The International Survey of Family Law

2017 Edition

Click here to go to Main Contents

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2017 Edition

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CONTENTS

Click here to go to Main Contents

Click here to go to Main Contents

Click here to go to Main Contents

Click here to go to Main Contents

Click here to go to Main Contents

PREFACE

This year's ISFL World Congress in Amsterdam has as its theme 'family law and family realities' asking whether existing national family laws adequately reflect the rapidly changing realities of family life. The theme is particularly appropriate because 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 (as it seems to be in Switzerland), 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 20 chapters, unsurprisingly we find a wide range of topics: adoption, assisted reproduction and 'baby boxes', abortion, child protection and maintenance, children's rights, affiliation and illegitimacy, child marriage, child support, co-motherhood, international child abduction (and jurisdiction), marriage in a pluralistic society, marriage equality, polygamy, divorce, spousal maintenance, marital property, domestic violence, and succession law.

My thanks to Dominique Goubau and Christine Bidaud-Garon who have been responsible for producing the French résumés at the beginning of each chapter. LexisNexis and its editor Cheryl Prophett continue to do a remarkable job for the International Society.

For those desiring to learn more about the Society, its goals and history, or how to join the Society, the place to look is the ISFL website, www.isflhome.org.

Margaret Brinig
South Bend, Indiana
July 2017

Click here to go to Main Contents

ALBANIA

MARITAL PROPERTY REGIMES IN ALBANIA

Dr Ledina Mandia[*]

Résumé

Dans la plus part des pays du monde il existe des régimes matrimoniaux, divisés en régime de la communauté et régime de la séparation des biens.

En Albanie, jusqu'en 2003, il y avait un seul régime matrimonial, celui de la communauté où on présumait que les conjoints avaient la moitié du bien jusqu'à ce que le contraire soit prouvé.

Finalement, les régimes matrimoniaux en Albanie sont réglés par le Code de Famille de l'année 2003, en reflétant les changements dans la société et dans les relations conjugales après la chute du communisme en 1991.

Pour la première fois, la législation albanaise a connu deux régimes matrimoniaux: Le régime de la communauté et le régime de la séparation des biens.

Le Régime de la communauté comprend la communauté légale et la communauté avec contrat. Les futurs époux peuvent décider par l'accord écrit de régler le régime matrimonial dans l'avenir. Mais, même les conjoints qui sont mariés en vertu de la législation antérieure ont le droit de réviser le régime matrimonial pour l'avenir.

La législation a fait des progrès, en prenant en considération l'égalité de l'homme et de femme d'une part, mais aussi la liberté contractuelle de l'autre côté.

Ainsi, se référant à la loi, les époux peuvent décider sur leurs biens en avance quel que soit le sort de leur vie conjugale en avenir. Une législation contemporaine concernant les régimes matrimoniaux mais qui a une application limitée en pratique se référant même aux préjugés dans la société albanaise en termes du contrat de mariage.

* Legal Adviser of the President of the Republic of Albania.

I HISTORICAL VIEW ON THE MARITAL PROPERTY REGIMES IN ALBANIA

Albanian legislation has provided that a marriage should be considered effective once the act of the marriage is registered in the marriage's register. In that moment the marriage creates a complex unit of rights and obligations, which are divided between personal and marital property rights. The marital property rights and obligations of the spouses are classified in two groups, one of them with a personal property character and the other one classified merely as property.

The Albanian legislation has for many years stipulated the martial property regime, which through the recent Family Code has been approximated with the European and international standards.

For approximately 50 years, Albania legislatively accounted for only one marital property regime, community property, in which both spouses have common property after the beginning of the marriage, and were not allowed to enter into a contract designating another property regime.

After the fall of communism in Albania in 1992, the society has been faced with an increased number of divorces and therefore divorce's consequences concerning the marital property, and needed to make an enormous change in the framework of the family legislation including the marital property regimes.

The Family Code of 1982[1] remained in force until 2003, when the new Family Code,[2] began to regulate the marital property relations of the spouses.

In November 1994, the new Civil Code[3] took effect, which in the art 1167 provided that the provisions of the Civil Code of the year 1981[4] concerning the common property between the spouses shall remain in force until a new Family Code took effect.[5] As consequence, until 2003, the marital property relations between spouses did not reflect the reality of either the marital property relations between the spouses or of future spouses.

Article 86 of the Civil Code of 1981 provided that: 'Assets acquired during marriage, except assets strictly for the personal use of each spouse, are in the joint ownership of both spouses.' This included any assets acquired during the

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1 Family Code of 1982 approved with the law no 6566, dated 29 June 1982.
2 Family Code of 2003 approved with the law no 9062, dated 8 May 2003.
3 Civil Code of 1994 approved with the law no 7850, dated 29 July 1994.
4 Civil Code of 1981 approved with the law no 6340, dated 26 June 1981.
5 Article 1167 of the Civil Code: 'The law no 6340, dated 26/06/1981 "On the Civil Code", except the provisions regulating property regime between spouses, law no 2362, dated 16/11/1956 "On social organisations not pursuing economic purposes", law no 7688, dated 13/03/1993 "On joint ownership over residences", law no 7695, dated 07/04/1993 "On foundations", Articles 1-15, Decree no 600, dated 22/07/1993 "On lien and mortgage", approved, as amended, with the law no 7753, dated 30/09/1993, shall be repealed.'

marriage through the work, gift, inheritance, or through any other legal transaction in favour of one of the spouses.

The joint ownership of the spouses obtained during the existence of the marriage was terminated only in the cases provided through the arts 92 and 93 of the Family Code of 1982, that is in the case of death of one of the spouses, a declaration voiding the marriage or, in the case of divorce, through the judicial process. The legislation presumed that each of the spouses had an equal share of the assets in the marital estate, unless one spouse proved the contrary.

The Family Code of 1982 differed from the legislation of 1955,[6] because for the first time the law provided for co-ownership in shares rather than the previous model of the co-ownership in common. The co-ownership in shares of the spouses could not be changed through the will of the spouses. As consequence, every agreement between the spouses, which provided differently from the legal presumption, was considered void. During this time, the solidarity of the marital property interests of the spouses was consolidated, decreasing the marital property independence and restricting the contractual freedom for each of the spouses. The motivation for such a regime was the principle of the legal equality between men and women.[7]

After the years 1992, taking in consideration the economic and social conditions and on the other hand inspiring from the principle of the contractual freedom, the legislation in Albania has been changed and to accept the new model of marital property that allowed marital contracts as instruments regulated in the provisions of the family legislation.

Thus, the Family Code of 2003, for the first time in the history of the Albanian legislation has provided that 'The marital property regime of spouses is stipulated by the law, in the absence of a specific agreement by the spouses designating their own regime, which must not be contrary to the provisions of this Code and any respective legislation'.[8] According to this rule, the spouses are free to decide on the marital property regime and enter into a specific agreement in relation to the assets acquired by either or both spouses during the marriage. This doesn't mean that the spouses may evade their rights and obligations originating from the marriage, their parental responsibilities or the rules of legal administration and guardianship.[9]

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6 Decree No 2083, dated 6 July 1955 'On the property', acting until 1 January 1982, when entered into force the Civil Code of 1982.

7 See, V Zace 'The Marital Relations According to the Albanian Legislation' (1996) Logoreci, fq 116.

8 Article 66 of the Albanian Family Code of 2003, Law no 9062, dated 8 May 2003.

9 Article 67 of Albanian Family Code.

Click here to go to Main Contents

II MARITAL PROPERTY REGIMES ACCORDING TO FAMILY CODE 2003

The recent family legislation stipulates the choice of the marital property regime, not only in the moment the marriage takes place, but also during the marriage.

Usually, the new legislation applies to legal relations that occur after its entry into force.[10] But, the art 315 of the recent Family Code, stipulates that even joint ownership by spouses created before the entry into force of the Family Code, may be changed by an agreement of the spouses, in accordance with the provisions of the Code. Also, for the spouses who were married before the entry into force of the new Family Code of 2003, the assets obtained by both spouses after the entry into force of the new law are regulated by this Code.[11]

When a minor marries under the age of 18 years old, the marital property regime of community property is applied until she/he reaches the age of 18, after which time she/he can request a change of the marital property regime.[12]

According to the law, any spouses may agree, in the interest of the family, to alter partially or totally the marital property regime only after 2 years have passed from its implementation.[13]

The Marital property regime is divided in the Community Property Regime and Separate Property Regime. The community property regime is divided in the Legal Community and Community Contract (Marriage Contract).

Community property regime

Legal community

Marital estate and the personal assets

The community property regime is applicable when the spouses have not signed a contract designating another property regime.

The wealth of the spouses is presumed to be held jointly, unless one spouse proves its personal character pursuant to the art 76 of the Albanian Family Code.

The marital estate consists of: (a) the assets obtained by the spouses, together or separately, during the marriage, except those obtained through gift, inheritance or legacy; (b) income from specific activities of each spouse during the

[10] Article 314 of Albanian Family Code.
[11] Article 315 of Albanian Family Code.
[12] Article 7, para 2 provides 'The court in the location where the marriage is to be concluded may, for sufficient reasons, allow marriage prior to this age.'
[13] Article 72, para 1 of the Albanian Family Code.

marriage, which was not consumed, before the termination of joint ownership; (c) profits from the properties of each spouse, which have been acquired and not consumed before the termination of joint ownership; (d) business or trade activity created during matrimony. If the trade activity belonged to only one of the spouses prior to the marriage, but during the marriage was managed by both spouses, the community property portion of the estate includes only the revenues and added value.[14]

Pursuant to the art 77 of the Family Code in force, personal assets that are not considered part of the marital estate are: (a) assets, which prior to the marriage were jointly owned by one spouse and another person(s) or over which she/he was entitled to a real property usage right; (b) assets acquired during marriage through gift, inheritance or legacy, unless in the instrument evidencing the gift or in the testament it is stated that the assets were given to both spouses; (c) assets strictly for the personal use of each spouse and assets gained as accessory structures from personal wealth; (d) work equipment necessary for the performance of the profession of one of the spouses, except for those items that have been specified for the administration of a trade activity; (e) assets gained from an award of personal damages, except for pension funds obtained as the result of a partial or full loss of work capacity; (f) assets gained from the disposal of the above-mentioned personal wealth; (g) the exchange of assets, when this is expressly declared in a contract of sale.

Obligations of spouses in the legal community

Both spouses are responsible in equal shares for the assets in the marital estate, including: the obligations of the spouses relating to the purchase of the property; as well as for all expenses for the administration of common property; for all expenses of family maintenance and for all obligations incurred by the spouses, even if individually, which are in the interest of the family; for all additional contractual or non-contractual obligations, except for obligations specified as personal according to Family Code.[15]

Obligations of the spouses taken on prior to the marriage or that encumber inheritance and gifts obtained during the marriage remain personal obligations.[16]

In the case of the one's spouse obligation/s the creditor has the right to request payment initially from the personal assets and income of the debtor spouse. When the personal property of a spouse is insufficient to cover the creditor's claims, an amount not exceeding one-half of the community property may be used to satisfy the debt when: (a) the obligation was for the administration of the community property while acting beyond his/her rights of administration; and (b) it is a personal obligation, regardless of when it was incurred. If a personal obligation is paid from community property, the debtor spouse is

[14] Article 74 of the Albanian Family Code.
[15] Article 81 of the Albanian Family Code.
[16] Article 82 of the Albanian Family Code.

Click here to go to Main Contents

obligated to reimburse the marital estate for the amount of the debt. In any case, personal incomes of a spouse cannot be seized by the creditors of the other spouse, unless the obligation was for the maintenance of the residence and family as provided above on the responsibilities in the marital estate.

The Family Code has stipulated that the contractual obligations for personal interests paid from the community property should be reimbursed to the marital community by the debtor spouse. The same stipulation occurs when one of the spouses has paid a contractual obligation contrary to obligations imposed by marriage.[17]

Administration of the Marital Community Property

Each spouse has the right to perform ordinary administration of community property and at the same time is legal representative of the other spouse before administrative and judicial tribunals for issues of ordinary administration. The spouses must act jointly in the performance of actions that exceed ordinary administration (or are *ultra vires*).[18] In the case of refusal by one of the spouses, the authorisation will reserved from the court.[19]

Article 91 allows one of the spouses, even without the power of attorney or the authorisation of the court, to perform necessary actions even when mutual consent is requested. Also, the law provides the possibility of replacement in administration in the case of a lack of ability or bad faith of one of the spouses as the court decides on that. A spouse deprived of the administration rights may request that the court return those rights, if she/he can prove that the cause for the removal of those rights has terminated.[20]

Concerning the personal property, each of the spouses has the right to administer and freely possess it. Personal property may be administered by the other spouse only as authorised by a power of attorney under the rules on representation of the Albanian Civil Code.[21]

Termination of the Community

The Family Code stipulates that the Community Property regime terminates upon:

(a) the death of one of the spouses, a declaration that one of the spouses is missing or dead, a declaration voiding the marriage or the dissolution of the marriage;
(b) the division of the property;

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17 Articles 87 and 88/2 of the Albanian Family Code.
18 Article 90 of the Albanian Family Code.
19 Article 92 of the Albanian Family Code.
20 Article 93 of the Albanian Family Code.
21 Article 95 of the Albanian Family Code.

(c) a change of the marital property regime, if it terminates that regime.

Division of the property in the Legal Marital Community

In Albania, most often the division of the marital wealth is considered as one of the consequences of divorce. In the case of divorce, the ex-spouses may agree to the division of the marital wealth and if they fail to do so, then the court will divide it according to the civil procedural rules. According to Art 97 of the Family Code, the division of the wealth may not take place during the marriage, even in the case of the spouses' agreement. However, the Family Code does allow the division of the marital wealth during the marriage through the judicial process according to the rules of Civil Code and Civil Procedural Code, in the unusual case of poor administration by one of the spouses, where their manner of wealth administration puts at risk the interests of the other spouse or of the family, or when one of the spouses does not contribute to the needs of the family, in proportion with his or her situation and capacity for work and when there has been a factual division of the martial wealth. Division of wealth can be requested personally by one of the spouses or their legal representative but not creditors of one spouse. The decision by the court for such a division is applicable from the date the request was presented and places the spouses under the marital regime of separate estates, as provided for in this Code.[22]

A division of wealth in the marital estate shall be made according to the equality of its assets and liabilities. After deducting from the estate the obligations of the spouses and third parties, the remainder is divided into two equal shares. The court, based on the needs of children and on who will have custody of the children, may decide to award one spouse with a portion of the marital estate belonging to the other spouse.[23] Upon the initiation of proceedings for division of the marital property, spouses or their heirs have the right to retain personal movable property, owned by them prior to the marriage or that they have gained during the marriage in the form of inheritance or gift. In the absence of contrary evidence, however, movable property is presumed to be part of the marital estate.

The Family Code has stipulated the compensation in the process of the division of the marital estate. Each of the spouses should reimburse the amounts taken from the marital estate, which were used for purposes other than the fulfilment of marital obligations in the legal community regime. According to art 104, when compensation is made in favour of one spouse, that spouse takes from the marital estate a sum equal to the value that the estate owes him/her. If the assets of the marital estate are not sufficient to cover this obligation, the other spouse is indebted for the difference. If the assets of the marital property are not sufficient to fulfil obligations of the marital estate towards third parties, creditors have the right to request payment from both spouses, who are jointly liable. A spouse, who has paid an obligation of the marital property where

[22] Article 98 of the Albanian Family Code.
[23] Article 103 of the Albanian Family Code.

Click here to go to Main Contents

there were insufficient assets, has the right to reimbursement from the other spouse for the portion of the obligation paid on his/her behalf.

III MARRIAGE CONTRACTS

The Marriage Contract is an instrument used by future spouses or spouses, who decide between different models of the marital property regimes. This is a solemn contract, which might be realised only through a notary. Such a contract is related to the marriage and has effects only when the marriage is concluded. During the marriage, it may be that that the spouses, for the family interests, may agree on the change of the marital property regime, and that will be realised through a notary, too. The marriage contract is different from the other contracts provided in the Albanian Civil Code. The marriage contract has an institutional character, has not limited effects for the spouses and at the same time is not obligatory for the future spouses or the spouses.

(a) Form of the contract

According to the recent Albanian family legislation the future spouses through a special agreement can designate another marital property regime different from the Legal Community. Also, the spouses are allowed to change the marital property regime through agreement. However, the provisions of the contract should be in accordance with the family legislation in force and further legislation applicable referring to the relevant issue in discussion. Also, spouses cannot evade their rights and obligations originating from the marriage, their parental responsibilities and the rules of legal administration and guardianship pursuant to art 67 of the Family Code.

According to art 69 of the Albanian Family Code, the matrimonial contract is concluded through a notary act, in the presence of and with the simultaneous approval of the future spouses or their representatives. When the contract is signed, the public notary issues a notary certificate to the parties, confirming the identity of the parties, their future marital address, and the date of the endorsement of the contract. The public notary is required to deposit copies of the contract in the civil registration office before the marriage is concluded. If, in the marriage act, it is shown that the spouses have not signed a contract, they will be considered, in regard to third parties, as married under the community property regime.

In the case of the altering partially or totally of the marital property regime, this must be done in the same form that is required for the initial matrimonial contract and has effect to the third parties 3 months after it has been deposited in the matrimonial register.[24]

[24] Article 72, paras 2, 3 of the Albanian Family Code.

(b) Object of the contract

According to the rules of the marriage contract as provided through art 112 of the Family Code, the spouses may agree to an unequal division of the assets in the marital estate, but will remain liable up to their share in the marital estate and any clause that obligates a spouse beyond his or her share of the marital estate or excludes their liability is void.

Also, the spouses can agree to: (a) include movable property acquired prior to marriage and income from personal wealth during marriage in the marital estate; (b) change the rules regarding administration; (c) have unequal shares; (d) have joint community.[25]

Where the parties agree that the marital estate includes movable property acquired prior to marriage and income from the personal wealth during marriage, the marital estate will include the property in the legal community regime.

Personal property that cannot be the object of the marriage contract are: (a) assets strictly for the personal use of each spouse and assets gained as accessories from personal wealth; (b) work equipment necessary for the performance of the profession of one of the spouses, except for those specified for the administration of a trade activity; (c) assets gained from an award of personal damages, except for pension funds obtained as the result of a partial or full loss of work capacity.

Spouses may agree in the marriage contract to reimbursement of their premarital debt, which may be paid from the marital estate but only up to the limit of their share of the value of the estate.

The contract may include the joint community of both movable and immovable properties existing at the time of the marriage and those that may be acquired in the future, except assets strictly for the personal use of each spouse and assets gained as accessories from personal wealth; work equipment necessary for the performance of the profession of one of the spouses, except for those that have been specified for the administration of a trade activity; and assets gained from an award of personal damages, except for pension funds obtained as the result of a partial or full loss of work capacity. The joint community is liable for all the obligations of the spouses that existed at the time of signature of the contract and during the marriage.[26]

[25] Article 108 of the Albanian Family Code.
[26] See art 114 of the Albanian Family Code.

Click here to go to Main Contents

(c) Administration of the marital property in the marriage contract

Through the marriage contract the spouses may agree to change the general rules of the administrations provided for the legal community.

Referring to art 111 of the Family Code, spouses can agree in the contract to a joint administration of the marital estate. In this case, the acts of administering and disposing of assets will require joint signatures and consent of the spouses and will require their joint obligation.

(d) Division of the property in the marriage contract

The rules provided in the Family Code, Civil Code and Civil Procedural Code are applicable in the division of the marital estate under the marriage contract. Such rules are the same as in the division of the marital estate in the legal community, taking in consideration the will of the parties in the marriage contract, which is found legal and valid.

IV SEPARATE PROPERTY REGIME

(a) Object of the contract in the separate property regime

Spouses in the marriage contract may agree on the marital regime, which may be different from that of community. When spouses have specified in their marriage contract a separate property regime, each of them reserves the rights to freely administer, use and dispose of his/her property. Each spouse is personally liable for separate obligations, incurred before or during the marriage, except when the spouse has not reached the age of 18.

Spouses are liable for obligations arising from the marriage, based on the provisions of the marriage contract.

If the contract does not specify liability for obligations arising from the marriage, the spouses will still be liable in accordance with art 54 of this Code.

(b) Administration of the property in the Separate Property Regime

In the Separate Property Regime, each of the spouses administers his or her own property. One of the spouses can entrust to the other spouses the administration of his/her personal wealth applying the rules of representation through the power of attorney according to the Civil Code.

In practice this usually happens when one of the spouses administers the wealth of the other spouse, without a power of attorney, but with the knowledge of

and without the objection of that spouse. In such cases, the actions related to administration, but not to those related to disposal are considered to have been consented to. If one of the spouses, despite the objection of the other, administers the wealth of the latter or performs actions related to this wealth, she/he is responsible for any damages and for loss of earnings.[27]

The spouse, acting under a power of attorney, is not required to give an accounting for the restitution of profits, unless the power of attorney document expressly requires it.

(c) Termination of the Separate Property Regime

A separate property regime terminates with the death of one of the spouses, divorce or annulment of the marriage.

In the case of the death of one of the spouses, according to art 120, the division of wealth between spouses with a separate property regime is based on the laws of inheritance for the division of property among heirs. As it regulates the form, this includes the preservation of inseparable commodities as undivided, the system of preferences, auction of indivisible commodities, the effects of division, and guarantees and differences.

The same rules are also applied after the dissolution of a marriage, except for the system of preferences.

In the case of the termination of the marriage, including the annulment of the marriage and where the wealth of one of the spouses has increased during the marriage, the other spouse who has contributed in some way to this increase has the right to demand restitution for their added contribution.

V CONCLUSIONS

Nowadays Albania has contemporary legislation on the marital property regime, reflecting the social and economic developments during those 25 years after the fall of the communist regime.

For the first time through the Family Code of 2003 now in force, the law stipulates that the spouses may agree on the choice of the marital property, expressing their will in a premarital agreement or during the marriage through a contract. Legal equality and the contractual freedom are the main principles on which is based the legal framework of the marital property regime.

I do not here pretend to complete a detailed treatment of the judicial practice of the marital property regime, but only to present in this survey the legal framework of the marital regime in Albania today.

[27] Article 118 of the Albanian Family Code.

Even now, the Legal Community remains the most applied marital property regime in Albania even though the legislation has stipulated the marriage contract. The separate Property Regime is less applicable in practice, and the Marriage Contract remains with a limited application in practice because of various prejudices in the Albanian society.

AUSTRALIA

THE PROBLEM WITH CHILD SUPPORT REFORM IN AUSTRALIA: DEPARTURE APPLICATIONS – A CASE IN POINT

Lisa Young[*]

Résumé

Quel que soit le système en place, la question des pensions alimentaires dues aux enfants fait toujours l'objet de controverses politiques. Dans cette matière, comme dans d'autres domaines du droit de la famille, des groupes de pression mécontents se font entendre et parviennent à s'immiscer avec succès dans la gestion du calendrier des programmes de réforme. Il serait opportun de mettre en place un processus d'évaluation continue et d'examen des dispositions relatives aux pensions alimentaires en Australie, mais les réformes sont coûteuses et la question de ces pensions alimentaires est complexe. Il appartient pourtant au gouvernement d'élaborer un solide plan de réforme qui devra tenir compte de la complexité du système, faire en sorte d'éviter les récidives et renforcer le recours à des preuves tangibles. Les dernières aspirations du gouvernement australien quant à la réforme du régime des pensions alimentaires pour les enfants ne reflètent en rien cela, mais sont plutôt une réaction électoraliste menée par les groupes de pression appelant au changement. La genèse de ce processus, sa méthodologie ainsi que le manque d'expertise du comité concerné, ont abouti à un rapport décevant, tout particulièrement lorsque les questions de nature juridique touchant au fond du droit (contrairement aux questions de procédure) sont abordées. C'est en tenant compte de ce contexte que le présent article entend critiquer le mode d'évaluation des pensions alimentaires pour les enfants, notamment en ce qui concerne les problèmes fréquemment soulevés par le paiement des frais de scolarité des écoles privées et la prise en compte des capacités financières de l'un des parents.

Child support is a highly controversial policy area, no matter the system in place. Like other areas of family law, there are very vocal, and disaffected, lobby groups whose success in driving reform agendas is well documented. There may well be good cause to have an ongoing process of evaluation and review of a Scheme such as Australia has in place for child support. However, reform is expensive and child support is complex. Thus, it behoves the government to develop a robust plan for ongoing reforms, which will take account of the complexity of the system, avoid repetition and rely on sound evidence. The most recent move by the Australian government to consider

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Click here to go to Main Contents

reform of the child support Scheme reflects none of this, but rather is another election driven reaction to time-worn calls for change from lobby groups. The genesis of this process, together with its methodology and lack of expertise of the relevant committee has resulted in a disappointing report. This was particularly the case where matters of legal substance (as opposed to process) were considered. Against this backdrop, this chapter critiques how the report dealt with an important legal process – departures from child support assessments – and in particular the often raised issues of the payment of private school fees and a parent's financial circumstances.

I INTRODUCTION

The level of public discontent surrounding Australia's child support scheme ('the Scheme') comes as no surprise to anyone working in the field of family law. Politicians are routinely petitioned by their constituents about the Scheme's perceived injustices and so someone new to Parliament – as lower house MP George Christensen was in 2010 – might be forgiven for thinking that the Scheme was in need of major review. Notwithstanding that Australia has arguably one of the most sophisticated child support schemes in the world, and underwent a major review culminating in significant reforms in 2006–2008, in 2014 Mr Christensen 'spoke out' about the need for review of the family law and child support systems;[1] again not surprisingly to those working in the area, his particular concerns echoed those of fathers' rights groups[2] and it was clear that the perceived unfairness of the formula was to be revisited yet again.

Australian research has documented the success of fathers' rights groups in driving the family law reform agenda,[3] and the willingness of the legislature to act on anecdote rather than data.[4] And so, Mr Christensen's call resulted in him heading up yet another enquiry into the Scheme. The report, *From conflict to cooperation: Inquiry into the Child Support Program* ('the Christensen Report'), was delivered in July 2015[5] and in August 2016 the government responded.[6] The fact that the government was prepared to undertake another

1 K Cook and K Natalier 'Using and Ignoring Evidence: The Case of Australian Child Support Law Reform, Symposium: Reform and Rhetoric in Australian Social Policy' *Australian Review of Public Affairs*, September 2014, available at www.australianreview.net/digest/2014/09/cook_natalier.html (accessed 3 March 2017).

2 Ibid; M Vnuk, B Smyth and T Archer 'Comment on the 2015 report of the Parliamentary Inquiry into the Child Support Program' (2015) 5 *Fam L Rev* 155 at 157.

3 See K Cook and K Natalier, The Gendered Faming of Australia's Child Support Reforms' (2013) 27(1) *Int J Law Policy Family* 28.

4 R Graycar, 'Family Law Reform in Australia, or Frozen Chooks Revisited Again?' (2012) 13(1) *Theoretical Inquiries in Law* 241.

5 House of Representatives, Standing Committee on Social Policy and Legal Affairs, *From conflict to cooperation: Inquiry into the Child Support Program*, June 2015, www.aph.gov.au/childsupport (accessed 4 March 2017).

6 Available at www.dss.gov.au/families-and-children/publications-articles/australian-government-response-to-the-house-of-representatives-standing-committee-on-social-policy-and-legal-affairs-report-from-conflict-to-cooperation-inquiry-into-the-child-support-program (accessed 4 March 2017).

expensive taxpayer-funded enquiry (after having recently completed a major review of the Scheme) on the basis of so little raises questions about the process of family law reform in Australia. One might well ask just how much time and money the government is willing to spend to appease vociferous advocates of child support reform. It is telling that aside from the sensible step of reviewing some of the figures being used in the formula given the passage of time – something which had been foreshadowed as necessary during the last review[7] – the government expressed ongoing commitment for the fundamentals of the Scheme, and is not proposing to make any significant changes to the formula for assessment of child support. As Vnuk and coauthors note, most of the recommendations are about service delivery and require no legislative change.[8]

However, it would indeed be surprising if the Scheme could not be improved, both in terms of process and substance. Given how much public ire child support issues generate, ongoing refinement is no bad thing, though of course considered and sensible reforms may never appease those most dissatisfied with the system. But good reform would require a far more targeted and sophisticated analysis of both the underlying philosophy of the legislation, its practical operation and the jurisprudence developed so far, than was evidenced in this most recent inquiry.

Space constraints (and the technicalities of the Scheme) are such that this chapter cannot tackle in detail the various shortcomings of this most recent inquiry. Moreover, it is not surprising that in such a process there are positives. After a critique of the review and its key recommendations, Vnuk et al conclude thus:

> 'And while the terms of reference represent a "grab-bag" of competing post-separation gender issues, the Committee's final recommendations bear little relation to these references – which suggests that the Committee (and its secretariat) genuinely engaged with the issues before it rather than cherry-picking the evidence and ideas to support a pre-determined position. There certainly appears to be a shift in tone to a more balanced set of voices heard. Mothers groups appear to have been better organised and to have been able to convey their ideas more forcefully in this inquiry than in previous inquiries.
>
> While some might see the most recent child support evaluation as a "tick-the-box" inquiry, the present authors hold a more positive view. The Inquiry has been a useful catalyst for keeping child support issues on the policy radar. Depending on the government's response, the Inquiry's report has the potential to act as a useful springboard to a more technical examination by an expert group.'[9]

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7 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, [17.7] at www.dss.gov.au/sites/default/files/documents/best_interests_children_full_report.pdf.

8 M Vnuk, B Smyth and T Archer 'Comment on the 2015 Report of the Parliamentary Inquiry into the Child Support Program' (2015) 5 Fam L Rev 155 at 161.

9 M Vnuk, B Smyth and T Archer 'Comment on the 2015 Report of the Parliamentary Inquiry into the Child Support Program' (2015) 5 Fam L Rev 155 at 166–167.

Click here to go to Main Contents

But herein lies the problem. Rather than developing an ongoing and sophisticated process of evaluation where good evidence is collected and evaluated by experts (in addition to users of the Scheme), politicians react to appease the vocal disaffected resulting in an unfocussed process that invariably wastes time and money going over well-worn matters. Vnuk et al note that just prior to the 2013 federal election, the National Party supported a motion to garner government backing to review the Scheme based on a list of complaints that are strongly aligned with those of the fathers' rights movement in Australia.[10] So, while the review may serendipitously result in some worthwhile reforms, its potential was seriously undermined by its genesis, the lack of expertise of the Committee, and the nature of the evidence-gathering process that was undertaken.

This chapter will focus on two issues raised in the review, which were very poorly addressed, both of which arise out of the departure process. This is the process by which parents can seek to have their child support liabilities determined outside the administrative formula. Departure applications are very significant because they are the main site of legal decision making about what is 'fair' in child support awards. Two of the most common grounds for seeking a departure from the formula assessment are the question of the payment of private school fees, and whether the assessment is fair based on a parent's financial situation, including earning capacity.

Before turning to these issues, the chapter outlines briefly the history of the Scheme and its present operation.

II THE INTRODUCTION AND CURRENT OPERATION OF THE AUSTRALIAN CHILD SUPPORT SCHEME

(a) In the beginning …

Prior to the Scheme, Australia had a court-based discretionary system for the making of child maintenance orders. The typical problems arose: maintenance orders were for low amounts and many parents did not have any orders in place or receive their maintenance.[11] Child maintenance was seen as a 'top-up' to government welfare payments for sole-parent families, with 85% of such families receiving these benefits. Because orders were not indexed for inflation, it was costly to return to court for an increase and enforcing orders involved further, costly, court proceedings. Emerging research data showed that women (and thus the children living with them) were, of course, the major losers under

[10] M Vnuk, B Smyth and T Archer 'Comment on the 2015 report of the Parliamentary Inquiry into the Child Support Program' (2015) 5 *Fam L Rev* 155 at 156.

[11] As to the reasons why parents did not seek maintenance orders, see M Harrison, P McDonald and R Weston 'Payment of Child Maintenance in Australia: The Current Position, Research Findings and Reform Proposals' (1987) 1 *International Journal of Law and the Family* 92.

this regime, with a deterioration in their living standards post-separation, whereas fathers were likely to experience an increase in living standard.[12]

The idea of a radically different approach to child support was proposed by the 1986 Cabinet Sub-Committee on Maintenance and endorsed by the government of the day. It was to involve an administratively assessed, formula based, rate of child support that could be automatically taken from a payer of child support for transfer to a payee. This was such a significant departure from the existing mechanisms that it was decided to introduce the Scheme in two stages, the first stage[13] being the creation of a departmental infrastructure that could collect court ordered maintenance, and Stage 2[14] introducing the formula-based assessment for eligible children. Thus, for a long time there were two populations of children – Stage 1 and Stage 2 (with only Stage 2 cases having formula-based assessment); however with the passage of time all cases now fall under Stage 2.

While alleviating child poverty in single parent families was certainly a factor in the introduction of the Scheme, the government was acutely aware of the need to reign in the welfare spent in those same families.[15] In an announcement about the Scheme in 1987, the relevant Minister spoke of the Scheme having the following objectives:

(1) that non-custodial parents should share the cost of supporting their children according to their capacity to pay;
(2) that adequate support be available for all children of separated parents;
(3) that Commonwealth expenditure be limited to what is necessary to ensure that those needs be met;
(4) incentives for both parents to participate in the labour force are not impaired;
(5) that the overall arrangements should be simple, flexible, efficient and respect personal privacy.[16]

(b) The Scheme

In broad overview (and focussing on Stage 2 cases that were fully in the Scheme), the Scheme as originally implemented had a number of key features. The court no longer played a major role in the making, or enforcement of, child maintenance orders. A federal government department (originally housed in the

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[12] L Young, A Sifris, R Carroll and G Monahan *Family Law in Australia* (9th edn, LexisNexis Butterworths, Australia, 2016) at [11.2].
[13] Commenced operation on 1 June 1988.
[14] Commenced operation on 1 October 1989.
[15] L Young, A Sifris, R Carroll and G Monahan *Family Law in Australia* (9th edn, LexisNexis Butterworths, Australia, 2016) at 743.
[16] D Daniels *The Child Support Scheme*, Department of the Parliamentary Library, 11 October 1990, available at www.aph.gov.au/binaries/library/pubs/bp/1990/90bp29.pdf (accessed 17 April 2017).

Australian Taxation Office, but presently found in the Department of Human Services) became responsible for both creating and enforcing, 'child support assessments'. Assessment of child support was based on a formula that depended on only a very few variables: the paying parent's income,[17] the number of children, and the payer's care of the children where it exceeded about 30% of nights in a year. Thus, in many cases a percentage tied to the number of children (eg 18% for one child) was simply applied to the paying parent's income (after deduction of a small self-support amount) to derive an annual rate of child support.[18] The paying parent owed the debt to the Commonwealth (who then paid the money on to the payee if recovered) and the relevant Department had considerable enforcement powers, including the ability to garnish the support payment direct from the payer's wage.

The Scheme underwent early evaluation[19] and was also the subject of much public criticism and so reforms began quite quickly as various reports investigated the operation of the Scheme. The Australian Institute of Family Studies was commissioned to evaluate Stage 1,[20] the Child Support Evaluation Advisory Group was appointed in 1989 and reported in 1990,[21] and in 1992 a Joint Select Committee reviewing family law matters[22] commented on child support issues as a result of which a parliamentary inquiry into the Scheme was conducted in 1993–94 and reporting in 1994.[23] Then, in 2003, the relevant Minister and then Attorney-General directed the Standing Committee on Family and Community Affairs to inquire into 'child custody arrangements in the event of family separation'. A term of reference was included requiring the Committee to consider 'whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children'. In response to the resultant 2003 Report[24] the Government of the day set up a

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17 A payee's income was only factored in when it exceeded quite a high threshold and therefore most assessments effectively ignored the payee's income.

18 There were (and remain) a number of formulae to accommodate, for example, children living in different households, shared care and multiple cases: L Young, A Sifris, R Carroll and G Monahan *Family Law in Australia* (9th edn, LexisNexis Butterworths, Australia, 2016) at [11.72].

19 As early as 1989 an evaluation group was appointed that reported in 1990: J Fogarty (chair), Child Support Evaluation Advisory Group *The Child Support Scheme: Adequacy of Child Support and Coverage of the Sole Parent Pensioner Population* (AGPS, Canberra, 1990). For further details on the various reports and recommendations see L Young, A Sifris, R Carroll and G Monahan *Family Law in Australia* (9th edn, LexisNexis Butterworths, Australia, 2016) at [11.10]–[11.26].

20 M Harrison, G Snider, and R Merlo *Who Pays for the Children? A First Look at the Operation of Australia's New Child Support Scheme* (AIFS, Melbourne, 1990); M Harrison et al *Paying for the Children: Parent and Employer Experiences of Stage One of Australia's Child Support Scheme* (AIFS, Melbourne, 1991).

21 See n 19 above.

22 Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act 1975 (Cth) *The Family Law Act 1975: Aspects of its Operation and Interpretation* (AGPS, Canberra, 1992).

23 Joint Select Committee on Certain Family Law *Child Support Scheme: An Examination of the Operation and Effectiveness of the Scheme* (AGPS, Canberra, 1994).

24 K Hull (chair), Standing Committee on Family and Community Affairs *Every Picture Tells a Story: Inquiry into child custody arrangements in the event of family separation*, Canberra, 29

Taskforce to deal with specific recommendations about the operation of the formula. The 30 recommendations in the Taskforce's Report[25] were largely implemented in three waves of reforms with the last commencing operation on 1 July 2008. This included the introduction of a new and much more complex formula. At the heart of much of the criticism of the formula over the years had been the complaint that the original and very simple formula was not fair and needed to be more nuanced to better reflect the complexity of modern families. Whether one agrees with the changes made or not, this was a fairly comprehensive review that attempted to use evidence where it could for the basis of its suggested reforms.

So, how then does the current Scheme operate and how are assessments for child support calculated? Parents may – or must, if they want to receive certain government benefits[26] – apply for registration of their case with the Department. An assessment for child support will issue. Parents may pay privately between themselves, or have the Department collect the child support. In the latter case, the debt is owed to the Commonwealth[27] and the Department has a range of substantial powers to enforce and encourage payment ranging from garnishing wages to issuing orders to prohibit child support defaulters from leaving the country.[28] Parents can enter into agreements and elect to have them collected by the Department.

The calculation of the child support liability is now very complex. In broad terms however it operates like this:

- Calculate an adjusted taxable income for both parents. This is usually the person's most recent taxable income, with some automatic variations (eg adding back negatively geared property losses).
- Deduct a self-support amount from each parent's income.[29]
- Add the two modified parental incomes together to get a combined parental income.
- Determine the notional total costs of the children from a table with bands that factors in:
  - the number of children and their ages;[30]

December 2003, see www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=fca/childcustody/report.htm (accessed 4 March 2017).

25 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 at www.dss.gov.au/sites/default/files/documents/best_interests_children_summary.pdf.

26 On this, and the available exemptions, see L Young, A Sifris, R Carroll and G Monahan *Family Law in Australia* (9th edn, LexisNexis Butterworths, Australia, 2016) at [11.52] and [11.60].

27 Child Support (Registration and Collection) Act 1988 (Cth), s 30, however, see further L Young, A Sifris, R Carroll and G Monahan *Family Law in Australia* (9th edn, LexisNexis Butterworths, Australia, 2016) at [11.53].

28 L Young, A Sifris, R Carroll and G Monahan *Family Law in Australia* (9th edn, LexisNexis Butterworths, Australia, 2016) at [11.55]–[11.57].

29 The amount in 2017 was AUD$21 154 (see http://guides.dss.gov.au/child-support-guide/2/4/2).

30 There are higher values for children aged over 13.

Click here to go to Main Contents

  - the combined parental income.
- Apportion that cost between the parents based on their proportionate share of combined parental income, adjusting for the costs already met by the level of care the parent has of the child.

So it can be seen that a parent is expected to pay their proportionate share of the notional costs, with a reduction if they are already meeting some of those costs through direct care of the child. A paying parent with no care (which is deemed to be less than 52 nights care per year) will thus pay their full share of costs to the payee parent. The more care the paying parent has, the less they pay. While 30% care had been required for a reduction, 14% became the threshold. If parents have equal shared care and equal incomes, therefore, no child support will be paid by either parent. But if one parent has a greater income than the other parent, then they would be expected to pay more than half of the child's costs, and so would have a child support liability to pay to the other parent, even though care is shared equally. The table of notional costs of the child does not go up ad infinitum. Once an income-related maximum notional cost is reached, a paying parent's child support can only increase if the share of total parental income increases. Thus, if a very high earning parent has 100% of the income (as the carer parent has little or no income) then there is a maximum possible child support liability. The formula also accounts for other liabilities a parent has to support other children (dependent biological children in their household and children in other child support cases).

While the formula is much more complex than its predecessor, it can be seen that it is still based on a few key pieces of information: parents' incomes, number and ages of children, level of care and other legally dependent children.

There are a range of ancillary processes surrounding the operation of the Scheme. As indicated above, from a legal point of view, one very important process is 'departures' – what in the Department is formally called the 'Change of Assessment' process. Since 1992 the legislation has provided that parents can apply to have the formula assessment reconsidered in limited circumstances (the legal framework for this is detailed below). A departmental decision maker will conduct a (free) de novo review of the assessment in light of the statutorily determined[31] grounds for a departure from the formula assessment; if one of those grounds is established then the decision maker will consider the fairness of making a change to the assessment. Both parents can participate and the decision maker has very extensive powers to obtain information. Any decision made can be the subject of an internal merits review, and then a further merits review can be sought in the federal Administrative Appeal Tribunal. An application to court can only follow if the issue raises a matter of law.[32] This

[31] See below for discussion of the provisions.

[32] For further detail see L Young, A Sifris, R Carroll and G Monahan *Family Law in Australia* (9th edn, LexisNexis Butterworths, Australia, 2016) at [11.74].

process has not changed much under recent reviews of the Scheme, though there have been some amendments to the grounds for departure from the formula from time to time.

(c) The Christensen review and the departure process

It's difficult to know whether George Christensen (or his party) had considered in detail the many voluminous reports, and indeed the Scheme itself, when he called for a further review, or whether instead he and his political colleagues took at face value those constituents who contacted him with their side of their story. Despite the government having set up a Taskforce to deal with previous calls that the formula was too simplistic and in need of an overhaul, and despite the government having implemented the Taskforce's recommendations (which were based on a lengthy report), Christensen now asserted that one of the Scheme's key failings was that it was too complex.[33] Make no mistake; the new formula is much more complex and the computations can no longer be performed on a hand held calculator. However, the Department has online calculators that require simply that the information listed above be inputted. Needless to say, those critics who inspired Christensen to make this call, had other complaints and so it was not only the formula that was considered – but yet again special interest was expressed in reviewing how child support was calculated.[34] There was no term of reference specific to departures though one term of reference was to consider the flexibility of the Scheme to accommodate changing family circumstances,[35] some aspects of which are germane to departures.

In addition to the more familiar submissions and public hearings, one of the evidence gathering mechanisms for this review was an online questionnaire that anyone could complete as well as other informal ways for the general public to communicate their views to the Christensen Committee. The Committee estimates that through the various channels 12,000 people contributed. In relation to the questionnaire, despite stating that it was 'not designed to produce scientifically rigorous statistical information'[36] it refers to the information as data[37] saying it was 'very useful'[38] though perhaps more in providing context.[39] The concern that people would complete the questionnaire multiple times was dismissed on the basis that 'there is no indication this … occurred'[40] (it is unclear how this could be ascertained). In the usual way, the

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33 The Nationals 2012, 'George slams complex child support system: "Time for an overhaul!"', 25 July [Online], www.nationals.org.au/News/tabid/60/articleType/ArticleView/articleId/7625/Georgee-slams-complex-child-support-system-Time-for-an-overhaul.aspx (page now removed).

34 The Christensen Report, at p xi.

35 Ibid.

36 The Christensen Report, at [1.23].

37 The Christensen Report, at [1.22].

38 Ibid.

39 M Vnuk, B Smyth and T Archer 'Comment on the 2015 report of the Parliamentary Inquiry into the Child Support Program' (2015) 5 Fam L Rev 155 at 159.

40 The Christensen Report, at [1.23].

Click here to go to Main Contents

Christensen Committee received submissions from people other than users of the system, though less than one would expect.[41] While the Committee did have access to some experts with either research or technical expertise, in some areas the Christensen Report evidences a striking lack of technical understanding and considerable confusion.

The ultimate conclusion of the review was that, generally speaking, the Scheme works quite well. But as was to be expected, a broad general call to the public to comment on the Scheme resulted in familiar issues being raised. As a consequence, the Report spends a deal of time revisiting issues that have been well canvassed before but are still being challenged by customers who feel some aspect of the system disadvantages them (or indeed who do not understand the system). Further, and as outlined later in this chapter, there are recommendations based primarily on anecdotal evidence including in some instances only one comment. Vague claims about cases professionals have dealt with transform into direct recommendations in the Report. Some recommendations show little understanding of the Scheme processes they target. Some recommendations make little sense. And some recommendations defy credulity in terms of how they might be implemented, again showing little appreciation by the Christensen Committee of the processes involved.[42]

However, this chapter will focus on two aspects of the departures process that featured in the Report. Before turning to those sections of the Report, and the Government's response, more detail is provided below on departures, so that the Committee's deliberations and recommendations can be better understood.

III CHILD SUPPORT DEPARTURES: AN ARGUMENT FOR BETTER REFORM PROCESSES

(a) The departures framework

While the Australian System is in some senses a 'one-size fits all' model, based on the notional costs of notional children, since 1992 the Scheme has provided space for discretionary decision-making in limited circumstances. Section 117 of the Child Support (Assessment) Act (Cth) 1989 ('the Act') allows applications to be made to vary the formula-based assessment, when there is a 'special circumstance' falling within one of a list of specified categories. As noted above, this procedure – which allows a decision-maker to depart from the formula-based assessment and decide what is fair by way of a child support award – now reflects the heart of legal decision-making about child support awards in Australia. Whereas once judges decided this matter, now, by and

[41] M Vnuk, B Smyth and T Archer 'Comment on the 2015 report of the Parliamentary Inquiry into the Child Support Program' (2015) 5 Fam L Rev 155 at 159.

[42] In this regard, the last dot point of Rec 5 stands out – it exhorted the government to consider child support income management 'where there are substantiated allegations of child support payments not being adequately spent on the needs of the child'. Sensibly the government rejected this proposal.

large, specialist Departmental decision-makers (many of whom, though by no means all, are legally trained) hear and determine thousands of delegated departure applications every year.

However, there is little judicial guidance for these decision-makers on what are complex and sometimes rather vague provisions. As I have documented elsewhere, these matters rarely end up in superior courts, and there has even been a degree of confusion among judicial officers as to the operation of the key provisions.[43] Without developed superior authority, the question of interpretation becomes a difficult one.

Section 117 of the Act provides that an application may be made by either parent (or a non-parent carer entitled to support from the parents) to depart from the assessment. In essence the section sets out a three-step approach to determining these matters.[44] First, a parent must show a special circumstance that fits within one of the specified categories set out in the section. Once this threshold is met, then the question becomes what is fair, and the enquiry at this stage very much resembles the enquiry a court would have made. The reasonable costs of the child/ren are ascertained and then an assessment is made as to what is a fair sharing of those costs between the parents, taking account of their respective financial situations. At this stage (in theory at least) the formula is not being applied,[45] but rather a discretionary decision is being made as to the appropriate maintenance for the child(ren) in question. Finally, a decision-maker must be satisfied that any decision is 'otherwise proper', which basically means fair to the taxpayer. This last step is included to ensure that decisions are made with a view to the public purse. So, for example, a decision to reduce child support to a payee parent – and thus increase their entitlement to income-tested government benefits – based on the paying parent meeting a joint obligation for a pre-separation investment loan may not, on the face of it, be proper from the taxpayer's point of view.

In terms of the first threshold question – whether there is a special circumstance falling within the specified categories – the Department has packaged up the relevant parts of s 117 into ten 'grounds' for a 'change of assessment', as follows (though very simplified):

- High contact costs (greater than 5% of the parent's income)
- Special needs costs
- High and agreed-upon education, care or training costs
- Child's income
- Payments made in lieu of child support

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[43] L Young '"Special circumstances" in Child Support Departure Applications and the Very Wealthy' (2015) 29(1) AJFL 1.

[44] *Gyselman* [1991] FamCA 93; (1992) FLC 92-279.

[45] Note *Styles & Palmer* [2014] FamCA 383 at [361] referring to the Full Court decision of *Beck v Sliwka* (1992) 15 FLR 520; FLC 92-296; this does not mean decision-makers should not have regard to what a formula rate may be, as a 'cross check and balance'.

Click here to go to Main Contents

- High child care costs (greater than 5% of the parent's income)
- High expenses impacting a parent's ability to meet a child's care costs
- A parent's income, assets, financial resources or earning capacity
- Costs for another legal dependent not accounted for in the formula that impact the parent's ability to meet a child's care costs
- In very limited circumstances, support of a child living in the parent's household

These grounds are referred to as Reasons, so they are Reason 1, Reason 2 etc. It is Reasons 3 and 8 that were discussed in some length in the Christensen Report, and these are the most common grounds in applications to the Department for departure (Reason 3 accounted for nearly 11% of the reasons relied on, and Reason 8 just over 54%, in 2008–09).[46]

(b) Departing on the grounds of care, education or training costs – Reason 3

Section 117(2)(b)(ii) provides a ground for departure where, in the special circumstances of the case, the costs of maintaining the child are significantly affected because 'the child is being cared for, educated or trained in the manner that was expected by his or her parents'.

Typically, none of the key words in this provision is defined in the Act. What is meant by, and so encompassed within, the words 'cared', 'educated', 'trained' and 'manner'? What is sufficient to amount to an expectation? When must this expectation exist? Does the use of the present tense exclude applications where the child is not presently being so educated, etc, because one of the parents has refused to contribute and the other parent has not been able to maintain the cost of the education or training pending an increase in child support?

Prior to the introduction of the Scheme, the Family Court had of course considered the issue of private school fees in setting child maintenance. The Full Court, in *Mee and Ferguson*,[47] had this to say about the responsibility of parents to contribute to the costs of a private education post-separation:

> 'Where the non-custodian has agreed to the child attending such a school that person is liable to contribute to the fees involved so long as and to the extent that he or she has a reasonable financial capacity to continue to do so. Where the non-custodian has not agreed to the child attending such a school he or she is not liable to contribute to those expenses unless there are reasons relating to the child's welfare which dictate attendance at that school rather than at a non-private

[46] *CSA facts and Figures 08-09* is the last such document of its kind and the figures show these two reasons as being by far the most common: www.humanservices.gov.au/sites/default/files/documents/facts-and-figures-2009.pdf (accessed 25 March 2017).

[47] *Marriage of Mee and Ferguson* (1986) 84 FLR 179.

> school. Then the non-custodian, as an aspect of the welfare and maintenance of the child, is required to contribute to the extent that he or she has a reasonable financial capacity to do so.'[48]

Since the introduction of the departures process, this case, and that extract, continue to be routinely cited by Australian family courts in applying the new child support sections,[49] despite the very different wording of the new legislation. Indeed, there are some stark differences between the *Mee* formulation and s 117(2)(b)(ii). First, *Mee* refers only to schooling, second the word 'agreement' is not used in the section and third, there is no reference in the section to a welfare basis for requiring a parent to contribute to school fees. Moreover, it is not clear whether under *Mee* one could apply the welfare basis to applications about 'care' and 'training'.

Despite these significant divergences, in *Lightfoot v Hampson*[50] the Full Court said it had been correctly assumed by the court since 1989 that:

> 'the [*Mee*] principles apply in determining [the matter under s 117(2)(b)(ii)] … That is, that sub-paragraph provides the structure or source of authority by which the issue is determined, and the pre-existing principles continue to apply. It would obviously be unsatisfactory if different principles applied to the same issue depending on an accident of time.'[51]

The reference to an 'accident of time' is surprising to say the least, given that the fairly lengthy transition introducing the Scheme saw a great many children and parents intentionally the subjects of starkly different provisions due to that 'accident of time'. Surely change was the whole point of the new Scheme.

The continued uncritical application of *Mee* by Australian family courts is extremely problematic. For example, it is inappropriate as a matter of statutory interpretation to refer now to *Mee* as authority for the point that the fact a payer can afford to pay school fees is not sufficient to require payment.[52] The plain words of the statute say this (in requiring a joint expectation) and so should be the primary source of citation; no reference to *Mee* is required to divine the intention behind the words of the section. I have argued elsewhere that in both child support and family law matters there is at times a failure to adopt a rigorous process of statutory interpretation.[53] The approach to s 117(2)(b)(ii) provides another example.[54]

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48 Ibid, at [75].

49 While Australian family law is federal, and there is a federal Family Court, there are other courts with family law jurisdiction.

50 (1996) FLC 92-663.

51 At 82,851.

52 *Walker v Patrick* [2010] SSATACSA 26 at [63]; *Campbell v James* [2011] SSATACSA 10 at [34]; *Jeffries v Jeffries* [2011] SSATACSA 7 at [28].

53 L Young 'Child Sexual Abuse Allegations in Parenting Disputes in Australia and the Exercise of Judicial Discretion in Family Law Matters' in B Atkin (ed) *The International Survey of Family Law 2015* (Jordan Publishing, Bristol, 2015) 1; L Young '"Special Circumstances" in Child Support Departure Applications and the Very Wealthy' (2015) 29(1) AJFL 1.

54 See for another example of the confusion, the decision in *Bertram-Power and Power* [2013]

Click here to go to Main Contents

The reliance on *Mee* has also led to a very significant misinterpretation of s 117(2)(b)(ii), with judicial officers failing to recognise that the question of a child's welfare – that is, what a child's welfare dictates about the school they should attend – is not a matter contemplated by the sub-section.[55] Applying *Mee*, one early case went so far as to base the decision that a particular private secondary school advanced a child's welfare, on the mother's assertion that most of the child's friends were going there.[56] One can see that *Mee* is leading the court down rabbit holes that were never intended to be explored, even if at the end a strict standard is required to find that a child's welfare does demand private education. In *Alexiou & Alexiou*[57] it was held that the mere fact a child was doing well at a school did not lead to a finding that a child's welfare required them to attend such a school; nor was it sufficient that a child wanted to go to a particular school.[58] These are parenting decisions and ones that were not intended to be decided by Departmental decision-makers. Such questions about a child's welfare are not primarily monetary matters but rather 'best interests' assessments, something that the Departmental processes are not equipped to deal with and the decision-makers not trained to assess. Moreover, if one could provide statistical evidence that private education enhanced most children's future prospects, surely anyone could argue that private education dictated that the child's welfare demanded such an advantage where a parent could afford to pay it. The court should be clear such arguments are not open under the terms of s 117(2)(b)(ii).

The failure of the courts to appreciate the error here is perhaps explained by the fact that they are well used to determining a whole range of issues – both property and parenting disputes – in one hearing. They have a comprehensive jurisdiction. Judicial officers do not seem to have turned their minds to why the legislature chose not to give Departmental decision-makers (who are the persons most routinely applying this section) the power to effectively determine where a child might best go to school. If there is no agreement or expectation,

FamCA 520 where the judicial officer somewhat curiously came to the conclusion that because the children were being cared for in a very generous manner because of their parents' incomes, that this was how the parents 'expected' their children to be cared for. To compound this strange conclusion, the judicial officer added to this the payer's considerable income and thus capacity to pay, in finding this ground for departure established. The formula has a cap built into it – on that basis in *Seymour v Seymour* [2011] FamCAFC 520 the judicial officer expressly rejected the notion that the mere fact of a parent having a very high income amounted to a special circumstance. For a critique of 'big money' child support decision-making, see L Young '"Special Circumstances" in Child Support Departure Applications and the Very Wealthy' (2015) 29(1) AJFL 1.

55 *F & S* [2003] FMCAfam 531 (child's welfare advanced by an orthodox Jewish education, even though no agreement prior to separation and both a private and state school had been considered); *Beklar & Beklar* [2013] FamCA 327 at [253]; *R & R (No 1)* [2002] FMCAfam 153 at [57].

56 *Coon v Cox* (1993) 116 FLR 166; 17 Fam LR 692 at 695.

57 [2012] FamCA 1146, though here there was agreement about a private education however because of the welfare reference in *Mee* this was still considered as part of the overall decision. See also *Grey & Grey* [2012] FamCA 389 at [35]. In *C & G* [2002] FMCAfam 361 there was a discussion as to whether the welfare argument was made out (which it was not) where the mother felt the close state schools had bad reputations and were 'rough'.

58 *Beklar & Beklar* [2013] FamCA 327.

but one parent puts a child into a private school and then obtains a departure decision requiring the other parent to contribute to school fees, they have de facto avoided the sole jurisdiction of the family courts to determine such parenting matters (though of course the unhappy parent can always bring an expensive parenting application to sort it out …).

When the Full Court in *Mee* referred to the child's welfare dictating attendance at a particular school, they may well have had in contemplation (at least in part) children with special needs. Many judicial officers hearing Reason 3 applications where welfare grounds are raised have generally not factored into their analysis of s 117(2)(b)(ii) that s 117 provides another ground for departure that can cover those cases where a child's special needs requirements significantly impact on the educational costs of raising the child: s 117(b)(ia) (Reason 2). It had previously been recognised that Reason 2 could be used in relation to private schooling costs.[59] The child in this case had a medical condition and was attending a private school that catered specifically for children with this condition. The test under this subsection is whether the cost being incurred is significant and necessary or desirable for the child's welfare *given the special needs* and while not strictly limited to medical conditions, this is what it is most commonly used for. Agreement or joint expectation is not a factor in establishing this ground of departure. In such a case, a decision-maker presented with clear medical evidence as to the child's need, would then be able to consider the schooling in the same way as treatments and medications are considered. This is a much narrower and more straightforward task for a decision-maker to perform than to assess more generally under s 117(2)(b)(ii) whether a child's general welfare is advanced by a particular school. For example, in *Gingham & Gingham*[60] the court accepted that the child had 'special needs' based on evidence that he suffered from attention deficit hyperactivity disorder associated with dyslexia. The judicial officer said the test was then whether the evidence established that the child's needs could only be met in a private school as opposed to in the state school system.[61] Absent sufficient evidence to that effect, a ground for departure was not established.

Returning then to the interpretation of Reason 3, what of the requirement for a joint 'expectation' under s 117(2)(b)(ii)? There are some principles that are clear in relation to this phrase. Rather self-evidently, the court looks to past expectations. Expectations do not have to amount to any kind of formal agreement.[62] Where an agreement is reached post-separation (or if the parties never lived together) as to a child's particular schooling, the agreement must include the payment of fees (as many parents may agree to attending a child

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[59] *Walker v Patrick* [2010] SSATACSA 26. See also the brief discussion in *F & S* [2003] FMCAfam 531 at [28] where it was acknowledged that attendance at an orthodox Jewish school could not be classified as a 'need'.

[60] [2007] FMCAfam 254.

[61] Ibid at [46].

[62] See for example *Cooper v Gardener* [2011] SSATACSA 2 where there was no dispute the father never agreed to enrolment in a private secondary school and was not consulted about it; however his concession that had the parties still been together they would have opted for a private education was sufficient to establish a joint past expectation.

Click here to go to Main Contents

attending a particular school post-separation if they are not required to contribute to fees).[63] Further, the expectation may be about a style or type of education, such as a religious education,[64] as opposed to a particular school. In this regard, one is to look to the history as to what mattered to the parents in their decision-making process: eg public v private; secular v religious; co-educational v single-sex schooling.[65] The question of type or style of school includes the question of cost, but for an expectation to exist, more than mere early childhood discussions are required, and evidence such as completing enrolment forms, putting the child on a waiting list and starting at the school with parents' consent will be influential.[66]

It is clear from these decisions that there is no point in time as such that joint expectation is measured and that the history of the matter needs to be considered in detail. This reflects the fact that expectations may change over time and a range of factors might influence different parents' expectations. It is also clear that a parent's expectation *cannot* be withdrawn unilaterally after separation. Indeed, this is the whole point of s 117(2)(b)(ii) and *Mee* before it: where there was a pre-existing expectation or agreement, a contribution to the costs is appropriate if the parent can afford it. Unilateral withdrawal of agreement/expectation is axiomatically not possible.

However, there are some grey areas in relation to expectation. For example, does enrolment of children into a private primary school suggest an expectation of a private secondary education? Given that the parents had not talked about high school, the original decision-maker in *Murphy v Murphy (Child Support)*[67] found that electing private primary education did not give rise to a joint expectation of a private secondary education. However, in the Administrative Appeals Tribunal it was found that there *was* a joint expectation, with considerable weight placed on the likelihood that parents who elected for private primary school would more likely than not send their children to a private secondary school. Many parents in Australia might be surprised to know this inference is being drawn in the Tribunal, though it seems unlikely that Departmental decision-makers are routinely drawing the same inference. In the case at hand, the parents were separated when the children were in the first years of primary school. The mother was challenging the joint expectation of private high school education, saying that the father had insisted on the private schooling to date. The children were effectively in the sole care of the father when enrolled in the private secondary school and it was not

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63 *R & R (No 1)* [2002] FMCAfam 153 at [48]ff where the mother decided on the education and asked the father to sign an enrolment form. The mother did not discuss fees with the father and did not ask for a contribution at the outset. The mother had intended to pay the fees from her child support but later sought a departure claiming that the signing of the form amounted to a joint expectation. The court found otherwise.

64 *F & S* [2003] FMCAfam 531 (orthodox Jewish education expected despite no agreement); contrast *S & B* [2003] FMCAfam 265 at [44] where despite both parents being Catholic, no expectation found even though, as in *F & S*, there was no clear evidence of agreement.

65 *Farthing & Robinson & Anor* [2016] FCCA 2851.

66 *C & G* [2002] FMCAfam 361 at [45].

67 [2016] AATA 2001.

discussed with the mother. On this basis, it was strangely found that the mother must have expected that the children would be enrolled into a private high school and therefore should contribute to the cost.[68]

Some of the other puzzling aspects of s 117(2)(b)(ii) in fact do not reach the courts much. For example, what do the words 'care' and 'training' encompass? Presumably training other than formal school education is included, such as enrolment in some skills-based training course, though this could also be encompassed by a broad interpretation of the word education. Many children (and perhaps a great many more than in the past) engage in a range of extra-curricular activities that could be said to train them – dance, sport, music, horse riding. There are conflicting decisions on whether these are just the normal costs of raising (wealthier?) children and so covered by the basic formula (on the basis that they are not special or unusual) or, where they are agreed upon, whether they can amount to 'training' and are a special circumstance.[69] It seems that where a court includes such things under s 117(2)(b)(ii), it is (arguably inappropriately) focusing more on the fact of agreement giving rise to the liability to contribute, than on the nature of the activity, and whether it is a special circumstance. Further, there is a very early and brief decision that found under Reason 2, where a child has a special skill (such as an elite athlete), this can be encompassed by 'special needs'.[70] One would have thought that, had these terms been looked at in the context of the overall provision, it could have been deduced that this more properly fits under s 117(2)(b)(ii) in terms of 'training'. After all, should the training costs of a young elite athlete be considered a special need – and require no joint intention to demand a financial contribution from an unwilling parent – or should they fall under the rubric of a path of education jointly expected by the parents? In addition to the joint expectation, the activity would need to be out of the ordinary or unusual (as all special circumstances must be) and have a significant cost attached to it.[71]

Before turning to what the Christensen Report had to say about this subsection, it is important to note that it cannot be assumed that the day-to-day decision-making of the Department reflects all of the shortcomings seen in the decisions of the courts and the Tribunal. For example, there is no evidence that Departmental decision-makers in fact make s 117(2)(b)(ii) decisions based on a child's welfare. Indeed, one of the difficulties of assessing the operation of these provisions is that the matters so rarely go to Court and so occasional court decisions, by decision-makers less familiar with the provisions, may not reflect the bulk of decision-making. Moreover, there is no assessment of outcomes of

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68 At [21].

69 Compare for example *Essex & Essex (SSAT Appeal)* [2011] FMCAfam 688 where agreed extra-curricular activities of a child were accepted as falling within this section, with *Crowell & Bodrey (SSAT Appeal)* [2011] FMCAfam 275 where the SSAT said similar expenses (e g music lessons) were not a 'special circumstance' as it is not unusual for children to participate in such activities.

70 *In the Marriage of R T and B J Blamey* (1994) 18 Fam LR 481.

71 Whether a cost is significant is relative to the resources of the person having to pay for it.

Click here to go to Main Contents

Departmental decision-making. The other matter to keep in mind is that, at the end of the day, once a reason for change is established, the question as to what change, if any, should be made, is discretionary and takes account of a range of matters. Therefore, demands for consistency in overall outcomes must take account of the fact that the decision-maker will be considering a whole host of matters when deciding what rate of child support is fair. Private education costs are just a factor that can open the door to that deliberation.

(c) The Christensen Report and s 117(2)(b)(ii) private education costs

Under the heading 'Payment', the Christensen Report considered the question of payments made in lieu of child support and able to be credited against a child support liability. These are called non-agency payments (NAPs). Some discretionary payments can be credited only with parental agreement; payment of other basic expenses requires no agreement for a credit to be claimed; these are called 'prescribed' NAPs. One such prescribed NAP is school fees. So, a parent paying for a child's private school fees over and above child support can claim a prescribed NAP for the carer-parent's half share of the fees and have it offset against their child support liability. However, as the Christensen Report rightly noted, a parent can also bring a departure application in relation to private school fees, as discussed above. The departure application may take two forms, depending on who is paying the school fees. If a paying parent has claimed a prescribed NAP to reduce their child support liability, and the carer parent considers it is not fair that they are forced to pay half of the private school fees in the form of reduced child support (via a NAP), they can apply for a departure under Reason 3. Imagine a situation where the parent paying child support has a very high income and the receiving parent has no income. In such a case it may be questionable whether the receiving parent should be forced effectively to pay for private school fees out of their child support. Equally, and perhaps more commonly, a carer parent paying the school fees can make the application to increase child support to account for the paying parent's share of fees.

The consideration of this issue in the Christensen Report is disappointing. After discussing NAPs, the question of school fees is introduced by recounting the comment of a witness, Professor Patrick Parkinson, that Departmental change of assessment decisions on school fees were 'arbitrary'. Parkinson said he:

> 'would prefer to see a test along the lines of whether it is reasonable in all the circumstances that a child should have an education at a particular private school taking into account a) the income of the parties b) the previous educational plans of the parties c) the circumstances in which the child has been educated to date and d) the current needs of the child. There are circumstances where due to the particular needs of a child, he or she may best be educated at a private school which can cater to those needs. If the father has sufficient income, it may well be reasonable to ask him to contribute notwithstanding that this had not been planned by the parents at a time before those needs emerged.'

It is not clear from this extracted comment what Parkinson thought was arbitrary in decision-making, nor why s 117(b)(ii) and s 117(2)(b)(ia) as they are currently applied do not meet his aspirations. As the summary above clearly shows, all of these matters are considered under the current provisions. The Christensen Report said that other concerns were raised about private school fees and cited the Queensland Lawyers' Association, which before suggesting guidelines might assist on this issue, made this cryptic and vague comment:

> 'School fees are a very good example and one of the most common scenarios where an application for review is lodged. Our members report that clients often receive advice from child support officers that they should not consider a review because they may be worse off … there appears to be no uniform approach adopted by child support with respect to the payment of [school fees].'

Having next noted the Social Security Appeals Tribunal's[72] comment that applications about school fees were common in the Tribunal (a hardly surprising revelation given long-standing data),[73] the Christensen Report then recited the following:

> 'The SSAT also noted that, whilst one of its decisions relating to school fees was challenged in court:
>
> > "The case does not establish a clear principle as to the point in time when mutual expectation must exist and whether a change of expectation after separation must be mutual."'[74]

Whatever shortcomings may exist in the court's jurisprudence in that particular case, it can hardly be said that these two questions have not been addressed in other court decisions. As outlined above, the answer to the first point is that the court is clear (for reasons not unrelated to those mentioned by Parkinson) that there is no specific point in time, and the answer to the second point is that the court has stated that any such change in expectation must be mutual.

It is extremely disconcerting that a government inquiry of the law takes no account whatsoever in its deliberations of what the case law – or indeed the statute – says. No doubt any number of people have views on how various legal provisions work; but those views should not be considered by the government in this type of review in the absence of at least some understanding of the law and jurisprudence. The Christensen Report concludes its discussion with the statement that there is 'considerable support for *a specific rule* applying to school fees' (emphasis added), though it is not at all clear what the Committee

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[72] Prior to the AAT hearing reviews, matters went to the Social Security Appeals Tribunal, another federal Tribunal; the change is practically insignificant.

[73] See *CSA facts and Figures 08-09* www.humanservices.gov.au/sites/default/files/documents/facts-and-figures-2009.pdf (accessed 25 March 2017).

[74] At [3.131].

Click here to go to Main Contents

means by this.[75] The final recommendation is nonsensical and relates only to NAPs (a separate system that is automatic and independent of the departures process):

> '1. The Committee recommends that the Australian Government seek to develop a clearer system for resolving disputes about the payment of school fees as Non-Agency Payments.'

Given the confused wording of the recommendation, the Government Response[76] (which showed somewhat more understanding of the law) supported Recommendation 11 in spirit rather than its actual form, agreeing to review how school fees are dealt with in both departures and as NAPs. It is notable of course that s 117(2)(b)(ii) deals with more than school fees, but there was no discussion of this, so it will be interesting to see whether uncertainty about the wider application of this subsection is addressed.

It is not that the question of the treatment of private school fees is not a topic worthy of reconsideration. However, whether there will be any sensible reform, given the confused process of consideration that led there, which fails to address some of the issues that need rethinking, and relies on mistaken understandings of the law, is open to question. Certainly, the history of reform of the next topic raises similar concerns about the ability of the reform process to deliver sophisticated and sensible reform.

(d) Departing on the grounds of income, assets, financial resources and earning capacity – Reason 8

The relevant sections of the Act (s 117(2)(c)) say that a ground for departure is made out, if:

> 'in the special circumstances of the case … administrative assessment of child support would result in an unjust and inequitable determination of the level of financial support to be provided by the liable parent for the child:
>
> …
>
> (ia) because of the income, property and financial resources of either parent or
> (ib) because of the earning capacity of either parent.'

As to the application of this provision in relation to earning capacity, s 117 goes on to say (emphasis added):

> '(7B) In having regard to the earning capacity of a parent of the child, the court may determine that the parent's earning capacity is greater than is reflected in his or her income for the purposes of this Act **only** if the court is satisfied that:

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[75] At [3.132].

[76] A brief document with a page of introduction and short comments against each numbered recommendation.

(a) one or more of the following applies:
  (i) the parent does not work despite ample opportunity to do so;
  (ii) the parent has reduced the number of hours per week of his or her employment or other work below the normal number of hours per week that constitutes full-time work for the occupation or industry in which the parent is employed or otherwise engaged;
  (iii) the parent has changed his or her occupation, industry or working pattern; **and**
(b) the parent's decision not to work, to reduce the number of hours, or to change his or her occupation, industry or working pattern, is not justified on the basis of:
  (i) the parent's caring responsibilities; or
  (ii) the parent's state of health; and
(c) the parent has not demonstrated that it was not a major purpose of that decision to affect the administrative assessment of child support in relation to the child.'

The Christensen Report noted that there was a lot of criticism of the broad nature of these terms and 'overwhelming support' for greater clarity in how to apply Reason 8.[77] These words are of course taken directly from long-standing, similar provisions from the Family Law Act 1975 (Cth) used in relation to property settlements, spousal maintenance and formerly child maintenance. Parkinson, who has a clear view on the need for more statutory rules and more consistency in property matters,[78] extended his criticism to this provision saying it is 'very vague language', is not understood well by the court (despite it being a phrase with which the courts are very familiar) and says he has 'seen some fairly dodgy decisions over the last few years',[79] though it is not clear whether he means by judicial officers or Departmental decision-makers. Parkinson goes on to say:

> 'deemed income where it is alleged somebody is in the cash economy. I do not know there is much more we can do on that than we do, because it is inherently subjective. The agency does have powers to look at bank accounts and so on. The key issue, I think, is that, before deeming somebody to have an income which according to their tax records they do not have, there should be an opportunity given to them to explain what is in their bank accounts. A number of cases I have come across where assumptions have been made about money travelling in and out of a bank account which has a perfectly innocent explanation where the child support review officer has not confronted the payer with that issue and sought their response. So some basic issues of natural justice and procedural fairness would definitely help.'

Child support decision-makers, just as in family law property matters, must consider if there is evidence that a parent has income or financial resources not

[77] At [3.117].

[78] P Parkinson 'Constitutional Law and the Limits of Discretion in Family Property Law' (2016) 44(1) *Federal Law Review* 49; T Oldham and P Parkinson 'Evaluating Judicial Discretion – Family Property Law in Australia and the USA Compared' (2016) 30(2) *Australian Journal of Family Law*, 134; P Parkinson 'Applying the s 75(2) Factors to the Division of Family Property: A Principled Approach' (2014) 4(2) *Family Law Review* 77.

[79] At [3.115].

Click here to go to Main Contents

reflected in their taxable income. Parkinson's comment is not a critique of the application of the section, but rather a vague criticism about what appears to be (though may not have been[80]) a lapse in process in a few undisclosed cases. It does not explore Departmental guidelines on procedural fairness, nor explain whether the decisions he refers to were the subject of challenge and correction (if matters were as claimed). If these were decisions by Departmental decision-makers, then a letter to the Department objecting to the decision and providing the relevant explanation would be all that is required to have the matter reconsidered. This comment provides no evidence there is any systemic failure to afford parents in this process natural justice.

Parkinson is then quoted as saying:

> 'The other big issue in terms of deemed income is capacity to earn. We made recommendations in 2005 for changes to the law which were partially accepted. It seems to me there ought to be a very high bar before we say that somebody has an income they do not in fact have because they have the capacity to earn in a job they do not have. Only yesterday I was dealing with that very issue with a client where nobody is saying he is hiding money or acting in the cash economy; it is simply that he left a job. He had good reason to leave that job. He was concerned the department did not think he had good reasons, and then he was deemed to have an income he did not in fact have. So I think we do need to look at the law again and to set a very high bar in those situations.'[81]

As Parkinson notes, this matter was considered by the Taskforce, which Parkinson chaired, though very briefly and without any detailed consideration of patterns of decision-making.[82] Nonetheless, changes were made so that the current provisions on earning capacity make it very difficult to assess any parent on earning capacity. In essence, parents whose earning capacity is under consideration must satisfy the decision-maker that the primary motivation in their change of employment, or their failure to work full-time, is not child support. In other words, generally speaking it is only where parents appear to be motivated by child support considerations that earning capacity is considered. It is difficult to understand the anecdotal account given here in that context. It may have been a poor decision on the law; again we are not told if any objection followed. We have no data on how common it is under the new provisions for a parent to be assessed on earning capacity, though it must be much less common given how restrictive the new provisions are. The Christensen Report gave no consideration to the detail of any decisions or any judicial decisions in this regard, nor indeed to the words of the new provision.

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[80] In fact, given the obligation of full and frank financial disclosure on parents in this process, where a parent's income is under scrutiny in this way, it is arguable it is the obligation of the parent to provide a full account of such matters (eg to provide copies of their bank statements and explanations of income travelling through accounts that might appear to conflict with their claims about cash income).

[81] At [3.115].

[82] For a discussion of this in detail, see L Young and N Wikeley 'Earning Capacity and Maintenance in Anglo-Australian Family Law: Different Paths, Same Destination?' (2015) 27 *Child and Family Law Quarterly* 129.

The Committee's conclusion was that Reason 8 needs greater clarity and this strangely resulted in the following recommendation 11:

> 'The Committee notes that the intent of the "capacity to earn" criteria is to prevent payers deliberately avoiding their financial responsibilities in respect to shared parenting. However there are also genuine instances where a person's earning capacity may decrease due to decreased market demand for certain skills, the need to retrain, health issues or other life changes. A greater degree of flexibility is required. The Committee therefore recommends the Australian Government review "capacity to earn" as a rationale for initiating Changes of Assessment under Reason 8.'

Capacity to earn is just a very small part of Reason 8. Moreover, it applies to payers and payees. The provision already clearly states that where a person changes a work pattern, or does not work, and their reasons are unrelated to child support, then they *cannot* be assessed on their earning capacity. As a matter of law, if a parent proved a major purpose for their work choice was a health issue (s 117(7B)(b)(ii)), child care responsibilities (s 117(7B)(b)(i)), or something other than child support (s 117(7B)(c)) (eg the need to retrain or relocating) then the decision-maker has no option to assess them on earning capacity. Moreover, if evidence was provided that in fact due to decreased demand for their skills they could not find work, then this would also prohibit an earning-capacity decision, as in addition to motivation the decision-maker must consider (in line with a long history in the case law) whether there is appropriate work available.

Notwithstanding this, the government response accepts the recommendation saying that genuine changes in circumstances may mean it is not reasonable to assess a person on their earning capacity (as the legislation already recognises). It concludes by saying the government will review the criteria in the legislation for changing assessments based on earning capacity to ensure the provisions are providing appropriate outcomes. This would of course require a consideration of outcomes, not just the criteria.

I have argued elsewhere[83] that the new earning capacity provisions are problematic, but not for the reason raised here, which is basically the same argument that led to the introduction of the current iteration of the provision. In summary, the current provision, while confirming parents should not be assessed on earning capacity where they have good reason for reducing their income or not working, also permits parents to avoid being assessed on their earning capacity where they have selfish or unreasonable motivations for not exercising their earning capacity. That is because the test is not – as it arguably should be, and arguably was before the last round of reforms – whether a parent's employment choices are reasonable given their obligation to support their children. The test is whether child support primarily motivated their current employment choices. Thus, a parent not motivated by child support,

[83] L Young and N Wikeley 'Earning Capacity and Maintenance in Anglo-Australian Family Law: Different Paths, Same Destination? (2015) 27 *Child and Family Law Quarterly* 129.

Click here to go to Main Contents

but who chooses not to work, can escape any liability for the financial support of their children and let that obligation fall solely on to the other parent and/or the public. So, a parent who decides to go on a spiritual journey to India for a year, say, will still have to pay their mortgage, but will not have to support their children. This absurd approach also harms payers of child support, because a carer parent with a long history of not working can avoid being assessed on earning capacity even when their current care arrangements do not preclude them from working. This is so because the test is all about motivation, rather than what is reasonable.

It may be that the problem in the case Parkinson mentions was in fact the reverse onus of proof built into the section, which is problematic.[84] There is no doubt it could be difficult for a parent to prove they were not motivated by child support in making an employment choice. However, to determine whether in practice that presents an evidentiary problem for parents, actual decisions would need to be considered.

IV CONCLUSION

Australia has much to be proud of in the development and implementation of its child support Scheme. However, the corollary of this has been that it is extremely complex. It is also a policy area that generates a lot of heated debate – it is difficult to imagine a scheme that would not, given the way family law disagreements play out in modern Western society. This naturally leads to a situation where critique of the Scheme, particularly in relation to its more technical, legal aspects, can be ill-informed and confused. Smyth et al have highlighted that many parents are mistaken as to their understanding of how child support works.[85] It is patently clear that the Christensen Committee did not understand the areas discussed above. No doubt aggrieved taxpayers feel listened to when the government spends a lot of precious taxpayers' money embarking on such an inquiry. But this is hardly a targeted or sophisticated model for reform. To avoid this knee jerk reaction, and its disappointing outcomes, the government would be wise to develop, and implement, a plan for the ongoing evaluation of this large and controversial scheme. Such a plan for evaluation should include getting the best evidence on each topic available from time to time – not just the information that happened to be provided by those people with the time and inclination to participate in such an inquiry. The Christensen Report did make some recommendations about the Department collecting more data to enable better evaluation but this focussed on

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[84] In effect, the section requires the person to prove they were not motivated by child support considerations; if they cannot do this then the decision-maker can infer they were; see the critique of this aspect of the provision in L Young and N Wikeley 'Earning Capacity and Maintenance in Anglo-Australian Family Law: Different Paths, Same Destination?' (2015) 27 *Child and Family Law Quarterly* 129.

[85] B Smyth, B Rodgers, V Son, L Allan and M Vnuk 'Separated Parents' Knowledge of How Changes in Parenting-Time Can Affect Child Support Payments and Family Tax Benefit Splitting in Australia: A Pre-/Post-Reform Comparison' (2012) 26(3) AJFL 181.

information that can be accessed automatically from Departmental records. This would facilitate evaluation, but is not a plan for evaluation.

In relation to the very legalistic departures process, which is now the main avenue for any discretionary decision-making in child support, it is perhaps predictable that the Christensen Committee floundered. In effect, after all its efforts, the Committee came to the view that there seem to be a lot of people who are unhappy about Reasons 3 and 8 but then it abandoned the broader Reason 8 question in favour of the small area of earning capacity. In fact, if the Review Committee had tested what was said on the earning capacity point against the provisions themselves, it should not have recommended any change (though a reconsideration may not be a bad thing, but for very different reasons). In relation to Reason 3, it can only be hoped that any reconsideration of this provision will engage more deeply with the actual law and tease out the difficult issues surrounding the application of this provision.

The mere fact that Australia's successes in the area of child support are considerable compared to some jurisdictions – take the UK for example[86] – is no reason to perpetuate a pattern of law reform that operates responsively and apparently for reasons of politics and not good policy.

[86] See C Skinner 'Child Maintenance in the United Kingdom' (2012) 14 Eur J Soc Sec 231 at 233ff.

Click here to go to Main Contents

CANADA

PROTECTING CHILDREN IN CANADA

Martha Bailey[*]

Résumé

Les tribunaux et les assemblées législatives au Canada ont abordé diverses questions relatives à la protection des enfants et ce texte s'intéressera à trois d'entre elles: 1) la protection du meilleur intérêt de l'enfant non accompagné dans le cadre du droit de l'immigration; 2) le fait de savoir si la détermination de la résidence habituelle de l'enfant au sens de la Convention de La Haye sur les aspects civils de l'enlèvement international d'enfants devrait dépendre de l'intégration de ce dernier dans son milieu social et familial ou plutôt de l'intention des parents; et 3) la filiation des enfants issus des ententes de gestation pour autrui.

I INTRODUCTION

Canadian courts and the legislatures have been addressing various issues relating to the protection of children. This note will focus on three of those issues: (1) the protection of the best interests of unaccompanied minors under immigration law; (2) whether determination of a child's habitual residence for the purposes of an application under the Convention on the Civil Aspects of International Child Abduction[1] should be based on the integration of the child in a social and family environment or on the intentions of the parents; and (3) parentage of children born as the result of surrogacy arrangements.

II BEST INTERESTS OF THE CHILD AND IMMIGRATION

The best interests of the child principle requires that children's best interests be taken into account in actions concerning them. This principle has been addressed in many previous decisions of the Supreme Court of Canada ('the Court'), including the particularly notable 1993 decisions in *Young v Young*

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1 Convention on the Civil Aspects of International Child Abduction, Can TS 1983 No 35 ('Abduction Convention').

and *P (D) v S (C)*.[2] In these two cases, dealing with restrictions on non-custodial fathers who were involving their children in their Jehovah's Witness faith during access visits, the Court upheld the constitutionality of the best interests of the child test, which had been explicitly set by the governing legislation. The Court determined that the test was not impermissibly vague, and it did not violate the fathers' freedom of religion or freedom of expression, guaranteed by the Canadian Charter of Rights and Freedoms.[3]

Even in cases where the governing legislation does not expressly mention the best interests of the child, the principle has been relevant to the Court's analysis of issues relating to children, in part because of the Convention on the Rights of the Child.[4] Article 3(1) of the CRC provides that

> 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

Baker v Canada (Minister of Citizenship and Immigration), a case dealing with deportation of a mother with Canadian-born children, is the leading authority on the obligation to consider the best interests of the child when making discretionary decisions that affect a child. In *Baker*, the Court ruled that, while the CRC and other international treaties have no direct application in Canadian law if they have not been implemented by statute, they may inform a contextual approach to statutory interpretation and judicial review.[5] When determining whether relief should be granted on humanitarian and compassionate grounds, 'the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them'.[6] To the extent possible, interpretations and approaches that reflect the values and principles enshrined in international treaties to which Canada is a party should be preferred.

In *Kanthasamy v Canada (Citizenship and Immigration)* the issue was whether a 17-year-old should be exempted from the requirement that permanent residence applications be made outside of Canada.[7] The case involved Jeyakannan Kanthasamy, a Tamil from northern Sri Lanka, who came to Canada at age 16 and applied for refugee status. Tamils, particularly young Tamil men, faced discriminatory treatment in Sri Lanka, and Kanthasamy claimed a well-founded fear of persecution based on his ethnicity. The Immigration and Refugee Board refused his application. The Board had determined that the situation of Tamils in Sri Lanka had improved and that Kanthasamy was not at risk of death, torture or cruel and unusual punishment

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2 *Young v Young*, [1993] SCJ No 112, [1993] 4 SCR 3 ('*Young*'); *P (D) v S (C)*, [1993] SCJ No 111, [1993] 4 SCR 141 ('*P (D)*').

3 Constitution Act, 1982, being Sch B to the Canada Act 1982 (UK), 1982, c 11.

4 Convention on the Rights of the Child, Can TS 1992 No 3 (CRC).

5 *Baker v Canada (Minister of Citizenship and Immigration)* [1999] SCJ No 39, [1999] 2 SCR 817 ('*Baker*').

6 *Baker* at para 75.

7 *Kanthasamy v Canada (Citizenship and Immigration)* 2015 SCC 61 ('*Kanthasamy*').

if he were returned to that country. Kanthasamy, now age 17 and having been denied refugee status, wanted to obtain permanent resident status. In order to do so, he applied under s 25(1) of the Immigration and Refugee Protection Act to be exempted from the requirement that permanent residence applications be made outside of Canada. The provision states that an exemption may be granted if 'it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected'. Section 25(1.3) provides that the Minister, in considering a request for an exemption, 'may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee … or a person in need of protection … but must consider elements related to the hardships that affect the foreign national'.

Kanthasamy's application for an exemption was not granted. The Officer who reviewed the application referred to the Guidelines prepared by the Minister for Officers dealing with immigrant applications made in Canada on humanitarian and compassionate grounds.[8] Paragraph 5.10 of these Guidelines state that the criterion of 'unusual, undeserved or disproportionate hardship', a test adopted by the Federal Court in its decisions on s 25(1), should be used. The Officer should determine whether it would 'be a hardship for the applicant to leave Canada in order to apply abroad'. The Guidelines further state that

> 'Individual H&C [Humanitarian and Compassionate] factors put forward by the applicant should not be considered in isolation in a determination of the hardship that an applicant would face; rather, hardship is determined as a result of a global assessment of H&C considerations put forth by the applicant. In other words, hardship is assessed by weighing together all of the H&C considerations submitted by the applicant.'

A non-exhaustive list of factors that an applicant may rely on is set out in the paragraph 5.11 of the Guidelines, a list that includes 'the best interests of any children affected by their application'. In paragraph 5.12, extensive guidance on how to address the best interests of the child is provided, including a non-exhaustive list of factors to consider:

> 'Generally, factors relating to a child's emotional, social, cultural and physical welfare should be taken into account when raised. Some examples of factors that applicants may raise include but are not limited to:
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> - the age of the child;
> - the level of dependency between the child and the H&C applicant or the child and their sponsor;
> - the degree of the child's establishment in Canada;
> - child's links to the country in relation to which the H&C assessment is being considered;
> - the conditions of that country and the potential impact on the child;
> - medical issues or special needs the child may have;

[8] Canada. Citizenship and Immigration Canada. 'IP 5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds', in *Inland Processing* (www.cic.gc.ca).

Click here to go to Main Contents

- the impact to the child's education; and
- matters related to the child's gender.

After considering the application in light of the Guidelines, the Immigration Officer determined that Kanthasamy's return to Sri Lanka would not result in unusual and undeserved or disproportionate hardship. On judicial review, the Federal Court confirmed that the test was whether the hardship was 'unusual and undeserved or disproportionate' in accordance with the Guidelines, and found that the Officer's decision to deny relief was reasonable.[9]

In its judgment, the Federal Court of Appeal clearly outlined the two issues before it: (1) the correct interpretation of s 25 of the Immigration and Refugee Protection Act; and (2) whether the outcome reached by the Immigration Officer was reasonable.[10] The Federal Court of Appeal determined that 'unusual and undeserved, or disproportionate hardship was the appropriate standard' to be applied.[11] It commented that the Guidelines were useful but were not the law, and that it would be a reviewable error to use the factors listed in the Guidelines as if they constituted a closed list. While it concluded that subsection 25(1) was not intended to duplicate refugee proceedings, the evidence from those proceedings can nonetheless be considered for the purpose of determining whether the applicant will face 'unusual and undeserved, or disproportionate hardship' if returned to the foreign state. The Federal Court of Appeal then conducted a reasonableness review of the Immigration Officer's decision, commenting

> 'In conducting reasonableness review of factual findings such as these, it is not for this Court to reweigh the evidence. Rather, under reasonableness review, our quest is limited to finding irrationality or arbitrariness of the sort that implicates our rule of law jurisdiction, such as a complete failure to engage in the fact-finding process, a failure to follow a clear statutory requirement when finding facts, the presence of illogic or irrationality in the fact-fining process. Or the making of factual findings without any acceptable basis whatsoever …'[12]

After finding that the Immigration Officer's decision did not suffer any of these flaws, the Federal Court of Appeal determined that it was reasonable.

Kanthasamy then appealed to Canada's highest court. In a 5:2 split decision, the Court allowed the appeal and remitted the matter for reconsideration. Justice Abella wrote the reasons for judgment for the majority. These reasons are notable for their strong emphasis on the best interests of the child. It may be said that Abella J has assumed the mantle of L'Heureux-Dubé J as the Court's primary 'protector' of the best interests of the child principle.[13] Justice L'Heureux-Dubé was the first member of the Court to cite the CRC,[14] and the

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9 *Kanthasamy*.
10 *Kanthasamy*.
11 *Kanthasamy* at para 47.
12 *Kanthasamy* at para 99.
13 See, eg, Abella J's dissenting opinion in *MM v United States of America* 2015 SCC 62 (*MM*).
14 *Young* and *P (D)*, n 2 above.

judge most likely to refer to it until her retirement in 2002.[15] Justice Abella has continued the project of giving force to the obligations imposed by the CRC.[16]

In *Kanthasamy*, Abella J noted that there is a statutory obligation under s 25 to consider the best interests of the child, and that these interests include 'such matters as children's rights, needs, and best interests; maintaining connections between family members; and averting the hardship a person would suffer on being sent to a place where he or she has no connections'.[17] Justice Abella, citing the Guidelines, noted that the 'best interests' principle applies to all children under 18 years of age. She further noted the 'highly contextual' nature of the principle, because of the range of factors that may relate to the child's best interest.[18] The principle is to be applied in a manner that is responsive to each child's age, capacity, needs and level of maturity and development. The decision-maker must determine 'the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention'.[19]

Justice Abella cited the best interests of the child principle from the CRC,[20] and went on to quote extensively from the Court's judgment in *Baker*, noting that *Baker* had identified the best interests of the child principle as an important factor in determining claims for exemptions based on humanitarian and compassionate grounds. In particular, she stated that *Baker* required 'attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision' in order to ensure that a humanitarian and compassionate decision falls within the standard of reasonableness.[21] In accordance with *Baker*, the decision-maker must be 'alert, alive and sensitive' to best interests of children affected by the decision, and if the interests of children are not given sufficient attention, the decision will be unreasonable.[22]

Justice Abella wrote that because s 25 specifically required that the best interests of a child who is 'directly affected' be considered, those interests should be 'a singularly significant focus and perspective'.[23] The best interests of

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[15] The CRC has been cited in 20 decisions of the Court. In addition to *Young* and *P (D)*, L'Heureux-Dubé J cited the CRC in the following: *R v L (DO)*, [1993] 4 SCR 419; *W (V) v S (D)* [1996] 2 SCR 108; *Gordon v Goertz*, [1996] 2 SCR 27; *Baker*, n 8 above; *Winnipeg Child and Family Services v KLW* [2000] 2 SCR 519; *R v Sharpe* [2001] 1 SCR 45, 2001 SCC 2; and *Trinity Western University v College of Teachers* 2001 SCC 31. As well, the CRC was cited in *United States v Burns* [2001] 1 SCR 283, 2001 SCC 7, a judgment of the whole Court of which L'Heureux-Dubé J was a member.

[16] Abella J has cited the CRC in *R v DB* 2008 SCC 25; *AC v Manitoba (Director of Child and Family Services)* 2009 SCC 30; *AB v Bragg Communications Inc* 2012 SCC 46; *Kazemi Estate v Islamic Republic of Iran* 2014 SCC 62; *MM*; and *Kanthasamy*.

[17] *Kanthasamy* at para 34.

[18] *Kanthasamy* at para 35.

[19] *Kanthasamy* at para 36. Here Abella J was quoting her own judgment in a custody/access case, *MacGyver v Richards* (1995), 22 OR (3d) 481 (CA), at 489.

[20] *Kanthasamy* at para 37.

[21] *Kanthasamy* at para 38.

[22] *Kanthasamy* at para 38.

[23] *Kanthasamy* at para 40.

Click here to go to Main Contents

the child principle was more strongly engaged in *Kanthasamy* than it had been in *Baker*. In the latter case, the mother applied for humanitarian and compassionate relief, and the best interests of her Canadian-born children were a factor to be taken into account. But in *Kanthasamy*, the applicant was a child, and, as Abella J stated, 'It is difficult to see how a child can be more "directly affected" than where he or she is the applicant'.[24] When the applicant is a child, that child's best interests should be treated as a significant factor in the humanitarian and compassionate analysis and should also influence the evaluation of other circumstances. Justice Abella, quoting the Federal Court of Appeal, wrote 'children will rarely, if ever, be deserving of any hardship',[25] and concluded that the test of unusual and undeserved hardship is presumptively inapplicable when considering a child's application for humanitarian and compassionate relief. Moreover, circumstances that would not warrant relief for an adult applicant under s 25 may entitle a child to relief because 'children may experience greater hardship than adults faced with a comparable situation'.[26]

After giving this fresh interpretation of s 25, Justice Abella went on to consider whether the provision had been properly applied and concluded that the Immigration Officer had not exercised her discretion reasonably. The Immigration Officer had erred in failing to give sufficiently serious consideration to the applicant's youth, his mental health, and the possibility that he would suffer discrimination in Sri Lanka. Further, the Immigration Officer erred in taking a 'segmented approach', assessing each relevant factor to determine if it satisfied the test of unusual and undeserved or disproportionate hardship, and failing to adequately consider the applicant's circumstances as a whole.[27] The psychological report submitted by Kanthasamy, the evidence of possible discriminatory treatment, and the best interests of the child principle were not given sufficient weight. The Immigration Officer 'misconstrued the best interests of the child analysis, most crucially disregarding the guiding admonition that "[c]hildren will rarely, if ever, be deserving of any hardship"'.[28]

The majority, then, concluded that the Immigration Officer's decision was not reasonable and remitted the matter for reconsideration. Advocates for children have found much to cheer for in the Court's expansion of the best interests of the child principle. Two lawyers who acted for interveners in the *Kanthasamy* appeal wrote:

> 'The SCC gives the BIOC concept real substance and provides that courts should intervene where this substance in absent. The Court is raising the standard for BIOC analysis and in so doing makes real Canada's obligations under the *Convention on the Rights of the Child*.'[29]

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[24] *Kanthasamy* at para 41.
[25] *Hawthorne v Canada (Minister of Citizenship and Immigration)* [2002] FCJ No 1687, [2003] 2 FCR 555, quoted in *Kanthasamy* at paras 41 and 59.
[26] *Kanthasamy* at para 41.
[27] *Kanthasamy* at para 45.
[28] *Kanthasamy* at para 59.
[29] Emily Chan and Jennifer Stone 'Where No Court Has Gone Before: Primacy and Centrality of

Children's rights advocates celebrated a victory, and Kanthasamy has had a significant impact on the how Immigration Officers approach cases involving children.

It must be pointed out, however, that Abella J's full-throated promotion of the rights and interests of children led to an incoherent approach that seemed unmoored from the governing legislation and inconsistent with basic administrative law principles. The robust support for the rights and interests of children, heartening though it may have been, led to a 'reasonableness' review that abandoned the required deference in favour of a careful parsing of the decision-maker's reasons seemingly more aimed at determining correctness.

The majority gave a fresh interpretation to s 25, which would be the approach taken if the standard of review were correctness. But the majority specifically considered the standard of review, and, oddly, insisted that it was reasonableness. Thus, there appeared to be a disjunction between the standard of review the majority claimed it was applying and the actual standard applied.

The dissenting judges did not agree with the majority's interpretation of s 25, pointing out that the provision 'is meant to provide a flexible – but exceptional – mechanism for relief. Giving it an overly broad interpretation risks creating a separate, freestanding immigration process, something Parliament clearly did not intend'.[30] And indeed, it must be conceded that the interpretation of the majority, which suggests that any hardship at all could ground the claim of a child applicant to an exemption from the usual procedures, will expand the likelihood of success beyond 'exceptional' cases.

After giving its interpretation of s 25, the majority then conducted a reasonableness review of the Immigration Officer's decision, but did so in a way that, again, suggested that a correctness standard was being applied. As Justice Moldaver, writing for the dissent, commented:

> 'Decision making under s. 25(1) is highly discretionary and is entitled to deference. Care must be taken not to overly dissect or parse an officer's reasons. Rather, reasonableness review entails respectful attention to the reasons offered or which could be offered in support of a decision …'[31]

But there was no deference at all accorded to the Officer by the majority. Justice Moldaver rightly expressed concern that Abella J 'parses the Officer's decision for legal errors, resolves ambiguities against the Officer, and reweighs the evidence'.[32]

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the Best Interests of the Child Principle – Case Comment on *Kanthasamy v Canada*' (2016) 29 Can Journal of Administrative Law and Practice 219 in Part 4.

30 *Kanthasamy* at para 85.

31 *Kanthasamy* at para 111.

32 *Kanthasamy* at para 112.

The Court's role is not to make the decision but to review the decision for reasonableness, a role that requires extending some deference to the decision-maker. As Moldaver J pointed out, the Court does not have authority to find a decision unreasonable simply because it would have come to a different result. It is difficult to see in the majority's judgment any margin of appreciation at all for the decision of the Officer or any acknowledgement that it is not the judicial branch of government that is charged with making decisions under s 25. Child advocates, however, are less concerned with the problematic nature of the majority's decision than with the result of *Kanthasamy*, which makes it easier for minors to succeed in immigration applications.

III THE CHILD'S PERSPECTIVE IN DETERMINING HABITUAL RESIDENCE

The objectives of the Abduction Convention, set out in Art 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 a Contracting State, 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. Article 3 provides that a removal or retention is 'wrongful' if it is in breach of rights of custody under the law of the state in which the child was habitually resident immediately before the removal or retention.

As apparent from looking at this basic scheme of the Abduction Convention, the concept of 'habitual residence' is central to its operation. The concept is not defined in the Abduction Convention, and a large body of case law focuses on the factual issue of where the child is habitually resident at the time of a purportedly wrongful removal or retention. It is the habitual residence of the child, and not the parents, that must be determined, although in practice it is generally hard to conclude that the habitual residence of a child, particularly a very young child, is different from that of the parents because of the limited capacity of children.[33] However, in some cases an issue as to whether the child shares the habitual residence of one parent or the other at the relevant time. Where this is an issue, courts may determine the child's habitual residence by adopting a parental intention focus, a child-centred focus, or a combination of

[33] Paul Beaumont and Peter E McEleavy *The Hague Convention on International Child Abduction* (Oxford: OUP, 1999) at 91.

the two.[34] Courts have adopted differing approaches to this question, and there is no consensus among, or even within, Contracting States.[35]

As discussed by Schuz, the parental intention model determines the child's habitual residence by looking at whether the parent or parents who have rights of custody (which Art 5 of the Abduction Convention says includes the right to determine the child's place of residence) had the requisite intention to change the habitual residence. If the requisite intention is lacking, the child will remain habitually resident in the original country. If both parents have rights of custody, neither can change the child's habitual residence without the other's consent. In contrast, the child-centred model determines the child's habitual residence by looking at the lived experience of the child, in particular the connections between the child and the putative habitual residence. And finally, the combined, or hybrid, model determines the child's habitual residence by focusing on the child's reality and connections to the putative habitual residence while also taking into account the intentions of the parents that are evidenced by their actions and communicated to the child. Communicating the intentions of the parents is considered relevant in this combined model 'because this will affect the way in which the child behaves and the quality of the connections which he forms with the people and institutions around him'.[36]

A problem with the parental intention model is that, applied strictly, it may lead to a determination that a child is habitually resident in a country with which the child has relatively little connection. And, as Stuart-White J said, 'it would be an affront to common sense to hold that habitual residence of a child perhaps of 10 to 12 years of age, was other than in the country in which he had spent virtually the whole of his life'.[37] At some point it no longer accords with the reality of the child's life to rule that the habitual residence is the place at one time intended by the parents to be the family home and still so intended by one parent. Keeping in mind that it is the child's, and not the parent's, habitual residence that is at issue, in some circumstances the child's experience and relative connections to the competing countries should be a consideration.

In Canada, the province of Quebec has for some years adopted a child-centred focus, applying the principle that the 'habitual residence of a child will be determined by focusing on the reality of the child, not that of the parents'.[38]

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[34] For an excellent discussion of 'The Parental Intention Model', 'The Independent/Child-centred Model', and 'The Combined/Hybrid Model' see Rhona Schuz *The Hague Child Abduction Convention: A Critical Analysis* (Oxford: Hart Publishing, 2013) at 186–222.

[35] The Hague Conference on Private International Law's INCADAT (database of abduction cases) includes a comment on the differing approaches taken in different Contracting States at www.incadat.com/index.cfm?act=search.detail&cid=1287&lng=1&sl=1.

[36] Rona Schuz 'Habitual Residence of Children Under the Hague Child Abduction Convention – Theory and Practice' (2001) 13 *Child and Family Law Quarterly* 1 at 16.

[37] *Re B (Abduction: Children's Objections)* [1998] 1 FLR 667.

[38] *Droit de la famille – 3713* [2000] RDF 585 (CA) at para 26. See also *Droit de la famille – 2454* [1996] RJQ 2509 (CA); *SS-C c GC* [2003] RDF 845 (CS), confirmed by *GC c SS-C* [2003] RDF796 (CA), *Droit de la famille – 08638* [2008] R.DF 399 (CS) and *Droit de la famille – 112106* 2011 QCCS 3612.

Click here to go to Main Contents

This child-centred approach was approved again by the Quebec Court of Appeal in 2013, in a decision that recognised alternative models and canvassed the various approaches to the issue in different US courts.[39] In contrast, the Alberta Court of Appeal applied a parental intention approach in determining that a 6-year old child was habitually resident in California, despite the fact that the child had spent just 4 months with the father in California and far more time with the mother in Alberta, because of the evidence that the parents intended to settle in California.[40] Unlike the Quebec Court of Appeal, the Alberta Court of Appeal did not discuss or evince familiarity with alternative models or the possibility of adopting a more child-centred approach to the question of habitual residence.

In 2016, the Court of Appeal for Ontario, like the Alberta Court of Appeal, adopted the parental intention model when determining that two Canadian children born in Germany to Canadian parents were habitually resident in Germany.[41] The children, born in 2002 and 2005, never acquired German citizenship, but, with the exception of brief sojourns in Canada with their mother, they lived and attended school in Germany until April 2013. When the children were experiencing school difficulties in Germany, in April 2013, the parents agreed that the children would live with the mother and attend school in Ontario, Canada. The father transferred physical custody of the children to the mother until August 2014, when it was agreed that the children would return to Germany. But the mother did not return the children to Germany in August 2014, and even before the agreed-upon return date the father was pursuing an application under the Abduction Convention. The issue for the court was the habitual residence of the children in August 2014, when period of the consensual time-limited stay expired. If, as argued by the mother, the children were habitually resident in Canada in August 2014, then her retention of the children would not be 'wrongful' within the meaning of the Abduction Convention, and the father would not be entitled to an order of return.

Justice Sharpe, writing for the unanimous Ontario Court of Appeal, adopted a strict parental intention approach, stating that a child's habitual residence is tied to that of the child's custodians and that one parent cannot unilaterally change the habitual residence of the child. On the issue of consensual time-limited stays, Sharpe JA quoted with approval:

> 'The consent to the children being abroad for a particular purpose for a particular time period, but not beyond … does not operate so as to effect a change in the habitual residence of the children.'[42]

This quote is from a decision of an Ontario court, and, indeed, almost all of the authorities relied on were from the province of Ontario. Of those authorities

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39 *Droit de la famille – 131863* 2013 QCCA 1196.
40 *AS v AW* 2013 ABCA 133.
41 *Balev v Baggott* 2016 ONCA 680 ('*Balev*').
42 *Balev* at para 43, quoting *Cornaz v Cornaz-Nikyuluw* (2005) 20 RFL (6th) 99 (ON SC) at para 57.

not from Ontario, two were decisions of the Supreme Court of Canada, neither of which addressed the issue of habitual residence in the context of consensual time-limited stays, and just two were from other Contracting States, the US and the UK.

Justice Sharpe relied on the US case *Mozes v Mozes*, quoting from it as follows:

> 'The academic year abroad has become a familiar phenomenon in which thousands of families across the globe participate every year … Children who spend time studying abroad in this manner are obviously expected to form close cultural and personal ties to the countries they visit – that's the whole point of sending them there for a year rather than simply for a brief tourist visit. Yet the ordinary expectation – shared by both parents and children – is that, upon completion of the year, the students will resume residence in their home countries. If this were not the expectation, one would find few parents willing to let their children have these valuable experiences.'[43]

The *Mozes* case elaborates on the importance of considering parental intent when determining the habitual residence of the child and the dangers of adopting a strictly child-centred approach. But it also cautions against adopting a strict parental intention model:

> 'Recognizing the importance of parental intent, some courts have gone off in the other direction, announcing a bright line rule that "where both parents have equal rights of custody no unilateral action by one of them can change the habitual residence of the children, save by the agreement or acquiescence over time of the other parent".'[44]

The court in *Mozes* went on to say that a child's habitual residence may change, even if the parents do not have a shared intention that it change, if it is found that 'the child's relative attachments to the two countries have changed to the point where requiring return to the original forum would not be tantamount to taking the child "out of the family and social environment in which its life has developed"'.[45]

Justice Sharpe acknowledged that 'there may be cases where a consensual time-limited stay is so long that it becomes time-limited in name only and the child's habitual residence has changed'.[46] However, Sharpe J went on to say that evidence of the child settling in is not relevant unless the application for return is brought within one year of the wrongful removal or retention. Here Sharpe J was referring to the Abduction Convention's Art 12, which allows a court to refuse an application for return that is brought more than a year after the wrongful removal or retention if it is demonstrated that the child is now settled in its new environment. Because the Art 12 defence was not available in *Balev*, Sharpe J ruled that it was an error to consider evidence that the children had

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43 *Balev* at para 44, quoting *Mozes v Mozes* 239 F3d 1067 (9th Cir 2001) ('*Mozes*') at 1083.
44 *Mozes* at 1080.
45 *Mozes* at 1081.
46 *Balev* at para 49.

Click here to go to Main Contents

settled into Ontario. But if such evidence is inadmissible, it is hard to see how it could ever be ruled that the habitual residence of a child in Ontario on a consensual time-limited stay has changed. Despite paying lip service to the possibility of making such a ruling, it seems that the Ontario Court of Appeal did the very thing that the *Mozes* court cautioned against – adopting a bright line rule that the unilateral action of one custodial parent cannot change the habitual residence of the child except with the agreement of the other parent.

Justice Sharpe cited and rejected case law that supported the consideration of the child's acclimatisation when determining habitual residence. One of the cases cited was a 2014 decision of the UK Supreme Court, which affirmed that the child's habitual residence is 'the place which reflects some degree of integration by the child in a social and family environment'.[47] The UK Supreme Court explained that

> 'the perception of the children is at least as important as that of the adults in arriving at a correct conclusion as to the stability and degree of their integration. The relevant reality is that of the child, not the parents. This approach accords with our increasing recognition of children as people with a part to play in their own lives, rather than as passive recipients of their parents' decisions.'[48]

The *Balev* decision did not indicate that careful consideration had been given to the reasoning of the UK Supreme Court or to that of the courts in other Contracting States that have taken into account the integration of the child.

In the *Balev* case, the two children were aged 11 and 14 at the time of the appeal. They had lived with their mother in Ontario for over a year by the time the period of the consensual time-limited stay expired. The evidence that the children had settled in and become integrated in a social and family environment was rejected because the father had brought his application for an order of return well within a year of the alleged wrongful retention. Both children objected to being returned. Although Art 13 of the Abduction Convention allows a court to refuse to order return of the child if the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views, the views of the children in *Balev* were not accorded weight. Their views were not considered substantial enough or to have enough strength of feeling to make the circumstances 'exceptional', and Sharpe J took the view that an order of return should be refused only in exceptional circumstances.

It is difficult to see in the *Balev* reasoning and decision to return the children to Germany any 'recognition of children as people with a part to play in their own lives, rather than as passive recipients of their parents' decisions'.[49] Because there are differences in approach among Canadian courts as to the correct approach to determining habitual residence for the purpose of an application

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47 *In the Matter of LC (Children)* [2014] UKSC 1 (*LC*) at 10.
48 *LC* at 30.
49 *LC* at 30.

under the Abduction Convention, it is to be hoped that the Supreme Court of Canada will eventually address the matter. In the meantime, Canadian courts should keep in mind that it is the child's – not the parents' – habitual residence that must be determined, and that a strict parental intention approach that disallows evidence of the child's integration in a social and family environment is not always appropriate.

IV SURROGACY, JUDICIAL JURISDICTION AND PARENTAGE

Little attention has been given in Canada to the issue of judicial jurisdiction to make a parentage ruling, leaving uncertainty as to what connections to a province there must be for a court in that province to have jurisdiction to rule on parentage. The provinces of Alberta and Québec are exceptional in expressly addressing the issue. Alberta's Family Law Act provides that a court has jurisdiction to rule on parentage either if the child is born in Alberta, or if an alleged parent resides in Alberta.[50] Québec's Civil Code provides that 'Québec authorities have jurisdiction in matters of filiation if the child or one of his parents is domiciled in Québec'.[51]

Janet Walker, a Canadian authority on private international law wrote that

> 'Declarations of the parentage of children must generally be sought in the domicile of the putative parent of the place in which the child is habitually resident or with which the parent or the child has a real and substantial connection.'[52]

No authority was given for this assertion, though reference is made to statutory provisions in some provinces regarding recognition of extra-provincial declarations on these bases.[53] The province of Ontario adopted these rules regarding recognition of extra-provincial declarations of parentage in 2016, but did not at that time add an express rule regarding judicial jurisdiction.

The amendments to Ontario's Children's Law Reform Act[54] came into force in December 2016.[55] The purpose behind the amendments relating to parentage was to facilitate parentage determinations where assisted reproductive technologies or surrogacy arrangements were used. Although Canadian federal law prohibits commercial surrogacy,[56] the provinces have exclusive legislative competence in regard to all other aspects of surrogacy. Explicit rules regarding recognition of extra-provincial declarations were added to Ontario's statute, as

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50 Family Law Act, SA 2003, c F-4.5, s 9(6).
51 Civil Code of Québec, CQLR c CCQ-1991, art 3147.
52 Janet Walker *Canadian Conflict of Laws* (6th edn, LexisNexis Canada, 2005 including update issues 2005-2016) at 20.6.
53 See, eg, Family Law Act, SBC 2011, c 25, Part 3, s 36.
54 Children's Law Reform Act, RSO 1990, c C.12 (CLRA).
55 All Families are Equal Act, SO 2016 C 23.
56 Assisted Human Reproduction Act, SC 2004.

noted above. Unfortunately, no provision regarding judicial jurisdiction to make a parentage declaration was included in the amendments. And if the surrogate relinquished any entitlement to parentage by means of a surrogacy agreement before the child was conceived, the intended parents will be recognised as the child's parents without a court declaration.[57] In British Columbia, as well, no declaration is needed in these circumstances.[58]

One problem with the failure to address judicial jurisdiction to make parentage determinations and with dispensing with the requirement of a declaration in some circumstances relates to surrogacy tourism, where parties from countries where surrogacy is banned or prohibitively expensive obtain services in a country where it is permitted or relatively inexpensive.[59] Because surrogacy is permitted in most Canadian provinces and relatively inexpensive compared with other countries, surrogacy tourism is a live issue.[60] If foreign parties obtain a declaration of parentage in respect of a child born to a surrogate in Canada, or are simply registered as the parents, their home country may be forced to recognise the parentage determination, despite the home country's public policy against surrogacy, in order to protect the child's right to family life or the best interests of the child.

For example, the European Court of Human Rights ruled in two cases that France's refusal to recognise, or even permit establishment of, the legal relationship between children who were born in California, and their genetically-related intended fathers and their intended mothers, violated the children's right to family life.[61] And in Quebec, where 'Any agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null', a Quebec court recognised a Pennsylvania declaration of parentage in order to protect the best interests of the child. States confronted with such a *fait accompli* may be forced but to give effect to surrogacy arrangements when their residents evade the law by travelling to states that allow non-residents to engage in surrogacy tourism and grant them a declaration of parentage or simply register them as parents.

The private international aspects of parentage are currently of great international concern, in large part because of the issues arising from assisted reproductive technologies and surrogacy arrangements. Ontario courts dealing with parentage applications in the context of cross-border surrogacy arrangements have not given attention to the private international law issues.[62] The Hague Conference on Private International Law has been working on a

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57 CLRA, ss 6 and 10.

58 Family Law Act, SBC 2011, c 25, Part 3, s 29.

59 See generally, Karen Busby 'Of Surrogate Mother Born: Parentage Determinations in Canada and Elsewhere' (2013) 25 *Canadian Journal Women and the Law* 284.

60 Alex Finkelstein et al 'Surrogacy Law and Policy in the US: A National Conversation Informed by Global Lawmaking' (2016) *Columbia Law School Sexuality and Gender Law Clinic* at 7.

61 *Case of Mennesson v France* (Application no 65192/11); Affaire Labasse c France *(Requête n° 65941/11)*. The European Convention on Human Rights, Art 8, provides: 'Everyone has the right to respect for his private and family life …'.

62 See, eg, *BCP and LP v ARP*, 2016 ONSC 4518.

Parentage/Surrogacy Project for the past several years.[63] The work of the Hague Conference on this issue should inform efforts in Canada and elsewhere to reform and clarify the law.

V CONCLUSION

Canada continues to give extensive attention to protecting the rights and interests of children. Pursuant to the *Kanthasamy* decision, the best interests of unaccompanied minors under immigration law have been given even greater weight. In contract, in cases under the Abduction Convention, most courts in Canada adopt a strict parental intention model when determining the child's habitual residence, and they continue to treat children as 'passive recipients of their parents' decisions'.[64] However, other courts in Canada adopt a more child-centred approach. This is an issue on which a Supreme Court of Canada ruling is needed. On the issue of surrogacy, most provinces allow surrogacy arrangements and allow intended parents to obtain a declaration of parentage or to simply be registered as parents, even when the intended parents are surrogacy tourists. Additional attention to issues relating to surrogacy tourism is needed, and Canada should continue to work with other countries at the Hague Conference on Private International Law to develop agreement on the issues.

[63] See www.hcch.net/en/projects/legislative-projects/parentage-surrogacy for the background and supporting documents.

[64] *LC* at 30.

Click here to go to Main Contents

CHINA

COHABITATION IN CHINA: LEGISLATION AND PRACTICE

*Chen Wei, Shi Lei**

Résumé

Parmi les conjoints de fait en Chine, certains se marieront, d'autres ont procédé à une célébration de mariage selon des rites traditionnels mais n'ont jamais officiellement enregistré leur union. D'autres encore, particulièrement les aînés, choisissent ce mode d'union en raison de l'opposition de leurs enfants à l'idée d'un mariage ou afin d'éviter tout conflit sur le partage des biens en cas de séparation. Dans l'état actuel du droit, les conjoints de fait ne bénéficient pas des mêmes droits et ne sont pas soumis aux mêmes obligations que les époux mariés. Dans le but de vérifier le niveau de protection des conjoints de fait, les auteurs présentent ici leur analyse des législations et de la jurisprudence et formulent un certain nombre de propositions en la matière.

Some people in China live as cohabitants. Some of these are expecting a marriage after this cohabitation. Some celebrated their marriage in traditional ways but did not register their marriage in a registration office. Some of the elderly choose this lifestyle for their remaining life journeys due to opposition to their marriage from their children and worry about disputes over properties if they married and divorced. According to the present laws and regulations, cohabitants do not have the same rights and duties as do married couples. To explore whether the present laws and regulations can provide full and satisfactory protection for cohabitants, the authors pose questions based on judgments, analyse the present laws and regulations and their application in China, and propose relevant suggestions.

I QUESTIONS

Mr Ran and Miss Li celebrated their marriage in a traditional way in 1997 but failed to register their marriage. In February 1998, they had a daughter. During their cohabitation, they built a house near a country road in H county on land

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Click here to go to Main Contents

already owned by Miss Li. In 2012, they bought a house in this county town with 96,000 RMB. On 22 July 2013, the relationship ended and they entered into a separation agreement. In this agreement, they agreed on the following matters: (i) they would end their cohabitation; (ii) the house they built during their cohabitation by the road belongs to Miss Li. The house they bought in the town belongs to Mr Ran. And the man should give Miss Li 10,000 RMB as a relief. This payment should be done within a year after separation; (iii) the debts of 60,000 RMB would be paid by the man; (iv) the child born during the cohabitation would be raised by the man, and Miss Li would not pay any child support; (v) after separation, neither should intervene with the other's life; (v) the agreement would be effective after signing by both sides. Later on, since the agreement did not get enforced, Mr Ran petitioned in the people's court claiming for division of the houses according to law and sharing the common debts incurred during the cohabitation. He also claimed for raising their daughter and that Miss Li should pay 600 RMB per month as the child support. Miss Li claimed for compensation for emotional distress too.

The court of first instance held that the parties did not register their marriage but cohabited as husband and wife, their relationship could not get the same protection as a married couple. The house they built during cohabitation was on the land replaced with Miss Li's land. Besides, they agreed that this house would be Miss Li's in the agreement they reached on 22 July 2013. Therefore, it was held appropriate that this house should be regarded as Miss Li's house. Regarding the house they bought in the town, they agreed that the house belongs to Mr Ran and he would pay 10,000 RMB as compensation. The court confirmed this article of their agreement. As regards child support, since the daughter has reached 15 and the child was willing to live with her mother, the court agreed that the daughter should live with her mother and Mr Ran should pay her 10,000 RMB as a lump sum payment for the child support. As for the debts of 60,000 RMB Mr Ran claimed to be shared by both parties, because they agreed that these debts should be paid by Mr Ran, the court refused Mr Ran's claim for sharing these debts. Miss Li claimed that the fund for building the house near the road came from the compensation paid for her ex-husband's death caused by a car accident in 1995, amounting to more than 60,000 RMB, but showed no evidence for this. The court refused this argument too, and further found that was no legal ground to support her claim for compensation for her emotional loss. The court concluded the following:

(1) the daughter should live with Miss Li and Mr Ran should pay 10,000 RMB as a lump sum payment for the child support;
(2) the house bought in town should be owned by Mr Ran, with Mr Ran giving Miss Li 10,000 RMB as a compensation; the house near the road they built during their cohabitation would be Miss Li's house;
(3) the common debts of 60,000 RMB should be borne by Mr Ran.[1]

[1] The Intermediate People's Court in Tongren in Gunzhou Province, Li v Ran (2nd instance) (2014) Tong Zhong 1st Civil Court Cases No.78, 12 December 2014, China Judgements

This is a typical case on cohabitation. This case involves division of the property acquired during cohabitation and child support after cohabitation. Is this judgment a fair one? Do the present laws and regulations fully protect the vulnerable party in cohabitation and their child? The authors accordingly discuss the legislation and judicial interpretations on cohabitation in China.

II THE DEVELOPMENT OF COHABITATION LAWS IN CHINA

(a) The concept of cohabitation

Cohabitation refers to a man and a woman who live together openly for quite a long time without meeting formal requirements for a marriage. Although a de facto marriage is close to this concept, the two have different connotations. In China, a de facto marriage refers to a relationship of a single man and a single woman cohabiting as husband and wife without registering their marriage before 1 February 1994, where both parties were marriageable and the neighbours also accepted that they were in a relationship of husband and wife. Therefore, the important distinction between cohabitation and a de facto marriage is whether a marriageable single man and a marriageable single woman form such a relationship before 1 February 1994. The time when they entered into this relationship is significantly important. Besides, if the parties form a husband-and-wife relationship after 1 February 1994, and one or both of them was not marriageable at the time of entering this relationship, but later they become marriageable, they could then register their marriage. The marriage would then be regarded as commencing on the day when both marriageability and intent to marry were present. The marriage from such a day to the day when they register their marriage would be accounted as a de facto marriage. If both parties are marriageable and live together after 1 February 1994, but they did not register their marriage, whether they live in the name of husband and wife or not, they are considered cohabitants.

(b) The development of cohabitation and de facto marriage laws

After establishment of the People's Republic of China in 1949, the Marriage Law 1950 stipulated that a marriage must be registered. There were no rules regarding such a relationship where people called themselves husband and wife but failed to register, and it was unclear whether such a relationship had the same legal effect as a legal marriage. On 14 November 1956, the Supreme People's Court issued a judicial explanation on cohabitation named as 'The Supreme People's Court's Reply on the Legal Effect of Unregistered Marriage'. This reply expressly stipulated that when a man and a woman who were

Online: www.court.gov.cn/zgcpwsw/content/content?DocID=63adbcd9-9777-41e1-8816-efe7c53a8960&KeyWord=%E9%BB%91%E6%B0%B4%E4%B9%A1 (accessed 6 January 2016).

Click here to go to Main Contents

eligible to marry according to the Marriage Law did marry to each other in traditional ways but only failed to register their marriage, their relationship should be recognised as a legal marriage, but as a de facto marriage with almost the same effect as a registered marriage. Or to put it simply, there was no difference between a marriage and a de facto marriage at that time. Later, the Supreme People's Court reaffirmed this viewpoint in a judicial explanation issued on 26 March 1957 named as 'The Supreme People's Court's Reply on the Legal Effect of a Registered Marriage Where One or Both Parties Misstated Their Ages'. (They cannot register their marriage if one or both was under the marriageable age.) On 1 March 1958, 'The Joint Notice on Correcting Cohabitation by Parties under Marriage Age Issued by the Public Security Ministry and the Domestic Affairs Ministry' stipulated that a marriage without registration was against the Marriage Law. On 8 November 1965, 'The Civil Affairs Department's Report Confirmed by the Domestic Affairs Department on Further Strengthening Marriage Registration' was issued declaring that it is illegal for parties to fail to register their marriages and noting that illegal marriages cannot be protected by laws. For those marrying to each other in informal ways and not registering, the authorities should make decisions case-by-case. If both parties had reached statutory age, the authorities should educate them, tell them their mistakes, and have them go through the marriage registration. If both parties were under the marriageable age, the authorities might persuade them to give up getting married temporarily, but they could not force them to separate. In February 1979, in 'The Supreme People's Court's Opinions on Enforcing Civil Policies and Laws issued by the Supreme People's Court', the concept of a de facto marriage was first expressly stipulated. As mentioned above, de facto marriage refers to a relationship formed by a man and a woman who do not register their marriage but cohabit in the name of husband and wife, and neighbours also accept that they are husband and wife. This opinion, again, reconfirmed that a legal marriage must be registered, while an unregistered marriage is illegal and both parties should be criticised. For those disputes which involved parties under the statutory marriage age, if childless, the court should explain the problem and dissolve their illegal marriage. For those disputes where both parties had reached marriageable age, the court should treat this marriage as a legal marriage. Judging from judicial explanations issued before 1980, it is safe to say that Chinese laws regard cohabitation, where both parties substantially meet requirements of getting married, cohabit as husband and wife but do not register their marriage, as a de facto marriage. The relationships possessed the general substantial elements of marriage, but lack of registration led to a negative judgement that it was illegal. Nevertheless, it would be heard as a general marriage case. To put it simply, a de facto marriage is illegal, but the law at that time recognised its effect as a legal marriage to a limited extent.

The Marriage Law 1980 also adopted the approach taken by the Marriage Law 1950 regarding marriage's procedural requirements. Article 7 in the Marriage Law 1980 expressly requires both men and women must go to the marriage office to register their marriage in person. The Supreme People's Court's Opinions on Several Problems in Enforcing Civil Policies and Laws issued by

the Supreme People's Court on 30 August 1984 stipulated that a single man and a single woman cohabiting as husband and wife without registering their marriage in accordance with the marriage law break the law. Where both of them had reached the statutory marriage age and satisfied the requirements of getting married when a divorce case began, such a case could be judged in accordance with Art 25 of the Marriage Law. That is, if mediation was successful or the petitioner dropped his or her claims after mediation, it should be ordered that they should go to register their marriage in relevant offices. If not, and either of the spouses was under the statutory marriage age or failed to meet any of the other marriage requirements, the court should end their cohabitation. Regarding raising the children borne during cohabitation and division of properties acquired in this relationship, relevant regulations in the marriage law would be applied. The new judicial explanation issued on 21 November 1989, namely, 'Opinions of the Supreme People's Court on Hearing Cases Involving Partners Cohabiting as Husband and Wife without Registering Their Marriage' (hereinafter referred to as 'Opinions on Cohabitants without Marriage Registration'), followed the same policy generally. The explanation pronounces that a de facto marriage is illegal, so that criticism and education or civil sanctions should be appropriately applied according to the seriousness of the violation. However, based on complex reasons and specific circumstances when these marriages were formed, in order to protect the legitimate rights and interests of women and children, to maintain family stability and unity, it was feasible to conditionally recognise de facto marriages within a limited period of time. This means that where a marriageable man and a marriageable woman do not go through marriage registration procedures and cohabit as husband and wife before the Marriage Registration Regulations effective on 15 March 1986, and neighbours also accept that they are in a husband-and-wife relationship, if both satisfy legal requirements of marriage when one partner petitions for a 'divorce' in the people's court, it can be identified as a de facto marriage. If one party or both parties do not meet these marriage requirements, their relationship should be categorised as illegal cohabitation. After 15 March 1986, a single man and a single woman who do not marry and do not register their marriage but live together as husband and wife, and neighbours also accept that they are husband and wife, if two sides are legally eligible to be married when they enter into this cohabitation, it can be identified as a de facto marriage. If one party or both parties do not meet these marriage requirements at that time, this relationship should be regarded as illegal cohabitation. At that time, the Chinese law actually steered a middle course to give limited legal consequences regarding cohabitants in the living as husband and wife without fulfilling marriage registration.[2] Judging from these judicial documents as regards to de facto marriages and non-marital cohabitation in 1980s, as it became more difficult for those relationships to be accepted by law indicating that the legislation took a harder line to confirm whether a relationship was a de facto marriage, with non-marital cohabitation is regarded as 'illegal'.

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[2] See Chen Wei *Study on the Legislation of Marriage and Family Law in China* (Qunzhong Press, 2000) p 117.

Click here to go to Main Contents

In the next decade, the most important legal document involving cohabitation, and the source of the important date mentioned previously, is the Regulations on Marriage Registration Administration issued by the Ministry of Civil Affairs on 1 February 1994. This Regulation provided at Art 24 that a relationship where both cohabitants lived as husband and wife, satisfying requirements of a legal marriage, but failing to register their marriage with the relevant authorities, the marriage would be void and could not be protected by law. It means that a de facto marriage, which is recognised by law some years previously, is a void marriage now and the law would not regard this relationship as one with even limited consequences of a legal marriage. But it is worth noting that a different judicial explanation that issued on 14 December 1994 added something more regarding non-marital cohabitation. This explanation, namely 'the Supreme People's Court's Reply on Whether Illegal Cohabitants in Bigamy Cases Cohabiting in the Name of Husband and Wife after the Regulations on Marriage Registration Administration Take Effect Should Be Convicted of Bigamy', states that after promulgation of the Regulations on Marriage Registration Administration, anyone with a spouse living with a third party as husband and wife, or a single person cohabiting with a person as husband and wife knowing the counterpart has a marriage already, should still be convicted of bigamy. Therefore, if one party had a spouse or both sides have spouses before their de facto marriage, such a relationship would be counted as bigamous and parties involved should be punished. In brief, after the Regulations on Marriage Registration Administration was enacted, a de facto marriage formed after 1 February 1994 is void but it can still be counted as a second marriage in criminal bigamy proceedings. However, this judicial explanation was abolished on 18 January 2013. That means such a de facto marriage not only is not recognised as a marriage any more, but also cannot establish a criminal offence of bigamy.

In the late 20th century, a great debate took place surrounding amending the Marriage Law 1980. Article 31(2) of the draft of the Marriage Law of the People's Republic of China in April 1997 and Art 28(2) of the later draft in October 1997 both stipulate that a cohabitation in the name of husband and wife without registration as a marriage will not be counted as a legal marriage, but will be considered void from its formation even without a judicial declaration.[3] Interestingly, the Marriage Law Amendment promulgated in April 2001 does not make a clear statement regarding this issue. Article 8 in this Amendment only provides that if parties fail to register their marriage, they should go through post-registration of their marriage. In the same year, the Supreme People's Court promulgated the Interpretations No 1 on Several Problems in Applying the Marriage Law of PRC on 27 December 2001 (hereinafter referred to as the Explanations No 1 of the Marriage Law). Article 5 in this Interpretation provides that before 1 February 1994 when the Regulations on Marriage Registration Administration come into force, partners living together as husband and wife and having substantive and legal elements

[3] See Chen Wei *Study on the Legislation of Marriage and Family Law in China* (Qunzhong Press, 2000) p 150.

of marriage would be treated as couples in a de facto marriage. Those partners cohabiting after that date and also meeting requirements of a legal marriage were no longer to be treated as such. If one partner brought a case before the court to petition for divorce, the court should give an order of dissolution of this cohabitation. Shortly after this interpretations, the Regulations on Marriage Registration Administration was abolished and a new set of regulations replaced this one, that is, the Regulations on Marriage Registration issued on 1 October 2003. However, the new regulations keep silent with regard to cohabitants living as husband and wife without marriage registration. Thus, judges in practice would follow the rules stipulated in the Interpretations No 1 of the Marriage Law. To put it simply, only before 1 February 1994, could cohabitants who lived as husband and wife meeting the substantive legal elements of marriage be treated as being de facto married. After that date, no matter whether the cohabitants lived as husband or wife, and no matter whether both of them were legally marriageable, their relationship would be treated as cohabitation in law. Thus the current laws and judicial interpretations follow the same approach to de facto marriages. After 1 February 1994, any cohabitation regardless of the parties' marriageability or the appearance of a cohabitation (whether in the name of husband and wife) would be treated as cohabitation. However, cohabitation is no longer illegal and the word 'illegal' in 'illegal cohabitation' in the old laws is deleted.

(c) The existing provisions with regard to non-marital cohabitation

According to the present laws and regulations, cohabitation relationships cannot be protected. Parties involved have rights to form and dissolve such relationships as they please. Regarding their property problems, the most important rules come from the Opinions on Cohabitants without Marriage Registration 1989. Article 8 provides a basic principle to deal with cohabitation property disputes, that is, judges should ensure that women and children's rights are fully protected and divide properties after duly considering facts and circumstances in a case and wrongs committed by one or both parties. According to the Opinions on Cohabitants without Marriage Registration 1989, if the cohabitation is dissolved, the properties voluntarily given to the other party as gifts before cohabitation should be dealt with in accordance with gift laws. Income and properties jointly acquired during cohabitation will be treated as general common properties (Art 10). Credits and debts created during cohabitation due to working and/or living together would be treated as joint credits and joint debts (Art 11). Cohabitants have no rights to inheritance to each other. If one party supports the other party for a long time or he or she is dependent on the other side and loses his or her ability to work and earn a living, he or she can be awarded an appropriate share of the estate (Art 13). In terms of the support system, where a cohabitant is seriously ill and is not completely cured at the time of separation, he or she should be given appropriate care or given a lump sum payment as financial assistance (Art 12).

Click here to go to Main Contents

As regards to parent-child relationships, where a child is born during cohabitation, the relationship between the children and their parents is protected. Children of married and unmarried parents enjoy the same rights.[4] When dissolving a cohabitation lived as husband and wife, both sides may negotiate about raising the children. Where negotiation fails, the judgement should be based on the interests of minor children and the specific circumstances of the parties. In accordance with Art 9 in the Opinions on Cohabitants without Marriage Registration 1989, breastfeeding babies should be generally raised by the mother. If the father has better financial resources and other favourable conditions to take care of babies and the mother agrees, the father can raise these babies alone too. Where the child is old enough with limited competence (that is, is older than 10 years old but younger than 18 years old according to Chinese law), the child's voice should be heard. In the case of placing out their children for adoption, the party willing to sending the children out should obtain the other party's consent.

III EXAMINATION OF RULES AND REGULATIONS ON NON-MARITAL COHABITATION IN CHINA

(a) In the perspective of the system's value

From the development of rules and regulations on de facto marriages and non-marital cohabitation in China since the establishment of the PRC in 1949, it is not difficult to conclude that the legal attitude towards non-marital cohabitation is changing as is reflected in the names given this relationship in relevant policies and legal documents. In the Opinions on Cohabitants without Marriage Registration 1989, 'illegal cohabitation' is adopted by the Supreme People's Court, while more than a decade later, this relationship is called 'cohabitation' in the Explanations No 1 of the Marriage Law 2001 issued by the Supreme People's Court.

Reviewing the reforming route of rules and regulations on de facto marriages and non-marital cohabitation in the last half a century in China, we can find the relationship between family law's reform and social development. The legislative Committee of the Central People's Government of China issued a report named the Report on Drafting Process and Reasons of the Marriage Law of PRC in 1950. This report indicates that the old family system in semi-colonial and semi-feudal society was regarded as a barrier to productive forces. Reconstructing a new family system through legal reforms dovetailed nicely with a demand for a new socialist trend in the socialist society. Besides, it would also help to liberate the female labour force and was justifiable for benefiting the improvement of social productive forces and social development.[5] Therefore, the government carried out a campaign to publicise

[4] Article 25 in the Marriage Law Amendment 2001.

[5] See Jin Mei 'Reflections on the Reform Movement of Marriage Rules in 1950s in China' (2010) (8) *Legal Science* 105.

legal information on the Marriage Law and to educate the public to abide by it. The courts also took advantage of trials as a tool to encourage those abiding by the marriage rules and discourage any actions against them.[6] Of course, de facto marriages and non-marital cohabitation, with some characteristics of the old society and the old system, became part of the objects receiving criticism and legal punishment. But as the Opinions on Cohabitants without Marriage Registration 1989 indicates, considering the complex situations and different cultures in various regions in China, the courts actually take a middle way regarding de facto marriages, that is, recognising some cohabitations where both parties are in line with substantive requirements but without registering their marriage as a marriage with some legal consequences in order to protect the legitimate rights and interests of women and children. Such judicial approaches can be found in policies and documents issued after the New China was founded.

American scholars P Stein and J Shand pointed out that three basic values of a legal system are order, fairness and individual freedom. A theoretic explanation on the nature of a legal system generally tends to emphasise one of these three values while ignoring the others.[7] With regards to de facto marriages and non-marital cohabitation, Chinese policies precisely demonstrate a compromise of this contradiction between these different legal values. For a long period after the foundation of the PRC in 1949, it was the priority for the new government to maintain social order beginning with new marriage rules and regulations. The second, fairness value is the need to protect women's and children's seen in some of the de facto marriage law. The value of individual freedom, seen in the property and contracting context follows. To summarise, the rules and regulations on de facto marriages and cohabitation are oriented by order, followed by fairness, and finally demonstrating individual freedom.

To be honest, the legal order is a constructive social order,[8] which plays a crucial role in safeguarding social stability. When a new system replaced an old one, China chose a typical path by taking the following measures, including carrying out a campaign named 'All Participation in Publicization Month', making the Marriage Law 1950 publicised, implementing and enforcing it, giving negative responses to any actions threatening the new marriage law, and conditionally recognising some cohabitations as de facto marriages considering historical heritage. These measures to some extent are justifiable. Along with economic development and social progress in China, the relevant rules and regulations on cohabitation and de facto marriages do not change greatly although the current law no longer regards cohabitation as an illegal relationship. Thus, it is worth thinking whether the cohabitation and de facto marriages system should still uphold the legal values in the same order was originally necessary.

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6 See Jin Mei 'Reflections on the Reform Movement of Marriage Rules in 1950s in China' (2010) (8) *Legal Science* 101.

7 P Stein and J Shand *Legal Values in Western Society*, Wang Xianping trans (Publishing House of People's Public Security University of China, 1990) p 7.

8 Li Long (ed) *Jurisprudence* (Wuhan University Press, 2011) p 471.

Take elderly cohabitation as an example. Recently, cohabitation between the elderly increases in China. This is partly because the elderly widowed need someone to take care of them not only in their personal lives but also in their spiritual needs. Family planning policy implemented in the late 1970s changed Chinese family structure greatly, particularly increasing single child families. Accompanying this new change, the problem of supporting the elderly has become increasingly prominent. Therefore, the elderly's need of 'living together and supporting each other' (Da Ban Yang Lao) is predictable. On the other hand, the non-marital cohabitation choice made by the elderly reflects the reality of the problem that the elderly are unlikely to remarry.[9] The logic behind this choice includes calculation and balance among many considerations such as his or her personal life, their children's feelings, their properties, etc. But it is untrue that we can presume that these elderly did this because they do not want to be protected by law, since it is generally known that cohabitation cannot protect them in such a more satisfactory way as marriage.

Surely a marriage differs greatly from cohabitation. This difference has already been rooted in most Chinese citizens. However, can we set up two systems of marriage and cohabitation which have different contents and targets and give different protection to married couples and cohabitants separately?

From the perspective of the values of a legal system, we need to find a satisfactory approach to balance the three basic values of order, fairness and individual freedom. To recognise cohabitation as a lifestyle and make appropriate rules to regulate its consequences, and to further express fairness and individual freedom, does cohabitation really undermine the order-keeping value of the marriage system? Or to put it simply, would furnishing cohabitants some (not all) of the rights and duties of married couples, really make people choose cohabitation as opposed marriage more often? Another question we need to rethink is as follows: to maintain the basic order of the marriage system and keep offenders from being protected by law, must this be at the expense of individual freedom to a certain lifestyle?

(b) From the perspective of implementation

Examining the present cohabitation system in the perspective of implementation, three questions need to be addressed regarding hearing cohabitation disputes.

First, how to identify the community property during cohabitation?

In the case outlined at the beginning of the chapter, the parties disputed ownership of the house built near the country road during cohabitation. Is it a

[9] Jiang Xiangqun 'Da Ban Yang Lao and Difficulties of Elderly's Remarriage' (2004) (5) *Population Research* 94.

common property? Miss Li argued that the funding for this house came from the award due to her ex-husband's death. But the court refused to take this argument based on lack of evidence.

Non-marital cohabitation is different from general civil relations. It is also different from partnership relations. Typically, cohabitants would treat each other like couples entering into a marriage and live in the similar way. That explains why cohabitants would not expressly clarify the ownership of a property in their relationship or acquired through other civil relations. In accordance with the present judicial interpretations, income and property jointly acquired during cohabitation will be treated as community property. Thus, should each party's salaries and bonuses be treated as community property? How about the savings held under each party's name? In judicial practice, one judge held that if both bank accounts are kept by one person, savings in these bank accounts should be held as community property of cohabitants.[10] Another judge opined that if both parties' properties are mixed together, the properties acquired during cohabitation should be held as community property.[11] But a third judge held the different view that where it cannot be proven that each party's properties have been commingled, one party's savings cannot be treated as community property. The court refused one partner's argument that he gave his wages to the woman and so should be awarded a portion of the savings.[12] Where houses are involved, if one party's name has been added to the title of a house owned by the other one, such a house would be counted as community property.[13] However, one judge

[10] The Intermediate People's Court in Qiandongnan in Gunzhou Province, Zhao v Long (2nd instance) (2015) QianDong Civil Court Cases No 542, 10 September 2015, China Judgements Online www.court.gov.cn/zgcpwsw/content/content?DocID=eca1c230-2537-48e0-a5da-1c18d963f35f&KeyWord=%E7%BB%8F%E6%B5%8E%E5%B8%AE%E5%8A%A9 (accessed 6 January 2016).

[11] The Intermediate People's Court in Xiangxi in Hunan Province, Yang Jia v Yang Yi (2nd instance) (2014) Zhou 1st Civil Court Cases No 235, 6 November 2014, China Judgements Online www.court.gov.cn/zgcpwsw/content/content?DocID=4f763c2f-01a7-4e8c-a054-edad9eca1d3b&KeyWord=%E5%90%8C%E5%B1%85%E6%9E%90%E4%BA%A7|%E5%85%B1%E5%90%8C%E8%B4%A2%E4%BA%A7|%E4%B8%AA%E4%BA%BA%E8%B4%A2%E4%BA%A7 (accessed 6 January 2016).

[12] The Intermediate People's Court in Qingdao in Shangdong Province, Zhu v Dong (2nd instance), (2013) Qing 5th Civil Court Cases No 2201, 31Octomber 2014, China Judgements Online www.court.gov.cn/zgcpwsw/content/content?DocID=58fd1bc8-b1a3-483b-bb79-0380b9676eb9&KeyWord=%E4%B8%AA%E4%BA%BA%E8%B4%A2%E4%BA%A7 (accessed 8 January 2016).

[13] The Intermediate People's Court in Xinxiang in Henan Province, Chen v Wang (2nd instance), (2014) Xinzhong 4th Civil Court Cases No 234, 24 November 2014, China Judgements Online www.court.gov.cn/zgcpwsw/content/content?DocID=1f58674a-accd-45e9-90de-0abfee66bef1&KeyWord=%E4%B8%AA%E4%BA%BA%E8%B4%A2%E4%BA%A7 (accessed 8 January 2016). In another case, the man party argued that the house was bought on his own, but the court rejected this argument too. The court held that there is no evidence to show that this house was bought in his own name as both parties' names were on the certificate of the house ownership. Therefore, it is a jointly-owned house. The Intermediate People's Court in Luoyang in Henan Province, Fei v Zhang (2nd instance), (2013) Luo 2nd Civil Court Cases No 2255, 20 March 2014, China Judgements Online www.court.gov.cn/zgcpwsw/content/content?DocID=b1d934d1-12b8-4b2f-adfa-0ea13ec2ef91&KeyWord=%E6%88%BF%E4%BA%A7%E8%AF%81 (accessed 9 January 2016).

Click here to go to Main Contents

maintained that a house ownership certificate is a document issued by the relevant authorities to certify that the right holder enjoys the rights of this house, but is insufficient to prove the real owners in a family. Where cohabitants dispute the ownership of a house, the court should give a judgment based on payments made by both parties when buying this house and their relationship. Therefore, a house registered as one's property is treated as jointly owned by both cohabitants.[14]

Judging from the above-mentioned judicial practices, it can be concluded that the main approach to decide whether a property is jointly owned by both cohabitants is to discover whether this property is a fruit of mixed property (a mixture of both properties). If evidence proves that it is true, such a property would be treated as jointly owned. But judges disagree on ownership of real properties.

Family relationships differ from general market trading relationships. Sociologically, the former is the primary relationship while the latter is the secondary relationship. Cohabitation in the name of husband and wife closely resembles a family relationship. Altruism, common in family relations[15] can also be found in cohabitation. Both partners often behave altruistically during cohabitation. In our view, it is reasonable to confirm whether a property is jointly owned based on whether both parties' properties are mixed together based on the principles of civil law. Regarding real property disputes, in accordance with Art 10 in the Opinions on Cohabitants without Marriage Registration and its spirit, properties bought by both parties during cohabitation would be treated as a jointly-owned property. Therefore, the ownership of a real property should be determined by each party's financial contributions. This approach would be a better one to represent fairness and justice of the law.

Secondly, is the separation agreement reached by both parties enforceable?

When cohabitants separate, they usually reach a separation agreement or an agreement on dissolution of cohabitation. In these cases, the court will uphold their agreement. If the agreement does not contain any clause which makes it void or voidable, such an agreement surely should be considered valid. Interestingly, emotional damages clauses can be found in some separation agreements, which require one cohabitant to pay emotional damages to the other when they separate.[16] In judicial practice, some judges believe that this is

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[14] The Intermediate People's Court in Changsha in Hunan Province, Cheng v Li (2nd instance), (2014) Changmin 1st Civil Court Cases No 01330, 24 December 2014, China Judgements Online www.court.gov.cn/zgcpwsw/content/content?DocID=6030fa23-6e39-4f4b-b6a4-363662c79f66&KeyWord=%E6%88%BF%E4%BA%A7%E8%AF%81 (accessed 9 January 2016).

[15] See Becker *A Treatise on the Family*, Wang Xiansheng, Wang Yu trans (The Commercial Press, 1998) p 367.

[16] In separation agreements, different terms were used to mean these emotional damages, such as mental damages, compensation for loss of one's youth, money spent on paramours, mental injury compensation etc.

individual's autonomy which should be respected by law, making such an agreement effective.[17] But others comment that such an agreement violates public policy and therefore is invalid.[18]

We maintain that we should follow the general test for civil actions based on the contents of such an agreement and determine its effect accordingly. The current rules and regulations do not prohibit cohabitants from reaching an agreement on child raising and property division. Therefore, if both parties entered into this agreement freely and there is no fraud or coercion, such an agreement should be valid. But the effect of an emotional damages clause should be determined on a case-by-case basis. For example, where a woman gets an abortion during cohabitation or shortly after the end of cohabitation and consequently suffers personal injury, she can request damages for personal injuries and emotional damages as well. Furthermore, the Anti-Domestic Violence Law of the PRC has been passed on 27 December 2015 and is effective on 1 January 2016. Article 37 stipulates that it can also be applied where violence occurs between cohabitants. Such violence would be treated as domestic violence and punished according to this new law. Where any personal and spiritual injuries result from one partner's domestic violence, maltreatment, desertion, etc, the injured partner could petition for emotional damages. However, if there are not any underlying personal and spiritual injuries, one cohabitant's petition for emotional damages merely because of separation should be rejected by the court.

Thirdly, when would the court award one partner financial assistance?

In the case with which we began, Miss Li's petition for emotional damages was rejected. But if Miss Li had petitioned for financial assistance, would the court have supported her claim? In accordance with the current judicial interpretations, where one cohabitant is seriously ill and not cured during cohabitation, special care should be taken of the sick partner's rights and interests, or a lump sum financial assistance payment should be given. However, in judicial practice, at least one case did not support this financial assistance claim petitioned by the ill partner.[19] Interestingly, in another case,

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[17] The Intermediate People's Court in Qiandongnan in Guizhou Province, Wang v Yang (2nd instance), (2014) Qiandong Civil Court Cases No 237, 16 July 2014 (China Judgements Online www.court.gov.cn/zgcpwsw/content/content?DocID=6a4ac727-3588-490e-ad70-98d766ac6aeb&KeyWord=%E5%88%86%E6%89%8B%E5%8D%8F%E8%AE%AE (accessed 9 January 2016).

[18] The Intermediate People's Court in Zhenjiang in Jiangsu Province, Sun v Nie (2nd instance), (2014) Zhen Civil Court Cases No 0619, 27 August 2014, China Judgements Online www.court.gov.cn/zgcpwsw/content/content?DocID=5aba4581-bee3-4f85-beee-aaa29077e174&KeyWord=%E5%88%86%E6%89%8B%E5%8D%8F%E8%AE%AE (accessed 9 January 2016).

[19] The Intermediate People's Court in Xingtai in Hebei Province, Huo v Zhang (2nd instance), (2014) Xing 4th Civil Court Cases No 441, 15 January 2014, China Judgements Online www.court.gov.cn/zgcpwsw/content/content?DocID=ab62ec76-3fcc-48db-bd87-413ddde06262&KeyWord=%E5%90%8C%E5%B1%85%E5%85%B3%E7%B3%BB|%E7%BB%8F%E6%B5%8E%E5%B8%AE%E5%8A%A9 (accessed 10 January 2016).

considering that one partner needed to raise their child, and had no job and no house, the court supported her petition for financial assistance payment.[20]

As mentioned above, the judicial interpretations from the Supreme People's Court provide that where a cohabitant gets ill during cohabitation and is not cured at the time of separation, the other partner should give her or him a financial assistance payment. Nevertheless, the practice indicates that courts have disagreed on when financial assistance claims are warranted. Some judges in rejecting a financial aid petition by the sick partner held that the 'financial assistance clause in the Marriage Law is only applied to a marriage rather than cohabitation'.[21] Authorising petitioner's financial assistance claim where she had no serious illness, other courts supported the claim because she needed to take care of the partners' child, and had no job and no house to live in, etc.[22]

In our view, as a relief for an end of a family-like intimacy, financial assistance aims to help the disadvantaged in cohabitation to be independent after separation. Although the present judicial interpretations stipulate that only the seriously ill cohabitant may petition for financial assistance, some judges have inferred from the legislative purpose of the Marriage Law that where one party bears child-raising burdens but has no stable economic resources and no housing, etc, his or her financial assistance claim should be supported as well. This is reasonable not only because it would protect the basic living rights of the disadvantaged after separation, but also because it would be consistent with the principle of best interests of the child who is now to be treated like a marital child.

IV SUGGESTIONS FOR IMPROVEMENT OF NON-MARITAL COHABITATION SYSTEM

Non-marital cohabitation, a different life-style from marriage, is freely chosen by some people. It exists in our real life. The foregoing exploration of the present judicial practice regarding cohabitation reveals that the current system on non-marital cohabitation in China is relatively simple and provides weak protection for the disadvantaged party. Thus we recommend that the legislature

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[20] The Intermediate People's Court in Zhumadian in Henan Province, Sun v Wei (2nd instance) (2014) Zhu 3rd Civil Court Cases No 00012, 31 March 2014, China Judgements Online www.court.gov.cn/zgcpwsw/content/content?DocID=3cafbe38-d0dd-4841-8157-2aa2562079a8&KeyWord=%E5%90%8C%E5%B1%85%E5%85%B3%E7%B3%BB|%E7%BB%8F%E6%B5%8E%E5%B8%AE%E5%8A%A9 (accessed 10 January 2016). In another case, the court also determined that the unemployed cohabitant can be awarded financial assistance payment from the other one. The Intermediate People's Court in Linxia in Gansu Province, Ma v An (2nd instance), (2015) Lin Civil Court Cases No 14, 2 April 2015, China Judgements Online www.court.gov.cn/zgcpwsw/content/content?DocID=16dab8d8-287b-42ac-8a80-ef71be0cf9b0&KeyWord=%E5%90%8C%E5%B1%85%E5%85%B3%E7%B3%BB|%E7%BB%8F%E6%B5%8E%E5%B8%AE%E5%8A%A9 (accessed 10 January 2016).

[21] See n 19.

[22] See n 20.

should improve our existing system of non-marital cohabitation. With regard to the legislative model, we should adopt a mixed system where cohabitation-without-registration system is the main subject and registered-cohabitation system is the alternative. Surely, the law would deal with cohabitation in this mixed system in a different way from marriage. In accordance with the basic principle of private autonomy in civil law, the law should give partners the choice of whether to register their cohabitation. For those registering, they would be treated as registered partners. Couples in 'registered partnership' would enjoy some rights similar to those rights enjoyed by married spouses.[23] For those cohabitants remaining unregistered, the non-marital cohabitation system would apply. Regarding cohabitation agreements, as long as valid and effective, the court can deal with property disputes in accordance with them.

Furthermore, it is recommended to improve the existing non-marital cohabitation legislation in the following areas.

First, in terms of common property during cohabitation, it is recommended to make legislation based on the judicial interpretations. The incomes and properties acquired during cohabitation should be jointly owned by both parties. Where one's personal properties are mixed with the other's, the commingled properties should be a common property owned proportionally to the contributions of each. Where a real property is involved, the court should consider each party's financial investment in this real property to determine each one's share.

Secondly, it is suggested that a separation agreement freely reached by both cohabitants regarding child-raising and property division should be effective unless one party is deceived or coerced to reach such an agreement. Where one partner has personal injuries and mental injuries due to domestic violence, maltreatment or desertion committed by the other, both may reach an agreement on damages for these wrongs. Such an agreement would be valid no matter how high the damages is since it could cover punitive as well as compensatory. Notably, if the agreed damages agreed were too high, the part of damages beyond what is affordable for the faulty party would be invalid.

Thirdly, in terms of the application of financial assistance, it is suggested that the situations where financial assistance is available should be expanded in legislation: where one partner needs to raise the child born in cohabitation and has no job and no house to live in at the time of separation, the other party should make an appropriate one-time payment as financial assistance to the disadvantaged party.

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[23] Chen Wei, Wang Wei, 'On the social basis and legislative propositions of establishing non-marital cohabitation law of the PRC', *US-China Law Review*, Vol 6 No 1, January 2009 (Serial Number 50), David Publishing Company in USA, pp 1–13.

Click here to go to Main Contents

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ENGLAND AND WALES

MENTAL INCAPACITY AND PERSONAL RELATIONSHIPS – WRAPPING IN FORENSIC COTTON WOOL OR RESPECTING THE AUTONOMY OF THE INDIVIDUAL

Mary Welstead[*]

Résumé

Dans le recueil de cette année, j'étudie un certain nombre de décisions des juridictions d'Angleterre et du Pays de Galles dans lesquelles les tribunaux ont dû examiner des dispositions de la loi sur la capacité mentale de 2005 relativement à des affaires qui concerne la capacité à mettre un terme à des relations personnelles telles que le mariage, les relations sexuelles et le concubinage.

Les décisions illustrent les problèmes auxquels les tribunaux ont été confrontés dans l'interprétation de la loi de 2005 et conduisent à s'interroger sur l'efficacité de la loi à satisfaire le double objectif du législateur, à savoir: Une personne ne doit pas considérée comme incapable de prendre une décision simplement parce qu'il ne serait pas prudent de la laisser décider; Et lorsqu'une personne vulnérable n'a pas la capacité de prendre des décisions, les tribunaux ne peuvent décider de son avenir qu'en fonction de son intérêt.

J'attire l'attention sur le problème particulier auquel sont confrontées les personnes asiatiques vulnérables qui résident dans notre Etat et dont les familles ont tenté d'organiser un mariages ou les ont forcé à contracter mariage. La motivation de ces familles est généralement de veiller à ce qu'elles soient soignées par un conjoint lorsque leur famille ne sera plus en mesure d'accomplir cette tâche.

La constatation par un tribunal d'un défaut de capacité à consentir à une relation personnelle étroite aura des conséquences majeures pour une personne vulnérable. Elle sera privée de ce soutien émotionnel que la majorité de la société considère comme acquis. Je soutiens que des modifications à la loi sur la capacité mentale de 2005 sont nécessaires pour empêcher une telle privation.

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Click here to go to Main Contents

Hedley J, in *A NHS Trust v P and another*,[1] emphasised the principle enshrined in s 1(4) of the Mental Capacity Act 2005 (MCA) that a person is not to be treated as being incapable of making a decision merely because it would be an unwise one. He noted that

> 'In the field of personal relationships that is a very important qualification to the powers of the court. The plain fact is that anyone who has sat in the Family jurisdiction for as long as I have, spends the greater part of their life dealing with the consequences of unwise decisions made in personal relationships. The intention of the Act is not to dress an incapacitous person in forensic cotton wool but to allow them as far as possible to make the same mistakes that all other human beings are at liberty to make and not infrequently do.'[2]

In this year's *International Survey*, I propose examining a number of decisions in the jurisdiction of England and Wales in which the courts have considered the provisions of the MCA with respect to the right to engage in close personal relationships such as marriage, sexual relationships, and cohabitation. The decisions demonstrate the problems which the courts have faced in interpreting the MCA and lead to questions about the efficacy of the Act in achieving the intention expressed so appropriately by Hedley J.

I THE RIGHT TO A PERSONAL RELATIONSHIP

The essence of the right delineated in the European Convention on Human Rights 1950 ('the Convention') is a respect for human dignity and human freedom which encompass the right to enjoy a personal relationship.

More specifically, Arts 5, 8, and 12 provide, respectively, for the protection of a person's liberty and security; the right to respect for private and family life; and the right to marry and to found a family. Any interference with these rights must be in accordance with the justifiable exceptions incorporated into the Convention.

The MCA has limited these Convention rights by giving the courts the power to determine a person's capacity to engage in a personal relationship. There is a distinct lack of any significant discussion of Arts 5, 8, 12 in the case law.[3]

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1 [2013] EWHC 50 (COP) (para 10).
2 Ibid (para 10).
3 Cf *NCC v PB and TB* [2014] EWCOP 14 (paras 113, 114); *Luton Borough Council v SB and RS (Capacity to consent to sexual intercourse and marriage)* [2017] EWHC 3534 (paras 48ff).

II THE MENTAL CAPACITY ACT 2005 AND THE CODE OF PRACTICE 2007

The MCA and its related Code of Practice 2007 ('the Code')[4] governs decisions to determine the capacity of a person, and his or her future, if capacity is found to be lacking. In the foreword to the Code, Lord Falconer, the Lord Chancellor at that time, described the Act as:

> 'a vitally important piece of legislation which would empower people to make decisions for themselves wherever possible, and protect people who lack capacity by providing a flexible framework that places individuals at the very heart of the decision-making process. It will ensure that they participate as much as possible in any decisions made on their behalf, and that these are made in their best interests.'

(a) The principles in s 1

Section 1 of the MCA lays down a number of important principles:

- a person must be assumed to have capacity unless it is established that he lacks capacity;
- a person is not to be treated as lacking capacity unless all practicable steps to help him or her to do so have been taken and have been shown to be unsuccessful;
- a person is not to be treated as incapacitous because his or her decision is an unwise one;
- any act done or decision made for an incapacitated person must be based on his or her best interests and in the least restrictive way possible.

(b) The 'best interests' test

Once a court has found that a person lacks capacity, any determination about his or her future must be made in accordance with the 'best interests' test in s 4 of the MCA. Sections 16 and 17 of the Act determine the powers of a court with respect to decisions relating to personal welfare. However, these powers are not unlimited and s 27 of the MCA provides that a court may not make decisions about, inter alia, marriage or sexual relationships. This limitation means that once a court has made a finding of incapacity with respect to marriage or sexual relationships, that decision will have a very significant and profound effect on a person's future. He, or she, will be in the hands of the court and any possibility of a close emotional or sexual relationship will be at an end.

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[4] Issued by the Lord Chancellor in 2007 in accordance with ss 42, 43 of the MCA.

Click here to go to Main Contents

(c) Tests to assess incapacity

The MCA lays down two tests for assessing a person's incapacity.

First, the diagnostic test in s 2(1) provides that:

> 'a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.'

Whether a person lacks capacity must be decided on the balance of probabilities.[5]

Secondly, the stringent decision test in s 3(1) provides that a person will be held to be incapacitated with respect to personal decision making if unable to satisfy the following:

(a) to understand the information relevant to the decision;
(b) to retain that information;
(c) to use or weigh that information as part of the decision-making process or
(d) to communicate that decision.

The Code states that the Act does not replace the common law definition of capacity.[6] It also maintains that:

> 'It is important not to assess someone's understanding before they have been given relevant information about a decision. Every effort must be made to provide information in a way that is most appropriate to help the person to understand. Quick or inadequate explanations are not acceptable unless the situation is urgent … Relevant information includes:
>
> - the nature of the decision,
> - the reason why the decision is needed, and
> - the likely effects of deciding one way or another, or making no decision at all'.[7]

(d) The debate: act-specific or person/circumstances-specific

Although the language of the MCA with respect to the diagnostic test in s 2(1) has been said to be plain,[8] there has been considerable legal debate about its relationship with the s 3(1) decision test. The conflict centres on whether the determination of the issue of capacity requires an approach which is act-specific

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5 MCA, s 2(4).
6 See the Code of Practice 2007 (para 4.33).
7 Ibid (para 4.16).
8 See *PC and NC v City of York Council* [2013] EWCA 478 (para 35).

or one which is person/circumstances-specific. The two decisions of the Court of Appeal in the next section illustrate the attempts which have been made to resolve the conflict.

III THE COURT OF APPEAL AND THE CAPACITY TEST

(a) PC and NC v York City Council (2013)[9]

(i) The facts

A woman, PC, aged 48, had been diagnosed with significant learning difficulties. She had an IQ of between 66 and 69, and had had a number of problematic relationships. She had been married once and had undergone two abortions but had eventually given birth to a child who lived with her sister. PC had occasional contact with this child.

In 2001, PC began to live with NC who, in 2002, was sentenced to 13 years in prison for serious sexual offences but he and PC continued to deny his guilt. Whilst NC was in prison, he and PC married. Prior to NC's release from prison on licence, the local authority issued proceedings in the Court of Protection and argued that PC lacked capacity to consent to live with NC and that he posed a risk to her.

(ii) The decision of the Court of Protection

The Court of Protection held that the decision test in s 3(1) of the MCA would sometimes centre on an act-specific approach. At other times, the test might require a court to consider all the circumstances prevailing at the time the decision had to be made which might well include the identity of the prospective partner. The Court found that PC lacked capacity to make a decision to resume living with NC. The court then proceeded to apply the best interests' test and held that PC could cohabit with NC on condition that the local authority monitor their relationship and give support to PC. By implication, the Court was consenting on PC's behalf to consent to a sexual relationship with NC and made no reference to the limitation placed on the Court by s 27 of the MCA with respect to such an action.

(iii) The hearing in the Court of Appeal

The decision was challenged in the Court of Appeal by the Official Solicitor and three distinct issues were identified for the Court's determination:

> 'As a matter of law a "decision" to which MCA 2005, Part 1 (ss.1–3) applies can only be act-specific and can never be person-specific.

[9] [2013] EWCA Civ 478.

Click here to go to Main Contents

> If, contrary to A, it is permissible for some "decisions" to be person-specific, the decision of a wife to go to live with her husband is not one of those decisions.
>
> If, contrary to A and B, it is permissible for the decision of a wife to go to live with her husband to be person-specific, where, as here, the wife has had and maintains capacity to marry, the outcome of the test for capacity to marry will be the same as that for the capacity to decide to cohabit.'[10]

The Court of Appeal referred to the major precedents on capacity to marry and/or to have a sexual relationship. In *Sheffield City Council v E* (2005), a pre-MCA decision under the inherent jurisdiction, Munby J (as he then was) concluded that in determining capacity to consent marriage:

> 'In all the cases, as we have seen, the question has always been formulated in a general and non-specific form: Is there capacity to understand the nature of the contract of marriage?'

He added:

> 'In relation to her marriage the only question for the court is whether E has capacity to marry. The court is not concerned – has no jurisdiction – to consider whether it is in E's best interests to marry or to marry S. The court is concerned with her capacity to marry, not with the wisdom of her marriage in general or her marriage to S in particular.'[11]

Munby J took a similar approach to the question of capacity to consent to engage in a sexual relationship.[12]

The Court of Appeal accepted that the enactment of the MCA had not established any basis for questioning Munby J's decisions in spite of the doubts about them expressed by Baroness Hale about in *R v Cooper* (2009):

> 'it is difficult to think of an activity which is more person and situation specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place. Autonomy entails the freedom and the capacity to make a choice of whether or not to do so.'[13]

Her Ladyship's comments were made during an appeal involving the offence of 'sexual activity with a person with a mental disorder impeding choice' contrary to the Sexual Offences Act 2003, s 30.[14] The House of Lords overruled the decision in the Court of Appeal on the grounds that it had unduly limited the

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10 Ibid (para 17).

11 [2005] Fam 326 (paras 85 and 102); see also *M v B, A and S (by the Official Solicitor)* [2005] EWHC 1681 (Fam); *A, B and C v X and Z* [2012] EWHC 2400 (COP); *D Borough Council v B* [2011] EWHC 101 (Fam).

12 *Local Authority X v MM* [2007] EWHC (Fam).

13 [2009] UKHL 42 (paras 7 and 27).

14 Ibid (para 25). Baroness Hale observed that 'it is not for us to decide whether Munby J was right or wrong about the common law'.

scope of the 2003 Act by holding that a lack of capacity to choose whether or not to agree to sexual activity cannot be person or situation specific. Thus, Baroness Hale's view was obiter.

In *PC and NC v York City Council*, the Court of Appeal declined to consider whether the decision in *R v Cooper* was limited to criminal cases.[15] However, it appeared to accept that the test for capacity to engage in a sexual relationship might need to be person-specific:

> 'Whilst consent to sexual relations forms part of the wider decision by a spouse whether or not to take up full cohabitation with her husband, the two decisions are not precisely the same. The fact that one may be act-specific does not mean that the other, wider decision cannot be person-specific'.[16]

However, despite the Court's elaboration on this issue and its acceptance that decisions such as those relating to contact might be person-specific, it proceeded to cause confusion by saying that:

> 'all decisions, whatever their nature, fall to be evaluated within the straightforward and clear structure of MCA 2005, ss. 1 to 3 which requires the court to have regard to "a matter" requiring "a decision". There is neither need nor justification for the plain words of the statute to be embellished.'[17]

(iv) The decision of the Court of Appeal

The Court of Appeal appeared to ignore its own view as expressed above and accepted that where a person was found to have had the capacity to marry, it would be difficult to reach a contrary conclusion with respect to his or her capacity to cohabit. It held that PC did have capacity to decide to live with NC even though her decision might put her at risk of abuse from him. The Court maintained that a decision about capacity should not be made on the basis of concern about the outcome for, or against, the person concerned. As Lewison LJ remarked:

> 'I well understand that all the responsible professionals take the view that it would be extremely unwise for PC to cohabit with her husband. But adult autonomy is such that people are free to make unwise decisions, provided that they have the capacity to decide. … I do not consider that there was a solid evidential foundation on which the judge's decision can rest. We must leave PC free to make her own decision, and hope that everything turns out well in the end.'[18]

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15 *In D Borough Council v B* [2011] EWHC 101 (Fam), Mostyn J held that the decision in *R v Cooper* related only to criminal law cases.

16 Ibid (para 27).

17 Ibid (para 35). McFarlane LJ added: 'The MCA 2005 itself makes a distinction between some decisions (set out in s 27) which as a category are exempt from the court's welfare jurisdiction once the relevant incapacity is established (for example consent to marriage, sexual relations or divorce) and other decisions (set out in s 17) which are intended, for example, to relate to a 'specified person' or specific medical treatments.'

18 Ibid (para 62).

Click here to go to Main Contents

(b) IM v LM and AB (2014)[19]

(i) The facts

LM, the daughter of IM, was a 42-year-old woman who throughout her chaotic adult life had had serious drug and alcohol related problems. She had also been convicted of offences related to prostitution. She had been unable to care for two of her three children who had all been born during a former relationship with an abusive partner. The youngest child, aged 11, lived with LM. After admission to hospital for surgery, LM suffered a brain injury and was left with amnesia albeit with some periods of mental clarity. Prior to her hospitalisation, LM was living with AB in a sexual relationship. AB had a significant criminal record and had behaved so inappropriately when visiting LM in hospital that he had been barred from seeing her. When LM was transferred to a rehabilitation unit, her whereabouts was withheld from him. AB commenced proceedings in the Court of Protection to challenge the restrictions placed on LM because it prevented their having contact with each other.

By the time of the hearing in the Court of Protection, the Local Authority had decided that LM lacked capacity to make decisions relating to her care, accommodation, and contact with others. It believed it to be in her best interests:

- to live in special residential accommodation;
- to have supervised contact with AB;
- to move eventually to live independently after a care and support plan had been put in place. The plan would be discussed with LM's family and AB when her health improved.

(ii) The hearing in the Court of Protection

In his statement to the Court, LM's neuropsychologist, Dr P, having taken into account the requirements of s 3(1) of the MCA (see above), had been unable to reach a clear conclusion about LM's ability to consent to a sexual relationship. He accepted that she had the capacity to understand issues of a sexual nature but questioned whether she was able to choose or refuse to engage in a sexual relationship. Her decision might depend on her proposed sexual partner and the pressures which he might put upon her.

A further report to the Court from Dr G, a psychiatrist, maintained that it was questionable whether LM had capacity to consent to any sexual relationship regardless of the conduct of her prospective partner. Dr G accepted that although LM could describe the mechanics of sexual intercourse and the chance of becoming pregnant, she was unable to weigh up the risks to her, or any child were she to do so. LM was aware of sexually transmitted diseases but refused to discuss them and their prevention.

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[19] [2014] EWCA Civ 37.

(iii) The decision of the Court of Protection

The Court of Protection maintained that the threshold for those asserting a person's incapacity to consent to a sexual relationship had to be high in relation to an act about which it was so very hard to rationalise. The Court accepted that the area in which LM's understanding was weakest was with respect to the risk of pregnancy but declined to find that she lacked capacity to engage in a sexual relationship. The Court elaborated:

> 'a declaration of incapacity whilst having huge implications for [LM's] individual future would not, to my mind, provide her with very much protection. What will provide her with protection is the fact that she needs continued close support, amounting at times to supervision, in how she goes on with her life. And taking [AB's] position as an example, the opportunity for sexual activity will for at least some time to come be limited. But even so as time has passed, the respect that a person with disabilities such as LM is entitled to must mean that she is given opportunities which may carry with them at least some levels of risk'[20]

(iv) The hearing in the Court of Appeal

LM's mother, IM, appealed on the ground, inter alia, that the Court of Protection had failed to take into account any person-specific factor in its assessment of LM's capacity to consent to a sexual relationship.

The Court of Appeal approved of the decision in *PC and NC v York City Council* (2013) and reiterated the need to follow the plain words of the statute without any embellishment.[21]

With reference to Baroness Hale's obiter view in *R v Cooper* (2009) (see above), the Court of Appeal maintained that it was important to accept that the issue of consent in the context of criminal law was very different from that which was relevant in Court of Protection decisions:

> 'The criminal law bites only retrospectively. Has this conduct, in these circumstances and with the knowledge or understanding of these participants, contravened the law? … The civil law requires prospective assessment in the light of the circumstances of the affected individual.'[22]

The Court of Appeal voiced its concern at the use of a certain type of terminology which had come to dominate the decisions relating to capacity such as: 'person-specific, act-specific, situation specific, and issue-specific'. It believed that this development drew attention away from:

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[20] Ibid (para 17).

[21] Ibid (para 23), the Court of Appeal stated that: 'the assessment of a person's capacity must be based on their ability to make a specific decision at the time it needs to be made, and not their ability to make decisions in general: in the jargon that litters this area of law, it is "decision specific"'; see the Code (para 4.4).

[22] [2014] EWCA Civ 37 (para 48); see also *A Local Authority v H* [2012] EWHC 49 COP (paras 21, 22, 26); *NHS Trust v P* [2013] EWCH 50 (COP).

Click here to go to Main Contents

> 'from the broad base of the statutory test which, when applied to the question of capacity in the wide range of areas that is covered by the Act will inevitably give rise to different considerations. It is important to emphasise that s.3(1)(c) of the Act refers to the ability to use or weigh information as part of the process of making the decision. In some circumstances, having understood and retained relevant information, an ability to use it will be what is critical; in others, it will be necessary to be able to weigh competing considerations.'[23]

The Court believed that this approach reflected the views of Munby J that complex decisions, such as consent to medical treatment, would require refined analysis and more straightforward ones, such as marriage or consent to sex, would not.[24]

(v) The decision of the Court of Appeal

In spite of its approval of Munby J's categorical view that decisions relating to marriage or sex were act or status specific, the Court stressed that:

> 'every single issue of capacity which falls to be determined under Part 1 of the MCA must be evaluated by applying s.3(1) in full and considering each of the four elements of the decision making process … The extent to which, on the facts of any individual case, there would be a need either for a sophisticated, or for a more straightforward, evaluation of any of these four elements will naturally vary from case to case and from topic to topic.'[25]

The Court of Appeal maintained that given that a person with capacity did not typically consider much in the way of information before consenting to sex, it would be unfair to put that burden on a person with a mental disorder. It would be over paternalistic and would derogate from the person's autonomy.[26] Furthermore, to assess capacity to make decisions relating to a sexual relationship on a person-specific basis would be practically unworkable.

IM's appeal was dismissed.

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[23] [2014] EWCA Civ 37 (para 52).

[24] The Court of Appeal (para 71) suggested that Baroness Hale might have misunderstood Munby J's approach. After all, he had said: 'that he was not seeking to apply a different test, that is to say one which did not include evaluation of ability to 'weigh', to capacity to marry or to consent to sexual relations.'

[25] [2014] EWCA Civ 37 (para 73).

[26] Bodey J in *Re A (Capacity: Refusal of Contraception)* [2010] EWHC 1544 (Fam) (para 61) and Mostyn J in *D Borough Council v B* [2011] EWHC 101 (Fam), both concluded that consent to sexual relations was act specific. To decide otherwise would limit the potential for autonomy for vulnerable persons. Mostyn J also pointed out the: 'very considerable practical problem in allowing a partner-specific dimension into the test. Consider this case. Is the local authority supposed to vet every proposed sexual partner of Alan to gauge if Alan has the capacity to consent to sex with him or her?'(para 45).

IV THE AFTERMATH OF THE DECISIONS IN THE COURT OF APPEAL

In the aftermath of the two decisions of the Court of Appeal, the lower courts have shown a tendency to accept that consent to marry or have a sexual relationship must be evaluated on a status or act-specific basis whereas cohabitation or contact with a specific person could be evaluated by taking into account all of the circumstances surrounding the issue. Baker J noted in *RA Local Authority v TZ* (2013)[27] that lawyers and the judiciary had been left in the slightly uneasy position that the correct approach may yet remain to be decided by the Supreme Court.

(a) The London Borough of Southwark v KA, MA and RN 'Capacity to marry'[28]

(i) The facts

KA was a 29-year-old man who had an IQ of 70 and moderate learning disabilities; he had problems in understanding and retaining information, and communicating. He was one of five children from a family of Bangladeshi origin and lived with his parents because he needed support on a daily basis. KA's parents were well aware that they would eventually become too old to look after him and believed that he needed a wife who would help with his care.

With KA's marriage in mind, his parents took him to see a doctor to request a fertility test. The doctor referred KA to a psychiatrist because of concerns about his mental health and his capacity to consent to marriage. KA was found to talk to himself, hoard rubbish, have poor eating habits and appalling personal hygiene. His parents refused to cooperate with Southwark Borough Council's (SBC) wish to undertake a formal assessment of KA. The Council, therefore, obtained Forced Marriage Protection Orders[29] and began proceedings to obtain declarations that KA lacked capacity: to litigate, to take care of himself, and to make decisions about sexual relationships and marriage. It was accepted that he did not have the capacity to litigate and the Official Solicitor was appointed to act on his behalf.

(ii) The hearing in the Court of Protection

A psychiatrist was appointed by the Court of Protection and reported that KA did not have capacity to consent to marriage or to engage in a sexual relationship. KA seemed to understand a significant amount about marriage although some of the questions he was required to answer relating to division of property on divorce might have taxed someone of considerably greater

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[27] Ibid, para 22; see *PC and NC v York City Council* (2013) (para 21).
[28] [2016] EWCOP 20.
[29] See Forced Marriage (Civil Protection) Act 2007.

Click here to go to Main Contents

intelligence than KA. He had a not inconsiderable understanding of sex but was confused about pregnancy. He thought that it occurred every time one had sexual intercourse. He did not know how long pregnancy lasted or had any knowledge of the process of childbirth. Although KA was aware of sexually transmitted diseases he did not know how to protect himself from becoming infected.

Parker J stated that the tests for capacity in respect of consent to engage in sexual relationships were not high or complex and that:

> 'Even though the statutory criteria needed to be looked at individually, evaluation of a particular capacity should not simply be practical but also has a holistic element needed to be looked at individually. It is not an examination in which one has to attain a certain mark in all modules.'[30]

She emphasised the need for KA to understand that he could choose whether to agree or refuse to have sex.

(iii) The decision of the Court of Protection

Parker J believed that although KA was only on the borderline of understanding marriage and sexual relations, he did not lack capacity. His parents agreed that he should continue to receive information and education about marriage and that they would fully disclose his disabilities to any potential spouse and her family.

Parker J ended her judgment by saying:

> 'I do not know whether a marriage will truly bring happiness to KA. His disabilities will provide challenges for any wife, and they will be different for a wife who has capacity from one who lacks it. A marriage might lead to distress, conflict and misery for KA and his family, as opposed to enhancement of his life and of his personal autonomy. But it is not for me to weigh up the relative chances of finding a wife who is prepared to love and cherish KA with all his needs against that of finding one who is unequal to the task.'[31]

(b) A Local Authority v TZ (2013)[32]

(i) The facts

TZ was a young man aged 24 who was born when his mother was aged 17. He had learning difficulties, autism and a hyperactivity disorder. TZ's mother had been unable to care for him and his brother and when TZ was aged 3, they were adopted by Mr and Mrs Z. During adolescence, TZ left his adoptive parents to find his mother. He became mixed up with undesirable people who took advantage of him. His lifestyle, spending, personal hygiene and health all

[30] [2016] EWCOP 20 (para 73).
[31] Ibid (para 81).
[32] [2013] EWCOP 2322.

became problematic. He returned to his adoptive parents but left them again. He began a homosexual relationship with A and alleged to the police that he had been sexually assaulted by him. The police decided not to take any action.

The local authority placed TZ in a residential unit and began proceedings in the Court of Protection. It maintained that TZ did not have capacity to care for himself, decide where to live or to make decisions about social or sexual relationships including contact with A.

An expert psychiatrist was instructed who concluded that TZ lacked capacity with respect to all of these issues.

(ii) The hearing in the Court of Protection

It was agreed that TZ lacked capacity to litigate, so he was represented by the Official Solicitor. Baker J's decision, which was given after the Court of Appeal decision in *P and NC v York City Council* (2013) but prior to the Court's decision in *IM v LM and AB* (2014), related only to KA's capacity to have a sexual relationship. A further assessment was to be undertaken before any decision could be made about his capacity with respect to other issues which Baker J maintained had to be determined at the time they became relevant and stressed the time-specific nature of capacity.

Having considered the precedents on capacity, Baker J proceeded to take an act-specific approach to the question of KA's capacity to engage in a homosexual sexual relationship. It was obvious that the s 3(1) test would require different questions to be put to KA than those appropriate for determining the capacity of a person to engage in a heterosexual relationship. Following a programme of sex education undertaken by KA, the psychiatrist's final report revealed that his ability to use and weigh the relevant information relating to sexual relationships remained problematic. However, KA might be able to improve his ability given further support and therapy.

KA's informal evidence to the Court revealed a considerable knowledge about sexual matters he explained to Baker J that:

> 'it was important to be friends first with someone before moving onto a sexual relationship … but [he] also thought it was important to be happy and healthy not be abused and not be let down.'[33]

He wanted to be able to visit gay bars to meet a partner and had learned not to rush things because he needed to be able to trust the person.

(iii) The decision of the Court of Protection

Baker J held that TZ did have capacity to consent to engage in a sexual relationship. He commented that certain members of the judiciary had pointed

[33] [2013] EWCOP 2322 (para 47).

Click here to go to Main Contents

out that the experts on capacity and sexual relationships had imposed too difficult a test which would probably not be met by many very capacitated people. Hedley J, for instance had stated that sexual relations:

> 'are made rather more by emotional drive and instinct than by rational choice.'[34]

(c) NCC v PB and TB (2014)[35]

(i) The facts

A woman, PB, aged 79, had a longstanding history of psychiatric and physical ill-health which necessitated regular intervention in her life by social services. She had lived with TB, aged 50, in his small flat in Norfolk; he too had psychiatric problems. The couple frequently travelled around the country and, on a number of occasions, TB had abandoned PB away from home. She had to be rescued and brought back to Norfolk. Eventually Norfolk County Council (NCC) moved her into a care home. By this time, she was in a fragile state; she spent much of her time in bed and when out of bed was wheelchair dependent. TB had moved into the care home with PB for a short time before returning to his home. PB was able to visit him from time to time. Both PB and TB were incontinent and concern was expressed by social services about the exceptionally insanitary conditions in TB's home. When in the care home, PB expressed a wish to live with TB. This led NCC to begin proceedings in the Court of Protection to determine the issue of PB's capacity to live, or have contact, with TB, and whether she should be deprived of her liberty and be forced to remain in the care home.

(ii) The hearing in the Court of Protection

It was accepted by all parties that both PB and TB lacked the capacity to litigate, and they were represented by the Official Solicitor. Parker J drew attention to PB's high intellectual understanding; she commented that PB was not only aware of the MCA but also knew of its problematical nature.[36] PB the incapacitated woman was aware of this.

Three reports were provided by an independent psychiatrist about PB's capacity to consent to live with TB. Two further reports were provided by PB's own psychiatrist. The former concluded that PB lacked capacity even when not under the influence of TB. The latter thought that PB lacked capacity at all times although TB contributed to her inability to weigh information.

Parker J maintained that s 2 of the MCA required her to find causal relationship between PB's mental impairment and her lack of capacity to make the decisions at issue. IF PB's lack of capacity was a consequence of TB's influence over her that could not lead to a finding of the relevant incapacity for

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[34] *A Local Authority v H* [2012] EWHC 49 (COP) (para 25).
[35] [2014] EWCOP 14.
[36] Ibid (para 45).

the purposes of the MCA. Parker J found that PB's condition, even without the influence of TB, affected her ability to use and weigh information relevant to the decisions about her living arrangements.

Parker J held that the decisions facing PB required her to be able to take into account the immediate and serious consequences should she decide to return to live with TB and that:

> 'The principle of autonomy must have limits, or there would be no intervention under the MCA 2005. Where a decision has consequences of a serious impairment of health or welfare, the court is not considering a decision which is merely unwise.'[37]

(iii) The decision of the Court of Protection

The foreseeable consequences for PB of returning to live with TB were held to be all too evident. There had been disastrous consequences in the past on a regular basis and PB had shown that she was incapable of taking into account what might happen to her in the future were she to return to live with TB. Parker J, therefore, held that PB lacked capacity.

(iv) PB's best interests

Having considered what would be in PB's best interests under s 4 of the MCA, Parker J concluded that they would be best served for the time being by her remaining in the care home where she had been placed by NCC. She would be able to spend time, including at least part of Christmas, with TB. They could also go on holiday together. All these activities would have to be supervised by a responsible person.

(v) The use of the inherent jurisdiction

Parker J expressed the view that even if she had found PB to have capacity, the Court of Protection could have used the broad doctrine of the inherent jurisdiction to make an order that PB live in a specific place where she could be cared for. The inherent jurisdiction was available to protect vulnerable persons and liberate and enhance their personal autonomy:

> 'but any orders must be both necessary and proportionate … I am inclined to the view that a regime could be imposed on PB if that is the only way in which her interests can be safeguarded. To be maintained in optimum health, safe, warm, free from physical indignity and cared for is in itself an enhancement of autonomy.

[37] Ibid (paras 98, 99).

Click here to go to Main Contents

> I see no indication that the inherent jurisdiction is limited to injunctive relief. Each case depends on the degree of protection required and the risks involved. And the court must always consider Article 8 rights and best interests when making a substantive order.'[38]

The Court of Protection, in taking such an action, would have to ensure that any order it decided to make would also be compliant with Art 5 of the Convention, the right to liberty and security. It would have to be shown to have been imposed by the Court through a legal process of which notice had been given. It would be perfectly possible for a person who had been held to have capacity to understand the effect of such an order.

Parker J's view of the power of the court under the inherent jurisdiction was, of course, *obiter dicta* given that she had found that PB did lack capacity. It, therefore remains questionable whether a person's freedom can be restricted in this way. The inherent jurisdiction is normally brought into play for the opposite reason – the protection of a person's freedom.[39]

V THE CONSEQUENCES OF A DECLARATION OF INCAPACITY TO MARRY WHEN A MARRIAGE HAS ALREADY TAKEN PLACE

The decisions in this section all relate to the consequences of a declaration of incapacity for a person who has already married at the behest of his or her family. All the decisions involve Asian families who have often acted in the best interests, as they perceive them, of an incapacitated adult child, in the belief that he or she will be cared for by the chosen spouse. In these complex circumstances, the courts, have had a difficult task in determining whether to allow the marriage to continue or not in order to satisfy the best interests' test.

(a) Sandwell Metropolitan Borough Council v RG and others (2013)[40]

(i) The facts

Two brothers, GG aged 39, and RG, aged 38, were Indian in origin. They were both of low intelligence, had learning problems, and exhibited challenging behaviour. A consultant psychiatrist considered that their problems dated from birth, were likely to be lifelong and there was little hope that they might improve. GG and RG were accommodated and cared for by the local authority. It was common ground that the brothers lacked capacity to litigate or make decisions about their care, marriage and sexual relationships. RG's family had arranged his marriage to a physically disabled Indian woman, SK, and had

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[38] Ibid (paras 113, 114).
[39] See *LBL v RYJ and VJ* [2010] EWHC 2665 (COP); *Re DL* [2012] EWCA Civ 25.
[40] [2013] EWCOP 2373.

taken him to the Punjab for the ceremony which was formally a valid marriage in India. SK had not met RG prior to the marriage and only later became aware that he did not behave like a normal person. The marriage was consummated and SK came to England where she worked for a low wage as a manual rural labourer. Given their respective problems, neither RG nor SK would have found it easy to marry within their own culture.

(ii) The decision of the Court of Protection

Given the common ground of RG's incapacity, the Court of Protection had to consider what would be in RG's best interests with respect to his marriage to SK. He had clearly lacked capacity at the time it had taken place.

The local authority wanted the Court to make a declaration of non-recognition of the marriage or to order the Official Solicitor who was representing RG to apply for annulment of the marriage. It maintained that there were policy reasons for such a request. A number of incapacitated adults in the local authority's area were being forced to marry by their families. The legal ending of RG's marriage to SK would send a strong message to the Sikh and Muslim communities about the unacceptability of forced marriages and that they would be brought to an end.

SK was distressed by the acceptance by all parties that RG lacked capacity to consent to marry or to have a sexual relationship. She wanted the marriage to continue and claimed that she had grown to love RG and was committed to him. She also maintained that she would be ostracised by her community if the marriage were to end. The court was not unsympathetic towards SK but acknowledged that its decision was only about RG's best interests and not hers. She also wanted to continue her sexual relationship with him because it would be culturally impossible for her to have a sexual relationship with anyone else. She found it difficult to understand that any sexual contact with RG would be regarded as an offence under the Sexual Offences Act 2003 because he could not give a valid consent and the maximum sentence for non-consensual sex is life imprisonment.[41]

The Court of Protection accepted that in order to make any declaration of non-recognition of the marriage, it would have to consider the issue of RG's domicile at the time of the marriage and the law relating to capacity in India. If the local authority wished to pursue a declaration of non-recognition of the marriage, it would have to issue a formal application to the Court supported by evidence. With respect to annulment, the Court did not have the power to make the decision itself but could order the Official Solicitor to make a separate petition for a decree of nullity on RG's behalf for lack of consent under s 12(c) of the Matrimonial Causes Act 1973. Such an order could only be granted if it were in RG's best interests. The Court found that RG showed pleasure in SK's

[41] Sexual offences Act 2003, ss 3(3) and 30.

Click here to go to Main Contents

frequent visits to him and had expressed a wish to remain married to, and live with, SK. The Court declined to order the Official Solicitor to commence nullity proceedings on RG's behalf saying:

> 'Whilst marital sex and co-habitation are, of course, normal incidents of normal marriage between people of normal capacity, neither is essential to a marriage. Unquestionably, RG cannot gain the support, pleasures and benefits of a marriage, as normally understood. He cannot gain many of the other pleasures of life that are available to persons of normal capacity. But still he gains some pleasure and some benefits from this marriage and this relationship.'[42]

The Court also rejected the public policy arguments of the local authority that the Muslim and Sikh communities would learn that forced marriages would not be tolerated and would be brought to an end by a court order. There was no room for decisions about capacity to be based on such an approach. The Court did, however, recognise the difficulties facing the local authority in these cases and complimented it on:

> 'the great lengths they have gone to, and the expenditure they must daily incur to provide for each of these needy and disadvantaged gentleman as secure and fulfilling a life as possible, cared for by the dedicated support workers. I express the hope that each of CG and RG will gain as much pleasure and fulfilment from their lives as is possible for many years to come.'[43]

The decision illustrates that although a court cannot help an incapacitated person to marry in their best interests, because of the direct prohibition in s 27 of the MCA, it can give an incapacitated person some matrimonial benefits by allowing marriages that pre-date the court hearing to determine capacity to continue – a thin dividing line indeed. The Court acknowledged that its decision meant that SK would retain inheritance rights flowing from her marriage to RG and would also have the right to be consulted as his nearest relative under the Mental Health Acts. The Court could, of course, take action on both of these issues if it thought that it was in RG's best interests to do so.

(b) YLA v PM and MZ (2013)[44]

(i) The facts

PM was a 37-year-old British woman of Sikh origin. She had moderate to severe learning problems and an IQ of 49. At some stage in her life, she had converted to Islam but it was doubtful whether she understood the significance of any religious affiliation. Her family had arranged, or possibly forced her into, three marriages. The first had ended because her husband had been unable to obtain a visa to enter the jurisdiction. The second marriage to a cousin was ended by a decree of divorce in India; he claimed not to have known about PM's disabilities prior to their marriage. PM's mother assured social services

[42] [2013] EWCOP 2373 (para 61).
[43] Ibid (para 64).
[44] [2013] EWCOP 4020.

that she would not arrange a third marriage for PM but went ahead and did so. This third husband was MZ, a 33-year-old from Pakistan. He had entered the country as a student but lost that status when his course was discontinued. He therefore had problems with the immigration authorities in the jurisdiction.

MZ and PM married in a Muslim ceremony in England which was not recognised as a valid marriage in the jurisdiction. The couple commenced a sexual relationship and PM became pregnant. A civil marriage in England followed in spite of concerns, expressed to the Registrar by the local authority, about PM's capacity to marry. Allegations were made, but remained unproven, that PM's mother and step-father had been paid £20,000 by MZ and his family for the marriage to take place in order to resolve his immigration problems.

(ii) The hearing in the Court of Protection

When the couple's baby boy, B, was born, it was clear that PM could not care for the baby and proceedings took place for him to be removed him into care. At the hearing in the Court of Protection relating to PM's capacity, it was agreed that she lacked capacity to litigate and would be represented by the Official Solicitor. The Court of Protection made a preliminary order for all the family to go into a foster care placement. They were ordered not to share a bedroom or engage in any sexual activity. For the avoidance of doubt, and perhaps a little unrealistically, Parker J directed that MZ was permitted to show some affection and put his arm around PM and hold her hand.

The Official Solicitor told the Court that PM was unequivocal in her claims that her marriage was a love match and that she wanted to remain married to MZ and live with him and baby B. She had no hesitation in talking about her sexual relationship with MZ. He also claimed that his marriage to PM was a love match and that he wanted to stay with PM out of duty and a sense of responsibility towards her and their baby. The foster carers reported that MZ and PM appeared to have a very distant relationship with each other and that MZ told them that he had been duped by his parents into marrying PM for immigration reasons. MZ later denied saying this and maintained that no money had changed hands between his and PM's family.

(iii) The decision relating to capacity

Parker J considered the fourfold test in s 3(1) (see above) and found that PM lacked capacity to marry both at the time of the hearing and prior to the marriage. She liked the idea of being married but had no real concept of what that meant and had no understanding of divorce. Parker J also found that PM lacked capacity to consent to a sexual relationship. She understood the mechanics of sex but did not understand contraception, the risks of a sexual disease or that she had a choice about whether to engage in sex or not. Parker J recognised the gravity of a declaration of incapacity but maintained that:

Click here to go to Main Contents

> 'people with disabilities also have the right to have their bodily integrity and their autonomy protected. And, as I have said elsewhere, to inflict pregnancy and childbearing on a person who cannot consent to that state is about as gross a physical interference as can be imagined. And to put an incapacitated person in a position whereby she bears a child which she cannot look after is grossly cruel.'[45]

(iv) The best interests' test

Parker J stressed that the Court must make a distinction between finding a person to lack capacity and its decision to make an order in that person's best interest. The latter had no part to play in the determination of the former.

When applying the best interests' test the Court had to take into account Art 8 of the Convention and bear in mind that that the essence of Convention rights was a respect for human dignity and human freedom.[46] The Court also had to take into account such factors as the feelings and wishes of the person found to lack capacity, the strength of those feelings, and the degree of the incapacity. The weight to be attached to a person's feelings and wishes would depend on the individual circumstances of each case.

In the case of PM, the relevant factors for the Court to consider were: PM's incapacity was not on the borderline as she seemed to lack understanding of the issues in the proceedings and was unaware of the immigration issues facing MZ and the way in which she had been used by him in an attempt to stay in the jurisdiction, and MZ had finally admitted that he did not love PB and had never done so in spite of his earlier protestations that he wished to take responsibility for her. MZ had stated that he regarded himself as having been duped by PM's family; PM might suffer distress if her wish to live with MZ and B were not granted; the extent to which PM's wishes were rational, sensible, and capable of being implemented.

Following interim decisions that PM could not care for B and should not live with MZ, Parker J learned that MZ recognised that his marriage was over and was obtaining legal advice about an annulment. He wanted to remain in England with B and was trying to be accommodated with the baby in the community and regularise his immigration status. The local authority was attempting to educate PM and facilitate contact between her and B.

Parker J's final order was that PM should be found a home by the local authority and have contact with B. The sex education which PM had been undergoing should be discontinued (except in so far as it was necessary for her own protection) because it would expose her to sexual ideas and might make her more vulnerable to exploitation by other men.

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[45] See para 157.

[46] See *Re MM (an adult)* [2007] EWHC 2003 (para 102); *Pretty v United Kingdom* (2003) 35 EHRR 1 (para 61); *Niemietz v Germany* (1993) 16 EHRR 97 (para 29)

(c) Luton Borough Council v SB and RS (Capacity to consent to sexual intercourse and marriage) (2015)[47]

(i) The facts

RS, a 25-year-old-man of Pakistani origin was intellectually disabled and had an autism spectrum disorder. After several years in a residential institution, where he had been placed because of inappropriate sexual and aggressive behaviour, his mother had brought him home to live with her and six of his seven siblings. She had been warned by Luton Borough Council that marriage would not be appropriate for RS and in November 2014, the Council applied for a Forced Marriage Protection Order under Part 4A of the Family Law Act 1996 to prevent a marriage from taking place. However, the Council was too late; one month earlier, RS had been taken to Pakistan by his family to be married. RS began a sexual relationship with his new wife before returning to England and leaving her behind in Pakistan. The Council's application was reconstituted and the proceeding continued under the inherent jurisdiction. It was accepted by all parties that RS lacked capacity to litigate and he was represented by the Official Solicitor.

Hayden J stressed that RS's family loved him and had acted from a concern to ensure that he would be cared for throughout his life. However, its members had a tendency to understate RS's disabilities and over-emphasise his very limited potential. The expert psychiatrist explained to the court that RS's normal behaviour was somewhere between the level of that of a 5 to 8-year-old.

(ii) Capacity to consent to a sexual relationship

The psychiatrist's report revealed that RS had some understanding of sexual matters which was primarily gained from discussions with an uncle with whom he watched pornography. He was found to be capable of understanding:

- the basic physical aspects of sexual intercourse;
- the use of condoms;
- the possibility of sexual diseases;
- some link between sexual intercourse and pregnancy.

Hayden J held that RS lacked the capacity to consent to a sexual relationship.

(iii) Capacity to consent to marriage

The psychiatrist explained that RS had no significant grasp of the nature of the role or duties of a spouse, had no concept of being faithful to one person, and was unable to discuss such issues. He did not understand that his wife would need a visa to join him in England.

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[47] [2015] EWCA 3534.

Click here to go to Main Contents

Hayden J acknowledged that:

> 'Whilst some attempt has to be made (as above) to identify the key or indivisible aspects of a marriage, the very attempt at doing so forces the realisation, as Macur J highlighted, that "different people" will give "different weight" to "different factors".[48] To this I would merely add the obvious … "at different times" of their lives. People's priorities change.
>
> All this illustrates that marriage is anything but a "concrete" concept. Mutuality and reciprocity may be indivisible components but they are subtle, complex and not easily reducible to easy definition.'[49]

In *Sheffield City Council v E,* Munby J (as he then was) urged caution in finding a person to lack capacity to marry:

> 'There are many people in our society who may be of limited or borderline capacity but whose lives are immensely enriched by marriage. We must be careful not to set the test of capacity to marry too high, lest it operate as an unfair, unnecessary and indeed discriminatory bar against the mentally disabled.'[50]

Hayden J found that the particular combination of RS's disabilities meant that he was unable to grasp, either emotionally or intellectually, the nature of marriage or of a sexual relationship which was a fundamental requisite of marriage. He had little difficulty in concluding that RS lacked the capacity to marry.

(iv) Potential for achieving capacity

Hayden J, with regret, held that RS's disabilities precluded him from understanding abstract concepts. He found that the psychiatric evidence was entirely without dogmatism or 'motivated by a "protection imperative" which may influence the thinking of professionals involved in assessing the vulnerable'. The expression 'protective imperative' referred to a paternalistic instinct on the part of some professionals to protect the vulnerable which negated the primary objective of the MCA which was to not merely to help the vulnerable but to protect their autonomy in so far as possible.

The psychiatrist had accepted that RS might learn how he should behave towards his wife by modelling in the same way as he had learned how to behave in relationship to his sisters or other women. However, this would simply show that he could comply with learned rules without necessarily understanding them or being able to generalise them. Certain issues were simply beyond his comprehension.

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48 [2010] EWHC 2664 (Fam) (para 24).

49 *Luton Borough Council v SB and RS* [2015] EWHC 3534 (Fam), paras 29, 30.

50 [2005 1 FLR 965 (para 144); see also *Cole v Cole* (1857) 5 Sneed's Tennessee Rep 56 at 58 quoted in *Park v Park* [1954] P 112 at 126; *LBL v RYG* [2010] EWCA 2664 (Fam).

Hayden J concluded that there was no real possibility of RS acquiring the capacity to consent to marriage or sexual relations.[51]

(v) Declaration of non-recognition of RS's marriage in Pakistan

The Local Authority had argued that public policy demanded a declaration of non-recognition of RS's Pakistan marriage which was formally valid in that country. RS's lack of capacity meant that the marriage could not have been conducted lawfully in the jurisdiction of England and Wales because the key element of consent was absent. Marriages entered into abroad by incapacitated persons could prove to be abusive and exploitative. RS would gain little advantage from the marriage remaining in place; he could not have a sexual relationship with his wife as she would be guilty of a crime.[52]

The evidence showed that the objective of the marriage was to provide RS with care and security for the remainder of his life following his mother's concerns about his isolation in the residential unit in which he had been placed. The marriage had been very well planned and a lot of money had been spent on the event to show the status and position of RS's family. RS and his wife appeared to have been happy on their wedding day. The Iman had asked RS a number of times about whether he consented to the marriage and RS had responded positively.

Hayden J found that RS's wife had:

> 'had made a utilitarian calculation of her own interests in this marriage. From a purely western perspective that might appear to be a critical observation. I do not intend it to be regarded as such. W has different cultural expectations; social priorities which are influenced by her upbringing in Kashmir and by her own understandings of the responsibilities and obligations expected of women in her society. She was articulate in her assertion that she had entered this marriage of her own free will. Despite the highly personal nature of the inevitable and proper questions she confirmed, with some robustness, that the marriage had been consummated. She also told me that at the time of her menstruation her new husband had shown sensitivity and forbearance. In short, I have absolutely no sense that she had entered this marriage under duress or in consequence of any abusive pressure. On her part I am entirely satisfied that she gave free consent.'[53]

Having considered Convention case law with its emphasis on the importance of autonomy, the development of psychological and moral integrity and relationships with other human beings, as key aspects of human rights,[54] Hayden J concluded that capacity to consent was an integral component of a relationship such as marriage. The recognition of a marriage where this was lacking would be a precarious foundation for family life and demeaning for RS

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[51] See the Code (para 4.16).
[52] Sexual Offences Act 2003, s 30 (see above).
[53] *Luton Borough Council v SB and RS* [2015] EWHC 3534 (Fam) (para 47).
[54] See *Pretty v UK* (2002) 35 EHRR; *Niemetz v Germany* (1993) 16 EHRR 97.

Click here to go to Main Contents

and his wife. Furthermore, it was a moot point whether such a marriage came within the rights protected by Art 8 of the Convention because of the absence of consent.

A final point made by the local authority was that if the court were not to make a declaration of non-recognition of RS's marriage, he would remain subject to the legal obligations of marriage which he was highly unlikely to understand or which he would be incapable of carrying out. His wife would have the right to inherit any of his property and if the couple were to have children, RS would automatically have parental responsibility for them but would be unable to fulfil the obligations which were part of such a responsibility.

Hayden J made a declaration of non-recognition of the marriage and ended his judgment by saying:

> 'In most cases an overseas marriage, entered into by an individual who lacks capacity to consent to either sexual relations or marriage, is likely to require the Court to make a declaration of non- recognition. However, it overstates the position to regard the discretionary exercise here as essentially "illusory". Whilst I am not prepared to predict the circumstances in which the discretion might be exercised, neither am I prepared to say that a Court is never likely to do so. The interests of justice, fairness and respect for different aspects of individual autonomy may, in certain circumstances prevail. That said, those circumstances are likely to arise very rarely indeed. They have not done so here.'[55]

VI CONCLUSION

One important question arises from an analysis of the case law on incapacity; has the MCA achieved the two-fold aims of the legislators? Their first aim was to enshrine in law a viable test of incapacity that would not ensnare all vulnerable people and thereby compromise their autonomy. In so far as possible, vulnerable persons were not to be prevented from making the same sort of unwise decisions which many of their fellow citizens make with great regularity. It is a well-known fact that the family courts deal with the consequences of such unwise decisions on a daily basis. The legislators' second aim was to allow the courts to make a limited number of decisions on behalf, and in the best interests, of those persons found to be incapacitated and enable them to lead a life with as few restrictions as possible.

The case law considered in this chapter suggests that with respect to the legislators' first aim, there remains some room for further clarification by the Supreme Court about the nature of the evaluation of capacity in the context of close personal relationship. The two decisions in the Court of Appeal leave the courts facing an anomaly. Evaluation of capacity to marry was held to be act- or status-specific, and capacity to have a sexual relationship in the context of the facts before the Court was also held to be subject to the same evaluation.

[55] *Luton Borough Council v SB and RS* [2015] EWHC 3534 (Fam) Luton (para 52).

However, the Court of Appeal also stressed the importance of having regard to all the provisions of ss 1–3 of the MCA and acknowledged that there might be circumstances and, by implication, even circumstances involving a decision relating to sexual relationships, and possibly to marriage, in which an evaluation of capacity might need to be tied down to a specific person, time or place.

The act-specific approach is an attractive one in that it is pragmatic and may possibly lead to a greater protection of a vulnerable person's autonomy. But is it too blunt an instrument for all decisions relating to marriage and sexual relationships? These decisions are momentous and have a serious effect on a person's future. Once a person is found to lack capacity to marry or engage in sexual relationships, his or her emotional existence is at an end. Maybe a better approach would be to accept that decisions about close personal relationships, such as marriage and sex, may lie along a continuum where at the less complex end of the continuum, an act- or status-specific approach may be appropriate. At the other end of the continuum, the context may be so complex that only a wider evaluation of capacity would be in keeping with the statutory interpretation and aims of the MCA. This approach would not necessarily lead to more people being found to be incapacitated.

There is a further difficulty facing the courts which relates to the fourfold test of capacity in s 3(1) of the MCA; it is centred on the requirement that a person whose capacity is in question, must be able to understand, retain, use or weigh the information relevant to the decision at issue. The cases in this chapter show that the test has been interpreted, in a subjective and rigid manner, particularly where capacity to have a sexual relationship is under consideration. Some members of the judiciary have shown a certain scepticism in their criticism of this subjectivity and rigidity. Baker J, for example, pointed out that:

> 'Impulsivity is a component in most sexual behavior. Human society would be very different if such choices were made the morning after rather than the night before.'[56]

Mostyn J similarly observed that the criterion posed by the experts with respect to the using and weighing of the relevant information*:*

> 'is much too sophisticated to be included in the low level of understanding and intelligence needed to be able to consent to sex. Apart from anything else, I would have thought that a great deal of sex takes place where one party or the other is wholly oblivious to this supposed necessity.'[57]

A rigid approach to the capacity test in s 3(1) may lead to an over-diagnosis of incapacity. The barriers to capacity should not be set too high and the information should relate to that which a person with full capacity may be expected to have and use in making a decision about engaging in a personal

[56] [2013] EWCOP 2322 (para 53).
[57] *D Borough Council v AB* [2011] EWCOP 101(para 37).

Click here to go to Main Contents

relationship. Current expectations about marriage and sexuality and different cultural views of these matters should also be taken into account. The cases in this chapter involving Asian vulnerable persons and their families suggest a very different concept of marriage and sexuality than that in the context of non-immigrant persons and their families.

One final conundrum presents itself and that is the limitations placed on the court with respect to the nature of the orders it may make in the best interests of the person found to lack capacity. The court is prohibited under s 27 of the Act from making an order for an incapacitated person to marry or have a sexual relationship. Yet, the court may allow a marriage that was entered into at a time when a person lacked capacity to continue and for the couple to have contact with each other. It seems unrealistic in these circumstances that a blanket bar be placed on any sexual relationship between them, and a bar that the local authority would be expected to police. Any breach of the bar would leave the spouse with capacity at risk of prosecution for non-consensual sex.

Close emotional relationships are important for all human beings including the incapacitated. Many of the latter engage in these relationships and never end up in the hands of the local authority or appear before a court and risk their relationships being brought to an end. It is important that the MCA, which set out to protect vulnerable human beings, is not interpreted in a black-and-white way which would either detract from satisfying these basic human needs by a declaration of incapacity or place a vulnerable person at risk by finding them to have capacity. It may be that consideration should be given to amending the law in s 27 of the MCA to allow a personal attorney to be appointed who could oversee, in appropriate circumstances, the close emotional and sexual relationships of incapacitated persons.

FRANCE

A CHRONICLE OF FRENCH FAMILY LAW

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 with the aim of 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, Clara Delmas, Eric Fongaro, Guillaume Millerioux, Aurélien Molière, Amélie Panet, Amar Slimani, Laura Sorisole, Stessy Tetard and Richard Vessaud.

Résumé

Une très importante série de réformes a été adoptée en France en 2016. Compte tenu des échéances électorales, cela n'a rien de surprenant. 2016, est la dernière pleine année de mandat pour les actuels députés de l'assemblée nationale française avant les élections présidentielles qui auront lieu en mai 2017 et les élections législatives en juin 2017. Ce qui surprend davantage, c'est que beaucoup de ces réformes ont été votées au sein d'une même loi : la loi de modernisation de la justice du 21e siècle du 18 novembre 2016. Elle réforme le droit des personnes et de la famille sur différents points : elle ouvre une nouvelle procédure de divorce sans juge (1), elle modifie l'autorité compétente pour enregistrer les pactes civils de solidarité (2), elle crée de nouvelles règles quant au nom de famille dans les situations internationales (3) et elle change totalement les règles gouvernant la modification de la mention du sexe dans les actes de l'état civil (4). Le droit pénal des personnes et de la famille a également été retouché. D'une part, le délit d'entrave à l'IVG a été étendu aux sites internet (5) et, d'autre part, le décret définissant les stages de responsabilisation pour la prévention et la lutte contre les violences au sein du couple ou sexistes et les stages de sensibilisation à la lutte contre l'achat d'actes sexuels a été publié (6). Toutefois, dans ce domaine, le changement le plus important est la réintroduction de la notion d'inceste dans le code pénal français (7).

Au delà de ces évolutions législatives, la jurisprudence témoigne elle aussi des changements qui se produisent actuellement dans le droit français. La tendance des juges est au développement du contrôle de proportionnalité lorsqu'ils doivent s'interroger *in casu* sur le respect ou non des droits fondamentaux des personnes (8) et ce contrôle s'ajoute parfois à un contrôle de conventionalité comme l'illustre une décision rendue par le Conseil d'Etat à propos de la possibilité de poursuivre un protocole d'aide médicale à la procréation après le décès du mari (9).

Click here to go to Main Contents

> Du côté des textes provenant de l'Union européenne, on notera l'adoption de deux nouveaux règlements de droit international privé intéressant le droit patrimonial de la famille. Le premier est relatif aux effets patrimoniaux des partenariats enregistrés (10) et le second aux régimes matrimoniaux (11).

A very important set of reforms was adopted in France in 2016. Given the upcoming elections, this is not surprising. 2016 is the last full year of office for the current deputies of the French National Assembly before the presidential elections that will take place in May 2017 and before the parliamentary elections in June 2017. What is more surprising is that many of these reforms were passed within the same law: the law on modernisation of justice of the 21st century of 18 November 2016. It reforms the law of persons and the family on different points: it opens a new divorce proceedings without a judge; it modifies the competent authority to register the civil solidarity pacts (French registered partnership); it creates new rules concerning the surname in international situations; and totally changes the rules governing the modification of the mention of sex in civil status documents. The criminal law of persons and the family has also been reworked. On the one hand, the offence of illegal interference with abortion was extended to the internet and, on the other hand, a decree defining traineeships of accountability to combat domestic and gender-based violence and traineeships of awareness to fight against the offence of buying a sexual act was published. Moreover, the reintroduction of the concept of incest in the French criminal code is the most important change in this area.

Beyond these legislative changes, the jurisprudence also reflects the developments that are occurring in the French law. The tendency of judges is to develop proportionality test when they are confronted *in casu* with the question of respect of fundamental human rights. This control is sometimes added to a conventionality control as in a decision of the State Council concerning the possibility of continuing a medical aid for procreation protocol after the death of the husband.

Considering the EU texts, we note the adoption of two new regulations of private international law concerning the patrimonial family law. The first relates to the patrimonial effects of registered partnerships and the second to matrimonial property regimes.

I DIVORCE WITHOUT JUDGE: THE CONTRACTUAL BREAKDOWN OF MARRIAGE BECOMES POSSIBLE[1]

In 2016, French law underwent two major changes: a reflective and very important evolution with the reform of contract law (Ordinance n° 2016-131

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of 10 February 2016) and a precipitated revolution with the realisation of the possibility of divorcing without a judge (Law n° 2016-1547 of 18 November 2016).

This new divorce proceedings is required to spouses that are agreed on the principle and all consequences of their separation. It is logically excluded when a spouse, because of his vulnerability, is placed under a legal protection system (curatorship or guardianship for example). Judicial divorce by mutual consent does not disappear but it becomes subsidiary. Judicial divorce remains the only procedure possible when the couple has a minor child and when this one, informed of his right to be heard by a judge, asks for a hearing.

The realisation of this non-judicial divorce is original, at least in France. The judge's decision is replaced by a contract called a convention, which takes the form of a private agreement countersigned by two lawyers (art 229-1 of the Civil Code). To be valid, it must contain some provisions: the complete settlement of the effects of the divorce and the liquidation of the matrimonial property regime. A period of reflection has been foreseen: each spouse cannot validly consent to the agreement before the expiry of a 15-day period from its reception. Once signed, a notary registers the convention and that confers to it a certain date and enforceability. This recording frees the effects: divorce and all its consequences.

This reform is part of a major modernisation of justice. The intent of the legislator is to refocus the judge on his essential missions. It is difficult to believe that the protection of the spouses and their children interests is not one. However, the disappearance of the judge may well be only temporary. The judge may well reappear in a post-divorce dispute or to review the compensatory allowance contractually set. Moreover, the contractual support of this divorce suggests the emergence of a new type of litigation. Indeed, numerous means of contract law can be invoked to call into question the agreement: for example, the nullity based on a defect of consent (error, fraud, violence). The annulment thus obtained through the convention will undoubtedly spread to divorce. How could it be otherwise? Now, if one of the spouses remarried, this will clearly create a difficulty …

The reform of the divorce took place in a hurry. Compared to the reform of contract law that matured only over a lengthy time, it appears to be an insufficiently well thought out act. Legal professionals should be particularly careful.

Click here to go to Main Contents

II NEW MODALITIES OF CIVIL PARTNERSHIP REGISTRATION IN FRENCH LAW[2]

The 'pacte civil de solidarité' (PACS) is a registered civil partnership opened to all couples. It was created by the law of 15 November 1999 and reformed by the law of 23 June 2006. Even though this solution had been discussed, registration of such civil partnerships was entrusted to the district courts registries. When these laws were discussed, many proposals concerning the authority that should be responsible for registering civil partnerships were suggested. Most of them preferred a registration at the town hall without reproducing the solemnity attached to marriage. This recourse to the civil registrar was finally withdrawn in favour of the clerk of the couple's common residence (former art 515-3 of the French Civil code). Yet, the idea of registration of the French civil partnership by the civil registrar was never completely abandoned and it finally succeeded. Thus art 48 of the law on modernisation of justice of the 21st Century of 18 November 2016, now entrusts registration of the civil partnership concluded under private signature to the civil status officer of the couple's place of common residence (new art 515-3 of the French Civil Code). This new rule came into force on 1 January 2017 and will be applied to civil partnerships concluded since then, as well as to declarations of modification or dissolution of partnerships concluded before that date. The registration of a civil partnership concluded in the authentic form remains within the competence of the solicitor (art 515-3 para 5 of the French Civil Code).

This transfer of competence from the courts' registry to the civil registrars reveals, between the lines, a major change in French society, which more easily recognises the couple independently of any matrimonial bonds. This explains why, from the legislator's perspective, there is no longer any reason why the partnership should not be 'celebrated' by the same authority as for marriage. While some authors see in this new rapprochement between two modes of conjugality an additional affront to marriage, the new modalities of civil partnership registration actually reflect a progressive erasure of fears that civil partnership would compete with marriage.

III FAMILY NAME AND INTERNATIONAL SITUATION: AN EVOLUTION WITH A EUROPEAN ACCENT[3]

The J21 reform,[4] dealing with many aspects of the law, has evolved the solutions in terms of name changes, and also the transcription of civil status documents for international situations.

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4 Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle ; V. Avena-Robardet, 'Réforme de la Justice du XXIè siècle', *AJ fam* 2016, p 286.

Two new articles have been created in the Civil Code, as well as a new subparagraph for an existing article. Article 61-3-1 provides that if a person has a name on the civil status register of another State, he may request that his name in France be changed, in order to correspond to the name registered abroad.

The change of name no longer requires a decree, but only a simple authorisation from the civil servant. In case of difficulty, the latter can only transmit the request to the public prosecutor who, if necessary, can object to it.

Article 311-24-1 provides that in the case of a birth abroad, a child with at least one French parent will have his name, as mentioned abroad, transcribed, without control, into the French registers. However, the parents will have the possibility to apply the French law for the determination of the child's name at the time of transcription, with the aim of giving it another name than the one already awarded abroad.

Lastly, the second paragraph of art 61-4 provides that 'decisions to change first names and names duly acquired abroad are entered in the margin of civil status documents on instructions from the public prosecutor.

In short, concerning the name, there is longer need for preceding the transcription of a foreign document, or the amendment of the civil registry (if the original name differs than the one recorded in a foreign document).

Indeed, the only limit that still exists is in the change of name procedure, where the civil servant detects a difficulty. Then, assuming that he is able to detect the difficulty, he can forward the request to the prosecutor, who, following his own assessment of the situation, may oppose the request. The question that arises, therefore, is what might constitute such a difficulty. The texts give no indication on this subject, but the study of the origin of this evolution makes it easy to answer the question.

These developments are in fact the mere translation in French legislation of the European requirements in this area. The cases *Garcia Avello*,[5] *Grunkin Paul*[6] and *Nabiel Peter Bogendorff*,[7] rendered by the Court of Justice in recent years, have demonstrated the existence of a specific obligation on the Member States of the European Union. These decisions require States not to hinder the free movement of European citizens and prevents them from refusing to recognise the name that citizens acquired in another Member State.

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5 CJCE, 2 October 2003, aff C-148/02, *Garcia Avello*; *D* 2004, p 1476, note M Audit; *RCDIP* 2004, p 184, note P Lagarde.

6 CJCE, 14 October 2008, aff C-353/06, *Grunkin-Paul*; *D* 2009, p 845, note F Boulanger; *RCDIP* 2009, p 80, note P Lagarde.

7 CJUE, 2 June 2016, aff C-438/14, *Bogendorff von Wolffersdorff*; *RTD eur* 2016, 648, note E Pataut.

Click here to go to Main Contents

This principle of uniqueness of the name (ie the fact that your name has to be the same everywhere) is attached by the Court to European citizenship. One might then have thought that the French reform could only concern acts or decisions of other Member States. However, the legislative evolution does not make this distinction, because the position of the European Court of Human Rights is relatively similar to the one of the Court of Justice. Indeed, it considers that the uniqueness of the name participates in the individualisation of a person and therefore constitutes an essential element of his identity.[8]

This position of the European Courts explains the evolution of French legislation.[9] These judgments also make it possible to determine the limits to this 'automatic' transcription. The 'difficulties', as mentioned in the Civil Code, that might appear for the civil servant, are offences to the French public order, but only if the latest is seriously violated, and if the value in question is also protected by the European Union.[10] It might be considered that if the situation is external to the European Union, then the refusal of modification or transcription will be easier. We don't think so, since the European Court of Human Rights is very attentive to the respect by States for the paramount interest of the applicants, including the uniqueness of the name.

Beyond these different elements, this evolution confirms the emergence of the recognition method.[11] With the new French rules, the requirements of private international law and the various rules relating to conflict of laws have completely disappeared. The control will be extremely weak, and only held *a posteriori*. Without going into further details, public order will be the only obstacle to the recognition of a name acquired abroad. No control process will take place *a priori*.

IV SOME NEW RULES ABOUT SEX AND CIVIL STATUS CHANGES[12]

On 18 November 2016, after many debates, the law on modernisation of justice of the 21st century has finally been adopted.[13] One of the elements which has been the most impacted by these debates is sex change and its notation on civil status certificates. If there have been many debates, it's also because the legislature hasn't yet intervened in this matter. Only the case law

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8 CEDH, 5 December 2013, n° 32265/10, *Henry Kismoun c/ France*; *AJ fam* 2014, 194, obs C Doublein.

9 Communication from France concerning the case of Henry Kismoun against France (Application n° 32265/10), 15 October 2014.

10 CJUE, 22 December 2010, aff C-208/09, *Sayn Wittgenstein*; *RTD eur* 2011, 571, obs E Pataut.

11 P Lagarde (dir), *La reconnaissance des situations en droit international privé, Actes du colloque international de La Haye du 18 janvier 2013*, Pédone, 2013; A Panet, *Le statut personnel à l'épreuve de la citoyenneté européenne. Contribution à l'étude de la méthode de la reconnaissance mutuelle*, thèse Lyon 3, February 2014.

12 Laura Sorisole, PhD student in Law, Family Law Centre, Université Jean Moulin – Lyon 3.

13 Law of 21st century justice modernisation, n° 2016-1547, 18.11.2016, JOFR n° 0269, 19.11.2016, text 1.

has dealt with the problems of the relationships between sex change and change of civil status. Indeed, for a long time, the question of the legal sex criterion didn't really arise. It's only with the realisation of the possibility of discord between biological sex and psychological sex that this question has become unexpectedly important.

This discord is known in France as the 'transsexual syndrome'. It is defined as a discord between the physical sex appearance and the psychological sex. It is marked by the irreversible feeling of belonging to the opposite sex and the need to change both sex and civil status certificates to get socially reintegrated with this 'new' sex. Today, medical practices allow this sex change to be achieved thanks to hormonal treatments and surgical procedures. Finally, all of this eventuates in a legal question whether these individuals whose sex is physically changed can also change their civil status certificates in order to match the gender to which they now belong.

The French case law, after having first refused to legalise sex changes, particularly based on the principle of the unavailability of persons,[14] finally admitted that a change of the sex reference in civil status certificates could be effected.

But, for that, the transsexual syndrome had to be recognised by a medical expert appointed by the judge, then the sex change operation had to have a therapeutic aim and the person could no longer possess the characteristics of sexual origin and, on the contrary, must adopt the appearance and social behaviours of the claimed sex.[15] This implied medical treatment and total sexual reassignment.

In 2016, with the law on modernisation of justice of the 21st century, the legislature finally broke the silence. Initially, the question of sex change wasn't in the draft law but it was finally added by amendment. Long debates were born from a persistent disagreement between National Assembly and Senate. Finally, art 61-5 was created and states:

> 'any adult or minor emancipated who demonstrates by sufficient facts that the mention relating his or her sex in civil status certificates doesn't correspond to the one in which the person presents and in which he or she is known, can obtain the modification. The principle of these facts whose the evidence may be reported by any means, may be that: the person publicly appears as belonging to the claimed sex; that this person is known under the claimed sex by his or her family, friends or

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[14] For example: Cour de Cassation, 21 May 1990, n° 88-12829, JurisData n° 1990-001602, *JCP G* 1990, II, 21588: The Court refuses to accept legalisation of sex changes because it considers that it's contrary to the principle of unavailability of persons. It was a civil law phenomenon and lot of jurisdictions had the same solution: they considered that the transsexual syndrome didn't really correspond to a sex change so, it wasn't an obligation to admit the civil status change. This solution was established and followed by a lot of jurisdictions.

[15] Cour de Cassation, 11 December 1992, n° 91-11900, *JCP G* 1993, II, 21991, G Memeteau ; Cour de Cassation, 13 February 2013, n° 11-14515.

professional entourage; that this person obtained the change of his or her first name in order that it corresponds to the claimed sex.'

As to obtain this change, the applicant will have to demonstrate his free and informed consent to change his or her sex in civil status certificates and to produce evidence to support his application (C civ, art 61-6). The fact that there is no medical treatment, surgery or sterilisation can no longer on its own be enough to motive the refusal of this application.

Once an application is accepted, the mention of this sex change is registered in the birth certificate. This notation is made on request of the public prosecutor in the fortnight after this decision is definitely adopted (C civ, art 61-7). However, the sex change mention will affect neither the contractual obligations of the person with regard to other persons nor established filiations before this modification.

Although these dispositions are the main subjects of many debates, the Constitutional Council approved them and declared them consistent with the Constitution in November 2016.[16]

V ABOUT THE EXTENSION OF THE OFFENCE OF ILLEGAL INTERFERENCE ON ABORTION TO THE INTERNET[17]

In 1971, the French newspaper *Le Nouvel Observateur* published the 'Manifeste des 343 salopes' in which 343 women claimed their right to abortion, and in which they assumed that they already had recourse to it even though it was prohibited.[18] Four years later, the Veil law legalising the voluntary termination of pregnancy (TOP) was voted (law n° 75-17 of 17 January 1975). Since then, abortion has been made more accessible and mostly accepted in France: 218 000 TOP were completed in 2015, and 35% of women are predicted to have recourse to it at least once in their life.

In Europe, TOP is mostly legalised. Despite this global tendency abortion is not fully accepted all around Europe: five countries still prohibit it – sometimes with a blanket ban (Malta), sometimes with a ban tempered by exceptions such as cases of rape, incest, foetal malformation (Poland, Cyprus) or when the pregnancy creates a real risk for the woman's life (Andorra, Ireland).

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16 Conseil constitutionnel, 17 November 2016, n° 2016-739 DC, JORF 18 November 2016, text 4.

17 By Clara Delmas, PhD student in Law, Université Lumière – Lyon 2, Researcher at the Centre de droit de la famille, Université Jean Moulin – Lyon 3.

18 See http://tempsreel.nouvelobs.com/societe/20071127.OBS7018/le-manifeste-des-343-salopes-paru-dans-le-nouvel-obs-en-1971.html and www.ina.fr/contenus-editoriaux/articles-editoriaux/le-manifeste-des-343-salopes/.

In order to face the vigour of some opponents, the access to abortion has been more and more reinforced through the past decades. On one hand, the right of access to abortion for women was guaranteed (Law n° 2014-873 of 4 August 2004). On the other hand, obstacles to abortion are punished through the offence of illegal interference with the voluntary interruption of pregnancy (Law n° 93-121 of 27 January 1993). This offence figures now at the art L 2223-2 of the French Public Health Code according to which anyone actually preventing or attempting to prevent a woman, by physical or psychological disruption, from having recourse to TOP or from inquiring about TOP, incurs a punishment of 2 years' incarceration and a €30,000 fine. The disposition covers the situations where the woman is *physically* near to establishments performing legal abortions. As a matter of fact, the disposal appears to be dated since the offence was created in 1993 mostly to prevent the 'anti-TOP commandos' from physically stopping women from accessing abortion (see TGI Roanne, 27 June 1995, dealing with the 'commandos anti-IVG', available on Gallica website;[19] see also Cass Crim 31 January 1996, n° 95-81319). The problem is that this offence no longer covers all the realities of abortion interference.[20] That is why a group of deputies submitted on 12 October 2016 a bill on extension of the illegal interference of TOP. This bill aims to solve the problem of unreliable websites proposing false information about abortion. These 'neutral-fake' websites are accused of deliberately misleading, intimidating or exercising moral or psychological pressures in order to dissuade women from having an abortion. The deputies underlined that these websites do not make their position clear regarding TOP and that they hide a dissuading discourse under an official appearance. Moreover, some of these website appear in Google results before the Government website (for instance: https://ivg.net/).

The bill introduced on October 2016 passed on 16 February 2017 and was been sent to the Conseil Constitutionnel 4 days later in order to control its conformity to the French Constitution. The new article states that the illegal interference on TOP can also be directed online or by electronic means. In other words, it extends the offence not only to physical presence but also to the internet. Considering the conformity of this bill to the Constitution, the Conseil Constitutionnel will have to determine if a fair balance is struck between the right of access to TOP and freedom of expression. Indeed, even though the French Supreme Court (the Cour de Cassation) had already stated that the offence of illegal interference on the voluntary interruption of pregnancy complied with Arts 9 and 10 of the ECHR (the protection guaranteed by these articles can be restricted by measures necessary to the protection of health or the rights of others), the decision concerned the physical actions of anti-TOP commandos in the 1990s.[21] Then, what equilibrium can be found between the hostility to abortion (guaranteed by freedom of opinion) and the freedom of choice that women deserve regarding TOP? When does information become interference?

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[19] http://gallica.bnf.fr/ark:/12148/bpt6k6281111b/f77.image.r=commandos%20anti-IVG.

[20] Even though the physical interferences still exist! See Cass Crim, 1 September 2015, n° 14-87441.

[21] Cass Crim 31 January 1996, n°95-81319.

Click here to go to Main Contents

VI TRAINEESHIPS TO COMBAT DOMESTIC AND GENDER-BASED VIOLENCE AND THE OFFENCE OF BUYING A SEXUAL ACT[22]

For several years, the French legislature has been developing a new type of penal sentence: the internships. Family and persons laws do not escape this movement. A decree of 12 December 2016[23] validated what already existed in practice: traineeships of accountability to combat domestic and gender-based violence and traineeships of awareness to fight against the offence of buying a sexual act. In both cases, this internship can be an alternative to a more conventional punishment (fine, conditional sentence, etc) or a supplementary sentence that the offender receives in addition to another sanction. The duration of this period is one month maximum and when its cost is charged to the offender, it cannot exceed €180 euros (Penal Code, art 131-35-2).

The first type of internship comes from Law No 2014-873 of 4 August 2014 for real equality between women and men.[24] The decree has specified that:

> 'The content of the internship of accountability for the prevention and combating of violence within the couple and gender-based violence must make it possible to remind the convicted person of the republican principle of equality between women and men, the gravity of violence, whatever their form, within the Couple or sexist behaviors in general and, where appropriate, the duty of mutual respect implied by the couple's life. It also aims to make the offender aware of its criminal and civil responsibility for the acts committed.'[25]

The second type of internship is the result of Law No 2016-444 of 13 April 2016 aimed at strengthening the fight against prostitution and at helping prostitutes.[26] This law created the offence of buying a sexual act that punishes clients of prostitutes, but does not punish prostitutes. On the contrary, the law establishes an accompanying system to support those who wish to stop prostituting themselves. The decree specifies that:

> 'the content of traineeships of awareness of the fight against the purchase of sexual acts must make it possible to remind the convicted of the realities of prostitution and the consequences of the commodification of the body. It also aims to make him or her aware of the criminal and civil responsibility for the acts committed.'[27]

These internships are more educational than therapeutic. They aim to lead offenders to become aware of their behaviour and to avoid any recurrence. It will be a few years before having statistics on the success rate of these measures

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[22] By Christine Bidaud-Garon, Assistant professor at University of New-Caledonia, Deputy director of the Economic and Legal Research Laboratory (LARJE).
[23] Decree n° 2016-1709, 12 December 2016: JORF 14 December 2016, text n° 52.
[24] JORF n°0179, 5 August 2014, p 12949, text n° 4
[25] Penal C, art R 131-51-1. Our translation.
[26] JORF n°0088, 14 April 2016, text n° 1.
[27] Penal C, Art R 131-51-3. Our translation.

are available, but given their success in other states such as Canada,[28] there is a real hope that they will contribute to the reduction of these offences.

VII THE REAPPEARANCE OF INCEST IN FRENCH LAW: AN EXPECTED ADVANCEMENT[29]

The year 2016 was abundant with reforms: they irrigated French legal life as evidenced by 14 March 2016's law.[30] Even though it encompasses several legal aspects, the study that is made today concerns only incest, whose criminal and civil treatments have often been botched, excoriated, or condemn.

First of all, we must have a look at the definition of incest. The collective unconscious thinks immediately of the famous and legendary story of Oedipus who, in order to escape from a fatal oracle, killed his father and married his mother. Classically, incest is characterised in two ways, by its actors (two close relatives) and by the acts involved (sexual intercourse, touching, sexual assault).

In the circumscribed field of incest, this reform has two main characteristics.

At first glance, the law is innovative. Incest was removed from the Criminal Code by the French revolutionaries in 1791 and, again, in 1810. French criminal law merely repressed incest through the quality of the victim but also thanks to the family relationship that might exist between the victim and the perpetrator. However, in 2010,[31] the French Parliament voted a law specifically naming these acts and, in fact, introducing the concept of incest. Far from being superfluous, this addition was censored at two levels. Indeed, in a first decision,[32] the French constitutional council ruled on the constitutionality of this law, regarding the principle of legality and precision of the criminal infringement. The Wise Judges (as they are called in France) concluded that the law was contrary to the Constitution, adopting the idea that 'the proposed definition of incest is too broad and too narrow, inherited from a hesitant conception of the family'.[33]

Similarly, in a second decision,[34] the constitutional council repealed art 227-27-2 of the French criminal code, stating that 'if the legislator were able to establish a particular criminal qualification in order to point out incestuous sexual acts, he could not, without disregarding the principle of the legality of offences and penalties, refrain from designating precisely those persons who

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28 For more details, see www.criviff.qc.ca/fr/publications-du-cri-viff.

29 By Amar Slimani, PhD student in Law, Family Law Centre, Université Jean Moulin – Lyon 3.

30 Law n°2016-297 concerning protection of child, 14 March 2016, JORF 15 March 2016.

31 Law n°2010-121 to register in the criminal code incest committed on minors and to improve the detection and care of victims of incestuous acts, JORF 9 February 2010.

32 Cons Counc 16 September 2011, n° 2011-163 DC: JO 17 September 2011, text n°74.

33 A Montas and G Roussel, 'La pénalisation explicite de l'inceste, nommer l'innommable', *Archives de politique criminelle*, n° 32, 2010, p 301.

34 Cons Counc 17 February 2012, n° 2011-222 DC: JO 18 February 2012, text n°71.

Click here to go to Main Contents

must be regarded, in the sense of that qualification, as members of the family'. As stated earlier, this law is innovative since it draws lessons from the previous censures made by the constitutional council.

Moreover, this reform aims at being symbolic. Actually, much more than other legal branches, criminal law has an axiological dimension because it wants to preserve social values. The very first symbol concerns the perpetrators of incest: this law intends to repeat the disapproval of these kinds of behaviours. At the same time, the victims of incest were craving for such a law. Even if French criminal law already punished incest without naming it, to the repressive function of criminal law is added an expressive function, corollary of the precision and clarity required for any incrimination.

Besides, this preoccupation of precision enjoined the French legislator to name persons who could commit incest. Thus, for instance, art 222-31-1 of the criminal code now affirms that 'rape and sexual assault are considered incestuous when they are committed against a minor by: 1 an ascendant; 2 A brother, a sister, an uncle, an aunt, a nephew or a niece; 3 The spouse, the cohabiting partner of one of the persons mentioned in 1 and 2 or the partner bound by a civil partnership with one of the persons mentioned in 1 and 2, if he has on the minor a de jure or de facto authority'. This demarcation of the perimeter of incest also makes it possible to take into account today's family realities: the family is no longer a monolithic monochrome structure.

Despite these huge advances, the legislator did not opt for the creation of an autonomous offence of the incest. Opting for an 'over-qualification' of the incest is likely to be the result of an assumed criminal policy. If the law had created the offence of incest, the principle of non-retroactivity of the more severe criminal law would have prevented it from being applied to behaviours committed before it took effect. Over-qualification makes it possible to circumvent this difficulty without contravening the principle of legality of offences and penalties.

VIII THE FRENCH JUDGE AND THE PROPORTIONALITY TEST: A BETTER PROTECTION OF THE INDIVIDUAL'S RIGHTS AND FREEDOMS?[35]

Has the judge the power to dismiss a legal rule – in itself perfectly consistent with fundamental rights and freedoms – on the grounds that its application *in casu* would disproportionately undermine the rights and freedoms of those concerned? Even though the question is not specific to family law, as it could also be asked regarding property law or town planning rules for example, the issue is taking on a very special importance in family matters given the significance of fundamental rights and freedoms in general, and the right to

[35] By Hugues Fulchiron, Professor at Université Jean Moulin – Lyon 3, Director of Family Law Center, Institut universitaire de France.

respect of private and family life (guaranteed by Art 8 of the ECHR) in particular. For instance, art 161 of the French Civil code proscribes marriages between people who are directly related. How about a wedding celebrated despite this prohibition? Shall the judge, in the name of the public interests included in the legal rule, void the union? Shall the judge, in some cases, decide not to apply the law in consideration of the protection of the private interests involved?

Launched by a judgment of 4 December 2013[36] regarding a wedding between a man and his son's ex-wife in which the French Supreme court refused to void the wedding, considering that the union had been 'celebrated without facing any opposition' and had 'lasted for more than twenty years',[37] the debate over the judgements has continued to grow. Mainly, the French rules regarding actions challenging paternity are often discussed: concerned about filiation stability, the French legislator decided in 2005 to restrict these actions in very stringent delays that appear to be of an excessive severity regarding the child's right to respect for his identity.[38] Furthermore, some French rules prohibiting posthumous artificial insemination have also been submitted to the proportionality test.[39]

Thus, doctrine got divided. Some authors condemned the dangers of such a test: a case-based process submitted to the magistrates' subjectivity would undermine the rule of law, would threaten legal certainty and would open the door wide to arbitrariness; it would empower the judge to question the democratic equilibriums reached by the legislature; and it would threaten social cohesion by allowing private interests to take priority over general interests. Other authors have underlined that it may be necessary – in a legal system that has recognised to the individuals a certain number of fundamental human rights and civil liberties and that intends to ensure their respect *in concreto* and not *in abstracto* anymore – to strike the balance between competing interests when applying the rule to the case rather than only when producing it. In that sense, to give to the legal rule some flexibility would ensure a 'fairer' regulation of social relations.

Despite criticisms, the Cour de Cassation pursues its efforts in order to determine the adequate methods allowing the balance of the competing public and private interests, in the line of reasoning adopted by the European Court of Human Rights. According to the French Court, the proportionality test (ie the balance of the competing public and private interests) belongs to the lower

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[36] Civ 1 ère 4 December 2013, n° 12-26.006, *D* 2014, 179, note F Chénedé, *RTD civ* 2014, 88, obs J Hauser, *RTD civ* 2014, 307, obs J-P Marguenaud, H Fulchiron, 'La Cour de cassation, juge des droits de l'homme?', *D* 2014, 153.

[37] Our translation.

[38] Cf, for example, Cass Civ 1ère 9 November 2016, n°15-25068, Dr famille 2017, comm 9, note H Fulchiron, JCP 2017, comm 46, note V Larribeau-Terneyre.

[39] CE 31 mai 2016, n°396848, *Madame Gonzalez-Gomez*, this chronicle.

Click here to go to Main Contents

courts: the trial judges and the courts of appeal. The Cour de Cassation yet intends to exercise a control on this test.[40]

Actually, the debate is part of a wider issue regarding the place of fundamental rights in general, regarding the ECtHR's missions in particular[41] and regarding the articulation between national, European and international norms.[42] Beyond its theoretical issues, the debate also takes on a practical importance: by giving flexibility to a legal rule, the proportionality test allows a better protection of the individuals' rights and freedoms.

IX GIVING BIRTH AFTER DEATH?[43]

The very existence of techniques of medically assisted procreation (MAP) rests on the scientific (and sociologic) will to provide solutions to the pain caused by infertility. Since the end of the 1970s and the first 'test-tube babies', techniques of MAP have constantly been improved in order to address the needs of persons who suffer from genetic, pathologic or phenotypic infertility. The legal framework of these techniques has changed significantly over recent years, due to case law and the intervention of the French legislature.

In the years 1980 and 1990, some contradictory court decisions alternatively authorised or denied the use of a *post-mortem* MAP.[44] At that time, the possibilities to have access to a MAP were uncertain.

The French legislator attempted to remove the doubts with the 'bioethics Laws' of 29 July 1994, which clearly denied the possibility of performing a *post-mortem* MAP. From then on, the possibility to practise a MAP is reserved for living heterosexual couples (married or not), of the age to procreate, and animated by a parental project.[45]

In one particular case, Mrs A (a Spanish national) and Mr B (an Italian national) planned to have a child while they were living in Paris. But the cancer of Mr B thwarted the couple's project because he needed chemotherapy that would lead to his infertility. For this reason, in a preventive manner, Mr B left some of his gametes in the Center of Study and Conservation of Eggs and Sperm (CSCES) of the Tenon Hospital in Paris, with the intent to perform a

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40 Cf H Fulchiron, *Le contrôle de proportionnalité, questions de méthodes*, D 2017, à par.

41 Cf *La Cour EDH. Une confiance nécessaire pour une autorité renforcée*, S Touzé (dir), éd. Pedone, 2016, p 188 s.

42 Cf B Bonnet (dir), *Traité des rapports entre ordres juridiques*, LGDJ, 2016.

43 Richard Vessaud and Guillaume Millerioux, PhD students in Law, Family Law Center, University Jean Moulin – Lyon III.

44 Tribunal de grande instance of Créteil, 08 January 1984: the tribunal has authorised the restitution of the deceased husband's gametes to his widow; *contra*, see Tribunal de grande instance of Toulouse, 26 March 1991.

45 See arts L 2141-2 et seq of the French Public Health Code.

future MAP. At this time, the couple were married and qualified for a MAP. However, the project didn't go through because of Mr B's brutal death by murder on 9 July 2015.

Because the death of a member of the couple results in the impossibility to carry on a MAP in France,[46] Mr B preventively authorised his spouse to use his gametes after his death to perform a MAP in Spain, where such practice is legal.

Accordingly, after Mr B's death, Mrs A returned to Spain because she no longer had attachments in France, and asked to export her dead husband gametes to practise a MAP in Spain. To that end, she requested the judge of expedited matters of the administrative tribunal of Paris to order the hospital and the Agency of Biomedicine to export her dead husband's gametes to a Spanish establishment authorised to practise a *post-mortem* MAP. The judge rejected her request on the basis of art L 522-3 of the Code of Administrative Justice. Mrs A appealed before the French Council of State, acting in an expedited proceeding.

In this case, the Council of State ordered the exportation of Mr B's gametes to Spain so that the widow could perform a *post-mortem* MAP. The Council of State considered that the application of the French law would 'cause a serious and disproportionate breach' of the right to respect for private and family life, guaranteed by Art 8 of the ECHR.

The High Judges operated a real revolution in a matter of procédure de référé, similar to a declaratory judgment. Indeed, since a judgment of 30 December 2002,[47] the Council of State denied the possibility for an administrative judge, ruling in a preventive manner, to verify the conventionality, or conformity with Conventions, of a text. This prohibition has now broken down; a judge, ruling in matter of expedited manners, can practise an *in abstracto* control (verify the conventionality of a text).

Under the procedure, the Council of State declared:

> 'the judge of the administrative Tribunal of Paris, ruling in a matter of expedited manners, has made an error of law, by rejecting, on the basis of the Article L. 522-3 of the Code of Administrative Justice, the request, solely on the ground that it didn't belong to it to decide, having regard to its function, on the existence of a serious and disproportionate breach of the right to respect for private and family life, guaranteed by the article 8 of the European Convention of Human Rights.'

Therefore, it came under the authority of the judge to proceed to a double control: *in abstracto* and *in concreto*.

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[46] See art L 2141-2 of the French Public Health Code.

[47] Conseil d'Etat, 30 December 2002, n° 240430: for a petition for suspension, then extended to others types of petition.

Click here to go to Main Contents

Anyhow, this new 'reasoning' of the Council of State led to an order that the hospital take all requisite measures to ensure the exportation of the gametes to the Spanish establishment within 7 days of the judgment. Mrs A and Mr B's project could be realised in Spain, provided that the insemination happens in the period of 12 months imposed by the Spanish law starting from the death of Mr B.

Could this judgment be interpreted as a weakening of the French prohibition, or a new jurisprudential turpitude? Time will tell …

X THE NEW EUROPEAN REGULATION IN MATTERS OF THE PROPERTY CONSEQUENCES OF REGISTERED PARTNERSHIPS (JURISDICTION, APPLICABLE LAW AND THE RECOGNITION AND ENFORCEMENT OF DECISIONS)[48]

There is an increased number of couples with an international dimension nowadays: couples not sharing the same nationality, couples living in a Member states other than that of their nationality, or owning property in different countries … International couples have to manage their property, in particular in case of separation or the death of one of its members.

In 2011, the Commission, seeking to provide legal certainty to international couples concerning the management and the sharing of their property, presented two proposals to the first involving the property regimes of registered partnerships.

In such a field involving family law, the proposal had to be adopted by the Council by unanimity after having consulted the European Parliament. As no unanimity could be reached within a reasonable period of time, the Council abandoned the idea of adopting a regulation. Then, 18 Member States[49] expressed the wish to establish enhanced cooperation between themselves, and the Commission adopted a proposal for a Council decision authorising enhanced cooperation in the area of the property regimes of international couples,[50] and another proposal on the property regimes of registered partnerships.[51] On 9 June 2016, the Council adopted Decision (EU) 2016/954 authorising such enhanced cooperation. That's why we now have the 'Council regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships'. As the EU seeks to provide unmarried couples with legal

[48] By Amélie Panet, Assistant Professor at Université Jean Moulin – Lyon 3, Family Law Center.
[49] Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, France, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain and Sweden.
[50] 2 March 2016, COM(2016) 108 Final.
[51] 2 March 2016, COM(2016) 107 Final.

certainty as to their property and offer them a degree of predictability, this instrument covers all the rules applicable to the property consequences of registered partnerships. As the name of the instrument shows, it provides rules for conflict of laws as well as for jurisdiction and recognition. The Regulation then concentrates the jurisdiction on the property consequences of registered partnerships in the Member State whose courts are called upon to handle the succession of a partner in accordance with Regulation (EU) n°650/2012, or the dissolution or annulment of registered partnership. Where there are no such pending proceedings, this regulation provides a scale of connecting factors to determine jurisdiction (starting with the habitual residence of the partners). The instrument provides rules to avoid any risk of denial of justice, and alternative jurisdictional rules are included for cases where no court has jurisdiction to deal with the situation in light of ordinary provisions of the regulation.

Concerning the applicable law, seeking to allow citizens to avail themselves with legal certainty of the benefits offered by the internal market, the regulation enables partners to know in advance which law will apply to the property consequences of their registered partnerships. The regulation authorises partners to choose the law applicable to the property consequences of their registered partnership among those with which they have close links,[52] if they attach property consequences to registered partnerships. The choice may be made at any moment, before the registration, at the time of the registration or during the course of the registered partnership.

Where no applicable law is chosen, the regulation provides that the law of the State under whose law the mandatory registration of the partnership was made in order to establish it apply to the property consequences of the registered partnership. By way of exception and upon application by either partner, a judicial authority having jurisdiction to rule on matters of the property consequences of a registered partnership may decide that the law of another State shall govern the property consequences, provided that the partners had their last common habitual residence in that other State for a substantial time, and both partners had relied on the law of that other State in arranging or planning their property relations.

There also are several exceptions to the application of the law such as public policy or overriding mandatory provisions.

To conclude, there are classical provisions for recognition, enforceability and enforcement of decisions in the regulation, which may permit to ensure that decisions given in a Member State to be recognised in the other Member States without requiring any special. There are limited grounds of non-recognition, which will be verified in case of the recognition of a decision raised in a dispute. Concerning enforceability, there is a simplified procedure, mainly held in the State of enforcement. In a first period of time, no contestation is possible. It's

[52] Such as because of their habitual residence or nationality.

Click here to go to Main Contents

only in case of an appeal against the decision of the application for a declaration of enforceability that the grounds of non-recognition will be studied.

The regulation shall apply from 29 January 2019. The transitional provisions foresees that the rules on conflict of laws shall apply only to partners who register their partnership or who specify the law applicable to the property consequences of their registered partnership after 29 January 2019. For recognition and enforcement rules, it depends on the date of decisions: decisions given after 29 January 2019 shall be recognised and enforced in accordance with the regulation as long as the rules of jurisdiction applied comply with those set out in the regulation, if the proceedings in the Member State of origin were instituted before the entry into force.

This enhanced cooperation is another step closer to the construction of an European private international law system, which may clearly increase legal certainty, predictability and the autonomy of the parties.

XI THE NEW EUROPEAN REGULATION ON CONFLICT OF LAWS IN MATTERS OF MATRIMONIAL PROPERTY REGIMES[53]

On 24 June 2016, the Council of the European Union also adopted a new European Regulation implementing an enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

With regards to its scope, this regulation applies to matrimonial property regimes defined as a set of rules concerning the property relationships between the spouses and in their relations with third parties, as a result of marriage or its dissolution. With regards to transitional provisions, the rule states that the Regulation will only apply to legal proceedings instituted, on or after 29 January 2019, and, in relation to the law applicable, the Regulation will only apply to spouses who will marry or specify the law applicable after this date.

With respect to jurisdiction, the Regulation takes into consideration the connections that exist at the time of the dissolution of the matrimonial regime between the laws governing the matrimonial regime and the divorce or the succession.

Thus, when a jurisdiction in a Member State is sought to rule on a question relating to the succession of one of the spouses, pursuant to the European Regulation on international succession (Regulation No 650/2012), or to rule on a divorce application pursuant to Regulation Brussels II bis, the jurisdictions of

[53] Eric Fongaro, Assistant Professor at Université de Bordeaux, Research Institute on Business Law and Family Property & Succession Law.

the said Member State will be competent to rule on matrimonial regime questions relating to the said succession or divorce application.

In other instances, the jurisdictions of the Member State in whose territory the spouses are habitually resident will have jurisdiction; or, failing that, in whose territory the spouses were last habitually resident, insofar as one of them still resides there at the time the court obtains jurisdiction; or, failing that, in whose territory the respondent is habitually resident; or, failing that, of the spouses' common nationality.

Moreover, provided specific conditions are met, the Regulation recognises choice of court agreements. The Regulation also provides for further jurisdictional rules. The Regulation further sets out principles applicable to a court's jurisdiction, to examination as to competence, to *lis pendens* and to related actions.

In relation to applicable law, the European Regulation is inspired by the Hague Convention of 14 March 1978 on the law applicable to matrimonial property. The new instrument is of universal application: having force even where the said law is not a law of a Member State. Further, the law applicable to a matrimonial property regime is also applicable to all assets falling under that regime, regardless of where the assets are located. Pursuant to the Regulation, the spouses or future spouses can choose the law applicable to their matrimonial regime either before or during the marriage. In this respect, they can choose the law of the State where the spouses or future spouses, or one of them, is habitually resident at the time the agreement is concluded, or the law of a State of nationality of either spouse or future spouse at the time the agreement is concluded. Contrary to The Hague Convention of 14 March 1978, the Regulation excludes automatic changes of the law applicable. In the absence of any choice, unless an exception applies, the law applicable to the matrimonial regime is the law of the State in which the spouses had their first habitual residence; or, failing that, the law of the State of the common nationality of the spouses; or, failing that, the law of the State with which the spouses jointly have the closest connection.

With respect to recognition, enforceability and enforcement of decisions, the Regulation contains well-known principles. A decision given in a Member State shall be recognised in the other Member States without any special procedure being required. In relation to enforceability, the Regulation follows the principles set out by Brussels I. Last, regarding authentic instruments and court settlements, the principles set out by the new Regulation are directly inspired by Regulation n° 650/2012 on international succession.

Click here to go to Main Contents

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GERMANY

REGISTRATION OF INTERSEX PERSONS, MEDICALLY ASSISTED REPRODUCTION AND OTHER MATTERS UNDER CONSIDERATION

*Nina Dethloff, Susanne L Gössl and Stefanie Sucker**

Résumé

En Allemagne, au cours des deux dernières années, les réformes législatives en matière de droit de la famille ont été rares. Une exception majeure concerne la réforme relative à l'enregistrement du sexe à la naissance. En 2013, la possibilité de laisser vide la mention relative au sexe a été admise en cas d'intersexualité. Toutefois, même s'il s'agit d'un changement fondamental du système binaire actuel, la réforme a engendré plus de questions qu'elle n'a apporté de réponses. Ainsi, après une décision de la Cour suprême fédérale refusant l'enregistrement d'un troisième sexe comme étant un sexe dit "inter/divers", la constitutionnalité de la solution est actuellement étudiée par la Cour constitutionnelle fédérale.

Des changements considérables sont aussi à noter dans le domaine de la procréation médicalement assistée. Une réforme législative a été effectuée et les tribunaux se sont intéressés à des questions comme la parenté juridique des couples homosexuels en cas de maternité de substitution, la co-maternité ou encore la possibilité d'une insémination post mortem.

Enfin, de nombreuses autres réformes sont actuellement en cours de discussion et certaines sont sur le point d'être adoptées en 2017. On trouve par exemple celle relative au droit du père légal d'obtenir des informations concernant le père biologique ou encore celle concernant la durée du droit au paiement anticipé pour soutenir les enfants de parents célibataires. En outre, sont également en discussion des règles relatives à la prévention des mariages d'enfants ou à la restriction de la liberté d'un enfant par ses parents ou par le tribunal de la famille. Enfin, l'introduction d'une représentation légale par le conjoint ou par le partenaire enregistré en cas d'incapacité mentale est discutée.

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I INTRODUCTION

Legislative reforms in the area of family law have been surprisingly sparse during the last couple of years in Germany.[1] A major exception constitutes the reform concerning sex registration upon birth (II). Following the recommendation of the German Ethics Council (*Deutscher Ethikrat*) in 2012 on 'Intersexualität' the option to leave the sex registration empty in case of intersexuality was introduced. Though this has to be considered a fundamental change in the thus far binary system, the reform left more questions than providing answers. Consequently, after a ruling of the Federal Supreme Court which denied registration of a third sex as inter/diverse, the constitutionality of the provision is currently under review by the Federal Constitutional Court. Medically assisted reproduction is the other area where considerable changes are taking place (III). While so far these changes have primarily been brought about by court rulings, lately legislative reform has also been spurred. Finally, towards the very end of the legislative period – with Federal Elections in September 2017 – numerous reforms are presently under debate, with some of them almost sure to pass (IV).

II INTERSEXUALITY AND THE RECOGNITION OF A 'THIRD SEX'

Sex registration at birth as either female (F) or male (M) was compulsory until November 2013.[2] Since November 2013, according to the newly introduced s 22(3) of the Personal Status Law (*Personenstandsgesetz*) the registration form 'has to be left empty' with regard to the sex whenever 'the child can neither be related to the male nor the female gender'.

(a) Section 22(3) of the Personal Status Law – Background

The provision was introduced as a first quick and provisory step. A general reform of the Personal Status Law, the statute concerning the status registry, was already in progress. This reform was especially meant to adapt the Personal Status Law to the new electronic format of the registry and needed to be finished before the end of the legislative period in the autumn of 2013. Thus, the legislator added s 22(3) of the Personal Status Law but did not systematically reform the status of gender diverse persons. The wording leaves open which cases of intersexuality fall within the scope of the provision. As s 22(3) of the Personal Status Law has been inspired by the Opinion of the

[1] For the last report on Germany see Hauschild 'Reforming the Law on Parental Responsibility' in Bill Atkin (ed) *The International Survey of Family Law* (ISFL) (Jordan Publishing, 2014) p 147.

[2] Even though the registrar had no possibility to enforce a sex determination; Bockstette 'Das Personenstandsrechts-Änderungsgesetz' StAZ (*Das Standesamt – Zeitschrift für Standesamtswesen, Familienrecht, Staatsangehörigkeitsrecht, Personenstandsrecht, internationales Privatrecht des In- und Auslands*) 2013, 169 at 171.

German Ethics Council (*Stellungnahme des Deutschen Ethikrates*), one might refer to the Opinion's understanding of intersexuality as genetic-anatomic-hormonal conditions or a biological-medical description of a physical status.[3] As in the case of male and female, the sexual condition and the following registration will have to be proven by a medical statement or expert opinion.[4]

The reform of the provision was preceded by a public debate instigated by the German Ethics Council and its subsequent, abovementioned Opinion on the situation of intersexual individuals in Germany proposing changes to the existing law.[5] The Opinion was triggered by a request by the Federal Ministry of Education and Research and the Federal Ministry of Health which in turn had been initiated by a request from the UN Committee on the Elimination of Discrimination Against Women (CEDAW) to the Federal Government to improve the situation of intersexual individuals in Germany. The CEDAW committee especially relied on a shadow report[6] by the Federal Association of Intersexed People (*Intersexuelle Menschen eV*) and XY-Women (*XY-Frauen*), as the corresponding annual report issued by the German Government in 2007[7] did not mention the situation of intersexual people in Germany at all.[8]

The German Ethics Council found a number of human rights violations caused especially by the current practice of irreversible sex surgery on intersexual children shortly after birth.[9] Such surgery is often induced by the obligation to determine the sex upon the registration of the birth and the following social pressure on the parents assuming anything not strictly male or female was abnormal.[10] Thus, eliminating or at least mitigating that pressure was regarded as the most urgent legislative step. Whether the new rule actually mitigates the said pressure is another question which has not yet been confirmed or disproved. The new provision is supposed to avoid a 'stigmatising' of intersexual individuals and to take pressure off the parents. A later entry as a male or female is possible without any time limitations (s 27 (3) no 4 alt 1 of the Personal Status Law). The wording of s 22(3) of the Personal Status Law supports an interpretation as an obligation to leave the section open ('has to'). Nevertheless, the provision is generally understood as a possibility, not an obligation.[11]

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3 Stellungnahme des Deutschen Ethikrates, BT-Drs. (*Drucksachen des deutschen Bundestages*) 17/9088, 11.

4 Gaaz in Hepting and Gaaz (eds), *Personenstandsrecht mit Eherecht und internationalem Privatrecht: Kommentar* (Verl. für Standesamtswesen 1991) § 21 at 28.

5 BT-Drs. (*Drucksachen des deutschen Bundestages*) 17/9088.

6 Shadow Report to the 6th National Report of the Federal Republic of Germany on the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), available in German and English at www.intersexuelle-menschen.net/parallelberichte/cedaw_2008.php (9 March 2017).

7 Sechster Bericht der Bundesrepublik Deutschland zum Übereinkommen der Vereinten Nationen zur Beseitigung jeder Form von Diskriminierung, Unterrichtung durch die Bundesregierung, BT-Drs. (*Drucksachen des deutschen Bundestages*) 16/5807.

8 BT-Drs. (*Drucksachen des deutschen Bundestages*) 17/9088, 4 fn 2.

9 BT-Drs. (*Drucksachen des deutschen Bundestages*) 17/9088, 44–57.

10 BT-Drs. (*Drucksachen des deutschen Bundestages*) 17/9088, 44–57.

11 Helms 'Personenstandsrechtliche und familienrechtliche Aspekte der Intersexualität vor dem

(b) Problems of the new rule

While in the beginning the interpretation was unclear, court decisions have established that the option 'empty space' is available not only to newborn children. Intersexual individuals who have been registered as either male or female (before 2013) can later change their sex registration to 'empty space'.[12]

The new provision of the Personal Status Law conflicts with the rest of the legal system which is still based on a binary view. For example, an alternative to male or female is still unknown in social security, insurance and taxation law as well as in all questions of family law which derive from a traditional concept of the family. Thus, German civil law defines a 'mother' as the 'woman' who has given birth (s 1591 of the German Civil Code (*Bürgerliches Gesetzbuch – BGB*)) and the father always as a 'man' (s 1592 of the German Civil Code). There is no rule on an intersexual parent.[13] Furthermore, German law provides for the institution of marriage for only a 'man' and a 'woman' and the registered civil partnership (*eingetragene Lebenspartnerschaft*) only for same-sex couples (s 1 of the Civil Partnerships Act (*Lebenspartnerschaftsgesetz*)). There is no provision for a union including one intersexual person.[14] Furthermore, German law lacks any rule facilitating a name change after an intersexual person has been assigned to a sex and the first name is no longer appropriate for the assigned sex.[15] In general, German name law follows the principle of name continuity, thus, a change of name is only possible in a special proceeding and is has to be established that an 'important reason' justifies the name change (ss 3, 11 *Gesetz über die Änderung von Familiennamen und Vornamen – NamÄndG*). Probably the change of the assigned sex will constitute such a reason, nevertheless, uncertainty remains due to the lack of a specific regulation. On the other hand, for transsexual persons, a name change has been explicitly facilitated and clarified by the law (s 1 *Transsexuellengesetz – TSG*).

Hintergrund des neuen § 22 Abs. 3 PStG' in Götz, Schwenzer, Seelmann and Taupitz (eds) *Familie – Recht – Ethik: Festschrift für Gerd Brudermüller zum 65. Geburtstag* (C H Beck, 2014), 304.

12 *Bundesgerichtshof* (Federal Supreme Court – *BGH*), FamRZ (*Zeitschrift für das gesamte Familienrecht*) 2016, 1580; *Oberlandesgericht Celle* (Higher Regional Court – *OLG*), StAZ (*Das Standesamt – Zeitschrift für Standesamtswesen, Familienrecht, Staatsangehörigkeitsrecht, Personenstandsrecht, internationales Privatrecht des In- und Auslands*) 2015, 107; Gössl 'Eintragung im Geburtenregister als "inter" oder "divers"' StAZ (*Das Standesamt – Zeitschrift für Standesamtswesen, Familienrecht, Staatsangehörigkeitsrecht, Personenstandsrecht, internationales Privatrecht des In- und Auslands*) 2015, 171.

13 Dethloff *Familienrecht* (31st edn, C H Beck, 2015), § 3 at 13 et seq, § 7 at 9, § 10 at 6 et seq; Sieberich 'Das unbestimmte Geschlecht' FamRZ (*Zeitschrift für das gesamte Familienrecht*) 2013, 1180 at 1181 et seq.

14 Sieberich 'Das unbestimmte Geschlecht' FamRZ (*Zeitschrift für das gesamte Familienrecht*) 2013, 1180 at 1183.

15 See the answer of the Federal Ministry of the Interior (*Bundesministerium des Innern*) to the request by the Lesbian and Gay Association in Germany (*LSVD*), 1.4.2014, available at www.lsvd.de/fileadmin/pics/Dokumente/Recht/BMI.Antwort-140101.pdf (9 March 2017), 3.

(c) Pending constitutional proceeding

A proceeding is pending at the Federal Constitutional Court (*Bundesverfassungsgericht – BVerfG*) in which an intersexual person asks for the positive registration of 'X', 'intersex' or 'diverse' instead of only choosing between male, female and empty space. The option 'X' is not explicitly available. The lower instance courts and in 2016 the Federal Supreme Court (*Bundesgerichtshof – BGH*), thus, rejected the request as not provided by the law.[16]

The legislator discussed the possibility of introducing 'other' ('*anders*') but finally did not follow this option.[17] On the other hand, a differentiation between male and female people (having the possibility to positively register their sex) and intersexual individuals (only having the possibility to negatively *not* register their sex) can be seen as an unjustified discrimination and, therefore, a violation of Art 3 of the Basic Law (*Grundgesetz – GG*) as well as a violation of the individual's personality right (*Persönlichkeitsrecht*) in the form of the right to sexual self-determination and identity (*sexuelle Selbstbestimmung und Identität*), both protected by Arts 1 and 2 of the Basic Law and Art 8 of the European Convention on Human Rights.[18] On several occasions the Federal Constitutional Court has shown a more generous and open approach than the Federal Supreme Court in the past (eg regarding the recognition of gender reassignments in cases of transsexuality). Therefore, it is possible that the Federal Constitutional Court also disagrees with the Federal Supreme Court on this matter.

(d) Outlook

In 2016/17 two studies[19] were conducted regarding a possible reform of the abovementioned s 22(3) of the Personal Status Law and the Transsexuals Act (*Transsexuellengesetz*). Both studies came to the result that the current state of the law is not sufficient and a reform urgently needed. So, probably after the Federal Elections in September 2017 the then-new government will have to approach that reform.

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[16] *Bundesgerichtshof* (Federal Supreme Court – *BGH*), FamRZ (*Zeitschrift für das gesamte Familienrecht*) 2016, 1580; *Oberlandesgericht Celle* (Higher Regional Court – *OLG*), StAZ (*Das Standesamt – Zeitschrift für Standesamtswesen, Familienrecht, Staatsangehörigkeitsrecht, Personenstandsrecht, internationales Privatrecht des In- und Auslands*) 2015, 107.

[17] Bockstette 'Das Personenstandsrechts-Änderungsgesetz' StAZ (*Das Standesamt – Zeitschrift für Standesamtswesen, Familienrecht, Staatsangehörigkeitsrecht, Personenstandsrecht, internationales Privatrecht des In- und Auslands*) 2013, 169 at 171 et seq.

[18] Gössl 'Intersexuelle Menschen und ihre personenstandsrechtliche Erfassung' NZFam (*Neue Zeitschrift für Familienrecht*) 2016, 1122; Theilen 'Intersexualität, Personenstandsrecht und Grundrechte' StAZ (*Das Standesamt – Zeitschrift für Standesamtswesen, Familienrecht, Staatsangehörigkeitsrecht, Personenstandsrecht, internationales Privatrecht des In- und Auslands*) 2014, 1 at 4.

[19] See the study of the Humboldt University of Berlin, available at www.bmfsfj.de/blob/jump/114064/regelungs–und-reformbedarf-fuer-transgeschlechtliche-menschen—band-7-data.pdf and the study of the Institut für Menschenrechte, available at www.bmfsfj.de/blob/jump/114066/geschlechtervielfalt-im-recht—band-8-data.pdf.

III MEDICALLY ASSISTED REPRODUCTION

(a) Background

The increasing number of children born through medically assisted reproduction (MAR) has led to an increase in judgments dealing with questions of parentage as well as with the permissibility of the use of such methods. There exists no comprehensive legislation on medically assisted reproduction as there is in many other countries.[20] The existing provisions in the Embryo Protection Law (*Embryonenschutzgesetz*) and the Adoption Placement Law (*Adoptionsvermittlungsgesetz*) provide for a number of criminally sanctioned prohibitions. Banned are inter alia egg cell donation, § 1(1) no 1 and 2 Embryo Protection Law, surrogacy, §§ 1(1) no 6 and 7 Embryo Protection Law and § 13a Adoption Placement Law, as well as post-mortem insemination, § 4(1) no 3 Embryo Protection Law. Sperm donation is not prohibited but is merely partially regulated by the medical professional codes of conduct,[21] that is neither the number of permissible donations is provided for nor are there any provisions for a registry, despite the fact that the Federal Constitutional Court has long since acknowledged the constitutional protection of the child's right to know his or her genetic origin.[22]

Also questions of parentage have so far only gradually and partially been regulated in the German Civil Code. Thus, whereas in case of sperm donation with heterosexual couples the consenting husband is automatically considered the child's father and may not refute his fatherhood,[23] the same does not hold true for the mother's lesbian registered partner who must adopt the child in order to become a legal parent.[24] Moreover, courts find it difficult to determine the parentage of children born abroad by medically assisted reproduction techniques such as surrogacy that are legally accepted abroad but forbidden in Germany.

(b) Parentage after surrogacy

In 2014, the Federal Supreme Court ruled in a landmark decision recognising the legal parentage of two German homosexual men of a child born by a surrogate mother in California.[25] The legal parentage of both men was declared by the competent Californian Court prior to the child's birth. One of the men also was the genetic father of the child. Returning to Germany, public

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[20] Critical of this: Dethloff 'Ein Reproduktionsmedizingesetz ist überfällig', ZRP (*Zeitschrift für Rechtspolitik*) 2013, 91.

[21] For an overview see Dethloff *Familienrecht* (31st edn, C H Beck, 2015), § 10 at 74.

[22] Bundesverfassungsgericht (Federal Constitutional Court – BVerfG), NJW (*Neue Juristische Wochenschrift*) 1989, 891.

[23] Section 1600 (5) German Civil Code.

[24] Critical of this: Dethloff *Familienrecht* (31st edn, C H Beck, 2015), § 10 at 86.

[25] *Bundesgerichtshof* (Federal Supreme Court – *BGH*), NJW (*Neue Juristische Wochenschrift*) 2015, 479; see also Dethloff 'Leihmütter, Wunscheltern und ihre Kinder', JZ (*Juristenzeitung*) 2014, 922 and Dethloff JZ (*Juristenzeitung*) 2016, 207.

authorities and courts of lower instance denied recognition of the Californian Court decision for public policy reasons.[26] The Federal Supreme Court overruled these decisions. Parentage of the genetically linked father did not violate the public policy as under substantive German law he could have established his parenthood as well. Concerning the second father, the court took into consideration the 'limping' family relation (ie parentage legally obtained abroad but not accepted in Germany), the legal uncertainty of a potential adoption process and the existence of German law provisions recognising parentage without any genetic link all argued for recognition which serving the best interest of the child.

Furthermore, in 2016, the Federal Supreme Court decided a case where a lesbian couple who entered into a civil union type marriage in South Africa sought recognition of parentage of a child born to one of the mothers.[27] The ruling affirmed the recognition as German private international law provisions concerning parentage also cover parentage of homosexual couples. It was found that regulations coping with and limiting the effect of foreign homosexual marriages to the effects of a (German) registered civil partnership do not hinder the recognition of parentage.

(c) Post-mortem insemination

Recently, in February 2017, the Higher Regional Court (*Oberlandesgericht – OLG*) Munich decided a case in which the widow demanded the surrender of the frozen sperm of her deceased husband.[28] The appeal was dismissed due to an infringement of the Embryo Protection Law which prohibits post-mortem insemination.[29] Contrary to the widow's view, the court deemed this provision constitutional, but admitted appeal to the Federal Supreme Court.

However, in 2010, the Higher Regional Court Rostock had found that fertilised eggs were to be surrendered to the widow after her husband's death.[30]

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[26] See s 108, 109 (1) Act on the Procedure in Family Matters and in Matters of Non-contentious Jurisdiction (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit – FamFG)*.

[27] *Bundesgerichtshof* (Federal Supreme Court – *BGH*), NJW (*Neue Juristische Wochenschrift*) 2016, 2322.

[28] *Oberlandesgericht* (Higher Regional Court – *OLG*) München, reference number 3 U 4080/16, FamRZ (*Zeitschrift für das gesamte Familienrecht*) 2017, 904.

[29] See above, III(a).

[30] Oberlandesgericht (Higher Regional Court – OLG) Rostock, reference number 7 U 67/09, FamRZ (*Zeitschrift für das gesamte Familienrecht*) 2010, 1117 at 1119 et seq.

Click here to go to Main Contents

(d) Need for a comprehensive reform of MAR regulations and current reforms projects

The lack of a comprehensive law or code on MAR has led to certain calls for action.[31] In 2016, the 71st German Jurists' Association (*Deutscher Juristentag*), which provides the German legislators with proposals for law reforms, voted *inter alia* for regulations ensuring and improving the legal position of intended parents and children born through MAR.[32] Irrespective of the need of a MAR regulation reform, the provisions of the current German Civil Code concerning parentage do not reflect the present situations of modern families and recent medical developments. Thus, a working group organised by the Federal Ministry of Justice and for Consumer Protection is reviewing the law on parentage[33] and its results may lead to a reform project in the following legislative term.

Lastly, a pending bill[34] establishing a centralised register for children born after artificial insemination and setting conditions for official, thus non-private, sperm donations would recognise the constitutional right of a child to know his or her own origins. Simultaneously, the still-existing possibility of judicial establishment of the sperm donor as the legal father after a child's challenging the fatherhood of the intended father, which is unique compared to other European countries, would be abolished by the Bill.

IV MORE REFORMS IN THE MAKING

(a) Right to information by the legal father about the biological father

Necessitated by a Federal Constitutional Court's ruling on the legal father's right to demand information from his former wife about the child's true biological father,[35] a law reform effort seeks to regulate the conditions for such a right to information as well as the subsequent recourse to him for maintenance paid to the child.[36] Prior to this, the Federal Supreme Court acknowledged such a right to information based on the principles of good faith

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[31] See for example Gassner, Kersten, Krüger, Lindner, Rosenau and Schroth (eds) *Fortpflanzungsmedizingesetz, Augsburg-Münchener-Entwurf* (Mohr Siebeck, 2013).

[32] Available at www.djt.de/fileadmin/downloads/71/Beschluesse_gesamt.pdf (9 March 2017), 40 et seq.

[33] For more information see www.bmjv.de (9 March 2017).

[34] See Draft Bill of the Federal Government – Draft Bill on the regulation of the right to know his or her own origin in case of heterologous use of sperm (Gesetzentwurf der Bundesregierung – Entwurf eines Gesetzes zur Regelung des Rechts auf Kenntnis der Abstammung bei heterologer Verwendung von Samen), BT-Drs. (*Drucksachen des deutschen Bundestages*) 18/11291.

[35] *Bundesverfassungsgericht* (Federal Constitutional Court – *BVerfG*), NJW (*Neue Juristische Wochenschrift*) 2015, 1506.

[36] See BT-Drs. (*Drucksachen des deutschen Bundestages*) 18/10343.

(§ 242 German Civil Code),[37] but was overruled by the Federal Constitutional Court as exceeding the permissible limits of judge-made law. Therefore, the new § 1670 German Civil Code generally will provide a right to information for the legal father to receive information from the child's mother about partners with whom she had sexual intercourse during the time of conception; exceptions are made for severe cases where this right to information would infringe the mother's personal rights, such as rape cases. Moreover, the new § 1613(3) German Civil Code provides that the subsequent recourse for maintenance can now only be claimed within the reflection period of 2 years for challenging paternity and during its litigation.

(b) Advance payment of maintenance for children

The length of entitlement for advance payment of maintenance for children of single parents paid by the State will be extended. Currently, in case the other parent does not fulfil his obligation to pay maintenance for the child at all or only partially (see §§ 1601 et seq German Civil Code), the advance payment of maintenance was only granted until the child reached age 12 and then was limited to 6 years of payment. With the new regulation entering into force in July 2017,[38] advance payment can be claimed by the single parent until the majority of the child (18 years) and for the maximum length of these entire 18 years.

(c) Combatting child marriages

The increase in marriages among minors as a result of the massive movement of refugees has given rise to controversial court decisions[39] and consequently, a pending bill that aims at preventing and combatting forced and child marriages.[40] In order to protect minors the age for marriage would be raised to majority (18 years) without exceptions. Currently, according to s 1303 German Civil Code a marriage should not be entered into before the parties reach the age of majority, but the family court, on application, may grant exemption from this provision if the applicant has reached the age of 16 and his or her future spouse is of full age. According to the bill a marriage entered into before

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[37] *Bundesgerichtshof* (Federal Supreme Court – *BGH*), NJW (*Neue Juristische Wochenschrift*) 2015, 450.

[38] See Draft Bill of the Federal Government – Draft Bill for a revision of the Federal fiscal equalisation scheme from the year 2020 and for the amendment of budgetary provisions (Gesetzentwurf der Bundesregierung – Entwurf eines Gesetzes zur Neuregelung des bundesstaatlichen Finanzausgleichssystems ab dem Jahr 2020 und zur Änderung haushaltsrechtlicher Vorschriften), BT-Drs. (*Drucksachen des deutschen Bundestages*) 18/11135 (in Article 23).

[39] See *Oberlandesgericht* (Higher Regional Court – *OLG)* Bamberg, NZFam (*Neue Zeitschrift für Familienrecht*) 2016, 807; see also Andrae 'Flüchtlinge und Kinderehen' NZFam (*Neue Zeitschrift für Familienrecht*) 2016, 923.

[40] See Draft Bill of the Federal Government – Draft Bill for combating child marriages (*Gesetzesentwurf der Bundesregierung – Entwurf eines Gesetzes zur Bekämpfung von Kinderehen*) of 17 May 2017, BT-Drs. (*Drucksachen des deutschen Bundestages*) 18/12377.

Click here to go to Main Contents

majority is void if one of the spouses had not yet reached the age 16 years at the time of the marriage. If one of the spouses was 16 years old the marriage is not automatically void of any legal consequences but may be annulled by a judicial decree. The annulment must be effected unless the minor spouse has meanwhile reached the age of majority and has indicated that he or she wants to continue the marriage or unless otherwise extraordinary circumstances will result in a substantial hardship for the minor.

The bill provides that these principles shall not only apply when according to § 13(1) Introductory Act to the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuche*) German law is applicable to the marriage as a result of the German nationality of one or both spouses. The aforementioned concept shall in principle also prevail if foreign law applies to the requirements for entering into a marriage due to the spouses' foreign nationality. This shall always be the case if the marriage is concluded in Germany. The marriage remains valid if validly concluded according to foreign law and continued until the minor has reached majority where and neither of the spouses lived in Germany between marriage and reaching majority. In all other cases the – according to the applicable foreign law – validly concluded marriage shall be annulled according to the aforementioned principles. The annulment does not require the consent of the minor's parents.

Moreover, minors shall not be allowed to enter into a religious or traditional marriage instead or prior to the mandatory civil marriage. This prohibition is directed at the wedding person, the holder of parental responsibility and any witnesses, but not the minor, and a violation shall constitute (only) an administrative offence.

(d) Measures restricting the freedom of children, s 1631b German Civil Code

Currently, the parents of a child exclusively decide on the use of measures restricting the child's freedom.[41] Any cases of compulsory accommodation restricting the freedom of the child are subject to prior approval of the family court. With the new regulations of the pending bill,[42] the approval of the family court will be extended to all freedom-restricting measures for a child being in a hospital, orphanage or other institutions. Judicial control is only required for measures which extend for a certain amount of time or regularly restrict the freedom in an age inappropriate way, thus excluding baby high chairs, strollers, etc. The participation of the family court shall unburden the parents of difficult

[41] Confirmed by the *Bundesgerichtshof* (Federal Supreme Court – *BGH*), NJW (*Neue Juristische Wochenschrift*) 2013, 2969.

[42] See Draft Bill of the Federal Government –Draft Bill for the introduction of a family court approval for measures restricting the freedom of children (*Gesetzentwurf der Bundesregierung – Entwurf eines Gesetzes zur Einführung eines familiengerichtlichen Genehmigungsvorbehaltes für freiheitsentziehende Maßnahmen bei Kindern*), BT-Drs. (*Drucksachen des deutschen Bundestages*) 18/11278.

decisions in controversial situations with their child and guarantee a judicial control of the quality and length of the measures.

(e) Legal representation by spouse or registered partner

Whenever a spouse or registered partner becomes incapable of taking decisions concerning his health care due to a mental sickness or physical or mental disability, the other spouse or registered partner currently has no power of legal representation. Setting the requirements for such a representation, this pending bill[43] guarantees that the spouse or registered partner can take no actions against the will of the person concerned. Moreover, the legal representation by spouse or registered partner is excluded when the person is already under legal custodianship or contractually represented by someone.

(f) Same-sex marriage

In a last-minute decision before the end of the legislative period the Federal Parliament passed a law opening marriage to same-sex couples.[44] The law is supposed to come into force in autumn 2017. The law might be challenged as unconstitutional in a reference to the Federal Constitutional Court, as the court formerly limited the constitutional concept of 'marriage' to man and woman. Nevertheless, due to social changes and a broad acceptance of same-sex marriage in the German population, it is probable that the court will not declare the law as unconstitutional.[45]

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[43] See Draft Bill of the Federal Council – Draft Bill for the improvement of support between spouses and registered partners concerning health care and other matters of care (*Gesetzentwurf des Bundesrates – Entwurf eines Gesetzes zur Verbesserung der Beistandsmöglichkeiten unter Ehegatten und Lebenspartnern in Angelegenheiten der Gesundheitssorge und in Fürsorgeangelegenheiten*), BT-Drs. (*Drucksachen des deutschen Bundestages*) 18/10485.

[44] Draft Bill of the Federal Council – Draft Bill for introduction of the right for marry for persons of the same sex (*Gesetzentwurf des Bundesrates – Entwurf eines Gesetzes zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts*), BT-Drs. (*Drucksachen des deutschen Bundestages*) 18/6665.

[45] Dethloff 'Ehe für alle', FamRZ (*Zeitschrift für das gesamte Familienrecht*) 2016, 351.

Click here to go to Main Contents

INDIA

TO RETURN OR NOT TO RETURN: HAGUE CONVENTION V NON-CONVENTION COUNTRIES

Anil Malhotra and Ranjit Malhotra[*]

Résumé

Parmi les 1,2 milliards d'Indiens, environ 30 millions d'entre eux vivent dans 180 pays étrangers. Ce nombre inclut les familles transfrontalières, c'est-à-dire les familles dont les enfants sont partis vivre à l'étranger avec l'un de leurs parents tout en gardant un pied-à-terre en Inde par l'intermédiaire de l'autre parent qui y vit toujours. Ces mariages mixtes, lorsqu'ils sont rompus, entraînent souvent l'enlèvement par un parent des enfants de l'Inde vers l'étranger ou inversement et ce, en violation des ordonnances de droit de garde rendues par les juridictions ainsi qu'en violation des droits parentaux de l'autre parent. Malheureusement, bien qu'il s'agisse d'un phénomène fréquent dans le quotidien des Indiens migrants, l'Inde ne définit pas les enlèvements d'enfants par un parent et ne les reconnaît pas non plus comme étant une infraction à la loi. Pour cette raison, les solutions juridiques permettant de régler efficacement ce problème sont difficiles à mettre en place.

L'adhésion de l'Inde à la Convention de La Haye résoudrait la question de ces enlèvements entre les pays puisqu'elle repose sur deux principes: d'abord, revenir au statu quo ante et renvoyer rapidement l'enfant enlevé dans son pays de résidence habituelle afin de permettre à une juridiction de ce pays d'examiner le bien-fondé du litige entre les parents relatif à la garde de l'enfant et ensuite, pouvoir davantage se concentrer sur l'intérêt supérieur de l'enfant et le protéger. Selon la Convention, les tribunaux de la résidence habituelle de l'enfant sont les mieux placés pour déterminer son intérêt supérieur. L'adoption de la Convention pourrait donc marquer le début de l'happy-end d'un long et triste récit.

Of 1.2 billion Indians, about 30 million live in 180 countries abroad. This migration includes cross-border matrimonial relationships where offspring live in foreign abodes but connect with Indian soil through their parent(s). Broken multi-jurisdictional marriages lead to removal of children to India or foreign jurisdictions in violation of court custody orders or infringement of parental rights. Sadly, India does not define or recognise inter-parental child removal as

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Click here to go to Main Contents

an offence under any statutory law, even though it is a frequent phenomenon in daily lives of migrant Indians. As a corollary, remedies in law for effective relief are difficult to secure or achieve.

India's accession to the Hague Convention would resolve the issue of inter-country parental child removal since it is based on the principle of reverting the situation to *status quo ante* and on the principle that the removed child ought to be promptly returned to his or her country of habitual residence to enable a Court of that country to examine the merits of the custody dispute and thereupon award care and control in the child's best interest. The Convention considers these courts to be in a better position to determine the best interest of the child. Enacting the Convention may be a start to a happy ending of a long sad tale.

I INTRODUCTION

Intercontinental abduction of children by parents is a contemporary legal issue which baffles and mesmerises different legal systems of nations whose conflicting positions prevent return of children to the country of their habitual residence. Solace can be found among countries which are signatories to The Hague Convention on Civil Aspects of International Child Abduction 1980. But the Convention does not aid those aggrieved parents whose countries are not, and no global family law governs them. Defiant stands in different courts of such jurisdictions create deadlocks. The sufferers are innocent children who are victimised by legal systems.

II RELEVANT LEGISLATION AND FORUM FOR CUSTODY PROCEEDINGS

As far as the forum for securing the return of the children is concerned, it is important to mention that India is not a signatory to The Hague Convention on the Civil Aspects of International Child Abduction 1980.[1] Under Art 226 of the Constitution of India, a parent whose child has been abducted can petition the State High Court to issue a Writ of Habeas Corpus against the abducting spouse for the return of the child. Alternatively, a habeas corpus petition seeking recovery of the abducted child can be directly filed in the Supreme Court of India under Art 32 of the Constitution of India.

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[1] In fact, India rejected ratifying the Convention in November of 2016. See Shalini Nair, 'India Will Not Ink Hague Treaty on Civil Aspects of Child Abduction', *Indian Express* (27 November 2016). However, on 3 February 2017, India again opened the issue at a consultation of all stakeholders, reconsidering its refusal to joining the Hague Convention. This consultation by the Ministry of Women and Child Development has asked the Chandigarh Judicial Academy and Non Residents Indian Commission of Punjab to examine in detail the legal issues and report back within 4 months. 'India to review stand on convention on civil aspects of international child abduction', Times News Network, 3 February 2017.

The aggrieved parent may well seek recourse to the provisions of the Hindu Minority and Guardianship Act 1956 (hereafter 'HMGA 1956'). The HMGA 1956 like the Hindu Marriage Act 1955 (HMA), has extra-territorial application. It extends to the whole of India except the State of Jammu and Kashmir. Under s 4(a) of the HMGA 1956, 'minor' means a person who has not reached the age of 18 years and a 'guardian' in s 4(b) is defined as a person having the care of the person of the minor or of his property or both and includes a natural (parental) guardian, a guardian appointed by his parents' will, a court appointed guardian or a person empowered to act as such under any enactment.

(a) India and The Hague Convention on Civil Aspects of International Child Abduction 1980

While India is not a party to The Hague Convention on Civil Aspects of International Child Abduction 1980, different recent decisions indicate that Indian courts tend to decide the inter-parental child custody disputes on the paramount consideration of the welfare and best interest of the child. A foreign court's custody order is only one of the considerations in adjudicating any such child custody dispute between parents.[2] Foreign courts' orders of child custody are not mechanically enforced and normally the Indian courts look to the merits of the matter to decide the best interest of the child irrespective of any foreign court order. Hence, the position of law in India varies from case to case and there is no uniform precedent which can be quoted or cited as a universal rule.

(b) The position of Indian law on child abduction

Under Art 214 of the Constitution of India, each State in India has its own high court and under Art 124 there is Supreme Court of India. Under Art 141, the law declared by the Supreme Court is binding on all the Courts within India. However, the Supreme Court is not bound by its own earlier decisions and can render new decisions. Part III of the Constitution secures fundamental rights to citizens, which can be enforced directly in the respective high courts of the States or directly in the Supreme Court of India by issue of prerogative Writs under Arts 226 and 32, respectively, of the Constitution of India.

The high courts and the Supreme Court in India entertain petitions for issuance of a Writ of Habeas Corpus for securing the custody of the minor at the behest of a parent who lands on Indian soil alleging violation of a foreign Court's custody order or seeks the return of children to the country of the parent's jurisdiction. Invoking this judicial remedy provides the most effective speedy solution.

Different high courts within India have from time to time expressed different views in matters of inter-parental child custody petitions when their jurisdiction

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[2] *Dhanwanti Joshi v Madhav Unde* (1998) 1 SCC 112.

Click here to go to Main Contents

has been invoked by an aggrieved parent, seeking to enforce a foreign Court's custody order or implementation of their parental rights upon removal of the child to India without parental consent. The Supreme Court of India too has rendered different decisions with different viewpoints on the subject in the past five decades.

In an important 1998 case,[3] the Supreme Court observed that the order of the foreign court will only be one of the facts which must be taken into consideration while dealing with child custody matters. Since India was not a signatory to The Hague Convention, the Court within whose jurisdiction the child is removed will consider the question on the merits, bearing the welfare of the child as of paramount importance. In this case the Supreme Court changed the earlier view and declined to exercise summary jurisdiction in returning the removed children to their parent country.

In a considerably more recent case,[4] the husband and wife were American citizens of Indian origin and a son was born to them in America. The wife left her husband in the United States and returned to India with her son. She moved a Delhi guardian's court and was granted custody rights. In a suit filed by her estranged husband claiming abduction of the child, a United States court issued a 'Red Corner' Notice against the wife, directing her return to the United States. On an appeal, the Delhi high court set aside the order of the Delhi guardian's judge, directing the couple to submit before a US court as they were all US nationals and ordinarily resided in the USA. The wife appealed to Supreme Court. That court set aside the judgment of the Delhi High Court and directed that the proceedings shall go on before the guardian's judge to be disposed of as expeditiously as possible, with interim custody remaining with the mother and the father enjoying visitation rights only.

This verdict is salutary and laudable. It has culled out three questions for determination. The first question relates to the jurisdiction of the guardian's judge to entertain the petition for adjudicating custody issues. Interpreting the phrase 'ordinarily resident', the Court held that the intention of the parties would determine this important question. The fact that the child was studying and resident in Delhi for the preceding 3 years had clearly established that there was no coercion or duress since the father was a party to this arrangement. The conduct of the parties thus led the Court to establish that the guardian's judge was competent to decide the matter as the child was ordinarily resident in Delhi and not in USA.

The second issue led the Court to hold that the jurisdiction of the guardian's judge could not be declined on the principle of comity. Examining earlier precedent, the Court ruled that proceedings in habeas corpus matters are summary in nature, and may lead to determination of custody issues when the child is within the jurisdiction of the high court. Disapproving of the

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3 *Dhanwanti Joshi v Madhav Unde* (1998) 1 SCC 112.
4 *Ruchi Majoo v Sanjeev Majoo*, JT 2011 (6) SC 167.

application of the comity principle in the matter, the Supreme Court held that no foreign Court order had been violated by the wife. There was no final decision by any US Court, the minor was voluntarily in India, and there was no intention of the wife and child to return to the USA. Comity ensures that foreign judgments and orders are unconditionally conclusive of the matters in controversy, but in the matter of custody of child, since interest and welfare of the minor are paramount, a competent court in this country is entitled and indeed duty bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication. Distinguishing earlier judgments, the Supreme Court held that the interest of the minor could be better served if the mother continued to have custody. Even though habeas corpus proceedings are generally summary in nature and are based upon written affidavits, nothing prevents the high court from embarking upon a detailed enquiry in cases where the welfare of a minor is in question, which is the paramount consideration for the Court while exercising its *parens patriae* jurisdiction. A High Court may, therefore, invoke its extraordinary jurisdiction to determine the validity of the detention, in cases that fall within its jurisdiction and may also issue orders as to custody of the minor depending upon how the Court views the rival claims, if any, to such custody.

Akehya Yalamanchili v State of Andra Pradesh[5] also involved a writ of habeas corpus. This time the dispute was for the custody of a child among her parents who were citizens of the USA with status of Non-resident of Indian Origin. They had obtained a divorce in the USA and both admitted that the home State of the child was India. It was held that, under Art 226 of the Constitution, even if the residence of a person is not within the territory of that State, the high court of the State had jurisdiction to issue writs, including Writs of Habeas Corpus, if the cause of action wholly or partly arose within that State. Here the mother, unsuccessful in receiving custody in the US Courts, filed a petition before the Family Court, Hyderabad seeking permanent custody of the child. In a revision petition filed against the orders of the Family Court, the High Court directed her to return her daughter to the father in India, giving him custody of child pending litigation. Later on he moved with the child to Indonesia without the knowledge of the mother and withdrew his petition on the ground of his successful contested custody proceedings in the USA. The mother had also obtained an interim order to restrain the father from taking the child outside the jurisdiction of Hyderabad. After learning that the father had left Hyderabad, she filed a petition for a Writ of Habeas Corpus. As the father had moved to a foreign country when the dispute of custody of the child between then was pending before the family court, therefore, the contention of father that the high court had no jurisdiction as the child was no longer in Andhra Pradesh was not accepted by the high court which held that its jurisdiction was not ousted because of the absence of child in the State of Andhra Pradesh.

[5] 2012 (3) Andh L T 803.

Click here to go to Main Contents

In the first of two important 2013 cases,[6] the father of a two-and-a-half-year-old child was staying abroad while the child was in the custody of his grandfather and extended family. A habeas corpus petition was filed by the mother. The child was produced in the court and custody was given her. Although in the normal circumstances, she should have sought custody of the child under the relevant provisions of law contained in the Hindu Minority and Guardianship Act of 1956, in keeping with the peculiar fact situation, the high court exercised its extraordinary writ jurisdiction under Art 226 of the Constitution of India, declaring the mother entitled to the custody of her small son. This did not only avoid another round of unwarranted litigation but also ensured complete and substantial justice between the parties.

In the second case,[7] the father filed a habeas corpus petition in the High Court of Punjab and Haryana alleging abduction of children who had acquired permanent resident status in Canada. The father further stated that the maternal grandparents had taken the children contrary to the sole custody and restriction orders passed by the Supreme Court of British Columbia. It was observed that because the grandparents had genuinely brought the children for a limited family visit to their country of origin, making out no international child abduction case. It was also held that children who have been wrongfully taken or 'wrongfully retained' overseas should normally be returned promptly to their country of habitual residence.

In the 2014 case of *Arathi Bandi v Bandi Jagadrakshaka Rao*,[8] a decree of dissolution of marriage was obtained from a US court giving child custody to the husband. The wife thereafter travelled to India along with the child in defiance of the court's order. The husband then came to India and filed a habeas corpus petition before the high court seeking production of the child and permission to take custody of the minor in compliance with the US order. The high court directed the wife to submit to the jurisdiction of the US Courts. Her appeal was dismissed by the Supreme Court, which held that a parent doing wrong by removing children out of the country does not gain any advantage by the wrongdoing. The contention that the American court, which passed the order/decree had no jurisdiction and that the decree, since inconsistent with Indian laws, could not be executed in India, was not tenable.

Several cases worth mentioning were decided in 2015. In the first,[9] the mother and father contested custody of their very young son. The trial court at Goa awarded interim custody to the mother with visitation rights to the father. On appeal by the father, the Bombay High Court at Goa reversed the award. The father had moved to Bombay from Goa notice to the mother who began a criminal writ proceeding at the Bombay High Court, deferred action, awaiting the decision of the Goa trial court. Subsequently, the Supreme Court was approached by the mother, challenging the interim custody award. The

6 *Manpreet Kaur v State of Punjab* 2013 (3) Rec Civ Rep (Civil) 422.
7 *Karan Singh Bajwa v. Jasbir Singh Sandhu* 2013 (1) Rec Civ Rep (Civil) 809.
8 AIR 2014 SC 918.
9 *Roxann Sharma v Arun Sharma* (2015) 8 SCC 318.

Supreme Court held that the custody of a minor shall ordinarily be with the mother. However, the use of word ordinarily cannot be over-stretched.

Interpreting the Guardians and Wards Act, the Supreme Court held that

> 'we must immediately clarify that section 6 or for that matter any other provision including those contained in the Guardians and Wards Act, does not disqualify the mother to custody of the child even after the latter's crossing the age of five years ….We must again clarify that the father's suitability to custody is not relevant where the child whose custody is in dispute is below five years since the mother is per se best suited to care for the infant during his tender age. It is for the father to plead and prove the mother's unsuitability since Thalbir is below five years of age. In these considerations the father's character and background will also become relevant but only once the Court strongly and firmly doubts the mother's suitability; only then and even then would the comparative characteristic of the parents come into play …'

In a watershed opinion dated 27 February 2015,[10] the Supreme Court directed return of two minor children of 6 and 10 years of age to the United Kingdom and laid down salutary principles which can be condensed as following. First, the principles of comity and the best interest/welfare of child apply in such cases. Comity rules should not be jettisoned except for compelling special reasons to be recorded in writing. If the jurisdiction of the foreign court is not in doubt, whichever court is first seized of the matter will have jurisdiction. Second, interlocutory orders of foreign courts of competent jurisdiction must be respected. An elaborate or summary inquiry by domestic courts when there is a pre-existing order of a competent foreign Court must be based on reasons and not ordered as a routine. In addition to considering the nature and effect of a foreign Court's order, the Supreme Court stressed best interest principles: the reasons for repatriation/non-repatriation, any moral, physical, social, cultural or psychological harm to the child that might result, the harm to the parent in the foreign country and the speed in the foreign court proceeding.

Finally, in *Maninderjit Kaur Atwal v Barinder Singh Pannu*,[11] the High Court of Punjab and Haryana, setting aside the orders of the guardian's judge, permitted two minor children to visit their mother in the USA during their Indian school vacations. The parents were divorced in the USA. The mother resided in the USA and the father in India. Both the minor children, who were US nationals, were studying in a prestigious school in India and living with their father. The US court had ordered that they could be taken to the USA to visit their mother at her expense. The high court permitted the children to visit during winter vacations if the mother agreed before the guardian's judge that if the children were not returned to India, the court would be authorised to recover US$100,000 from her accounts and pay it as compensation to the minor children. Alternatively, she was asked to furnish a local bond in India to the tune of the equivalent of US$100,000 in Indian currency. The father was

[10] *Surya Vadanan v State of Tamil Nadu* 2015 (5) SCC 450.
[11] Civil Revision No 5533 of 2015, decided on 1 December 2015.

Click here to go to Main Contents

ordered to accompany the children to the USA and mother granted that the Indian High Court could be enforced by the US authorities.

An analysis of the Indian case law reveals that until 1997, Indian courts whenever approached by an aggrieved parent exercised a power of summary return of a removed child to the country of habitual residence in compliance with a foreign court order to restore parental rights.[12] However, changing the precedent, in 1998, the Indian Supreme Court decided that a custody order of a foreign court shall be only one consideration while determining the matters on merits in which the welfare of the child will be of paramount importance.[13] Since then, child removal and custody matters have been decided on merits in India with no set pattern consistently being followed. However, a different trend set by some of the recent decisions since 2014 onwards indicates that aggrieved parents who invoke the jurisdiction of the high court in Writs of Habeas Corpus are not non-suited simply because determination of the best interest of the child can be done only by an adjudicatory process in the family court or before the guardian's judge. Use of the habeas corpus remedy to enforce the child custody order of a foreign court is proving effective and result-oriented. These recent decisions also indicate a trend to respect foreign court orders wherein an aggrieved parent seeks return of the removed child on the strength of these decisions. The position varies on the facts and circumstances of each case, however.

(c) No provision for mirror orders in India

In light of the prevailing child abduction law in India discussed above, it is not possible to obtain mirror orders, as this is a concept known in the English system. Since foreign court custody orders cannot now be mechanically enforced, it is suggested that, in the event of any litigation in the foreign country of habitual residence, parties obtain a letter from the foreign court in which litigation is pending incorporating safeguards and conditions to ensure the return of the minor child to the country of normal residence.

This letter of request should be addressed by the foreign court to the Registrar General of the High Court within whose jurisdiction the estranged spouse resides with the minor child. Such a letter should also specifically mention that the passports of both the parent and the child should be deposited with the Registrar General of the State High Court to ensure that the child is not taken away from the jurisdiction of the Court where he or she is residing.

(d) The position of Indian law on shared residence orders

Under the relevant Indian statute law pertaining to child custody matters, that is HMGA 1956, supplemented with the provisions of the Guardians and Wards

[12] *Kala Aggarwal v. Suraj Praash Aggarwal* 1993 (1) Hindu LR (Del) 145; *Jacqueline Kapoor v Surinder Pal Kapoor* 1994 (2) Hindu LR (P&H) 97.

[13] *Dhanwanti Joshi v Madhav Unde* (1998) SCC 112.

Act 1890, there exists no concept of shared residence orders. However, there is one recent judgment of the Kerala High Court,[14] where on the facts and circumstances of the case the Court handed down an order close to a shared custody order. This was in a case where divorce and custody proceedings were pending in the USA and the mother was held to be entitled to custody of the children until a final decision was announced by the courts in the USA.

The petitioner mother, the respondent father and the children were all US citizens. The wife had approached the court with a habeas corpus petition seeking a direction that the father produce two twin infants named Roshan and Nishant before the Court and to hand over their custody with their passports to her. The twins were less than 3 years old.

The petitioner and the respondent had been married while in the USA, after which they moved to Bahrain where the twins were born. Because of a change of employment the family went back to the state of Texas in the USA and settled there. According to the mother, their married life was not happy because of domestic violence by the father resulting in a criminal case that was ultimately settled. The father lost his employment in Texas and the parents with their children visited India and came to Kozhikode in the state of Kerala where the father had his roots. While there, according to the mother, there was again ill-treatment by the father, who threw her out of the marital home and forced her to fly back to the USA without the children. According to her, the custody of the children to the father was illegal, and hence the children were illegally detained. She had already filed a petition for custody of the children as well as for the dissolution of the marriage in accordance with the family law applicable in the state of Texas in the USA.

In light of the facts and circumstances of the case, the court, while granting custody of the children to the mother, laid down rigorous conditions, one of which was shared custody with stringently controlled visitation rights involving embargoed passports and significant bonds for a period of 7 days from the time of the court order to the time the petitioner wife left India.

In another reported case of the Delhi High Court,[15] the custody of the older of two sons, who was residing with the father, was not in question and the case was confined to determining the custody of the younger. Thus, the case addresses split rather than shared custody. The court upheld the order of a Canadian court granting custody of the younger son to the mother, allowing him to go back to Canada. The court agreed that it had jurisdiction to order travel out of the country of the minor child with one of the parents and the mere possibility of losing jurisdiction would not dissuade it from permitting the departure of the child with the parent in the interest of the child.

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[14] Reported as *Eugenia Archetti Abdullah v State of Kerala* 2005 (1) Hindu LR (Kerala) 34.
[15] *Leeladhar Kachroo v Umang Bhat Kachroo* 2005 (2) Hindu LR (Del) 449.

Click here to go to Main Contents

Because there is no statutory concept of a 'shared residence order' under Indian legislation, the Indian courts would view interpreting any such order of a foreign court in the light of the principle of the best interest of the child. Undoubtedly, access rights of the father could be enforced based on a shared residence order and if such rights were violated, they could be enforced in an Indian court of law. However, such a proceeding would be viewed as an enforcement of a private contractual arrangement between the parents. The Court would still go into the welfare of the child to determine the rights of the child. Hence, the position would vary from case to case and there is no uniform principle which can be quoted as a universal rule.

(e) Value attached by the court to the wishes of the child

The courts should certainly consider the wishes of the parents and the minor child, but the child's wishes will be heard at the discretion of the court. As is evident from the case-law analysis, the paramount consideration is the welfare of the minor child.[16]

III A POSSIBLE SOLUTION

(a) Law in the making: an aftermath

Borders divide jurisdictions but families reunite them. The chain to this link is the global citizen. However, this inter-nation cross-flow has with the passage of time generated a new crop of legal issues in the realm of private international law which comprises rules a court would apply whenever there is a case involving a foreign element. Such legal dilemmas of the diaspora baffle systems of law but do not defy solutions if nations make sincere efforts for resolving such gripping complications.

A fugitive Non-Resident Indian (NRI) parent declared the offender in matrimonial proceedings in India cannot even see or talk to his children removed to India. A foreign court refuses to permit NRI children to be taken to India and likewise local courts decline to implement foreign court's orders directing return of NRI children. These daily occurrences find no straightforward resolution for the NRI in any Indian law. International parental child abduction, defined as the removal or retention of a child across international borders by one parent which is either in contravention of court orders or is without the consent of the other parent, is sadly an increasing phenomenon that causes acute emotional distress to the abducted child.

If the Indian Government acceded to The Hague Convention on Civil Aspects of International Child Abduction and India became a member of about 94 contracting convention nations, appropriate Indian legislation will need to be enacted for its implementation. In this way children removed to and from India

[16] *Leeladhar Kachroo v Umang Bhat Kachroo* 2005 (2) Hindu LR (Del) 449.

would be reunited with their aggrieved parent and India will no longer be a sought-after destination for parking removed NRI children from foreign jurisdictions. Also, foreign courts will be encouraged to permit NRI children to freely visit India without fear of abduction.

The Ministry of Women and Child Development uploaded on its website a proposal to enact a draft of The Civil Aspects of International Child Abduction Bill 2016, considering that before accession to the Hague Convention, it was imperative to have enabling legislation in India to give teeth to the provisions of the Convention in India.[17] The draft Bill provided for designation of a Central Authority and established a procedure for ensuring return of removed children as also seeking return of children wrongfully removed to and from India. The proposed Bill was to be renamed 'The International Child Removal and Retention Bill 2016' and was placed on the website of the Ministry for suggestions and comments until 13 July 2016. The sooner such a bill is enacted and the Convention ratified, the better it will be for children's interests.

The salient and salutary features of this proposed law were as follows:

- The proposed law seeks to create a Central Authority for performance of duties under The Hague Convention for securing the return of removed children by instituting judicial proceedings in the concerned High Court.
- The appropriate authority or a person of a contracting country may apply to the Central Authority for return of a removed child to the country of habitual residence.
- The High Court may order return of a removed child to the country of habitual residence, but may refuse to make such an order if there is grave risk of harm or if return would put the child in an intolerable situation. Consent or acquiescence of the parent may also lead to refusal for return of a child by the Court.
- The High Court may refuse to return a child if the child objects to being returned if the Court is satisfied that the child has attained a sufficient age and degree of maturity to take his views into account.
- The High Court before making an order of return may request the Central Authority to obtain from the relevant authorities of the country of habitual residence a decision or determination as to whether the removal or retention of the child in India would be wrongful.
- The High Court upon making an order of return may direct that the person who has removed the child to India pay the expenses and costs

[17] Government of India, Ministry of Women and Child Development, The Civil Aspects of International Child Abduction Bill, File Nol CW-1-31/59/2016-CW-1 (on file with the General Editor).

Click here to go to Main Contents

(b) Plugging the holes: suggestions for amendments

As noted previously, India declined to ratify the Hague Convention in 2016.[18] However, as of 3 February 2017, this decision is being re-examined since the Ministry of Women and Child Development, Government of India has called upon the Chandigarh Judicial Academy and the Non Residents Indian Commission to examine in detail the legal issues involved in the proposed law and furnish a report within 4 months. Thereafter, the Government of India will further proceed in the matter.[19] Though the efforts to make the Civil Aspects of International Child Abduction Bill 2016 would have been salutary, the following suggestions could be mooted to improve any proposed Indian law.

(a) Any introductory section should clarify that it would be applicable to every child removed or retained in India within the meaning of the Act from his or her country of habitual residence irrespective of religion, nationality, residence, domicile or status in India. This is necessary because of children of foreign nationals and professing different religions are often brought to India in violation of foreign Court orders. The terms, 'High Court', 'Appropriate Authority' and its quorum will need to be defined.

(b) The chairperson and members of the Central Authority have adequate knowledge and experience in International Child Abduction, access, custody and related issues. An effective Central Authority could consist of a solitary legally qualified Director assisted by case workers rather than ex-officio/non-official members. The Central Authority should be as small as possible and all such appointments should be left to the exclusive discretion of the Supreme Court. The number of members, their qualifications, experience and expertise in handling inter-country, inter-parental child removal issues must be specified.

(c) Article 11 of the Convention enjoins a period of 6 weeks for an expeditious disposal of the proceedings before the judicial or administrative authority of the Contracting State. A time period to be specified in proceedings before the Central Authority/High Court is very essential, since these proceedings are intended to be of a summary and expedient nature and delay is inimical to a child's best interest.

(d) The exclusive use of specialist or designated judges in every High Court of every State as designated 'Convention Judges' may be necessary since unlike the United Kingdom, which has 18 specialist judges of the family division to hear the Convention proceedings, India with neither a family division nor a specialist family law judiciary may find it difficult to cope with Convention proceedings. Likewise specialist practitioners in the field of international child abduction will be required for assistance. Similarly, training of judges by specialists in the field of international child abduction

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[18] Shalini Nair, 'India Will Not Ink Treaty on Civil Aspects of Child Abduction', Indian Express (27 November 2016); 'Gov't Likely to Junk Inter-Parental Child Abduction Bill', Tribune (6 November 2016).

[19] 'India to review stand on convention on civil aspects of international child abduction', Times News Network, 3 February 2017).

for an understanding of The Hague Convention and any new Indian law may be extremely essential. The Hague Guides to Good Practice are a benchmark in this regard.

(e) To operate effectively, the Central Authority must be able to communicate with at least two liaison judges as is the statutory precedent in the Netherlands. Even the United Kingdom had the benefit of a judge of the Court of Appeal acting as 'Head of International Family Law' who assisted in conferring with the judges abroad. An International Hague Network Judge for England and Wales has now taken over this role. India thus should create and nominate a Hague Network Judge for an effective working and judicial collaboration worldwide. Even the Chairperson of the Central Authority should ideally be a former judge who can effectively communicate with the High Courts for a smooth resolution of overseas child abduction disputes.

(f) A provision should be added creating a jurisdictional bar to parallel proceedings in India under the Guardians and Wards Act 1890 read with the Hindu Minority and Guardianship Act 1956 or under any personal law of the parties in India. This bar would apply in cases of inter-country and inter-parental child removal between contracting States to avoid defeating the purposes of the Hague Convention.

(g) Another effective provision that would need to be added relates to the power to order disclosure of a child's whereabouts. Seeing to the large geographical size of India spread over 29 States and seven Union Territories, it may be necessary to secure information about the child's availability as removal and harm to the child could otherwise result. Disclosure orders with penalties for noncompliance may be necessary to elicit information about the child's location.

(h) Providing an effective mode of recovering costs for the aggrieved spouse is necessary to deter future child removals and provide actual funding (yes). Hence, a section needs to be incorporated in the proposed law to ensure the true spirit of the rule that 'costs must follow the event'.

(i) The necessity of a section to permit making of implementing effective procedural rules is of extreme importance as they lend great assistance. Hence, rules of procedure regarding making of applications before the Central Authority and/or other requirements must be made a part of the new proposed Indian law.

The discussion is still pending since no Bill has achieved finality. Perhaps with the passage of time, more suggestions and views may mature it fully.

IV SOME EXPERIENCES WITH HAGUE CONVENTION COUNTRIES

There are two instances of removal of children from India to a Hague Convention country. Experience of these cases indicate that in such matters

when children are removed from India to a convention country either against parental consent or by violating Indian Courts' custody orders, the convention country has sought not to summarily return them to the place of habitual residence. Rather, the convention country courts have chosen to determine and adjudicate the best interest of the child. Since these two matters are still in the process of final adjudication, they are being referred to in hypothetical terms.

In the first instance,[20] a minor child was removed from India by a relative to a Convention country in violation of an Indian court's custody order and against the wishes of both the parents. Amicus curiae showed that the travel documents used by the relative to travel to the Convention country violated Indian laws and there was a clear case of overstaying in the Convention country in violation of visa regulations. Still, the courts of the Convention country initially continued to determine the child's best interests in an alien environment and conditions. The orders of the Indian court seeking return of the child to determine its welfare were ignored. Ultimately, when the court of the Convention country directed the return of the removed child back to India, the child was mysteriously abducted again whilst at school in the Convention country. The result was that the indulgence granted to a fugitive of Indian laws by a Convention country, totally inconsistent with the principles of The Hague Convention, led the small child to be used as a pawn for asylum being claimed by the abducting relative. Ultimately, whenever the child returns to India, a long lapse of time may create new problems for the child as well as untold suffering and the misery of the parents.

In the second instance, the minor children were taken by one of the parents from India to a Convention country purportedly for a holiday and were not returned to India. In response to the other parent's claim for return of the children to India, alleged domestic violence and safety issues were voiced. The matter is currently under examination before the Convention country's court to decide whether the children and the parent should go back to the country of habitual residence. The larger issue again would be which country's Court would be the best forum to decide or adjudicate upon the welfare of the minors the country where the children are now resident or the country where the children were habitually resident. The Hague Convention country does not seem to make a departure in dealing with non-Convention countries in such a situation. This is a question which needs to be elaborated and dwelt upon at a forum looking at the practical issues and lessons learned in the implementation of The Hague Convention.

Furthermore, what should be the procedure in dealing with child removal matters when children are removed from Non-Convention countries to Convention countries? Does the Convention provide a side window for dealing on separate principles? How would the courts of Convention countries make departures in this regard? What is the message that a non-Convention country's

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[20] *Seema Kapoor v Deepak Kapoor*, CM No 14931-CII of 2015, 2016 SCC OnLine P&H 1225 (Punjab and Haryana).

court gets in the adjudication of such disputes in a Convention country's court, and is the principle of reciprocity disturbed? Should it not be reverting to the best interest principle? Is a child in a foreign country uprooted from his or her habitual residence in any position to judge his or her welfare and best interest? Would it be appropriate to determine the child's best interest in the country of habitual residence? Should the abducting parent or relative be given the advantage of his or her own wrong by providing residence in a Convention country when clearly laws of a non-Convention country or parental rights have been violated? Is it fair to expect an aggrieved parent to travel to the Convention country to contest legal proceedings at considerable expense, costs and time to put forward his or her rightful claim in protracted legal proceedings in the Convention country? What country's law will apply in such circumstances to the removed child? Will such precedents retard the process of having more signatory countries to The Hague Convention? These are some issues which may arise for determination and different viewpoints may emerge on these perspectives.

V CONCLUSION

With the increasing number of Non-Resident Indians abroad and multiple problems arising leading to family conflicts, inter-parental child removal to India now needs to be resolved on an international platform. Until India becomes a signatory to The Hague Convention, this may not be possible. The time has now come where it is not possible for the Indian Courts to adapt to different foreign court orders arising in different jurisdictions. It is equally important that to create a uniform policy of law some clear, authentic and universal child custody law be enacted within India by adhering to the principles laid down in The Hague Convention.

VI POST SCRIPT: REWRITING CHILD CUSTODY LAWS

On 3 July 2017, in the case of *Nithya Anand Raghavan (Raghavan)*[21] the Supreme Court ruled that the High Court using its *parens patriae* jurisdiction may examine the return of a child to a foreign jurisdiction if it would be in the interests and welfare of the minor child. The foreign court's order directing return of the child within a stipulated time will only serve as a factor to be taken into consideration.

[21] Criminal Appeal No 972 of 2017, *Nithya Anand Raghavan v State of NCT of Delhi & Anor*, decided on 3 July 2017.

Click here to go to Main Contents

IRELAND

DOMESTIC VIOLENCE LAW IN IRELAND

Dr Louise Crowley[*]

Résumé

Nonobstant la protection constitutionnelle accordée à l'autonomie et à la liberté familiale en Irlande, la loi permet depuis 1976 l'intervention protectrice de l'État à la demande des victimes de violence domestique. Cependant, à l'origine (et même encore aujourd'hui dans certains cas) seuls les conjoints pouvaient initier une telle intervention. Il est vrai que depuis 1996 la nature et la portée des recours ont été étendues, mais ceux-ci demeurent souvent soumis à des conditions de détention de droits de propriété ou de durée de la cohabitation. Avec la publication en 2017 du Projet de loi sur la Violence domestique, le temps est venu de se pencher sur l'histoire de la violence familiale en Irlande et de se demander si le droit actuel ainsi que les réformes proposées permettent à l'Irlande de rencontrer ses obligations internationales tout en répondant adéquatement aux besoins des victimes dont la grande majorité sont des femmes. En décrivant le cadre juridique irlandais en vigueur, cet exposé évaluera également de façon critique la suffisance des mesures d'urgence actuellement disponibles pour les personnes les plus vulnérables. Dans le contexte de la *2016-2021 National Strategy on Domestic, Sexual and Gender-based Violence*, l'exposé mettra en lumière l'insuffisance des normes actuelles relatives à la dénonciation et à la poursuite des actes de violence familiale et il soulignera la nécessité de créer une infraction criminelle spécifique en matière de violence domestique. En conclusion, l'auteure estime que si le projet de loi de 2017 représente une avancée réelle vers une réponse étatique plus globale, incluant des stratégies de police ciblées et la poursuite immédiate des investissements dans des structures de protection d'urgence pour les femmes vulnérables, il reste que l'Irlande devra faire bien plus pour respecter la lettre et l'esprit de ses engagements internationaux.

I INTRODUCTION

Domestic violence is a most destructive social harm which requires a considered and comprehensive state response in order to adequately protect the vulnerable parties, whilst effectively addressing the behaviour of those who abuse. It is increasingly recognised as having multiple manifestations, with a resulting demonstrable regulatory shift away from the traditional and limited perception of physical abuse, to a growing recognition of the devastating impact of acts of

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psychological abuse, including intimidation, harassment, coercion, stalking and abusive economic control. The universal reality of domestic violence is that it presents as a predominantly gender-based issue which largely, but not exclusively, affects women and children. In Ireland it is reported that 1 in 5 women who have been in a relationship have been abused by a current or former partner.[1] Whilst the actual number of women who continue to live with domestic violence is unknown, given that the majority of women never report the abuse or seek assistance,[2] in 2015, there were 16,375 incidents of domestic violence against women reported to Women's Aid Ireland during 12,041 contacts with its direct services.[3] During that same period the number of applications to the courts for protective orders increased by 6% from the previous year to 14,374, with orders being made in 7,827 cases.[4] The sufficiency and effectiveness of the existing legal framework to support victims of domestic violence whilst holding perpetrators to account is questionable. The publication of the Domestic Violence Bill 2017 presents a timely opportunity to reflect upon the shortcomings of Ireland's traditional, more reactive approach to regulation and to critically assess the existing regulatory framework and the sufficiency of current proposals for reform.

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1 Women's Aid, 'National and International Statistics' www.womensaid.ie/policy/natintstats.html accessed 22 September 2015.

2 Safe Ireland, *The Lawlessness of the Home: Women's Experiences of Seeking Legal Remedies to Domestic Violence and Abuse in the Irish Legal System* (Dublin: Safe Ireland, 2014), at p 7. The 2014 Crime Investigation Report from the Garda Inspectorate demonstrates that the rate of reported domestic violence incidents are difficult to determine as they are not classified distinctly because the Central Statistics Office crime statistics do not identify separate figures for acts of domestic violence, which are included with all other assaults. At Part 6 of the Report it is noted that in Ireland the National Study of Domestic Abuse (NSDA) found that 'a quarter of those severely affected by domestic abuse told the Gardaí'. Additionally such incidents are more likely not to be recorded officially on PULSE, (Police Using Leading Systems Effectively – the computer system used by the Garda Síochána), the 2014 Report at p 159 noted that '[I]n domestic violence cases, where a victim has injuries but is unwilling to make a statement of complaint, members sometimes do not record the incident on PULSE; or it is recorded on PULSE without details of any injuries to the victim and incorrectly categorised as a domestic dispute. In the latter case, this crime is categorised as a "domestic dispute – no offences disclosed". This matter is effectively closed and the assault is not recorded. This is a very unsafe practice for such a crime': www.gsinsp.ie/en/GSINSP/Crime%20Investigation%20-%20Full%20Report.pdf/Files/Crime%20Investigation%20-%20Full%20Report.pdf.

3 www.womensaid.ie/download/pdf/womens_aid_impact_report_2015.pdf. These disclosures included 10,876 incidents of emotional abuse, 3,281 incidents of physical abuse and 1,602 incidents of financial abuse. In the same year, 616 incidents of sexual abuse were disclosed to the Women's Aid services including 212 rapes. In all, the Women's Aid National Helpline responded to 9,308 calls in 2015. In the period of 1996 to January 2017, 213 women murdered in Ireland, 63% in their own homes and 55% of these murders were committed by the partner or ex-partner of the victim.

4 There was a 2% increase in applications for safety orders (5,626 as compared to 5,499 in 2014) and a 16% increase in applications for protection orders (5,108 as compared to 4,406 in 2014). Applications for interim barring orders showed a 5% increase (731 as compared to 699 in 2014) while applications for barring orders showed a slight decrease from 2,671 in 2014 to 2,638.

II HISTORY OF STATE INTERVENTION

Notwithstanding the express protection of the autonomy and constitution of the marital family by Article 41 of the Irish Constitution,[5] one of the first legislative encroachments in to the private sphere of the family gave rise to a judicial power to effect a barring order to protect a vulnerable spouse and dependent children. This state intervention in the context of domestic violence was recognised as entirely necessary and constitutionally sound.[6] Critically, however, such intervention was for many years limited exclusively to the protection of those who were parties to a marital union. Section 22 of the Family Law (Maintenance of Spouses and Children) Act 1976 introduced the barring order, the first civil remedy for victims of domestic violence. The court was empowered to remove a violent spouse from the home where it was of the opinion that there were reasonable grounds for believing that the safety or welfare of the applicant spouse or of any dependent child of the family required it, representing the first statutory basis for a civil application to secure the protection of the court in the context of domestic violence. Section 22 was enacted as a gender-neutral right but limited to a spouse, permitting an application to the court for an order to remove and exclude the other spouse for a period of up to 3 months from the place where the applicant spouse and/or any dependent children resided. Prior to this enactment, persons in need of such protection only had recourse to equitable and/or criminal law remedies. Section 22 also envisaged circumstances where the respondent spouse might live apart from the applicant spouse and/or children at the time of the application, allowing for protection to be granted notwithstanding the lack of joint living arrangements. This recognition of the need to bar, notwithstanding the absence of the parties living together, was commendable at a time when regulation of marital breakdown had not as yet been addressed by the Irish legislature.[7] The barring order under s 22 could not exceed 3 months in duration but could be

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[5] Article 41.1.1 of the Constitution sets out the special position of the family and expressly identifies its elevated position and the superior nature of its status and associated rights. '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.' Additionally, in light of this stated importance of the Family, Article 41.2 provides that 'The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State'.

[6] The Supreme Court noted that 'the legislation in respect of domestic violence has been passed by the Oireachtas for a vital social purpose: the protection of spouses and others against lawful assault and, on occasion terrorisation. There is sometimes necessity for such protection to be provided immediately in an acute situation'. *Eileen Goold v Mary Collins, a judge of the Dublin Metropolitan District Court, The DPP, Ireland, the Attorney General and John Joseph (otherwise Jackie) Gallagher* [2005] 1 ILRM 1 per Hardiman J.

[7] The Judicial Separation and Family Law Reform Act 1989 later introduced the long awaited remedy of judicial separation, as amended and enhanced by the Family Law Act 1995. Divorce was introduced by the Family Law (Divorce) Act 1996, following a successful (second) referendum of the Irish people in 1995 to remove the constitutional prohibition contained in Art 41.3.2 as originally drafted, which prohibited the enacting of laws that would permit the dissolution of a marital union.

Click here to go to Main Contents

renewed on application by the party in whose favour the original order had been made.[8] Any such renewals could also not exceed 3 months in duration.[9]

III FAMILY LAW (PROTECTION OF SPOUSES AND CHILDREN) ACT 1981

The nature and scope of the remedies available to abused spouses was enhanced by the Family Law (Protection of Spouses and Children) Act 1981 which was the first dedicated Irish domestic violence legislative enactment.[10] The 1981 Act extended the potential duration and scope of a barring order to a period of up to 12 months,[11] and expressly allowed the court to also prohibit the respondent spouse from using or threatening to use violence against, molesting or put in fear the applicant spouse and/or any child. The order could be made subject to such exceptions and conditions as the court chose to specify.[12] An especially welcome aspect of the 1981 Act was the introduction of the protection order, an interim measure to allow the court to better ensure the safety of an applicant in the period prior to the determination of the barring order application. Where the court was of the opinion that there existed reasonable grounds for believing that the safety or welfare of the applicant spouse and/or any child required such intervention, it could order that the respondent spouse not use or threaten to use violence against, molest or put in fear the applicant spouse or the child, effective from the date of the application.[13] The duration of the protection order could not extend beyond the determination by the court of the application for a barring order.

However, the capacity for the statutory provisions to protect victims of domestic violence remained limited by both their exclusive availability to spouses, and the high evidentiary thresholds imposed by the judiciary. On a number of occasions the courts delivered restrictive views on the scope of the Act by requiring the presence or threat of physical violence for an application to

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8 Section 22(4).

9 Ibid.

10 Section 17 of the Family Law (Protection of Spouses and Children) Act 1981 repealed entirely s 22 of the Family Law (Maintenance of Spouses and Children) Act 1976. Additionally, the Act sought to supplement the existing provisions, regulating the taking effect of orders, the role of the Garda, including their power of arrest, the discharge of orders and the governing Rules of Court.

11 Section 2(4).

12 Section 2(2). Section 11 of the 1981 Act permitted the court to discharge the order prior to its expiration on application by either spouse, where it was satisfied that the safety or welfare of the spouse or child for whose protection the order was first sought no longer required the order to continue in force. Significantly, s 7 of the 1981 Act granted to members of a Garda Síochána, on complaint being made by the spouse in whose favour the order was made, the power to arrest without warrant, the respondent spouse, where the member of a Garda Síochána had reasonable cause to believe that the spouse was in contravention of the existing barring order.

13 Section 3 of the 1981 Act permitted the court to make the protection order of its own motion and did not necessarily require the application to come formally before the court.

be successful. In *O'B v O'B*[14] the Supreme Court considered the appeal by the defendant husband in respect of the barring order granted by the High Court, and in examining the statutory criteria, provided an interesting insight into the judicial perceptions of the remedy at that time. In noting the significant impact and consequences of a barring order, the court demanded that a high threshold of evidence be met. O'Higgins CJ noted the necessity of 'serious misconduct on the part of the offending spouse – something wilful and avoidable which causes, or is likely to cause, hurt or harm, not as a single occurrence but as something which is continuing or repetitive in its nature'.[15] In particular, he rejected instances of tension, mere disharmony, clear incompatibility or marital breakdown as adequate bases for the making of a barring order.[16] In applying this view, O'Higgins CJ allowed the respondent husband's appeal, regarding his behaviour as at times rude and insensitive, but not amounting to serious misconduct.

> 'The evidence of the plaintiff indicates that various incidents occurred – rudeness by the husband in front of the children, a lack of sensitivity in his manner to her and efforts by him at dominance in running the house – none of which, in themselves, could be regarded as amounting to serious misconduct, and all of which would probably have been tolerated, overlooked and forgiven, if the marriage were viable. There was, as the learned trial judge found, no case of violence to be made against the defendant.'[17]

On dissent, a quite different approach was adopted by Griffin J who in the course of his judgment documented much of the verbal and emotional abuse suffered by the applicant wife, concluding in favour of the applicant wife.

> 'I cannot agree that the conduct of the defendant husband was no more than what might be expected in the ordinary wear and tear of married life as I understand it [and was] bound to have an adverse effect on the physical and emotional health of the wife and of the children and the medical reports received in evidence at the hearing bore this out.'[18]

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14 [1984] IR 182.
15 Ibid.
16 Ibid.
17 At 189.
18 At 193–194: 'it is necessary to refer to some of the defendant's conduct which I would consider abnormal in married life by any standard … He frequently told her that she was living off him, and should pay him rent and pay for her food; in the presence of the children he referred to her as a "lazy slut" and on occasions changed the words lazy to that of a different four-letter word. When the children attempted to bring cups and plates to the kitchen sink, as they had been trained to do, he directed them not to do so as this was their mother's job; he undermined any authority she had over the children by directing them not to do whatever she had just told them to do. When, on Sundays, they expressed a wish to go to visit their maternal grandparents with their mother, he physically pulled them away from the plaintiff and refused to allow them to go. He constantly indulged in things of the nature to which I have referred, being conduct which, in my opinion, no woman should be required to put up with in normal married life.'

IV DOMESTIC VIOLENCE ACT 1996

The law relating to domestic violence in Ireland was most recently substantially reformed by the enactment of the Domestic Violence Act 1996 which effected the introduction of the safety order and the widening of the categories of persons who could seek all forms of available relief. Crucially, in extending the right to apply to non-marital adult relationships, the Irish legislature finally acknowledged the myriad of domestic arrangements where vulnerable members might require protection.

The statutory right to apply for relief was extended to include the spouse of the respondent; a person who has lived with the respondent as husband or wife for 6 of the 12 months immediately prior to the application; a parent of the respondent where the respondent is aged 18 or over and is not dependent upon the parent and a person aged 18 or over residing with the respondent in a non-contractual relationship.[19] In 2010, these categories were further extended to include civil partners, as defined by the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.[20] However a cohabitant or a parent remains ineligible to apply for a barring order where the respondent holds a greater legal or beneficial interest in the property than him/her.[21] This limitation on the rights of cohabitants and parents has traditionally been justified by the Constitutional right of an alleged abuser to own and enjoy his/her property and the duty to protect those rights in circumstances where a co-existing obligation to protect the marital family from the threat of violence does not arise. This significant limitation on the right to seek the protection of the courts in the context of domestic violence was considered during the Parliamentary Select Committee on Legislation and Security, and it was noted by the then Minster for Equality and Law Reform, Deputy Taylor, that to:

> 'allow a respondent other than a spouse with an ownership interest to be barred on the application of a person with no such interest or with a lesser interest than the respondent, might not survive constitutional scrutiny … [as] … a barring order would constitute an infringement on that person's property rights which the State and its laws must respect under Article 40.3 of the Constitution. The position is different where parties are married. An infringement of a spouse's property rights is presumed to be justified on the basis that the rights of a family founded on marriage are protected by the Constitution and take precedence over property rights.'[22]

He did note however that 'such persons will not be left unprotected. The safety order remedy under the Bill will be available to such persons as will the

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19 Section 2(1) (a) defines the parameters of an 'an applicant' for a safety order, s 3(1) defines 'the applicant' for a barring order.

20 Part 9 of the Civil Partnership and Certain Rights and Obligation of Cohabitants Act 2010 brings the civil partnership relationship within the remit of the Domestic Violence Act 1996 and equates the rights of the civil partner to that of a spouse.

21 Section 3(4)(a) of the Domestic Violence Act 1996.

22 Select Committee on legislation and Security Debate 7/11/1995.

strengthened powers of arrest for Gardaí also provided for in the Bill'.[23] However the obligation to make interim protection available to a non/lesser property owning cohabitants was the primary cause of Ireland's recent reluctance to ratify the Council of Europe Istanbul Convention,[24] but this discriminatory practice will now be addressed by the proposed emergency barring order included in the new Domestic Violence Bill 2017, considered below.

Notwithstanding this fundamental shortcoming in respect of the right to apply for a barring order, this newly introduced safety order, which does not suffer from the same restrictions, represented a crucial addition to the suite of remedies available to those in need of protection. A safety order is ordered where the court is of the opinion that there are reasonable grounds for believing that the safety or welfare of the applicant and/or any dependent person so requires,[25] and it directs the respondent not to use or threaten to use violence against, molest or put in fear the applicant and/or dependent persons, irrespective of whether the parties cohabit, but it does not remove the respondent from the home. This less restrictive but hugely important safety order is available to a greater pool of persons including those who do not fulfil the more onerous evidentiary burden associated with a barring order and such right to apply has since been extended by s 60(a)(i) of the Civil Law (Miscellaneous Provisions) Act 2011 to include the parent of a child whose other parent is the respondent, irrespective of their living arrangements.[26]

Once the safety order is granted, the applicant secures the protection of the court, placing the Garda Síochána on notice of the potential threat to his/her well-being. The safety order can be made for a period of up to 5 years in duration and the court can attach any exceptions or conditions to its operation. The interim protection order introduced by the 1981 Act remains available to an applicant for a safety order who requires similar short-term protection

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[23] Ibid.

[24] Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Strasbourg, 12 April 2011) www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210 explained in more detail below.

[25] Section 2(2).

[26] An application for a safety order can be made by an applicant who -
is the spouse of the respondent, or
is the civil partner of the respondent, or a person who was a party to a civil partnership with the respondent that has been dissolved under the 2010 Act, or
is not the spouse or civil partner within the meaning of the Act of 2010 of the respondent and is not related to the respondent within the prohibited degrees of relationship, but lived with the respondent in an intimate and committed relationship prior to the application for a safety order, or
is a parent of the respondent and the respondent is a person of full age who is not, in relation the parent, a dependent person, or
being of full age resides with the respondent in a relationship the basis of which is not primarily contractual or,
is a parent of a child whose other parent is the respondent.'
Additionally under s 6(2) the Child and Family Agency can apply for a barring order or a safety order on behalf of any of the above persons.

whilst awaiting the hearing of the safety order application, but it has been emphasised that the decision to grant a protection order 'is not determinative of how the court should view an application for a safety order and that before making such an order the court should be satisfied that there are reasonable grounds for believing that such an order is required'.[27]

V INTERIM PROTECTION 1981-2002

As noted, the protection order was introduced by the 1981 Act to permit immediate, short-term state protection pending the hearing of the substantive application for a barring order but without impacting the living and/or property rights of the respondent. This was subsequently supplemented by the introduction of the interim barring order under the 1996 Act, again operating as a temporary protective measure for the period between the initial application for a barring order and the substantive hearing, but the 1996 measure escalates the level of state temporary intervention by removing the alleged abuser from the domestic environs. The interim barring order directs the respondent to leave a place where the applicant and/or dependent person(s) reside and/or prohibits the respondent from entering such place until further order of the court.[28] The test to be satisfied by the court is that which applies at the full barring order hearing; that there are reasonable grounds for believing that:

- there is an immediate risk of significant harm to the applicant or any dependent person if the order is not made immediately; and
- the granting of a protection order would not be sufficient to protect the applicant or any dependent person.[29]

The process surrounding the granting of an interim barring order and its impact upon the rights of the individual parties was considered in the matter of *DK v Judge Crowley, Ireland and the AG*.[30] In this case, the Supreme Court ultimately accepted the respondent's challenge to the validity of the interim barring order in circumstances where the substantive hearing had been adjourned on a number of occasions, preventing the court from resolving the matter expeditiously, with the delays ultimately deemed a breach of his right to due process and fair procedure. Whilst it was expressly stated that the need to protect the applicant entitles the Oireachtas 'to abridge the constitutional right to due process of other persons … the extent of that abridgment must be proportionate, *ie* no more than is reasonably required in order to secure that the constitutional right in question is protected and vindicated'.[31] The court declared the process unconstitutional, regarding the failure of the 1996 Act to prescribe a fixed period of short duration during which an interim barring

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[27] Per Ó'Caoimh J in *Ledwidge v Judge Haugh* Unreported High Court 22/7/2002.
[28] Section 4(1) (i)–(ii).
[29] Section 4(1) (a)–(b).
[30] [2002] 2 IR 744.
[31] Ibid at 757, per Keane CJ, relying upon *Heaney v Ireland* [1966] 1 IR 580.

order made *ex parte* can continue in force as depriving the respondent of his constitutional right to a fair and expeditious hearing. The decision resulted in the enactment of the Domestic Violence (Amendment) Act 2002, which mandates that where an interim barring order is granted on an *ex parte* basis, the substantive matter must be heard within 8 days of the application.[32]

Not surprisingly, the constitutionality of the protection order, the lesser interim protective measure, was subsequently considered by the courts in *Goold v Judge Mary Collins, the DPP, Ireland, the AG and JJ (otherwise J) G*.[33] The applicant claimed that the granting of a protection order 'could tilt the balance in family proceedings before the High Court unfairly against her'[34] and potentially affect judicial decisions regarding the custody and welfare of her children or the nature of ancillary relief orders to be made. These arguments were rejected, Hardiman J in the Supreme Court upheld the validity of the statutory power to make a protection order, distinguishing the effect of the two orders and noting that the interim barring order

> 'unlike the protection order, has an immediate physical consequence: the Respondent to it must leave his or her home and remain out of it until the order lapses or until further order. The protection order, by contrast, merely enjoins the Respondent to it against the use of violence or threats of violence, which are in any event intrinsically unlawful.'[35]

This short-term state intervention through the ordering of a protection order is not subject to the same strict timelines now applicable to an interim barring order.

Finally, it is worth noting the court's powers to make associated orders in the context of domestic violence proceedings, without the need for the applicant to institute proceedings under other governing provisions, representing the state's acknowledgment of the often multi-faceted, complex cases which come before the courts in this context. Section 9 allows the court when hearing an application under the 1996 Act, to make orders relating *inter alia* to custody and access, maintenance, the family home and/or child care state intervention orders.[36]

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[32] Section 1 of the Domestic Violence (Amendment) Act 2002 provides that an interim barring order shall have effect for a period not exceeding 8 working days. Whilst such an order can be made on an *ex parte* basis where having regard to the circumstances it necessary or expedient to do so in the interests of justice, such an application must be grounded on an affidavit or information sworn by the applicant, a note of evidence given by the applicant shall be prepared by the judge, by the applicant or the applicant's solicitor and approved by the judge, or as otherwise directed by the judge and a copy of the order, affidavit or information and note shall be served on the respondent as soon as practicable.

[33] [2005] 1 ILRM 1. In judicial review proceedings the applicant sought an order declaring s 5(1) and (2) of the 1996 Act to be invalid having regard to Arts 40.1 and 40.3 of the Constitution. Section 5(1) provides for the making of protection orders and s 5(4) allows such orders to be made in the absence of service of the application upon the respondent.

[34] Ibid at 10.

[35] Ibid at 17–18.

[36] Section 9(1) of the Domestic Violence Act 1996 allows the court when hearing an application

Click here to go to Main Contents

VI DOMESTIC VIOLENCE ASSAULT AS A CRIMINAL OFFENCE – A FUNDAMENTAL FLAW IN THE IRISH APPROACH

A long-standing weakness of the Irish regulatory approach to domestic violence offences is that remedial measures lie predominantly within the sphere of civil proceedings, placing an inordinate pressure on victims to initiate the process of state intervention. Rather than recognising domestic abuse as an act of criminal assault in the first instance, with the appropriate criminal proceedings being initiated following arrest and caution, too often it remains incumbent upon the victim to seek out civil remedies in the form of a barring order or safety order and to rely upon these reliefs to provide protection into the future. Statistics reflecting the reluctance to charge offenders for criminal acts in the domestic context reflect the overwhelming perception of domestic violence offences as best resolved between the parties, unfairly pitting the victim against the abuser.[37] Howsoever the matter is pursued at present, the success of state intervention, whether through a civil application by the victim or a criminal prosecution by the state for the breach of an existing order, is hugely dependent upon the victim's willingness and capacity to prove the matter through the courts.[38] The inadequacies of the existing civil-based remedies outlined above, including the belated but still limited expansion of the categories of persons entitled to seek relief, and particularly the ongoing restrictive property ownership limitations impacting the availability of certain remedies including emergency protection further demonstrate the importance of a greater willingness to pursue acts of assault within the criminal justice system.

The expectation that the victim of domestic abuse should pursue a civil order to secure protection serves to highlight the perception (and fact) that a criminal charge will typically only arise where the civil remedy has subsequently been breached by the abuser. Evidently criminal law proceedings in respect of the act of violence may be initiated under the more general laws governing assault, but statistics demonstrate that criminal prosecutions for domestic assaults are not very common.[39] This often singular response to the act of domestic violence is

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under the 1996 Act, to make related orders under s 11 of the Guardianship of Infants Act 1964, as amended, s 5 of the Family Law Maintenance of Spouses and Children Act 1976, as amended, s 5 of the Family Home Protection Act 1976 and the Child Care Act 1991.

[37] 2014 Garda Inspectorate *Crime Investigation* Report: www.gsinsp.ie/en/GSINSP/Crime%20Investigation%20-%20Full%20Report.pdf/Files/Crime%20Investigation%20-%20Full%20Report.pdf.

[38] Unusually, in circumstances where the abused wife refused to testify against her accused husband, a 42-year-old man was nonetheless convicted of her assault at Cork Circuit Criminal Court in February 2016. When she declined to give evidence and requested that her complaint be withdrawn, the state was permitted to have her statements to Garda read into evidence: www.irishtimes.com/news/crime-and-law/courts/circuit-court/man-found-guilty-of-assaulting-wife-who-suffered-stroke-1.2546927.

[39] The absence of comprehensive data in respect of incidents, reporting and conviction of domestic offences has impeded informed law reform and policy making in Ireland. In their January 2017 submission to the UN Committee on the Elimination of Discrimination against Women the Dublin Rape Crisis Centre recommended *inter alia* that the state conduct a

evidently insufficient and suggests, deliberately or otherwise, that the act of violence in the domestic setting is a lessor form of assault than that committed outside that context. What is required, to demonstrate a recognition and acceptance of the need for a two-pronged response; ie protect the vulnerable party *and* criminally sanction the abuser, is for the act of assault to be rightly categorised and acted upon in the criminal context. Whilst this can be done under current criminal justice laws, it would require a very deliberate and targeted approach by the Garda Síochána and the office of the Director of Public Prosecutions to properly pursue and prosecute perpetrators of domestic violence, in the same way and with the same veracity as they currently treat non-domestic abusers.[40] The 2014 *Crime Investigation* Report[41] from the Garda Inspectorate identifies the existing Garda Síochána Domestic Violence policy contained in the 2007 Inspectorate Report *Policing in Ireland – Looking Forward*[42] which describes how domestic violence related crimes and domestic dispute incidents ought to be recorded and classified, by requiring the following:

- where there is visible evidence of an assault, the crime should be addressed by the responder rather than placing the onus on a victim to apply for a civil court order;
- where the investigating member has reasonable grounds to believe that a suspect has committed an offence, then any applicable power of arrest that exists should be exercised;
- an injured party's attitude will not be the determining factor in respect of exercising a power of arrest.[43]

However, following field visits where the Inspectorate met with operational Garda of all ranks, and discussed their roles in responding to calls of domestic violence and domestic disputes, it was observed that unless a domestic violence crime involves 'a murder or very serious assault there is virtually no detective input into DV cases. During meetings with detective supervisors, there was an acknowledgement that this is not a crime area that they review on a daily basis

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thorough, comprehensive analysis of the level of sexual violence in Ireland and the public attitudes to it, in order to provide a baseline and then for regular updates.
Disaggregate the data collected through the Central Statistics Office, the Garda PULSE system and the Courts Service, to better determine the categories of victims of sexual violence and the types of crimes reported, prosecuted and convicted.
Within the Justice system: Resource Garda Protective Unit's country-wide. Audit all elements of the justice system, including police and court, to ensure that the rights of victims of sexual offences are adequately protected at each and every stage of the criminal justice process.
www.drcc.ie/media1/government-submissions/

40 Section 4(1) of the Non-Fatal Offences Against the Person Act 1997 provides that a person who intentionally or recklessly causes serious harm to another shall be guilty of an offence. A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or to imprisonment for life or to both.

41 See n 36.

42 www.garda.ie/Documents/User/Policing%20in%20Ireland%20-%20Looking%20Forward.pdf.

43 See n 39 *Arresting Offenders* Part 6 at 40.

Click here to go to Main Contents

… the Inspectorate identified the high number of calls to domestic incidents and the low volume of arrests recorded on CAD at the time'.[44] The subsequent 2015 report again observes that there is very little evidence that this 2007 policy is audited or monitored to ensure that it is implemented at an operational level.[45]

The 2014 Inspectorate report highlights the issue of the incorrect recording of domestic violence offences, exacerbated by the absence of distinct Central Statistics Office statistics in respect of acts of domestic violence, which are currently included with all other assaults.[46] The report highlighted as a consequence of this frequent failure to record cases of domestic violence correctly, that such offences are much less likely to result in a criminal prosecution[47] and/or that a large number of domestic incidents were moved to the non-crime category of 'Attention and Complaints'. In respect of domestic violence cases, the Inspectorate was also critical of the practice of members of the Garda not recording incidents of assault where a victim who has suffered injuries is unwilling to make a statement, and instead categorising it as a 'domestic dispute – no offences disclosed' with the matter 'effectively closed and the assault is not recorded'.[48] Additionally the documented failure on the part of Garda inspectors to routinely check cases of domestic violence for compliance with the stated policy, and to ensure the accurate recording of these incidents on the PULSE system, is reported as reflecting a widespread failure in the divisional-based response to the overarching domestic violence policy.[49] This problem is exacerbated by the absence of a formal risk assessment process at an incident of domestic violence, as is routinely conducted in other jurisdictions, to identify those at the highest level of risk of abuse, with a view primarily to reduce the risk to those persons. The 2014 Inspectorate Report highlighted the unavoidable consequences flowing from this absence of a practice of conducting a risk assessment, namely that the Garda all too often have to deal with the same victim repeatedly. Additionally, such repeat incidents of abuse can have the very real potential to escalate to life-threatening

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44 Ibid para 3.12 *Domestic and Sexual Assault* at 150.

45 www.gsinsp.ie/en/GSINSP/1286-ChangingPolicinginIreland_Low-Full.pdf/Files/1286-ChangingPolicinginIreland_Low-Full.pdf 2015 The *Crime Investigation* Report of the Garda Síochána Inspectorate at 213.

46 Jacky Jones 'Second Opinion: Strategies for domestic violence should focus on perpetrators' *The Irish Times* (Dublin, 13 April 2015) www.irishtimes.com/life-and-style/health-family/second-opinion-strategies-for-domestic-violence-should-focus-on-perpetrators-1.2168913.

47 See n 40 at chart 6.16.

48 Ibid, part 6 at 41 which included incidents domestic violence in the examples of the type of unrecorded cases that were provided to the Inspectorate. The findings stated that 'Members from all seven divisions stated in focus groups that positive action is not always taken where crimes were committed and where there were opportunities to arrest the offender. These members also said that DV is not always recorded in cases were a crime had clearly taken place and that injuries sustained by victims are not always recorded on PULSE.'

49 Ibid, part 6 at 39. This is noted with one state exception; the report references one identified district where a nominated sergeant was identified as having responsibility to monitor all domestic violence incidents.

violence.[50] This absence of a risk assessment with associated monitoring and interventions, coupled with the lack of the recording of the fact of an offence in the absence of a victim statement, are serving to fail the victim in every respect.

In order to enhance the proper recording of domestic violence crimes and effect a more appropriate and reflective level of criminal prosecutions of perpetrators who commit acts of assault in the domestic setting, key actions were identified by the 2014 Inspectorate report, including:

- ensure that all calls for DV are properly supervised from the receipt of the call to the recording of the crime or incident;
- ensure that all crime of DV and incidents of domestic dispute are recorded on PULSE, irrespective of the willingness of a victim to make a statement of complaint;
- ensure that positive action is taken where there are clear opportunities to arrest;
- implement a risk assessment process that is completed at all DV incidents.[51]

In calling for the Garda Síochána 'to urgently re-appraise both the strategic and operational response to DV' the Inspectorate highlighted the need for a revised 'more comprehensive and robust' approach which would involve working with COSC[52] and key strategic partners to implement a victim-centred policy and more effective investigative practices in Domestic Violence.[53] Thus the response to the challenges surrounding the need to treat assaults in the domestic setting as criminal acts is currently being addressed in Ireland through enhanced Garda Síochána policies in respect of their approach to such incidents, rather than through the deliberate legislative identification of a criminal offence of domestic violence. The continuing inadequacies of failing to identify domestic violence assault as a criminal offence, thereby facilitating the capacity for mis-categorisation and devaluation of the domestic offences were further highlighted in early March 2017 in the Concluding Observations of the UN Committee on the Elimination of Discrimination Against Women on the combined sixth and seventh periodic reports of Ireland. Recommendation 27(c) which relates to Irish regulation of domestic violence calls on the Irish government to '[c]riminalise domestic violence and introduce a specific definition of domestic violence and other emerging forms of gender-based violence such as online stalking and harassment'.[54]

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[50] Ibid, part 6 at 42, noting the wide ranging implications of the failure to record an assault or other crime.

[51] Recommendation 6.18; ibid, part 6 at 12.

[52] COSC (meaning to stop or prevent as Gaeilge) is the National Office for the Prevention of Domestic, Sexual and Gender-based Violence: www.cosc.ie.

[53] Ibid, part 6 at 44.

[54] In line with its general recommendation No 19 (1992) on violence against women, the Committee recommends that the state party:
'(a) Ensure that the National Office for the Prevention of Domestic, Sexual and Gender-based Violence and relevant institutions implement the "gold standard" so that data on all forms of

VII IRELAND'S RESPONSE AS SIGNATORY TO THE ISTANBUL CONVENTION

After much delay, the Domestic Violence Bill 2017, originally issued as the Heads of Bill in 2015, was finally published by the Minister for Justice and Equality on 3 February 2017. It purports to 'improve the protections available to victims of domestic violence, most critically for cohabitants and parents in crisis situations, by introducing a new emergency barring order which can last for up to 8 working days … [and] to make the court process easier for victims of domestic violence'.[55] The Act repeals both the Domestic Violence Act 1996 and the Domestic Violence (Amendment) Act 2002 in their entirety, representing a consolidated reform of domestic violence laws in Ireland. The impetus for these long-awaited reforms was undoubtedly enhanced by Ireland's overdue obligation to ratify and give meaningful effect to its obligations on becoming a signatory to the Convention on Preventing and Combating Violence against Women and Domestic Violence ('the Istanbul Convention').[56] The Istanbul Convention was opened for signature at the Council of Europe Ministers meeting in Istanbul in May 2011 and entered into force on 1 August 2014. As the first Council of Europe treaty to specifically target violence against women, it sets out minimum standards on prevention, protection and prosecution, and mandates the development of integrated policies. In its preamble the Convention recognises

> 'that violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full

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gender-based violence against women, including domestic violence, is systematically collected, analysed and that it is disaggregated by, inter alia, age, ethnicity and relationship with the perpetrator;
(b) Intensify existing efforts to combat gender-based violence against women, including domestic violence, by ensuring that prosecutors and the police are properly trained to identify, investigate and prosecute cases of gender-based violence, including domestic violence, particularly targeting Traveller, Roma and migrant women and girls;
(c) Criminalise domestic violence and introduce a specific definition of domestic violence and other emerging forms of gender-based violence such as online stalking and harassment;
(d) Provide adequate financial resources to non-governmental organisations that provide services to victims of gender-based violence, including domestic violence; and
(e) Expedite the ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention).'
See link to full Observations: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fIRL%2fCO%2f6-7&Lang=en.

[55] Statement of Frances Fitzgerald, Minister for Justice and Equality upon publication of the Bill. www.inis.gov.ie/en/JELR/Pages/PR17000033. As regards better protecting victims of domestic violence within the court process, she pointed to the inclusion of measures whereby '[A] victim will have the right to be accompanied to court by a family member, friend or support worker. A victim will be able to give evidence by live television link. There will be restrictions on attendance at both civil and criminal court proceedings and protections for the victim's anonymity.'

[56] Council of Europe, Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Strasbourg, 12 April 2011): www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210.

> advancement of women … [and further recognises] … the structural nature of violence against women as gender-based violence, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men'[57]

The preamble also recognises 'that domestic violence affects women disproportionately, and that men may also be victims of domestic violence … [and] … that children are victims of domestic violence, including as witnesses of violence in the family' causing the Council to aspire to 'create a Europe free from violence against women and domestic violence'.[58]

The purposes of the Convention are identified in Art 1 as follows:

(a) protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence;
(b) contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women;
(c) design a comprehensive framework, policies and measures for the protection of and assistance to all victims of violence against women and domestic violence;
(d) promote international co-operation with a view to eliminating violence against women and domestic violence;
(e) provide support and assistance to organisations and law enforcement agencies to effectively co-operate in order to adopt an integrated approach to eliminating violence against women and domestic violence.

Article 4 identifies the over-arching obligation on signatories to take 'the necessary legislative and other measures to promote and protect the right for everyone, particularly women, to live free from violence in both the public and the private sphere'. The nature and scope of the signatories' obligations is extensive; and includes measures relating to integrated laws and policies (referencing financial resources, data collection, research); preventative measures (mandating awareness raising, education, training of professionals, private sector participation and the media); protection and support (addressing the issues of support services, complaints processes, shelters, helplines, protection and support for witnesses and reporting mechanisms); as well as the targeting of relevant substantive laws, including sexual, physical and psychological violence in both the civil and criminal context.[59] Many of these

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[57] Ibid at 5–6.
[58] Ibid at 6.
[59] In light of this express recognition of the overwhelmingly gendered nature of domestic violence and Art 4(2) of the Convention mandates unequivocally that 'Parties condemn all forms of discrimination against women and take, without delay, the necessary legislative and other measures to prevent it, in particular by:
– embodying in their national constitutions or other appropriate legislation the principle of equality between women and men and ensuring the practical realisation of this principle …
– prohibiting discrimination against women, including through the use of sanctions, where

issues are directly related to the challenges of domestic violence and if given domestic effect would result in a comprehensive and informed approach to both prevention and protection in the domestic violence.[60]

Ireland finally became a signatory to the Istanbul Convention on 5 November 2015, reaffirming 'the commitment of Government to foster a culture and to implement meaningful changes which can help reduce the incidence of domestic violence, better support victims and bring the perpetrators to justice'.[61] From the outset, Ireland purported to support in principle the aims of the Istanbul Convention, but was demonstrably reluctant to sign and ratify it. The Irish government understood that ratification would require the state to develop consolidated and reformed domestic violence legislation to expressly recognise the gender-specific implications of domestic violence whilst more robustly protecting all victims against threatened and actual intimidation and violence. The primary obstacle however, and the cause of Ireland's prolonged delay in ratifying the Convention was the perceived need to protect the competing property rights of persons accused of such offences. In particular, the state was required to satisfy itself that the ratification and implementation of the Convention requirements in respect of the availability of emergency barring orders under Art 52 would not interfere with the property rights of accused persons as protected by the Irish Constitution.[62] With reference to the general Art 18(2) obligation under the Convention[63] to take all legislative and other necessary measures to give effect to the Convention, the National Istanbul Convention Action Plan[64] committed to the enactment of the new consolidated Domestic Violence Act by Quarter 1, 2016.[65] This deadline had passed a full

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appropriate;
– abolishing laws and practices which discriminate against women.'

60 Domestic Violence is defined in Art 3b as 'all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim'.

61 *Minister Fitzgerald welcomes the signature by Ireland of the Istanbul Convention on preventing and combating violence against women and domestic violence* Press Release of Minster for Justice Frances Fitzgerald 5 November 2015: www.justice.ie/en/JELR/Pages/PR15000568.

62 Ireland's reluctance to interfere with the property rights of alleged abusers was not as challenging an issue in most other signatory states, with 38 states signing the Convention in advance of Ireland. See further the criticisms of Amnesty International at that time; 'Ireland Must Sign and Ratify the Istanbul Convention to Fight Violence against Women and Girls'; www.amnesty.ie/news/ireland-must-sign-and-ratify-istanbul-convention-fight-violence-against-women-and-girls.

63 Parties shall take the necessary legislative or other measures, in accordance with internal law, to ensure that there are appropriate mechanisms to provide for effective cooperation between all relevant state agencies, including the judiciary, public prosecutors, law enforcement agencies, local and regional authorities as well as non-governmental organisations and other relevant organisations and entities, in protecting and supporting victims and witnesses of all forms of violence covered by the scope of this Convention, including by referring to general and specialist support services as detailed in Arts 20 and 22 of this Convention.

64 www.justice.ie/en/JELR/ActionPlanIstanbulConNovember.pdf/Files/ActionPlanIstanbulConNovember.pdf.

65 The ratification of the Convention requires that the Irish government instigate and effect a

year before the eventual, recent publication of the Bill in February 2017, still with no definite schedule for the enactment of the final Act disclosed as yet. Whilst the Bill includes many broad-based reforms of Irish laws, two novel elements in the Irish domestic law landscape included in the Bill can be specifically linked to the requirements arising directly from the Istanbul Convention obligations. The first of these is the provision of immediate protection for a victim of domestic abuse who may have a lesser interest in the property at issue. Article 52 of the Convention mandates as follows:

> 'Parties shall take the necessary legislative or other measures to ensure that the competent authorities are granted the power to order, in situations of immediate danger, a perpetrator of domestic violence to vacate the residence of the victim or person at risk for a sufficient period of time and to prohibit the perpetrator from entering the residence of or contacting the victim or person at risk. Measures taken pursuant to this article shall give priority to the safety of victims or persons at risk.

Section 8 of the Domestic Violence Bill 2017 introduces the emergency barring order, a new remedy under Irish law and a key measure mandated by Art 52 of the Convention. As distinct from the existing interim barring order (introduced under Irish law in 1996 as explained above), the emergency barring order will only be available to persons who are not a spouse or a civil partner of the respondent but who have lived with him/her in an intimate and committed relationship prior to the application; or who is the parent of the respondent where the respondent is of full age and not dependent upon that parent. A successful application for an emergency barring order will remove the alleged abuser from the property where the applicant or dependent person resides for a period of up to 8 days. The Bill provides that an applicant is permitted to apply for this relief in respect of a place where the applicant or dependent persons resides where:

(a) the respondent has a legal or beneficial interest in the place but the applicant has no such interest, or
(b) the applicant's legal or beneficial interest is, in the opinion of the court, less than that of the respondent.

Whereas under the Domestic Violence Act 1996 a cohabitant or other authorised applicant could only secure an interim barring order,[66] let alone a full barring order, against his/her cohabitant where an equal or greater interest in the property could be proven to the satisfaction of the court; no such proprietal threshold is now required to secure such protection. Additionally s 8 of the Bill provides that an emergency barring order is a stand-alone order not made pending the hearing of a more substantive application and if granted provides immediate effective protection for the applicant by removing the source of violence from his/her living environment.

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range of legislative and administrative actions; acknowledged and outlined in the 10-page Istanbul Convention Action Plan issued by the Department of Justice Equality and Law Reform.

[66] Section 3(4)(a) of the Domestic Violence Act 1996.

Click here to go to Main Contents

In facilitating accessibility to this relief, the Irish legislature has finally accepted the need to empower the courts to intervene as necessary, to ensure the safety of the applicant irrespective of property ownership. Perhaps unsurprisingly, however, in recognition of the omnipresent constitutionally protected property rights of a respondent, s 8(3) sets out a high evidentiary threshold for the applicant. In order to grant the short-term emergency barring order, the court must be satisfied that 'there are reasonable grounds for believing that there is an immediate risk of significant harm to the applicant or a dependent person if the order is not made immediately'. The impact of the order, although short lived, is thus dramatic in effect. Once satisfied that the evidentiary threshold has been reached, the court may direct the respondent, if residing at the place where the applicant or that dependent person resides, to leave that place, and whether the respondent is or is not residing at the place where the applicant or that dependent person resides, prohibit that respondent from entering that place for such period, not exceeding 8 wrong days, as is specified in the order.[67]

Additionally the court can order associated directions where appropriate, prohibiting the respondent from engaging in one or more of the following acts:

- using or threatening to use violence against, molesting or putting in fear, the applicant or a dependent person;
- attending at or in the vicinity of, or watching or besetting, a place where the applicant or a dependent persons resides;
- following or communicating (including by electronic means) with the applicant or a dependent person.[68]

The application can be made on an *ex parte* basis, where this is deemed necessary in the circumstances or where it is expedient to do so in the interests of justice.[69] Finally whilst s 8(16)(a) purports to limit the capacity of an applicant to apply for an emergency barring order until at least one month has passed since the expiration of the last day of the previous emergency barring order, this limitation is immediately qualified by s 8(16)(b) which provides that this restriction can be overruled with the making of a new order 'where the court is satisfied, having regard to the circumstances of the respondent, that there are exceptional circumstances which justify the making of a further order'.

Worth noting, however, is that notwithstanding the apparent progress made by the proposed introduction of the emergency barring order, a very practical obstacle to its accessibility has recently been highlighted by the Director of the National Women's Council of Ireland, Orla O'Connor. She has noted the absence of any framework to make this urgent remedy available to victims

[67] Section 8(3)(a)–(b).
[68] Section 8(4).
[69] Section 8(11).

out-of-hours when the courts are not sitting.[70] Given the unpredictable nature of a threat of domestic violence, it is imperative that protection can be immediately instated when required, as envisaged by the test set out in s 8; specifically that there is evidence of 'an immediate risk of significant harm … if the order is not made immediately'. That significant harm which requires immediate intervention cannot be abated if the courts are routinely inaccessible. A suggested means of abridging this availability chasm is that the proposed laws could additionally accord powers to the Garda Síochána to unilaterally bar a perpetrator on an emergency basis, for a finite period of time (72 hours was suggested), to enable a victim to 'consider her options' and/or make the application to the court upon normal commencement of court business.[71] Similarly, Barnardos, in broadly welcoming this development, has emphasised that 'crises do not just happen in office hours' and has advocated for an amended proposal which would develop and utilise 'an on-call judge system that Gardaí can utilise to grant emergency barring orders'.[72]

This availability of short-term but emergency relief to victims beyond spouses and civil partners is very welcome and serves to acknowledge the lived reality of many violent intimate relationships, and prioritises immediate safety over proprietal rights. Ultimately however, it will be the attitude of presiding judges and the availability of the courts that will most influence the value and impact of this significant development.

A second aspect of the Istanbul Convention which mandates state action and is addressed somewhat by the Domestic Violence Bill 2017, is the requirement that signatory states take proactive and meaningful steps to engage with perpetrators of domestic violence. Article 16.1 places an obligation upon signatories to develop such preventive intervention and treatment programmes.

> 'Parties shall take the necessary legislative or other measures to set up or support programmes aimed at teaching perpetrators of domestic violence to adopt non-violent behaviour in interpersonal relationships with a view to preventing further violence and changing violent behavioural patterns.'

This Article reflects the growing acceptance nationally and internationally that rehabilitation of male perpetrators of domestic violence must form part of comprehensive domestic measures in order to bring about behavioural change and to prevent recidivism, where possible. Perpetrator programmes have been

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70 Orla O'Connor, Director of NWCI 'NWCI welcomes the Domestic Violence Bill, but says it fails to meet the extent of the problem' 20 December 2016.

71 Ibid. www.nwci.ie/index.php?/learn/article/nwci_welcomes_the_domestic_violence_bill_but_says_it_fails_to_meet_the_exte.

72 June Tinsley, Head of Advocacy Barnardos Ireland 'With small changes, Domestic Violence Bill could improve protections for children experiencing domestic abuse' 1 March 2017: www.barnardos.ie/media-centre/news/latest-news/with-small-changes-domestic-violence-bill-could-improve-protections-for-children-experiencing-domestic-abuse.html.

identified as 'important elements of an integrated and comprehensive approach to preventing and combating violence against women, which, in turn, should be part of a national policy or strategy'.[73]

Ireland's historical emphasis upon retribution rather than rehabilitation or prevention in the domestic violence context is evidently at odds with international standards and recent related developments in other jurisdictions.[74] Irish statutory provisions to date, as outlined above, have adopted a victim-centric approach, prioritising the provision of protection for the vulnerable partner and children, in anticipation of, or in reaction to episode(s) of abuse. Despite the relative statutory inaction, the need to consider perpetrator interventionist measures was previously acknowledged with the establishment in 1996 of the National Task Force on Violence Against Women (NSCVAW), charged with the development of a co-ordinated strategy in response to the mental, physical and sexual violence against women, especially in the context of domestic violence.[75] The report *inter alia* emphasised the importance of adequate provision of services for both victims and perpetrators of domestic violence,[76] and expressly identified the need for service provisions for perpetrators.[77]

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[73] *Domestic and Sexual Violence Perpetrator Programmes: Article 16 of the Istanbul Convention* a Collection of Papers on the Council Of Europe Convention on preventing and combating violence against women and domestic violence. Hester M and Lilley SJ Council of Europe at 5.

[74] Both the United Nations and the Council of Europe have called for enhanced domestic measures of intervention which seek to bring about behavioural change in perpetrators of domestic violence. In 2004, The UN Commission on the Status of Women urged UN agencies, governments, the private sector and NGO's to encourage and support men and boys to take an active part in the prevention and elimination of all forms of violence, by developing integrated education and training which prioritises the rehabilitation of perpetrators. Separately, the Council of Europe has also asserted the need for state funded intervention with perpetrators of domestic violence manifesting in the Istanbul Convention which sets out minimum standards on prevention, protection and prosecution, and mandates the development of integrated policies including an obligation on signatory states to develop preventive intervention and treatment programmes for perpetrators of domestic violence.

[75] The Terms of Reference required the Task Force to examine existing services and supports (emergency, interim and long term) for women who had been subjected to violence; examine legislation dealing with the victims and perpetrators of domestic violence; make recommendations on how legislation, services and supports could be improved and made more effective; examine the causes of violence against women (including, if necessary, initiating research); make recommendations for a comprehensive preventative strategy and examine rehabilitation programmes for perpetrators of such crimes. Notably, the Task Force was requested to have regard to public expenditure constraints in making proposals and recommendations.
Page Report of the Task Force on Violence Against Women (Dublin: The Stationery Office, 1997) at 7.

[76] Ibid at 21. The priority recommendations outlined at the conclusion of chapter 10 of the Report include the proposal that intervention programmes for offenders should be adequately resourced and should be available in areas where support services for women and children (such as refuges) are already in place.

[77] Ibid at 22, and considered in detail in Chapter 11 of the Report. See further; Safe Ireland, *The Lawlessness of the Home: Women's Experiences of Seeking Legal Remedies to Domestic Violence and Abuse in the Irish Legal System* (Dublin: Safe Ireland, 2014), at p 13. The Report

At present, 13 intervention programmes for male perpetrators of domestic violence operate in Ireland with limited capacity and restrictive geographical reach, and were reported in 2013 to have received combined government funding of €390,000.[78] The number of organisations responsible for the delivery of these programmes is limited to three; the South East Men's Network, the North East Men's Network and MOVE Ireland. The South East Men's Network operates the South East Domestic Violence Intervention Programme (SEDVIP) which runs four MEND (Men Ending Domestic Abuse) Programmes in the South East, Carlow, Clonmel, Waterford, Wexford, for men seeking to address their violent behaviour towards their partner or ex-partner.[79] The programme includes a partner support service that offers one-to-one support to the partners or ex-partners of the men on the group programme. The North East Domestic Violence Intervention Programme (NEDVIP) is a similar programme but is run by the Irish probation service in Louth with its participants being referred by the local courts or social work services, the latter typically in the context of a child protection plan.[80] Finally MOVE Ireland (Men Overcoming Violence) works with men to help them address their abusive behaviour towards their partners or ex-partners,[81] currently operating in nine different locations nationally. It is a voluntary self-governed body supported by a combination of charitable/voluntary contributions and state funding from COSC.[82] COSC (meaning to stop or prevent as Gaeilge) is the National Office for the Prevention of Domestic, Sexual and Gender-based Violence.[83] It was established in June 2007 with the key responsibility to ensure the delivery of a coordinated Government response to domestic, sexual and gender-based violence. Until the publication of the Domestic Violence Bill 2017, there was an absence of any legal duty on the courts to mandate perpetrators to engage with perpetrator intervention programmes nor was there any related expectation that the state ought to provide such interventionist opportunities. Unfortunately the discretionary underpinnings of the proposals contained in s 25 of the Bill, outlined below, seem to avoid such a mandatory approach and are not aided by the continuing shortcomings of the necessary related state financial investment.

Action 12 of the National Istanbul Convention Action Plan[84] expressly refers to perpetrator programmes and notes that the Domestic Violence Bill will accord Irish judges with the legislative based power to refer domestic violence perpetrators to such programmes, now enunciated in s 25(1) of the Bill. What is immediately concerning about Action 12, however, is its failure to reference

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set out in much detail the Task Force vision and expectations of such programmes; and stipulated that any such developments should include full collaboration with the existing statutory services and women's organisations.

78 www.cosc.ie/en/COSC/Pages/RD14000025.

79 www.mend.ie.

80 www.mend.ie/sedvip.

81 www.moveireland.ie.

82 E Fisher 'Perpetrators of Domestic Violence: Co-ordinating Responses to Complex Needs' [2011] 8 *Irish Probation Journal* 124 at 124. See also COSC, www.cosc.ie/en/COSC/Pages/WP08000095.

83 www.cosc.ie

84 Supra n 60.

Click here to go to Main Contents

Art 16 of the Convention where this issue expressly arises; and more significantly, the absence of any detailed domestic action plan relating to the required investment in the development and expansion of new and/or existing perpetrator programmes, currently operating in a very limited and underfunded manner. Whilst as noted above, Art 16(1) of the Convention requires signatory states to 'take the necessary legislative or other measures to set up or support programmes aimed at teaching perpetrators of domestic violence to adopt non-violent behaviour', the current Action Plan is silent on the fact and specifics of such mandated measures. Thus apart at all from the economic challenges posed by the provision of suitable and sufficient programme opportunities for perpetrators, it is far from reassuring where the domestic legislation fails to reflect or reference the aims of the grounding international Convention.

As regards perpetrator interventionist measures, s 25(1) of the 2017 Bill provides that:

> 'When granting a barring order or a safety order, the court may direct a respondent to engage with services to address issues relating to the respondent's behaviour which may have contributed to the granting of the order. The services may include but are not limited to:
>
> (a) a domestic violence perpetrator programme …'[85]

Whilst this provision when enacted will permit the court to refer a person who is the subject of a court mandated protective order to attend *inter alia* a perpetrator programme, it does not require the court to order or even consider the ordering of such intervention in every instance.[86] Additionally the very limited availability of Domestic Violence Perpetrator programmes and the absence of adequate state resources to fund their expansion, further undermines the likely impact of this initiative. However in acknowledging the longstanding need to demand perpetrator accountability in order to properly protect victims and serve societal need, the 2016–2021 (second) National Strategy on Domestic, Sexual and Gender-based Violence strategy[87] does recognise the need for the modern Irish legal framework to do more than simply punish the perpetrators and acknowledges the potential impact of effective perpetrator interventionist measures, accepting that 'work to monitor and treat sex offenders and perpetrator programmes for domestic violence perpetrators, also

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[85] www.justice.ie/en/JELR/Domestic_Violence_Bill_2017.pdf/Files/Domestic_Violence_Bill_2017.pdf.

[86] Section 25(1) also permits the court to direct a respondent to engage with (b) an addiction service, (c) a counselling or psychotherapy service, or (d) a service in relation to financial planning.

[87] www.justice.ie/en/JELR/Second%20National%20Strategy%20on%20Domestic,%20Sexual%20and%20Gender-based%20Violence%202016%20-%202021.pdf/Files/Second%20National%20Strategy%20on%20Domestic,%20Sexual%20and%20Gender-based%20Violence%202016%20-%202021.pdf.

have roles to play. In limited cases in this area carefully designed restorative practices can serve the needs of victims and perpetrators'.[88]

These developments, whilst welcome and certainly long overdue in acknowledging the need to work with both the cause as well as the consequences of domestic abuse, remain incomplete and not sufficiently far reaching. In the absence of both mandatory statutory provisions and a commitment to adequately fund the necessary structures, it is unfortunately evident that there has been a failure to grasp the opportunity to develop a robust and meaningful response to the international demands surrounding intervention with perpetrators of domestic abuse. Rather in its current form, s 25 provides the court, upon granting a protective order to an applicant, with the capacity to require the abuser to engage with a domestic violence perpetrator programme, and additionally the fact of the abuser's engagement with such a service can be taken into account in subsequent hearings relating to the matter; but otherwise remains silent. There is currently an absence of any related state commitment as regards the development for support of such programmes, and given the current relative dearth of availability, this legislative shift towards engaging perpetrators may in practice prove inadequate.

From an operational perspective, if Ireland is to give meaningful effect to its international obligations and actively protect vulnerable parties from ongoing abuse; it is time to recognise the immediate need to further invest in and develop comprehensive laws and structures to provide immediate emergency protection for vulnerable women, to tackle incidents of domestic violence with robust criminal prosecutions and to mandate perpetrator engagement with accessible perpetrator intervention programmes. The 2017 Bill is a welcome, progressive first step but an effective state response including targeted policing strategies will mandate ongoing law, policy and operational progress.

[88] Ibid at 6. The National Strategy identifies the holding of domestic violence perpetrators to account as one of the three aims of the State during the lifetime of the strategy.

Click here to go to Main Contents

ITALY

FAMILY RELATIONSHIPS IN ITALY AFTER THE 2016 REFORM: THE NEW PROVISIONS ON CIVIL UNIONS AND COHABITATION

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Résumé

Le droit italien de la famille a toujours été adopté postérieurement aux changements sociaux déjà en place pour s'aligner, malgré son retard extrême, sur les législations étrangères. Cela a été le cas pour l'introduction du divorce, de l'autorité parentale conjointe, de la réglementation concernant les unions de même sexe ou encore des relations entre concubins.

Après un rapide regard sur les grandes réformes du droit italien de la famille qui ont entièrement redessiné la structure du Code civil de 1942, cet article analyse les requêtes de la Cour constitutionnelle italienne, celles des juridictions nationales des première, deuxième et troisième instance ainsi que les recommandations de la Cour européenne des droits de l'homme concernant sa législation. Ces dernières finiront peut-être par protéger toutes les unions familiales, indépendamment de l'orientation sexuelle et de l'identité de genre des partenaires.

Par la suite, s'en suit l'analyse en détails de la réforme prévue par la loi n°76/2016: le pouvoir législatif a laissé des questions non résolues à la discrétion du pouvoir judiciaire. Ces questions (adoption du beau-fils ou de la belle-fille, adoption par les couples de même sexe ou maternité de substitution) ont été délibérément négligées par la loi n°76/2016 et ont ainsi rendues la réforme de 2016 partiellement inadaptée.

Italian family law has always adapted *ex post* to the social changes already in place, aligning with extreme delay to foreign legislations. This was the case for the introduction of divorce, of shared parental responsibility and ultimately also for the regulation of same-sex unions and cohabiting relationships.

After a brief excursus on the major reforms in Italian family law, which entirely redesigned the Civil Code's structure of 1942, this chapter examines the

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Click here to go to Main Contents

requests of the Italian Constitutional Court and of the domestic courts of first, second and third instance, as well as the recommendations of the European Court of Human Rights and the doctrine to the legislature. These will eventually protect all family unions, regardless of the sexual orientation and gender identity of the partners.

Then follows the detailed analysis of the reform set out in Law No 76/2016, of the unsolved legal issues devolved by the legislature to the discretion of the judiciary, and of those aspects (step-child adoption, adoption by same-sex couples and surrogacy) purposely neglected by the Law No 76/2016, which immediately made the 2016 reform partially inadequate.

I A TROUBLED PATH TO REACH THE 2016 REFORM

The Italian family law is grounded in the Civil Code of 1942, which, crystallising a concept of the family obviously based on institutions, habits and customs now obsolete in practice, has made it necessary to adapt the rules in force with the intervention of the legislature.

Beyond the continuous adjustments, periodically made to allow coordination with law on taxes, health, in the field of adoption, etc,[1] the First Book of the Civil Code, specifically entitled 'Of the people and the family', has undergone two structural reforms that have completely redesigned its body.

First, Law No 898/1970 has in fact introduced divorce,[2] thus allowing the dissolution of civil marriage and consequently allowing the birth of new types of relationships (reconstituted families, step-parent families,[3] etc). Secondly, the Law No 76/2016, in view of the widespread practice of 'innominate', or non-regulated forms of interpersonal relations, has systematised the whole matter. Three forms of family organisation have thus been provided by law, in place of the original one founded on heterosexual marriage. In Italy, since July 2016, families based on marriage are recognised with civil effects as well as are civil unions and stable cohabitations characterised by emotional ties and assistance between the two partners.

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1 Reference is made to the amendments to the Civil Code introduced by Law No 151/1975 on '*fondo patrimoniale*' and the family enterprise, by Law No 184/1983 on international adoption, by Law No 6/2004 concerning '*amministrazione di sostegno*', by Laws Nos 158/2001 and 304/2003 against violence in family relationships, by Law No 40/2004 on medically assisted procreation, by Law No 54/2006 on sharing custody of the offspring, by Law No 219/2012 on the recognition of natural children, by Law No 162/2014 on the devolution of separation and divorce procedures in the absence of minor children to the mayor, and by Law No 55/2015 on the so-called speedy divorce. Moreover, beyond the above interventions, which have specifically modified the field in question, various articles of the First Book of the Civil Code have been modified on several occasions, as a result of changes in other areas of law.

2 Divorce, introduced by law in 1970, was confirmed by referendum in 1974.

3 MV Antokolskaia, 'Parenting in step-parent families: legal status versus de facto roles' (2015) *Child and Family Law Quarterly* 271-284.

The time schedule of these three milestones in the reform path of the Italian family law, with the adoption of the Civil Code in 1942, the great reforms of 1970/1975[4] and the last one in 2016, are clear evidence of the difficulties faced by the legislature in attempting to modernise and update the field. Beyond the political reasons for this slowness, traced by certain authors to the equal bicameralism, by others to the electoral law that would prevent the full governability, and sometimes even to the location (and its alleged influence) of the State of the Vatican City as an enclave in the territory of the Italian Republic,[5] what is important for the purposes of the present analysis is the solution that was adopted in everyday life, pending the said reforms. In view of the above described deadlock of the legislative power, in fact, on several occasions the judiciary has anticipated parliamentary reforms, legitimising factual situations not yet recognised by statutory law.

The 2016 reform was preceded by a number of national and European judgments, which, while overruling the existing case law, aimed to highlight the urgent need for the systematic intervention of the legislature.

II THE VARIOUS BILLS DRAFTED AS FROM 1986

Civil unions were discussed for the first time in Parliament in 1986, and then again in 1988, when a bill for the regulation of all types of cohabitation (ie heterosexual, same-sex and between persons not in a sentimental relationship)[6] was drafted. The debate was then abandoned for several years, resurfacing only as a result of the French adoption of Pacs.[7]

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[4] Whereas Law No 898/1970 introduced the institute of divorce, Law 19 May 1975 No 151 (so-called 'reform of family law') marked the transition from the marital power to the shared parental power (now 'responsibility': see M Bianca, *Filiazione. Commento al decreto attuativo. Le novità introdotte dal d.lgs. 28 dicembre 2013, n. 154* (Giuffrè, Milan, 2014); it established the principle of equality between the spouses, whose new legal property regime became that of the community of assets; it has replaced the separation because of the fault of one spouse with the separation for intolerable continuation of the cohabitation; it has lowered the marriage age from 21 to 18 years.

[5] M Dogliotti 'Commento alla sentenza della Corte Costituzionale n 281/1994' (1994) *Famiglia e Diritto* 525–526, quoting the definition (used in legal literature after the entry into force of the Civil Code) of cohabitation as the 'union based on sin', relevant only because of its criminal effects (it was a misdemeanor). Most of the debate is by politicians rather than academics.

[6] For an excursus on the concept of the de facto family within the Italian legal system, G Alpa *Istituzioni di Diritto privato* (UTET, Torino, 1994) pp 410-420; F Gazzoni, *Dal concubinato alla famiglia di fatto* (Giuffrè, Milan, 1983), focusing on the 'recent' (at the time of publication) and widespread use of cohabitation no longer intended as concubinage, but as a way to create a family; for a comparison to the US system, and the increase of nonmarital cohabitation, M Garrison 'Nonmarital Cohabitation: Social Revolution and Legal Revolution' (2008) *Family Law Quarterly* 309 et seq.

[7] Pacte civil de solidarité, introduced in France by law (Law No 99-944 '*Du pacte civil de solidarité et du concubinage*'): G Autorino Stanzione and P Stanzione 'Unioni di fatto e patti civili di solidarietà. Prospettive *de iure condendo*' in *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 prosettive* (Giappichelli, Torino, 2007) pp 34–37; P Rescigno 'Osservazioni sulla legge francese' in *I contratti di convivenza* (Giappichelli, Torino, 2002) pp 269–272; H

Click here to go to Main Contents

Following the example from beyond the Alps, in 2007 the so-called 'DICO' bill was drafted.[8] This was a proposal to regulate, protect and guarantee the rights and duties of persons durably living together. This bill was defeated together with the government in office, but the debate was promptly resumed in 2008 with the so-called bill 'DIDORE' on the rights and the mutual duties of the partners in a personal relationship.

At that point there was a phase of substantial inactivity, during which the Italian Parliament did not pass any bill on civil unions or same-sex marriage. On the contrary, various Italian courts and the European Court of Human Rights issued decisions on specific cases, in order to allow in Italy the recognition of status and of rights that were already recognised abroad in favour of Italian citizens residing outside Italian borders, or in favour of foreign citizens residing in Italy.

Lastly, in 2013, several bills concerning civil unions, cohabitation agreements, contracts of cohabitation and solidarity, mutual rights and duties of cohabiting partners, same-sex unions, de-facto unions, and registries for stable cohabiting partnerships were drafted. These many proposals, from across the political spectrum, were brought together in a unified bill of 2014, the so-called Cirinnà bill (named after the parliamentary proposer and rapporteur), then modified in 2015, examined and discussed in the Committee on Justice of the Parliament.

In 2015 and in 2016 this bill was amended in order to avoid on the one hand the opening (originally planned) of marriage to homosexual couples, and on the other hand the introduction of an institution, similar and alternative to marriage, which should be different from marriage only in name but not in the rights deriving therefrom. In particular, all references to Art 29 of the Constitution (which deals with the rights of the family, as 'a national society founded on marriage') were eliminated, and instead civil unions were connected to Art 2 of the Constitution, which safeguards social groups in broad terms. In addition, in order to facilitate the approval of the law, avoiding any obstruction to the bill, children's adoption by partners, either those in a cohabiting relationship or those civilly united, was erased from the bill.

The bill was thus going through several readings, passed on 11 May 2016 and enacted after the signature of the President of the Republic on 20 May 2016. The law came into force on 5 June 2016, even though it was still in need of integration through implementing governmental decrees.

Fulchiron 'Pacs et partenariats enregistrés en DIP français' in *Aspects de droit international privé des partenariats enregistrés en Europe – Publications de l'Institut suisse de droit comparé* (Schulthess, Genève, 2004), p 93.

8 G Oberto, 'I contratti di convivenza nei progetti di legge (ovvero sull'imprescindibilità di un raffronto tra contratti di convivenza e contratti prematrimoniali' (2015) *Famiglia e Diritto* 165–181.

III THE EXHORTATIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS AND OF THE ITALIAN CONSTITUTIONAL COURT

On 21 July 2015, the European Court of Human Rights decided the *Case Oliari and Others v Italy*[9] in a way that worked to admonish Italy to promptly update internal regulations on family law to ensure that all citizens enjoy the same rights and the same protections.

The dispute in question was brought by Mr Enrico Oliari, Mr A, Mr Gian Mario Felicetti, Mr Riccardo Perelli Cippo, Mr Roberto Zaccheo and Mr Riccardo Zappa, who complained that they were discriminated against by the Italian State because of their sexual orientation, for having been unable to contract either same-sex marriage or civil union with their respective partners. In substance, the plaintiffs accused Italy of infringing Arts 8, 12 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The case originated from three different events.

For the first two plaintiffs, their request of marriage banns presented to the civil registry of Trento was rejected.[10] Therefore the couple challenged the decision in courts of first and on second instance, being unsuccessful in both sets of proceedings.

It should be noted that the Court of Appeal of Trento, before deciding on the merits, suspended its judgment, referring to the Constitutional Court on the control of constitutional legitimacy of the legal provisions in force. The matter referred to the constitutional sieve, that is, certification that there was a constitutional issue, concerned the possible illegality of the Civil Code, which precluded the possibility of same-sex partners marrying, thus violating the principle of equality and the prohibition of discrimination on sexual orientation. The complaint of constitutional illegitimacy pertained to Arts 2, 3 and 29 of the Italian Constitution, which state as follows:

> '[Article 2] The Republic recognises and guarantees inviolable human rights, both as an individual and in social groups where personality is developed, and requires the fulfilment of obligations of political, economic, social solidarity, against which there is no derogation …
>
> [Article 3] All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an

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9 ECHR, Applications No 18766/11 and No 36030/11.

10 The marriage banns aim to inform third parties on the intention of the engaged couple to marry and to ascertain that there are no impediments to marriage. Requisites, rules and preconditions for the publication of the banns are in G Ferrando, 'Il matrimonio civile' in M Bessone (ed) *Famiglia e matrimonio in Trattato di diritto privato* (Giappichelli, Torino, 2010), vol I, pp 258–262.

Click here to go to Main Contents

> economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country …
>
> [Article 29] The Republic recognises the rights of the family as a natural society founded on marriage. Marriage is based on the moral and legal equality of the spouses within the limits laid down by law to guarantee the unity of the family.'

The Italian Constitutional Court,[11] with judgment No 138/2010, while agreeing on the fundamental right of everyone to live freely as couples, with corresponding rights and duties, however, considered that the legal recognition of a relationship should not necessarily take the same form of marriage, without this constituting inequality nor discrimination:

> 'it is true that the concepts of family and marriage cannot be considered "crystallized" with reference to the time when the Constitution came into force, because they have the ductility of constitutional principles and, therefore, they are to be interpreted taking into account not only the transformations of the whole legal system, but also the evolution of society and of customs. That interpretation, however, cannot go up to the point of affecting the core of the rule, modifying it in such a way as to include therein phenomena and problematic situations not regarded in any way when the Constitution was enacted … This meaning of the constitutional precept cannot be extended throughout hermeneutics, because this would not be a simple rereading of the system nor the abandon of a mere interpretative practice, but would mean to carry out a creative interpretation'

The Constitutional Court, with this historic decision has deemed the Italian family law in force back in the year 2010 in compliance with the constitutional principle of equality, even with express reference to Article 143 Italian civil code: 'with marriage, the husband and wife acquire the same rights and assume the same duties'.

According to the logical and legal reasoning of the Court, in fact, the fundamental right to live freely one's own personal relationship is not denied in the event that the law does not provide for same-sex marriage if it provides for alternative legal forms of partnership.

Even if it is true that these forms of partnership were not yet laid down under the 2010 Italian law (at the time of the ruling of the Constitutional Court), and therefore that the family law in force back then was anachronistic, it is equally true that the Constitutional Court cannot interpret the positive law in an evolutionary way, completely distorting its original scope and replacing the

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[11] Decision No 138/2010. See R Bin, G Brunelli, A Guazzarotti, A Pugiotto, P Veronesi (a cura di) *La 'societa' naturale' e i suoi 'nemici'. Sul paradigma eterosessuale del matrimonio* (Giappichelli, Torino, 2010); R Romboli 'Per la Corte costituzionale le coppie omosessuali sono formazioni sociali, ma non possono accedere al matrimonio' (2010) *Foro it* I, 1367; F Dal Canto 'La Corte costituzionale e il matrimonio omosessuale' (2010) *Foro it* I, 1369; PA Capotosti 'Matrimonio tra persone dello stesso sesso: infondatezza versus inammissibilita' nella sentenza n. 138 del 2010' (2010) *Quad cost* 361 et seq.

legislature.[12] With that, the Constitutional Court, called to decide incidentally and preliminarily on the dispute of Mr Oliari and Mr A., dismissed the question of constitutional legitimacy (related to the lacuna within the Italian legal system in relation to same-sex marriage), at the same time urging legislative action in order to reform the law.

Coming now to the second and third plaintiff couples, acting in front of the European Court of Human Rights in the framework of the abovementioned *Case Oliari and Others v Italy*, it must be said that even here the competent registries of civil status prohibited the marriage banns. Consequently, these couples first challenged these prohibitions within domestic courts, and finally addressed the European Court.

Therefore the European Court of Human Rights examined the issues, with particular reference to the bills discussed in the Italian Parliament attempting to introduce a new institution to establish, protect and ensure same-sex unions. It also took note of the non-opposition of the public opinion to the recognition of a legal status to homosexual unions, as attested by surveys and statistics on record;[13] and finally, it conducted a comparative investigation on the current practices in the other EU Member States and the United States of America.[14] On this basis, the European Court limited its examination to whether or not, in practice, there was a balance in the relationship between the private interest of the applicants to join in marriage and the public interest in having the Italian Government, in the discretionary exercise of its power and performance of its tasks, decide modalities and times for the reform of domestic family law.

Comparatively assessing such interests at stake, the European Court of Human Rights finally held that the discretion of the Italian Government shall also include the decision on which type of legal recognition to confer on same-sex unions. There was already no doubt whether to legally recognise same-sex unions, in light of the uniform jurisprudence made by all levels of domestic courts.

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[12] On the role and tasks of the Italian judiciary, and its relationship with the European Court of Human Rights, D Galliani, '"E' più facile perdonare un nemico che un amic". La Corte europea dei diritti dell'uomo, la giusta giustizia, la giurisprudenza consolidata, l'ordinamento italiano' in *I diritti umani in una prospettiva europea. Opinioni concorrenti e dissenzienti (2011-2015)* (Giappichelli, Torino, 2016) p 5 et seq.

[13] The European Court of Human Rights took into account the public opinion polls, in line with the possibility accorded by German law under § 138 BGB. On the comparison among the Italian *buon costume*, the French *bonnes moeurs* and the German *gute Sitten,* U Breccia 'Contrarietà al buon costume' in G Alpa, U Breccia and A Liserre (eds) *Il contratto in generale*, in Trattato di diritto privato (editor M Bessone) (Giappichelli, Torino, 1999) vol III, p 13 et seq.

[14] For an overview of the regulation on same-sex unions in the United States, Canada, Australia, Denmark, Norway, Sweden, Iceland, the Netherlands, Germany, etc, M Sesta 'Verso nuove trasformazioni del diritto di famiglia italiano?' (2003) *Familia, fasc 1*123. For Germany, N Dethloff 'Die Eingetragene Lebenspartnerschaft – Ein neues familienrechtliches Institut' (2001) NJW 2598–2604.

> 'in the absence of a prevailing community interest being put forward by the Italian Government, against which to balance the applicants' momentous interests as identified above, and in the light of domestic courts' conclusions on the matter which remained unheeded, the Court finds that the Italian Government has overstepped its margin of appreciation and failed to fulfil its positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions.'

In conclusion, within this case, the European Court of Human Rights attested the violation of Art 8 of the European Convention on Human Rights, which specifically protects the 'right to respect for private and family life'. Consequently the Court condemned Italy to compensate the applicants.[15]

Beyond the condemnation, indeed derisory, Italy suffered as a result of the *Case Oliari and Others v Italy*, the decision of the ECHR marked a milestone in the slow path of Italian recognition of the legal status of civil unions. Indeed, the European Court of Human Rights urged the Italian Government to reform its domestic family law, which, even if was not unconstitutional, was still anachronistic,[16] inadequate to the needs of contemporary society, and unable to ensure the full protection of all citizens.

IV THE ATTEMPT OF THE JUDICIARY TO REFORM FAMILY LAW

Pending legislative intervention to reform family law, the Italian courts were repeatedly called upon to rule on issues relating to the protection of the constitutional right to equality, the principle of non-discrimination and the right to gather together in social groups provided by Art 2 of the Constitution. In practice, these groups may also take different forms from those of heterosexual marriage, which until 2016 was envisaged by the Italian civil code as the only legally acceptable union.

Thus, same-sex unions were gradually recognised by judicial decisions, which originally released opposing judgments. In fact, given that there was no legislation in this area, until 2016 it was up to each and every individual judge to decide whether or not to accept the requests submitted to the court, mostly relating to the refusal to grant marriage banns, as attested by the following judgments released by the Supreme Court.

The judgment No 4184 of 15 March 2012 of the Court of Cassation, Section I, while rejecting the request of recording of the marriage already celebrated

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[15] On the protection of the right to marry as provided by Art 12 of the European Convention on Human Rights, the ECHR has gradually overruled its own decisions. A detailed analysis of the subsequent overruling decisions is in G Oberto *I diritti dei conviventi. Realtà e prospettive tra Italia ed Europa* (CEDAM, Padova, 2012) pp 21–25.

[16] On the comparison with foreign legislations, providing for registered partnerships: G Autorino *Manuale di Diritto di Famiglia* (Giappichelli, Torino, 2016) pp 646–650.

abroad by a same-sex couple, on the assumption that the union was not meeting the Italian requirements provided for marriage, placed emphasis however on the right to family life guaranteed by Art 8 of the European Convention on Human Rights. As if to say that the Supreme Court sought the Parliament to reform family law (as it was already requested by the Constitutional Court with the foresaid judgment No 138/2010). Later on, the same Section I of the Supreme Court, with the judgment No 2400 on 9 February 2015, 'excluded that the foreign marriage title may be contrary to the public policy, even though it is recognised as unable to produce the effects of the marriage bond within our legal system', in line with the judgment No 4184/2012 of the Court of Cassation, which had already held that 'the impossibility to register same-sex unions stems no longer from their "non-existence" … and not even from their "invalidity", but from their inability to produce any legal effect within the Italian legal system, such as those precisely produced by marriage'.[17]

Finally, with the judgment No 8097 of 21 April 2015, the Court of Cassation, Section I, authorised a couple, already lawfully wedded, to retain the status of spouses even after the rectification of sexual identity of one of the two,[18] thus allowing that same-sex couple to remain joined in marriage. Support of the decision can be attributed on the one hand to the need to protect an existing situation, which as a result of the serious gap in legislation could have been suddenly deprived of legal recognition, and on the other hand to protect the children of the couple, born in wedlock.

It must be said, however, that the issue of same-sex unions was also addressed by many domestic courts of first instance, which, solely by reason of the

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[17] See C Sgobbo 'Il matrimonio celebrato all'estero tra persone dello stesso sesso: la Cassazione abbandona la qualifica di "atto inesistente" approdando a quella di "non idoneo a produrre effetti giuridici nell'ordinamento interno" – Same-sex Marriage Celebrated Abroad: the Supreme Court abandons the Label of a "Void Act" Switching to an "Act Incapable of Producing Legal Effects in our System"' (2013) *Giustizia Civile*, fasc 10, 2183 et seq: 'The ruling of the Cassation, while denying constitutional foundation to the right to same-sex marriage, says that same-sex unions are included in the concept of "social formations" referred to by Article 2 of the Constitution, when they are unions understood as stable cohabitations between persons of the same sex; these last ones have the right to live freely a couple relationship (which, must be remembered, in the judgment of the Court can also be secured with different tools from that of equating marriage between same-sex unions and marriage). Again, the Constitutional Court referred to the Parliament, in the exercise of its sole discretion, to identify the forms of guarantee and recognition for the above unions'. See also the comparison between the judgments cited above of the Italian Court of Cassation, and the decision of the ECHR in the *Case of Schalk and Kopf v Austria* (Application No 30141/2004), in F Angelini, 'La Corte di cassazione su unioni e matrimoni omosessuali: nell'inerzia del legislatore la realtà giuridica si apre alla realtà sociale' (2012) *Giurisprudenza Costituzionale*, fasc. 2, 1520.

[18] In accordance with the provisions of the Constitutional Court within judgment No 170/2014, which declared the unconstitutionality of Art 31, sixth paragraph of the Legislative Decree No 150/2011 where it did not provide for spouses to make the request to keep alive the marriage (possibly in another form legally admissible) even after the rectification of attribution of sex.

personal understanding of each individual judge, sometimes accepted and sometimes rejected claims of same-sex couples seeking to obtain the legal recognition of their union.

Thus the Court of Grosseto, in its judgment of 17 February 2015[19] considered 'apt to be registered the certificate of marriage celebrated abroad between homosexual persons, since there is in the Italian law no impediment to the transcript in the registers of civil status of the certificate of marriage contracted abroad'. The registration consists of a compliance certification (attesting that the act was performed in compliance with domestic rules) and provides evidence of the marriage, aimed therefore not to constitute the bond of marriage, but to give notice to third parties. While in theory this judgment enabled the plaintiffs to be considered and referred to as spouses in Italy, in fact it provided their foreign marriage with no legal effect inside Italian borders: they could not enjoy all the rights which spouses are entitled to under Italian law.

On the contrary, the Court of Appeal of Milan, Family Division, with the judgment No 2286/2015: 'although same-sex marriage provides for the recognition of the principles of equality and non-discrimination – and the fact that access to same-sex marriage is allowed by many countries within the European Union, and also from European countries outside the Union, suggests that the effect of same-sex marriage is not in conflict with public policy; the legal vacuum caused by the inertia of the legislature cannot be filled through the court's decision. The legislature still has not adjusted to multiple indications of national courts, the European Court of Human Rights and also the European Parliament, whose resolutions have encouraged EU member states to contribute to the reflection on the recognition of marriage and civil unions between persons of the same sex as a political, social, human rights' and civil rights' issue'.[20]

To resolve the dispute between the decisions mentioned above and the many other ones of all levels, the Ministry of Interior with the provision ('circolare') dated 7 October 2014, finally ordered the Prefects[21] to provide *ex officio* for the cancellation of any same-sex marriage record from civil registries across Italy. This provision was deemed legitimate (in relation not to its content, but to the exercise of the functions by the Ministry) by the Council of State, Section III, with the decision No 5043 of 4 November 2015,[22] following the decision No 2037 of 29 September 2015 from the Regional Administrative Court of Milan, which instead held that the Prefect, exercising the power to supervise the

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19 In *Fam dir* (2014) p 672.

20 Among others, the European Parliament has adopted two legislative resolutions, No 2011/0059 CNS on matrimonial property arrangements and No 2011/0060 CNS on the property consequences of registered partnerships, as well as other non-legislative resolutions (e g No 2013/2183 INI).

21 The Prefect is an administrative body, representing the Italian Government at the local level; it hierarchically depends from the Ministry of Interior.

22 See *Foro Amministrativo* (2015) 11, p 2760.

offices registering civil status, had no authority to intervene or correct the already-performed record of a same-sex marriage contracted abroad. This is because the rights transcribed at the civil status' registry are individual and subjective, whose concrete existence should be evaluated by a civil court, and not by an administrative one.

The analysis of the case law referred to above, provides the framework for the state of extreme confusion and uncertainty that characterised the matter under review until the entry into force of the 2016 reform. In fact, often not only had the civil courts expressed different opinions on similar issues, but also the administrative courts decided related matters, sometimes accepting and sometimes rejecting similar claims.

On a closer look, however, a common thread emerges in all these judgments, and it is the common complaint about the legislative gap within the Italian civil code, which, indifferent to the counsel received even by the European Court of Human Rights, still did not legally recognise other unions except marriage founded on the assumption of heterosexuality of the spouses.

Thus, on several occasions the request to reform Italian family law was even carried out by Italian civil and administrative courts, responding to needs directly arising from society.

V THE COHABITATION PACTS OF THE COUNCIL OF ITALIAN NOTARIES

As of 2 December 2013, on the initiative of the Council of Italian Notaries, couples cohabiting as husband and wife ('more uxorio') were given the opportunity to sign before a notary a cohabitation agreement, to regulate the property regime of the union during the life of the relationship and even after its breakdown.[23] Therefore, the contract in question could relate to the criteria for participation of the two partners in the common expenses, the allocation of the ownership of the goods purchased during the cohabitation, use of the residential home and the choice of which should enjoy the family home in case of termination of the cohabitation, etc.

Originally, the notary project aimed to change the Civil Code, inter alia, by inserting a new chapter that contained specifically a number of provisions

[23] Already in 1997, the Council of Italian Notaries drafted a project for the introduction of a 'Family Pact' and an 'Enterprise Pact', which then resulted in two bills (endorsed by Becchetti and Pastore) never passed into law. Later, the Law No 55/2006 introduced Art 768 *bis* of the Civil Code on the family pact, which allowed family members to dispose after death solely of the family enterprise, thus avoiding the ban for inheritance pacts provided by Art 458 Civil Code. The family pact applied strictly to members of a family founded on marriage. A Zoppini 'Profili sistematici della successione "anticipate" (note sul patto di famiglia)' in MV De Giorgi, S Delle Monache and G De Cristofaro (eds) *Studi in onore di Giorgio Cian* (CEDAM, Padova, 2010) p 2547 et seq.

Click here to go to Main Contents

regulating cohabitation agreements. This bill was never read in Parliament, but the Council of Italian Notaries urged notaries to draw up cohabitation pacts in line with the contractual autonomy of the parties, provided by Art 1322 Civil Code ('The parties are free to determine the contents of the contract within the limits imposed by law. The parties may also conclude contracts that do not belong to the types having a particular discipline provided by the code, as long as they realize interest worthy of protection under the law').

It must be noted that a contract apt to regulate the mutual rights and duties between two individuals capable of acting under the law could actually be signed even before 2 December 2013, when the Council of Italian Notaries named this type of contract 'cohabitation pact', limiting however its scope to cohabiting couples within an affective relationship.[24] The real novelty of the notary proposal consisted in urging the government to create a register for cohabitation pacts, which was supposed to alter the registries for civil status as well.

The cohabitation pact drawn up by notaries in 2013[25] (partly taken over from the 2016 reform), that did not become law, was a source of rights and duties as would be any other contract between subjects capable of acting under the law. It could even regulate maintenance and education of the offspring, but it could not provide rules on specific personal relationships that were not definable *ex ante* such as exclusive custody of any offspring.

As a matter of fact, the Council of Italian Notaries wanted to show Parliament that, notwithstanding the inertia of the legislature, those relationships, which were denied any valid legal recognition by means of positive law, could be legally regulated anyway.

Even this notary initiative has therefore called for a legislative intervention to reform family law, to ensure a minimum level of protection to stable cohabiting partnerships. The outcome of this call has been successful, since, as discussed below under para 8, the current discipline of cohabitation agreements set by the Law No 76/2016 follows the same pattern as the notary project above.

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[24] Cohabiting agreements were in fact already used (and examined by the doctrine) long before the 2013 notary project was released, as attested by A Zoppini 'Tentativo d'inventario per il "nuovo" diritto di famiglia: il contratto di convivenza' in *I contratti di convivenza* (Giappichelli, Torino, 2002) pp 1–29; L Balestra 'Contratto di convivenza, transazione e adempimento dell'obbligazione naturale' (2011) 3 *Rivista Trimestrale di Diritto e Procedura Civile* 921–927.

[25] Examples of these pacts may be found in E Rossi *Matrimonio, Unioni civili e Convivenze* (UTET, Vicenza, 2016) pp 156–182.

VI THE LAW NO 76 OF 20 MAY 2016 SO-CALLED CIRINNÀ

Law No 76 of 2016, which reformed Italian family law, introduced regulations and provisions on civil unions and cohabiting partnerships. Some introductory considerations must be made.

In the first place, the reform law consists of a single article, whose first 35 paragraphs relate to civil unions (for same-sex couples), and the subsequent paras 36-69 relate to cohabitation (heterosexual or homosexual).[26]

Secondly, the reform does not introduce a new Book within the Civil Code, but relegates the field in question to a special law, amending only marginally the Civil Code, the Code of Civil Procedure and the International Private Law (for the necessary related coordination). A similar choice was already made when divorce was introduced into the Italian legal system, and its regulation was precisely set in a special law and not inside the Civil Code, on the assumption that the institution was alien to the Italian legal tradition and culture.

Thirdly, the legal recognition of civil unions and of cohabiting partnerships is based on the reference to the social groups protected by Art 2 of the Constitution, and not instead on Art 29 of the Constitution, which continues to take care only of the family founded on marriage. Therefore, the reform does not extend the institute of marriage to same-sex couples, but it establishes *ex novo* a different institution, also constitutionally protected.

Finally, the reform under examination is not completed by means of the 2016 law, since the Government has to provide for the necessary integrations implementing various decrees. It was supposed to do so in the 6 months following the entry into force of the law, but the Government has not fully complied with this task, thus affecting the concrete results of the reform (see Section IX).

VII CIVIL UNIONS FOR SAME-SEX COUPLES

The 2016 reform legally recognised civil unions, namely the emotional relationships between persons of the same sex and of age.

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[26] The choice of the legislature to carry out the reform by means of a law consisting of a single long article has been largely criticised, as the architecturally complex structure of the Law No 76/2016 complicates the interpretation of an institute per se not easy (since it is completely new) and yet essential. Among others, L Querzola 'Riflessioni sulla legge in materia di unioni civili' (2016) *Rivista Trimestrale di Diritto e Procedura Civile*, fasc3, 843: 'the fast-law cannot be afford headings (for this reason, therefore, it writes paragraphs rather than articles), and perhaps even speak of interpretation will become a luxury, as all the things that require time and thought'.

Click here to go to Main Contents

The union is established by declaration in front of the civil registrar and the presence of two witnesses.[27] Unlike what is prescribed for marriage, published banns are not required in order to enter into a civil union, but those who wish to join civilly must declare that there are no impediments, ie no previous marriage, civil union, interdiction for mental infirmity, convictions for murder consummated or attempted against those being married or civilly united with the other party, the absence of kinship, affinity or adoption (in the same degree suitable for impeding marriage). The possible existence of impediments, if ascertained before appearing in front of the civil registrar, determines the inability to proceed further with the union formalisation; but if any obstacle emerges later, when the union has already been registered, the union is affected by nullity.

While declaring that there are no impediments, the partners ask the civil registrar to take their declaration of union. The civil registrar has 15 days from the date of the request to examine the files. Then, if the accuracy of the statements is established and there are no impediments, the registrar gives notice to the couple of the positive outcome of the control, and orally receives the union statement in the presence of the witnesses. Subsequently the registrar collects the union statement in written form and submits it for the signatures of all present. In their declaration, the parties may opt for an alternative property regime to that of the legal community property,[28] and may also choose the surname of the united couple.

The declaration, which must meet the requirements set by the Government with the Legislative Decree No 5/2017,[29] is entered in the register[30] for civil unions and noted on the birth registries of both partners.[31]

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[27] G Ferrando 'La disciplina dell'atto. Gli effetti: diritti e doveri' (2006) *Famiglia e Diritti* 894–896, for a detailed description of the declaration, necessary to constitute the civil union.

[28] The parties to the civil union are allowed to change their property regime, in the same way as provided for spouses by Arts 162 et seq Civil Code, that is to say with a notary pact to then be noted on the civil registry. On the property regimes available under Italian law, see G Ferrando 'Comunione convenzionale, separazione dei beni, fondo patrimoniale' in M Bessone, M Dogliotti and G Ferrando *Giurisprudenza del Diritto di Famiglia* (Giuffrè, Milan, 2002), vol II, pp 527–613; G Bonilini, A Genovese, M Gorini, A Tullio and F Volpe *La comunione legale tra coniugi* (UTET, Milan, 2016); A Paladini 'La comunione legale' in S Patti and MG Cubeddu (eds) *Diritto della famiglia* (Giuffrè, Milan, 2011) p 231. On the peculiar dispositions to be applied to the community property under Italian law, which represents a 'compromise' as opposed to the regime of the communion of increases provided by, among others, the German, French and Swiss legal system, see MG Cubeddu 'Modelli uniformi di regime patrimoniale convenzionale' in *Introduzione al diritto della famiglia in Europa* (Giuffrè, Milan, 2008) p 258 et seq.

[29] See Section IX(a).

[30] Law No 76/2016 makes reference to a temporary register. Transience is due to the fact that the reform envisaged a later-delegated decree that would specify the final shape of the register. The decree in question was adopted only in February 2017 (see Section IX), so that until then each municipality has set the requirements and the rules to keep the register.

[31] The registration of the civil union on the birth certificates of both partners, held at the civil registry, goes under the Italian definition of 'trascrizione' of the civil union, which is carried out by analogy with the procedure followed in case of marriage, examined in E Giacobbe *Il matrimonio. L'atto e il rapporto,* vol I (UTET, Torino, 2011) pp 514–547.

The 2016 reform provides a further method to constitute the union: in fact, if one of the two spouses joined in marriage obtains the gender reassignment (so-called rectification of gender), marriage is automatically converted into civil union, unless contrary intention of the couple.

(a) The rights and duties of persons civilly united

In line with what is provided for the relationship of marriage, the 2016 law provides for equal rights and mutual duties between the members of the civil union.[32] In fact, both parties are held to moral and material mutual support, to cohabitation and to contribute to the family management within the limits of their respective capacities and concrete possibilities. There are also implied duties, which arise from the union, such as that relating to the emotional bond and mutual solidarity. However, there is no obligation to mutual fidelity: this omission has been the subject of extensive debate, and the doctrine has justified it by saying that the duty of fidelity is included within the wider duty of care, expressly provided for by Law No 76/2016, Art 1, para XI.

Furthermore, the partner must be preferred to anyone else (if possible) as a guardian (within the proceeding for 'amministratore di sostegno'[33]), and is included among the persons entitled to apply for recognition or revocation of the interdiction or inability for disempowered adults.[34]

The legal property regime for a civil union is community property: the provisions regarding the assets' fund for the needs of the family,[35] community property, conventional communion, separation of assets and family enterprise are all applicable to the parties to a civil union, paralleling marriage.[36]

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[32] M Sesta 'La disciplina dell'unione civile tra tutela dei diritti della persona e creazione di un nuovo modello familiare' in (2016) *Famiglia e Diritto* 881 et seq.

[33] G Autorino Stanzione and V Zambrano *Amministrazione di sostegno. Commento alla legge 9 gennaio 2004, n. 6* (IPSOA, Milan, 2004); P Cendon and R Rossi *Amministrazione di sostegno. Motivi ispriratori e applicazioni pratiche* (UTET, Torino, 2009); A Farolfi *Amministrazione di sostegno. Casistica e formule* (Giuffrè, Milan, 2014).

[34] Interdiction or inability may be requested by the spouse, relatives within the fourth degree, relatives in law up to the second degree, the guardian or trustee and the prosecutor, upon notification by third parties.

[35] The assets' fund for the needs of the family (*fondo patrimoniale* in Italian) is an institute provided by Art 167 Civil Code et seq, which gives the possibility to married couples to protect the family home and the other movables (including negotiable instruments) from creditors, by means of establishing a separate fund. *Ex multis,* A Mora 'Fondo patrimoniale, opposizione all'esecuzione ed onere della prova' in *La Nuova Giurisprudenza Civile Commentata*, vol I, 31–39; T Auletta 'Riflessioni sul fondo patrimoniale' (2012) *Famiglia, Persone e Successioni* 326; M Bianca *Vincoli di destinazione e patrimoni separati* (CEDAM, Padova, 1996) p 48 et seq.

[36] The civil union's discipline refers to the whole Section I, of the Chapter VI of the Title VI within the Book I of the Italian Civil Code, on patrimonial issues between spouse, except for Arts 159, 160, 161, 165 and 166 bis cc (for which the reform provides similar rules). G Oberto 'I rapporti patrimoniali nelle unioni civili e nelle convivenze di fatto' in M Blasi, R Campione, A Figone, F Mecenate and G Oberto (eds) *La nuova regolamentazione delle unioni civili e delle convivenze* (Giappichelli, Torino, 2016) pp 39–44: the author explains the exception made by

Within succession law, the parties to a civil union are mutually heirs by law and entitled to reserve portions.[37] Therefore, in the absence of the will of the deceased, the surviving partner is entitled to a share of the estate, to be calculated as for a spouse.[38]

(b) The dissolution of the civil union

The dissolution due to the will of the members to the civil union is carried out in two successive stages.

The parties, together or separately, must give notice to the civil registrar of their intention to dissolve the union; then, within 3 months, individually or jointly they can ask the court to order the dissolution.[39] The reform does not clarify what methods should be adopted for the declaration to the civil registrar; thus, within the maximum negotiating autonomy of the parties, the declaration should take the form laid down by Art 12 of Law decree No 132/2014, converted into Law No 162/2014 on the agreement of the spouses before the mayor to be performed in case of separation, dissolution or termination of the civil effects of marriage, change of separation or divorce conditions.

In substance, the declaration of the intention to dissolve the union should be a statement to be made individually or jointly, with the optional assistance of a lawyer, to clearly express the intention to dissolve the union. If the dissolution comes from a joint statement, it can provide for the entire regulation of the

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Law No 76/2016 for the articles above mentioned as a way to avoid the complete resemblance of the civil union's regime to that of marriage, in line with the requests of those opposing the reform.

37 V Tagliaferri 'La successione degli uniti civili' in *ilFamiliarista.it* (Giuffrè, Milan, 2016); G Dosi *La nuova disciplina delle unioni civili e delle convivenze* (Giuffrè, Milan, 2016) pp 75–78; P Schlesinger 'Successioni (diritto civile): Parte generale' in *Noviss. Digesto it.,* XVIII edn, p 748 et seq; F Giardini *Testamento e sopravvenienza* (CEDAM, Padova, 2003) p 57 et seq on the relevant grounds for will dispositions, which have to respect the reserved portions.

38 The Italian provision on inheritance included in the Law No 76/2016 has to be applied in accordance with 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. The regulation detects the law applicable to the succession: in fact, even though the general rule is that succession is governed by the law of the country where the deceased was usually living at the time of death, it may be that the deceased was opting instead for the law of the country of nationality. See A Bonomi and P Wautelet *Le droit européen des successions. Commentaire du Règlement n° 650/2012 du 4 juillet 2012* (Bruylant, Bruxelles, 2013). On the practice of forum shopping, in relation to family issues, and in particular on the research of a succession law which would protect the partner in a same-sex union, in the event that either the law of the country of residence or that of the country of origin does not provide for same-sex unions or marriages, A Davi' and A Zanobetti *Il nuovo diritto internazionale privato europeo delle successioni* (Giappichelli, Torino, 2014) pp 5, 171–176.

39 F Danovi 'L'intervento giudiziale nella crisi dell'unione civile e della convivenza di fatto' in (2016) *Famiglia e Diritto* 881 et seq.

dissolution, but it cannot transfer assets between the parties. Immediately after declaring their will to the civil registrar, the parties put it in written form and sign it.

Three months after this declaration, the parties to the civil union can demand the judicial court to dissolve the union or can apply for negotiation, which has to be carried out with the assistance of at least one attorney per party.[40] It is therefore a sort of direct divorce, without previous legal separation.

The civil union is also dissolved for all other reasons provided for the dissolution of marriage,[41] ie because of death (or presumed death), foreign annulment or divorce, particularly serious criminal offences, or gender rectification.

Only with the final judicial decision is the union dissolved and inheritance and patrimonial rights extinguished. Thus, only after dissolution, the common property regime and the assets' fund for the needs of the family are extinguished, may each party use only the personal surname given at birth, and may alimony be ordered in favour of the economically weaker partner for solidarity purposes.[42]

(c) The invalidity of the civil union

Law No 76/2016 lists in detail the impediments, which will declare void an already celebrated civil union.

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[40] Under Art 6 Law Decree No 132/2014, converted into Law No 162/2014. On assisted negotiation, M Sesta 'Negoziazione assistita e obblighi di mantenimento nella crisi della coppia' in (2015) *Famiglia e Diritto* 295–305; F Tommaseo 'Separazione per negoziazione assistita e poteri giudiziali a tutela dei figli: primi orientamenti giurisprudenziali' in (2015) *Famiglia e Diritto* 392 et seq; M Rossi 'Il procedimento di negoziazione assistita per le soluzioni consensuali di separazione e divorzio' in G Cassano (ed) *La famiglia dopo le riforme* (Giuffrè, Milan, 2015) pp 365–397. See also MD Panforti 'Mediation and Child Welfare: A Comparative Perspective – The Italian Experience' in *The Role of Self-determination in the Modernisation of Family Law in Europe* (Documenta Universitaria, Girona, 2006) pp 203–210 on extrajudicial settlements of family disputes, with a special focus on the protection of the offspring.

[41] On substantial preconditions for divorcing under Italian law, G Contiero *Le procedure di separazione, divorzio e a tutela dei figli nati fuori del matrimonio* (Giuffrè, Milan, 2016) pp 288–310.

[42] On the payment of alimony and maintenance duties after separation or divorce, V Zambrano and F Guglielmi 'L'esecuzione dei provvedimenti in materia di separazione e divorzio' in G Oberto (ed) *Gli aspetti patrimoniali della famiglia. I rapporti patrimoniali tra coniugi e conviventi nella fase fisiologica ed in quella patologica* (CEDAM, Pdova, 2011) pp 1231–1276. The rules on alimony, even though originally provided for separation and divorce only, is now (after the 2016 reform) applicable to civil unions and cohabiting partnerships as well. See also S Patti 'Obblighi di mantenimento dopo la separazione e il divorzio' in *Le 'nuove famiglie' e la parificazione degli status di filiazione ad opera della L. 219/2012* (AA.VV.) (Gruppo24Ore, Milan, 2015) pp 249 et seq: the author reconnects the order of alimony support to the solidarity principle, applied by the Italian legislature to the law of the family even after the dissolution of the relationship.

In addition to the marriage impediments, there is the possible existence of another previous marriage or civil union. All interested parties (the parties to the union, their respective relatives in linear and collateral line, the prosecutor, and other people which may have a legitimate and actual interest), in all cases of nullity, are given standing to verify the validity of the union.

However, the fact that the partners are heterosexual or minors is not an impediment to the civil union, but can later determine contract invalid.

Furthermore, the party to the union can contest it for defects of consent, ie in the event that consent was extorted by violence, by means of fear of exceptional gravity or by mistake on the identity or the essential qualities of the other party,[43] provided that the parties did not live together for one year following the cessation of violence, the discovery of the mistake or of the underlying cause of fear. The judicial claim, if successful, leads to the declaration of nullity of the civil union.

Nullity is pronounced retroactively whenever it cannot be rectified (eg in case of bigamy), whereas in the remaining cases of impediment, where the relationship may be ratified by cohabiting together for over one year after the cessation of the impediment itself (as in cases of mistake on essential qualities), the effects of the declaration that the union is void date back to the date of filing.

VIII LEGAL REGULATIONS FOR COHABITING PARTNERSHIPS

The 2016 reform law also regulates cohabiting partnerships, which are granted civil effects.[44]

Thus, it is absolutely necessary to clearly frame cohabiting partnerships, so as to determine in objective terms their existence in specific cases.

[43] B De Filippis *Trattato breve di Diritto di Famiglia* (CEDAM, Padova, 2002) pp 125 et seq; P Rescigno *Matrimonio e Famiglia. Cinquant'anni del diritto italiano* (Giappichelli, Torino, 2000) pp 50 et seq.

[44] Until 2016, the cohabiting partnership was also referred to as a *de facto* or a *more-uxorio* partnership. Nevertheless, this last definition (*more-uxorio* partnership) is no more used for the purposes of the reform, as cohabiting partnerships are available for heterosexual couples as well as for same-sex ones. On *de facto* partnerships: F Gazzoni *Dal concubinato alla famiglia di fatto* (Giuffrè, Milan, 1983) pp 58–60; F D'Angeli *La famiglia di fatto* (Giuffrè, Milan, 1989); D Riccio *La famiglia di fatto* (CEDAM, Padova, 2007); L Farenga 'In tema di rapporto "more uxorio", famiglia di fatto e impresa familiare' (1980) *Dir fall* II, 613; M Bessone, G Alpa, A D'angelo, G Ferrando and MR Spallarossa *La famiglia nel nuovo diritto. Principi costituzionali, riforme legislative, orientamenti della giurisprudenza* (Zanichelli, Bologna, 1999) pp 69–78. The authors of this last contribution highlight the strict connection between divorce and *de facto* families (as many divorced persons are then entering *de facto* families, instead of remarrying), and the subsequent need to regulate *de facto* families by means of special legislation (in regard to labour law, tax law, minors' protection, maternity leave, lease contract, etc).

The definition offered by para 36 of Art 1, Law No 76/2016 is: 'The term "de facto cohabiting" refers to two persons of age, firmly joined by emotional ties and providing for mutual moral and material assistance, not bound by kinship, affinity or adoption, by marriage or civil union.' The cohabiting partnership presupposes a provable stable situation, between two unmarried persons, neither joined in civil union nor in marriage, which may be regulated by a cohabitation agreement.

Suitable evidences to prove the existence of cohabitation is not specifically defined by law; the parties may prove they live together by producing a common residence certificate (even if the cohabitation partnership does not entail the obligation of living together[45]), by means of witnesses, of receipts attesting the payment of utilities, etc. Proving the emotional bond between the two partners is a requisite for the legally recognised cohabiting partnership.

The evidence of the sentimental relationship is met in the event that the couple has entered into a cohabitation agreement made in solemn public form or with a private deed signed and authenticated by a notary or lawyer (on pain of voidness). In order for it to bind third parties, it is necessary that the practitioner who made it transmit it within 10 days to the civil registry of the municipality of residence, asking to take note of it.

Paragraph 50 of Art 1 of the law in question restricts the content of the agreement to the regulation of patrimonial relations because of the life in common. That is, the parties may establish in writing how each will contribute to family management and may also opt for the legal regime of community property (editable at any time).

Moreover, even in the absence of a cohabitation agreement, the partner who has for some time worked in the family enterprise of the other, has the right to share profits and assets purchased with the profits, as well as to share the increases in the enterprise.[46] The court may also order alimony payments in case of need, to be calculated in proportion to the duration of cohabitation.[47] And if the family home is in the exclusive use of the partner filing for cohabitation dissolution, that same partner must give the other party at least 3 months' notice to exit the house.

Thus from cohabiting partnerships arise patrimonial rights, sometimes secured by the parties by means of entering in the cohabitation agreement (while exercising their negotiating autonomy), and sometimes instead recognised authoritatively by law.[48]

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[45] Civil Court of Milan, 9 March 2004, in *Danno resp* (2005) p 80; D Riccio *La famiglia di fatto*, op cit, p 75.

[46] D Vittoria and MC Andrini *Azienda coniugale e impresa familiare* (CEDAM, Padova, 1989).

[47] Alimony provisions are also due after cohabitation in some states of the US, as emerges from the analysis of statute laws and jurisprudence in CL Starnes 'I'll be watching you: alimony and the cohabitation rule' (2016) 50(2) *Family Law Quarterly* 261–301.

[48] On unintended consequences that may arise from a law reform, with specific regard to Scottish

Click here to go to Main Contents

After all, it is not granted that people in a de facto partnership wish to give legal relevance to their union. The new law of 2016 entrusts civil effects even to those relationships between persons who have not shown any willingness to formalise and regulate their bond. It is patent that if Italian courts will opt for the widespread recognition of cohabitation (even after short periods of cohabitation), there will be legal uncertainty.

In fact, as cohabiting partnerships cannot be objectively detected because of parameters defined *ex ante*, and can still have binding effects for the parties (and even patrimonial effects), there will be a real risk of interpretative drift. In the event the parties do not sign any cohabitation agreement, it will be up to the judge to assess whether the cohabitation pleaded by a party is per se sufficient to conclude that both parties have intended to live together in a cohabiting partnership as provided by the 2016 law. Consequently, it could happen that one court deems cohabitation for a month sufficient and another instead requires at least one year of cohabitation to apply the provisions of the 2016 law, with obvious divergence in the outcomes across Italy.

Lastly, perhaps the most remarkable aspect of the new regulation of cohabitations concerns the other fundamental rights granted to cohabiting partners. In line with the rights of spouses and of partners in a civil union, Law No 76/2016 grants the cohabiting partner the right to visit in the hospital and in prison, the right to appoint the other party as guardian and as the person in charge of making urgent medical decisions, or deciding on organ donation and funeral celebrations.

It should also be highlighted that reconstituted families formed by persons legally separated but not divorced are totally excluded from all the rights above mentioned. For reconstituted families, as the previous marriage is not dissolved (or cessation of its civil effects have not been decreed, in case of a religious marriage), even though the new couple is durably living together, there is no benefit from the protections provided for by the 2016 reform.

Statistical data show that in 2014, there were 89,303 legal separations and 52,355 divorces, echoing a constant trend begun in 2008.[49] In fact, many people, even though legally separated, are not divorcing for various reasons: to keep mutual inheritance rights, to avoid further legal expenses, for sentimental reasons. To these many reasons, the 2016 law could add a new and further one: namely to avoid being bound by law to pay alimony to the former cohabiting

family law, J Miles, F Wasoff and E Mordaunt 'Reforming family law – the case of cohabitation: things may not work out as you expect' (2012) 34(2) *Journal of Social Welfare and Family Law* 167–177.

[49] Istat, *Report statistiche, Matrimoni, Separazioni e Divorzi*, year 2014, www.istat.it, p 1. The trend mirrors the increasing tendency to cohabitate rather than to get marry, which has been observed also in the United States: LW Waggoner 'Marriage is on the decline and cohabitation in on the rise: at what point, if ever, should unmarried partners acquire marital rights?' (2016) 50(2) *Family Law Quarterly* 215 et seq.

partner. If one lives durably with the same partner, but is still bound by a previous valid marriage, the provisions of Law No 76/2016 on cohabitation do not apply.

(a) The dissolution of the cohabiting partnership

A cohabiting partnership is dissolved by death, marriage or civil union (between the two partners, or with a third party), or as a result of the unilateral termination received or authenticated by a notary or a lawyer.

In the event of the partner's death, the survivor may continue to live in the home of the deceased for 2 more years, or for the same length of time as the cohabitation up to 5 years. If the surviving partner has minor or disabled children, he/she has the right to continue living in the same house for not less than 3 years. In the event that the survivor gets married, civilly united or enters in a new cohabiting partnership the benefit ceases.

In this regard, although not specified, it is patent that the law of 2016 deals exclusively with cases of cohabitation dissolution in the presence of children born from previous relationships of one of the partners (step-parent families), since if the children are in common, the enjoyment of the family home is regulated by Art 337 sexies Civil Code. In fact Art 337 sexies Civil Code grants the right of enjoyment of the house 'taking primarily into account the interest of the offspring', whether or not the children are born in wedlock,[50] assuming that the offspring are born from the same parents involved in the dispute about the family home.[51]

If the house is occupied by virtue of a lease contract made out in the name of the deceased partner, the surviving partner is entitled to succeed to the other in the contract. However, the surviving partner is not entitled to any other inheritance right, unless testamentary dispositions are made in his/her favour in respect of the reserved portions.[52]

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[50] The equalisation of the rules governing the allocation of the family home is also recent, going back to the so-called 'Filiation decree' (Legislative decree No 154/2013), which has implemented a jurisprudence already expressed by over a decade by the merit and legitimacy courts. On the various family models available under Italian law and in practice, G Ferrando 'Stato unico di figlio e varietà dei modelli familiari (2015) *Famiglia e Diritto* 952 et seq.

[51] Cass Civ No 18863/2011.

[52] The 2016 reform has not granted cohabitants any inheritance right. For an overview on the position of the *more-uxorio* partner within Italian law and the prohibition of inheritance pacts among partners, G Bonilini 'La successione del coniuge superstite tra riforma e proposte di novellazione'(2015) *Famiglia e Diritto* 1035–1042; P Cendon 'Le successioni' in *Il diritto privato nella giurisprudenza* (UTET, Torino, 2000) vol I, pp 65–71; A Palazzo *Le Successioni*, vol I (Giuffrè, Milan, 1996) pp 60 et seq; E Moscati 'Rapporti di convivenza e diritto successorio' in *I contratti di convivenza* (Giappichelli, Torino, 2002) pp 152 et seq, on the use of trust to avoid the inheritance pacts' prohibition.

Click here to go to Main Contents

Case law already consolidated before the entry into force of Law No 76/2016, make any financial obligations spontaneously performed in favour of the partner are to be deemed as natural obligations pursuant to Art 2034 of the Civil Code, *ex post* non-repeatable.[53]

IX THE MANDATE TO THE GOVERNMENT FOR THE COORDINATION AND SUBSEQUENT INTEGRATIONS

Within 30 days after the entry into force of Law No 76/2016, the Prime Minister was to adopt by decree the transitional provisions necessary to define the civil registry.

Further, within 6 months after entry into force of the law, the Government should have adopted, in the exercise of its delegated powers, three legislative decrees to adapt the overall system to the new provisions on registration and annotation of titles at the civil registry, to amend private international law and to incorporate the provisions of the new law, taking into account the necessary coordination with the innovations of the 2016 reform.

Notwithstanding the clear deadlines set by the 2016 law, the decrees in questions were delayed and are still not fully adopted as of this writing.

(a) The belated exercise of governmental mandate for the keeping of civil registries and archives, and the consequences with regard to surnames and property regimes

In fact, albeit the reform law foresaw a 6-months' period starting on 5 June 2016 (entry into force of Law No. 76/2016) for the exercise of the mandate in question, the Government has adopted its legislative decree only belatedly, 70 days later than planned, with a delay causing very serious consequences.

Only from the entry into force of Legislative decree No 5/2017 dated 11 February 2017 was the recording and preservation of the constitutive act of civil union definitively regulated. The record had to be kept within a single digital server accessible to each civil status office (the same one for all acts regarding citizenship, birth, marriage, civil unions and death), so there has been a period of legal vacuum. In the intervening 70 days between 3 December 2016 and 10 February 2017, civil registries were unregulated. Accordingly, the union registrations that had already been performed, automatically lost their immediate effectiveness.

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[53] Cass Civ n 1277/2014. On the issue of payments in cash carried out in the course of the cohabitation, A Fasano and GE Gassani *La tutela del convivente dopo la legge sulle Unioni Civili* (Giuffrè, Milan, 2016) pp 148–151.

If on the one hand the validity of the union has remained steady, on the other hand the supervening ineffectiveness of any registration has also resulted in the ineffectiveness of optional and possible choices on the alternative property regime to those of community property and the family surname.

Thus couples who, while getting civilly united have decided to adopt a common surname (last name of one, the other or both partners), were suddenly deprived of that surname as of 3 December 2016, regaining the same family surname by law on 11 February 2017. This situation has been increasingly complicated by the fact that, where it was a biological parent changing the family surname. For a few months even their children suddenly and repeatedly had to change surnames, passing from the original surname of the biological parent before the union, to the one chosen by the parent at the time of the constitution of the union, then revoked by law on 3 December 2016, and then again granted and recognised by law on 11 February 2017. The difficulties that such confusion has procured are obvious, not only for related administrative and bureaucratic matters (continuous changes of identity documents and public files, such as in school enrolment papers), but also in terms of discrimination against the offspring of persons civilly united, deprived (even for a restricted period of time) of the family surname chosen by the biological parent.

The legal vacuum in question, which lasted for 70 days between 2016 and 2017, also caused serious economic risks for those couples who opted for separation of assets or set up an assets' fund for the needs of the family at the time of constitution of the civil union. These could bind third parties, because of the supervening ineffectiveness of the registration of the deed constituting the civil union and of the relative transcription in the land registries.[54]

Examining in detail the decree's provision, it should first be said that the decree provides, in line with the requirements for the validity of marriage banns that the civil union be established within 6 months of being notified of the positive outcome of the checks and inspections by the officer of the civil state. After that date, it will be necessary to make a new declaration in front of the civil registrar, with accompanying new documents and checks.

The decree also expressly allows the partners to join civilly in a municipality other than that in which they presented their request, by means of a proxy granted for this purpose by the officer of civil status. They may even join outside the town hall, but only in case of illness or other justified impediment of one of them.

Furthermore, Art 1 of Legislative Decree No 5/2017 specifies the legal requirements for the civil union declaration, as it must indicate in detail: (a) the name and surname, place and date of birth, nationality and residence of the

[54] On the system to provide for evidence of titles on real estate in Italy, with a special focus on the evidence to be offered to third parties in regard to the choice of property regimes made by the spouses, M Sesta and B Valignani 'Il regime di separazione dei beni' in *Regime patrimoniale della famiglia* in Trattato di diritto di famiglia (Giuffrè, Milan, 2002) pp 482–484.

parties; (b) the date of the request to appear in front of the civil registrar for the union's declaration and constitution; (c) the consent decree, in the event there was a legal impediments; (d) the statement that the contents of paras 11 and 12 of Art 1 of Law 20 May 2016, No 76 were read to the partners; (e) the will of the parties to create the civil union; (f) the place where the civil union was constituted if outside the town hall, given that there was an imminent danger to life and the reason for the transfer of the civil state officer in that place; (g) the possible choice of a common surname; (h) the possible choice of the separation of assets or any other regime detected under current private international law rules.

(b) The reorganisation of the Italian private international law

In order to allow the necessary coordination with the new institution of civil unions, the Italian system of private international law, based on Law No 218/1995,[55] has been rearranged by Legislative decree of 19 January 2017 No 7, entitled 'Modifications and reorganization of private international law for the regulation of civil unions', published in the Official Gazette on 27 January 2017 taking effect on 11 February 2017.

This act provides under Art 1, para 1, for the effectiveness within Italy exclusively of same-sex marriages contracted abroad, despite the original delegation (contained in the Art 28(b) Law No 76/2016), expressly making reference not only to the marriage contract abroad between persons of the same sex, but also to 'civil union or similar institution'. This is a serious omission of the legislative decree, which could lead to a vast litigation for clear discrimination between those who are married abroad and those who are civilly united abroad; the latter could not in fact be recognised as civilly united within Italian borders. Moreover, the provision in question introduces a kind of automatic disqualification of same-sex marriages contracted abroad, which could not be recognised in Italy if not as civil unions. It should also be noted in this regard that such a conversion mechanism has also been adopted in other countries (eg Austria, Germany), without having raised issues of violation of the principle of equality or discrimination.

The legislative decree also requires that the capacity and the other conditions for constituting civil unions are governed by the national law of each party at the time of the union formation; but, in the event that the other country does not allow civil unions between adult persons of the same sex, the Italian law shall be applied. In this case, the 'nihil obstat' declaration[56] is replaced by a certificate or by another act suitable to attest the freedom to enter into the union.

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[55] R Clerici, F Mosconi and F Pocar *Legge di riforma del diritto internazionale privato e testi collegati* (Giuffrè, Milan, 2009).

[56] The nihil obstat is a declaration of no objection to the constitution of the marriage or the civil union, released by the civil registrar after inspecting all the necessary elements and documents.

Therefore, Italy, in an attempt to internationally stand as a guarantor of fundamental rights of same-sex couples,[57] introduces a provision entirely superfluous and unnecessary. When, in fact, an individual requests the certificate of no impediment in the country of origin, he/she does not have to justify the request. With that, there is no reason to believe therefore that the 'nihil obstat' declaration may be denied by the country of origin because of discrimination based on sexual orientation of the applicant, since it in fact remains unknown to the civil officer.

As for the personal and property relations between the parties, Art 1, fourth paragraph of Legislative decree 19 January 2017 No 7 subjects them to the law of the state where the partnership was formed, and alternatively, at the request of the parties, to the law of the state of common residence of one of the parties,[58] with the possibility for the persons concerned to opt in writing for the law of citizenship or residence of one or the other. Maintenance obligations are governed instead by the law designated by the Regulation 2009/4/EC of 18 December 2008, and maintenance obligations as a result of the civil union dissolution by the Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, executed in Italy by means of Law 24 October 1980, No 745.

In regards to civil union dissolution, there is a substantial equalisation to the rules provided for separation and divorce: in fact the Italian jurisdiction exists, in addition to the cases provided for in Arts 3 and 9 of the Italian Law No 218/1995 on Private International Law,[59] even when one of the parties is an Italian national or the union was formed in Italy. It is also expressly provided for the application of the Council Regulation (EU) No 1259/2010 of 20 December 2010, implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.[60]

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[57] Notwithstanding the fact that until 2016 Italy was often urged by the European Court of Human Rights, the European Parliament, the United Nations Committee on Human Rights, etc, to update its domestic law in order to recognise civil effect to same-sex unions.

[58] K Boele-Woelki 'General Rights and Duties in the CEFL Principles on Property Relations between Spouses' in *Family Law and Culture in Europe: Developments, Challenges and Opportunities* (Intersentia, Cambridge, 2014) pp 3–12.

[59] The Law No 218/1995 provides within its Art 3 for the existence of the Italian jurisdiction where the defendant is domiciled or resident in Italy or has an authorised representative to stand in trial on his/her behalf, and in the other cases where it is required by law and when the defendant is not domiciled in a contracting state to the 1968 Brussels Convention (when it is in relation to a subject matter comprised in the scope of the Convention). Article 9 instead provides for the Italian voluntary jurisdiction when the requested decision concerns an Italian citizen or a person resident in Italy or when it concerns situations or relationships to which it is applicable Italian law. For a detailed analysis of the jurisdiction on family disputes in the frame of the European Union, P De Cesari *Diritto internazionale privato dell'Unione Europea* (Giappichelli, Torino, 2011) pp 175–226; T Ballarino *Diritto internazionale privato italiano* (CEDAM, Padova, 2011) pp 171–180.

[60] Even though it is not expressly recalled by the 2016 Italian reform, the Brussels II Regulation is still applied to issues in family law involving the conflict of laws between member states, in particular in relation to divorce, child custody and international child abduction, which may arise after the dissolution of civil unions, cohabiting relationships and marriages. P Beaumont and G Moir 'Brussels Convention II, A new private law instrument in family matters for the

Click here to go to Main Contents

Taking now into account the connection criteria of the new rules on cohabiting partnerships with the system of international private law, it should be noted that Art 1, para 64 of Law No 76/2016 had already amended the Law No 218/1995 (the Italian private international law), by inserting Art 30 bis on cohabitation agreements. With that, for cohabiting partnerships there is no need for further modification of the Law No 218/1995, given that it was already provided that cohabitation agreements are subject to the common national law of the partners; if they are of different nationalities, the law of the country where the cohabitation is mainly localised will be applied without prejudice to the national, European and international rules that regulate the case of multiple nationality.

X OUTCOMES ON THE ADOPTION OF MINORS AND ON SURROGACY

The adoption of minors is precluded to the parties in a civil union.

The 2016 reform has specifically excluded any reference to the Law No 183/1984 on adoption, albeit initially provided for in the bill discussed for over 2 years within the Justice Committee of the Parliament. In order to avoid stopping the entire reform on family law, because of the raging debate on whether to allow the parties civilly united to adopt as a couple or by means of step-child adoption, adoption of minors has been completely carved out from the bill originally drafted.

However, by judicial decision, there has been for some years a broad interpretation of the provisions of Law No 183/1984, and in particular of the specific institute of adoption under special circumstances referred to in Art 44(d).[61] Adoption under special circumstances is in fact accessible even to single individuals, on the grounds that the adopter is linked by strong emotional bonds with the child. Thus this institute was invoked on several occasions by the courts of all levels to declare the adoption in favour of the cohabiting partner of the biological parent, even before the 2016 law on civil unions took effect.

European Union or the European Community (1995) *European Law Rev* 268–288; P McElevy 'The Brussels II Regulation, how the European Community has moved into family law' (2002) *Int Comp Law Quart* 883. Instead, the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, does not apply to registered partnerships, same-sex unions and same-sex marriages (even though Regulation No 2201/2003 does not mention the gender of the partners, with a decision dated 17 February 1998 in *Grant v South West Trains Ltd*, C-249, the Court of Justice of the European Union has explained that 'marriage' for the purposes of Regulation No 2201/2003 has to be considered only the union of heterosexual partners).

[61] M Dogliotti and F Astiggiano *Le adozioni. Minori italiani e stranieri, maggiorenni* (Giuffrè, Milan, 2014) pp 201–226.

After a first judgment of the Court of Rome on 30 July 2014,[62] which confirmed the adoption in favour of a woman's cohabiting partner of the biological child of the woman, the Court of Cassation repeatedly decided in the field, explaining that 'the inquiry into on the interest of the child … cannot be carried out even indirectly by taking into account the sexual orientation of the applicant and the resulting nature of the relationship established by the applicant with the partner'.[63]

This approach is widely followed, as attested *ex multis* by the decisions of the Juvenile Court of Rome on 23 December 2015,[64] the Turin Court of Appeal of 27 May 2016,[65] and the Juvenile Court of Rome on 30 December 2015.[66] This last judgment, in particular, categorically excludes any type of limitation to adoption under special circumstances, 'given that a different interpretation of the law would be contrary to the "ratio legis", the Constitution and the principles of the European Convention on Human Rights and Fundamental Freedoms, of which Italy is part'. Lastly, the Supreme Court with decision No 12962/2016 ascertained that the partner of the biological parent could adopt the offspring of the other without any reference to adoption under special circumstances: thus, the minor was fully adopted even if preconditions for adoption (the minor being deprived of material and/or moral support) were not occurring.[67]

As noted in the literature,[68] adoption under special circumstances is sometimes used both by the interested parties and by the courts to bridge the legislative gap which still exists in the field, and to allow the formation of a family, even in

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[62] Published in *Foro it* 2014, 10, I, 2743. P De Cesari 'Il diritto della famiglia nell'Unione europea. Fondamenti e prospettive' in *Persona e Famiglia* (Giappichelli, Torino, 2008) pp 223–224.

[63] Civil Cassation, sez I, judgment No 12962 of 22 June 2016. In this specific case, the Supreme Court recognised a woman the possibility of adopting the daughter of her partner (in the form of adoption under special circumstances), born out of in vitro fertilisation with an anonymous donor within a shared parenting plan. In Diritto and Giustizia 2016, 23 giugno 2016; in Guida al diritto 2016, n 29, p 15.

[64] *Ilfamiliarista.it* (Giuffrè, Milan, 2016).

[65] *Foro it* 2016, 6, I, 1910.

[66] *Diritto di Famiglia e delle Persone* 2016, 2, 557; *Diritto di Famiglia e delle Persone* 2016, 3, 805.

[67] On adoption under special circumstances, provided by Art 44(d) of the Law No 183/1984, G Bonilini, *Manuale di diritto di famiglia* (UTET, Milan, 2016) pp 419 et seq.

[68] R Carrano and M Ponzani 'L'adozione del minore da parte del convivente omosessuale tra interesse del minore e riconoscimento giuridico di famiglie omogenitoriali' in *Diritto di Famiglia e delle Persone*, 2015, 174, che sostengono come 'dietro l'interesse del minore si nasconde il tentativo degli adulti di ottenere, seppur indirettamente, il riconoscimento giuridico di vincoli familiari diversi e non riconosciuti dalla legge'; R Pane, *Le adozioni tra innovazioni e dogmi* (Esi, Napoli, 2003) p 162: the new trend to re-evaluate adoption highlighted its flexibility, which allows an effective technical tool to protect the interests of the child in the presence of multiple and new situations envisaged by the social reality (e g the array of family models). The wide range of situations in which it is possible to have recourse to this form of adoption, in fact, reveals the variability of purpose that may, in practice, be implemented by adoption, and accentuates its personalist foundation, solemnly enunciated by Art 57, n 2, which links the pronunciation of adoption under special circumstances to the verification of the child's best interest.

the absence of the formal creation of the union (before the 2016 reform) or notwithstanding the continuing ban on step-child adoption after the 2016 reform.[69] It is obvious that there is still an open legal issue, which must be solved by the legislative in order to avoid legal uncertainty between opposing judgments released by domestic courts.

Lastly, it is necessary to recall three very recent judgments of the Court of Appeal of Trento and the Juvenile Court of Florence on the field. The Trento Court of Appeal recognised on 23 February 2017 the full parental status of a pair of twins born through in vitro fertilisation to both parents, of which only one had genetic bonds with the children. The other parent has thus been recognised as father in all respects, and not as adopting father under special circumstances provided by Art 44(d) of Law No 183/1984.[70]

The Juvenile Court of Florence with two decrees dated 7 March 2017 recognised the adoption of two children by an Italian same-sex couple, residing abroad where the children had been adopted under the local law, and, second, the adoption of a little girl in favour of an Italian-American same-sex couple, resident in the United States. Both these adoptions were also registered in Italy, with automatic recognition of the status of children and the granting of Italian citizenship to the children. In the Florentine decisions there is a substantial difference at law from previous judgments, which recognised the adoption under special circumstances of the partner's offspring: in fact these two decisions recognised the adoption in favour of two parents, both entirely devoid of biological bonds with the minor.

Thus, these three recent decisions exceed the boundaries of the 2016 Italian reform on family law, in order to ensure effective protection to those rights that were ignored by the legislature. Once again the judiciary anticipates further

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[69] The United Nations Committee for Human Rights has recently recommended that Italy improve the condition of stepfamilies. See the Concluding observations on the sixth periodic report of Italy dated 29 March 2017 (CCPR/C/SR.3345 and 3346): 'While welcoming the adoption of the Law No. 76 of 20 May 2016, the Committee remains concerned that the Act does not provide same-sex couples the right to adopt children and does not afford full legal protection to those children living in same-sex families'

[70] On the Italian Law No 40/2004 on in vitro fertilisation and its subsequent amendments: M Sesta, 'La procreazione medicalmente assistita' in R Clerici, M Dogliotti and M Sesta (eds) *Filiazione, Adozione, Alimenti* in Trattato di diritto privato (M Bessone, ed), vol IV, 333 et seq; M Dogliotti 'Procreazione assistita: le linee guida' (2008) *Famiglia e Diritto* 749–752; G Ferrando 'Le diagnosi preimpianto, dunque, sono ammissibili' (2013) *La nuova giurisprudenza civile commentata*, n 1, 20–31. On the balancing of interests related to medically assisted procreation, which sees opposing on the one hand the interest of the individual to procreate and on the other the collective interest for the respect of public policy, V Zambrano 'La fecondazione assistita e il mito dell'apprendista stregone: l'esperienza comparatistica' in P Stanzione and G Sciancalepore (eds) *Procreazione assistita. Commento alla legge 19 febbraio 2004, n. 40* (Giuffrè, Milan, 2004) pp 296-303; G Sciancalepore 'La procreazione medicalmente assistita' in *La filiazione. La potestà dei genitori. Gli istituti di protezione del minore* (Giappichelli, Torino, 2006) pp 255 et seq; M Sesta 'La procreazione medicalmente assistita tra legge, Corte costituzionale, giurisprudenza e prassi medica' (2010) *Famiglia e Diritto* 839.

needed reforms, calling for the urgent adjustment of the discipline in force to ensure children's rights and human rights protection.

Also surrogacy, despite being banned in Italy, is beginning to find recognition by means of the adoption under special circumstances. The Court of Appeal of Rome, upholding the judgment of the Juvenile Court of Rome, with the decision of 23 November 2016 recognised valid and effective the adoption 'in favor of the partner of the biological parent of a child born abroad out of surrogacy'.[71] However, surrogacy is still struggling to find recognition within Italian case law, as attested by the numerous contrary judgments.[72]

The ban on surrogate motherhood is based on Art 12, para VI of Law No 40 of 19 February 2004 on medically assisted procreation.[73] This law prohibits the use of medically assisted procreation techniques of heterologous type (and it penalises any violation with fines of between €300,000 and €600,000). The Constitutional Court with its judgment No 96 of 5 June 2015, has ruled on the prohibition of the use of heterologous medical assisted procreation, claiming these provisions unconstitutional in respect of infertile couples or bearers of serious transmissible genetic diseases. There remains, however, the prohibition of surrogate motherhood outside these exceptional cases.[74]

On the refusal to recognise the relationship of parenthood begun by surrogacy, the European Court of Human Rights (European Human Rights Court, *Case of Mennesson v France* No 65192/2011, and *Case of Labassee v France* No 65941/2011, both decided on 26 June 2014) ascertained that France violated Art 8 ECHR for failure to recognise within its domestic law the filiation by surrogacy, thus not respecting the human rights of the offspring.

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71 A concurring case law was set by the Court of Milan, judgment No 3301/2015, in *Ilfamiliarista.it* (Giuffrè, Milan, 2015).

72 Civil Cassation, Sec I, judgment No 24001/2014, *In Foro it* (2014) 12, 3408.

73 A Miranda 'Surrogate Motherhood in Italy' in *Gestation pour autrui: Surrogate Motherhood* (Société de législation comparée, Paris, 2011) pp 187–197.

74 The early case law on surrogacy has been examined (together with a comparative investigation on surrogacy within the States of California and New Jersey) in S Rodota' *Tecnologie e diritti* (Il Mulino, Bologna, 1995) pp 333 et seq. At first, the Civil Court of Monza on 27 October 1989 decided against surrogacy, denying any parental right acquired by means of a contract with a surrogate mother, which was deemed void under Italian law. In order to bypass the prohibition set by the law, the case decided by the Juvenile Court of Rome, with the decree 31 March 1992, shows that sometimes couples pursued surrogacy in an untraditional way, declaring that the child was born out of wedlock through the adultery of the biological father with an unknown mother. See G Sciancalepore and P Stanzione *Filiazione e procreazione assistita* (IPSOA, Milan, 2001) pp 51 et seq, on the possible refusal of the father to recognise the offspring born by means of surrogacy. M Sesta 'La fecondazione assistita' in M Dogliotti and M Sesta (eds) *Il diritto di famiglia* in Trattato di diritto privato (Giappichelli, Torino, 1999) pp 193–195 on the voidness under Italian law of the surrogacy agreement with the surrogate mother. See also AB Faraoni *La maternità surrogata. la natura del fenomeno, gli aspetti giuridici, le prospettive di disciplina* (Giuffrè, Milan, 2002) for an overview of the discipline prior to the Law No 40/2004 on medically assisted reproduction; C Casini, M Casini and ML Di Pietro *La legge 19 febbraio 2004, n. 40* (Giappichelli, Torino, 2004).

Click here to go to Main Contents

On the contrary, within the *Case of Paradiso and Campanelli v Italy* No 25358/2012, decided on 24 January 2017, the European Court of Human Rights stated that surrogacy obtained abroad by two Italian citizens in violation of their national law has no legal effect, on the presupposition that 'the Convention does not recognise a right to become a parent … Agreeing to let the child stay with the applicants, possibly with a view to becoming his adoptive parents, would have been tantamount to legalising the situation created by them in breach of important rules of Italian law. The Court accepts that the Italian courts, having assessed that the child would not suffer grave or irreparable harm from the separation, struck a fair balance between the different interests at stake, while remaining within the wide margin of appreciation available to them in the present case'.

With that, the injustice of the Italian legal system is obvious, since the recognition of a link between the parents and the child born to surrogate motherhood depends on the discretion of the domestic judge in each individual case ruling on the relevance or importance of the affective bond between parents and children. The judge entrusts the investigation to external consultants who, as competent and experienced as they may be, may still not be able to fully read the depth of a parental relationship with a newborn, a toddler or a child.

To avoid similar unequal treatment that may arise from the subjective and discretionary opinion of individual judges, the entire topic should eventually be regulated by law.

XI CONCLUSIONS

The 2016 Italian reform on family law implemented only part of the reforms needed to avoid further EU sanctions (due to the non-recognition of any form of union, except that founded on heterosexual marriage). In fact, as seen above, civil unions were introduced within the Italian legal system as the European Court of Human Rights, the Constitutional Court, the Supreme Court, some appellate courts and courts of first instance complained about the illegality of the legislative gap, which did not guarantee full protection to the inviolable right to family, or more accurately, did not grant the right to validly form a legally recognised family irrespective of the sexual orientation of the partners.

However, step-child adoption, adoption by same-sex couples and surrogacy remain completely excluded by the 2016 reform. In these cases, there is not yet a domestic nor a European concurring case law. There is no clear and consistent condemnation of the Italian failure to recognise the right to parenting (even if it is based on adoption or surrogacy), and the corresponding right of minors to grow up in their family. In the absence of similar censures, the Italian Parliament opted for inaction.

The continuing legal vacuum, because of this omitted legislation on stepfamilies and surrogacy, is in contrast with the Sixth Principle of the Universal Declaration of the Rights of the Child, signed in New York in 1959, that for greater protection of the child, and in particular to the harmonious development of his personality, the child should grow up surrounded by the affection, love and understanding that parents can offer him in the exercise of their duties of care and responsibility: 'A child of tender years shall not, save in exceptional circumstances, be separated from his mother.'

Furthermore, Art 2 of the 1989 United Nations Convention on the Rights of the Child specifically prohibits all kind of discriminations based on the child's 'or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status'. Thus, it is obvious that any refusal to recognise within Italian borders the parent-offspring relationships already established abroad by means of adoption or surrogacy discriminates against the child because of the sexual orientation and the gender identity of his or her parents. A discrimination obviously unlawful under the terms of the said Convention, of the Italian Constitution and the many international treaties and bilateral agreements on minors' protection to which Italy is signatory.

The goal of the legislature, as a matter of fact, should not be to remedy *ex post* factually controversial situations.

Instead the legislature should have the main task of adapting existing regulations to the changes and the needs of society, in order to ensure, first and foremost, the protection of human rights and the superior rights of the child. Unfortunately too often, as attested by the developments so far in the field of family law, the reforms have been implemented by the Italian legislature in view of no longer postponable adaptation of the rules to the supervening changes, already established within the case law.

There are actually areas of private law where the Italian Parliament has on several occasions amended the regulations in force, sometimes even adopting innovative rules.[75] On many occasions, the Parliament has indeed reformed the law, imposing terms, new institutes and procedures that were not already in use within the civil society. Such reform should not be relegated to the courts, forcing all interested parties to adjust their behaviour to take the reform into account and avoid forfeitures or damages.

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[75] *Ex multis*, the introduction of the 20-year term of effectiveness of the transcript of the foreclosure file (see G Miccolis 'La rinnovazione della trascrizione della domanda giudiziale, del pignoramento immobiliare e del sequestro conservativo sugli immobili' (2009) *Foro it* V, 340 et seq); the Legislative decree 01/09/2006 No 5, which amended Art 101 L Fall (Bankruptcy Law), excluding the possibility for mortgage creditors to file for repayment at any given time until the closure of the procedure (which was instead possible under the regulatory regime before 2006).

Click here to go to Main Contents

But this has never happened for the reform of family law, so far modified by the Italian Parliament in the wake of the social needs and demands of the courts of justice, sometimes even with large and inexcusable delay with respect to foreign legal systems.

It would be appropriate now that the Italian legislature decides immediately on the issues above, rather than waiting for new condemning decisions from the judiciary because of the failure of the Italian family law to fully recognise families created out of adoption and surrogacy.

It is time for the Parliament to get back its legislative power and to avoid delegating it to the judiciary.

KOREA

ADOPTION LAW REFORM, 'BABY BOX' AND THE ANONYMOUS BIRTH DEBATE IN SOUTH KOREA

Lee, Dongjin[*]

En 2011 et 2012 le droit de l'adoption coréen a connu d'importantes transformations. Au lendemain des réformes, le nombre d'adoptions a chuté de manière considérable. Certains observateurs ont avancé que la réforme avait précipité le nombre d'abandons d'enfants et qu'une nouvelle réforme était dès lors requise. Pour faire face à la situation, des prêtres et des travailleurs sociaux ont commencé à mettre en place ce qu'il est convenu d'appeler des «boites à bébés» et des députés on proposé des projets de lois visant à permettre aux femmes de donner naissance dans l"anonymat. Dans cet article, j'examinerai les raisons qui ont entrainé la chute des adoptions et j'évaluerai la pertinence des 'boites à bébés' et des législations sur l'anonymat comme réponses à ce problème. Ma conclusion principale est que la réforme du droit de l'adoption semble en effet à la source du déclin des adoptions et que la naissance anonyme peut effectivement constituer une réponse adéquate en ce qu'elle protégerait la vie privée des mères non mariées et les inciterait ainsi à ne pas abandonner illégalement leur enfant. Quant aux 'boites à bébé', leur légitimité dépend d'une inconnue, soit leur degré d'efficacité réelle.

I INTRODUCTION

Until recently, no official statistics existed on the number of unmarried mothers in South Korea.[1] The main reason for this is that unmarried mothers are reluctant to reveal that they have children out of wedlock. This is understandable considering the emotional, familial, social and economic difficulties unmarried mothers face in South Korean society. Thus, many with unplanned pregnancies choose to relinquish their babies. In those cases, they have several alternatives: abortion, abandonment and entrusting their baby to

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1 The 2015 Korea Census reported that there are around 24,000 single mothers, 11,000 single fathers and 42,000 children raised by a single parent in South Korea. This was the first official attempt to estimate the number of single parents. The report, however, only reflects the number of single parents who raise their children alone and does not reflect the number of unmarried mothers who relinquish their children for adoption. There are statistics on the number of children protected in child welfare facilities or adoption agencies. The number of children born by unmarried mothers but neither reared by unmarried mothers nor entrusted in child welfare facilities or adoption agencies for adoption, however, is still unknown.

Click here to go to Main Contents

an adoption agency followed by adoption. Undeniably, adoption is the best as it is the only way to legally protect the babies' life and health in South Korea. But reducing its associated burden and costs is necessary to make mothers prefer adoption to the other alternatives.

Adoption in the real world serves various purposes. Some are for the adoptee's best interest, while others are just for the adoptive parent's interest. It is also uncertain whether an adoption will eventually succeed. Some adoptive parents fulfil their roles quite well and form a tight relationship with the adoptees, while others do not. Considering the profound influence of adoption on an adopted minor, a decision regarding a minor's adoption should be prudent and careful.

The abovementioned two demands – making mothers prefer adoption to the other alternatives and making decisions regarding a minor's adoption prudent and careful – might conflict with each other. More prudent and careful adoption is easily associated with more burden and costs, which in turn, makes adoption less attractive than, for example, abandonment.

In this article, I will report two closely related policy debates and social actions in South Korea demonstrating this conflict very well: the 'Baby Box' movement or debate, and the anonymous birth debate. 'Baby Box' is a box designed to protect babies and set up in churches or other facilities. When someone leaves her baby in the box, the staff responsible for managing it immediately becomes aware and assumes responsibility for the baby, who, of course, will be waiting for adoption as an abandoned baby whose parent is unknown.

Jongrak Lee, a priest who headed a church in Gwankak–gu, Seoul, began this social action. He set up and began to run a 'Baby Box' in his church from 2009 on. In 2011 and 2012, Korean adoption law was greatly reformed, and in 2013, the 'Baby Box' movement triggered a debate. Those opposing adoption law reform in 2011 and 2012 regarded the increasing use of a 'Baby Box' and the decreasing number of minor adoptions as a vivid evidence of the adoption law reform's failure. This debate led to the issue of whether to amend the adoption law again to allow the so–called anonymous birth.

This chapter's plan is as follows: first, I will introduce the adoption law reform of 2011 and 2012 and its impact on adoption. A simple analysis of statistical data will attempt to show there seems to be the need to protect the unmarried mother's identity. Secondly, the 'Baby Box' and anonymous birth movements will be examined in view of existing laws and draft bills. Finally, a possible solution or consideration will be presented.

II ADOPTION LAW REFORM AND ITS IMPACT

(a) Adoption law: before and after

As indicated before, those running a 'Baby Box' since 2009 and those leading the anonymous birth debate from 2013 on believe that both movements are evidence of the failure, or reactions to, the 2011 and 2012 adoption law reform. Thus, it is necessary to give an overview of the changes that the 2011 and 2012 adoption law reform made.

Before 2011, Korean family law acknowledged three different adoption forms: simple and full adoptions under the Civil Code, and full adoption under the Act on Special Cases Concerning Promotion and Proceedings of Adoption. The former two, prescribed in the Civil Code, are for independent adoptions, while the latter is for agency adoptions.[2] Although the former two formed the fundamental structure of Korean adoption law, the last has dominated the vast majority of adoption cases.

In principle, the prerequisites of all adoption forms were the same: the consent to adoption between the adoptive parent and the adoptee, and the registration of adoption, for which both parties should jointly apply. Of course, a minor adoptee, especially an infant adoptee, might not validly consent to adoption and apply for registration thereof because of lack of capacity.[3] In this case, the parent consented and applied for registration on the minor's behalf.[4] If the parent did not exist or was unknown, the legal guardian gave the consent and application for registration. For children in child welfare facilities with unknown or unreachable parents, the director of the facility became the legal guardian[5] and could consent to adoption. The consent to adoption was specific in the understanding that both parties to adoption – the adoptive parent and the adoptee or his parent or his legal guardian – knew each other.

There was one exception to this principle. A parent could entrust an adoption agency with protecting and adopting the child. In this case, the parent could consent to permanently relinquishing the child at the same time. This consent was inevitably an open one, that is, consent to future adoption by an unspecified adoptive parent. As the birth or biological parent consented to

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[2] The Civil Code applies generally, while the Act on Special Cases Concerning Promotion and Proceedings of Adoption applied only where the prospective adoptee was in a child welfare facility or adoption agency. As only approved adoption agencies may intermediate between prospective adoptive parents and biological parents, however, the Civil Code applies only to independent adoptions and not to agency adoptions. See, arts 10 and 27 of the Act on Special Cases Concerning Promotion and Proceedings of Adoption.

[3] A minor under 13 cannot make a valid consent to adoption at all. A minor over 13 but under 19 can make a valid consent to adoption only when his parent who has custody or his legal guardian also consents. No minors under 19 have the capacity to apply for the registration of adoption even with the consent of their parent or legal guardian. See, art 5 and art 869, ss 1 and 2 of the Civil Code, and arts 26 and 27 of the Act on Family Relation Registration, etc.

[4] Article 869, s 1 of the Civil Code and art 26 of the Act on Family Relation Registration, etc.

[5] Article 3 of the Act on the Guardianship of Minor in Protective Facilities.

Click here to go to Main Contents

adoption before the adoptive parent was determined at all, the birth or biological parent had no idea who the adoptive parent was. The Act on Special Cases Concerning Promotion and Proceedings of Adoption presupposed the validity of an open consent to adoption. This exception was necessary because, understandably, adoption agencies struggled to reach and collect consents on the adoption from birth or biological parents who relinquished their own children for adoption and disappeared. Thus, it enabled a kind of *anonymous adoption*.[6]

More importantly, this exception provided a de facto opportunity for *anonymous birth* in South Korea.

As is in many other jurisdictions, a woman giving birth to a baby establishes a mother–child relationship under Korean family law. There is no way for a mother to avoid this relationship.[7] The family relation register, the public register of an individual's personal status, should reflect this relationship as soon as and as far as possible. The Act on Registration of Family Relation, etc, enabled this by imposing on the baby's father and mother the duty to register the baby's birth with the mother's information, within one month of the birth. For an unmarried mother's baby, the law imposed this duty only on the mother, and not on the birth or biological father,[8] because a father–child relationship needs either a marital linkage – presumption of paternity – or the biological father's recognition of the baby as his child.[9] The law did not allow any exception to this principle. Both registration of adoption and registration of recognition also presuppose registration of birth.

When a mother abandons her baby without registering his birth, she is subject to criminal punishment for abandonment.[10] Here, law enforcement registers the baby's birth, of course, with the mother's information[11] when they discover it during the investigation. If they do not, they register the baby as a baby with an unknown parent and entrust a child welfare facility with the baby's protection and eventual adoption.[12] The principal of the child welfare facility becomes the legal guardian of the baby and cares for the baby[13] until someone adopts it.[14]

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6 Hyun, So-Hye, 'Problems of Korean Anonymous Adoption System and its Solutions', *Korean Journal of Civil Law* Vol 50, 547, 562 ff (2010) (written in Korean).

7 Constitutional Court decision on 31 May 2001, case no. 98Heonba9.

8 Article 44, s 1 and art 46, ss 1 and 2 of the Act on Registration of Family Relation, etc. Neither the physician nor the hospital had a duty to report the birth of the baby, except when his father and mother could not register the baby's birth. Article 50 of the Act on Registration of Family Relation, etc.

9 Articles 844 and 855 of the Civil Code.

10 Article 271, s 1 of the Criminal Code. A child abandonment by his parent constitutes a crime punishable by jail up to 3 years or a fine up to 5 million KRW.

11 The application form for registration of birth includes information on the birth or biological parent. Article 44, s 2, subs 4 of the Act on Registration of Family Relation, etc.

12 Article 52 of the Act on Registration of Family Relation, etc.

13 Article 3 of the Act on the Guardianship of Minor in Protective Facilities. In principle, the parental authority of the birth parent survives and competes with the guardian's power.

14 The perfection of adoption confers the parental authority of the birth parent or power of legal guardian to the adoptive parent. Article 909, s 1, sentence 2 of the Civil Code.

If the mother chooses to leave the baby in an adoption agency with an open adoption consent, however, she could avoid the registration of the birth with her identity information because nobody would much care about the registration of birth.

First, the police had little reason to care about this circumstance. There was no criminally punishable[15] child abandonment, and the baby was safe.

Moreover, the adoptive parent might even prefer to keep the fact that their child was adopted from their adoptive child as well as third parties. Many also wanted to exclude any possibility the birth or biological parent would approach, communicate, or try to reunite with the adopted child. When their adoptive child was unregistered, they could register it as an abandoned child whose birth and biological mother was unknown. In this case, it would be very difficult for the birth or biological parent to locate their biological child afterwards. The adoptive parents even could register their adoptive child as their biological child, as if they gave birth.[16] It explains the reason why adoptive parents strongly prefer to adopt infants. See Table 1. They want to be the only parent of the adoptive children by either hiding that they were adopted or excluding the birth or biological parents' approach.

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[15] The fact that one relinquishes their own child, by itself, does not constitute abandonment in the meaning of art 271, s 1 of the Criminal Code. It should not leave the child without any protection. Leaving a child in an adoption agency does not make the child unprotected, so that it does not constitute criminally punishable abandonment.

[16] This kind of sham registration was easy because one could submit affidavits written by two persons present at the scene of birth instead of certificate of birth issued by a doctor, etc, as evidence for registration of birth. Article 44, s 4 of the Act on Family Relation Registration, etc. This exception was criticised as an outdated legacy of the era when many people gave birth to babies not in hospitals, but in their own homes. It was amended in 2016. Article 44, ss 4 and 5, and art 44–2 of the Act on Family Relation Registration, etc. Now, this kind of sham registration of birth is very difficult, even impossible to accomplish.
This registration is illegal, of course, because an adoptive parent is not a birth or biological parent and a birth registration is not an adoption registration. The Korean Supreme Court, however, has declared that this registration is valid as a registration of adoption. Supreme Court *en banc* decision on 26 July 1977, case no 77Da492. When they meet all requirements of adoption except for registration of adoption, registration of birth establishes the parent–child relationship between them. The courts reconstruct the registration of birth as an adoption registration. This doctrine is called the doctrine of *adoption by sham registration of birth*.

Table 1: 2015 adoption statistics (Ministry of Health and Welfare)

Year	Domestic Adoption						Foreign Adoption					
	Gender		Age				Gender		Age			
	Male	Female	Under 3 months	3 months to 1 year	1-3 years	Over 3 years		Male	Female	Under 1 year	1-3 years	Over 3 years
2013	686	203 (29.6%)	483 (70.4%)	**39 (5.7%)**	**548 (79.9%)**	72 (10.5%)	27 (3.9%)	236	194 (82.2%)	42 (17.8%)	-	229 (97.0%)	7 (3.0%)
2014	637	223 (35.0%)	414 (65.0%)	**20 (3.1%)**	**398 (62.5%)**	167 (26.2%)	52 (8.2%)	535	438 (81.9%)	97 (18.1%)	2 (0.4%)	464 (86.7%)	69 (12.9%)
2015	683	222 (32.5%)	461 (67.5%)	**29 (4.2%)**	**394 (57.7%)**	215 (31.5%)	45 (6.6%)	374	287 (76.7%)	87 (23.3%)	-	338 (90.4%)	36 (9.6%)

Lastly, in this situation, adoption agencies also had little reason to collect the information on the identity of the birth or biological parent. They already collected an open adoption consent and had no further need to reach the birth or biological parent. Their remaining job was simply to find a proper adoptive parent and deliver the baby to him/her. Of course, they, as legal guardians of the baby, should cooperate with the registration of adoption with the adoptive parent if the adoptive parent wanted it, which in turn presupposes the registration of birth. It was, however, only a minor procedural issue, and many adoptive parents did not want it or at least did not care about it. Consequently, they welcomed unregistered babies as much as or more than registered babies. For unmarried mothers, this provided a de facto opportunity for anonymous birth.

The key feature of Korean adoption law enabling this de facto opportunity for anonymous birth was that it did not require the family court's involvement or review. Before introducing full adoption into the Civil Code in 2005, no form of adoption necessitated the family court's approval. Even after introducing full adoption into the Civil Code, at first, the family court's approval was necessary only for full adoption according to the Civil Code, and only for minor adoptions, while it was still unnecessary for simple adoptions, and more importantly, for full adoption under the Act on Special Cases Concerning Promotion and Proceedings of Adoption.

This regime changed fundamentally under the 2011 and 2012 adoption law reform.

In 2011, new legislation, the Act on Special Cases Concerning Adoption, repealed and substituted the Act on Special Cases Concerning Promotion and Proceedings of Adoption. As the changed title suggests, the new legislation does not blindly promote adoption. Rather, it facilitates raising the child in the birth family and considers adoption as the last resort. Thus, it makes the decision for adoption more prudent and the process generally more careful. For this, it introduces the new requirement of the family court's approval for adoption.[17] In 2012, the Civil Code followed this policy. The revised art 870, s 2 of the Civil Code now requires the family court's approval even for simple adoption if the adoptee is a minor under 19. As a result, all forms of minor adoption now necessitate family court approval. Now, the family court can and should verify that the adoption is in the best interest of the child in the approval process.

In addition, the 2011 reform introduced a cooling–off period for agency adoption. An open consent on agency adoption is still possible under the new legislation, but the birth or biological parent can make it only one week after the birth and should have counselling during that period.[18]

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[17] Article 11 of the Act on Special Cases Concerning Adoption.
[18] Article 13, s 1 of the Act on Special Cases Concerning Adoption.

Table 2: Adoption law in South Korea

		Civil Code: independent adoption		**Act on Special Cases Concerning Promotion and Proceedings of Adoption**: agency adoption
		Simple adoption	Full Adoption	
Agreement and Registration of Adoption		Agreement between the adoptive parent and the adoptee or representative thereof, Registration of Adoption		**Open consent of the birth parent,** (Determination of adoption agency of adoptive parent,) Consent of adoptive parent, Registration of adoption
Family Court's Approval	Before the Reform	N	**Y**	N
	After the Reform	**Y**		
Other Requirement				**Cooling–off period** (1 week after the birth)

(b) The impact of reform

After the reform, the number of adoptions declined abruptly and drastically. Before 2011, the annual number of agency adoptions had been stable at around 2,400. In 2012, however, it decreased to 1,880, and in 2013, it decreased even further to 922. Up until the present, it has remained around 1,000, and has not recovered its pre–2012 levels. The change was greater for foreign adoptions than domestic adoptions, but the change in the latter is still significant.[19] Without the impact of the 2011 and 2012 adoption law reform, it would be impossible to explain this abrupt and drastic change.

[19] The 2011 and 2012 adoption law reform applies to not only domestic adoption but also foreign adoption. According to art 19 of the Act on Special Cases Concerning Adoption, a Korean child adopted by a foreigner cannot obtain emigration permit from the Korean government before the Korean family court approves the adoption, and it is the only way of foreign adoption. Moreover, art 18 of the Act on Special Cases Concerning Adoption mandates the government to make an effort to diminish foreign adoption 'in order to fulfil state responsibility to protect children'. It was because South Korea was infamous as the county to 'export' babies most. It was one of the purposes of the 2012 revision to reduce foreign adoptions and regulate them more strictly. Thus, the decrease in the number of foreign adoption was intended.

Table 3: Agency adoption (2015 Adoption Statistics, Ministry of Health and Welfare)

	2007	2008	2009	2010	2011	2012	2013	2014	2015
Total	2,652	2,556	2,439	2,475	2,464	1,880	922	1,172	1,057
Domestic	1,388 (52.3%)	1,306 (51.1%)	1,314 (53.9%)	1,462 (59.1%)	1,548 (62.8%)	1,125 (59.8%)	686 (74.4%)	637 (54.4%)	683 (64.6%)
Foreign	1,264 (47.7%)	1,250 (48.9%)	1,125 (46.1%)	1,013 (40.9%)	916 (37.2%)	755 (40.2%)	236 (25.6%)	535 (45.6%)	374 (35.4%)

So what were the reasons? Various explanations are possible, which need examination.

First, the newly introduced family court approval process may be blocking adoptions, contrary to, or at least potentially in terms of, the adoptive child's best interest. For example, those adopting a minor are eligible for government subsidies,[20] so some may attempt adopting minors mainly for the benefit of those subsidies; and some might even regard adoptive children as a labour force for their businesses. Others might want to be good parents but just be unprepared; they might have serious psychological or familial issues. Foreign adoption does not make any exception for this possibility of adoptions contrary to the adoptive child's best interest. Under the reformed adoption law, the family court would not approve this kind of adoption, which would reduce the total number of adoptions. Table 4 shows that adoption law reform diminished adoptions by lower class more than adoptions by middle or upper class.

[20] Article 23 of the now repealed, Act on Special Cases Concerning Promotion and Proceedings of Adoption, and art 35 of the Act on Special Cases Concerning Adoption. The amount of subsidy that the central government provides for the adoptive parent per month is around 150,000 KRW (= 150,000 KRW fostering subsidy and 200,000 KRW psychological therapy subsidy) per adopted minor.

Table 4: Income level of adoptive parents (Domestic Adoption Statistics 2009, 2010, 2011, 2012, Ministry of Health and Welfare)

Year	2009	2010	2011	2012
Domestic Adoption Total	1,314	1,462	1,548	1,125
Adoption by those whose Income is Below Average	563 (42.8%)	645 (44.1%)	632 (40.8%)	317 (28.1%)
Adoption by Lower Class	82 (6.2%)	101 (6.9%)	76 (4.9%)	24 (2.1%)

Click here to go to Main Contents

Second, the increased burden or costs of adoption might discourage adoption itself. Adoptive parents face two kinds of costs: a fixed adoption fee paid to adoption agencies when they adopt a minor,[21] and other less–substantial burdens or costs including time consumption. The former did not change, while the latter increased considerably after the adoption law reform. Now those who want to adopt a minor through adoption agencies will not only consume more time but also experience the stressful situation of asking the family court for its approval.[22] Adoption agencies also might face more costs because they attempt to help those who want to be adoptive parents to obtain the family court's approval.

There are, however, still other possibilities. The new law now requires the family court's approval before they execute the adoption. Adoption agencies cannot deliver the child to an adoptive parent before the family court approves it – it is a much more serious legal violation. As the family court would not approve adopting an unregistered child, now it is truly necessary to register the birth of the child before applying for adoption approval. Article 11, s 1, subs 1 of the Act on Special Cases Concerning Adoption makes it clear by prescribing that those applying for approval of adoption should prepare and submit the adoptee's birth certificate to the family court. Even without this provision, the result would be the same. The family court's approval requirement created that change. In this regard, we can say that this change was an incidental byproduct of adoption law reform, even if we cannot say that this change was unintended at all.

It also became impossible for the adoptive parent to adopt an unregistered child and register him as if he were a biological child of the adoptive parent, at least one acquired through adoption agencies.[23] Adoptive parents, however, still can register the full adoption of a minor, where the relationship between them will look like the relationship between a birth or biological parent and a biological child on most official certificates of their personal status, including the Certificate of Family Relation.[24] Stated simply, most certificates do not provide

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[21] Article 20 of the Act on Special Cases Concerning Promotion and Proceedings of Adoption, and art 32 of the Act on Special Cases Concerning Adoption. The central or local government can subsidise all or part of the abovementioned fee.

[22] This factor might be more important in foreign adoptions because foreign adoptive parents have many alternatives other than South Korean children. It might partially explain why foreign adoptions diminished more than domestic adoption.

[23] Adoption law reform influenced the so-called adoption by sham registration of birth in two ways: first, an adoption agency can no longer agree to the sham registration of birth by delivering an unregistered child to the adoptive parent and entrusting the adoptive parent with the adoption registration. Secondly, even if the adoptive parent attempts adoption by sham registration of birth, the court would not regard it valid because it lacks at least one requirement of adoption – the family court's approval. Thus, many understand that adoption law reform repealed the doctrine of adoption by sham registration of birth. Yune, Jin-Su, *Law of Family and Inheritance* (2016) p 184 (written in Korean).

[24] The Act on Registration of Family Relation, etc, provides four certificate types: Certificate of Family Relation, Certificate of Marriage Relation, Certificate of Adoption Relation, Certificate of Full Adoption Relation, and Basic Certificate. Among them, the Certificate of Family Relation and Basic Certificate are most commonly used.

any information to discern whether the relationship is biological or adoptive, at least for full adoption.[25] The new parents, of course, still register information on the nature of their relationship – adoptive – and on the identity of the birth or biological parent as far as they know it. If one obtains a Certificate of Full Adoption of a child, one can see that he/she is adopted and who his/her biological parent is. The issuance of Certificate of Full Adoption, however, is strongly restricted. In general, one can demand the issuance of all other certificates of one's own, one's spouse, one's immediate blood relative, and some others with special causes, while only *emancipated* adoptees, their birth or biological parent, their adoptive parent, and some others with more special causes, can demand the issuance of Certificate of Full Adoption.[26] In short, one can hardly approach full adoption until the adoptee reaches 19 as an adult. Despite that, of course, adoption law reform still increased the possibility that the adoptee or his birth or biological parent might discover the information. This might discourage the adoptive parents' demand to adopt.

Maybe more importantly, adoption law reform blocked the de facto opportunity for *anonymous birth*. Now, adoptive agencies cannot receive an unregistered child from his unmarried parent because the agency should register the child's birth, and then, should report the parent's identity for adoption. Some unmarried parents could dislike this situation and look for other alternatives.

To the author's best knowledge, there is no empirical or field study on the reason for the decrease in the number of agency adoptions or their relative influences. Combining and comparing the number of the children given to the welfare agencies, adopted, and abandoned, however, allows insight into the agency adoption decrease.

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[25] Article 15, s 1 of the Act on Registration of Family Relation, etc. This is one important difference between simple adoption and full adoption. In a simple adoption, the Certificate of Family Relation and Certificate of Adoption Relation also show the fact that their parent–child relationship is not biological, but adoptive.

[26] Article 14 of the Act on Registration of Family Relation, etc.

Table 5: Children in need of protection and children adopted (Statistics on Children In Need of Protection, Adoption 2008 – 2015, Ministry of Health and Welfare)

		2008	2009	2010	2011	2012	2013	2014	2015
Children in Need of Protection	Out of Wedlock	2,349	3,070	2,804	2,515	1,989	1,534	1,226	930
	Abandoned	202	222	191	218	235	285	282	321
	Total		2,439	2,475	2,464	1,880	922	1,172	1,057
Children Adopted	Out of Wedlock	2,170	2,121	2,166	2,262	1,744	896	1,087	992

As figures in Table 5 indicates, most adopted children were born out of wedlock, and the number of agency adoptions roughly have corresponded to the numbers in need of protection, whose biological parent entrusted adoption agencies with the children's protection and adoption, until 2012. The gap between out–of–wedlock children in need of protection and out–of–wedlock children actually adopted, abruptly increased in 2013 but immediately decreased to less than 100 in 2014. The number of children in need of protection, however, has decreased rapidly and the number of abandoned children in need of protection has substantially increased since 2012. The former has steadily decreased from 1,989 to 930 during that period, while the latter has increased from 235 to 321. It seems clear that the supply of out–of–wedlock children waiting for agency adoption has decreased rapidly, which is undeniably the main reason for the decrease in adoptions. Contrarily, there seems to be no indication that the decrease in adoption demand drove the decrease in adoptions. Possibly, the decrease in demand was not so great.

Then, what would be the reason for the decrease in supply of out–of–wedlock child entrusted for adoption in adoption agencies? Adoption law reform would likely not decrease the birth of children out of wedlock itself. It indicates that unmarried mothers entrust the protection and adoption of their children less and choose other alternatives more. The increasing number of abandoned children also supports this presumption. Behind this unwelcomed change, there seems to be the reluctance for the unmarried mothers to reveal the fact that they gave birth to children by registering the birth.

III 'BABY BOX' AND ANONYMOUS BIRTH

(a) 'Baby Box'

As explained before, priest Jongrak Lee began to run 'Baby Box' in a church in Gwanak–gu, Seoul in 2009. Another church in Gunpo, Gyeonggi, followed, running its own 'Baby Box' beginning in 2014. Until now, there were only those two 'Baby Boxes'. The number of babies left in those two boxes are shown in Table 6.

Table 6: Babies left in Baby Boxes (Report of Ministry of Health and Welfare, and Reports of Churches Running 'Baby Boxes,' Combined[27])

	2009	2010	2011	2012	2013	2014	2015
Babies	1	4	37	79	252	280	278

[27] The number of babies put in a 'Baby Box' in 2009 and 2010 comes from a Ministry of Health and Welfare report, and the numbers from 2011 to 2015 comes from churches running 'Baby Boxes'. The Ministry of Health and Welfare report does not provide numbers for 2014 and 2015, and the churches also do not for 2009 and 2010. There are slight differences between the Ministry of Health and Welfare's and the churches' numbers reported from 2011 to 2013. As the differences were small enough, I combined two reports into one table.

There were a few challenges posed to 'Baby Boxes'.

First, the priests who ran 'Baby Boxes' were accused of inducing or aiding and abetting child abandonment. The prosecutor, however, decided not to prosecute the babies' parents since leaving babies in a 'Baby Box' does not constitute criminally punishable child abandonment. The police, following this line, also do not investigate this accusation on the ground that running a 'Baby Box' does not constitute criminally punishable inducement or aid and abetment of child abandonment since the birth or biological parent's leaving the baby in the box does not constitute criminally punishable child abandonment.[28]

Secondly, a citizen, himself an adoptee, filed a petition in May 2013 to the National Human Rights Commission, stating that Gwanak–gu, Seoul's local government, induced more baby abandonments and infringed infants' human rights by not forbidding 'Baby Boxes'. The National Human Rights Commission, however, dismissed this petition in September 2013 because there existed no legal basis to demolish a 'Baby Box' forcefully, and that a 'Baby Box' itself did not constitute unjustifiable discrimination as far as it protected the babies.[29]

Both challenges failed. Until now, there has been little legal enforcement against a 'Baby Box' once set up. Yet, we cannot say that the institution of the 'Baby Box' has secured legal recognition.

A social welfare foundation attempted to set up a 'Baby Box' in Sasang–gu, Busan in April 2014. The local government, however, immediately accused the social welfare foundation of inducing or aiding and abetting child abandonment and of violating the Child Welfare Act and the Social Welfare Services Act. Subsequently, the social welfare foundation gave up running 'Baby Box'. Since 2011, the local government of Gwanak–gu, Seoul also has repeatedly warned the church running the 'Baby Box' in its governing area that it violated the Social Welfare Services Act and urged the church to stop running the 'Baby Box'.

In addition, a member of local assembly of Gunpo, Gyeonggi, submitted to the local assembly a draft bill supporting the 'Baby Box' on 10 March 2014, but the local assembly decided to table the draft bill because of the furious debate about the 'Baby Box's' legality. The local government of Gunpo, Gyeonggi also has urged the church running the 'Baby Box' to stop.[30] According to these local

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[28] News1 on 17 March 2016 (http://news1.kr/articles/?2604683) (written in Korean).

[29] National Human Rights Commission decision no 12–Jinjung–0358700. Some explanation might be necessary to avoid misunderstanding this decision. The National Human Rights Commission has jurisdiction to investigate and suggest a remedy measure only where a public agency infringes on human rights or unreasonably discriminates against people and where a private person, including private profit or nonprofit organisations discriminate against people unreasonably. Private party human rights infringement is not enough. Article 30, s 1 of the National Human Rights Commission Act.

[30] Baby News on 5 August 2014 (www.ibabynews.com/news/newsview.aspx?newscode=201408041755197790001863&categorycode=0010#z) (written in Korean).

governments, the 'Baby Box' violates the Child Welfare Act or the Social Welfare Services Act irrespective of whether legal enforcement thereof is possible.

First, it seems sensible that the 'Baby Box' does not constitute abandonment punishable under the Criminal Code. Abandonment in the meaning of art 271 of the Criminal Code presupposes that the action or omission endangers the life or health of the abandoned, and that one with a duty to protect the abandoned but still abandons, must act or omit knowing and expecting the result (life or health endangerment). Those who leave their babies in the 'Baby Box', however, would not believe or expect that they endanger the baby's life or health, and the babies left in 'Baby Box' would actually be safe in most cases. Since leaving a baby in a 'Baby Box' does not meet the requirement of abandonment under the Criminal Code, running the box also does not constitute an aid and abetting or inducement to a crime. Moreover, an action or omission that simply has a general tendency to promote a certain kind of crime but has no intention to specifically promote a specific person to commit the crime, does not meet the requirement of an aid and abetment or inducement under the meaning of arts 31 and 32 of the Criminal Code. It is hard to believe that those running a 'Baby Box' have the intention to aid and abet or induce a specified baby's abandonment.

Secondly, it seems more controversial whether a 'Baby Box' infringes on infants' human rights. Birth or biological mothers have the duty to rear their children until others adopt their children.[31] They also have a duty to register their children's birth within one month of birth.[32] All these duties correspond to the infants' human rights as well as provide private claims against their birth or biological mothers' needing to rear them in their own birth families and to register them in a family relation register. Birth or biological mothers who leave their babies in a 'Baby Box' without registering the babies' birth infringe on these human rights and babies' private claims, irrespective of whether it constitutes an abandonment crime under the Criminal Code. Whether running 'Baby Box' also constitutes an infringement of infants' human rights is, however, a different issue.

On the one hand, it is crucial to know whether running a 'Baby Box' aids and abets or induces this illegal action by birth or biological mothers. If not, the 'Baby Box' operation itself constitutes neither aid and abetment nor inducement. It depends on whether running a 'Baby Box' increases infant abandonments themselves or just changes the manner or mode of infant abandonments. The data does not allow an easy and straightforward inference. The number of babies left in 'Baby Boxes' has increased continuously since 2009. The number of abandoned babies, including those left in a 'Baby Box', has also increased continuously. See Tables 5 and 6. The number of babies abandoned in a criminally punishable manner, however, has decreased

[31] Article 909, s 1, and art 913 of the Civil Code.
[32] Article 44, s 1, and art 46 of the Act on Family Relation Registration, etc.

Click here to go to Main Contents

considerably, according to the police reports.[33] The result excludes neither the possibility that a 'Baby Box' reduces or substitutes for less–safe abandonments nor the possibility that a 'Baby Box' increases the total abandonment numbers of itself.

On the other hand, it also matters whether 'Baby Boxes' reduce filicide – that is infant murder by their mother – and if so, by how much. If yes, it might allow a defence of necessity (art 22 of the Criminal Code and art 761, s 2 of the Civil Code). One empirical study, however, shows that the filicide numbers remain stable despite running 'Baby Boxes' for years. This result corresponds to the insight that those committing filicide and those considering leaving their babies in 'Baby Boxes' are quite different groups.

For now, it seems uncertain whether 'Baby Box' infringes infants' human rights and private claims. A more rigorous statistical analysis would be necessary to answer this.

On the other hand, it seems clear that running a 'Baby Box' violates the Child Welfare Act and Social Welfare Services Act. Babies left in a 'Baby Box' are children in need of protection under the meaning of art 3, subs 4 of the Child Welfare Act,[34] and facilities running a 'Baby Box' must be temporary child protection facilities in the meaning of art 52, s 1, subs 2 of the Child Welfare Act, which protects a child in need of temporary protection. Temporary child protection facilities, as a kind of child welfare facilities, should meet some prescribed requirements, including officially notifying the head of the local government, and having professionals qualified in child welfare services.[35] If a facility does not meet these requirements, the local government principal can order it shut down.[36] Running the facility without notifying the local government principal is subject to criminal punishment.[37] Moreover, this service belongs to social welfare service under the meaning of art 2, subs 1B of the Social Welfare Services Act,[38] and those providing this service belong to social welfare facilities under the meaning of art 2, subs 3 of the Social Welfare Services Act. Again, a social welfare facility should meet prescribed requirements including an official notification to the local government official or designate. As a matter of course, if a facility does not meet these requirements, the local government principal can order the facility shut down.[39]

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33 News1 on 17 March 2016 (http://news1.kr/articles/?2604683) (written in Korean).

34 Article 3, subs 4 of the Child Welfare Act defines a child needing protection as a child who has no protector, or is separated from a protector, or whose protector is unsuitable for, or incapable of, rearing them, such as those who abuse children. A protector is a person with parental authority, a guardian, a person who protects, rears, and educates a child or who is held liable to do so, or a person who actually protects and supervises a child due to business and employment relations, etc.

35 Article 50, ss 2 and 3, and art 55 of the Child Welfare Act.

36 Article 56, s 1, subs 1 of the Child Welfare Act.

37 Article 72, s 2, subs 3 of the Child Welfare Act.

38 This provision lists services prescribed in the Child Welfare Act as a type of social welfare service under the Social Welfare Services Act.

39 Article 40, s 1, subs 1 of the Social Welfare Services Act.

If someone runs the facility without notifying the local government principal, he is subject not only to a shutdown order but also to criminal punishment.[40] Thus, local governments and police have authority to impose legal sanctions on facilities running 'Baby Boxes' without notifying what child welfare facilities and social welfare facilities should do to meet legal requirements. They just are not currently exercising that authority.

Why, then, are local governments and police so reluctant to enforce these laws? Churches running 'Baby Boxes' might not qualify as child welfare facilities or social welfare facilities, which presents an issue in itself. However, the real much more important issue is when a qualified child welfare facility or social welfare facility runs a 'Baby Box'. As indicated before, the answer depends on whether the 'Baby Box' increases the total number of abandonments or makes abandonments safer, which we do not know yet. If 'Baby Boxes' do not increase total abandonments significantly and instead make abandonments safer, at least some qualified facilities may run 'Baby Boxes' even under existing law. In that case, a 'Baby Box' would have a very strong appeal in that it saves babies' lives. Where it is uncertain whether a 'Baby Box' itself is justifiable, local governments and police might well be reluctant to enforce the law even against unqualified churches running such a box.[41]

Many family law scholars consider anonymous birth to be an alternative to the 'Baby Box', and at most do not take a 'Baby Box' itself seriously,[42] mainly because anonymous birth is better organised and safer than a 'Baby Box'.[43] It is uncertain, however, whether anonymous birth can fully substitute for 'Baby Box'. There remains a possibility that at least some unmarried mothers hesitate to use anonymous birth before they give birth but consider leaving the babies in a 'Baby Box' afterwards. Even though we discuss anonymous birth here, the 'Baby Box' issue will remain untouched, and we still must address this issue. To do this, we need more data and analysis. Moreover, should we eventually decide we still need 'Baby Boxes' in addition to a certain form of anonymous birth, we will have to implement a sophisticated mechanism for 'Baby Boxes' to help birth or biological mothers' decisions and to support mothers' health and safety as well as babies'. State *Safe–Haven* laws in the United States of America,

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[40] Article 40, s 1, subs 5, and art 54, subs 3 of the Social Welfare Services Act.

[41] Baby News on 5 August 2014 (www.ibabynews.com/news/newsview.aspx?newscode=201408041755197790001863&categorycode=0010#z) (written in Korean).

[42] The fact that 'Baby Box' is a de facto mechanism to protect babies in most jurisdictions including Germany and Japan, meaning that it is neither expressively forbidden nor expressively recognised might influence this attitude. Of course, there are countries like all states in the Unites States of America where 'Baby Box'–*Safe Haven*—is a *de jure* mechanism to protect babies, and there are countries like France where 'Baby Boxes' are forbidden.

[43] Kwon, Jae-Moon, 'The Dilemma of so-called Baby Box: Safe Haven for Abandoned Babies' Lives or unintended Substitute for Legal Adoption', *GNU Law Review* Vol 22(1), 59, 66 ff (2014) (written in Korean); Kwon, Jae-Moon, 'A Comparative Study of Anonymous Birth', *Northeast Asian law journal* 8(3), 475, 491 ff (2015) (written in Korean); Shin, Ok-Ju, A Comparative Study on the Introduction of restricted anonymous Birth, *Hanyang Law Review* 25(4), 331, 334 ff (2014) (written in Korean). See, also, Seo, Jong Hee, 'Comparative Study on Anonymous Birth', *Kookmin Law Review* Vol 27(2), 79 (2013) (written in Korean).

which indemnify some qualified abandonment of infants, also implement complex regulations for the facilities running Safe–Haven, an American equivalent of 'Baby Box'.

(b) The anonymous birth debate

Many adoption agencies viewed the 'Baby Box' movement or controversy and the increase in babies left in the box or abandoned as evidence showing the need to amend the adoption law, especially the Act on Special Cases Concerning Adoption, again. They advocated for the repeal of the requirements of registration of birth and the cooling–off period that would be necessary to prevent baby abandonment, especially by young unmarried mothers and to facilitate adoption.

On the contrary, adoptees' associations and unmarried mothers' associations most of whose members rear their children out of wedlock by themselves, are opposed to the movement against the prior adoption reform. They maintain that it might add additional pressure on unmarried mothers to give up registering their babies' births and rearing their babies by themselves; their parents and their babies' biological fathers who want to keep the out-of-wedlock birth secret might force them to choose anonymous birth. If anonymous birth is coupled with counselling and government protection, this potential danger can be minimised. Put differently, anonymous birth presupposes a well–designed social, psychological, and medical support for the pregnant person, especially the minor who is pregnant.

There have been three attempts to address this issue in the National Assembly.

The first attempt was a draft bill titled as a Draft of the Act on Prevention of Abortion and Support of Birth proposed by representatives Seonyoung Park et al, on 12 September 2008 during the 18th National Assembly.[44] This draft bill proposed introducing a new mechanism, 'Birth with Hope', which roughly corresponds to anonymous birth. Anyone in labour could demand 'Birth with Hope' in health care institutions designated by the central or local governments. When a mother demands 'Birth with Hope', the responsible officer would inform her of the legal effect of 'Birth with Hope', the importance of knowing one's own origin and birth family, the fact that she can provide the information on herself and have control thereof at any time, and the fact her identity would be kept from all others in principle. After the birth, the birth or biological mother writes down the information on a paper that she wants to provide and transmits the paper to the responsible officer. The responsible officer then seals the paper and writes down the baby information such as sex, birth date, birth location, and name, if the birth or biological mother granted it, on the sealed envelope of the paper under the supervision of the principal of the designated health care institution. Nobody can demand that she present her ID during this

[44] http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_U0Z8Y0N9X1N2D1V0N4E1K4Y0L8R4I3.

procedure. As the demand for 'Birth with Hope' would affect open consent to adoption, the baby could be adopted. The child could access the information of the birth or biological mother only if she consents to the access. If he was adopted, he would need the consent of the adoptive parents, too.[45]

This draft bill does not address how to register the birth itself. It rather entrusts the birth or biological mother with providing birth information, and even this information is not subject to registration. In this regard, it followed the French anonymous birth model, *accouchement secret*, and protects the birth or biological mother's privacy strongly. The 18th National Assembly ended on 29 May 2012 without addressing this draft bill.

The second attempt was a draft bill of amendment to the Act on Special Cases Concerning Adoption made by representatives Jaehyun Baik et al, on 18 January 2013 during the 19th National Assembly.[46] This draft bill matched the arguments or demands of adoption agencies. Thus, this draft bill was designed to meet practical needs, and did not seem to refer to any legislation in other jurisdictions. It made an exception to the required cooling–off period for consent on agency adoption and registration of birth where the birth or biological mother is a minor and wants to have her out–of–wedlock baby adopted. In this case, the principal of the adoption agency can assume the responsibility for the unregistered baby and register him as an abandoned baby with unknown parents. Thus, this draft bill allows *de jure* sham registration. The draft bill does not include any regulation regarding providing information on the birth by the birth or biological mother, nor the social, medical, and psychological support for the biological mother during and after her pregnancy. In this regard, we can say that this draft bill was an attempt to restore the old agency adoption scheme. The 19th National Assembly also ended on 29 May 2016 without addressing this draft bill.

The last attempt is, until now, another draft bill of amendment to the Act on Special Cases Concerning Adoption made by representatives Hoyeong Ju et al, on 9 June 2016 during the 20th National Assembly.[47] This draft bill does not make any exception to the consent to agency adoption cooling–off period. Nor does it provide any social, medical, and psychological support for the biological mother during and after her pregnancy. It provides, however, an exception to the requirement of registration of birth when the baby was born out of wedlock. In this regard, the only difference between the draft bill of Baik et al, and this one, is that the exception in this bill is not limited to minors. Again, the principal of the adoption agency registers the unregistered baby as a baby with unknown parents. Thus, this draft bill also allows *de jure* sham registration of

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[45] In addition, the local government provides health care services for the birth mother. Many of unmarried mothers are poor and young so that they might need medical and financial protection.

[46] http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_S1I3G0K1J1S8N1V5I4U1O2O8Y4J8H5.

[47] http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_W1X6O0N6S0W9X1Q5B3C4X2T7Y5K7W5.

Click here to go to Main Contents

birth. Unlike the draft bill of Baik et al, however, this draft bill allows the principal of the adoption agency to make up a record on the adoption including the identity of a single parent and submit the record to the court as well as the Korea Adoption Services. The adoptee can demand the Korea Adoption Services provide the adoption records, including the information on his birth or biological mother. The Korean Adoption Services should provide the records or information therein except for the biological parent's identity. As for the identity, however, the disclosure is possible on a strict condition. Either the birth or biological parent must agree to the disclosure or there must be a reasonable cause like death why the biological parent cannot agree and a medical or any other necessity to disclose the information.[48] This draft bill is still pending.

Many family law scholars support the German model of anonymous birth, *vertrauliche Geburt*. First, repealing the requirement of birth registration is neither proper nor enough. Failing to register the birth was illegal under the previous law, too. Thus, just repealing the requirement of birth registration does not change anything, at least from a legal perspective. More importantly, it is neither appropriate nor necessary to allow the sham registration that the baby is abandoned with an unknown birth or biological mother. The new law does not allow adoption by sham registration of birth but treats a fully adopted child just like a biological child. Likewise, it would be enough to have birth or biological mothers register their babies' birth with the information on mothers but provide them an option to keep their identities from the babies and third parties until the babies reach a certain age, for example 18.[49] Most also stress that the government should provide those who are pregnant with social, psychological, and medical support, including overall counseling about adoption and raising babies as unmarried mothers that they can access without revealing their identity. At the same time, they oppose repealing the cooling–off period.[50]

This policy is agreeable. Unlike the 'Baby Box', this institution itself does not endanger the baby's life and health. Although there may be a possibility that anonymous birth discourages her from rearing the baby by herself, we can

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[48] Article 36 of the Act on Special Cases Concerning Adoption. The draft bill only refers to this provision in the existing law and does not amend it.

[49] Adoption law reform almost deprived those who do not want to register their baby's birth of the possibility to put their baby up for adoption directly through adoption agencies, the most attractive adoption mode for adoption agencies. A family law scholar sees this as a reason why agencies opposed the reform and demanded the amendment of the adoption law, especially for repealing the birth registration requirement. Kwon, (2014), 79.

[50] Kim, Sang Yong, 'Baby Box and Anonymous Birth', *Law Review (Institute of Law Studies Pusan National University)* Vol 54(4), 315, 323 ff (2013) (written in Korean); Jang, Byeong Ju, 'A Proposition about Reform of New Adoption System – A Distinction between Korean Civil Code and Adoption Mediation Act', *Kyungpook Natl Univ Law Journal* Vol 41, 501, 524 f (2013) (written in Korean); Seo, 117 ff; Shin, 359 ff. It seems clear that the new German legislation on 'trustable' birth, *vertraulichen Geburt* in German, has influenced this solution. The French anonymous birth model, *accouchement secret*, which entrusts to the biological mother the decision whether to form a mother–child relationship from the beginning and how much information she provides on herself to the government, seems to be generally rejected.

address this danger by providing mandatory counselling programmes and support. It is one reason why we need a cooling–off period. Setting aside the danger to the baby's life and health, anonymous birth relates only to whether to collect and disclose the biological parent's identity. In short, the most important point is weighing the birth mother's privacy (art 17 of the Constitution) against the right to know one's own birth origin. In this regard, we cannot protect the unrestricted right to know one's own birth origin. If it places a huge burden on his birth or biological parent and he would live in a facility waiting for full adoption, it seems reasonable to suspend this right. We can regard this as just an extension of the existing rule restricting or suspending this right for a full adoption. The other extreme, not collecting the biological parent's identity at all, is not acceptable because it does not properly consider the biological mother's privacy. The German model seems to meet the balance. This policy might also reduce the child abandonment, while this effect is not necessary to justify this policy.

In addition, it is dubious to allow a sham birth registration as a baby with an unknown parent. It is only necessary to strictly control disclosure. Collecting, but managing identifying information, not as family relation registration, but as an adoption record is inconsistent with both information management systems. Birth mother information should be on the family relation register, not on the agency adoption record.

Finally, it seems necessary to give the birth or biological mother an option to withdraw the anonymous birth designation at any time before the adoption is completed.

IV CONCLUSION

The 'Baby Box' and anonymous birth debate in South Korea shows the impact of adoption law reform and the reaction of social workers, family law professionals, and other stakeholders against it. The adoption law reform's impact and effect is very complex, and regrettably, we have neither enough data nor rigorous analysis thereof. There are various conflicting interpretations on the impact. Understandably, they proposed different, sometimes conflicting solutions. Some reactions and solutions were rational and agreeable, while others might be hard to agree with and seem to pursue the individual stakeholders' interests instead of the common good.

The 'Baby Box' issue is still waiting for a solution. And the debate on anonymous birth is still pending. Many seem to propose one right answer to the latter question, but the solution to the first question is still very uncertain. We need more data and better analysis on this question.

Click here to go to Main Contents

MAURITIUS

MARRIAGE BY FOREIGN NATIONALS TO MAURITIAN CITIZENS: A COMMENT ON SECTION 19A OF THE CIVIL STATUS ACT OF 1981

Jamil Ddamulira Mujuzi[*]

Résumé

La Loi sur l'état civil de l'île Maurice a été modifiée en 1995 par l'adoption de l'article 19A qui prescrit les conditions de validité d'un mariage entre un étranger et un citoyen mauricien. Ainsi, le mariage est interdit si le non-citoyen a un casier judiciaire, s'il est accusé dans un procès criminel, s'il n'occupe pas un emploi rémunéré ou, encore, s'il a une maladie contagieuse. Les tribunaux se sont penchés sur l'application de cette disposition et le présent texte fait état de cette jurisprudence ainsi que des défis que pose cet article en termes de droits de la personne. L'auteur est d'avis que l'article 19A viole les droits fondamentaux de la personne, tant en droit interne qu'en droit international.

In 1995 the Mauritian Civil Status Act was amended to insert s 19A, which regulates the circumstances in which a foreign national may marry a Mauritian citizen. In particular, a foreign national with a criminal record or a suspect in a criminal case or one who is not gainfully employed or one with a communicable disease may not be allowed to marry a Mauritian national. Jurisprudence has started to emerge from Mauritian courts on the implementation of s 19A. The purpose of this chapter is to highlight that jurisprudence and some of the human rights implications of s 19A. The author argues that s 19A is contrary to Mauritius's national and international human rights obligations and should therefore be amended.

I INTRODUCTION

In 1995 the Mauritian Civil Status Act[1] was amended to insert therein s 19A which regulates the circumstances in which a foreign national may marry a Mauritian citizen. Section 19A provides that:

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1 Civil Status Act, Act 23 of 1981.

Click here to go to Main Contents

> '(1) Notwithstanding any other enactment and subject to subsection (3), no marriage shall take place between a non-citizen and a citizen of Mauritius unless the parties comply with the provisions of this section. (2) No marriage under subsection (1) shall be celebrated— (a) unless— (i) publication of the intended marriage is made at the Central Civil Status Office and at the office of the district in which each of the parties to the marriage has been residing for at least 7 days immediately preceding the day of publication; (ii) the non-citizen has resided in Mauritius for a continuous period of at least 7 days before the first day of the publication; (iia) the non-citizen and the citizen declare, at the time of making an application for the publication of the marriage, that they have disclosed to each other whether or not they are HIV positive or have AIDS; (iii) the non-citizen produces at the time of making an application for the publication of the marriage— (A) all certificates required for the purpose of ascertaining whether he may lawfully get married; (B) his passport; (C) subject to subsection (3), a certificate or certificates issued by the competent authorities of his country of residence attesting that he is of good character and is not the suspect in relation to any pending criminal proceedings, investigation or process; (D) an affidavit sworn before the Master and Registrar of the Supreme Court of Mauritius, as well as a certificate from his country of residence, attesting that he is in gainful employment or, alternatively, has sufficient means to maintain himself; (E) medical certificates attesting that he is not suffering from any infectious or contagious disease; (F) such other information as may be prescribed; (b) before the expiry of a period 10 days commencing on the first day of the publication; c) on any private premises or at any place other than at the Central Civil Status Office; or (d) by any authorised or unauthorised person. (3) Where the non-citizen satisfies the Registrar of Civil Status that he is unable to comply with subsection (2) (a) (iii) (C), he may produce an affidavit— (a) attesting to the matters specified in that subsection; and (b) sworn and duly authenticated in accordance with the law of his country of residence.'

Jurisprudence has started to emerge from Mauritian courts on the implementation of s 19A. The purpose of this chapter is to highlight that jurisprudence and some of the human rights implications of s 19A. The author argues that s 19A is contrary to Mauritius's national and international human rights obligations and should therefore be amended.

II EMERGING JURISPRUDENCE

To date there are three cases from the Supreme Court of Mauritius which have dealt with s 19A.[2] The author will discuss them in the order in which they were decided. The first was that of *Schezzo George Michel v State of Mauritius*.[3] In

[2] In *Abbas S v Registrar of Civil Status* 2015 SCJ 391 the court mentions that s 19A was referred to but it is not clear in what circumstances. The relevant part of the judgment states that 'The applicant is a Pakistani national who entered into a first marriage with a Mauritian national on 4 November 2011, and divorced on 10 June 2014. He now wishes to civilly marry another Mauritian national and following publication under section 19A of the Civil Status Act (the Act), an objection was raised by the applicant's former wife and the Prime Minister's Office. The latter objection was upheld by the respondent following a hearing held under section 22(2) of the Act'; see p 1.

[3] *Schezzo George Michel v State of Mauritius* 1999 SCJ 55.

December 1996, the applicant, an Italian national working in Mauritius, had religiously married a Mauritian citizen and wished to 'civilly marry her'.[4] Under s 19A he was required to exhibit his passport as one of the requirements for the marriage ceremony to take place. His passport was being held by the Mauritian immigration authorities as he was being prosecuted for issuing a cheque 'for which there was no provision'.[5] His 'main contention [was] that the refusal of the respondent [official] to produce and exhibit his passport at the Civil Status Office [was] tantamount[] to an objection to his proposed civil marriage, thus depriving him of his civil right and fundamental freedom under the laws of Mauritius'.[6] The respondent argued, inter alia, that the law empowered him to retain the passport for the purpose of the pending prosecution.[7] The Court observed that the purpose of keeping the passport was to ensure that the applicant remained in the country to attend his trial and the question it had to decide was whether the respondent was entitled to refuse to exhibit the passport for the purpose of enabling the applicant to celebrate his civil marriage.[8] The Court observed that:

> 'The applicant is not asking for permission to leave the country. He has given every detail to show that he has been religiously married for two years. This state of affairs has not been denied by the respondent. In fact learned Counsel for the respondent admits that the applicant has a right to marry. He however states that the applicant has not averred whether he can satisfy the other requirements of the Civil Status Act in order to get married. The learned State Counsel seems to be taking the argument outside the issues raised. Indeed the question before me is not whether the applicant can fulfil the legal requirements imposed under the Civil Status Act for him, as a non-citizen, to get married. The point made by the applicant is that in order to entail the procedure for him to get married, he is required to produce his passport to the Civil Status Officer since he is marrying a citizen of Mauritius. Thus, his present application to cause the passport to be exhibited to the Status Officer for the purpose of the publication of his intended marriage.'[9]

In ordering the respondent to exhibit the applicant's passport, the court held that:

> '[T]he right to marry is of public order subject to the law of the land, and the respondent cannot legitimately use its power to withhold the applicant's passport so as to also, indirectly, deprive him of his natural human right to marry under the law. The refusal of the respondent to allow the use of the passport by the applicant for the purpose of entailing marriage procedure under S 19A of the Civil Status Act is, in the circumstances of the case, unjustified and amounts to an unfair exercise of power.'[10]

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4 Ibid p 1.
5 Ibid p 2.
6 Ibid p 2.
7 Ibid p 2.
8 Ibid p 3.
9 Ibid p 3.
10 Ibid p 4.

Click here to go to Main Contents

One of the most important issues to note about this case is that the Court expressly recognises the fact that people in Mauritius have a right to get married. This is the case although this right is not provided for in the Mauritian constitution. This issue will be dealt with later in this chapter. The second case in which s 19A was dealt with was *Robert MCJ v The State of Mauritius*.[11] The applicant, a Mauritian national, challenged the legality of the immigration officer's decision to refuse to grant her husband, a French national, a tourist visa to visit Mauritius. Their marriage had taken place in 1990, before s 19A was inserted into the Act. The reason why he had been denied the tourist visa was because in 1991 a French court had convicted him of rape and attempt upon chastity and sentenced him to 5 years' imprisonment.[12] The Court held that denying him a visa was contrary to the relevant immigration laws and ordered the immigration officials to issue him a visa. Although the case was not decided on the basis of s 19A, the fact that it was mentioned shows that had it been in issue the court would have dealt with it.

The third case in which s 19A was dealt with was that of *Marguerite VEP v The Prime Minister of Mauritius & Anor.*[13] The applicant was a Mauritian national and her husband a British national. They had met in England when the applicant was a student. In April 2007 'they both came to Mauritius where they intended to get married on 17 May 2007'.[14] On the basis of s 19A, the applicant's husband was required to submit a certificate from the United Kingdom showing whether or not he had ever been convicted of any offence. The certificate he submitted to the Mauritian authorities 'showed that during the period 08 June 1987 to 21 October 2005, he had been convicted of 22 offences, including several drug offences, one of which being possession of controlled drugs with intent to supply and for which he was sentenced to 2 years' imprisonment'.[15] In the light of the above certificate, 'the Registrar of Civil Status … informed the parties to the proposed marriage that the marriage had not been authorised'.[16] Because of the applicant's husband's 'heavy criminal record' the first respondent 'requested that arrangements be made for him to leave Mauritius immediately'.[17] The applicant's husband left Mauritius. The applicant followed him after a few days and they got 'civilly married' at the Registrar's Office in the United Kingdom.[18] After their marriage, the applicant's husband applied for visas to enter Mauritius but all his applications were unsuccessful because of his criminal record. The applicant made two arguments to challenge the legality of the decision denying her husband a visa to enter Mauritius. The first argument was that denying her husband a visa to enter Mauritius was against the 'principle of "regroupement familial"'.[19] He argued that this principle is derived from the case law of the European Court of

[11] *Robert MCJ v The State of Mauritius* 2014 SCJ 39.
[12] Ibid p 1.
[13] *Marguerite VEP v The Prime Minister of Mauritius & Anor* 2014 SCJ 37.
[14] Ibid p 1.
[15] Ibid p 1.
[16] Ibid p 1.
[17] Ibid p 1.
[18] Ibid p 2.
[19] Ibid p 2

Human Rights based on art 8 of the European Convention of Human Rights: 'That case law … is to the effect that the removal of a person from a country where close members of his family are living may amount to an infringement of the right guaranteed under article 8 of the Convention.'[20]

In rejecting that submission, the Court held that:

'It is to be noted that that Convention is not applicable to Mauritius and that the case for the applicant cannot be that [her husband] is being removed from Mauritius. Moreover…the European Court has also stated that a State has the right under international law to control the entry of non-nationals into its territory: vide *Y. v Russia* [2010] 51 EHRR 21. In that case, the European Court went on to express the view that knowledge on the part of one spouse at the time of the marriage that rights of residence of the other were precarious militate against a finding that an order excluding the latter spouse violates article 8. We would also wish to add that articles 17 and 23 of the International Covenant on Civil and Political Rights would not, in the circumstances of the present case, avail the applicant either. In any event, the principle enunciated in the *Y. v Russia* case (supra) is reflected in our law in section 3 of the Act which reads as follows – Subject to this Act, no person may be admitted to Mauritius or, being within Mauritius, remain there.'[21]

The applicant also argued that in the light of s 5(1)(c) of the Immigration Act, her husband had residence status in Mauritius because of their marriage and therefore denying him a visa to enter Mauritius was unlawful. This is because s 8(1) of the Immigration Act provides that '[e]xcept as provided in subsection (2), the following persons, other than citizens and, subject to section 6, residents, shall be deemed to be prohibited immigrants and shall not be admitted to Mauritius'. The Court held that denying the applicant's husband a visa to travel to Mauritius was contrary to the Immigration Act as he was a Mauritian resident by virtue of the marriage. It concluded that:

'No doubt it is open to the first respondent in his absolute discretion to deprive [the applicant's husband's] of his status of resident, should he be satisfied that it is in the public interest to do so. There is no averment that this has been done. The result is that resort cannot be had to section 8 in the circumstances. The application must accordingly succeed. We quash the decision of the respondents refusing to grant an entry visa to [the applicant's husband's], the spouse of a Mauritian citizen, with costs.'[22]

The above case shows, inter alia, that s 19A has been invoked to present a foreign national from getting married to a Mauritian citizen. However, s 19A may be bypassed by conducting the marriage outside Mauritius and coming

[20] Ibid p 2.
[21] Ibid pp 2–3.
[22] Ibid p 3.

Click here to go to Main Contents

back to Mauritius after the marriage as a resident on the basis of s 5(1)(c) of the Immigration Act.[23] It is now necessary to analyse the above jurisprudence and s 19A.

III ANALYSING S 19A AND THE JURISPRUDENCE

The first issue to be dealt with relates to the issue of the right to marry and found a family. Unlike the constitutions of different African countries such as Uganda,[24] Zimbabwe,[25] Kenya,[26] and Namibia,[27] the Mauritian constitution does not provide for the right to marry. However, in *Schezzo George Michel v State of Mauritius*[28] the Supreme Court held that '[T]he right to marry is of public order subject to the law of the land, and the respondent cannot legitimately use its power to withhold the applicant's passport so as to also, indirectly, deprive him of his natural human right to marry under the law'.[29] The Court makes it very clear that a person has a natural right to marry, whether or not a Mauritian citizen. However, *Marguerite VEP v The Prime Minister of Mauritius & Anor*[30] the court rejected the applicant's argument that refusing her husband a visa to enter Mauritius violated his rights under Art 8 of the European Convention on Human Rights. The Court held that the European Convention of Human Rights is not applicable to Mauritius. What is clear is that although the right to marry is established in Mauritian case law, this same case law is silent on the right to family life. The Court's outright rejection of the jurisprudence of the European Court of Human Rights is not convincing in the light of the fact that the Privy Council has emphasised the importance of the European Court of Human Rights' jurisprudence in Mauritius. In *Hurnam v The State*[31] the Privy Council held:

'Chapter II of the Constitution reflects the values of, and is in part derived from, the European Convention … It is indeed noteworthy that the European Convention was extended to Mauritius while it was still a Crown Colony, before it became independent under the 1968 Constitution: see European Commission of Human Rights, Documents and Decisions (1955-1957), p 47. Thus the rights guaranteed to the people of Mauritius under the European Convention were rights which, on independence, "have existed and shall continue to exist" within the terms of section 3. This is a matter of some significance: while Mauritius is no longer a party to the European Convention

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[23] Section 5(1) of the Immigration Act, Act No 13 of 1970, provides that 'Subject to section 6, any person, not being a citizen, shall have the status of a resident for the purposes of this act where … – (c) he is the spouse of a citizen.'

[24] Article 31 (Constitution of Uganda, 1995).

[25] Section 26 (Constitution of Zimbabwe, 2013).

[26] Article 45(2) (Constitution of Kenya, 2010).

[27] Article 14 (Constitution of Namibia, 1990).

[28] *Schezzo George Michel v State of Mauritius* 1999 SCJ 55.

[29] Ibid p 4.

[30] *Marguerite VEP v The Prime Minister of Mauritius & Anor* 2014 SCJ 37.

[31] *Hurnam v The State* 2004 PRV 53.

or bound by its terms, the Strasbourg jurisprudence gives persuasive guidance on the content of the rights which the people have enjoyed and should continue to enjoy.'[32]

Mauritian courts, including the Supreme Court, have also referred to the European Convention of Human Rights in interpreting some provisions of the constitution.[33] The Supreme Court held that the Mauritian Constitution 'boasts of a Bill of Rights which is more or less a textual reproduction of the European Convention of Human Rights'.[34] The Privy Council held that the Mauritian Constitution is 'substantially modelled on the European Convention of Human Rights'.[35] However, the European Convention of Human Rights does not supervene the Mauritian constitution.[36]

It is argued the Court's reasoning would have been more convincing it if had held, for example, that much as the Bill of Rights in the Mauritian Constitution was modelled on the European Convention on Human Rights, the right to family life in the European Convention on Human Rights was not transferred in the Bill of Rights and therefore not part of Mauritian law.[37] However, this reasoning would also have been open to debate. This is because although the

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[32] *Hurnam v The State* 2004 PRV 53 para 4.

[33] For example, *Director of Public Prosecutions v Ali Abeoulkader Mohamed & Ors* 2015 SCJ 452 (on the question of the right to liberty and unlawful detention); *ICAC v Anderson Ross & Ors* 2014 INT 35 (on the issue of retrospective application of legislation); *State v Charles Jean Desire Huberto* 2012 SCJ 407 (on the question of secure protection of the law); *Hurnam D v Peeroo S and Ors* 2012 SCJ 41 (on the right to a fair trial); *Police v Ramatoolah* 2011 INT 252 (freedom of religion); *Rambhurosh RB v The State* 2009 SCJ 218 (on the requirement that a judgement has to be pronounced publicly); *King Car Co. Ltd. v Kurmally T* 2007 SCJ 262 (the right to a fair trial); *Police v Nitin Chinien* 2014 PL3 1 at p. 3 (the courts a matter of guidance on the interpretation of the words 'criminal offence', I have referred to the jurisprudence of the European Court on Human Rights. Article 5 of the European Convention of Human Rights contains similar provisions as s 5 of our constitution on the right to liberty of an individual).

[34] *Manraj D & Ors v ICAC* 2003 SCJ 75, p 20.

[35] *Darmalingum Sooriamurthy v The State (Privy Council)* 1999 PRV 42; 2000 MR 210, p 4.

[36] In *Lincoln & Ors Petitioners v Governor General & Ors* 1974 MR 112, p.6, the Supreme Court held that 'While the Court will willingly turn to the Convention [European Convention of Human Rights] and to the decisions of the European Court of Human-Rights for guidance when it has to determine the meaning and scope of the fundamental rights and freedoms embodied in our Constitution, it could plainly not see in the Convention some kind of supra-national law to which the municipal law of this country is subordinate unless and until our municipal law itself made provision for its overriding by the Convention. If ever the Government could be taken to task for infringing the terms of the Convention, the forum for an eventual complainant must be some other than this Court.'

[37] In *Police v Dwarka Hans Yatindranath & Ors* 2007 INT 210, p 3, the Court held that 'We are thus of the view that Section 10 of the Constitution pertaining to the right to a fair trial has been borrowed from article 6 of the European Convention of Human Rights although the drafting style is different and believe that the pronouncements of the European Court of Human Rights as well as the decisions of the UK Courts interpreting those provisions would certainly provide useful guidance when the Courts have to interpret similar principles in our own Constitution.' The Intermediate Court observed 'It has been times and again recognised that Mauritian Constitution has been derived to a large extent from the European Convention of Human Rights so that the Strasbourg Jurisprudence provides a powerful persuasive guidance on the contents of the rights under our Constitution.' See *Police v Peroomal Veeren & ors (Ruling)* 2015 INT 387, p 6.

Click here to go to Main Contents

constitution of Mauritius does not provide for the right to 'private life' which is one of the rights under Art 8 of the European Convention on Human Rights, the Supreme Court held that that right is part of Mauritian law. In *Soornack Nandanee v Le Mauricien Ltd & Ors*[38] the Supreme Court held that:

> 'The right to the protection of private life is itself established under article 22 of our Civil Code which is similar to article 9 of the French Civil Code … Article 12 of our Constitution is a reflection of article 10 of the European Convention of Human Rights and the protection of the private life of an individual is ensured in Article 8 of the same Convention. Both in England and in France the Courts have aligned themselves with the jurisprudence of the European Court in relation to those two rights which are provided for in the European Convention.'[39]

However, in a later decision, the Supreme Court held that the Mauritian constitution did not protect the right to private life. In *Madhewoo M v The State of Mauritius and Anor*[40] the Court referred to Art 8 of the European Convention of Human Rights and held that:

> '[T]he provisions of Sections 3 and 9 of our Constitution are not the equivalent of Article 8 of the European Convention and would not as a result create constitutionally protected rights of privacy and private life in the same manner and to the same extent as Article 8 of the European Convention.'[41]

In an earlier decision in which the Court dealt with a person's right not to have his correspondence interfered with, it held that '[t]he drafting style may be different but the gist of Article 8 of the Convention and Section 12 of the Constitution is to the same effect'.[42] The Court referred to the decisions of the European Court on Human Rights on the right to private life and concluded that '[t]his indicates that the decisions of the European Court of Human Rights are based on the protection of a right to respect for private life, which protection is not afforded by the wording of sections 3 and 9 of our Constitution'.[43] Although the Constitution does not recognise the right to family life, the Supreme Court will consider the accused's family life (eg whether or not he is married and how many children he has) in determining which sentence to impose on him.[44] What the above jurisprudence shows is that case law is not clear on whether or not the rights under Art 8 of the European Convention of Human Rights are also protected in Mauritius. The Supreme Court would have to come up with a clear stand on that issue.

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38 *Soornack Nandanee v Le Mauricien Ltd & Ors* 2013 SCJ 58.
39 *Soornack Nandanee v Le Mauricien Ltd & Ors* 2013 SCJ 58, p 10.
40 *Madhewoo M v The State of Mauritius and Anor* 2015 SCJ 177.
41 *Madhewoo M v The State of Mauritius and Anor* 2015 SCJ 177, p 17.
42 *The State v Sir Bhinod Bacha* 1996 SCJ 218; 1996 MR 97, p 38.
43 *Madhewoo M v The State of Mauritius and Anor* 2015 SCJ 177, pp 18–19.
44 *State v Ghoorbin S* 2014 SCJ 262, p 3.

The Court also made it very clear in *Marguerite VEP v The Prime Minister of Mauritius & Anor*[45] that Arts 17 and 23 of the ICCPR would not be of help to the applicant. Article 17 provides that:

> '1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.'

Article 23 provides that:

> '1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. 2. The right of men and women of marriageable age to marry and to found a family shall be recognized. 3. No marriage shall be entered into without the free and full consent of the intending spouses. 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.'

The challenge is that the *Marguerite VEP* opinion does not discuss the above Articles and in particular it does not explain how they were not applicable to the applicant's case. This is so although in the past the Court has discussed how international human rights treaty provisions are relevant or otherwise in interpreting rights in the Mauritian constitution.[46] Of concern is the fact that the judgment is devoid of any jurisprudence from international human rights bodies on the right to family life, yet in the past the Court has referred to jurisprudence from international human rights bodies when dealing with human rights issues.[47] Although international human rights instruments do provide for the right to family life, international human rights bodies such as the Committee on the Rights of the Child,[48] the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families,[49] the Committee on the Elimination of Discrimination against Women,[50] and the

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45 *Marguerite VEP v The Prime Minister of Mauritius & Anor* 2014 SCJ 37.

46 See for example *Babeea v The Queen* 1981 MR 67 1981 SCJ 67; *Bajan M v The State* 2010 SCJ 348 (the court referred to Art 14 of the ICCPR); *Bhewa and Alladeen v Government of Mauritius and DPP* 1990 MR 79 1990 SCJ 126 (the court referred to Art 18 of ICCPR); *Bishop of Roman Catholic Diocese of Port Louis and Ors v Suttyhudeo Tengur and Ors* 2003 PRV 21 2004 MR 197 (the Court referred to the UNESCO Convention against Discrimination in Education of 1960 and the UN International Covenant on Economic, Social and Cultural Rights).

47 *Darmalingum S v State* 1999 SCJ 67a (the Court refers to the jurisprudence of the Human Rights Committee).

48 Concluding observations of the Committee on the Rights of the Child on the initial report of Cape Verde CRC/C/15/Add.168 7 November 2001 para 38(a).

49 Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families on the initial report of Peru CMW/C/PER/CO/1, 13 May 2015 para 33.

50 Concluding observations of the Committee on the Elimination of Discrimination against Women on the seventh periodic report of Denmark CEDAW/C/DEN/CO/7, 7 August 2009 para 40.

Human Rights Committee,[51] have called upon states parties to adopt measures or enact legislation that also protects the right to family life. The Human Rights Committee has stated expressly that:

> '[W]hile the Covenant [ICCPR] does not recognize the right of aliens to enter or reside in the territory of a State party, an alien may, in certain circumstances, enjoy the protection of the Covenant, even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.'[52]

The Human Rights Committee recognised that Norway had an obligation to prevent child marriages through putting in place conditions regulating the circumstances in which families may be re-united, but it took issue with Norway for 'excessive breadth of the conditions [it adopted which] may adversely affect the enjoyment of the right to family life, marriage and the choice of spouse'.[53] The Committee urged Norway 'to assess the impact of the new conditions for such permits on the enjoyment of the right to family life, marriage and choice of spouse. Such a study should assess whether conditions should be amended to better respect the right to family life'.[54] The Committee on the Elimination of Racial Discrimination has also called upon states not to adopt measures that would prevent people within their jurisdictions from 'the enjoyment of their right to family life, marriage and choice of spouse'.[55] The Committee on the Elimination of Racial Discrimination has called upon Denmark to 'review its legislation to ensure that the right to family life, marriage and choice of spouse is guaranteed to every person without discrimination based on national or ethnic origin'.[56] It is argued that the same recommendations are applicable to Mauritius. This is because a Mauritian citizen is not required to submit a certificate of his or her criminal records, financial means or evidence whether or not he/she has an infectious disease if he/she intends to marry another Mauritian citizen.

A law that prohibits a Mauritian citizen from marrying a foreign national with a criminal record or not in gainful employment or with an infectious disease in effect ensures that such person is prevented from choosing his or her spouse. The Committee on the Elimination of Racial Discrimination has called upon a state party to '[a]void the expulsion of non-citizens, especially of long-term

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[51] Concluding observations of the Human Rights Committee on the fifth periodic report submitted by Iceland CCPR/C/ISL/CO/5, 31 August 2012 para 14.

[52] Concluding observations by the Human Rights Committee on the fifth and sixth periodic reports of Ecuador CCPR/C/ECU/CO/5, 4 November 2009 para 18.

[53] Concluding observations of the Human Rights Committee on the sixth periodic report submitted by Norway CCPR/C/NOR/CO/6 18 November 2011 para 15.

[54] Concluding observations of the Human Rights Committee on the sixth periodic report submitted by Norway CCPR/C/NOR/CO/6 18 November 2011 para 15.

[55] Concluding observations of the Committee on the Elimination of Racial Discrimination on the eighteenth to twentieth periodic reports of the United Kingdom and Northern Ireland CERD/C/GBR/CO/18-20, 14 September 2011 para 26.

[56] Concluding observations of the Committee on the Elimination of Racial Discrimination the sixteenth and seventeenth periodic reports of Denmark CERD/C/DEN/CO/17 19 October 2006 para 15.

residents, that would result in disproportionate interference with the right to family life'.[57] States must 'take effective measures to ensure that the right to family life is guaranteed to all persons … [in their jurisdiction] without distinction'.[58] It is argued that the same recommendations apply with equal force to Mauritius. Another, perhaps unintended consequence of the law is that it appears to be affecting more women as opposed to men. In all the cases that the court has dealt with, it is women who have been interested in marrying foreign male nationals. While the sample of cases is small, it is consistent with the idea that the law indirectly affects Mauritian women more than it affects men. It is argued that this is contrary to Art 16 of the Mauritian Constitution which provides that 'no law shall make any provision that is discriminatory either of itself or in its effect'.

It is also not clear why the Court did not refer to the African Charter on Human and Peoples' Rights which Mauritius ratified in 1992.[59] Article 18 of the African Charter on Human and Peoples' Rights obliges states parties to protect the family. Another important issue relates to the issue of discrimination. Section 16 of the Mauritian constitution prohibits discrimination. It provides that:

> '(1) Subject to subsection (4), (5) and (7), no law shall make any provision that is discriminatory either of itself or in its effect. (2) Subject to subsections (6), (7) and (8), no person shall be treated in a discriminatory manner by any person acting in the performance of any public function conferred by any law or otherwise in the performance of the functions of any public office or any public authority. (3) In this section, "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, caste, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages that are not accorded to persons of another such description.'

It is clear that the grounds on which a person may not be discriminated against are limited to the following: race, caste, place of origin, political opinions, colour or creed. This means that a person may not argue that it is unconstitutional to discriminate against him because of his criminal record, or because he is not gainfully employed or because he has an infectious disease. However, Mauritius ratified the ICCPR and Art 2(1) of this treaty provides that:

> 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights

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[57] Concluding observations of the Committee on the Elimination of Racial Discrimination on the ninth to twelfth periodic reports of the Dominican Republic, CERD/C/DOM/CO/12, 16 May 2008 para 13(c).

[58] Concluding observations of the Committee on the Elimination of Racial Discrimination on the fifteenth periodic of Denmark CERD/C/60/CO/5, 21 May 2002 para 14.

[59] See Ratification Table: African Charter on Human and Peoples' Rights. Available at www.achpr.org/instruments/achpr/ratification.

recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

It is clear that Art 2(1) of the ICCPR is broader than s 16 of the Mauritian Constitution. In particular, it provides that a person shall not be discriminated against because of 'other status'. This is broad enough to include a criminal record, gainful employment or having an infectious disease. Different international human rights bodies such as the Committee on the Elimination of Discrimination against Women[60] and the Committee on the Elimination of Racial Discrimination[61] have called upon states parties to repeal or amend laws that discriminate against women who are married to foreign nationals.

Like the ICCPR, the African Charter on Human and Peoples' Rights provides (Art 2) that 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.' It is also clear that the African Charter on Human and Peoples' Rights prohibits discrimination on the ground of 'other status.' In *Open Society Justice Initiative v Côte d'Ivoire*, the African Commission on Human and Peoples' Rights, the African Commission, held that 'the list under Article 2 of the [African Charter] is neither absolute nor comprehensive. It is merely indicative'.[62] The African Commission has interpreted to include grounds which are not expressly mentioned in the African Charter on Human and Peoples' Rights.[63]

Apart from the issue of a certificate of good conduct from the foreign national's country of nationality, s 19A also imposes other conditions that have to be examined closely and they could be invoked to prevent people from getting married. One of the conditions is that 'the non-citizen and the citizen declare, at the time of making an application for the publication of the marriage, that they have disclosed to each other whether or not they are HIV positive or have AIDS'. It could be that this disclosure is needed for the authorities to be sure that if one of the parties is HIV positive, the other party knows of the fact and decides to enter into that marriage well aware of the risks involved. If Mauritius were to prevent the marriage from taking place simply because one of the

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60 Concluding observations on the combined initial and second periodic reports of Brunei Darussalam, CEDAW/C/BRN/CO/1-2 (CEDAW, 2014) para 29; Concluding observations of the Committee on the Elimination of Discrimination against Women on the initial report of Qatar, CEDAW/C/QAT/CO/1, 10 March 2014, para 32.

61 Concluding observations of the Committee on the Elimination of Racial Discrimination on the twelfth to seventeenth periodic reports of the United Arab Emirates, CERD/C/ARE/CO/17 21 September 2009, para 17; Concluding observations of the Committee on the Elimination of Racial Discrimination on the initial and second reports of Saudi Arabia, CERD/C/62/CO/8 2 June 2003 para 14.

62 *Open Society Justice Initiative v Côte d'Ivoire*, Communication 318/06 para 145.

63 *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Communication 245/2000, 21st Activity Report of the African Commission on Human and Peoples' Rights (May–November 2006), January 2007, EX.CL/322(X), Annexiture III para 169; *Purohit and Moore v The Gambia* 241/01.

parties is HIV positive, this would be discriminatory and would be criticised by international human rights bodies as they have done in respect of other countries that have adopted laws or policies which discriminate against people living with HIV/AIDS.[64] The Human Rights Committee has stated expressly that a state has a duty to enact legislation prohibiting discrimination on the ground of HIV.[65]

Another requirement, which is in tension with the one just discussed above on HIV/AIDS, is that a non-citizen must also submit 'medical certificates attesting that he is not suffering from any infectious or contagious disease'. The effect of this provision is that a marriage may not take place if such a foreign national is suffering from a contagious or infectious disease. This is the case whether or not he is on medication to treat such an infection or he contracted such an infection from a Mauritian national he intends to get married to. The challenge is that this provision appears to be in conflict with the one on HIV/AIDS discussed above. HIV is an infectious disease[66] and on the basis of this requirement a foreign national living with HIV/AIDS may be prevented from getting married to a Mauritian national who is HIV negative (or positive) even if that foreign national has declared his status to a Mauritian national and the Mauritian national is willing to enter into the marriage. As discussed above, if a foreign national were prevented from marrying a Mauritian citizen simply because of the fact that he/she is HIV positive, this would amount to discrimination.

Another requirement is that the non-citizen must also submit 'an affidavit sworn before the Master and Registrar of the Supreme Court of Mauritius, as well as a certificate from his country of residence, attesting that he is in gainful employment or, alternatively, has sufficient means to maintain himself'. There are challenges with this requirement. First, it ignores the fact that a foreign national may not have the means to 'maintain himself' but may be taken care of by the Mauritian spouse after the marriage. It is submitted that the best approach would have been to require a foreign national either to have the means to maintain himself or to show that his Mauritian spouse was willing and able to maintain him. Secondly, the provision ignores the fact that a foreign national may have high qualifications and be able to find employment in Mauritius or somewhere else after the marriage although he may be unemployed at the time of the marriage. Another problem with this provision is that it requires the 'certificate' in question to come from the foreign national's country of residence. This means that it has to be an official government

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[64] Concluding observations of the Human Rights Committee on the third periodic report of Jamaica CCPR/C/JAM/CO/3, 17 November 2011 para 9; Concluding observations of the Human Rights Committee on the third periodic report submitted by Kenya CCPR/C/KEN/CO/3, 31 August 2012, para 9; Concluding observations of the Committee on the Rights of the Child on the fourth periodic report of Nicaragua CRC/C/NIC/CO/4, 20 October 2010 paras 66–67.

[65] Concluding observations of the Human Rights Committee on the fourth periodic report submitted by the Sudan CCPR/C/SDN/CO/4 19 August 2014 para (g).

[66] Concluding observations of the Committee against Torture on the third periodic report of Kazakhstan CAT/C/KAZ/CO/3 12 December 2014 (conditions of detention).

document stating that he is gainfully employed. This provision ignores the fact that such a person may not be in government employment or some governments may not be able to issue such certificates because it is not their common practice. It is recommended that the best approach would have been to require the foreign national to submit any proof that he is gainfully employed. This proof could come from his employer, for example.

IV CONCLUSION

In 1995 the Mauritian Civil Status Act was amended to insert therein s 19A which regulates the circumstances in which a foreign national may marry a Mauritian citizen. In particular, a foreign national with a criminal record, one with an infectious or contagious disease and one who is not gainfully employed, may not be allowed to marry a Mauritian national. Jurisprudence has started to emerge from Mauritian courts on the implementation of s 19A. In this chapter, the author has dealt with the human rights implications of s 19A and has argued that s 19A is contrary to Mauritius's national and international human rights obligations and should therefore be amended.

VISIONS ON SURROGACY – FROM NORTH TO SOUTH: THE APPROACH OF THE NETHERLANDS AND SOUTH AFRICA TO THE ISSUE OF SURROGACY AND THE CHILD'S RIGHT TO KNOW HIS ORIGIN

Simona Florescu and Julia Sloth-Nielsen[*]

Résumé

Ce chapitre traite du droit sud-africain qui impose l'exigence d'un lien génétique en matière de gestation pour autrui, condition validée récemment par la Cour constitutionnelle dans l'affaire *AB and others* v *Minister of Social Development and Others (Centre for Child Law intervening as amicus curiae)*, CCT 155/15 (jugement du 29 November 2016), et compare cette exigence avec les proposition formulées en décembre 2016 aux Pays-Bas par le Comité gouvernemental sur la réévaluation du droit de la filiation qui visent notamment la question du droit de l'enfant à l'identité et celle de l'opportunité d'introduire une exigence de lien génétique. Nous ferons état des différences d'approche dans ces deux pays pour ce qui est des ententes internes et internationales de gestation pour autrui, ce qui permettra de tirer certaines conclusions quant à la meilleure manière de garantir le droit de l'enfant de connaître son identité.

I INTRODUCTION

This chapter compares the current situation regarding the requirement of a genetic link for the conclusion of a valid surrogacy agreement in South Africa, upheld by the recent Constitutional Court case of *AB and others v Minister of Social Development and Others (Centre for Child Law intervening as amicus curiae)*, CCT 155/15 (judgment of 29 November 2016), to the proposals for surrogacy published in December 2016 by the Government Committee on the Reassessment of Parenthood appointed in the Netherlands, also as regards the child's right to identity and the (possible) requirement of a genetic link. The

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different approaches for national and international surrogacy arrangements under both schemes are also discussed. Some conclusions are drawn regarding the more favourable alternative for implementation of the child's right to know his or her identity.

II SURROGACY IN THE NETHERLANDS

(a) Placing the Netherlands in the broader European context

The status of surrogacy in Europe is at the moment subject to controversy. Pursuant to research conducted in 2014 covering 34 European states, surrogacy was expressly prohibited in 14 of them.[1] Ten other countries did not regulate it expressly, it being either prohibited under general legal provisions, not tolerated or left to legal uncertainty.[2] Further, according to the report, surrogacy is permitted under strict legal conditions in only seven of the 35 countries. These states are Albania, Georgia, Greece, the Netherlands, the United Kingdom, Ukraine and Russia.

Another controversial aspect is the recognition of filiation established following foreign surrogacy agreements. In this area the approaches seem equally diverse. Some countries are more open to recognising (some) foreign birth certificates – provided the legal conditions where the surrogacy agreement was carried out were met, others limit the recognition to the proof of a genetic link between one of the parents and the child, while others prohibit any kind of recognition.[3]

Against this diverse legal landscape where surrogacy agreements are clouded in legal uncertainty, in 2014 the Dutch Government commissioned a report seeking a complete reassessment of legislation in the field of parenthood in the Netherlands. On 7 December 2016 the report of the Government Committee on the Reassessment of Parenthood (*Staatscommissie Herijking Ouderschap*) was published.[4] The report is structured in ten chapters covering existing legislation in the Netherlands in the field of parentage, custody and surrogacy and one chapter on proposals for amending the existing legislative regimes in this field. While such proposals have yet to become law, an overview on their content in the field of surrogacy is nevertheless interesting, especially against

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1 The research was conducted on the occasion of the delivery by the European Court of Human Rights of the judgment in the cases of *Mennesson v France* (no 65192/11, §§ 40-42, ECHR 2014 (extracts) and *Labassee v France* (no 65941/11, §§ 31-33, 26 June 2014, paras 31, 32. According to the research, the 14 states which expressly prohibit surrogacy are Germany, Austria, Spain, Estonia, Finland, Iceland, Italy, Moldova, Montenegro, Serbia, Slovenia, Sweden, Switzerland and Turkey.

2 These countries are Andorra, Bosnia Herzegovina, Hungary, Ireland, Latvia, Lithuania, Malta, Monaco, Romania and San Marino.

3 See *Mennesson v France*, n 1, para 42.

4 'Kind en Ouders in de 21ste eeuw Rapport van de Staatscommissie herijking ouderschap' and in English 'Child and parents in the 21st century. Report of the Government Committee on the Reassessment of Parenthood. It is available online at www.tweedekamer.nl/kamerstukken/detail?id=2016D47681&did=2016D47681.

the prevailing legal landscape in Europe and the pragmatic approach of the Government Committee's proposals. This section will thus start with a brief overview of the existing regulation in the field of surrogacy, followed by a more detailed inspection of the proposals for change as well as their place within the broader European (human rights) framework. More attention will be devoted to the issue of requiring a genetic link with the commissioning parents, as well as the proposed regulation of the child's right to know his origins.

(b) Existing legal framework in the Netherlands

As mentioned above, surrogacy at this moment is not illegal per se. However, the possibilities for surrogacy are heavily restricted to the point that in 2012 it was estimated that over the past 10 years, roughly 10 children have been born through surrogacy.[5]

The only form allowed is altruistic surrogacy, that is where the surrogate is not compensated in a commercial way. In the high-technological surrogacy cases – ie where the surrogate mother is not genetically linked to the embryo – surrogacy is only possible with the gametes of the commissioning parents.[6] There is one single Medical Centre in the Netherlands authorised to perform the procedure and this Centre has attached strict conditions for all parties involved, such as Dutch nationality for both the surrogate mother and the parents, residency in the Netherlands, etc.[7] Even though the Medical Centre requires that a contract be signed between the surrogate and the commissioning parents, it is agreed in practice that this contract is not enforceable.[8] In addition, the legal position of the child born following surrogacy is unclear as well as is the means of establishing parenthood for the commissioning parents.[9] In all cases, the surrogate mother will be the legal mother of the child, irrespective of any genetic links, and the commissioning parents may become the legal parents only following court procedures.[10] Commissioning parents may be registered as legal parents only if they adopt the child and this has to follow lengthy and cumbersome proceedings.

Commercial surrogacy is strictly prohibited.[11] Further, any activities that are perceived to encourage surrogacy such as using professional intermediaries or placing advertisements for surrogacy are criminalised.

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5 N Koffeman, *Morally sensitive issues and cross-border movement in the EU: the cases of reproductive matters and legal recognition of same-sex relationships* (Intersentia, 2015) p 295.
6 Ibid, p 292.
7 Ibid, p 292.
8 I Curry-Sumner and M Vonk, 'Chapter 17: The Netherlands' in K Trimmings and P Beaumont (eds) *International Surrogacy Arrangements: Legal Regulations at the International Level* (Hart Publishing, Oxford, 2013).
9 N Koffeman, n 5, p 293 and 2011 research report.
10 N Koffeman, n 5, p 293.
11 N Koffeman, n 5, p 293.

Click here to go to Main Contents

Given the strict and unclear national regime on surrogacy it is speculated that some commissioning parents have resorted to international surrogacy, although there is no reliable data on the actual number.[12] In any event, commissioning parents wishing to have their child born via a surrogacy agreement abroad also face severe hurdles.

Recognition in the Netherlands of a child born via surrogacy abroad can be divided into two main categories. First, there are the situations where the commissioning parents and the child are abroad and wish to either have the child recognised as their own by the Dutch Embassy abroad or require the issuance of a residence permit or other travel authorisation of some kind for the child.[13]

The second scenario is that where the parents and the child have successfully arrived in the Netherlands (as for example where there was no need for a visa for the child) and wish to register the child as their own in the Netherlands.

Regardless of which scenario is applicable, the Dutch authorities will apply their private international law rules to recognise an act or fact created abroad.[14] (There are no specific rules yet on surrogacy.) Even though recognition of foreign facts and acts are not in principle prohibited in the Netherlands, there are some situations where recognition would not be tolerated in the Netherlands. One such non-recognition ground is the public policy principle, under which Dutch authorities are not bound to recognise a foreign relation if the recognition would lead to a situation contrary to the fundamental principles and values of the Dutch system.[15] This ground was, for example, used in a situation where two homosexual men had a child via a surrogacy agreement in France. In France anonymous birth is permitted, hence they tried to register the child's birth certificate in the Netherlands without including the name of the mother. The registration was refused in the Netherlands on the ground that it was contrary to Art 7 of the Convention on the Rights of the Child (CRC), according to which each child has the right to know his or her own parents.[16]

While a lengthy discussion on how and when the relationship between Dutch parents and children born out of surrogacy agreements abroad may be recognised in the Netherlands is outside the scope of the present contribution, both the Government Committee's report as well as legal scholars agree that at present such recognition is clouded in legal uncertainty for all involved, i e the child, the surrogate mother and the commissioning parents.

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12 N Koffeman, n 5, p 293.
13 I Curry-Sumner and M Vonk, n 8, p 15.
14 Book 10 of the Dutch Civil Code.
15 L Strikwerda, *Inleiding tot het Nederlands Internationaal Privaatrecht* (Deventer, Kluwer, 2008) 53
16 The District Court of The Hague, 14 September 2009, *LJN*: BK1197, also MV, p 25.

(c) Current Government Committee proposal

Against this background, the Government Committee's proposal seeks to ensure legal certainty by putting forward solutions which in its view offer due respect and protection for the rights of all those involved in the surrogacy process. The main rights which were perceived to be at the core of the proposal were the right of the child to know his or her story of origin, as well as the rights of the surrogate mother to protection from exploitation. The Government Committee's proposal relates to both surrogacy within the Netherlands and surrogacy outside the Netherlands (i e rules on recognition).

(i) National surrogacy

The new proposal for regulating national surrogacy is comprehensive and covers the position of the child, the surrogate and that of the commissioning parents. Under the new proposal, the only acceptable form continues to be altruistic surrogacy with the obligation for the commissioning parents to cover all actual costs incurred by the surrogate (medical, legal, employment, disability insurance, etc). It is also estimated that an additional amount of €500 per month for the surrogate would be acceptable on account of carrying and delivering the child. Such an additional amount would represent compensation for the surrogate's discomfort and pain during and after the pregnancy. Also, it would be most likely taxable income which entails that the surrogate would retain only a small amount. These factors together result in the agreement still being considered as altruistic.

The following sections will outline the main aspects of the proposal.

Availability of national surrogacy

The procedure will only be available if at least one of the commissioning parents as well as the surrogate have habitual residence in the Netherlands for the entire length of the surrogacy procedure. Nationality is not relevant; however situations where the habitual residence is established solely for the purpose of the surrogacy are excluded. It is not the aim to have the Netherlands become a destination for 'surrogacy tourism'.

Also, it is stressed that in principle there should be a genetic link between one of the commissioning parents and the child. This rule can be deviated from in exceptionally compelling circumstances (to be assessed by a court).

Furthermore, so as to make the procedure more accessible, it is proposed that the government eliminate the criminal sanctions for the involvement of intermediaries. Under the new scheme, the Child Protection Board is to approve non-governmental organisations or private persons who may provide information on available surrogates for potential commissioning parents.

Click here to go to Main Contents

The procedure

The commissioning parent(s) and the surrogate are to enter into a surrogacy agreement which needs to be judicially approved prior to fertilisation. The surrogacy agreement would be a family law type of contract (similar to marriage or legal partnership) and would follow general contract law rules of the Dutch Civil Code (Book 6, Articles 213–260). The surrogate must obtain independent legal advice prior to entering into the agreement.

As for the judicial approval, the Government Committee makes clear that the only viable option which would offer the best possible guarantees is that of *court approval*. Moreover, the Committee lays down clear guidelines on the scope of such judicial approval. Under these guidelines, courts would have to look at the following aspects of the surrogacy contract: free consent of the parties, remuneration, commissioning parents (criminal record, possibility of becoming a parent; genetic links or if not, compelling circumstances); the surrogate (receipt of independent legal advice, information and supervision, risks incurred, agreements on future access and contact rights with the child), habitual residence of the parties, and the possibility for the child to have access to his or her story of origin.

The court approval at first instance should not last longer than 6 months. After the court approval, the contract, including the identity of the surrogate, and the information about the gametes will be included in the Register of the Story of Origin which the child may access later in life.

The last step is to have the commissioning parents registered as legal parents of the child. This shall be effected in the civil register on the basis of the court approved contract and registration in the Register of the Story Origin.

Even after the conclusion of the agreement and the court approval, there are situations where the surrogate mother can reconsider the handing over of the child. The proposed time allotted for such reconsideration is 6 weeks after giving birth. Also, there is no legal mechanism for allowing the surrogate to terminate the pregnancy, regardless of the considerations. Should they change their minds, the commissioning parents will become the legal parents even if they had wished the child not to be born. On the other hand, as long as the pregnancy has not started, any of the parties may terminate the agreement. After the pregnancy has started, in most cases the commissioning parents will be bound by the contract. They could only terminate such contract, and not be registered as legal parents, if there are no genetic links between either one of them and the child. Exceptionally, the intended parents may terminate the surrogacy agreement if there are no genetic links between the designated donor and the child and they prove duress, mistake, fraud or misuse of power. They may bring such an action at the latest within 6 weeks after the birth of the child. After this period, only the child will be allowed to bring a court challenge to terminate legal parenthood.

The rights of the child

The proposal for permitting national surrogacy is strongly based on the inherent rights of the child. The rights most prominently present are the child's right to know his origin, the child's right to a nationality, and the child's best interests.

It is thus perceived in the best interest of the child to create the so-called Story of Origin Register where the child can access comprehensive information on the identity of the genetic parents (wherever possible), the identity of the surrogate, and the circumstances of birth. The doctor or medical institution which provided assistance with fertilisation as well as parents or third parties – with the permission of the parents – are entitled to register data on the Story of Origin Register. In the latter case, since the parents or third parties are not independent experts, they would need to provide supporting documentation in order to register information. It is also interesting that it is expressly provided that the age limit for the child for accessing such information should be removed. Instead, a child of any age, if he or she is deemed to be able to reach a reasoned and valued assessment of his/her interests, should be able to access the register.

On the child's right to a nationality, surrogacy agreements that would result in a child being stateless should not be court approved. The child should thus have the nationality of at least one of the commissioning parents, since the Netherlands does not automatically grant Dutch nationality at birth to children of foreign parents.

As part of the child's best interests assessment, the Government Committee also looked at the right of the child to have the parent-child relationship recognised in the country where the child will be raised. This issue would arise if the commissioning parents were habitual residents in the Netherlands but will move with the child after birth. Secondly, on the suitability of the commissioning parents to become parents, the question was whether the applicable scrutiny should be such a far-reaching one as that conducted in the case of adoption, or a looser one. The second test was preferred, given the difference between surrogacy and adoption. In the current proposal it was preferred to only restrict the accessibility to surrogacy for commissioning parents in cases of serious contraindications for parenthood. In other words, only if a high risk of serious harm to the child exists should the state refrain from cooperation in surrogacy plans.

(ii) Surrogacy outside the Netherlands

The Government Committee's proposal also extends to issues of recognition of foreign surrogacy agreements. The rule is that if foreign authorities have followed the same essential requirements as the Dutch Authorities would have, then the agreement would be recognised. Under this rule, if the foreign surrogacy agreement was subject to prior judicial oversight, the consent of the

Click here to go to Main Contents

surrogate mother was freely given, and it was determined as such in court, and the child will have access to his or her story of origin, then there would be no issue to granting recognition in the Netherlands. On the other hand, Dutch authorities expressly mention that surrogacy via anonymous gametes and where there is no genetic link to at least one of the commissioning parents will not be recognised. One change from the current system is that the Committee proposes that even if the birth mother remains anonymous, the surrogacy will be recognised, subject to compliance with the requirements above.

However, if the foreign process was not subject to judicial oversight and the birth mother's identity was not recorded in the birth certificate, such a situation would not benefit from legal recognition in the Netherlands. For all other situations where the surrogacy occurred abroad, but the mother is nevertheless registered on the certificate, it would be up to Dutch courts to issue a new birth certificate where the commissioning parents are registered as the child's legal parents. Such a process should be conducted in light of the child's best interests.

III SURROGACY IN SOUTH AFRICA

Two weeks before the release of the Government Committee's report in the Netherlands, the Constitutional Court of South Africa handed down the long awaited ruling in *AB and others v Minister of Social Development and others* (Case CCT 155/15). The case concerned the issue of surrogacy and in particular the Constitutional Court's position on the current legal requirement of a genetic link between at least one of the commissioning parents and the child.

This section will address in detail the questions put forth and the reasoning of the Constitutional Court in the case of *AB*. However, so as to relate the South African situation to the one in the Netherlands, the section will begin with an overview of the existing legal requirements in South Africa, followed by the analysis of the Constitutional Court's position and ending with the implications thereof for the position of the child born out of a surrogacy agreement, in particular on his right to know his origins.

(a) Aspects of the current legal framework

In South Africa, Chapter 19, ss 292–303 of the Children's Act 38 of 2005 (fully in operation from 1 April 2010) are specifically dedicated to the issue of surrogacy. The act originated from a South African Law Commission Investigation (now South African Law Reform Commission) dating back to the early 1990s, largely before children's rights rose to such prominence. After 1994, the new Parliament appointed an *ad hoc* Committee which drafted a Bill on Surrogacy, which was however never tabled or adopted.[17] The inclusion of the chapter on surrogacy in the Children's Act, an Act which broadly speaking

[17] Draft Bill on Surrogate Motherhood, proposed by South African Law Commission, GN 512 GG 16479, 14 June 1995.

concerns the care, welfare and protection of children, gave effect to the Bill drafted a decade previously in an entirely separate process, as the Project Committee which had drafted the Children's Act had not debated surrogacy at all. The arguments of the *Ad hoc* Committee proved to be an important source of reasoning in the Constitutional Court in *AB*.

Sections 292–303, Chapter 19 of the Children's Act, delineate the procedural and substantive boundaries of surrogate motherhood agreements. Prior to April 2010, surrogacy was not regulated and the informal nature of the arrangement had led to legal uncertainty. It was widely accepted that altruistic surrogacy was allowed,[18] although the commissioning parents would have to have followed adoption procedures to establish legal parentage. Commercial surrogacy would have been considered *contra bonos mores*.[19] In the current regulation, s 301 prohibits the receipt of payment in respect of surrogate motherhood agreements, and provides for limited exceptions such as the payment of medical expenses. Commercial surrogacy is prohibited, and is a punishable criminal offence which carries with it the potential of 20 years' imprisonment.

(i) National surrogacy

Availability of the procedure

Section 292 clarifies that the surrogacy procedure in South Africa is available if at least one of the commissioning parents is domiciled in South Africa.[20] South African citizenship or permanent residence in South Africa does not, on its own, enable a person to become a commissioning parent or a surrogate mother in South Africa, as the requirement is domicile (see the Domicile Act 3 of 1992), which is found where a person is legally deemed to be constantly present (even if factually absent).[21] Also, the surrogate mother must be at the time of entering into the agreement domiciled in South Africa. What the Constitutional Court terms the 'threshold requirement' is established by s 295(a), namely that the commissioning parent or parents must not be able to give birth to a child and that such condition must be permanent and irreversible. A person is 'conception infertile' if they are unable to contribute a gamete for the purposes of conception through artificial fertilisation. A person is 'pregnancy infertile' if they are permanently and irreversibly unable to carry a pregnancy to term. In other words, both situations would meet the requirements of s 295(a) of the Children's Act. Once that 'threshold' is established, the couple meets the

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18 The issue came to the public attention in 1987 after a high profile case involving a mother who carried triplets for her daughter was reported in the press.

19 L Mills 'Certainty about Surrogacy' 2010(3) *Stel L Rev* 429.

20 'Domicile' requires that the person acquiring a domicile of choice must have reached the age of majority, have the mental capacity to make a rational choice, be lawfully present at the place where he or she has settled and must intend to settle at that place for an indefinite period. In the case of foreigners wishing to avail themselves of the South African surrogacy regime, it is doubtful whether they could satisfy the 'intention to settle' requirement.

21 H Kruger and A Skelton (eds) *The Law of Person in South Africa* (Oxford University Press, 2010).

Click here to go to Main Contents

requirement of s 294 which requires the parent(s) nevertheless to be able to provide a gamete for the purposes of fertilisation.[22]

Furthermore, s 294 establishes that there should be genetic links between the child and both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, between at least one of the commissioning parents and the child. In the latter situation, it is possible to obtain the remaining gametes via anonymous donors. Thus, for instance, if a married father is able to donate gametes, the ovum could come from an anonymous source.[23]

The procedure

As in the Dutch proposal, in South Africa the procedure is based on a contract to be signed by the parties and approved in court. The agreements must be in writing and confirmed by a High Court prior to fertilisation in order for it to be valid. The Court must verify that all the conditions set out above have been met, including that the commissioning parents are fit to be parents and that the agreement is in the child's best interests. Section 293 advises when the consent of the husband, wife or partner of a commissioning parent is necessary, and when it can be dispensed with.[24] Section 297 speaks to the effect of surrogate motherhood agreements on the status of children. A child born through surrogacy is for all purposes the child of the commissioning parents from the moment of her birth and the surrogate mother is obliged to hand over the child to them as soon as is reasonably possible thereafter. A surrogate motherhood agreement that does not comply with the Children's Act is invalid, and a child born of this agreement is deemed to be the child of the woman who gave birth to her. In addition, if the surrogate is also the genetic parent, she may, subject to court approval terminate the surrogate motherhood agreement within a period of 60 days after the birth of the child, according to s 298(1) of the Act. In this case, the surrogate mother who is genetically related to the child will become the legal parent of the child. Section 300 subjects the continuation of the surrogacy agreement to the Choice on Termination of Pregnancy Act (92 of 1996) – and the decision to terminate lies solely with the surrogate mother (s 300(2)). She must however inform the commissioning parents before the termination is carried out.

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22 Section 1 of the Children's Act 38 of 2005 defines a gamete as 'either of the two generative cells essential for human reproduction'.

23 The Regulations Relating to Artificial Fertilisation of Persons, published in March 2012 (and updated in September 2016), issued in terms of the National Health Act regulate the use of IVF in the conception of a child. In terms of these regulations, the recipient of IVF treatment is not prevented from using both male and female donor gametes of their choice (*AB* para 100).

24 According to s 293(3) the consent of a husband or partner of a surrogate mother who is not the genetic parent of a child can be dispensed with where it is unreasonably withheld.

(ii) International surrogacy

The requirement of the Children's Act in s 292 to the effect that parties to a surrogate motherhood agreement must be domiciled in the Republic is generally thought to imply that surrogacy agreements concluded abroad will not be recognised in South Africa. However, the provisions of s 292(2) allow a High Court to dispense with the domicile requirement in relation to the surrogate mother – not the commissioning parents – 'on good cause shown' when deciding whether or not to confirm a surrogate motherhood agreement. This might occur, for instance, if a commissioning couple would like to use a foreign relative as a surrogate.

Heaton[25] has, however, argued recently that despite the fact that failure to comply with the domicile requirement would render the agreement invalid and unenforceable, there are indications that this requirement has not completely discouraged intermediary agencies from offering what appear to be international surrogacy services.[26] As regards South Africans obtaining a child via surrogacy abroad, the legal position is that they are not prevented from doing so, although they might encounter substantial difficulties in having their parentage recognised domestically.[27]

(b) The Constitutional Court judgment

(i) Background to the case

The facts in *AB* related to a situation of a single infertile woman who wished to have a child conceived via surrogacy. She could not have an agreement approved as it was not possible for her to have a genetic link with the prospective baby.

Specifically, during the period of 2001–2011 *AB*, who was 55 years old at the time of the initial High Court judgment in 2015, underwent a number of IVF cycles to conceive a child. Seemingly, 16 of the IVF cycles were done with embryos that had no genetic link to her. Of the 16, 14 used both male and female anonymous donor gametes. The IVF treatments twice resulted in pregnancy but ended in miscarriages. AB was advised to consider surrogacy as a means to have a child. She was however advised that she was not eligible to enter into a valid surrogacy agreement due to the requirements of s 294 of the Children's Act 38 of 2005, namely that there must be a genetic link between at least one of the commissioning parents and the baby to be conceived. *AB* then mounted a constitutional challenge to the validity of that requirement of s 294. In the High Court, *AB*[28] was successful, insofar as the judge ruled the 'genetic link' requirement to be unconstitutional, striking down the impugned section,

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[25] J. Heaton 'The Pitfalls of International Surrogacy: A South African Family Law Perspective' (2015) 78 *Journal of Contemporary Roman-Dutch Law* 24-46.

[26] Ibid at 32.

[27] Ibid at 41.

[28] An organisation called the Surrogacy Advocacy Group joined the case as second applicant. The Centre for Child Law entered as amicus curiae.

Click here to go to Main Contents

and referring the matter to the Constitutional Court for confirmation (as required by the Constitution).[29] A critical factor which prompted the High Court to declare s 294 provisionally unconstitutional was the differentiation in law between the use of surrogacy and the use of IVF procedures. The IVF regime does not require that the parent or parents of a child to be conceived through IVF donate a gamete, while the surrogacy regime does. In the view of the High Court, this amounted to differential treatment, even though it was conceded that the two procedures were fundamentally different. The Court asked the question 'how is the child's alleged interest in knowing its genetic origin promoted by targeting only surrogacy commissioning parents who elect to use double-donor gametes, but not prospective parents who use IVF and elect to use double-donor gametes?'[30]

The constitutional challenge was further based on the grounds that the 'genetic link requirement' in the impugned provision violates the rule of law and *AB*'s rights to equality, human dignity, privacy, reproductive autonomy and access to health care services.[31] The applicants in the various cases argued that there is no rational basis for the differentiation caused by the genetic link requirement. They argued that the exclusion of *AB* on the basis of infertility is discriminatory and unfair. The applicants also argued that the commissioning parents' rights to reproductive autonomy and human dignity are infringed by the genetic link requirement, because it prohibits the double-donor gametes decision by commissioning parents. Further, the applicants maintained that *AB*'s right to access to health care services and reproductive health care in terms of s 27 of the Constitution is violated.[32]

The Minister of Social Development, as the custodian of the Children's Act, opposed the application to strike down s 294 as unconstitutional on several grounds, namely that:

(a) It was not only *AB's* rights that were at issue, but also those of the child to be created by the surrogate mother and donor(s). The prospective child had the right to know its genetic origins.[33]

(b) The adoption process in South Africa catered for *AB*'s need to have a child.

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[29] *AB v Minister of Social Development* [2015] ZAGPPHC 580; 2016 (2) SA 27 (GP) (High Court judgment). The referral for confirmation is required by s 167(5) of the Constitution.

[30] *AB* para 267.

[31] Paragraph 238.

[32] *AB* para 270.

[33] Section 41 of the Children's Act makes provision for a child born as a result of surrogacy, or the guardian of that child, to have access to any *medical* information or other information concerning the child's *genetic parent*(s) after the child reaches the age of 18 years. This is consistent with the object of s 294 to ensure that the child becomes aware of its genetic origin. This is so even if the provision does not allow access to information regarding the *identity* of the surrogate mother in terms of s 41(2) (*AB* para 254).

(c) To allow a single infertile person to create a child with no genetic link to her would result in the creation of a 'designer' child. This would not be in the public interest.

(d) Section 294 assists other legislation in preventing commercial surrogacy.

(ii) Reasoning of the Constitutional Court[34]

The Constitutional Court regards it as significant that the impugned provision resorts under the overarching principles of the Children's Act. Reference is made to s 6(1)(a) which sets out general principles that guide the implementation of all legislation applicable to children, including the Children's Act. Section 6(1)(b) provides that these principles will guide 'all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general'. In terms of s 6(2)(a)–(c) all proceedings, actions or decisions in a matter concerning a child must—

> '(a) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation;
> (b) respect the child's inherent dignity;
> (c) treat the child fairly and equitably.'

Section 7 deals with the best interests of the child standard which must be applied in relation to all decisions taken in terms of the Act. The child's best interests are also a constitutional standard, encapsulated in s 28(2) of the Bill of Rights. Section 9 goes further to underscore the best interests of the child standard, in harmony with s 28(2) of the Constitution. It provides that '[i]n all matters concerning the care, protection and well-being of a child the standard that the child's best interests is of paramount importance, must be applied. Section 294 therefore [must] in the context of the Children's Act as a whole … [t]he legislative scheme under Chapter 19, especially the impugned provision, also protects the child by ensuring that a genetic link exists when that child is conceived'.[35]

In determining first whether the prohibition in s 294 infringes *AB*'s equality rights[36] in that it posits an irrational legal differentiation between would be surrogacy participants and IVF beneficiaries (because the IVF regulations permit double-donor gametes which s 294 does not), the Court notes that '[t]he correct approach to be adopted when legislative measures are challenged is to determine whether there is a rational connection between the means chosen and the objective sought to be achieved. A mere differentiation does not render a legislative measure irrational. The differentiation must be arbitrary or must manifest "naked preferences" that serve no legitimate governmental purpose

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[34] The Court was split 7-4, with both majority and minority writing lengthy reasoned judgments. Some reference is made to the minority judgement where appropriate.

[35] See *AB* para 279–281.

[36] Section 9(1) of the Constitution provides that '[e]veryone is equal before the law and has the right to equal protection and benefit of the law'.

Click here to go to Main Contents

for it to render the measure irrational'.[37] Furthermore, the two procedures (IVF and surrogacy) are regulated under different statutes, each of which has different objectives. Rationality of a provision under one statute cannot be measured against the rationality of a provision in a different statute. Only when the regulatory measure itself does not serve a legitimate government purpose can it fall foul of s 9(1) of the Constitution.[38]

According to the majority judgment,

> '[t]he requirement of donor gamete(s) within the context of surrogacy indeed serves a rational purpose – the public good chosen by the lawgiver – of creating a bond between the child and the commissioning parents or parent. The creation of a bond is designed to protect the best interests of the child-to-be born so that the child has a genetic link with its parent(s). Therefore, a rational connection exists.'[39]

Secondly, it is rational because it safeguards the child's genetic origin, in the best interests of the child, in the view of the Court.[40]

Dealing with the finding of the High Court that, because gamete provision is not required in the context of IVF where double-donation of gametes is permitted, it should not be required in the context of surrogacy either, the Court hinged its arguments on the fact that a IVF parent would have *gestational* links to the child to be born, and more cogently that the risk 'to children's self-identity and self-respect (their dignity and best interests) is, unquestionably, all important. The fact that these rights are placed at similar risk in another context [IVF] is hardly a reason to find their protection irrelevant'.[41]

The Court rejected the applicants' submission, originally endorsed by the High Court, that the 'legal conception of family' was of critical importance to the determination of the matter. Rather, the Court held that it could not interfere with a lawfully and rationally chosen measure on the ground that the Legislature should have taken other considerations into account, or that it should have considered a different decision that is more preferable.[42]

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37 *AB* para 285.

38 *AB* para 286.

39 *AB* para 287.

40 *AB* para 288. The Court compares the disqualification of persons unable to donate a gamete to those with defective vision (blindness) or uncontrolled epilepsy and uncontrolled diabetes mellitus, who are disqualified from obtaining a driver's licence.

41 *AB* para 290. The minority judgment views this entirely differently: 'The second differentiation further demeans the dignity of the conception and pregnancy infertile by compelling them to accept that the law does not deem it necessary to police the implications of the choices of people who elect to use IVF, but does where surrogacy is employed' … (para 120) 'If all children must have a genetic link to at least one of their parents in order to have a worthwhile life, then this logic must apply in both the IVF and surrogacy contexts: it is discriminatory to require a genetic link in only one of these cases' (para 122).

42 *AB* para 292. See too at para 294: 'the substance below the surface is the need for a genetic link between a child and at least one parent. The importance of this genetic link is affirmed in the

Having determined that the prohibition in s 294 met a legitimate government purpose and was not irrational, the next question to be determined was whether s 294 limited *AB*'s equality rights so as to constitute unfair discrimination. The High Court had held that the differentiation based on the genetic link requirement constitutes discrimination because it has the effect of excluding infertile persons who could not donate gametes 'from accessing surrogate motherhood as a reproductive avenue'.[43] The Constitutional Court did not agree. The alleged ground of discrimination is not based on the attributes and characteristics of *AB* or of other similarly placed persons, the Court said:

> 'The impugned provision does not disqualify commissioning parents because they are infertile. It affords infertile commissioning parents the opportunity to have children of their own by contributing gametes for the conception of the child contemplated in the surrogate motherhood agreement … But if that parent cannot contribute a gamete, the parent still has available options afforded by the law: a single parent has the choice to enter into a permanent relationship with a fertile parent, thereby qualifying the parent for surrogacy.[44] It is therefore the exercise of this personal choice that disqualifies her, not her infertility or the impugned section.'[45]

Having found no discrimination, it was therefore unnecessary to consider the question as to whether the discrimination was unfair.[46] Although outside of the scope of this chapter, it suffices to mention that the Constitutional Court also

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adage "ngwana ga se wa ga ka otla ke wa ga katsala" (loosely translated the adage means "a child belongs not to the one who provides but to the one who gives birth to the child").Hence clarity regarding the origin of a child is important to the self-identity and self-respect of the child. There is a rational nexus between the purpose of the legislative scheme, including section 294, that provides a framework within which individuals are able to have children and become parents in circumstances where they would otherwise not have been.'

43 *AB* para 298.

44 *AB* para 302.

45 The minority judgment disagreed, finding that the psychological impact that s 294 has on the excluded infertile persons was of such a magnitude as to limit their rights unfairly.

46 The minority judgment deals with the issue as part of its limitations analysis (para 139 et seq). Reviewing the objectives alluded to by the respondent Minister, the minority found there were adequate provisions to curb commercial surrogacy, including hefty criminal sanctions, without relying on a genetic link. Second, the minority Court was confounded by the assertion that section 294 would prevent "designer children" (whatever these were and whether they were backed by any scientific evidence). Third, it was argued that the purpose of section 294 is to ensure that children born of surrogate motherhood agreements will be able to know the identity of one of their genetic parents, or, ideally, both. But then logically, the minority Court held that all children should have the right to know their genetic identity, which section 41 of the Children's Act prohibits: children born as a result of surrogate motherhood agreements or double donor gametes are, as of birth, barred by law from finding out the identity of any gamete donor who contributed to their conception. A child is entitled to medical and other information about the donor in terms of section 41(1), but that person's identity may not be revealed in terms of section 41(2). Thus, according to the minority judgment, section 204 cannot have as a purpose the aim of ensuring children born of surrogacy may know their genetic origin, since the Act is not even handed when it comes to which child may, and which may not, know their genetic origin. Dealing with the last argument, that section 294 prevents parents from circumventing adoption processes by requiring a genetic link, the minority finds this to be the true purpose of the section, but dismisses this as a basis for the limitation of rights

rejected the contention that the provisions of s 294 constituted an infringement of *AB*'s rights to freedom and security of the person and to reproductive autonomy (to make reproductive decisions), arguing that was an unduly strained interpretation of the constitutional right to make decisions concerning reproduction, given the context of surrogacy, in which the reproductive decision does not concern the woman's own body, but that of another: the surrogate, a point upon which the minority judgment diverges completely.[47] Similarly, the Court found that the Constitution does not give anyone the right to bodily integrity in respect of someone else's body.

IV SURROGACY AND THE RIGHT TO KNOW ONE'S ORIGINS

The examples of the Netherlands and South Africa are illustrative both for the approaches taken to surrogacy as well as highlighting the continuing and divergent debates on the topic. Clearly, important factors which play a role in choosing to regulate surrogacy include the rights of the surrogate and those of the child. Ultimately, however, we believe that it is key to protecting the interests of the child to be born. Here guidance is to be found in the CRC which, even though drafted at a time when surrogacy was not on the international agenda, remains the only comprehensive treaty covering the rights of the child.

The child's right to know his origin is included in Arts 7 and 8 of the CRC. The relevant parts read as follows:

> 'Article 7(1): The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents
>
> …
>
> Article 8 (1): States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.'

The text of Art 7(1) is particularly relevant to the child's right to know his origins in the context of surrogacy. Interestingly, the drafters appeared to intend to limit the right of the child to know his origins to situations where national legislation (for example) provides for anonymous adoption or in vitro fertilisation.[48] Nevertheless, some argue that the inclusion of Art 8(1) was

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inherent in requiring a genetic link: "adoption and surrogacy are fundamentally different, it cannot be correct to limit surrogacy purely because the outcome is the same as adoption' (para 184).

47 *AB* para 75.

48 D Hodgson 'The International Legal Protection of the Child's Right to a Legal Identity and the Problem of Statelessness' (1993) 7 *Int'l JL Pol'y & Fam* 255 at 264-265.

effected precisely with the purpose of granting the child an unqualified right to preserve the identity, save for circumstances where it is factually impossible to do so.[49] The restriction of Art 7(1) should only apply where it would be factually impossible to give effect to the right to know and be cared for by parents due, for example, to family separation occasioned by war or where the birth parents have voluntarily abandoned the child and they cannot be located.[50] While this argument is yet to be accepted across the board, in the case of surrogacy there is a growing movement in favour of the prohibition of using anonymous donor gametes on the basis that, among others, this would be contrary to the child's right to know his identity.[51]

The discussion above should not necessarily lead to the conclusion that the child's right to an identity is only preserved if surrogacy is conditioned on a genetic link with at least one of the commissioning parents. The cases of the Netherlands and South Africa are illustrative for diverging positions on this aspect, both motivated by the aim to secure the child's right to an identity.

In the Netherlands for example, the current Governmental Committee's proposal sees the genetic link between the child and the commissioning parents as important but not determinative. Thus, it is possible to have a surrogacy agreement in absence of a genetic link between the commissioning parents and the child if there are extraordinary compelling circumstances to be determined by a court. However, it is prohibited to use gametes from anonymous donors in all cases. Moreover, all available data shall be recorded in the Story of Origin Register, which the child shall have access to from the moment a judge determines that he or she possesses the requisite level of maturity. The genetic link between the child and at least one of the parents is however required in the case of international surrogacy. Also, in the case of international surrogacy, the Dutch authorities would in principle only recognise agreements where the child has access to the story of origin, and this requirement is rooted in Art 7 of the CRC. In other words, the approach seems to be rather pragmatic, in that the genetic link requirement becomes of crucial importance in international surrogacy where there is a higher risk for the child to have limited or no access to information surrounding his birth. In the national cases, where regulations will lay down clear conditions for registration in the Story of Origin Register, coupled with the prohibition of using anonymous donor gametes, the Government Committee has deemed that in certain limited circumstances the genetic link requirement may be dispensed with.

As discussed above, South Africa also allots significant weight to the child's right to know his origins. Yet, the way such right is preserved is different from that in the Netherlands. Arguing from a child rights perspective, the amicus curiae (The Centre for Child Law) in the case of *AB* had proposed that s 294

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[49] M Giroux and M De Lorenzi '"Putting the child first" A necessary step in the recognition of the right to identity' (2011) 27 *Can J Fam L* 53 at 77.

[50] Ibid at 74.

[51] HCCH, A Study of Legal Parentage and the Issues Arising From International Surrogacy Arrangements, Prel Doc No 3C (The Study), March 2014; Giroux and De Lorenzi, n 49, at 56.

entailed that the child-to-be-created had the right to know about his genetic origins, which purposes were ensured by this section. Also, in the drafting of the provision, the rationale behind the *Ad hoc* Committee's recommendation was framed in the following terms:

> 'In the instance where both the male and female gametes used in the creation of the embryo are donor gametes, it would result in a similar situation to adoption, as the child or children would not be genetically linked to the commissioning parent or parents. This would obviate the need for surrogacy as the couple could adopt a child. This type of surrogacy was not preferred by commentators. It was felt in both partial and full surrogacy it should be a pre-condition that the child or children should always be genetically linked to the commissioning parent or parents.'[52]

The same view was ultimately shared by the Constitutional Court which upheld the validity of s 294. However, in South Africa, as opposed to the Netherlands, while requiring a genetic link with at least one of the commissioning parents, it is allowed at the same time to use gametes from anonymous donors. Thus, there can be situations where a child has access to information about his story of origin story only in respect of one biological parent. Another difference is that in South Africa there is no comprehensive preservation of details in a Story of Origin Register, where the child could later in life have access to information about the circumstances of birth. (Although the Regulations Relating to Artificial Fertilisation of Persons of September 2016 do provide for comprehensive data on donors (including their identity) to be collected, revelation of this information is restricted by both the Regulations and s 41 of the Children's Act.) Seen in this light, it is not surprising that the genetic link requirement is so important in South Africa and could never be dispensed with. It is were not the case, there could be situations where the surrogate born child would have absolutely no identifying information about the circumstance of his birth, other than the limited information provided for in s 41, it medical information concerning the child's genetic parents (s 41(1)(a)) and any other information concerning the child's genetic parents except their identity, after the child reaches the age of 18 years (s 41(1)(b)).

V CONCLUSIONS

This contribution presented two different and new positions in respect of surrogacy, focusing in particular on the genetic link requirement and the compatibility of such a requirement with the child's right to know his origins. Based on the analysis above, it could be concluded that allowing anonymous donations of gametes for the purposes of surrogacy is arguably not in line with this right; however in the case of South Africa, this has been partially alleviated by the obligation in all cases to establish a genetic link between the child-to-be and one of the parents in the context of surrogacy. A different solution was opted for in the Netherlands where, while permitting the genetic link

[52] Paragraph 244.

requirement to be dispensed with in 'extraordinary compelling circumstances', the new legislative proposal aims to fulfil the content of the right to an identity by banning anonymous donations of gametes in all cases and by setting up a Story of Origin Register for the child to have access to comprehensive information on the circumstances of birth. This proposal seems indeed to better achieve the underlying goal of ensuring the right to an identity, although it has not yet been tested and it is limited to national surrogacy. International surrogacy, which may have a significant impact on a small country like the Netherlands, remains prone to less legal certainty and to more situations where the right to an identity will not be fully complied with. It remains to be seen if the international community will achieve more harmonisation in this controversial yet important area for the right of the child.

Click here to go to Main Contents

NEW ZEALAND

PROTECTING VULNERABLE CHILDREN IN NEW ZEALAND

Professor Mark Henaghan[*]

Résumé

La mise en place de ministères pour les enfants vulnérables et l'adoption de lois axées sur les enfants ne permettent pas, en soi, de comprendre la raison fondamentale pour laquelle ces enfants sont vulnérables dans notre société. La Nouvelle-Zélande a adopté une législation sur la protection de l'enfance depuis de nombreuses années. Des rapports du Commissaire néozélandais en charge de l'enfance, relatifs aux enfants qui ont été blessés ou, malheureusement, tués par leur famille, montrent que les problèmes sont largement liés aux conditions de ressources de la famille ou viennent des conséquences de ce manque de ressources. En matière de protection des enfants vulnérables, le droit traite davantage des conséquences que des causes. Les recherches exposées au début du présent article indiquent pourtant qu'à moins de traiter les problèmes liés à la privation et à la pauvreté, la situation des enfants qui vivent dans de telles conditions et qui souffrent d'abus et de négligences ne changera pas.

Une intervention rapide n'a d'utilité que si elle peut apporter un véritable accompagnement à ces familles afin qu'elles puissent subvenir aux besoins des enfants. Placer ces enfants à la charge de l'État a été une grave erreur en Nouvelle-Zélande, tous les indicateurs permettant d'évaluer le bien-être émotionnel, physique et scolaire révèlent que ces placements ont provoqués de graves défaillances.

I THE CONTEXT OF CHILD ABUSE IN NEW ZEALAND

New Zealand has an appalling record of child abuse. On the UNICEF league table[1] for child maltreatment deaths New Zealand has 1.2 deaths of children per 100,000 children, which puts New Zealand third from the bottom (worst) of developed countries. On average, each year in New Zealand, around 10 children are killed through maltreatment.

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1 Innocenti Report Card, Issue No 5, September 2003, A League Table of Child Maltreatment Deaths in Rich Nations, 2006.

Click here to go to Main Contents

A New Zealand Child, Youth and Family report[2] shows that children who live in situations where there is poverty, low education of parents, young parents who have poor mental health including alcohol and drug abuse or who have been victims of family violence as a child, are more likely to be at risk of fatal child treatment. A New Zealand Ministry of Social Development study[3] found that the 'prevalence of child maltreatment is higher in deprived families and communities than in well-resourced families and communities'.[4] The report goes on to say that 'genetic characteristics and growing up in a violent or abusive environment'[5] are predisposing factors for child maltreatment.

The wider social and community factors are identified as 'poor learning standards, overcrowding, poor housing and social economic inequality or instability'.[6] A recent report by economist Arthur Grimes[7] shows that New Zealand has a large gap between the well-off and the not well-off: 'We have strong inequality in material standards of living, and also have strong inequality in how people think about life satisfaction … We have large ethnic divides which is clearly a major component. We do know Maori are less satisfied with their lives'.

A study by Martin and Pritchard on Homicide within Families in New Zealand[8] found that nearly 50% of the children who had been killed were Maori, who are the indigenous people of New Zealand and make up 25% of New Zealand's child population; 29 of the 38 children killed were under the age of 5. On the Index of Deprivation scale broken up into five quintiles, no children were killed in quintile one, the most well-off group. A few were killed in quintiles two, three and four, but twice as many child homicides occurred in quintile five, the least well-off group, than in quintile three.

Hospital admissions for injuries arising from the assault, neglect or maltreatment of children aged 0-14 years placed on New Zealand Index of Deprivation scale show that the least deprived families in quintile one have only

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2 New Zealand Ministry of Social Development, Children at Increased Risk of Death from Maltreatment and Strategies for Prevention.

3 New Zealand Ministry of Social Development, Preventing Physical and Psychological Maltreatment of Children in Families, Review of Research for the Campaign for Action on Family Violence (Centre for Social Research and Evaluation, March 2008).

4 New Zealand Ministry of Social Development, Preventing Physical and Psychological Maltreatment of Children in Families, Review of Research for the Campaign for Action on Family Violence (Centre for Social Research and Evaluation, March 2008), at p 3.

5 New Zealand Ministry of Social Development, Preventing Physical and Psychological Maltreatment of Children in Families, Review of Research for the Campaign for Action on Family Violence (Centre for Social Research and Evaluation, March 2008), at p 3.

6 New Zealand Ministry of Social Development, Preventing Physical and Psychological Maltreatment of Children in Families, Review of Research for the Campaign for Action on Family Violence (Centre for Social Research and Evaluation, March 2008), at p 3.

7 Stuff.co.nz, NZ is a richer country than many of us believe – but we're one of the most unequal too, 9 April 2017.

8 New Zealand Ministry of Social Development, Learning from Tragedy: Homicide within Families in New Zealand 2002-2006 (Centre for Social Research and Evaluation, working paper April 2010).

4.2 hospital admissions per 100,000 children, whereas the children living in the most deprived families have 42.2 hospital admissions per 100,000 children.[9]

There is a clear pattern in all these separate studies of maltreated children in New Zealand. Children living in poor economic conditions face far more risks of maltreatment than other children, yet the New Zealand Government rejected the work carried out by an expert advisory group set up by the New Zealand Commissioner for Children that recommended child poverty legislation aimed at requiring the Government to work through a comprehensive programme to reduce the numbers of children living in poverty.

Instead, the New Zealand Government passed the Vulnerable Children's Act 2014. The key changes provided by the Act are:

- requiring prescribed Chief Executives to work together to produce and report progress on implementing a cross-sector agency plan (the vulnerable children's plan), which sets out how agencies will collectively achieve the Government's priorities for vulnerable children;
- requiring prescribed state services to have policies in place containing provisions on the identification and reporting of child abuse and neglect, and to ensure that their funded and contracted services also have such policies in place;
- new standard safety checks for employees in the Government and Government-funded children's workforce, and a restriction on the employment of persons with disqualifying convictions.

As part of the package of reforms, the primary legislation which deals with child abuse in New Zealand, the Children, Young Persons and Their Families Act 1989 has been amended. There is now an onus on a parent of a subsequent child to demonstrate that he or she is safe to parent, if a child or young person in the parent's care was permanently removed due to abuse or neglect or the parent has been convicted of the murder, manslaughter, or infanticide of a child or young person in the parent's care.[10]

II THE VULNERABLE CHILDREN'S ACT ALSO CREATES NEW CHILD SAFETY REGULATIONS[11]

Everyone in the children's workforce employed (or contracted) by central and local government (roughly 280,000 people) to deliver services to children will be subject to safety checking. The same safety checking requirements will later be phased in for the children's workforce employed or contracted by local government. The children's workforce includes all workers who have regular or

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[9] The New Zealand Child and Youth Epidemiology Service, Department of Women's and Children's Health Dunedin School of Medicine, University of Otago.

[10] Children, Young Persons and Their Families Act 1989, s 18A.

[11] Child Safety Checking Regulations, created by the Vulnerable Children Act 2014.

overnight contact with children, without a parent or guardian being present, as part of their role. Core children's workers work alone with, or have primary responsibility or authority over, children. Examples of roles that may meet these definitions include teachers, nurses, and youth counsellors. Non-core children's workers are paid or funded by state agencies and have regular, but limited, child contact (examples of roles that may meet this definition include: non-teaching school staff, general hospital staff, and many social and health workers).

The checks will involve an identity verification process (so that people can prove they are who they say, including disclosing former identities), information gathering (thorough police, records, history and behaviour checks), and a risk assessment process (judgement based process for interviewing staff).

III A NEW MINISTRY FOR VULNERABLE CHILDREN, ORANGA TAMARIKI HAS BEEN CREATED

In August 2016 it was announced that a new government department, named the Ministry for Vulnerable Children, Oranga Tamariki will be created. It will begin operating in April 2017. It is supposed to be a child-centred, stand-alone ministry that focuses on the care and protection of vulnerable children and young people. The Ministry will be responsible for the care and protection of vulnerable children and young people, youth justice services, and operational adoption services. The Children's Action Plan Directorate and the Children's Teams will become part of the new Ministry. The Children's Action Plan Directorate has been set up to lead the introduction of the legislation and to establish regional children's directors to provide regional leadership. It must also develop a children's workforce action plan and develop a 'vulnerable kids information system' to enable frontline professionals to share information about children who have been abused or neglected are at risk of abuse or neglect and to enable tracking of high-risk adults. A further task is to launch a public awareness initiative to let everyone know child abuse and neglect will not be tolerated and child welfare is everyone's responsibility. The children's teams, two of which are to be established by the Children's Action Plan Directorate, are being set up to test the new early response system to children at risk, looking into issues such as identification of abuse and assessment of abuse tools and a single integrated plan for each child. The goal is to implement further teams in other locations over time.

IV CHANGES TO THE CHILDREN AND YOUNG PERSONS AND THEIR FAMILIES ACT

(a) Changes to the definition of Maori families

The most recent in the package of changes has been a major overhaul to the Children, Young Persons and Their Families Act[12] which has been in operation since 1989 and is the central piece of legislation in New Zealand for the state to intervene to protect children who are in at-risk families. The approach of the reform which is still in Bill form, is to move from a minimum intervention of the state in the lives of vulnerable children to one that is more aimed at early intervention to improve the long-term outcomes for children and to provide the solution of finding permanent homes for children who are at high risk. The difficulty is that the Bill has changed a number of key definitions in the original Children Young Persons and Their Families Act, which change is likely to cause confusion and difficulties into the future.

First, the terms iwi and hapu, which are Maori terms for tribe and sub-tribe, have largely been removed from the legislation. Given the very sad over-representation of Maori children and young persons in the care and protection and youth justice systems which are both covered by the Children, Young Persons and Their Families Act, this is a bad direction for the legislation to take. The Bill has also not retained core principles from the existing legislation which state that provided children and young people can be kept safe from serious harm, priority should be given to family, whanau, hapu, iwi and family group as caregivers and that only as a last resort should other non-family placements be considered. Removal of culturally sensitive placements is inconsistent with Art 20 of the United Nations Convention on the Rights of a Child.

A further misunderstanding of the Maori world is the definition in clause 4 of the Bill which defines mana tamaiti (tamariki) in relation to a person who is Maori, meaning their intrinsic worth, well-being, and capacity and ability to make decisions about their own life. Maori family lawyers in a submission to Parliament through the New Zealand Law Society[13] do not support this definition as it is currently drafted. Maori children or young persons are not seen as autonomous individuals separate from their whanau, hapu and iwi. The definition appears as a non-Maori world view of children and young persons. The preferred definition of mana tamaiti (tamariki) is the inherent dignity of a child both as an individual and as part of a greater kin collective (whanau, hapu and iwi). Whanau is not limited to the idea of the European nuclear family but includes wider whanau connections.

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12 Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill.

13 New Zealand Law Society submissions on the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill 03/03/2017, at [13]–[14] and at [19]–[21].

(b) Conflicting purposes

The legislation sets out a number of purposes. The original seven objects in the current legislation[14] are proposed to be replaced with 12 separate purposes.[15] These purposes are conflicting and confusing. They range from promoting the provision of services that advance positive long-term outcomes for children and preventing and responding to the suffering or risk of harm to children, through to ensuring that children who come to the attention of the department have a safe, stable and loving home from the earliest opportunity, as well as supporting families to provide such a safe, stable and loving home. It also includes recognising 'the practice of whanaungatanga' (relationship, kinship, sense of family connection) and promoting an approach that supports capability building at the whanau level to improve life course outcomes for Maori children.

The wording is very general and the Law Society have said in their submission to Parliament that the new goals are 'likely to create unnecessary legal issues'.[16] It would be far better to keep the purpose of the Act focusing on the welfare and best interests of children, particularly working to enable children to participate in the decision-making that is made for them. The legislation is promoted as being child-focused but there is no mention in the purpose section regarding the participation of children.

A prime example of the looseness of language in the purpose section of the proposed legislation is in paragraph 4C which says that one of the purposes is to ensure that children and young persons who 'come to the attention' of the department have a safe, stable and loving 'home' from the earliest opportunity. The words 'come to the attention' are very broad and suggest that there should be intervention in all cases when children come to the attention of the department. The word 'home' is also ambiguous. In legal terms, it usually refers to a family home and it no doubt is a reference of the government's desire to place children in Home for Life plans, however, as the Law Society have said 'the Act is not a housing Act'.[17] The emphasis should be on safe, stable and loving care for children.

(c) Watering down of the welfare principle

A major concern with the proposed legislation is the changing of the key principle of the current Act, to language substituting 'wellbeing and best interests' for the current 'welfare and best interests'. As the Law Society

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[14] Children, Young Persons, and Their Families Act 1989, s 4.

[15] Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill, clause 6, which is to replace s 4 of the original Act.

[16] New Zealand Law Society submissions on the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill 03/03/2017, at [33].

[17] New Zealand Law Society submissions on the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill 03/03/2017, at [43].

submission shows,[18] the term wellbeing is assumed to mean something different from welfare. The concise Oxford dictionary defines wellbeing as a state of being well, contented. On the other hand, welfare is defined as wellbeing, happiness, health and prosperity and therefore can be seen to be a wider word than wellbeing. It probably was not the intention of the drafters of the proposed new legislation to narrow the compass for children, but replacing welfare with wellbeing has this potential.

(d) Children's participation

Even though there is no mention of a primary focus on children in the purpose provision of the proposed new Act, s 5a which sets out new principles, places a particular emphasis on the child or young person being at the centre of the decision-making and this includes the young person's rights under the United Nations Convention on the Rights of the Child, which are to be respected and upheld. Under Art 12 of the United Nations Convention on the Rights of the Child, children have a right to express their views on all matters that affect them. If the Act is truly to be a child-centred one, then the wording of Art 12 should be spelled out in the proposed legislation. Article 12 is spelled out in s 5A headed Principles of Participation but the wording is diluted. Rather than 'assuring' to children the right to participate, the words 'so far as practical' are used. The child 'must be encouraged and assisted to participate' in proceedings affecting them.

Overall, the wording is less powerful than that in Art 12. One aspect of the wording which is a significant improvement on Art 12 is that the age and maturity of children is taken out altogether, signalling that all children, no matter what their age or maturity, should be given the maximum opportunity to participate in decisions that affect them and that their views 'must be taken into account'. Also, s 5A(b) requires decision-makers to set out the views of the child in their written decisions, and if those views were not followed, to include the reasons for not doing so. It also requires 'as far as is practical' for the decision and the reasons for it to be explained to the child. These are important gains for vulnerable children who are often left out of decision-making. The only major weakness in the provision is not assuring children the right to participate but rather basing implementation on what is practicable, which is a lower threshold for not listening to children if it seems impractical.

(e) Reducing disparity

An important duty[19] placed on the Chief Executive of the Ministry of Social Development is to ensure that the policies and practices of the department on the wellbeing of children have the objective of reducing disparities by setting

[18] New Zealand Law Society submissions on the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill 03/03/2017, at [64D].

[19] Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill 03/03/2017, clause 11 and clause 12, (new ss 7 and 7A in the original Act).

Click here to go to Main Contents

measurable outcomes for Maori children and young persons who come to the attention of the department. It is not quite clear what this means because disparities are not defined but many of the young children who do come under the rubric of the department will be living in deprived circumstances. It is not clear how the Chief Executive is to address these disparities and whether the policy includes a range of disparities that some young children face. Without provision for resources to deal with disparities, the provision reads like a well-intentioned wish list rather than an effective tool to deal with the crucial underlying issues for much abuse: poverty, deprivation and parents who have major mental health issues.

(f) Changes to the definition of children in need of care or protection

A major proposed change is the definition of a child in need of care or protection. Under current law, a child is defined as being in need of care or protection if being, or is likely to be harmed (whether physically or emotionally or sexually), ill-treated, abused or seriously deprived. The proposed definition changes this dramatically. A child or young person is defined in need of care or protection if he or she has suffered or is likely to suffer serious harm.[20] This raises the threshold considerably as to when the state sees fit to become involved in a child or young person's protection. It is also inconsistent with other aspects of the legislation. For example in s 13(2)(f) of the Children, Young Persons and Their Families Act 1989, a child or young person should only be removed from the care of their usual caregivers 'if there is a serious risk of physical or emotional harm'. The harm in the new proposal does not have to be serious and actual, but only risked. This results in the confusion that in order to intervene there must in fact be serious harm, but, in order to remove a child, there only needs to be the serious risk of harm. This needs redrafting and rethinking if the legislation is truly to be child-focused.

(g) The investigation process

Under the current legislation, once a report is made about a child in need of care or protection, s 17 of the Act provides for the investigation of such reports. There is currently no obligation on a person receiving the report regarding the child to inform the person who made the report whether the report has been investigated, and if so whether any further action has been taken. A proposed amendment to this section allows for continuous involvement with the family by the Ministry even where there is no evidence the child is in need of care or protection. The Ministry may undertake further assessments of the child, provide services, or refer the family to other agencies. The proposed new section also provides authority for the Chief Executive of the Ministry 'to take no further action if the investigation discloses no identifiable risk of harm to the

[20] Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill 03/03/2017, s 14 of the original Act replaced.

child'. The Law Society in their submission on the Bill comment that lawyers working in the area of child abuse often see cases where children and families are referred to another agency for assistance following investigation, but there is then poor or non-existent monitoring to ensure that sustainable changes are made. The Law Society concludes 'the child often comes to notice again for similar problems as the issues have not been effectively addressed'.[21]

There is also provision in the proposed legislation[22] that where there is no finding that a child or young person is in need of care or protection, the Chief Executive can still report a matter to a care or protection coordinator who must convene a family group conference. A family group conference allows the family members to get together to discuss what is best for the child in the circumstances. The Law Society are concerned about the provision. They comment[23] that, a family group conference is not necessarily a child-centred forum as the child is not legally represented and power conflicts often exist between the adults' interests and the child's interest, and therefore there is potential for serious injustice to occur using such an informal mechanism. The Law Society rightly recommend that in situations where a child is not in need of care or protection and there is no possibility of the matter proceeding to court that it would be much better to refer the matter to Children's Teams who are to be set up to watch over children who do not require immediate intervention but whose circumstances make them at risk of abuse or neglect.

(h) Change to court orders

At present, when the matter goes to court, the court has authority to make an order that declares that a child or young person is in need of care or protection. The concept of a declaration is not always understood by parents, as their main concern is who is going to have custody or care of the child. The new legislation will have just the one order called a care or protection order. The Law Society wisely recommends[24] that before such an order is made, a social worker present a detailed proposal to the court and the parents with regard to what the plan should be for the child.

The Bill proposes amendments to the grounds for an interim placement of a child in custody away from the parents or caregivers are proposed to be amended. The grounds will place a child in interim custody if the court is satisfied 'it is in the interest of the child or young person or in the public interest that an interim custody be made as a matter of urgency'. This has the potential to put the interests of the child or young person in conflict with the vague notion of the public interest, which could in some cases be for

[21] New Zealand Law Society submissions on the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill 03/03/2017, at [133].

[22] New s 18AAA to be inserted into the Children, Young Persons, and Their Families Act 1989.

[23] New Zealand Law Society submissions on the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill 03/03/2017, at [137].

[24] New Zealand Law Society submissions on the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill 03/03/2017, at [160].

Click here to go to Main Contents

convenience, cutting against the whole declared idea of the changes, which is to put the child at the centre of decision-making.

(i) Information sharing

The Bill inserts a new information-sharing framework in the Children, Young Persons and Their Families Act to 'facilitate the timely and consistent exchange of personal information about individual vulnerable children and young persons to promote their safety and well-being'.[25] Social workers under the new proposed law will be able to compel almost all individuals and agencies in New Zealand to disclose a wide range of information about children, young persons and their families. Agencies are defined as including any person or body of persons in either the public or private sector and the provision[26] makes it clear that the well-being and the interests of the child take precedence over any duty of confidentiality owed by any person. There are exceptions to disclosure which are not consistently set up. For example, if there is a request for information[27] by child welfare and protection agencies, or independent persons from other child welfare and protection agencies, the holder of the information can refuse to disclose it if they believe the disclosure will increase the risk of harm to the child[28] or would not be in the interest of the child.[29] However, if the request is made under s 66, which requires agencies to supply information on request, there are no such grounds for withholding information even if the person has reasonable grounds to believe that the disclosure is not in the child's best interest. This needs to be tidied up, for otherwise it could lead to confusion and will not work in the intended way, which is to free up information that will help children, but to protect information that may harm them.

A report on information sharing[30] pointed out the important risks associated with mandatory information sharing in the context of protecting children. These were identified as:

> '• the social stigma that may arise from being the subject of any inquiry or statutory response,
> • the harm that may arise from false accusations or inferences of being a perpetrator of child neglect or abuse,
> • the risk some families may be less inclined to engage with social services and other supports due to concerns about how their personal information will be used.'

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25 Explanatory note to the Bill p 8.

26 Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill 03/03/2017, s 66.

27 Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill 03/03/2017, s 66E.

28 Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill 03/03/2017, s 66G(b)(i).

29 Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill 03/03/2017, s 66G(b)(v).

30 *Regulatory Impact Statement – Investing in Children: Information Sharing*, 7 September 2016, at [44].

V CONCLUSION

Setting up ministries for vulnerable children and passing legislation with the goal of being child-focused do not in themselves address the core reason that children are vulnerable in our society. We have had child protection legislation for a number of years. The major reports by the New Zealand Commissioner for Children on the outcomes of children who have been injured or, sadly, killed by their family show that the problems are largely ones of properly resourcing families and those that work with them.[31] The law is very much the ambulance at the bottom of the cliff when it comes to protecting vulnerable children. All the research shown at the beginning of this chapter indicates that unless we address issues of deprivation and poverty we will never make a major difference to children who live in such conditions and who are much more likely to suffer abuse and neglect.

Early intervention is only going to work if we are able to provide either full support for these children's families or alternative families who will provide all the resources that children need. Placing children in state care has been an abject failure in New Zealand,[32] with placed children showing the lowest performance on all indicators of well-being, whether emotional, physical or educational.

Life should not be a lottery depending on which environment you are born into. New Zealand used to lead the world with its welfare state, providing security and support from the cradle to the grave. Since the late 1980s, when we have moved to a political system of what is termed 'neo-liberalism', children have borne the brunt of policies marginalising those in need on the assumption that people should be able to provide for themselves and otherwise are at fault. We used to be a country that prided ourselves on looking after everyone in the team. We are now a country where, if you are not born into the right squad, your chances of a productive and fulfilled life are much more limited.

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[31] *Dangerous Situations – Report into the death of a child*, March 1988 DSW, *Commissioner for Children's Report into Craig Manukau's Death*, 1993, *Commissioner for Children's Report into the Death of James Whakaruru,* June 2000, *Judge Michael Brown Dec 2000 Ministerial Review of the Department of CYF.*

[32] State of Care 2015, What we learnt from monitoring Child, Youth and Family, Office of the Children's Commissioner, 2015.

Click here to go to Main Contents

PORTUGAL

THE DAWN OF A BRAVE NEW WORLD IN PORTUGAL? A CRITICAL OVERVIEW OF THE NEW LEGAL FRAMEWORK APPLICABLE TO MEDICALLY-ASSISTED PROCREATION

Rute Teixeira Pedro[*]

Résumé

L'an dernier, la législation portugaise sur la procréation médicalement assistée (Loi no 32/2006 du 26 juillet 2006) a été substantiellement modifiée par deux lois (la Loi nº 17/2016 du 20 juin 2016 et la Loi nº 25/2016 du 22 août 2016). Les aspects majeurs de cette réforme seront exposés dans ce chapitre: l'érosion du principe de subsidiarité dans le recours à l'aide médicale à la procréation, l'extension de la liste des bénéficiaires de ces techniques et la reconnaissance des contrats de gestation pour autrui. On peut voir dans ces réformes successives une véritable révolution du droit de la filiation au Portugal.

I INTRODUCTION

In 2016, two Laws were enacted in Portugal that introduced some important changes in the legal framework applicable to medically-assisted procreation.

Law nº 17/2016, dated 20 June 2016, and Law nº 25/2016, dated 22 August 2016, have significantly reshaped the rules governing the use of medical techniques in procreation. These techniques were originally authorised by Law nº 32/2006, dated 26 July 2006 (also known, in Portugal, as 'the Law of medically-assisted procreation'). These two laws represent an important landmark in the legal treatment of the subject, not only due to the sheer number

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Click here to go to Main Contents

of alterations – 19 of the 43 articles that compose the 2006 Law[1] were changed – but also because of the shift in emphasis in the mainstays of the previous framework.

In this brief overview of the latest developments in this field, the first step will be to outline the main traits of the legal framework applicable to medically-assisted procreation before the amendments introduced in 2016 (Part II). Following this, the most important changes produced by the enactment of the two above-mentioned 2016 laws will be described (Part III). Subsequently, based on a critical analysis, a major trend that may be inferred from the newly reshaped legal framework will be highlighted: the emergence of a new concept of legal parentage that deviates from the traditional perspective adopted in this area of law (Part IV). Finally, some concluding remarks will be made concerning the revolution that has taken place in the Portuguese Legal system law of affiliation.

II THE MAIN TRAITS OF THE LEGAL FRAMEWORK APPLICABLE TO MEDICALLY-ASSISTED PROCREATION BEFORE THE AMENDMENTS INTRODUCED IN 2016

Besides biological parentage, based on blood ties,[2] the Portuguese legal system traditionally only recognised adoptive parentage.[3] This perspective changed in 2006, when the use of medically-assisted techniques to procreate was allowed by Law nº 32/2006, dated 26 July 2006. The enactment of this Law importantly fulfilled the task charged by art 67, nº 2, (e) of the Constitution of the Portuguese Republic (hereafter referred as CPR): regulation of access to those techniques 'in such a way as to safeguard the dignity of the human person'.

As was stated in the first version of Law nº 32/2006, dated 26 July 2006, the legal framework implemented three main principles: (i) the principle of human

[1] Law nº 32/2006, dated 26 July 2006, is still in force today with amendments introduced by Law nº 17/2016, dated 20 June 2016, and Law nº 25/2016, dated 22 August 2016. These laws did not abrogate the Law that dates back to 2006.

[2] As is stated in art 1578 of the Portuguese Civil Code (hereafter referred to as the PCC), this link connects persons who descend from each other or descend from a common ancestor.

[3] Adoption (recognised in art 1586 of the PCC) is regulated in arts 1973–1991 of the PCC. A judicial decision is needed and numerous conditions must be met to establish the adoptive link, which creates a relation that the law treats in a similar way to the relation based on the biological link. Indeed, in the light of art 1986, nº 1, the adoptee acquires the legal status of son/daughter of the adopter and he/she is integrated, with his/her descendants, in the adopter's family, and, at the same time, the legal connections between the adoptee and his/her biological ascendants and collaterals are extinguished, except for the purpose of evaluating the legal ability to celebrate marriage. The Portuguese legal framework concerning adoption was thoroughly revised by Law nº 143/2015, dated 8 September 2015. See Rute Teixeira Pedro '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', in Bill Atkin (ed) *The International Survey of Family Law 2016 Edition* (Bristol, Jordan Publishing, 2016) at 391ff.

dignity (art 3 of the aforementioned law in accordance with art 1 of the CPR and with art 1 of the Council of Europe's Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (hereafter referred as the CHRB); (ii) the principle of prohibition of discrimination based on grounds of genetic heritage (art 3 of the aforementioned law in harmony with art 13 of the CPR, extensively interpreted, and with art 11 of the CHRB) and (iii) the principle of subsidiarity, as the access to medically-assisted techniques should be allowed, as a rule, only to a couple formed by a woman and a man who could not naturally procreate through the practice of sexual intercourse (based on the diagnosis of infertility), as was stated in art 4 of the original version. Furthermore, as a second level corollary of the same principle, (partially or totally) heterologous procreation was not permitted, except in cases of the impossibility of the generation of a baby with the gametes of the beneficiaries of those techniques (art 10 of the Law nº 32, 2006). Exceptionally, the use of those techniques was accepted to treat a serious disease or to avoid the risk of transmission of disease of genetic, infectious or other origin (art 4, nº 1 of the same version of the law). In spite of this exceptional deviation from the principle of subsidiarity, access to medically-assisted procreation was not envisaged as an alternative to natural procreation. The technique necessarily required a medical indication to support its use, in the light of the principle of beneficence, promoting a parental project of persons who could not procreate at all or could not conceive a healthy baby without medical assistance.

In accordance with those principles, it was only accessible to married heterosexual couples or cohabiting heterosexual couples, if, in the latter case, they had lived together for at least 2 years (art 6 of the first version of Law nº 32/2006, dated 26 July 2006).

It is worthy of note that, even while a revolutionary change was produced by a law enacted at the beginning of 2016 (Law nº 2/2016), providing for the elimination of gender discrimination in access to any family relationships – namely, regarding adoption or foster relationships ('*Apadrinhamento civil*')[4] – differences in treatment still persisted concerning medically-assisted procreation. Access to those techniques continued to be denied to same-sex couples, as no amendments were introduced to Law nº 32/2006, dated 26 July 2006, which governed that subject.

In conclusion, even if since 2006 parentage without a biological link exclusively grounded on the intention to be a parent could be actualised through non-natural procreation in the light of the original rules governing medical assisted procreation, the family link replicated biological parentage when nature failed.

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[4] Celebration of same-sex marriage was allowed by Law 9/2010, dated 31 May 2010 following the previous recognition – in 2001, by Law 7/2001, dated 11 May 2001 – of the legal effects of same-sex de facto unions.

Click here to go to Main Contents

III THE LEGAL FRAMEWORK APPLICABLE TO MEDICALLY-ASSISTED PROCREATION AFTER THE AMENDMENTS INTRODUCED IN 2016

In the meantime, the above-depicted scenario changed, as Law nº 32/2006, dated 26 July 2006 was amended twice last summer:[5] first by Law nº 17/2016, dated 20 June 2016, and subsequently by Law nº 25/2016, dated 22 August 2016.[6] The former mainly concerned the provisions regulating the circle of beneficiaries of medically-assisted procreation techniques and the latter specifically regarded gestational surrogacy contracts.

In the following sections the most important changes will be highlighted.

(a) The erosion of the principle of subsidiarity of medically-assisted techniques

There was an important change to one of the three cornerstones upon which the previous framework was built. Indeed, the erosion of the principle of subsidiarity of medically-assisted techniques triggered by Law nº 17/2016, dated 20 June 2016 must be highlighted.

By that Law, an additional number (nº 3) was added to art 4 of the MAPL. At present, in the new rule it is stated that medically-assisted techniques may be used by any woman, irrespective of a diagnosis of infertility. This possibility is recognised without regard to her civil status (ie single, married,[7] divorced, widow, cohabiting) and her sexual orientation, as is now clarified in art 6, nº 1 of the MAPL.

As a consequence, no medical justification is required for access to medically-assisted procreation, in the sense that any woman, even if she is able to procreate naturally, may choose to further her parental project by means of

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5 As the amendments were made through two Laws that dated from June and August of 2016 and as, surprisingly – without sufficient discussion and analysis – they changed some important aspects of the Portuguese legal framework concerning the subject, it became common to say that the amendments happened 'suddenly, last summer', borrowing the words used in the world-famous play by Tennessee Williams.

6 Hereafter Law nº 32/2006, dated 26 July 2006 with the amendments introduced in 2016 will be referred to as the Medically-Assisted Procreation Law and with abbreviation MAPL. Furthermore, from this point on, whenever we refer to an article without a reference to the law it belongs to, it is an article of the Portuguese Law of Medically-Assisted Procreation as it was amended and is in force at the moment.

7 Article 6, nº 1 is clear when it allows the use of these techniques by any woman, 'irrespective of her civil status'. As a consequence, in spite of being married, a woman may make use of the techniques alone, without the consent of her spouse. Nevertheless, this act may have consequences within the marital relationship, as it may be a violation of the spousal duties that each spouse is bound to fulfil (duties of respect, cohabitation, fidelity, cooperation and assistance, in accordance with art 1672 of the PCC) and may mean that there was an 'irretrievable breakdown' of the marriage, the sole condition to obtain a divorce on the grounds of art 1781, in this case (d).

medical assisted techniques instead of opting for the practice of sexual intercourse. The subsidiarity principle was partially replaced by the (thus yet limited) acceptance of the complementary or alternative principle of these medical reproduction methods.

The only thing necessary for what is also known as 'artificial' procreation is the desire to become a parent and consent to the use of the technique. In this case, a male genetic donor is required, who will never be considered the father of the child (arts 10, 21 and 27). This heterologous medically-assisted procreation will lead to a situation in which children are born that will have only one parent (the mother).[8]

The possibility of single parenthood is afforded only to women. This solution may be challenged in the light of the principle of equality (art 13 of the CPR), which states that no person may be privileged, favoured, prejudiced, deprived of any right or exempted from any duty for reasons of sex. Nonetheless, it is consistent with the rules adopted in 2016 regarding gestational surrogacy contracts, to which we will refer in Section II(c), and which allow that technique only in exceptional circumstances.

In spite of the changes mentioned, the use of medically-assisted techniques for procreation is not allowed for the purpose of improving certain non-medical characteristics of the unborn child, namely, in order to choose a future child's sex (art 7, nº 2 of the MAPL). Two cases are exempted from this prohibition: where there is a high risk of genetic disease linked to sex and for which direct detection by pre-implantation genetic diagnosis is not yet available, and also when there is a reasonably serious need to obtain a compatible HLA group (human leukocyte antigen) for the treatment of another child's serious disease (art 7, nº 3 of the MAPL).

(b) The expansion of the circle of beneficiaries of medically-assisted techniques

Law nº 17/2016, dated 20 June 2016, changed art 6, which defines those who may benefit from medically-assisted procreation techniques. Access to medically-assisted methods of procreation was broadened to encompass any single woman over 18 years of age, and (married or cohabiting) same-sex couples when composed of two women.[9]

The last two situations refer to heterologous procreation, as donation of the male genetic material is always necessary. In neither of these cases will the

[8] Without the possibility of investigating the fatherhood (art 20), as will be detailed infra.

[9] This right is recognised only in the case of same-sex couples when they are composed of two women. When they are composed of two men the right is not afforded. As was stated above, regarding the right afforded to single women and not to single men, the solution may be challenged in the light of the principle of equality (art 13 of the CPR), but it is in harmony with the newly amended regulation of gestational surrogacy contracts (see next section).

Click here to go to Main Contents

donor be considered father to the child, and there will the recognition of co-motherhood or of a single motherhood, respectively. As a consequence, situations in which there is donation of genetic elements are potentially multiplied, as (at least partially) heterologous procreation is promoted.

These new possibilities contribute to the disruption of the principle of subsidiarity, which was referred to in the previous section.

(c) Recognition of the validity of gestational surrogacy contracts

Although the principle of human dignity (art 3, nº 1 of the MAPL) still applies, the corollaries that are inferred from it have changed, leading to a different legal approach to the challenging question of the legal recognition of gestational surrogacy contracts.

In 2006, lawmakers intentionally chose the expression 'human dignity' instead of the expression 'dignity of the human person' used in art 3 of the CPR. The extent of the former is wider than the content attached to the latter, as it encompasses legal protection to any expression of the human species, regardless of its qualification as a person.[10] In so doing they did not need to make a decision about the legal status of the embryo. This broad principle of human dignity had many ramifications. For instance, transaction of ova, semen, embryos or any other biological material involving any form of payment was (and still is) prohibited (arts 17 and 18 in force today). Another inference from the same principle was the prohibition of gestational surrogacy contracts (commonly known as 'wombs for rent' or '*barriga de aluguer*' in Portuguese): situations in which a woman makes herself available to carry and deliver a baby for another person and to hand over the child after birth to this person, renouncing her own rights and duties as a mother), ie recognising the legal status of mother in the person for whom she carries the child. It was a corollary accepted until 2016, and it explained the solutions that were adopted in arts 8 and 39 of the original version of the MAPL: gestational surrogacy contracts were void and without legal effect, as such practices were considered contrary to the principles of 'public order' and 'good mores'.[11]

In spite of the maintenance of the proclamation of the principle of human dignity (art 3, nº 1 of the MAPL), Portuguese lawmakers changed their approach to gestational surrogacy contracts. By Law nº 25/2016, dated 22

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[10] Article 66, nº 1 of the PCC states that personality is acquired at the moment of birth, if the newborn is alive after the conclusion of the birth, meaning that it is able to live autonomously, even if for a short period, without connection to the mother, ie after the umbilical cord is cut.

[11] Contracts that violate the 'public order' or the 'good mores' are void and with no effect in the light of the rule defined in art 280 of the PPC. In spite of the existence of this general rule, in Law nº 32/2006, dated 26 July 2006, lawmakers expressly dictated that consequence of any gestational surrogacy contract. Additional to that consequence, if there was payment of any amount of money the act of making a gestational surrogacy contract would be criminally punished in the light of art 39 of the original version of the 2006 Law.

August 2016, art 8 of the MAPL, which regulates this issue, was radically reformulated. The valid celebration of gestational surrogacy contracts is accepted in some specific circumstances providing some conditions are met.

In point of fact, recognition of this option was surrounded by many safeguards, as multiple and cumulative requirements must be respected. First, the conclusion of the contract is only permitted on an exceptional basis 'in cases of the absence of a uterus, injury or disease of this organ that absolutely and definitively prevents the woman's pregnancy or in clinical situations that justify it' (art 8, nº 2 of the MAPL). As a consequence, both principles of beneficence and subsidiarity apply when this medical technique is applied. Secondly, the contract has to be gratuitous, as any payment in money or in kind is forbidden, except for the reimbursement of the amount corresponding to the health care expenses actually provided to the woman, including expenditures for transportation, if, in any case, they are duly titled in a specific certificate (art 8, nº 2 of the MAPL). Thirdly, there must be a document,[12] where the parties to the contract expressly pronounce their declarations of will in writing. The consent of all the persons involved in the contract must comply with the provisions of art 14 of the MAPL that regulates the consent of the beneficiary(ies) of medically-assisted procreation. As a consequence, that/those beneficiary(ies) and the woman who carries the child must be informed in advance of all known benefits and risks arising from the use of those techniques, as well as of their ethical, social and legal implications (art 14, nº 2 of the MAPL) and of the importance of the influence of the surrogate pregnant woman on embryonic and foetal development (art 14, nº 6 of the MAPL).[13] Afterwards, the beneficiary(ies) and the pregnant surrogate should expressly give their free, informed written consent to the doctor responsible (art 14, nº 1 of the MAPL). Fourthly, before the celebration of the contract an authorisation from the National Council of Medically-Assisted Procreation[14] must be issued, which should be preceded by a hearing from the Portuguese Medical Association (art 8, nº 4 of the MAPL). Fifthly, when there is gestational surrogacy, medically-assisted procreation, may only be partially heterologous: therefore, the gametes of at least one of the respective beneficiaries must be used. Furthermore, in no case may the woman who carries the child be the donor of any oocyte used in the particular procedure in which she is a participant (art 8, nº 3 of the MAPL). Finally, between the parties involved in the conclusion of the aforementioned contract, there cannot exist any relationship of economic subordination, namely a labour relationship (art 8, nº 6 of the MAPL).

With regard to the content of gestational surrogacy contracts, the law limits itself to demanding the inclusion of some clauses and forbidding the inclusion

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[12] Gestational surrogacy contracts are formal contracts, which deviate from the rules that apply to contracts in the Portuguese Legal system. Article 219 of the PCC states the principle of freedom of form.

[13] The information that must be provided is included in a document approved by the National Council of Medically-Assisted Procreation (art 14, nº 3 of the MAPL).

[14] This Council supervises the whole process.

Click here to go to Main Contents

of other clauses. On one hand, parties are required to include provisions to be observed in the event of the occurrence of malformations or foetal diseases and in the case of possible voluntary termination of pregnancy, in accordance with the criminal legislation in force (art 8, nº 11 of the MAPL).[15] On the other hand, the contract cannot impose on the pregnant surrogate, either 'behavioural restrictions' or 'norms that violate her rights, freedom and dignity' (art 8, nº 11 of the MAPL).[16]

The law does not include any rule that can be applied regarding the consequences of any change of circumstances, nor to the non-fulfilment of the commitment established between the parties. Moreover, the provision of art 14, nº 4 of the MAPL – which states that consent may be freely revoked by any party to the contract 'until the beginning of the therapeutic processes of medically-assisted procreation', gives rise to many questions. When should that temporal limit be established? When do therapeutic processes of medically-assisted procreation begin? There is no unequivocal answer.

(d) The rules regarding the establishment and the contestation of parentage of a child born as a result of the use of medically-assisted techniques

As far as the establishment of parentage is concerned, art 20 of the MAPL must be applied. In order to respect the will that underlies access to medically-assisted procreation, the parent(s) must be the beneficiary(ies) of the medical technique. That is the legal solution adopted for the determination of parenthood. As a consequence, a child born as a result of the use of medically assisted techniques is legally considered the son/daughter of the person or people who has/have given consent under the terms of art 14 of the MAPL. On one hand, if it was a woman alone, there will be a single motherhood (with no possibility of establishing the fatherhood: in this case the genetic material is provided by a donor and he cannot be considered the father of the child). On the other hand, if there are two beneficiaries – the members of a married couple or a de facto couple – there will be two parents: a mother and a father if it is a heterosexual couple, or two mothers (co-motherhood), if it is a same-sex couple.

As far as contestation of parenthood is concerned, the only possible way of challenging the established parenthood depends on the demonstration that no

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[15] The meaning of this provision is not clear, as the woman who bears the child has the right to decide to terminate the pregnancy, in the light of the legislation in force.

[16] As happens with the mandatory clauses of the contract (see previous footnote), the meaning of this provision is not clear. To allow the woman who bears the child to adopt any behaviour, irrespective of its consequences for the foetus may be contradictory to the content of the contract. Should it not be legally possible to impose any restrictions on her conduct? Some restrictions could be inferred from the commitment that she accepted and, by that acceptance, she is due to respect.

valid consent was given to the medically-assisted procreation technique or on the demonstration that the child was not born as a result of insemination for which the consent was given.

Finally, regarding establishment of the affiliation of the child born through the use of gestational subrogation, the legal rule dictates that he/she will be considered the son/daughter of the beneficiaries of the technique (art 14, nº 7 of the MAPL). There is no problem when the above-mentioned requirements are met and, therefore, the gestational surrogacy contract is valid. What if the legal conditions are violated and the contract is void? Should the same rule apply? The law does not say. Is it possible for the person interpreting the law to make a distinction? When the contract is void, and has no legal effect, either solution deserves to be criticised. On one hand, if the rule is applied, the beneficiaries – who celebrated the void contract and may be criminally punished for that behaviour – will be the parents of the newborn.[17] If this would be so the fulfilment of the aim pursued through the void contract would be legally recognised. From a different perspective, it could be argued that the exclusion of the application of the contract should lead to the application of the general rules regarding the establishment of motherhood and fatherhood included in the PCC (art 1796 and ff). The mother would be the woman who bore the child. The father would be the member of the couple who provided the genetic material, if the material did not come from a donor. If there has been a donation, art 10, nº 2 applies and the donor will not be considered the father of the child: the newborn will be the son/daughter of a sole parent: the woman who bore the child, who may not have the intention in raising the child. Is this solution in accordance with the promotion of the best interest of the child? None of the solutions seem to provide adequate protection to the child. Nevertheless, irrespective of unlawfulness of the behaviour of the (adults) beneficiaries, the solution should promote the 'best interest of the child'. And in that light, the first solution is better than the second, although there are critics that are opposed to it.

IV THE MATERIALISATION OF A REVOLUTION IN THE LEGAL CONCEPT OF PARENTAGE: WHAT HAS 'THE BEST INTEREST OF THE CHILD' GOT TO DO WITH IT?

As a consequence of the above-described changes, it may be said that a revolution has taken place in Portugal regarding the legal concept of parentage.

In the light of the traditional framework applicable to this institution, the family link built either through adoption or through medically-assisted procreation aimed to replicate biological parentage (mother and father, ie a female and a male parent). This model has progressively been abandoned in recent years as there had been a gradual replacement of the prominent

[17] This is the sense of the interpretative declaration issued by the National Council for Medically-Assisted Procreation on the subject dated September 2016.

biological approach in favour of a model where the will to become a parent and the effective performance of the role of caring for and raising a child play an increasingly important part.[18] Besides biological truth, importance was given to sociological and volitional truth. But this is not sudden change in attitude as it has been emerging over the past few decades.

The laws of 2016 produced a different and more revolutionary shift. From my point of view, in order to fulfil the intentional truth, several aspects of the interests of the child who will be created to satisfy the procreative intention are not properly considered as they are in other areas of the legal system (for instance in the legal framework that governs adoption). I will illustrate my reasoning with some examples.

Should a minimum duration of the marriage or of the *de facto* union be required to allow access to medically-assisted procreation? In the past a minimum of 2 years was required. Law nº 17/2016, dated 20 June 2016, eliminated that requirement. We may conclude from this change that members of those couples may have recourse to these techniques, regardless of the length of marriage or the de facto cohabitation.[19] In the case of adoption, a minimum duration of 4 years of the marriage or of the de facto union is required (art 1979, 1 of the PCC), to better guarantee the stability of the family context in which the adoptee will be inserted. If that is so, should not the same guarantee be afforded to the child conceived with medical assistance?

As far as age requirements are concerned, only a minimum age is demanded: over 18 years. Given the possibility of using gametes of third parties according to art 10, and given the erosion of the principle of subsidiarity, what is the time limit for this resource? The law is silent. In the case of adoption, the parents must be over 25 years for joint adoption, and 30 years for single adoption,[20] and under 60 in either case (art 1979, 1-3 of the PCC). It is argued that these conditions serve the best interest of the child, preventing the existence of parents who are too young or too old. Does the child conceived with medical assistance deserve less protection than an already-born child?

It may also be stressed that there is not necessarily any intervention of public authority (except for the recognition of a gestational surrogacy contract) to approve the use of these techniques. In the case of adoption, a succession of administrative and judicial entities intervene in the process (art 1973 of the PCC).

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[18] Considering this shift, see Guilherme de Oliveira '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 pp 278 and ff and Rute Teixeira Pedro 'An ongoing (r)evolution unfolded step by step …' at 385 ff.

[19] In the case of de facto cohabitation, it may be defended that Law 7/2001 of 11 May and its requirement of 2 years to recognise the effectiveness of the union may be applicable.

[20] Apart from the possibility of adopting the child of a spouse, in which case the age of 25 is sufficient.

Focusing on the possibility of the use of medically-assisted procreation techniques by a single person (who must necessarily be a woman), in the light of the newly reshaped framework, only motherhood will be established without any need for a subsequent public investigation into the identity of the father.[21] These solutions deviate from the regime described in art 1864 of the PCC, which imposes that investigation, when the fatherhood of a child conceived by natural procreation is not established. Does the public interest that underlies this investigation not apply to a child born using medically-assisted procreation?

These are some of the many aspects where the best interest of the child seems to be neglected, in favour of the materialisation of this 'intentional parentage', solely based on the intention of the adults 'to assume a parental role' for a child.[22] It seems that this new kind of parentage only serves the interests of the grown-ups: symptomatically they are called 'beneficiaries' of the medically-assisted procreation techniques.

V CONCLUSION

The legal recognition of access to medically-assisted procreation gives rise to many legal and ethical problems. Traditionally, the principle of subsidiarity, alongside the principle of human dignity and the principle of prohibition of discrimination on the grounds of genetic heritage, was considered as a major cornerstone of the legal framework applicable to this controversial area of medical intervention. In the light of this principle, the use of medically-assisted procreation techniques was envisaged as a solution provided by science to give effect to a parental project that nature alone would not enable.

The apparent erosion of the principle of subsidiarity and the (thus far limited) acceptance of the complementary or alternative principle of these reproduction methods, generated by Law nº 17/2016, dated 20 June, 2016, and Law nº 25/2016, dated 22 August, 2016, calls for serious reflection on the legal and ethical consequences of this newly shaped 'intentional parentage', solely based on the aim to undertake a parental role[23], which in my view lacks sufficient protection of the best interests of the child conceived to satisfy that aim. Some aspects of the current legal framework are incomplete, and other aspects are

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[21] This solution is consistent with the rule of anonymity of the donor (art 15 of the MAPL). Indeed information about the identity of the donor may be obtained only in exceptional circumstances on the grounds of substantial reasons that have to be recognised by judicial decision. Nevertheless the person who was born as a consequence of the use of medically-assisted procreation techniques may request genetic information about him/herself, excluding donor identification. Furthermore whenever that person decides to marry, he/she may demand information about the existence of any biological impediment to the marriage.

[22] As is expressively summed up by Ingeborg Schwenzer *Tensions between Legal, Biological and Social Conceptions of Parentage* (Antwerpen-Oxford, Intersentia, 2007) p 11.

[23] The application to day-to-day life of scientific achievements must be the object of normative analysis, namely from a legal point of view, considering the rules and principles the Law encompasses and the values it is called to protect. As Aldous Huxley stated in the Foreword he

unclear and contradictory. A good deal of work has to be done by the doctrine, by the jurisprudence and by the legislature.

wrote in 1946 to his *Brave New World*: 'The theme of Brave New World is not the advancement of science as such; it is the advancement of science as it affects human individuals.'

PUERTO RICO

A SHADOW THREATENS THE FUTURE OF THE FAMILY IN PUERTO RICO

Pedro F Silva-Ruiz[*]

Résumé

Le présent texte s'intéresse au projet de loi visant l'abolition du Code civil de 1930 et l'adoption d'un nouveau code, introduit devant le sénat de Porto Rico.

Les notaires publics, qui sont des juristes, sont autorisés à célébrer des mariages et à rédiger des contrats de mariage sous forme authentique signés par les parties et par le notaire. Le divorce pour cause d'échec irrémédiable du mariage peut être obtenu par acte notarié.

La Cour suprême de Porto Rico n'a rendu que deux arrêts en matières familiales. La première a établi que le procureur aux affaires familiales n'est pas tenu d'intervenir dans les litiges concernant la consignation judiciaire de sommes pour un mineur. Dans la deuxième décision, la Cour a conclu que les œuvres d'art créées par un époux marié en communauté de biens lui restent propres.

I THE CIVIL CODE

Five days before the end of the seventh ordinary session of the Seventeenth Legislative Assembly, a bill was introduced before the Senate of Puerto Rico. It was Senate Bill 1710 (P del S 1710, 25 June 2016).[1] The last ordinary session closed on 30 June 2016.

The purpose of the bill was to adopt a (new) Civil Code and to repeal the existing Civil Code of 1930, as amended.

The Governor of Puerto Rico, after the general election held on 8 November 2016, called an extraordinary session of the Legislative Assembly to consider pending bills. One of them was P del S 1710 (Senate Bill 1710) (to adopt a new Civil Code).

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1 The bill was referred for the consideration of the appropriate Commission.

Click here to go to Main Contents

One of the books of the proposed Senate Bill 1710 deals with the family and family law.

Very few public hearings had been held before the Senate Bill's enactment.[2]

As the bill was not approved before 31 December 2016, it needed to be presented in January 2017 for consideration at the 18th Legislative Assembly (years 2017–2020).[3]

II NOTARIES ARE ALLOWED TO PERFORM MARRIAGES

An act allowing a notary public[4] to perform marriages was recently approved by the legislature. The Governor signed it into law.[5] The parties can request a notary public of their preference to draw a marriage contract (under a public deed) to be signed by them.

III DIVORCE BY THE IRRETRIEVABLE BREAKDOWN OF MARRIAGE

Act No 155 of 9 August 2016 (Law 155-2016) amended arts 96, 97 and 1232 of the Civil Code, 31 LPRA 321, 331 and 3453,[6] to allow divorce *ad vinculum* where there is irretrievable breakdown of the marriage (ruptura irreparable del vínculo matrimonial), by executing a public deed (escritura pública) before a notary public only in those cases where there are no assets or debts to the divided and there are no minor children. Thus, divorce can be obtained by many grounds, among them the mutual consent of the parties (a ground established by the Supreme Court case law) adultery, separation and some others.

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2 See (1) *Justicia avala creación de un Nuevo Código Civil* (The Department of Justice calls for the adoption of a new Civil Code), in *El Nuevo Dia*, 18 November 2016, p 10; (2) *Urge aprobar el nuevo Código Civil* (the approval of the new Civil Code is urgent), in *El Nuevo Dia*, 20 November 2016, p 20; (3) the Bar Association call for a debate of the Civil Code (Bar Association, General Assembly 176, Resolution no 1, 10 September 2016). Some of the changes or modifications proposed – mainly in the family law area – are of a controversial nature.

3 R Banuchi, *No se compromete con el Código Civil* (he – the President of the Senate for 2017–2020 – makes no promise as to the Civil Code (remember book one deals with Family Law), *El Nuevo Dia*, Sunday, 8 January 2017, p 18.

4 The Public Notary is regulated by law. He/she needs to be a lawyer, admitted to the practice of both professions, lawyer and notary. A person can be a lawyer and not a notary, but all notaries are lawyers. See Pedro F Silva-Ruiz *Derecho notarial (casos y materiales)* (University of Puerto Rico Press, San Juan, Puerto Rico, second revised edition, 1914), 717 pages, in particular see pp 137–195, 303–433.

5 Law 201 of 27 December 2016 (P de la C 696 – House Bill 696); in force 120 days after it was approved.

6 Article 96 CCPR, 31 LPRA 221, list the grounds for divorce. Article 97 CCPR 97, 31 LPRA, procedure for divorce. Article 1232 CCPR, 31 LPRA 3453, contracts/acts that must appeared in a public document, such as a deed (escritura ante notario público).

IV SOME VITAL STATISTICS

According to Department of Health[7] of the Commonwealth of Puerto Rico, the year 2016 will end with fewer people born and more deaths than in previous years. This has not happened since the year 1930. It should also be specifically mentioned that, according to the Planning Board of Puerto Rico, about 300,000 persons will have migrated to the US mainland during the last years hoping for a better quality of life.[8]

V CASE LAW

Only two cases interesting to family lawyers reached the Supreme Court. The first one was *Administración del Sistema de Retiro de los Empleados del Gobierno del Estado Libre Asociado de Puerto Rico, recurrida v Ex Parte, Procurador de Relaciones de Familia, peticionario,* decision handed down on 30 November 2016, 2016 TSPR 239 (Rodríguez, J). This case held that the Procurator on Family Affairs (Procurador de Asuntos de Familia) need not intervene in controversies about the judicial consignation of money for a minor. The Supreme Court of Puerto Rico reversed judgments of both the intermediate Court of Appeals and the Court of First Instance.

In short, consignation is a deposit of the things owed with a third party under Court authority allowing the debtor to ask the Court for the cancellation of any debts (arts 1132 and 1134 of the Civil Code, 31 LPRA 3182 and 3184).

The second case was *Rosado Muñoz v Acevedo*, 23 November 2016, 2016 TSPR 236 (Pabón Charneco, J). The question in the case was whether the works of art created by a married man when the community property of goods (sociedad legal de gananciales) was still in force retained their private character or became community property? The case found that these were his private property rather than part of the community.

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7 Demographic Division of the Department of Health. Roughly speaking, the year 2016 will end with ± 28,200 births to ± 28,900 deaths.

8 Gerardo Alvarado León *Sombrío panorama económico* in *El Nuevo Día*, Friday, 25 November 2016, front page and pp 4–5. Ricardo Cortés Chico *Crisis fiscal y criminalidad claves para la emigración* in *El Nuevo Día*, Wednesday, 4 January 2017, p 12.

Click here to go to Main Contents

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SCOTLAND

PROACTIVE CHILD PROTECTION: A STEP TOO FAR?

Elaine E Sutherland[*]

Résumé

Comme beaucoup d'autres systèmes juridiques développés, la loi écossaise cherche à protéger les enfants contre les maltraitances et les abandons. Comme beaucoup d'autres systèmes juridiques développés, elle a échoué dans la mise en oeuvre de cet objectif ce qui a entraîné des conséquences parfois fatales.

Afin de tenter de concilier à la fois la volonté de protection des enfants et le respect de la vie privée et familiale, la loi exigeait jusque-là de rapporter des preuves d'un préjudice minimum causé à l'enfant pour qu'une intervention soit requise et puisse avoir lieu.

Depuis les premiers jours de la décentralisation, les gouvernements écossais successifs ont mis en place une politique de protection proactive des enfants, en mettant l'accent sur des interventions précoces, sur des aides universelles et sur des coopérations entre institutions.

La dernière étape dans le processus de prévention a été la création, par acte législatif, d'un "service de personne désignée". Avec ce plan original, chaque enfant, en Ecosse, aurait un individu qui lui serait désigné et qui garderait toujours un oeil sur lui. Cette designation serait automatique, sans qu'il y ait besoin de démontrer qu'il existe des raisons de s'inquiéter pour l'enfant.

Cet article analyse la protection de l'enfance en Ecosse en la replaçant dans son contexte historique et vis-à-vis les droits de l'homme. Il s'attache ensuite à l'analyse des différents mécanismes juridiques déjà en place, à leur efficacité et aux problèmes qu'ils posent.

Cet article examine l'approche de plus en plus préventive des gouvernements écossais successifs qui ont tenté de créer un "service de personne désignée" tout en se demandant si ce n'est pas finalement une étape de trop.

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Click here to go to Main Contents

I INTRODUCTION

Like many other developed legal systems, Scots law seeks to protect children from abuse and neglect. Like many other developed legal systems, it has failed to achieve that goal, on occasion, sometimes with fatal consequences.

In its quest to protect children, the state can and, in Scotland, does offer support designed to ensure that children can continue to live in their own families. Where parents welcome or, at least, accept that support, there is no problem. Difficulties arise, however, where they do not and state agencies believe that compulsory intervention in the family – at its most extreme, the removal of the child from the parents' care – is necessary. The prospect of mandatory state intervention raises fundamental questions that have far-reaching implications for family privacy and the rights of children and parents.

In the attempt to marry together the desire to protect children with respect for family privacy, Scots law requires that, before there can be compulsory intervention in a family, evidence must be produced that a minimum threshold of harm to the child has been, or is likely to be, reached. Yet instinct and intuition indicate that it makes sense to prevent a problem before it occurs and, failing prevention, to take remedial action at the first signs of trouble. Around the world, there have been calls for a more proactive child protection system: one that offers better support to parents from the outset rather than waiting for signs of possible harm before intervening.[1]

Since the early days of devolution, successive Scottish governments have pursued a policy of proactive child protection, emphasising early intervention, universal services and inter-agency cooperation. The latest step in that proactive process was the creation, by statute, of the named person service. Under the original plan, an identified individual – a 'named person' – would keep a watchful eye on (almost) every child in Scotland. In addition to offering advice and support to the child, young person and the parents, the named person would have the power and the obligation to communicate concerns to other agencies. This took early intervention to a new level. Rather than the state waiting until it could demonstrate cause for concern in respect of a child, there was to be state oversight of child wellbeing. Some parents viewed this as state supervision of parenting – a step too far – and the named person service was challenged in the courts.

The challenge was partially successful and the Supreme Court found that aspects of the legislation violated the right to respect for private and family life,

[1] For a forthright and comprehensive analysis of the shortcoming of the child protection systems in Aotearoa New Zealand, Australia, Canada and the United Kingdom, see, Alison Cleland 'A Long Lesson in Humility? The Inability of Child Care Law to Promote the Well-Being of Children' in Elaine E Sutherland and Lesley-Anne Barnes Macfarlane (eds) *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (Cambridge University Press, Cambridge, 2016).

guaranteed by art 8 of the European Convention on Human Rights. Since the Scottish Parliament has no competence to legislate in a manner incompatible with Convention rights, the offending provisions fell and the Scottish government is currently revising them.[2]

This chapter sets child protection in Scotland in its historical and human rights contexts before exploring the operation of the various legal mechanisms in place, their efficacy and the tensions within the system. It examines the increasingly proactive approach of successive Scottish governments, culminating in the attempt to create the named person service, and asks whether it is a step too far.

II CHILD PROTECTION CONTEXTUALISED

In democratic societies, limits are placed on the power of the state to intervene in families and it may be helpful to the reader to outline, by way of background, some of the constraints placed on the child protection system, in Scotland, and the tensions that can result.

As the United States Supreme Court famously observed, 'The child is not the creature of the state.'[3] Baroness Hale expressed a similar sentiment in the United Kingdom Supreme Court:

> 'Taking a child away from her family is a momentous step, not only for her, but for her whole family, and for the local authority which does so. In a totalitarian society, uniformity and conformity are valued. Hence the totalitarian state tries to separate the child from her family and mould her to its own design. Families in all their subversive variety are the breeding ground of diversity and individuality. In a free and democratic society we value diversity and individuality. Hence the family is given special protection in all modern human rights instruments including the European Convention on Human Rights (art 8), the International Covenant on Civil and Political Rights (art 23) and throughout the United Nations Convention on the Rights of the Child.'[4]

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2 Scotland Act 1998, s 29(2)(d).

3 *Pierce v Society of Sisters* 268 US 510, 535 (1925).

4 *In Re B (Children)* [2009] 1 AC 11, at [20]. She has reiterated this sentiment on numerous occasions. See, for example, 'Time and again, the cases have stressed that the threshold conditions are there to protect both the child and his family from unwarranted interference by the state. There must be a clearly established objective basis for such interference. Without it, there would be no "pressing social need" for the state to interfere in the family life enjoyed by the child and his parents which is protected by article 8 of the ECHR. Reasonable suspicion is a sufficient basis for the authorities to investigate and even to take interim protective measures, but it cannot be a sufficient basis for the long term intervention, frequently involving permanent placement outside the family, which is entailed in a care order.' *Re J (Children) (Care Proceedings: Threshold criteria)* [2013] 1 AC 680 at [44].

It is axiomatic that child protection in Scotland must operate in a manner consistent with the requirements of these international instruments.[5] That the United Nations Convention on the Rights of the Child prioritises the best interests of the child[6] and places the state under a clear obligation to protect children from abuse and neglect is familiar territory.[7] Similarly, readers will be aware of that Convention's recognition of the important role of parents, guardians and other family members in the upbringing of children[8] and the child's right to protection from arbitrary or unlawful interference with his or her privacy, family home or correspondence.[9]

The European Convention on Human Rights,[10] which was incorporated into the various legal systems throughout the United Kingdom by the Human Rights Act 1998,[11] guarantees respect for private and family life.[12] That guarantee is not absolute, but the onus falls on the state to demonstrate that any infringement is 'in accordance with the law' and 'necessary in a democratic society' in order to achieve at least one of a number of enumerated goals.[13] While the Convention is silent on child protection, the European Court of Human Rights has addressed the tension between parental rights and state intervention on numerous occasions. In the context of whether parents could found on their right to family life in order to secure the return of children in state care, it made clear how it prioritises rights and interests:

> 'a fair balance has to be struck between the interests of the child in remaining in public care and those of the parent in being reunited with the child. In carrying out this balancing exercise, the Court will attach particular importance to the best interests of the child, which, depending on their nature and seriousness, may override those of the parent.'[14]

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5 For completeness, it is worth noting that the Charter of Fundamental Rights of the European Union, art 7, provides, 'Everyone has the right to respect for his or her private and family life, home and communications.'

6 Article 3(1).

7 Articles 3(2) and (3) and art 19.

8 Article 5.

9 Article 16.

10 ETS No. 155 (1950).

11 Readers outside the UK may be wondering about the impact of Brexit on UK obligations under the ECHR. The UK ratified it in 1951 and Brexit alone will have no impact. There has, however, been talk of the UK withdrawing from the ECHR: Anushka Asthana and Rowena Mason 'UK must leave European convention on human rights, says Theresa May', *The Guardian*, 25 April 2016: www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum. In a related move, the UK government is considering repealing the Human Rights Act 1998 and replacing it with a Bill of Rights which would be more 'British' in character (whatever that means). A report from the House of Lords European Union Committee highlighted a number of problems with this course of action: The UK, the EU and a British Bill of Rights, HL Paper 139, 9 May 2016: www.publications.parliament.uk/pa/ld201516/ldselect/ldeucom/139/139.pdf. Were Scotland to become independent, post-Brexit, it is almost certain that the Scottish government would ratify the ECHR.

12 Article 8(1).

13 Article 8(2).

14 *Johansen v Norway* (1997) 23 EHRR 33, at [78]. The Court has repeated this view in countless

It is inevitable, perhaps, that this balancing of rights will lead to tensions, with those on the front line of child protection being placed in the unenviable position of being 'damned if they do and damned if they don't'. Either social workers are condemned for over-zealous intervention in families or they are criticised for failing to act appropriately and timeously. While the Scottish courts are usually more circumspect in their criticism of social workers than some of their English counterparts,[15] they have not been slow to condemn social workers for overstepping the mark.[16]

Yet the potential consequences of failing to act hang like a dark cloud over the child protection process. In this chapter, we will encounter numerous modern examples of such failures. Before exploring the current system, it is worth taking a moment to consider past failures and attempts to address them.

III ADDRESSING PAST FAILURES IN CHILD PROTECTION

It is undeniable that the child protection system has failed numerous children in the past.[17] A systematic review of historical abuse in residential schools and care homes in the period from 1950 to 1995 revealed widespread problems.[18]

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subsequent cases. See, for example, *Elsholz v Germany* (2002) 34 EHRR 58 at [50], *TP and KM v United Kingdom* (2002) 34 EHRR 2, at [71] and *Buchberger v Austria* (2003) 37 EHRR 13, at [40].

15 See, for example, the following observations of Wall LJ in *In re A (Children) (Adoption: Placement order)* [2010] 2 FLR 661, at [109]: 'What social workers do not appear to understand is that the public perception of their role in care proceedings is not a happy one. They are perceived by many as the arrogant and enthusiastic removers of children from their parents into an unsatisfactory care system, and as trampling on the rights of parents and children in the process.'

16 Addressing the challenges posed in child protection cases, one Scottish appeal court observed, 'In dealing with these difficult issues it is not only the sheriffs [in Scotland, legally-qualified judges] who have to apply the law; social workers must also do so … It would be an understandable reaction for a social worker to decide that the safety first approach is to sever the relationship between the child and the parent; it would be all too easy to conclude that a drastic consequence for a child is much more likely to become a reality if a child is left in the supervised care of a parent. But that would be a breach of duty and, from the particular perspective of a court, a gross failure to apply the law': *City of Edinburgh Council v RO and RD* [2016] SAC (Civ) 15, at [3]. See, also, *NJ and EH v Lord Advocate* 2013 SLT 347, where the Court found the failure to inform two women of a court hearing and allow legal representation in a process which led to their newborn babies being taken into care amounted to an infringement of their art 8 rights. In *AB, CD v AT* 2015 SC 545, also reported as *B, Petitioner* 2015 SLT 269, social workers faced contempt proceedings for failing to obtemper a court order.

17 See, Elaine E Sutherland *Child and Family Law* (2nd edn, W Green, Edinburgh, 2008), paras 9-029–9-051, for a discussion of a range of pre-2008 cases. Some of the more recent cases are highlighted below.

18 Historical Abuse Systemic Review: Residential Schools and Children's Homes in Scotland 1950 to 1995 (Scottish Government, Edinburgh, 2007), known as the 'Shaw Review'. For a discussion, see, Robin Sen, Andrew Kendrick, Ian Milligan and Moyra Hawthorn 'Lessons learnt? Abuse in residential child care in Scotland' (2008) 13(4) *Child and Family Social Work* 411.

Click here to go to Main Contents

Partly in response to that, an inquiry into historical abuse of children in residential and foster care was established in 2015 to raise public awareness, acknowledge the suffering of the (now adult) abused children and provide a forum for validation of their experiences.[19] While it was dogged by problems from the outset,[20] it now appears to be making progress.

In 2004, the (then) First Minister, Jack McConnell, apologised on behalf of the people of Scotland to victims of past abuse in children's homes.[21] Over a decade later, an apology was made on behalf of the Catholic bishops in Scotland to all who had been abused, as children, by clergy of the Roman Catholic Church.[22] More recently, the Scottish Football Association apologised for past failures to respond appropriately to allegations of abuse by a coach and a scout,[23] unleashing numerous other allegations of abuse of young players by football (soccer) coaches[24] and leading the Association to establish an inquiry into past abuse.[25]

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19 For further details, see www.gov.scot/Topics/People/Young-People/protecting/child-protection/historical-child-abuse.

20 The Scottish Child Abuse Inquiry started work on 1 October 2015, chaired by Susan O'Brien, QC, assisted by two panel members, Professor Michael Lamb and Glenn Houston. Its remit was criticised by abuse survivors and two religious orders were unsuccessful when they challenging the choice of chair, alleging 'apparent bias' since Ms O'Brien had previously represented clients alleging abuse as children while being cared for by the orders: *Congregation of the Poor Sisters of Nazareth v Scottish Ministers* 2015 SLT 445. Ms O'Brien and Professor Lamb later resigned amid allegations of political interference and Ms O'Brien is now suing the Scottish Ministers: 'Susan O'Brien QC sues Scottish government for £500,000 over child abuse inquiry ejection', Scottish Legal News, 31 January 2017: www.scottishlegal.com/2017/01/31/susan-obrien-qc-sues-scottish-government-for-500000-over-child-abuse-inquiry-ejection. The Rt Hon Lady Smith, a Senator of the College of Justice, took over as chair on 1 August 2016 and was assisted by Glenn Houston. In the latest twist, Mr Houston has now resigned, citing a 'change in priorities' in his working life following his appointment to the Northern Health and Social Care Trust and the Disclosure and Barring Service: 'Scottish child abuse inquiry: Senior panel member resigns', BBC News, 21 February 2017: www.bbc.co.uk/news/uk-scotland-39040995; The Independent Inquiry into Child Sexual Abuse, established for England and Wales, in 2015, also got off to a troubled start: www.iicsa.org.uk.

21 'McConnell "sorry" for homes abuse', BBC News, 1 December 2004: http://news.bbc.co.uk/2/hi/uk_news/scotland/4056927.stm. More recently, it seems that the Scottish government apologised (it is not clear to whom) over the handling of abuse claims by a civil servant: Stephen Naysmith 'Government ministers ordered to apologise to survivor of child abuse', *The Herald*, 17 December 2016: www.heraldscotland.com/news/14972723.Ministers_ordered_to_apologise_to_abuse_victim/?ref=ebln.

22 'Roman Catholic Church in Scotland issues apology for child abuse', BBC News, 18 August 2015: www.bbc.com/news/uk-scotland-33959446. This followed publication of the review undertaken by the McLellan Commission, established by the Bishops' Conference of the Catholic Church in Scotland, Review of the Current Safeguarding Policies, Procedures and Practice within the Catholic Church in Scotland (McLellan Commission, Edinburgh 2015).

23 'SFA apologises over failure to deal with child abuse claims', *The Scotsman*, 5 December 2016: www.scotsman.com/news/sfa-apologises-over-failure-to-deal-with-child-abuse-claims-1-4309562.

24 'SFA and Police Scotland to discuss football abuse claims', BBC News, 12 December 2016: www.bbc.com/news/uk-scotland-38283880 (raising the spectre of as many as 80 suspects across 90 different football clubs).

25 Martin Williams 'Former police child protection chief heads up Scottish football's abuse

It may be inevitable that this climate of apology would result in legislation and the Apologies (Scotland) Act 2016 was passed to facilitate apologies for past wrongs by rendering them inadmissible as evidence of liability in certain civil proceedings. While the legislation was making its way through the Scottish Parliament, it was amended to ensure that it did not have an adverse effect on claims by victims of historic child abuse.[26]

Victims of past abuse in institutional care have sometimes sought redress in the courts, only to find their claims time-barred.[27] While some local authorities made *ex gratia* payments to victims who had been abused while in their care,[28] the issue of claims being barred due to lapse of time prompted debate over whether there was a need for law reform[29] and, at the time of writing, legislation is currently before the Scottish Parliament to remove the 3-year time limit on raising such actions.[30]

IV THE MODERN SCOTTISH CHILD PROTECTION SYSTEM

What can be characterised as the 'modern' Scottish child protection system dates from the Children (Scotland) Act 1995. That statute implemented many of the recommendations of the inquiry[31] that followed in the wake the infamous *Orkney case*,[32] where nine children from four different families were removed from their homes amid allegations of sexual abuse, only to be returned 5 weeks later without the allegations being tested in court.

The 1995 Act provided for a range of court orders available to the state where there was concern over a child's care. Subsequent developments resulted in the protective orders being scattered across a number of statutes and others being introduced, but the key feature of all of the orders enabling state intervention in

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investigation', *The Herald*, 3 February 2017: www.heraldscotland.com/news/15067434.Former_police_child_protection_head_leads_Scottish_football_s_abuse_investigation/?ref=rss.

26 'Apologies Bill passes final stage at Holyrood', Journal of the Law Society of Scotland online, 20 January 2016: www.journalonline.co.uk/News/1021252.aspx#.WB0KY4WcGM8.

27 See, for example, *AS v Poor Sisters of Nazareth, sub nom, B v Murray* 2007 SLT 605, affirmed 2008 SC (HL) 148. For a full discussion of the problem and the cases, see, Eleanor J Russell 'Historic abuse: the hard reality for victims' (2015) 20(1) *Juridical Review* 53.

28 See, for example, 'Council to pay £20,000 each to victims of sex abuse', Journal of the Law Society of Scotland online, 2 October 2009: www.journalonline.co.uk/News/1007072.aspx#.WBzozIWcGM8.

29 Scottish Government Consultation on the Removal of the 3 Year Limitation Period From Civil Actions for Damages For Personal Injury for in Care Survivors of Historical Child Abuse (Scottish Government, Edinburgh, 2015): www.gov.scot/Resource/0048/00480345.pdf. Removal of the 3 Year Limitation Period from Civil Actions for Damages for Personal Injury for in Care Survivors of Historical Child: Scottish Government Response to the Consultation (Scottish Government, Edinburgh, 2016): www.gov.scot/Resource/0049/00496566.pdf.

30 Limitation (Childhood Abuse) (Scotland) Bill, SP Bill 1, 2016.

31 Report of the Inquiry into the Removal of Children from Orkney in February 1991, known as the 'Clyde Report' (HMSO, Edinburgh, 1992).

32 *Sloan v B* 1991 SLT 530.

Click here to go to Main Contents

the life of a family is that they require proof that the circumstances meet the relevant statutory threshold for intervention. Thus, a child assessment order, authorising temporary removal of the child for the purpose of determining whether concerns are justified, and the child protection order, authorising slightly longer-term removal, will only be granted if it is established in court that the child is suffering, or is likely to suffer, 'significant harm'.[33] An exclusion order, which compels someone other than the child to leave the family home, is subject to a similar test.[34] In the absence of parental consent, a permanence order, transferring some or all parental responsibilities and rights in respect of the child to the state, requires proof that living with the parent is, or is likely to be, 'seriously detrimental to the welfare of the child'.[35]

In terms of mandatory intervention, another crucial facet of child protection in Scotland is children's hearings system. It has been operating since 1971[36] and is founded on the recommendations of the Kilbrandon Committee of 1964.[37] Fundamental to these recommendations is a belief that the needs of abused or neglected children are much the same as those of children who offend since, in each case, 'the normal up-bringing process' had 'fallen short'.[38] Thus, it is appropriate to deal with them in the same tribunal. A second strand of the Kilbrandon philosophy is that, while courts are the appropriate place to determine disputed facts, decisions about what should happen to the child, thereafter, could be dealt with by panels of trained lay people. In all of this, the goal of the hearings system is to find a positive way forward on the basis that the child's welfare is the paramount consideration and in the light of all of the circumstances of the child's life.[39] The hearings system has undergone review over the years, but these principles remain at its core and, while disposals are premised on a strong welfare ethos, it is important to appreciate that the hearings system is, first and foremost, a legal process.

Before a child can be referred to a children's hearing, two criteria must be satisfied: there must be a prima facie case indicating that the child comes within the scope of at least one of the 17 grounds listed in the statute[40] and it must be determined that compulsory intervention is necessary.[41] One of the grounds for

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33 Children's Hearings (Scotland) Act 2011, ss 35–39. A child assessment order is only available to the local authority. While the statute permits any person to apply for a child protection order, authorising removal for up to 8 working days, in practice, it is local authorities that do so.

34 Children (Scotland) Act 1995, s 76.

35 Adoption and Children (Scotland) Act 2007, s 84(5)(c)(ii).

36 It was established by the Social Work (Scotland) Act 1968.

37 Report of the Committee on Children and Young Persons, Scotland, Cmnd 2306, 1964 (Kilbrandon Committee), known as the 'Kilbrandon Report' or simply 'Kilbrandon'.

38 Kilbrandon Report, para 15.

39 The hearings system is now governed by the Children's Hearings (Scotland) Act 2011 and s 25 ascribes paramountcy to safeguarding and promoting the welfare of the child throughout childhood. While taking account of any views the child wishes to express was always inherent in children's hearings, the obligation to do so is now articulated expressly in the statute: 2011 Act, s 27.

40 Children's Hearings (Scotland) Act 2011, s 67(2).

41 2011 Act, s 66(2).

referral is that 'the child has committed an offence'[42] and several others address behaviour by the child that is causing concern,[43] but most focus on protecting children from abuse or neglect or from adults who may pose a threat to them.[44] If the child or any of the 'relevant persons' (usually, the child's parents) do not accept that the allegations supporting the ground on which the child has been referred to a hearing are true, they must be proven in court. Proof is on the balance of probabilities in all cases except for the offence ground, when proof beyond reasonable doubt is required, as is the norm in criminal cases in Scotland.[45] Thus, it is only once the criteria for intervention have been satisfied, via a court and all the protection that entails, if necessary, that the welfare ethos that drive disposal comes into play. In short, as with the court orders designed to protect a child, a family can only be compelled to engage with the system if evidence can be produced to satisfy the statutory threshold criteria.

While it does not use the term 'holistic', the Kilbrandon Report anticipated that welfare-based decisions would be taken in the light of the whole circumstances of the child's life, not only the act that had triggered referral. Similarly, the disposal (disposition) addresses all of the child's needs. To that end, it recommended reorganisation of local authority social services, bringing the disparate services together under a single 'social education department'.[46] That radical change in service provision never came to pass.

Despite the range of remedies designed to protect children and the extensive support services that accompanied them, the system continued to fail children – and to fail children who were known to it. Three-year-old Kennedy McFarlane was released from hospital into her mother's care just 12 days before she was killed by her mother's boyfriend in 2000.[47] Caleb Ness was 11 weeks old and on the Child Protection Register when he was killed by his father in 2001.[48] Concerns over the care of 5-year-old Danielle Reid were known to social

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42 2011 Act, s 67(2)(j).

43 These include: 'the child has misused' alcohol or drugs; 'the child's conduct has had, or is likely to have, a serious adverse effect on the health, safety or development of the child or another person'; 'the child is beyond the control of a relevant person' (usually, a parent); and 'the child has failed without a reasonable excuse to attend at school regularly'.

44 The most commonly used of the protection grounds is that 'the child is likely to suffer unnecessarily, or the health or development of the child is likely to be seriously, impaired, due to a lack of parental care': 2011 Act, s 67(2)(a). See, Scottish Children's Reporter Administration, Annual Report 2015-16 (SCRA 2016), p 23 and Table 1: www.scra.gov.uk/wp-content/uploads/2016/10/SCRA-Annual-Report-2015-16.pdf.

45 2011 Act, s 101(3).

46 Kilbrandon Report, paras 238–246.

47 Dr Helen Hammond *Child Protection Inquiry into the Circumstances Surrounding the Death of Kennedy McFarlane* (Dumfries and Galloway Child Protection Committee, 2000), available at: http://lx.iriss.org.uk/sites/default/files/resources/057.%20The%20Hammond%20Report%20on%20the%20Death%20of%20Kennedy%20McFarlane.pdf.

48 Susan O'Brien, QC, with Helen Hammond and Moira McKinnon *Report of the Caleb Ness Inquiry* (City of Edinburgh Council, 2003), available at: www.edinburgh.gov.uk/download/meetings/id/20340/caleb_ness_inquiry.

workers prior to her death at the hands of her mother's boyfriend, in 2002.[49] The depressingly familiar themes that emerged from the inquiries into these cases and numerous others were that there had been a failure to act appropriately and timeously and a lack of communication and cooperation between agencies.

V GREATER PROACTIVITY

The structure of government in the United Kingdom underwent radical reform at the end of the 20th century when a quasi-federal system was introduced and legislative competence on a whole range of issues was transferred from the Westminster Parliament, sitting in London, to devolved administrations.[50] For Scotland, that meant the creation of the Scottish Parliament, sitting in Edinburgh and legislating on devolved matters, while the Westminster Parliament retained the authority to legislate on 'reserved matters'. Initially, family law was devolved, but a range of issues that had a significant impact on families, like child support, welfare benefits and taxation were reserved to Westminster. Further powers were devolved to the Scottish Parliament by the Scotland Act 2012.

Devolution heralded a new – and more proactive – approach to child protection. From the early days of the (Labour) Scottish Executive, when it evaluated the services available to children and their families and began mapping out its plans for the future, there was an emphasis on early intervention in children's lives and the integration of services across the board.[51] These were the seeds of what developed into a comprehensive policy framework, *Getting It Right For Every Child*, or GIRFEC, as it is known in a world infested with acronyms (and others follow presently).[52]

Girfec is grounded in 10 'core components' and no less than 14 'values and principles'.[53] The emphasis is on improving the outcomes for children and families, through a coordinated approach to services and information-sharing between agencies, and there is recognition of an 'integral role for children,

[49] Dr Jean Herbison *Danielle Reid: Independent Review Into the Circumstances Surrounding Her Death* (2005), available at: http://nescpc.org.uk/uploads/dr-finalreport-8thsept-bkmarked.pdf.

[50] The National Assembly for Wales was created by the Government of Wales Act 1998. The devolved authority in Northern Ireland is the Northern Ireland Assembly: Northern Ireland Act 1998. There is no separate assembly for England, hence the reference to the system being 'quasi-federal'.

[51] For Scotland's Children (Scottish Executive, Edinburgh, 2001): www.gov.scot/Publications/2001/10/fscr; Report of the Child Protection Audit and Review: It's everyone's job to make sure I'm alright (Scottish Executive, Edinburgh, 2001): www.gov.scot/Resource/Doc/47007/0023992.pdf.

[52] For an official overview and links to many of the documents mentioned in this chapter, see the Scottish government website's section on GIRFEC: www.gov.scot/Topics/People/Young-People/gettingitright.

[53] A Guide to Getting it Right for Every Child (Scottish Government, Edinburgh, 2012), pp 7–8. The core components are:
A focus on improving outcomes for children, young people and their families based on a shared

young people and families in assessment, planning and intervention'.[54] Central to GIRFEC are two key characters, the Lead Professional and the Named Person (these titles seem always to begin in upper case in Scottish government publications). The Lead Professional's role is to coordinate and monitor multi-agency activity in respect of an individual child, with there being a Child's or Young Person's Plan setting out details of the child's needs, the action to be taken to improve the child's situation, the services to be provided, the views of the child and the carers and any compulsory measures in place. The functions of the Named Person will be explored presently.[55]

Another essential element of GIRFEC is the emphasis on child 'wellbeing', a concept with a respectable pedigree, not least because it features, in hyphenated form, in art 3(2) of the United Nations Convention on the Rights of the Child.[56] Indeed, the United Nations Committee on the Rights of the Child has called on states parties to the Convention to establish national standards for child wellbeing.[57] Wellbeing has its roots in the social sciences, yet social scientists admit that it is notoriously difficult to define.[58] That probably explains why international efforts have focused instead on developing 'performance indicators' as a way to measure the progress being made in improving child wellbeing.

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understanding of wellbeing.
A common approach to gaining consent and to sharing information where appropriate.
An integral role for children, young people and families in assessment, planning and intervention.
A coordinated and unified approach to identifying concerns, assessing needs, and agreeing actions and outcomes, based on the Wellbeing Indicators.
Streamlined planning, assessment and decision-making processes that lead to the right help at the right time.
Consistent high standards of cooperation, joint working and communication where more than one agency needs to be involved, locally and across Scotland.
A Named Person for every child and young person, and a Lead Professional (where necessary) to co-ordinate and monitor multi-agency activity.
Maximising the skilled workforce within universal services to address needs and risks as early as possible.
A confident and competent workforce across all services for children, young people and their families.
The capacity to share demographic, assessment, and planning information – including electronically – within and across agency boundaries.

54 Ibid, p 7.

55 See Section VI, below.

56 Article 3(2) provides: 'States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.'

57 United Nations Committee on the Rights of the Child, General Comment No 13: The right of the child to freedom from all forms of violence, CRC/C/GC/13, 2011, at [18]: 'States parties need to establish national standards for child well-being, health and development as securing these conditions is the ultimate goal of child caregiving and protection.'

58 See, for example, Gaelle Amerijckx and Perrine Claire Humblet 'Child Wellbeing: What Does it Mean?' (2014) 28 *Children and Society* 404, at 405 ('to date, there is no consensus on a definition') and Asher Ben-Arieh 'Social Policy and the Changing Concept of Child Wellbeing: The role of international studies and children as active participants' (2014) 60(4) *Zeitschrift Für Padagogik* 569, at 151 (referring to wellbeing as a 'conceptually muddy' term).

Performance indicators often reflect quantitative data. For example, the indicators developed by UNICEF to measure progress in child protection include, *inter alia*, whether a country has achieved a 10% reduction in the number of 2 to 14-year-olds who have experienced violent discipline in the home or a 10% reduction in the number of 15-17 year-old girls who have experienced sexual violence or a 10% reduction in the number of children in residential care.[59] However, other performance indicators are more qualitative and subjective in nature.[60] So, for example, while the *Innocenti Report Card 11* uses objective measures, like infant mortality or the number of children who smoke, it also records the more subjective element of self-reporting by children on the quality of their relationship with their parents.[61]

In the Scottish context, measuring wellbeing is expressed in terms of the SHANARRI indicators: that is, the extent to which the child is safe, healthy, achieving, nurtured, active, respected, responsible and included.[62] The SHANARRI indicators began life as one of the tools, used primarily by social workers, to summarise the child's needs and to identify and monitor the intended outcomes for any planned intervention.[63] There are two other tools in the toolbox. The 'My World Triangle' 'helps practitioners to examine the strengths and pressures in children's lives that may be impacting on them'.[64] The 'Resilience Matrix' groups the 'strengths and pressure' in a child's life around a 'vulnerability–resilience axis', focusing on the strengths and pressures that are intrinsic to the child's development, and the 'adversity–protective factors axis', that focuses on the strengths and pressures within the child's family, school and wider community.[65] All three tools are endorsed in the Guidance on GIRFEC.[66]

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[59] Following the UN Millennium Declaration (General Assembly Resolution 2/55. RES/55/2, 18 September 2000), which established the Millennium Development Goals, the constituent parts of the UN system, including UNICEF, were charged to elaborate the nature and extent of their role in achieving these goals. As a result, UNICEF has produced a wide range of performance indicators on aspects of children's rights, including child protection: UNICEF Strategic Plan, 2014-2017, E/ICEF/2013/21 and the Revised Results Framework for the UNICEF Strategic Plan, 2014-2017, E/ICEF/2016/6/Add.2.

[60] Laura H Lippman, Kristin Anderson Moore and Hugh McIntosh *Positive Indicators of Child Well-Being: A Conceptual Framework, Measures and Methodological Issues*, Innocenti Working Paper 21, 2009 (UNICEF Office of Research – Innocenti, Florence, 2009): www.unicef-irc.org/publications/pdf/iwp_2009_21.pdf.

[61] Innocenti Report Card 11: Child Wellbeing in Rich Countries: A comparative overview (UNICEF Office of Research, Florence, 2013): www.unicef.org/media/files/RC11-ENG-embargo.pdf.

[62] What became the SHANARRI indicators can be traced back to the 2005 publication, Getting it Right for Every Child: Proposals for Action, op cit, but it was not until the pathfinder project in Highland region that the order of the individual elements was reorganised to produce the acronym: Changing Professional Practice and Culture to Get it Right for Every Child, op cit, 6.

[63] Bob Stradling and Bill Alexander 'Getting it right for children: promoting effective change' in Malcolm Hill, George Head, Andrew Lockyer, Barbara Reid and Raymond Taylor *Children's Services: Working Together* (Routledge, London and New York, 2012), 67.

[64] Ibid.

[65] Ibid.

[66] National Guidance for Child Protection in Scotland (Scottish Government, Edinburgh, 2014), at [299]–[307]: www.gov.scot/Resource/0045/00450733.pdf.

Implementing GIRFEC was explored first in the context of the children's hearings system[67] but, as was anticipated from the outset, its application progressed across child protection, more generally.[68] Pilot projects – known as 'Pathfinder projects' – were established, with the most comprehensive operating in Highland region.[69] It was independently evaluated and pronounced a success.[70]

Thus far, GIRFEC and the SHANARRI indicators were part of a framework for service providers, finding detailed expression in the extensive guidance provided to them. The Children and Young People (Scotland) Act 2014 changed that through a range of provisions addressing ministerial and public authority obligations to children, information-sharing between agencies and inter-agency cooperation.[71] Effectively, it took whole sections of the GIRFEC guidance and turned them into statutory obligations, importing what were previously terms of child protection practice into law. Thus, the requirements and operation of the children's and young person's plan,[72] the concept of 'wellbeing' and the SHANARRI indicators are now found in the statute.[73]

During the consultation on the proposals for the 2014 Act, some wondered if this conversion of social work practice into law reflected the fact that practice guidance alone was proving ineffective. If that was the case, did it raise fundamental questions about the feasibility of the guidance itself? Given the vagueness of wellbeing and the SHANARRI indicators, their inclusion in legislation was questioned. As we shall see presently in respect of the named person service, Lady Hale saw the implications of their vagueness as posing a problem in terms of justifying interference with the right to respect for private and family life under art 8 of the European Convention.[74]

In addition, the legal system had extensive experience of using the 'welfare of the child' – the Scottish version of the 'best interests' test – as one of the criteria for decision-making in respect of children. While the welfare test has long been

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67 Getting it Right for Every Child: Proposals for Action (Scottish Executive, Edinburgh, 2005): www.gov.scot/Resource/Doc/54357/0013270.pdf.

68 Getting it Right for Every Child: Implementation Plan (Scottish Executive, Edinburgh, 2006): www.gov.scot/Resource/Doc/131460/0031397.pdf.

69 Four other Pathfinder projects, located in the local authority areas of Dumfries and Galloway, Edinburgh City, Falkirk and West Dunbartonshire, focused on children and young people affected by domestic violence.

70 Bob Stradling, Morag MacNeill and Helen Berry *Changing Professional Practice to Get it Right for Every Child* (Scottish Government, Edinburgh, 2009): www.gov.scot/Resource/Doc/292706/0090352.pdf.

71 The Act will be supported by extensive statutory guidance. See, Revised draft guidance for Parts 4, 5 and 18 (section 96) of the Children and Young People (Scotland) Act 2014 (Scottish Government, Edinburgh, 1 December 2015): www.gov.scot/Resource/0049/00490013.pdf. There is also non-statutory guidance: National Guidance for Child Protection in Scotland (Scottish Government, Edinburgh, 2014): www.gov.scot/Resource/0045/00450733.pdf.

72 2014 Act, ss 33–55.

73 2014 Act, s 96.

74 *Christian Institute v Scottish Ministers* [2016] UKSC 51, at [95], discussed in section VI, below, at n 115 and accompanying text.

Click here to go to Main Contents

criticised as 'vague and indeterminate',[75] at least the courts and those who use them have developed a degree of expertise in terms of its content.[76] There was concern that adding the new statutory test of 'wellbeing' would simply create confusion. How does it sit alongside 'welfare'? Which is to be prioritised? The statutory guidance which, at the time of writing, remains in draft form, indicates that the two concepts are not identical, but is less than enlightening about the precise difference.[77]

Some commentators have suggested that there is nothing new about the incorporation of wellbeing into the statutory scheme since 'the holistic element inherent in GIRFEC can be traced back to the whole-child approach of the Kilbrandon Report'.[78] In so far as this observation relates to the Kilbrandon Committee's calls for preventive and better-integrated service provision, that is accurate, but it is doubtful that it would have endorsed the translation of social work practice into law in the way that has occurred and, in all likelihood, it would have viewed the named person service with astonishment and horror.

Many of the obligations under the 2014 Act are relevant to the stage after mandatory intervention in the family has been sanctioned by a court or the decision of a children hearing and place obligations on state agencies. Either the local authority has proved, in court, that one of the protective orders was justified by the strict statutory criteria or, where the child and the parents did not accept the ground(s) of referral to a children's hearing, the ground(s) have been established in court. Thus, children and their families have had the protection of a legal process. Of a very different order, however, was the creation, by statute, of the named person service to which we shall return presently.

What has been the impact of this more proactive approach? Since parts of the 2014 Act only came into force very recently, it is too early to gauge their effect. However, much of the practice they embody was already in operation and there is some evidence of it having an impact. In 2015–16, the number of child protection orders granted fell by over 20% on the previous year, dropping from 754 to 595, albeit the proportion granted in respect of children under 2 years

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[75] Robert H Mnookin 'Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1976) 39 *Law and Contemporary Problems* 226, 229.

[76] Elaine E Sutherland 'Article 3 of the United Nations Convention on the Rights of the Child: The Challenges of Vagueness and Priorities' in Sutherland and Barnes Macfarlane *Implementing Article 3 of the United Nations Convention on the Rights of the Child*, op cit.

[77] The Children and Young People (Scotland) Act 2014: Revised Draft Statutory Guidance for Parts 4, 5 and 18 (section 96), para 2.3.5, www.gov.scot/Resource/0049/00490013.pdf, offers the following: 'Welfare, as it relates to children and young people, is a term that is open to interpretation, but is often used in the context of identifying a need for compulsory intervention under the 2011 Act. In terms of Scottish Government policy on children and families, welfare and wellbeing are different, in that wellbeing is a broader, more holistic concept.'

[78] Emma Coles, Helen Cheyne, Jean Rankin and Brigid Daniels 'Getting It Right for Every Child: A National Policy Framework to Promote Children's Well-being in Scotland, United Kingdom' (2016) 94(2) *The Millbank Quarterly* 334, 340.

old increased.[79] For the ninth consecutive year, fewer children and young people were referred to the reporter to the children's hearing, with a drop of 3.2% (453) in care and protection referrals and 4.5% (130) in offence referrals.[80] The number of children for whom the state is responsible ('looked after children') has been falling for the last 5 years, from 16,200 per 100,000 children under 18, in 2011, to 15,365, in 2015.[81] It would be a mistake, however, to overstate this recent reversal since it followed a period of steadily rising numbers since 2005, when the figure was 12,190.

There is no doubting the commitment of the Scottish government to improving child wellbeing, children's services and child protection.[82] Funding has been earmarked to promote change in the early years of a child's life[83] and for early intervention.[84] Guidance for professionals working in child protection was revised in 2014.[85] The government is undertaking mapping exercises and conducting wellbeing surveys of children and the parents of younger children.[86] There is ongoing evaluation leading to the publication of numerous reports, action plans and the like.[87] Some have a fairly broad focus,[88] while others address specific aspects of child protection,[89] including the experiences of

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79 Statistical Analysis 2015–2016: Ensuring Positive Futures for Children and Young People in Scotland, (Scottish Children's Reporter Administration, Stirling, 2016), p 6 and table 1.1: www.scra.gov.uk/wp-content/uploads/2016/10/Full-statistical-analysis-2015-16.pdf.

80 Ibid, p 5 and figure 1.1. The drop in numbers here can be attributed, at least in part, to other policy initiatives like the Whole Systems Approach to youth justice and a general move towards multi-agency, pre-referral screening before making referrals to the reporter as part of the Early and Effective Intervention agenda.

81 Children's Social Work Statistics Additional Tables 2014–15 (Scottish Government, Edinburgh, 2016), Table 2.8: www.gov.scot/Topics/Statistics/Browse/Children/PubChildrenSocialWork/AdditionalTables2014-15.

82 For an overview, see: www.gov.scot/Topics/People/Young-People.

83 See the Early Years Change Fund: www.gov.scot/Topics/People/Young-People/early-years/leadership.

84 Evaluation of the Children, Young People & Families Early Intervention and Adult Learning & Empowering Communities' Fund Evaluation – Baseline Report (Scottish Government Edinburgh, 2016).

85 National Guidance for Child Protection in Scotland (Scottish Government, Edinburgh, 2014, replacing the 2010 Guidance): www.gov.scot/Resource/0045/00450733.pdf. See also, National Guidance for Child Protection Committees for Conducting a Significant Case Review (Scottish Government, Edinburgh, 2015, replacing the 2007 Guidance): www.gov.scot/Resource/0047/00474570.pdf.

86 See further: www.gov.scot/Topics/People/Young-People/realigning-childrens-services/meeting-childrens-needs.

87 For an overview, see: www.gov.scot/Topics/People/Young-People.

88 See, Susan Deacon *Joining the dots: A better start for Scotland's children* (2011): www.gov.scot/Resource/Doc/343337/0114216.pdf: Brigid Daniels, Cheryl Burgess and Jane Scott *Review of Child Neglect in Scotland* (Scottish Government, Edinburgh, 2012): www.gov.scot/Resource/0039/00397132.pdf; and the Brock Report: Safeguarding Scotland's vulnerable children from child abuse (Scottish Government, Edinburgh, 2014): www.gov.scot/Resource/0046/00463125.pdf.

89 National Action Plan to Tackle Child Sexual Exploitation (Scottish Government, Edinburgh, 2014): www.gov.scot/Resource/0046/00463120.pdf and the Update (Scottish Government, Edinburgh, 2016): www.gov.scot/Resource/0049/00497283.pdf.

children themselves.[90] Periodically, the government reports on the progress being made in implementing recommendations.[91]

The government has instituted a programme aimed at Realigning Children's Services (RCS) that seeks to utilise local data and Community Planning Partnerships (CPPs) to support communities in making better decisions on improving the lives of children in their area.[92] The Children Hearings Improvement Partnership (CHIP),[93] a multi-agency group, coordinated by the Scottish government and designed to provide a strategic overview of the children's hearings system, recently published a report, including standards to improve the hearings system based on the views of children, young people and practitioners.[94] The Permanence and Care Excellence programme (PACE) is designed to apply a 'whole system approach' to reducing drift and delay in finding secure, permanent homes for looked after children.[95]

In February 2016, the (then) Cabinet Secretary for Education and Lifelong Learning, Angela Constance, announced that the Scottish government would commission a comprehensive review of policy, practice, services and structures in the child protection system.[96] In June of that year, Catherine Dyer, a former Crown agent, was appointed to chair a review of child protection committees, initial case reviews, significant case reviews and the child protection register.[97] Early in 2017, what the First Minister described as a 'root and branch' review of the child care system was established, chaired by Fiona Duncan, Chief Executive of Lloyds TSB.[98] Its focus is on improving the quality of life and outcomes of young people in the care system. Past reviews of child protection were often lengthy, sometimes leisurely, affairs. That is no longer the case, possibly reflecting an appreciation of the urgent need to improve the system and the energy and commitment of those involved. In any event, Ms Dyer's

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90 Susan Elsley, E Kay, M Tisdall and Emma Davidson *Children and young people's views on child protection systems in Scotland* (Scottish Government Social Research, Edinburgh, 2013): www.gov.scot/Resource/0042/00427260.pdf.

91 Progress Report on the Brock Report and the National Action Plan to Tackle Child Sexual Exploitation (Scottish Government, Edinburgh, 2015): www.gov.scot/Resource/0048/00486835.pdf.

92 See further: www.gov.scot/Topics/People/Young-People/realigning-childrens-services.

93 See further: www.chip-partnership.co.uk.

94 The Next Steps Towards Better Hearings (Children's Hearings Improvement Partnership, Edinburgh 2016): www.chip-partnership.co.uk/wp-content/uploads/2016/10/Better-Hearings-Research-Report-2016.pdf. See also, The Role of the Solicitor in the Children's Hearings System (CELCIS/SLAB, Edinburgh, 2016): www.celcis.org/files/8514/7576/7298/CELCIS-The_role_of_the_solicitor_in_the_Childrens_Hearing_System_-_2016.pdf.

95 See further: www.gov.scot/Topics/People/Young-People/protecting/lac/pace.

96 Angela Constance MSP, Cabinet Secretary for Education and Lifelong Learning, Parliamentary Statement on Child Protection, 25 February 2016: www.gov.scot/Resource/0049/00497993.pdf.

97 'Former Crown Office chief to lead child protection review', BBC News, 3 June 2016: www.bbc.com/news/uk-scotland-scotland-politics-36435448.

98 'Independent review into care system', Scottish Government website, 16 February 2017: http://news.gov.scot/news/independent-review-into-care-system.

findings and recommendations were published on 2 March 2017,[99] the same day as CHIP produced its most recent report.[100]

That there is an urgent need to improve the child protection system is evidenced by the fact that it continues to fail some children. The Scottish government has reviewed the more recent failures, examining 20 Significant Case Reviews covering the period 2012–15,[101] and its finding mirrored those of an earlier study of 56 Significant Case Reviews and 43 Initial Case Reviews for the period 2007–12.[102] For many of the children who died or were harmed 'there was extensive involvement by a number of services, sometimes over many years, but this was not sufficient to protect them'.[103]

As we reflect upon these general findings, it is crucial to remember that they represent individual children who experienced very real suffering. Declan Hainey lived for a little over a year when he died, in 2009, as a result of atrocious maternal neglect and despite his mother's substance abuse and mental health problems being known to the authorities.[104] Mikaeel Kular, who was 3 years old when his mother killed him, in 2014, had been looked after by a local authority, Fife Council, in the past.[105] That year, 2-year-old Liam Fee died at the hands of his mother and her partner despite numerous reports of concern being made to the local authority.[106] The tragic irony, in Liam's case, was that

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[99] Protecting Scotland's Children and Young People: It is Still Everyone's Job (Dyer Report) (Scottish Government, 2017): www.gov.scot/Resource/0051/00514758.pdf.

[100] Child Protection Improvement Programme Report (Scottish Government, 2017): www.gov.scot/Resource/0051/00514761.pdf.

[101] Learning From Significant Case Reviews in Scotland: A retrospective review of relevant reports completed in the period between 1 April 2012 and 31 March 2015 (Care Inspectorate, Dundee, 2016): www.careinspectorate.com/images/documents/3352/Learning%20from%20Significant%20Case%20Reviews%20in%20Scotland%202012%20-%202015.pdf.

[102] Sharon Vincent and Alison Petch *Audit and Analysis of Significant Case Reviews* (Scottish Government, Edinburgh, 2012): www.gov.scot/Resource/0040/00404517.pdf.

[103] Learning From Significant Case Reviews in Scotland, op cit, p 5.

[104] Fatal Accident Inquiry into the death of Declan Hainey, 2014FAI25. Summary: www.scotland-judiciary.org.uk/10/1308/Fatal-Accident-Inquiry-into-the-death-of-Declan-Hainey Full determination: www.scotcourts.gov.uk/search-judgments/judgment?id=bcb1a7a6-8980-69d2-b500-ff0000d74aa7.

[105] Executive Summary from a Significant Case Review Undertaken on behalf of Fife and Edinburgh Child Protection Committees on Child MK (Edinburgh and Fife Child Protection Committees, Edinburgh, 2015): http://publications.1fife.org.uk/uploadfiles/publications/c64_SCRMKExecSummaryFinal16.04.15.pdf. In the same year, 2-year-old Madison Horn died of brain and other injuries following a brutal attack by her mother's boyfriend who had a long history of crimes of violence including domestic abuse although, in that case, the family was not known to the social work department. See, Report of Findings from a Significant Case Review: Child A (Fife Child Protection Committees, Fife, 2016): http://publications.1fife.org.uk/uploadfiles/publications/c64_ReportoffindingsfromasignificantcaseChildA.pdf, where Madison is referred to only as 'Child A'.

[106] A Serious Case Review in respect of the case will take place: Victoria Weldon, 'Liam Fee: investigation launched after social workers admit toddler "fell off the radar"', *The Herald*, 31 May 2016: www.heraldscotland.com/news/14527249.Liam_Fee__investigation_launched_after_social_workers_admit_toddler__fell_off_radar. One of the social workers involved has already been subject to disciplinary proceedings in respect of Liam's case and others and has relinquished her social work registration: '12 charges against social worker in Liam Fee's case

his local authority, again, Fife Council, had an equivalent of the named person service in place at the time of his death.[107]

VI THE NAMED PERSON SERVICE

What, then, is the 'named person service', the latest and most controversial step in the increased proactivity evident in child protection in Scotland? While the term 'named person' was not used, the seeds of the scheme can be traced back to the early days of GIRFEC and the 2001 publication, *For Scotland's Children*, which emphasised the need to coordinate services and maintain contact with all children.[108] The idea was developed further in the 2008 guidance on GIRFEC[109] and the scheme was finally piloted in the Highland Pathfinder project that sought to implement all aspects of GIRFEC. An independent evaluation of that project was generally positive about the named person service.[110]

The Children and Young People (Scotland) Act 2014 provided the statutory framework for the service[111] and the original plan was to provide almost every child and young person in Scotland with a 'named person': an identified individual who would usually be a health care professional, for pre-school children, or schoolteacher, for older children.[112] That person's function would be threefold: to advise, inform or support the child or young person or his or her parent; to help the child or young person or his or her parent access services or support; and to discuss or raise a matter about the child or young person with a service provider or relevant authority.[113] The striking feature of the scheme was that appointment of a named person would be automatic and comprehensive: that is, (almost) every child would have one and there would be no need to satisfy a threshold test prior to the appointment.

Reaction to the legislation was swift and divided. While the scheme has its supporters, there was widespread opposition to the whole concept and to specific aspects of the service, with the most high-profile opponents being the 'No to the Named Person' (NO2NP) campaigners.[114] While some of the opponents were religious, conservative parents, who saw the service as

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upheld', Scottish Legal News, 20 September 2016: www.scottishlegal.com/2016/09/20/12-charges-against-social-worker-in-liam-fee-case-upheld.

[107] Kenneth Roy, 'Liam Fee, the Scottish Government, and an incriminating document' Scottish Review, 1 June 2016: www.scottishreview.net/KennethRoy54a.html.

[108] For Scotland's Children (Scottish Executive, Edinburgh, 2001).

[109] Scottish Government, *A guide to getting it right for every child* (Edinburgh: Scottish Government, 2008), p 10.

[110] Bob Stradling, Morag MacNeill and Helen Berry *Changing Professional Practice to Get it Right For Every Child* (Scottish Government, Edinburgh, 2009), pp 60–62: www.gov.scot/Resource/Doc/292706/0090352.pdf.

[111] Children and Young People (Scotland) Act 2014, ss 19–32.

[112] Young people serving in the reserve or regular armed forces are excluded: 2014 Act, s 21(4).

[113] 2014 Act, s 19(5).

[114] For further details, see their website: http://no2np.org.

interfering with their right to raise their children as they saw fit, others were children's rights and human rights activists who viewed it as a violation of art 8 of the European Convention. Questions were raised about the training and skills of named persons and whether they would be sufficiently independent of the local authority to advocate for children effectively in respect of local authority obligations to children. More general disquiet was occasioned by the prospect of resources being diverted to monitor vast numbers of children who have no demonstrable need for state intervention, when over-stretched social work departments are unable to fulfil their responsibilities to children who are already on their radar due to concerns about their care.

Four registered charities with an interest in family matters and three individual parents sought to challenge the scheme in the courts. There was a skirmish over whether the charities had standing to raise the action (they did) and the courts in Scotland upheld the validity of the legislation.[115] Throughout the litigation, bad publicity dogged the service[116] and the situation was not helped when the First Minister, Nicola Sturgeon, made statements suggesting that she did not understand the operational details of the service her government had created.[117]

By the time the case reached the United Kingdom Supreme Court, the opponents of the named person service had focused on four challenges: that the legislation related to a 'reserved matter' and, thus, was outwith the legislative competence of Scottish Parliament; that the scheme as a whole breached the art 8 rights of parents because it permitted the appointment of a named person without parental consent or any evidence that the appointment was necessary to protect the child from significant harm; that the provisions on the sharing of information between agencies breached art 8; and that the information-sharing provisions of the service were incompatible with the Charter of Fundamental Rights of the European Union. The Community Law Advice Network, representing the rights of children, intervened in the action, objecting to the violation of children's rights inherent in the information-sharing provisions of the 2014 Act.

The Supreme Court dispensed with the first and fourth challenges fairly quickly. It did not accept that the legislation introducing the service encroached impermissibly on 'reserved' territory.[118] Nor were the information-sharing provisions incompatible with EU law 'in any way which goes beyond their

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[115] In the Outer House of the Court of Session, they were found to lack standing, only to have it reinstated in the Inner House: see *Christian Institute v Scottish Ministers* 2015 SLT 72, [93]–[96] and *Christian Institute v Scottish Ministers* 2016 SC 47, [37]–[45], respectively.

[116] There were media reports of a teacher appointed as a 'named person' being struck off the teaching register after she admitted posting comments involving sexual abuse of children: Xantha Leatham 'Teacher appointed first Named Person state guardian struck off', *The Scotsman*, 29 January 2016: www.scotsman.com/news/politics/teacher-appointed-first-named-person-state-guardian-struck-off-1-4014998.

[117] Lindsay McIntosh 'Parents could "opt out" of named person policy', *The Times*, 24 March 2016.

[118] 2016 SLT 805, [63] and [64], respectively: 'The fact that a provision of an Act of the Scottish Parliament requires or authorises the disclosure of personal data does not in itself mean that

Click here to go to Main Contents

incompatibility with article 8 of the ECHR'.[119] In so far as the service was designed to promote the wellbeing of children and to assist, coordinate and improve access to public services, the Court found it to be rationally connected to the pursuit of legitimate aims.[120] Since it allowed the state the customary margin of appreciation in selecting the means by which these aims were realised, it concluded that 'it cannot be said that its operation will necessarily give rise to disproportionate interferences in all cases'.[121]

However, the Court determined that the complex provisions for the sharing of information between agencies were not sufficiently accessible, made it difficult to gauge whether they were being applied arbitrarily and, thus, were not 'in accordance with the law'. As a result, they were 'incompatible with the rights of children, young persons and parents under article 8 of the ECHR'.[122] Furthermore, other provisions could operate, in practice, to interfere disproportionately with art 8 rights. Since incompatibility with Convention rights renders a provision outwith the legislative competence of the Scottish Parliament, these provisions fell.[123]

Non-lawyers in Scotland would be forgiven if they were confused about what the Supreme Court decided since each side in the litigation claimed victory. The deputy First Minister, John Swinney, announced that 'the attempt to scrap the named person service has failed',[124] while the NO2NP campaigners were triumphant over what one described as a winning 'a David and Goliath fight'.[125] The claim of the latter is bolstered by the fact that the Supreme Court ordered the Scottish Ministers to pay their costs, something that is typically the prize of the victor in litigation in the United Kingdom.[126] The scheme was due to come into effect across Scotland in August 2016 and, one week prior to the appointed date, the deputy First Minister laid orders before the Scottish Parliament to stop the process.[127]

It would be premature, however, to pronounce the named person scheme dead. Where Scottish legislation falls due to its incompatibility with Convention

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the provision is outside legislative competence', nor was the information-sharing provisions 'truly distinct' from the overall purpose of promoting the wellbeing of children and young people.

119 2016 SLT 805, [104].

120 2016 SLT 805, [91]–[92].

121 2016 SLT 805, [93].

122 2016 SLT 805, [106].

123 Scotland Act 1998, s 29(2)(d).

124 'Supreme Court rules on "named person"', Scottish Government website, 28 July 2016: http://news.scotland.gov.uk/News/Supreme-Court-rules-on-named-person-279f.aspx.

125 Victoria Allen 'Victory for Family Crusaders', *Scottish Daily Mail*, 29 July 2016.

126 'Scottish government ordered to appellants' legal costs in Named Persons case', Scottish Legal News, 14 November 2016: Details of the Court's order can be found at: https://gallery.mailchimp.com/91cb73bca688114fefed773f2/files/christian_instituite_v_lord_advocate.pdf.

127 'Named person orders laid before Parliament', Scottish Government website, 24 August 2016: http://news.scotland.gov.uk/News/Named-person-orders-laid-before-Parliament-295a.aspx Categories.

rights, the Court has discretion[128] – which it chose to exercise in this case – to give the Scottish Ministers and the Scottish Parliament the opportunity to correct the defects.[129] In short, the Scottish Ministers can try to adapt the scheme in order to render it human rights compliant.

Since the current SNP government is persistent to the point of obstinacy, it came as no surprise when the deputy First Minister announced, on 8 August 2016, that 'this Government remains absolutely committed to the named person service'.[130] He promised to 'gather input from practitioners undertaking the named person role, parents, charities, young people, those who support the policy and those with concerns', as well as the Children's Commissioner and the Information Commissioner, in revising the named person service provisions'.[131] The intention is that the named person service will become operative in August 2017.

At the time of writing, 6 months on from the Supreme Court handing down its decision, there is no sign of a revised proposal from the Scottish government. Indeed, the NO2NP campaigners are reported to have accused the Scottish ministers of 'throwing a veil of secrecy' around their deliberations and have made Freedom of Information requests in order to find out more about what is happening.[132] Thus, the precise terms of the new named person service are unknown. In the immediate aftermath of the decision, the depute First Minister referred to the new service being 'guaranteed by law *to those who want to use it*'.[133] If, by this, he meant that participation in the new scheme would be optional, then it would be very different from the original scheme.

It would be surprising if the Scottish government made this dramatic concession since automatic, universal application lies at the heart of the whole notion of the named person service. When the Supreme Court rejected the 'broad' human rights challenge, it signalled a degree of support for this proactive state role, noting that any requirement for parental consent would diminish the scope for early intervention.[134] It did not, however, endorse unfettered state power.

The Court acknowledged that art 8 was engaged by Part 4 of the 2014 Act, albeit it noted that not everything a named person might do would necessarily interfere the rights it guarantees.[135] It saw the first two of the named person's functions – providing advice, information and support to children, young people and their parents and assisting them in accessing services – as generally

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[128] 2014 Act, s 102(2)(b).
[129] 2016 SLT 805, [109].
[130] 'Engagement to implement named person', Scottish Government website, 8 September 2016: https://news.scotland.gov.uk/News/Engagement-to-implement-named-person-2a8a.aspx.
[131] Ibid.
[132] '"Secrecy" claim over named person scheme' Scotland on Sunday, 26 February 2017.
[133] 'Named person orders laid before Parliament', Scottish Government website, 24 August 2016: http://news.gov.scot/news/named-person-orders-laid-before-parliament. Emphasis added. Categories:
[134] 2016 SLT 805, [93].
[135] 2016 SLT 805, [78].

Click here to go to Main Contents

benign in human rights terms.[136] Even where an action did interfere with the guaranteed rights, it saw scope for justification in art 8(2), provided that it was in accordance with law, proportionate and designed to meet one of the enumerated aims.[137]

Yet even in respect of what it saw as the named person's more benign advisory or supportive functions, the Court was alert to the potential for this kind of intervention to become coercive if parents were given the impression that they were required to take the advice offered and that a failure to do so would be regarded as evidence of serious harm, justifying compulsory intervention.[138] The Court was in no doubt that such coercion might amount to disproportionate interference with art 8 rights. This becomes particularly important when one remembers that intervention most often occurs in respect of the least educated and empowered of parents: that is, those who may be most vulnerable to coercion.[139]

As we await the new incarnation of the named person service, it is worth remembering that Convention-compatibility was only tested within the confines of the United Kingdom. The European Court of Human Rights did not have the opportunity to pronounce on it. There is the tantalising prospect that the NO2NP campaigners, emboldened by their past success, will challenge the new scheme. If they were to be unsuccessful in the Supreme Court, the stage would be set for them to take their case to the European Court.

VII CONCLUSIONS

Who does not want the best for children? It is one measure of a civilised society that it seeks to maximise the opportunities for its children and young people. In Scotland, there is no doubt that some children are being denied that optimum environment due to poverty, environmental and other hazards and, sometimes, because their parents are unwilling or unable to provide them with the necessary care. It is the responsibility of the state to address these issues and one

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136 Ibid.

137 2016 SLT 805, [89]. The Court accepted that 'the promotion of the wellbeing of children and young people is not … one of the aims listed in article 8(2)', but it accepted that promoting child wellbeing could be linked to a number of these aims (e g prevention of disorder or crime, protection of health or morals).

138 2016 SLT 805, [95] ('there must be a risk that, in an individual case, parents will be given the impression that they must accept the advice or services which they are offered, especially in pursuance of a child's plan for targeted intervention under Part 5; and further, that their failure to co-operate with such a plan will be taken to be evidence of a risk of harm. An assertion of such compulsion, whether express or implied, and an assessment of non-co-operation as evidence of such a risk could well amount to an interference with the right to respect for family life which would require justification under art.8(2)').

139 For a discussion of the coercive potential of the child protection process, see, Daniel Pollack, Kirsteen MacKay and Katie Shipp 'The Use of Coercion in the Child Maltreatment Investigation Field: A Comparison of American and Scottish Perspectives' (2014–2015) 22 *University of Miami International & Comparative Law Review* 129.

part of that responsibility is to provide effective mechanisms to ensure that all children who need protection, whether from their own family members or strangers, are protected.

The challenge in child protection does not come from the state offering support to parents in order to enable them to do the best possible job of parenting, save that it requires adequate resources to be made available. In a perfect world, parents and the state would work together to ensure the best for children, albeit they might not agree on precisely what that is. But child protection addresses the problems of a less-than-ideal world and it cannot always rely on the voluntary participation of parents.

Too often – and once is too often – the child protection system has failed children in Scotland. As they wait to ensure that they can satisfy the statutory thresholds and amid poor intra- and inter-agency communication, over-stretched social workers and other professionals have intervened too little, too late or not at all. In the attempt to meet these deficits, successive Scottish governments have taken a more proactive approach to child protection.

Nothing is more likely to set off alarm bells for a human rights advocate – and cause a member of the public to raise a cynical eyebrow – than the words, 'I'm from the government and I'm here to help you.' The right to make one's own decisions about how to live one's life, free from government interference, is rightly prized. The danger is that respecting family privacy can translate into respecting the rights of the adult members at the expense of the rights of children.

The latest step in proactive child protection – the creation of the named person service – sought to enable professionals to respond to the first sign of problems in a family and to ensure that no child fell through the cracks in the system. In order to do that an automatic, comprehensive approach was taken that meant the state would keep a watchful eye on every child, regardless of whether there was any demonstrable need for intervention. For some parents, that was a step too far, but the Supreme Court was untroubled by the essential concept. It remains to be seen whether the European Court of Human Rights would be so sanguine.

Click here to go to Main Contents

SERBIA

(NON) APPLICATION OF THE PRINCIPLE OF EQUALITY IN SERBIAN INHERITANCE LAW

Melanija Jančić[*]

Résumé

Même si le principe bien reconnu du droit à l'égalité est garanti par la Constitution serbe de 2006, il n'est pas toujours respecté dans la Loi sur les successions de 1995 telle qu'amendée en 2015. La question de savoir s'il faut étendre le droit des successions aux conjoints non mariés fait actuellement l'objet de discussions au sein de la communauté scientifique. Le débat ne concerne que les couples de sexe opposés, dans la mesure où les couples de même sexe ne bénéficient actuellement d'aucune reconnaissance juridique en Serbie. Par contre, dans d'autres pays issus de l'ex-Yougoslavie, comme la Slovénie, la Croatie, le Monténégro ou la Bosnie-Herzégovine (mais seulement la Fédération de Bosnie-et-Herzégovine), le droit successoral reconnaît aux conjoints de fait les mêmes droits qu'aux époux mariés. Le projet de Code civil serbe est actuellement en chantier et il y a donc là une excellente occasion de mettre de l'avant de principe d'égalité et d'étendre le droit successoral aux conjoints de fait. Cela risque malheureusement de ne pas arriver car la résistance, pourtant dénuée d'arguments juridiques convaincants, est forte. Ce texte propose une présentation des règles relatives au principe d'égalité en droit des successions, tant en droit serbe que dans une perspective de droit comparé.

I INTRODUCTION

Although the principle of equality, as one of the generally accepted legal principles, is guaranteed by the Constitution of Serbia (2006),[1] it is not consistently applied in the Inheritance Act (1995),[2] with last amendments in 2015. The issue that is disputed and open to debate within the Serbian scientific

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1 Ustav Republike Srbije, Službeni glasnik RS (The Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia), No 98/2006, Art 21. English version of the Constitution: www.srbija.gov.rs/cinjenice_o_srbiji/ustav_odredbe.php?id=218.

2 Zakon o nasleđivanju Republike Srbije, Službeni glasnik RS (Inheritance Act of the Republic of Serbia, Official Gazette), No 46/95, 101/2003, 6/2015.

Click here to go to Main Contents

community is whether or not to recognise the inheritance rights to unmarried couples. Since any right still has not been recognised to the couples of the same sex, this issue in Serbia refers only to the unmarried couples of the opposite sex, because they are equal with married couples in any other rights except the right to inheritance. However, in other countries of former Yugoslavia, for example in Slovenia, Croatia, Montenegro or Bosnia and Herzegovina,[3] the right to inherit by law is recognised to cohabitants, who are equalised with the married couples. Currently in Serbia the Civil Code has been drafted and the public debate is in progress, so it is a great opportunity to apply the principle of equality and include unmarried couples in the positive legal provisions regarding inheritance rights. Unfortunately, this is not happening and there is still strong resistance to this legal matter with no acceptable legal arguments. The goal is to identify and analyse the legal regulations regarding the application of the principle of equality in inheritance law in Serbia and from the perspective of comparative law.

II THE PRINCIPLE OF EQUALITY

The principle of equality is one of the most important and generally accepted theoretical legal principles, but at the same time it is the principle that is most prone to different interpretations and applications in legislations and practice. In legal theory, there is no unanimity of opinion on the exact meaning of the principle of equality and its substance. The most common division of the concept of equality is into formal and substantive equality. Since both concepts have its positive and negative aspects, legislators in the majority of countries try to combine and incorporate those two concepts in legal systems. In literature, the understanding of equality can be found as freedom or autonomy (libertarian theory)[4] or as human dignity (dignitary theory).[5]

This universal principle is incorporated into every human right suggesting that all people are equal. In the Universal Declaration of Human Rights, it is said that all human beings are born free and equal in dignity and rights (Art 1). The whole system of human rights is based on this fundamental principle.

The principle of equality is closely related to the principle of non-discrimination and in fact it is the goal of that principle and it refers to a broad right of every individual to be treated generally the same way and given the same

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[3] Bosnia and Herzegovina consists of two constitutional and legal entities: Federation of Bosnia and Herzegovina and Serb Republic (Republika Srpska). These two entities have their separate constitutions and laws. There is also a self-governing administrative unit called Brčko District.

[4] J Gardner 'On Grounds of Her Sex(uality)' (1998) 18 *Oxford Journal of Legal Studies* 167; S Moreau 'What is Discrimination' (2010) 38 *Philosophy and Public Affairs* 143; K Yoshino 'The New Equal Protection' (2011) 124 *Harvard Law Review* 747.

[5] B Eidelson 'Treating People as Individuals' in D Hellman and S Moreau (eds) *Philosophical Foundations of Discrimination Law* (Oxford, Oxford University Press, 2013) pp 203–227.

opportunities in the society.[6] The Inter-American Court of Human Rights has recognised the fundamental character of the principle of equality holding that

> '[t]he notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion [of equality] to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character.'[7]

These two principles are of the great importance in every field of law. Every human being has a right not to be discriminated on the grounds of its personal attributes, including marital status. In this chapter, the author deals with the application of the principle of equality in inheritance law in Serbia, recommending some normative solutions for the improvement of the status of all couples, not only married ones in Serbian society.

III THE PRINCIPLE OF EQUALITY IN SERBIAN INHERITANCE LAW

There are several essential constitutional provisions in regard to the principle of equality and the right to inheritance. Nowadays in Serbia, it is quite common that there is no discrimination in inheritance rights between children no matter if they are born either in or out of wedlock,[8] but it is still present between married and unmarried partners (cohabitants).

First, the Serbian Constitution from 2006 guarantees the principle of non-discrimination and proclaims that everyone is equal before the Constitution and law, that everyone has a right to equal legal protection without any discrimination.[9] In constitutional provisions, any discrimination, direct or indirect, on any ground is also prohibited, especially on the ground of race, sex, ethnicity, social origin, birth, religion, political or other beliefs, financial condition, culture, language, age and mental or physical disability.[10] In 2009, the Antidiscrimination Act of Serbia is enacted and the principle of equality is guaranteed in the way that everyone is equal and enjoys equal status and equal legal protection with no regard to personal characteristics and that everyone is required to respect the principle of equality, ie the prohibition of

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6 CFJ Doebbler *Principle of Non-Discrimination in International Law* (Washington, CD Publishing, 2007) p 4.

7 Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, IACtHR Advisory Opinion No OC4/84, Ser A No 4, para 55, 19 January 1984.

8 The equality among children in inheritance rights in Serbia is established by the Constitution in 1974.

9 The Constitution of the Republic of Serbia, Art 21, paras 1 and 2.

10 The Constitution of the Republic of Serbia, Art 21, para 3.

discrimination.[11] Discrimination is defined as any unjustified distinction or unequal treatment, ie omission (exclusion, limitation or preferential treatment) in relation to individuals or groups, as well as members of their families or persons close to them, directly or indirectly, on the grounds of race, skin colour, ancestors, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial status, birth, genetic characteristics, health, disability, *marital and family status*, previous convictions, age, appearance, membership in political, trade union and other organisations and other real or presumed personal characteristics (hereinafter referred to as personal characteristics).[12] It is worth of emphasising that marital and family status are explicitly mentioned in this Act.

Secondly, in the Serbian Constitution it is emphasised that cohabitation is equalised with marriage, according to the law.[13] According to the provisions of Serbian Family Act from 2005, cohabitants have rights and obligations as married partners under conditions prescribed by that Act.[14] In Serbian family law, the same rights and obligations are recognised to the cohabitants as to the married partners (right to maintenance, right to adopt a child, right to share common property etc), but when inheritance rights are concerned, cohabitants do not have a right to inherit each other by the law, only by a will. Therefore, the Serbian legal system does not recognise unmarried partners as beneficiaries in inheritance law. Such treatment of unmarried couples is not in accordance with the constitutional principle of equality. Although the Inheritance Act was amended in 2015, the provisions about inheritance rights of cohabitants remained the same.

Moreover, the principle of equality is also one of the principles in inheritance law in Serbia, but it refers to equality among male and female heirs, among spouses and marital and extramarital relatives.[15] This principle, although one of the most inevitable ones, does not refer to unmarried couples either heterosexual or homosexual. In the Serbian legal system, according to the provisions of the Inheritance Act, there are two grounds of inheritance distribution, either by law or by will.[16] The rules of inheritance by law shall always be applied if a decedent left no will, if a decedent did not include all assets in a will, if a will is null or revoked, if all testamentary heirs refuse to

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[11] Zakon o zabrani disrkiminacije Republike Srbije, Službeni glasnik RS (Antidiscrimination Act of the Republic of Serbia, Official Gazette), No 22/2009, Art 4.

[12] Antidiscrimination Act of the Republic of Serbia, Art 2, para 1.

[13] The Constitution of the Republic of Serbia, Art 62, para 5. This provision would mean that some rights should be recognised under the conditions prescribed by law and not complete exclusion by non-regulation of rights, in this case the right to inheritance.

[14] Porodični zakon Republike Srbije, Službeni glasnik RS (Family Act of the Republic of Serbia, Official Gazette), No 18/2005, 72/2011, 6/2015, Art 4, para 2.

[15] See more about the principles in inheritance law in Serbia: S Svorcan, *Nasledno pravo – peto izdanje* (Inheritance Law – the fifth edition, 2006), Kragujevac, Pravni fakultet u Kragujevcu (The Faculty of law in Kragujevac), pp 12, 13; I Babić Nasledno pravo – četvrto izmenjeno i dopunjeno izdanje (Inheritance Law – the fourth revised edition, 2011), Belgrade – Novi Sad, pp 27, 28.

[16] Inheritance Act of the Republic of Serbia, Art 2.

inherit or if they are unworthy of inheritance, if no testamentary heir outlives a decedent or if for any other reason rules on testamentary inheritance cannot be applied.[17] However, the principle of equality is only applicable when inheritance is distributed by law, which is the most common way to inherit in Serbia. When inheritance is distributed by a will then a testator has freedom of distribution and the principle of equality is not or does not have to be represented. The freedom of a testator's distribution by will is limited by the necessary share, but it is not under the jurisdiction of the competent court to take care *ex officio* if there are necessary heirs, except in the case of minor children. According to the provisions of current Inheritance Act, heirs who could inherit by law are decedent's descendants, adoptees and their descendants, spouse, parents, adoptive parents, brothers and sisters and their descendants, grandfathers and grandmothers and their descendants and other ancestors.[18] Heirs of the first order of inheritance by law are decedent's descendants and a spouse.[19] Therefore, unmarried partners are excluded from inheritance rights. Although the Draft Civil Code in Serbia is still in progress and the public debate is ongoing, the provisions regarding the inheritance rights of unmarried couples remained the same and the circle of heirs that could inherit by law has not been changed (Art 2602 of the Draft Civil Code).[20] This legal solution represents backward and conservative understanding of cohabitation, especially bearing in mind that in family law matters and in other fields of law[21] cohabitation is equal to marriage and has the same legal effects.

I find this exclusion of unmarried partners very unfair, especially having in mind that they are equal to married partners in every other right deriving from

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17 See more: Babić (2011) p 46.

18 Inheritance Act of the Republic of Serbia, Art 8, para 1.

19 Inheritance Act of the Republic of Serbia, Art 9, para. 1.

20 Prednacrt Građanskog Zakonika Republike Srbije (The Draft Civil Code of the Republic of Serbia), www.mpravde.gov.rs/files/NACRT.pdf (in Serbian).

21 Unmarried partners are equal to spouses in health law regarding provisions on family members (an unmarried partner is considered as a family member and therefore has the same rights as a spouse), see Zakon o zdravstvenom osiguranju, Službeni glasnik RS (Health Insurance Act, Official Gazette RS), No 107/2005, 109/2005 – ispr, 57/2011, 110/2012 – odluka US, 119/2012, 99/2014, 123/2014, 126/2014 – odluka US, 106/2015 i 10/2016 – dr zakon, Art 24, para 4, Art 25) and Zakon o pravima pacijenata, Službeni glasnik RS (Patient Rights Act, Official Gazette RS), No 45/2013, Art 2 – circle of family members, Art 18, Art 20 – the right to access medical records, Art 22), in criminal procedure law regarding the rules on exemption of a judge, see Zakonik o krivičnom postupku, Službeni glasnik RS (Criminal Procedure Code, Official Gazette RS), No 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014, Art 37, 42), in civil procedure law, see Zakon o parničnom postupku, Službeni glasnik RS (Civil Procedure Act, Official Gazette RS), No 72/2011, 49/2013 – odluka US, 74/2013 – odluka US i 55/2014, Art 67 – rules on exemption of a judge, 249 – rules on witnesses, 265 – rules on expert witnesses), in public notary law, see Zakon o javnom beležništvu, Službeni glasnik RS (Public Notaries Act, Official Gazette RS), No 31/2011, 85/2012, 19/2013, 55/2014 – dr zakon, 93/2014 – dr zakon, 121/2014, 6/2015 and 106/2015, Art 54, para 1 – rules on exemption of a public notary). Moreover, an unmarried partner is also equal to a spouse in a non-contested proceedings and, therefore, has a right to initiate a procedure for deprivation of legal capacity, see Zakon o vanparničnom postupku, Službeni glasnik RS (Non-contested Procedure Act, Official Gazette RS), No 25/82 i 48/88 i 'Sl. glasnik RS', br. 46/95 – dr zakon, 18/2005 – dr zakon, 85/2012, 45/2013 – dr zakon, 55/2014, 6/2015 i 106/2015 – dr zakon, Art 32, para 1).

Click here to go to Main Contents

a mutual relationship, whatever the name of such relationship is (marriage or cohabitation). The essence of both relationships is the same and it is very common that unmarried partner, as well as a married one, invest not only time and energy, but also money in their relationship and community of life. Therefore, I see no valid reason or argument for non-recognition of inheritance rights to unmarried couples.

In 2013 a non-governmental organisation drafted a Model Act on registered same-sex partnership and the idea of this Model was to legally recognise and regulate same-sex unions, which shall be registered and in terms of inheritance law a registered partner would be equal to a spouse (Art 32).[22] Although this Model, if adopted, would contribute to a higher legal certainty and protection of same-sex couples, it is almost certain that it will not be taken into consideration, because same-sex partnership and its legal effects, unfortunately, have not been among current political goals and priorities.

IV THE HEREDITARY STATUS OF UNMARRIED PARTNER IN COMPARATIVE LAW

In comparative law of the former Yugoslav countries, it is becoming more and more common to recognise the same inheritance rights to unmarried partners as to married couples, which is in accordance with the principle of equality and non-discrimination.

To begin with, Slovenia adopted its Inheritance Act in 1976, last amended in 2016,[23] and the provisions of this Act regarding the rights, obligations, limitations and status of spouses apply equally to men and women who live in a long-term cohabitation and are not married, if there are no impediments, ie grounds due to which marriage between them would be void.[24] After the Constitutional Court of Slovenia decided that this Act was not in accordance with the law that regulates homosexual partnership in 2013, it was amended and the hereditary status of homosexual cohabiting partners is equalised with the heterosexual cohabiting partners and the same rules apply to them. Not only that the hereditary status of a heterosexual cohabiting partner is equalised and enhanced, but also the right to inherit by the law is granted to cohabiting partners of the same sex.[25] The principle of equality in the Inheritance Act of

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22 S Gajin (ed) *Model Zakona o registrovanim istopolnim zajednicama (Model Act on registered same-sex partnership*) (Centar za unapredjivanje pravnih studija, Belgrade, 2003) p 50. (available at http://cups.rs/wp-content/uploads/2013/05/Model-zakona-o-registrovanim-istopolnim-zajednicama.pdf in Serbian).

23 Zakon o dedovanju, Uradni list SRS, št. 15/76, 23/78, Uradni list RS, št 13/94 – ZN, 40/94 – odl US, 117/00 – odl US, 67/01, 83/01 – OZ, 31/13 – odl US in 63/16 (Inheritance Act of the Republic of Slovenia, Official Gazette of the Socialist Republic of Slovenia, No 15/76, 23/78, Official Gazette of the Republic of Slovenia, No 13/94 – Notary Act, 40/94 – decision of the Constitutional Court, 117/00 – decision of the Constitutional Court, 67/01, 83/01 – Obligations Act, 31/13 – decision of the Constitutional Court and 63/16).

24 Inheritance Act of the Republic of Slovenia, Art 4a.

25 More about same-sex unions in Slovenia see: M Alibegović 'Zajednica života osoba istog spola

Slovenia is fully applied. According to the Slovenian Inheritance Act, heirs who shall inherit a decedent by law are decedent's descendants, adoptees and their descendants, a spouse,[26] parents, adoptive parents and their relatives, brothers and sisters and their descendants, grandparents and their descendants.[27] In the first inheritance line heirs who shall inherit a decedent are decedent's children and a spouse in equal shares (Art 10). The grandchildren and other descendants could inherit by the right of representation, that is applied only if the decedent's children do not want to inherit or could not inherit (Art 12).[28]

The former Yugoslav Republic of Macedonia adopted the Inheritance Act in 1996,[29] in which unmarried partners are not included in the circle of heirs who shall inherit by law. This legal solution is the same as in Serbian inheritance law, in which unmarried couples are not recognised as a legal category when the rules for distribution of inheritance by law shall be applied. According to the Macedonian Inheritance Act, in the circle of heirs who shall inherit a decedent by law are included all decedent's descendants, adoptees and their descendants, a spouse, parents, adoptive parents, brother and sisters and their descendants, grandfathers and grandmothers and their descendants.[30] In the first inheritance line are included decedent's children and a spouse and they inherit in equal shares, but if a child in the moment of a decedent's death is not alive, that share shall inherit a decedent's grandchild and so on by right of representation.[31] It is interesting that Macedonian Inheritance Act is the only Act in the countries of former Yugoslavia under which the right to inheritance by law is recognised also to the members of family community, which includes a foster child and foster parent, stepchildren, a stepfather and a stepmother, a daughter-in-law, fathers-in-law, a mother-in-law, a son-in-law and others, under the conditions prescribed by that Act.[32] These conditions refer to the following: that the members of the family community are living in a permanent community and that a decedent does not have any heir who belongs to a first inheritance line (children, their descendants or a spouse) or parents, brothers and sisters in which case the whole inheritance is shared equally between the previously mentioned members of the family community.[33] In case there is only a surviving spouse and no other heirs in the first inheritance line nor parents, brothers or

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u Republici Sloveniji (The Community of life of same-sex persons in Republic of Slovenia)' in B Krešić (ed) *Pravna regulacija životnih zajednica istog spola u Hrvatskoj, Sloveniji, Srbiji i Bosni i Hercegovini (Legal Regulation of same-sex unions in Croatia, Slovenia, Serbia and Bosnia and Herzegovina)* (Sarajevo, 2015) pp 27–39.

26 An unmarried partner or a cohabitant is not explicitly mentioned because according to Art 4a, cohabitants are equal to spouses.

27 Inheritance Act of the Republic of Slovenia, Art 10, para 1.

28 The decedent's children could not inherit if they are not alive at the moment of decedent's death, if they are unworthy or deprived of inheritance (those are inheritance penalties) or they are renounced of inheritance.

29 Zakon za nasleduvanjeto, Sl Vesnik na RM, br 47 od 12.09.1996. (Inheritance Act of the former Yugoslav Republic of Macedonia, Official Gazette of the Republic of Macedonia No 47/96).

30 Inheritance Act of the former Yugoslav Republic of Macedonia, Art 12, para 1.

31 Inheritance Act of the former Yugoslav Republic of Macedonia, Art 13, 14.

32 Inheritance Act of the former Yugoslav Republic of Macedonia, Art 12, para. 4.

33 Inheritance Act of the former Yugoslav Republic of Macedonia, Art 29. Permanent community,

sisters, the whole inheritance is shared in two equal shares, from which one-half belongs to a spouse and the other half belongs to members of the permanent family community (their half would otherwise belong to a decedent's parents and brothers and sisters).[34]

Under the Inheritance Act of Croatia from 2003, last amended in 2015, unmarried partners are considered equal to married couples as regards inheritance by law.[35] Regarding this provision that equals the partners either married or unmarried, the heirs who inherit the decedent by the law are all descendants, adoptees and their descendants, spouse, including an unmarried partner who is equal to a spouse, parents, adoptive parents, brothers and sisters and their descendants, grandfathers and grandmothers and their descendants and other ancestors.[36] This provision also defines cohabitation as a community of life of an unmarried woman and unmarried man that lasted longer, but is ceased by the decedent's death, provided that the preconditions required for the validity of marriage are fulfilled.[37] Croatian legislator also interpreted the principle of equality in its full sense. Namely, in 2014 the Parliament in Croatia adopted the Same-Sex Civil Partnership Act, which defines civil partnership as a community of family life of two people of the same sex concluded before the competent authority in accordance with this Act.[38] Numerous legal effects of a homosexual civil partnership, including inheritance law, are regulated by the provisions of this Act. Thus, inheritance legislation rules will be applied when inheritance among civil partners is concerned, whereby a civil partner is equalised with a spouse, but children over whom a civil partner has partner care are equalised to that partner's own children.[39] Although the Inheritance Act was amended in 2015, a long-term civil partner was not included among heirs who inherit by law, probably because, according to the Same-Sex Civil Partnership Act, a civil partner has the same legal status as a spouse in inheritance law.

Montenegro adopted the Inheritance Act in 2008, after the separation from the State Union of Serbia and Montenegro and, therefore, used that opportunity to adopt a new law and include new provisions regarding the inheritance rights of unmarried couples. Namely, the circuit of heirs that could inherit a decedent by law includes decedent's descendants, adoptees and their descendants, spouse,

according to the provisions of this Act, is defined as a community that lasted at least 5 years with no break since it has been established until the death of a decedent (para 3).

34 Inheritance Act of the former Yugoslav Republic of Macedonia, Article 29, para. 2.

35 Zakon o nasljeđivanju Republike Hrvatske, Narodne novine (Inheritance Act of the Republic of Croatia, Official Gazette), No 48/03, 163/03, 35/05, 127/13, 33/15, Art 8, para 2.

36 Inheritance Act of the Republic of Croatia, Art 8, para 1.

37 Inheritance Act of the Republic of Croatia, Art 8, para 2.

38 Zakon o životnom partnerstvu osoba istog spola Republike Hrvatske, Narodne novine (Same-Sex Civil Partnership Act of the Republic of Croatia, Official Gazette), No 92/14, Art 2.

39 Same-Sex Civil Partnership Act of the Republic of Croatia, Art 55. More about civil partnership in Croatia see: R Jotanović 'Zajednica života osoba istog spola u Republici Hrvatskoj (The Community of life of same-sex persons in Republic of Croatia)' in B Krešić (ed) *Pravna regulacija životnih zajednica istog spola u Hrvatskoj, Sloveniji, Srbiji i Bosni i Hercegovini (Legal Regulation of same-sex unions in Croatia, Slovenia, Serbia and Bosnia and Herzegovina)* (Sarajevo, 2015) pp. 9–26.

parents, adoptive parents, brothers and sisters and their descendants, grandparents and their descendants, great grandfather and great grandmother, but also the decedent's unmarried partner, who is equalised in inheritance rights with the spouse.[40] For the purposes of this Act, cohabitation is a community of life of a woman and a man that lasted longer, had no impediments to conclude a valid marriage and is ceased by the decedent's death.[41] Such definition of cohabitation is very similar to a definition given in the Croatian Inheritance Act, but the only difference is not explicitly mentioning the word unmarried woman and unmarried man, because being married is already one of the impediments to marriage and there is no need for emphasising it.

In 2014, Federation of Bosnia and Herzegovina adopted a new Inheritance Act,[42] which has some novelties, but I will concentrate on the principle of equality in terms of cohabiting partners. Heirs that shall inherit a decedent by the law are the following: all decedent's descendants, adoptees and their descendants, a spouse, parents, adoptive parents, brothers and sisters and their descendants, grandfathers and grandmothers and their descendants and other ancestors.[43] By the law, a decedent's unmarried partner is also an heir and is equalised with the spouse in inheritance law.[44] In terms of this Inheritance Act, cohabitation is defined as a community of life of a woman and a man, in accordance with the provisions of the Act that regulates family relationships, if such community is ceased by the death.[45] The Inheritance Act of Serb Republic is adopted in 2009[46] and contains the same provisions as the Serbian Inheritance Act regarding the inheritance rights of an unmarried partner and represents the incomplete regulation of hereditary status of an unmarried partner. Therefore, in the circle of heirs who shall inherit a decedent are included all descendants, a spouse, parents, brothers and sisters and their descendants, grandfathers and grandmothers and their descendants and other ancestors.[47] In the first inheritance line, heirs are a decedent's children and a spouse. None of the provisions regulating inheritance law mention unmarried partners. Some authors are of the opinion that by extensive interpretation of the provisions of the Inheritance Act of Serb Republic one shall conclude that

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40 Zakon o nasljeđivanju Republike Crne Gore, Službeni list Crne Gore (Inheritance Act of the Republic of Montenegro, Official Gazette of the Republic of Montenegro), No 74/2008, Article 9, para. 1 and 2.

41 Inheritance Act of the Republic of Montenegro, Art 9, para 3.

42 Zakon o nasljeđivanju Federacije Bosne i Hercegovine, Službene novine Federacije BiH (Inheritance Act of Federation of Bosnia and Herzegovina, Official Gazette of Federation of Bosnia and Herzegovina), No 80/14.

43 Inheritance Act of Federation of Bosnia and Herzegovina, Art 8, para 1.

44 Inheritance Act of Federation of Bosnia and Herzegovina, Art 9, para 1.

45 Inheritance Act of Federation of Bosnia and Herzegovina, Art 9, para 2.

46 Zakon o nasljeđivanju Republike Srpske, Službeni glasnik Republike Srpske (Inheritance Act of Serb Republic, Official Gazette of Serb Republic), No 1/09.

47 Inheritance Act of Serb Republic, Art 8, para 1. In the Serb Republic, adoptive relationship is equal to a blood relationship, so that adoptees and adoptive parents are also included in the heir circle.

unmarried partners are also within the circle of heirs.[48] This conclusion is derived from the provision in which an illegitimate kinship is equalised with a marital kinship in terms of inheritance law (Art 4, para 1). As far as I am concerned, even if this provision is interpreted extensively, it shall not mean that unmarried partner is equalised with the married one, because married as well as unmarried couples are not in any kind of kinship and only children are in kinship with their parents but parents are not in kinship among themselves. By conclusion of a marriage or entering into cohabitation, there is no kinship established, but only a family law relationship of other kind, which is called marriage or cohabitation. Under the term an illegitimate kinship, one shall understand only a kinship between a parent and an illegitimate child and his or her descendants and kinship between an illegitimate child and other relatives of his or her parents.

In inheritance acts in all countries of former Yugoslavia, heirs inherit according to the inheritance lines. Spouses and unmarried partners, in countries where they are equalised, inherit in the first inheritance line, together with children and descendants. All children, born either in or out of wedlock as well as the adopted children, and outlived spouse or unmarried partner share the inheritance in equal shares. Such provisions lead to the conclusion that a spouse or an unmarried partner, where equalised, has a very important role in inheritance law and, thus, is protected by the law in terms of legal certainty when it comes to inheritance and property relations.

V CONCLUSION

In many countries of former Yugoslavia, such as Slovenia, Croatia, Montenegro, Federation of Bosnia and Herzegovina, except Serbia, Serb Republic and the former Yugoslav Republic of Macedonia, an unmarried partner is protected by the law in terms of inheritance rights and property rights after a death of a spouse or unmarried partner. Slovenian and Croatian legislator applied the principle of equality consistently by recognising the inheritance rights also to same-sex cohabiting partners. In Serbian inheritance law, an unmarried partner is not protected by the law and in cases when there is no will left, such partner could be left on the street no matter how long their community of life lasted, how much each of them contributed to their community or if they have common children. The contribution of unmarried partners throughout their community of life is relevant only in family law matters, recognising the right to division of joint property if it existed. In inheritance law, an unmarried partner is not secured in any terms, especially in economic and social terms, which does not seem to be in accordance with the principle of equality. The fact that cohabiting partners do not have inheritance rights would not be a motive for them to conclude a marriage if they do not

[48] Softić Kadenić, Darja, Novo nasledno parvo u entitetima Bosne i Hercegovine de lege lata I de lege ferenda (New Inheritance Law in the Entities of Bosnia and Herzegovina), Nova pravna revija, 2/2011, Vol 3, p 39.

want this formal act of entry into a community of life. Those marital formalities are often the main reason why cohabiting partners do not want to conclude a marriage. There is a possibility to compose a will and include an unmarried partner in its provisions, but Serbia is a country in which a will is not a common way of inheritance and even if it is, a testamentary heir is limited with provisions of necessary share. The principle of equality has not been consistently applied in Serbian inheritance law in two ways: by not recognising heterosexual unmarried partners, on the one hand, as well as homosexual unmarried partners, on the other hand, as legal heirs. The Draft Civil Code was a chance to make a change in the area of inheritance rights of unmarried couples, but until the public debate is finished there is still little chance to act in a direction of equalising married and unmarried couples. Although there is room for such legal manoeuvre, this is very unlikely to happen. The role of a partner in any kind of a community, whether you call it a marriage or cohabitation, shall be the same bearing in mind that they have the same legal rights and obligations in family law relationships. Why not equalise them in inheritance rights?

Click here to go to Main Contents

SOUTH AFRICA

IMPLICATIONS OF THE OFFICIAL DESIGNATION OF MUSLIM CLERGY AS AUTHORISED CIVIL MARRIAGE OFFICERS FOR MUSLIM POLYGYNOUS, INTERFAITH AND SAME-SEX MARRIAGES IN SOUTH AFRICA

Najma Moosa and Muneer Abduroaf[*]

Résumé

Entre 2014 et 2017 quelque 227 religieux musulmans sud-africains, dont trois femmes, ont accédé au rang de célébrant des mariages civils en application de loi 25 sur le mariage de 1961. Bien qu'ayant désormais le pouvoir de célébrer tant le mariage religieux (nikah) que le mariage civil, cette désignation ne leur permet de célébrer et d'enregistrer que le mariage civil. Le mariage religieux, notamment le mariage musulman polygame, n'est pas formellement reconnu en Afrique du Sud. Le nikah doit normalement précéder la cérémonie civile mais il s'agit bien de deux mariages distincts. Les auteurs soutiennent qu'un des objectifs de l'introduction d'officiers célébrants musulmans était de simplifier le processus en permettant la célébration du nikah et du mariage civil dans une seule cérémonie, comme c'est actuellement le cas pour les mariages chrétiens et juifs. Pour être valide, le mariage civil musulman doit être monogame et célébré entre personnes de sexes opposés. Étant donné qu'il s'agit d'un projet-pilote, la désignation des officiers célébrants musulmans a également été soumise à des limitations ministérielles. Ainsi, ces officiers ne peuvent célébrer des mariages interreligieux et leur mandat est limité dans le temps. Le présent texte examine les implications constitutionnelles et religieuses que représentent ces limitations en regard des mariages polygames, interreligieux et entre personnes de même sexe. Il s'intéresse également aux raisons qui ont conduit à la mise sur pied de ce projet-pilote ainsi qu'aux implications de ce qui selon les auteurs deviendra ultimement une forme unique de mariage civil 'conditionnel' en phase avec les exigences de la loi islamique (Shari'a) en matière de nikah.

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Click here to go to Main Contents

From 2014 to 2017 some 227 South African Muslim clergy, including three females, graduated as civil marriage officers in terms of the Marriage Act 25 of 1961. Although now vested with dual capacity to perform both Muslim marriages (nikahs) and officiate at civil marriages, their designation authorises them to solemnise and register only civil marriages. All religious marriages, including Muslim polygynous marriages, remain formally unrecognised in South Africa. The nikah is expected to precede the civil marriage ceremony; however, they remain two separate (unrelated) marriages. The authors contend that one of the goals of introducing Muslim marriage officers should have been to streamline the process in order for a nikah and a civil marriage to be concluded during one ceremony, as is currently the rule for Christian and Jewish weddings. For Muslim civil marriages to be regarded as valid, they must be monogamous and entered into by opposite-sex couples. Since this is a pilot project, the designation of Muslim marriage officers has also been subjected to several ministerial limitations which includes precluding them from officiating at inter-faith civil marriages and subjecting their appointment to a time limit. This chapter examines the possible constitutional and religious implications of these limitations for Muslim polygynous, interfaith and same-sex marriages; the rationale for introducing the pilot project; and the implications of what the authors contend will ultimately be a 'conditional' civil marriage of a unique kind that has been brought into line with the Islamic law (Shari'a) requirements of a nikah.

I INTRODUCTION

On 30 April 2014, just prior to South Africa's fifth democratically held elections on 7 May 2014, the Ministry in the Department of Home Affairs (DHA),[1] in collaboration with the leadership of the Muslim Judicial Council (MJC),[2] a religious tribunal based in the Western Cape province,[3] graduated and certified some 114 Muslim clerics (all males) as authorised (Muslim) civil marriage officers (MMOs) in terms of s 3[4] of the Marriage Act of 1961[5]

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1 The DHA is a department of the South African government. It is responsible for the maintenance of the National Population Register (NPR) which includes the recording of marriages and deaths. For detail see www.dha.gov.za:8086/index.php/about-us/minister-of-home-affairs (accessed 10 April 2017).

2 The MJC, an umbrella body established in 1945, describes itself on its website as 'one of the oldest, most representative and most influential religious organizations in South Africa'. See www.mjc.org.za/index.php?option=com_content&view=article&id=104&Itemid=21 (accessed 10 April 2017). Although without legal force in South Africa, the pronouncements of the MJC on Muslim personal law issues are generally accepted as morally binding by those members of the Muslim community who seek its assistance and involvement in their religious disputes, including those pertaining to matters of Muslim personal law.

3 In 1994 South Africa was geographically reorganised from four to nine provinces: Eastern Cape, Free State, Gauteng, Kwazulu-Natal, Limpopo, Mpumalanga, Northern Cape, North West and Western Cape. Muslims are predominantly located in four of these provinces: Eastern Cape, Western Cape, Gauteng and Kwazulu-Natal.

4 'The Minister and any officer in the public service authorized thereto by him may designate any minister of religion of, or any person holding a responsible position in, any religious denomination or organization to be, so long as he is such a minister or occupies such position,

(Marriage Act). The Marriage Act is an Act of the Parliament of South Africa and as such governs the solemnisation and registration of civil marriages. In order for such civil marriages to be regarded as valid, they must be: monogamous; entered into by opposite-sex (heterosexual) couples and solemnised by authorised marriage officers who are expected to strictly comply with the formalities prescribed by the Marriage Act.

Although the MMOs include religious authorities (ulama) with varying status, most MMOs hold the rank of imam (literally 'leader'). Subsequent training opportunities have increased the current number of MMOs to 227 and include the first three female MMOs. Although the civil marriage has its basis in the Roman-Dutch Law (common law), as evident from its terminology, the Marriage Act[6] reflects a bias towards Christianity. Most of the major local textbooks on family law refer to religious marriages in the context of Indian, Jewish and Muslim marriages as if these exclude Christian marriages. Nonetheless, although Christianity is the dominant religion, all of the above religious marriages remain formally unrecognised in South Africa. Furthermore, the option of becoming civil marriage officers was always available to clergy of all these main religions in terms of the Marriage Act. While the appointment of ministers of religion as marriage officers is therefore not a novel step in South Africa, the fact that this was the first time that imams became MMOs, and did so in such large numbers, was deemed historic.[7] This may have justified why the then Deputy President of South Africa, Kgalema Motlanthe, the then Home Affairs Minister, Naledi Pandor, and her (still current) Deputy Minister, Fatima Chohan (both Muslim women)[8] were all in attendance at the graduation ceremony.

Since it is also the first time that a project of such a nature was rolled out, not everyone may be aware of the fact that this is a pilot project in terms of which the designation of MMOs has been subjected to several ministerial limitations which include precluding them from officiating at inter-faith civil marriages and which subjects their designation to a time limit after which it expires. Although currently these are no longer serious obstacles to recognition, Muslim marriages

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a marriage officer for the purpose of solemnizing marriages according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion' (s 3 (1)). This section is still clothed in pre-democracy patriarchal language. It assumes the Minister of Home Affairs and ministers of religion to be males and still refers to the colonially coined term 'Mohammedans' to refer to local Muslims.

5 The Marriage Act 25 of 1961. Civil marriages are governed by the Marriage Act since its date of commencement on 1 January 1962 and the regulations issued in terms of the Act.

6 As, for example, evidenced by the explicit reference to 'church' in ss 3 and 29 (2).

7 On 22 September 2016 Sheikh Emandien, Head of the Social Development Department of the MJC, confirmed the authors' query that, to his knowledge, there were no imams in the Western Cape who were civil marriage officers before this pilot project was introduced.

8 Ms Pandor has since 26 May 2014 been replaced by Minister Mr Malusi Gigaba and Ms Chohan has been re-appointed as his deputy. Gigaba was head of the DHA until 31 March 2017 when the President of South Africa unexpectedly appointed him to another portfolio.

Click here to go to Main Contents

(nikahs)[9] remain formally unrecognised in South Africa because they permit polygyny and are not solemnised by authorised marriage officers in terms of the Marriage Act. To remedy this, an essentially Islamic law (Shari'a) compliant draft Muslim Marriages Bill (MMB)[10] has been approved by Cabinet in 2010 but has yet to be enacted. If enacted, it would be the nikah that would be recognised as legally valid and given separate legal standing in terms of South African law. The MJC, which has a long history in South Africa of being at the forefront of campaigning and championing for recognition of Muslim marriages, remains supportive of the proposed separate recognition of Muslim marriages through the MMB.[11]

The conducting of nikahs usually forms an integral part of the role of imams in South Africa and, although it does occasionally occur elsewhere, the solemnisation of such marriages usually takes place in a mosque (Muslim house of worship). The rationale for introducing the project provided by the DHA for having a ready supply of MMOs in place when the legal recognition of Muslim marriages does indeed occur, may be deemed a positive, proactive preparatory step and may to a large extent justify the reason the MJC may have given this DHA pilot project its support. However, there were other practical reasons which have contributed to this alliance between the DHA and MJC, which in its turn, may also have been motivated by judicial and political considerations. Whether or not the accreditation of MMOs before recognition of Muslim marriages may be deemed to be a premature step, such accreditation has been largely welcomed by local Muslims, including activists,[12] as a positive step. Although the MJC had the blessing of a major national umbrella body, the United Ulama Council of South Africa (UUCSA),[13] of which it is also a founding member,[14] not all ulama (including some MJC members)[15] were in support of this initiative or participated in the process.[16] Some older MMOs

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9 The Arabic word 'nikah' is usually used to denote an Islamic marriage although the terms 'marriage ceremony' and 'wedding' are also used interchangeably in this chapter to refer to the 'nikah' ceremony.

10 The MMB was published for public comment in January 2011. For a link to the Draft Muslim Marriages Bill, 2010 (General Notice 37, Government Gazette 33946 of 21 January 2011, 3-29) see www.gov.za/sites/www.gov.za/files/33946_gen37.pdf (accessed 10 April 2017).

11 See 'Marriage officers vital: MJC' The Voice of the Cape, VOC News 6 May 2014 available at www.vocfm.co.za/index.php/news/local-news/item/12659-marriage-officers-vital-mjc (last accessed 22 May 2014).

12 See 'Marriage officers hailed' The Voice of the Cape, VOC News 1 May 2014 available at www.vocfm.co.za/index.php/news/local-news/item/12628-marriage-officers-hailed (last accessed 22 May 2014).

13 The UUCSA was established in 1994. It is one of two major national ulama umbrella bodies.

14 See N Moosa *Unveiling the Mind. The Legal Position of Women in Islam – A South African Context* (2nd edn, Juta, Cape Town, 2011) at 152 and its note 49.

15 For example, well respected Imam Moutie Saban, current Imam of the Jameah Mosque (est 1850), although affiliated to the MJC, was not supportive of this training.

16 In a statement issued on 30 April 2014 by the Islamic Unity Convention, an organisation also based in the Western Cape, they deemed the action of those ulama, who willingly sought accreditation as MMOs, as 'opportunistic and self-servicing'. It also appears from this statement that Islamic Unity Convention officials have confused accreditation of MMOs with the instant recognition of Muslim marriages. The Islamic Unity Convention statement, titled

have also indicated that given their age, they will themselves not be entering into civil marriages at this late stage in their lives but will encourage the younger generation to do so.

Since Muslim marriages remain formally unrecognised, it is only the civil marriage that can be registered by MMOs as a valid marriage. It is therefore unfortunate that during a congratulatory speech delivered to MMOs at their graduation, the then Deputy President of South Africa (Kgalema Motlanthe) incorrectly intimated that the registration of Muslim marriages by MMOs would henceforth accord such marriages legal status:

> 'As a result of the Imams being designated as Marriage Officers in terms of the Marriages Act … the registration of Muslim unions will accord Muslim Marriages legal status and with that, the protective instruments of the secular state may be accessed to ensure that these Qur'anic values are realised and complied with, within the Constitutional state.'[17]

The DHA itself also provided incorrect information on its website as follows:

> 'The significance is that for the first time in South Africa's history, *Muslim marriages* conducted by these *Imams will be recorded on the National Population Register [NPR]*, thereby receiv[ing] legal status and recognition afforded by the Constitution.'[18]

Comments like these, fuelled by ulama of the MJC and widely reported as such in the media, were therefore the cause of much confusion. To their credit, soon thereafter the MJC[19] (and later the umbrella body the UUCSA[20]) provided

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'Legalisation of Muslim Marriages raises concern-IUC [Islamic Unity Convention]' was republished in *Al-Qalam*, Vol 40 No 5, May 2014, p 8.

17 See 'SA: Kgalema Motlanthe: Address by the Deputy President of South Africa, on the occasion of the Graduation Ceremony for Imams qualifying as marriage officers, Old Mutual Park, Cape Town' (30 April 2014) available at www.polity.org.za/article/sa-kgalema-motlanthe-address-by-the-deputy-president-of-south-africa-on-the-occasion-of-the-graduation-ceremony-for-imams-qualifying-as-marriage-officers-old-mutual-park-cape-town-30042014-2014-04-30 (accessed 10 April 2017).

18 Emphasis added. See the full statement at 'Deputy President Kgalema Motlanthe to speak at the graduation ceremony of the Imams in Cape Town – 30 April 2014 at 10h00' available at www.home-affairs.gov.za/index.php/statements-speeches/456-deputy-president-kgalema-motlanthe-to-speak-at-the-graduation-ceremony-of-the-imams-in-cape-town-30-april-2014-at-10h00 (accessed 10 April 2017).

19 It did so through media statements, radio panel discussions and its official website. See, for example, 'Marriage officers vital: MJC' The Voice of the Cape, VOC News 6 May 2014 available at www.vocfm.co.za/index.php/news/local-news/item/12659-marriage-officers-vital-mjc (last accessed 22 May 2014). On its own website, the MJC indicated the following: 'The statement that with the graduation of the Muslim Marriage Officers, the Muslim marriage has been legalised is not correct. We wish to rectify any incorrect perception created through the graduation of the Muslim Marriage Officers or media reporting … It must be stressed that there are no new laws in this regard that have been passed … The Muslim Judicial Council (SA) apologises for any confusion caused in this regard.' The 'MJC Muslim Marriage Officers statement' was available on the official website of the MJC at www.mjc.org.za/index.php?option=com_content&view=article&id=553:mjc-marriage-officers-statement&catid=15:press-releases&Itemid=13 (last accessed 22 May 2014). See 'Community notice: MJC

Click here to go to Main Contents

clarity and rectified the misconception. It therefore initially appeared that many people, lay and professional alike, may not have clearly understood the implications recording and civil status have on hitherto unrecognised Muslim marriages, or even that the imams themselves understood the extent of their powers and duties in their new role despite their training.

An MMO (one person) is vested with dual capacity to perform both nikahs and officiate at civil marriages. Their designation as MMOs legally authorises imams to solemnise civil marriages in terms of the Marriage Act and to register only these civil marriages at which they officiate. It is therefore the civil marriage that receives legal status and recognition and only its details are recorded in the NPR managed by the DHA.

While this implies that the parties to these civil marriages ought to be able to automatically access the protective provisions of secular state laws, and that this ought to be good news for Muslim women and their children, this chapter will highlight that that may not necessarily be the case because of what we contend will ultimately be a 'conditional' civil marriage brought into line with the Islamic law (Shari'a) requirements of a Muslim marriage (nikah). The civil option was always available to Muslims. In addition to a nikah, some Muslim couples enter into a civil marriage in order to guarantee the validity of their relationship in terms of South African law. However, the majority of Muslims do not enter into civil marriages because of fundamental differences between the two (religious and secular) systems. Many therefore still prefer the option of formal recognition of Muslim marriages. We contend that the argument that a ready supply of MMOs would be in place by the time Muslim marriages were recognised may not have been sufficient motivation to get the ulama on board. Given that the status quo of Muslim marriages remains unchanged, and that the MJC remains supportive of recognition, the DHA had to make the option of a civil marriage much more attractive in order to convince ulama to participate in the project. We contend further, as this chapter will detail, that, apart from various practical and political reasons which may have motivated the MJC to cooperate with the government, with the support of the provisions of the Marriage Act itself, ministerial limitations and negotiations between the MJC and the DHA, it appears that MMOs may not merely advise as marriage officers normally do. They may in fact prescribe to Muslim couples that the civil marriages over which they officiate must not be interreligious and must contractually conform to financial consequences in accordance with the requirements of Islamic law (Shari'a) and others that do not (negatively) impact on Muslim personal law. Failing this, they may refuse to officiate the wedding (in terms of the Marriage Act) or face censure by the MJC (umbrella body) which can request to have their authorisation as MMOs revoked (in terms of a

announces new leadership' The Voice of the Cape, VOC News 24 April 2016, available at www.vocfm.co.za/community-notice-mjc-announces-new-leadership/ (accessed 10 April 2017).

[20] See Press Statement issued by the UUCSA on 20 May 2014 titled 'Accreditation of Muslim Marriage Officers Sends Confusing Signals'. It was posted in Vol 9 No 20 of an online newsletter of one of its member bodies on 21 May 2014 and is available at www.jmtsa.co.za/online-newsletter-vol-09-20/ (accessed10 April 2017).

ministerial limitation). We contend that these conditions may in fact give rise to a civil marriage of a unique kind and that they exceed even those options provided by the proposed 2010 MMB. This may dissuade Muslims with more liberal understandings of Islamic law, who do not wish the terms of the civil marriage options to be dictated to them, from making use of the services of an MMO. These may instead opt to enter civil marriage using the services of other state authorised marriage officers who are appointed in terms of s 2 of the Marriage Act.[21] One also has to question whether these conditions, and their refusal, may therefore leave MMOs and the religious bodies to which they may be attached open to constitutional challenge?

Local family law authors do not make the distinction between religious and civil marriages very clear:

> '… if a religious marriage … is solemnised in terms of the Marriage Act or Civil Union Act (as Jewish and Christian marriages are), the marriage is fully recognised. In such event, the marriage has dual validity; in other words, the religious and civil marriages exist side by side, with the consequences of the civil marriage being governed by the South African common law and legislation relating to civil marriages, and the consequences of the religious marriage being governed by the particular system of religious law in terms of which the marriage was celebrated.'[22]

This creates a mistaken impression that if the religious ceremony complies with the formalities of the civil marriage laws, that it too is fully recognised. It seems that similar mistaken impressions are created by foreign authors in other Muslim minority countries like the USA[23] and Australia.[24] However, authors in the UK make the distinction quite clear.[25]

Although a preceding nikah is not required in rare cases where civil marriages (officiated by s 2 marriage officers) are also entered into, the Muslim wedding ceremony (nikah) conducted by an imam would usually precede it. The MJC requires that there should be a preceding nikah. MMOs are now continuing in this vein. Whether an MMO performs both the nikah and the civil marriage for

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[21] Certain functionaries, like magistrates and justices of the peace, are automatically marriage officers *ex officio* by virtue of the offices that they hold. These marriage officers occupy this position by virtue of their being civil servants of the state. However, the Minister of Home Affairs (or an official authorised to act on behalf of the Minister) can appoint other civil service employees as marriage officers. In practice, many employees in local offices of the DHA are appointed as marriage officers. See s 2 (1) and (2) of the Marriage Act.

[22] J Heaton and H Kruger *South African Family Law* (4th edn, LexisNexis, South Africa, 2016) at pp 3–4.

[23] See A Quraishi and N Syeed-Miller 'No Altars: a Survey of Islamic Family Law in the United States' Chapter 11: The Muslim family in the USA: law in practice 188-198 in L Welchman (ed), *Women's Rights and Islamic Family Law: Perspective on Reform* (Zed Books, London, 2004) at 188–189.

[24] A Black 'Can there be a compromise? Australia's state of confusion regarding shari'a family law' In E Giunchi (ed) *Muslim family law in Western courts* (Routledge, United Kingdom, 2014) at Part III pp 149–167 at 154–155.

[25] See, for example, D Pearl and W Menski *Muslim Family Law* (3rd edn, Sweet & Maxwell, London, 1998) at pp 169–170 and 228.

the same couple or their civil marriage as an independent event, the nikah is expected to precede the civil ceremony and they remain two separate (unrelated) marriages. The DHA may have supported and encouraged this. The main reasons that they will not be simultaneously entered into (as may be the case in a Christian or Jewish marriage) are because of clear conflicts between the formalities for the solemnisation of a Muslim and a civil marriage and the dictates of local custom. There is therefore also no question of couples having to 'convert' a nikah to a civil marriage or of the nikah being formally recognised. The rationale for two separate marriages is motivated by the fact that if the couple is already religiously married, then they are able to easily comply with the formalities of the Marriage Act. We contend that one of the goals of having MMOs introduced should have been to streamline the process so that a nikah and a civil marriage can occur on one occasion as is usual with all other religious marriages officiated by civil marriage officers. It appears that the then Minister of Home Affairs (Naledi Pandor), who initiated the project, may share this view. At the graduation and quoted in the media, she commented: 'When I got married, we were taken by our parents to a civil ceremony … [I] was told the real ceremony would happen later. The minister pointed out the goal had been for all unions to be recognised, so that there only needs to be one wedding.'[26] This makes the case for a more integrated, inclusive and streamlined process so that both the nikah and civil marriage (albeit still continuing as two separate marriages) can be concluded during one ceremony.

In support of our arguments and above contentions, this chapter will be divided into 11 sections, inclusive of the Introduction (Section I) and Conclusion (Section XI). Section II provides a necessary explanatory context. Section III provides a brief overview of further types of marriages that are currently legal in South Africa and the context in terms of which Muslims may validly enter into or officiate at these marriages, especially same-sex marriages. Section IV provides a brief overview of Muslims and the current progress with the proposed MMB to determine whether there may be a link between this recognition process and the introduction of MMOs and whether recognition may still be necessary. Section V highlights the practical reasons that justified the alliance between the DHA and MJC. Section VI provides an overview of the training process and graduation of MMOs in the context of women as MMOs, ministerial limitations attached to the role of MMOs, and possible constitutional implications.

Sections VII and VIII, respectively, highlight some of the differences between the requirements for the validity, and the formalities for their solemnisation, of Muslim marriages and civil marriages. Section IX highlights some of the differences between the matrimonial property regimes and the financial effects of Muslim and civil marriages. Section X makes the case for a more integrated,

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[26] K Legg 'Historic day for Muslim marriages' Cape Argus, 30 April 2014 p3, available at www.iol.co.za/news/south-africa/western-cape/historic-day-for-muslim-marriages-1.1681947#.U2PXmYGSySo (accessed 10 April 2017). Ms Pandor converted to Islam upon marriage to a Muslim man.

inclusive and streamlined process so that both the nikah and civil marriage (albeit still existing as two separate marriages) can be concluded during one ceremony.

II EXPLANATORY CONTEXT

The label 'clergy' is conveniently used in this chapter to refer to essentially conservative local male Muslim religious authorities (ulama) even though they all belong to the *Sunni* branch of Islam which does not have a formal clergy. Although the label 'imam' was generally used by the media to denote all MMOs, Muslim clerics, in their roles as leaders in the Muslim community or as members of religious tribunals like the MJC, are also variously referred to as 'sheikh', 'moulana' or 'mufti', depending on their qualifications, and the location and religious orientation of the organisation or institution to which they belong. These terms are therefore used interchangeably in this chapter to refer to MMOs.

Although the training of MMOs was rolled out in three of the four provinces where Muslims are predominantly located, the focus of the chapter will be limited to the MJC[27]and to marriages between Muslims residing in the Western Cape.[28] Muslim personal law refers to the Muslim religious-based personal law which covers a gamut of areas pertaining to, among others, marriage, polygyny, divorce, maintenance, custody, guardianship and succession.[29] MPL is regulated by the prescriptions of the eighth century classical Shari'a rules developed by male jurists who were founders of the four Sunni schools (madhhabs or versions) of law, namely, Hanafi, Maliki, Shafi'i and Hanbali, as established in the two seventh-century primary sources of Islam, namely, the Qur'an[30] (the holy book of Islam) and Sunna[31](the traditions) of Prophet Muhammad, from which Islamic law is derived and on which it is based. After Muhammad's death his traditions were embodied in a body of texts compiled as books called

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27 This is because of the pivotal role it played in initiating the process and because the co-author is an MMO and member of the MJC and was able to consult with other members of the MJC in order to clarify, confirm and provide answers to many of the questions raised in the chapter.

28 This is because the authors are resident in, and more familiar with, the position in this province.

29 See N Moosa, *Unveiling the Mind* 10.

30 All excerpts from the Qur'an in this chapter are translations by Ali Y, *The Holy Qur'an: Text, Translation and Commentary* (Islamic Education Centre 1946). For ease of reference they are, for example, cited as follows: Q.1:2 which refers to the Qur'an, chapter (surah) one, verse (ayat) two.

31 Technically hadith (plural: 'ahadith') 'is an item of information related to the Prophet, containing either something he did or said or (tacitly) consented to, and it is sometimes translated "tradition" as transmitted orally from reporter to reporter' (See N Moosa, *Unveiling the Mind* at 26). All references to ahadith in this chapter are English translations from the authentic collection by Imam al-Bhukhari (an imam of traditions as distinguished from an imam of Islamic jurisprudence) which were sourced from four of the nine volumes edited by MM Khan *The Translation of the Meanings of Sahih Al-Bukhari Arabic-English* Volumes 2, 3,7 and 8 (Saudi Arabia: Darussalam, 1997). For ease of reference, a hadith will, for example, be cited as follows: 7/52 which refers to Volume 7, p 52.

hadith. Jurists of the four schools of law hold different opinions about the requirements for a valid Muslim marriage and of the process to be followed during its solemnisation. South African-born Muslims and their ulama are essentially followers, in more or less equal numbers, of the Hanafi and Shafi'i schools.[32] Hence, given their dominance, this chapter focuses only on these two schools. The description of a nikah in Section VIII is based on the experiences of the main author (who is a follower of the Hanafi school of law) and the co-author (who is a follower of the Shafi'i school) as members of the greater Cape Town Muslim community. Due to space constraints, in the case of both Islamic law and South African law the focus will be only on some areas that highlight potential conflict between the two systems by detailing, without necessarily motivating, any religious rationale. The 2010 MMB is the latest of three such published versions and is an amended version of the 2003 MMB. While brief reference is made to its progress and some of its provisions, the historical context and process leading up to the publication of the draft 2010 MMB, its constitutionality, and the mixed reception it received from the Muslim community, also fall beyond the scope of this chapter due to space constraints.[33] The MJC has since the introduction of the pilot project undergone a leadership change[34] and updated its website. The website therefore no longer contains information relating to the MMO process referred to in some of the references used in this chapter.

III FURTHER MARRIAGES THAT ARE CURRENTLY LEGAL IN SOUTH AFRICA

The Marriage Act is not the only law under which a marriage may be contracted in South Africa. There are currently two further separately legislated and regulated marriage options available whose solemnisation and registration are also managed by the DHA and which are recorded in the NPR.

South Africa recognises African customary marriages through the Recognition of Customary Marriages Act (RCMA)[35] of 1998. These marriages can be monogamous or polygynous but only apply to opposite-sex (heterosexual) couples. The definition of such a customary marriage in South Africa does not include marriages concluded in accordance with religious rites. Civil unions or partnerships are recognised in terms of the Civil Union Act (CUA)[36] of 2006. These unions or partnerships are monogamous and available to both opposite-sex and same-sex couples (without reference to whether the individuals are heterosexual or homosexual). Hence, Muslim couples may also

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[32] See Moosa *Unveiling the Mind* at pp 10, 56, 82 and 151.

[33] For a detailed history of the South African government's engagement with Islamic law and the three versions of the Draft Bill, see Moosa *Unveiling the Mind* at pp 143–162.

[34] See 'Community notice: MJC announces new leadership' The Voice of the Cape, VOC News 24 April 2016, available at www.vocfm.co.za/community-notice-mjc-announces-new-leadership/ (accessed 10 April 2017).

[35] Act 120 of 1998.

[36] Act 17 of 2006.

enter into monogamous, opposite-sex civil partnerships using the CUA without necessarily having to fall foul of Islamic law.

The CUA[37] provides that marriage officers appointed in terms of s 2 of the Marriage Act are automatically eligible to solemnise civil unions or partnerships. While it has been argued[38] that it ought not to be the case given their very public role as civil servants of the state, the CUA[39] also exempts these s 2 officiants from being compelled to officiate at unions of same-sex couples on the basis of a right to express a moral or conscientious objection.

The civil marriage option is only available to heterosexual couples and since MMOs are appointed in terms of s 3 of the Marriage Act, their mandate is limited to solemnising marriages of opposite-sex couples only. MMOs cannot therefore be approached, or expected, to solemnise same-sex unions. Marriage was a Sunna (tradition or custom) of Prophet Muhammad and the Qur'an encourages marriage to legitimise sexual relations between two people of the opposite sex.[40] Marriage between persons of the same sex is prohibited as homosexuality is deemed forbidden in Islam.[41] In the light of comments in this regard made by the MJC,[42] it is hardly likely that the MJC will ever approve of a gay marriage or of a gay imam as an MMO. The CUA[43] does, however, make provision for ministers of religion to officiate at marriages in accordance with the law and the rites of his or her religion. Although many local gay Muslim men and lesbian Muslim women[44] remain closeted for fear of being ostracised, Cape Town already has an openly gay imam[45] of a gay mosque[46] who is,

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37 Sections 4(1) and (2).

38 See Helen Kruuse 'Conscientious Objection to Performing Same-Sex Marriage in South Africa' (2014) 28(2) *International Journal of Law, Policy and the Family* pp 150–176 at 154.

39 Section 6.

40 See Q.24:32–33; Q.24:33 and Q.24:3.

41 See, for example, Q.7:80–81 and 7/418 (hadith).

42 During a roundtable ulama panel discussion on the role of MMOs, the deputy president of the MJC, Sheikh Riad Fataar, addressed the question of gay marriages as follows: 'the imam would have the right to turn away any couple that he felt uncomfortable with, whether that person was homosexual or other. "All that he is required to do by the Department of Home Affairs is to make a note in a file that he is uncomfortable with this, and this is the reason he is not doing the marriage. That was probably one of the first questions we raised when we spoke to the deputy minister…"' ('Marriage officers vital: MJC' The Voice of the Cape, VOC News 6 May 2014 available at www.vocfm.co.za/index.php/news/local-news/item/12659-marriage-officers-vital-mjc (last accessed 22 May 2014)).

43 Section 5 (1–4).

44 See C Collison 'Queer Muslim women are making salaam with who they are' 10 February 2017 Mail & Guardian available at https://mg.co.za/article/2017-02-10-queer-muslim-women-are-making-salaam-with-who-they-are (accessed 10 April 2017).

45 Muhsin Hendricks is an openly gay Imam and a grandson of an imam. Subsequent to declaring his status he was ostracised and formally requested 'to leave the mosques where he worshipped and worked. He now has a difficult relationship with other imams. They say that he is sinful' (A Okeowo 'South Africa's Gay Imam and His Disciples' available online at http://aliciapatterson.org/stories/south-africa%E2%80%99s-gay-imam-and-his-disciples (accessed 10 April 2017)). For more South African stories in which Muhsin also features, see P Hendricks (ed) *Hijab: Unveiling Queer Muslim Lives* (African Minds, Cape Town, 2009).

46 Muhsin Hendricks is also the imam of Cape Town's first gay mosque. For details see L Chutel 'Mixing religion and politics: A gay mosque in Cape Town sounds the call to prayer for

moreover, in an inter-faith and same-sex marriage with a Hindu man. The rights of lesbian, gay, bisexual and transgendered people are protected in the Constitution.[47] There is nothing that would constitutionally preclude a gay (or a lesbian) imam, wishing to solemnise civil unions for same-sex couples, from applying for approval to become a religious marriage officer in terms of the CUA[48] as long as they are affiliated with a Muslim organisation that is supportive of such status and alternative Islamic law position.

IV OVERVIEW OF MUSLIMS AND THE CURRENT PROGRESS WITH THE RECOGNITION OF MUSLIM MARRIAGES (NIKAHS)

Dutch (followed by British) colonialism brought Islam from Indonesia (and later India) around the 1650s to what is today known as the Western Cape.[49] South Africa has a population of around 54 million with women constituting just over half of the population. Muslims, estimated to constitute close to 2 per cent of the population, remain a small religious minority there.[50] Since their arrival almost four centuries ago, Muslim marriages (nikahs) have remained formally unrecognised and unreformed in terms of South African law. Twenty years ago post-apartheid South Africa became a secular constitutional democracy with a justiciable Bill of Rights. The Constitution guarantees freedom of religion[51] and makes provision for Muslim marriages and/or Muslim personal law to be formally and separately recognised through legislation.[52] Once recognised, Muslim marriages must be consistent[53] with the Constitution's other provisions, like equality.[54] Although these constitutional provisions apply equally to all religious groups whose marriages are not recognised, the most progress as far as a call for recognition is concerned has thus far been made by Muslims. Progress with the MMB in 2010 occurred only after a 2009[55] Constitutional Court application was brought by the Women's

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everyone' 2 November 2016 Quartz Africa available at https://qz.com/824711/a-gay-mosque-in-cape-town-sounds-the-call-to-pray-for-everyone/ (accessed 10 April 2017).

47 The Constitution of the Republic of South Africa 1996.

48 See s 5(4).

49 See S Allie 'A Legal and Historical Excursus of Muslim Personal Law in the Colonial Cape, South Africa, Eighteenth to Twentieth Century' in R Roberts, S Jeppie and E Moosa (eds) *Muslim Family Law Colonial Legacies and Post-Colonial Challenges* (Amsterdam, University of Amsterdam, 2017) pp 63–84 and Moosa *Unveiling the Mind* at pp 143–162.

50 Christianity is followed by an estimated 80% of the population whilst African traditional beliefs, Judaism, Hinduism, Islam and other faiths together accounted for 3.7%. Muslims form the largest of these religious groups (2%) followed closely by Hindus (1.2%). This information and approximations have been gleaned from mid-year population estimates (2014) and data captured in the 2001 South African Census since the latest Census (2011) excludes religious affiliation.

51 Section 15(1).

52 Section 15(3)(a), s 15(3)(a)(i) and s 15(3)(a)(ii).

53 Section 15(3)(b).

54 Section 9.

55 *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2009 (6) SA 94 (CC). For the judgment see http://wlce.co.za/wp-content/uploads/2017/02/MPL-

Legal Centre, a non-governmental organisation (NGO), in which it sought to oblige the current government to speed up the process of recognition.

The judiciary has in a series of MPL related cases since democracy to date acknowledged that non-recognition of Muslim marriages is discriminatory, and this has prompted some legislative changes favourable to Muslim women and children. Unfortunately, these and other secular protections of South African law apply to Muslim marriages on a piecemeal case-by-case basis and litigation is a very expensive option for lay women to pursue.[56] In 2013, the Women's Legal Centre brought yet another problematic Muslim marriage application, namely, *Faro v Bingham*,[57] to the Western Cape High Court. The matter was postponed. However, three astute observations from the case regarding the MJC and the MMB were highlighted as follows:

> '[T]he court verified that the [MJC] "has no statutory or religious authority finally to determine questions as to whether a marriage has been validly concluded or dissolved in accordance with the tenets of Islam" [at para 34] … [T]he court lambasted a government department for not making any progress on the enactment of legislation recognising the validity of Muslim marriages. It ordered the Department of Justice and Constitutional Development to set out the progress it has made in respect of the enactment of the Muslim Marriages Bill … no later than 15 July 2014 [at para 47(c)(ii)] … it is envisaged that the comments of the court regarding the status of the [MJC] will not go down well with the council and the conservative members of the Muslim community who regard themselves bound by its decisions.'[58]

Instead of the government changing the status quo through enactment of the MMB, the deadline set by the Court merely prompted the government, through

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Judgment.pdf (accessed 10 April 2017). Given the obligation and role that other organs of state, such as, the Ministries of Justice and Home Affairs, among others, ought also to play in the enactment of legislation, it was not surprising that the ruling of the Constitutional Court (highest Court) (at paras 21 and 27–28) did not allow the Women's Legal Centre direct access to it, and not only because it is not a court of both 'first and final instance', but because it also found that the matter would be best served by the intervention of other courts. The Constitutional Court judgment therefore does not consider whether Parliament may be under an obligation to enact legislation recognising Muslim marriages. The Women's Legal Centre describes itself as 'a non-profit, independently funded law centre, started by a group of lawyers in Cape Town in 1999, with a vision to achieve equality for women in South Africa … The WLC [Women's Legal Centre] has been at the forefront of legal reform in relation to women's equality in South Africa since the Constitution came into effect, having won several precedent setting cases in the past'. See 'After a 10-year reform process, this week the recognition of Muslim marriages will be heard by the Cape High Court' http://wlce.co.za/wp-content/uploads/2017/02/WLC_Media-Release_Muslim-Marriages_130916.pdf (accessed 10 April 2017).

[56] For an example of one Muslim woman's story, with a case currently before the court, see Tammy Petersen 'Legality of Muslim marriage a religious, human rights issue – divorcee', News24, 24 March 2017. Available at www.news24.com/SouthAfrica/News/legality-of-muslim-marriage-a-religious-human-rights-issue-divorcee-20170324 (accessed 10 April 2017).

[57] *Faro v Bingham NO and Others* ZAWCHC unreported case number 4466/2013) of 25 October 2013 available at www.saflii.org/za/cases/ZAWCHC/ (accessed10 April 2017).

[58] C Rautenbach 'The Modern-day Impact of Cultural and Religious Diversity: "Managing Family Justice in Diverse Societies"' (2014) 17(1) Potchefstroom Electronic Law Journal (PELJ) 521–552 and 536–537.

its Ministry of Home Affairs, put in place the pilot MMO project. The MJC agreed to participate in the pilot project in October 2013. Consultations took place with ulama in KwaZulu-Natal shortly thereafter in November 2013.

The fact that the first graduation of MMOs took place just prior to the national elections held in early May 2014, it has been suggested, may have been expedient and politically motivated given the waning popularity of the ruling majority party, the African National Congress, among Muslims in the Western Cape. Joining forces with the MJC in holding the graduation at that time could appease Muslims sufficiently to garner support for the African National Congress. This much has been theorised by the only registered Muslim community political party to have contested the 2014 elections, namely, the Al Jama-ah party,[59], in a press statement released by it shortly thereafter. The view was also supported by the Islamic Unity Convention.[60] Nonetheless, the Al Jama-ah party leader conceded that the MJC's official stance was neutral and a local political analyst rightly opined that the view of Al Jama-ah attributed too much power to clergy bodies like the MJC and gave their congregants too little credit for being able to make their own choices and decisions.[61] This is borne out by the fact that following the elections, the Al Jama-ah party did not manage to secure a seat in Parliament and the Western Cape province was the only (of nine) province that the African National Congress lost to an opposition party.

Prompted by the fact that the government failed to meet the July 2014 deadline to report on the progress of the MMB, the Women's Legal Centre decided to proceed with the judicial route originally advised by the Constitutional Court in 2009. In March 2015[62] it re-launched its application in the High Court seeking to oblige the government to enact the Bill within a year in a renewed bid to

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[59] ''Organised clergy' derailed us: AJ' The Voice of the Cape, VOC News 13 May 2014 www.vocfm.co.za/index.php/voc/general/item/12720-organised-clergy-derailed-us-aj (last accessed 27 May 2014); 'The MJC's official stance was that you should apply your mind and vote for the party that would best suit you. But individual [clergy] like … who is a very powerful voice in the MJC openly aligned himself with the ANC [African National Congress] and urged his followers to also vote for that party. That put us at a huge disadvantage.' ('MJC tightlipped on Al Jama-ah' The Voice of the Cape, VOC News 13 May 2014 http://www.vocfm.co.za/index.php/news/local-news/item/12727-mjc-tightlipped-on-al-jama-ah (last accessed 27 May 2014)).

[60] 'Opposition to marriage officers' The Voice of the Cape, VOC News 2 May 2014 available at www.vocfm.co.za/index.php/voc/general/item/12629-opposition-to-marriage-officers (last accessed on 27 May 2014).

[61] The analyst opines that 'as strong as the various ulema and religious lobby groups believe their grip on their followers is; those same adherents will still base their decisions on what they believe in…these groups assume that their adherents will follow their edicts to the letter' ('Ulema can't sway vote: analyst' The Voice of the Cape, VOC News 14 May 2014 www.vocfm.co.za/index.php/news/local-news/item/12737-ulema-can%E2%80%99t-sway-vote-analyst (accessed on 27 May 2014)). As indicated in note 59 above, its leader is in the forefront of new developments relating to recognition of religious marriages.

[62] See R Isaacs 'WLC [Women's Legal Centre] turns to courts on Muslim Marriage Bill' The Voice of the Cape, VOC News 3 February 2015 www.vocfm.co.za/wlc-turns-to-courts-on-muslim-marriage-bill/ (accessed 10 April 2017). *Women's Legal Centre Trust v President of the Republic of South Africa* (Case No: 22481/14) [2014] ZAWCHC (17 December 2014). See F

speed up the process of recognition. This application has since been postponed several times. When proceedings eventually resumed in September 2016, it was intimated for the first time during the hearing that the government was in fact in the process of investigating a proposal by Naledi Pandor (the same former Home Affairs Minister who was instrumental in rolling out the MMO pilot project) with regard to another controversial Bill which was drafted 2 years after the 2003 version of the MMB in 2005. The Recognition of Religious Marriages Bill (RRMB),[63] pertains to the uniform recognition of all religious marriages, including Muslim marriages, but which, unlike the 2010 MMB (based on the 2003 MMB), has not yet been approved by Cabinet. Both the draft MMB and the draft RRMB have yet to enter the parliamentary process. The case was postponed to 20 March 2017[64] and yet again postponed to 28 August 2017[65] when it is expected to proceed as a class action (and will include the Faro case).[66]

The surprise development with regard to the RRMB and the introduction of MMOs leads the authors to question whether the MMB will indeed ever materialise. This reservation is supported by the fact that, as will be detailed in Section VI, the number of authorised MMOs has increased to over 200 after two further groups graduated in 2017. One has to question whether the continuation of training signals the need to have a ready supply of MMOs to deal with Muslim marriages in the context of the RRMB (which leaves the regulation of such marriages to religious authorities) rather than the MMB (which also makes provision for the role of Muslim clergy as marriage officers).

Villette 'Muslim marriage dispute lands in court', Cape Times 4 March 2015, available at www.iol.co.za/news/crime-courts/muslim-marriage-dispute-lands-in-court -1827178 (accessed 10 April 2017) p 1.

63 F Schroeder 'Government not delaying marriage law, court told' Cape Argus 15 September 2016. Available at www.iol.co.za/news/crime-courts/government-not-delaying-marriage-law-court-told-2068528 (accessed 10 April 2017). A podcast detailing the very latest developments and some of the proposed revisions to the RRMB can be heard on the following link. 'Muslim marriages are finally recognized in South African Law – Ganief Hendriks' by Salaamedia #np on #SoundCloud https://soundcloud.com/salaamedia/muslim-marriages-are-finally-recognized-in-south-african-law-ganief-hendriks (accessed 8 April 2017). Mr Hendricks is the leader of the Al Jama-ah political party referred to above. Subsequent to the airing of this podcast around 8 April, this information has also been reported in local newspapers on 11 April 2017.

64 F Schroeder 'Muslim marriages case thrown out … for now', The Argus 20 September 2016. Available at www.iol.co.za/news/crime-courts/muslim-marriages-case-thrown-out–for-now-2070418 (accessed 10 April 2017).

65 See T Petersen 'Muslim marriage case to be heard in August' News24 20 March 2017. Available at www.news24.com/SouthAfrica/News/muslim-marriage-case-to-be-heard-in-august-20170320 (accessed 10 April 2017).

66 It was gleaned (on 17 March 2017) from correspondence between the MJC and the Women's Legal Centre, that the Judge President of the Western Cape High Court has ordered that the Faro and the Women's Legal Centre matters be consolidated with another matter (*Esau v Esau & Others* Case No: 13877/2015), in which the Women's Legal Centre is an amicus and which was also set down to be heard in March 2017, in order to be heard jointly.

Click here to go to Main Contents

V RATIONALE FOR THE ALLIANCE BETWEEN THE DHA AND MJC

While the reasons detailed in Section IV may indeed have contributed to the introduction of the pilot project, this section highlights a less well-known practical reason, namely, an issue pertaining to the changing of surnames.

Islam does not require a bride to change her surname to that of her husband when she gets married. On marriage a wife can keep her maiden surname, join her surname with her husband's (double-barrelled surname), or assume her husband's surname as the new spousal surname. It was complaints received by the MJC from Muslim women within the community that the DHA was not accepting the MJC marriage (nikah) certificate for the purposes of changing surnames that apparently initiated the process of appointing MMOs. In the past it was possible to change surnames without cost. Motivating their decision on the basis of curbing fraud, the DHA now requires a woman wishing to change her surname to do so by making an application and paying a fee of approximately 650 ZAR (roughly €60) which many are unable to afford. The MJC raised the matter with the Deputy Minister, Fatima Chohan, who responded by suggesting that the imams be registered as civil marriage officers.[67]

With a civil marriage, the surname the wife has chosen is recorded on the marriage register and the marriage certificate. The DHA will automatically change the women's surname when the marriage is registered. Couples to a civil marriage therefore get an abridged (less detailed version) marriage certificate free of charge on their wedding day. The wife can use this certificate to change her surname with banks, etc. A week or two after the wedding the bride can apply at the DHA for a new identification (ID) book reflecting her new surname.

VI OVERVIEW OF THE TRAINING AND GRADUATION OF MMOS

The first training programme for imams in the Western Cape was co-ordinated by Mr Mowzer (Director in the office of the Deputy Minister of Home Affairs) in close liaison with Sheikh Emandien of the MJC.[68] The training was free and facilitated by the Learning Academy of the DHA. MMOs were provided with a study manual tailor-made to suit their designation.

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[67] See 'Marriage officers vital: MJC' The Voice of the Cape, VOC News 6 May 2014 available at www.vocfm.co.za/index.php/news/local-news/item/12659-marriage-officers-vital-mjc (last accessed 22 May 2014).

[68] This information was gleaned from a letter dated 18 February 2014 which was sent to Emandien by Mowzer and circulated to participating imams.

The training took place at a workshop held over 2 days (26 and 27 February 2014) in a hall at a convenient location. The (then) Minister of Home Affairs, Ms Pandor, delivered the keynote address at the opening. The training covered the principles of the Marriage Act and entailed passing a 2-hour written examination on them.[69] MMOs had to obtain a mark of 70 per cent. While many were able to exceed that requirement, a few imams either failed to write the examination or failed to pass it. Some of the latter rewrote the examination and passed it.

It was a prerequisite that all the imams be South African citizens who were affiliated to bona fide ulama organisations with constitutions. It was suggested by the MJC, therefore, and deemed more practically feasible by the DHA, that imams who did not meet these requirements do so under the umbrella of the MJC and in this way be able to be eligible for the MMO training.

An estimated 227[70] MMOs have to date undergone training in five separate groups (in three of the four provinces where Muslims predominate) and graduated at four different ceremonies. The training has excluded the most conservative Muslim scholars from Port Elizabeth in the Eastern Cape province who have also been instrumental in thwarting the progress of recognition of Muslim marriages until now.[71]

(a) Women as MMOs

Although the first group of graduates were all men, it did not come as a surprise when the first women graduated as MMOs in Gauteng. Many professional Muslim women employed in the civil service are s 2 marriage officers and therefore already officiate at civil marriages. Both the Marriage Act and the 2010 MMB make provision for such a possibility. The Marriage Act clearly includes women within the ambit of its gender neutral definition of a 'marriage officer' as '*any person* who is a marriage officer by virtue of the provisions of this Act'.[72] The MMB provision pertaining to marriage officers is

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[69] In terms of Regulation 3 (of 2009) of the 13th Amendment to the Marriage Act which reads as follows: 'The Director-General may direct that any marriage officer, or any person in respect of whom an application is made in terms of regulation 2, be subjected to an oral or written test, or both, for the purpose of ascertaining whether such marriage officer or person has an adequate knowledge of the Act and these regulations.'

[70] The latest total of 227 was confirmed by Mr Mowzer him in a telecon on 6 April 2017 and were constituted as follows: 106 graduated from the Western Cape; 53 from KwaZulu-Natal; and 68 from Gauteng. Although the first graduation of some 115 MMOs was held at a joint function in the Western Cape, these MMOs underwent separate training in two different provinces (65 in the Western Cape and 50 in KwaZulu-Natal). This was followed by the graduation of two groups in the Gauteng province (34 in 2016 and 30 (including the first three women MMOs) in 2017), and a further group in Cape Town (41 in 2017).

[71] This was confirmed on 26 August 2016 by Sheikh Emandien of the MJC. He confirmed on 3 April 2017 that he knew of no MMOs in Port Elizabeth.

[72] Section 1 (emphasis added).

Click here to go to Main Contents

also framed as gender neutral and provides that marriage officers may include 'any [accredited and qualified] Muslim person'[73] regardless of gender.

As was also the case with its first course, it is evident from a notice circulated by the MJC[74] in October 2016 which invited imams to register for its second MMO course, that it excluded women. This did not, however, preclude women from challenging the status quo. Fatima Seedat, who holds a doctorate in Islamic law, and Farhana Ismail, a pre-marital coach and family mediator, are among the first three women to have graduated as MMOs.[75] These women have officiated at nikahs in South Africa since 2005 and have trained other women to do so.[76] They were not appointed as the agent (wakil) of the prospective bride. To the authors' knowledge, there are no women who are officially appointed as imams of any mosques although they may be committee members of mosque boards.

(b) Ministerial limitations

After the first MMOs received certificates of completion, they received official appointment certificates or 'Notices of Designation as Marriage Officers'[77] from the Minister of Home Affairs. These both limited the period or duration[78] of their designation and listed four further ministerial limitations.

It becomes apparent from a specially crafted training guide issued to these imams that they were in fact made aware of these limitations during their training and it appears that they may have been inserted either at the request of the Muslim clergy or on the advice of the DHA and may therefore even have been welcomed by them. However, it appears that some of the MMOs may have been taken by surprise by the time limit attached to their designation and the implication that, unlike other s 3 marriage officers,[79] they may have to

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73 See cl 1 of the Muslim Marriages Bill.

74 This has been confirmed by the MJC's Sheikh Emandien on 4 November 2016 to the co-author of this chapter.

75 This has been confirmed in a telecom between the main author of this chapter and Ms Ismail held on 1 April 2017. For a picture of Ms Ismail at the graduation ceremony see @HomeAffairsSA'sTweet available at https://twitter.com/HomeAffairsSA/status/832703893754703873?s=08 (accessed 10 April 2017).

76 For detail see F Seedat and F Ismail 'Muslim nuptial contracts – progress at last?' (2014) available at https://mg.co.za/article/2014-05-08-muslim-nuptial-contracts-progress-at-last (accessed 10 April 2017).

77 In terms of s 4 of the Marriage Act which prescribes how the designation as marriage officer is to be made.

78 Those issued to imams in the Western Cape in 2014, limited the period or duration of their designation to 30 April 2020 (terminating exactly 6 years after the date of their graduation on 30 April 2014).

79 On 4 November 2016, an employee of the DHA called the co-author to enquire whether he was still a marriage officer, in order to update their files. When the co-author enquired if the designation of other marriage officers in relation to churches also had expiry dates, he was informed that this was not the case. When he queried this, he was told by the DHA employee to take up the matter with the MJC and the Regional Director of Home Affairs. As a member of the MJC, he will pursue the matter with the MJC.

undergo a re-registration process when their designations comes to an end. In response to the authors' query as to why the accreditation of MMOs is limited in duration, the response from the Office of the Deputy Ministry of Home Affairs was that, given that this was a pilot project, the Department thought it prudent to so limit it. Despite this justification, the limitations may amount to discrimination between imams and marriage officers of other religions.

The first limitation reads as follows:

> '(a) No marriage involving any non-Muslim party shall be solemnised by yourself.'

In terms of this limitation, an MMO is therefore expected to solemnise only marriages of couples who are followers of Islam. MMOs can refuse to perform interfaith marriages unless, of course, the non-Muslim party removes this 'temporary impediment' by converting to Islam before the nikah. An MMO can rely on this ministerial limitation and on s 31[80] of the Marriage Act as motivation that such a marriage does not accord with the tenets of Islam.

However, limitation (a) is problematic for two reasons. First, Islam allows interfaith marriages. Second, given that South Africa is a multi-cultural and multi-religious nation, such marriages already do occur among Muslims of both sexes and therefore this limitation may be open to constitutional challenge.[81]

The Qur'an[82] extols freedom of religion and emphasises non-compulsion as regards religious belief. However, Islam is also deemed to permit interreligious marriages only between Muslim men and non-Muslim, mainly Christian and Jewish (kitabi), women who, because they practise a monotheistic religion, do not have to convert to Islam. Although both parties may be marrying according to the precepts of Islam (nikah), it is inferred from the Qur'an[83] that a bride does not have to be a Muslim as long as she is a believer and not a polytheist.

However, the same privilege does not extend to Muslim women who may marry only Muslim men. Although there is no express provision in the Qur'an prohibiting a Muslim woman from marrying a male kitabi, the majority of Muslim jurists argue that since express permission was given only to men, women must, by implication, be prohibited from doing the same. On this basis,

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[80] Section 31 of the Marriage Act makes it possible for MMOs to refuse to solemnise certain marriages as follows: 'Nothing in this Act contained shall be construed so as to compel a marriage officer who is a minister of religion or a person holding a responsible position in a religious denomination or organization to solemnize a marriage which would not conform to the rites, formularies, tenets, doctrines or discipline of his religious denomination or organization.'

[81] For detail see Moosa *Unveiling the Mind* at pp 32–36 where juristic views of apostasy (or conversion from Islam) in the context of interreligious marriages, including in a South African context, are detailed and where the potential human rights related implications of such marriages are also referred to. Mindful of these implications the MMB, although Clause 1 clearly defines both a 'Muslim' and a 'Muslim marriage' (as a marriage between a man and woman), does not deal directly with interfaith marriages.

[82] See Q.2:256 and Q.18:29.

[83] Q.2:221. See also Q.4:25 and Q.5:5.

a Muslim woman is only allowed to marry another Muslim man.[84] However, there is a saying or tradition of Muhammed (hadith)[85] which supports the view that both parties to the marriage must be Muslim.[86]

The 'Open Mosque', launched in Cape Town on 19 September 2014,[87] held its first interfaith marriage between a Muslim woman and a Christian man without requiring him to convert to Islam.[88] As also indicated in Section III, the imam of the gay mosque is in an inter-faith partnership with a Hindu man. Although the mosque has attracted much criticism and controversy, it is accessible to all, regardless of religion, cultural affiliation, school of law, sexual orientation, or gender. However, the MJC has advised Muslims, in no uncertain terms, not to patronise it.[89]

Should MMOs in the Western Cape not abide by these limitations of their certificates or related rulings of the MJC, their designation may be revoked in terms of ministerial limitation (e).[90]

VII DIFFERENCES BETWEEN THE REQUIREMENTS FOR THE VALIDITY OF MUSLIM AND CIVIL MARRIAGES

In terms of both Islamic and South African law, a marriage must comply with a number of requirements before it can be regarded as valid. Although there may be some overlap between systems, there are also marked variations between them. Legal capacity, consent of parties, presence of witnesses, and dower (mahr)[91] are deemed to constitute the four essential requirements for a Muslim marriage. Although ahadith (plural of hadith) clearly indicate that a woman should consent to her marriage, how her consent is ensured may vary.[92] Depending on the school of Islamic law that she may belong to, her consent alone may also not be sufficient since she may require the presence of her

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84 Q.2:221; Q.60:10.

85 (7/137). This is borne out by the reference to Q.2:221 in another hadith (7/52).

86 See M Abbas *Daughters of the Holy Prophet* (Adam Publishers, New Delhi, 2013) at pp 9 and 15.

87 C Coetzee '"Open Mosque" to launch in Cape Town' Cape Times, 15 September 2014, pp 1 and 4 available at www.iol.co.za/news/south-africa/western-cape/open-mosque-to-launch-in-cape-town-1750826 (accessed 10 April 2017).

88 L Moftah 'South Africa Mosque Holds First Interfaith Marriage: Muslim Woman, Christian Man Marry In Controversial Ceremony' 23/03/15 International Business Times available at www.google.co.za/amp/www.ibtimes.com/south-africa-mosque-holds-first-interfaith-marriage-muslim-woman-christian-man-marry-1855788%3Famp%3D1 (accessed 10 April 2017).

89 F Villette and A Hartley 'Stay away from Open Mosque, urges MJC', Cape Times, 19 September, pp 1 and 4.

90 Limitation (e) reads as follows: 'This designation shall be revoked prior to the date stated in (d) above if you are suspended or expelled from the religious body that nominated you or at the instance of the Minister of Home Affairs in terms of section 9 (1) of the Act.'

91 See Q.4:4, Q.4:24–25, Q.5:5.

92 See ahadith 7/58–59.

guardian (wali)[93] as a contracting party, or his representative (wakil). The presence of a wali would also depend on whether or not it is her first marriage (she could be widowed or divorced). The hadith 'marriage only through a guardian' has to date played an instrumental role in preventing the majority of Muslim women from being active participants in their own marriage. Abiding by this religious rationale and customary practice, their lack of participation is therefore more of a symbolic affront to the brides. However, little mention is made of another hadith in terms of which the Prophet attributed a wider meaning to the role of a guardian with regard to a ward and warned that such role be taken seriously.[94]

A civil marriage may only be solemnised by a marriage officer[95] in the presence of both parties and not by their representatives.[96] Proxy marriages are clearly therefore not permitted in terms of the Marriage Act. Moreover, the civil marriage formula requires parties to hold each other's right hand.[97] This is significant because it implies their presence and actual, as opposed to virtual, consent.

The presence of the wali as a contracting party (or his agent) is deemed by jurists of the Shafi'i school of law to be important for the very validity of the marriage itself. They find the basis for their view in the Sunna (traditions) of Muhammad. However, unlike a Shafi'i bride, in the case of a Hanafi bride who is of marriageable age and who is able to contract herself into marriage, the father is not her wali[98] but may represent her (wakil). A civil marriage requires the presence of the bride, two witnesses and the marriage officer at the wedding ceremony to sign the marriage register.[99] While the presence of two adult Muslim witnesses is also required for a Muslim marriage, they are always two males in terms of the Shafi'i school but may be one male and two females in terms of the Hanafi school based on the Qur'an.[100] In South Africa an existing civil marriage can only be terminated by divorce by the secular courts or death. Parties will need to show a marriage officer proof of termination of a previous civil marriage through a final decree of divorce or the deceased spouse's death

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93 According to Aisha, the wife of the Prophet, he said: 'A marriage is not valid except through the Wali (i e her father or her brother or her relative etc)' (7/52).

94 The Prophet is reported to have said: 'Everyone of you is a guardian and everyone of you is responsible (for his wards) … Beware! All of you are guardians and are responsible (for your wards)' (7/81–82).

95 Section 11(1) of the Marriage Act.

96 Section 29(4) of the Marriage Act.

97 Section 30(1) of the Marriage Act.

98 Jurists of the Hanafi school hold that, based on the Qur'an (2:232) itself, previously married women, young and old, may get married on their own accord, that is, without the approval of (and presence of) a guardian, without it affecting the validity of the marriage.

99 Section 29A(1) of the Marriage Act. Furthermore, any male and female person present at the ceremony may sign the register as a witness, provided they are 16 years of age or older (albeit still a minor in terms of South African law) and able to produce a South African Identity Document, or, for those not resident in South Africa, their passport, as this information is required for the marriage register.

100 See Q.2:282. See also Q.5:109–110 and Q.2:143, although unrelated to marriage, but which nonetheless, encourage the use of witnesses.

certificate. The Marriage Act does not deal with the dissolution of marriages, which is governed by the Divorce Act of 1979.[101] Although judges, when dealing with a secular divorce, have a discretion to request proof of a religious divorce[102] (the MJC will only issue a final decree of divorce if the prescribed waiting period or idda process has been completed),[103] it remains to be seen whether an MMO, in the event that a widowed bride-to-be, who was married in terms of Islamic law and is in the process of completing the prescribed idda of widowhood, but wants to civilly marry another man during this period, may refuse to solemnise such a civil marriage on this basis. Although the authors maintain that an artificial link is being created between two separate (legally unrelated) marriages, if the religious 'idda' is an 'impediment' to the finalisation of the civil divorce, then by the same token it may be possible for an MMO to view the idda of a widow as an impediment to entering into a civil marriage and justify refusal on the basis of the Marriage Act.[104] There are also variations in Islamic law regarding the content of an essential requirement as applied in the Muslim world. For example, while Muslim countries may agree that the legal capacity of parties pertains to their having mental and physical capacity and that they are free of several impediments pertaining to age, gender, existing marital status and religion etc, some Muslim countries have, through MPL reforms, bypassed the Islamic law pertaining to puberty[105] by raising the minimum age of marriage of both males and females to 18 years or above. These minimum ages vary from country to country and in most instances the minimum age for boys is always higher than that for females although in some countries the ages for both sexes are the same. If below the required age, the additional consent of a guardian may be required to make up for the consent. Although 18 is the age of majority and therefore also the legal age for marriage in South Africa, and the proposed age for marriage in terms of the MMB of 2010, both South African and Islamic law allow for earlier child marriages (before the age of 18[106]) with the necessary permission. Minors (below 18) must have parental consent to the marriage.[107] A male under the age of 18, or a female under the age of 15, will need the consent of the Minister of Home

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101 Act 70 of 1979.

102 In terms of s 5A of the Divorce Act, primarily to avoid a scenario of hanging religious marriages or divorces, a secular court judge has a discretion to refuse to grant a civil divorce unless parties produce evidence (for example, a certificate from a credible religious body like the MJC) that a religious divorce (whether initiated by a husband (talaq) or wife (faskh)), has first been obtained. However, it is possible for Muslim couples to contractually regulate a husband's delegation of his right to divorce his wife to her before the marriage, so that ultimately only a final (secular) divorce decree needs to be obtained.

103 A specified amount of time must therefore have elapsed (usually 3 months for a divorcee and 4 months and 10 days for a widow) before they are allowed to re-marry.

104 Section 31 of the Marriage Act.

105 See N Moosa 'Women, gender and child marriage: Sub-Saharan Africa, overview' in S Joseph, A Najmabadi, J Peteet, S Shami, J Siapno and J Smith (eds) *Encyclopedia of Women and Islamic Cultures* Family, Body, Sexuality and Health Vol 3 (Leiden: Brill Academic Publishers, 2006), pp 61–63.

106 Section 28(3) of the Constitution and s 1 of the Children's Act (Act 38 of 2005) define a minor as a person below the age of 18.

107 Section 24(1) of the Marriage Act.

Affairs in addition to parental consent.[108] This discrimination on the basis of sex may be unconstitutional but has not yet been challenged. While it is presumed, given its paramountcy in South African law and its application in many Muslim countries, that such permission ought to be guided by the principle of what is in the 'best interest' of the child, it appears that in South Africa such permission may be sought and granted without having to supply any real reason, including a religious or cultural rationale therefor. In South Africa only age, gender, and existing marital status would be regarded as essential. Religion, for example, will not be an impediment when state-authorised marriage officers solemnise a civil marriage. Unlike the position according to the Shafi'i school, but similar to that adopted by the Hanafi school, in South Africa a minor girl attains the status of majority upon marriage and retains it after the marriage is terminated through death or divorce. The consent of a third party requirement is therefore dispensed with thereafter.[109] The 2010 MMB[110] allows the wali or guardian of a minor to contract a marriage on behalf of that minor. Furthermore, the MMB[111] also allows a Muslim person or body designated by the relevant Minister to authorise a marriage between minors. The Marriage Act prescribes that civil marriages be both heterosexual and monogamous. However, although the Qur'an encourages monogamy for both sexes,[112] it also contains provisions that permit Muslim men to enter into polygynous marriages with up to four wives at any one time.[113] It is also evident from various Qur'anic verses,[114] that polygyny was not intended to be a privilege for all believing men that would continue in the future. A man is mandated to treat all wives equally and if he fears that he will not be able to meet these conditions then he is not allowed to have more than one wife.[115] Since bigamy is a crime in South Africa,[116] it is illegal to re-marry civilly if there is already an existing civil marriage. The DHA will not register a further civil marriage if a person is recorded as 'married' on its system.[117] While nothing would preclude a civilly married man from entering into a further nikah, the courts will not recognise the religious marriage as a valid.[118] Although an MMO cannot solemnise a further civil

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[108] Section 26(1) of the Marriage Act.

[109] Section 24(2) of the Marriage Act. This section (and s 26(1) referred to above)) may be in violation of the equality clause (s 9) of the Constitution. The rationale that the female body may be more developed for childbearing may be true but is nonetheless exploitative and tantamount to denying a girl the further opportunities to develop herself intellectually.

[110] Clause 5(4).

[111] Clause 5(5).

[112] The Quran (24:32) encourages men and women to marry persons who are single (which would include widows/widowers and divorcees). See also Q.4:24.

[113] See Moosa *Unveiling the Mind* at pp 33 and 37.

[114] See Q.33:50; Q.4:3 and 129 and Q.33:4.

[115] Q.4:3.

[116] Bigamy is defined as follows: 'Bigamy consists in unlawfully and intentionally entering into what purports to be a lawful marriage ceremony with one person while being lawfully married to another.' J Burchell *Principles of Criminal Law* (4th edn, Juta, Cape Town, 2013) p 656.

[117] The DHA has an online marriage verification service which allows a person and marriage officers, via SMS or email, to check a man or woman's marital status. See www.home-affairs.gov.za/index.php/marriage-certificates (accessed on 10 April 2017).

[118] See *Ismail v Ismail and Others* [2007] ZAECHC 3 (8 February 2007) available at

marriage for the same man to another woman whilst the man is already civilly married as he would fall foul of the civil law, his dual role as an imam may not necessarily preclude him from performing a further religious marriage between such a civilly married Muslim man and another woman. There is also nothing precluding such a civilly married man from approaching an imam who is not an MMO to solemnise such further (polygynous) Muslim marriages for him. In both cases the husband cannot be guilty of bigamy since the nikah is not recognised as a valid civil marriage. For the same reason nothing would preclude an MMO from solemnising a (first) civil marriage for a man to a woman other than the wife to whom he may already be religiously married only, or, for that matter, inadvertently solemnising a (first) civil marriage of a woman to a man other than a husband to whom she may already be religiously married (tantamount to polyandry which is not allowed in Islam). These are precisely the type of application problems that the provisions of the MMB propose to regulate.

VIII DIFFERENCES BETWEEN THE FORMALITIES FOR THE SOLEMNISATION OF MUSLIM MARRIAGES (NIKAHS) AND CIVIL MARRIAGES

It can be inferred from the primary sources of Islam, the Qur'an and the Sunna, that a Muslim marriage can be both sacramental (religious) and contractual (legal) in nature. While certain Muslim authors may disagree on the extent to which a Muslim marriage, deemed by some to be a contract (civil act) only, may be of a 'sacramental' nature, many agree that Muslim marriages be regulated in terms of Islamic religious law to give their effects a character of sanctity.[119]

www.saflii.org/za/cases/ZAECHC/2007/3.html (accessed 10 April 2017) and *Rose v Rose* (unreported Case No: 14770/2011) [2015] ZAWCHC, judgment delivered on 29 January 2015). In the Ismail case the first and second (first wife) respondents were the parties to a civil marriage. The applicant was the second wife of the first respondent married to him in terms of Islamic law, and the marriage subsequently broke down. The Court upheld the right of a second wife (Islamic marriage) to interdict her husband and his first wife from selling 'her home' in respect of which she had an unregistered 99-year lease although the property legally belonged to her husband and his first wife. However, it was the lease that was upheld, not the polygynous marriage. The *Rose* case was another controversial Muslim personal law case brought to the Western Cape High Court by the Women's Legal Centre. In this case a couple concluded a Muslim marriage after the husband was already civilly married to another party in terms of the Marriage Act. The Court granted the Muslim wife relief which was deemed to be in excess of what she would strictly speaking have been entitled to in terms of Islamic law, and its outcome also contravened South African law since, as correctly pointed out by Heaton and Kruger *South African Family Law* at p 246, the Muslim marriage would be void in terms of South African law.

[119] See J Nasir *The Islamic Law of Personal Status* vol XXIII, Arab and Islamic Laws Series (3rd edn, Kluwer Law International, 2002) at p 45. See also N Moosa 'A comparative study of the South African and Islamic law of succession and matrimonial property with special attention to the implications for the Muslim woman' (1990) (Master thesis dissertation) University of the Western Cape at pp 24–25.

While a Muslim marriage may often be seen as a religious function, Islamic law (Shari'a) does not prescribe any particular form of marriage ceremony.[120]

The more social part of the nikah ceremony has been encouraged by the Prophet Muhammad who is reported to have said: 'make the marriage publicly known, and perform it in mosques, and beat it with duff [type of tambourine]'.[121] The Marriage Act makes provision for a civil marriage to be conducted in various locations, including a mosque, hall or private home.[122] Although the Marriage Act no longer requires that banns of marriage or notices of intention to marry be published or that special marriage licences be obtained. Anyone may still raise objections to a civil marriage, causing the union to be investigated by the marriage officer.[123]

The Qur'an describes a Muslim marriage as a sacred agreement or pledge ('solemn covenant').[124] The Qur'an encourages the practice that commercial contracts and financial arrangements be reduced to writing.[125] Since it also allows the marriage gift or dower (mahr) to be of considerable value,[126] it can be argued that a contract of marriage, although normally deemed to be an oral arrangement, should also be reduced to writing.[127] However, although alluded to in hadith,[128] this has not been required by the Qur'an and therefore it is not surprising that jurists of the Hanafi and Shafi'i schools of law deem a witnessed oral agreement of marriage as sufficient proof of its validity. However, this has not precluded the marriage contract from being formalised in writing and subsequently registered, as is currently the case in many Muslim countries. Reducing the contract to writing would also have greater evidentiary value if witnesses are no longer alive.

While a marriage officer is needed for a civil marriage, since in Islam there is strictly speaking no concept of clergy, the presence of, or officiation by, an imam is not required. While the Qur'an does not prescribe any particular religious ceremony to be followed for the solemnisation of a Muslim marriage, we are guided by the Sunna of the Prophet Muhammad. Although the contract of marriage is usually an oral agreement, it does not require that there be a fixed formula or set of words or even that Arabic (the language of the Qur'an) be used to convey or express the 'offer' ('ijab') of marriage and its 'acceptance' ('qubul') that are necessary for the validity of a Muslim marriage. Any language, including English, may therefore be used. Thus, strictly speaking,

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120 N Moosa 'A comparative study of the South African and Islamic law of succession and matrimonial property with special attention to the implications for the Muslim woman' (1990) at p 25.
121 (7/63).
122 Section 29(2).
123 Section 23.
124 Q.4:21.
125 Q.2:282.
126 Q.2:236.
127 Because it also involves assets, the same argument can be made with regard to bequests. See Q.5:106.
128 (7/57).

Click here to go to Main Contents

because Islam requires very little by way of religious formalities or even that the contract of marriage be in writing, assuming the necessary capacity to do so and compliance with the essential requirements, it is possible, from a purely contractual point of view, for parties to personally and by themselves, or through someone else, legally contract a valid marriage with each other[129] and to do so orally and/or in writing.

Since there is, strictly speaking, no concept of clergy, a Muslim father is also empowered in Islam to marry off his own daughter (and son). However, it is an entrenched practice locally, and therefore customary, for a religiously qualified imam to officiate at the actual marriage ceremony (nikah) in a mosque. There is still much more emphasis on marriage as ritual and sacrament than contract in the Muslim community. The roles of both the imam and the wali are therefore recognised by the community as essential to the nikah ceremony which usually occurs in a mosque.

There is usually a request for marriage made by the prospective groom and acceptance by the prospective bride. However, nothing precludes the request coming from a woman[130] as was the case with the Prophet's marriage (to Khadija). In the case of a Shafi'i bride (whether she is a minor or an adult), her male guardian (wali) (usually her father or brother) indicates, in the presence of the congregation in attendance and the witnesses that he has brought who can confirm the same, that his daughter, who is usually an absentee 'contracting' party (although she may be present if separate facilities are available for women and she does not participate in the actual ceremony) has indicated her wish to be married to the groom and has consented to the marriage and that he as her guardian (and therefore the real contracting 'party') approves of the marriage and has appointed the nominated imam as his wakil (first agent or representative) to conduct the proceedings and perform the nikah ceremony. The imam, duly authorised, then conducts a sermon in Arabic which invariably he translates into English for the benefit of the assembled congregation, the majority of whom, although they may be able to rote read and recite Arabic, do not understand its meaning.[131] Thereafter he conducts the nikah with the formula in Arabic (Hanafis, unlike the Shafi'is, allow any language to be used). The imam conveys the offer (on behalf of the father) to the groom and the groom accepts it in Arabic. The imam asks the groom a question along the following lines: 'do you take so and so to be your lawful wife for such and such a dower', to which he then responds in the affirmative: 'I accept so and so to be

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[129] According to TU Rahman *A Code of Muslim Personal Law* Volume 1 (Hamdard Academy, Pakistan, 1978) p 61 nothing precludes the words of consent from being addressed to each other.

[130] See 7/45 and 7/65.

[131] It was a tradition (Sunna) of the Prophet to deliver a sermon (khutbah) before the actual solemnisation of the nikah during which he imparted advice (naseegha) on the role of marriage and the rights and responsibilities of the parties to it. See (7/63 and 7/67). The nikah is usually followed by a prayer (dua), tantamount to a blessing, asking God to shower his blessing on the marriage and the couple and unite the two of them in goodness. Both his khutbah and dua make reference to the couple. The Prophet also encouraged the groom to hold a wedding feast, known as a walima, after the nikah ceremony (7/74).

my wife for such and such a dower'. The dower or marriage gift (mahr) and its type (prompt or deferred payment) that has been agreed upon, to be provided by the husband to the wife[132] to ensure the validity of the marriage, is confirmed. After the payment of the mahr, there is a closing prayer (dua) or blessing. The Marriage Act makes it possible for an MMO who leads the couple during the solemnisation process to utter a sui generis (but pre-approved) marriage formula[133] and thereafter to bless[134] the marriage with a dua for the couple. The MJC has confirmed that the current[135] nikah formula used by imams to conclude marriages is still not legally recognised.[136] Whether ulama will be able to reach consensus on a national nikah formula remains to be seen. Given that there is no concept of clergy, a nikah does not require the religious benediction of an imam for its legal validity.[137] By solemnising and registering civil marriages, s 3 MMOs are performing administrative functions for the DHA without remuneration and may not demand any fee[138] for doing so. However, the same fee section of the Marriage Act may be used to motivate that there may be nothing precluding MMOs from accepting a fee for blessing the civil marriage since a gratuity (known as a 'slawat'),[139] associated with the granting of such religious benediction, has been a long-standing practice in the case of the purely religious nikahs.

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[132] See Q.4:4 and 4:20.

[133] In terms of s 30(1) of the Marriage Act.

[134] Section 33 of the Marriage Act provides: 'After a marriage has been solemnized by a marriage officer, a minister of religion or a person holding a responsible position in a religious denomination or organization may bless such marriage according to the rites of his religious denomination or organization.'

[135] The following is a literal English translation, from Arabic, of a typical nikah formula used by Shafi'is locally: 'I Am Performing This Marriage In Accordance With The Command Of Allah … Dear [prospective groom] I Am Giving Unto You In Marriage Your … [prospective bride] Daughter Of Mr [father of bride] My Principle For The Dowry Of [amount in ZAR] Cash Of Which Both Of You Have Agreed Upon. The groom will then reply immediately in Arabic in the following manner … I Accepted To Marry Her For Myself And For That Dowry.' Sheikh MA Fakier *Ar-Risaalah Al-Mufeedah A Book on General Islamic Knowledge* (Lansdowne, 1995) p 268.

[136] See 'MJC Muslim Marriage Officers statement' available on the official website of the MJC at www.mjc.org.za/index.php?option=com_content&view=article&id=553:mjc-marriage-officers-statement&catid=15:press-releases&Itemid=13 (last accessed 22 May 2014).

[137] See N Moosa 'A comparative study of the South African and Islamic law of succession and matrimonial property with special attention to the implications for the Muslim woman' (1990) at p 25 n 12.

[138] Section 32 of the Marriage Act dealing with fees payable to marriage officers states clearly: '(1) No marriage officer may demand or receive any fee, gift or reward, for or by reason of anything done by him as marriage officer in terms of this Act: Provided that a minister of religion or a person holding a responsible position in a religious denomination or organization may, for or by reason of any such thing done by him, receive (a) such fees or payments as were immediately prior to the commencement of this Act ordinarily paid to any such minister of religion or person in terms of the rules and regulations of his religious denomination or organization, for or by reason of any such thing done by him in terms of a prior law; or (b) such fee as may be prescribed.'

[139] 'Slawat' is 'a colloquial term referring to a small stipend paid to an Imam for services he renders to members of his congregation' (F Gamieldien *The History of the Claremont Main Road Mosque, its People and their Contribution to Islam in South Africa* (Claremont: Claremont Main Road Mosque, 2004) at p 132). The sum of money paid to an imam usually varies according the means of whoever of the bridal party (bride or groom) or his or her family

Click here to go to Main Contents

The Hanafi bride who is a minor is also given into marriage by her guardian (wali) who is usually her father. Although a Hanafi bride of marriageable age is able to contract herself into marriage, because she is also traditionally an absentee contracting party, her father or someone appointed by her usually assumes the role of her wakil (first agent) and he in turn delegates the task to the imam who becomes the second agent in the process. While both Hanafi and Shafi'i grooms who are minors[140] will also be contracted into marriage through a wali (guardian), they will be present at the nikah.[141]

As the process currently stands, in the case of Shafi'is, the bridegroom technically 'concludes' the contract with the legal guardian (wali) of the bride, and in the case of Hanafis, even though the guardian's consent does not substitute for the bride's consent, the bridegroom concludes the contract with the imam! Nonetheless, the permission (consent) of the guardian is deemed commendable and honours the parent (or relative) who was responsible for the upbringing and best interests of the bride up to that point. While respect for and the blessing of parents are highly valued, this does not imply the substitution of the bride's own consent and participation without both of which the marriage is void. Both parties to the marriage must freely consent to the marriage. Forced marriages are not permitted in Islam.

IX DIFFERENCES BETWEEN THE PROPRIETARY CONSEQUENCES (EFFECTS) OF MUSLIM AND CIVIL MARRIAGES

Muslim women are regularly reminded of their marital obligations, and while there is little contention among Muslims that Islam affords women many rights upon marriage, many women are unaware of the fact that they may, at the time of marriage (when they have the maximum bargaining power) contractually safeguard, either orally or by way of express stipulation in the marriage contract itself, many of these rights. Unfortunately, many women often first become aware of these rights only when it is too late to do anything about the contract. This is usually at the time when the marriage has broken down or has terminated through death or divorce and when they then seek, and are most in need of, relief and recourse.

(usually parents), where they are still very young, who 'employs' his services and may therefore, in some cases, also be quite high. There is currently no specific legislation which regulates religions in South Africa and cases of abuse of religion through, for example, the soliciting of payments for weddings and prayers.

[140] While it may be deemed not to be necessary at the time of marriage, the parties must have reached marriageable age (puberty) at its consummation (7/57). The permissibility of giving one's young children in marriage on the basis of this hadith remains a controversial issue. Various scholars question the authenticity of this hadith. For detail on a minor's legal capacity and awareness of being able to rescind a marriage on reaching puberty in terms of Islamic law see J Nasir 'The Status of Women under Islamic Law and Modern Islamic Legislation' in Vol I: Arab and Islamic Laws Series (3rd edn, Brill NV, 2009) at p 32.

[141] Nasir 'The Status of Women under Islamic Law and Modern Islamic Legislation' at p 32.

In South Africa a nikah contract is typically little more than a one-page certificate. While it contains details of the dower and the type (prompt or deferred) of dower that the husband is obligated to provide, it seldom includes other permissible written provisions or stipulations[142] which may give effect to a woman's personal and financial rights in marriage. This is not surprising because little attention is given to the marriage contract by imams.

Muslim marriages, because they are based on consensus and give rise to obligations, are referred to as contracts. In South Africa, civil marriages are for the same, though secular, reasons also referred to as contracts although such a description has been deemed undesirable.[143] In the case of both types of marriages, proprietary consequences may be contractually regulated, although failing to do so prior to the marriage will have different (opposite) default proprietary consequences.

The Marriage Act does not deal with matrimonial property regimes and the financial consequences of civil marriages. These are governed by the Matrimonial Property Act of 1984.[144] In terms of the Matrimonial Property Act there are three marital property regimes which can apply to a civil marriage in South Africa. First, a couple will be married in community of property by default if they do not sign an antenuptial contract before the marriage. In so doing, their combined assets and liabilities are merged into one estate, in respect of which each spouse has an undivided half-share. Secondly, by executing an antenuptial contract before a notary public, spouses may exclude community of property so that each spouse maintains a separate estate with separate assets and liabilities. In order to be effective against third parties, the antenuptial contract must also be registered in a deeds registry. The antenuptial contract can also include specific provisions with regard to how the property must be handled and distributed after death or divorce. As regards marriages contracted with an antenuptial contract since the passing of the Matrimonial Property Act in 1984, s 2 of the Matrimonial Property Act provides that the accrual system will automatically apply to the marriage unless it is specifically excluded in the antenuptial contract. Under the accrual system, the spouses' property remains separate during the marriage, but at the time of death or divorce their estates will be adjusted so that the difference in accrual (the increase of the net value of the estate from the marriage's commencement to its dissolution with the exclusion of inheritances, legacies and donations) between their two estates is divided equally.

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[142] (7/66). Examples of such stipulations would include the right to work outside of the home; to further her studies; and to divorce her husband in certain specific circumstances (eg his entering into a further (polygynous) marriage). A prospective bride cannot stipulate, as a condition in her Muslim marriage contract, that her husband remain monogamous. She may, however, stipulate that she be entitled to divorce him should he take a further wife; or in the event of him divorcing her, to receive the payment of a lump sum of money from him (besides any outstanding dower) etc.

[143] See Heaton and Kruger *South African Family Law* at p 15.

[144] Act 88 of 1984.

Because of the community of property default, the DHA therefore does not require the existence of a marriage contract to be recorded. Such a community of property default system will not only result in better protection for Muslim women, but will cost them literally nothing!

MMOs are expected to advise couples of the various options to enable them to make appropriate choices, and refer them to an attorney for the drafting of marriage contracts. Enclosed with his letter (dated 18 February 2014) sent to Emandien (of the MJC), Mowzer (from the DHA) included several sample marriage contracts, with their drafters duly acknowledged on the documents. These were later posted on the website of the MJCs mother body, the UUCSA.[145] The UUCSA had available on its website four sample marriage contracts, all of which include marriage conditions incorporated into the antenuptial contract, rather than regulating them through two separate documents. In August 2014, the MJC had a meeting with notaries public and a follow-up meeting with MMOs. At the meeting with the notaries, a list of attorneys who agreed to charge a flat rate of ZAR 650 for a standard antenuptial contract minus the accrual for a period of one year, was drawn up. This was much less than the cost of an antenuptial contract (ordinarily in the range of ZAR 1,500).

Given that the default position of a Muslim marriage, as it is traditionally understood, is one that is not a community of property or accrual, it appears that MMOs may 'technically insist' that parties draw up antenuptial contracts without accrual to bring them in alignment with Islamic law (Shari'a) before they will solemnise a civil marriage; failing which, they can refuse to officiate. This can be gleaned from the following statement by the MJC:

> 'It is of utmost importance that the couple signs an Ante-Nuptial Contract (ANC) as approved by a religious authority before having their marriage solemnised by a Marriage Officer. The role of the Marriage Officers would then be to solemnise the marriage in terms of the Marriage Act of 1961 after the Nikah. The contract must be signed before a notary public.'[146]

MMOs reserve the right to refuse to conduct the civil ceremony if their advice on the proprietary consequences is not heeded by couples, and to do so by relying on the Marriage Act[147] itself! Yet, many imams also have no qualms about, and are quite happy to continue with their current practice of, conducting nikah ceremonies and issuing one-page certificates without requiring the parties to conclude any formal marriage contract.

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[145] See www.uucsa.org.za/ (last accessed 7 June 2014).

[146] 'MJC Muslim Marriage Officers statement' available on the official website of the MJC at www.mjc.org.za/index.php?option=com_content&view=article&id=553:mjc-marriage-officers-statement&catid=15:press-releases&Itemid=13 (last accessed 22 May 2014). See also 'Marriage officers vital: MJC' The Voice of the Cape, VOC News 6 May 2014 available at www.vocfm.co.za/index.php/news/local-news/item/12659-marriage-officers-vital-mjc (last accessed 22 May 2014).

[147] Section 31.

However, entering into an unrecognised Muslim marriage in South Africa has far-reaching material implications for many Muslim women. For example, in *Ryland v Edros*,[148] an early post-democracy case dealing with a Muslim divorce, the Court acknowledged the contractual nature of the Muslim marriage and treated the marriage as a contract which could be enforced between the parties. Given the default nature (separate property minus accrual) of such a marriage, the court found that the wife was not entitled to a share in the growth of her husband's estate. We contend that the antenuptial contract (with accrual) may be the better option for young couples entering a marriage, who have an occupation and are both independently employed. Ultimately, the antenuptial contract (minus accrual) option may not be the best one for the majority of Muslim women already in long-existing marriages, who are mainly homemakers.

The MMB[149] provides that the default matrimonial property system of an Islamic marriage is complete separation of property (that is, marriage out of community of property without the accrual system), unless the parties have mutually and expressly regulated otherwise in an antenuptial contract. In Islam, an antenuptial contract that provides for the accrual system is allowed and valid.[150] A marriage in community of property is also possible.[151] The authors contend that, especially given different Islamic law views in this regard, not only should parties have the freedom to choose their own marital regime but that they should be allowed to adapt their contract of choice to suit their own particular circumstances and the different ways that each partner is expected to contribute to the accumulation of wealth during the course of the marriage.

Statements like the following by the Deputy Minister of Home Affairs (Chohan) support our contention:

> 'What we are offering is the opportunity for people to be able to regulate the consequences of their marriage through an Islamic contract based on Shariah law *or their understanding of Shariah law through one or other form* … and have this contract govern the consequences of such a marriage in the sad event of a death or divorce.'[152]

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148 1997 (2) SA 690 (C).

149 Clause 8(1).

150 AK Toffar *Administration of Islamic Law of Marriage and Divorce in South Africa* (1993) Masters of Arts thesis, University of Durban-Westville at p 261.

151 N Moosa 'A comparative study of the South African and Islamic law of succession and matrimonial property with special attention to the implications for the Muslim woman' (1990) at p 73.

152 Emphasis added. See 'Education needed on marriage officers', The Voice of the Cape, VOC News 24 June 2014 available at www.vocfm.co.za/education-needed-on-marriage-officers/ (accessed 10 April 2017).

Click here to go to Main Contents

X INTEGRATED MUSLIM AND CIVIL MARRIAGE CEREMONIES WITH WOMEN AS ACTIVE PARTICIPANTS: A VIABLE FUTURE OPTION?

It appears that all imams, regardless of liberal or conservative leanings, believe that the marriages will take the form of two separate ceremonies, with the nikah always preceding the civil ceremony. The former is valid in the eyes of God and the latter in terms of the law of the state. Doing so in this order will ensure that the legal requirements of the Marriage Act can easily be met. However, the idea behind having large numbers of readily accessible MMOs was to streamline the process for Muslims and to make it convenient for them to be able to enter into a civil marriage. It is unfortunate that, if there is a delay in entering into a civil marriage after a nikah and consummation of the marriage, husbands may change their minds and it may be difficult for wives to persuade them otherwise. Many husbands will deem getting married in terms of God's law as sufficient and more important than getting married in terms of South African law, and this may also be a convenient way for them to avert any legal responsibility for their wives and children. This makes a valid case for such ceremonies to be integrated, as explained below.

As indicated in Section VIII, it is the norm in the Western Cape, and probably also elsewhere in South Africa, for the actual solemnisation of the marriage (nikah) to occur in a mosque. In cases where the bride and female guests may also be present in a mosque during the nikah, they are usually seated separately from the groom and male guests and merely have spectator status. In some cases the nikah and celebratory reception may conveniently be held at the same venue with a separation occurring between the bride and female guests and the groom and male guests during the nikah, often using a makeshift screen, although the bride and female guests may hear the procedure taking place. However, in exceptional cases, forward-thinking imams are also officiating at the nikah in the presence of both the groom and the bride and with her active participation, as has been the case at a local mosque in Cape Town.[153] This mosque has been precedent setting in allowing mixed-gender congregations, women in mosque governance, and delivery of pre-prayer (khutbah) Friday sermons since 1994.[154] One such sermon concerned a young married woman, then aged 26, giving an account of how she wished her marriage ceremony (nikah) to be: to include her as an active participant rather than merely a spectator, attended by close female friends and family; and that this was in fact made possible by this mosque with the blessing of family and friends.[155]

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[153] The imam of the Claremont Main Road Mosque, Dr Rashied Omar, believes MMOs to be a positive development since they 'will be able to solemnize marriages according to Islamic rites as well as an agreed upon marriage contract that conforms to South African Law'. See his comments in 'Opposition to marriage officers' The Voice of the Cape, VOC News 2 May 2014 available at www.vocfm.co.za/index.php/news/local-news/item/12629-opposition-to-marriage-officers (last accessed 26 May 2014).

[154] See also N Moosa *Unveiling the Mind* at p 100 and its n 66 for more information regarding the CMRM and at pp 47 and 51 regarding the role of women as imams.

[155] In discussing the tradition of the marriage ceremony itself she had the following to say: 'Having

However, it becomes evident from a video clip of her nikah that although she was present in the mosque when her husband made the offer of marriage to her and she accepted, that the exchange was done with a screen between them. Her father, who still acted as her wali, then continued to play his role in the actual ceremony as per the Shafi'i tradition. However, as far as the wali is concerned, there is nothing precluding a Shafi'i woman who has reached puberty to, through the practice of talfiq,[156] temporarily adopt the Hanafi madhhab (doctrinal teachings) and contract herself into marriage. This appears to already be the case in some instances in Malaysia.[157] Given local custom, the bride will more than likely be doing so in the presence of her guardian and with his consent so that he will still, figuratively speaking, be giving her 'hand' in marriage to the groom.

Based on the practice or Sunna of Prophet Muhammad, there is nothing prohibiting a woman from being present in a mosque and by implication being able to participate in her own marriage. In early Islam, women would visit the Prophet's mosque not only to perform (congregational) prayers but also to acquire knowledge through being taught by him.[158] It is therefore not surprising that there are authentic ahadith (by Imams Abu Dawud and Bukhari) to this effect that precluded even the ultra-strict Umar (successor-companion) of the Prophet from denying his own wife this privilege.[159] Commenting on the

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attended a couple of Nikahs I was disheartened by the lack of female involvement in the proceedings. Ahadith describe the ceremony as a simple process. In South Africa, we have a reception in the Western sense and adopt an austere division of genders at the Nikah. I was gutted that it would be expected of me to be content to do my hair and make-up at home, while the formal pronouncement happened at the mosque. To me, this was a systematically discriminatory interpretation of a historical tradition. We wanted to have a ceremony which would include us both and start our marriage the way we planned to continue … both families and friends … supported our ideals. We took active steps to encourage women to attend our nikah and the turnout was amazing. We got the most amazing feedback where people, who we feared would be shocked by having an inclusive ceremony, commented that it was the best Nikah they had ever attended … I want to urge everybody contemplating marriage to make sure that your expectations are covered in a personalised marital contract.' See 'A personal account of marriage and the marriage ceremony ("Nikah")', Pre-Khutbah Talk by Khadeeja Bassier held on 22 November 2013 at CMRM which is available at www.cmrm.co.za/index.php/weekly/2013/pre-khutbah-talk-by-khadeeja-bassier-22-november-2013.html (last accessed 27 May 2014). For further detail on the cultural aspects of a local Muslim marriage see B Elion and M Strieman *Clued up on Culture. A Practical Guide for all South Africans* (Juta: South Africa, 2006) pp 114–116.

156 The practice of talfiq makes it possible for Muslims to, for the sake of practical convenience, change from the school of law that they usually subscribe to one of the other four schools of law without intending that the change be permanent. When doing so there is no formal 'process' to follow.

157 See Nasir 'The Status of Women under Islamic Law and Modern Islamic Legislation' at p 50.

158 The following are two such examples: 'The people used to offer the Salat (prayer) with the Prophet … and the women were ordered not to lift their heads till the men had sat straight' (2/182). It appears from this hadith that women were placed at the back of the mosque and that the men congregated in the front: '[T]he wife of … said, 'I was in the mosque and saw the Prophet … saying, "0 women! Give alms even from your ornaments" (2/317).

159 See SHH Nadvi 'Foreword' in A Davids *Mosques of Bo-Kaap: A social history of Islam at the Cape* (Cape Town: The South African Institute of Arabic and Islamic Research, 1980) at pp xxxviii–xxxix.

local relevance to mosques in Cape Town, of the recommendations of a Mecca Mosque Conference held in 1975, it was highlighted in 1980 already that not only should mosques 'be regarded as the cultural, social and educational centres of the community [but that] … [d]eserved attention should be paid to the womenfolk and the youth in the mosque'.[160] Significantly, the first (and still functional) mosque in Cape Town was not only constructed in 1795 during a socio-political period of slavery, prejudice and lack of religious freedom, but was built on land donated by a Muslim woman, Saartjie van de Kaap (slave name).[161] Through conducting nikahs in their mosques with the participation of women and in their presence, the imams of Cape Town can continue to uphold the legacy of Saartjie and their role as forerunners on the MPL front. Given the precedent already set by some progressive imams in various mosques, this should not be too difficult to achieve.

XI CONCLUSION

An openly gay imam, an open mosque, female MMOs, and interfaith marriages – all these actions courted and survived controversy in South Africa and may yet survive constitutional challenge. Although the MJC may appear not to be supportive of women as MMOs, its own constitution has been amended to include women as members. The Marriage Act may not reflect the rich diversity that makes up the South African populace, but it allows all South Africans, of various faiths, the freedom to elect to be governed by its provisions.

Civil and Muslim marriage options are available to opposite-sex couples only. Although Islam is deemed to prohibit same-sex marriages, a further marriage option in South Africa permits it, and it does occur among local Muslims. Although a civil marriage is a protective tool that not only promotes monogamy but also ought to ensure it, because an unrecognised Muslim marriage does not preclude polygyny, there is no guarantee for a Muslim woman entering into a civil marriage that her husband will not thereafter enter into further religious marriages. Although the proposed MMB is silent on interfaith marriages and the ministerial limitations on the role of MMOs may prevent them from officiating at such marriages, Islam permits them and they do occur among locals.

The DHA regards the introduction of MMOs as the realisation of one of its 'greatest goals'.[162] This chapter has unpacked several factors that may have prompted the DHA, as a supportive arm of government, to initiate this pilot project. Although there had been little prior public awareness of this training, the graduation of MMOs was widely publicised with much fanfare in the local

[160] Ibid, xlii.

[161] See A Davids, *Mosques of Bo-Kaap: A social history of Islam at the Cape* (Cape Town: The South African Institute of Arabic and Islamic Research, 1980) at p 5.

[162] See newspaper article by K Legg 'Historic day for Muslim marriages' Cape Argus, 30 April 2014 p 3, available at www.iol.co.za/news/south-africa/western-cape/historic-day-for-muslim-marriages-1.1681947#.U2PXmYGSySo (last accessed 10 April 2017).

media, and the accreditation of MMOs has been largely welcomed by local Muslims as a positive step. It was therefore unfortunate that the confusion and misinformation in the wide array of news reports and radio interviews was fuelled by both the MJC and the DHA since this led many to mistakenly conclude that this was not only a preparatory step in the direction of legal recognition of Muslim marriages, but that it had in fact replaced the very need for such recognition.

Although the provisions of the Marriage Act make allowances for ministers of religion to tailor a civil marriage's solemnisation (through a different formula and blessing) to allow for a religious connotation, as yet there is no approved Islamic formula attached to it and a blessing is optional. This chapter has highlighted that MMOs are now able to wear two hats to perform separate religious and civil marriages in South Africa. It has clarified some of the confusion which followed the graduation of MMOs, especially the misconception surrounding the respectively different legal statuses of religious Muslim marriages (nikahs) solemnised by imams and the civil marriages that would now be solemnised and registered by them. Muslim couples currently enter into nikah and civil marriages as two different marriages on two different occasions. Nikah ceremonies in South Africa are more focused on ritual and an entrenched understanding of marriage as being more sacrament and less contract. It may be difficult to get imams and Muslim couples to move away from such understanding, but it is not impossible. It is contended that the purpose of having a large number of MMOs (who are able to perform both marriages) accessible ought ultimately to have also been to streamline the process for couples. It would therefore be less cumbersome for couples to enter into nikahs and valid civil marriages with relative ease if these ceremonies could take place on one occasion with the nikah still preceding the civil ceremony. This will provide women with more assurance that a civil marriage will occur and the legal security that it may offer. Although there is no link between the two marriages, integrating the marriage ceremonies may justify both a secular judicial requirement that courts be provided with proof of a religious divorce in order to finalise a civil divorce, or even dispense with such requirement in the case where the right to divorce has been contractually delegated to the wife. The fact that Muslims are now encouraged to contractually regulate the consequences of their civil marriage so as to conform to Islamic law, should also be welcomed, but should not be restricted because the 'conditional' civil marriage that is envisaged provides women with little extra protection.

Although many verses of the Qur'an, which were referred to in this chapter, provide theoretical guidance on what a marriage may or may not entail, some of them are equivocal and do not prescribe a clear structure as to how a nikah should take place. Muslims therefore turn for practical guidance to the Sunna of the Prophet, which were collected and written down after he died. However, two of these ahadith, for example, that relate to the age of marriage of a minor and that marriage occurs through a guardian (wali), are controversial. The possibility of fabrication, even of authentic (sahih) hadith, and the fact that the recorded collections of ahadith are based purely on narrations (which means

that their (con)text and actual content are usually beyond scrutiny and challenge), also make them the subject of much criticism.[163] Although the Sunna by their very definition are 'recommended' practices of the Prophet, and by his own admission certainly not obligatory or compulsory especially if the divine Qur'an expressly dictates or intimates otherwise, many local Muslims will be loath to deviate from them. Similarly, jurists of the four main schools of Islamic law have indicated that in cases of conflict between their human interpretations of both primary sources, the latter should always be given precedence.[164]

With a large number of MMOs being easily accessible, a unique opportunity presents itself for Muslims in the Western Cape to tap into the knowledge of these ulama to inform themselves of the well-established practice in the rest of the Muslim world of prospective couples negotiating formal written marriage contracts (rather than merely verbal marriage contracts or one page certificates). Young bridal couples should be encouraged and supported to draft such contracts and to hold the nikah, which, after all, is the actual marriage, in ways that will allow the bride to be both present and actively participating. While it may be customary and acceptable for the majority of Muslim women to remain 'veiled' in the presence of men, or absent from their own marriages, a new younger generation of women, who want to do things differently and participate in the process, is already beginning to change the set perception around marriage in the community. Ultimately, South African Muslims should be better able to regulate their family life on the basis of Islamic principles and to do so within the official civil marriage laws of South Africa. As the deputy Minister of Home Affairs, Chohan, has emphasised, the DHA has 'no specific interest in the details of the marriage contract'.[165]

The pilot MMO project is certainly 'a good story for the country's 20 years of democracy', as a statement released by the DHA[166] has highlighted. However, it is 18 years since the process of recognition of Muslim marriages started in 1999, yet recognition continues to remain a legislative challenge, and judicial challenges therefore persist. Since there is no guarantee that Muslims, including especially older MMOs themselves who have thus far mainly entered into nikahs only, will opt for the civil option, the parallel process of recognition should remain on the legislative agenda because Muslim women and children in these marriages will ultimately be able to derive some benefit from it. However, it appears that the government may no longer remain willing to recognise Muslim marriages in terms of the MMB but may still be willing to do so along

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163 See N Moosa *Unveiling the Mind* at pp 28 and 66–67.

164 See N Moosa *Unveiling the Mind* at pp 26–27.

165 Y Richards 'Chohan speaks about implications of *imams* as Muslim marriage officers' July 2014 *Muslim Views* 28(7) at 17.

166 Emphasis added. See full statement at www.home-affairs.gov.za/index.php/statements-speeches/456-deputy-president-kgalema-motlanthe-to-speak-at-the-graduation-ceremony-of-the-imams-in-cape-town-30-april-2014-at-10h00 (accessed on 10 April 2017).

with all other religious marriages in terms of the RRMB. Either way, as the Judge in the *Faro* case commented, 'the nettle will need to be grasped sooner or later'.[167]

[167] At para 43.

Click here to go to Main Contents

UNITED STATES

DEVELOPMENTS IN FAMILY LAW IN THE USA IN 2016

*Lynn D Wardle**

Résumé

L'évolution du droit de la famille aux Etats-Unis d'Amérique en 2016 a montré des défaillances quant à l'élaboration d'un cadre légal adéquat pour les relations familiales (1), mais également quant à la rupture des relations familiales traditionnelles (2), et enfin quant aux différends découlant de la rupture des relations « quasi-familiales non traditionnelles », les relations homosexuelles étant inclues dans cette catégorie (3). Cette chronique commence avec trois décisions de la Cour suprême des Etats-Unis relatives au droit de la famille – deux concernent la loi sur l'avortement et une est relative à la confiance et à l'autorité dues à des décrets relatifs à l'adoption pris par un Etat et qui n'ont pas pu être pris en compte dans un autre Etat dans lequel la reconnaissance est demandée. Puis, la jurisprudence des Etats est présentée dans une perspective avant-pendant-après pour les deux principales catégories de relations familiales : la conjugalité et la parenté. Cette chronique de la jurisprudence de 2016 souligne les raisons pour lesquelles les relations familiales traditionnelles formelles ont été favorisées par la loi ; *i.e.*, parce que généralement elles sont plus stables et bénéfiques.

Family law developments in the United States of America in 2016 involved (1) the failure to properly form legal family relations, (2) the breakdown of traditional family relations and (3) disputes arising out of the failure of non-traditional quasi-family relationships including same-sex relationships. This review starts with three family law decisions of the Supreme Court of the United States – two involving abortion regulations and one concerning full faith and credit due to sister-state adoption decrees which could not have been entered in the state in which recognition is sought. Then the 2016 state cases are presented in a 'before-during-after' sequence of the two main categories of family relations: spousal (and quasi-spousal), and parental (and quasi-parental) relationships. This review of 2016 cases underscores why formal traditional family relations have been favoured in the law, ie because generally they are the most stable and beneficial.

This chapter reviews some of the significant developments in American jurisdictions in 2016 that involved and elaborated principles and rules of family

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Click here to go to Main Contents

law. At the outset, it is important to remember that the authority to govern by enacting, interpreting and enforcing laws is divided in the United States of America between the national (federal) government and the state and territorial governments. There are 57 different American permanent jurisdictions each with its own government: the federal nation, the 50 states, the District of Columbia, and five permanent territories (Puerto Rico, Guam, Northern Mariana Islands, Virgin Islands and American Samoa). However, the federal government lacks constitutional authority to regulate many family relations directly, though it often does so *indirectly* through financial incentives and sometimes *directly*, as with parental abductions, through criminal penalties. This review begins with three noteworthy family law decisions of the Supreme Court of the United States. Then this chapter examines developments regarding spousal (or quasi-spousal) and parental (or quasi-parental) relationships organised in a 'before-during-after' sequence concerning the regulation of the creation of, ongoing, and the dissolution of and post-dissolution aspects of such family relations.

The theme that emerges from this review of 2016 family law developments in the USA is the instability of non-traditional relationships. That illustrates that one of the reasons why family laws generally still favour traditional marital and marital-family relations.

I SUPREME COURT RULINGS

In 2016 the Supreme Court of the United States decided three family law cases. *Whole Woman's Health v Hellerstedt*,[1] invalidated a 2013 Texas law regulating abortion. The abortion law was enacted in response to the scandal surrounding the conviction of Dr Kermit Gosnell, the operator of a filthy 'house of horror' abortion clinic in Philadelphia, Pennsylvania, who was sentenced 'to life in prison without parole for the murder of a baby born alive in a botched abortion, who prosecutors said would have survived if the doctor had not "snipped" its neck with scissors'.[2] That scandal led many states to enact more stringent restrictions of abortions and abortion clinics. One of the new abortion provisions enacted in Texas required that all physicians performing an abortion in the state have admitting privileges at a hospital within 30 miles of the place where the abortion was performed, and another required that all abortion clinics comply with the rules and regulations applicable to ordinary ambulatory

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1 579 US ___, (2016).

2 Jon Hurdle 'Doctor Starts His Life Term in Grisly Abortion Clinic Case', *NY Times*, 15 May 2013, at www.nytimes.com/2013/05/16/us/kermit-gosnell-abortion-doctor-gets-life-term.html (seen 24 March 2016). 'Dr. Gosnell was also sentenced to a total of 30 to 60 years on two charges of conspiring to kill two of the babies and on one charge of violating the corrupt organizations act … [for] ordering subordinates to commit crimes. And he was sentenced to two and a half to five years on involuntary manslaughter in the case of Karnamaya Mongar, a woman who died after being given too much anesthetic in Dr. Gosnell's West Philadelphia abortion clinic.' Id.

surgical centres. A federal district court had enjoined enforcement of both Texas provisions, but the Fifth Circuit found them to be constitutionally valid.

Hellerstedt was the first major abortion case to come before the Court in nearly a decade. Some commentators considered *Hellerstedt* to be potentially the most important abortion case in a quarter-century with the possibility of significantly reforming the *Roe v Wade* abortion doctrine.[3] In the end, however, it was just 'more of the same' as the Court invalidated the abortion restrictions – as it has routinely done since its 1973 landmark ruling in *Roe v Wade*.[4] Standing alone, the two Texas medical regulations seemed unremarkable and reasonable; but because they dealt with abortion they were very stringently reviewed and found by the Supreme Court to intrude unduly upon a woman's access to abortion. By a vote of 5-3, the eight-member Court (lacking a ninth justice due to the death of Justice Antonin Scalia) summarily held that 'both the admitting privileges and surgical center requirements place a substantial obstacle in the path of women seeking a previability abortion, constitute an undue burden on abortion access, and thus violate the Constitution'.[5] So, once again, in American abortion law, *plus ça change, plus c'est la même chose*!

Another 2016 Supreme Court family law decision, *Zubik v Burwell*,[6] was really a 'non-decision'. In *Zubik*, a provision of President Obama's signature health law, the Patient Protection and Affordable Care Act (known as the ACA or 'Obamacare') had been interpreted by the responsible federal agency as requiring employers to provide their employees with insurance coverage for 20 specific contraceptives, including birth control pills or the morning-after pill that some religions object to as sinful.[7] Some opponents claimed some of the drugs also functioned as abortifacients. Some private companies owned and/or operated by conservative persons and organisations of faith (including Evangelicals and the Little Sisters of the Poor), objected to being required to provide insurance coverage for such items on moral/religious grounds. In 2014, the Supreme Court held (by 5-4 vote) in *Burwell v Hobby Lobby*,[8] that the 'contraceptive mandate' of the ACA was unconstitutional as applied to persons of faith (including closely held corporations) who objected on moral grounds to providing such material, because there were less-restrictive means available for

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3 See Emma Green and Matt Ford 'A New Supreme Court Challenge: The Erosion of Abortion Access in Texas', *The Atlantic*, 13 November 2015, at www.theatlantic.com/politics/archive/2015/11/a-new-supreme-court-challenge-the-erosion-of-abortion-access-in-texas/415929/ (seen 24 March 2017).

4 410 US 113 (1973).

5 Ibid, slip op at 2, 32.

6 578 US ___, 136 S Ct 1557 (2016).

7 Tom Howell, Jr 'Trump moves to end Obama's cost-free birth control mandate', *Washington Times*, 23 January 2017, at www.washingtontimes.com/news/2017/jan/23/trump-moves-to-end-obamas-cost-free-birth-control-/ (seen 24 March 2017); Anna Maria Barry-Jester 'Trump's Executive Order on Obamacare Means Everything and Does Nothing', *FiveThirtyEight*, 21 January 2017, at https://fivethirtyeight.com/features/trumps-executive-order-on-obamacare-means-everything-and-does-nothing/ (seen 24 March 2017).

8 573 US ___, 134 S Ct 2751 (2014).

Click here to go to Main Contents

the government to achieve its contraceptive policy objectives.[9] Following oral argument in *Zubik* the Court requested supplemental briefing about whether the contraceptive coverage could be provided by the insurance companies to the employees without participation of the objecting employers. In light of information in those supplemental briefs, the Court vacated the lower court judgments and remanded to let the parties try to reach some accommodation of both the objectors' religious exercise and women's access to contraceptive coverage. Justice Sotomayor, joined by Justice Ginsburg, concurred to suggest their preference for contraceptive coverage.

In the third Supreme Court ruling in a family law case the Court addressed full faith and credit due to a sister-state adoption order. In *VL v EL*,[10] a lesbian couple lived together in Alabama and through assisted reproductive technology (ART), EL gave birth to three children during the relationship. The parties intended to raise the children together. They temporarily relocated to Georgia so that VL could take advantage of that state's more lenient adoption laws. They returned to Alabama and later split up. VL filed a petition in an Alabama court to register the Georgia adoption judgment, and for custody or visitation. Eventually, the Alabama Supreme Court ruled that Alabama courts did not have to recognise the Georgia adoption because the Georgia court lacked subject matter jurisdiction to allow VL (the non-biological mother) to adopt without terminating EL's maternal rights. In a brief *per curiam* opinion, the Supreme Court of the United States reversed that ruling of the Alabama Supreme Court. Acknowledging that a state may inquire into the jurisdictional basis of the sister-state adoption decree and need not give full faith and credit to a judgment of a court that lacked jurisdiction, the Court said: 'That jurisdictional inquiry, however, is a limited one … [I]f the judgment on its face appears to be a "record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself".'[11] The court concluded its brief opinion noting: 'The Georgia judgment appears on its face to have been issued by a court with jurisdiction, and there is no established Georgia law to the contrary. It follows that the Alabama Supreme Court erred in refusing to grant that judgment full faith and credit.'[12] It is not unreasonable to wonder whether this decision embarrassed the Alabama judiciary, and contributed to the troubles experienced by Chief Justice Roy Moore a few months later, as discussed in Part II below.

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9 Brian Solomon 'Meet David Green: Hobby Lobby's Biblical Billionaire', *Forges*, 8 October 2012, at www.forbes.com/sites/briansolomon/2012/09/18/david-green-the-biblical-billionaire-backing-the-evangelical-movement/#73fb75fd5807 (seen 24 March 2017).

10 577 US ___ (2016).

11 577 US at ___ (slip op at 3).

12 577 US.at ___ (slip op at 6).

II DEVELOPMENTS: ENTERING INTO MARRIAGE

Decision by the Supreme Court of the United States about family law are relatively rare, but they can be profoundly influential.[13] One such decision was made in 2015 when the Supreme Court ruled in *Obergefell v Hodges*,[14] that the Constitution of the United States requires that all states must allow and recognise marriages by couples of the same-sex. Thus, the United States is among what is still the small minority of nations that allow same-sex marriage. The dissent noted the constitutional assignment of the authority to regulate family relations to the states, rather than to the federal government, and the over two centuries of interpretation of the Constitution by the Court that did not question restricting marriage to gender-integrating unions, and in the absence of any textual or historical support for mandating the legalisation of same-sex marriage, so the *Obergefell* ruling raised significant and serious systemic and constitutional issues about the role of the judiciary in family law cases and about doctrinal (constitutional) integrity. In 2016, many American state and federal courts wrestled with such issues. The *Obergefell* decision effected massive changes (conceptual, doctrinal, and practical) in the marriage laws of most states. Thus, throughout the year 2016 state and federal lawmakers and courts were involved in implementing the *Obergefell* ruling and dealing with its collateral consequences.

For two examples, confirming the scope of the impact of the *Obergefell* redefinition of marriage, the Internal Revenue Service (IRS) published regulations implementing the Supreme Court's decision. The final rule,[15] provides that the terms 'spouse', 'husband', and 'wife' and 'husband and wife' mean two individuals lawfully married to each other, but do not include persons who have entered into a registered domestic partnership, civil union, or other similar relationship not deemed a marriage under the laws of the state or territory where that relationship was created.

A North Carolina law that allowed magistrates to recuse themselves from performing same-sex marriages was challenged by some taxpayers in *Ansley v Warren*.[16] However, the plaintiffs did not allege any 'injury in fact' and the federal court held that they lacked standing to challenge the state law and their action was dismissed for lack of subject matter jurisdiction, and the law allowing North Carolina judges to decline to perform same-sex marriages stood.

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[13] See Margaret Ryznar 'Rare Family Law Case Heard by U.S. Supreme Court', *Huffington Post*, 9 February 2013, at www.huffingtonpost.com/margaret-ryznar/supreme-court-chafin-v-chafin_b_2272575.html (seen 24 March 2017).

[14] 576 US __, 135 S Ct 2584 (2015).

[15] TD 9785; RIN: 1545-BM10, 26 CFR Parts 1, 20, 25, 26, 21 and 301, 81 Fed Reg 60609, 2 September 2016.

[16] No 1:16-cv-oo54-MOC-DLH, 20 September 2016, at http://law.justia.com/cases/federal/district-courts/north-carolina/ncwdce/1:2016cv00054/82223/67/ (seen 20 March 2017).

Click here to go to Main Contents

Obergefell does not require a state to allow same-sex non-marital cohabitants to sue each other for quasi-marital property rights in Illinois. Rather, the 37-year-old Illinois Supreme Court decision in *Hewitt v Hewitt*,[17] holding that the public policy prohibition against common law marriage still bars non-marital cohabitants from asserting claims against each other for 'palimony'-like property division. That legal rule applies to same-sex cohabitants as well as opposite-sex cohabitants according to the Illinois Supreme Court.[18]

The 2015 *Obergefell* ruling also had significant collateral consequences in 2016. The Alabama Court of the Judiciary, the judicial-oversight body that hears complaints against judges, suspended Alabama Chief Justice Roy Moore without pay for the remainder of his term because of his official acts in opposition to *Obergefell*.[19] Several months after *Obergefell* was decided by the Supreme Court of the United States, Chief Justice Moore had issued an order to the state's probate judges not to issue marriage licences to same-sex couples. Acting in his capacity as Administrative Head of the Unified Judicial System of Alabama and purportedly responding to '[c]onfusion and uncertainty' about the effect of *Obergefell* upon Alabama's probate judges, as well as widespread controversy from the jailing of Kentucky county clerk Kim Davis for refusing to issue marriage licences to same-sex couples, Chief Justice Moore had directed Alabama probate judges that: 'Until further decision by the Alabama Supreme Court, the existing orders of the Alabama Supreme Court that Alabama probate judges have a ministerial duty not to issue any marriage licence contrary to the Alabama Sanctity of Marriage Amendment or the Alabama Marriage Protection Act remain in full force and effect.'[20] While the underlying principle that a ruling in one case (*Obergefell*) is not directly binding on persons not parties to the case is valid, the law of precedent is no less relevant. So the Alabama judicial administration body ruled that the Chief Justice's unilateral order violated six rules of judicial conduct, including failing to respect and comply with the law and making public comment on a case pending before his court (since a case about same-sex marriage was then pending before the state court).[21]

Alabama is not the only state in which some state officials were reluctant to recognise fully same-sex marriages. A federal court in Kansas issued a permanent injunction in July 2016 requiring the state and all of its agencies to treat same-sex couples the same as heterosexual couples in all respects,

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17 394 NE 2d 1204 (Ill 1979).

18 *Blumenthal v Brewer*, 2016 IL 118781 (2016).

19 *In the Matter of: Roy S Moore, Chief Justice, Supreme Court of Alabama*, Court of the Judiciary Case No 46 (30 September 2016).

20 Administrative Order of the Chief Justice of the Alabama Supreme Court, 6 January 2016, at http://src.bna.com/bUq (seen 20 March 2017).

21 See Chris Marr 'Ala. Chief Justice Suspended Over Same-Sex Marriage Order', 42 Fam L Rptr 1572 (11 October 2016), at http://news.bna.com/flln/display/story_list.adp?mode=ep&frag_id=98768798&item=topic2&prod=flln (seen 20 March 2017).

including tax matters.[22] While the court may have been hasty, the ruling is clear evidence of some official reluctance to facilitate same-sex marriage.

Moving away from same-sex marriage, among the common questions to arise in the context of disputes arising out of failed attempts to form a marriage is whether an engagement ring is a conditional gift, which the giver can demand be returned if the marriage does not occur, and whether a 'heart balm' statute bars suit to recover such a ring. Ethan gave Julia a $26,000 two-carat engagement ring worth $26,000. A year later, he broke off the engagement and, when she refused to return the ring, he filed suit seeking its return. She that claimed his suit was barred by the statute abolishing heart-balm, breach-of-promise-to-marry, and criminal conversation actions. The Virginia Supreme Court ruled in *McGrath v Dockendorf*[23] that the action to recover an engagement ring was not barred by the heart-balm statute. 'Had the General Assembly wished to bar actions in detinue for the recovery of engagement rings, it would have chosen a vehicle that unequivocally does so.'[24] '[T]he gift of the ring … was a conditional gift … When the condition upon which the gift was made did not occur, Dockendorf could institute an action in detinue to recover the ring or its value.'[25]

A party to a marriage who acts in apparent belief that the marriage has been terminated will be treated as though divorced, and estopped from claiming to be the surviving spouse, even if there never was a divorce. In *Brown v Alley*,[26] the wife told her husband she could no longer live with him because of his extra-marital affairs. She left him and he began living with another woman (and other women). Both she and he attempted to enter subsequent marriages, which were void, of course, because of their undissolved prior marriage. When he died, she sought to be appointed Personal Representative of his estate. The majority of the Oklahoma Supreme Court ruled that she was estopped from claiming to be his wife and being appointed as Personal Representative because she had acted as if the marriage were over. Three justice dissented noting that she still was the legal spouse of the decedent and, thus, entitled to appointment pursuant to the statute.

III DEVELOPMENTS: CREATING PARENT–CHILD RELATIONS

In *Pavan v Smith*,[27] the Arkansas Department of Health refused to put the names of the same-sex spouses of the biological mothers on the birth certificates

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22 *Marie v Mosier*, D Kan, No 2:14-cv-02518-DDC, 'Memorandum and Order Ruling on Plaintiffs' Request for Permanent Injunction', 22 July 2016, at http://src.bna.com/g8W (seen 22 March 2017).

23 793 SE 2d 336 (Va, 2016).

24 Ibid at 339.

25 Ibid at 340.

26 367 P 3d 486 (Okla, 2016).

27 2016 Ark 437.

of three children born in the state to women in same-sex marriages. In contrast, the agency routinely recorded on birth certificates the names of opposite-sex spouses. The Arkansas Supreme Court upheld the practice as constitutional in *Pavan* and directly distinguished *Obergefell*.

The question presented in this case does not concern either the right to same-sex marriage or the recognition of that marriage, or the right of a female same-sex spouse to be a parent to the child who was born to her spouse. What is before this court is the narrow issue of whether the birth-certificate statutes as written deny the appellees due process. The purpose of the statutes is to truthfully record the nexus of the biological mother and the biological father to the child. On the record presented, we cannot say that naming the non-biological spouse on the birth certificate of the child is an interest of the person so fundamental that the state must accord the interest its respect under either statute.

To support upholding the gender-differentiated biological birth parent legal standard in an immigration context, the Arkansas Supreme Court cited a 2001 US Supreme Court decision that upheld gender-differential parental immigration standards applicable to persons born abroad and out of wedlock depending on whether the American parent was the child's father or the mother.

> '[T]o fail to acknowledge even our most basic biological differences – such as the fact that a mother must be present at birth but the father need not be – risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. The distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class. The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.'[28]

In defence of the Arkansas rule, the state and its supporters read *Obergefell* narrowly, noting (correctly) that that 2015 case dealt only with same-sex couples' right to marry.[29] On the other side, those challenging the Arkansas rule note (correctly also) that the majority opinion in *Obergefell* relied heavily upon the potential harms and disadvantages that children being raised by same-sex couples experience if their legal parents are unable to marry.

In *Torres v Rhoades*,[30] a federal district court in Wisconsin granted class certification in a case brought by lesbian spouses of birth mothers seeking to have both lesbian spouses listed on the birth certificates. The Court limited the class to 'families like plaintiffs who conceived a child through artificial insemination but did not comply with one or more requirements in Wis. Stat. §

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[28] *Tuan Anh Nguyen v INS*, 533 US 53, 73 (2001).

[29] See Kimberly Strawbridge Robinson, 'Reach of Same-Sex Marriage Ruling Comes to Supreme Court', US Law Week (85:33), 9 March 2017, at 1191 (seen 13 March 2017).

[30] ___ F Supp 3d ___ (WD Wis, 2016)) , 2015 BL 419460, WD Wis, No 15-cv-288-bcc, 12/21/15.

891.40, the statute that governs the situation under which a married couple who conceived a child through artificial insemination may list both spouses as parents on the birth certificate'.[31] The court reasoned that the plaintiffs could not adequately represent a larger class including children conceived through other methods because reasons for denial of putative parents' listing on birth certificates depend in part upon the way the child was conceived.

On the other hand, a federal court in Indiana ruled that Indiana's 'Parenthood Statutes' which recognise male partners of married women as parents on birth certificates but not same-sex lesbian partners violated federal due process and equal protection.[32] The analysis was methodically thorough but perhaps the most persuasive point it cited was *dicta* from the *Obergefell* decision that interpreting the Constitution to mandate legalisation of same-sex marriage was justified to extend the benefits of such status, including 'adoption rights; … birth and death certificates; … and child custody, support, and visitation rules'.[33]

Interestingly, a New York Supreme Court (trial court) held that the same-sex spouse of a biological mother could adopt her spouse's child, even though it noted that as a matter of New York (and arguably US constitutional) law the same-sex spouse would be recognised as parent without adoption.[34] The judicial hearing officer noted that the marital status might be questioned in other jurisdictions so granting the adoption was a 'belt and suspenders' secondary protection to establish parentage.[35]

The flip side of the same coin was presented in *McLaughlin v Jones*,[36] in which the Arizona Court of Appeals held that a biological mother's same-sex spouse is the presumptive parent of the child born via artificial insemination during their marriage. The case was stayed awaiting the ruling in *Obergefell* which held that same-sex couples must be given marital rights and suggested in dicta that they must also be allowed related rights such as procreation and child-rearing. Then the Arizona Court of Appeals therefore ruled that same-sex spouses must be accorded the same presumption of parentage as biological opposite-sex parents.

The basis for the presumption of spousal parentage in an opposite-sex marriage is the biological reality and elementary fact of dual-gender human reproduction. The basis for extending the presumption of spousal parentage in a same-sex marriage, on the other hand, is in derogation of this biological reality. While a weak gender-equality argument might be made for that

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31 Ibid at ___.

32 *Henderson v Adams*, __ NW 2d __, 2016 BL 210671 (SD Ind, 30 June 2016).

33 *Obergefell,* 135 S Ct at 2601.

34 *In re L*, NY Fam Ct, No A-11966/15 (6 October 2016).

35 Julianne Tobin Wojay, 'Legal Parent May Adopt Her Own Child', 42 Fam L Rptr 1580 (18 October 2016), at https://news-bna-com.proxlaw.byu.edu/flln/FLLNWB/split_display.adp?fedfid=99038399&vname=flrnotallissues&wsn=491302500&searchid=29569922&doctypeid=1&type=date&mode=doc&split=0&scm=FLLNWB&pg=0 (seen 17 March 2017).

36 2016 BL 338273, Ariz Ct App, No 2 CA-SA 2016-0035, 11 October 2016).

extension, arguably it comes at the expense of the well-being of the child, who – in truth – does have a biological father and who, if past experience is a reliable guide, will want to know who his or her father is, and who may go to significant lengths to discover the answer that question.[37]

On the contrary, the Massachusetts Supreme Judicial Court unanimously held that the same-sex partner of a woman who gave birth to two children during their non-marital relationship had presumptive parent status.[38] The parties had held themselves out as parents of the children. Since, under similar circumstances, a male partner of the birth mother would be given parental status, gender equality required that same-sex female partner also to be so treated. The court emphasised the parties' 'shared intention that [the defendant and plaintiff] would both be parents to the resulting children'.[39] Enforcing agreements among parties who may later change their minds is common in court cases, but doing so without giving close and careful consideration to the well-being and best-interests of the child or children seems both inappropriate and contrary to the role and responsibility of the courts to protect the well-being of children.

Courts split over whether to recognise de facto parenthood of same-sex partners. The general standards of showing a parent-like relationship that was encouraged by the legal parent apply in courts which recognise same-sex partners as de facto parents. The Maryland Court of Appeals held in *Conover v Conover*[40] that a same-sex partner of the biological parent may claim parental rights if he or she meets the requirements of *In re Custody of HSH-H*,[41] namely, that 'the legal parent must consent to and foster the relationship between the third party and the child; the third party must have lived with the child; the third party must perform parental functions for the child to a significant degree; and most important, a parent-child bond must be forged'.[42]

On the other hand, the Michigan Supreme Court, in a terse one-sentence order, denied a woman leave to appeal an intermediate appellate court order that she lacked standing to seek custody as the equitable parent of three children who were born to her same-sex partner during their 15-year relationship.[43] While some may dispute the policy behind that ruling, the clarity of the rule in Michigan is indisputable.

The Kentucky Supreme Court ruled that the former same-sex partner of a woman was entitled to intervene as of right in the adoption proceeding initiated

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37 See Elizabeth Marquardt, Morval D Glenn and Karen Clark, 'My Daddy's Name is Donor' (2010); see also AnonymousUs.org, at https://anonymousus.org/ (seen 17 March 2017); Alana S Newman, 'Children's Rights, or Rights to Children', *Public Discourse* (10 November 2014), atMwww.thepublicdiscourse.com/2014/11/13993/ (seen 17 March 2017).

38 *Partanen v Gallagher*, 2016 BL 330413, Mass, No SJC-12018 (4 October 2016).

39 Ibid at 643/1142.

40 146 A 3d 433 (Md, 2016).

41 533 NW 2d 419 (Wis, 1995).

42 146 A 3d at 439.

43 *Mabry v Mabry*, 882 NW 2d 539 (2016).

by the husband of her former partner regarding a child born to the wife during the same-sex relationship. In *AH v WRL*,[44] the same-sex couple decided that one of them would have a child for both of them. They lived together for 5 years after the daughter was born. After they split up, the biological mother married a man who later filed a petition to adopt the child. The former same-sex spouse then filed for custody/visitation and opposed the adoption but the state court of appeals found that she lacked standing to intervene. She filed under the Kentucky rule allowing intervention as of right[45] which provides: 'Upon timely application anyone shall be permitted to intervene in an action … (b) when the applicant *claims an interest* relating to the property or *transaction* which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest.' The state supreme court concluded that the former partner's 'level of association and collaboration in the creation and rearing of a child clearly indicates a cognizable legal interest for purposes of intervening in an adoption proceeding'.[46]

Proper jurisdiction was the dispositive issue in *Ramirez v Barnet*.[47] In that case, Christopher and Sunday cohabited in Arizona, and she became pregnant. She stopped communicating with him shortly before the baby was born and arranged for the child to be adopted. The adopting couple filed adoption proceedings in New York shortly *after* Christopher filed for paternity and received a temporary order of custody in Arizona. The Arizona family court found that when Christopher filed his paternity petition in Arizona, it had home state jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to make an initial child custody determination. It held that the New York court subsequently granting the adoption had done so in violation of the US full faith and credit statute[48] because of the prior pending Arizona paternity action. Thus, the Arizona courts did not need to give full faith and credit (recognition and preclusion) to the New York adoption order.

May a child have more than two legal parents at one time? The Arkansas Court of Appeals ruled that the mother's husband and her paramour who was the biological father of her child (and whose name was on the birth certificate) could not both be the child's father.[49] The Arkansas Juvenile Code's definition of parent included, inter alia, one who has acknowledged paternity and one who is married to the mother (and other definitional categories of paternity). As there was 'no legal basis' in Arkansas law to support finding two different men to be fathers; by finding that the boyfriend was the father of the child, the court had effectively divested the husband of his parental rights.

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44 482 SW 3d 372 (Kentucky 2016).
45 Ky R Civ Pro 24.01(b).
46 482 SW 3d at 374.
47 307 P 3d 1003 (Ariz App, 2016), at http://law.justia.com/cases/arizona/court-of-appeals-division-one-published/2016/1-ca-cv-15-0568-fc.html (seen 24 March 2017).
48 28 USC § 1738A.
49 *Howerton v Arkansas Department of Human Services*, 2016 Ark App 560 (2016).

Likewise, a California Court of Appeal rejected the claim of a man to be the third parent of children his girlfriend had previously with another man. While noting that under the Uniform Parentage Act it is possible to designate three adults as parents of children, the court held that that provision was 'narrow in scope and [intended] to apply only in "rare cases" in which a child "truly has more than two parents" who are parents "in every way"'.[50] Here the man claiming third-parent status had merely cohabited in a hotel room with the mother and children and had not shown full parental commitment. Additionally, the children still viewed the former husband as their true father.

In *Sieglein v Schmidt*,[51] the husband had a vasectomy before marriage and refused to have it reversed even though his wife wanted a child. Instead, he signed a consent form for her in vitro fertilisation. The birth certificate listed him as the father. When the wife filed for divorce, he argued that he was not the child's legal parent. He asserted that since the particular ART procedure used by his wife did not exist when the statute was enacted, the parentage provision did not apply to children born as a result of that new procedure. The Maryland Court of Appeals affirmed the lower courts' rejection of his claim, noting that the legislative history revealed that the concern of the lawmakers was on 'the effect of the use of donated sperm in artificial reproduction on legitimacy and inheritance, rather than on … a specific reproductive technique'.[52]

Informal sperm donation may have serious legal consequences, as shown in *In re PS*.[53] A lesbian convinced her male friend to provide sperm so that she could become pregnant by artificial insemination. Had the man provided his sperm to a physician for use in artificial insemination, under the Uniform Parentage Act the donor would not be considered a legal parent. Since in this case he provided the sperm directly to his friend, rather than to a doctor, he did not qualify as a donor and thus could be (and in this case was) found to be the legal father of the child and, as such, could be held responsible for the child's support.

By comparison, a recent British High Court of Justice ruling in *B v B (Fertility Treatment – Paperwork Error*[54] ruled that a man (X) was the legal father of a child born to his then-girlfriend (now wife) as a result of artificial reproduction treatments. '[T]he couple signed a mass of consent paperwork in the reasonable belief that the Trust was ensuring that the legal position of themselves and any child born to them was being secured.'[55] However, the agency responsible for the records failed to obtain the consent records required to confirm paternity. When the agency later (some time after birth) discovered the oversight, it had the parents sign consent forms, but, even more negligently, lost them. Some of the forms failed to contain the necessary statutory language. The statute

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[50] *San Diego County Health and Human Services Agency v Anthony R (In re MZ)*, 2016 BL 369457, __ Cal Rptr 3d __, (Cal Ct App, 3 November 2016).
[51] 136 A 3d 751 (Maryland, 2016).
[52] Ibid at 763.
[53] 2016 BL 359369, Tex Ct App, No 02-16-00008-CV, 27 October 2016.
[54] [2017] EWHC 599 (Fam).
[55] Ibid at para 22.

required prior written consent to establish paternity of a child born through ART. However, since the couple had intended and agreed to become parents, and had signed written consents (at some point) the Family Division entered an order declaring that X was the legal father of the child. Of course, in the British case the parties had taken all the steps the agency required to establish legal parentage, while in the Texas case the parties had deliberately circumvented the steps required to avoid legal parentage. Both cases resulted in confirming dual parentage for the innocent child who resulted from ART. Thus, both cases may support the principle that protecting the interests of the child take priority over the wishes or intentions of the adults.

An American woman residing in Mexico travelled to California solely to give birth there; then she returned to Mexico. In a dependency proceeding, the California Juvenile Court ruled that California was the child's home state. Under the Uniform Child Custody Jurisdiction and Enforcement Act the child's home state was where she had lived with a parent since birth. The mother's short hospital stay to give birth did not suffice to make California the child's 'home state'. However, California did have 'emergency jurisdiction' under the UCCJEA because the child was present in that state and needed state protection as she was born with drugs in her system and her mother had a history of substance abuse.[56]

While it is rare that courts will set aside an adoption, the Mississippi Supreme Court did so in *Doe v Smith*[57] because of fraud upon the court. Katy and Stan conceived a child out of wedlock. Later she gave birth to Matthew while married to Mark. She consented to Matthew's adoption and stated that she did not know the identity or address of his father. Paternity tests later showed that Stan was the father. When Stan learned of the adoption, he filed a petition to set aside the adoption decree. Because the lie told by Katy defrauded the court, the appellate court affirmed the decree that set aside the adoption.

The Indian Child Welfare Act does not require granting a tribe's motion to transfer jurisdiction over an Indian child's placement when the motion is filed after the state court has properly terminated the parental rights in connection with an adoption. After the adoption, the ICWA basis for tribal jurisdiction has changed.[58]

Moreover, the California Supreme Court ruled that ICWA does not apply to children of Native American descent who do not come within the federal definition of 'Indian child'.[59] Thus, statutory language matters in determining coverage under and eligibility for benefits under ICWA.

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[56] *San Diego County Health & Human Services Agency v Cynthia C (In re RL)*, 2016 BL 342640, Cal Ct App, No D069729 (14 October 2016).

[57] ___ So 3d ___, https://courts.ms.gov/Images/Opinions/CO116315.pdf (Miss, 2016).

[58] *Gila River Indian Community v Department of Child Safety,* http://caselaw.findlaw.com/az-court-of-appeals/1745944.html (Ariz Ct App, 11 August 2016).

[59] *In re Abbigail A (Sacramento County Department of Health and Human Services v Joseph A)*, 2016 BL 226319, 2016 WL 3755924 Cal, No S220187, 14 July 2016).

Click here to go to Main Contents

Reunification rules applicable to the termination of parental rights in adoption may have international extraterritorial effect according to the Connecticut Supreme Court.[60] The father of a child adjudicated as dependent in Connecticut resided in Nigeria. The mother of their child had come to the United States to give birth. She was mentally ill and unable to care for the child who was taken into state custody. State law required reunification efforts. The father could not come to the United States for reunification with his child because of, inter alia, visa problems. The state supreme court held, nonetheless, that his parental rights could not be terminated if the child (who had congenital heart defects and had undergone several heart surgeries) was able to travel to Nigeria for possible reunification with his distant father since reunification efforts were mandated by state law.

The Maine Supreme Court ruled that the court-ordered obligation of a husband to make payments to a third party of a debt incurred jointly during marriage with his former spouse was not discharged in his bankruptcy.[61] The court held that '[t]his debt falls squarely within the exception to discharge created by section 523(a)(15) because it is a debt to a former spouse that was incurred in the course of a divorce proceeding … and it was therefore not extinguished by the discharge'.[62]

In a surprisingly jejune opinion, the Iowa Supreme Court rejected a petition to unseal adoption records filed by a 51-year-old alcoholic woman with mental health problems who had been adopted as an infant. She presented undisputed medical evidence that her ignorance of her biological family's history was a root cause of her mental health problems and that learning the identities of her biological parents would assist her recovery. The juvenile court had granted her petition, but the district court reversed, barring release of the parents' names. The Iowa Supreme Court concluded in *In the Interests of RD*[63] that the woman had 'failed to meet her burden to overcome the statutory protection of confidentiality of the identify of biological parents'. Certainly, confidentiality of adoption records is important, but a half-century after the birth/adoption and under these circumstances in which the potential for benefit to a struggling adopted person was uncontested, the decision seems sadly aloof and disappointingly unjust.

IV DEVELOPMENTS: ONGOING SPOUSAL RELATIONS

Suits challenging the ACA (Obamacare) 'contraceptive mandate' that came before the Supreme Court briefly in *Zubick* were filed by many private individuals, faith-based colleges and universities, faith-based charities providing homes and services for the aged, and various other religious organisations. They objected to being required to participate, even indirectly, in providing

[60] *In re Oreoliuwa O*, 321 Conn 523, 139 A 3d 674 (2016).
[61] *Collins v Collins*, 2016 ME 51.
[62] Ibid at para 11.
[63] Available at http://caselaw.findlaw.com/ia-supreme-court/1728844.html (Iowa, 2016).

contraceptive and/or abortion products and services to their employees which they considered to be immoral and evil. Seven consolidated cases were brought to the Supreme Court in November 2015, in *Zubick*. After oral argument in March 2016, the Court issued an order directing the parties 'to file supplemental briefs that address whether and how contraceptive coverage may be obtained by petitioners' employees through petitioners' insurance companies, but in a way that does not require any involvement of petitioners beyond their own decision to provide health insurance without contraceptive coverage to their employees'.[64] Then, on 16 May 2016, the Court by *per curiam* order vacated the decisions of the courts of appeals and remanded the cases for reconsideration, directing that the plaintiffs be given 'an opportunity to arrive at an approach going forward that accommodates the challengers' religious exercise while at the same time ensuring that women covered by the challengers' health plans receive full and equal health coverage, including contraceptive coverage'.[65]

The Obama administration then issued a request for information on whether there are alternative ways for eligible objecting organisations to obtain accommodation while ensuring women access to the contraceptives.[66] However, as of March 2017, the federal government and the objecting non-profits had failed to reach agreement.

Two months after President Donald Trump took office, in March 2017, the contraceptive mandate was still part of federal law.[67] It is likely that new federal regulations or new congressional legislation will need to be drafted if the contraceptive mandate is to be repealed.[68]

Several cases in 2016 concerned access by same-sex spouses of company employees to valuable employee benefits. For example, in December 2016, Wal-Mart reached a (proposed) $7.5m settlement in a class action in which the employees alleged that the company unlawfully discriminated against gay and lesbian employees by denying health insurance benefits to same-sex spouses.[69] Suggesting that a driving consideration in at least some cases may be financial,

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64 578 US at ___ (slip op at 3).

65 Ibid.

66 *Coverage for Contraceptive Services* 81 Fed Reg (141): 47741–5, 22 July 2016 (seen 24 March 2016).

67 Brian Fraga, 'HHS Mandate Remains Despite Trump's Religious-Liberty Promises', *National Catholic Register*, 16 March 2017, at www.ncregister.com/daily-news/hhs-mandate-remains-despite-trumps-religious-liberty-promises-and-congress (seen 24 March 2017) ('"For now, the litigation remains alive, the law remains alive, and [the contraceptive mandate] still on the books," [Beckett Fund senior counsel Mark] Rienzi said. "Something has to be done to resolve the thing. The courts will give the government some time, but, ultimately, they need to take steps to get rid of it".'

68 Ibid.

69 *Cote v Wal-Mart Stores, Inc, D Mass*, No 15-12945, proposed settlement 2 December 2016, available at http://walmartsamesexspousebenefitssettlement.com/ (seen 13 March 2017).

Click here to go to Main Contents

several reports have noted that larger employers are more likely to offer employee benefits to same-sex spouses than are smaller companies.[70]

A federal court in northern California ruled in January 2016 that FedEx may owe a surviving same-sex spouse who died a week before the Supreme Court ruling in *Obergefell*.[71] While the company's interpretation of its pension plan was correct, the court held that the pension plan itself appeared to be in violation of governing federal law, the Employee Retirement Income Security Act (ERISA), which, as recently amended, bars such plans from distinguishing between same- and opposite-sex spouses.[72]

A three-judge Ohio state court in *Cahill v Testa*[73] upheld a state law that required heterosexual couples – but not same-sex couples – to file joint state income tax returns if they filed joint federal tax return. The state law turned on marital status which was not available to same-sex couples at the time. The court noted: 'The disparate legal standing of husband-and-wife couples and same-sex couples under Ohio law in 2013 was rationally related to the government policy that the filing status of "married filing jointly" only be applied to married couples'.[74] Obviously, the Supreme Court decision in *Obergefell* mooted this issue by making marriage available to same-sex couples.

V DEVELOPMENTS: ONGOING PARENT-CHILD RELATIONS

Some same-sex marriage partners unsuccessfully sought to 'have their cake and eat it too' by claiming the status and benefits of marriage to their same-sex partner but seeking to avoid spousal duties and burdens. For example, in *Legg*

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[70] Lisa Schenker and Bob Herman 'Same-sex marriage ruling puts health benefits in spotlight', Modern Healthcare, 26 June 2015, at www.modernhealthcare.com/article/20150626/NEWS/150629906 (seen 13 March 2017) ('About 77% of large employers offer same-sex domestic partner healthcare coverage, according to Chicago-based benefits consulting firm Aon Hewitt. The Human Rights Campaign, an LGBT civil rights organization, estimates two-thirds of Fortune 500 companies offer domestic partner benefits to same-sex employees …'); see also Matt Dunning, 'Same-sex spousal health benefits offered by many employers', *Business Insurance*, 5 January 2014, at www.businessinsurance.com/article/20140105/NEWS03/301059974 (seen 13 March 2017).

[71] Jaclyn Wille 'FedEx May Owe Same-Sex Spouse Pension Benefits', *Bloomberg BNA*, 6 January 2016, at www.bna.com/fedex-may-owe-n57982065780/ (seen 13 March 2017).

[72] See further 'Treatment of Marriages of Same-Sex Couples for Retirement Plan Purposes', IRS Notice 2014-19, at www.irs.gov/retirement-plans/treatment-of-marriages-of-same-sex-couples-for-retirement-plan-purposes (updated 23 Jan. 2017) (seen 13 March 2017). 'Following the *Windsor* decision, the IRS issued Revenue Ruling 2013-17, which holds that married same-sex couples are now treated as married for all federal tax purposes where marriage is a factor, if the couple is lawfully married under the laws of one of the 50 states, the District of Columbia, a U.S. territory or a foreign jurisdiction' (ibid).

[73] Case No 2015-L-111 (7 November 2016), at www.bloomberglaw.com/public/desktop/document/Cahill_v_Testa_No_2015L111_2016_BL_370819_Ohio_App_11th_Dist_Nov_?1478629400 (seen 20 March 2017).

[74] Ibid at p 20.

v Commonwealth,[75] two women, Tiffany and Candace, entered into a civil union in New Jersey in 2010. A few days later, Candace give birth to Ethan, designated Tiffany as Ethan's father on his birth certificate and gave the child a hyphenated surname combining both of their names. They filed for divorce. Even though the biological father was identified, the Kentucky court ruled that Tiffany was a parent because she had acted *in loco parentis* and ordered her to pay child support. The Kentucky Supreme Court affirmed, ruling that because Tiffany had acted as a parent for nearly 4 years, was named on the birth certificate, had agreed to let the child bear her name and *Obergefell* required the court to 'equally apply maternity/paternity-by-estoppel principles' to a same-sex putative parent.[76]

The long-established principle that adoption statutes will be strictly interpreted and narrowly applied was dispositive in *In re Adoption of Baby Q*,[77] There, the biological father failed to file his notice of claimed paternity within the 30-day time to file after being given notice. However, the notice given to him failed to describe exactly the consequences of failure to timely act (including forfeiture of the right to object to adoption) as had been mandated by the statute. The notice said, 'you may lose' but the statute provided that one who failed to comply 'will lose' parental rights. Even though the language of the notice given arguably was more accurate than that required by the statute (because, for instance, the adoption might not be completed – in which case the parental rights would not be terminated), the Utah Supreme Court concluded that the language in the notice must comply exactly with the statute to trigger the 30-day time period. 'Because the Notice did not contain all the information the Statute mandates, the thirty-day clock did not begin to tick and James's failure to comply within that time frame did not deprive him of his ability to contest Child's adoption.'[78] For those reasons, the Utah lower court's order denying the father's motion to intervene in the adoption proceeding was reversed and the case remanded to the district court.

The Fifth Circuit Court of Appeals gave narrow interpretation to the 'age of maturity' defence in the Hague Convention on the Civil Aspects of International Child Abduction to the mandatory return rule applicable to children wrongfully removed or abducted from another nation. The mother had brought her 11-year-old child from Mexico to Texas on a 6-month entry card, but overstayed. The father initiated Hague Convention proceedings in the federal court for return of the child to him in Mexico. The Fifth Circuit noted that finding that the child 'would be happier' staying in the US was not the same as finding that the child objected to being returned to Mexico, as the Convention requires. The court also gave a generous and practical

[75] 500 SW 3d 837 (2016).
[76] Ibid at 840.
[77] 2016 Utah 29, 379 P 3d 1231 (2016).
[78] Ibid at para 35.

interpretation to what it means to 'exercise' custody rights, and reversed the district court's holding that the father was not exercising his custody rights at the time of removal.[79]

The Hague Convention on the Civil Aspects of International Child Abduction provision affording a 'grave risk' defence to mandatory return of an abducted child was interpreted by the US Court of Appeals for the Eleventh Circuit in *Gomez v Fuenmayor*.[80] The father, mother, and child lived in Venezuela. The mother and her husband made numerous threats against the child's father; his parent's building was broken into, his mother's car vandalised, his family was physically intimidated, etc. So the father took the child and joined his mother and his sister in the US. The mother of the child petitioned to have the child returned to her in Venezuela under the Hague Convention. The Eleventh Circuit held that the 'grave risk' defence to return under Art 13(b) of the Convention applied and the federal district court was justified in rejecting the petition to return the child to Venezuela.

On the other hand, a federal district court in Georgia rejected the 'grave risk' defence raised when a father in the US refused to send the child back to his mother in Mexico. The father's claim that the amount of crime and violence in Mexico made it a 'war zone' was rejected. The federal court concluded that the child's habitual residence was in Mexico with his mother, and granted her Hague Convention petition for return of the child – who had experienced problems (educational, language, and social) during his stay in the US.[81]

While the Indian Child Welfare Act (ICWA) requires placement of a child with adults in four categories (eg member of the child's tribe, Indian foster home, etc), the Oklahoma Supreme Court prudently held that when the tribe fails to provide an ICWA-compliant temporary placement option until the child has been in foster-care for nearly a year with non-ICWA-compliant foster mother, there is good cause under ICWA to not disturb the non-ICWA placement.[82]

The Alaska Supreme Court correctly ruled that tribal courts have inherent subject-matter jurisdiction to determine child support obligations owed to Indian tribal children. Accordingly, the Alaska child support agency must recognise and enforce child support orders issued by tribal courts.[83]

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79 *Rodriguez v Yanez*, 711 F 3d 541 (5th Cir, 2016).

80 812 F 3d 1005 (11th Cir, 2016).

81 *Mendoza v Pascual*, No 615-40, ___ F Supp 3d ___ (SD Ga 2016).

82 *In the Matter of MKT, CDT, and SAW, Deprived Children*, 2016 OK 4, ___ P 3d ___ (Oklahoma 2016), available at https://turtletalk.files.wordpress.com/2016/01/mkt.pdf (seen 31 March 2017).

83 *State v Central Council of Tlingit and Haida Indian Tribes of Alaska*, 371 P 3d 255 (Alaska 2016).

VI DEVELOPMENTS: DISSOLUTION OF AND POST-DISSOLUTION SPOUSAL RELATIONS

Typically, one member of a marriage must be domiciled in a state for that state to have jurisdiction to dissolve the marriage. One might expect that the same rule would apply to dissolving civil unions – the marriage-like domestic relationships created for same-sex couples before *Obergefell* mandated national recognition of same-sex marriages. But in 2016 the Vermont Supreme Court upheld a Vermont law that allowed childless same-sex couples who had entered into Vermont civil unions and marriages to obtain dissolution in Vermont courts even if they did not reside in the state – if their current jurisdictional residence did not provide for dissolution of such relationships.[84] While that provides a pragmatic solution, it raises some interesting constitutional issues regarding state court judicial jurisdiction.

When a man filed a tort suit in a North Carolina state court claiming that his marriage was destroyed by the defendant's adulterous affair with the plaintiff's wife, the defendant removed the case to federal court. Then the plaintiff asserted that the 'domestic relations exception' to federal court jurisdiction applied to deprive the federal court of jurisdiction. Citing *Ankenbrandt v Richards*,[85] in which the Court held that the domestic relations exception to federal court jurisdiction did not apply to a wife's suit for alienation of affections against her husband's alleged paramour, the federal court in North Carolina rejected the argument, holding that the domestic relations exception applies only to actions for divorce, alimony and child custody.[86]

Because a voidable marriage may be annulled only by a party to the relationship, the Maryland Court of Special Appeals held that the personal representative of the deceased wife lacked standing to seek an annulment after the wife's death based upon alleged fraud in inducing her to marry.[87] '[T]he general rule is that, unless a statute explicitly provides to the contrary, a personal representative may not prosecute an action for annulment of the decedent's marriage based on fraud, because such marriage is voidable, not void, and voidable marriages may be annulled only during the joint lives of the parties to the marriage.'[88]

Many states have replaced or subordinated fault-based divorce grounds with no-fault grounds for divorce in an effort to focus courts' and parties' attention on the practical issues that attend divorce, rather than on 'blame' issues.

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84 *Solomon v Guidry*, Vt, No 2016-004, 23 September 2016, at www.bloomberglaw.com/public/desktop/document/Solomon_v_Guidry_2016_VT_108_Court_Opinion?1490213656 (seen 22 March 2017).

85 504 US 689, 701-02 (1992).

86 *Vonfeldt v Grapsy*, US Dist Ct M D N C, 8 December 2016, at www.bloomberglaw.com/public/desktop/document/Vonfeldt_v_Grapsy_No_116cv1179_2016_BL_408381_MDNC_Dec_08_2016_Co?1490397333 (seen 24 March 2016).

87 *Morris v Goodwin*, 148 A 3d 53 (Md Ct Spec App, 2016).

88 Ibid at 70.

California was a leader in the no-fault divorce movement. However, a California Court of Appeals court ruled in *Schu v Schu*,[89] that evidence of 'fault' may properly be admitted into evidence and considered by the court in deciding related issues, such as child support. In this case, the mother had sex with a 12-year-old friend of her son and the affair continued for years; she also showed the marital children pornographic films, and served them alcohol. The court ruled that fault is relevant to child support and affirmed the trial court's denial of child support to the mother.

Sometimes the old common law defences to fault divorce still apply in no-fault divorces. Thus, a man who opposed his wife's no-fault divorce petition and accused her of adultery, but then engaged in a non-marital sexual relationship with another woman, could be guilty of recrimination. The New Hampshire trial court properly dismissed his cross-petition for divorce based on his wife's adultery citing that old fault-divorce defence.[90]

The date of divorce, not the date of the separation agreement, governs the calculation of the wife's share of her husband's retirement benefits according to the Georgia Supreme Court.[91] That date is certain and not as susceptible to manipulation.

A couple's pattern of saving money during their marriage must be considered by the court in determining alimony.[92] Otherwise, the supported spouse could be 'penalised' because of her (the couple's) frugality during the marriage. In this case, after a 20-year marriage, the court concluded that it was appropriate to consider the savings as part of the marital lifestyle.

It is important to request in writing a share of specific retirement funds in property division. In *Huntley v Huntley*,[93] Charles and Lydia separated after 27 years of marriage. In her complaint for divorce, she requested, inter alia, a share of Charles' retirement benefits. Charles answered but did not file a counter-claim. During trial, however, he asked the court to award him one-half of Lydia's retirement benefits. The Court of Special Appeals affirmed the denial of that claim because Charles had only made the request orally during trial, but not in his written pleadings.

Normally, social security benefits are beyond the jurisdiction of divorce courts (except that they may be tapped to pay child support and alimony).[94] On the other hand, other federal and state retirement benefits may be divided upon

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89 __ Cal Rptr 3d ___ (Cal App, 2016).
90 *In re Ross*, 146 A.3d 1232 (NH, 2016).
91 *Christian v Christian*, at www.bloomberglaw.com/public/desktop/document/Christian_v_Christian_No_S16F1160_2016_BL_386033_Ga_Nov_21_2016_C?1490732412 (Ga, 2016).
92 *Lombardi v Lombardi* (NJ App Div, 12 September 2016), at www.courtlistener.com/opinion/4255665/lisa-lombardi-v-anthony-a-lombardi/.
93 229 Md App 424 (Md Ct Spec App, 2016).
94 42 USC §§ 407(a) and 659(a).

divorce. The question in *Jackson v Sollie*[95] was whether the *value* of social security benefits could be considered as a relevant factor in dividing property upon divorce. The Maryland Court of Appeals held that they could be considered, thus impacting the property division and indirectly affecting the value of the social security benefits to the covered spouse. In Nebraska, the state supreme court ruled that a husband's contributions to a municipal pension, made in lieu of contributions to social security, were not beyond division by the divorce court (as social security benefits are).[96] In *Peterson v Peterson*,[97] the husband had contributed for retirement to Social Security, which under federal law is his separate property, while his wife contributed for her retirement to a defined-benefit plan through her employer, which is deemed community property. Accordingly, the California Court of Appeals ruled that upon their divorce, the husband could keep all his social security while the wife's retirement benefits were divided equally with the husband under the California community property rules.

In calculating the period of 'marriage' for purposes of determining alimony, the Massachusetts Supreme Judicial Court held that a holistic approach should be taken rather than a technical interpretation. In *Duff-Kareores v Kareores*,[98] the parties first married in 1995 and had two children during their 9-year marriage. Upon divorce in 2004, husband was ordered to pay wife $7,600 per month in alimony. Three years later, the husband moved back in with wife, and the parties remarried 5 years after that, in 2012, the wife filed for divorce just 6 months after their second marriage. In that second divorce proceeding the trial court determined that the length of the parties' marriage was effectively 18 years for purposes of calculating alimony, not just 6 months. The state's highest court largely affirmed, relying on a statute that allowed the court to 'increase the length of the marriage if there is evidence that the parties' economic marital partnership began during their cohabitation period prior to marriage'.[99] The key was finding 'a relationship that resembles, but is not equivalent to, a legal marriage'.[100]

A lesbian couple lived together in New Hampshire for 15 years before they entered into a civil union in 2008, which converted into a marriage 3 years later. A year after the marriage, one woman filed for divorce and argued that their marriage was of only brief duration. She did so to avoid the 'equal division' statute, and the trial court agreed, using the date of the civil union as the relevant beginning. However, the New Hampshire Supreme Court vacated and remanded,[101] joining the position taken by most state courts that had addressed the issue previously and allowed consideration of pre-marital cohabitation time as a factor in the property division upon divorce.

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95 123 A 3d 1005 (Md Ct App, 2016).
96 *Lorenzen v Lorenzen*, 883 NW 2d 292 (Nebraska, 2016).
97 197 Cal Rptr 3d 588 (Cal Ct App, 2016).
98 474 Mass 528 (2016).
99 Mass Gen Laws ch 208 § 48.
100 474 Mass at 534.
101 *In re Munson*, 146 A 3d 153 (NH, 2016).

Click here to go to Main Contents

Cohabitation with a same-sex partner violates a Virginia law providing for termination of alimony if the recipient cohabits 'with another person in a relationship analogous to marriage'. Thus, the Virginia Supreme Court reversed the lower courts that had held that the statutory requirement of cohabitation did not include living in a romantic relationship with a person of the same sex.[102] Otherwise, 'it would produce the following untenable result: two identically-situated individuals with identical spousal support awards would receive opposite treatment if one cohabits in a same-sex relationship and the other cohabits in an opposite-sex relationship'.[103]

In Utah, as in Virginia, non-marital cohabitation by an alimony recipient is ground for termination of alimony. In *Scott v Scott*,[104] the former wife who had been awarded alimony for 27 years forfeited her right to alimony after only 4 years as a result of a 31-month-long ongoing relations with another man during which they lived together in one of his homes for 6 weeks. The husband sought to terminate his alimony obligation and both the trial court and court of appeals agreed, noting a three-part test for cohabitation: (1) a common abode (2) that both parties considered their principle domicile (3) for more than a temporary or brief period.[105]

VII DEVELOPMENTS: DISSOLUTION OF AND POST-DISSOLUTION PARENT-CHILD RELATIONS

The US Court of Appeals for the Eighth Circuit decided an important case involving the Hague Convention on the Civil Aspects of International Child Abduction. In *Custodio v Torres Samillan*,[106] a man and woman married and had two children in Peru. Upon divorce, the Peruvian court split custody, giving most of the time to mother. She later sought permission from the Peruvian court to travel with the children to the US for medical treatment on one of their sons. The Peruvian court gave permission for a short trip but required her to return with the children by a set date within 3 months. She failed to return and married an American just days after arriving in the US. The Peruvian court issued four orders compelling her to return the children to Peru, but she refused. The Peruvian father filed a petition under the Hague Convention in a federal court in Missouri for the return of the children – who were 15 and 16 years old at the time this case was decided. Affirming the district court the Eighth Circuit ruled that the Hague Convention (Art 4) ceases to apply to a child when he or she turns 16, so the request to return the older child was denied. Finding that the younger child objected to being returned to Peru, the Eighth Circuit court deferred to the trial court, held that a 'mature child's views on return can be "conclusive"', and, despite evidence that the mother had deceived the Peruvian courts about intending to return to Peru, it ruled that

[102] *Luttrell v Cucco*, 784 S E 2d 707 (2016).
[103] Ibid at 712.
[104] 379 P 3d 1183 (Utah Ct App, 2016).
[105] *Haddow v Haddow* 707 P 2d 669 (Utah, 1985).
[106] ___ P 3d 1086 (8th Cir, 2016).

'[t]he district court's decision to respect 15-year-old G.'s opposition to returning to Peru and desire to remain in the United States was not an abuse of discretion', since '[w]hether to apply the mature child defense was within the district court's discretion'.[107]

A sharply divided three-judge Missouri Court of Appeals affirmed a trial judge's ruling that pre-embryos created by a married couple for later implantation were not 'persons' subject to a custody award but were merely 'marital property of a special character'.[108] The dissent noted that the Supreme Court of the United States has approved and used life-begins-at-conception language, citing as well numerous Missouri statutes that show that living-but-unborn children are deemed human beings in Missouri law.

While it is not uncommon for some parties to inflate their claimed expenses and support needs, that approach can backfire as a divorcing woman discovered in *SP v FG*.[109] The mother was a Swedish reality television star and father was a successful businessman worth $400m (net) with an annual income of over $4m. By private agreement the father had paid $9,200 per month for child support, plus additional sums for the daughter's educational, medical and extracurricular expenses. When the child was 12 years old, the mother sought to increase child support by nearly 400 per cent to at least $35,000 per month. Under the state child support guidelines, the monthly amount would have been $40,882. The appellate court affirmed the original $9,200 award, noting that: 'The mostly arbitrary figures included in mother's income and expense declaration, as well as her questionable credibility, torpedoed her request for the guideline child support or, in the alternative, a minimum of $35,000.'[110]

The Maine Supreme Court held that laches is not a valid defence to a claim for collection of unpaid (past-due) child support, but may be raised as a defence to claims for interest owing on such arrearages or for unpaid spousal support.[111] Shortly after being ordered to pay support, the father had gone absent without leave, or AWOL from the Marines. Thirty-five years later, in response to her 42-year-old son's request for information about his father, the mother went online and located the man. She then filed suit to collect nearly $400,000 in unpaid child support and alimony, and interest. The man raised a defence of laches, which the trial court accepted. The Maine appellate court emphasised public policy considerations regarding the support of children in rejecting laches for collection of such claims. However, because spousal support does not terminate at age 18, and could accrue to exorbitant amounts, and the one who

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[107] Ibid at 1092.

[108] *McQueen v Gadberry*, 2016 BL 379117, Mo Ct App, No ED103138, 15 November 2016. Missouri was one of the states that allowed slavery, and apparently the lessons of the Civil War have not sunk into the judicial consciousness there. While there may be several different ways to accurately characterise living-but-unborn children, to call them 'property' is not one of them. The error of that conceptualisation is clear under the Thirteenth, Fourteenth and Fifteenth Amendments.

[109] 4 Cal App 5th 921 (2016).

[110] Ibid at 935.

[111] *Brochu v McLeod*, 2016 Me 146 (2016).

Click here to go to Main Contents

delayed seeking recovery is the one who controls the claim, the court allowed laches to apply to claims for back spousal support. The court remanded without consideration the issue of whether laches should apply to the claims for interest on the back child support.

Drawing the line as to when grandparents may have standing to seek custody of grandchildren is a delicate question. Since *Troxel v Granville*,[112] courts have been reluctant to approve of relatives' unwanted interference with or intrusion upon parenting. The Pennsylvania Supreme Court held in *DP v GJP*[113] that a state law allowing grandparents to file an action for partial or supervised custody when, inter alia, the parents of the child have been separated for at least 6 months was unconstitutional. One may ask whether the outcome might have been different if grandparent visitation rather custody had been authorised.

In a significant policy change, the New York Court of Appeals overturned a quarter-century of precedent and held that a former non-marital partner of a biological parent has standing to seek custody and/or visitation of a child conceived and born during their relationship by mutual agreement when he or she can show that the parties had mutually agreed to conceive and raise the child together.[114] The court of appeals explicitly overruled *Alison D v Virginia M*,[115] which had held that the unmarried partner lacked standing to seek custody or visitation.

A court may order an involuntary termination of parental rights when a father and child have become permanently alienated. A six-and-a-half year-old girl was placed in foster care due to her parents' serious substance abuse problems. Five years later, court-ordered services had resolved the parenting deficiencies, but the child remained unattached to the father. The Washington Supreme Court affirmed the termination of his parental rights because the father was 'unable to parent' due to the child's lack of attachment to him.[116]

A Nevada state court continues to have jurisdiction over a father's motion to modify custody even though he had since moved to Turkey and the mother and their child had moved to England. The Nevada court no longer had *exclusive continuing* jurisdiction under the UCCJEA. If the criteria for modifying a prior existing custody order were satisfied, however, the court could still modify its own prior custody order. The child and one parent still had significant contact with Nevada and there was substantial relevant evidence there regarding the child's care, protection and relationships.[117]

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[112] 530 US 57 (2000).
[113] 146 A 3d 204 (2016).
[114] *Brooke SB v Elizabeth ACC*, 28 NY 3d 1 (2016).
[115] 77 NY 2d 651 (1991).
[116] *In re KMM*, 379 P 3d 75 (Wash, 2016).
[117] *Kar v Kar*, 132 Nev Adv Op 63 (2016).

In *Waldecker v O'Scanlon*,[118] an agreement incorporated into their 2010 Nevada divorce decree provided that if either party moved more than 200 miles from Oahu or San Francisco, that custody automatically would be given to the non-moving party. The Hawaii Supreme Court vacated and remanded the trial court's enforcement of the provision, finding that it was error in 'failing to consider the best interests of the child'.[119] It held that: 'A custody determination should not be so inflexible as to foreclose inquiry into the best interests of the child …'[120]

The Supreme Courts of two states in 2016 clarified that counsel must be appointed for an indigent parent whose parental rights will be involuntarily terminated in an adoption proceeding. *In re KAS*,[121] the Utah Supreme Court held that ineffective assistance of counsel, with no counsel for an incarcerated parent opposing adoption, violated the Due Process Clause of the Fourteenth Amendment and of the Utah Constitution. Likewise, the New Jersey Supreme Court ruled that an indigent parent who faces termination of his or her parental rights in a private adoption proceeding has a right under the state constitution to representation by appointed counsel.[122]

Most American courts encourage and support parties' use of alternative dispute resolution procedures because they often are faster and less expensive than litigation, they often lead to voluntary resolution of the disputes in ways that enhance the parties' relationships, and they reduce the burdens upon the judicial system. However, the Maine Supreme Court vacated a provision in the parties' divorce decree that required them to mediate their parenting disputes before coming to court.[123] The court declared that: 'By imposing mediation as a condition to the commencement of a post-judgment proceeding, the judgment materially frustrates the parties' right of access to the courts …'[124]

The Indiana Supreme Court interpreted a statute authorising courts to order divorced parents to pay their children's educational expenses 'at postsecondary educational institution' to mean only ordinary undergraduate college expenses, but not graduate or professional school expenses.[125] The court relied upon the 'Legislature's intent to limit parental financial obligations after children reach the age of majority'.[126]

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[118] 375 P 3d 239 (Hawaii, 2016).
[119] Ibid at 240.
[120] Ibid at 250.
[121] 2016 Utah 55 (2016).
[122] *In re Adoption of JEV*, 141 A 3d 254 (NJ, 2016).
[123] *Karamanoglu v Gourlaouen*, 2016 ME 86 (2016).
[124] Ibid at para 31.
[125] *Allen v Allen* 54 NE 3d 344 (Ind, 2016).
[126] Ibid at 348. This policy underlying this decision may be curious since studies consistently show that children of divorce experience educational disadvantages compared to children of intact married families, but courts have also been reluctant to continue support duties after majority.

In Connecticut, a substantial increase in the obligor's income may warrant an increase in child support.[127] So ruling, the court distinguished its decision just a year earlier[128] that an alimony obligor's post-divorce increase in income did not, without more, necessarily justify increasing his alimony obligation. The contrasting cases illustrate the public policy differences between child support and spousal support.

A downward deviation from the child support guidelines may be justified when both parents and the supported child are disabled and have restricted income potential. However, to consider only the expenses of the obligor only, but not of the mother, was error, so the Kentucky Supreme Court remanded the case.[129]

In a change-of-custody proceeding, the 'overarching inquiry' is to determine what is in 'the best interests of the child', declared the Louisiana Supreme Court in *Tracie F v Francisco D*.[130] The case involved a maternal grandmother who had been designated as the 'domiciliary parent' in a consent divorce degree. The father later sought increased custodial rights. The state top court ruled that in such circumstances, the moving parent must show (1) that there has been a material change of circumstances since the original custody decree was entered and (2) that the proposed modification is in the best interest of the child.

VIII CONCLUSION

This review of 2016 American family law developments shows that most of the family law cases decided by American courts in 2016 deal with (1) the failure to properly form legal family relations, (2) the breakdown of traditional family relations, or (3) disputes arising out of the failure of non-traditional relationships including, especially in the wake of *Obergefell*, same-sex family and quasi-family relationships. The former two categories have always constituted a substantial part of American family law; the latter category has dramatically increased in quantity and significance, especially since *Obergefell* because of the legal uncertainty created by that decision. This review suggests why the law traditionally has strongly favoured formal traditional family relations because comparatively they are most stable and beneficial.

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[127] *McKeon v Lennon*, 138 A 3d 242 (Conn, 2016).
[128] *Don v Dan*, 105 A 3d 118 (Conn, 2015).
[129] *Carver (Butler) v Carver*, 488 S/W/3d 585 (Ky, 2016).
[130] 188 So 3d 231 (Louisiana, 2016).