

International Family Law, Policy and Practice

**Some Current International Issues
in Child Law and Parentage**



Volume 6, Number 1 • Spring 2018

International Family Law, Policy and Practice Volume 6, Number 1 • Spring 2018

SOME CURRENT INTERNATIONAL ISSUES IN CHILD LAW AND PARENTAGE

Contents

The Abduction Convention in a Post Brexit Era – Hon Diana Bryant	5
Evaluation of the Fight Against Child Marriage in Nigeria– O S Adeluken Odewale	17
Protecting Children under Hague– R Saladino	26
Affectivity As A Legal Support to the Right to Filiation in Brazil – D Pereira and Z Consalter	30
Book Review: Family Forms and Parenthood (Andrea Buchler & Helen Keller, Intersentia) – A M Hutchinson and C Rogerson	36
Guidelines for Submission of Articles	38

Editor's Message

This issue is the first since we completed the selection of collected papers from the Centre's 2016 Conference on Culture, Dispute Resolution and the Modernised Family. In this collection we have four articles and a book review highlighting topics of key international interest in relation to cross border child protection (with particular reference to the post Brexit era) and on parentage, with particular reference to the huge changes in family formation which now appear to be current in most jurisdictions of the world.

We start with The Hon Diana Bryant AO's 2017 International Family Law Lecture on Child Abduction in the Post-Brexit Era, held in association with ICFLPP at the University of Westminster in June 2017, which she has kindly written up for us in this issue.

Next is a detailed and thoroughly referenced article from Nigeria on the ongoing fight against Child Marriage which remains particularly prevalent in Africa and of significant impact in Nigeria because of the at least 3 religious and cultural contexts in which the population of this large West African country lives, thus offering increased opportunity for not giving up the practice, whatever the international initiatives to address this essentially child protection issue.

Thirdly, Rosa Saladino from Australia takes up the Hague child abduction theme from the perspective of her ISS background, setting out her concerns about lack of universal legal aid for the abducting parent, who (however wrong in taking a child or children across borders without consent of the left behind parent) has a role to play in providing security and confidence for the children involved which arguably includes legal assistance in explaining what s/he did and why in the proceedings which will inevitably follow - and in which if s/he cannot afford representation the court, and the children involved, will just as inevitably be disadvantaged.

Fourthly, two researchers from Parana State University in Brazil take us through the remarkable changes in family formation in that very large country which appear now to be recognised by its courts owing to the perceived importance of affectivity in filiation, which it seems can now, in the interests of the children concerned, be prioritised over biological connection.

Finally, Anne-Marie Hutchinson and Colin Rogerson review Intersentia's *Family Forms and Parenthood*, which they describe as being unable to be 'more timely' in view of the now worldwide adoption of such a variety of family units.

The themes from this issue, covering both key child and parenting topics, afford an excellent preparation for ICFLPP's next triennial International conference in July 2019, registration for which will shortly be open, since the themes for that next gathering in London when we will once again share perspectives and insights from around the world are on Gender, Inclusivity and Protecting the 21st Century Family.

Frances Burton

Frances Burton
Editor, *International Family Law, Policy and Practice*

This issue may be cited as (2018) 6 IFLPP 1, ISSN 2055-4802
online at www.icflpp.com.

Editorial Board of *International Family Law, Policy and Practice*

Professor Peter de Cruz

Professor Julian Farrand

(Joint Chairmen)

The Hon Mr Justice Jonathan Baker

Professor Stephen Gilmore, Kings College, London

Anne-Marie Hutchinson QC OBE, Dawson Cornwell, Solicitors

Clare Renton, 29 Bedford Row Chambers

Julia Thackray, Solicitor and Mediator

(*Ex officio*, the Co-Directors of the Centre)

Dr Frances Burton (Editor)

Professor Marilyn Freeman

The Abduction Convention in a Post-Brexit Era: The Law Will Survive the Changes to the Political Landscape¹

The Honourable Diana Bryant AO*

1. Introduction

On 29 March 2017, the British Ambassador to the European Union hand-delivered a letter from the Prime Minister of the United Kingdom to the President of the European Council, thereby invoking Article 50 of the *Lisbon Treaty*² and triggering the two-year process of negotiations that will lead to Britain's exit from the European Union. This 'Brexit' will significantly alter the political landscape — though how exactly it will do so is, as yet, largely unknown.

I will discuss what Brexit means for how international parental child abduction is dealt with by the United Kingdom. I will discuss what is known as the Brussels IIa Regulation ('Brussels IIa')³ and two relevant Hague Children's Conventions, the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* ('the 1980 Convention')⁴ and the *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in respect of Parental Responsibility and Measures for the Protection of Children* ('the 1996 Convention').⁵ I will also discuss certain controversial international family law decisions of the European Court of Human Rights ('ECtHR').

2. The European Convention on Human Rights

On 25 April 2016, the then Home Secretary, Teresa May, said that the United Kingdom must withdraw from the *European Convention on Human Rights*.⁶

Fast forward 12 months to April 2017, and the post-Brexit referendum reality, to reports that the now Prime Minister's colleagues were seeking to have her change her views leading up to the publication of the Tory election

Manifesto.

In the result, it was not part of the Manifesto, but the Prime Minister said that the UK would remain signatories 'for the next parliament'.

The Conservative Party Manifesto says that consideration will be given to the UK's 'human rights legal framework when the process of leaving the EU concludes'.⁷ That would not be until 2022.

Clearly the issue remains a live one and, although weight of opinion at present seems to favour remaining, as I will demonstrate later, one never knows what political imperatives might intervene. The recent attacks in London will inevitably lead to some strengthening of anti-terror laws which involve as a corollary some interference with human rights and freedoms.

I will therefore take some licence to consider some of the decisions of the European Court of Human Rights which impinge on the 1980 Convention with the possibility that at some point the UK might not be subject to its jurisdiction.

3. The 1980 Hague Abduction Convention

Along with the unprecedented human mobility that became commonplace in the 20th century came greater numbers of relationships between citizens of different countries. Sometimes these relationships evolved into families, and sometimes those families did not remain together. And when relationships end, many migrants want to return to their countries of origin — and some do so, taking their children with them, without the consent of the other parent. Prior to 1980, many parents took this action in an attempt to obtain more favorable custody

*Chief Justice of the Family Court of Australia. The paper on which this article is based was delivered at the University of Westminster in association with The International Centre for Family Law, Policy and Practice, as the International Family Law Lecture 2017.

¹The views of the paper and this article are my own; they do not represent the views of the Family Court of Australia or other judges. These views do not indicate how I would decide a case after having the benefit of the argument. I would like to thank my Senior Legal Research Adviser, Candice Parr, for her assistance in researching and composing this paper.

²*Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, signed 13 December 2007, 2702 UNTS 3 (entered into force 1 December 2009).

³*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* [2003] OJ L 338/1 ('Brussels IIa').

⁴Opened for signature 25 October 1980, 1343 UNTS 97 (entered into force 1 December 1983) ('1980 Convention').

⁵Opened for signature 19 October 1996, 2204 UNTS 95 (entered into force 1 January 2002) ('1996 Convention').

⁶*Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010). See also Council of Europe, 'European Court of Human Rights' (2014) *Migration and Human Rights* <http://www.coe.int/t/democracy/migration/bodies/echr_en.asp>.

⁷*Forward Together: Our Plan for a Stronger Britain and a Prosperous Future* (The Conservative and Unionist Party Manifesto 2017) 37 <<https://www.conservatives.com/manifesto>>.

determinations.⁸ As the problem of international parental child abduction increased in significance, the lack of a uniform approach to these kinds of disputes caused consternation⁹ and, ultimately, led to the creation of the 1980 Convention.¹⁰

The 1980 Convention is focused upon restoring the status quo by securing the prompt return of a child who has been wrongfully removed from his or her place of habitual residence. The intention is to deprive the taking parent of any jurisdictional advantage and prevent forum shopping. All contracting states recognise that a child's best interests are served by their prompt return to their place of habitual residence, the underlying idea being that the authorities in the child's place of habitual residence are best placed to look into the merits of a parenting dispute and decide upon issues of custody and access.¹¹

Thus the 1980 Convention aims particularly to discourage a court in the country to which the child is taken from accepting jurisdiction to determine a custody dispute on its merits. This means that, for judges, application of the 1980 Convention is somewhat counter-intuitive, in that we are required not to apply our country's laws or enter into a full inquiry about what is in the best interests of the child. Rather, we must apply the 1980 Convention and, if the requirements are met and no exceptions made out, return the child to the country of habitual residence.

Generally speaking, a removal or retention of a child is 'wrongful' if it is one that is in breach of the rights of custody of the left behind parent under the law of the state in which the child is habitually resident. The concept of habitual residence is not defined in the 1980 Convention or, indeed, in any of the other Hague conventions in which it appears.¹² The Hague Conference considers the question of habitual residence to be one of pure fact¹³ and the decision not to include a definition was a deliberate one.¹⁴

Where a child has been wrongfully removed¹⁵ from or

retained outside of their country of habitual residence,¹⁶ the child must be returned unless the respondent can show that more than one year has elapsed since the child's removal and the child is settled in his or her new environment¹⁷ or an exception to return¹⁸ can be made out. The exceptions are contained in Article 13 and include circumstances:

- where the person applying for return subsequently consented to or acquiesced in the child's removal or retention;
- where there is a grave risk that the return of the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; and
- where the child objects to return and has attained an age and degree of maturity at which it is appropriate to take the child's views into account.

The United Kingdom ratified the 1980 Convention on 1 August 1986, when the implementing legislation, the *Child Abduction and Custody Act 1985*, came into force. At that time, only four other states had ratified the Convention (Canada, France, Portugal and Switzerland) and none had acceded to it.¹⁹ The UK's long history with the 1980 Convention as one of its first contracting states means that it's no surprise that there is a large and influential body of jurisprudence on the Convention from this jurisdiction.

One of the current issues for the continued success of the 1980 Convention is the treatment of domestic violence in the context of the 'grave risk' defence in Article 13(1)(b). Domestic violence has emerged as an issue because of the demographic of abducting parents, which has — contrary to what the drafters of the Convention anticipated — turned out not to be abducting fathers but, rather, mothers wishing to return to their countries of initial residence — sometimes to flee domestic violence.

There are many new signatories to the Convention and

⁸ Sam F Halabi, 'Abstention, Parity, and Treaty Rights: How Federal Courts Regulated Jurisdiction under the Hague Convention on the Civil Aspects of International Child Abduction' (2014) 32 *Berkeley Journal of International Law* 144, 146. Note that in Australia we do not use terminology such as 'custody' and 'access' due to the proprietary connotations of these concepts. However, for ease of understanding, I will use these terms as they are well known and easily understood.

⁹ See Stephen I Winter, 'Home Is Where the Heart Is: Determining "Habitual Residence" under the Hague Convention on the Civil Aspects of International Child Abduction' (2010) 33 *Washington University Journal of Law & Policy* 351, 351.

¹⁰ The Abduction Convention has been incorporated into Australian law through regulations made under the *Family Law Act 1975* (Cth), namely the Family Law (Abduction Convention) Regulations 1986 (Cth).

¹¹ Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Convention* (HCCH Publications, 1982) 434–5.

¹² For commentary on habitual residence, see, eg, Todd Heine, 'Home State, Cross-Border Custody, and Habitual Residence Jurisdiction: Time for a Temporal Standard in International Family Law' (2011) 17 *Annual Survey of International & Comparative Law* 9; Jeff Atkinson, 'The Meaning of "Habitual Residence" under the Hague Convention on the Civil Aspects of International Child Abduction and the Hague Convention on the Protection of Children' (2011) 63 *Oklahoma Law Review* 647; Winter, above n 9.

¹³ Cf the legal concept of domicile.

¹⁴ Pérez-Vera, above n 11, 445.

¹⁵ 1980 Convention art 3.

¹⁶ Ibid art 4.

¹⁷ Ibid art 12.

¹⁸ Ibid arts 13, 20.

¹⁹ See Nigel Lowe, 'The 1980 Hague Convention on the Civil Aspects of International Child Abduction: An English Viewpoint' (2000) 33 *New York University Journal of International Law and Politics* 179.

it is easy to anticipate significant differences in values between at least some of the 97 contracting states²⁰ where the issue of domestic violence is concerned.

The Conclusions and Recommendations that came out of Part I of the Sixth Meeting of the Special Commission on the Practical Operation of the Abduction Convention and the Protection Convention, which took place in June 2011, affirmed support for promoting greater consistency in dealing with domestic and family violence allegations in the application of the Article 13(1)(b) grave risk exception. After discussion at Part II of the Sixth Meeting in January 2012, broad support emerged for the establishment of a Working Group of judges, Central Authorities and interdisciplinary experts to develop a Guide to Good Practice on the interpretation and application of Article 13(1)(b), a component of which is intended to provide guidance specifically directed to judicial authorities. I chair that Working Group.

4. The 1996 Hague Protection Convention

The 1996 Convention applies to a wide range of legal proceedings concerning children, including measures dealing with parental responsibility, custody and access, guardianship (including of the child's property) and foster or institutional care.²¹ The 1996 Convention governs jurisdiction for the taking of measures directed at the protection of the person or property of the child.²² It also covers the law authorities exercising jurisdiction will apply,²³ and questions of applicable law concerning parental responsibility for a child where there has been no specific intervention by authorities (such as by a court order). Provision is made for the recognition and enforcement of measures between contracting states,²⁴ and for administrative cooperation between contracting states to ensure the proper operation of the Convention.²⁵

Some interesting features of the 1996 Convention include the following:

- primary jurisdiction lies with the judicial or administrative authorities of the contracting state

in which the child is habitually resident;²⁶

- jurisdiction moves with the child, such that when a child's habitual residence changes, jurisdiction moves to the new contracting state of habitual residence;²⁷
- the contracting state of the child's habitual residence can decide to transfer jurisdiction to another contracting state if that state is better placed to determine the best interests of the child, though certain pre-conditions must be met (for example, that the child is a national of the state to which transfer is being contemplated or there are matrimonial proceedings between the child's parents in that state);²⁸ and
- where a child's habitual residence changes, the parental responsibility that exists under the law of the state of the child's previous habitual residence will continue to apply but, where the law of the state where the child is newly habitually resident confers parental responsibility on a person who did not previously have it, that law prevails.²⁹

There are limited grounds for non-recognition or refusal to register.³⁰

As is not doubt clear, the 1996 Convention has a broad scope, covering both private and public law matters, applying to children up to the age of 18 (in contrast to the 1980 Convention, which ceases to apply at 16) and has a broad and non-exhaustive definition of 'measures' (Article 3) to which the provisions apply. A 'measure' could potentially include any decision made via a written judgment, a court order (made by consent or otherwise), an undertaking given by one party³¹ and/or any decision that isn't excluded by Article 4.³²

The 1996 Convention has been somewhat slow to get rolling. Until the end of 2010 it was only in force in 15 contracting states. The EU member states were only authorised to ratify the Convention in 2008.³³ It has been argued that the slow ratification of the 1996 is attributable

²⁰ See the HCCH status table for the 1980 Convention: <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=24>>.

²¹ 1996 Convention art 3.

²² Ibid ch II.

²³ Ibid ch III.

²⁴ Ibid ch IV.

²⁵ Ibid ch V.

²⁶ Ibid art 5(1).

²⁷ Ibid art 5(2).

²⁸ Ibid arts 8, 9.

²⁹ Ibid arts 16, 17, 18.

³⁰ Ibid art 23.

³¹ See, eg, *Re Y (A Child)* [2013] EWCA 129.

³² Emma Nash, 'Recognition under the 1996 Hague Convention' [2015] *International Family Lawyer* 1.

³³ 2008/431/EC: Council Decision of June authorising certain Member States to ratify, or accede to, in the interest of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorising certain Member States to make a declaration on the application of the relevant internal rules of Community law — Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (15 June 2008).

to its breadth:

Part of the difficulty is that, as a more traditional conflict of laws agreement, the [1996] Convention demands a much greater level of harmonization between divergent legal systems. While the Convention defines a role for Central Authorities in facilitating communications and transmitting information between countries, most of its rules are designed to be implemented by judges under appropriate national legislation.³⁴

This is in contrast to the 1980 Convention, which assigns significant responsibilities to Central Authorities.³⁵

Today, the 1996 Convention is in force in 46 contracting states³⁶ — less than half the number of contracting states to the 1980 Convention. In light of the fact that 28 of these are EU members — amongst which Brussels IIa has precedence over the 1996 Convention (except for Denmark) — it is unsurprising that the jurisprudence on the 1996 Convention has been slow to develop.

Articles 61 and 62 of Brussels IIa deal with its relationship with the 1996 Convention. Article 61 stipulates that Brussels IIa applies where the child concerned has their habitual residence on the territory of an EU member state as concerns the recognition and enforcement of a judgment given in a court of a member state on the territory of another member state. Article 62 confirms that the 1996 Convention applies between EU member states only in relation to matters not dealt with by Brussels IIa.

In cases between the UK and any of the non-EU contracting states to the 1996 Convention (including Australia), the 1996 Convention applies.

In England and Wales there have to date been so few decisions analysing the 1996 Convention.³⁷

5. The Brussels IIa Regulation

Brussels IIa has been in force between EU member states since 2005. It is in many ways similar to the 1996 Convention, having been (at least in part) modelled upon it,

though it deals with a greater variety of issues, most notably international parental child abduction, but also divorce, legal separation and marriage annulment. Brussels IIa and the 1996 Convention both deal with parental responsibility, including rights of custody, access, guardianship and placement in institutional or foster care.

Brussels IIa applies to all judgments made by courts in matters of parental responsibility, not just those arising in relation to matrimonial proceedings. The child's parents do not have to be married or be biologically related to the child. Brussels IIa can also apply to agreements between parents that are enforceable in the country where they were made. Brussels IIa covers jurisdiction, recognition and enforcement, cooperation between Central Authorities, as well as containing specific rules on child abduction and access rights.³⁸ The Regulation also deals with measures relating to a child's property, if these are related to the protection of the child.³⁹ As I have already indicated, I will focus primarily on those aspects of Brussels IIa that are relevant to international parental child abduction.

The Court of Justice of the European Union ('CJEU') is responsible for the interpretation of Brussels IIa, and a reference can be made to the CJEU by any EU member state. The court has an urgent procedure for children's cases, pursuant to which decisions are generally delivered within two months of the receipt of the reference.⁴⁰ The benefit of the CJEU is that it provides authoritative interpretation of Brussels IIa that is binding throughout member states (though this can of course be seen as a drawback as well).⁴¹

6. The Relationship between the 1980 Convention and Brussels IIa

In international parental child abduction cases between EU member states (with the exception of Denmark), the 1980 Convention applies and is supplemented by certain provisions of Brussels IIa, which provides, in some (important) respects, for modified application in intra-EU

³⁴ Ann Laquer Estin, 'Families across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States' (2010) 62 *Florida Law Review* 47, 59.

³⁵ See generally 1980 Convention chs II, III, IV, V.

³⁶ See the HCCH Status Table for the 1996 Convention: <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=70>>.

³⁷ See *Re Y (A Child)* [2013] EWCA Civ 129; *Re P (Recognition and Registration of Orders under the 1996 Hague Child Protection Convention)* [2014] EWHC 2845 (Fam); *Re J (A Child) (1996 Hague Convention) (Morocco)* [2015] EWCA Civ 329 and its appeal, *In the matter of J (A Child)* [2015] UKSC 70; *Re M & L (Children)* [2016] EWHC 2535 (Fam).

³⁸ House of Lords European Union Committee, 'Chapter 3: The Brussels IIa Regulation and the Maintenance Regulation' in *Brexit: Justice for Families, Individuals and Businesses?* (17th Report of Session 2016–17, HL Paper 134, 20 March 2017) Box 8 <https://www.publications.parliament.uk/pa/ld201617/ldselect/lducom/134/13406.htm#_idTextAnchor044> ('*House of Lords Report Chapter 3*').

³⁹ *Ibid.*

⁴⁰ Nigel V Lowe, 'Some Reflections on the Options for Dealing with International Family Law following Brexit' [2017] (April) *Family Law* 399, 400.

⁴¹ *Ibid.*

abduction cases.⁴² Of particular relevance is Article 11 of Brussels IIa and pertinent CJEU jurisprudence. Brussels IIa reinforces the principle that the court shall order the immediate return of the child and seeks to restrict the application of the exception under Article 13(1)(b) of the 1980 Convention to a strict minimum. Under Brussels IIa, the child shall always be returned if he or she can be protected in the state of habitual residence. Accordingly, Article 11(4) of Brussels IIa provides that '[a] court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return'.

Article 11 of the 1980 Convention requires the judicial and administrative authorities of contracting states to act expeditiously, with the aim being that the authority will have reached a decision within six weeks from the date of commencement of the proceedings. In the UK (England and Wales), this aim is generally achieved.⁴³ In Australia, we have struggled to meet the six week turnaround time, with times varying from six weeks to six months⁴⁴ depending upon the complexity of the issues involved. Although the High Court of Australia (our supreme court) has highlighted the need to hear and decide 1980 Convention cases expeditiously,⁴⁵ the Court has also cautioned against 'inadequate, albeit prompt, disposition of return applications'.⁴⁶ In particular, in *MW v Director-General, Department of Community Services* [2008] HCA 12, their Honours Gummow, Heydon and Crennan JJ observed:

48. The judicial or administrative authorities which decide return applications in some Convention countries may not, under their legal systems, have the obligations to provide the measure of procedural fairness and to give reasons which generally apply in common law systems and which were observed here by the Family Court. Thus, in this country, the requirement of promptitude can be an onerous one.

49. Nevertheless, prompt decision making within 42 days is one thing, and a peremptory decision upon a patently imperfect record would be another. [...]

It should also be mentioned that, unlike the 1980 Convention, Article 11(2) of Brussels IIa expressly includes

the requirement for state courts to ensure that the child is given an opportunity to be heard when applying Articles 12 and 13 of the 1980 Convention (thus including Article 13(1)(b) cases), unless this appears inappropriate having regard to the child's age or degree of maturity. An important statement of law in relation to Article 11(2) of Brussels IIa have come from the Right Hon the Baroness Hale of Richmond (when still a Law Lord in the House of Lords) in the case of *Re D (A Child) (Abduction: Foreign Custody Rights)* [2006] UKHL 51, as follows:

57. ... there is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parents' views.

...

61. Hitherto, our courts have only allowed separate representation in exceptional circumstances. And recently in *In re H (A Child)* [2006] EWCA Civ 1247, the view was expressed in the Court of Appeal, that if the test for party status were to be revised in any direction, it should in future be more rather than less stringently applied. But [the] Brussels II Revised Regulation requires us to look at the question of hearing children's views afresh. Rather than the issue coming up at a late stage in the proceedings, as has tended to take place up to now, European cases require the court to address at the outset whether and how the child is to be given the opportunity of being heard. If the options are canvassed then and there and appropriate directions given, this should not be an instrument of delay. CAFCASS officers and, in the few cases where this is appropriate, children's representatives are just as capable of moving

⁴²Hannah Baker and Maja Groff, 'The Impact of the Hague Conventions on European Family Law' in Jens M Scherpe (ed), *European Family Law Volume I: The Impact of Institutions and Organisations on European Family Law* (Edward Elgar, 2016) 143, 151 (citations omitted).

⁴³ Permanent Bureau, *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: United Kingdom (England and Wales) Country Profile* (Info Doc No 2, March 2011) 29.

⁴⁴ Permanent Bureau, *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Australia Country Profile* (Info Doc No 2, March 2011) 27.

⁴⁵ See especially *De L v Director General, Department of Community Services (NSW)* (1996) 187 CLR 640, 689–90 (Kirby J). See also *MW v Director-General, Department of Community Services* [2008] HCA 12 at [47].

⁴⁶ *MW v Director-General, Department of Community Services* [2008] HCA 12 at 640.

quickly if they have to do so as anyone else. The vice has been when children's views have been raised very late in the day and seen as a 'last ditch stand' on the part of the abducting parent. This is not the place they should take in the proceedings. There is no reason why the approach which should be adopted in European cases should not also be adopted in others. The more uniform the practice, the better.

In the situation where a court has decided not to return a child on the basis of Article 13 of the 1980 Convention, Article 11(6) and 11(7) of Brussels IIa provides for a special procedure, the so-called 'override mechanism'. The procedure provides the possibility for the court in the member state where the child was habitually resident immediately before the wrongful removal or retention, and having jurisdiction under Brussels IIa, to examine the question of custody of the child. According to Article 11(8) of Brussels IIa, if said court were to issue a subsequent judgment requiring the return of the child, that judgment would be directly recognised and enforceable in the requested Member State without the need for exequatur.

An overall summary of the position in England and Wales in respect of Articles 11(7)–(8) of Brussels IIa was provided by Theis *J in D v N and D (By the Guardian Ad Litem) (Brussels II Revised: Art 11(7))* [2011] EWHC 471 (Fam) at [39], as follows:

- (1) The interrelationship of Articles 10 and Articles 11(7) and (8) of [Brussels IIa] permit the State of origin (from where the child has been wrongfully removed or retained ...) to undertake an examination of the question of the custody of the child, once a judgment of non return pursuant to Article 13 has been made by a State where a request has been under the Hague Convention 1980;
- (2) Proceedings under Article 11(7) should be carried out as quickly as possible (*M v T (Abduction: Brussels II Revised, Art 11(7))* at para [8] at 1689);
- (3) In undertaking the examination of the question of the custody of the child, the Judge should be in a position that he or she would have been in if the abducting parent had not abducted the child. Thus the whole range of orders that would normally [be] available to a Judge should be available when examining the question of the custody of the child (*Re A; HA v MB (Brussels II Revised: Art 11 (7) Application)* at para [90]; *M v T (Abduction: Brussels II Revised, Art 11(7))* at para [17] at 1691 – 1692);
- (4) In undertaking the examination of the question of the custody of the child, the court exercises a welfare jurisdiction: the child's welfare shall be the

court's paramount consideration (section 1(1) of the Children Act 1989; *Re A; HA v MB (Brussels II Revised: Art 11 (7) Application)*; *M v T (Abduction: Brussels II Revised, Art 11(7))* at para [17] at 1691 – 1692);

- (5) It may not be necessary or appropriate to categorise the jurisdictional foundation for such an enquiry as deriving from, or relying upon, the inherent jurisdiction. The foundation for any examination of the question of the custody of the child is simply through the gateway of Article 11(7);
- (6) The court has a well known and historic ability to order the summary return of a child to and from another jurisdiction;
- (7) As part of the court's enquiry under Article 11(7) the court does have the ability to order a summary return of the child to this country to facilitate the decision making process leading to a final judgment (*M v T (Abduction: Brussels II Revised, Art 11(7))* at para [17] at 1692; *Porse v Alpaço* Case C-211/10 [2010] 2 FLR 1343);
- (8) In deciding whether to order a summary return or to carry out a full welfare enquiry, the court exercises a welfare jurisdiction. (*M v T (Abduction: Brussels II Revised, Art 11(7))*) at para [17] at 1692). It is not altogether clear whether the decision to order a return of the child on a summary basis is more appropriately considered as akin to that which might be ordered under the inherent jurisdiction or whether it is effectively a specific issue order under the *Children Act 1989* order: if it is more appropriately considered as akin to the inherent jurisdiction then – at least as to the question of summary return – it may not be necessary for the court mechanistically and slavishly to direct itself to the welfare checklist; that having been said, once the child has returned and the court is considering what order to make the court should direct itself to the welfare checklist;
- (9) Any summary return order is directly enforceable through the procedures in [Brussels IIa] (see, Article 42 and Article 47 of [Brussels IIa], *Porse v Alpaço* (supra)).

It is important to emphasise that the objectives and underlying principles of the 1980 Convention, including considerations in relation to the scope of Article 13(1)(b) and its role within the normative system of the Convention, remain valid for contracting states in cases where both the 1980 Convention and Brussels IIa apply, given the complementary nature of the relevant provisions of the latter Regulation.

7. A Note on Brussels IIA (Recast)

One week after the Brexit vote, on 30 June 2016, the European Commission published the proposal for a recast of Brussels IIA.⁴⁷ The proposal identified six areas of Brussels IIA that required improvement, which included (relevantly to child abduction) the return procedure, hearing the child and cooperation between Central Authorities.⁴⁸ On 27 October 2016, the UK Government confirmed its decision to opt in to the latest negotiations on the Brussels IIA recast in spite of the Brexit referendum result.⁴⁹ Since it is not clear at this point how Brussels IIA (and other EU civil justice regulations⁵⁰) will figure in the post-EU United Kingdom, this was a sensible decision on the part of the Government.

It is unclear how long the negotiations will last (particularly due to the fact that unanimity across EU member states is required⁵¹), and even once the recast is finalised there will be a period of time before it can enter into force. Nevertheless, it is possible that it will have come into force by the time the UK formally exists the EU on the scheduled date of 29 March 2019. So it's worth briefly mentioning some interesting things about it.

A particular proposal for reform is that Brussels IIA (Recast) would provide for more realistic time limits for the disposal of return applications under the 1980 Convention. At the moment, Brussels IIA stipulates that 'the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged' (Article 11(3)). The proposal for Brussels IIA (Recast) is to allow six weeks for the requested Central Authority to issue proceedings; six weeks for the

case to be determined at first instance; and six weeks to dispose of the one appeal that will be permitted.⁵² Further, there is a stated expectation that return orders should be enforced within six weeks.⁵³ The hope is that the more realistic timeframe will encourage speedier resolution of matters in member states. The UK already processes return applications expeditiously,⁵⁴ but the hope is that Brussels IIA (Recast) will mean that applications made to other member states will be disposed of more quickly as well.⁵⁵

It also appears that Brussels IIA (Recast) will place more emphasis on mediation.⁵⁶ This is a positive development, though some have cautioned that mediation can sometimes be used by taking parents and, it is alleged, even Central Authorities, to prolong a child abduction case to enable the children to remain in the state to which the child was abducted.⁵⁷

Some may balk at the prospect of allowing only a single appeal, though this will facilitate the 1980 Convention's underlying requirement for speedy return and minimise the taking parent's ability to delay return through the issuing of appeals.

In their analysis of the proposed Brussels IIA (Recast), Paul Beaumont, Lara Walker and Jayne Holliday identify the suggestion of concentration of jurisdiction for abduction cases as a 'particularly strong proposal ... for the reason the Commission cites in Recital 26; "speeding up the handling of child abduction cases ... because the judges hearing a larger number of these cases develop particular expertise"'.⁵⁸

This is something emphasised in the draft Guide to Good Practice on Article 13(b).

⁴⁷ *Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)*, (EC) COM(2016) 411 final (30 June 2016).

⁴⁸ The other three areas identified were: placement of the child in another member state; the requirement of exequatur; and actual enforcement of decisions: *Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)*, (EC) COM(2016) 411 final (30 June 2016). For a comprehensive discussion of the proposal, see Lowe, above n 40.

⁴⁹ As reported in the *Law Society Gazette* (28 October 2016).

⁵⁰ *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)* [2012] OJ L 351/1; *Council Regulation (EC) No 4/2009 of 18 December 2008 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters relating to Maintenance Obligations* [2009] OJ L 7/1.

⁵¹ Article 81(3) of the *Treaty on the Functioning of the European Union* ([2012] OJ C 326/01) provides that 'measures concerning family law with cross-border implications' require the use of a special legislative procedure, namely unanimous voting in the Council and consultation of the European Parliament. As De Baere and Gutman point out, the fact that family law must receive 'special' treatment in the EU decision-making process points to 'the sensitivities that this topic engenders': Geert De Baere and Kathleen Gutman, 'The Impact of the European Union and the European Court of Justice on European Family Law' in Jens M Scherpe (ed), *European Family Law Volume I: The Impact of Institutions and Organisations on European Family Law* (Edward Elgar, 2016) 17.

⁵² *Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)*, (EC) COM(2016) 411 final (30 June 2016).

⁵³ Lowe, above n 40, 401.

⁵⁴ See, eg, David Hodson, 'Brexit: England and Wales as a Global Family Law Leader or EU-Emasculated?' [2016] (May) *Family Law* 572, 574.

⁵⁵ Lowe, above n 40, 401.

⁵⁶ *Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)*, (EC) COM(2016) 411 final (30 June 2016) Recital 28, Article 23(2).

⁵⁷ Paul Beaumont, Lara Walker and Jayne Holliday, 'Parental Responsibility and International Child Abduction in the Proposed Recast of the Brussels IIA Regulation and the Effects of Brexit on Future Child Abduction Proceedings' [2016] *International Family Lawyer* 307, 309.

⁵⁸ *Ibid* 308.

A further change put forth in the Brussels IIa (Recast) concerns the hearing of the child. In relation to the issue of abduction, the Explanatory Memorandum sets out the mischief to be remedied by the recast Regulation thus:

... the importance of hearing children is not highlighted in the Regulation in general terms for all cases on matters of parental responsibility, but only in relation to return proceedings. If a decision is given without having heard the child, there is a danger that the decision may not take the best interests of the child into account to a sufficient extent.⁵⁹

The Brussels IIa (Recast) proposal seeks to remedy concerns that divergent national rules governing the hearing of a child have meant that in many cases children have not been afforded appropriate opportunity to be heard.⁶⁰ The proposal includes a new Article 20 on the 'Rights of the child to express his or her views', which requires that 'the authorities of the Member States shall ensure that a child who is capable of forming his or her own views' is given an opportunity to express their view' and that it should be a 'genuine and effective opportunity to express those views freely during the proceedings'. Proposed recital 23 provides that Member States have the ability to determine how the child is heard as well as by whom, but they must do so whilst respecting the child's rights. 'The underlying message is that the question left to national authorities is how the child should be heard, rather than whether the child should be heard'.⁶¹

8. So, What then of Brexit

Let me say at the outset that there are many here who are far more familiar with Brussels IIa and the Convention and the various arguments for and against than I, an interloper from the Antipodes. I have thus drawn heavily upon a number of scholarly articles written by those with a far greater knowledge, Nigel Lowe and Paul Beaumont in

particular, to inform my observations.

So, what will happen, in terms of international parental child abduction, when the UK leaves the EU? Well I should start by saying that the non-EU contracting states to the 1980 Convention manage just fine. There will be losses, but these aren't the end of the world.

Members of the UK legal profession have spoken favourably about Brussels IIa's effect on the 1980 Convention, which 'in the era of modern, mobile populations ... bring[s] much-needed clarity and certainty to the intricacies of cross-border family relations',⁶² and some have particularly lamented the prospect of losing the Regulation's child abduction provisions.⁶³ Although the British Government will seek to convert the 'acquis' — the body of EU legislation — into UK law when the *European Communities Act 1972* is repealed,⁶⁴ there is no 'domestic legal mechanism that can replicate the reciprocal effect of the rules' in Brussels IIa.⁶⁵ In other words, Brussels IIa being applicable in UK law isn't useful without an agreement assuring reciprocity.

Some members of the profession have argued that the UK should seek, as part of the Brexit deal, to maintain Brussels IIa; however, this would necessarily involve the CJEU having an interpretive role.⁶⁶ This seems to have been ruled out by the current Government — in her statement to the Conservative party conference in September, Prime Minister Theresa May said: 'Let's state one thing loud and clear ... we are not leaving [the EU] only to return to the jurisdiction of the European Court of Justice. That's not going to happen.'⁶⁷

It has thus been suggested that the UK thus try to maintain Brussels IIa (or Brussels IIa (Recast), as the case may be) while carving out the CJEU,⁶⁸ perhaps by providing that UK courts should 'have regard' to the CJEU's rulings rather than be bound by them.⁶⁹

Yet others have argued that the existence of the 1996 Convention means that 'there would be no adverse

⁵⁹ *Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)*, (EC) COM(2016) 411 final (30 June 2016) 4.

⁶⁰ See generally Beaumont, Walker and Holliday, above n 57, 310.

⁶¹ See generally Beaumont, Walker and Holliday, above n 57, 310.

⁶² *House of Lords Report Chapter 3*, above n 38, [82].

⁶³ *Ibid* [89].

⁶⁴ Department for Exiting the European Union, *Legislating for the United Kingdom's Withdrawal from the European Union* (White Paper, 30 March 2017) 5 <<https://www.gov.uk/government/publications/the-great-repeal-bill-white-paper>>.

⁶⁵ *House of Lords Report Chapter 3*, above n 38, [97]. See also Lowe, above n 40; Mathew Thorpe, 'Brexit and European Family Law: An Address to the 2016 International Family Law Conference in Bratislava' (Paper presented at the 2016 International Family Law Conference, Bratislava, 2016); David Hodson, 'The Great EU Repeal Bill White Paper and Family Law' (International Family Law Group, 9 April 2017) 9.

⁶⁶ House of Lords European Union Committee, 'Chapter 4: Options for the Future' in *Brexit: Justice for Families, Individuals and Businesses?* (17th Report of Session 2016–17, HL Paper 134, 20 March 2017) [103] <https://www.publications.parliament.uk/pa/ld201617/ldselect/ldcom/134/13407.htm#_idTextAnchor067> (*House of Lords Report Chapter 4*).

⁶⁷ See Josh May, 'Read in Full: Theresa May's Conservative Conference Speech on Brexit' (2 October 2016) *PoliticsHome* <<https://www.politicshome.com/news/uk/political-parties/conservative-party/news/79517/read-full-theresa-mays-conservative>>. This position was reiterated by the Minister appearing before the House of Lords European Union Committee: see *House of Lords Report Chapter 4*, above n 67, [141].

⁶⁸ *House of Lords Report Chapter 4*, above n 67, [103]–[105].

⁶⁹ Lowe, above n 40, 403.

consequences from leaving the EU' and losing Brussels IIa.⁷⁰ If the UK decides to abandon Brussels IIa, or fails to reach an agreement with the EU about it, then the 1996 Convention can still be relied upon. While the 1996 Convention does not deal as comprehensively with abduction, especially in relation to the timing of applications,⁷¹ David Hodson has argued that:

The reality is that the UK (and some other countries) leads the way in Europe. Several EU countries do not operate returns quickly or effectively. Leaving the EU would not change the UK commitment to fast timetable and return orders for child abduction work.⁷²

The advantage for the UK of relying upon the Hague Conventions rather than being bound by Brussels IIa is increased simplicity (for practitioners and parents), as one international regime will be applicable to child abduction (the 1980 Convention) and one international regime will be applicable to parental responsibility (the 1996 Convention).⁷³ A further advantage will be that UK courts will be able to provide a truly internationalist approach to achieving uniform interpretation of the 1980 and 1996 Conventions.⁷⁴

Another benefit to the UK of no longer being subject to Brussels IIa would be that it could independently accept other countries' accessions to the 1980 Convention, whereas the UK is of course currently bound by the collective will of the EU.⁷⁵ As scholars have pointed out, this could be an issue in respect of, say, Pakistan, which recently acceded to the 1980 Convention; the UK may be more interested in accepting that accession than other EU states.⁷⁶ Nevertheless, the EU's record in negotiating EU-wide acceptance of accessions is good, so individual state competence is perhaps not an issue worth fighting over.⁷⁷

I have already mentioned the override mechanism contained in Brussels IIa, which enables the courts in the country of the child's habitual residence to make a return order that must be enforced in the state where the child is present (Article 11(6)–(7)). While the proposal for Brussels IIa (Recast) does create some exceptions to the currently absolute requirement to enforce the override return orders, the 1996 Convention has a more flexible regime for recognition and enforcement of an order for return of a child made by a court in the child's country of habitual residence.⁷⁸ Another technical advantage of the 1996 Convention compared to Brussels IIa is that the transfer provision can be invoked by the court that has jurisdiction under the Convention or by another court that would like to receive a transfer of the case from the court that has jurisdiction.⁷⁹

It should be noted that whether the 1996 Convention will continue to apply after the UK exits the EU is not altogether clear. The UK opted to deem the Convention an EU treaty as defined by s 1(2) of the *European Communities Act 1972*, in order to ratify it without primary legislation. Were the 1972 Act to be repealed, the status of the 1996 Convention within the UK 'would be in legal limbo and would probably require primary legislation to clarify'.⁸⁰

9. The European Court of Human Rights

Obviously Brexit does not affect the UK's membership of the ECtHR.⁸¹ Nevertheless, since — as I have mentioned — there has been some suggestion that the UK should leave the ECtHR,⁸² and since the Court has had a jurisprudential impact on international family law as it pertains to abduction cases, I thought I would make some observations about it.

The *European Convention on Human Rights*⁸³ is almost 70

⁷⁰ Hodson, above n 54, 574.

⁷¹ Lowe, above n 40, 404.

⁷² Hodson, above n 54, 574.

⁷³ Beaumont, Walker and Holliday, above n 57, 316. See also Thorpe, above n 65, 4.

⁷⁴ Beaumont, Walker and Holliday, above n 57, 316.

⁷⁵ See Opinion 1/13, EU: C:2014:2303.

⁷⁶ Lowe, above n 40, 403.

⁷⁷ In this I agree with Lowe, above n 40, 403.

⁷⁸ Beaumont, Walker and Holliday, above n 57, 316.

⁷⁹ Ibid.

⁸⁰ Lowe, above n 40, 404.

⁸¹ The EU has its own human rights treaty, the Charter of Fundamental Rights of the European Union [2000] OJ C 364/1. The CJEU has responsibility for overseeing compliance with the *Charter* as part of its remit for overseeing compliance with the EU law.

⁸² See, eg, Jess Staufenberg, 'What Has the European Court of Human Rights Done for Us?', 25 April 2016, *Independent* (online) <<http://www.independent.co.uk/news/uk/politics/what-has-the-european-court-of-human-rights-done-for-us-a7000531.html>>. Get more and better sources. I note however that the UK Government has backed off this proposal for the time being: see, eg, Heather Stewart, 'Ministers Put British Bill of Rights Plan on Hold until after Brexit', 30 December 2016, *The Guardian* (online) <<https://www.theguardian.com/law/2016/dec/29/ministers-put-british-bill-of-rights-plan-on-hold-until-after-brexit>>; Christopher Hope, 'Britain to Be Bound by European Convention on Human Rights until 2022', 26 April 2017, *The Telegraph* (online) <<http://www.telegraph.co.uk/news/2017/04/26/britain-likely-bound-european-convention-human-rights-2022/>>.

⁸³ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010). See also Council of Europe, 'European Court of Human Rights' (2014) *Migration and Human Rights* <http://www.coe.int/t/democracy/migration/bodies/echr_en.asp>.

years old, having entered into force on 4 November 1950. It is an instrument of the Council of Europe, which was established in 1949 through the signing of the *Treaty of London* by Belgium, Denmark, France, Republic of Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden and United Kingdom. (Greece and Turkey signed immediately thereafter.) Today, the Council of Europe has 47 member states (28 of which are (currently) members of the EU).⁸⁴ Any 'European' state can join the Council of Europe, with that territorial region being interpreted very broadly as including Turkey, the whole of Russia, as well as Iceland and Greenland (the latter being an autonomous part of Denmark).⁸⁵ Every Council of Europe member state must ratify the *European Convention on Human Rights* and the Protocols thereto.

The ECtHR⁸⁶ was set up in 1959 to monitor compliance with the *European Convention on Human Rights*.

In the UK, the Human Rights Act 1998 helped to integrate the *European Convention on Human Rights* into UK law. It is this piece of legislation that some members of the Conservative Party have advocated scrapping in favor of a 'British Bill of Rights'.⁸⁷

The *European Convention on Human Rights* contains two articles dealing directly with family issues, namely Article 8 ('Right to respect for private and family life') and Article 12 ('Right to marry'). The prohibition of discrimination in article 14 is also important. Finally, peripherally, the right to a fair trial in article 6 involves family law issues with regard to procedure, for example, the right to be heard in court and the right to a decision within a reasonable time.⁸⁸

Concerns have been raised about the ECtHR's ever-expanding interpretations of the European Convention on Human Rights.⁸⁹ Even defenders of the *Human Rights Act 1998*, such as Lady Hale of the Supreme Court, have expressed concern that 'the current problems facing both Strasbourg and the member states is whether there are any limits to how far the [Convention] can be developed'.⁹⁰

Two ECtHR cases are particularly pertinent. The first is *Neulinger and Shuruk v Switzerland* ('*Neulinger*').⁹¹ The case involved the removal of a child from Israel to Switzerland by his mother, a Swiss–Belgian national, in 2005. The father initiated proceedings for return under the 1980 Convention. The Swiss Federal Court reversed decisions of the district and appellate cantonal courts, which had upheld a 'grave risk' defence, and ordered that the child be returned to Israel by the end of September 2007. The mother failed to return the child but the order was never enforced because the mother initiated proceedings in the ECtHR challenging the order on the basis of Article 8.

In January 2009, a seven person chamber decided by a 4/3 majority that Article 8 had not been breached. In June 2010, the Grand Chamber determined that Switzerland would be in violation of Article 8 if the return order were enforced. In so finding, the Grand Chamber held by a 16/1 majority that although the return order complied with the 1980 Convention, the Court was not convinced that it would be in the child's best interests for the child to be returned to Israel and, furthermore, held that the mother would sustain a disproportionate interference with her right for respect to family life if she were forced to return to Israel. Thus the European Court of Human Rights determined that the child should not be returned.

Unsurprisingly, the decision was received with great dismay by the international family law community.⁹² There was concern that the ECtHR's emphasis on the need for judges to conduct 'an in-depth examination of the entire family situation'⁹³ and assess the child's best interests in every case⁹⁴ could be perceived as encouraging national courts to look into the merits of the case in a 1980 Convention application.⁹⁵ It was hoped that the case could be confined to its own facts; it was, after all, five years after the wrongful removal when the Grand Chamber handed down its decision. Indeed, the President of the ECtHR said as much, extra-curially.⁹⁶ The Supreme Court of the UK

⁸⁴ See generally *Council of Europe* (2017) <<http://www.coe.int/en/web/portal/home>>.

⁸⁵ Dagmar Coester-Waltjen, 'The Impact of the European Convention on Human Rights and the European Court of Human Rights on European Family Law' in Jens M Scherpe (ed), *European Family Law Volume I: The Impact of Institutions and Organisations on European Family Law* (Edward Elgar, 2016) 49, 50.

⁸⁶ See <<http://www.echr.coe.int/Pages/home.aspx?p=home>>.

⁸⁷ See, eg, Staufenberg, above n 82. Again, I note that this proposal no longer seems to be of immediate concern for the UK Government.

⁸⁸ Coester-Waltjen, above n 86, 58.

⁸⁹ Owen Bowcott, 'The European Court of Human Rights' Judgments that Transformed British Law', 4 October 2014, *The Guardian* (online) <<https://www.theguardian.com/law/2014/oct/03/landmarks-human-rights-echr-judgments-transformed-british-law>>.

⁹⁰ Quoted in *ibid*.

⁹¹ *Neulinger and Shuruk v Switzerland* (European Court of Human Rights, Grand Chamber, Application No 41615/07, 6 July 2010).

⁹² See, eg, Lara Walker, 'The Impact of the Hague Abduction Convention on the Rights of the Family in the Case-Law of the European Court of Human Rights and the UN Human Rights Committee: The Danger of *Neulinger*' (2010) 6 *Journal of Private International Law* 649, 349.

⁹³ *Neulinger and Shuruk v Switzerland* (European Court of Human Rights, Grand Chamber, Application No 41615/07, 6 July 2010) [139].

⁹⁴ *Ibid* [138].

⁹⁵ Walker, above n 94, 649.

⁹⁶ 'Speech Given on 14 May 2011 by Mr Jean-Paul Costa, President of the European Court of Human Rights, at an Irish–British–French Symposium on Family Law' (Permanent Bureau, Hague Conference on Private International Law, Information Document No 5 or May 2011 for the Attention of the Special Commission of June 2011 on the Practical Operation of the 1980 Hague Abduction Convention and the 1996 Hague Protection Convention).

also rejected the *Neulinger* approach, stating in *Re E (Children)* [2012] 1 AC 144 at [52]:

Where there are disputed allegations which can neither be tried nor objectively verified, the focus of the inquiry is bound to be on the sufficiency of any protective measures which can be put in place to reduce the risk. The clearer the need for protection, the more effective the measures will have to be.

More generally, the Supreme Court rejected the notion that the ECtHR had intended in *Neulinger* to introduce any change to well-established 1980 Convention principles and refused to accept that abduction cases ought to be approached differently in light of the decision.⁹⁷

Nevertheless, this troubling trend continued in the subsequent ECtHR cases of *Raban v Romania*,⁹⁸ *Šneersone and Kampanella v Italy*⁹⁹ and the initial decision in *X v Latvia*.¹⁰⁰ However, the Grand Chamber's decision in *X v Latvia* arguably responds to at least some of the criticisms of the *Neulinger* approach.¹⁰¹

In *X v Latvia*, the child was taken from Australia, her place of habitual residence, to Latvia by her mother. The father commenced Hague proceedings and the Latvian court made a return order. The mother appealed. On appeal, the mother asserted that the child was well settled in Latvia and submitted a psychologist's report stating that the child should not be separated from her mother and that the child would suffer psychological harm should separation occur. The mother also said she lacked the funds to return to Australia. The appeal was dismissed. Proceedings were brought in the ECtHR, contending that the mother's right to respect for family life would be violated by the return order. The Court was called upon to assess whether the decision-making process had been fair and whether the mother's rights, as afforded to her pursuant to Article 8 of the *European Convention on Human Rights*, had been afforded due and appropriate respect.

X v Latvia was first heard in 2011 by the Third Section, which held by a majority of five votes to two that there had

been a violation of Article 8. The case was then referred to the Grand Chamber, which delivered judgment on 26 November 2013.

There was no dispute about whether the return order amounted to interference with the mother's right to respect for her family life as protected by Article 8. Accordingly, what remained to be determined was 'whether the interference was "in accordance with the law", pursued one or more legitimate aims as defined in that paragraph and was "necessary in a democratic society" to achieve them'.¹⁰² In the ECtHR's view, the decisive issue was whether a fair balance had been struck between the competing interests at play, with due account being taken of the fact that 'the best interests of the child must be of primary consideration and that the objectives of prevention and immediate return correspond to a specific conception of "the best interests of the child"'.¹⁰³ The majority found (in a decision that split the judges 9 to 8):

... in the context of an application for return made under the [1980] Convention, which is ... distinct from custody proceedings, the concept of the best interests of the child must be evaluated in the light of the exceptions provided for by the [1980] Convention, which concern the passage of time (Article 12), the conditions of application of the Convention (Article 13(a)) and the existence of a 'grave risk' (Article 13(b)), and compliance with the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms (Article 20).¹⁰⁴

The Court then held that *Neulinger* did 'not in itself set out any principle for the application of the [1980] Convention by the domestic courts'.¹⁰⁵

At the very least, *X v Latvia* limits the ECtHR's role in 1980 Convention cases to a supervisory one and indicates that *Neulinger* should be considered exceptional.¹⁰⁶ The Court held that the exceptions in the 1980 Convention must be strictly interpreted but, before returning a child,

⁹⁷ *Re E (Children)* [2012] 1 AC 144, [19]–[27].

⁹⁸ *Raban v Romania* (European Court of Human Rights, Third Section, Application No 25437/08, 26 October 2010).

⁹⁹ *Šneersone and Kampanella v Italy* (European Court of Human Rights, Second Section, Application No 14737/09, 12 July 2011).

¹⁰⁰ *X v Latvia* (European Court of Human Rights, Third Section, Application No 27853/09, 13 December 2011).

¹⁰¹ Helen Keller and Corina Heri, 'Protecting the Best Interests of the Child: International Child Abduction and the European Court of Human Rights' (2015) 84 *Nordic Journal of International Law* 270, 284. See also Baker and Groff, above n 42, 155 et seq.

¹⁰² *X v Latvia* (European Court of Human Rights, Grand Chamber, Application No 27853/09, 26 November 2013) [54].

¹⁰³ *Ibid* [95].

¹⁰⁴ *Ibid* [101].

¹⁰⁵ *Ibid* [105].

¹⁰⁶ Keller and Heri, above n 103, 286.

¹⁰⁷ *Ibid*.

¹⁰⁸ *X v Latvia* (European Court of Human Rights, Grand Chamber, Application No 27853/09, 26 November 2013) [116].

¹⁰⁹ *Blaga v Romania* (European Court of Human Rights, Third Section, Application No 54443/10, 1 July 2014).

¹¹⁰ Keller and Heri, above n 103, 287.

¹¹¹ *Berrehab v The Netherlands* (European Court of Human Rights, Court (Chamber), Application No 10730/84, 21 June 1988).

the relevant state must give 'due consideration' to any arguable alleged grave risks and provide reasons specifically detailing why the decision was made as it was in the circumstances.¹⁰⁷ The Court stated that 'grave risk' must be interpreted in light of Article 8 of the *European Convention on Human Rights* and therefore includes all 'situations which go beyond what a child might reasonably bear'.¹⁰⁸

The Court's reasoning in *X v Latvia* has since been reiterated in *Blaga v Romania*¹⁰⁹ and 'seems to represent the new standard in such cases'.¹¹⁰

What concerns me as someone removed from the effect of the decisions of the Court (but in this case aware of it), is that as an outsider I think there is a blurring of personal inter-party domestic litigation with human rights instruments.

Article 8 provides for the right to respect for private and family life, home and correspondence. It further provides that there shall be no interference by a public authority of this right:

- except in accordance with the law;
- where this is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The relationship between parents and their children (both married and unmarried) falls within Article 8.¹¹¹

Unmarried couples who live together with their children will normally be said to enjoy family life.¹¹² In *Boughanemi v France*,¹¹³ the applicant's relationship with his son born outside marriage and with whom he had little contact, was found to amount to family life.

Family life does not come to an end upon ceasing to live together.¹¹⁴

When a right of custody and care of a child is awarded to one parent, then under the *European Convention on Human Rights* one can complain that the decision violates his or her right to respect for family life. Hence the ECtHR's review of whether domestic decisions of this kind are consistent with article 8 is influenced heavily by the 'wide margin of appreciation' which the State enjoys in this area, and it is unlikely to find that a decision awarding custody to one parent violates Article 8 unless the procedure followed was arbitrary or otherwise failed to take the parties' rights and interests into account.

Fairly obviously, procedural delay may lead to a de facto

determination of the issue and breach Article 8.¹¹⁵ Some of the well-known cases clearly fall within this rubric.

But *X v Latvia* does not.

So in *X v Latvia*, both parties had the right to enjoy family life — and that family life was being enjoyed in Australia before the mother wrongfully removed the child from the country of habitual residence where the father had rights of custody. None of that was in dispute.

I accept that the *European Convention on Human Rights* takes the litigation from pure inter-parties to something involving the State — but, I would argue, not entirely.

Why is the mother entitled to have her 'rights' taken into account but the father's 'rights' to family life are ignored? She raised an exception; she had the onus of proving it. If she failed in doing so, how is that a breach of her rights? And 'best interests' is not the appropriate consideration under the Abduction Convention when considering the exceptions. The exceptions may themselves raise it (grave risk of harm or objections to return), but it arises within the confines of the exceptions, not more broadly.

I appreciate that I may be preaching to the converted but it does give some support at least to the Prime Minister's concerns.

Still I suppose we need to look at the other benefits and the admonition not to throw the baby out with the bath water is apposite. The answer lies perhaps in continuing to persuade the ECtHR to look more carefully at the 1980 Convention's exceptions and acknowledge that there can be a fully run case in the country of habitual residence where, after all, most of the cases should be litigated.

10. Conclusion

Whilst there are possibilities that the UK will not be part of Brussels IIa and/or the *European Convention on Human Rights* (with the latter perhaps less likely), life will go on. The UK will simply be in the same position as many other countries, including Australia.

In so far as there are some procedural differences in application of Brussels IIa, this can be overcome and we have dealt with it in the draft Guide to Good Practice. During our Working Group meetings, the different way in which the task of dealing with Article 13(1)(b) was approached in those states in which Brussels IIa operates and the states which simply apply the 1980 Convention became apparent. The draft Guide suggests that either approach will provide the same outcome.

¹¹² *Johnson and Others v Ireland* (European Court of Human Rights, Court (Plenary), Application No 9697/82, 18 December 1986).

¹¹³ (European Court of Human Rights, Court (Chamber), Application No 22070/93, 24 April 1996).

¹¹⁴ *Berrehab v The Netherlands* (European Court of Human Rights, Court (Chamber), Application No 10730/84, 21 June 1988).

¹¹⁵ See *W v United Kingdom* (European Court of Human Rights, Court (Plenary), Application No 9749/82, 8 July 1987); *H v United Kingdom* (European Court of Human Rights, Court (Plenary), Application No 9580/81, 8 July 1987).

Evaluation of the Fight against Child Marriage in Nigeria

O S Adeluken-Odewale *

Abstract

Child marriage is a problem that has eaten deeply into many African countries. Factors such as poverty, culture and gender inequality have been attributed to the high rate of child marriage in Africa. According to UNICEF, 17% of girls under 15 years old are married while 47% of under 18 year old girls are married in Nigeria. The effect of this is that the child brides have been deprived of the opportunity to contribute effectively to the economic growth of Nigeria due to the fact that a larger percentage of these girls are denied their right to education. Efforts have been intensified globally to end child marriage. While Nigeria has ratified several international instruments and imported them into domestic legislation in a bid to end child marriage, it appears that this endemic problem seems to be on the rise. Many have pointed to the economic recession in the country as a contributing factor to the impediment against its spread. This article will evaluate the success of the efforts to end child marriage in Nigeria through legislation, policy and initiatives. Efforts will be made to determine the role and effectiveness of the judiciary in bringing an end to child marriage in Nigeria.

Key Words: Child Marriage, Violence, Harmful Practices, Nigeria, Africa.

1. Introduction

Child marriage is a pandemic that Africa has been dealing with for decades. This practice has eaten deeply into the African system so that the potential for African girls to realise a brighter future which could lead to economic contribution and sustenance has been jeopardised. The highest rate of engagement in child marriage has been reported in West Africa with 49% of girls under the age of 19 living in marital unions.¹

Nigeria is not left out in this problem. In respect of girls, the incidence of child marriage varies depending on the part of the country concerned, with about 76% in the North West region and 10% in the South East of Nigeria.²

Though child marriage is not exclusive to girls, in Africa, girls are predominantly the victims of child marriage. Child marriage undermines the girl child's right to education, economic empowerment and equal participation in the growth of the society. Child marriage is a gross abuse of human rights.

The United Nations Population Fund (UNFPA) has projected that if action is not taken in Nigeria, '4,615,000 of the young girls born between 2005 and 2010 will be married or in a similar union before age 18 by 2030. This projection shows an increase of 64% from the 2010 estimate of married girls, which is compounded by high fertility and low mortality in the recent past'.³

Though there are international and national legal frameworks that provide for the minimum standard to conform to as regards marriage, often the monitoring and enforcement mechanisms are too weak to achieve an effective result. Despite laws that prohibit and criminalise child marriage in Nigeria, the practice is still predominant in some parts of the country. It is against this background that it becomes necessary to re-examine the concept of child marriage under the Nigerian perspective with a view to identify the promoting factors and the hindrances to the realisation of effective results in the fight against child marriage in Nigeria.

2. Child marriage

Child marriage has been described as 'a customary, religious or legal marriage of anyone under 18 which occurs before the child is physically and psychologically ready for the responsibilities of marriage and child bearing'.⁴ Child marriage has been described as a type of gender based violence perpetrated in a male dominated society to determine the power structure. Child marriage can be seen as forced marriage since the child brides can barely make a sound and free decision about the groom, or the nature and implication of such a contract.⁵ Child marriage has been defined by United Nations Office of the High Commissioner for Human Rights (OHCHR) in the

* OS Adeluken-Odewale, LL.M, BL, MLIS, American University of Nigeria, nkegolden@yahoo.com.

¹ Women's Health and Action Research Centre 'Addressing child marriage' available at <http://www.wharc-online.org/publications/wharcs-monthly-update/addressing-child-marriage/> (accessed 18 August 2015).

² <http://www.girlsnotbrides.org/child-marriage/nigeria/> (accessed 18 August 2016).

³ http://www.devinformo.org/mdg5b/profiles/files/profiles/4/Child_Marriage_Country_Profile_AFRNGA_Nigeria.pdf (accessed 12 August 2015).

⁴ JA Walker *Mapping early marriage in West Africa: a scan of trends, interventions, what works, best practices and the way forward* (Being a research report submitted to the Ford Foundation, West Africa, September 2013) 7.

⁵ n 3 above.

Convention on the Rights of the Child (CRC) as 'marriage or cohabitation before age 18'.⁶ In most cases, child brides are not afforded the opportunity to meet their grooms beforehand. They have no say in the decision about the marriage.

According to the Nigeria Demographic and Health Survey (NDHS), 2008, 30% of teenagers within the range of ages 15-19 had begun child bearing. Out of this 30%, 39% and 46% were teenagers from the North East and North West respectively.

3. Marriageable Age

The issue of marriageable age in Nigeria has always been controversial mainly because the Constitution makes no express provision for this, neither did the Marriage Act nor Matrimonial Causes Act. A child had been defined by section 277 of the Child's Rights Act⁷ (CRA) as any person below the age of 18.⁸ The CRA expressly prohibited marriage to and by any person under 18, the Act further prohibits parents, guardians or any other person from betrothing a child to anyone and where such betrothal is effected, it is provided that it shall be null and void.⁹

Where a person marries a child under 18, is betrothed to a child, promotes the marriage of a child or betroths a child, such a person, according to section 23 of the CRA, is guilty of an offence punishable by a fine of N500,000¹⁰ or imprisonment for a term of five years or both. The punishment attached to this crime is not enough to make offenders realise the gravity of the offence. It would be better if the offence was made a felony without any option of a fine as its sanction.

Since the Child's Rights Act is federal legislation that falls under the concurrent list of the Constitution, its provisions are not binding on the states of the federation until each state has enacted its own version of the Act. As such, states can choose to regulate the determinant age to marry, for example, marriageable age in Akwa Ibom State and Kwara State is 16 years while it is 15 years in Jigawa State.¹¹ As such, by the very law that seeks to protect the Nigerian child in these states, child marriage is legally promoted. Thus it is clear that the political will to change

marriage laws is not as strong as it ought to be.

Furthermore, there are three different types of marriage that a man and a woman can contract in Nigeria which are statutory marriage, customary marriage and Islamic marriage.¹² As Nigeria is a multi tribal society, the customs of its people are as varied as the number of ethnic societies. In other words, there is no single customary law for Nigerians.¹³ In this respect, the traditional marriage system allows marriage of persons between the ages of 12-14 years for girls and 16 years and above for boys. In some parts of the Eastern region, the marriageable age for girls ranges from as low as 10 years but based on the condition that after the marriage ceremony is completed, the girl child remains under the protection of her father-in-law until she attains the marriageable age that is normal within the society. Determining the 'normal' marriageable age in the society will further depend on the societal acceptability.

However, for marriages concluded under Islamic law, the determinant age of a girl getting married is the age she starts her first menstruation which ranges from 9-15 depending on the hormones of the particular girl. A usual practice is to betroth a girl as young as 2 years and the marriage ceremony will be properly concluded when the child attains puberty. This is common in the Northern region of the country. For girls that are betrothed at a tender age, the child remains in the custody of her parents but the groom takes up financial responsibility for the child but only takes custody and begins consummation of the marriage when the girl reaches puberty.

It has however been observed that among the educated Nigerians who conduct Islamic marriage, the brides' ages range from 20-35. Thus there is no fixed rule that every marriage conducted under Islamic law involves child brides; rather the practice is common among the uneducated and poverty stricken households in the core North of Nigeria.

Since only statutory marriage is regulated by a promulgated law, the rule that the parties to the marriage must be at least 18 years of age is only adhered to in marriages celebrated under the Marriage Act. It follows therefore that any marriage that is validly conducted according to the rules of customary law and Islamic law

⁶ <http://www.ohchr.org/en/professionalinterest/pages/crc/asp>.

⁷ Child's Rights Act 2003 Cap C50 Laws of the Federation of Nigeria 2004 sec 21.

⁸ Sec 21.

⁹ n 7 above, sec 22.

¹⁰ Equivalent to \$1588 as at February 2017.

¹¹ Jigawa Child's Rights Law, 2008.

¹² Marriage is strictly a union of one man to one woman or more, depending on the nature of marriage. Same sex marriage is prohibited and criminalised in Nigeria by the Same Gender Marriage (Prohibition) Bill of 2011 which was further affirmed by a voice vote of the National Assembly in May 2013.

¹³ O Adedokun-Odele 'Recovery of child support in Nigeria' (2014) in P Beaumont et al *The recovery of maintenance in the EU and worldwide* 241.

which are recognised in Nigeria remains valid. Worthy of mention is the common practice of many Nigerians, especially the educated citizens who engage in a dual system of marriage whereby they conduct both the customary marriage and the statutory marriage. In some situations, some Muslim couples have been noted to celebrate the 3 forms of marriage, i.e. statutory, customary and Islamic forms of marriages. However, as noted earlier, this is a common practice among the elites who are usually above the age of 18 and as such age is not usually a factor in determining the validity or otherwise of the marriage.

4. Factors that Promote Child Marriage

4.1 Poverty

Child marriage is common in the poor countries of the world and more prominent in poor families. The poorer a family is, the higher the tendency that the girls of that family will be given out in marriage at a tender age. This gives the family an excuse for lesser mouths to feed. This is more prominent in the Northern part of Nigeria. Furthermore, the bride price received on the child bride provides a means of income for the family and this is evident in the way female children are taken care of till they are given in marriage in the Northern region of Nigeria.

This is evident in the report of Women's Health and Action Research Centre¹⁴ that:

In Asia and Africa, the importance of financial transactions at the time of marriage also tends to push families to marry their daughters early. For example, in many sub-Saharan cultures parents get a high bride price for a daughter who is married near puberty.

The poverty level in the North West of Nigeria is 77.7% while it is 76.3% in the North East of the country. This is evident of the high increase of betrothal of girl children at a tender age to relieve the parents of the financial burden of raising the girl child.¹⁵

4.2 Culture and religion

Child marriage is a by-product of discriminatory social norms and power imbalances which ascribes different social roles and status to males and females. Thus the practice can be traced to the social norm which defines a woman's social

status by marriage and child bearing.¹⁶

Many cultures in Nigerian society support child marriage in order to prevent a girl child from being promiscuous. The belief is that if a girl child is married off before she becomes sexually active, she will be dedicated to the husband alone and therefore the tendency of the girl child being promiscuous will be reduced. This had not proved totally successful as there had been instances where married women, especially those who were not given the opportunity to have a say in the choice of their groom, have been found to engage in extramarital affairs based on the justification that they do not love their husbands and if given the choice, they would have chosen to marry the persons with whom they engage in such extramarital affairs.

In the Northern region of Nigeria where the culture is greatly influenced by Islam, a girl child is expected to get married when she attains the age of puberty. Puberty in this context is determined by the period when a girl child first experiences her menstrual cycle. Thus, a girl child is not expected to observe the second monthly period in the father's house but in her husband's house. As such, the important role that Islam plays in the lives of the Northerners cannot be separated from the promotion of child marriage in the region. This is further strengthened by the constitutional guarantee of the freedom of religion, though the paramount interest of the child needs to be emphasized.¹⁷

Up till 2002 when Zamfara state officially adopted the Shariah legal system, Shariah was operative in Northern Nigeria as a form of customary law,¹⁸ and eleven other Northern states¹⁹ were quick to follow suit. This step further strengthened the promotion and legality of child marriage in those parts of the country.

It can be safely concluded that due to the influence of Islam in the Northern region of Nigeria, and based on the fact that the majority of the population of Northern Nigeria practises Islam which endorses and promotes child marriage, the high incidence of child marriage in the Northern region can be attributed to this factor.

4.3 Insecurity

With the high level of insecurity and displacement caused by the Boko Haram insurgents in Nigeria, over 35%

¹⁴ n 2 above.

¹⁵ A Erulkar & E Muthengi *Evaluation of Berhane Hewan: A programme to delay child marriage in rural Ethiopia* <http://www.guttmacher.org/pubs/journals/3500609.html> (accessed 12 June 2015).

¹⁶ International Planned Parenthood Federation (IPPF) *Ending child marriage: a global guide for policy action* (2006) <http://www.unfpa.org/sites/default/files/pub-pdf/endchildmarriage.pdf> (accessed 26 June 2015).

¹⁷ TS Braimah 'Child marriage in Northern Nigeria: Section 61 of Part I of the 1999 Constitution and the protection of children against child marriage' (2014) 14 *African Human Rights Journal* 474.

¹⁸ S Fabamisse 'The introduction of Sharia legal system in Nigeria: problems and prospects' in A Ibidapo-Obe & TF Yerima (eds) *International law, Human Rights and development, essays in honour of Professor Akintunde Oyebo* (2004) 380.

¹⁹ Niger; Bauchi; Borno; Gombe; Jigawa; Kaduna; Kano; Katsina; Kebbi; Sokoto & Yobe.

of girls between ages of 6-14 are out of school in the Northwest and Northeast regions of Nigeria. This is further compounded with the demands of insurgents, among which is some advocacy against Western education. In most of their attacks and kidnappings, the insurgents give preference to girls who are out of school and who are married. Where they kidnap at random, the practice has been to release the girls who were married, especially if they proclaim the Islamic faith. This has led many parents in these regions to give their girls in marriage with minimal or no chance at formal education.

5. Effects of Child Marriage

5.1 Education

In Northern Nigeria, parents deliberately keep their daughters out of school because investing in their education is considered a liability to the parents.²⁰ Upon marriage, the chances of a girl child attending school to complete her education are greatly reduced. This is mainly due to the burden of household chores coupled with that of child bearing. Some husbands deliberately keep their child brides away from school on the ground that education will not benefit them in any way and to prevent them from being influenced by 'Western knowledge'.

Also, in many African homes, the role of the woman is still seen as being that of the house keeper and child rearer. This factor has discouraged many families from investing in educating a girl child. This is coupled with the justification of many poor families in the Northern part of Nigeria that it is better to get their daughters married off than to enrol them in a school where they get a low quality of education that would not add value to their lives.

Research in 29 countries showed that women who got married when they were 18 years or older had more education than their counterparts who got married when they were younger than 18 and it was discovered that a woman's age at first marriage is positively related to her total years of schooling.²¹ It was observed in Nigeria that women who were at least 18 when they married achieved, on average, 9.3 years of schooling, while those who married before they were 18 remained in school for only 2.5 years.

For the child brides that continue school after marriage, they are often forced to drop out of school upon getting pregnant and this also results in the same effect as those who had to stop school for marriage purposes. Research has further shown that mothers with education are less likely to keep their children in school since they themselves

lack the knowledge of the benefit of being educated and even if they desire for their children to be educated, they often lack the capacity and resources to educate them so the children end up being child brides themselves.²² This in turn leads to recycling child marriage, poverty and lack of access to education and information.

5.2 Reproductive health

Most child brides lack the basic information they require regarding reproductive health issues. This is mainly due to the fact that the girls are kept out of school and they hardly attend ante-natal programmes where they can get adequate information on health related issues such as HIV vulnerability, maternal mortality and risks associated with pregnancies at a tender age.

Young mothers experience higher rates of maternal mortality and higher risk of obstructed labour and pregnancy-induced hypertension because their bodies are unprepared for childbirth.²³ Girls between 10 and 14 are five times more likely than women aged 20 to 24 to die in pregnancy and childbirth²⁴ while girls ages 15 to 19 are twice as likely as older women to die from childbirth and pregnancy, making pregnancy the leading cause of death in poor countries for this age group.²⁵ A child born to a mother in her teens is two times more likely to die before they reach the age of one than a child born to a woman in her 20s.²⁶ also, child brides are more vulnerable to contact sexually transmitted diseases and stand the risk of contracting HIV/AIDS since their spouses are always much older and more sexually active.

It had also been established that girls who have babies also have a high risk of suffering from obstetric fistula, a condition in which the vagina, bladder and/or rectum tear during childbirth and, if left untreated, causes lifelong leakage of urine and faeces.²⁷ Research had further revealed that if all women completed primary education, the under-five mortality rate would drop by 15% in low and lower middle income countries, saving almost a million lives annually²⁸ and if all women completed secondary education, the under-five mortality rate would drop by 49%, saving three million lives annually.²⁹

5.3 Economic Impact

While it can be shown that educated women contribute towards the economic growth of their society, research on the rate of global impact of women on the economy is underway, being conducted by the World Bank and

²⁰ n 1 above.

²¹ S Clark et al 'Protecting young women from HIV/AIDS: the case against child and adolescent marriage' (2006)32:2 *International Family Planning Perspectives* 79.

²² L Asrar *Preventing child marriage in the Commonwealth: the role of education* (2015).

²³ SM Mathur et al 'Too young to wed: the lives, rights and health of young married girls' (2003) *International Center for Research on Women*.

²⁴ United Nations Population Fund and the University of Aberdeen *Maternal mortality update 2004: delivering into good hands* (2004).

²⁵ Save the Children 'State of the World's Mothers 2004' (2004).

²⁶ S Jain & K Kurz *New insights on preventing child marriage: a global analysis of factors and programmes* (2007) 8.

²⁷ United Nations Population Fund and Engender Health *Obstetric fistula needs assessment report: findings from nine African countries* (2003).

²⁸ UNESCO (2013) 20.

²⁹ n 27 above, 20.

International Centre for Research on Women with projected results in 2017.³⁰ Female education is essential to economic growth and investment in female education has economic and social benefit as it is possible to break the poverty cycle.

The effect of the form of marriage based on the predominant culture in Northern Nigeria indicates a low level of economic contribution on the part of married women. As noted by Salamone³¹ when she said:

Hausa women are put into purdah³² directly upon marriage if their husbands can afford to do so. They are cut off from contact from all males but kinsmen. There are strict regulations regarding their public movements. For women, marriage is the only path to virtue. Consequently, marriage is common for young girls between the ages of ten and twelve.

As noted, child marriage is a causal factor to the non-education of many female children in Nigeria and in order to break the cycle of poverty, there is a dire need to invest heavily in education of the girl child. By this investment, the educated female child would be able to contribute her quota to economic development and sustenance which is the most viable means to break the cycle of poverty as well as curb child marriage in Nigeria.

6. Initiatives to End Child Marriage

Globally, there have been several approaches to fighting child marriage which can be broadly categorised into the legal approach, the social benefit and development approach, the economic benefit and employment approach and the empowerment education approach.³³

Nigeria has about 25 intervention programmes on child marriage with almost all of them concentrated in the Northern region. While some programmes are targeted at enrolling and retaining girls at schools using strategies like direct cash grants to the parents on the condition that the girls remain in school, some seek to empower women to be economically independent while other programmes are focused on fistula.

6.1 Legal approach

The legal approach found its root in the works of non-governmental and developmental agencies³⁴ and the Convention on the Elimination of All Forms of

Discrimination Against Women, issued in Cairo in 1994 and the aim of which is to eradicate child marriage and promote education and protection of the girl child.

The International Conference on Population and Development (ICPD) in the Beyond 2014 agenda-setting report maintains a strong focus on ending child marriage by compelling governments to fulfil their responsibilities in the area of girls' rights in health and education.³⁵ The rights based approach seeks to ensure that states promulgate laws regulating the minimum age of marriage but whereas many African countries have complied with this, enforcement of the laws remain elusive as there are no judicial authorities to buttress the provisions of the laws so promulgated, despite the prevalence of child marriage in the Nigerian society.

In Nigeria, between the 1970s and 2015, there have existed over 54 policies and laws aimed at promoting girls' education. However, it has been recorded that Nigeria has the highest number of school girls in West Africa and many of these out of school girls between the ages of 10-14 in Nigeria had never attended schools.³⁶ The main problem seems to lie in the aspect of implementation and enforceability of these frameworks.

And to buttress the need for implementation, at the event to commemorate Day of the African child 2015, Girls, Not Brides had called on all African governments to develop and implement national strategies and action plans and provide a legal framework that protect girls from early marriage and its negative consequences by working closely with civil societies that protect all girls at risks.³⁷

6.1.1 Violence against Persons (Prohibition) Act (VAPA) 2015

The Violence against Persons (Prohibition) Act 2015 recently signed into law is an Act to eliminate violence in private and public life, prohibit all forms of violence against any persons and to provide maximum protection and effective remedies for victims and punishment of offenders. The Act goes a step further than the Criminal Code Act³⁸ in defining rape to mean the intentional penetration of the vagina, anus or mouth of another person if such person does not consent to the said penetration or if the consent is obtained by force or means of threat or intimidation. It also recognizes the fact that women can commit rape too.³⁹

The provision that a list of sex offenders should be

³⁰ International Center for Research on Women *Understanding the Economic Impacts of Child Marriage* <http://www.icrw.org/where-we-work/understanding-economic-impacts-child-marriage> (accessed 10 June 2015).

³¹ F Salamone *The Hausa of Nigeria* (2010) 134.

³² Seclusion.

³³ A Ekine et al 'Improving learning opportunities and outcomes for girls in Africa' (2013) <http://www.brookings.edu/globalscholars> (accessed 15/08/2015).

³⁴ Such as USAID, Action Aid, UNESCO, UNICEF and a host of others.

³⁵ International Conference on Population and Development (ICPD) Beyond 2014 'ICPD Beyond 2014 and the Post-2015 UN Development Agenda' (2014).

³⁶ n 32 above.

³⁷ 'Girls Not Brides Calls For Renewed Action To End Child Marriage In Africa' *Leadership* 16 June 2015.

³⁸ Laws of Federation of Nigeria 2004 Cap C38.

³⁹ Violence against Persons Act 2015 sec 1.

maintained and made accessible to the public is a welcome development in Nigeria.⁴⁰ However, this law had not been sufficiently publicised for stakeholders to be aware of their rights and benefits under the new law. Also, the societal attitude might not encourage the effective implantation of this law as members of Nigerian society normally frown on the fact that a wife might make a formal report of sexual assault against the husband. The law enforcement agents rather look towards settling the dispute as a 'family dispute' rather than focussing on the crime that has been committed against the wife.

6.1.2 Child's Rights Act

In 2003, Nigeria gave internal effect to the UN Convention on the Rights of the Child by the Child's Rights Act⁴¹ and this had been effected in 26 states in Nigeria. Some states in Northern Nigeria⁴² refused to pass the Child's Rights Law mainly because of the provision on marriageable age which contradicts the prevailing custom that permits child marriage. The effect is that the states that have refused to give effect to the Child's Rights Act by enacting a state version of the law cannot be bound by the provisions of the Child's Rights Act.⁴³

The justification for the requirement of individual states of the federation to domesticate the law is based on the fact that child justice administration is under the concurrent list of the Nigerian Constitution⁴⁴ and as such the National Assembly fails to make laws for the states on issues that fall within the concurrent list.

6.1.3 Sexual Offences Bill

The Sexual Offences Bill is legislation passed into law in May 2015 which seeks to make provisions about sexual offences, prevent and protect all persons from harm, unlawful sexual acts and related purposes. Since inception of the Act in May 2015, section 7 of the Act had generated a lot of controversy among scholars, practitioners and members of the public. Section 7 relates to defilement of a child and it provides that:

7. (1) A person who commits an act which causes penetration with a child is guilty of an offence called defilement.
- (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
- (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for life.
- (4) A person who commits an offence of

defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for life.

A careful observation and interpretation of this provision will reveal that any person that defiles a child below the age of 18 is guilty of the offence of defilement. However, it had been argued nationwide that the manner in which this provision of the law was drafted is ambiguous and this was evidenced by the heat that the provision generated. The opinion of members of the public was that the provision was drafted in a manner to protect prospective offenders. This was based on the fact that many people just read the first part that prohibited defilement of a child below 11 years and based on that did not read any further.

Subsection 5 of section 7 further provides that:

- (5) It is a defence to a charge under the section (if)-
 - (a) It is proved that such child deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
 - (b) the accused person reasonably believed that the child was over the age of eighteen years.

This is in sharp contrast to the provision of section 31 of the Child's Rights Act 2003 which also prohibited sexual intercourse with a child and makes such an act to be rape which is punishable by imprisonment for life. Under the Child's Rights Act, it is immaterial that the offender believed the person to be of or above the age of 18 years or that the sexual intercourse was with the consent of the child.

From the contradictions in the provisions of the Sexual Offences Bill and the Child's Rights Act, one cannot help but wonder if this is a deliberate act on the part of the lawmakers to insert a shield to protect offenders of child marriage and defilement. This line of reasoning flows from the fact that the Sexual Offences Bill was enacted in 2015 while the Child's Rights Act is a 2003 law. Rationally, a 2015 law should be an improvement on the loopholes of an earlier law and not seek to contradict a law which, if properly implemented, could bring about a great reduction in the incident of child marriage in Nigeria.

6.2 Social benefit and development approach

This approach emanated in the 1950s from literatures on girls' education and fertility. This approach is in line with the contribution of education in delaying the first marriage of girls. Thus when girls are kept in school, the tendency is that the first marriage will be delayed till the girls are psychologically and physically mature to handle the

⁴⁰ n 38 above, sec 2.

⁴¹ n 7 above.

⁴² Specifically Adamawa, Bauchi, Borno, Enugu, Gombe, Kaduna, Kano, Katsina, Kebbi, Sokoto, Yobe and Zamfara States of Nigeria.

⁴³ n 12 above, 245.

⁴⁴ The Constitution of the Federal Republic of Nigeria, 1999 (as set out in 1999 Part II of 2nd Schedule to s 4(2)).

demands of marital life. Thus, delayed first marriage brings about delayed fertility of girls.

Demographers, population scholars, ethnographers and sociologists were at the forefront of this approach. Their work has showed simple linear propositions equating to duration of schooling with changes in the age of marriage, numbers of births, numbers of live births and child mortality.⁴⁵

In Nigeria, forward radio programs like 'Tsarabar Mata' focuses on discussions on health related issues like fistula and early marriage. There have also been several campaign programmes by civil societies, media and government on the need to stop acts of child marriage. Most West African countries have in place scholarship schemes and Ambassador programs to keep female children in school by seeking to reduce the education burden on the parents. Education programs combined with community advocacy is the most dominant intervention in northern Nigeria.

Also, an estimated 400,000 to 800,000 of the world's estimated 2 million fistula sufferers live in Nigeria, most of them young girls.⁴⁶ Programs focused on VVF are considerably high in the Northern region of Nigeria. Most of these programmes focus on prevention and surgical repairs. Also, some of the programmes offer economic support to some victims of VVF who have undergone surgical repair to make their integration into society easier.

In July, 2016, the Federal Government, through the Ministry of Women's Affairs and Social Development set up a technical committee to come up with modalities to end the incidence of child marriage completely in Nigeria. The committee is saddled with the duty to raise awareness on child marriage issues as well as to encourage attitudinal change among members of society. Also, the committee is enjoined to monitor and implement existing laws to eradicate child marriage in Nigeria.

6.3 Economic benefit and employment approach

The economic benefit and employment approach emerged from 'discourses on economic empowerment and technical education to demonstrate the benefits of non-formal education to the individual girl in terms of income generation alternatives to child marriage.'⁴⁷ Literature developed to link child marriage to the inability of females to participate in and contribute to the growth of underdeveloped economies.

A notable programme in this context is the married adolescent programme which is a programme that seeks to promote safe and healthy transition to adulthood through prevention of HIV/AIDS among young married girls in eight states in Northern Nigeria. The program provides youth-friendly sexual and reproductive health services such as family planning to married adolescents. The program was funded by USAID and implemented by the Population Council through partners including AHIP, Islamic Education Trust and FOMWAN (Federation of Muslim Women's Associations in Nigeria).

6.4 Empowerment education approach

This is basically a feminist approach to ending child marriage. This approach is to the effect that child marriage is a form of gender based violence and the advocates of this approach aim at raising consciousness and bringing an end to child marriage. This approach tends to empower girls with the knowledge and skills to understand and confront the male dominated status of the society.

Thus, the strategy is to adopt non formal education rather than the formal education system with the aim of reaching more marginalised girls.⁴⁸ The approach was made popular by the International Labour Organization basic needs strategy and by the Women in Development (WID) movement of the mid-1970s to early 1990s.⁴⁹ It has been observed that the potential of non-formal training programmes to serve as an empowering platform for girls and women escaping from traditional roles, including that of child marriage, was missed in the framing of the MDGs (Millennium Development Goals).⁵⁰

Owing to the household chores and other marital responsibilities of a girl wife, she is excluded from her right to education. As such, a series of global policies on women and child's rights set the stage for this approach. This led to compelling arguments on empowerment education made by development agencies.⁵¹ As such, UN Women pushed for a curriculum that seeks to provide girls and young women with tools and expertise to understand the root causes of violence in their communities and to educate communities to prevent such violence; in a joint statement by UN agencies to commemorate the 2013 International Day of the Girl Child important empowerment policy recommendations were reiterated on how education can end child marriage.⁵²

⁴⁵ n 32 above.

⁴⁶ Walker (n 4 above) 42.

⁴⁷ n 32 above.

⁴⁸ J Chimombo et al *A comparative study on universal primary education policy* (2008) 53.

⁴⁹ International Labor Organization *Employment, growth and basic needs: a one world problem-the international basic needs strategy against chronic poverty* (1977).

⁵⁰ M Hartl 'Gender pathway out of poverty: rural employment program – technical and vocational education and training (TVET) and skills development for poverty reduction – do rural women benefit?' (paper presented at FAO-IFAD-ILO workshop on gaps, trends and current research in gender dimensions of agricultural and rural employment: differential pathways out of poverty, Rome, March 31–April 2, 2009).

⁵¹ Ekine (n 32 above).

⁵² UN Women *UN Women: Approaches to End Child Marriage* (2012) <http://www.unwomen.org/en/news/stories/2012/10/un-womenapproaches-to-end-child-marriage/#sthash.WG5QPpym.dpuf> (accessed 15/08/2015).

7. Conclusion

An attempt had been made at identifying the prominent causes and factors responsible for child marriage in Nigeria. While child marriage is a general problem in Nigeria, it is more prominent in the Northern part of Nigeria due to the influence of Islam and the adoption of the Sharia legal systems in some Northern states of the country.

Also, although the government has enacted the domestic version of the UN Convention on the Rights of the Child and further enacted several laws to reduce the incidence of child marriage, these laws have been of little effect, especially in the region that require them most, due to the fact that matters that relates to child justice administration falls under the exclusive list of part I of the second schedule of the Constitution and as such, the Federal government lacks absolute power over matters relating to child justice administration.

Lastly, while the recent passage of the Violation against Persons (Prohibition) Act in May 2015 had been a welcome idea in expanding the frontiers of acts that qualify as violence against women and girls, the Sexual Offence Bill 2015 on the other hand appears to contradict the efforts of previous laws on reducing the incidence of child marriage in Nigeria due to the defence that if a man reasonably believes that a child is above the age of 18, the man will not be guilty of defiling the girl child.

8. Recommendations

‘Changing social norms can take a long time, and there is still lack of consensus about how exactly social norms change.’⁵³ There is no single solution to end this phenomenon of child marriage. A starting point to end child marriage is to embark on an aggressive advocacy campaign on the need for attitudinal change of members of the society and especially in the Northern region where most policies are interpreted to be attacks on their faith. There is a need to sensitise members of the society on the need to maintain a rational approach and sense of reasoning towards a progressive policy.

While it might be true that the Hadiths⁵⁴ promoted child marriage, this act had become archaic in light of modern development and the utmost factor should be the best interest of a child.

In terms of policy and legal framework, the Nigerian government has to review the Constitution to include child justice administration in the exclusive list such that laws that relate to child welfare and administration will be within the ambit of the federal government without the need for state governments to enact their versions as they deem fit. In this regard, the country would then be able to maintain uniform laws on matters that deal with child administration and not leave the wellbeing and fate of the future generation, especially the girl child, in the hands of a few individuals whose paramount interest is to protect and promote their individual interests.

While consent of the parties is a requirement of a valid statutory marriage, consent of the parents, families and parties are required under various customary law systems in Nigeria, depending on the ethnic group involved; whereas in some localities, the consent of the bride is not obtained as this is seen as immaterial since she is bound to obey the wishes of her parents, particularly the father. There is the need to embrace a nationwide position that makes the bride’s consent a prerequisite to a valid marriage in Nigeria, irrespective of the nature of the marriage.

A notable problem with Nigerian society basically relates to the implementation and enforcement techniques and enthusiasm for enforcing legislation. Though the country is rich in terms of policy making that is progressive, the laws are of no use if they cannot be implemented to serve the purposes for which they were enacted. The more the government and enforcement agents are able to be dedicated to their duties in a patriotic manner, the more the laws enacted will be enforced to serve their purposes.

Inasmuch as government and civil organisations are making efforts in promoting the education of the girl child, the government has to take a firm step on this position by enacting a specific law on prohibition of child marriage. The law, while prohibiting child marriage, should make completion of basic education of the girl child compulsory and should criminalise all acts to keep the girl child away from a mode of education. Efforts should also be made to make quality inclusive education accessible to all, especially in the Northern region of the country where the practice of child marriage is prominent.

⁵³ L Asrar et al *Preventing child marriage in the Commonwealth: the role of education* (2015).

⁵⁴ Sayings and deeds of Prophet Mohammed.

Bibliography

- Asrar, L.; Jones, H; Saunders, H & Smith, K *Preventing child marriage in the Commonwealth: the role of education* (Plan International UK and Royal Commonwealth Society: London 2015).
- Braimah, TS 'Child marriage in Northern Nigeria: Section 61 of Part I of the 1999 Constitution and the protection of children against child marriage' (2014) 14 *African Human Rights Journal* 474.
- Chimombo, J; Kendall, N; Tembo, N; Chimsanya, G; Mlia, M & Njanji, N *Situation Analysis Study Report for Marginalized Girls in Kasungu District* (CARE International Malawi & Patsy Collins Trust Fund Initiative 2008).
- Diamond, I; Newby M & Varle, S 'Female Education and Fertility: Examining the Links' in Bledsoe, CH; Casterline, JB; JohnsonKuhn JA & Haaga, JG (eds) *Critical Perspectives on Schooling and Fertility in the Developing World* (Washington: National Academy Press, 1998), 23–48
- Fabamise, S 'The introduction of Sharia legal system in Nigeria: problems and prospects' in Ibidapo-Obe, A & Yerima, TF (eds) *International law, Human Rights and development, essays in honour of Professor Akintunde Oyebo* (University of Ado-Ekiti: Nigeria 2004).
- Hyde, KAL & Kadzamira EC GABLE: *Knowledge, Attitudes and Practice Pilot Survey* (Centre for Social Research: Zomba 1994).
- International Labour Organization *Employment, Growth and Basic Needs: A One World Problem— The International Basic Needs Strategy against Chronic Poverty* (Praeger: New York 1977).
- Jain, S & Kurz, K *New Insights on Preventing Child Marriage: A Global Analysis of Factors and Programmes* (International Center for Research on Women: Washington, DC 2007).
- Kendall, N & O'Gara, C 'Vulnerable Children, Communities and Schools: Lessons from Three HIV/AIDS-Affected Areas' (January 2007)37:1 *Compare: A Journal of Comparative and International Education*.
- Mathur, S., M. Greene, and A. Malhotra. 2003. *Too Young to Wed: The Lives, Rights and Health of Young Married Girls*. International Center for Research on Women (ICRW): Washington, D.C.
- Murphy-Graham, E; *Opening Minds, Improving Lives: Education and Women's Empowerment in Honduras* (Vanderbilt University Press: Nashville 2012).
- Nancy Kendall and Chloe O'Gara, "Vulnerable Children, Communities and Schools: Lessons from Three HIV/AIDS-Affected Areas," *Compare: A Journal of Comparative and International Education* 37, no. 1 (January 2007).
- Narayan, U *Dislocating Cultures: Identities, Traditions, and Third-World Feminism* (Routledge: New York 1997).
- Sailors, M; Hoffman, JV; Pearson, PD; McClung, N & Shin, J *Measuring Growth over Time in Years 1 and 2 of Malawi Reads* (University of Texas at San Antonio: San Antonio 2012).
- Salamone, FA *The Hausa of Nigeria* (University Press of America: Lanham 2010).
- United Nations Population Fund & Engender Health *Obstetric Fistula Needs Assessment Report: Findings from Nine African Countries* (UNFPA and EngenderHealth: New York 2003).
- United Nations Population Fund & University of Aberdeen *Maternal Mortality Update 2004: Delivering Into Good Hands* (UNFPA: New York2004).

Protecting Children from unintended effects of return orders under the Hague Convention

Rosa Saladino *

This article will discuss a way forward for dealing with the not infrequent harm done to children and their carers as a result of return orders made under the Hague Convention on the Civil Aspects of International Child Abduction (the 1980 Hague Abduction Convention). I will examine the need for some intervention and the role to be played by the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the Protection Convention). I will also advocate for the provision of Legal Aid to the abducting parent as a cost effective means of minimising the harm done to children by traumatic returns to their country of habitual residence and a means of speeding up the resolution of these difficult matters.

Introduction

Personal and family or commercial situations, which are connected with more than one country, are commonplace in the modern world. These may be affected by differences between the legal systems in those countries. With a view to resolving these differences, States have adopted special rules known as "private international law" rules.

The statutory mission of the Conference is to work for the "progressive unification" of these rules. This involves finding internationally-agreed approaches to issues such as jurisdiction of the courts, applicable law, and the recognition and enforcement of judgments in a wide range of areas, from commercial law and banking law to international civil procedure and from child protection to matters of marriage and personal status.¹

This quotation from the website of the Permanent Bureau of Hague Conference on Private International Law (the PB) succinctly and perhaps a little dryly, explains what is a legal miracle: that is binding one country to respect and enforce the laws of another country, laws, which its citizens have had no say in determining.

In the case of the 1980 Hague Convention on the Civil

Aspects of International Child Abduction (the 1980 Convention), the Hague Conference has produced an instrument, which is exceptionally effective.

The 1980 Convention affects the lives of many children each year. Worldwide 2,904 children were involved in applications concerning the 1980 Convention in the 2015 calendar year.²

Looking at applications concerning Australia in the 2015/16 financial year 109 children were returned to the country from which they had been taken by a parent without the consent of the other parent or an order of the court. Of these 44 children were returned to their country of habitual residence from Australia and 63 children were returned to Australia from overseas.

The Preamble of the 1980 Convention opens with the following words:

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence³

The stated purpose of the 1980 Convention is to avoid harm to children. However not infrequently the return of a child to their country of habitual residence is more traumatic than the initial abduction. In many cases the return process itself can be traumatic and upon return the child may be taken from the abducting parent who in most cases is also the custodial parent, and placed in the care of the other parent whom they have not seen for many months and who has not been the primary carer of the child.

Profile of the abducting parent

Comprehensive statistics on the 1980 Convention have been submitted to the Permanent Bureau by Professor Nigel Lowe in 1999⁴; 2003⁵; 2008⁶ and 2017⁷. These statistical reports look at many aspects of the operation of

* Rosa Saladino, Independent Hague Convention specialist, formerly with International Social Services Australia

¹ <https://www.hcch.net/en/about> accessed 30 June 2017

² Part 1- *A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction- Global Report – provisional edition, pending the completion of the French Version*, Professor Nigel Lowe and Victoria Stephens, Preliminary document 11A <https://www.hcch.net/en/publications-and-studies/details4/?pid=6545&dtid=57>, page 3 (2017 Lowe Report)

³ 1980 Hague Convention on the Civil Aspects of International Child Abduction (the 1980 Convention) Preamble.

⁴ *A Statistical Analysis of Applications made in 1999 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* drawn up by Professor Nigel Lowe, Ms Sarah Armstrong and Ms Anest Mathias (1999 Lowe Report)

⁵ *A statistical analysis of applications made in 2003 under the Hague Convention of 25 October 1980 on the civil aspects of international child abduction part 1 – overall report* drawn up by Professor Nigel Lowe (2003 Lowe Report)

⁶ *A statistical analysis of applications made in 2008 under the Hague Convention of 25 October 1980 on the civil aspects of international child abduction part 1 – global report* drawn up by Professor Nigel Lowe, Cardiff University Law School (2008 Lowe Report)

⁷ 2017 Lowe Report

the 1980 Convention including assembling a profile of the Abducting Parent.

The gender of the Abducting Parent is overwhelmingly female. In the 1999 Lowe Report 69% of taking parents were female and 30% were male. In the 2003 Lowe Report 68% were the mothers of the children and 28% were the fathers of the children. In 2008 the figures were virtually identical with 69% of the taking parents being mothers and 28% fathers. In the 2017 Report 73% of the taking parents were mothers.

As a general rule the taking parent is also the principal or joint carer of the child and is returning to a country of which they are a national. The 2017 Lowe Report finds that 83% of the taking parents were the primary or joint carers of the child with this figure rising to 92% where the taking parent was the mother.⁸

With respect to the country to which the children are taken, the 2017 Lowe Report indicates that 58% of the taking persons took the child to a State of which they were a national.⁹

From the above statistics we can conclude that the typical abducting parent is a mother who is either the primary carer of the child or the joint carer of the child, and that most commonly she is returning to a country of which she is a national.

In the Australian context most of the parents abducting children to Australia are young women who are the primary or joint carers of the children and are returning home to Australia after a failed relationship overseas.

Lack of availability of legal assistance for the abducting parent

Legal Aid is available in all Australian states and territories and a parent defending an application made to return a child under the 1980 Convention is not automatically precluded from applying for legal aid.

In practice however Legal Aid is rarely granted to the abducting parent. The basic test used by all Legal Aid Commissions in Australia is what is commonly referred to as the means and merits test. In short the applicant for Legal Aid must meet an income test and the case must have sufficient prospects of success to justify the allocation of funds.

In NSW, family law matters must satisfy Merit test B.¹⁰ This test has two additional requirements which are “whether a prudent self-funded litigant who was not eligible for Legal Aid would risk his or her funds in legal proceedings” and “whether it is appropriate to spend limited public funds on the case”.

Child abduction matters in addition to meeting the Means Test and Merit Test B are required to meet 2 further

tests. They are the Unpaid Funds Test and the Availability of Funds Test. The former is simply that if they have previously received Legal Aid and not repaid any compulsory contribution, they must repay that contribution before a further grant is made. The second additional requirement directs Legal Aid NSW to consider “available funds and competing priorities in determining applications for legal aid.”¹¹

Applicants for Legal Aid are not generally provided with assistance in completing their applications for financial assistance and so most commonly applicants are not aware of what if any defence they may have. Consequently in their applications they tend to focus on issues not relevant to the 1980 Convention further reducing their chances of securing financial assistance.

The additional hurdles which applications for assistance in Convention matters have to overcome; the lack of awareness of the defences and the limited resources available to Legal Aid Commissions mean that an abducting parent defending an application will rarely be able to access a grant of Legal Aid even if they meet the means test and have a very good defence.

Providing a legal representative for the child can sometimes be an effective alternative to legal representation for the abducting parent. This option is limited by the capacity of the court to order an Independent Children’s Lawyer (ICL) for the child. Section 68L of the Family Law Act, 1975 (the FLA) requires exceptional circumstances for the appointment of ICLs in Convention cases. This is unfortunate because the ICL has an important role in trying to negotiate a settlement between the parents and can draw possible defences to the notice of the court so that they are raised early in the initial hearing and not as is often the case, on appeal. Appointing an ICL can go some way to remedying the imbalance in the resources available to the left behind parent and those available to the taking parent. In some cases the arguments put by the ICL can determine the outcome of the case.

Given the restrictions on the appointment of ICLs most cases proceed without an ICL and the abducting parent must manage as best she can.

Consequences of current situation

The left behind father making the application seeking the child’s return is guaranteed generous; non-means tested funding by the Australian Government. He is represented by lawyers, usually from the State Central Authorities, who are experts in this area of law and who brief similarly expert barristers. The abducting mother will be unrepresented if she cannot fund her own defence and at the mercy of

⁸ 2017 Lowe Report, page 3, paragraph 11

⁹ 2017 Lowe Report, page 3, paragraph 11

¹⁰ <http://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/8.-merit-test/8.3.-merit-test-b-commonwealth-matters>

¹¹ www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/5.-family-law-matters-when-legal-aid-is-available?a=22101

private lawyers who generally do not have expertise in Convention cases, if she does have the financial resources to pay for legal representation.

The imbalance between the well-resourced and expert team, which appears on behalf of the applicant father meets at best an inadequate and poorly expressed defence from the abducting mother. Although as the institutional litigant, the applicant's lawyers do have a responsibility to the court not to take advantage of the ignorance of the defendant, that duty does not extend to running their case for them.

This creates a serious problem for the child because there is a real risk that a return will be ordered in cases where there is a valid defence. If a return is ordered the abducting mother does not have the resources to negotiate proper arrangements for that return.

In many cases this means that young women will return to a country of which they are usually not a national and in which they have no family support. Not infrequently these young women are met at the airport by the father who has in the meantime secured domestic custody orders which require the children to be handed over to him at the airport. In these cases the children are returned to their country of habitual residence but are removed from the parent who has been their long-term custodian. If the taking mother lacks financial resources in the country to which she is returning, as is often the case, she will have difficulty even securing proper access to her children. The taking mother may also have to meet criminal charges for having taken the children out of the country.

No statistics are kept of what happens to these young women and their children once they are returned to the country of habitual residence. The Central Authorities of both countries no longer have a mandate to be involved and the case is subsumed into the great mass of domestic family law disputes.

There are however anecdotal reports of the difficulties

these young women face upon return including lack of housing and financial resources to commence proceedings in the habitual residence country or to meet the domestic proceedings, which the left behind parent may bring. In many cases this is in the context of credible domestic violence allegations, which are often the immediate spur to leaving the country of habitual residence in the first place. In at least one case of which the writer is aware the father murdered a returning mother within weeks of a court ordered return to the country of habitual residence.

The benefits of providing these mostly misguided young women with Legal Aid when proceeding are brought in Australia is not only one of equity but more importantly so that the abducting parent's legal advisor can negotiate proper return orders protecting the child from further sudden upheavals when they are returned to their country of habitual residence. Essentially Legal Aid will protect the returning child from further trauma when the abducting parent returns the child to the country of habitual residence.

We cannot wash our hands of our responsibility for these children because their mothers have done the wrong thing.

How the 1996 Convention¹² can help

The 1996 Hague Convention gives Australian courts a proper opportunity to protect children returning to their country of habitual residence. This Convention gives Australian courts the opportunity to make detailed orders, which can provide for things such as the children remaining in the care of the abducting parent and requiring the left behind parent to make proper provision for the return of their family so that their children will have a proper place to live and the returning mother will have resources to live and importantly to be able to do the right thing and make an application to the courts in the country of habitual residence.

¹² Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children

The Perez Vera Report¹³ makes it clear that one of the main reasons for establishing the 1980 Hague Convention was to prevent a parent removing a child to another country to obtain a jurisdictional advantage.¹⁴ We have for many years ignored the jurisdictional advantage, which the left behind parent gains by securing self-serving orders in the country of habitual residence while the abducting parent is defending his application under the 1980 Hague Convention. Add to this the fact that most left behind parents are fathers and most fathers are the breadwinners and therefore have the financial resources to prosecute their claims under domestic legislation while their Hague Application is prosecuted courtesy of the Australian tax payer and you will see that the well intention 1980 Convention is paradoxically being used to disadvantage the vulnerable custodial parent upon their return to the country of habitual residence.

The possibility that the 1996 Hague Convention gives Australian courts to make detailed orders protecting returning children and their mothers and to be confident that these orders can be registered and enforced in the country of habitual residence once the children return, is an opportunity to enhance the efficacy of the 1980 Hague Convention and to minimise the trauma of children being returned to the country of their habitual residence after lengthy litigation in the country of refuge.

Strengthening the 1980 Hague Convention

The profile of the abducting parent revealed by each of the 4 statistical reports prepared by Professor Lowe, that is

an abducting parent who is usually female and usually the custodial parent, is quite at variance with the original paradigm on which the 1980 Hague Convention was based. It is clear from the Perez Vera report that the original paradigm was abduction by a non-custodial father. In paragraph 25 Ms Perez Vera discusses the trauma created by the initial abduction in the following terms:

...the sudden upsetting of his stability, the traumatic loss of contact with the parent who has been in charge of his upbringing, the uncertainty and frustration which come with the necessity to adapt to a strange language, unfamiliar cultural conditions and un-known teachers and relatives'.¹⁵

This mismatch between the paradigm of the 1980 Hague Convention and the reality revealed by the statistical analyses has created problems which judges and courts have tried to deal with by creating an ever more elaborate jurisprudence around the defences set out in the 1980 Hague Convention. A simpler approach, which would strengthen rather than undermine the 1980 Hague Convention would be to ensure that both the left behind and abducting parent have proper legal representation. This would allow the adducting parent to be given an early and realistic appraisal of their chances of success in defending an application and would give them someone in their corner once return orders are made to ensure that effective safe harbour orders are made and that trauma to returning children is reduced.

¹³ Explanatory Report by Elisa Pérez-Vera

¹⁴ Perez Vera Report paragraphs 16 to 19

Affectivity as a Legal Support to the Right to Filiation in Brazil

Zilda Maria Consalter and Dirce do Nascimento Pereira*

Filiation (right to belong to a family) is a right guaranteed by the Brazilian Constitution for all individuals who live in Brazil. However, currently, the concept of this right has undergone changes due to innovations in family formation. Thus, research in this field has begun to analyse the transformation of the paternal role grounded in religious ties, so as now also to feature other functions of the contemporary family. The genetic element is still seen as a major factor in determining the affiliate link, but this is also now associated with the contemporary context which also includes love, respect and affection. Therefore, using a deductive approach and making use of theoretical research, contemporary affiliation is now seen as depending on the principle of affection, regardless of any biological bond. Thus, affection is now considered as the appropriate legal basis on which to interpret and protect modern Brazilian family ties, which are not always founded on blood bonds, but in social and affective links.

Introduction

The traditional concept of fatherhood and filiation has been a focus of discussion in Brazil because of the perception that not only the biological criteria, but also the socio-emotional and legal status, has a role in its contemporary definition and legal protection. Thus, for a person to be considered a parent it is not just a genetic link with the child which counts, but the individual who educates, supports, gives affection, attention and other nurturing has also to be considered: that is, the person who has the attributes and responsibilities of father or mother (always seeking to support the child's interests) is seen as the context that really matters. This way of conceiving the family relationship is a fairly new approach, that is the socio-legal point of view which attributes undeniable importance to the principle of affection.

It is important to remember that the formal, that is to say legal, tie of filiation is indissoluble, except in cases where there is some basis in the children's interests. However, in the contemporary context, affectivity has become one of the key factors for the development of family life, especially in the case of defining membership, since currently the essentiality of the biological link no longer prevails against the presence of the social-emotional bond. Thus, it is possible to affirm that now, more than ever, the popular proverb prevails: 'Father is the one who

educates', to which may be added the importance of the role of aid, respect, love and support. Social circumstances such as adoption, heterologous insemination and the informal illegal but widely practised 'Brazilian adoption', all of which create social-affiliations between parents and children show - despite the absence of consanguineous relationship - that parentage can be detected and supported by the noblest of feelings: love.

Thus what this article sets out to emphasize is that theoretical research shows that the principle of affection is an important feature in the legal concept of filiation, capable of surpassing traditional approaches. This recognition of the legal effects of social affection ensures a multidisciplinary and plural analysis of legal institutions. The present study counted for its development on Brazilian writers on affectivity, such as Maria Berenice Dias and Paulo Luiz Netto Lobo and other Family Law specialists in this field, who, following the deductive scientific method of approach, have analysed the principle of affection from more general rules towards the potential of more specific legislation for meeting the demands of the community as a whole.

The historic evolution of bonds between father and children

In the traditional organization of Antiquity, the biological bond was fully discharged. In the case of a husband's sterility, it was possible for a son to be replaced by a sibling or relative and the child was considered the son or daughter of the sterile husband. Family membership recognized exclusively their religious linkage, considered in these historic times as the greatest strength between family members and surpassing any other family feeling.¹ Other evidence of the lack of importance of the biological connection at this time is the fact that even before the birth of a child from the relationship between a woman and her husband it was decided whether or not a child belonged to family. Thus, only the father's statement of this constituted the family ties.²

During the Roman Empire, the 'pater' authority was the basis for the organization of the family because he cumulated the functions of political leader, priest and judge, in addition to exercising the right over children of life and death, which was also extended to his wife, who had no rights of her own.³ In that context, having the largest number of children increased reverence to the gods at the

*Zilda Maria Consalter PhD and Dirce do Nascimento LLM are researchers in Family Law at the Department of Law, Paraná State University, Ponta Grossa City campus, Brazil.

¹ Numa Denis Fustel de Coulanges, *A cidade antiga* (1984), 4th ed. Martins Fontes at p. 48.

² Numa Denis Fustel de Coulanges, fn 1 above, at p. 36.

³ Caio Mário da Silva Pereira, *Instituições de direito civil* (2011), 18th ed. Forense at p. 31.

altar by the 'sacred fire'. Also, anyone who died without children did not receive sacrifices and was sentenced to 'eternal hunger'.⁴ Eventually to compensate for the lack of children, and in order to keep the 'sacred fire', adoption was recognized by Roman law, since the adopted son was introduced into ancestral worship.⁵ On the other hand, extramarital relationships were repudiated and the bastard was considered extraneous in relation to his father and his mother, without any inheritance, or legal protection.⁶

Over the centuries, religion and the consequent patriarchal authority persisted until in the twentieth century both suffered significant decline: 'that rigid hierarchical structure was replaced by the coordination and sharing of life interests'.⁷ The advancement of technology led to the decline of this form of affiliate linking based on religion. In the last century, among other advances in the biological sciences, it has become possible to establish paternity and maternity through Deoxyribonucleic Acid (DNA) analysis. So, the biological link became the main factor to determine filiation. In Brazil, this alternative started in 1988.⁸ Considering the efficiency and reliability of that expert evidence this was raised to the 'main category of evidence' in paternity actions.⁹

Once the biological link became established (also called the blood bond¹⁰) it assumed great importance and had impact on the legal field in determining the duties of family responsibilities,¹¹ that is, except in cases where this was appropriately suspended or discharged. Although Article 1634 of the Brazilian Civil Code foresees hypotheses of duties inherent to parents in relation to minor children, unfortunately, the law has not included or reflected the concept that perhaps the most important duty is to give love, affection and true care.¹² In this context, doctrine is beginning to support the idea that the link from the affective bond belongs to the ontic world and should be protected by the deontic world.¹³

It is important to note that currently there are three criteria for the affiliation link, namely: biological, legal and social-emotional and those can coexist just as they can also be considered individually.¹⁴

The biological link, for example, existing from one of

the assisted human reproduction (heterologous) techniques, will have no impact on the parental sphere in relation to the right of filiation as stated by the Brazilian Biosecurity Law (Law n. 11.105/2005). Another important aspect related to the filiation presumption hypothesis is foreseen by Article 1597 of the Brazilian Civil Code: the heterologous artificial fertilization with prior permission of the husband, which is independent of biological link. Of course, in this case, the parental connection will exist.

In this sense, if there is convergence between the three pillars of the affiliate link, there will be no problem, because it is entirely relevant to attribute legal effects based on the evidence of consanguineous link, whose relationship will be also recognized by the emotional bond. However, issues may arise from the disparity between these bonds.

Thus, all these changes lead legal scientists to seek to demystify these new paradigms, seeking not necessarily absolute answers, but 'liquids' to honor the words of Polish Sociologist Bauman:¹⁵ among his most important books is *Amor Líquido* ('Liquid Love'), which deals with the difficulties of perpetuation of ties and with the supposed solutions that have emerged from them.

In this context the next section will deal with the affection paradigm that explains the role of the current family, consolidated in symmetry and whose members are united by ties of freedom and responsibility, collaboration and sharing life.

The principle of affection

The word 'affection' can express different meanings, whereas in 'natural language' it has a positive connotation, referring to the noblest sentiments, but based on the 'philosophical-scientific language', it means all the affections and other 'morally repudiated feelings'.¹⁶ Affection in the strict sense (noble feelings) does not have the power to identify the family structure because, unfortunately, there are situations where although there is coexistence between members of the family group (so, in this theory there is a family) there is no sentimental nobility between its components.¹⁷

Thus, affection, despite being considered one of the

⁴ Numa Denis Fustel de Coulanges, fn 1 above at p. 37.

⁵ Caio Mário da Silva Pereira, *Reconhecimento de paternidade e seus efeitos* (1998), 5th ed. Forense at p. 8.

⁶ Cit. by Marco Túlio de Carvalho Rocha, *O conceito de família e suas implicações jurídicas: teoria sociojurídica do direito de família* (2009), Elsevier at p. 193.

⁷ Paulo Lobo, *Direito civil: família* (2011), 4th. ed. Saraiva at p. 20.

⁸ Marco Túlio de Carvalho Rocha, fn 6 above at p. 185.

⁹ Francisco Amaral, A prova genética e os direitos humanos, In Eduardo de Oliveira Leite (org.), *Grandes temas da atualidade – DNA como meio de prova de filiação*, 2nd. ed. (Forense, 2002) at p. 109.

¹⁰ Paulo Lobo, see fn 7 above at p. 180.

¹¹ Sílvio Rodrigues, *Direito civil* (2004), 28. ed. Saraiva, v. 6 at p. 356.

¹² Maria Berenice Dias, *Manual de direito das famílias* (2011), 8. ed. Revista dos Tribunais at p. 429.

¹³ Marco Túlio de Carvalho Rocha, fn 6 above at p. 190.

¹⁴ Maria Berenice Dias, see fn 12, above at p. 359; and also Marco Túlio de Carvalho Rocha, see fn 6, above at p. 190.

¹⁵ Zygmunt Baumann, *Amor líquido: sobre a fragilidade dos laços humanos* (2004), Jorge Zahar LV.

¹⁶ Marco Túlio de Carvalho Rocha, fn 6 above at p. 61.

¹⁷ Ibid, at p. 62.

pillars of constitutionalized family - and hence filiation - cannot be analyzed in isolation, and other factors should also be considered.

The objective at this point does not mention the absence of affective ties, but its effective presence in relations between parents and children, including significant legal impacts on the conception of the contemporary family.

Delimitation of the theme

As mentioned above, the 'affect' can be glimpsed in the strict sense or in a wide sense. However, the option is to consider the start from social and psychological aspects (covering the noble sentiments), to the concept of affection. The positive connotation is to converge with its legal consequences.

'Affection', starting from a legal approach, results from 'trans effectiveness of psychosocial facts that converts into a legal fact, a legal effects generator', and thus being possible to affirm that the evolution of the conception of family comprises the transformation of 'natural fact of consanguinity to the cultural fact of affectivity, especially in the contemporary Western World'.¹⁸

The connection between non-biological parents and children, built under a 'psychological affiliation' is called non-biological paternity. This term has been used in Brazil for the first time by Villela¹⁹ not considering the biological relationship and to cogitate the affection existent in the relationship.

Starting from this context, it marks the term 'social affectivity' (the bond between the social phenomenon and the normative phenomenon): 'In one side there is the social fact and the other side, the legal fact. The standard is the legal principle of affection. Family relations and parentage relations are social affective relations because they bring together the social fact (partnership) with the normative principle (affection)'.²⁰

So, considering the social-emotional phenomenon, the laboratory evidence and the search for a biological certitude were gradually losing ground to the subjectivity and the consequence is the nobility of feelings being evaluated as a legal principle and changing Family Law. 'Family Law installed a new legal order for the family, giving legal force to affection'.²¹ Thus, to parent-children relationship was added a plus: affection. And it must be present not only to generate psychological and social effects as well as legal effects.²²

Legal protection

In Brazil, current legislation does not expressly foresee affection as a constitutive element of the parent-children relationship, but it is possible to identify in certain excerpts of the legal text, in the Constitution and in ordinary law. The principle of affection in Family Law began to gain space in Brazil with the advent of the Constitution (CF), in 1988, and implicitly became part of its fundamental principles. The legal concept of human dignity, proposed in Article 1, section III of the Constitution 'reflects a fundamental value of respect for human life'. This is according to their possibilities and expectations, equity and affective, 'indispensable to their personal development and the pursuit of happiness'.²³

From the equality among children prescribed by Articles 5 and 227, the sixth paragraph of the Constitution and also Article 1593 of the Civil Code, it is also possible to extract the fundament of affection as a legal principle. When all children are treated in the same way by the law, independent of the origin of filiation or obtained through adoption or assisted human reproduction methods, for example, their affection gains legal value through the equal treatment that is a result of existence of affection in the relationship.

The same conditions have the principle of solidarity, described in Article 3, section I of the Constitution. This is originated by emotional ties featuring strong ethical content, considering in 'his essence the real meaning, comprising brotherhood and reciprocity'.²⁴ This principle is also required by Article 229 of the Constitution, which provides for the duty of care, breeding and education of children, extends equal protection to teenager and to (old) parents when they are in need. The duty of care cannot be considered entirely if there is not present the duty of protection permeated by love and brotherly tenderness.

Family acquaintanceship is another corollary of the principle of affection that under Article 227 of the Constitution is to ensure an absolute priority to children and adolescents. Obviously, family life is not linked to the biological origin of membership, but rather a relationship built on the basis of affection. The proof of this is the practice of acts harmful to the interests of the child or adolescent, which leads to suspension or even the loss of parental rights. Independence of origin to determine parentage is covered by Article 1593 of the Civil Code that attributes parentage to other forms of paternal-filial connections, providing that all of them should be considered equivalent by dignity.

Regarding the recognition of social-affective paternity,

¹⁸ Paulo Lobo, fn 7 above at p. 29.

¹⁹ Maria Berenice Dias, see fn 12, above at p. 357.

²⁰ Paulo Lobo, see fn 7, above at p. 29.

²¹ Maria Berenice Dias, see fn 12, above at p. 71.

²² Paulo Lobo, see fn 7, above at p. 71.

²³ See Pablo Stolze Gagliano, Rodolfo Pamplona Filho, *Novo curso de direito civil: Direito de família – as famílias em perspectiva constitucional*, (2011), Saraiva at p. 74.

²⁴ Maria Berenice Dias, fn 12, above at p. 66.

starting from the interpretation of Article 1593, in the First Journey of Studies about Civil Law (provided for the Brazilian Supreme Court) were prepared two statements on the subject stating that:

‘Statement 103: The Civil Code recognizes in Article 1593 other species of civil kinship beyond that resulting from adoption, thus welcoming the notion that there are civil kinships in parental bonding from heterologous assisted reproduction techniques with regard to either of the father (or mother) not contributing their fertilizing materials or social-affective paternity, based on tenure of the status of son’.

Statement 108: [...] with birth (a legal fact) mentioned in Article 1603, understood jointly with Article 1593, are comprised by consanguineous and also social-affective filiation.

During the Third Journey of Civil Law, social affectivity was the subject of discussion and results from the Statement 256, which states: ‘The tenure of status of son (social affection parenthood) is a kind of civil parentage’.

Moreover, confirming the object of study, once more, the social-affective relationship is recognized to characterize the ‘generating element of the maintenance obligation’ (Article 1696 of Brazilian Civil Code), established this understanding from Statement 341, emanating from the above mentioned Journey.

The bond of affection can also be seen in Article 1597 of the Brazilian Civil Code, which provides for the possibility of heterologous artificial insemination, i.e., the use of genetic material from a third party provided with prior permission of the husband, which is a recognized technique for affiliate linking purposes, moving away from any source of consanguineous links and assigning to affectivity the accountability to determine the right to parentage.²⁵

Another normative content that demonstrates the recognition of the principle of affection is Article 1614 of the Brazilian Civil Code which according to Paulo Lobo ‘is not an imposition from nature or from laboratory examination, since it allows the freedom to reject it’.²⁶ Thus, recognition of filiation in the case of an adult child depends on that person’s acceptance, in order to produce legal effects; but even a minor child has the possibility of contesting recognition, regardless of the finding of

biological paternity.²⁷

On the basis of those considerations, with no obvious claim to consider the theme complete, there arises a temptation to present the main normative forecasts that underlie and extend the application of the principle of affection in the Brazilian legal system, in order to sustain the value given to the social-filial relationship nowadays.²⁸ However, beyond the legislative and doctrinal support it is also possible to present the judicial reasoning on the subject, since the interpretation of the court is very important to understand and recognize the emotional bond as part of the family relationship. This will be discussed below.

Jurisprudential decisions

This section aims to present, in chronological order, the prevalent opinion regarding social-affective paternity in the courts. At the beginning of this century, the courts on the whole decided as follows: ‘[...] in a parental investigative action, if the alleged father refuses to undergo the DNA test, it induces presumption *juris tantum* of paternity’.²⁹ Thus, it is possible to perceive the initial tendency to recognize, overwhelmingly, the consanguineous link from the use of DNA analysis techniques and the recognition of social-affective paternity. Even in the case of negative test results, such recognition was possible only with the clear presence of affection throughout the family membership.

As time went on, more emphasis was given to the concept of affection, even when there were negative results in DNA testing or other issues, until then affection had finally obtained some relevant importance in parentage recognition when decisions might be seen such as: ‘[...] parentage is not based only in consanguineous criteria, it can also founded in another source, among them, social-affective parentage’.³⁰ In addition: ‘A Court decision must consider the best interests of children, because that allows the Court to reach a truthful filiation and to establish the true bonds that are based on affection with parents’.³¹

Nowadays, what has been seen in almost all decisions, is the prevalence of affection as an argument to decide cases involving parentage, including through expert examination. An example: ‘Success in actions in denial of paternity depend on demonstration of absence of a biological link which has not constituted the ‘status of son’, but which is strongly marked by social-affective relationships and is built on familiar coexistence’.³² And: ‘Once the bond of

²⁵ Marco Túlio de Carvalho Rocha, fn 6 above at p. p. 53.

²⁶ Paulo Lobo, fn 7 above at p. 271.

²⁷ Maria Berenice Dias, fn 12 above at p. 384.

²⁸ Marco Túlio de Carvalho Rocha, fn 6 above at pp. 63-64.

²⁹ Appeal 520063 SP 2003/0071283-4, Judge: Humberto Gomes de Barros. Judgment date: 04.11.2005, 3rd. Group of judges, published in Official Diary in 05.02.2005.

³⁰ Appeal 107010926088120011 MG 1.0701.09.260881-2/001(1), Judge: Elias Camilo. Judgment date: 12.03.2009, published in Official Diary in 01.12.2010.

³¹ Appeal 67773620088070006 DF 0006777-36.2008.807.0006, Judge: César Loyola. Judgment date: 03.02.2011, 6th. Group of judges, published in Official Diary in 03.07.2011.

³² Special Appeal no. 1.059.214-RS, Judge: Luis Felipe Salomão. Judgment date: 02.16.2012, 4th. Group of Judges of Brazilian Supreme Court, published in Official Diary in 03.12.2012.

paternal-filial affection is consolidated, in attention to best interests of the child this status cannot be modified by the registral and social-affective father, who would seem to be a stranger in this case to the biological truth'.³³

Thus, from the analysis of the evolution of Court Decisions above, four grounds are used as guidelines for judgments³⁴ which it agrees and enumerates:

First: the abandonment of the exclusivity of the arguments related to biological connection (by DNA test), because this was the most widely form used for the proof of filiation.

Secondly: the elevation of the importance of social affectivity used by the Superior Court to characterize the parent-child bonding.

Thirdly: the impossibility of de-constitution of permanent familiar acquaintanceship in favour of organic origin, whereas the subjective aspect (affection) should prevail over the objective aspect (laboratory tests).

Fourthly: the absence of defect in the spontaneous recognition of filiation, because the consent recognition should prevail if no flaw in this legal act.

Species of social-affective filiation

As mentioned, currently, the law, doctrine and Courts do not recognize the traditional (old) concept of filiation which is based only on consanguineous ties. Today it is considered that the father or mother who educates and gives support are the parent(s), without arguing how the relationship is established, whether if by biological, social or emotional ties. As a result the Brazilian Constitution provides in Article 226, paragraph 3, the concept of 'the family' in the traditional sense extending to other types of family units, such as those from single-parent and informal (stable) unions. In addition to these, the doctrine and jurisprudence has given shelter to other types of composition of families, such as homo-affective unions and non-parental families (that is, without parents, and formed only of brothers or cousins, or aggregated relatives).

Thus, it is important to establish what the situation in

practice is, and if it is possible to consider the existence of socio-affective affiliation, namely that which comes from the social or legal recognition, but without blood ties. It is also important to mention and exemplify all common social circumstances, and to consider what will be done now?

The first example is regular adoption, which is '[...] a solemn act by which is created between the adopter and the adoptee a fictional relationship of paternity and filiation'.³⁵ In this case, it is important to mention that only after the creation of the Statute of the Child and Adolescent that the concept of adoption began to have greater reach, bringing as the main objective the insertion of the child or adolescent into a supportive home that provides them with an environment for their development.

Considering affective filiation, the Court of Rio Grande do Sul State decided in this way: 'Adopter living with the child since birth for ten years, treating the child as your daughter, supplying the material and emotional needs. The difference of fifteen years and five months of age, [...] is the legal requirement (eighteen years of difference between parents and the child) but that cannot overlap with the children's welfare, especially when the petition to adopt is more the formalized result of a factual situation which is already solidified'.³⁶ It may be observed that the focus of the concept of adoption went from just a legal link to the concern with the insertion of the child into a familiar environment, taking care that the adopter assumes the legal and moral responsibilities of raising a child. To prove this, it is possible to cite the Statute of Children and Adolescents, that requires the presence of several declarations of will: of the biological parents, of the applicants, of the adolescent if already twelve years or over, and finally the judicial manifestation through the judgment.³⁷

The second example is the 'Brazilian adoption', an irregular mode in which '[...] mothers who cannot or do not wish to raise her child 'donate her' to other families, usually with higher income, which then states in front of the official civil registry that the child was born from of the family and not from the real mother'.³⁸ This is an illegal

³³ Special Appeal no. 1.330.404-RS, Judge: Marco Aurélio Bellizze. Judgment date: 02.05.2015, 3rd. Group of Judges of Brazilian Supreme Court, published in Official Diary in 02.19.2015.

³⁴ See Paulo Lobo, *Socioafetividade em família e a orientação do Superior Tribunal de Justiça*, In Ana Frazão, Gustavo Tepedino (coord.) *O Superior Tribunal de Justiça e a Reconstrução do Direito Privado* (Revista dos Tribunais, 2011), at pp. 635-653.

³⁵ See Francisco Cavalcanti Pontes de Miranda, *Tratado de Direito Privado* (1951), Borsoi at p. 21.

³⁶ Rio Grande do Sul State Court, Civil Appeal no. 70.021.207.733, Judge Ricardo Raupp Ruschel, Judgement date: 09.26.2007, 7th. Group of Judges, published in Official Diary in 10.03.2007.

³⁷ See Maria Helena Diniz, *Curso de Direito Civil Brasileiro: Direito de Família* (2012), 27th ed, Saraiva at p. 569.

³⁸ See Douglas Phillips de Freitas, *A função sócio-jurídica do(a) amante e outros temas de família* (2008), Conceito at p. 57.

procedure, but it is very usual in the country despite being illegal. The Paraná State Court of Justice has recognized the 'truth social-affective' in order to protect the best interests of the child, preserving their human dignity. *Verbis*:

[...] Recognized paternity by public statement on civil registry, there is no support for the father, subsequently held to deny it, even by DNA testing that excluded the biological paternity and does not impair the recognition the fact that the contested judgment alludes to its realization as 'Brazilian adoption' ³⁹

Despite this, the legal uncertainty of adopters and adopted persists because the act may be set aside, and parents may also face criminal prosecution, by registering as their own someone else's child (Article 242 of the Brazilian Criminal Code) although there is a possibility of evading criminal liability in certain circumstances.

The third example is heterologous artificial insemination, which is made with semen and/or egg from another person. It occurs if the infertile husband, wife or partner is not able to use their own genetic material for fertilization. In this case, the legal and biological criteria diverge. Faced with this fact, some laws condemn this practice because of the implications that could be caused in relation to the spouse, the donor, his son, to third parties etc. This kind of insemination is regulated in Brazil by the Federal Council of Medicine (Resolution CFM no. 1.9576/2010, II, 1:1). When permitted, it requires the husband or partner to assume legal paternity, by giving a declaration of consent to insemination of his wife with third party semen. In these cases, a legal fiction will prevail to provide '[...] the security of a legal status for the child, which cannot be disturbed by later misunderstandings or parental mind change'.⁴⁰ In view of all these laws, a person who had consented to such insemination cannot deny paternity some time later.

Moreover the sperm donor, in addition to the obligation to provide health vouchers, must submit a written consent of his wife if he is married. However he never will be responsible for child's economical support. Further the

physician should take some precautions, such as checking that there are no impediment to marriage between the donor and recipient (for example that a brother of the woman is the donor and the doctor uses his semen to impregnate her, as they could not be married and therefore the insemination would also be not permitted). In this precautionary situation, there is also a ban on the disclosure of the names of the people involved in the process.

Conclusion

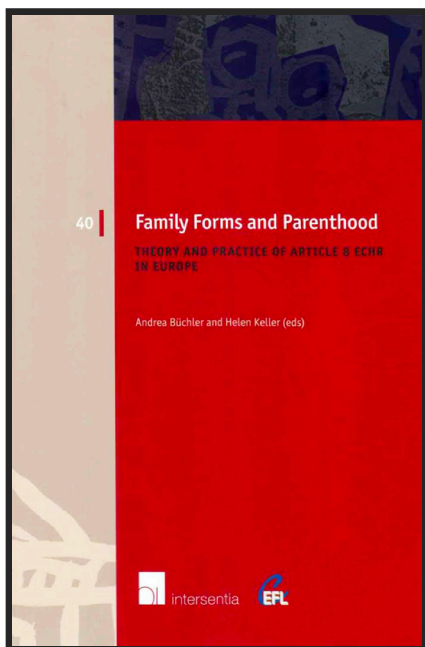
It is thus possible to conclude that in Brazil there is present a non-retroactive reality with regard to the paternal-filial relationship embodied in the principle of affection. The social fact linked to the legal fact (from the normative effects) attributed to the principle of affection generates a social-affectivity bond, and that that is an element that must be inexorably present as one of the 'supporting pillars' of contemporary family relationships.

The study has sought to demonstrate that affection is related to the noblest feelings that can enhance the human being and that it is precisely the feeling that (when present) generates significant effect on the legal orbit of family relationships, leading to recognition of filiation, regardless of biological truth. To this aim, we have sought the implicit presence of this principle in existing national legislation, which has leveraged the concept of family as the fundamental basis of human dignity. National Courts have also begun to tread new paths from the removal of the exclusivity of the biological criteria towards recognition of filiation and the consequent realization of social-affective paternity as extremely important to the maintenance of paternal-filial relationships.

Thus the main idea of this study was to demonstrate the legal consequences and the importance of the presence of affectivity in filiation relations, which is a task that has in practice been accomplished in Brazil, considering all the above forms of social-affective affiliation, unquestionably as representing affectivity as a determining element, so that the main element of their identity as a human being and also of social belonging may also be observed.

³⁹ Parana State Court, Civil Appeal no. 903962-5, Judge Themis Furquim Cortes, Judgement date: 09.12.2012, 12ndh. Group of Judges, published in Official Diary in 09.25.2012.

⁴⁰ See Gláucia Savin, Crítica aos conceitos de maternidade e paternidade diante das novas técnicas de reprodução artificial (2000) *Revista dos Tribunais*, vol. 659, pp. 234-242.



FAMILY FORMS AND PARENTHOOD: Theory and practice of Article 8 ECHR in Europe

Authors – Andrea Buchler & Helen Keller

Publisher – Intersentia

This work could not be more timely. It concentrates on the Article 8 of the ECHR right to family and a private life through the spectrum of the perspective of family forms and parenthood. It could indeed have included the words family formations.

There can be probably no more complex and fast growing area of family law than family formation: forms of family in terms of recognition of same sex family units, single parent units and the formation of family units through parentage by way of adoption, assisted reproductive technology and in particular surrogacy arrangements.

The importance of this issue is exemplified by the number of international institutions who are undertaking urgent work in the area and in particular the Hague Conference on Private International Law work, the expert group on

Book Review

A M Hutchinson and Colin Rogerson *

parentage/surrogacy, the International Social Services project entitled Principles for a better protection of children's rights in surrogacy and the UN Committee on the Rights of a Child in respect of Surrogacy Arrangements in the context of 'the sale of children'.

The issues arising are the subject of significant numbers of academic research projects.

In addition to the work being undertaken at an international organisation level there are important national developments and it is true to say that the practice of ART and its impact on national law, national rights and obligations and domestic family law has come into sharp focus in a significant number of jurisdictions. A number of states, which had not previously legislated on the issue, are looking to incorporate comprehensive legislation whilst others, sometimes in a kneejerk reaction to the practice of commercial surrogacy, seek to ban and prohibit any such arrangements and enact criminal sanctions for these practices. For example the Republic of Ireland has introduced in 2017 the general scheme of the Assisted Human Reproduction Bill 2017 which addresses fertility treatments and surrogacy arrangements. At the other end of the spectrum, in response to a number of cases relating to child abuse/exploitation, Cambodia is making moves to criminalise commercial surrogacy, just as has happened in Nepal and Thailand.

Other states are looking to address changes to existing law and statutes relating to ART arrangements. In the United Kingdom, 2018 should see a change in the legislation to allow single commissioning parents with a genetic link to their surrogate-born child to be able to apply for parental orders in order to establish legal parentage (such orders were hitherto limited to couples). The UK Law Commission announced in 2017 that it would include the issue of surrogacy law reform in its most recent programme.

*A M Hutchinson, Partner at Dawson Cornwell, Solicitors, London. Expert for IAFL on the Hague conference parentage/surrogacy project and ART Fellow of the Academy of Adoption and Assisted Reproduction Attorneys. Colin Rogerson, Senior Associate, Dawson Cornwell. American Bar Association Section of Family Law, ART Committee International Representative of the Executive Council and ART Fellow of the Academy of Adoption and Assisted Reproduction Attorneys.

The work commences with a very helpful introduction to the principles of the Convention on the Rights of the Child and its implementation through the jurisprudence of the ECHR. It places Article 8 into particular context, especially for those who may have an interest in the area of family law relating to ART but not have a full understanding of ECHR process and jurisprudence.

It is clear that the ECHR's definition of family life in the context of the Article 8 right to private life and the right to family life is non-restrictive. What constitutes a family is broad; it is the nature of the relationship that is important rather than its form or indeed its legal status under any national law.

A comprehensive overview as to developments in the ECHR is provided by Andrea Buchler.

A radical and continuing change and scientific development impacted not only on national governments but have indeed impacted on the ECHR jurisprudence. As is said in the work, "many issues arising under Article 8 stem from areas that are in flux due to new technical developments and changing attitudes in society." This is reflected in the potential of the Court's jurisprudence to change over time. Whilst Strasbourg may have once acknowledged that there was no European consensus on a certain issue and the states therefore had a wide margin of appreciation, this does not preclude the emergence of new convention standard. The Convention has of course been described as a living instrument and as such there has been a rapid evolution of case law in this area.

The work explores the theory and practice in different states or in respect of Article 8 rights in the context of family forms and formation of families in the context of ART in particular. The work produces a number of country reports by renowned authors who are leaders in their field. The countries covered are Austria, Croatia, England and Wales, Germany, Greece, Hungary, Netherlands, Poland, Spain, Sweden and Switzerland. Each

chapter covers the national law on parentage and its establishment, rights of maternity, rights of paternity, adoption and the right to procreate. In respect of each state it covers forms of family and family unions including those of same sex couples, civil partnership, right to marry etc.

Each section comes with important aspects of a child's right, such as a child's right to know its origins in terms of not only birth parents but also in terms of genetic and biological parentage.

It is said that the aim of this research is to "examine the various possible impacts of the Convention and the ECtHR's jurisprudence on the national legal order, inter alia, on the national courts and the legislator, in two areas, namely parenthood and family constellations." It also serves to illustrate the huge divergence that there is amongst the EU states in their current approaches to these fast moving issues and the differing state responses in dealing with technological and scientific changes that have impinged on family forms and family formation.

It is clear that all states do have to confront these issues. Whilst many states may find it unpalatable to address, the fact is that the emergence of ART practices has developed and created new ways for people to set up their families. So called international fertility tourism is here to stay, and states must address the legal issues, including nationality and legal parentage of children born as a result of such practices, even if they are not permitted under the parties' own national laws.

Further the right of a person to procreate and to create a family is now firmly in the public arena and is no longer just a matter for academic discourse.

The project upon which the work is based is an excellent one and it is hoped that it will continue. The area is so fast moving that already there have been significant changes or developments in the states covered and that is only likely to increase very speedily within the European arena.

International Family Law, Policy and Practice

Submission of articles for publication in the journal *International Family Law , Policy and Practice*

The Editor and Editorial Board welcome the submission of articles from academics and practitioners for consideration for publication. All submissions are peer reviewed and should be original contributions, not already published or under consideration for publication elsewhere: authors should confirm this on submission (although material prepared for the Centre's own conferences and seminars may be accepted in suitably edited versions). Any guidance required may be obtained by contacting the Editor, (Frances Burton, at frb@frburton.com) before submission.

Each issue of *International Family Law, Policy and Practice* will be published on line and will be accessible through a link on the Centre's website. There will normally be three issues per annum, roughly coinciding with the standard legal and academic vacations (Spring: March-May depending on the date of Easter; Summer: August-September; and Winter: December-January). Copy deadlines will normally be three months prior to each issue. Certain issues may also be published in hard copy, for example, occasionally hard copy issues may be produced for commemorative purposes, such as to provide a collection of articles based on key conference papers in bound hard copy, but normally the policy is that provision of the online version only will enable the contents to be disseminated as widely as possible at least cost.

Copyright

The author is responsible for all copyright clearance and this should be confirmed on submission.

Submission format

Material should be supplied electronically, but in some cases where an article is more complex than usual a print out may be requested which should be mailed to the Editor, Frances Burton, at the production address to be supplied in each case NOT to the Centre as this may cause delay. If such a print out is required it should match the electronic version submitted EXACTLY, i.e. it should be printed off only when the electronic version is ready to be sent. Electronic submission should be by email attachment, which should be labelled clearly giving the author's name and the article title. This should be repeated identically in the subject line of the email to which the article is attached. The document should be saved in PC compatible (".doc") format. Macintosh material should be submitted already converted for PC compatibility.

Author's details within the article

The journal follows the widely used academic format whereby the author's name should appear in the heading after the article title with an asterisk. The author's position and affiliation should then appear next to the asterisk at the first footnote at the bottom of the first page of the text. Email address(es) for receipt of proofs should be given separately in the body of the email to which the submitted article is an attachment. Please do not send this information separately.

Peer review, proofs and offprints

Where there are multiple authors peer reviews and proofs will be sent to the first named author only unless an alternative designated author's name is supplied in the email submitting the article. Any proofs will be supplied by email only, but the editor normally assumes that the final version submitted after any amendments suggested by the peer review has already been proof read by the author(s) and is in final form. It will be the first named or designated author's responsibility to liaise with any co-author(s) with regard to all corrections, amendments and additions to the final version of the article which is submitted for typesetting; ALL such corrections must be made once only at that

stage and submitted by the requested deadline. Multiple proof corrections and late additional material MUCH increase the cost of production and will only (rarely and for good reason) be accepted at the discretion of the Editor. Upon any publication in hard copy each author will be sent a copy of that issue. Any offprints will be made available by arrangement. Where publication is on line only, authors will be expected to download copies of the journal or of individual articles required (including their own) directly from the journal portal. Payment will not at present be made for articles submitted, but this will be reviewed at a later date.

House style guide

The house style adopted for *International Family Law, Policy and Practice* substantially follows that with which academic and many practitioner authors writing for a core range of journals will be familiar. For this reason *International Family Law, Policy and Practice* has adopted the most widely used conventions.

Tables/diagrams and similar

These are discouraged but if used should be provided electronically in a separate file from the text of the article submitted and it should be clearly indicated in the covering email where in the article such an item should appear.

Headings

Other than the main title of the article, only headings which do substantially add to clarity of the text should be used, and their relative importance should be clearly indicated. Not more than three levels of headings should normally be used, employing larger and smaller size fonts and italics in that order.

Quotations

Quotations should be indicated by single quotation marks, with double quotation marks for quotes within quotes. Where a quotation is longer than five or six lines it should be indented as a separate paragraph, with a line space above and below.

All quotations should be cited exactly as in the original and should not be converted to *International Family Law, Policy and Practice* house style. The source of the quotation should be given in a footnote, which should include a page reference where appropriate, alternatively the full library reference should be included.

Cross-references (including in footnotes)

English terms (eg above/below) should be used rather than Latin (i.e. it is preferable NOT to use 'supra/infra' or 'ante/post' and similar terms where there is a suitable English alternative).

Cross-referencing should be kept to a minimum, and should be included as follows in the footnotes:

Author, title of work + full reference, unless previously mentioned, in which case a shortened form of the reference may be used, e.g. (first mention) J Bloggs, *Title of work* (in italics) (Oxbridge University Press, 2010); (second mention) if repeating the reference - J Bloggs (2010) but if the reference is already directly above, - J Bloggs, above, p 000 will be sufficient, although it is accepted that some authors still use "ibid" despite having abandoned most other Latin terms.

Full case citations on each occasion, rather than cross-reference to an earlier footnote, are preferred. Please do not use End Notes (which impede reading and will have to be converted to footnotes by the typesetter) but footnotes only.

Latin phrases and other non-English expressions

These should always be italicised unless they are so common that they have become wholly absorbed into everyday language, such as *bona fide*, i.e., c.f., *ibid*, *et seq*, *op cit*, etc.

Abbreviations

If abbreviations are used they must be consistent. Long titles should be cited in full initially, followed by the abbreviation in brackets and double quotation marks, following which the abbreviation can then be used throughout.

Full points should not be used in abbreviations. Abbreviations should always be used for certain well known entities e.g. UK, USA, UN. Abbreviations which may not be familiar to overseas readers e.g. 'PRFD' for Principal Registry of the Family Division of the High Court of Justice, should be written out in full at first mention.

Use of capital letters

Capital letters should be kept to a minimum, and should be used only when referring to a specific body, organisation or office. Statutes should always have capital letters eg Act, Bill, Convention, Schedule, Article.

Even well known Conventions should be given the full title when first mentioned, e.g. the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 may then be abbreviated to the European Convention. The United Nations Convention on the Rights of the Child should be referred to in full when first mentioned and may be abbreviated to UNCRC thereafter.

Spellings

Words using 's' spellings should be used in preference to the 'z' versions.

Full points

Full points should not be used in abbreviations.

Dates

These should follow the usual legal publishers' format:

1 May 2010

2010–2011 (not 2010-11)

Page references

These should be cited in full:

pp 100–102 (not pp 100–2)

Numbers

Numbers from one to nine should be in words. Numbers from 10 onwards should be in numerals.

Cases

The full case names without abbreviation should be italicised and given in the text the first time the case is mentioned; its citation should be given as a footnote. Full neutral citation, where available, should be given in the text the first time the case is cited along with the case name. Thereafter a well known abbreviation such as the Petitioner's or Appellant's surname is acceptable e.g. *Livesey (formerly Jenkins) v Jenkins* [1985] AC 424 should be cited in full when first

mentioned but may then be referred to as *Livesey* or *Livesey v Jenkins*. Where reference is to a particular page, the reference should be followed by a comma and 'at p 426'.

For English cases the citation should follow the hierarchy of reports accepted in court (in order of preference):

- The official law reports (AC, Ch, Fam, QBD); WLR; FLR; All ER
- For ECHR cases the citation should be (in order of preference) EHRR, FLR, other.
- Judgments of the Court of Justice of the European Communities should be cited by reference to the European Court Reports (ECR)

Other law reports have their own rules which should be followed as far as possible.

Titles of Judges

English judges should be referred to as eg Bodey J (not 'Bodey', still less 'Justice Bodey' though Mr Justice Bodey is permissible), Ward, LJ, Wall, P; Supreme Court Justices should be given their full titles throughout, eg Baroness Hale of Richmond, though Baroness Hale is permissible on a second or subsequent reference, and in connection with Supreme Court judgments Lady Hale is used when other members of that court are referred to as Lord Phillips, Lord Clarke etc. Judges in other jurisdictions must be given their correct titles for that jurisdiction.

Legislation

References should be set out in full in the text:

Schedule 1 to the Children Act 1989

rule 4.1 of the Family Proceedings Rules 1991

Article 8 of the European Convention for the Protection of Human Rights 1950 (European Convention)

and in abbreviated form in the footnotes, where the statute usually comes first and the precise reference to section, Schedule etc follows, eg

Children Act 1989, Sch 1

Family Proceedings Rules 1991 (SI 1991/1247), r 4.1 (SI number to given in first reference)

Art 8 of the European Convention

'Act' and 'Bill' should always have initial capitals.

Command papers

The full title should be italicised and cited, as follows:

(Title) Cm 1000 (20--) NB Authors should check the precise citation of such papers the style of reference of which varies according to year of publication, and similarly with references to Hansard for Parliamentary material.

Contributions in edited books should be cited as eg J Bloggs, 'Chapter title' (unitalicised and enclosed in single quotation marks) in J Doe and K Doe (eds) 'Book title' (Oxbridge University Press, 2010) followed by a comma and 'at p 123'.

Journals

Article titles, like the titles of contributors to edited books, should be in single quotation marks and not italicised. Common abbreviations of journals should be used

whenever possible, eg

J. Bloggs and J. Doe 'Title' [2010] Fam Law 200

However where the full name of a journal is used it should always be italicised.