International Family Law, Policy and Practice

Some Current Themes at the Centre's 2019 Conference

Gender, Inclusivity and Protecting the 21st-Century Family

Volume 7, Number 1 • Spring 2019

International Family Law, Policy and Practice
Volume 7, Number 1 • Spring 2019

Some Current Themes at the Centre's 2019 Conference: Gender, Inclusivity and Protection of the 21st-Century Family

Contents

Editor's Message

This issue is the first of 2019 and looks forward to the Centre's 2019 triennial Conference on *Gender, Inclusivity and Protecting the 21st Century Family*, which will take place at the University of Westminster during the first week of July, the period when our regular delegates working in the wide field of Family Law find it convenient to gather in London from both the Northern and Southern Hemispheres, so as to share information, views and opinions, and experience in both civil and commercial jurisdictions worldwide. In this collection we have four articles and a five part report from our Indian correspondents on the ongoing work in the Asian sub-continent in the important field of Surrogacy, which is now such a significant catalyst in the creation of contemporary family formats, but which still lacks much global cohesion, and on associated topics including child abduction and custody disputes without the benefit of membership of the Hague Convention, and the 2018 Report suggesting the alternative of Indian domestic law reform.

Together this issue's commentaries highlight some topics of key international interest in relation to the cross border context in which our international delegates work, two of them with particular reference to the post Brexit era (if it ever arrives): moreover one of those two positive, optimistic and ambitious for the future influence of English Family Law globally in both civil and common law jurisdictions, and the other helpfully complementary and factual on the subject of what we would be left to start with in a transitional period on Brexit Day One (and on which to build those future ambitions for which we will inevitably have to wait for replacement legislation) .

When we planned the themes of the 2019 conference and set out to consider how to address them, we thought that the topic of Gender suggested itself because of the then prevalent initial focus on gender fluidity and the rise of the intersex debate. We did not expect that this important focus on Gender issues would be overshadowed by Brexit still dominating the daily news, still less that there would be powerful threats of the UK perhaps eventually 'crashing out with no deal' amid any amount of political, professional and academic turmoil in Family Law as a result; while we also had no idea that a silver lining would be found in the potential for our eventual unexpectedly under planned departure from the EU by David Hodson, (who throughout the years since we set up the first conference has often contributed to both our conferences and to the journal).

Complementing David Hodson's vision, Professor Peter de Cruz highlights the immediate major changes that can be expected in English Family Justice when we depart the EU (assuming we do). Against the potentially rosy future that David Hodson envisions, Professor de Cruz holds up a useful yardstick against which to calibrate a 'where we are now' view if and when we are somewhat suddenly no longer subject to BIIR and the EU Maintenance Regulation and must make our way through a transition period. This short article may be regarded as a trailer for the greater detail with which he has promised to follow it up, in one of our post-conference issues, in autumn or winter 2019 or spring 2020, when we actually know if and when the UK is leaving the EU, and some greater detail can then be provided of the replacement legislation that will be necessary. His contribution at this time also marks Professor de Cruz's move, on his retirement from full time teaching, from Joint Chair of the Editorial Board, to a more hands on role in production of the journal, thus bringing his comparative law perspective to good use on content. We are grateful for his past work on the journal since its inception in 2013 and on its predecessor since 2010.

We also originally thought that our Inclusivity theme would be likely to be centred around extension of the existing gender related options and possibly also including the developing intersex debate, especially as the intersex issue has had a

significant impact on the apparently mundane but crucial border crossing requirement of 'M' or 'F' on passports (which some jurisdictions had quickly resolved with use of the alternative 'X', while others found reasons to object to such a compromise}.

However we had not thought that, in an era in which UK legislation was being tightened up to protect against female genital mutilation (FGM), there would emerge an even more amazing threat to contemporary inclusivity in the shape of the 'forgotten crime' of breast ironing (of which some Family practitioners had not even previously heard let alone therefore had the opportunity to forget that this crime exists and appears to be alive and flourishing even in the UK). The persistent prevalence of such cultural practices was a shock, since they not only cause actual bodily harm but also militate against inclusivity of minority ethnic groups into the British style of family life and Family Justice - which clearly seeks to protect both children and adults from the consequences of such harm . Not only might such practices have been thought to be absent from modern Westernised minority ethnic groups, but the latest article (from Neelam Sakaria, formerly at the CPS in London, and Gerry Campbell, a leader in Police projects to address all such forms of violence against women) indicates that eradicating such obvious harm , which is clearly abuse and usually child abuse, is more difficult than first appears when it is culturally rooted – in the context of which it seems the harmful practice is seen by the perpetrators as the model of inclusivity in the group concerned, but in which we (who seek to prevent it) are the undesirable interference, not they!

We were indeed expecting the conference to bring together further examples of good practice and related skills which often have their origins in overseas jurisdictions, and are highlighted at our international conferences. We therefore welcome Astrid Martalas' new article on Parental Coordination (the Dispute Resolution methodology which it seems has now spread from South Africa to the UK in the development of a similar system at a leading Family Law firm in London). This time she follows up her earlier introductory 2016 article - which may be read in (2016) 4 IFLPP 3 on the journal pages of our website - with an account of the method's relationship with therapeutic jurisprudence.

Finally our faithful Indian correspondents' account of the latest news on Surrogacy in India addresses the latest developments on surrogacy protection in India and the potentially related Child Abduction legislation, and also some matters of a more general nature in relation to Child Custody and Guardianship and the status of case law in India. Considering the practical nature of India's early control of 'surrogacy tourism' through the introduction of a special visa (replacing the former practice of allowing access to India to seek a surrogate on a simple tourist entry) the rest of the world has much to learn from this pragmatic approach, since there is still not much progress towards the model international law of surrogacy that is obviously needed.

The themes from this issue, covering some important topics, including some that were not expected when this year's conference was set up, nevertheless afford an excellent preparation for that meeting of delegates in July 2019, registration for which is now closed, with the working sessions and social events alike sold out.

[*Frances Burton*

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

This issue may be cited as (2019) 7 IFLPP 1, ISSN 2055-4802
online at https://www.icflpp.com/journal/.

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

Global GB: family law opportunities post Brexit. Envisaging international innovations

David Hodson*

Overview

Just as in the political debate in our country, there has been far too little consideration in the family law context of the future opportunities for the UK outside the EU. So much campaigning by some family law organisations has only been about staying within EU laws. Yet without the restrictions imposed by the EU upon the UK, many exciting international innovations open up. The UK is the original common law jurisdiction but is the closest common law country to the heart of the civil law system in continental Europe. The UK has so many families from outside the common and civil law worlds who are used to other systems of law which also find a place in English family law trends. The UK has a very good record in gender neutrality and fairness and the best interests of children. The exceptionally experienced judges and lawyers in the UK are very alert to opportunities to improvements. The UK is supremely well placed post Brexit to walk boldly into a future embracing the different systems of law and other international initiatives.

The journey begins after the EU departure

Presuming the UK leaves the EU with either a deal or no deal, it will imminently or at the end of any implementation period be able once again to enter into international treaties and agreements with other countries. Hitherto this has been prevented by the EU which has required member states only to enter into family law agreements with the express permission of the EU and with all other member states joining at the same time. This has significantly frustrated in the opportunity to make progress.

Yet the UK is a very advanced family law jurisdiction. It's judges and lawyers are amongst the leading influencers worldwide. They are highly specialist and very knowledgeable of international laws affecting cross-border families. The UK is highly innovative in new ways of working, of taking full account of issues of gender and ethnicity and exploring the best interests of a child and its representation. Progress has not been possible because of EU restrictions

The UK as the original common law jurisdiction is close to the many other common law countries around the world with whom there are many shared family ties. This has seemed at times to be close to breaking point with the requirement for greater closeness with the EU and its very different traditions. Paradoxically, the UK is also the closest common law jurisdiction to the civil law, as found primarily in continental Europe and as applied by the EU in EU family laws. So the UK now has significant elements in its law which come from civil law concepts, many of them working satisfactorily. The UK does not want them to be imposed which has caused much friction with the EU. But intrinsically the UK is keen to build on the closeness with the EU and the civil law.

But the UK is a very cosmopolitan society with many cross-border families from outside the EU and civil law traditions. This has supremely been found in concepts of religious laws, practised by many families within the UK and which in the number of instances have touched and informed developments of UK law for families. This progress is to be encouraged.

Therefore with these elements, what could be some future innovations in which the UK could work with other leading family law jurisdictions for a better international family law for the many cross-border families around the world? This is a preliminary note which will be expanded by the author. It relates only to England and Wales directly although often the other UK countries would be in a similar place.

---

* David Hodson OBE MCIArb is a co-founder and partner at The International Family Law Group LLP, London, www.iflg.uk.com, dh@davidhodson.com

He is an English solicitor, arbitrator and mediator and also an Australian qualified solicitor, and sits as a part-time family court judge at the Central Family Court. He is an Accredited Specialist (with portfolios in Substantial Assets and International Cases), a Member of the English Law Society Family Law Committee, a Fellow of the International Academy of Family Lawyers, a Fellow of the Centre for Social Justice, and a member of the Family Law Section of the Law Council of Australia. He is author of *The International Family Law Practice* (Jordan's 5th edition Dec 2016). He is an Honorary Professor at Leicester University and visiting Professor at the University of Law. He received the OBE in 2015 for services to international family law.

 This article is work in progress. The editor hopes that it will be a trailer for further developments which may appear in a subsequent issue of this journal and that it may be a catalyst for discussion of some positive advantages which may eventually emerge from the adverse impact on Family Law of the protracted and still uncertain Brexit.

What criteria for forum?

It is an inevitable element for cross-border families that sometimes more than one country would have sufficient connection and jurisdiction, for proceedings. Where it makes no difference then matters of forum are largely irrelevant. But there are still huge differences around the world, even between neighbouring countries, and particularly found in the financial outcomes of relationship breakdown. So with legal advice, each party seeks to have the proceedings in the country most beneficial to that party. Hence forum disputes. And hence judges and policymakers have created criteria to decide where proceedings should be.

The traditional UK and common law approach has been with which country has the closest connection, that is *forum conveniens*. The logic that proceedings should be in the country with which the family has closeness. But it comes at a disadvantage that deciding forum relies on many factors and features, with some uncertainty as to the outcome therefore producing litigation and costs.

The EU considered this 20 years ago and came up with the test of *lis pendens*, which party is first to lodge proceedings. The benefit of certainty and predictability, but hugely unjust and unfair. It created racing to court. It disadvantaged the financially weaker party, the one who wanted the marriage to continue or was not aware the other wanted it to end. It was a huge disincentive to reconciliation, mediation or pre-action negotiation. No other set of countries has it. But the EU has been absolutely unrepentant and unwilling to budge, blaming forum races on English lawyers!

Fortunately when the UK leaves the EU, we will no longer have this race to court and will revert to closest connection. But should we in the longer term retain this test?

Certainly it has the benefit of a strong sense of fairness based on connections. But it does have uncertainty. What else could be possible?

A jurisdictional criteria and forum test was proposed by some of us more than a decade ago to the EU but they have not been prepared to adopt it. The UK should reflect and consider whether this might be better and might also be acceptable for other countries. It is found in a number of other international laws.

It is also based on simple hierarchy. For there to be proceedings in any country there has to be connecting factors. Some are fairly weak e.g. sole domicile or nationality. Some are very strong e.g. habitual residence in a country by both throughout the marriage. So the connecting factors would be placed in a hierarchy. If for example one country has connection with a couple through a connecting factor which is fourth on the list in the hierarchy and another country has a connection with a couple through a factor which is second on the list then that latter country would deal with the proceedings.

England has already worked on this hierarchy because the EU invited us to do so about three years ago when they gave some thought to this, before rejecting it. Crucially this hierarchy is not nationalistic or strong for any particular group of countries. It is only what connecting factors are believed to be the strongest, in descending order.

The advantage is that this creates a common jurisdiction, one of the existing benefits of the EU laws. It creates forum criteria with certainty and predictability. It allows personal autonomy because choice of country would be one of the connecting factors in the hierarchy. It takes away the need for choice of law, applicable law, because it would be the national law of the country with which there was the highest in the hierarchy. It would be adopted by countries keen to minimise the number of forum disputes and litigation. It has already been prepared and is, in different ways, already working in other international laws concerning families and children.

However this cannot happen whilst the UK is part of the EU because the EU has specifically rejected it. But the UK can innovate for the future once it is outside the EU, and directly help cross-border families and reduce litigation

The jurisdiction criteria

What should be the connecting factors for any country to have family court proceedings? In matters concerning children, it is less contentious as it is invariably the habitual residence of the child. It is in divorce and financial matters where there have been disputes

Originally England and Wales had only two for divorce and ancillary financial proceedings. Habitual residence for 12 months or domicile. Since March 2001 there have been seven or eight overlapping factors as imposed by EU law. Some were directly used by applicants engaged in forum shopping. There was much greater reference to residence than domicile.

In considering what should be the jurisdiction criteria after leaving the EU, habitual residence and elements of residence for a period of time will be to the fore. This is the increasing trend worldwide.

But what about domicile? This is an incredibly complex law, with a very backward looking component which is sometimes into previous generations. It is mixed up with fiscal and succession law. Surely its time has passed.

Many countries including within the EU prefer nationality. It is far more certain and provable. There may be instances of dual nationality but even then it is ascertainable.

The UK cannot change jurisdiction whilst subject to EU laws but, free from them, it should review whether in

the UK and with influence worldwide the use of domicile should be ended

The preconditions for a marital agreement

One of the biggest divides across the international family law world is the preconditions required for laws to give either binding weight or persuasive influence to marital agreements. Many common law countries are very keenly aware of the potential prejudice to the financially weaker spouse, often although not always the woman, by the pressures to enter into these agreements which are often to their disadvantage. So preconditions are put in place, including opportunities for legal representation and advice and knowing the facts, having disclosure. Without these preconditions either the agreements will be ignored or given little weight. Yet across the civil law world the position is diametrically opposite. As long as it is in writing in some permanent form then an agreement will be binding for decades during a relationship. No need for independent legal advice. At most joint advice from a notary with, anecdotally, very little realistic advice on whether a party should or should not sign. Common law jurisdictions often have very little difficulty ignoring such agreements when they are shown to be clearly disadvantageous to one spouse and unfair.

But EU law requires that the UK treat such agreements as binding. Yet in a non-EU case, the same agreement would be ignored or given little weight. Once free of EU laws, England will again be free to make sure that the financially weaker spouse has been protected in the entering into such an agreement.

It is not suggested that England or other common law countries taking a strong position on separate representation before entering into marital agreements should change their stance. Equally the EU with its civil law traditions and cultures is unlikely to change its stance. The divide will not be bridged.

But with increasing movement of cross-border families, and awareness of the need of independent legal advice before entering into important contractual obligations, a number of European families are now taking independent legal advice notwithstanding their own tradition. The UK and common law traditions should continue to be diligent and demanding of laws and practices which affect the more vulnerable spouse or parent. They should continue to require marital and parenting agreements only to be given weight internationally when each has had the benefit, or opportunity, of independent legal advice and knowing the full facts

The ADR imperative

The EU introduced the Mediation Directive. It was very commendable and gave encouragement to mediation across the EU. The major problem is that another EU law, encouraging racing to court, absolutely worked against mediation. Having tactically issued proceedings in one country to the advantage of that party, why would the other spouse then engage in mediation? Apart from the Directive, there have been no other EU family law ADR initiatives. Some attempts have been made in some EU countries to progress cross-border mediation in child abduction work but without much progress.

In the meantime a number of countries have pressed ahead with ADR initiatives. Collaborative law is strong in some countries, particularly where there is an aggressive litigation culture which collaborative law tries to avoid. Family arbitration is being used with training in a number of countries. Early neutral evaluation is used productively. The Hague Conference has produced the very impressive Guide to mediation in child abduction cases, with application in all international children work.

Yet there are significant road bumps along the way. The New York Arbitration Convention would be a wonderful opportunity for arbitration awards to be recognised and enforced worldwide, in a form much simpler than reciprocal enforcement. But this now relatively historic international law does not cover family law due to reservations made by countries at a time when there was no family arbitration. There needs to be encouragement by ADR supportive countries to change this. In August in Singapore the Mediation Convention will be signed but yet again there are reservations, exclusions, for family mediation. This is notwithstanding that family mediation is found in very many countries worldwide with its own distinctive way of working and with many benefits in cross-border cases.

The mediation profession seems unable to progress beyond national borders to any meaningful extent. There is no real international association of specialist mediators undertaking international cases for families, particularly outside child abduction. Training is patchy. There is no branding and presently no agreed common standards, accreditation or lists.

The UK has been a strongly pro-ADR jurisdiction over many years. Without the restrictions from the EU, it is hoped the UK will strongly press for both mediation and arbitration to be opened up to family law matters and then for the UK to enter into these respective Conventions. It is to be hoped that there will be soon some international gathering of ADR professionals. ADR has transformed family justice resolution nationally in so many countries. But it must move on to the international scene.

Religious and ethnic imperatives

Around the world globalism is supporting freedoms for religious, ethnic and other groups to stress that their traditions should be heard and listened to in justice systems. There are calls for national courts to follow the religious laws of the couple concerned. Parallel systems of tribunals working for religious and ethnic groups argue their outcomes should be reflected in the national law. Protections are sought for vulnerable members of these groups in areas such as forced marriage or FGM. Communities have sometimes engaged in marriages and divorces valid in the eyes of their community but not according to national law. Liberal countries have struggled at times combining secular pluralism with the fair recognition of rights of individuals in their communities and traditions within a country. This issue will only increase for national family justice systems.

The UK has very many religious and ethnic groups and communities. Like a number of other countries it has tried to deal with these issues fairly, impartially and justly. It has not been easy and insensitive mistakes are innocently made. Many of these families have international connections. Some of the countries from which sizeable religious and ethnic groups originate are very different to the UK in their expectations of issues regarding children, justice, gender, liberties and similar.

There is a real need for countries like the UK and others to give a lead on the appropriate balance for distinctive religious and ethnic groups within the overall scheme of a national law system. This is not based out of any guilt or past history but simply respect for all individuals in a country including those originally from other traditions. This may need bilateral or multilateral treaties, which are impossible whilst in the EU. It may need departure from historical traditional concepts of law. It is very important this is considered internationally and the UK has the opportunity fully to take part in this.

Innovations in parenting

Child law has perhaps seen the biggest developments in recent years through new patterns of parenting, partly through availability through technology. Some of this has come within same-sex relationships, which some EU countries still refuse to accept and acknowledge. Some has come from scientific developments. It includes quite different patterns of adoption. It certainly covers surrogacy along with three parent families, the use of a mitochondrial replacement therapy (MRT) technique.

These are invariably international, and indeed one of the mischiefs needed to be sorted out by international laws are shortcomings in international adoptions and surrogacies. The Hague Conference has Conventions in respect of the first but not the second, although this is being discussed. International consensus is needed with countries of liberal traditions free to be able to enter into international laws.

In a similar although perhaps more traditional fashion, there is a need to review the 1980 Hague Convention in the context where too often the child abductor is the so-called innocent parent fleeing from a very difficult situation, perhaps back to her home country. The original rightful intentions in 1980 are now increasingly skewed against the abductor as primary parent. It may be there will be no significant change but there should be a review.

Very many cases of child relocation now arise whereby one parent seeks to move with a child permanently to another country. This has a very adverse effect on the child's relationship with the so-called left behind parent. Some countries are very liberal in allowing relocations. Some have been liberal and are pulling back. Some are very restrictive thereby creating so-called land locked parents. Much work is needed to produce some international consensus and the UK is already playing its full part. Just as with 1980 Convention, the UK cannot do so if restricted by EU laws from entering into new international family law arrangements

Conclusion

This is only a summary. There are other areas which will be expanded upon separately by the author. But the UK has a tremendous opportunity, joining with other innovative family law jurisdictions, to improve, enhance and create better systems of law for international families. This will build upon the confluence of common law and civil law enjoyed by the UK but without the overbearing authority of the civil law dominated EU.

What is important is that with the imminent freedom from the restrictions of either EU laws or EU policies, the UK can once again take its place in leading with other countries to produce fair, sensible, non-discriminatory, child focused, settlement orientated international laws and practices for the very many cross-border families in our world today. It's an exciting opportunity.

Family Law, Brexit and the Cloud of Unknowing

Professor Peter de Cruz*

As this issue goes to press, it is still 'Deal or no-deal'? Even 'Should we stay or should we leave (the EU)'? Or 'Is Brexit going to happen?' These are questions that have continued to dominate the British political scene in 2019 and have been since 2016. Does it matter if Brexit happens or not?

Yes, it does, not least because if Brexit does actually happen, the Law Society has already delivered guidance to solicitors to indicate that certain aspects of Family Law and Child Law will be affected and in terms of day-to-day practice, the status of ongoing cases, post-Brexit, will be unclear. They also declare that rules governing the enforceability of any case decided after the exit date will cease to have effect, and thus the risk of parallel cases being taken in multiple jurisdictions will be a distinct possibility[1].

The United Kingdom is now living under 'a cloud of unknowing', a concept dating back to medieval times, but perfectly applicable to the current malaise and uncertainty enveloping Britain's political future in the light of the Brexit saga. There is, for example, considerable uncertainty over the impact of Brexit on children with European connections who are in need of protection by the State. This uncertainty arises not just because the EU laws governing such children will no longer have effect under UK law but because there is also the possibility of more than one law being applicable to the case in question. Conflict of law experts may revel in this, but it does not make for the smooth and efficient administration of law at the sharp end or provide much-needed assistance to parties in times of need.

The United Kingdom has been undergoing a sustained period of political uncertainty and upheaval, not just because of the inability of Parliament to reach agreement over the terms on which Brexit should happen but also because of the continuing uncertainty over whether the UK will in fact leave the European Union, despite the referendum result, and if so, on what terms. New political parties have emerged, spawned from the disillusioned members of the two main political parties to which we have been used in government and opposition for some time; and the country is in a state of flux and transition, polarised by the differences of opinion over what will happen if Brexit takes place and the UK actually leaves the European Union. What Brexit actually means in practical terms, still differs from person to person. These differences of opinion extend to lawyers. Some legal organisations envisage a rather worrying post-Brexit landscape with uncertainty surrounding certain aspects of Family Law which could potentially leave children less well protected than under EU law. Hence, the Law Society of England and Wales has issued Guidance for solicitors in several areas of Family Law if the EU and UK fail to sign a withdrawal agreement governing the terms of the UK's departure from the EU and an agreement governing the future relationship between the two parties (the 'no-deal' scenario).

The Law Society's list of key areas to consider for solicitors working in Family Law includes:

Child abduction, where although it confirms that the Hague Conventions will continue to apply between the UK and EU/EEA states, it also points out that all reciprocal elements of EU law will cease to exist unless otherwise agreed before Brexit, between the UK and the EU member states. Hence, national rules will apply to this area of law in the UK and the EU/EEA member states the day after Brexit takes place.

EU family law instruments based on the principle of mutual recognition will no longer apply cross-border between the UK and EU/EEA states. The EU **Maintenance Regulation** and *Brussels IIa* Regulations (EC) No 2201/2003 will no longer have effect in the event of a no-deal Brexit.

Jurisdiction in family law cases if there is a no-deal Brexit

The government has produced a statutory instrument (SI) to deal with jurisdiction in Family law cases after a no-deal Brexit. The draft Jurisdiction and Judgments (Family) (Amendment etc) (EU Exit) Regulations 2019 (SI 2019/S19) will come into force on exit day, and if there is no-deal, it will repeal *Brussels IIa* in its entirety. However, as to transitional arrangements, the SI allows for the fact that if proceedings are issued before exit day, the jurisdictional rules in Brussels will continue to apply to those proceedings after exit day. However, Maria Wright points out that because the SI limits the transitional arrangements to purely

---

*Professor de Cruz, formerly Professor of Law at Liverpool John Moores University, from which he retired in 2018, is the author of two leading titles *Comparative Law in a Changing World*, 3rd edition, Routledge2015; and *Family Law, Sex and Society,* Routledge, 2010.

[1] The Law Society, *No-deal Brexit,* The Law Society, October 2018. For civil and commercial law, there has been additional guidance in January 2019. See https://www.lawsociety.org.uk/

jurisdictional matters, to the exclusion of the rest of the Regulation, this creates 'potentially problematic implications' for cases issued before exit day, which are continuing after exit day. Pending cases could become segmented on exit day. *Brussels IIa* would continue to govern the jurisdictional basis of the case but the 1996 Hague Convention would govern the recognition and enforcement of any orders made and would also be the applicable instrument for any cross-border cooperation required after exit day[2] (Wright, February 2019).

Another problem which could arise is the fact that in the event of a no-deal Brexit, applicants might not be able to avail themselves of the recognition and enforcement provisions of *Brussels IIa* after exit day, even if the order that they wish to have recognised and enforced was made before exit day. This is because while applicants might have invoked Article 11(8) *Brussels IIa* to secure their abducted child's return even after an order for the non-return of the child was made under the 1980 Hague Convention before exit day, they would not be able to invoke the recognition and enforcement provisions of *Brussels IIa* after exit day, as this would require directly enforcing the return order in the relevant Member State. There are similar recognition and enforcement provisions under the 1980 Hague Convention which will have to be used after a no-deal Brexit but the whole process will be lengthened if these provisions were invoked, which would not be beneficial to the parties involved, especially the child.

A further possible complication is that *Brussels IIa* is being currently revised and improved so that it works better for children and families in cross-border cases. The revised version will be known as *Brussels IIa Recast* which is being considered by the Council of the European Union. However, we do not know when this revised version will come into force. If the UK enters into new agreements with the member states, will they reflect *Brussels IIa* or *Brussels IIa Recast*? What if *Brussels IIa Recast* comes into force after the end of the transition period before Brexit formally takes place? Which version would govern the adjudication of a particular case? It would not make sense for the UK to make an agreement with member states reflecting the original *Brussels IIa* version while the member states used *Brussels IIa Recast* with each other. At the very least, the court would have to decide which Regulation should govern the dispute or case at hand. Meanwhile, the status of thousands of children caught up in cross-border proceedings would remain unclear as Maria Wright identifies.

On the other hand, leading commentators such as David Hodson, have opined that the UK will be ready and able to cope with a no-deal Brexit, as a result of several statutory instruments released by the government, without any material prejudice in most cases to clients, and with adequate alternatives to EU laws . Hodson takes the view that a no-deal Brexit which reverts English law to the pre-EU position is not necessarily a bad outcome. He concedes that the power to trump an order refusing the return of an abducted child will be lost with the repeal of *Brussels IIa* but points out that this power is used in very few cases, indeed at most two cases each year by the UK. Indeed, he states that some countries in Europe do not use it on a regular basis, and that the UK does not distinguish between EU or Hague abduction cases, and always applies a fast return timetable so it would not be as serious a problem as imagined.

As we can see, there is a 'cloud of unknowing' which hovers over an already opaque and highly divisive political scenario. As Teresa May (the outgoing British Prime Minister) found to her cost, the country is divided, Parliament is divided, the two main political parties are divided internally, and this pall of uncertainty continues to cast its shadow over not just the present political and economic landscape but could have repercussions well into the future. These might be resolvable through legislation but until this cloud lifts and clarity in politics and law is at least partially achieved, even the legal experts can only speculate on what the future shape of Family Law will be, if and when Brexit happens. Meanwhile, despite its ubiquity, Brexit must not obscure the need for the government to address the ongoing practical needs of families and to support family relationships, to encourage inclusivity and equality for all, to celebrate diversity and to provide a framework for a fairer and more just society, regardless of whether Brexit ever happens. It is to be hoped that Family Law will reflect these objectives.

---

[2] Maria Wright, Part I: the immediate implications of a no-deal Brexit for cross border children cases, https://www.familylaw.co.uk/news, 14 February 2019; Part 2: the implication of a no-deal Brexit for cross border children cases, https://www.familylaw.co.uk/news, 15 February 2019 .

[3] David Hodson, https://www.familylaw.co.uk/news_and_comment/opinion-the-uk-will-be-ready-for-a-no-deal-brexit-in-family-law. 14 January 2019.

Breast Ironing: A forgotten crime and call for action.

Why we need to introduce new legislation and protection in England, Wales and Northern Ireland

Neelam Sakaria* and Gerry Campbell***

The family courts are used to protecting girls from a whole range of different harms often perpetrated by someone with parental responsibility or performing a carer's role. However, for court protection to be considered and provided, the harm, or risk of it, must be identified. Some such harmful practices, although cultural in origin, are thus a greater threat to inclusivity in modern society than any otherwise backward approaches to employment opportunity, equal pay or other modern restrictions affecting women in contemporary society, or both sexes in contemporary family formation.

Such harms include breast 'ironing', which is also known as breast 'flattening', and breast 'whipping'. These are just some of the names used to describe this harmful traditional practice, but there will be regional variations in the terms used in different languages.

Breast 'ironing' is a little known harmful traditional practice that involves the mutilation of a girl's breasts leading to disfigurement, which has a devastating impact on a victim's self-esteem and confidence.

It is a form of child abuse and currently in the UK is most likely to be a crime contrary to the Offences Against the Persons Act 1861. We say 'most likely' as this legislation has not been tested in respect of this harmful practice.

The deep-seated cultural belief driving this mutilation is that it could prevent teenage pregnancy, rape, sexual assault and sexual harassment by stopping male attention owing to delaying the signs that a girl is becoming a woman. On the other hand girls who have not undergone the practice, as with for example Female Genital Mutilation (FGM) (which has received recent publicity and updated legislation) face social isolation, stigmatisation and false accusations about perceived promiscuity. In short, breast 'ironing' is about preserving the girl's honour and preventing shame. In cultures which have and practise 'honour codes', a female's honour is measured through their conduct and behaviour; once they have lost their honour they cannot re-gain it.

While widespread in Cameroon where this practice is believed to originate, similar customs have been documented in Togo, Republic of Guinea, South Africa and Côte d'Ivoire. The UN estimates that some 3.8 million teenager girls are affected and has identified breast 'ironing' as one of five forgotten crimes against women.[1]

The frightening truth is that this practice, Breast 'Ironing', is now, according to the CAME Women and Girls Development Organisation (Cawogido) Non-Government Organisation (NGO)[2], taking place in the United Kingdom amongst the West African diaspora. CAME estimates that 1000 girls are at risk of Breast 'Ironing' every year in the UK and community groups are reporting cases in London, Yorkshire, Essex and the West Midlands area.[3]

There is no readily available source of data on breast 'ironing' in the UK. This is a notable area of concern given the level of harm caused to young girls.

The Scottish Government in their October 2018 paper "Strengthening protection from Female Genital Mutilation (FGM): consultation" also asked whether additional protections needed to be introduced in Scotland in respect of the practice of breast ironing, and whether there is any evidence to suggest that individuals in Scotland have been subject to the practice. The outcome of this consultation is awaited.[4]

Unlike FGM there is little known about this harmful practice. This is compounded by the fact that it is difficult to detect and often takes place in the privacy of a victim's home and is kept secret by the victim and the perpetrator.

This in part contributes to the shocking dearth of knowledge of this harmful practice amongst the front line professionals who are charged with protecting our children i.e. teachers, social workers, healthcare professionals and police officers. Given how breast 'ironing' is likely to present, healthcare, social care and teaching professionals are the most likely front line professionals to be alerted to this painful and destructive practice.

Jake Berry MP called for breast 'ironing' to be made a specific criminal offence. He was concerned about the 'lack of hard facts and figures', which prompted him to seek the

*Neelam Sakaria. Gender-Based Violence and Criminal Justice Expert. Former Head of Criminal Justice Unit at the CPS, Associate Lecturer in Victimology, Inter-personal Violence and Police Psychology

**Gerry Campbell. Former Scotland Yard Detective Chief Superintendent. Policing, Security and Community Safety Consultant and Associate Lecturer in Victimology, Inter-personal Violence and Police Psychology

[1] https://www.unfpa.org/press/violence-against-women-stories-you-rarely-hear-about

[2] More information about CAME Women and Girls can be found be visiting http://cawogido.co.uk/our-organisation/

[3] http://cawogido.co.uk/2019/02/04/revealed-dozens-of-girls-subjected-to-breast-ironing-in-uk/

[4] https://www.gov.scot/publications/strengthening-protection-female-genital-mutilation-fgm/pages/8/

debate and the Government's response. Having done so Mr Berry highlighted his concern about the responses he received from the UK's 44 police forces:

'The police forces that wrote back to me showed real concern. They know that this is a worrying crime and they have an equally worrying lack of knowledge of it. Some 72% of the police forces that responded either failed to answer a question about breast ironing or admitted that they had never heard of it, while 38% said they wanted more guidance. This demonstrates a lack of understanding among our police forces about breast ironing and the signs that reveal that it is happening….'

He went on to reveal that Local Authorities (Councils) wanted more information and training on the subject:

> Of those who responded, 23% volunteered the information that they had never undertaken any training in this area, and 65% said that they would like more guidance…. On their own admission, the police and local authorities need further training in dealing with this practice and bringing criminals to prosecution. If we fail to give them the tools that they require to identify and understand the victims of this crime, they will never be able to tackle it.[5]

There is no specific legislation in the United Kingdom to tackle this offending, nor are is any sentencing guideline that recognises that such a harmful traditional practice plays a key role in controlling the sexuality and the sexual autonomy of girls. To date there has been no prosecution for this serious and harmful offence.

What is breast 'ironing'?

Breast 'ironing' is a procedure to flatten the growing breasts of pre-pubescent or pubescent girls by pounding or massaging them with hot or heated objects such as stones, spatulas, wooden paddles etc. Breast 'ironing' often results in burns, deformities and psychological problems in young girls, sometimes younger than nine. It exposes girls to many health problems including tissue damage and cysts. It can even cause one or both breasts to disappear. As well as being painful, it exposes girls to physical health problems including abscesses, cysts, infection, tissue damage and even the disappearance of one or both breasts. There are also significant psychological affects too, which alongside the physical affects often lead to longer-term health impact too.

In Cameroon, richer families make young girls wear a wide belt, which presses the small paps in the breast and prevents them from growing. In more than half of the cases from Cameroon, mothers were identified as the main offender. In other situations a young girl may find that her mother will knead her naked, developing breasts from a young age with a hot stone twice a week to stop them growing.[6]

Who carries it out?

Breast 'flattening' has also been known to be performed by a nurse or caretaker, aunt, older sister, grandmother, the girl herself and, in a minority of cases, by a traditional healer, father, other family members, friends or neighbours. In other research and news reports, the most commonly cited motivation is to deter unwanted sexual attention from men who may perceive breasts as a sign of sexual maturity and subsequently may pursue the girl. In such scenarios, such pursuit may result in early, unwanted pregnancy.

How is it carried out?

Tools used for breast 'flattening' include a grinding stone, a wooden pestle, a spatula or broom, a belt to tie or bind the breasts flat, leaves thought to have special medicinal or healing qualities, napkins, plantain peels, stones, fruit pits, coconut shells, salt, ice, and others. Typically, the object is heated in the ashes of a wood fire in the kitchen and then applied in a pressing, pounding, or massaging motion. The heat, style of application, and duration vary by individual and by region. While some women report a single treatment of heated leaves placed ceremonially on the breasts, others describe a heated grinding stone used twice a day for weeks or months to crush the knot of the budding breast.[7]

The mother often warrants the ritual removing of the signs of puberty so her daughter can pursue education for longer rather than being regarded as 'ready for marriage'. Breast 'ironing' is as described above as a secret kept between the young girl and her mother. The girl believes that what her mother is doing is for her own good and she keeps silent. This silence perpetuates the phenomenon and all of its consequences.

Often the father and other male family members remain completely unaware. However, as with other forms of harmful traditional practice, this is more a case of men overlooking or ignoring the practice as there is a cultural belief that it is 'women's work' to bring up and educate

[5] Hansard, Volume 067, 22 March 2016 accessed via http://bit.ly/2WfQP3E

[6] https://www.ohchr.org/Documents/HRBodies/CEDAW/HarmfulPractices/GenderEmpowermentandDevelopment.pdf

[7] https://www.academia.edu/12252029/Understanding_Breast_Ironing_A_study_of_the_methods_motivations_and_outcomes_of_breast_flattening_practices_in_Cameroon

children, particularly girls.

A survey from a research study found that that 58% of the 'ironing' was done by victim's mothers, 10% by a nanny, 9% by a sister and 7% by a grandmother. The risk of having the breast 'ironed' was identified as depending on the age when the breasts first develop. For girls whose breasts developed before the age of 9, there was a 50% chance of having the breasts 'ironed'. The rate was 38% for girls whose breasts grew before 11, 24% for girls whose breasts grew before 12 years of aged and 14% for girls whose breasts grew before the age of 14. The survey also found that 70% of the breasts were bandaged or attached with breast bands after the 'ironing' while 30 % used under-sized breast wear.[8]

The impact of breast ironing

While there is little research on the health effects of the practice, it is considered that the practice can cause tissue damage in addition to the pain of the 'ironing' process. The U.S. State Department, in its 2010 human rights report on Cameroon, cited news reports stating that breast 'ironing' 'victimized numerous girls in the country' and in some cases 'resulted in burns, deformities, and psychological problems'. There are more than 200 ethnic groups in Cameroon with different norms and customs. Breast 'ironing' is practised by all ethnic groups. According the GTZ/RENATA survey a plethora of illnesses were reported to be associated with breast 'ironing'. Among them were the following in a severe form :

- pain, high fever; abscess in the breast; pimples on and around the breasts nipples; cysts in the breasts; itching of breasts, severe chest pain; flow of breasts, milk infection of breasts as a result of scarification; one breast being bigger than the other; breasts never growing bigger and complete disappearance of the breasts.[9]
- Other possible side effects include: breast infections; malformed breast and the possible complete eradication of one or two breasts. In addition, ten cases of diagnosed breast cancer were identified in women who underwent breast ironing.[10]

The international context

Breast 'ironing' is a fundamental breach of the human rights of women and girls, rights which are embodied in the Human Rights Act, the European Convention on Human Rights (ECHR) and the EU Charter on Fundamental Rights. These rights are also set out in a number of international treaties such as Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC) and the Convention Against Torture (CAT). The existing safeguarding duty detailed in the Children Act 2004 places a legal duty on statutory agencies to co-operate to safeguard and promote the welfare of children.[11] This is reinforced by the Convention on the Rights of the Child that details an obligation to take measures to abolish practices that are prejudicial to the health of children.[12] State parties or domestic governments also have an obligation to protect children from all forms of physical and mental violence, abuse and maltreatment.[13]

In addition all public authorities and their employees bear a specific duty under Article 2 ECHR to safeguard the lives of those within its jurisdiction and under ECHR Article 3, which stipulates that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.[14]

The challenges for investigation and bringing offenders to justice

Whilst there should be a zero tolerance approach to crimes, especially those which have their origins in a harmful traditional practice, the police service investigate each case on its own merits and on a case-by-case basis in accordance with the needs of the victim.

The police service is at the forefront of, and is taking a leadership role in tackling Honour Based Abuse (HBA), which includes Forced Marriage and FGM. The police service must be clear with victims, communities and partners what their role is within the coalition of partners responsible for tackling HBA, which now needs to include other forms of harmful traditional practices such as breast

8. Department of Public Health Sciences: Breast Ironing in Cameroon: Just a Rumour? Mancho Innocent Ndifor, Karolinska Instituet, Master theses in Public Health. Board of Education in Public Health Sciences at Karolinska Institutet.

9 UNICEF. *Violence against children in the home and family.*

10 https://www.ohchr.org/Documents/HRBodies/CEDAW/HarmfulPractices/GenderEmpowermentandDevelopment.pdf

11 Children Act 2004, s11.

12. Convention on the Rights of the Child, Article 24

13. Convention on the Rights of the Child, Article 19

14. Article 3 ECHR; Article 2 CAT; Article 3 HRA; Article 7 ICCPR

'ironing'.

The UK's Police Services' core responsibilities are:

- Protecting life and property
- Preventing and Detecting crime
- Maintenance of Her Majesty the Queen's Peace.

In addition, the police service's approach to the investigation of HBA is underpinned by three key principles, which also has a direct influence on the police investigation and other facets of the criminal justice system:

(i) Putting victims, their safety (safeguarding) and well-being at the heart of our responses and investigations; and

(ii) That the victim's personal details will be stored, managed and handled with integrity and confidentially.

Police investigators have a key role in securing HBA victims' trust and confidence. This principle is the foundation on which a relationship with victims and affected communities is built. It is only by securing the trust and confidence of victims and prospective victims in the police service and its ability to investigate such crimes seriously and with sensitivity, will victims come forward and report their concerns. Where a victim or support group detects or perceives that the police service's first responders and/or investigators are not treating a case seriously, or are failing to provide adequate protection to the victim will undermine the victim's confidence in the police service and affect their participation in an investigation.

In any investigation the wishes of the victim must be considered whilst making some key decisions e.g. the decision to arrest suspect(s) who invariably – but not exclusively - will be family members or other known to the victim and her family. This places a significant burden on the victim. For officers leading such investigations, there is also the competitive challenge of victim-led versus victim-focused investigations. Given the notable longer term physical and psychological impact on victims it is vital that the arsenal of support mechanisms available to victims be utilised including liaison officers, victim support scheme[15], and the special measures provided by the Youth Justice & Criminal Evidence Act 1999, should the case progress to prosecution.

There are numerous challenges investigating such cases and bringing perpetrators to justice:

(a) The majority of the offences take place when the victims are 8 – 12 years old. This presents significant problems in the gathering of evidence from the victim, who may not recollect the events (depending on when the police investigation is taking place) or become confused about the sequence of the events potentially leading to conflicting or un-reliable evidence;

(b) This is compounded by trying to access witness and professional evidence in foreign countries which may culturally support the practice;

(c) Investigators will need to establish early on whether the victim will support any prosecution as invariably it will be mothers/aunts/ grandmothers being prosecuted, and the victim will require culturally sensitive support following conditioning that this act was committed for their own good;

(d) The need to identify cultural and medical experts to support the investigation and prosecution. There are fortunately numerous academics and campaigners who can identify why any practice is followed and distinguish between the cultural and regional variations in how the 'ironing' is performed. There is, however, an absence of medical experts who can speak authoritatively of the longer-term impact of breast 'ironing'.

There is a real need for a collaborative justice approach to tackling harmful practices by informed professionals. The real focus must be on prevention and raising awareness of harmful practices in affected communities and with the police, teachers, health and social care professionals. The police service's experience of Honour Based Abuse and FGM is that this must be delivered as part of a sustained partnership effort whilst also ensuring that the different actors in the partnership have a shared understanding of the key issues.

Nevertheless addressing these harmful cultural practices is not without problems. There has been one case of breast 'ironing' reported to police in London, which was a number of years ago, and which did not progress to a prosecution, and the first successful prosecution of a case of FGM, which has become better known than those of breast ironing, was achieved only in the last year .

[15] https://www.victimsupport.org.uk

Community Driven Solutions

In addition, communities have a significant role to play in tackling breast 'ironing' so as to prevent and eventually end its practice. Given the deeply ingrained cultural nature of harmful practices Community Driven Solutions (CDS) are essential to change mind sets and behaviours. Nevertheless, CDS solutions have certain limitations and are probably best achieved through networks of influential community champions and role models from within affected communities rather than more widely or publicly approached.

Underpinning every investigation must be the protection / safeguarding of the victim in accordance with Article 2 ECHR and anyone else affected by the police investigation. Risk assessment, identification and management therefore is essential – but even professionals can only do this if they understand the subject area in the first place, if they recognise the signs, symptoms and the 'red flags'.

As part of the protection process police investigators and prosecutors must enlist the support of the courts to help safeguard victims, by obtaining Criminal Justice Restrictive Orders such as a Violent Offender Order [16] (under the Criminal Justice & Immigration Act 2008, s 98) so as to control the behaviour of the suspect(s), to protect the UK public or a particular person in the UK from serious physical or psychological harm.

How might a victim who has undergone breast 'ironing' come to notice?

In a similar way to FGM, a victim who has undergone breast 'ironing' is likely to come to the notice of authorities following a disclosure by the victim to a teacher, social worker, GP, midwifery services, breast caner screening or other healthcare professional. However, it is critical that effective partnership work is undertaken to ensure early intervention and prevent the harmful practice being undertaken.

The future

There is currently no statutory standalone crime of breast 'ironing' in the UK, with police and prosecutors relying on the existing pool of criminal offences available to them, such as offences under the Offences Against the Persons Act 1861. Forced marriage was recently criminalised as a standalone offence and it is only time before legislators and policymakers advocate a specific offence.

There is much that we can learn from the manner in which FGM is managed across the justice system and the strategic partnership. The key preventative work with affected communities and education (including with statutory agency professionals) can also be applied to cases of breast 'ironing'. The police services' long and difficult experience with tackling FGM can inform the partnership working in preventing, tackling, investigation and prosecution of breast 'ironing' cases.

The Serious Crime Act 2015 introduced a number of changes to assist with the investigation and prosecution of FGM cases such as victim anonymity, FGM Protection Orders and a new offence of failing to protect a girl at risk of FGM. This approach has a notable resonance with breast 'ironing' too.

We encourage HM Government to introduce new legislation specifically to criminalise breast 'ironing' to afford victims similar protection and action against the perpetrators as is now found with FGM. Any new offence must include provisions for extra-territorial jurisdiction to capture those offences committed overseas by offenders habitually/ordinarily resident in the UK or as a UK National. This is relevant given the nature of this offence, its motivation and where it is most likely to take place i.e. outside of the UK. There is anecdotal evidence, however, from CAME Women and Girls NGO that breast 'ironing' is taking place in the UK, which emphasises that action is required by Government and statutory agencies to improve staff awareness and take positive action to work with affected communities and to improve the identification of girls who are at risk of breast 'ironing'

[16] http://www.legislation.gov.uk/ukpga/2008/4/part/7/crossheading/violent-offender-orders

Does Parenting Coordination Embody the Principles of Therapeutic Jurisprudence?

Astrid Martalas *

1. Introduction

The legal system in action affects everyone in society. Law can affect people in many ways: economically, socially and in their relationships. Therapeutic jurisprudence (TJ) is an interdisciplinary approach to law that asks how the law itself might serve as a therapeutic agent without displacing due process. It emphasizes how legal actors, legal rules, and legal procedures can produce therapeutic or anti-therapeutic consequences in legal practice.[1]

This article proposes that parenting coordination embodies the principles of therapeutic jurisprudence and examines the role of the parenting coordinator in bringing about therapeutic outcomes for parties to their post-divorce disputes.

2. Therapeutic jurisprudence

Therapeutic Jurisprudence ('TJ') is an interdisciplinary field of philosophy and practice that examines the therapeutic and anti-therapeutic properties of laws and public policies, legal and dispute resolution systems and legal institutions.[2] It is the 'study of the role of the law as a therapeutic agent.' [3]

The concept has been defined as follows:

> '[A]n interdisciplinary enterprise designed to produce scholarship that is particularly useful for law reform. [It] proposes the exploration of ways in which, consistent with the principles of justice (and other constitutional values), the knowledge, theories and insights of the mental health and related disciplines can help shape the development of the law'. [4]

Therapeutic Jurisprudence asserts that the law can affect wellbeing.[5] It examines how the law itself might serve as a therapeutic agent without displacing due process.[6] It emphasizes how legal actors, legal rules, and legal procedures can produce therapeutic or anti-therapeutic consequences in legal practice.[7]

Therapeutic Jurisprudence does not advocate an exclusive focus on therapeutic considerations, but seeks to include them with legal considerations.[8] Moreover, it encourages the empirical testing of therapeutic concerns in the legal process to determine their relevance and impact.[9] A Therapeutic Jurisprudence approach focuses on the process of law as well as its outcomes from the perspective not only of legal actors such as judges, attorneys, or other legal professionals, but also those subject to the law such as victims, offenders, families, plaintiffs, and respondents.[10]

Fundamentally, Therapeutic Jurisprudence focuses on the 'socio-psychological ways' in which laws and legal processes affect individuals; and how laws and legal processes may in fact support or undermine the public policy reasons for instituting those laws and legal processes.'[11]

---

*Dr. Astrid Martalas is a psychologist in private practice in Cape Town, South Africa. Her areas of expertise are child and adolescent psychology, parenting, contact and care assessments, relocation assessments, post-divorce facilitation and mediation.

[1] Wexler DB, 'Therapeutic Jurisprudence: An Overview' *United World Law Journal* (2018) Vol. 1(1) 4. A UK Chapter of the International Society for Therapeutic Jurisprudence was created in 2018, more information available at http://www.theconsciouslawyer.uk/therapeutic-jurisprudence-uk/ accessed on 23 April 2019.

[2] Available from the International Society for Therapeutic Jurisprudence website, available at https://www.intltj.com, accessed on 24 April 2019.

[3] Wexler DB and Winick BJ, 'Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence' (1996) xvii.

[4] Wexler DB and Winick BJ, 'Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence' (1996) xvii.

[5] King MS, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' *Melbourne University Law Review* (2008), 32 1096.

[6] Wexler DB and Winick BJ (eds), 'Essays in Therapeutic Jurisprudence' (1991) xi [hereinafter Essays]. For a complete bibliography of published materials on therapeutic jurisprudence, visit http://www.therapeuticjurisprudence.org.

[7] Essays *supra* note 23 ix.

[8] Van Wees KAPC and Akkermans AJ, 'Therapeutic Jurisprudence: de Studie van de Gezondheidseffecten van het Recht' *Tijdschrift voor Vergoeding Personenschade* (2007) 4 139.

[9] Essays *supra* note 23 xi.

[10] Wexler DB and Winick BJ, 'Therapeutic Jurisprudence and Criminal Justice Mental Health Issues' *Mental and Physical Disability Law Reporter* (1992) 16(2) 229.

[11] Hora PF, Schma WG and Rosenthal JTA, 'Therapeutic jurisprudence and the drug treatment court movement: revolutionizing the criminal justice system's response to drug abuse and crime in America' *Notre Dame Law Review* (1999) 74 444.

3. Do we need to concern ourselves with therapeutic outcomes in family law disputes?

It is by now generally accepted in the literature that ongoing high levels of conflict post-divorce or separation are a more potent predictor of poor outcomes for children post-divorce than divorce itself.[12] It is furthermore accepted that the courts are not always the most appropriate forum in which to settle contact and care disputes due to the costs involved and the recognition that children's best interests are often not served through litigation.[13] In addition, it appears that courts are discouraged from considering the emotional context of a particular case or the immediate post-decision future of the parties involved.[14] The adversarial process can therefore be regarded as anti-therapeutic for both the parents and the children involved in a divorce.

Developments in society and changes in legislation have resulted in both of a child's parents having a greater degree of continued involvement in his or her life post-divorce or -family separation. To give effect to the demand for continued involvement, parents can agree on a parenting plan that regulates, inter alia, the contact and care arrangements for the children as well as those decisions regarding their children that parents have to make jointly post-divorce or -family separation. Parenting plans can also make provision for alternative dispute resolution mechanisms in the event that the parents cannot agree on an issue involving the child/children.

Family law disputes, and, in particular, disputes involving children and their best interests require a speedy resolution and outcomes that are long lasting, benefit the family and are in the best interests of the children involved. A therapeutic outcome to family law disputes is clearly preferable to an anti-therapeutic outcome. The question then arises as to how such a therapeutic outcome can be achieved without sacrificing due process.

4. Parenting coordination

Parenting coordination was introduced as an ADR process post-divorce or family separation in the USA and Canada some 40 years ago and evolved 'in response to the needs of family courts overburdened by high-conflict parents ... who take advantage of the legal system to resolve their non-legal child related issues'.[15] High-conflict litigants tend to consume the majority of the court's time and thus require alternative approaches for assisting them in resolving child-related issues. Parenting coordination developed as a remedy to address the courts' and parties' lack of available time and resources in order to reduce the well documented negative effects of parental high-conflict on children.[16]

Parenting coordination has been defined as:

> 'a child-focussed alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high-conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner, educating parents about children's needs, and, with prior approval of the parties and/or the court, making decisions within the scope of the court order or appointment contract'.[17]

Definitions of the parenting coordination process can be summarised as follows:

- parenting coordination is a dispute resolution process usually employed post-decree;
- it is child-focused and aims to prevent ongoing child exposure to parental conflict;
- it involves a multidisciplinary approach requiring varying degrees of decision-making by the PC;
- it borrows from other ADR processes such as mediation and arbitration and includes assessment, education and case management;
- it operates within the legal system of a specific jurisdiction; and
- it offers an alternative to litigation. [18]

---

[12] Kelly JB, 'Children's Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research' *Journal of the American Academy of Child and Adolescent Psychiatry* (2000) 39(8) 964.

[13] Fidler BJ and Epstein P, 'Parenting Coordination in Canada: An Overview of Legal and Practice Issues' *Journal of Child Custody* (2008) 5(1/2) 56.

[14] Gould PD and Murrell PH, 'Therapeutic Jurisprudence and Cognitive Complexity: An Overview' *Fordham Urban Law Journal* (2002) Vol 29(5) 2118.

[15] Fieldstone L, Lee MC, Baker JK and McHale JP, 'Perspectives on Parenting Coordination: Views of Parenting Coordinators, Attorneys and Judiciary Members' FCR (hereinafter Fieldstone L et al.) (2012) 50(3) 441.

[16] Fieldstone L et al., (2012) supra 442.

[17] AFCC guidelines 'Overview and Definitions', FCR (2006) 44(1) 165.

[18] Martalas AM, 'Alternative Dispute Resolution Post-Divorce or -Family Separation. Parenting Coordination: A Blueprint for its Regulation in South Africa and its Introduction in the Netherlands' Unpublished PhD, (2018) 248, available at www.pomegranate.org.za/PhD.

The parenting coordinator (PC) becomes involved with the family when post-divorce disputes arise. Depending on the mandate of the PC, he/she can consult widely to obtain all the relevant information necessary in order, in the first instance, to attempt to mediate an agreement between the parents, and, failing agreement, to make a decision. The PC is therefore well placed to take into consideration all those factors which may improve the chances of a therapeutic outcome for the family.

The role and function of the PC can be summarised as including:

- fulfilling a legal/mental health hybrid role which requires professional qualifications and additional specialised training;
- managing and resolving conflict;
- monitoring and implementing parenting plans including making decisions within the scope of authority given to the PC;
- remaining child focused at all times and ensuring that the best interests of the child or children are being served; and
- providing education and information regarding several processes including the role of the PC itself.[19]

One of the criticisms of parenting coordination is that it frustrates due process. However, parents always retain the right to approach a court for a review of the PC's decision. In addition, when parties divorce, their due process rights to make decisions regarding their children is affected in any event, in that courts frequently delegate decision-making authority to third parties such as a guardian *ad litem* or a custody evaluator. The PC can be regarded as such a third-party delegee.[20]

5. Conclusion

Therapeutic outcomes for post-divorce disputes are likely to enhance the parent-child relationship and can therefore be regarded as being in the best interests of the child involved. The PC appointed to resolve such a dispute is uniquely placed to reduce the anti-therapeutic effects of family law disputes whilst taking into consideration all the factors that would bring about a therapeutic outcome for the child, his parents and other role players in the system[21] of the child.

In conclusion, parenting coordination, as a multi-disciplinary alternative dispute resolution mechanism, despite having developed separately from Therapeutic Jurisprudence, nevertheless embodies the principles of Therapeutic Jurisprudence by providing therapeutic outcomes to family law disputes.

---

[19] Martalas AM *supra* n18 (2018) 254.

[20] Montiel JT, 'Is Parenting Authority a Usurpation of Judicial Authority? Harmonising Authority for, Benefits of and Limitations on this legal-Psychological Hybrid' T*ennessee Journal of Law and Policy* (2011) 7(2) 368-369.

[21] For more information on family systems theory see for example Titelman P, 'Clinical Applications of Bowen Family Systems Theory' Rutledge, New York 1998 (e-book publication 2014).

Despatches from our Indian Correspondents

Anil and Ranjit Malhotra *

This is the first in a series of commentaries from our Indian correspondents on topical issues in Family Law in India [1]

1. Surrogacy and Foreigners in India

Anil Malhotra*

.

In accordance with the prevailing Government of India policy decision dated 4 November 2015, surrogacy services in India for foreign nationals was banned, and neither Indian Visas, nor permission of any kind was to be granted by Indian Embassies abroad or by the Foreigners' Registration Officers to overseas citizens, or to overseas citizens of India, for obtaining medical visas to enter India, nor exit permission to leave India. The Indian Council of Medical Research by a decision of 27 October 2015, declared that surrogacy would be limited to Indian married couples only and not to foreigners.

However, these provisions did not apply if the foreign citizens or overseas citizens of India were already domiciled and living in India, and having availed themselves of facilities for the birth of children in India through surrogacy, and having decided to live in India did not need exit permission. Thus what would be the fate of such children born to foreign nationals in India, who would otherwise qualify for the same foreign nationality which their overseas parents held? Likewise, what about single parents with surrogate children? No existing codified law on surrogacy was on the statute book to address these problems or to pronounce on the validity of the birth of such surrogate children.

Bollywood film star Sunny Leone and her husband Daniel Weber, both foreign nationals stated to be living in India, recently publically announced the births of their biological sons, Noah Singh Weber and Asher Singh Weber, born through surrogacy. Their statement said

> we chose to do surrogacy with a fertilised egg from Daniel's genes and my genes. Asher and Noah are our biological children and God sent us an angel surrogate to carry our boys until they were born.

Film star Tushar Kapoor, as a single parent is also the proud father of a baby boy and Karan Johar a film celebrity, is the doting father of twin children as a sole parent.

Bill No. 257 of 2016 - that is the Surrogacy (Regulation) Bill, 2016 – was then tabled in the Lok Sabha in November 2016. It had proposed a complete ban on commercial surrogacy, restricting ethical altruistic surrogacy to legally wedded infertile Indian married couples only, provided they had been married for at least five years. A certificate of proven infertility of either spouse or couple from a Medical Board was mandatory. Overseas Indians, foreigners, unmarried couples, single parents, live-in partners and gay couples were barred from commissioning surrogacy. Only a close married blood relative, who must herself have already borne a child, and not a Non Resident Indian or a foreigner, could be a surrogate mother and that once in a lifetime. Indian couples with biological or adopted children were prohibited from undertaking surrogacy. Only medical expenses were to be allowed to be paid. Commercial surrogacy, among other offences, would then entail imprisonment of at least ten years and a fine of up to rupees ten lakhs. Compensated gamete donation was banned. Surrogacy clinics were to require mandatory registration. National and State Surrogacy Boards were to advise, review, monitor and oversee implementation of the new law.

In January 2017, the Rajya Sabha Chairman referred this legislation, as introduced in the Lok Sabha, to the Standing Committee on Health and Family Welfare. This Parliamentary Committee by Report 102 presented on 10 August, recommended beneficial major sweeping changes. Major stake holders, experts, Government representatives of various Ministries and professionals lent their views in extensive interactions with the Committee. The changes recommended are laudable, practical, beneficial and harmonious to the rights of the parties.

---

*Anil Malhotra, LLM, SOAS London, Advocate, Malhotra & Malhotra Associates, Chandigarh anilmalhotra1960@gmail.com, is a practising lawyer and is the principal author of *Surrogacy In India : A Law In The Making* (2014) and *Surrogacy In India : A Law In The Making-Revisited* (2015). He can be reached at anilmalhotra1960@gmail.com

[1] Despite the unevenness of regulation of surrogacy globally, India has been proactive in rising to the challenge of balanced protection of the parties involved.

The major recommendations of the 88 page report can be identified in nine features. **Firstly**, "compensated" in place of "altruistic" surrogacy is proposed, with the amount of adequate and reasonable compensation to be fixed by the authorities, together with the "mandatory appointment of a competent authority" to obtain the fully informed consent of surrogate mothers"

Secondly, the Committee recommended that surrogacy be available to live-in couples, divorced women, widows, Non Resident Indians, and (to avoid prejudice and discrimination) including PIOs and OCI card holders[2] but, foreign nationals cannot commission surrogacy in India.

Thirdly, recognising "the fundamental right to reproduce to have a child as a person's personal domain"; the five year waiting period, thought to be "arbitrary, discriminatory and without any definable logic," was recommended to be reduced to one year with the right to go for a second chance at surrogacy in case of any abnormality in the previous child.

Fourthly, holding the limiting of the practice of surrogacy to close relatives as "non-pragmatic and unworkable", the Committee has recommended that "both related and unrelated women should be permitted to become a surrogate." The Committee further recommends screening of intending couples for medical assessment, social economic background, criminal records and related checks before commissioning surrogacy.

Fifthly, the requirement of "a certificate of infertility from an appropriate authority" was recommended to be substituted by medical reports.

Sixthly, the Committee recommended practical changes in the constitution of the National and State Boards of Assisted Reproductive Technology for resolution of legal implications and maintenance of appropriate records.

Seventhly, the Committee suggested that "sex selective techniques" in surrogacy should be harmonised with existing laws and since "surrogacy and related procedures are not criminal, any penalties should be commensurate with the level or degree of infraction committed".

Eighthly, amongst miscellaneous recommendations, the Committee included written registered surrogacy agreements, adequate insurance coverage for the unborn child, provision of a birth certificate with names of the commissioning parents, establishment of an independent agency with quasi-judicial powers for resolution of disputes between the parties involved in surrogacy, and mandatory DNA testing for genetic determination in parenthood.

Lastly, the Committee observed that the Assisted Reproductive Technologies (ART) Bill, 2008, had been revised in 2010 and 2014 was still with the Government and should be brought forward before the Surrogacy Regulation Bill 2016.

Whilst the 2016 Bill is still pending, the Assisted Reproductive Technology (Regulation) Bill 2017 (in the public domain for consultation) seeks to establish a National Board, State Boards and the National Registry for regulation and supervision of assisted reproductive technology clinics and also for prevention of misuse and for safe and ethical practice of assisted reproductive technology services. Without a surrogacy law in place, some machinery for its monitoring is sought to be created, it seems without first identifying the parameters of permissible surrogacy in India and its availability to citizens or others. Thus problems prevail.

Restricting limited conditional surrogacy to Indian married couples and disqualifying other persons on the basis of nationality, marital status, sexual orientation or age, does not appear to meet the test of equality. Right to life enshrines the right of reproductive autonomy, inclusive of the right to procreation and parenthood and it is for the *person* and not the *State* to decide modes of parenthood. It is the prerogative of person(s) to have children born naturally or by surrogacy in which the State, constitutionally, cannot interfere. Moreover, infertility cannot be a prerequisite for undertaking surrogacy. A certificate of "proven infertility" is a gross invasion of the right of privacy which is part of right to life under the Constitution. All these legal maladies find redress in the erudite Committee report.

The Indian Council for Medical Research (ICMR), working under the Ministry of Health and Family Welfare, finalised the National Guidelines for Accreditation, Supervision and Regulation of Artificial Reproductive Technology (ART) Clinics in India, 2005. It stipulated that there shall be no bar to the use of ART by single women who would have all the legal rights and to whom no ART clinic may refuse to offer its services. By anomaly, single men too could claim this right. These guidelines have not been rescinded up to the present.

Anomalous and inconsistent as it may seem, in the matter of Inter-Country adoptions, the Government has a diametrically opposite policy. It statutorily propagates fast-track inter-country adoptions from India for foreigners. The Juvenile Justice (Care and Protection of Children) Act

[2] 'PIO' - persons of Indian origin; 'OCI' - overseas citizens of India.

2015 (the JJ Act) allows a Court to give a child in adoption to foreign parents irrespective of the marital status of such a person. The latest guidelines governing Adoption of Children notified on 17 July 2015, have streamlined Inter-Country Adoption procedures, permitting single parent adoptions with the exception of barring single male persons from adopting a girl child.

Surrogacy in vogue for over the past twelve years has been shut down overnight. Tripartite constitutional fundamental rights of stakeholders stand violated in the process. A right to reproductive autonomy and parenthood, as a part of a right to life of a single or foreign person, cannot be circumvented.

The possible Government logic for banning foreign surrogacy to prevent misuse, seems counterproductive. Barometers of domestic altruistic surrogacy will be an opportunity for corruption and exploitation, sweeping surrogacy into unethical hands in an underground abusive trade. Relatives will be generated. Surrogates will be impregnated in India and shifted to permissible jurisdictions with lax laws. The ends will defeat the means. Surrogacy may still flourish with abandon. Sweeping it under the carpet will not help. Ignoring its prevalence cannot extinguish it at a stroke.The Parliamentary Committee recommendations taking due note have done very well. The suggestions must find favour. A beneficial surrogacy law is the need of the hour.

2. Child Custody and Guardianship Issues and Challenges in India

Anil Malhotra and Ranjit Malhotra*[3]

Statutory Provisions of Indian Law

All codified personal laws of different religious communities in India identify

biological parents as the natural guardians of their children. In the case of Hindus, section 6 of the Hindu Minority and Guardianship Act 1956 (HMGA) prescribes that the natural guardian of a Hindu minor shall be the father, and after him the mother, provided that the custody of a minor who has not reached the age of five years shall ordinarily be with the mother.

The HMGA rests the appointment or declaration of any person as a guardian of a Hindu minor by a court on the welfare of the minor as the paramount consideration. However, in the absence of any statutory procedural remedy being available under the HMGA, all inter-parental child custody issues are invariably adjudicated through guardianship petitions preferred under the Guardian and Wards Act 1890 (GWA), which is a secular law, and is invoked by all persons in India irrespective of religion and nationality. The Hindu Marriage Act 1955 (HMA) and the Special Marriage Act 1954 (SMA) also provide for the adjudication of custody issues of children as an ancillary issue in pending proceedings under the respective enactments. However, inter-parental, intra-country or inter-country child removal by a parent is not statutorily recognised as an offence or a wrongful act in India. In such a situation, the entire evolution of a jurisprudence on the subject of inter-parental child removal in India has evolved through beneficial interpretation of the courts from time to time. In matters of intra-country child custody disputes, the law has been consistent that the determining paramount factor will be the welfare and the best interests of the children. Superior financial or other rights of litigating parents will be subordinate in such determinations and, wherever possible, the wishes of the child will be ascertained in adjudicating such disputes.

However, the vexed question of cross-border inter-parental child removal not finding any legislative definition remains a subject of varying judicial interpretation of the Supreme Court of India from time to time. India is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction 1980, acceded to by 98 other countries and thus wrongful removal and retention of a child domestically defies recognition and acceptance under codified Indian law, even though it is an offence internationally. A corpus of about 32 million non-resident Indians living globally in 208 countries with multifarious relationships creates an immense potential for unresolved child custody disputes upon a parent relocating to India or beyond its territorial borders, by violating foreign court orders or being in infringement of parental rights in foreign jurisdictions.

While the HMGA declares that the natural guardian of a Hindu minor boy or an unmarried girl shall be the father, and after him, the mother, provided that the custody of a minor who has not reached five years of age shall ordinarily be with the mother, the HMGA does not contain any independent, statutory or procedural mechanism for adjudicating custody rights or declaring court-appointed guardians. The reference to the word 'Court' in the HMGA treats a parent or any other person seeking appointment as

*Ranjit Malhotra, LLM SOAS London, Advocate, Malhotra & Malhotra Associates, Chandigarh
ranjitmalhotra1966@gmail.com

[3] Anil Malhotra and Ranjit Malhotra are the authors of *The Removed Child and The Law in India*, published by Malhotra & Malhotra Associates, Chandigarh (2018) – ISBN 978-93-5321-776-1 released 9 November 2018.

a 'guardian', so as 'to invoke the provisions of a 127-year-old colonial law', that is, the GWA in India, by means of which the aggrieved or violating parent is constrained to seek exclusive temporary custody of his or her biological offspring during the pendency of such hearing.

Residence Determines Jurisdiction:

To be entitled to maintain a petition for guardianship under the GWA, the guardianship judge will have jurisdiction only if the '*minor ordinarily resides*' within the territorial limits of the authority of the District or Family Court. In the celebrated judgment of *Ruchi Majoo v Sanjeev Majoo*,[4] the Supreme Court of India held that in exercising its powers under the GWA, the guardianship judge is competent to entertain a petition only if the '*minor ordinarily resides*' in its jurisdiction as:

> a Court that has no jurisdiction to entertain a petition for custody cannot pass any order or issue any direction for the return of the child to the country from where he has been removed, no matter such removal is found to be in violation of an order issued by a Court in that country. The party aggrieved of such removal, may seek any other legal remedy open to it. But no redress to such a party will be permissible before the Court who finds that it has no jurisdiction to entertain the proceedings.

The phrase '*minor ordinarily resides*' in the GWA has been construed by some High Courts in different decisions as not being identical to meaning '*residence at the time of the application*' or '*residence by compulsion at a place however long, cannot be treated as the place of ordinary residence*', the purpose being to avoid the mischief that a minor may be stealthily removed to a distant place and forcibly kept there so as to gain jurisdiction.

Thus, the '*minor ordinarily resides*' has been interpreted to mean a '*place from where he had been removed or in other words, the place where the minor would have continued to remain but for his removal*'. In such a situation, a guardianship judge may thus decline to exercise jurisdiction if the minor child resident abroad does not '*ordinarily reside*' within his territorial limits, but is simply present there on the date of the filing of the guardianship petition.

***Parens Patriae* Writ Jurisdiction:**

Against the backdrop of this statutory position, the Supreme Court and the High Courts in India, in the exercise of their extraordinary writ jurisdiction under Articles 32 and 226 of the Constitution of India respectively, issue a prerogative writ of habeas corpus exercising jurisdiction as *parens patriae* in their best discretion to adjudicate upon conflicting claims of parents for the welfare of children. Hence, the evolution of a beneficial law on inter-parental child custody issues has been a progressive phenomenon emerging through judgments of the various High Courts in India based on varying precedents settled by the Supreme Court of India from time to time.

The writ of *habeas corpus* for seeking the implementation of child rights where the parents are fighting for the custody of their offspring was settled by the Supreme Court of India in *Gohar Begum v Saggi alias Nazma Begum*,[5] by following principles applicable to such writs in England to deliver the custody of infants. In *Nil Ratan Kundu v Abhijit Kundu*,[6] following English and American law, the Supreme Court of India held that

> the basis for issuance of a writ of *Habeas Corpus* in a child custody case is not an illegal detention, [but] the primary purpose is to furnish a means by which the court, in the exercise of its judicial discretion, may determine what is best for the welfare of the child, and the decision is reached by a consideration of the equities involved in the welfare of the child, against which the legal rights of no one, including the parents, are allowed to militate.

Hence, the invoking of the writ of *habeas corpus* by a non-resident parent for child custody on the strength of a foreign court custody order is the only efficacious, speedy and effective remedy, since the minor 'ordinarily resides' abroad and there is a bar of jurisdiction under the GWA for a guardianship petition before a guardianship judge.

Varying Position of Indian Case Law:

In matters relating to inter-country parental child removal, the position of the law has varied. In *Surinder Kaur v Harbax Sandhu*[7], and in *Elizabeth Dinshaw v Arvand Dinshaw*[8], the Supreme Court of India, exercising summary

---

[4] AIR 2011 SC 1952
[5] AIR 1960 SC 93
[6] AIR 2009 Sup SC 732
[7] AIR 1984 SC 1224
[8] AIR 1987 SC 3

jurisdiction, returned the removed minor children to the foreign country of their origin on the basis of foreign court custody orders. This was done on the basis of the principle of the comity of the courts and the prerogative of the jurisdiction having closest contact with the child to determine all inter-parental child custody disputes.

However, in *Dhanwanti Joshi v Madhav Unde*[9], and in *Sarita Sharma v Sushil Sharma*[10], the Supreme Court of India favoured keeping the welfare and best interests of the child in mind over all other aspects. Accordingly, foreign court orders were held to be only one consideration in adjudicating child custody disputes, which were to be decided by domestic courts on the merits of each case.

Subsequently, in *Dr V Ravi Chandran v Union of India*[11], the Supreme Court of India held that foreign courts had already passed custody orders or consent orders between the parties and had granted the divorce to the parties and had the jurisdiction to deal with the custody matters of the child, who should be returned to the respective country from where he/she had been removed.

In *Arathi Bandi v Bandi J Rao*[12], the Supreme Court of India held that the mother was singularly responsible for the removal of the child from the jurisdiction of the US courts and summary jurisdiction was exercised for the return of the child to the United States (US).

In *Shilpa Aggarwal v Aviral Mittal*[13], the Supreme Court of India held that the country in which the child has been living during his initial years of life, will be the determining factor with respect to the jurisdiction which has the most intimate contact with the child for purposes of adjudicating issues relating to custody. Accordingly, Courts of that country will have the jurisdiction to decide custody issues of the child. This would also be in consonance with the principle of comity of courts.

The Supreme Court of India in *Surya Vadanan v State of Tamil Nadu*[14], set at rest a five-decade chain of precedents laid down by courts in India from time to time to evolve a consistent approach in multijurisdictional child custody disputes and laid down the following principles:

- The principle of comity of courts and nations must be respected. The best welfare/ interest of the child should apply in such cases.
- The principle of *'first strike'*, that is, whichever court is seized of the matter first ought to have the privilege of jurisdiction in adjudicating the best interest of the child.
- The rule of comity of courts should not be abandoned except for compelling special reasons to be recorded in writing by a domestic court.
- Interlocutory orders of foreign courts of competent jurisdiction regarding child custody must be respected by domestic courts.
- An elaborate or summary enquiry by local courts must be held when there is a pre-existing order of a competent foreign court. It must be based on reasons and not ordered as routine when a local court is seized of a child custody case.
- The nature and effect of a foreign court order, reasons for repatriation, moral, physical, social, cultural or psychological harm to the child, harm to the parent in the foreign country and promptness in moving a concerned foreign court must be measured before ordering the return of a child to a foreign court.

Recent Updated Position of Indian Case Law:

However, in *Nithya Anand Raghavan v State of NCT of Delhi and Another*[15], the Supreme Court of India abolished the principle of the comity of courts and the principle of 'first strike' in matters relating to inter-country, inter-parental child custody disputes and laid down the following principles to be followed:

- The concept of *forum conveniens* has no place in wardship jurisdiction.
- The principle of the comity of courts is not to be given primacy in child custody matters.
- Child removal cases are to be decided on the merits on the welfare of the child principle.
- Foreign court orders are only one factor to be taken into consideration.
- Courts are free to decline the relief of return of a child within its jurisdiction.
- Courts may conduct a summary or elaborate enquiry on questions of custody.
- The High Court exercises *parens patriae* jurisdiction in cases of custody of minors.
- The Remedy of *habeas corpus* cannot be used for the enforcement of foreign court directions.
- Use of other substantive remedies is permissible in law for the enforcement of foreign court orders.

---

[9] 1998(1) SCC 112
[10] 2000(3) SCC 14
[11] 2010 (1) Supreme Court Cases 174
[12] *Judgments Today* 2013 (II) SC 48
[13] 2010 (1) Supreme Court Cases 591
[14] 2015 (5) Supreme Court Cases 450
[15] AIR 2017 SC 3137

- The High Court can examine the return of a minor without being 'fixated' on the foreign court order.
- The 'first strike' principle is abolished as being in conflict with the welfare of the child.
- Summary jurisdiction to return a child is to be exercised in the interest and welfare of the child.

Further, in *Prateek Gupta v Shilpi Gupta and Others*[16], the Supreme Court of India held as follows:

- It has been reiterated that the notion of the '*first strike principle*' is not subscribed to and the judgment of the Supreme Court in *Nithya Anand Raghavan*[17] is preferred.
- Notwithstanding the principles of the comity of courts, and the doctrines of '*intimate contact and closest concern*', the issue of repatriation of a child removed from its native country is clearly founded on the predominant imperative of the overall well-being of the child.
- In the process of adjudication on the issue of repatriation, a court can elect to adopt a summary enquiry and order the immediate restoration of the child to its native country, if the applicant parent is prompt and alert in the initiative to do so. The overwhelming exigency of the welfare of the child will be the determining factor for such a process.
- The doctrines of *'intimate contact and closest concern*' are of persuasive relevance, only when the child is uprooted from its native country and taken to a place to encounter an alien environment, language custom, etc, with a focus on the process of overall growth and grooming.
- There is no forum convenience in the wardship jurisdiction and the welfare of the child as the paramount consideration will be the mandate.
- Considering that the child in question in this leading case was barely two-and-a-half years old when he came to India and is now over five years old, a child of tender years, he ought not to be dislodged from the custody of his father while proceedings are pending before the guardianship judge in Delhi.

Current Existing Directions:

The Supreme Court of India in the case of *Nithya Anand Raghavan* (above at n15) enunciated new directions in matters relating to custody in inter-country parental child removal cases by departing from the principles of the comity of courts and the first strike jurisdiction, which had been laid down earlier in the verdict of *Surya Vadanan* (above n14). While now holding that the jurisdiction of the writ of habeas corpus cannot be used and converted for executing the directions of a foreign court, the Supreme Court of India has ruled that the High Court may examine the return of a child to a foreign jurisdiction if it would be in the interests and welfare of the minor child. This would be done in the exercise of the *parens patriae* jurisdiction of the High Court without its being '*fixated*' with the foreign court order directing the return of the child within a stipulated time, which would however be only one factor to be taken into consideration.

In Surya Vadanan (above n14), the Supreme Court of India following Surinder Kaur Sandhu (above n7) held that the best interests and welfare of the child should be determined by the jurisdiction having '*most intimate contact*' and '*closest concern'* since a foreign court would be *'better equipped and perhaps best suited to appreciate the social and cultural milieu in which the child has been brought up rather than a domestic court*'. In *Nithya Anand Raghavan* (above n15), though it has been held that '*the principle of comity of Courts cannot be given primacy or more weight for deciding the matter of custody or for return of the child to the native state', the 'closest concern'* doctrine does not seem to have been clearly shelved in determining the welfare of the child.

The decision in *Nithya Anand Raghavan* also requires that '*the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person' and holds that 'instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child*' as *'indubitably, merely because such an order is passed by the foreign court, the custody of the minor would not become unlawful per se'*. Further, it has been held that '*ordinarily, the custody of a "girl" child who is around seven years of age, must ideally be with her mother*'.

The Supreme Court of India in its latest judgment in *Prateek Gupta* (above n 16), delivered on 6 December 2017, following the earlier court precedent given in Nithya Anand Raghavan, decided on 3 July 2017, has again firmly decided that the issue of the return of a child, removed from its native country by a parent against the other parent's wishes, will be predominantly based on the welfare of the child principle. Differing from previous judgments given over the past five years, wherein children were directed to be returned to their foreign homes, the Supreme Court has now rejected the primacy given to orders of foreign courts on the issue of custody of minor children. Consequently, legal principles

[16] 2017 SCC OnLine SC 1421

[17] n15 above

of such determination will no longer find preference and foreign court orders directing the return of children will now not find automatic implementation. Determination of the welfare of the child now lies with the domestic courts.

Recent Decision Ordering Return of Children:

In *Jasmeet Kaur v Navtej Singh*[18], based on the factual matrix of the case, the issue before the High Court of Delhi was regarding section 9 of the GWA, which makes specific reference to the words '*ordinarily resides*'. Accordingly, it was held that since both the parties were US citizens, the expression '*ordinarily resides*' clearly conveyed that a place of permanent residence in this case would be the US and not Delhi. The parties were married in the US and were permanent residents there for ten years. The daughter was born in the US and the son had been born in India when the wife came in 2016 and refused to go back to the US. Her guardianship petition was dismissed by the Family Court, Delhi in 2016 owing to lack of jurisdiction and the High Court affirmed the judgment. The High Court held that the children and the mother were not ordinarily resident in Delhi. The High Court of Delhi directed the wife to return to the US on the conditions agreed to by the husband. However, this order was set aside by the Supreme Court of India in *Jasmeet Kaur v Navtej Singh,* 2018 SCC Online SC 174, with a direction on 20 February 2018 to the Family Court to decide the matter on the merits in six months to determine the welfare of the children. Thereafter, the Family Court at Delhi, by a detailed judgment dated 20 August 2018 in *Jasmeet Kaur v Navtej Singh*[19], dismissed the guardianship petition and declined the sole guardianship/custody rights of the mother after adjudication of the matter on the merits. The Delhi High Court in *Dr Navtej Singh v State of NCT*[20], simultaneously by a decision dated 6 March and orders of 20 May 2018, in a *habeas corpus* petition has been pleased to direct that the mother and the two minor children of the parties should return to the US upon fulfilment of the conditions prescribed, failing which the children, along with their passports, will be handed over to the father for travel to the US. At the time of writing, an appeal is pending with the Supreme Court of India in this matter, against this judgment of the Delhi High Court.

Mirror Order Jurisprudence:

The jurisprudence in the above case is noted in the compliance made by the US court in passing 'mirror orders' for implementation of the directions of the Delhi High Court judgment dated 6 March 2018 in Dr Navtej Singh (above n20) as a condition precedent for directing the return of the mother along with the two children to the US. The Delhi High Court had directed that the father shall move the US Court for recall of US Court orders dated 17 November 2016 and 25 January 2017:

> insofar as they direct respondent no. 2 to grant temporary physical and legal custody, and the sole legal and physical custody, of the two minor children to the petitioner... The two minor children shall continue to remain in the custody of respondent no. 2 even after she returns to USA, till so long as the competent court in USA passes fresh orders on the aspect of temporary/ permanent custody of the aforesaid two minor children after granting adequate opportunity of hearing to both the parties.

The Delhi High Court also stipulated further arrangements to be made by the petitioner to meet all the expenses of the second respondent and the minor children until she found a suitable job or restarted her professional career.

Upon the judgment of the Delhi High Court in *Dr Navtej Singh* (above n20) being placed before the US Court, fresh orders dated 14 May 2018 were passed by the US Court, partially recalling its earlier orders dated 17 November 2016 and 25 January 2017 granting sole custody to the father. Under the fresh US Court orders dated 14 May 2018, the children shall now remain in the custody of the mother. The US Court directed that the mother will return immediately to the US with the minor children, who shall remain in the custody of the mother with the father having reasonable interim visitation. The US Court also approved the affidavit of undertaking of the father confirming his conduct of compliance with the directions of the Delhi High Court contained in the judgment dated 6 March 2018 in *Dr Navtej Singh* (above n20).

Conclusion:

The above evolving mirror order jurisprudence in child custody matters in India, wherein the US Court passed mirror order directions to comply with the judgment of the Delhi High Court, can be a possible way forward to establish a precedent for the return of children to their homes of foreign jurisdictions. This mirror order formula evolved by judicial mechanisms through the far-sighted wisdom of the Indian courts to ensure the best interests and welfare of the children, as well as to provide them a

---

[18] 2017 SCC Online Del 10593

[19] 2018 SCC Online Family Court (Del) 1

[20] 2018 SCC Online Del 7511

family life with love, care and the affection of both parents, can be cited as a possible method for the return of children to foreign jurisdictions, until a law on the subject is enacted and some adjudicatory legal resolution process is evolved by any prospective law. It is hoped that if such an evolving mirror order jurisprudence finds judicial approval in India, children removed to India will benefit by being reunited with both parents in their foreign abode. If such a practice is endorsed, it may also encourage foreign courts to permit children residing abroad to visit their extended families in India, if an assurance is found for their return by a mirror order jurisprudence. This may perhaps be the best stopgap arrangement that can be evolved through the mechanisms of the courts until a legislative solution is found to inter-parental child removal. Until then in India, matters will continue to be decided on *ad hoc* parameters, in the best interests and welfare of the children on a case-by-case basis

3. Report of Mr Justice Rajesh Bindal's Committee

Anil Malhotra *

On May 18 2017, the Ministry of Women and Child Development constituted a 13 member high level Committee to examine issues relating to inter-country parental child removal and suggest a model legislation to safeguard the interest of parents and children, both within India and beyond its territorial borders. A concept note on the proposition was put out by the Committee for eliciting public views, comments and suggestions at an international level. Thereafter, interactions by video conferencing and direct meetings took place at New Delhi and Bangalore with left behind parents located domestically and internationally, besides seeking the opinions of stakeholders, institutions and foreign missions who had viewpoints to express.

The Committee examined international instruments, domestic law and a large volume of legal and other literature to delve into the position of inter-country parental child removal issues existing in other nations to draw up a comparative perspective. The unique joint family support structure of the Indian societal network in India had a special relevance to the equivalence of foster care advocated in foreign nations. The perspective of domestic violence faced by Indian spouses in foreign jurisdictions upon return with removed children was a legal issue to grapple with, which needs a sympathetic remedial resolution and is posed to be a major issue in enactment of any proposed legislation.

The Committee was faced with unique propositions put forth before it with regard to difficulties, both domestic and international, faced by affected parents if a removed child was sought to be returned to its country of habitual residence by a domestic court. Relevant issues faced abroad pertained to legal protection from spousal violence, maintenance, immunity from criminal prosecution, litigation costs and custody and visitation rights, besides insecurity and alienation stemming from unfriendly legal procedures imposed by harsh penal laws for child abduction in an international arena.

The Committee found a special emphasis on mediation methods which could find a place in peaceful settlement and burial of the hatchet when warring parents sought to resolve their differences in the larger interest of their progeny. International instruments, particularly the Japanese structures and the Hague Guide to Good Practice within its deliberations provided very useful food for thought. Consequently, a strong mediation mechanism was proposed as an alternative to belligerent court battles.

India adopted the protection of the United Nation Convention on the Rights of the Child (UNCRC) by acceding to it on December 11, 1992, and thereafter in 2015 drastically amended the Juvenile Justice (Care and Protection of Children) Act, 2000, which gives force to the legislative intent to put the "best interest of child" under the beneficial parameters of UNCRC. The general principles of care and protection of children had a special value for the Committee to consider and had to be moulded and blended with conflicting parental interests, lobbied by internationally located spouses who pitched their interest with their unique, heart rendering experiences.

Adopting the UNCRC parameters and giving a legal colour to wrongful removal or retention of children, whether within the four corners of India or beyond its territorial borders, has for the first time found definition in Indian child law jurisprudence. Until the introduction of relevant legislation, illegal removal, retention or holding custody by one parent to the exclusion of the other did not find recognition as a legal wrong and thus did not secure a lawful remedy for return was undetermined. Thus the ultimate draft of the Protection of Children (Inter-Country Removal and Retention) Bill, 2018 (the proposed legislation recommended by the Committee) has for the first time defined wrongful removal or retention of children as an act breaching rights of custody actually exercised by a natural

* The author, a practising lawyer had the privilege of assisting the Committee as a co-opted member.
21 April 218

parent by reason of a judicial order, operation of law or an agreement before such violation occurred.

From this previous position, thereafter flows in the proposed Bill the complete process of an operational machinery for implementation of child rights in an inter-parental dispute resolution scheme.

The issue of establishing a Central Authority, as is visualised under the Hague Convention, posed a major challenge. In the ultimate draft Protection of Children (Inter-Country Removal and Retention) Bill, 2018, the Committee has recommended constitution of a four member 'Inter-Country Parental Child Removal Disputes Resolution Authority', proposed to be headed by a Chief Justice of a High Court as its Chairperson and three other members from the Ministries of Women and Child Development, Foreign Affairs and Home Affairs. This Authority is proposed to adjudicate applications pertaining to wrongful removal or retention of children and taking appropriate measures for discovering their whereabouts, prevent harm, secure return and perform other related functions to be discharged through powers as vested in a Civil Court.

The procedure for making such an application, obtaining interim orders and possible exceptions, arrangements with other countries and rights of access, have been put down in the proposed Bill which also proposes that disputes are to be decided with a time frame of one year for expeditious disposal of applications. The unique feature of providing exceptions for return of children encapsulate key features such as, best interest of the child, grave risk or psychological harm, domestic violence, mental or physical cruelty or harassment, besides age of majority, wishes of the child or any other reasons to be recorded by the Authority. The multi-member Authority would have jurisdiction to ensure through diplomatic channels or otherwise, proper education, well-being and security for children returned from India to their country of habitual residence.

The pivotal leadership role played by Mr. Justice Rajesh Bindal as Chairperson of the Committee, in motivating tireless efforts, eliciting international perspectives, delving into legal and other literature, seeking valuable thoughts of experts and inspiring new perspectives, gave an extended lease to the laudable task of the Committee. Despite his time consuming judicial duties and multifarious administrative responsibilities, he conscientiously devoted extra energies by burning the midnight oil to open new arenas and examine minutest details which had not even occurred to the present author with his over three decade experiences professionally and academically in the horizons of this challenging child law jurisprudence. No stone was left unturned by Mr Justice Bindal in this monumental exercise. His diligent, painstaking and meticulous efforts were indeed commendable.

Ms. Justice Mukta Gupta with her mature and far-reaching perception encouraged significant propositions which open new perspectives. Mrs. Justice Anita Chaudhry, with her vast judicial experience of handling family law related matters, opened up new vistas which were of immense significance. Mr. Justice R.K. Garg, in his role building stellar performance as Chairman of the Punjab State NRI Commission, provided the Committee with practical perspectives tailored to Indian parents facing child removal dilemmas. The brilliant coordination, mapping, consolidation and effective working of the Committee could not have been achieved but for the pivotal role played by Member Secretary Ms. Meenaxee Raj.

Dr. Balram K. Gupta, Director, Judicial Academy, was a role model with his judicial blend of academe, professional pursuits and devotion to teaching, which gave us the insights of the parens patriae jurisdiction, which was the light house in the sea of unchartered waters over which the Committee had to set course, sail, traversed its charted path, and has now docked its report with the authorities who will ponder and deliberate over the Herculean exercise conducted for the benefit of the most precious commodity of our society, namely our offspring, and is dedicated to our nation which has the highest global population of children.

We are at cross roads in the jurisprudence relating to national and international parental disputes as to the location and custody of children in cross border families and we now need a law to reign in this such disputes, whereby contending parents will find a legal umbrella for resolution of their human problems. The Report of the Committee dated 21 April 2018 contains all the relevant information.

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, e.g. 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 Rights1950 (European Convention)

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

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, e.g.

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.