expected to work full time until the youngest child has reached the age of 16 and thus no longer requires ongoing parental supervision. However, if the divorced spouse looking after the children was already working during the marriage, the same level of gainful employment must be continued after divorce, irrespective of the 10/16 rule.[20]

(c) Unmarried couples living together

The situation is different for unmarried couples. Whereas a divorced parent is entitled to post-marital maintenance if he or she continues not to work, or works part time, so as to be able to look after the children, unmarried parents have no claims on each other in the event of their separation.[21] Because the parent bringing up the children is required to provide for his or her own maintenance, that parent will often not be able to look after the children after the couple have separated, particularly because of the need to pursue gainful employment.[22] After separation, the entitlement of the parent bringing up the children is limited to the direct child maintenance costs incurred by that parent.

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18 Cf Rumo-Jungo and Stutz 'Kinderkosten' in Schwenzer, Büchler (eds) *Fünfte Schweizer Familienrecht§Tage* (Stämpfli Verlag, Bern, 2010), 263, 268.

19 Cf Hausheer, Geiser and Aebi-Müller (n 15 above), N 10.78.

20 Cf SFCD 137 III 102, 109, E. 4.2.2.2.

21 Cf Rumo-Jungo and Stutz (n 18 above), 268.

22 Cf Rumo-Jungo and Hotz 'Der Vorentwurf zur Revision des Kindesunterhalts: ein erster Schritt' *Die Praxis des Familienrechts* (FamPra.ch) (Stämpfli Verlag, Bern, 2013), 1, 3 f.

IV AIMS AND CONTENT OF THE CHANGES TO CHILD MAINTENANCE LAW

(a) The reform's objectives

The reform of child maintenance law aims to improve the situation of the child and to place the paramount emphasis on his or her best interests.[23] Improving the situation of the children of unmarried parents is a particular objective of these changes to the law. Under the new law, childcare support is defined as part of child maintenance.[24] Every child should receive appropriate care, irrespective of the marital status of the parents.[25] This entitlement not only requires the child's needs to be met, but should also ensure that the child receives the best possible childcare, be it from one of the parents or a third party.[26]

The new law also stipulates that the maintenance entitlement of minor children has priority over any other maintenance entitlements.[27]

Finally, the revised law now also deals, for the first time, with the model of alternating parental custody (art 298, para 2ter, SCC-D). After divorce or separation, a continuous and close relationship between the child and the parent no longer living in the same household tends to be the exception rather than the rule. It is however generally accepted that it is very important for the child to maintain a constant relationship with both parents after they have divorced or separated. The term parental custody describes a factual state of affairs involving one parent sharing a home with the child. Alternating parental custody means that both parents care for the child more or less equally. Under the new law, if one of the parents, or the child, apply for an order of alternating parental custody, courts and authorities are required to give serious consideration to decreeing it.[28]

It should also be noted that the purpose of this revised legislation is not to ensure that both parents receive equal treatment in law after separation or divorce, but rather to make it possible for the child to maintain a good relationship with both parents and to be cared for by each of them as well and as often as possible, despite their having separated or divorced.[29] Neither the third-party care nor the care for by either parent should be prioritised. Decisions relating to childcare should remain with the parents.[30]

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23 Cf Pamphlet on Child Maintenance (n 2 above), 550.
24 Cf Schwenzer and Keller 'Gemeinsame elterliche Sorge – Der (steinige) Schweizer Weg' Hilbig-Lugani, Jakob, Mäsch, Reuss, Schmid (eds), *Zwischenbilanz: Festschrift für Dagmar Coester-Waltjen zum 70. Geburtstag* (Bielefeld, Gieseking Verlag, 2015), 235, 244.
25 Cf Pamphlet on Child Maintenance (n 2 above), 530.
26 Cf Pamphlet on Child Maintenance (n 2 above), 574.
27 Cf Pamphlet on Child Maintenance (n 2 above), 547.
28 Cf Schwenzer and Keller (n 24 above), 245.
29 Cf Pamphlet on Child Maintenance (n 2 above), 535; cf also art 9, para 3, UNCRC.
30 Cf Pamphlet on Child Maintenance (n 2 above), 552.

(b) Specific aspects of childcare support

(i) General remarks

Under Swiss law, one of the duties of all parents is to ensure that their children are properly looked after both in and outside the home. In art 276, para 2 and art 285, para 2, the revised Swiss Civil Code explicitly states that childcare is an integral part of child maintenance.[31] Childcare support is generally described as the maintenance which enables one parent to look after a separated or divorced couple's minor offspring.[32] However, under this definition, childcare support covers both childcare provided by the parent and childcare provided by a third party. Overall child maintenance will not replace monetary maintenance or maintenance in kind. Instead, it will complement them both.[33] This means that the overall concept of child maintenance will not only encompass the material needs of the child, such as food, clothing and a home, but also the time that a carer spends looking after the child to support his or her development.[34] Under this new definition, child maintenance is thus not limited to meeting the child's immediate needs, but is also intended to ensure that the child is looked after as well as possible, be it by a third party or the parents.[35]

Childcare maintenance thus compensates the parent looking after the child for the restrictions that this places on his or her ability to pursue gainful employment.[36] This means that the parent looking after the child is only entitled to receive childcare maintenance if he or she would have been able to pursue gainful employment during the time spent looking after the child.[37] If the child is of school age, it also means that childcare giving rise to childcare support entitlement is only necessary or possible during the school holidays.[38]

(ii) Amount

Many questions regarding the amount of childcare support have yet to be resolved. The new legislation does not contain any stipulations on the monetary value of childcare support or the criteria to be used in determining it. According to the Swiss Federal Council's pamphlet (in German, 'Botschaft') introducing

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31 Cf Pamphlet on Child Maintenance (n 2 above), 571; cf. also Rüetschi and Spycher 'Revisionbestrebungen im Unterhaltsrecht: aktueller Stand und Ausblick' in Schwenzer, Büchler und Fankhauser (eds) *Siebte Schweizer Familienrecht§Tage* (Stämpfli Verlag, Bern, 2014), 155, 157; cf also Spycher '"Betreuungsunterhalt" nach Schweizer Art – worum geht es? Zum aktuellen Revisionsprojekt im Unterhaltsrecht' *in dubio* 5_14 179, 180, 181.

32 Cf Schwenzer and Egli 'Betreuungsunterhalt – Gretchenfrage des Unterhaltsrechts' *Die Praxis des Familienrechts* (FamPra.ch) (Stämpfli Verlag, Bern, 2010), 18, 18; for a more detailed definition cf Diezi (footnote 10 above), N 889.

33 Cf Spycher 'Kindesunterhalt: Rechtliche Grundlagen und praktische Herausforderungen – heute und demnächst' *Die Praxis des Familienrechts* (FamPra.ch) (Stämpfli Verlag, Bern, 2014), 1, 30; cf also Spycher 'Betreuungsunterhalt' (n 31 above), 183; cf also Rüetschia and Spycher (n 31 above), 161.

34 Cf Pamphlet on Child Maintenance (n 2 above), 571f.

35 Cf Rüetschi/Spycher (n 31 above), 156.

36 Cf Spycher 'Betreuungsunterhalt' (n 31 above), 180 f.

37 Cf Rüetschi and Spycher (n 31 above), 160; Pamphlet on Child Maintenance (n 2 above), 554.

38 Cf Spycher 'Kindesunterhalt' (n 33 above), 22.

the new legislation, where the childcare duties of the parent looking after the child prevent him or her from earning enough to meet the living expenses of the household, childcare support should be equal to those expenses.[39] The pamphlet explicitly states that childcare support should not be determined on the basis of opportunity cost (ie what the parent looking after the child could have earned while caring for the child) nor on the basis of market cost (ie what the same childcare would have cost if provided by a third party).[40] However, if childcare support is calculated – as suggested in the pamphlet – on the basis of the living costs and earning power of the parent looking after the child, it is certainly conceivable that the child's principal parental carer may not be entitled to any childcare support from the other parent. This would apply in cases where the principal parental carer is able to earn enough by working relatively few hours to meet his or her living costs.

Thus, rather than being specified by law, the specific calculations in each case are left to the courts and authorities concerned.[41] The amount of childcare support payable by each parent will of course also depend on the nature and extent of the contact between the child and each parent. If both parents spend roughly equal amounts of time looking after the children, it will then be relatively rare for either parent to be entitled to receive childcare support from the other. Such arrangements are not common in Switzerland, however.

(iii) Duration

How long the duty to pay childcare support lasts is equally unresolved. The material describing the new legislation merely states that it will not stipulate a specific duration for childcare support, particularly since each case needs to be assessed individually, in order to ensure that every individual child can benefit from childcare for as long as his or her best interests require it.[42]

One possible approach would be to apply the child-support decrees handed down by the Swiss Federal Supreme Court in cases involving divorced parents and thus to extend the aforementioned 10/16 rule to unmarried parents.[43] It is, however, unlikely that this approach will be adopted. It seems more probable that a separated unmarried parent looking after the children will receive childcare support for a shorter time than a similarly placed divorced parent. The literature on this matter cites the provisions in force in Germany, under which childcare support is payable for 3 years.[44] This also corresponds to the approach taken by Swiss social security, which deems that a parent with childcare duties can reasonably be expected to resume or commence gainful employment once the youngest child has reached the age of 3.

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39 Cf Pamphlet on Child Maintenance (n 2 above), 554.
40 Cf Pamphlet on Child Maintenance (n 2 above), 552 ff.
41 Cf Pamphlet on Child Maintenance (n 2 above), 554.
42 Indications in Rumo-Jungo and Hotz (n 22 above), 18.
43 Cf Section III (b) of this article.
44 For further discussion cf. Rumo-Jungo (n 16 above), 31 f.

(iv) Childcare support and post-marital maintenance

Since childcare support is a direct right of the child, the question arises as how this correlates with post-marital support of a former partner.[45] The Federal Council pamphlet on the new childcare-support law explicitly states that the new childcare-support payments should not leave the parent caring for the children better or worse off financially than under the previous legislation.[46] It goes on to state that the sum of childcare support and post-marital maintenance should be equal in amount to the post-marital support payable under the previous legislation.[47] Thus, while the parent paying childcare support will now pay more for the child, the amount he or she will have to pay the former spouse will decrease by the same amount. This shift from post-marital maintenance to childcare support is relevant because, in the event of the former spouse remarrying, the post-marital maintenance obligation expires, whereas the childcare support obligation does not (cf art 130, para 2, SCC). Furthermore, while it is very difficult to obtain an increase in post-marital support (cf art 129, para 3, SCC), the same does not apply to childcare support.

V CONCLUDING REMARKS

The revised child-support legislation contains a number of important innovations. While the legislature has left several important questions unanswered, three clear principles have been established, namely that child support should include childcare costs, that it is payable irrespective of the marital status of the parents, and that it is accorded priority over any other maintenance entitlements. This brings legal parity between the children of unmarried couples and those of married couples considerably closer. It also means that single parents who are both entitled to exercise parental care over their child and were never married to the child's other parent will now have the opportunity of looking after their child themselves for a period of time. As far as childcare and employment are concerned, Switzerland still has much to do. In order for women to participate on equal terms with men in the employment market, it is essential that existing childcare structures be expanded.

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45 Cf Pamphlet on Child Maintenance (n 2 above), 555.
46 Cf Rüetschi and Spycher (n 31 above), 160.
47 Cf Rüetschi and Spycher (n 31 above), 160.

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UNITED STATES

MARITAL PROPERTY

Margaret F Brinig[*]

Résumé

Aux États-Unis, le droit patrimonial de la famille est de la compétence des États et on y retrouve donc une diversité d'approches. Celles-ci se divisent globalement en deux catégories: l'approche des régimes communautaires et l'approche qui permet un partage des biens en fonction de l'équité. Avec l'avènement du divorce sans faute, on a cependant assisté à une certaine convergence des approches. En effet, la plupart des États imposent désormais le partage des biens acquis pendant le mariage et la tendance est de plus en plus en faveur d'un partage qui serait à peu près égal. Le présent chapitre explore différentes questions relatives aux biens matrimoniaux, incluant les questions délicates du sort des diplômes universitaires, des régimes de retraite, des commissions et de la valeur économique des entreprises. Il inclut les résultats d'une recherche que l'auteure a menée à partir de dossiers judiciaires en Arizona (un État dont l'approche est communautariste) et en Indiana (dont l'approche est fondée sur l'équité).

I PROPERTY DIVISION IN HISTORICAL AND THEORETICAL CONTEXT: THE 'CLEAN BREAK' IDEAL AND CONVERGENCE OF TWO SYSTEMS

At a time when the idea of divorce was changing dramatically and probably permanently in the United States, property law was changing as well. At first no-fault was seen as merely forcing truth from a system that refused to acknowledge 'dead marriages'[1] and required collusion or outright lying to proclaim the obvious, within a decade influential academics and practitioners thinking through the Uniform Marriage and Divorce Act[2] saw the opportunity for re-envisioning divorce. Without fault and proof of that fault to justify the continuation of marital obligations, divorce could best be described as

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1 National Conference of Commissioners on Uniform State Laws 1970.

2 National Conference of Commissioners on Uniform State Laws 1970; AP Herbert, *Holy Deadlock* (London: Methuen, 1934); H Jacob, *Silent Revolution: The Transformation of Divorce Law in the United States* (Chicago: University of Chicago Press, 1988).

sundering the bonds of a partnership and liquidating its assets.[3] As the US no-fault reformers would have it, now that divorce procedures could be simpler and less costly both socially and financially, divorce could allow a 'clean break' between the spouses, allowing each to fully reclaim a single life.[4]

The concurrent movement in property was away from tangible assets. No longer was the predominant asset land outside of the marital home, since farming in the United States was no longer practised by more than a few.[5] The country had moved toward a technology-centred economy, where assets at the time of divorce might include pensions, or for the wealthiest couples, shares of stock or other ownership of businesses. The most valuable asset in most dissolving marriages, where young couples do not own much, however, was not land but human capital, that is, education and training.[6] The change in property holdings was felt earliest in the community property system (modelled on its European-derived civil law counterpart) which would at divorce divide a marital community under which each spouse owned a half-interest in all property acquired by earnings during the marriage. Parenthetically, as we shall see, a few community property states would do this division equally and the rest equitably.[7] Marital fault, now irrelevant in obtaining the divorce, should, arguably, not change the property to be divided, though equity might vary the amount each should receive. These community property states soon began developing division doctrines that would deeply influence the law in the other, non-community states.[8]

Early in the 20th century story, academics saw problems with extending the developing community property case-law to cases from so-called common law, or equitable distribution states, or to cases involving unmarried couples who had lived together long enough to accumulate what would otherwise have been divided as community property. The first conceptual issue was that, while the community property states recognised contributions of cash and kind or market

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3 Alicia Brokars Kelly, 'Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: Recognition of a Shared Life' (2004) 19 *Wisconsin Women's Law Journal* 141–209.

4 Herma Hill Kay, 'An Appraisal of California's no-Fault Divorce Law' (1987) 75 *California Law Review* 291–319.

5 John H Langbein, 'The Twentieth-Century Revolution in Family Wealth Transmission' (1988) 86 *Michigan Law Review* 722750, Mary Ann Glendon, *The New Family and the New Property* (Boston: Butterworths, 1981).

6 John H Langbein, 'The Twentieth-Century Revolution in Family Wealth Transmission' (1988) 86 *Michigan Law Review* 722–750, Marsha Garrison, 'Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes' (1991) 57(3) *Brooklyn Law Review* 621–754, and Alicia Brokars Kelly, 'Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: Recognition of a Shared Life' (2004) 19 *Wisconsin Women's Law Journal* 141–209.

7 Volumes have been written on the community property systems in the United States: Grace Blumberg, *Community Property in California* (6th edn, New York, Aspen, 2012); J Thomas Oldham, *Texas Marital Property Rights* (Carolina Academic Press, Durham North Carolina, 2010). It involves management of the community estate during the marriage as well as distribution at death or dissolution. Only the distribution at divorce is discussed here.

8 American Law Institute, *Principles of the Law of Family Dissolution* (Philadelphia, PA: American Law Institute, 2002).

and household work, other states did not. This was true of Canada as well, see, eg, *Murdoch v Murdoch*,[9] in which an Alberta farm wife got no share of the ranch in her husband's name after 25 years of marriage. Since husbands did more market work than their wives, who contributed more housework and childcare to the ongoing marriage, husbands tended to have most of the divisible assets in their names, or under their control, at the time of the divorce. As Joan Krauskopf recognised,[10] this meant that husbands at the time of the 'clean break' would receive the lion's share of the wealth, impoverishing their former wives and the children who for the most part lived with them. Running the household should be conceived as equally contributing to the acquisition of marital wealth. Krauskopf's economics-based reasoning was popularised by sociologist Lenore Weitzman's work on post-divorce standards of living.[11] Though her exaggeratedly gloomy numbers were disproved, the directions the spouses' lifestyles took were not: men fared better than women because they earned more during marriages and pensions, for example, were in their names.

Meanwhile, in California, the most populous community property state, the briefs in a famous case involving post-separation support for an unmarried couple also sought to value non-cash contributions to the household and career of a movie star cohabitant.[12] Though Michelle Marvin in *Marvin v Marvin*,[13] ultimately received no compensation, the holding in the case set the stage for recovery on the basis of home-work in California and the vast majority of other states. Arguably, if an unmarried partner could recover because of her support of the other's career, a wife was still more entitled.[14]

Finally, in states adopting no-fault divorce and marital property division systems relatively early on, the common law/equitable distribution states began, as a matter of fairness, to add 'housework' as a factor to weigh the quantity of property each should get to cash or earnings contributions. See, for example, *Gummow v Gummow*[15] (where equating market and housework was used to benefit a lower earning husband), Minn Stat § 518.58, listing factors including contribution as a homemaker. These rules remain in place today, though, as was noticed by the early 1990s, former wives might still be systematically disadvantaged because of their lower earnings in the labour market due to

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9 *Murdoch v Murdoch* [1975] SCR 423.

10 Joan M Krauskopf, 'A Theory for "Just" Division of Marital Property in Missouri' (1976) 41 *Missouri Law Review* 165–177.

11 Lenore Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (New York: Free Press 1985) and Lenore Weitzman, 'The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards' (1981) 28 *University of California Los Angeles Law Review* 1181–1268.

12 Carol S Bruch, 'Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services' (1976) 9 *Family Law Quarterly* 101–136.

13 *Marvin v Marvin* 557 P.2d 106 (Cal 1976).

14 Margaret Brinig, 'The Influence of Marvin V. Marvin on Housework during Marriage' (2001) 76(5) *Notre Dame Law Review* 1311–46.

15 *Gummow v Gummow* 356 N.W.2d 426, 429 (Minn App, 1984).

contributions on the household front and in the care of children.[16] As will be shown in Part III, human capital is not easily divided under a 'clean break' system.

Theoretical arguments for community can be seen in the paper by Frantz and Dagan, arguing that a community of acquests best fits goals of autonomy, equality and community that marriage fosters, and Alicia Kelly[17] (also arguing for a community of acquests as fitting a partnership theory as opposed to solitary individualism).

II CONVERGENCE OF THE SYSTEMS

The great wisdom of viewing marriage as a community – or a partnership[18] – with divorce as its endpoint or occasion for liquidation,[19] has meant that the two systems, community property and equitable distribution, have largely converged over time.[20] While some exceptions remain, particularly in cases dealing with future income,[21] both the case-law and empirical evidence demonstrate that for this set of issues, it no longer matters much where a divorce takes place (or where property is held). A quick summary would be that all property acquired by or through the earnings of either spouse during the marriage is presumed marital (or community, depending on the jurisdiction) property and divided, presumptively equally, upon divorce. Rules for including and excluding property are similar in countries as varied as South Africa, Poland and Korea.

A limited matrimonial community system seems to be in place in common law countries such as South Africa under the Matrimonial Property Act 88 of

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16 Alicia Brokars Kelly, 'The Marital Partnership Pretense and Career Assets: The Ascendancy of Self Over the Marital Community' (2001) 81(1) *Boston University Law Review* 59–125 and Martha Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (Chicago: University of Chicago Press, 1991).

17 Alicia Brokars Kelly, 'The Marital Partnership Pretense and Career Assets: The Ascendancy of Self Over the Marital Community' (2001) 81(1) *Boston University Law Review* 59–125.

18 Alicia Brokars Kelly, 'Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life' (2004) 19(2) *Wisconsin Women's Law Journal* 141–209 and Bea Smith, 'The Partnership Theory of Marriage: A Borrowed Solution Fails' (1990) 68 *Texas Law Review* 689–743.

19 Saul Levmore, 'Love it or Leave it: Property Rules, Liability Rules, and Exclusivity of Remedies in Partnership and Marriage' (1995) 58 *Law and Contemporary Problems* 221–249.

20 Judith Younger, 'Marital Regimes: A Story of Compromise and Demoralization, Together with Criticisms and Suggestions for Reform' (1981) 67 *Cornell Law Review* 45–102 and Alicia Brokars Kelly, 'The Marital Partnership Pretense and Career Assets: The Ascendancy of Self Over the Marital Community' (2001) 81(1) *Boston University Law Review* 59–125. It should be remembered throughout that, although I speak of convergence of systems, each US state has its own rules about property as well as about division, and no two are precisely alike.

21 As will be seen, these deal with whether or not degrees or other earning capacity earned during marriage can be seen as property, and whether personal goodwill is something that can be divided. There has also been litigation on questions involving the property status of unvested pension rights of various kinds.

1984.[22] Even England, which adheres most closely to a common law system as far as legislation is concerned, cases support equitable distribution, and, more recently, an equality presumption.[23] Ireland and Northern Ireland seem to adhere to a discretionary equitable distribution system, while sharing many of the ideals and aims of community property (advocating a community of acquests).[24] A few developing nations, such as the islands of Samoa and Tonga, still have no laws regarding division of marital property, which must therefore be decided under constructive trust theories.[25] The divisibility and equality rule also functions as a default rule in Poland.[26]

Similar rules seem to be part of non-European jurisdictions' laws as well. For example, Article 839–2 of the Korean Civil Code provides a kind of equitable division, prescribing that a divorcing party can file an order for division of all the properties acquired by either party during their marriage. All the marital assets, ie properties acquired during the marriage, except those properties donated or bequeathed, by either party and marital debts, ie debts incurred to acquire or maintain marital assets or support the couple's household are considered in assessing the value of marital property to be divided.[27] A rule of acquests is also followed in Kazakhstan according to Marina Dalpane.[28] Kazakhstan follows the rule that premarital property remains separate, but property purchased through earnings during the marriage (acquests) becomes

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[22] Jacqueline Heaton, 'The Proprietary Consequences of Divorce' in *The Law of Divorce and Dissolution of Life Partnerships in South Africa*, edited by Jacqueline Heaton (Claremont, Zambia, Juta, 2014) 98–107.

[23] *White v White* [2001] AC 596, [2000] 2 FLR 981, [2000] 3 WLR 1571 (HL 2000) (presumption of equality unless reason to depart from it), *Miller v Miller and Mcfarlane v Mcfarlane* [2006] UKHL 24, [2006] 2 AC 618, Mary Welstead, 'Judicial Reform Or an Increase in Discretion – the Decision in *Miller v Miller; McFarlane v McFarlane*' in Bill Atkin (ed), *The International Survey of Family Law* (Jordan Publishing, Bristol, 2008) 61–74; and Masha Antokolskaia, 'Harmonisation of Substantive Family Law in Europe: Myths and Reality' (2010) 22(4) *Child and Family Quarterly* 397–421.

[24] Milton C Regan, 'Spouses and Strangers: Divorce Obligations and Property Rhetoric' (1994) 82(5) *Georgetown Law Journal* 2303–2408.

[25] Jennifer Corrin Care' For Better Or Worse: Marriage and Divorce Laws in the Kingdom of Tonga' in B Atkin (ed), *The International Survey of Family Law* (Jordan Publishing, Bristol, 2007) 291–306 and Jennifer Corrin, 'Getting a Fair Share: Financial Relief on Breakdown of Marriage in Samoa' in Bill Atkin (ed), *International Survey of Family Law* (Jordan Publishing, Bristol, 2008) 295–313.

[26] Anna Stepien-Sporek, Pawel Stoppa, and Margaret Ryznar, 'The Rules on the Administration of Community Property in Poland' in Bill Atkin (ed), *The International Survey of Family Law* (Jordan Publishing, Bristol, 2012) 271–279 (follows a limited community principle since the 1965 Family and Guardianship Code, Act of 2 February, 1964, J.L. No. 9, Item 59); and despite the possibility of agreements for separately held property. Anna Stepien-Sporek and Margaret Ryznar, 'Separation of Assets with Equalisation of Accrued Gains (Accruals): A Marital Property Regime for the Modern Family?' in Bill Atkin (ed), *International Survey of Family Law* (Jordan Publishing, Bristol, 2014) 419–429. Such agreements would require legal actions by a possibly inexperienced spouse. Stepien-Sporek and Ryznar at 428.

[27] Whasook Lee, 'Transformation of Korean Family Law' in Bill Atkin (ed), *International Survey of Family Law* (Jordan Publishing, Bristol, 2008) 237–251.

[28] Mariya Baideldinova Dalpane, 'Matrimonial Property and its Contractual Regulation in Kazakhstan' in Bill Atkin (ed), *The International Survey of Family Law* (Jordan Publishing, Bristol, 2011) 247–257.

community property; as does Slovenia (with a presumption of a 50–50 division at divorce).[29] Even, to some extent, since Muslim Family Codes were passed in the late 1980s, in Indonesia,[30] there have been some marital property awards by Shari'a courts of from one-third to one-half of the property acquired during the marriage.

In New Zealand, marital property is divided equally absent some showing of special circumstances,[31] while separate property may be shared if the non-owner makes a substantial contribution to it. Student loans are often treated as separate debts of the student spouse, as in Cal Fam Code §§ 2627 and 2641. A form of deferred community can also be found in Ontario, Canada, which adopted it in the Family Law Act of 1 March 1986. A similar law has been adopted in Prince Edward Island and the North West Territories. Deferred community has been characteristic of Saskatchewan since 1979, Manitoba since 1977 and Alberta since 1980, according to Rogerson. In other provinces, however, the presumption of equal division of marital assets does not apply to business assets or non-family assets.[32] Since 1 July 1970, Quebec has followed a partnership of acquests according to its Civil Code.[33]

As noted, the community property system in the United States stemmed originally from the civil law practised by the earliest European settlers from Spain. This plans out on the continent today as seen in the French Civil Code art 214, which equalises joint property ownership at divorce even though one spouse has made larger financial contributions than the other. In Spain, the appropriate sections of the Civil Code are §§ 1346 and 1347 dealing with separate and community property (called the conjugal partnership). Generally the provisions follow acquest rules, except that the growth in separate property that takes place during the marriage becomes community property (called the conjugal partnership). Under § 1349 the control over a pension belonging to one spouse will be separate, but the fruits, pensions or interest accrued during the marriage are marital. At the time of divorce, the marital property will be presumptively divided equally under § 1441.

The community property states include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. The history of community property can be found, among many other sources, in the brief article by Walter Loewy.[34] Wisconsin adopted a community-like property system under the

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[29] Viktorija ŽnidaršičSkubic, 'The Reform of Slovenian Family Law: Property Relations between Spouses' in Bill Atkin (ed), *The International Survey of Family Law* (Jordan Publishing, Bristol, 2008) 367–378.

[30] Noor Aziah Modh Awal, 'Family Laws in Malaysia: Past, Present and the Future' in Bill Atkin (ed), *International Survey of Family Law* (Jordan Publishing, Bristol, 2007) 181–205.

[31] Bill Atkin, 'Reflections on New Zealand's Property Reforms "Five Years on"' in Bill Atkin (ed), *The International Survey of Family Law* (Jordan Publishing, Bristol, 2007) 217–243.

[32] Carol Rogerson, 'The Life and Times of the F.L.A' Toronto, Ontario, CA, 1 March 2011.

[33] For a description see hwww.educaloi.qc.ca/en/capsules/matrimonial-regimes-partnership-acquests.

[34] Walter Loewy, 'The Spanish Community of Acquests and Gains and its Adoption and Modification by the State of California' (1912) 1(1) *California Law Review* 32–45.

Uniform Marriage and Divorce Act and at divorce divides property equally. Under the Napoleonic Code, marriage established a community that would persist until death (in which case the spouse would receive half the community share, with the rest passing through the decedent's estate) or, as it was recognised, divorce, in which case each spouse would receive either an equal or an equitable share.[35] While husbands for many years were presumed to head the community during the extant marriage, these greater property rights accorded to women were kept after statehood because they attracted pioneer settlers from older, common law, Eastern states.

In the Eastern states originally settled by English colonists, the so-called common law states, married women could not even hold property separate from their husbands or make contracts until the latter half of the nineteenth century.[36] At divorce if they were faultless and remained single, they might receive alimony, or an allowance from the marital estate still held by their (now ex-) husbands.[37] In a no-fault era, especially when women sought gender equality in employment, jury service and elsewhere, alimony made little theoretic sense.[38] And, as Martha Fineman sagely put it,[39] because of their greater household responsibilities, divorce awards presented an 'illusion of equality'. Feminists insisted that housework be included in what became known as equitable distribution legislation, and as time went on argued that case-law developed in the community property jurisdictions be adopted.[40] In any event, alimony was rarely awarded historically[41] and is even less common today. My research in Arizona and Indiana reveals that less than 15% of the couples in Arizona and 4% of those in Indiana involved even short-term spousal support.

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35 American Law Institute, *Principles of the Law of Family Dissolution* (Philadelphia, PA: American Law Institute, 2002).

36 Milton C Regan, 'Spouses and Strangers: Divorce Obligations and Property Rhetoric' (1994) 82(5) *Georgetown Law Journal* 2303–2408.

37 American Law Institute, *Principles of the Law of Family Dissolution* (Philadelphia, PA: American Law Institute, 2002).

38 Margaret F Brinig and June Carbone, 'The Reliance Interest in Marriage and Divorce' (1988) 62 *Tulane Law Review* 855–905.

39 Martha Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (Chicago: University of Chicago Press, 1991).

40 Martha Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (Chicago: University of Chicago Press, 1991); Herma Hill Kay, 'An Appraisal of California's no-Fault Divorce Law' (1987) 75 *California Law Review* 291–319, Joan M Krauskopf, 'A Theory for "Just" Division of Marital Property in Missouri' (1976) 41 *Missouri Law Review* 165–77, *Hinton v Hinton*, 321 S.E.2d 161, 163 (N.C. App. 1984); Sally Burnett Sharp, 'The Partnership Ideal: The Development of Equitable Distribution in North Carolina' (1987) 65 *North Carolina Law Review* 195–255, Margaret Brinig, 'The Influence of *Marvin v Marvin* on Housework during Marriage' (2001) 76(5) *Notre Dame Law Review* 1311–46; Carol S Bruch, 'Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services' (1976) 9 *Family Law Quarterly* 101–36, and *Gummow v Gummow* 356 N.W.2d 426 (Minn App 1984).

41 Elizabeth S Scott and Robert E Scott, 'Marriage as Relational Contract' (1998) 84(7) *Virginia Law Review* 1225–1334 and Marsha Garrison, 'Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes' (1991) 57(3) *Brooklyn Law Review* 621–754.

A study by the author comparing nearly 1,000 divorce court records from two counties in Arizona, a community property state, and Indiana, an equitable distribution state, all beginning in 3 months of 2008 and all involving children reveals that spousal support indeed remains rare.[42] It appeared in 3.6% of the completed cases in Indiana and 14.7% of those from Arizona. This is in the range of what Marsha Garrison found in New York in the 1990s (15%)[43] or Brinig found in Iowa in 2002 (5%), and Wishik in Vermont in 1982–83 (7%).[44] On the other hand, the Brinig study showed that the marital home was a factor in about half the cases in each state (52.7% in Indiana and 47% in Arizona). Pensions, the 'new property' noted by John Langbein,[45] were addressed in approximately 40% of the cases in each state. A business was owned in 6.2% of the Indiana cases and 9.7% of those from Arizona. Other major assets including additional real estate and stock were owned in 8.8% of the Indiana cases and 13.8% of those in Arizona.

While the folk wisdom, and some early scholarship, suggested that wives were more likely to receive the marital home since they would primarily have custody of children,[46] they were almost equally likely to receive the home in Arizona, and fathers were nearly twice as likely to remain in the home in Indiana. In about two-thirds of the cases in both states, the homes were sold and proceeds equally divided. In those where one spouse or the other remained in the home, the other typically received compensation for half either by exchanging property (such as rights to a pension) or in cash. For another example, see *Gamble v Gamble*,[47] where the wife was awarded the house while the husband received his entire pension, though distribution would not occur for some years.

Both states presume that assets be shared equally, and with very few exceptions they were.[48] While one spouse might end up with the business, the other would then get the marital home, cash, or significant other property. The proposals drafted by counsel or the discovery filed in the few cases actually decided by judges showed valuations and equalisation of the two spouses' shares.

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42 Margaret F Brinig, 'Result Inequality in Family Law' (2016) 46 *Akron Law Review* (forthcoming).

43 Marsha Garrison, 'How do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making' (1996) 74 *North Carolina Law Review* 401–552.

44 Heather Ruth Wishik, 'Economics of Divorce: An Exploratory Study' (1984) 20(1) *Family Law Quarterly* 79–103.

45 John H Langbein, 'The Twentieth-Century Revolution in Family Wealth Transmission' (1988) 86 *Michigan Law Review* 722–750.

46 Heather Ruth Wishik, 'Economics of Divorce: An Exploratory Study' (1984) 20(1) *Family Law Quarterly* 79–103 and Lenore Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America*. (New York: Free Press, 1985).

47 *Gamble v Gamble* 421 S.E.2d 635 (Va Cir. Ct. 1992).

48 There were a very few cases in which lawyers failed to claim rights to pensions, even large pensions, earned during marriage by one of the spouses. There was also a handful of cases in which judges noted dissipation of the assets by one spouse and awarded a larger share to the other. Finally, there were some cases involving substantial assets that were located outside the court's jurisdiction (in Mexico, for example, in the Arizona cases), or where one of the spouses could not be found giving the court no personal jurisdiction.

A sharing of assets implies that debt should be shared as well. Marital debts, excluding home mortgages, of over $20,000 were involved in 5.5% of the Indiana cases and 13.5% of those in Arizona. These were also shared evenly except for student loans (included in 6.5% of the Indiana cases and 12.8% of the Arizona cases), which remained obligations of the student spouse. Student loans are often treated as a separate debt of the student spouse, as in Cal Fam Code 2627 and 2641. In a few cases, about 4% in each state, bankruptcy proceedings stayed the divorce. Sometimes the bankruptcy was sought by only one of the spouses; sometimes both sought this legal relief.

III QUESTIONS TO ANSWER REGARDING MARITAL PROPERTY

Robert Levy, the Reporter for the Uniform Marriage and Divorce Act, set down four questions that should be asked in marital property cases.[49] These questions, with variations on them, have endured for more than a quarter of a century. Again, be cognisant that the answers will depend upon individual state. The questions, which will be considered in turn, are:

(1) Is an item property?
(2) Is it marital or separate property?
(3) How much is it worth?
(4) What is the basis/standard for division/distribution?

(a) Is an item property?

Some things are obviously property. Among these are land, or real property, and most often, today, the marital home. Other obvious items include furniture and appliances, the family car(s), jewellery and clothing, artwork, silver and china. It is easy to conceive of dividing bank accounts, cash, and only slightly less obviously securities such as stocks and bonds, since these are relatively liquid assets. While division may be painful, and has sparked litigation, including among the cases studied by Brinig, pets are also considered property to be divided, as are treasured professional or college sports season tickets.

Things that are less obviously property involve deferred income or what economists call human capital.[50] Funds that were earned during the marriage but are to be paid out later are typically viewed as marital (or community) property. This type of property typically includes pensions,[51] and retirement

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[49] Robert J Levy, 'An Introduction to Divorce-Property Issues' (1989) 23(1) *Family Law Quarterly* 147–161.

[50] Gary S Becker, *Human Capital: A Theoretical and Empirical Analysis, with Specific Reference to Education* (2nd edn, New York: National Bureau of Economic Research, Columbia University Press, 1985).

[51] Not, however, some government pensions specifically made personal to the wage-earner.

accounts, and less obviously year-end or quarterly bonuses and earned but unpaid commissions. Patent royalties? The stickiest issues through the years, however, have involved earnings tied to future activity or personal to one spouse, such as goodwill of a professional practice, and, generating hundreds of cases and vast commentary, professional degrees, licences, and other 'enhanced earning capacity'.

(i) Professional degrees

The frequently cited case of *Marriage v Graham*[52] notes why these cases are particularly problematic:

> 'An educational degree, such as an M.B.A., is simply not encompassed even by the broad views of the concept of "property." It does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term'.

In other words, enhanced earning capacity requires future input by the degree holder to become valuable. Treated as property and given a precise value by the court can restrict the degree holder to a particular career path that may not be as rewarding or suitable. This kind of risk (or the speculative nature of the valuation) may be appropriate in a tort action, where future income is often quite speculative, because there the tortfeasor has committed a wrong and should rightly bear it. But with no fault divorce, there is no wrong to vindicate. For an example of a spouse whose degree resulted in a failed academic career, and therefore would not have produced the expected value.[53]

The speculative nature of future earnings makes it similar to personal goodwill and to future earnings such as bonuses. Enhanced earning capacity shares features with royalties, which may be dependent upon the promotional efforts made by the author as well as the publisher. Many of the cases restricting the non-earning spouse's property interests come from community property states,[54] where property division at divorce was more likely than in the common law states where it originally tended to be restricted to items titled in both spouses' names. They also tended to be dealt with more restrictively for the simple fact that, to the extent they did belong to the marital community,

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Hisquierdo v Hisquierdo 439 US 572 (1979) (Railroad Retirement pension could not be divided). Social Security is also personal to the wage earner and cannot be divided, though it receives special treatment under the Act for divorced spouses after 10 years of marriage.

52 *Marriage v Graham* 574 P.2d 75, 77 (Colo. 1978).

53 See *Srinivasan v Srinivasan* 396 S.E.2e 675 (Va. App. 1990) (where the other property was divided approximately evenly).

54 See, for example, *Todd v Todd* 76 Cal. Rptr. 131 (Cal. App. 1969), involving a law degree.

they would have to be divided equally, or at least presumptively equally. Goodwill, and, particularly, interests in professional degrees could not easily be thought of simply as akin to deferred employee compensation, which fit the earned during marriage criteria fairly closely.

The degree-as-property cases thus violate both the 'clean break' principle because they are based on future, not past, acquisition of property, and the principles underlying no-fault. No-fault's clean break model prefers property division over alimony and sees divorces, especially in childless marriages, as allowing spouses to move on with their separate lives.[55] The *Graham* case itself mentions one way in which the wage-earning (non-student) spouse may be compensated – as a factor entitling him or her to a greater share of the other property acquired during the marriage. (As we have seen, this may be an ethereal promise indeed in short marriages.) This seems to be the approach taken in New Zealand (there called the concept of 'halving') as well as some states.[56]

Further, the final or capstone degree 'is a cumulative product of many years of previous education'. That is, the spouse in graduate or professional school has probably been an extremely successful and hard-working student throughout what is by now a long academic career. The portion earned during the marriage, while ultimately greatly enhancing future earnings, may be 2 (for an MBA) to 7 years (for a medical doctorate plus internship and residence) of an 18 to 23-plus year education.

Finally, while the lawyers and judges who handle these cases have all suffered through law school, how different are the sacrifices made by students from those made by executive or military spouses or any others enduring less than pleasant present circumstances to work up career ladders?[57]

The exception to the rule that professional degrees are not property is found in several cases from New York, including *O'Brien v O'Brien* and *McSparron v McSparron*, as well as in language from *Woodworth v Woodworth*.[58] Both hold that they are property since the degree,[59]

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[55] Milton C Regan, 'Spouses and Strangers: Divorce Obligations and Property Rhetoric' (1994) 82(5) *Georgetown Law Journal* 2303–2408 and Alicia Brokars Kelly, 'The Marital Partnership Pretense and Career Assets: The Ascendancy of Self Over the Marital Community' (2001) 81(1) *Boston University Law Review* 59–125.

[56] John Caldwell, 'New Zealand: Developments in Dispute Resolution and Achieving Fairness in Property Division' in Bill Atkin (ed), *International Survey of Family Law* (Jordan Publishing, Bristol, 2009) 363–367.

[57] Margaret F Brinig, 'Property Distribution Physics: The Talisman of Time and Middle Class Law' (1997) 31 *Family Law Quarterly* 93–118.

[58] *O'Brien v O'Brien*, 489 N.E.2d 712 (N.Y. 1985); *McSparron v McSparron*, 87 N.E.2d 758 (NY 1995); and *Woodworth v Woodworth*, 337 N.W.2d 332 (Mich. Ct. App. 1983). *Woodworth* was followed by *Postema v Postema*, 471 N.W.2d 912 (Mich. Ct. App. 1991), which found that although the earning an advanced (law) degree was to be taken into account if a 'concerted family effort', the only compensation should be in terms of the losses — unrewarded sacrifices, efforts and contributions toward attainment of degree — not gains to the other's lifetime earnings as in New York, and as alimony, not property. The court held,

> 'was the end product of a concerted family effort. Both parties planned their family life around the effort to attain plaintiff's degree … We believe that fairness dictates that the spouse who did not earn an advanced degree be compensated whenever the advanced degree is the product of such concerted family investment. The degree holder has expended great effort to obtain the degree not only for him—or herself, but also to benefit the family as a whole. The other spouse has shared in this effort and contributed in other ways as well, not merely as a gift to the student spouse nor merely to share individually in the benefits but to help the marital unit as a whole.'

On the other hand, the alternative to the spouse's support during the professional education is taking out a bank or family loan (which may partially finance such ventures in the degree cases). The bank would expect to be repaid with interest, not receive a share of the future earnings.[60]

The loan to the graduate student could also cover living expenses, which, at least in theory, are the duty of both spouses while the marriage continues. Reimbursing for the entire investment arguably is appropriate for the wage-earning spouse may have deferred his or her own further education, and may have made many other sacrifices on the home front (doing additional housework, giving up vacations and entertainment, and so forth) and in terms of relocation,[61] or staying in a less-fulfilling job while the other pursues the degree. To simply reimburse the outlay for tuition and books without interest and without recognising the other sacrifices may shortchange the non-student spouse. In the majority of states that do not recognise advanced degrees as marital property, the sacrifices may warrant consideration in alimony awards.[62]

'concerted family effort is also exemplified by the fact that both spouses typically share in the emotional and psychological burdens of the educational experience. For the nonstudent spouse, these burdens may be experienced either directly, such as through the presence of increased tension within the household, or indirectly, such as where the spouse shares vicariously in the stress of the educational experience' (at 916).

59 *Woodworth v Woodworth*, 337 N.W.2d 332, 334 (Mich. Ct. App. 1983). For general discussions claiming that contributions to earning capacity are like other assets producing future streams of returns, see Allen M Parkman, 'Human Capital as Property in Celebrity Divorces' (1995) 29 *Family Law Quarterly* 141–69. Margaret F Brinig, 'Property Distribution Physics: The Talisman of Time and Middle Class Law' (1997) 31 *Family Law Quarterly* 93–118 and Alicia Brokars Kelly, 'The Marital Partnership Pretense and Career Assets: The Ascendancy of Self Over the Marital Community' (2001) 81(1) *Boston University Law Review* 59–125.

60 Margaret F Brinig, 'Property Distribution Physics: The Talisman of Time and Middle Class Law' (1997) 31 *Family Law Quarterly* 93–118 and Daniel D Polsby and Martin Zelder, 'Risk-Adjusted Valuation of Professional Degrees in Divorce' (1994) 23 *Journal of Legal Studies* 273–285.

61 See *Lightburn v Lightburn* 1998 WL 169499 (Va. Ct. App.).

62 For example, see *In re Marriage of Olar* 747 P.2d 676, 678 (Colo. 1987) (decided in the same court as *Graham*), *Mahoney v Mahoney* 653 A.2d 527 (N.J 1982) (reimbursement alimony); see also Cal. Fam. Code § 2641(b)(1) (reimbursement to community); *Haughan v Haughan* 343 N.W.2d796, 800–03 (Wis. 1984) (reimbursement for opportunity costs as well as social contributions, 'insofar as this is possible'); Ind. Code Ann. § 31-15-7-6 (monetary award if little or no marital property to be based solely on tuition, books and lab fees incurred for the post-secondary education of the other); Ariz. Rev. Stat. § 25–319(A)(6) (treated as a reason for maintenance). Some states also award money under restitutionary theories. For example, see

Contributions to advanced degrees can be used as a factor in division in more than half the states.[63]

(ii) Pensions

Pensions are a bit different, since the major thing under the control of the wage earner is his or her length of employment. Though it will be paid out in the future, the success of the pension fund, and its effect on the contributions to it made during the marriage, depends upon the employer, market conditions, and not the wage earner. The only speculative question involves unvested pensions, and at least, for these, the amount contributed by the employee is similar enough to salary to be reimbursed as marital property. The actual payout may be deferred until a later time. As the Maryland Court of Appeals noted in differentiating pensions from professional degrees, while pension rights constitute a current asset that the individual has a contractual right to receive, the future enhanced income resulting from a professional degree is a 'mere expectancy'.[64] One question is whether to pay out the spousal share at the time of divorce (reducing it to present value of the contributions and accumulated earnings for a defined contribution plan), as in *Dewan v Dewan*[65] or deferring it until the employee spouse reaches retirement, as in *Marriage of Hobbs*.[66] Pensions may be bifurcated under the federal Employee Retirement Income Security ACT (ERISA), 29 USC §§ 1001 et seq. The Act defines a Qualified Domestic Relations Order (QDRO) as a state court judgment meeting certain formal requirements and allowing an alternate payee (the non-employee spouse) the right to receive all or a portion of the benefits payable to a participant under a covered pension plan: 29 USC § 1056(d)(3). ERISA does not cover public employee pensions, though some states have enacted analogous provisions that do. See also ALI § 4.08(g).[67]

DelaRosa v DelaRosa 309 N.W.2d 755 (Minn. 1981) (restitution of contributions made for financial support). For a claim that these treatments are unfairly limited, given the marital partnership idea, see Alicia Brokars Kelly, 'The Marital Partnership Pretense and Career Assets: The Ascendancy of Self Over the Marital Community' (2001) 81(1) *Boston University Law Review* 59–125.

63 Linda D Elrod and Robert G Spector, 'Review of the Year in Family Law 2006–2007: Federalization and Nationalization Continue, A' (2008–2009) 42 *Family Law Quarterly* 713–756; see, eg, Va. Code Ann. § 20–107.1(E)(9) through (12).

64 *Archer v Archer* 493 A.2d 1074, 1079 (Md. 1985) citing *Deering v Deering*, 292 Md. 115, 437 A.2d 883 (1981). Pensions and their treatment as marital or community property are discussed at some length in the American Law Institute's Principles of Family Dissolution § 4.08 and Reporter's Notes at 723–24, 726–28 and Comments a and d (American Law Institute, *Principles of the Law of Family Dissolution*. Philadelphia, PA: American Law Institute, 2002), Grace Ganz Blumberg, 'Marital Property Treatment of Pensions, Disability Pay, Workers' Compensation, and Other Wage Substitutes: An Insurance, Or Replacement, Analysis' (1985–1986) 33 *UCLA Law Review* 1250–1308.

65 *Dewan v Dewan* 506 N.E.2d 879 (Mass. 1987).

66 *Marriage of Hobbs* 442 N.E.2d 629 (Ill. Ap 1982).

67 American Law Institute, *Principles of the Law of Family Dissolution* (Philadelphia, PA: American Law Institute, 2002).

In a relatively early case, *Deering v Deering*,[68] a husband's civil service pension had contributions of $12,500 during the parties' marriage. The court found it divisible, citing cases from many states,[69] and discussing various payout alternatives.

Typically pensions will be treated as community property as well.[70] After 10 years of marriage, and upon satisfying the necessary age requirements, an ex-spouse in the US is entitled to federal Social Security benefits. The benefits are not otherwise subject to division in a divorce proceeding because of US Code, title 42, § 407(a), which protects Social Security benefits from any kind of attachment or garnishment through legal process except alimony or child support. Welsh and Hargrave argue that despite the wording of the Act (which specifically excludes property distribution), state courts have found ways to consider differences in social security benefits, mostly by using the discrepancy as a factor in determining shares of other assets.[71]

If pensions are unvested at the time of dissolution, typically benefits will be deferred until actually received.[72] They may also be discounted to reflect their risk.[73] According to Professor Blumberg, no solution perfectly reflects fairness in every situation,[74] though most states treat them as marital property.[75] They are typically paid out as actual pension is distributed[76] to avoid their speculative nature. In a recent case, an ex-husband was properly ordered to pay directly to the ex-wife the stipulated percentage of his firefighter disability benefits after he received them, pursuant to the terms of divorce that required him to pay her a percentage of his retirement benefits that included these, even though generally the Illinois statute requiring QDROs would not cover

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68 *Deering v Deering*, 292 Md. 115, 437 A.2d 883 (1981).

69 Ibid at 888–90.

70 *Marriage of Brown*, 15 Cal.3d 838, 544 P.2d 561 (Cal. 1976); Grace Ganz Blumberg, 'Marital Property Treatment of Pensions, Disability Pay, Workers' Compensation, and Other Wage Substitutes: An Insurance, Or Replacement, Analysis' (1985–1986) 33 *UCLA Law Review* 1250–1308; Ontario Regulation 287/11, Family Law Matters, following the Family Law Statute Amendment Act 2009, So. 2009, c. 11 (Bill 133). Deferred compensation can include stock options, *Dietz v Dietz*, 436 S.E.2d 463 (Va. App. 1993). This is also true in Australia (Frank Bates, 'Finances and Facilitations – Australian Family Law in 2005' in Bill Atkin (ed), *International Survey of Family Law* (Jordan Publishing, Bristol, 2007) 23–51 (where they are called superannuation) and in New Zealand (Bill Atkin, 'Reflections on New Zealand's Property Reforms 'Five Years on'' in Bill Atkin (ed), *The International Survey of Family Law* (Jordan Publishing, Bristol, 2007) 217–243.

71 Stanley W Welsh and Franki J Hargrave, 'Social Security Benefits at Divorce: Avoiding Federal Preemption to Allow Equitable Division of Property in Divorce' (2006–2007) 20 *Journal of the American Academy of Matrimonial Law* 285–298.

72 See, eg, *Laing v Laing*, 741 P.2d 641 (Alaska 1987).

73 *Lowry v Lowry*, 544 A.2d 972, 973 (Pa. Super 1988).

74 Grace Ganz Blumberg, 'Marital Property Treatment of Pensions, Disability Pay, Workers' Compensation, and Other Wage Substitutes: An Insurance, Or Replacement, Analysis' (1985–1986) 33 *UCLA Law Review* 1250–1308.

75 See, eg, *Burns v Burns*, 618 N.Y.S.2dd 761 (N.Y. 1994).

76 Alicia Brokars Kelly, 'The Marital Partnership Pretense and Career Assets: The Ascendancy of Self Over the Marital Community' (2001) 81(1) *Boston University Law Review* 59–125.

disability benefits.[77] Va Code § 20–107.3 allows distribution only of whatever benefits are payable, and can be through direct assignment to a party from the employer trustee, plan administrator or other holder of the benefits.[78]

A few cases, but potentially more with the economy changing toward self-employment and small businesses,[79] involve minority interests in small corporations. If these shares are not, by their original charters, available for sale on the open market nor required to be repurchased by the other owner or owners, the divorce court may not treat them as distributable marital property. *Watkins v Watkins*[80] provides an example involving an extremely wealthy family whose patriarch owned many businesses and employed the son at a relatively low wage, but with new cars, insurance, utilities and meats all provided free of charge. Of course this begs the question of transfers to others solely to avoid distribution. For example, in *Stainback v Stainback*,[81] the husband's father began a corporation to help the husband toward a career in art. He hired the husband, who served as president and director, and the artworks produced by the husband were the property of the firm, as were all proceeds from the sale of the artwork. Because the husband and the firm were alter egos, since the paintings came into being because of his labours, the fruits of that labour were marital property. A group of New Zealand cases uses a similar rationale for family trusts.[82] Because the settlor does not own the property, it cannot be distributed, though the non-owner may receive a compensating financial set-off.

(iii) Commissions

Commissions are typically treated as community or marital property. For example, *Niroo v Niroo*[83] considered and treated as divisible renewal commissions on insurance policies. *Marriage of Wade*[84] divided an insurance agent's termination payments based on the percentage of renewal commissions earned during the marriage. Contingent fees would operate similarly if the legal work justifying them was completed during the marriage, unless assigning a value at the time of dissolution would be 'tenuous and risky'.[85]

(iv) Goodwill

Goodwill is defined as the expectation of continued pubic patronage, according to Cal Bus & Prof Code § 14100. It depends upon fair market value of firm. It

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77 *In re Marriage of Benson*, 33 N.E.3d 268 (Ill. App. 2015).
78 *Garrett v Garrett*, 683 P2d 1166 (Ariz .App. 1984) (contingent fees, like unvested pensions).
79 N Joel Kotkin, 'The Rise of the 1099 Economy: More Americans are Becoming Their Own Bosses', *Forbes*, 25 July 2012.
80 *Watkins v Watkins*, 265 S.E.2d 750 (Va. 1980).
81 *Stainback v Stainback*, 396 S.E.2d 686 (Va. App. 1990).
82 Eg *Prime v Hardie* [2003] NZFLR 481 and *Glass v Hughey* [2003] NZFLR 865.
83 *Niroo v Niroo* 545 A.2d 35 (Md. App. 1988).
84 *Marriage of Wade*, 923 S.W.2d 735 (Tex. App. 1996).
85 *Beasley v Beasley*, 518 A.2d 545, 554 (Pa. Super. 1986).

is held to be property in *Hanson v Hanson*.[86] But how much can be recovered depends upon evidence that other professionals are willing to pay for goodwill when acquiring a practice. This can be done through recent actual sale of a similarly situated professional practice, expert testimony, or an offer to purchase.[87] The American Law Institute, in § 4.07 (3)(a), classifies goodwill as marital property to the extent that it has value apart from the value of spousal earning capacity, skills, or post-dissolution labour. Examples are *Marriage of Talty*,[88] and *Dugan v Dugan*.[89] However, other cases find that professional goodwill is indistinguishable from earning capacity and therefore is separate property.[90] Many cases allow for the possibility of professional goodwill but require substantial evidence of its value.[91]

(b) Is it marital or separate property?

A summary of the general concepts of separate and marital property can be found in s 4.03 of the American Law Institute's Principles of the Law of Family Dissolution. As Comment (a) to this section notes, the alternative to these general rules applies the same rationale to all property, regardless of how or by whom acquired. This is discussed under the heading 'hotchpot' system. For most states, though, states follow a rule allowing division of property acquired by either spouse's labour during the marriage, or system of acquests.[92] For example, the Wisconsin property division statute, modelled on the Uniform Marriage and Divorce Act,[93] allows all property acquired during the course of the marriage to be equitably divided unless it was a gift from a non-spouse, came through a deferred employment benefit plan, an individual retirement account, or insurance proceeds, by a trust distribution, by bequest or inheritance or by a payable on death or a transfer on death; or came from funds

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86 *Hanson v Hanson*, 735 S.W.2d 429 (Mo. 1987) (law firm).

87 See, eg, *Sorenson v Sorenson*, 839 P.2d 774, 776 (Utah 1992) ('Unless the professional retires and his practice is sold, his reputation should not be treated differently from a professional or advanced degree: both simply enhance the earning ability of the holder').

88 *Marriage of Talty*, 652 N.E.2d 330, 333 (Ill. 1995) (car dealership had 'enterprise goodwill').

89 *Dugan v Dugan*, 457 A.2d 1, 9 (N.J. 1983) (law practice had marital property goodwill to the extent that the attorney's earnings exceeded 'that which would have been earned as an employee by a person with similar qualifications of education, experience and capability … in the same general locale'). See also Alicia Brokars Kelly, 'The Marital Partnership Pretense and Career Assets: The Ascendancy of Self Over the Marital Community' (2001) 81(1) *Boston University Law Review* 59–125.

90 *Marriage of Zells*, 572 N.E.2d 944, 945–56 (Ill. 1991) (goodwill is merely 'income potential'); *Nail v Nail*, 486 S.W.2d 761 *Tex 1972) (involving a single practitioner).

91 For examples, see *Hanson v Hanson*, 738 S.W.2d 429 (Mo. 1987) (dental practice) and *Eslami v Eslami*, 591 A.2d 411, 418 (Conn. 1991) (valuation of radiology practice allowed because the income flow could in fact be transferred to a willing buyer). For examples of professional goodwill's treatment in community property states, consider *Nail v Nail*, 486 S.W.2d 761 (Tex. 1972) (goodwill of a sole practitioner not divisible), but see *In re Marriage of Foster* 117 Cal. Rptr. 49 (Cal. App. 1974) and *Todd v Todd*, 78 Cal. Rptr. 131 (Cal. App. 1969), both dividing established professional goodwill.

92 Walter Loewy, 'The Spanish Community of Acquests and Gains and its Adoption and Modification by the State of California' (1912) 1(1) *California Law Review* 32–45.

93 *Wis. Stat. § 767.61,* 2005 Act 443, § 232, *Wisconsin Statutes*. Section 767.61(a)(2).

acquired in one of these ways. That is, property acquired during the marriage through the efforts of either spouse (onerously acquired, or an acquest in the civil law terminology) belongs to the marriage. Property that was acquired before the marriage or after it was clearly over, is individual property.[94]

Appreciations of separate property, if passive, that is, not due to the activities of either spouse, remain separate.[95] This is called a 'nearly universal rule' for the United States in Comment 1 to the American Law Institute's Principles of the Law of Family Dissolution § 4.04 at page 663. Most community property systems also classify the income from separate property as separate, as do most common law-equitable distribution states, but some community property states follow a 'Spanish rule' under which the income is deemed community.[96] However, any increase in value cannot be through the personal efforts of either spouse and remain separate.[97]

Placing separately acquired assets in a joint bank account before using them to purchase another asset results in the transmutation of the new property into marital property;[98] as does placing the new asset in joint names. See Cal Fam Code § 2581 (presumptive unless varied by a written agreement or a clear statement in the deed that the property is separate). This follows the general rule that purchases made with funds during the marriage are presumptively marital/community property, a presumption that can be rebutted pro rata by showing that separate funds formed a consideration for the new property.[99] This set of transmutation rules seemingly holds true in Italy as well, but not in Poland or France. Compare the pieces of Pintens with that of Stepien-Sporek, Stoppa and Ryznar.[100]

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[94] Some jurisdictions, notably including Washington, allow all property whenever or however acquired to be considered part of the marital community, but allocate the individually owned property to the owner, making up the difference in value in cash. This is called a 'potlatch' system. See Mary Ann Glendon, 'Family Law Reform in the 1980s' (1984) 44 *Louisiana Law Review* 1553–73 and Robert J Levy, 'An Introduction to Divorce-Property Issues' (1989) 23(1) *Family Law Quarterly* 147–161.

[95] *Merriken v Merriken*, 590 S.2d 566 (Md. Spec. App. 1991); *Baker v Baker*, 753 N.W.2d 644 (Minn. 2008); Ohio Rev. Code Ann. § 3105.171(A)(6)(a); *In re Marriage of Komnic*, 417 NE.2d 1305 (Ill. 1981); *Painter v Painter*, 320 A.2d 484 (N.J. 1974); and *Dillingham v Dillingham*, 434 S.W. 459 (Tex. Civ. App. 1968).

[96] Comment 1 to the American Law Institute's Principles of the Law of Family Dissolution § 4.04 at page 663.

[97] Ibid and Reporter's Notes, Comment at 665–667; see, eg, Va. Code § 20–107.3(3)(a). Examples include *Merriken v Merriken*, 590 A.2d 566, 575 (Md. Spec. App. 1991) and *Knowles v Knowles*, 588 A.2d 315, 317 (Me. 1991). The issue is discussed by J. Thomas Oldham, 'Separate Property Businesses that Increase in Value during Marriage' (1990) *Wisconsin Law Review* 585–632.

[98] *Taylor v Taylor*, 387 S.E.2d 797 (Va. App. 1990).

[99] *Moritz v Moritz*, 844 S.W.2d 109 (Mo. App. 1992).

[100] Walter Pintens, 'Europeanisation of Family Law' in *Perspectives for the Unification and Harmonisation of Family Law in Europe*, edited by Katharina Boele-Woelki (New York: Oxford, 2003) 10; Anna Stepien-Sporek, Pawel Stoppa and Margaret Ryznar, 'The Rules on the Administration of Community Property in Poland' in Bill Atkin (ed), *The International Survey of Family Law* (Jordan Publishing, Bristol, 2012) 271–279. A complicated set of cases involving both transmutation and tracing of assets in Australia is discussed by Frank Bates,

Improvements made to a separately held property, such as a new heating and air-conditioning system, would not transform it into marital property, so that only the amount by which the value of the home was enhanced would be marital.[101] This would be the rule in Brazil as well under Civil Code, art 1.659. In Germany, lacking a family law statute on the topic, substantial contributions would be recognised under § 313 of German Civil Code under the theory of frustration of contract under the expectation that the relationship would last. A similar result would be obtained under Greek law, where a 'claim to participate in the increments of the assets of the other spouse', would mean that each spouse, after the dissolution or annulment of the marriage, is entitled to claim from the other spouse part of the assets accumulated during marriage, provided of course that the claimant is able to prove that this increase of assets is also due to his or her own contribution (Art 1400, 1 and 2 CC). This contribution is generally presumed to be one-third of the increase.

Similarly, the premarital purchase of the marital home, or furniture for it, is generally treated as marital property. This may also be true of assets acquired during premarital cohabitation.[102]

(i) Royalties

In *Morgenstern v Morgenstern*,[103] the court considered royalties on the novel *The Night Circus*. Since the book was written during the marriage, royalty rights were vested and therefore divisible. A medical device invented during the marriage but not yet marketable was marital property even though its economic value was as yet unknown.[104] Valuing royalties and like property frequently requires the hiring of an expert.[105] A prize for the personal achievement of one of the spouses would be separate property in Poland.[106]

(ii) Gifts

For gifts of stock, see *Stainback v Stainback*,[107] and 23 Pa Cons Stat Ann § 3501 (a)(3)(2000) (gifts between spouses are marital property; other gifts are the separate property of the done); NJ Stat Ann § 2A:34–23 (2000). This rule is

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'Finances and Facilitations – Australian Family Law in 2005' in Bill Atkin (ed), *International Survey of Family Law* (Jordan Publishing, Bristol, 2007) 23–51.

101 *Ellington v Ellington*, 378 S.E.2d 626 (Va. App. 1989).

102 *Marriage of Dubnicay*, 830 P.2d 608 (Or. App. 1992); and *Chestnut v Chestnut*, 499 N.E.2d 783 (Ind. App. 1986).

103 *Morgenstern v Morgenstern*, 2015 BL 251121, Mass. App. Ct., No. 14P341, 8/6/15. See also *Heinze v Heinze*, 631 N.E.2d 728 (Ill. App. 1994) (also dividing future book royalties).

104 *Hazard v Hazard*, 833 S.E.2d 911 (Tenn. App. 1992).

105 See *Donley v Donley*, 403 N.E.2d 1337 (Ill. App. 1980).

106 Anna Stepien-Sporek, Pawel Stoppa and Margaret Ryznar, 'The Rules on the Administration of Community Property in Poland' in Bill Atkin (ed), *The International Survey of Family Law* (Bristol, UK: Jordan Publishing Ltd, 2012) at 294.

107 *Stainback v Stainback*, 396 S.E.2d 686 (Va. App. 1990). See also 23 Pa. Cons. Stat. Ann. § 3501 (a)(3)(2000) (gifts between spouses are marital property; other gifts are the separate property of the done); N.J. Stat. Ann. § 2A:34–23 (2000).

followed in Kazakhstan as well.[108] While gifts to both spouses in their individual names may seem like separate property, they may also be titled in that way to take maximum advantage of the gift-tax exclusion,[109] though the donor's intent may also have been to give to a single spouse.[110] For another example, see, eg, *Theismann v Theismann*,[111] where the wife was awarded nearly a million dollars of the marital property worth over $2.5 million, even though the marriage was of short duration and the husband brought the vast majority of financial contributions to the marriage. The husband had retitled the property from his own name to joint names. The rule that gifts to both spouses or gifts where a single spouse is not clearly indicated become community property is followed in Kazakhstan as well.[112]

(iii) Hotchpot states[113]

The court may 'equitably apportion between the parties the property and assets belonging to either or both however and whenever acquired, and whether the title thereto is in the name of the husband or wife or both'. The rules are also summarised in Comment (a) to the American Law Institute's Principles of the Law of Family Dissolution § 4.03, which stresses how much latitude in equity the rule gives the trial judge and how the hotchpot and separate property states are in fact converging.[114] A community system that also includes property owned prior to the marriage prevails in the Netherlands absent a notarial contract to the contract or limiting particular assets.[115] A popular device criticised because of inherent accounting problems limits community ownership during the marriage but provides for a 'netting' so that each receives 50% upon dissolution.[116] Antokolskaia argues that legislation harmonising Dutch and the

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[108] Mariya Baideldinova Dalpane, 'Matrimonial Property and its Contractual Regulation in Kazakhstan' in Bill Atkin (ed), *The International Survey of Family Law* (Bristol, UK: Jordan Publishers Ltd, 2011) 247–257.

[109] *Davila v Davila*, 908 P.2d 1027 (Alaska 1995).

[110] *Marriage of Martens*, 406 N.W.2d 819 (Iowa App. 1987) (family farm property).

[111] *Theismann v Theismann*, 471 S.E.2d 809 (Va. App. 1996).

[112] Mariya Baideldinova Dalpane, 'Matrimonial Property and its Contractual Regulation in Kazakhstan' in Bill Atkin (ed), *The International Survey of Family Law* (Jordan Publishing, Bristol, 2011) 247–257.

[113] Oldham J Thomas, *Divorce, Separation and the Distribution of Property* (Law Journal Press, 1987) and American Law Institute, *Principles of the Law of Family Dissolution* (Philadelphia, PA: American Law Institute, 2002) list Connecticut, Hawaii, Indiana, Kansas, Massachusetts, Michigan, Mississippi, Montana, New Hampshire, North Dakota, South Dakota, Vermont, Washington and Wyoming. See, eg, Mont. Code Ann § 40-4-202 (a) (2005).

[114] American Law Institute, *Principles of the Law of Family Dissolution* (Philadelphia, PA: American Law Institute, 2002) 656–657, and Oldham J Thomas, 'Tracing, Commingling and Transmutation' (1985) 23(2) *Family Law Quarterly* 219–252.

[115] Gregor Van der Burght, 'The Netherlands: Overview of Matrimonial Developments' in Bill Atkin (ed), *The International Survey of Family Law* (Jordan Publishing, Bristol, 2007) 207–215 and Shoshana Grossbard-Shechtman, Olivia Eckert-Jaffe and Berrand LeMennicier, 'Property Division at Divorce and Demographic Behavior: An Economic Analysis and International Comparison', conference paper, Atlanta, Georgia.

[116] Gregor Van der Burght, 'The Netherlands: Overview of Matrimonial Developments' in Bill Atkin (ed), *The International Survey of Family Law* (Jordan Publishing, Bristol, 2007) 207–215.

more common systems has received increasingly favourable reception and was recommended by a study committee.[117]

(iv) Workers' compensation and personal jury awards

To the extent that it is intended to replace future wages, an award is separate.[118] To the extent that it replaces lost wages or medical costs expended during the marriage, the award will be considered marital property at least in part.[119]

(v) Lottery ticket proceeds

In the case of a winning lottery ticket, no effort by either spouse has been expended at all. In community property states, if the ticket was purchased from community property, such as current earnings, as it almost always is, then the winnings are also community property.[120] In the common law equitable distribution states, the property is commonly divided equally, because it is a 'fortuitous circumstance' for which the spouses' 'contributions' hold little significance.[121] Alternatively, states might favour an approach applying all the usual 'equitable factors'.[122]

(vi) Transmutation

Changing property from separate to marital or community is considered at length by Thomas Oldham.[123] For example, in *Cousins v Cousins*, an inherited business became marital property when used to form a new Virginia corporation in which he worked during the marriage, and for which the wife

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[117] Masha Antokolskaia, 'Harmonisation of Substantive Family Law in Europe: Myths and Reality' (2010) 22(4) *Child and Family Quarterly* 397–421.

[118] *Ramsey v Ramsey*, 682 So.2d 797 (La. App. 1996), *Hatcher v Hatcher*, 933 P.2d 1222 (Ariz. 1996); *Christmas v Christmas*, 787 P.2d 1267 (Okla. 1990); *Landwehr v Landwehr*, 545 A.2d 738 (N.J. 1988); *Marriage of Pugh*, 906 P.2d 829 (Or App. 1990) (even though no distinction in state between separate and marital property, court distributes a greater share to tort plaintiff). See also *Zeh v Zeh*, 618 N.E.2d 1376 (Mass. App. 1993), *Bywater v Bywater*, 340 N.E.2d 102 (Mich. App. 1983) (held that pain and suffering compensation was divisible), but *Van de Loo v Van de Loo*, 346 N.W.2d 173 (Minn, 1984) (not divisible as marital property); *Amato v Amato*, 434 A.2d 639 (N.J. Super. 1981) (not divisible; like replacement of separate property).

[119] Tex Family Code Ann § 3.0001(3)(2005); *Thomas v Thomas*, 408 S.E.2d 596 (Va. App. 1991); *Brown v Brown*, 675 P.2d 1207 (Wash. 1984); *In re Marriage of Smith*, 405 N.E2d 884 (Ill. App. 1980).

[120] See, eg, *Marriage of Rossi*, 90 Cal. App. 4th 34, 108 Cal. Rptr. 2d 270 (2001); and *Lynch v Lynch*, 791 P.2d 653 (Ariz. App. 1990).

[121] See, eg, *Thomas v Thomas*, 579 S.E.2d 310 (S.C. 2003); *Ullah v Ullah*, 555 N.Y.S.2d 834 (App. Div. 1990).

[122] Examples of this approach include *Alston v Alston*, 331 Md. 496, 629 A.2d 70 (1993) and *DeVane v DeVane*, 280 N.J.Super. 488, 655 A.2d 970 (App.Div.1995).

[123] Oldham J Thomas, 'Tracing, Commingling and Transmutation' (1985) 23(2) *Family Law Quarterly* 219–252.

worked for some time as well.[124] If the purchase money comes from marital and separate funds, it may be proportionally allocated as separate and marital.[125] In community property states, the spouse may have an equitable lien on the separate property of the other.[126] Some states have by statute specified that the commingling of funds does not itself cause a transmutation of the separate property into marital property.[127]

(vii) Property acquired during separation

Property acquired during separation is generally marital property,[128] and some states rely on the dissolution decree as fixing the end of the marriage.[129] Some states take the separation into account in allocating the marital property.[130] Finally, some states leave the 'end point' as a matter for judicial discretion.[131]

(c) How much is it worth (valuation)?

One interesting case involving valuation of a medical degree is that of *Marriage of Francis*.[132] The expert testified to the difference between a college graduate and doctor's income over the expected length of practice. He then reduced this amount to present value. He used the assumption that 70% of most firm's income is due to labour (or future efforts of the doctor), leaving 30% to the capital investment made during his education. This amount accordingly was split based on the relative contributions of the spouses.

(d) What is the basis/standard for division/distribution?

As we have seen, marital and community estates may be divided either on an equitable or an equal basis. Three community property states divide the estate

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[124] *Cousins v Cousins*, 5 360 S.E.2d 882 (Va. App). See also *Goldstein v Goldstein*, 310 So. 2d 361 (Fla. App. 1975).

[125] *Schweizer v Schweizer*, 484 A.2d 267 (Md. 1984).

[126] *Jensen v Jensen*, 665 S.W.2d 107 (Tex. 1984).

[127] *Marriage of Nagel*, 478 N.E.2d 1192 (Ill. App 1985); *Stephens v Stephens*, 842 S.W.2d 909 (Mo. App. 1992); and Ohio Rev. Code Ann. § 3105.171.

[128] *Brandenburg v Brandenburg*, 416 A.2d 327 (N.J. 1980).

[129] *Lynch v Lynch*, 791 P.2d 653 (Ariz. App. 1990); *Alston v Alston*, 629 A.2d 70 (Md. 1993); *Giha v Giha*, 609 A.2d 945 (R.I. 1992) (all involving lottery proceeds).

[130] *Applebaum v Applebaum*, 535 N.Y.S/2d 717 (App. Div. 1988); and *Temple v Temple*, 519 So. 2d 1054 (Fla. App. 1988).

[131] *Marriage of Van der Nuell*, 28 Cal. Rptr. 2d 447 (App. 1994). This matter is generally discussed in the ALI Principles, § 4.03 659–62 and Comments e and f; and in Carol S Bruch, 'The Legal Import of Informal Separations: A Survey of California Law and a Call for Change' (1977) 65 *California Law Review* 1015–1085. For a case involving significant medical expenses incurred after separation by a wife diagnosed with cancer, see *Fuehrer v Fuehrer*, 51 N.E.2d 1171 (Ind. App. 1995).

[132] *Marriage of Francis*, 442 N.W.2d 59 (Iowa 1989) (see report of Professor Richard A Stephenson, June 2, 1988, mentioned in the case).

equally.[133] A number of the equitable distribution-common law states begin with a presumption of equal division, as in *Brown v Brown*, even presuming equal contribution by a homemaking spouse.[134]

(i) Role of fault

Lay persons surveyed in Arizona seemed to think an approximately equal division was fair.[135] Dissipation of property is taken into account under (3) of the American Law Institute's Principles § 4.10, however, as discussed presently. While arguments for a comparative fault system going beyond a dissipation of marital funds were made by Barbara Woodhouse, a survey of Arizona residents by Braver and Ellman indicated that most were reluctant to consider even admittedly unjustified adultery.[136] Fault was not considered in *Hinton*, where the husband pointed a loaded shotgun at the wife's head and frequently struck her.[137]

(ii) List of factors

Both the economic circumstances of the parties and the contributions of each party to the acquisition of the division are automatically achieved by an equal division of earnings.[138]

(iii) Short marriages

Length of the marriage was considered important both in the survey of Arizona jurors.[139] Brinig's recent survey indicates that, together with income, the length

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[133] Cal Fam. Code § 2550; La. Rev. Stat. Ann. ∞ 9.9:2801(4)(b) and New Mexico. See *Ruggles v Ruggles*, 868 P.2d 182. 188 (1993).

[134] Sanford L Braver and Ira Mark Ellman, 'Citizens' Views About Fault in Property Division' (2013) 47 *Family Law Quarterly* 419, 420; *Brown v Brown*, 914 P.2d 206 (Alaska 1996); and Fla. Stat. Ann. § 61.075 (equal division without court's written findings otherwise). See, eg, *Ferguson v Ferguson*, 357 N.W.2d 104 (Minn. App. 1984), Christopher Cornwell and Peter Rupert, 'Unobservable Individual Effects, Marriage and the Earnings of Young Men' (1997) 35 *Economic Inquiry* 285–294 and Allen M Parkman, 'Bring Consistency to the Financial Arrangements at Divorce' (1998) 87(1) *Kentucky Law Journal* 51–93.

[135] Ira M Ellman, Paul M Kurtz, Lois A Weithorn, Brian H Bix, Karen Czapanskiy and Maxine Eichner, *Family Law: Cases, Text, Problems* (5th edn, New Providence, NJ: LexisNexis, 2014); *Israel v Allen*, (Arizona Rev. Stat., 25–318(c)–25–318(c)); Ira Mark Ellman and Sharon Lohr, 'Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce' (1997) *Illinois Law Review* 719–71; American Law Institute Principles of the Law of Family Dissolution § 4.10 (excluded completely in 32 states and nearly so in an additional three).

[136] Barbara Bennett Woodhouse and Katharine T Bartlett, 'Sex, Lies, and Dissipation: The Discourse of Fault in a no-Fault Era' (1993–94) 82(5) *Georgetown Law Journal* 2525–2569 and Sanford L Braver and Ira Mark Ellman, 'Citizens' Views about Fault in Property Division' (2013) 47 *Family Law Quarterly* 419–436.

[137] *Hinton v Hinton*, 321 S.E.2d 161, 163 (N.C. App. 1984). See also *Chalmers v Chalmers*, 320 A.2d 478, 482 (N.J. 1974).

[138] Mary Ann Glendon, 'Family Law Reform in the 1980s' (1984) 44 *Louisiana Law Review* 1553–73.

[139] Sanford L Braver and Ira Mark Ellman, 'Citizens' Views about Fault in Property Division' (2013) 47 *Family Law Quarterly* 419–436.

of the marriage predicts about 20% of the likelihood of home ownership and 31% of the likelihood that a pension would be involved at the time of divorce.[140]

(iv) Dissipation of assets

Dissipation of assets is the one type of fault considered a factor by the American Law Institute Principles of the Law of Family Dissolution § 4.09 (2)(b); 410(3).[141] Similarly, sometimes spouses attempt to take property out of the marital estate by transferring it to third parties. Given this intent, such transfers will not be successful (though bona fide third party recipients may need compensation).[142] Property distribution debts arising from divorce, unlike child support and spousal support, are dischargeable in bankruptcy.[143]

As mentioned earlier, courts may compensate for disparities in property ownership, in what might be characterised as a marriage with 'lumpy' assets or disparate incomes that make even division difficult, by awarding cash to make up the difference. This power is available in New Zealand as well under s 15 of the Property (Relationships) Act 1976, though it has been criticised as leaving too much uncertainty and allowing too much discretion by trial courts.[144]

At divorce in the United States, spouses typically receive their separate property and marital or community property is divided. See, eg, Ariz Rev Stat Ann § 25–318(A) (community property); NJ Rev Stat § 2A:34–34 (equitable distribution). However, after very lengthy marriages, some share even of separate property may be distributed to the other spouse in the so-called 'hotchpot' states.[145]

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[140] Margaret F Brinig, 'Result Inequality in Family Law' (2016) 46 Akron Law Review (forthcoming), reports survey methodology.

[141] For examples see *Robinette v Robinette*, 736 S.W.2d 351 (Ky. App. 1987); *Marriage of Westcott*, 516 N.E.2d 566, 570 (Ill. 1987) (gambling trip to Las Vegas when marriage was already in serious jeopardy though many other expenditures were for household items or entertainment for both spouses); *Zeigler v Zeigler*, 530 A.2d 445 (Pa. Super. 1987) (husband used marital funds to make down payment on home titled in girlfriend's name). Not usually for bad investment-caused losses: *Marriage of Drummond*, 509 N.R.3f 707; and *Hauge v Hauge*, 427 N.W.2d 154 (Wis. App. 1998). However, in New York, truly egregious fault may have an impact on property distribution. See *O'Brien v O'Brien*, 498 N.Y.S.2d 743, 750 (N.Y. 1985).

[142] For examples, see *Meuhlanthaler v DeBartolo*, 347 N.W.2d 688 (Iowa. 1984); *Abraham v Abraham*, 279 N.W.2d 85 (Nev.1979); and *Buchanan v Buchanan*, 585 S.E.2d 533 (Va. 2003).

[143] *In re Lecak*, 38 B.R. 164 (S.D. Ohio 1984).

[144] John Caldwell, 'New Zealand: Developments in Dispute Resolution and Achieving Fairness in Property Division' in Bill Atkin (ed), *International Survey of Family Law* (Jordan Publishing, Bristol, 2009) 363–367.

[145] See, eg, *Zeh v Zeh*, 618 N.E.2d 1376 (Mass. App. 1993); *Marriage of Taylor*, 856 P.2d 325 (Or. App. 1993); *Gaulrapp v Gaulrapp*, 510 N.W.2d 620, 621(N.D. 1994). The Swedish Marriage Code, Chapter 12, § 1, also follows this rule. Cynthia Starnes, 'Divorce and the Displaced Homemaker: A Discourse on Playing with Paper Dolls, Partnership Buyouts and Dissociation Under No-Fault' (1993) 60 *University of Chicago Law Review* 67–139.

(v) Transfer of title

In the United States, courts may actually transfer title from one spouse to another, or from joint to sole ownership, except in Maryland.[146]

If property is located in a community property state and divorce is in an equitable distribution state, or vice-versa, generally the law at the time of acquisition will be applied.[147] Since this will occasionally be daunting with couples' frequent moves, the law of the forum state will occasionally be applied especially if it allows distribution of all property wherever and however acquired (as we have termed it, a hotchpot state). Kingma discusses the Maine case of *Zeolla v Zeolla*,[148] though that involved Massachusetts property (equitable distribution rules as well). Another method community property states have used is to enact 'quasi community' property statutes, dividing property that would have been characterised as community property if the married couple had been domiciled in a community property state.

(vi) Non-modifiable

An order for property division is a final order and not modifiable.[149] It will therefore be given full faith and credit by other states under US Const art IV, § 2.[150] See, for example, 750 Ill Comp Stat Ann § 5/510: 'The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this State.'

IV PREMARITAL AGREEMENTS

In the United States, premarital agreements affecting divorce settlements were originally much disfavoured by the law since they might encourage or facilitate divorce. Since the advent of no-fault divorce in the early 1970s, courts have looked much more favourably upon them, and about half the states have enacted the Uniform Premarital Agreement Act, or its successor, the Uniform Marital and Premarital Agreements Act, which allow contracts to vary most aspects of property distribution on divorce.[151] There are rules in some states

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[146] See *Ward v Ward*, 426 A.2d 443 (Md. App.), appeal after remand, 449 A.2d 443 (1982). Maryland equitably divides real property through a cash award. In other states, in many cases, since there may be no other property to compensate, the reality is that a marital home will be sold and the net proceeds divided.

[147] Kenneth W Kingma, 'Property Division at Divorce Or Death for Married Couples Migrating between Common Law and Community Property States' (2009–10) 35(1) *ACTEC Journal* 74–96.

[148] *Zeolla v Zeolla*, 908 A2d 629 (Maine 2006).

[149] *Boschee v Boschee*, 340 N.W2d 685 (N.D. 1983).

[150] *Varone v Varone*, 359 F2d 769 (7th Cir. 1966).

[151] National Conference of Commissioners on Uniform State Laws 1983.

requiring counsel, forbidding agreements that are unconscionable (completely one-sided) at the time of enactment, and most states require premarital agreements to be in writing.

While some states were rather paternalistic toward women even until the 1980s,[152] some using language of fiduciary relationships, most modern cases and statutes look upon both potential partners as bargaining equals.[153] Some place the burden of proof upon the person attacking the agreement, even though there was no advice of independent counsel.[154] Some, however, have placed rules forbidding the waiver of spousal support,[155] especially when one spouse will otherwise go on public assistance;[156] and no state allows custody or child support to be decided before the marriage when children usually have not even been born and because courts must apply 'best interests' rules for custody and guidelines for support.[157]

While many options exist in France to agree prior to marriage to vary the community of acquests, a study shows that less than 20% of cases had actually chosen an alternative (16% prior to marriage).[158] The number is still lower in the United States. Claims that this is because people anticipating marriage have an over-optimistic bias about the chances of their own marriage ending unhappily or because they fear that asking for such a contract will signal distrust of the other partner.[159] In my study of Arizona and Indiana divorce records, I found only one case of the more than 1,000 containing a premarital agreement (in Indiana).[160] When I have repeated the surveys from Mahar's

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[152] See, eg, *Button v Button*, 388 N.W.2d 546 (Wis. 1986) (heightened scrutiny).

[153] See, eg, *Marriage of Bonds*, 5 P.3d 815 (Cal. 2000) (typical contract attacks of lack of capacity, duress, fraud and undue influence available but no presumption of a confidential relationship); Amy L Wax, 'Bargaining in the Shadow of the Market: Is there a Future for Egalitarian Marriage?' (1997) 84 *Virginia Law Review* 509–642; and *Simeone v Simeone*, 581 A.2d 162 (Pa. 1990).

[154] *Gant v Gant*, 329 S.E.2d 106 (W. VA. 1985).

[155] Iowa Code § 596.5(2); *Sanford v Sanford*, 694 N.W.2d 283 (N.D.2005).

[156] See *Warren v Warren*, 523 NE.2d 680 (Ill. Ct. App. 1988).

[157] See, eg, 750 Ill. Comp. Stat. 10/4 4(8)(b) 'The right of a child to support may not be adversely affected by a premarital agreement.' Jonathan Fields, 'Forbidden Provisions in Prenuptial Agreements: Practical Considerations for the Matrimonial Lawyer' (2005) 21 *Journal of the American Academy of Matrimonial Lawyers* 413. For examples, see *Edwardson v Edwardson*, 798 S.W.2d 941, 946 (Ky. 1980); *Huck v Huck*, 734 P.2d 417, 419 (Utah. 1986) (child support). Marital contracting is discussed in Brian Bix, 'Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and how We Think about Marriage' (1998) 40(1) *William and Mary Bill Law Review* 145–206 and is considered in Chapter 7 of the American Law Institute's Principles of Family Dissolution.

[158] Anne Barlow, Elizabeth Cooke and Therese Callus, *Community of Property: A Regime for England and Wales?* (Policy Press, Bristol, 2006) and Alice Barthez and Anne Laferrère, 'Contrats De Mariage Et Régimes Matrimoniaux' (1996) 296(1) *Economie Et Statistiques: Le Patrimoine Des Français: Comportements Et Disparités* 127–144.

[159] Heather Mahar, 'Why are there so Few Prenuptial Agreements?' and Lynn A Baker, and Robert E Emery, 'When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage' (1993) 17 *Law and Human Behavior* 439–50.

[160] Margaret F Brinig, 'Result Inequality in Family Law' (2016) 46 *Akron Law Review* (forthcoming article).

study on my family law classes, I have found few law students who indicate that they would ask for a premarital agreement (though more who say they would sign one proposed to them).

Under the South African Matrimonial Property Act 88 of 1984, spouses must enter into an antenuptial (or pre-nuptial) contract in order to marry with complete separation of property. In this contract, they must also expressly exclude the accrual system (a type of deferred community of gains), for otherwise the accrual system automatically applies to their marriage.

In contrast to the seldom used premarital agreement, the vast majority (perhaps 90%) of cases involving children and/or property involving more than personal effects are settled before trial.[161] Many of these involve what is commonly called a separation agreement or property settlement agreement. Where there are children, the separation agreement will resolve custody and child support issues as well; without them, it typically deals with property and spousal support. Courts favour these agreements and generally uphold them absent major contractual defects (or inadequate provision for children).[162] For these, the law discussed in this chapter establishes what Mnookin and Kornhauser call an endowment, or starting point.[163] A number of empirical studies have shown, despite Mnookin and Kornhauser's concerns, that few if any cases demonstrate a trading of custodial time for property.[164] This lack of trading may be because couples are aware of the strong tendency of courts to divide property equally, even when custody standards, based upon 'best interests of the child' are less determinate.

V PROCESS: DIVORCE BY CONSENT

When children are not involved, the vast majority of divorces (59% in Maricopa County, Arizona) are handled by default judgments where the petitioner claimed either that there was no property or that it had already been distributed, and the other spouse, when served, did not object. This is particularly true when little property was involved, as it so often is. For example, in the early 1980s, a survey of divorcing couples in Wisconsin had a

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[161] Eleanor Maccoby and Robert J Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* (Cambridge, MA: Harvard University Press, 1993); Marygold S Melli and Patricia R Brown, 'Exploring a New Family Form – The Shared Time Family' (2008) 231 *International Journal of Law, Policy and the Family* 269; and Margaret F Brinig, 'Result Inequality in Family Law' (2016) 46 *Akron Law Review* (forthcoming article).

[162] American Law Institute, *Principles of the Law of Family Dissolution* (Philadelphia, PA: American Law Institute, 2002).

[163] Robert H Mnookin and Lewis A Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950–998.

[164] Margaret Brinig and Michael V Alexeev, 'Trading at Divorce: Preferences, Legal Rules and Transaction Costs' (1993) 8 *Ohio State Journal on Dispute Resolution* 279–97, and Yoram Weiss and Robert Willis, 'Transfers among Divorced Couples: Evidence and Interpretation' (1993) 11 *Journal of Labor Economics* 629–79.

median marital estate of $7,800.[165] About 10% were actually the subject of trial court decisions in both childless couples and those with children. In the case where children were involved, however, about 60% were handled through consent divorces involving property settlements and custody (typically joint custody) plans. In Indiana, the number of consent decrees in divorces with children was 72% (179/248), and in Arizona, 44.6%. Still, more were handled by default (16.9% in Indiana and 38.9% in Arizona) than by trials (108% in Indiana and 16.4% in Arizona). Consent decrees were more likely in cases involving marital homes or pensions in both states, or where marital debt was involved. They were also more likely where a mediator was involved in both states. The likelihood of a contested divorce was not affected by debt or the presence of any of the major assets in Indiana, though a home made a trial more likely in Arizona.[166]

Possessing major assets did not affect the length of the divorce process (the time between a spouse's filing and the decree), holding constant spousal incomes and the length of the marriage. What does lengthen the process, in Indiana at any rate, was the presence of an attorney (a change of about 8 to nearly 13 months). On the other hand, for couples who were unrepresented (pro se), there was a 3.5 greater likelihood of a default decree.

In Indiana, non-custodial parents were more likely to file for reductions in child support, holding income constant, when the parents owned a home before the divorce. Ownership of a pension caused the same effect in Arizona.

VI CONCLUSION

While a complete detailing of the treatment of marital property in the United States cannot be made in a journal article, a survey like this one does show a convergence in the midst of all the many state laws' diversity. States overwhelmingly divide what is earned or purchased during the marriage, and now tend to do so more or less equally.

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[165] Judith A Seltzer and Irwin Garfinkel, 'Inequality in Divorce Settlements: An Investigation of Property Settlements and Child Support Awards' (1990) 19 *Social Science Research* 82–111.

[166] A divorce trial was more likely to be a factor of custody arrangements and pre-divorce allegations of domestic violence (seven times more likely in Arizona).

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ZIMBABWE

CHILD MARRIAGE IN ZIMBABWE? THE CONSTITUTIONAL COURT RULES 'NO'

Julia Sloth-Nielsen[*]

Résumé

L'objectif principal de ce chapitre est une discussion sur la récente découverte de la Cour constitutionnelle du Zimbabwe de l'incompatibilité du mariage des enfants avec la Constitution de 2013. A partir de la décision de la Cour, le mariage d'une personne âgée de moins de 18 ans ne peut être légal. La décision s'applique aux filles et aux garçons quelle que soit la forme du mariage autorisée au Zimbabwe, y compris les mariages civils, les mariages coutumier enregistrés, les mariages coutumiers non enregistrés (qui sont la forme la plus répandue du mariage) et les mariages religieux. Ce chapitre étudie le contexte du droit international et les dispositions de la Constitution 2013 relatives au mariage et à la famille et il donne également un bref aperçu de la loi interne sur le mariage avant la décision de la Cour constitutionnelle. Une discussion détaillée de la signification et les implications de l'arrêt de la Cour conclut le chapitre.

I INTRODUCTION

The main focus of this chapter is a discussion of the recent finding of the Constitutional Court of Zimbabwe that child marriage is inconsistent with the 2013 Constitution, and that from the date of judgment, no marriage of a person aged below 18 would be legal. The ruling applies to girls and boys. There are various marriage forms in Zimbabwe, including civil marriages regulated by statute, registered customary law marriages (also regulated by statute), unregistered customary marriages (which are the most prevalent form of marriage), and religious marriages (both of which are not regulated by statute). The Constitutional Court ruling clearly applies to all forms of marriage or union.

* Professor, Faculty of Law University of the Western Cape and Faculty of Law, University of Leiden. This chapter is based on research undertaken for the PLAN international 18+ campaign to end child marriage on the legal and policy framework on child marriage in Zimbabwe. The author would like to thanks Veritas Zimbabwe for the documentation related to the constitutional challenge, including applicant's heads of arguments and the judgment.

Until recently, little was known internationally about child marriage in Zimbabwe. With the global campaign spearheaded by the consortium Girls Not Brides[1] and the continental drive by the African Union Campaign to End Child Marriage[2] putting the spotlight on adolescent unions in recent times, that position has changed. Although previously the focus of domestic advocacy and research, it is now realised more widely that child marriage in Zimbabwe is very prevalent.[3] It is estimated that on average one in three girls is married before the age of 18. With a child population estimated at 47%, Zimbabwe is ranked 41 in the number of countries where children marry before the age of 18 years.[4] The rates of child marriage are higher in some areas (eg Mashonaland Central province) than others (eg Bulawayo). According to the 2012 Census national report, approximately 52% of the rural population are women. Women in rural areas have less access to social services, fewer economic opportunities and less ability to participate in decision-making.

The 2014 Multiple Indicator Cluster Survey[5] provides the most recent data on child and early marriage in Zimbabwe. Information on age at first marriage was obtained by asking all ever-married respondents the month and year they had been married or started living with a partner as if married. The proportion of women who were married before the age of 15 is more than that of men. 4.3% of women and 0.3% of men age 15–49 years were first married or in union before age 15. One in three women and less than 1 in 20 (3.7%) of men age 20–49 were first married or in union before age 18. Young people age 15–19 years currently married or in union were 24.5% and 1.7% for women and men, respectively. The percentage of women and men aged 15–49 years who are in a polygynous union was 10.1% and 3.8%, respectively.

Age mixing is prevalent for young women, with 19.9% of women aged 15–19, and 17.5% of women aged 20–24 years married or in union with a spouse 10 or more years older.

Child marriage occurs more frequently among girls who are the least educated, poorest and living in rural areas. In 2011, women aged 20–24 and living in rural areas were about twice as likely to be married/in union before age 18 than their urban counterparts. This urban–rural divide has remained at roughly the same level since 2006. The data from the 2014 MICS study indicates that the

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1 www.girlsnotbrides.org.

2 Launched in 2014, and complemented by country launches in several countries where child marriage is common, as well as by the adoption of an African Union Common Position on ending Child Marriage (with specific targeted measures) adopted at the African Union summit in June 2015 (see http://pages.au.int/sites/default/files/AU%20Common%20Position%20on%20Ending%20Child%20Marriage-English_0.pdf, accessed 2 March 2016).

3 Child marriage prevalence is the percentage of women 20–24 years old who were married or in union before they were 18 years old (UNICEF State of the World's Children, 2013).

4 See www.unfpa.org/sites/default/files/pub-pdf/MarryingTooYoung.pdf (accessed 5 January 2014).

5 Zimbabwe National Statistics Agency (ZIMSTAT). 2014. Multiple Indicator Cluster Survey 2014, Key Findings. Harare, Zimbabwe: ZIMSTAT (hereafter MICS).

split urban/rural remains to be roughly the same, ie 40% child marriage prevalence in rural areas versus 19.3% in urban areas.

Household wealth influences the prevalence of child marriage among all wealth quintiles. Girls from the poorest 20% of the households were more than four times as likely to be married/in union before age 18 than girls from the richest 20% of the households. Zimbabwe has had major economic crises in recent times, which has increased poverty and impacted the school drop-out rate, due to the unavailability of free education. This, too, has affected the incidence of child marriage, which has not declined since 2006.

Having set the scene, this chapter turns to its central focus on the recent judgment[6] of the Constitutional Court of Zimbabwe in a constitutional challenge to marriage laws. Prior to discussing the court's finding and reasoning, attention is turned to the international law context, then the provisions of the 2013 Constitution of Zimbabwe as far as the sections on marriage and the family are concerned, and a brief survey of the domestic marriage law of Zimbabwe prior to the Constitutional Court ruling follows. A detailed discussion of the significance and implications of the court's judgment concludes the chapter.

II THE INTERNATIONAL LAW CONTEXT[7]

Zimbabwe is party to all the major international treaties which could be implicated in the issue of child marriage, including the obvious ones such as the Convention on the Elimination of all Forms of Discrimination against Women (1984) and the Convention on the Rights of the Child (1989).[8] The most recent international standard on child marriage is to be found in the Joint General Recommendation/General Comment No 31 of the Committee on the Elimination of Discrimination against Women and No 18 of the Committee on the Rights of the Child on Harmful Practices of 2014.[9] This General

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6 *Mudzuru and another* v *Minister of Justice, Legal and Parliamentary Affairs* (CCZ 12/15) (hereafter *Mudzuru*).

7 Section 327(2) of the Constitution of Zimbabwe clarifies that Zimbabwe follows a dualist system of incorporation of international treaties, in so far as ratification must be approved by Parliament and incorporated into law through an Act of Parliament. Section 46(1)(c) of the Constitution states that when interpreting Chapter 4 ('Declaration of Rights'), a court, tribunal forum or body must take into account international law and all treaties and conventions to which Zimbabwe is a party.

8 As early as 1998, in its Concluding Comments addressed towards Zimbabwe, the Human Rights Committee recommended that the Government of Zimbabwe adopt measures to prevent and eliminate prevailing social and cultural attitudes supporting early and child marriage, and to address law reform in this regard.

9 CRC/C/GC/18 (2014). As the Zimbabwe Constitutional Court correctly notes at p 28 'the common feature of the many conventions was the failure to specify for States Parties the minimum age of marriage as a means of protecting children. They left the matter exclusively to domestic law. It is striking how poorly international human rights conventions addressed the practice of child marriage.'

Recommendation/Comment[10] comprehensively spells out the position of these two Committees on the topic of child, early and forced marriage. This document closes, to a considerable extent, the door on the debate about whether there is a distinction between child and forced marriage. It notes that 'child marriage is considered as a form of forced marriage given that one or both parties have not expressed their full, free and informed consent'. Nevertheless, the Joint General Recommendation/Comment has left the door open for legal obfuscation about the minimum age of marriage because it continues to assert that, as a matter of respecting the child's evolving capacities and autonomy in making decisions that affect her or his life, in exceptional circumstances a marriage of a mature, capable child below the age of 18 may be allowed provided that the child is at least 16 years old and that such decisions are made by a judge based on legitimate exceptional grounds defined by law and on demonstrated evidence of maturity, without deference to culture and traditions. However, the Joint General Recommendation/Comment sets the absolute ceiling for the minimum age (in these exceptional circumstances) at 16, meaning that state parties will not be justified for any reason whatsoever to accept marriages where a party is lower than this age.

As regards forced marriages, the Joint General Recommendation/Comment enumerates examples of situations where one or both parties to a marriage have not personally expressed their full and free consent to the union by pronouncing that forced marriages may also be manifested through marrying girls too young when they are not physically and psychologically ready for adult life or adequately prepared for making conscious and informed decisions and are thus not ready to consent to marriage. Additionally, where guardians possess the legal authority to consent to marriage of girls in accordance with customary or statutory law, this may result in forced marriages because girls are thus married contrary to their right to freely enter into marriage.

Zimbabwe has recently reported to the CRC Committee (in January 2016). Amongst several recommendations related to child marriage in the concluding observations, the Committee expressed its 'deep concern' about the prevalence of harmful norms and practices that perpetuate discrimination against girls, including in particular forced and early marriage, polygamy, bride-price and, in certain regions, virginity testing and witchhunting.[11]

More cogently, as will be shown in subsequent sections of this chapter, the state is also party to two important regional treaties, the African Charter on the

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[10] Each of the treaty bodies publishes its interpretation of the provisions of its respective human rights treaty in the form of 'general comments' or 'general recommendations'. Whilst not binding, they are authoritative expositions of the content of the right or issue concerned, and can be referred to in concluding observations to State Parties as source documents for further guidance.

[11] CRC/C/ZWE/CO2 para 46(a).

Rights and Welfare of the Child,[12] and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol).[13]

Article 6 of the Maputo Protocol[14] requires that state parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. Furthermore states parties should enact appropriate national legislative measures to guarantee that no marriage shall take place without the free and full consent of both parties; that the minimum age of marriage for women shall be 18 years; that monogamy is encouraged as the preferred form of marriage and the rights of women in marriage and family including in polygamous marital relationships are promoted and protected; that every marriage shall be recorded in writing and registered in accordance with national laws in order to be legally recognised; that the husband and wife shall by mutual agreement choose their matrimonial regime and place of residence; that a married woman shall have the right to retain her maiden name to use as she pleases, jointly or separately with her husband's surname; that a woman shall have the right to retain her nationality or acquire the nationality of her husband; and that during her marriage, a woman shall have the right to acquire her own property and to administer it freely.

The provisions of both article 1 and article 21(2) of the African Children's Charter are highly relevant to child marriage. Article 1 requires, as part of the implementation of the Charter, that 'any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations in the present Charter shall, to the extent of such inconsistency be discouraged'. Article 21(2) provides that 'child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory'. The implications of this provision are obvious: 18 must be the legislated age for entry into marriage,[15] and no exceptions to this may be permitted. Furthermore, since 'marriage' remains undefined, by necessary implication all forms of marriage are envisaged to fall within the purview of art 21(2), including unregistered marriages and customary and religious marriages. The standard set in the African Children's Charter is clearly higher than the current standard espoused in the Joint Recommendation/General Comment of the CEDAW and CRC Committee, which permits exceptions to the minimum age of 18 years.

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12 Ratified by Zimbabwe in 1995.

13 Ratified by Zimbabwe in 2008.

14 See for a discussion of the Maputo Protocol, F Banda 'Protocol to the African Charter on the Rights of Women in Africa' in Evans, Malcolm and Murray, Rachel, (eds), *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2006* (2nd edn, Cambridge University Press, 2008) 441–474.

15 This resounds with the definition of a child under the Charter which is 18 years (with no exception for attaining majority earlier, as in article 1 of the UN Convention on the Rights of the Child).

Zimbabwe presented its initial state party report to the African Committee of Experts on the Rights and Welfare of the Child in April 2015. The government report (submitted in 2014) did not contain much on child marriage at all, other than references to the need to harmonise legislation regarding the definition of a child.[16] This could be indicative that the magnitude of the problem of child marriage in Zimbabwe was at that point still largely under the radar, and that the full extent of the problem had not been taken on at the highest level of government. In dialogue on the issue with the government delegation, the Committee was informed that the government was preparing an 'omnibus bill' (a General Laws Amendment Bill) to amend 400 pieces of legislation in order to render them consistent with the 2013 Constitution. Marriage laws were just one of the affected areas. It was stated in the Government responses to the list of issues raised by the Committee that the definition of a child and an amendment to the legal age of majority are also envisaged in the General Laws Amendment Bill. However, although an omnibus General Laws Amendment Bill was tabled in May 2015, it did not include any matters relevant to the age of majority or to child marriage. However, as this chapter was being completed, a public announcement was made by the Deputy President that new marriage laws would be tabled soon.[17]

It is worth noting that in the Universal Periodic Review held at the 12th meeting, on 10 October 2011, the delegation of Zimbabwe, which was headed by the then Minister for Justice, Legal and Parliamentary Affairs, accepted recommendations concerning child marriage, including amongst others, that concrete measures be taken to align Zimbabwe's domestic laws, including customary laws, with international human rights instruments that it is party to, to ensure harmonisation with the protections guaranteed in the Constitution; and that, where gaps exist, Zimbabwe agreed to take elaborate legislative and administrative measures to outlaw discrimination against women and eliminate gender-based violence.

III THE CONSTITUTIONAL PROVISIONS AFFECTING MARRIAGE AND CHILDREN'S RIGHTS

With the above commitments as backdrop, it is worth alluding to the various relevant constitutional provisions in the 2013 Constitution of Zimbabwe. Section 78 of the 2013 Constitution, titled 'Marriage Rights', provides that '(1) Every person who has attained the age of 18 years has the right to found a family and (2) No person may be compelled to enter into marriage against their will'. This section falls within the chapter (Chapter 4) of the Constitution dealing with fundamental rights and freedoms, and the provisions are therefore justiciable.

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[16] A copy of the report is on file with the author, who was also at the time a member of the African Committee of Experts on the Rights and Welfare of the Child.

[17] www.Legalbrief.co.za (accessed 19 March 2016).

Section 80 ('Rights of women') also contained in Chapter 4, provides that:

> '(1) Every woman has full and equal dignity of the person with men and this includes equal opportunities in political economic and social activities;
>
> (2) Women have the same rights of men regarding custody and guardianship of children, but an Act of Parliament may regulate how those rights are to be exercised.
>
> (3) All laws, customs, traditions and cultural practices which infringe the rights of women conferred by this Constitution are void to the extent of the infringement.'

Section 81(1) of the Constitution enshrines the fundamental rights of the child. The fundamental rights, the alleged infringement of which are relevant to the determination of the issues raised by the Constitutional Court application, are:

> '(1) Every child, that is to say every boy and girl under the age of eighteen years, has the right –
>
> (a) to equal treatment before the law, including the right to be heard;
> (b) . . .
> (c) . . .
> (d) to family or parental care or to appropriate care when removed from the family environment;
> (e) to be protected from economic and sexual exploitation, from child labour, and from maltreatment, neglect or any form of abuse;
> (f) to education, health care services, nutrition and shelter;
>
> (2) A child's best interests are paramount in every matter concerning the child.
>
> (3) Children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian.'

Section 26(1) of the Constitution requires the state to take appropriate measures to ensure that no marriage is entered into without the free and full consent of the intended spouses, whilst s 26(2) requires the state to take measures to ensure that children are not pledged in marriage. The state must also ensure the equality of rights and obligations of spouses during marriage and at its dissolution (s 26(4)), and ensure that, in the event of dissolution of a marriage, provision is made for the necessary protection of any children and spouses. Marriage is not defined in s 332 (the definitions clause of the Constitution), and must therefore at face value include all forms of marriage, under civil, religious and customary law. This section (s 26) and s 25, discussed next, fall in the chapter of the constitution titled 'National Objectives'. These provisions are not justiciable, but set policy objectives for the development of the state.

Section 25 (headed 'Protection of the family) also constitutionalises an obligation upon the state and all institutions and agencies of government at every level to protect and foster the institution of the family and, in particular,

to adopt measures for the care and assistance of mothers and fathers and other family members who have the care of children.

Section 19 ('Children') is also relevant (and also falls in Chapter 2, 'National Objectives'):

> '(1) The States must adopt policies and measures to ensure that in matters relating to children, the best interests of the children concerned are paramount.
>
> (2) The State must adopt reasonable policies and measures, within the limits of the resources available to it, to ensure that children –
>
> (a) Enjoy family or parental care, or appropriate care when removed from the family environment;
> (b) Have shelter and basic nutrition, health care and social services;
> (c) Are protected from maltreatment, neglect or any form of abuse; and
> (d) Have access to appropriate education and training.
>
> (3) The State must take appropriate legislative and other measures –
>
> (a) To protect children from exploitative labour practices; and
> (b) To ensure that children are not required or permitted to perform work or provide services that –
> (i) are inappropriate for the children's age; or
> (ii) place at risk the children's well-being, education, physical or mental health or spiritual, moral or social development.'

A range of other constitutional provisions can further be adduced in support of gender equality, the protection of human dignity, and protection against slavery or forced servitude.

The array of constitutional protections concerning women's and children's rights, and elaborating state policy and objectives around marriage and family life, are extensive and potentially without parallel.

IV THE DOMESTIC LEGAL CONTEXT RELATING TO MARRIAGE, CUSTOMARY MARRIAGE AND COHABITATION

Two separate statutes regulate marriage, the Marriage Act (Cap 55:11) and the Customary Marriages Act (Cap 5:07).

Section 22(1) of the Marriage Act (Cap 55:11), enacted at a time of international uncertainty around the minimum age of marriage in 1965,[18]

[18] The Convention on Consent to Marriage, Minimum age and Registration of Marriages (1962), which Zimbabwe ratified in 1994, does not contain a minimum age of marriage (General Assembly resolution 1763 A (XVII) of 7 November 1962. Entry into force 9 December 1964).

prohibited marriage of a boy under the age of 18 and of a girl under the age of 16 except with the written permission of the Minister of Justice when he or she considered such marriage desirable. The written permission, which was intended to be granted prior to solemnisation of the marriage, could additionally be granted after the solemnisation, where the Minister considered the marriage desirable and in the interests of the parties concerned. Clearly, therefore, a discriminatory provision which differentiated the position of boys and girls was in place, in so far as the minimum age of marriage for girls was ordinarily 16 years, whilst for boys it was 18 years.

Section 20(1) of the Marriage Act required that consent in writing be given to the solemnisation of the marriage by the legal guardians of the girl. 'Legal guardian' was defined to include the mother of the girl where she and the father of the minor were living together lawfully as husband and wife or were divorced or were living apart and the sole guardianship of the minor had not been granted to either of them by order of the High Court. At the time, the age of majority in Zimbabwe was 21 years, so that a guardian's consent had to be obtained in respect of persons aged below 21 years, ie girls aged 16 and above, and boys aged 18 and above. Once a girl below 16 or a boy below 18 got married with the written permission of the Minister, and where a girl who had attained the age of 16 got married without the consent of the legal guardian, they were treated as persons of full age to whom the protection of the rights of the child was lost.

Some customary marriages are regulated by statute in Zimbabwe via the Customary Marriages Act (Cap 5:07), enacted in 1951, a statute which regulates registered customary marriages. Although s 11 of the Act prohibits the pledging of girls in marriage, that is not enough to bar child marriage, because there is no minimum age for a customary marriage set in the Act. This means that the Act is in contravention of the Constitution, as matters now stand. Traditionally under unwritten customary law, the minimum age of marriage was the attainment of puberty, hence it is assumed that, by default, this is the minimum age contemplated in the Customary Marriages Act. Thus girls could be married as young as 12 years of age, or even younger under custom. The Act itself applies only to registered customary marriages.

A problematic feature of the Customary Marriages Act includes that it is still required that women must have the consent of their customary-law guardians before they can marry. The Act implicitly confers the role of guardian only upon a male, in violation of constitutional guarantees of equality. In addition, a woman will not have a guardian once she achieves the age of majority which is now 18 years, the age later set in statute under the Legal Age of Majority Act (LAMA) of 1982.[19] According to Chiwaru, 'section 12(1) of the Customary

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However, the 1965 Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (General Assembly resolution 2018 (XX) of 1 November 1965) which followed the Convention suggested that states establish a minimum age for marriage (principle 2), which is recommended to be no lower than 15 years.

[19] The LAMA provided that all Zimbabweans – female, male, African, white – attain full adult

Marriages Act states that if Africans intend to marry under the Marriage Act, they should appear before a Magistrate and obtain a certificate stating that there is no bar to such marriage by reason of lack of consent of the parents or guardian of the woman. This section has the effect of reinforcing the perpetual minority status of an African woman which is no longer the case.'[20]

Section 18 provides for the appointment of marriage officers by the Minister, who can be persons employed by the state or chiefs. Marriage officers are frequently found at courts, but these may be a long distance from where people live, hence the failure to register marriages in practice, and the proliferation of unregistered customary unions. *Lobola* or bridewealth (and the actual payment thereof) is not a requirement for the validity of a customary marriage in Zimbabwe. In 1984, this was established by judicial precedent. However, according to s 7(1)(a) of the Customary Marriages Act, a marriage officer must be satisfied that an agreement on marriage consideration has been reached (whether or not it is actually handed over). In fact, it is provided that a magistrate may fix marriage consideration in consultation with the guardian of a woman, a provision which theoretically renders the state (or a person acting on behalf of the state) complicit in actions which could contribute to negating free and informed consent.

There is no legislation in Zimbabwe regulating domestic partnerships or unregistered customary unions. Unregistered customary unions are indeed the most predominant form of marriage in Zimbabwe, with estimates that more than 80% of marriages in rural households involve such unregistered unions.

V THE DECISION OF THE CONSTITUTIONAL COURT OF ZIMBABWE

The constitutional challenge in *Mudzuru and Ors v Minister of Justice, Legal and Parliamentary Affairs* was allegedly brought in an attempt to speed up the pace of law reform which, as indicated, had not progressed since first raised at

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status at the age of 18, 'for all purposes, including customary law'. Although the Act purported to be revolutionary at the time in establishing gender equality including for women living under customary law, in 1999, the beacon was extinguished when the Zimbabwe Supreme Court ruled in *Magaya v Magaya* that the LAMA does not in fact provide for women to be treated as adults under customary law. Ruling in an inheritance case, the court overruled prior cases confirming women's rights to inherit under customary law, and indicated that cases allowing women to sue in their own right for seduction damages, consent to marriage on their own, and inherit property, were wrongly decided. The court stated that Parliament did not intend the law to eliminate male preference and grant women rights that they had not had under customary law, but only to grant civil legal status to women so they could enter into contracts and bring lawsuits (www1.umn.edu/humanrts/iwraw/ww12-3-99.html accessed March 2016). The judgment attracted widespread and vocal criticism, including from women's groups in Zimbabwe and from the international community.

[20] Sylvia Chiwaru, 'Status of ratification and domestication of instruments relating to women and children and gaps and suggested legislative drafting' submitted to Ministry of Justice, Legal and Parliamentary Affairs, 2014 (copy on file with the author).

the international level in 1998. Loveness Mudzuru and Ruvimbo Tsopodzi wanted the Constitutional Court of Zimbabwe to declare unconstitutional some of the provisions of the Marriage Act and the Customary Marriages Act, arguing in respect of the latter that it does not provide for a minimum age limit for marriages, and in respect of the former that the exceptions to the age of 18 allowed were in violation of the Constitution. Mudzuru and Tsopodzi were both married at the age of 15 while they were still going to school. They were both parties to unregistered customary unions. Both had by the age of 18 given birth to several children, and had effectively entered adulthood at the age of 15. The action was brought in the public interest,[21] and their locus standi to bring the application was upheld after lengthy consideration of this issue.[22]

The applicants also sought a declarator to the effect that no one may enter into a customary law union before the age of 18 years and that any registered customary law union contracted by person below the age of 18 years be declared null and void. Relying on the CRC and the ACRWC, the applicants' arguments included that allowing children to be married is subjecting them to maltreatment, neglect and abuse which is proscribed in s 81(1)(e) of the Constitution. They also averred that an important provision relevant to this matter is the right of children to family or parental care, codified in s 81(1)(d) of the Constitution, and their pleadings referred also to s 19 of the Constitution as well as s 25. A breach of s 56(3) was ground for an additional challenge, since this section makes it clear that no person shall be discriminated against on the basis of age and sex, and s 22 of the Marriage Act makes just such discrimination on the basis of both age and sex. Finally, the application relied on s 80(iii) in so far as the Constitution makes it clear that all laws, customs, traditions and cultural practices that infringe the rights of women conferred by the Constitution are void to the extent of this infringement.

The court commenced with an articulation of some of the constitutional values that would underpin its approach. The court held that regard must be had to the contemporary norms and aspirations of the people of Zimbabwe as expressed in the Constitution. Regard must also be had to the emerging consensus of values in the international community, of which Zimbabwe is a party, on how children should be treated and their well-being protected, so that they can play productive roles in society upon attaining adulthood. Further, the court emphasised that the interpretation must resonate 'with the founding values and principles of a democratic society based on openness, justice, human dignity, equality and freedom set out in s 3 of the Constitution'. Notably, the court held that by ratifying the UN Convention on the Rights of the Child and

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[21] 'Children fall into the category of weak and vulnerable persons in society. They are persons who have no capacity to approach a court on their own seeking appropriate relief for the redress of legal injury they would have suffered. The reasons for their incapacity are disability arising from minority, poverty, and socially and economically disadvantaged positions. The law recognises the interests of such vulnerable persons in society as constituting public interest.' *Mudzuru*, p 24.

[22] This is a significant aspect of the judgment but full consideration lies beyond the scope of this chapter. The court inter alia refers extensively to jurisprudence on public interest litigation from South Africa, Canada, India and the United Kingdom.

the African Charter on the Rights and Welfare of the Child 'Zimbabwe expressed its commitment to take all appropriate measures, including legislative, to protect and enforce the rights of the child as enshrined in the relevant conventions to ensure that they are enjoyed in practice'. The result, the court found, is that the applicable provisions should be interpreted 'progressively'.

The court thereafter outlined its understanding of the meaning of 'child marriage', referring to child marriage as defined by the United Nations Children's Fund (UNICEF) 2011 publication 'Child Protection from Violence, Exploitation and Abuse Report' which defines child marriage as 'a formal marriage or informal union before age 18'. Describing it as a 'horrific' practice, the court regales that:[23]

> 'regardless of how it occurs, early marriage takes a terrible toll on a girl's physical and emotional health. Because of her age, inexperience and vulnerability, she is likely to be dominated and controlled by her husband, who has the power to keep her a virtual prisoner. Rape, beatings and other forms of sexual and domestic violence are common and early and repeated pregnancies are life threatening. Young mothers also face far greater risks of complications in pregnancy because their bodies are not sufficiently developed and infant mortality is far greater among young mothers.'

It is apposite to refer to the fact that the Minister of Justice, Legal and Parliamentary Affairs opposed the application for a declaration of invalidity. One stated reason was that girls mature earlier than boys which justifies setting different ages for entry into marriage.[24] The argument was dismissed soundly, the Constitutional Court opining that:[25]

> '[t]he contention is without scientific evidence to support it. The Zimbabwe Human Rights Bulletin Number 98, August 2014 states that the reason why eighteen years is specified under international human rights law and national constitutions as the minimum age for marriage, is that a person of that age is not considered to be psychologically and physiologically developed enough for the responsibilities and consequences of marriage and is incapable of giving free and full consent to marriage.'

Second, the Minister argued that the Constitutional text did not in fact prohibit child marriage, but only the right to found a family. 'The minor premise on which the contention is based is that the 'right to found a family' does not

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[23] *Mudzuru*, p 42.

[24] 'It is true that the Marriage Act, [Chapter 5:11] differentiates between the minimum age of marriage for boys and girls, and that the Customary Marriages Act, [Chapter 5:07] does not specify any minimum age for either boys or girls. I, however, deny that there is anything unconstitutional about that state of affairs. The differentiation is simply that, and is necessitated solely by the sexual difference itself and the implications therefore for married life. As far as I am aware the differentiation arises from biological and psychological maturity levels for boys and girls.' (Extract from the opposing affidavit quoted in Applicants' Heads of Argument (copies on file with the author) at para 31.)

[25] *Mudzuru*, p 51.

imply the right to marry.' This the court found to be an absurd proposition: what the government was arguing was a literal interpretation which would entail that underage married children would be denied the right to found a family, and conversely, that persons over 18 would be constitutionally permitted to found a family but not to marry![26] Hence, a literal interpretation of s 78 could not be sound, and only a purposive interpretation could give full effect to the link between the right to found a family and the right to marry (marriage being one way traditionally in which a family is founded).

As an aside, the views of the Minister on early sexual maturation resound with the scandalous views expressed in June 2015 statements[27] by the current Attorney General of Zimbabwe, who broadcast that, in his opinion, girls of 12 years of age who were no longer at school and were simply at home doing nothing should be allowed to get married. His views attracted a strong response from women's and children's rights groups in Zimbabwe, but indicate the deep-seated view – held at the highest levels – that girls' sexual and reproductive maturity should serve as a justification for marriage.[28]

The court conducted an extensive review of the applicable international law provisions. However, it was most swayed by the text of the ACRWC:[29]

> 'In clear and unambiguous language, Article 21 of the ACRWC imposed on States Parties, including Zimbabwe, an obligation which they voluntarily undertook, to take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child. The Charter goes on to specifically target child marriage as such a harmful social and cultural practice affecting the welfare, dignity, normal growth and development of the child particularly the girl–child. The States Parties are placed under a positive obligation to take effective measures, including legislation, to specify the age of eighteen years as the minimum age for marriage. They are obliged to abolish child marriage.'

The court further justifies its finding with lengthy quotes from the 2011 UNICEF report, citing subordination of women, greater propensity for domestic violence, trafficking, and the perpetuation of an intergenerational cycle of poverty which characterise child marriages. In the light of this and other research, the court concluded that[30]

> 'the adoption of legislative measures for the abolition of the offending statutory provisions such as s 22(1) of the Marriage Act became a compelling social need.

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[26] *Mudzuru*, p 43.

[27] www.nyaladzani.com/?p=614 (accessed 28 June 2015).

[28] It is worth observing that this view is not confined to Zimbabwe, and that there are many jurisdictions, including the United Kingdom, South Africa and New Zealand which have a lower age for marriage of girls than boys or where the age of marriage for girls is below 18 years. In the Netherlands, this position was altered only in December 2015 when legislation adopting a minimum age of marriage of 18 years was passed. The new law affects marriages concluded in the Netherlands as well as those contracted abroad (eg by refugees or migrants).

[29] *Mudzuru*, p 36.

[30] *Mudzuru*, p 39.

> There was overwhelming empirical evidence of the horrific consequences of child marriage. Study after study exposed child marriage as an embodiment of all the evils against which the fundamental rights are intended to protect the child. The studies showed that where child marriage was practised, it was evidence of failure by the State to discharge its obligations under international human rights law to protect the girl child from the social evils of sexual exploitation, physical abuse and deprivation of education, all of which infringed her dignity as a human being.'

The court deals with the fear that striking down the Marriage Act will result in girls getting pregnant and the boys who impregnate them evading responsibility. Here, there are two lines of reasoning: first, that the pregnant girl remains a child as defined in international instruments and the Constitution of Zimbabwe, and therefore entitled to protection, to parental care, to education and so forth. This also means, according to the court, that the parental obligations of her guardians do not cease because of her pregnancy. Second, the court was of the view that[31]

> 'there is a difference between making a man take responsibility for the pregnancy of a girl and the maintenance of the baby once it is born and compelling a girl child to get married because she got pregnant. The issue of early pregnancy is a social problem that needs cooperation amongst all stakeholders to solve. It would, in fact, be a form of abuse of a girl child to compel her to be married because she got pregnant.'

Finding that '[s]ection 78(1) of the Constitution sets eighteen years as the minimum age of marriage in Zimbabwe, with the effect is that a person who has not attained the age of 18 has no legal capacity to marry and that he or she has a fundamental right not to be subjected to any form of marriage regardless of its source',[32] the court confirmed that to the extent that it provides that a girl who has attained the age of 16 can marry, s 22(1) of the Marriage Act is inconsistent with the provisions of s 78(1) of the Constitution and therefore invalid. The court further declared 'any law, practice or custom authorising a person under 18 years of age to marry or to be married is inconsistent with the provisions of s 78(1) of the Constitution and therefore invalid to the extent of the inconsistency'. To hammer the point home, the order included a clear statement that 'with effect from 20 January 2016, no person, male or female, may enter into any marriage, including an unregistered customary law union or any other union including one arising out of religion or religious rite, before attaining the age of 18 years'.[33]

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[31] *Mudzuru*, p 54.

[32] 'The effect of s 78(1) as read with s 81(1) of the Constitution is very clear. A child cannot found a family. There are no provisions in the Constitution for exceptional circumstances. It is an absolute prohibition in line with the provisions of Article 21(2) of the ACRWC. The prohibition affects any kind of marriage whether based on civil, customary or religious law. The purpose of s 78(1) as read with s 81(1) of the Constitution is to ensure that social practices such as early marriages that subject children to exploitation and abuse are arrested. As a result, a child has acquired a right to be protected from any form of marriage.' *Mudzuru*, p 47.

[33] *Mudzuru*, p 55.

Of some concern is that the Customary Marriages Act is not mentioned expressly in the final order. This may be because the mischief embedded in the Customary Marriages Act lies in its failure to specify a minimum age of a customary marriage, and the court might have thought there was no need to strike any provision down. Also, the order does clearly apply to the customary marriage setting. However, the applicant's prayer in respect of a declaration of invalidity of the Customary Marriages Act remains unanswered.

VI SIGNIFICANCE OF THE DECISION AND ITS IMPLICATIONS

There are at least seven important implications of the finding of the Constitutional Court, it is submitted.

First, having drawn a line in the sand regarding the straight 18 position, any notion that there is a distinction to be drawn between different marriage forms under a constitutional dispensation in which marriage rights and privileges are constitutionalised is dispelled. The court has treated civil, religious and customary marriages on the same footing, and applied the declaration of unconstitutionality to all forms of union.

Secondly, the court has minimised any distinction between registered and unregistered customary marriages, since the applicants in the case at hand were admittedly involved in an informal union which by definition would not have been covered by the Customary Marriages Act in the first place. Arguably, it was not strictly necessary for the court to have struck down either the age provisions of the Marriage Act or for the court to have dealt with the absence of minimum age provisions in the Customary Marriages Act, since the unions of the applicants were not regulated by either. But, in stretching the constitutional mantle of protection, the court based its decision on the social reality that the majority of affected child marriages will be unregistered customary unions.

Thirdly, the court did not give clear directions as to the ultimate remedy it desired. Clearly amending legislation (amending the Marriage Act) or, preferably, a comprehensive new marriage law is required to harmonise domestic law with the Constitution, but the court did not require this, nor were any time frames for a parliamentary remedy established. This may have been deliberate in the political context of Zimbabwe, where the judiciary is arguably less independent than elsewhere, and less inclined to issue binding directives to the executive branch of government. Therefore, the answer as to when Zimbabwe will comply with international treaty bodies' requests to overhaul marriage legislation remains elusive, the recent assurances of the Deputy President notwithstanding.

Fourthly, the reasoning of the court is rooted in a strong articulated philosophy of gender equality and the eradication of patriarchal attitudes in Zimbabwe,

including under custom and tradition. An example is the view articulated by the court that pregnancy of adolescents provides no justification for marriage of the girls, but rather imposes parental and maintenance responsibilities on the (boy) impregnators, and that compelling girls to marry in these circumstances is unacceptable.[34] Another source for optimism about the positive judicial sentiment relating to furthering gender equality can be found in the following quote:[35]

> 'It is regrettable that the respondents failed to appreciate that the rationale they advanced in support of the difference in the treatment of girls and boys formalised by the impugned legislation, is the old stereotypical notion that females were destined solely for the home and the rearing of children of the family and that only the males were destined for the market place and the world of ideas … The contention by the respondents is contrary to the fundamental values of human dignity, gender equality, social justice and freedom which the people of Zimbabwe have committed themselves to uphold and promote through legislation governing the interests of children.'

The views of the court on gender equality bode well for future constitutional challenges in the environment where women are still subject to the marital power of their spouses, and where adult women who wish to marry customarily still require the consent of their male guardians (to name but two areas warranting urgent attention). That a comprehensive audit of law and policy to eradicate gender discrimination is required goes without saying.

Fifthly, the declaration of invalidity was restricted to marriages concluded or unions formed from the date of the judgment, and does not have retrospective application to prior marriages. The draft Joint General Comment on Child Marriage of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child[36] takes a different line, providing that child marriages that had been contracted in violation of international human rights law should be voidable, and the effective remedies and redress should follow suit. Care is taken in the Draft General Comment to ensure that the rights (including proprietary rights) of former child brides and their offspring are protected. One can but speculate what the position will be of girls who do (in contravention of the Constitutional Court finding) enter unions after 20 January 2016, and whether girls' systemic disadvantage will not be entrenched by the invalidity of their unions.

Sixthly, the willingness of the Constitutional Court of Zimbabwe to rely so extensively on regional human rights provisions (notably the provisions of article 21(2) the African Charter on the Rights of the Child) as justification for its constitutional interpretation sends an extremely positive signal for the status of international human rights law in future judgments of the court. The court has taken the bold step of outlining a strong place for international law in the

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[34] *Mudzuru*, p 54.

[35] *Mudzuru*, p 52.

[36] The draft Joint General Comment is at an advanced stage of preparation and is expected to be adopted in 2016. The author has a copy on file and was involved in its preparation.

constitutional interpretative endeavour, and this is particularly welcome given the fact this this application concerned the twin vulnerabilities of gender and childhood and an extremely patriarchal social milieu.

Finally, the strongly worded judgment is particularly important in sending the right signal about the unacceptability of child marriage, in the face of the mentioned broadcast of the Attorney General supporting early sexual debut for out-of-school girls, and also given that the Minister of Justice, Legal and Parliamentary Affairs trenchantly opposed the application for a declaration of constitutional invalidity, indicating weak political will at the level of the executive to face the problem of child marriage head on.

The challenge that remains is for the strong message of the court to be widely publicised, especially in child marriage 'hot spots' and in rural areas. There are encouraging signs that this is already occurring.[37]

[37] For instance, it has been reported that a youth organisation, My Age Zimbabwe Trust, has embarked on a massive exercise of conscientising youth in rural areas on the recent court ruling that outlaws child marriages; see www.newsday.co.zw/2016/02/22/youths-take-child-marriage-court-ruling-rural-areas/ (accessed 22 February 2016).

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