CHRONICLE CHRONIQUE CRÓNICA

Contents **Page**

Editorial — Avril Calder

Child abuse

This edition of the Chronicle begins with an updating article by the Dutch National Rapporteur on Trafficking in Human Beings**, Judge Corinne Dettmeijer-Vermeulen*** who is the only Rapporteur in the world with her particular remit to cover not only trafficking but also child pornography. On June 6th 2012 Corinne presented her *Report on Child Pornography* to the Special Representative of the Secretary-General on Violence against Children, Marta Santos Pais at UNICEF House in New York and she has kindly written a resumé for our journal.

I have twinned this article with another on child abuse, this time from Malaysia where **Tess van der Rijt** an Australian lawyer served as a consultant for *Voice of the Children*, a NGO promoting policy and law reform to ensure protection of children from abuse, exploitation and neglect. Her article outlines a positive initiative to prevent secondary abuse of child victims in pre-trial investigations by fostering a supportive and sensitive environment while the child is interviewed.

Forced marriage is another form of abuse. An article reports the experience of **Karma Nirvana**, a charity in England and Wales following the introduction of the Forced Marriage (Civil Protection) Act, 2008.

Natasha's article leads into several articles on aspects of parenting. The first, by **Professor Susana Sanz Caballero** of Spain, looks at a rarely considered aspect—climate change and parenting and shows that there are considerable effects.

Editorial Board member, **Judge Gabriela Ureta*** brings into focus the difficulties of parenting when couples separate and face residence difficulties. Acting **Judge Judy Cloete*,** a Council member, heard a classic case where one parent denied contact with a child of the partnership to the other. I am grateful to **Njongo Mgobozi** a Senior Legal Researcher at the Western Cape High Court for his kindness in encapsulating the Judge's finding for me.

Retired Youth Court **Judge Len Edwards*,**from California, a regular contributor to these columns, writes persuasively about how to go about placing children whose parents cannot looked after them with other family members.

Spreading good practice

Over a decade ago concern about children of parents who abuse drugs and alcohol inspired Judge Edwards to set up special courts to hear their cases; he lectured on his experience at our World Congresses in Australia (2002) and Belfast (2006). **Judge Michèle Lefebvre*** and **Derren Hayes** tell us of the evolution of family drug and alcohol courts in both Quebec and London based on what was said. I can think of no better example of how IAYFJM spreads good practice across different jurisdictions.

I should like to think that the next article by retired Family Court Magistrates, **Ann Entwistle** and **Cynthia Floud*** (editorial board) will similarly inspire other countries to take up the idea. Their article shows how, from the interest of one person, Mary Lawlor, an entire network of child contact centres was established in England and Wales—known as the National Association of Child Contact Centres—manned partly by professionals and partly by volunteers to enable the non-resident parent to see a child in safe surroundings.

In his article on the financial responsibilities of step parents, **Judge Paul van Teeffelen** of the Netherlands, explores an aspect of increasing relevance as families divide and regroup.

At this point I have interposed an instructive article on the media and Family Courts by **Dr hab. Joanna Misztal-Konecka** of Poland. I heard the Professor speak in Zakopane last September and, knowing that successive Presidents of the Family Division of the High Courtin England and Wales have addressed the issue I asked her to contribute an article. I hope it will encourage you to send me articles for the July 2103 Chronicle which will focus on the relationship between Youth and Family Courts and the media.

Restorative Justice

You will remember **Ted Wachtel,** President of the International Institute for Restorative Practices (IRRP), from the last edition. I am delighted that he has kindly sent an article on the efficacy of restorative justice, based on his new book. This and an article on restorative practices as an alternative to imprisonment from **Jean Schmitz,** Founder and Director of the Latin American Institute of Restorative Practices, provide more insight into restorative justice and practice which is a field still in its infancy.

International developments

You will also remember from the last edition the Kampala Conference —Deprivation of Children's Liberty as the Last Resort—held in November 2011 The African Child Policy Forum & Defence for Children International has now drawn up draft guidelines and welcome any comments you may have on them via Benoît Van Kiersbilck (bvk@sdj.be).

Our immediate past President, **Justice Renate Winter*** has been very busy on our behalf at UN meetings in both Vienna and Geneva. I am pleased to say that at the UNODC April 2012 conference she was successful in having an IAYFJM statement on pretrial detention adopted as part of the protocol of the Plenary Session. As such it will be submitted to the General Assembly in New York for consideration.

Internship

Many of you will know that I have recently had a young Belgian criminologist—Anaëlle Van de Steen from Belgium—working alongside me. Not only has Nell helped me with this edition, she has also laid the foundation for the next. I thank her most sincerely for her enthusiasm and never failing interest and energies.

André Dunant, a past President of IAYFJM and many other things besides, died last March. Friends and colleagues have written obituaries and, as a tribute to him, I am reprinting an article on adoption which he kindly sent to me when I was an apprentice Editor in Chief to encourage me in my endeavours.

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XIX World Congress

The Argentinean, Brazilian, Paraguayan Associations and the Mercosur Association of South America

propose to host the next IAYFJM World Congress in April 2014

in the Region of the Iguazu Falls.

The main theme being proposed is

Child Friendly Justice.

The exact dates and specific issues will be discussed and presented at the next Council and General Committee meeting in Paris on October 26th 2012."

Letter from the President—the European Section Joseph Moyersoen

A special meeting of the European section of the IAYFJM was organized by our Belgian colleagues Judges Francine Biron and Françoise Mainil from April 19 to 21, 2012.

On **April 19th**, the President of the European section Daniel Pical and his colleagues Hervé Hamon, Francine Biron and Joseph Moyersoen met with several representatives of the Directorate General for Justice of the European Commission to promote the European section as well as to explore the possibility of obtaining a funding.

Two options emerged from the meeting:

1 / IAYFJM was encouraged to tender for 'work' in the usual way with the possibility of the European section collaborating as an expert group of judges and magistrates, and

2 / IAYFJM putting forward projects on topics of particular interest to the European Commission—for example the training of European judges. In this case, there would be a possibility of obtaining funding (up to 80%) with the remaining amount (20%) going to a training organisation with which IAYFJM would be in partnership.

On **April 20th** a training day for magistrates and judges was organised in collaboration with the Belgian Institute of Judicial Training (IJT) at their offices in Brussels. The title of the conference was "Youth Justice from a European perspective."

It was chaired by Françoise Mainil and Francine Biron (Belgium) and attended by many representatives of the European section: Daniel Pical (President) and Hervé Hamon (France), Anne-Catherine Hatt (Vice-President, Switzerland) and Xavier Lavanchy (Switzerland), Margareeth Dam (Netherlands), Joseph Moyersoen (Italy), Beatriz Marques Borges (Portugal), Avril Calder (United Kingdom), Theresia Höynck (Germany) and Petra Guder (Germany), as well as many colleagues from Belgium and France, and many French and Italian lawyers.

We will try to collect the documentation that was handed out, because all the speeches were of a very high standard, especially those of Françoise Tulkens (Vice-President of the European Court of Human Rights) and Thierry Moreau (lawyer and professor at the Catholic University of Louvain), who respectively talked about the Court's jurisprudence regarding the rights of the child and the current trends in European systems of justice for children.

The conference demonstrated that youth justice is a concern not only for one country but for all the countries represented, underlining yet again the reasoning behind the founding of the European Section of IAYFJM.

We know that in Europe and elsewhere national reforms are travelling on a double track— on the one hand an increase in repression and on the other development of instruments related to restorative justice.

However, while the reforms implemented by countries ought to be based on the most child-friendly standards, in many cases reforms seem either to be heading towards minimum standards or to be getting closer to regulations applicable to adults.

For this reason we should suggest, both at European and national level, ways to avoid abuses and mistakes and to prevent setbacks—the European Directive on the repatriation of unaccompanied children is but one example.

We also agreed on the importance of having a proactive approach in implementing the European Convention on Human Rights, as it would favour an independent analysis of each case and decisions in the best interests of the child.

On **April 21st** a meeting between the members of the European Section occurred took place, again in the IJT building. Several issues were analysed and a report of the day is currently being drafted.

Different topics stemming from a questionnaire were discussed, including:

- whether in different countries there are situations that are contrary to child-friendly justice and the analysis of those situations;
- if and when a child under 18 may be treated as an adult;
- whether a young adult over 18 may be subject to educational measures; and
- the issues of a judge's impartiality and the right to a fair trial which that were the subject of judgements by the European Court of Human Rights.

The meeting also addressed the issue of youth gangs and urban violence, present in several European countries in different forms, with special attention to the instruments and means that the authorities – judicial or other – of these countries can implement.

Joseph Moyersoen*

Tackling child pornography: conclusions and recommendations in the Netherlands

Judge Rapporteur Corinne Dettmeijer-Vermeulen

On 6 June 2012 Corinne Dettmeijer-Vermeulen (on the right) presented her First Report on Child Pornography to the Special Representative of the Secretary-General on Violence against Children, Marta Santos Pais at UNICEF House in New York*

Abstract:
In her First Report on Child Pornography the independent Dutch National Rapporteur concludes that child abuse images, as a phenomenon, cannot be regarded separately from sexual violence against children. To separate the two in terms of policy would therefore be artificial. The findings in the report show that such a separation lessens the effect of interventions. Protection of children cannot solely be provided by a repressive approach. Protection also means: prevention of offences, identification and registration of offenders and victims, provision of assistance to victims and after-care for offenders. This requires cooperation and partnership between government institutions, non-governmental organisations and private parties.

Tackling child pornography: conclusions and recommendations in the Netherlands

The First Report on Child Pornography of the Dutch National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children

'My core message is that children are entitled to protection from all forms of sexual violence. The approach towards tackling child pornography must form part of an integrated approach towards tackling sexual violence against children. Connection, coordination and monitoring are essential elements of that approach.'

Corinne Dettmeijer-Vermeulen

In 2009 the Dutch government mandated the independent Dutch National Rapporteur on Trafficking in Human Beings, Ms Corinne Dettmeijer-Vermeulen, to report on the existing policy and practice regarding child abuse images – or child pornography – in the Netherlands. In 2011 the results were published in her *First Report on Child Pornography*. This article provides an overview of this report. It will elaborate on the main conclusions that have been drawn with regard to the phenomenon of child pornography and on the subsequent recommendations of the Dutch National Rapporteur to the Dutch government. Finally, this article will address a couple of relevant developments having taken place in the Netherlands after the Report had been published.

Five conclusions on child pornography

The Dutch National Rapporteur drew five main conclusions after having conducted research into the phenomenon of child pornography. These conclusions have formed the guiding principles for her research into policy and practice.

Firstly, child pornography is sexual violence against children. It does not exist in isolation; it always occurs in conjunction with other (punishable) sexual conduct, ranging from child prostitution to trafficking in human beings, from abuse to grooming. The common denominator of these offences is that children are victims of sexual violence. From this perspective it can be concluded that child abuse material is sexual violence against children displayed on images or film. Child sex tourism is sexual violence committed abroad. Child sexual exploitation is sexual violence for profit. If strategies to tackle child pornography and to protect children from all forms of sexual violence are to be effective, these strategies must be interlinked with regard to policy and implementation.

The second core observation is that technology, perpetrators and victims vary. The phenomenon of child pornography can be broken down into these three elements. Technology may refer to abusive material on the one hand and the information and communications technology (ICT) which enables the production, distribution and possession of such material, on the other hand. Additionally, the nature of perpetrators, victims and material is not clear-cut. Firstly, perpetrators do not form a homogenous group in terms of behaviour; some individuals only view child abuse images, whilst others also physically abuse children themselves. Secondly, victim characteristics, the nature of child abuse material and the circumstances under which it is produced differ between various age groups of victims. Apart from this, there are considerable differences between the commercial child pornography circuit and the amateur circuit in terms of perpetrators, victims and material. If policy and implementation are to be successful, they must reflect the diversity in perpetrators, victims and child abuse material.

Thirdly, sexual violence exists in both the digital and analogue worlds. At present, child abuse material predominantly exists in digital format. Technological developments rapidly succeed one another and will almost always influence the phenomenon of child pornography. Furthermore, online aspects of sexual violence are becoming increasingly prominent, such as child sex tourism and grooming. We all use ICT intensively in our daily lives. So too do (potential) perpetrators and (potential) victims. To children, cyberspace is an extension of the 'real', physical world; the offline and online worlds smoothly converge into one. This means that both worlds must be taken into account in legislation, policy and implementation. Technological, empirical and legal expertise and associated means must keep pace with developments in the digital domain. ICT sometimes presents a challenge, yet it also provides windows of opportunity for preventing and tackling child abuse images. However, much is still unknown. For example, it is not known what proportion of victims of sexual abuse are also victims of child abuse material. Furthermore, no judgments can be made with regard to the numbers of minors who have become victims of sexting and grooming. It is therefore necessary to investigate these areas in order to develop evidence-based policy and implementation.

The fourth conclusion is that child pornography is not bound by time or space. Children have always been sexually abused. Individuals have produced and viewed images of such abuse ever since the existence of photography. With current technologies, it is likely that child abuse material – even very old material – will be available for a very long time to come, possibly indefinitely. Besides, space is hardly a factor at all. As indicated in the previous section, ICT has added a new, online dimension to the phenomenon, which enables perpetrators, victims and material to come into direct contact with one another from anywhere in the world and at any time. It is highly likely that other countries are faced with similar challenges. As far as efforts in the Netherlands are concerned, it is desirable to seek international cooperation, for through this, we can learn from experiences of other countries.

Fifthly, child pornography cannot be tackled by the police alone. The extent of the phenomenon of child pornography – the number of perpetrators, victims and the quantity of child abuse material – is unknown. Nevertheless, it may be argued that the number of perpetrators and the volume of child abuse material have increased to such an extent that it cannot be tackled by criminal law alone. Put differently: there are too many perpetrators and too many images for the criminal justice system to process in a traditional manner. This means that we must seek strategies to tackle child pornography both within and beyond the criminal justice process.

Recommendations

The Dutch National Rapporteur has provided recommendations for tackling child pornography effectively. Until recently, the Dutch government regarded child pornography predominantly as a cybercrime. As a consequence, the Dutch strategy to combat it leaned heavily on repression via the justice system. While the legal framework is useful for determining the subject area, it is not the only perspective that can and should be used to address this form of sexual violence against children.

Most importantly, if strategies to tackle child pornography and to protect children from all forms of sexual violence are to be effective, these must be interlinked with regard to policy and implementation.

The Rapporteur has made recommendations on a policy level in order to tackle child pornography effectively. An integrated approach to tackle sexual violence against children should be provided, into which the programme of measures to tackle child pornography is fully integrated. In order to give substance to this integrated approach and to implement it, clear coordination is necessary. Therefore, an independent monitoring mechanism needs to be established which will safeguard the continuity of policy attention.

On a practical level, the complexity and the variety of the phenomenon present considerable challenges for preventing and tackling child pornography. Recommendations have been formulated from the analysis of the implementation of the processes for consecutively the prevention, registration and identification, detection, prosecution and trial, aftercare and supervision of offenders, and the provision of assistance to victims. They will here shortly be enumerated.

Preventive measures should focus on (potential) victims, (potential) perpetrators and situations. Firstly, the dangers of online behaviour, including child pornography, should expressly be included in prevention projects aimed at children. Secondly, the introduction of a public health model as a basis for a public prevention strategy is needed, in which attention is devoted to the nature of all forms of sexual violence against children. Thirdly, Stop It Now!, a helpline for potential perpetrators, should be promoted, also on digital channels. Lastly, the situational prevention to include all sectors that involve working with children has to be extended.

The identification and recording of child pornography can firstly improve by investing in training for professionals in detecting digital signs of sexual violence against children. This will successively improve the registration of cases of child pornography by institutions providing assistance (including Child Abuse Counselling and Reporting Centres). Furthermore, the public awareness campaign on child abuse including digital signs of sexual violence against children should be continued. Lastly, the identification of perpetrators and material through public-private sector partnerships (for example cooperation with internet service providers) provides new opportunities and should therefore be intensified.

With respect to investigation, prosecution and trials, offender-oriented and victim-oriented detection within a single national police unit should be combined. The integration of the investigation and prosecution can further be improved by making child pornography part of the remit of the National Public Prosecutor's Office. Additionally, networks of offenders should always be investigated and data storage media of sexual abuse suspects should at all times be seized. Besides, the possibility of making arrangements in relation to limiting the international influx of proposals for police investigations has to be explored; the efficacy of detection should be made transparent by registering identified victims; and the possibility of extending the legal provisions for (in)direct victims, such as the right to speak, compensation and anonymity, should be investigated.

Regarding the after-care for and supervision of sex offenders, the possibilities of central control for supervision on a case level, as exists in the United Kingdom, should be investigated in the Netherlands. The same holds for the possibility of a national policy framework and expertise centre for the supervision and after-care of convicted sex offenders. Accordingly, risk assessment instruments (e.g. distinction between those who view child abuse material and hands-on offenders; record digital data) should be improved. Low-intensity interventions for low-risk viewers of child abuse material have to be developed.

The Rapporteur's main recommendation on victim assistance contains the development of expertise with regard to victimhood of child pornography and the provision of an assistance package which addresses the consequences of the existence, distribution and possession of visual material of the sexual abuse.

Last but not least, public-private sector partnerships should be safeguarded within a platform and direction to these partnerships should be given, which includes optimisation of the notice and take-down regulation.

Recent developments in the Netherlands

In the Netherlands, the Rapporteur presented these findings and recommendations to the Dutch Minister of Security and Justice and the State Secretary for Health, Welfare and Sport, after which the report was discussed in Parliament. Partly as a result of her findings, various positive developments have since been set in motion as matters of priority. The most important of these developments that took place in the first half of 2012 are singled out below.

By far the most important measure is the taking up of the Rapporteur's recommendation to develop an integrated programme of measures to tackle child pornography. The Ministry of Security and Justice and the Ministry of Health, Welfare and Sport are assuming joint responsibility for this. By doing so, the government demonstrates its commitment to the obligations arising from the Convention on the Rights of the Child and its Optional Protocol, and the Lanzarote Convention. A Child Abuse and Sexual Abuse Task Force, which is yet to be established, will coordinate the implementation of the policy.

The most significant changes have taken place with respect to the understanding of this issue among those responsible for providing assistance to victims, with the increasing realisation that cyberspace is a relatively new arena in which sexual abuse is taking place, and one that adds a new dimension to victimhood. Moreover, the understanding that the Internet presents an opportunity to combat sexual violence is also growing. In February 2012, an online reporting button was launched, where children can find help and advice in the event of negative experiences on the Internet.

Efforts have not only been made in terms of identifying (potential) victims, but also in terms of identifying potential perpetrators. In this way, the offender-oriented 'Stop it Now!' programme, which was launched in April 2012, will help prevent children from being subjected to sexual violence. As far as detecting perpetrators is concerned, the capacity that has been deployed to combat child pornography has increased substantially. The Programme of Improvements in Tackling Child Pornography of the National Police Services Agency that had already been set in motion has enabled a more effectively integrated working method to be developed within a short span of time.

A new, large-scale and national child pornography unit will not only work in collaboration with the national High Tech Crime Unit, but also with regional police units, which attend to types of analogue sexual violence against children. Detection will be aimed at rescuing victims and locating perpetrators who produce material. The results of a project to employ non-judicial interventions for low-risk offenders – those who view child pornography sporadically – have been positive. This project will therefore also be implemented on a national scale.

When prosecuting suspects, the ability to ensure that victims remain anonymous in criminal proceedings is a positive development, as is the extension of the right to speak to include parents in cases in which (very young) children are not able to speak for themselves. Developments are also underway right at the very end of the judicial process – which involves the reintegration of convicted perpetrators, including the expansion of COSA, a probation and after-care project, and the investigation of the possibilities of long-term or life-long supervision of convicted high-risk sex offenders.

Corinne Dettmeijer-Vermeulen*, National Rapporteur, Netherlands

Preventing secondary abuse – an overview of the treatment of child victims during pre-trial investigations in Malaysia

Tess van der Rijt

Introduction

The Convention on the Rights of the Child (CRC) states that all State Parties shall take all appropriate measures to promote the physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse. Such recovery and reintegration shall take place in an environment that fosters the health, self-respect and dignity of the child.[1] Malaysia ratified the CRC in 1995, albeit with various reservations.[2]

After abuse against a child has occurred, there may be potential issues with the criminal justice, health and social service systems, as they may descend upon a child and his/her family with such a devastating impact they are left with the feeling that the "cure" is far worse than the original problem.[3]

Social workers and other functionaries, such as the police and the judiciary, play a very important role in rebuilding the lives of child victims. The successful rehabilitation of these victims is dependent on the degree of sensitivity and the level of understanding with which professionals deal with them while addressing their problems.[4]

This article outlines a positive initiative in Malaysia that aims to uphold its obligations under the CRC. It aims to prevent secondary abuse of child victims by fostering a supportive and sensitive environment while the child is involved in investigations. This article focuses on pre-trial investigations carried out by the Royal Malaysian Police.

The Royal Malaysian Police Force and child victims

The Sexual Crimes, Domestic Violence and Child Abuse Investigations division (D11) of the Royal Malaysian Police was established to investigate and work with women and child victims of assault and abuse. It endeavours to ensure that child victims are not further abused and that children have the best possibility of recovery. The division runs victim care centres, child interview centres and National Urgent Response (NUR) Alert, a system to locate missing children. D11 was established 15 May 2007, however D9(b) had been carrying out a similar role since 1986, albeit with narrower functions.[5] The D11 unit was set up following an alarming number of reported missing children in the country, many of whom were found abused and murdered.[6] Between January 2004 and May 2007, 6270 children were reported missing according to police statistics.[7] A Royal Commission report on the Management and Administration of the Royal Malaysian Police concluded that in line with the CRC and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and in light of the large number of missing children and difficulties conducting investigations, the Royal Malaysian Police needed to set up a separate division to deal specifically with women and child victims of abuse, assault and neglect.

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1 Article 39, Convention on the Rights of the Child, opened for signature 20 November 1989, (entered into force 2 September 1990).

2 The Malaysian Government maintains reservations to Article 2 on non-discrimination; Article 7 on name and nationality; Article 14 on freedom of thought, conscience and religion; Article 28(1)(a) on free and compulsory education at primary level; and Article 37 on torture and deprivation of liberty. Since ratification, the Malaysian Government has withdrawn its reservations to Articles 1, 13 and 15 of the CRC.

3 MacFarlane, Kee. (1978) "Sexual Abuse of Children" in *The Victimisation of Women,* edited by J. Chapman and Ms. Gates. Beverly Hills, CA: Sage, 81; cited in Kinnear, Karen L. (2007) *Childhood Sexual Abuse: A reference handbook, second edition.* ABC-CLIO, California, p22.

4 Department of Women and Child Development (India) & UNICEF "Manual for Social Workers Dealing with Child Victims of Trafficking and Commercial Sexual Exploitation".

5 Interview with Superintendant Ong Chin Lan, Royal Malaysian Police. 21 March 2012, Kuala Lumpur, Malaysia.

6 Loh, Joseph "Police keep cases open", *The Star Online,* 23 September 2007, find it here.

7 "Division has new task – find missing persons", *The Star Online*, 23 September 2007, find it here.

The British High Commission to Malaysia funded the establishment of D11 and provided international professionals who trained the Malaysian staff members. The division operates under MS ISO standards and is formally audited and monitored annually to ensure compliance with international obligations.[8]

There are 33 D11 officers based in Bukit Aman, the division headquarters in Kuala Lumpur, all of whom are female except two officers. Three specialised units operate at Bukit Aman: the Children's Unit; the Domestic Violence Unit; and the Sexual Crimes Unit. The Child's Unit deals with abandoned babies, abuse (physical, sexual and psychological), trafficked babies and missing children. The main functions of the D11 police officers are to: rescue victims and support them to access a place of safety; investigate all reported cases of child abuse and neglect; and to take statements and prepare evidence for the Deputy Public Prosecutor (DPP).[9]

The police are mandated through the Malaysian Child Act[10] to work in collaboration with other principal actors, including JKM,[11] the Ministry of Health and other relevant people in the medical profession.[12] D11 officers state that they have a positive and functioning working relationship with other relevant parties.[13]

Today, there are 700 D11 officers nationwide and there is at least one Victim Care Centre in each of the 13 states of Malaysia. Unfortunately there are still issues with access to the centres for people living in remote areas in Malaysia. While urban areas have excellent coverage for responding to reports of abuse against children, remote areas (most notably in the states of Sabah and Sarawak in East Malaysia) remain greatly underserviced, especially in terms of the number of trained D11 personnel available to conduct specialised investigations.[14]

As a result, investigation and prosecution is often impossible: for example, by the time a police officer is able to respond, much of the DNA evidence will have become unusable or has been erased. In addition, in very remote and inaccessible regions, it may simply be impossible to locate the various parties (victim, witnesses, perpetrator, etc) to the alleged crime.[15] Furthermore, Malaysia is a very culturally diverse nation and subsequently there is a large range of language and dialects spoken that makes investigating cases difficult, especially in Sabah and Sarawak. However, the D11 has responded to these language issues by trying to ensure that a cross sample of languages are spoken by division staff.[16]

Training of D11 staff

Every police officer working at D11 completes two weeks of in-service training, which is conducted 2 to 3 times per year.[17] During this training, officers are taught the core elements of abuse and sexual violence and how to recognise symptoms of each. Various sectors of society and organisations are involved in the training, including the Attorney General chambers, people from academia and representatives from Malaysian non-governmental organisations.[18]

There are some issues with the training that should be noted. As training is only conducted 2 to 3 times per year (however there are reports that in recent years this number is even less) many officers have been working at D11 for months before they receive any form of specialised training. Furthermore, many officers are rotated out of D11 before they have completed their training. It has been recommended that closer links be forged between the 'Services and Posting Section' of the Human Resources Department and the Police Training Branch to ensure that officers who have received specialist training remain within the division long enough to put their new skills into practice.[19] Promotion should also take place within D11, as often officers are moved out of D11 following promotion. This also results in the younger officers having few mentors in the division to assist in greater development and further informal training.

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8 MS ISO refers to a written standard that explains guidelines and basic requirements for quality management systems. It comprises of an organised working systems based on the international standard requirement. MS ISO or Malaysian Standards are developed by Standards Development Committees (SDCs) within the Malaysian Standards Development System and approved in accordance with the Standards of Malaysia Act 1996 (Act 549). The ISO/IEC Guide 59 – Code of good practice for standardization and Annex 3 to the WTO/TBT Agreement act as guiding principles in the development of Malaysian Standards. Cited in UNICEF & Child Frontiers, *Child Protection System in Malaysia: An Analysis of the System for Prevention and Response to Abuse, Violence & Exploitation against Children*, January 2010, p39.

9 UNICEF & Child Frontiers, January 2010; op cit, p40.

10 *Child Act* 2001, Act 611, 15 February 2001.

11 Jabatan Kebajikan Masyarakat (Department of Social Welfare).

12 UNICEF & Child Frontiers, January 2010; op cit, p40.

13 Interview with Superintendant Ong Chin Lan; op cit.

14 UNICEF & Child Frontiers, January 2010; op cit, p75.

15 Ibid.

16 Ibid.

17 Interview with Superintendant Ong Chin Lan; op cit.

18 These organisations include Protect and Save the Children and the Women's Aid Organisation; Ibid.

19 UNICEF & Child Frontiers, January 2010; op cit, p87.

Victims and D11

Victims are able to approach D11's Victim Care Centres directly. The centres have a very home-environment feel, with comfortable couches and flowers on display. There is a playroom with soft toys and books to make the children feel comfortable and put them at ease, a private enclosed interview room and a room with a bed for those who need to rest if they have travelled far. All of these factors aim to reduce the fear in victims and prevent secondary abuse by making them feel safe and relaxed.

D11 is victim-focused. The officers aim to ensure that a victim is not interrogated for the purposes of the investigation and providing evidence and then suddenly left alone – D11 officers work to ensure that the victim is supported legally, medically and emotionally. If the victim is required as a witness in a trial, a D11 social welfare officer will become their witness supporter. They will be taken to court before the date so that they are aware of the court environment and are as comfortable as possible in an otherwise daunting situation. D11 officers contend that this not only results in a more confident witness, but the victim is also able to give better quality evidence.[20]

D11 officers explain that the greatest issue with the process is that in order to make a decision about the case, the DPP requires medical reports of the victim. These medical reports can take months for the hospital to produce.[21] As a perpetrator can only be detained for fourteen days, they are often released and subsequently sometimes disappear. This is a particularly distressing situation for the victim.

Child interview centres

Besides the Victim Care Centres, D11 also has Child Interview Centres, where children's evidence-in-chief is pre-recorded. There are six interview centres in Malaysia: Bukit Aman headquarters (Kuala Lumpur) and another five centres spread throughout Peninsula Malaysia;' however none are situated in the states of Sabah or Sarawak. The first centre in Kuala Lumpur was also initiated by the British High Commission, which included not only providing the recording machines and funds for the building, but also technical expertise. The centre in Kuala Lumpur performs two to three interviews a day, four days a week. The fifth day of the week is reserved for interview transcript writing.

Any officer working at the centre has completed a Violence Investigation Course, which is organised by D11 and includes speakers from local non-governmental organisations and SUHAKAM (The Human Rights Commission of Malaysia).[22] International experts are also invited who teach the officers specific interview techniques for children.

D11 officers explained that it can be very difficult to interview child witnesses, as some are as young as four years old. Therefore when the child is brought to the interview centre, they initially spend time playing with the child in a large and open playroom. The room is painted in bright colours and is filled with natural light and numerous toys. The interviewer spends time conducting 'play therapy' with the child in order to build a rapport with the child and try to make them feel relaxed in the foreign environment. Once the child is comfortable, they are taken to the technical room, where the same officer asks the child to state the facts of the case. The room is set up with discreet microphones and cameras, which are controlled by another officer in a separate room. As such the recording can be adjusted and monitored without a stranger being present in the room. The officer explains to the child the various ways the child can describe the facts: they can talk, they can draw what happened, or they can choose to use anatomical dolls. There is an adult male, adult female, male child and female child doll available, all of which are anatomically correct, which the child can use to demonstrate what occurred. After the interview recording, the child is referred to a psychiatrist.

Although interviewing techniques and methods at D11 are efficient, interviewing could be enhanced through ensuring there is greater briefing and communication between officers. The initial 'rescuing officer' is the first person to interview the victim and they should always brief the subsequent investigating officer as to the facts of the case as stated by the victim. This will ensure that the succeeding questioning is effective, that no unnecessary questions are asked and will make certain that the victim does not continually have to relive the events.

[20] Interview with Superintendant Ong Chin Lan; op cit.

[21] Ibid.

[22] These organisations include Protect and Save the Children, Tenaganita and UNICEF Malaysia; Ibid.

NUR Alert

NUR Alert is a further initiative run by D11 that aims to protect children. NUR Alert works to locate missing children and is modeled on the successful Amber Alert system in the United States of America. Having received a report of a missing child and parental permission to publicise the child's image and information, D11 sends the child's details to the NUR Alert taskforce that consists of 31 agencies, including hospitals, banks, transport systems, customs, maritime and airport immigration. D11 officers state that the greatest challenge with NUR Alert is due to difficulties in communication. Scanners and the internet are often very slow, particularly in areas such as Sabah and Sarawak. Therefore it is sometimes impossible for the officers in these regions to download the child's photo and information, making exposure of the missing child limited.

Further issues with NUR Alert have been raised outside of D11. It has been reported that since NUR Alert was established at the end of 2010, it has only been used five times.[23] Two of these children were recovered successfully in Penang last year, one was found burnt to death and the other two reported missing children are yet to be found. Hamidah Yunis, Director of D11 and Assistant Commissioner of the Royal Malaysian Police stated that after receiving a report of a missing child, the police wait 24 hours to confirm that it is not a kidnapping case asking for a ransom, as publicising the event could put the child at risk.[24] However in the case of two boys who were reported missing, 8 days lapsed before a NUR Alert was triggered. Yunis explained that although there is a delay in a public alert, on receiving a report of a missing child, an immediate internal alert is issued to the whole police force in the country. Unfortunately in March this year a missing boy was returned to a police station, but no officers at the police station were aware that a missing person's report had been lodged for the same boy at a different police station earlier that day.[25]

Further issues with NUR Alert occur because it appears there is no standard operating procedure. D11 is only the NUR Alert focal point that triggers the task force and it is only triggered on the advice of the investigation officers.[26] At this point, D11 sends an email to members of the task force, who have no advice or guidance on how best to publicise the information. Sometimes the contact person for an agency in the task force no longer works for that agency and no replacement contact has been provided to D11.[27] As such, the organisation never receives the email and therefore the missing child's information is not publicised. A NUR Alert standard operating procedure would be welcomed as a means of minimising delays and assuring that the child's details are shared as quickly and efficiently as possible.

Conclusion

The establishment of D11 is a positive initiative that aims to uphold Malaysia's obligations under the CRC to ensure the greatest psychological recovery of a child victim of any form of neglect, exploitation, or abuse. The child victim centres and child interview centres endeavour to ensure that investigations leading to a trial are child-sensitive, supportive and intend to result in the greatest evidence possible with the least effect on the child. Unfortunately no D11 key performance indicators or internal evaluations were available at the time of publication. Although there are improvements to be made with the training of D11 officers, interview procedures and the effective operation of NUR Alert, the D11 specialised police unit is a step forward in ensuring the rights of Malaysian children are recognised and respected.

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VOICE OF THE CHILDREN

www.voc.org.my

[23] Choe Choe Tan, "Troubling questions over alert system" *New Straits Times,* 18 March 2012, find it here.

[24] Ibid.

[25] Ibid.

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Forced Marriages in England & Wales

Anup Manota & Judy Barber

JASVINDER SANGHERA Photo ©GSR Photographic

Founder of Karma Nirvana

The British Prime Minister David Cameron recently announced that Forced Marriages will become a criminal offence in its own right[1]. He was right to refer a forced marriage as "little short of slavery." As he said, "For too long we have thought, well, it's a cultural practice and we have to run with it." The charity Karma Nirvana has been advocating against forced marriages for over 15 years and their founder Jasvinder Sanghera is an expert in this field, after fleeing a forced marriage at the age of 15.

The real cause of this burdensome tradition stems from beliefs based upon honour. In the same way as Domestic Abuse issues relating to honour have been reported as Honour Based Abuse, which usually involves more than one perpetrator. Where Forced Marriages or an Honour Killing have taken place, the root cause will always start with Honour Based Abuse.

Awareness raising

We at Karma Nirvana have awareness raising events for professionals, so they are able to pick up the signs of potential victims. Frequent cases involve a teenage girl who may have a boyfriend of whom the family disapprove or the family and/or parents may feel a son or daughter is becoming too westernised, so to control and punish the individual they feel that they should be married to a person of the family's choice.

Now we at Karma Nirvana have been advocating hard that the law needs to send a stronger message that this kind of practice cannot be tolerated by 21st century Britain. Girls as young as 5 years old have been forced into marriage around the United Kingdom, and around the world. Victims are often tricked into marriage or physically coerced. When they submit, the abuse is horrific. Robbed of their childhood and often the right to an education, many are raped, beaten, and held prisoner in their own home. The damage is made worse by the fact that their own family is behind this abuse.

Government steps

The British government is following in the steps of Norway, Denmark, Germany, Austria, Malta, Belgium, and Cyprus in criminalizing forced marriage. In many of these countries, the government has since noted a 50 percent increase in reporting of cases.

In 2008 the Forced Marriage Protection Order (FMPO) was implemented only as a civil sanction[2]. This will be issued by a County Court judge and aims to change the behaviour of anyone who is trying to force a victim into marriage. It contains legally binding conditions on their behaviour, and if they disobey the order they can be sent to prison for up to two years. Each Forced Marriage Protection Order is unique, as it is designed to protect you according to your individual circumstances. For example, the court may order a person or persons to hand over another person's passport or reveal where they are. In an emergency, an order can be made to protect a person immediately.

[1] Legislation will be introduced in the 2013-2014 Parliamnentary session.

[2] Applications for FMPOs may currently only be heard in the High Court and 15 designated county courts (including the Principal Registry of the Family Division, London).

Monitoring

Forced Marriage Protection Orders were introduced by the Forced Marriage (Civil Protection) Act on 25 November 2008. In our view FMPOs are a positive step towards protecting victims. However, unless they are carefully monitored then they will potentially cause more harm than good. A key point is that they can be made for victims who have left home and victims who are still in the home with the perpetrators.

Monitoring at home

It is this second possibility which requires particularly close monitoring. Obviously, if the perpetrators are intent on committing abuses, a piece of paper with a court order will not offer much protection if there is no one there to enforce it.

We at Karma Nirvana have come across cases in which the FMPO is made and then the victim returns to the family home (i.e. the home of the person or persons who were trying to force her into marriage) and then simply left alone, unsupported by outside agencies. At this point the victim is often put under a lot of pressure (in the form of emotional blackmail, physical violence, threats or manipulation) to discharge the order. Families often persuade the victim that their intentions have changed and that there is no longer a need for the order to be in place. For this reason, it is vitally important that the victim is regularly seen alone and away from the family home in a neutral environment where they can feel safe enough to disclose whether the conditions of the order are being kept or not. It goes without saying that if the victim contacts the court wishing to discharge the order that they are seen alone and it is established that this is what they genuinely want and they are not acting under duress. In this situation we advise allowing or encouraging the victim to speak to an expert body such as Karma Nirvana to ensure they realize the possible implications of discharging the order. Safety plans must be put in place in the event of the order expiring.

Monitoring away from home

If the victim has fled the home, monitoring and careful support are still required. We frequently see victims returning to perpetrators due to isolation, guilt and sheer loneliness. This is why it is essential that a comprehensive support plan is put in place involving agencies such as refuges, social care, police, counselling and specialist support agencies such as Karma Nirvana. There are also various safety issues to take into account; if a victim has fled home and the abusers don't know of her whereabouts then it would be sensible to apply for the FMPO from a court in a different area from the one she to which she has moved.

Criminalisation

At the beginning of this year the Home Office announced a National Consultation on whether Forced Marriages should be criminalised. The consultation was open to members of the public, as well as organisations such as Karma Nirvana. We at Karma Nirvana were aware that a report was not enough information for an issue so close to our hearts. We therefore undertook a national postcard consultation[3] involving travelling across the UK to obtain a public consensus on the forced marriage consultation. During the postcard consultation Karma Nirvana managed to obtain 2,512 views from members of the public across England, Scotland and Wales. From this consultation with the public we have identified that 96% support the criminalization of forced marriage

Many victims are still telling Karma Nirvana that they are still feeling unsupported by the law and that something else is needed. With only one prison sentence ordered since the introduction of the FMPO, we feel this is not sending a deterrent message to perpetrators.

Statistics

The British government's Forced Marriage Unit dealt with 8,000 cases last year (2011). Karma Nirvana receives more than 500 calls a month on its help line from British-born subjects. We are in support of the Prime Minister who says that the law needs to be strengthened to make forced marriage a criminal offence. Some argue that criminalisng forced marriages will drive the practice underground. We in Britain acknowledge that we are dealing with the tip of the iceberg, rescuing just a few of the many victims; beneath the iceberg, there are many thousands we have yet to reach. At least we are moving in the right direction. Victims will never be forced to take their families to court. What this law will give us is the right to choose, so that we may say with conviction that forced marriage is a crime.

Conclusion

We have a moral and social duty to bring these issues above ground. It is a sad fact that many people fear a cultural backlash. I would like to point out that being accepting of another culture does not mean accepting abuse. Forced marriage is not supported by religion or tradition; if we make excuses, then we sadly become part of the problem. To this regard, the words of Gandhi come to mind when he said, "We will drown in a sea of oppression in the name of tradition."

[3] In major cities, universities and in other agencies, questions on a postcard were posed and the results analysed by Karma Nirvana in spring 2012.

Number of FMPOs made 2008—2011

	2008	2009	2010	2011	2012 Quarter 1
FMPOs –Apllications made	**5**	**96**	**116**	**123**	14
FMPOs –Applications made—age of applicant—17 and under			57	65	
FMPOs -Applications made—age of applicant—over 17			55	50	
FMPOs -Applications made—age of applicant—unknown			4	8	
FMPOs -Applications made—applicant type—person to be protected			37	38	
FMPOs -Applications made—applicant type—relevant third party			26	38	
FMPOs- Applications made—applicant type—other third party			40	38	
FMPOs -Applications made—applicant—other			13	9	
			116	**123**	**23**
FMPOs made	**7**	**101**	**149**	**157**	
FMPOs made with power of arrest	7	79	95	102	
FMPOs made without power of arrest	0	22	54	55	

Source Home Office

9% of the orders were made for males

50% made for boys and girls aged under 17 years

Calls per month to Karma Nirvana's Honour Network Helpline

2008	2532, averaging 281
2009	5599, averaging 467
2010	4815, averaging 401
2011	5517, averaging 460
2012	2632, so far averaging 526

Further details

- **47%** of victim callers are under the age of 21
- **12%** of calls were from Males who faced issues of Honour Based Violence and Forced Marriages
- **38%** of calls were from first time callers

Trigger for abuse

- **67%** said going against the family wishes
- **20%** said because a boyfriend/girlfriend family disapproved
- **7%** said due to becoming westernised and saying no to an arranged marriage.

Anup Manota, Project Manager
Judy Barber, Helpline
Karma Nirvana, England

Parenthood in the light of climate change challenges—a perspective from international law

Professor Susana Sanz Caballero

1. Introduction

Are the variables "climate change" and "parenthood" related at all? A first and superficial look at the two concepts will probably tell us nothing on whether there is a link among them. We may even conclude that there is no relation whatsoever. However, this is not the case at all.

Climate change affects children much more that it affects any other group of human beings[1]. Children belong to a very special category of vulnerable group. They are unable to look for their own means of sustenance and are completely dependent on adults for care. Therefore, climate change, as well as any other hazards impacts more on them than on other categories of human beings.

Children are normally raised by their parents. They usually are members of a family. Within the marriage is where they find love, care and the supply of their basic needs. This is one of the reasons why the family is one of the fundamental institutions of society. A structured and caring family is the best environment for a child's upbringing. As twin articles 16.3 of the Universal Declaration of Human Rights (UDHR) and article 23.1 of the International Covenant on Civil and Political Rights (ICCPR) affirm: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State". In the same vein, article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes: "The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children…"

2. Rights related to parenthood in the International Law of Human Rights

According to the UDHR, ICCPR, ICESCR and the Convention on the Rights of the Child (CRC), parents enjoy some important rights concerning their children. Most of these rights are not expressly contained or categorized in these international instruments as parents' rights or family rights but their link with parenthood and/or with the family can easily be inferred from them. Among them, the most crystal-clear rights are:

- The right to family life.
- The right to found a family.
- The right to a standard of living adequate for the health and well-being of the family including food, clothing, housing and medical care and necessary social services.
- The right to the highest attainable standard of physical and mental health.
- Motherhood and childhood are entitled to special care and assistance.
- All children shall enjoy the same social protection without any discrimination for reasons of parentage or other conditions.
- The right of the child to be registered immediately after birth, to have a name and to acquire a nationality.
- States have to respect the liberty of parents to choose the kind of education they want for their children.

Climate change affects the previous rights with regards to parenting by jeopardizing parents' rights to organize their family life and to offer their children what they need to cover their basic needs.

The Convention on the Rights of the Child of 1989 makes abundant references to the role parents are supposed to play for their child's well-being. Among the rights that touch parents' role and authority, we can cite:

- The right of the child to enjoy his/her rights irrespective of the parents' race, language, political status, opinion, national, ethnic origin, birth or status (art. 2).
- The best interest of the child as the primary consideration in all actions concerning children (art. 3).

[1] See, BARLETT, S.: "Children in the context of climate change: a large and vulnerable population", in *Population Dynamics and Climate Change,* 2009, vol. 80, pp. 133 ff.; SANZ CABALLERO, S.: "Climate change and its impact on children", in ZERMATTEN, J. (ed.): *Acts of Proceedings of the International Congress on the rights of the child and climate change*, 2012, Geneva, in press.

- The respect of parents' rights and duties in the assurance of protection for the well-being of the child (art. 3.2).
- The rights and duties of parents, members of the extended family or legal guardians to provide appropriate direction and guidance to the child (art. 5).
- The right of the child to be cared for by his/her parents (art. 7).
- The right of the child not to be separated from his/her parents against their will, except when such separation is necessary for the best interests of the child (art. 9).
- The right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests (art. 9.3).
- Humane and expeditious treatment of family reunification cases without any adverse consequences for the applicants and for the members of the family (art. 10.1).
- The right of parents and child to leave any country, including their own, and to enter their country for the purpose of maintaining direct contacts (art. 10.2).
- The right to be free from unlawful interference with family life and to protection against such attacks (art. 16).
- Common responsibilities of both parents for the upbringing and development of the child. Parents have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern (art. 18.1).
- States Parties shall render appropriate assistance to parents in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children (art. 18.2).
- States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities (art. 18.3).
- Protection of the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s) or legal guardian(s) or any other person who has the care of the child (art. 19.1).
- A child temporarily or permanently deprived of his or her family environment shall be entitled to special protection and assistance provided by the State (art. 20.1).
- States Parties shall in accordance with their national laws ensure alternative care for such a child (20.2) including the necessary placement of children in suitable institutions for the care of children (20.3).
- Adoption as a system of alternative care, if the law so permits, in view of the child's status concerning parents, relatives and legal guardians and, if required, with the informed consent of the persons concerned (art. 21).
- Appropriate protection for refugee children or children seeking refuge, whether unaccompanied or accompanied by their parents as well as international cooperation in case of need to trace the parents or other members of the family (art. 22).
- The right to enjoy the highest attainable standard of health and to facilities for the treatment of illness, including the fight against malnutrition and infant mortality, pre-natal and post-natal care for mothers, as well as guidance for parents concerning preventive health (art. 24).
- The primary responsibility of parents to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development (art. 27).
- Need of States to take appropriate measures to assist parents to implement the child's right to an adequate standard of living (art. 27.4).
- The right to education (art. 28). One of the aims of education is the respect for the child's parents, his or her own cultural identity, language and values (art. 29).

Other rights included in the CRC but not necessarily related to parents' role concerning the child are the following: the right to acquire a nationality (art. 7), States measures to combat illicit transfer of children abroad and children non-return (art. 11), the right of the child to freedom of thought, conscience and religion and parents' rights and duties to provide direction to the child in this field (art. 14), the right of indigenous communities to enjoy their culture (art. 30), the right of children to leisure and play and to participate in the cultural life (art. 31), the right of the child to be protected against economic exploitation (art. 32), the protection of children against drugs abuse (art. 33), the protection of the child against any form of sexual abuse (art. 34), the prevention of children from abduction, sale or trafficking (art. 35), the right of the child to be free from torture or any form of inhumane or degrading treatment (art. 37) as well as the promotion of child recovery in case of armed conflict, abuse, neglect or exploitation (art. 39).

As we will soon show, all these children rights and the related parents' rights are equally affected by climate change consequences.

3. **Special impact of climate change on parenthood**

A preliminary hypothesis is that there is not a single parents' right which is not affected by heavy climate change consequences. After cataclysmic disasters, epidemics and disease rapidly spread. Parents' capacity to prevent their children from falling ill is inversely proportionate to their ability to mitigate climate change consequences and to adapt to the new environment.

During disasters and in their aftermath, parents may lose sight of their children. The latter may die, get lost, be abducted, sold or given away in illegal adoption. Personal documentation of both parents and children may be destroyed and, as a result, they may encounter problems of identification before the authorities.

Parents' jobs or means of providing sustenance may vanish due to deforestation, floods, rising level of the waters, hurricanes or any other climate change-related cause. Parents will face the horrific situation of being unable to feed their children and to offer them a decent life. Their authority and their self-esteem may be eroded and they may lose control of their children. The inability of parents to provide food, shelter and health to their children may force them to flee from their countries. When parents migrate, they leave their children behind in the hope of sending money home once established abroad. The children left behind may develop feelings of abandonment, anger, anxiety or threat when their parents leave. Fleeing parents will lose their children's control and will miss their chance to educate them. They will also face heavy bureaucratic problems in case they wish for a family reunification in the recipient country.

De-structured families are one of the common results of climate change consequences. Even in cases when parents manage to flee with their families from their devastated lands to a new settlement, their children normally experience alienation, xenophobia and isolation in the new country or territory. Sometimes they experience the impotence of being unable to communicate in the new land when the language spoken is different from theirs. All these added burdens severely affect the ability of parents to educate their children.

Housing is also heavily affected by climate change consequences, undermining the chances of parents to provide an adequate standard of living for their children. Sometimes families' homes collapse during climate catastrophes. Sometimes families have to abandon their homes because living there becomes impossible due to rising temperatures, land erosion, rising sea-water levels, etc.

Families forced to leave their homes normally occupy or build new ones in slum areas of megacities or impoverished rural areas where they cannot provide their children with sanitation, basic services or education. When they settle down in overcrowded, ghettoized and unplanned areas, delinquency is normally what they find. As a result, parents experience authority problems to maintain their children away from gangs, drugs abuse and crime.

The right of parents to educate their children according to their own convictions and in schools of their choice also suffers from climate change impacts. When families are forced to flee due to the inhabitable conditions of land, education in their new settlement may be interrupted. Authorities in the new settlement may raise bureaucratic schooling obstacles for the children of newcomers. For those who stay in their homeland, education may also become impossible for different reasons. Among them, the need to employ children in the task of water-fetching for the family, cattle herding and firewood collecting, the departure of teachers due to global warming, the collapse of schools, the unaffordable reconstruction and relocation costs for new school buildings, the lack of sanitation facilities at school, etc.

Climatic hazards provoke mass migration. Parents forced to flee abroad may also suffer the distressing experience of not being able to pass their nationality to their children born abroad, or the refusal of the new country to register the newborns. Parents may find themselves in the situation giving birth to stateless children with no political rights not because of political reasons but because their State of origin does not exist anymore. Needless to say, extreme situations always lead, with or without the parents' consent, to child exploitation or slavery, children forced to work, children being sexually abused and the increase of street children.

Deforestation provokes forest degradation and impacts the indigenous peoples' rights to enjoy their culture, their traditional lands and access to food. Simply put, deforestation damages the indigenous people's way of life. This all has an impact on the right to a decent standard of living, the right to housing and the right to collective property. Parents of indigenous communities find themselves in a desperate situation because they can no longer teach their children about their values, their environmental friendly know-how or their ancestral knowledge about survival, contact with earth, animals and plants.

In short: sometimes parents die from climatic events, or they migrate with the intention of working abroad and sending money to the family. Sometimes they just abandon or sell their children when they feel hopeless about the future. The children left behind risk falling into the hands of gangs and organizations that traffic with human beings. All these hazards multiply the number of street children, abandoned or exploited children, children who have to work, gang children and trafficked children.

Parents have a lot to lose concerning the care and raising of their children and concerning the control of their family structure because of climate change consequences on the environment, household and on their local communities.

4. **Case law concerning family and parenthood rights in the context of environmental degradation**

Despite the fact that environmental degradation and climate change provoke serious human rights breaches the reality is that there is almost no international case-law on the subject. One of the trickiest problems of climate change is how to allocate responsibility for human-induced climate change and its harmful consequences. There are several reasons for this:

- The nature of global warming makes it impossible to establish a direct causal link between a specific past emission and a specific harm on a specific person.
- Responsibility of impacts cannot always be attributed to the nearest government, but also to far away countries.
- States are not the only ones to blame but also public and private entities. However, corporations are not subjects of international law.
- The rights at issue sometimes are difficult to enforce (migrant rights, rights in time of war) and most of the harms are yet to come.
- Courts are not likely to accept cases where harms are not very concrete, as human rights litigation does not usually work with events that create massive numbers of victims who may, in addition, be dispersed all over the world.
- Human rights prioritise harms to actual persons, not to future generations. The rights of future generations are at stake due to climate change but there are strong arguments against entitlements and litigation in the name of people not yet born[2].
- Emergency conditions –as in the case of famine, floods, mass migration…- limit the application of human rights law. Governments take measures derogating from their human rights obligations in the aftermath of climate change hazards[3] (curfew, etc.).

The previous reasons make it difficult for any victim of climate change harms -including mothers and fathers whose rights as parents are jeopardized due to global warming consequences- to have access to justice. To sum up: climate change gives clear evidence of the inadequacies of the international justice system in face of new threats and changing patterns of responsibility.

For the time being, no applications have been brought before international courts by parents claiming that the effects of global warming have undermined the exercise of their parenting rights. However, it is not inconceivable that this kind of application and this kind of legal argumentation will reach international organs in the next future. The few cases brought so far before international regional organs on the consequences of global warming or environmental degradation have been focused on their impact on community rights or individual rights instead of on parents' rights concerning their children.

However, there is an exception to this rule in the case-law of the European Court of Human Rights (ECHR), which has developed a very creative and far-reaching jurisprudence on the right to a healthy environment by stating that pollution can interfere with the right to family life. The ECHR is the executive body of the European Convention of Human Rights of 1950. Despite the fact that the Convention does not include the right to a healthy environment as such, the ECHR has been able to infer this right from the right to family life because pollution and environmental degradation can easily affect the right to enjoy a peaceful and joyful family life. In what is probably the first case ever of international litigation on environmental degradation where a court has condemned a State[4] -case *López Ostra/Spain* (1994)-, the ECHR understood that the right to family life of the López Ostra's family had been violated because the Spanish authorities had permitted the location of a noisy and pestilential waste treatment plan beside a family home without any previous study of ecological impact.

[2] One may maintain that generations to come do not have rights because they are not yet human beings. But this is a very narrowed-minded approach that only takes into account legal rights and forgets about moral rights.

[3] Some of these handicaps for environmental litigation are explained in International Council on Human Rights Policy, *cit.,* p. 4 and 45 and in UNICEF: *A brighter tomorrow: climate change, child rights and intergenerational justice*, London, 2011, p. 3.

[4] Before that ruling the European Commission of Human Rights had rejected environmental claims on the grounds that no right to nature preservation is as such included in the European Convention (Powell and Rayner against UK of 1990, on the excessive levels of aircraft noise in Heathrow Airport).

Severe and continuous environmental pollution caused serious health problems for all the family members: the mother suffered from depression, the daughter turned sick and all the members of the family had frequent quarrels. The family well-being and quality of life was so affected that they had to move. Although the judgment does not talk specifically about how environmental pollution affected the López Ostra's parenthood rights and authority, we can easily deduce it from all the facts surrounding the case. The ECHR found a violation of article 8 of the Convention, which deals with the right to private and family life as well as a violation of article 3 on degrading treatment.

Similar facts and similar court argumentation can be found in the ECHR case *Guerra and others against Italy* (1998), where a chemical factory located close to the applicant's home was classified as high-risk. Italian authorities failed to fulfil their obligation to protect the Guerra's family right to family life as they never informed them about the risk for health and for the family members' well-being of living beside such a plant. Another relevant judgment is *Tatar/Rumania* (2009), where the ECHR ruled that pollution could affect the quality of family life of a father and son.

The recent judgment *Dubetska/Ukraine* (2011) – about an extended family living close to a mine and to a polluting factory- could be, in our opinion, a leading case on parenthood rights, because the ECHR accepted the applicants' submission that sometimes environmental hazards impair the right to family life. The ECHR ruled that, although there was no provision in the Convention guaranteeing the right to preservation of the natural environment as such, Ukraine had failed in its obligations because severe pollution and lack of clean water reportedly provoked diseases and caused difficulties in relations between spouses, increased family frustration and affected the communication of family members, forcing younger members of the family to break away from the older ones in search of better conditions for the growing children.

These cases tell us a lot about the existing link between environmental degradation and the right to enjoy family life. However, none of them deals with the effects of climate change. In the rest of cases that have been brought before the ECHR on environmental degradation's charges the argument of the respect for the right to family life has not been raised or employed by the Court. These are the cases *Balner-Schafroth/Switzerland* (1997), *Kyrtatos/Greece* (2003), *Hatton and others/UK* (2003), *Pilar Moreno/Spain* (2004), *Oneryildiz/Turkey* (2004), *Gorraiz-Lizarrraga and other/Spain* (2004), *Ledyayeva/Russia* (2006), *Budayeva/ Russia* (2008) and *Bacila/Rumania* (2010).

In all of them the ECHR solved the disputes by using other legal arguments such as the right to life (art. 2), the right to private life (art. 8), access to justice (art. 13), the right to property (art. 1 Prot. 1) and the right to information on environmental matters (art. 10)[5].

The Inter-American Commission of Human Rights has followed the ECHR's path by recognizing environmental rights in the Americas. However, it has never used the argument of the breach of the right to family life as a legal reasoning. The Inter-American Commission has had at least three opportunities to develop on environmental harms in the cases *Yanomami/ Bra*zil (1985), *Mayagna (Sumo) Awas Tingni Community/Nicaragua* (2001) and *Inuit/USA* (2005). In the first one, the Inter-American Commission found that the environmental destruction of ancestral lands violated the right to life, the right to health and the right to food. In the second case, the Commission found that a logging concession violated property rights of an indigenous community protected in article 21 of the Inter-American Convention of Human Rights. The third case is much more relevant because the plaintiff (Sheila Watt-Cloutier) alleged that different rights of the indigenous group to which she belonged had been infringed due in large part to the failure of the USA to curb its green-house emissions. The application provided a large list of supposed violated rights such as the right of Inuit people to enjoy from the benefits of their culture, the right to enjoy their ancestral lands, the right to health, physical integrity, security, residence, to preserve their own means of subsistence as well as their right to the inviolability of the home. Unfortunately, the Inter-American Commission found the application inadmissible. Thus, the chance was lost to read about this organ's opinion on the eventual link between human-induced ice-melting, on the one hand, and the breach of some rights which have a lot to do with the respect of family life and with the respect of the life-style parents choose for their children, on the other. The non-admission of the application was due to the fact the Commission could not find a direct link between the negative effects the Inuit community was suffering in their way of life and USA emissions.

[5] BLAZOGIANNAKI, M.: "Human rights and climate change", 4th meeting of the Group of Experts on Biodiversity and Climate Change, Strasbourg, 8 April 2009, Doc. T-PVS/Inf (2009) 4; SANDS, P.: "Human rights and the environment", in Human Rights and the Environment. Proceedings of a Geneva Environment Network Roundtable, 2004, pp. 22 ff.; HREOC (AUSTRALIA): Background paper: Human Rights and Climate Change, 2008, p. 10.

The Inter-American Commission was of the opinion that the harms caused to this indigenous community were probably the result of several polluters' action, many of them of a private origin[6].

Domestic examples of judicial cases brought before USA courts have started to produce positive results. In *Massachusetts/EPA*, ruled by the Supreme Court (April 2007), the Court found that evidence of sea-level rise, together with credible predictions of worsening effects of climate change, were sufficient evidence of injuries suffered by nature and provoked by USA action. This is a landmark case. The Supreme Court ruled in favor of the State of Massachusetts and against the US because it found a link of causation, as the injury had been caused in some respect by the entity being sued. And in *Green Mountain Chrysler-Plymouth-Dodge et al./Cromble et al.* (September 2007, a Vermont court ruled in favor of 14 US States and against the plaintiffs (some automobile firms) because it found that the States' decision to limit by law the levels of admissible carbon dioxide emissions did not contravene the right to free enterprise.

5. Conclusions

Environmental degradation and violations of human rights are intrinsically linked. However, establishing standing to bring suit may be very difficult in case of harms caused by climate change. In order for an application before an international court to be admissible, a line of causation between a State action or inaction and the injury caused has to be established. Though it is evident that climate change's adverse effects on housing, life-style, means of subsistence, health, etc., damage family life as well as the institution of family as such, it can be extremely difficult to show before a domestic or an international court how and to what extent global warming directly affects the rights of parents to raise their children, to give them guidance, to educate them, to provide them with food, water and shelter, to offer them an adequate standard of living, to help them stay healthy, to help them develop all their potentialities and to transmit them their values, lifestyle and sense of cultural identity.

International litigation based on ecologic harms is and will continue to be tough. Needless to say that it will be even tougher if the plaintiff tries to demonstrate how their rights as a father or as a mother are affected by climate change consequences.

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[6] On the Inuit case, see: INTERNATIONAL COUNCIL ON HUMAN RIGHTS: Climate change and human rights. A Rough Guide, 2008, p. 41.

Personal care and co-parenting—current debate in Chile

Judge Gabriela Ureta

I. Introduction

The Convention on the Rights of the Child (CRC) was approved and ratified in Chile in 1990 and, consequently, forms part of the Chilean national legal system. In order to incorporate its principles into national legislation, Chile has passed and adopted a number of legislative and administrative measures with the aim of improving the situation of minors in the country. However, where the personal care of children whose parents are separated is concerned this has not been enough and this is one of the issues pending treatment in national legislation.

Context

In 2004 Chile was the last country in the world to pass a Divorce Law. In the first few years after the law became effective, legal separation of parents increased significantly, and this was in turn facilitated by the passing of the law that established Family Courts. It is estimated that in 2008 there was one divorce for every three marriages celebrated during the same period, and the trend has been growing. According to the statistics of the Administrative Corporation of the Judiciary, the Family Courts issued 29,889 divorce decrees in 2009; in 2010 this figure increased to 50,160, and in the six months to June 2011 it had reached 38,887.

According to the records of the Vital Statistics Registry, most separations take place among couples in their 30s and 40s and most particularly among recently married couples with quite young children. It is important to emphasise that statistics do not reflect the total scenario of separations, for they do not include unmarried couples with children who get separated after having lived together.

Divorce and its impact on children, the development of new family structures—mainly single parent families—the incorporation of women into the labour market, and the changing roles within couples reflect new kinds of interpersonal relationships. There has been a corresponding growth in the number of separated parents' associations advocating greater involvement of the father in the personal care of his children and a more active role in the decisions that are relevant to the child's development.

Against this background this article discusses a recent Parliamentary initiative and the resulting debate.

II. The issue

Section 7 of the CRC provides that:

The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

Article 18 provides:

States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities in the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

In Chile a distinction is made between the notions of *patria potestas* and *personal care*, both of which are treated as a single entity in these two articles of the Convention.

Patria potestas

Patria potestas, is defined by Section 243 of Chile's Civil Code as:

The set of rights and obligations pertaining to the father or the mother with regard to the property [i.e. estate] *of minor children. Patria potestas may also be applied to the contingent rights of the unborn child.*

The powers granted by *patria potestas* in our legislation[1] comprise the legal right of enjoyment and administration of children's property and legal representation of the children. The legal right of enjoyment consists in the power to use the property of the child and to receive its profits, with the obligation to preserve the form and substance of the property and—in the case of non-fungible property—either to restore it or to return the same amount and quality of the same kind of goods; or to pay the value of any fungible goods.

[1] Civil Code article 252, paragraph 1.

Article 244 of the Civil Code adds:

Patria potestas will be exercised by the father or the mother, or both jointly, as agreed in writing by public instrument or certificate issued by any official Vital Statistics Agency, which will be registered in a marginal note in the birth record of the child, within thirty days of issuance.

In case of disagreement, patria potestas will be awarded to the father.

In any case where the best interest of the child so requires, a judge may, at the request of one of the parents, award the exercise of patria potestas to the father or mother who did not have it, or award it to one of the parents if they were exercising it jointly.

Article 245 adds:

If the parents live separately, patria potestas will be exercised by the parent who is responsible for the personal care of the child, in conformity with Article 225[2]*.*

It should be noted that the Code does not simply award joint responsibility for *patria potestas* to both parents, although this is without prejudice to the possibility of joint responsibility where both parties agree.

An independent observer might consider this to contradict the principle of equal responsibilities, rights and obligations that article 18 of the CRC asserts for both parents in relation to their children. Such an observer might also consider that this is a form of discrimination under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which states in article 16, paragraph 1 (d):

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women, the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children. In all cases the interests of the children shall be paramount.

As indicated above, Chile's legislation provides that *patria potestas* can be established through a judicial decision. Although the legislation does not provide for the views of the minor to be heard, it does not preclude the child from appearing before the Family Judge to request his or her opinion to be considered, taking into account his or her age and degree of maturity.

Even when the mother has *patria potestas*, it can be difficult to apply unless there is evidence to prove to third parties that the parents live separately. It is necessary for the mother to go to Court to prove the separation and request the Office of Vital Statistics to annotate the child's birth certificate to indicate that personal care and *patria potestas* are to be exercised by her.

Personal care

Personal care, tuition or personal parental relation have been defined as:

the parental right to the upbringing, education and establishment of the minor, as well as the obligation to feed, educate and give at least basic vocational or professional training[3]*.*

In line with the provisions of the CRC in its preamble, any child has the right to live with his or her parents, not to be separated from them and to grow up in a family environment.

In this respect, article 224 of the Civil Code provides that the personal care, upbringing and education of the child are the responsibility of both parents or of the surviving father or mother Since the law makes no distinction of any kind between either parent in terms of parental responsibilities, it can be concluded that no problem is envisaged where parents live together. However, difficulties arise when parents live separately and there is disagreement between them on who is to undertake the care of the child.

Article 225 of the Code provides that:

If parents live separately, the mother will be responsible for the personal care of the children. However, both parents, acting jointly[4]*, may determine that the father will be responsible for the personal care of one or more children. This agreement may be revoked*[5]*.*

In any case where the interests of the child so warrant—either on the grounds of abuse, negligence or any other qualifying cause—a judge may award the personal care of the child to the other parent. However, the judge will not award personal care to a father or mother who has not contributed to child support while the child was under the care of the other parent provided they have had the capability of doing so.

Although legislators have used the term *personal care*, it is generally held that the provision refers to what used to be called *tutorship*, using the terms personal care, care, upbringing and education, and tutorship as synonymous.

[2] See below.

[3] *La Filiación en el Nuevo Derecho de Familia,* Claudia Schmidt and Paulina Veloso.

[4] By means of a public instrument or certificate issued before any Vital Statistics Office noted on the margin of the birth certificate of the child within thirty days following its issuance.

[5] Observing the same formalities as above.

Although national legislation guarantees the right of the child to maintain a relationship with both parents, personal care is considered to be the responsibility of the mother, and only exceptionally of the father. Today this idea is challenged by psychosocial research that concludes that both the father and the mother are capable of caring for the child. Society at large is taking a more even-handed approach regarding the roles of women and men, both within and outside the family.

Chilean law does not require shared tutorship, since it provides that in case of disagreement between the parents, tutorship should be awarded to the mother, and this principle has been upheld by the Supreme Court[6].

III. The debate

Several organizations representing separated fathers have been advocating shared tutorship. At least in theory, this should prevent one of the parents being precluded from having an active role in the life of their children.

Thus, at the request of such organizations, a bill with the aim of incorporating in law the notion that parental responsibility belongs to both parents was submitted in 2010. It is still under discussion. It stipulates that by mutual agreement parents should be able to determine which of them will be responsible for the personal care of the child; or that care will be shared by both parents. As stated above, this is not currently the legal position.

The bill seeks to amend Article 225 of the Civil Code regarding the awarding of personal care of the children after separation of the parents. The grounds advanced are that the current arrangements are discriminatory and stereotyped because they award the mother the preferential right of exercising care of the children, following an obsolete principle of attributing different gender roles in parenthood—namely, that the mother is responsible for the upbringing of children and the father for the administration of property[7].

The amending bill emphasizes mutual agreement between the parents, eliminates the preference for the mother and incorporates the notion of shared parenting.

The text of the bill provides:

If parents are separated, they may determine by mutual agreement which of them should undertake the personal care of one or more children, how such personal care shall be exercised or whether they opt for the modality of shared parenting. If there is no mutual agreement between the parents, it will be for a judge to decide who will be awarded tutorship, giving priority to the best interests of the child.

The current government administration has pointed out that—though it acknowledges that the active participation of the father in the upbringing of children is of great importance[8]—the fact that a parent does not live in the same household as the child does not exempt him or her from parental responsibilities; but, if there is no agreement between the parents, it is deemed necessary for the mother to be awarded care, in line with the roles determined by the Civil Code.

From an academic point of view, it is worth citing the opinion of Professor Fabiola Lathrop of the Universidad de Chile who, when speaking to the Constitution, Legislation and Justice Commission on this proposal, stated that the principle of giving preference for personal care to the mother is unconstitutional because it introduces an arbitrary discrimination against men. She added that it reinforces negative stereotypes in society, such as the belief that the woman should stay at home with the children and the man be a father who provides financial resources. She also commented that, because the current regulation discriminates against men, it goes against articles of the Political Constitution and also contradicts provisions of international treaties on children and adolescents subscribed to by Chile.

Professor Lathrop's view is that any amendment of the current rules should aim to seek agreement between the parents, but if no agreement can be reached, it should be the judge who decides—always looking to the best interests of the child. She is also of the view that the judge, when deciding on who is to be responsible for the personal care of the child and the corresponding arrangements, should consider the possibility of shared care. She mentions some relevant considerations:

i. affection between the child and each parent and other persons with whom the child has a relation of trust;
ii. the capacity of the parents to ensure the welfare of the child and the possibility of providing the child with an appropriate environment according to his or her age;
iii. the willingness of each parent to cooperate with the other parent to ensure the highest level of stability for the child, most particularly to maintain an appropriate relationship with both parents;
iv. the time that each parent had devoted to the care of the child before the separation and the responsibilities each one had assumed to ensure the well-being of the child;
v. the desire expressed by the child;
vi. the agreements reached by parents before and during the hearing;

6 Case: Rol 3097-2008, July 15, 2008.

7 Representative Gabriel Ascencio, one of the authors of the initiative.

8 Report to the Congress by the Minister of the National Women Service (SERNAM) Carolina Schmidt.

vii. the geographical location of the parents' domiciles and the times and activities of the child and of the parents;
viii. the results of expert opinions ordered by the judge; and
ix. any other precedent or circumstance that may be relevant, always serving the best interests of the child.

The current government, in turn, has put forward the following arguments against the initiative:

a. the need for children to have certainty regarding where and with whom they will continue to live, always seeking the best interests of the child;
b. emphasizing the current position in Chile that it is mothers who both have more time and who devote more time to the care of children and of the home where they live[9]; and
c. the proposal would lead to the immediate judicialization of cases to determine who should be entrusted with the personal care of children, with the consequent pain that that would cause to the children whose instability would be increased by the uncertainty about which parent they will live with and where.

The counterargument raised by the sponsors of the bill is that, in single parent families, the parent who has custody frequently changes domicile, which means that the child is separated from his or her regular environment, school and community. This would not happen if tutorship were shared, because neither parent would hold the "property" of the child with the consequent right to move the child from one place to another at will without the consent of the other parent or the authorization of a judge. What should prevail is the best interests of the child and so a parent who changes domicile has the responsibility to arrange their affairs so that they can exercise their right and their duty of sharing time with the child. There should be no impact on the stability of the child.

IV. By way of conclusion

Although in Chile national legislation on personal care and co-parenting has not yet been adapted to the Convention, the legislative initiative discussed above has had the merit of opening up Parliamentary and community debate on the topic. Two views can be identified that—although they each claim to stand for the best interests of the child—differ in terms of their treatment of the parents. One view wishes to establish that the mother is better suited to exercise personal care of the child while the other considers that both parents are equally competent for such a role. However, both sides agree that the best option for the child is mutual agreement between the parents and that shared tutorship should be possible if such an agreement exists.

Both sides also agree that concrete legislative action should be taken to prevent the parent who provides personal care from precluding or creating impediments to the child's regular relationship with the non-custodial parent as a means of obtaining economic benefits or for other illegitimate purposes that would affect the child's development or the rights of the non-custodial parent.

The debate stimulated by the bill has been useful because it has permitted different interests to be voiced. The voice of fathers claiming equal rights for the personal care of children has been raised. These fathers claim they have been prevented from exercising those rights and even discriminated against relative to women. These claims have been made regarding both legislation and specific judicial decisions.

While accepting the fair and legitimate feelings of fathers on the care of their children, it should be made clear on this and on all other matters regarding children that—in decisions on legislative amendments or in individual cases submitted to judicial decision—it is not the interests of parents to which legislators or judges should give priority. The fundamental purpose of child and family legislation should be to promote the best interests of the child.

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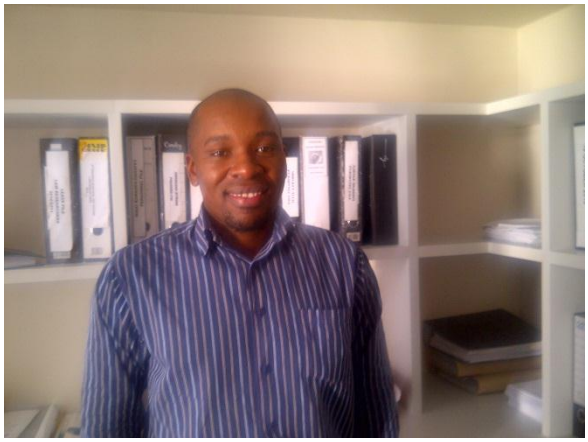
The opinions expressed in this paper are personal and do not represent institutional stances.

[9] According to a report of the Executive Power dated June 2011.

Paramountcy and best interests of the child— a case from the South African High Court

Njongo Mgobozi



An urgent application had been instituted by MM ("Applicant") against AV ("Respondent") for the determination of his parental rights and responsibilities with regards to their child M, born out of wedlock on 6 May 2000. The relief sought was in terms of the Children's Act, 38 of 2005. The applicant sought an order declaring that he and the respondent were co-holders of parental rights and responsibilities, which included his rights in respect of co-guardianship and his right to care and contact to be confirmed by the court and to thus compel the respondent to enter into a parent plan with him. The respondent opposed the application.

Background of the matter

Both parties claimed to have no memory of the night M was conceived due to their respective states of intoxication at the time of M's conception. A paternity test was carried out which revealed the applicant to be the biological father of M. Since that date, the applicant had enjoyed a co-parenting relationship with the respondent and had been involved in the upbringing of M and all decisions affecting M.

A dispute arose about the applicant's contact with M over the December 2009 and January 2010 school holiday which ultimately led to the applicant instituting the proceedings on the basis of urgency. In opposing the application the respondent contended that it was not urgent and raised certain points *in limine*, namely:

1. that the applicant, being the biological father of M, fell within the exclusionary provision in regard to the definition of a 'parent' in terms of section 1 of the Children's Act in that, since the child was conceived in circumstances in which the respondent could not have consented to sexual intercourse with the applicant, the child had been conceived as a result of rape. As such the applicant could not acquire any parental rights and responsibilities;
2. even if the court were to find in favour of the applicant on the first point, the respondent could not be compelled to enter into a parent plan with the applicant.

Judgement

In coming to its conclusion in regard to urgency, the court had regard to Rule 6 (12) (a) of the Uniform Rules of the High Courts which reads *inter alia* as follows:

"In urgent applications a court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to it seems meet."

The court took into account section 6(4) of the Children's Act which states:

"6(4) In any matter concerning a child –

(a) an approach which is conducive to conciliation and problem solving should be followed and a confrontational approach should be avoided; and

(b) a delay in any action or decision to be taken must be avoided as far as possible."

In addition to section 6(4) of the Children's Act the court took into account section 173 of the Constitution of the Republic of South Africa, which provides that: *The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.*

The court held that this includes the determination of whether a matter is urgent or not. In amplification thereof the court took into account the decision of *Commissioner, SARS v Hawker Air Services (Pty) Ltd* 2006 (4) SA 292 (SCA) at 299G-H, which said:

'Urgency is a reason that may justify deviation from the times and forms the rules prescribe. It relates to form, not substance, and is not a prerequisite to a claim for substantive relief. Where an application is brought on the basis of urgency, the rules of court permit a court (or a judge in chambers) to dispense with the forms and service usually required, and to dispose of it "as to it seems meet".'

Taking the above into account the court expressed a strong view that *all matters concerning children are by their very nature urgent*.

Before the court could deal fully with the evidence, it felt it necessary to sketch the background to the legal position of unmarried fathers in South African law. It stated that prior to the implementation of the Natural Fathers of Children Born out of Wedlock Act, 86 of 1997 (*"the Natural Fathers Act"*), such fathers were obliged, in terms of the common law, to apply to the High Court, as upper guardian of all minor children, to be granted rights in respect of a child born out of wedlock. Where disputes arose in regard to the right of the father, the court would determine what rights were to be exercised by the father and the exercise of such rights was essentially called a parent plan.

At paragraph [29] – [31] of its judgment the court said:

"[29] With the implementation of the Natural Fathers Act, these fathers were afforded, by statute, locus standi *to apply for certain rights in respect of their children born out of wedlock. Again, in the event of there not being an agreement with the mother of the child, the court was required to determine which rights should be granted to the father. Similarly, if there was a dispute in respect of the manner in which any of such rights were to be exercised, the court made a determination and gave an order setting out the manner in which such rights were to be implemented; again, a 'plan' setting out how parental rights were to be exercised.*

[30] Section 21 of the Children's Act similarly makes provision for parents of children born out of wedlock to agree upon a parent plan. Where the parties are not able to agree either directly or through mediation then either party has the right to approach court in order to determine how their parental rights and responsibilities are to be exercised.

[31] Accordingly, the provisions of Section 21 of the Children's Act are nothing new: they simply serve to 'codify' the legal position which previously pertained. What is important to note is that this is entirely consistent with the 'best interests of the child' principle enshrined in the Constitution of the Republic of South Africa. Section 28 of the Constitution stipulates that in all matters concerning a child it is the child's best interests which are paramount and that every child has the right to parental care. In my view those provisions recognise and moreover dictate that a court as upper guardian of all minor children must place the interests and the rights of the child above those of his or her parents..."

The court then turned to deal with the points raised by the respondent.

With regard to the first point, the court held that is was not necessary for it to make a 'blanket' finding as to whether the exclusionary provision of a 'parent' in terms of section 1 of the Children's Act was applicable.

In determining whether there was merit in the respondent's contention, the court looked at the wording of section 21 of the Children's Act which states:

"*21 Parental responsibilities and rights of unmarried fathers*

(1) The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20 [i.e. where a child is born from a marriage]*, acquires full parental responsibilities and rights in respect of the child –*

(a) if at the time of the child's birth he is living with the mother in a permanent life-partnership; or

(b) if he, regardless of whether he has lived or is living with the mother –

(i) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;

(ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and

(iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.

(2) This section does not affect the duty of a father to contribute towards the maintenance of the child.

(3)(a) If there is a dispute between the biological father referred to in subsection (1) and the biological mother of a child with regard to the fulfilment by that father of the conditions set out in subsection (1) (a) or (b), the matter must be referred for mediation to a family advocate, social worker, social service professional or other suitably qualified person.

(b) Any party to the mediation may have the outcome of the mediation reviewed by a court.

*(4) This section applies regardless of whether the child was born before or after the commencement of this Act.***"**

The court further looked at the history of the relationship between the parties and the relationship that M has with the applicant. The court found that since M was conceived, the respondent treated the applicant not only as the biological father of M but as M's parent as well and has, during the said period, recognized his full parental rights and responsibilities.

The court further held that in determining whether the applicant was excluded in terms of section 1 of the Children's Act, the starting point was the Constitution of the Republic of South Africa and in particular section 28 (1) which sets out the rights of a child; section 28 (2) which states that *"A child's best interests are of paramount importance in every matter concerning the child* "; section 10 which states that "*Everyone has inherent dignity and the right to have their dignity respected and protected";* and section 36 which sets out the circumstances under which such rights may be legally limited and which is to the following effect:

"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom…;

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

Furthermore, the court was required to give effect to the competing rights of M on the one hand and the respondent on the other. In doing this, the court looked at section 6 of the Children's Act which requires a court, in all proceedings concerning a child to "*inter alia, respect, promote, and fulfil the child's rights as set out in the Bill of Rights, the best interest of the child standard…and the rights and principles set out in this Act, subject to any lawful limitation"* and the decision of J v J 2008 (6) SA 30 (CPD) at 37 D – 38A which said:

"*As the upper guardian of minors, this court is empowered and under a duty to consider and evaluate all relevant facts placed before it with a view to deciding the issue which is of paramount importance: the best interests of the child…* (with reference to the matter of Terblanche v Terblanche 1992 (1) SA 501 (W) at 504C) W*hen a court sits as upper guardian in a custody matter it has extremely wide powers in establishing what is in the best interests of minor or dependent children… In AD & DD v DW & Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening party)* 2008 (3) SA 183 (CC)*… the Constitutional Court endorsed the view… that the interests of minors should not be "held to ransom for the sake of legal niceties" and held that in the case before it the best interests of the child "should not be mechanically sacrificed on the altar of jurisdictional formalism"."*

The court concluded that the answer to the 'balancing of rights' question could be found in the authority of S v M 2008 (3) SA 232 (CC) wherein the Constitutional Court at paragraph 244 E -246C stated as follows (For the sake of brevity, the court quoted the summary of what is set forth in paragraph 244 E -246C and which was conveniently paraphrased in the head note at 233H-234A):

"*The ambit of section 28 of the Constitution was undoubtedly wide. The comprehensive and emphatic language used in this section indicated that, just as law enforcement must always be gender-sensitive, so it must always be child-sensitive; statutes must be interpreted and the common law developed in a manner that favoured protecting and advancing the interests of children; and courts must function in a way that showed due respect for children's rights. Section 28 was also to be seen as an expansive response to South Africa's international obligations as a State party to the UN convention on the Rights of the Child. The four great principles of this convention which, as international currency, guided all policy in South Africa in relation to children, were survival, development, protection and participation. What united these principles, and what lay at the heart of section 28 was the right of a child to be a child and to enjoy special care. Every child had his or her own dignity; each child was to be constitutionally imagined as an individual with a distinctive personality, and not treated as a mere extension of his or her parents. The unusually comprehensive and emancipatory character of section 28 presupposed that the sins and traumas of fathers and mothers should not be visited upon their children*.'

(The Court underlined the specific passage to show emphasis).

After considering the evidence before it the court dismissed the respondent's first point.

The court then turned to look at the respondent's second point. In this regard the respondent sought to rely on section 22 of the Children's Act, which provides that a person who holds parental rights and responsibilities (here the respondent) may enter into an agreement (parent plan) with the biological father of a child who does not otherwise have such rights. On the evidence the applicant had already acquired such rights by virtue of section 21 of the Act.

The court thus found that section 22 could not be applied in the present matter. The applicable sections were 33(2) which states "*Subject to section 129, a person referred to in subsection (1) may exercise any parental responsibilities and rights reasonably necessary to comply with subsection (1), including the right to consent to any medical examination or treatment of the child if such consent cannot reasonably be obtained from the parent or guardian of the child*"; and section 33(5) which states *"In preparing a parenting plan as contemplated in subsection (2) the parties must seek—*

(a) the assistance of a family advocate, social worker or psychologist; or

(b) mediation through a social worker or other suitably qualified person."

Thus section 33(2) applies to parents who are already co-holders of parental rights and responsibilities, while section 33(5) details what is required for such parents to enter into a parent plan with each other. Furthermore, the Court held that although section 33 of the Children's Act was enacted on 1 April 2010, it had to be read in conjunction with section 24(1), which enables section 33 of the Children's Act to apply retrospectively.

The court then turned to look at the principles pertaining to children and in doing so, the court relied on section 28 (2) of the Constitution and Article 3(1) of the United Nations Convention on the Right of the child, to which South Africa became a signatory on 29 January 1993 and ratified on 16 June 1995.

The court stated that the '*best interests of the child'* principle is now deeply embedded in our law, both in terms of case law and statutory provisions and that the Children's Act places significant emphasis on child participation in decisions in respect of their care and well-being.

In amplification of the above the court referred to various authorities dealing with the said principle, which can be found on paragraph [90] to [92] of the court's judgment, where the court said:

"[90] It was stated in Terblanche v Terblanche 1992 (1) SA 502 (W) at 504C-D that the court has 'extremely wide powers in establishing what is in the best interests of minor or dependent children. It is not bound by procedural strictures or by the limitations of the evidence presented or contentions advanced by the respective parties. It may in fact have recourse to any source of information, of whatever nature, which may be able to assist it in resolving custody and related disputes'.

[91] In September v Karriem 1959 (3) SA 687 (C) at 689A Herbstein, A J P stated:

'If the Court is of the opinion that it should interfere with the rights of the parents, because the interests of the children demand such interference, it should be at large to act in the manner best fitted to further such interests.'

He stated further *'It seems to me that the Court as upper guardian should be given as complete a picture of the child and its needs as possible. Nothing of relevance should be excluded. For while certain aspects taken separately might appear to be of no real importance, in combination they might build up a strong case in favour of one or other conclusion.'*

[92] In *B v S* 1995 (3) SA 571 (A) at 581A, Howie JA referred to *Re KD (a minor) (ward: termination of access)* [1998] 1 All ER 577 (HL) at 588g-j, and quoted with approval:

'Parenthood, in most civilised societies, is generally conceived as conferring on parents the exclusive privilege of ordering, within the family, the upbringing of children of tender age, with all that that entails. That is a privilege, which, if interfered with without authority, would be protected by the courts, but it is a privilege circumscribed by many limitations imposed both by the general law and, where the circumstances demand, by the courts or the authorities on whom the Legislature has imposed the duty of supervising the welfare of children and young persons. When the jurisdiction of the court is invoked for the protection of the child the parental privileges do not terminate. They do however, become immediately subservient to the paramount consideration which the court has always in mind, that is to say the welfare of the child.'

And further (in reference to rights of contact), that:

'Whatever the position of the parent may be as a matter of law, and it matters not whether he or she is described as having a 'right' in law or a 'claim' by the law of nature or as a matter of common sense, it is perfectly clear that any 'right' vested in him or her must yield to the dictates of the welfare of the child.'

[93] In *Boberg's Law of Persons* at page 319 footnote 17 it is stated that:

'It has long been recognised in South Africa that the parental power (or "natural guardianship") is in fact concerned more with duties and responsibilities of parents than with parents' rights and powers – the modern emphasis in this regard being on the rights and interests of children rather than parents'."

In conclusion, the court stated that the law is clear, that the interests of the child are paramount in all matters concerning a child and the interests of the child take precedence over the interests of the parents. The court thus found that the respondent could be compelled to enter into a parent plan with the applicant and made a detailed order to that effect, setting out how, on the evidence before it, such plan was to be implemented.

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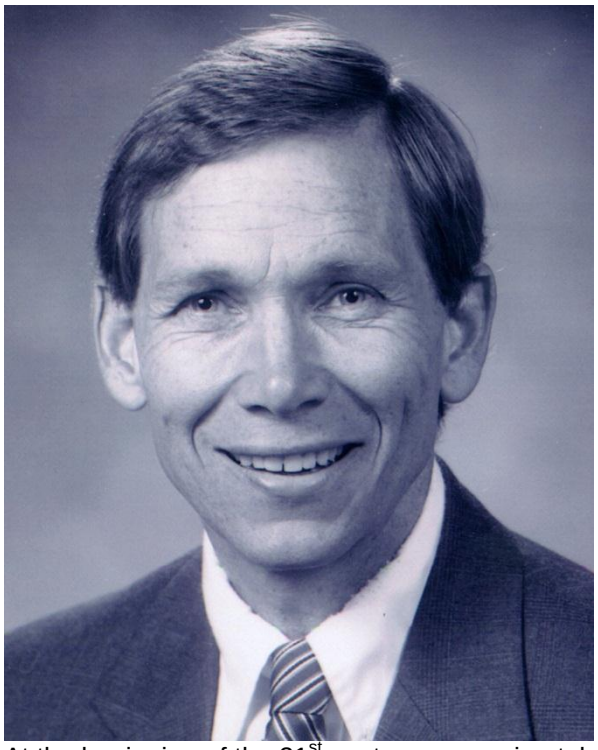
The full judgement given by Acting Judge J I Cloete and delivered on 23 November 2010 and 16 November 2011 is available in English from the Editor in Chief.

Placement with relatives in the USA — Judge (retd) Len Edwards



At the beginning of the 21st century, approximately 500,000 abused or neglected children lived in out-of-home care.[1] Combined with a decrease in foster homes, which until recently were the mainstay of the nation's out-of-home care system,[2] the placement issue has become increasingly important for these children. For a number of reasons, states and the federal government have embraced a new formal placement option— relatives.[3] The reduction of available number of foster homes, the growing numbers of children needing out-of-home care, changing attitudes toward relative caretakers, and litigation have resulted in a dramatic and sudden shift in state policies and a significant increase in relative placements.[4] As one welfare director stated,"{t]he use of kinship care has risen so rapidly that child welfare agencies have been forced to make policy, program, and practice decisions without the benefit of a substantive knowledge base of best practice experience."[5]

Apparently advocacy from relatives led to many of the legislative changes. For example, in 1986, at the urging of several relative advocacy organizations, a California state legislator sponsored a bill (AB 2645) to give relative caregivers a preference when a child was removed from parental care.[6] The author argued that these children ended up in receiving homes or foster homes without giving adequate consideration to available, fit relatives. The author and the sponsors believed it was in the child's best interests to remain within the family network, rather than be subjected to the trauma of placement with strangers.[7] The author further pointed out that former foster children "evidence severe emotional and behavioural problems" and concluded that "foster care is often more harmful than the original home situation." At the time of the legislation, approximately 9%-15% of all children removed from parental custody in California were being placed with relatives.[8] The legislation received strong support and intense lobbying from relative advocacy groups and was enacted without great opposition.

The term "relative" has no precise meaning, and each state defines the term somewhat differently. Many states adopt a broad definition of relative care and "usually the definition includes relatives through blood, marriage, or adoption from the first to the fifth degree."[9] Statistically, maternal grandmothers provide the highest percentage of placements, but other relatives also play an important part in these children's lives.[10] Some states enacted special legislation for Native American children, which requires the court to consider members of their tribes as extended family members for placement purposes.[11]

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1 *Children in the United States, op.cit.* note 1.

2 KINSHIP CARE: A NATURAL BRIDGE (Child Welfare League of America, Washington, DC, 1994) at 17 [hereinafter KINSHIP CARE: A NATURAL BRIDGE]; J. D. BERRICK, TAKE ME HOME: PROTECTING AMERICA's VULNERABLE CHILDREN AND FAMILIES (Oxford U. Press, 2009) at 67 {hereinafter TAKE ME HOME].

3 *Report to the Congress, op.cit.* note 30.

4 *Id.* at 9.

5 *Id.* at 11-12.

6 AB 2645 (On file in the California State Archives' Senate Judiciary Committee Bill File (1986) (MF6:1(75))).

7 *Id.* at 155.

8 *Id.* at 119.

9 *Placement of Children With Relatives: Summary of State Laws* (Child Welfare Information Gateway, U.S. Department of Health and Human Services, Children's Bureau, 2008), *at* www.childwelfare.gov, at 2; J. Gleeson & L. Craig, *Kinship Care in Child Welfare: An Analysis of States' Policies*, 16 CHILD AND YOUTH SERVICES REVIEW, 7-31 (1994) at 15-16.

10 L. Ehrle & R. Geen, *Kin and Non-kin Foster Care: Findings from a National Survey*, 24 CHILDREN AND YOUTH SERVICES REVIEW (2002) at 15-35.

11 *Placement of Children With Relatives; Summary of State Laws*, *op.cit.* note 40.

The federal Indian Child Welfare Act (ICWA) of 1978 favours relative placement of Indian children and pre-empts state legislation.[12] Shortly after its passage, a few state legislatures wrote laws declaring a preference for relatives for all children who are removed from parental care. Prior to 1980, states rarely placed children with relatives,[13] but now almost all states have enacted relative preference provisions in their child welfare law.[14]

The federal government was slower to acknowledge relative preference as a policy goal for children other than under the Indian Child Welfare Act. The Adoption Assistance and Child Welfare Act of 1980 required that when children are separated from their parents and placed in the custody of a public child welfare agency, the state must place them in the "least restrictive alternative available."[15] Some commentators interpreted this to include relatives, but it was not until June of 1987 that the federal Administration for Children, Youth and Families issued Policy Announcement ACYF-PA-8702 that the federal regulations included the term "relative foster homes." The Adoption and Safe Families Act of 1997 (ASFA) further emphasized relatives as placement options. It declared that placement with relatives qualifies as a permanent placement plan with a "fit and willing relative" without adoption or guardianship, and it authorized financial benefits to some relative placements.[16]

The first federal law to assert a *preference* for relatives within the state court systems was the "Personal Responsibility and Work Opportunity Reconciliation Act of 1996[17] which declared that "the State shall consider giving preference to an adult relative over a non-relative caregiver when determining a placement for a child, providing that the relative caregiver meets all relevant State child protection standards."[18]

Successful placement with relatives often relies heavily on strong federal financial support. Many states provide a lower level of financial support for relatives as compared to non-relative foster parents[19] on the ground that family members should be caring for their children out of love rather than by state assignment.[20] In *Millerv. Youakim* (1979), the United States Supreme Court held that relatives are entitled to the same federal foster care benefits received by non-relative foster parents if the placement is eligible for federal reimbursement under the AFDC-Foster Care Program (title IV-E-eligible children).

The relative-placement policy appears to reflect the actions of American families without formal state intervention—placing their children with relatives.[21] When parents find themselves unable or unwilling to rear their children, most frequently they turn to relatives for assistance. Many grandparents and maternal grandmothers in particular,[22] care for their grandchildren when parents cannot. Currently grandparents provide primary care for approximately 2,500,000 of their grandchildren in the United States, the great majority in informal or private arrangements.[23] In recent years the number of children placed with relatives in the child welfare system has grown so dramatically that relatives currently provide for more children than do foster parents in some states.[24]

As of 2009, policy shifts nationally and in most states favoured relative placement over traditional foster care.[25] Furthermore, the relative preference policy has gained significant momentum over the past decade. A 2000 Department of Health and Human Services report to Congress concluded that "[r]elatives should be viewed as potential resources in achieving safety, permanence, and well-being for children."[26]

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12 Indian Child Welfare Act of 1978, 25 U.S.C. 1901-1963, sections 1903, 1915 (b).

13 *Report to the Congress, op.cit.* note 30 at 5; *Kinship Care, op.cit.* note 4 at 25.

14 Allen et al., *op.cit.* note 40 at 5.

15 P.L. 96-272, 42 U.S.C. § 675 (5)(A).

16 P.L. 105-89, 42 U.S.C. §§ 621 et. seq; *Kinship Care, op.cit.* note 4 at 10.

17 P.L. 104-193, 42 U.S.C. §§ 621 et.seq.

18 *Id.*

19 *Placement of Children With Relatives*, *op.cit.* note 40.

20 *Extended Families Help Children Avoid Foster Care, But States Offer Limited Assistance to Kids and Kin*, CHILD TRENDS E-NEWSLETTER, Feb. 24, 2009, find it here.

21 A. Jantz, R. Geen., R., Bess, C. Andrews, & V. Russell, *The Continuing Evolution of State Kinship Care Policies* (The Urban Institute, Washington, DC, 2002).

22 TAKE ME Home, *op.cit.* note 32 at 69.

23 U.S. Census, 2000; *Grandfacts, A State Fact Sheet for Grandparents and Other Relatives Raising Children*, find it here.

24 J. D. Berrick, B. Needell, & R. Barth, *Kin as a Family and Child Welfare Resource*, in KINSHIP FOSTER CARE: POLICY, PRACTICE AND RESEARCH (R. Hegar & M. Scannapieco eds., Oxford U. Press, 1999) at 179-192, 179; Gleeson & Craig, *op.cit.* note 40, at 7; *Assessing the New Federalism: Children in Kinship Care*, The Urban Institute, find it here.

25 CAL. WELF. & INST. CODE § 361.1(c)(1), 361.3(a).

26 *Report to the Congress, op.cit*. note 30, Part II, at 7.

The Fostering Connections to Success and Increasing Adoptions Act of 2008[27] emphasizes the identification and engagement of extended families when children are removed from parental care.[28] Additionally, the Child and Family Service Reviews (CFSRs), federal reviews of state child welfare practices, focus attention on the engagement of families in child protection.

What Caused the Reluctance of Child Welfare Agencies and Legislatures to Place with Families?

Several explanations exist as to why state and federal government policy disfavoured placement with relatives before the 1980s. Some policy makers believed the old adage that "the apple does not fall far from the tree," meaning that when parents neglect and abuse a particular child, the extended family must also have significant problems that would prevent it from providing safe and nurturing care.[29] Some policy makers believed that the extended family must have known about the parental abuse or neglect yet did little or nothing about it. Others asked whether the state could entrust care to a family that produced the abusive and neglectful parents.[30] Moreover, many believed that, at least in theory, foster care was superior to placement with relatives because social service departments carefully screen foster parents, train them, support them after placement, and ensure maximum available financial support. Furthermore, some policy makers distrusted family members to protect the child. They suspected that the relatives would not believe reports about the parents' abusive or neglectful behaviours and might give the parents unauthorized post-placement contact with the children. Additionally, the parents may be hostile toward the relatives who may have placed the original call to the child protection authorities about the abuse or neglect.[31] Finally, early studies revealed that relative placement often meant that children lived with older caretakers with lower incomes and poorer health than children placed with non-relative foster parents.[32]

Studies showed that relative caretakers typically have less training to deal with traumatized children and have less access to support services that might help them care for these children.[33] From these studies it appeared that relatives were often less prepared than foster parents to accept children in their homes.[34]

Despite these factors, substantial research over the past 20 years demonstrates that children fare as well or better in relative care than in foster care. Studies have led to a consensus that relative preference is a wise policy, one that should be implemented by children's services agencies across the country. The reasons relative preference has become the policy of choice include the following:

1. Children in relative care tend to be just as safe, or safer, than children placed in foster care.[35]
2. Policy makers find that "[e]very child's family, however family is defined (...) is unique and has value, worth, integrity, and dignity."[36]
3. Generally, relative placements provide more stability than placements with foster families,[37] and, if the child has to move, it is likely he or she will move from the home of one relative to another.[38]
4. Siblings more often remain together in relative care,[39] and are more likely to visit one another even if they reside in separate relative homes.[40]
5. Relative caregivers are more likely to continue the ties with the child's birth family.[41]
6. Children in relative care are more likely to remain connected to their community, including their school.[42]

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27 Fostering Connections to Success and Increasing Adoptions Act of 2008, P.L. 110-351 (2008) [hereinafter The Fostering Connections Act or The Act].

28 *Id.* at section 102.

29 J. D. Berrick, *When Children Cannot Remain Home: Foster Family Care and Kinship Care*, 8 THE FUTURE OF CHILDREN: PROTECTING CHILDREN FROM ABUSE AND NEGLECT, Spring 1998, 72-87, at 74; *Report to the Congress, op.cit.* note 30 at 17.

30 TAKE ME HOME, *op.cit.* note 32 at 68.

31 A. FIELD, PENNSYLVANIA JUDICIAL DESKBOOK, 4TH ED. (Juvenile Law Center, Philadelphia, PA, 2004) at 167.

32 R. Geen, *The Evolution of Kinship Care Policy and Practice*, 14 THE FUTURE OF CHILDREN 131-149 (Winter 2004) at 131-136; *Report to the Congress, op.cit.* note 30 at 35, 37-38.

33 *Id.* at 139; *Kinship Care, op.cit.* note 4, at 6-8; *Report to the Congress, op.cit.* note 30 at 42, 51.

34 TAKE ME HOME, *op.cit.* note 32 at 68; *Report to the Congress, op.cit.* note 30 at 39.

35 A. Shalonsky & J. D. Berrick, *Assessing and Promoting Quality in Kin and Non-Kin Foster Care*, 75 SOCIAL SERVICE REVIEW (2001) at 60-83.

36 KINSHIP CARE: A NATURAL BRIDGE, *op.cit.* note 32, at 41.

37 *Kinship Care, op.cit.* note 4, at 36; J. D. Berrick, R. P. Barth, & J. McFadden, *A Comparison of Kinship Foster Homes and Foster Family Homes: Implications for Kinship Foster Care as Family Preservation*, (Child Welfare League of America, North America Kinship Care Policy and Practice Committee, Washington, DC, 1992).

38 TAKE ME HOME, *op.cit.* note 32 at 70.

39 A. Shlonsky, D. Webster, & B. Needell, *The Ties That Bind: A Cross-Sectional Analysis of Siblings in Foster Care*, 39 JOURNAL OF SOCIAL SERVICE RESEARCH 27-52 (2003); Ehrle & Geen, *op.cit.* note 41.

40 TAKE ME HOME, *op.cit.* note 32 at 70.

41 Ehrle & Geen, *op.cit.* note 41.

42 KINSHIP CARE: A NATURAL BRIDGE, *op.cit.* note 32.

7. Relatives express a willingness to adopt or become permanent guardians when children cannot be returned to their parents, but usually require some financial incentives.[43] However, many relatives, particularly maternal grandmothers, are reluctant to adopt.[44]
8. Relative caretakers facilitate parent-child visitation more easily since the caregivers will likely favour reunification and will be less likely than foster parents to compete with the parents for permanent custody of the child.[45] Furthermore, when the court concludes that the relatives can be trusted, authorities or even the relatives themselves can supervise parent-child visitation, usually in the relative's home.
9. Relatives are more likely to invest time and care for a child who shares a blood tie. This includes a willingness to care for the child for as long as needed.[46] Some researchers posit that the level of favourable treatment from a relative will depend on the degree of relatedness between the relative caregiver and the child.[47] The closer the relationship the greater the willingness to invest time, energy, and love.
10. Placement with relatives will generally be less traumatic than placement in an unfamiliar home because children will be living with someone they know and trust,[48] particularly if the non-relative differs racially or ethnically from the child.
11. Relative placement affirms the value of family connections.[49]
12. Placement with relatives supports the transmission of a child's family identity, culture, and ethnicity.[50]
13. Placement with relatives eliminates the unfortunate stigma that many foster children experience.[51]
14. Children placed with relatives are more likely than children placed with non-relatives to indicate that they were satisfied with their placement.[52] Children who are verbal usually express a desire to return home.[53]
15. Fewer children in relative care report changing schools (63%) than do children in non-relative foster care (80%) or group home care (93%).[54]
16. Placement with relatives reinforces the child's sense of identity and self-esteem, "which flows from knowing their family history and culture." [55]
17. Foster care placement can be traumatic[56] and developmentally damaging for children.[57] Some foster children report that they are treated differently than the foster parents' biological children.
18. Children fare better in relative care than in foster care along numerous axes.[58]

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43 TAKE ME HOME, *op.cit.* note 32 at 71; M. Testa et al., *Permanency Planning Options for Children in Formal Kinship Care*, 75 JOURNAL OF THE CHILD WELFARE LEAGUE OF AMERICA, INC. (1996), 451, 453.

44 T. W. Lorkovich, T. Piccola, V. Groza, M. E. Brindo, & J. Marks, *Kinship Care and Permanence: Guiding Principles for Policy and Practice*, 85 FAMILIES IN SOCIETY (2004), at 159-164.

45 B. Needell & N. Gilbert, *Child Welfare and the Extended Family*, *in* CHILD WELFARE RESEARCH REVIEW, VOL. 2, (R. Barth, J. D. Berrick, & N. Gilbert eds., Columbia U. Press, New York, 1997) at 85-97, 92.

46 *State ex.rel. Waldron v Blenek*, 193 N.W. 452, 155 Minn. 313 (1923) at 452-3; M. Scannapieco, R. Hegar, & C. Alpine, *Kinship Care and Foster Care: A Comparison of Characteristics and Outcomes*, 78 FAMILIES IN SOCIETY (1997) at 480-489.

47 D. Herring, *Kinship Foster Care: Implications of Behavioral Biology Research*, 56 BUFFALO LAw REVIEw, at 495-556, 519.

48 *Kinship Care, op.cit.* note 4 at 30; S. S. Chipungu, *A Value-Based Policy Framework*, in CHILD WELFARE: AN AFRICENTRIC PERSPECTIVE (J. E. Everett, S. S. Chipungu, & B. R. Leashore eds., Rutgers U. Press, New Brunswick, NJ, 1991) at 290-305.

49 D. B. Wilson, *Kinship Care in Family-Serving Agencies*, in KINSHIP FOSTER CARE: POLICY, PRACTICE AND RESEARCH (R. Hegar & M. Scannapieco eds., Oxford U. Press, 1999) at 84-92.

50 S. Jackson, *Paradigm Shift*, in KINSHIP FOSTER CARE: POLICY, PRACTICE AND RESEARCH (R. Hegar & M. Scannapieco eds., Oxford U. Press, 1999) at 93-111, 102.

51 *Paradigm Shift, id.*; "Misinformation and ignorance have led to negative stereotypes about foster kids, foster parents and the foster care system." Foster Kids Are Our Kids, find it here.

52 J. D. Berrick, *When Children Cannot Remain Home: Foster Family Care and Kinship Care*, 8 PROTECTING CHILDREN FROM ABUSE AND NEGLECT (1998) at 72-87.

53 TAKE ME HOME, *op.cit.* note 32 at 92; *Also see* A. BRIDGE, HOPE's BOY: A MEMOIR, (Hyperion, New York, 2008).

54 *National Survey of Child and Adolescent Well-Being (NSCAW) CPS Sample Component Wave 1 Data Analysis Report*, April 2005. (U.S. Department of Health and Human Services, ACF, Washington, DC, 2005).

55 KINSHIP CARE: A NATURAL BRIDGE, *op.cit.* note 32, at 13.

56 *Report to the Congress, op.cit.* note 30 at 43.

57 *Kinship Care, op.cit.* note 4 at 30.

58 R. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINNESOTA LAW REVIEW (1999) at 637.

19. The child placed with relatives knows his or her own family, sees family resemblances, and understands how he or she fits into it. Many foster and adopted children search for their families—often spending a lifetime trying to find out where they came from.[59] In addition to adoptees, many people, including foster children, spend time, energy, and resources trying to find relatives and tracing their heritage. The search for birth parents pits adoptees and birth parents in a nationwide legal struggle, the adoptees demand to learn the identity of their birthparents, while the birth parents assert their right to remain confidential.[60] Placement with relatives makes such searches unnecessary.

Systemic Issues

A number of other barriers exist for relatives seeking placement during court proceedings. Each of these legal requirements often results in bureaucratic inertia, delays, and findings of unfitness for placement.

A. Licensing of Relatives for Placement

Many states require relatives to obtain foster care licensing before being considered for placement.[61] Licensing procedure complexities frequently result in long delays before completion which, in turn, lead to delays in permanency for children. For example, licensure includes a home study, often a very time-consuming and complex process, and some states require the completion of a parenting class, usually 10-12 classes over a 2- to 4-month period of time. Different licensing standards for relatives than for foster parents should result in more relative placements. Currently approximately two-thirds of the states permit relatives to care for children in state custody without meeting all the licensing standards required of foster parents.[62] Without sacrificing safety, a more flexible standard would permit children to share rooms or live in so-called sub-standard housing, acknowledging that issues related to poverty should not disqualify a relative.[63]

The Fostering Connections Act suggests an answer to this issue when it amended the law to permit the agency to waive on a case-by-case basis a non-safety licensing standard for a relative foster family home.[64] In this respect, the Act acknowledges the importance of maintaining family ties.

B. Screening Relatives for Placement

Federal and state laws restrict placement of foster children with persons (including relatives) who have criminal and/or child abuse histories. The law applies to caretakers and extends to anyone living in the home where the child may be placed. Thus social workers must assess relative caregivers for any history of criminal behaviour, child maltreatment, and domestic violence.[65] This legal prohibition often disqualifies relative placements.[66] The law usually delineates specific crimes which disqualify a relative, and offers the opportunity for an appeal in cases involving minor crimes or when the crime occurred long ago. The appellate exemption process involves an administrative review within the child welfare agency which the court cannot overrule.[67]

Most state laws preclude juvenile court review of the screening decision.[68] If the court places the child in a home where caretakers have not been cleared, the family would be ineligible for federal and state funding. On occasion appellate court rulings have ordered trial courts to set such a placement aside. On the other hand, the trial courts generally possess greater expertise than the agency in the interpretation of criminal records. After all, it is the court system that has created those records, not the children's services agency. It would be reasonable for the court to be given authority to review the agency's decision to disqualify a relative placement based on past criminal or child abuse records. This authority is similar to the court's role in probate guardianship cases where the court reviews criminal and child abuse records before making the final placement determination. Similarly, the court also reviews criminal and child abuse records when making placement decisions in those states where guardianship is possible in the juvenile court if the parents waive family reunification services.[69]

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59 K. MOORE, GATHERING THE MISSING PIECES IN AN ADOPTED LIFE (Broadman and Holman, Nashville, TN, 1995); B. J. LIFTON, TWICE BORN: MEMOIRS OF AN ADOPTED DAUGHTER (McGraw-Hill, New York, 1975);.

60 E. W. CARP, ADOPTION POLITICS: BASTARD NATION & BALLOT INITIATIVE 58 (Univ. Press of Kansas, Lawrence, KS, 2004); ENDANGERED CHILDREN, *op.cit.* note 9 at 144-5; STRAUSS, *op.cit.* note 94.

61 M. Scannapieco & R. Hegar, *Kinship Foster Care in Context*, *in* KINSHIP FOSTER CARE: POLICY, PRACTICE AND RESEARCH (R. Hegar & M. Scannapieco eds., Oxford U. Press, 1999) at 6.

62 *Findings from the 2007 Casey Kinship Foster Care Policy Survey, op.cit.* note 40, at 4.

63 KINSHIP CARE: A NATURAL BRIDGE, *op.cit.* note 32 at 47-48.

64 42 U.S.C. § 471(a)(10).

65 EFFECTIVE INTERVENTION, *op.cit.* note 145 at 67, 102.

66 *In re Adoption of J.L.S.*, 2009 WL 2014088.

67 *In re Sencere P.*, 140 Cal.App.4th 65, 43 Cal.Rptr.3d 897 (2006), *In re S.W.*, 131 Cal.App.4th 838, 32 Cal.Rptr.3d 192 (2005).

68 G. Seiser & K. Kumli, *California Juvenile Court* (2006 ed.) section 2.127[3] at 2-224; *In re Esperanza C.*,, 165 Cal.App.4th 1042 (2008).

69 *See In re Summer H.*, (2006) 139 Cal.App.4th 1315.

Appendix

Engaging Relatives Checklist

1. Identify, locate, and give notice to each child's father.
2. Steps need to be taken to engage the father in the proceedings.
3. Identify all relatives, locate, and provide them notice of the proceedings.
4. Enquire of each parent about the identification and location of their relatives.
5. Ask the children about the identification and location of their relatives.
6. Encourage the agency to use Family Finding and Engagement protocols.
7. Encourage the agency to use group decision-making practices in order to convene the family and empower them to propose solutions for the child's current situation.
8. Implement court-based mediation as a practice that will convene family members in order to discuss plans for the child.
9. Appoint attorneys before the initial hearing.
10. Insist that attorneys receive the paperwork involving the child before the initial hearing so that they can meet their client and be prepared for that hearing.
11. Encourage a meeting among family members, attorneys, and social workers before the initial hearing. If the agency is unable to provide for a meeting, create a pre-shelter care hearing involving all parties, attorneys, and relatives.
12. Encourage relatives to attend court hearings.
13. Encourage relatives to visit the child, with protective measures, if necessary.
14. Use alternative dispute resolution protocols to help family members overcome past quarrels and grievances.
15. Inform the relatives that they will be considered for placement before any non-relatives.

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Toxi-cour(t) in Quebec

Judge Michèle Lefevbre

Introduction

In 2006 I attended an IAYFJM Conference where I took part in a workshop led by Judge Leonard Edwards from Santa Clara County, California who had set up a drug court project in the Family Court which he chairs. The workshop had a galvanising effect on me.

Afterwards I got in touch with Judge Edwards who sent me a DVD and a document (on the lines of 'Everything you need to know about getting a project like this going') that explained his project in words and pictures.

These two tools were of enormous help to me in opening minds and then convincing both the judicial powers that be and the various players—colleagues, judges, lawyers, social workers and professionals treating drug addicts—of the need to introduce a similar project in Quebec.

What made Judge Edwards's project even more interesting to me were the similarities between the legal systems and society in California and Quebec—

- between 50-90% of cases of abuse or neglect of children needing care are linked to parental drug problems;
- California law, like ours, requires a one year period of care, after which a plan for the long-term future of the child must be drawn up; and
- California law, like ours, requires the parents to be given services and support so that they have a chance to sort themselves out.

The project

In summary, the project sets up a system where, at their first court appearance, drug-addicted parents can volunteer to be assessed and to be given a treatment plan approved by the court

They are then followed up and appear before the court at regular intervals when their progress is recorded and encouragement given.

Judge Edwards identifies a number of factors contributing to the project's success, for example—

- a swift, intensive and sustained response;
- cooperation between the resources devoted to child protection and to drug treatment;
- frequent appearances of the parents before the court, because :
  - it gives an incentive to the parents to persevere;
  - it provides a check that support is being given;
  - the parents can be given encouragement; and
  - parents feel supported on their journey.
- the importance of treating parents with respect and dignity.

Of course there can be set-backs. But even if a parent does falter, it may well be that the treatment provided has been of some help. In addition, as Judge Edwards sees it, the parents in question are generally still of an age to have more children. Taking part in the project may have helped prevent children being born in a state of drug addiction.

Quebec

The Quebec courts have long been concerned about clients with problems—in particular problems of addiction to alcohol, drugs and gambling—and some years ago a Court Committee was set up to look into the possibility of establishing problem solving courts (Tribunaux spécialisés).

This meant that, when I put this project forward, it was looked on favourably by the judges on the Committee and there was similar enthusiasm on the part of the various organisations that had been approached to help get the project going (the centre for family services (youth centre), the detox centre, lawyers and the court administration).

The experts in child protection and in drug abuse gave each other training in their respective fields of expertise and similar training on drugs was provided for judges and lawyers.

Finally, on 15 February 2010 an agreement to set up the pilot project—Toxi-Cour(t)—and to run it for a year was signed by the Court of Quebec, the Centre for Young People and the Centre for Drug Addiction.

The pilot

Financial and administrative constraints mean that Toxi-Cour(t)'s scope is more limited than Judge Edwards's project. As a pilot project, Toxi-Cour(t) deals with only one of the two Centres of Family Social Services (Young People) in the Montreal area. The project is built on close collaboration between the Youth and Addiction Centres and the Court.

So, at their first court appearance, parents who are considered, either by the Youth Centre or the Court, to show drug-related problems that prevent their responding adequately to their children's needs are, with their consent, referred for an assessment. A member of the Drug Centre is on hand in the Court so the assessment can be done there and then. The assessment aims to see whether the parent should be admitted to the programme—basically whether he or she is serious in wishing to deal with their drug problems. If so, a more thorough assessment is made and a treatment plan worked out for the Court's approval.

The parent undertakes the course of treatment and for a period of up to a year must appear before the court at three-monthly intervals. The court records the progress that has been made and offers encouragement.

In parallel, measures to protect the child are put in place. These may include taking the child into care if the situation warrants. A care order often acts as an incentive for the parent to take part in the Toxi-Cour(t) programme, where the aim is for the child to go back to his family environment as soon as possible, but with better equipped parents.

However, if the parent does not complete the treatment, an alternative plan for the child's future will be developed.

Evaluation

After the pilot project's one year of operation, evaluation confirms that it has generally been successful. The main plus points identified were—

- rapid access through the programme to intensive drug treatment;
- the presence in court of a member of the Addiction Centre, allowing an immediate assessment of the parent;
- maintaining the motivation of parents who want to deal with their problems;
- a better relationship between parents and therapists;
- a non-confrontational approach which encourages parents to cooperate and to be open and honest during treatment;
- in many more cases being able to keep the child in his family setting or return him to it.

Some problems are—

- the challenge—right from the start of treatment—of maintaining parents' motivation and drive to deal with their problems; and
- a parent's use of drugs or alcohol is often a symptom of other underlying problems which emerge in a more obvious way when the parent achieves sobriety. This emphasises the need to be able to look in the same way at other issues (housing, work, mental health, domestic violence, abuse and so on). A swift and effective multidisciplinary approach would be the ideal form of treatment.

Conclusion

The future of the Toxi-Cour(t) project is uncertain because of financial problems connected with the various resources involved.

But, whatever happens, Toxi-Cour(t) has had an impact which by itself justifies its existence. The project made all those who took part—judges, lawyers and therapists—aware of the complex problems surrounding addiction. It has also made for closer working links between those dealing with child protection and those working with drug addiction. But most importantly, 50% of the children whose parents took part in the programme have been reunited with their parents within a more reasonable period of time.

The **Honorable Michèle Lefebvre***, Judge at the Court of Quebec, Youth Court of Montreal.

A court with substance—London, England

Derren Hayes

A specialist family court, run from the aptly-named Wells Street in central London, has achieved impressive results in its work helping parents with substance misuse problems recover and have their children returned to them. ***Derren Hayes*** *meets Dr Mike Shaw, its clinical lead, to find out more about the service, the first of its kind in the UK.*

"We tell them at the start 'you need to show within the next nine months whether you care for your child'," says Dr Michael Shaw, consultant child and adolescent psychiatrist and clinical lead for the Family Drug and Alcohol Court (FDAC). For many of the parents who come before the court that nine-month countdown has already started – nearly all have had children taken into local authority care (around half of them at birth) due to their, often longstanding, addiction to alcohol and/or drugs, and if the child is to be returned it needs to be before their first birthday. Many will think this is a mission impossible, and for some it is, but the impressive thing about FDAC is that in many of its cases families are reunited.

Its impressive results have not gone unnoticed by the great and the good either: over the past 12 months it has won the Royal College of Psychiatrist's Best Psychiatric Team of the Year, the London Safeguarding Children Award, and the Guardian Public Services award for children and young people.

FDAC, which is run from the Inner London Family Proceedings Court in Wells Street, London, was set up in January 2008 with funding from the Department for Education, the Ministry of Justice, the Home Office, Department of Health and four inner London councils – Camden, Islington, Westminster and Hammersmith & Fulham - that refer cases to it. FDAC receives six referrals per month from the four authorities on a rotation basis, and a fifth, Southwark, is due to join from April. It is a specialist problem solving court taken from a model popular in the US, and has attached to it a multidisciplinary team of practitioners (nurse and substance misuse specialists, social workers, a family therapist, adult and child psychiatrists) provided by a partnership between the Tavistock and Portman NHS Foundation Trust and the children's charity Coram.

Collaborative approach

The FDAC process differs from that used by standard family courts in that it takes a collaborative approach instead of an adversarial one, and focuses on parental recovery using a step-by-step therapeutic programme. Cases vary from teenagers with their first child to parents who have had numerous previous children taken into care. However, the group FDAC has shown to be most effective with is those in their 30s "because they've probably been muddling through for years and got sick of their drug use", explains Dr Shaw.

If put forward by their local authority most will take the opportunity of going down the FDAC route because of its better results, although you do get "a handful" who spurn the olive branch, says Dr Shaw. "Most will say 'I have a problem that I need to address and I want to get my kid back'. There is a conflict going on inside of them: part of them wants to be a good parent but there are things getting in the way. We try and work with that bit of them that wants to do the best for their families."

He says this positive and optimistic stance diffuses the potential for conflict that is inherent in the family court process where a local authority takes on the role of the prosecution. "Rather than a conflict within the parent it becomes a conflict with the authorities. FDAC encourages a parent to own their failure and that takes a bigger person."

The support network of professionals and family (FDAC puts great emphasis on extended family being actively involved in a parent's recovery) around the addict reinforces the message that "you're not alone", explains Dr Shaw. "You're asking people to go into the room of their nightmares – doing that alone is much harder.

"It's a very different approach to being lectured to that you've messed up and need to pull yourself together."

The process

The week after being put forward for the programme, the parent has an assessment by the FDAC multidisciplinary team, an intervention plan is drawn up and the court and parent sign up to it making it formal. The first, and often hardest, part of the process it to get them abstaining from street drug use. This is because taking drugs and drinking alcohol is ingrained in almost every aspect of their lives. Dr Shaw says: "They often live in very socially and emotionally impoverished circumstances so it is important to encourage them to change the social circles they move in." This, combined with simple changes in how they live their lives, can make all the difference. "Participants keep a diary: for someone so used to living in the now it encourages them to look forward to things in the future," he adds.

Understanding the "dangers" in an individual's life that can influence their substance misuse is an important part of the FDAC process to minimise exposure to them. Social Behaviour Network Therapy – a programme developed in Birmingham – helps parents to build up a picture of the roles that different people play in their lives and their addiction. "We try and migrate their lifestyle from one that is substance misuse-centred to something family oriented and then further down the line a child-centred one," he adds.

Such a lifestyle shift can take up to a year. So, with FDAC making a judgement after nine months as to whether a parent is going to complete the programme successfully, it is paramount they make sufficiently swift changes to their lifestyle. "The approach tests them out and identifies sooner [than standard family court proceedings] those parents that aren't going to make it," says Dr Shaw, who adds that this is so because the "intensity" of the intervention means experts can come to agreed conclusions quicker. "If they are not abstaining or going to treatment then we will have to call it [make a decision about the long-term care of the child] earlier. In those instances most parents will just walk away or say 'I'm doing this because it's the right thing for my child'."

The prescriptive timescales are there because research into attachment suggests the period between 6-18 months in a child's life is the most important for embedding the parent-child bond. "We tell them we want to find a permanent care placement inside 12 months, and to do that we need to make that decision after nine months. That's when the emotional and intellectual language between baby and mum kicks in," he adds.

"When parents are using and withdrawing from substances it is hard for them to be fully 'present' during the time the baby needs them to be there. Parents who are 'online' [in tune] with their children help them make sense of the world at that early stage; those that are 'offline' leave their children to their own devices."

Throughout the programme participants must attend court hearings with the judge (lawyers are not present but the FDAC worker, a social worker and children's guardian attend) and prove that they are meeting the milestones set out in the intervention plan. "The parent will come to the court with their diaries talking about what has happened over the past two weeks and what is going to happen next – it says to the person if you don't keep on track with the timescales then there will be consequences."

After the initial stabilization stage has been negotiated successfully – regular testing takes place to show abstention is being stuck to – participants enter a 12-week intensive treatment programme, usually in the community, using "high quality psychotherapy" (cognitive behavioural and psychodynamic-oriented therapy) to find out what issues lay behind their behaviour.

Dr Shaw explains the rationale behind this stage: "Until they are clear about what is driving their abuse they can't really be free. It is a high risk strategy and some of them will fall off the wagon and we are honest with them about that. You might see everything go to 'pot' [break down]; but that shows you what was put in place was not robust enough to take the strain."

The final stage of treatment looks at developing the parent-child relationship. Parenting skills are built up using a programme popularised by Professor Stephen Scott, consultant child and adolescent psychiatrist at the Maudsley Hospital/Institute of Psychiatry; while a discussion group where parents share experiences gives added support. Video Interaction Guidance (VIG), a clinical-based intervention to understand actions and behaviours by watching recorded footage, has proved to be an effective and powerful tool, says Dr Shaw.

"I'm looking for the positive interaction between mum and child. I may distil hours of footage down to a 15-second clip to show her. These parents don't believe in themselves – many ask 'is that me'?" Dr Shaw says the experience for the parent can be transformational: "The process makes them hungry to learn things about their child."

A three-day workshop on violence in relationships using multi family therapy, a systemic approach for dealing with conflict, is the final piece of the jigsaw.

Evaluation

An evaluation by Brunel University published in May 2011 tracked all 55 families that had entered FDAC in its first 18 months of operation and compared the outcomes against those of 31 families with parental substance misuse going through regular care proceedings. The researchers found that of the 41 FDAC mothers tracked to the final court order 48% were no longer misusing substances compared to 39% of the regular group; while 36% of FDAC fathers were no longer misusing substances compared to none in the comparison group. In addition, 39% of mothers were reunited with their child by the final court order but just 21% were in the regular group.

Other findings from the evaluation showed that the average length of cases was the same in both groups, however it took on average seven fewer weeks for children to be placed in a permanent alternative family when parents could not control their substance misuse. FDAC cases where parents were reunited with children took eight weeks longer due to helping consolidate recovery and safe parenting.

The average cost of delivering the FDAC programme per family is £8,740, a figure equivalent to little more than one month's public care for a child. FDAC also saved £4,000 per child in care placements costs; £682 per family in legal fees due to shorter court hearings; and £1,200 per case in bringing in external experts.

The findings are confirmation of the success of the approach and further evidence that it should be applied in a wider set of circumstances, says Dr Shaw. "You could have a similar approach with adult mental health or domestic violence as the main focus rather than substance misuse." He also thinks the savings will help in their negotiations over FDAC's future funding arrangements – the initial funding ends in March 2012. For Dr Shaw the key to FDAC's success is the combination of finding parents who really want to change their lives, having the support available to offer them the chance to do that alongside a court process that says there will be consequences if changes aren't made. "We're talking about creating a change process: it is the treatment of last resort but some need the muscle of the court to change," he adds.

The impact on the child of substance misuse:

With around 60% of children being taken into care due to parental substance misuse, the impact that drugs and alcohol has on these children's health and wellbeing is substantial.

And due to the near one-third rise in the number of children being taken into care over the past three years (903 in January 2012 compared to 666 in January 2009, according to figures from the Child and Family Court Advisory and Support Service) the number of children likely to be affected by this is expected to rise further.

Even when born, many of the children of substance misusing parents will be dependent on either alcohol or drugs and will need their withdrawal managed through a cocktail of drugs.

"Withdrawal for the child can be pretty unpleasant," says Dr Shaw. "With alcohol we're clear about the long-term impact on the child: the brain has parts it can recover. It is more uncertain with street drugs."

FDAC is increasingly working with parents before they have given birth – "it gives us a three months head start", says Dr Shaw – to give it the best chance to minimise the impact of substances on the developing foetus. But in cases where older children have been taken into care, the effects of living in a chaotic home can already be seen. "They are all at sea," says Dr Shaw. "Foster carers will say they eat like animals, hide food and put it under their mattress because the world feels unpredictable. Food is linked with love and they feel emotionally empty."

The chaotic, and often dangerous, circumstances in which these children live can also leave them more exposed to experiencing traumatic events. "Substance misusing parents have their danger radar down: I know of one case where a young child saw her mother, a street drinker, raped by a stranger she'd invited into the home. Guns are common place in the world of street drugs, and seeing domestic violence is terribly damaging for the child," says Dr Shaw.

FDAC works with the foster carers of the children of its clients building on the routines that have been established and looking at how the parent can structure their world to fit into that. This is supplemented with art therapy to help express feelings about their experiences. Ensuring the parent and child can communicate their feelings effectively makes a successful reunion more likely, says Dr Shaw.

"The child that grows up being loved and listened to feels good about themselves, but the one that misses out feels the world isn't interested in them. If you have a good attachment then it can be treated but it is harder the older they are."

Derren Hayes is the Editor of "YoungMinds"

Published quarterly, YoungMinds Magazine is for everyone concerned with child and adolescent mental health - CAMHS professional or parent, teacher or nurse, clinician or youth worker, trainer or consultant.

Child Contact Centres in England, Wales and N Ireland

Ann Entwistle & Cynthia Floud

"When can I see my Dad?" asks the child whose parents have just separated. And it is not usually an easy question to answer. 'When parents separate, they are not entirely rational' said Sir Nicholas Wall, President of the Family Division of the High Court, at an event in London in 2011 to celebrate 20 years of the National Association of Contact Centres. It is the very absence of reason and the presence of heightened emotions of anger and grief which make it so difficult for parents to answer the question. Many need help. Twenty-five years ago Mary Lower, MBE, now President of the NACCC, recognised this need for help and set up the first Contact Centre for ordinary families in a church hall in Nottingham. There were already professionally-run centres for families who were known to social workers and Probation Officers, where parents could meet their children and be assessed, but nothing for the family who could normally care for their children well, but who needed help to stay in touch in this crisis in their lives.

The potential users of this service are many: there are 350,000 children a year in England, Wales and N Ireland whose parents separate[1]. According to a 2009 poll[2] up to one third lost all contact with the parent with whom they did not live, usually but not always, their father. Mary was inspired by her personal knowledge of the hurt these children suffer, when they lose the regular contact and love of a parent. She ran the Centre with volunteers and spread the news of its success so that by 1991, there were 26 centres and the National Association of Child Contact Centres was formed with Mary as its Chairman.

Now NACCC has 350 contact centres covering almost every county in England, Wales and N Ireland. It sets national standards to which all centres must conform in order to be 'accredited'. Accreditation must be renewed every 3 years and, without accreditation, the centre will not be used by the courts. Families can still refer themselves, but, increasingly over the years, the centres came to be an essential part of the family court system, with most families using them after referral by their lawyers or court social workers.

However they are not seen as 'part of the system' by the users, because the volunteer workers who sit in the playrooms providing supported contact are not *judging* the contact. The aim of the NACCC is to provide 'Safe Contact in a Neutral Environment' and they have always known that contact flourishes best if the parent does not feel threatened by the adults running the centre, as they might if those adults were professionals making reports to the court, recommending more or less contact.

The centres are set up usually once a fortnight at weekends, in any local building which has facilities for play both indoor and out. New volunteers give permission for a check for any criminal past; they then receive training to give them an understanding of the pressures on children and parents, on how to defuse difficult situations and on their duty to safeguard the children from harm. Initially they would work with a senior volunteer to learn exactly what to do. Most volunteers are over 50 years of age and thus bring a wealth of experience to the task. They greet all parents and children and help them say goodbye at the end. Where parents must be kept apart to avoid painful scenes, the non-residential parent has to arrive early to be in place before the children and the other parent arrive; at the end of the roughly 2 hour session, he or she stays on till the children have left. Volunteers are on hand to listen to parents who wish to unburden themselves, for the general aim is to provide a warm and friendly environment as well as a neutral one. There are always at least three volunteers on duty. Sometimes contact is planned with other members of the family such as grandparents. At most centres volunteers do not sit in with a particular family, but generally keep an eye on all the families to check that no violence occurs or other threatening behaviour. All volunteers are trained to notice signs of worrying sexual or other behaviour and would report this to the referrer, but they do not write reports for the court. A record is kept, however, of who attends contact and this information can be useful to a court, as it shows the commitment of a parent.

[1] Dept of Children and Families 2011.

[2] 4000 people, retrospective, surveying the 20 years since the Children Act 1989.

Many families are grateful to the volunteers. A father said," Words are not enough to express the depth of gratitude I owe you all for giving up your personal time to help me, my children and many other families". Not all keep to the plan and volunteers have to cope with feelings of sadness, if a father or mother fails to arrive, but the successes outweigh the failures.[3]

Each centre has a Management Committee. A Coordinator draws up a rota for the other volunteers and takes the referrals, receiving a small remuneration for this. Each region has a Regional Support Manager who works from home and provides advice to centres. Some centres receive rent-free premises or other small subsidies from their local authority, but most have to undertake fund-raising. The NACCC itself has to raise funds to pay its HQ staff who provide training, produce leaflets, run a website and a telephone helpline. The website has a useful 'Find a Centre' facility and much other information for families, lawyers and volunteers.

Originally the centres were staffed entirely by volunteers, but, as the needs and profiles of families changed and as the courts gained confidence in the ability of the volunteers to cope with the more challenging families, where drug addiction, alcoholism and other serious problems occurred, some Supervised Contact Centres were founded with funding from CAFCASS[4]. At these 78 centres, professional social workers supervise an individual contact session and write reports for the court assessing the contact; volunteers work alongside them, opening up the centre, setting out the toys and activities and doing the greeting so that the experience is less threatening. Some of these centres are based in Family Centres and operate during the week.

Judges and magistrates find that all the centres are vital to the work of the family courts. A barrister writes, "[at the centres, the parents] can demonstrate commitment and show that contact can be trouble-free". A Judge has said, "The centres are incredibly helpful. Without them there would be serious difficulties in starting or restarting contact in many cases."

Where there are no family members who could assist the contact or where contact has ceased for years, it is essential to have a welcoming, neutral place for the relationships to be rekindled or even started from scratch. Another judge writes, "[centres] are absolutely vital. I do not believe we could do the job as well without them. The fragmenting of the family unit makes the wider family less accessible as a neutral venue for contact." The law recognises the right of the child to have contact with both parents, but the parents do not always see the point of that right. Thus the court is where the parents fight their battle; the contact centre is where the child can benefit from the protection of the law.

NACCC currently holds the Presidency of the European Confederation of Contact Centres [CEPREP]. In no other European country do volunteers run contact centres. But the trained volunteers of England, Wales and N Ireland have shown that they can make a major contribution to the provision for child contact, which the courts can trust and rely on. This suggests that other countries could expand their own provision with the careful use of volunteers in future, which, in turn, would mean that more children could get an answer to that difficult question, "When can I see my Dad?"

Ann Entwistle and **Cynthia Floud*** are retired Family Court Magistrates in England. Ann was a Trustee of ChildrenLAW UK and Cynthia is a member of the Chronicle's Editorial Board.

[3] National Association of Child Contact Centres, "Total number of contact sessions, families, children, volunteers and paid staff at NACCC child contact services", find it here, 14 May 2012.

[4] The court social work service.

NACC Statistics

Total number of **contact sessions** at Child Contact Centres

	2007 – 2008	2008 - 2009	2009 - 2010
Supported	8259	8252	8961
Supervised	7396	9925	7438
Supported and supervised	16682	11211	25141

Total number of **families** using Child Contact Centres

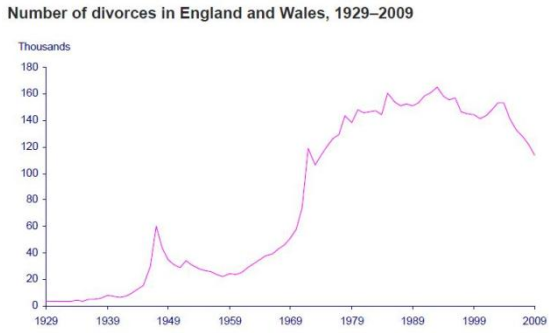
	2007 – 2008	2008 - 2009	2009 - 2010
Supported	6923	5767	7710
Supervised	621	684	811
Supported and supervised	2293	1104	2348

Total number of **children** at Child Contact Centres

	2007 – 2008	2008 - 2009	2009 - 2010
Supported	7235	6438	10085
Supervised	690	342	590
Supported and supervised	2175	1297	2781

Statistics on Divorce and cohabitation in England and Wales

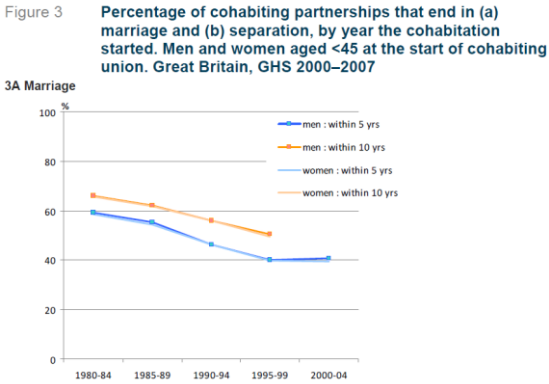
Number of divorces in England & Wales[1] (1929-2009)



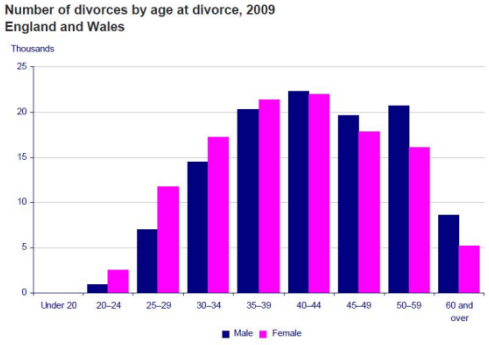
Source: Office for National Statistics

Total number of divorces
2008—121,708
2009—113,949.

Cohabiting partnerships in England & Wales (2000-2007)

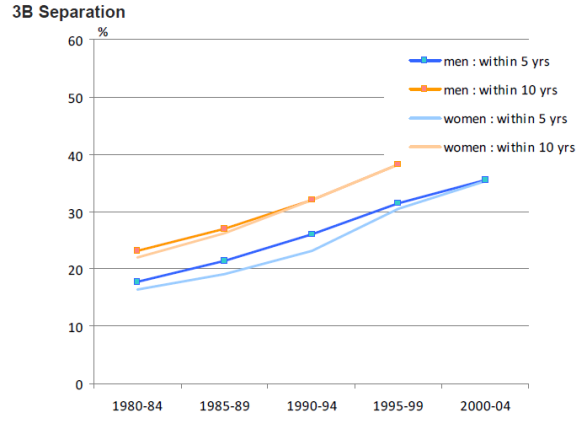


Number of divorces by age at divorce in England & Wales (2009)



Source: Office for National Statistics

Separation in cohabiting partnerships in England & Wales (1980-2004)



Source: CPC GHS time series datafile; see also note to Table 3

[1] Office for National Statistics (ONS) England & Wales

Step-parents' responsibility—maintenance for step-children, Dutch and international perspectives

Judge Paul Van Teeffelen

Introduction

In a recent article[1] in *Echtscheidingsbulletin (Divorce Bulletin)* I argued in favour of a simplification of the current system of maintenance payments for children in the Netherlands, saying that there would be a significant improvement in the system if the responsibilities of step-parents for providing maintenance were not given the same weight as those of the biological parents. Making the responsibility of the step-parent subsidiary would greatly reduce the complexity of the system—the legal parents would have prime responsibility for the support of their children and would not look to the step-parents for possible help.

In my view, there are good arguments for reducing the responsibility of step-parents in this way and the law should be changed accordingly.

This article considers whether there is a better basis for this proposition than the arguments I put forward in the *Echtscheidingsbulletin.* Indeed, one might ask whether step-parents should have to put up with a maintenance system for step-children that is as onerous as the current one.

Why and when was this responsibility put on the same footing as that of the legal parents? Was there a strong political consensus for its introduction? Once it had come into effect, was there no criticism? What were the arguments?

These are questions that need to be considered carefully before contemplating any change. The main objective of this paper is to analyse the relationship between the step-parent and the responsibility that they have to provide maintenance.

Unlike an earlier article[2], this one is not written from the children's point of view. But it goes without saying that any legal change must not damage step-children.

It is worth asking these questions in an international context. When the Netherlands adopts a position on step-parents that is out of line with other countries, the arguments for taking such a stance need to be good ones.

For comparison purposes, I will restrict consideration to the following questions. The first question in each country is—who has primary responsibility for the financial support of children and are step-parents involved? The second concerns priorities—is any responsibility that the step-parents may have on an equal footing to those with primary responsibility or does it rank lower down?

An immediate answer to these questions can be found in a brilliant recent thesis by Merel Jonker[3], describing the legal position of (step-)children in Norway and Sweden. A little over a decade ago, Tilly Draaisma submitted a thesis on step-parenting[4]. She looked at the legal position of step-parents in the Netherlands as well as in Switzerland, Germany and England. Unfortunately, only the situation in Germany could be updated, meaning that the position of step-parents in Switzerland and England cannot be covered. However, it was fairly straightforward to add details of our other neighbour, Belgium, to those of Norway, Sweden and Germany.

The history of step-parents' responsibilities in the Netherlands

Step-parents' responsibilities for the financial support of their step-children are set out in articles 395 and 395a of volume 1 of the Civil Code, forming part of Chapter 17, Maintenance.

1 'Vereenvoudiging van het kinderalimentatiestelsel, manoeuvreren tussen rechtvaardigheid en eenvoud', Echtscheidingsbulletin 2012, fasc 4.

2 'De belangen van het kind gewogen, de werking van art. 3 IVRK' in 'Wetgeving en rechtspraak op het terrein van het gezagsrecht', Tijdschrift voor Familie-en Jeugdrecht 2011, fasc 10, pp. 257-261.

3 'Het recht van kinderen op levensonderhoud: een gedeelde zorg. Een rechtsvergelijking tussen Nederland, Noorwegen en Zweden', Boom Juridische uitgevers, reeks Familie & recht, 2011.

4 'De stiefouder: stiefkind van het recht, een onderzoek naar de juridische plaatsbepaling van de stiefouder', VU Uitgeverij, Amsterdam, 2001.

The two articles read as follows:

> **Art. 1:395**: Except as specified in section 395a below, *during his/her marriage or civil partnership*[5]*,* a step-parent is not to be held responsible for child maintenance other than for his/her spouse's or civil partner's children below the age of majority and *belonging to the [step-parent's] family.*
>
> **Art. 1:395a (2)** During his or her marriage or civil partnership a step-parent is responsible for the costs set out in the previous sub-section (means of subsistence and education costs) in respect of adult children of his/her spouse or civil partner who belong to the [step-parent's] family and are below the age of 21.

These two articles were brought in only in 1970 when the new Civil Code came into force. They had formed part of a draft Bill known by the name of its proposer, Meijers[6].

Meijers sought to extend the responsibilities that then applied to maintenance in several respects—not only of step-parents for step-children belonging to their family, but also of brothers and sisters for each other and grand-parents for their grand-children.

During Parliamentary debates at the end of the 1950s, a divide opened up between the proponents of an extension of responsibility for family support and those who wanted to limit it. The debate centred around the responsibility of grand-parents for their grand-children. Its introduction was rejected in the Upper House by a single vote[7].

During these debates the financial responsibility of parents and step-parents for their children and (step-)children was naturally considered. Various MPs could not understand why the proposal to widen financial responsibility of step-parents for their step-children had taken so long[8] and welcomed the extension. However, others thought that the step-parent's responsibility should be subordinate to the original parent's and argued for a clause expressly on these lines[9]. But the Minister did not agree with this view[10].

The people who would be covered fall into two groups. One group—consisting of the partner, ex-partner, parents, children and step-children—takes priority over the second, consisting of the children of the new union and step-parents arising from that union[11]. However, no priority can be assigned to members of the first group. In the words of the Minister, setting priorities would be awkward, because in almost every hearing, it would be argued that there was someone further up the chain who should contribute financially. In deciding how much each person should contribute, it would be necessary to look into everyone's finances. But not only that—it would also be necessary to consider the relationship between each person and the child. There is a stronger link between a parent and child than between a step-parent and a child of a different union. In any case, legislation cannot take all the possibilities into account and the clause in question does not rank parents in respect of their financial responsibility. Hence the Minister's reply[12].

Over a decade went by between the Parliamentary debates and the introduction of the new Civil Code. In a report in 1971—soon after the introduction of the step-parent's responsibility—the Commission for the Review of the Law on Child Protection sharply criticised it and recommended its repeal. The Commission doubted that it was as much an improvement as the MPs would have liked us to think—

> "Conflicts will arise between the step-parent and the biological parent of the child either about the requirement to pay or the amount. The biological parent will hope to get a reduction because of the step-parent's responsibility, while the step-parent will be unwilling to contribute at all if the biological parent has been neglectful. In summary, the arrangement is hardly a solution in those situations where it is difficult to apply. The children involved run a distinct risk of finding themselves in the middle of a battle between two opposing camps. In cases where relationships are good (step-parent and biological parent each contributing a given amount by agreement) the arrangement is unnecessary."[13]

In an earlier edition of Asser[14], J K Moltmaker argued against the high position in the hierarchy, assigned to step-parents in article 1:392 (2)—

5 The term in Dutch is *geregistreerd partnerschap* or *registered partnership.*

6 Parlementaire Geschiedenis, p. 721.

7 Parlementaire Geschiedenis, pp. 721-767.

8 Parlementaire Geschiedenis, p. 719.

9 Parlementaire Geschiedenis, p. 1431.

10 Parlementaire Geschiedenis, p. 1442.

11 See the current article 1:400 (1) of the Civil Code,. To the first group were later added the current and the previous civil partner.

12 Parlementaire geschiedenis Invoeringswet, pp. 1442-1443.

13 Report of the Commissie voor de herziening van het Kinderbeschermingsrecht, 's-Gravenhage, 1971, pp. 118 et 119.

14 Asser-De Ruiter-Moltmaker, 1992, nº 1093.

because step-children do not have a reciprocal responsibility towards their step-parents, who have no legal claim on their step-children's estate. He thought it inappropriate to place such a one-sided obligation on step-parents.

In her thesis[15], Tilly Draaisma recommended the repeal of articles 1:395 and 1:395a on similar grounds. For her, that would remove the present unfairness in the status of the legal step-parents (no rights under the law, but a duty to pay) as well as between legal and *de facto* step-parents.

J de Boer is in fact the only commentator since 1970 who has come out in favour of the responsibility placed on the step-parent. He sees advantages in a system where the responsibilities of parents and step-parents are on an equal footing because in each case the judge can determine what the step-parent's contribution should be, in addition to those of the parents.[16]

Implications of step-parents' responsibilities in the Netherlands

A step-parent (in the legal sense) is the *spouse or civil partner* of a person having one or more children, but who is not the parent of those children. The partner of a parent to whom he or she is neither married nor in a civil partnership is not a step-parent (in the legal sense). The same still applies if—in the sense of article 8 of the ECHR—a family exists between the civil partner and the children of whom he or she is not the biological parent.[17] [18]

Step-parents do not legally have parental authority.[19] However, a married step-parent (but not a civil partner) has an indirect responsibility to support and educate the children belonging to his or her family.

Article 1:82 of the Civil Code requires a married couple jointly to look after minor children belonging to their family, to educate them and bear the costs of their support. In 2001 this article was amended, replacing the words *their children* by *children belonging to their family* in order to remove any doubt that the responsibility applies equally towards step-children and adopted children.

In this article we go deeper into the subject to consider the situation that often occurs where the legal step-parent *does not have the same parental authority* over his or her step-children.[20]

Under articles 1:395 and 1:395a, minor and young adult step-children have a clear *right to maintenance* from their step-parent which, under article 1:392 (2), is on the same footing as the responsibility of their legal parent.

In determining the amount of maintenance, account is taken—on the one hand—of the needs of the beneficiaries and—on the other hand—of the financial means of the person responsible (article 1:397 (1)). Under article 1:392 (2) (step-)children are not involved when the responsibility arises only because of the need of the beneficiaries.

Where the burden of maintenance cannot be met in full or in part, article 1:399 allows the judge to consider the behaviour of the beneficiaries. Under this article, the behaviour of minor (step-)children is excluded, however wounding it may be. The judge is, however, allowed to reduce the responsibility of the (step-)parents to maintain and educate their young adult children if their behaviour so warrants.

It is only during marriage or civil partnership with the parent that the step-parent has responsibility to support children *forming part of the family*. This term has to be understood in a wide sense. Step-children who are temporarily being looked after and educated outside the home or who are away at boarding school or university also belong to the step-parent's family[21]. If the step-parent and his or her spouse or civil partner stop living together, responsibility for maintenance ceases there and then. It follows that—should divorce occur—no maintenance order can be imposed on the step-parent in respect of his or her step-children[22].

Other obligations for maintenance

Given that the responsibilities of step-parents and legal parents for maintenance are on an equal footing, the Netherlands Supreme Court has said that the financial means of everyone responsible for supporting the child should be calculated. After a divorce, they are the two parents, after the remarriage (or new civil partnership) of the parent having custody, the (new) step-parent is added to the list. In theory, the amount is a function of the means of each person in relation to the needs of the child (or young adult).

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15 See note 5, p. 266.

16 Asser-De Boer, Personen- en Familierecht, 2010, p. 957.

17 HR, 8 April 1994, NJ 1994, p. 439.

18 Since his/her ex-spouse has already lived with her/his partner for several years without marriage or civil partnership, the partner without care of the children will hope to pay a lower amount of maintenance. From the male perspective, the law has been slow in keeping up with developments in social relations. However, the Court of Leeuwarden has said that it is not its role to change the law. Hof Leeuwarden .NJ 1994, p. 434.

19. Since 1998 it has been possible for joint authority to be exercised by parent and step-parent, following article 1:253t of the Civil Code, but this 'authority' will shortly not meet the conditions required.

20 Step-parents (either married or living in a civil partnership) who have parental authority face a responsibility for maintenance which is not limited to the period of time the child belongs to their family., see article 1:253w of the Civil Code. This sits uneasily with the step-parents' responsibility set out in articles 1 :395 and 1 :395a

21 Parlementaire geschiedenis invoeringswet, p. 1431.

22 HR, 7 February 1975, NJ 1975, p. 245.

Finally, the result may be adjusted by taking account of the relationships of the parent and step-parent with the child[23]. One of the main factors that the judge takes into account in each determination is the stronger parental link that exists between parent and child than between step-parent and step-child[24]. One indication of the strength of the link may be that—if the step-child bears the step-parent's family name—any substantive relationship between the child and the other parent may have been weak or non-existent over a long period[25]. Nevertheless, the mere fact that the child has his or her step-father's name does not absolve the father of financial responsibility[26].

As mentioned above, J de Boer sees value in a system that places equal responsibility on parent and step-parent, in that the judge can work out in each case how much the step-parent should contribute in addition to the parents' own contributions[27].

But the system sketched out by the Supreme Court is not only highly complex but is also impractical and generates a great deal of conflict.

In a recent article M A Zon[28] considers maintenance in reconstituted families.

Zon identifies the following frequently occurring situations—

- the father is unable to provide fully for his own children and ex-wife because of his marriage to a new partner who has children whom he has to support;
- the father wants to pay less because the mother has married a new partner who is under an obligation to support the children in their family.

Zon describes the stages that have to be gone through to arrive at an exact figure for the amount of maintenance due to each of the children in reconstituted families. What are the needs of each child? Who are the people with a responsibility to maintain these children? What are the financial means of each of them? How should the financial means of a parent be divided between the children for whom he/she is responsible? How should the financial means available for particular children be allocated among the people with maintenance responsibilities?

Finally, does there need to be an adjustment to allow for the quality of the relationships between the adults and the children?

In a note to one of the Orders of the Supreme Court[29] which concerned the division of a parent's assets between children for whom he was responsible who had been born in different relationships, Justice Wortmann rightly gave his view that it required an extremely complicated system that would be very difficult to realise in practice. A further drawback is that full application of the Order inevitably leads to new applications to adjust the maintenance for other children not covered by the initial proceedings.

Step-parents in the other four countries

As we shall see in what follows, in the other countries the status of *step-parent* arises mainly through *marriage* to a parent who has the care of a child from a previous relationship and who brings that child into the family. Comparable to civil partnerships in the Netherlands, step-parenthood in Belgium also arises through *legal cohabitation*. Sweden is the country that has gone furthest, by also considering as a step-parent an *unmarried* partner who lives with the parent and child.

Step-parents in Germany[30]

Under German law, married parents have the duty and the right to look after a minor child (in Germany this is known as *Elterliche Sorge*). The German idea is that step-children are the children of a partner who enjoys the right of *Sorge* (*care*) and brings those children into the marriage. It is generally accepted that step-children live in the partners' household and are brought up there. There can be no question of step-children if they live in a household where the parent is not married to his or her partner.

Under German law a responsibility for *Elterliche Sorge* cannot fall to a step-parent in respect of step-children. There is no direct legal duty (or right) for the step-parent to support or educate his or her step-children. Accordingly, there is *no legislative requirement on step-parents to provide maintenance for step-children*. As couples have a duty to support each other within the framework of marriage, the question then arises whether a step-parent living with a partner may actually be under an obligation to support the step-children. The majority view is that a step-parent is not bound simply by virtue of marriage, because he or she cannot be forced to make a contribution that the law does not explicitly impose.

23 HR, 11 November 1994, NJ 1995, p. 129.

24 See the opinion of the legislature in section 2 above.

25 HR, 22 April 1988, NJ 1989, p. 386. In this case, the biological father had not seen his child for fourteen years and the child had lived for ten years in the family of the mother and step-father and the child bore the step-father's name The father's contribution was reduced to zero by the Netherlands Supreme Court.

26 For example, HR, 28 May 1993, NJ 1994, p. 434.

27 Asser-De Boer, Personen- en Familierecht, 2010, p. 957.

28 'Kinderalimentatie in samengestelde gezinnen', Echtscheidingsbulletin 2011, fasc 11/12, pp. 182-187.

29 HR, 22 April 2005, NJ 2005, p. 379.

30 Based on the thesis cited above at note 5, pp. 152-174, in particular point 3.2.3. 'De stiefouder en zijn bijdrageplicht'. According to an expert on the issue in the Ministry of Justice of the German Federal Republic, the description remains up to date.

However, it is quite possible that the step-parent will undertake to support his/her partner or step-children through an agreement, provided that he does not contribute more than the parent is liable for. According to the majority view, taking the child into the ménage is not—of itself—enough to imply that a step-parent is contracted to support his step-children. Even if a step-parent does voluntarily agree to provide maintenance for his/her step-children, this obligation is null and void if the partners permanently dissolve their partnership or put an end to their marriage. Moreover, given good grounds, the step-parent can, at any time, seek to annul the contractual arrangement for maintenance.

Step-parents in Belgium[31]

In Belgium the responsibility to support, bring up and educate lies with each parent who is recorded as the child's parent. The form of acknowledgement is of no great importance, since it applies within and outside marriage and by birth or through adoption.

One becomes a step-parent *through marriage* with the parent concerned. The step-parent does not gain any parental authority.

As in the Netherlands, a step-parent married to a parent must contribute to the expenses of the marriage (article 221 of the Civil Code). These include the costs of educating children forming part of the family, even if they are not children by birth. This corresponds to article 1:82 of the Netherlands Civil Code. In Belgium, similar duties fall to anyone *legally cohabiting* with the parent (article 1477 para 3-5 of the Civil Code).

There is a further *very limited* duty of support in Belgium for a partner to support step-children *immediately after the death* of their parent. This need be no more than a simple sum of money. Moreover, the step-father's contribution is limited to whatever he will inherit from his deceased partner and any benefits received on marriage by way of gift or testimony.

Thus the step-father's duty of support consists *entirely* of what he has freely acquired from his late partner. He does not have to meet his obligation with the goods he has received, but with their value. If the step-parent's rights consist of a life-interest, the present value of that right of enjoyment must be determined once and for all so that his obligation can be clearly defined.

Step-parents in Norway[32]

Although the Norwegian state contributes in various ways to the costs of caring for children, there is no doubt that parents have a duty to support their children. And the duty is not restricted to parents with parental responsibility. Although not all (legal) parents have parental responsibility, those parents are certainly under an obligation to provide support. Since 1956 being a biological parent has constituted the sole grounds for maintenance. Where fathers are not married and do not acknowledge their child, the state is responsible for making a judicial determination of paternity. In this way, the legal status of the child is protected, because the state intends that every child should have *two* legal parents.

In Norway the duty of maintenance stems from the law of parenthood, based on the law of filiation. *The duty of maintenance does not depend on social parenthood, a step-parent (whether married, in a civil partnership or unmarried) has no financial obligation towards his step-children.*

Step-parents in Sweden[33]

In Sweden biological parenthood once occupied a central position as the legal basis for the provision of maintenance. In the twentieth century an alignment took place between biological and legal parenthood. The amendments to the law aimed to strengthen the legal position of children born outside marriage. Before 1917 biological parenthood was the basis for the duty to provide maintenance. After 1917 the (presumption of) biological parenthood formed the reference point for legal parenthood. In 1920, in addition to the introduction of an obligation on parents to support their children born within marriage, a similar obligation was placed on step-parents.

This obligation remains in the current law. Although originally only *married* step-parents had a duty to provide maintenance, from 1978 non-married partners of a partner caring for a child were under such an obligation for any step-children they had with that parent. *This responsibility replaces the duty on the parent who does not have care of the children*. There are two situations when a step-parent must provide support. First, when the step-parent has a higher standard of living than the parent who does not have care of the children. Second, when that parent is not (completely) fulfilling his responsibility.

31 Summary based on J. et M. Tremmery, Onderhoudsgeld voor kinderen, Anvers-Apeldoorn, 2005, pp. 31-52, in particular part III, 1.2.2. De stiefouder, ainsi que sur la base de F. Swennen, Het personen- en familierecht, 2e édition corrigée, Anvers-Cambridge.

32 Thesis cited above at note 4, pp. 73-82, in particular pp. 78 & 81.

33 Thesis cited above at note 4, pp. 82-101, in particular pp. 85, 92 & 93.

As the requirement on the step-parent is a substitution and as the child has the right to support from the state, there is rarely a need for maintenance from the step-parent even when the parent who does not have care of the children does not fulfil his responsibility.

Conclusions

1. The status of step-parents is unfair and thus wrongly set out in Netherlands legislation.

A step-parent has no legal authority but does have a direct obligation towards his step-children under articles 1:395 and 1:395a of the Civil Code. If he is married or in a civil partnership, this obligation follows indirectly from the link to the spouse or civil partner (article 1:82 of the Civil Code in combination with article 1:80b). There is a difference between the status of step-parents if they are married or in a civil partnership.

Even if the legal step-parent is given authority, his obligation to provide for his step-children follows him after the end of his cohabitation.

A step-parent who is neither married nor in a civil partnership but is cohabiting with the parent and his step-children has neither legal authority nor an obligation to provide for his step-children.

2. None of the other four countries (Belgium, Germany, Norway and Sweden) places a duty on a step-parent to provide maintenance on an equal footing to the obligation placed on the legal parents.

To the extent that an obligation is placed on the step-parent (not in Germany or Norway), it is indirect or acts as a substitute for the parent who has care of the child (Netherlands before 1970 and Belgium) or as a replacement (if necessary) for the parent who does not have care of the child (Sweden).

In summary, there are several reasons for a better structuring of a step-parent's responsibility in the Netherlands to provide maintenance, making it a replacement where necessary for the parent who does not have care of the child.

The following amendment to the law would be needed. Article 400 (1) should be recast on the following lines—

> *If a person is required to pay maintenance to two or more people and if his or her financial means are not sufficient to make the payments in full, his/her children* [delete "and step-children"] *below the age of 21 take priority over other beneficiaries and his partner, previous partner, civil partner, previous civil partner, his parents and children of the age of 21 or over and his/her step-children* [for step-children delete "of the age of 21 or over"] *take priority over his/her children by marriage and his/her step-parents.*

Articles 1:395 and 1:395a would not need amendment.

The result would be that the previously existing rules of priority for children and step-children would apply only to children, and step-children would come after the group of children (below the age of 21).

My view is that complete repeal of articles 1:395 and 1:395a would unnecessarily worsen the financial position of step-children.

This small change—budget-neutral as far as the state is concerned—would make the duty to provide maintenance for step-children subordinate to the obligation towards children. Legal parents of minor children and young adults have primary responsibility for the costs of supporting and educating their children. Furthermore, that corresponds precisely to their role under the law seeking to support continued parenting after divorce which came into force on 1 March 2009. It seems fair and equitable that a step-parent should only be called upon financially after the legal parents themselves. The maintenance calculations for reconstituted families should be simplified compared to the previous system[34].

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[34].A longer and more difficult analysis would be needed to remove the imbalance between legal and *de facto* step-parents.

Selected aspects of Press Law— Polish Court Practice

Dr hab. Joanna Misztal-Konecka

Introduction

A close look at court practice in Poland reveals that the press, radio and television are showing a growing interest in covering legal proceedings; this does not only concern instances of criminal action, but also purely civil proceedings, especially involving celebrities as parties, and cases pending before the family courts, in particular involving juvenile delinquency and the care of minors.

The legal framework for the participation and reporting by the mass media of court trials in Poland is laid down in the provisions of the Act of 26 January 1984 Press Law.[1] In addition, procedural arrangements are of significance— the 6 June 1997 Code of Criminal Procedure for criminal matters and juvenile cases in reformatory proceedings[2] and the 17 November 1964 Code of Civil Procedure for civil matters and juvenile cases falling under guardianship proceedings.[3]

The sources of a journalist's knowledge of an on-going trial

Reliable, and therefore true, reporting of events is one of the responsibilities of the press, radio and television under Polish law (Article 6(1) of the Press Law). At the same time, only such reporting that is factual may meet the requirement of proper public information without jeopardizing the interests of the justice system.

Still, it cannot be denied that not everything that is collected by a journalist meets the criteria of information publishable out of consideration for the social interest. Moreover, some data should be kept confidential as it may concern very intimate aspects of a person's life. Such reservations must be taken into account when interpreting the provisions of the Press Law and procedural laws discussed below.

A press, radio or television journalist may acquire knowledge of the subject matter of a court trial – besides information gathered when pursuing investigative journalism – through their own observation while in the court room, from a video/audio recording of a trial or from the relevant court files.

Journalist's presence during a court hearing

In criminal cases, besides the persons involved in the proceedings, the hearing may be attended by a person over the age of 18 years, unarmed, and in a condition compatible with the court's dignity (Article 356 of the CCP). Exceptionally, however, it is possible to hold the hearing *in camera*, which obviously makes a journalist's entry in the court room impossible. This particularly happens in the case of hearing witnesses who are obliged to preserve an official secret, or one related to their office or profession (Article 181(1) of the CCP) or anonymous witnesses (Article 394(4) of the CCP); also, when the public nature of the hearing may lead to a disturbance of public order, offend decency, disclose circumstances which, in consideration of significant state interests, should remain secret, or infringe important private interests (Article 360(1) of the CCP).

In civil matters, admission to a court room is granted not only to the parties and summoned persons, but also to anyone interested who is of legal age (Article 152 of the CCivP).

A non-public ie *in camera* hearing can be decided *ex officio* by the Judge where, if open to the public:

- it is likely to threaten public order or morality, or
- if information to be disclosed is protected as officially classified (Article 153(1) of the CCivP), or
- if proposed by either party, if the reasons given by a party are considered by the court to be justified, or
- when the details of family life are to be unveiled (Article 153(2) of the CCivP) or
- if the proceedings are held for connubial matters (Article 427 of the CCivP) or
- in cases involving the guardianship of minors or

[1] Journal of Laws No. 5, item 24 as amended (hereinafter the Press Law).

[2] Journal of Laws No. 89, item 555 as amended (hereinafter the CCP).

[3] Journal of Laws No. 43, item 296 as amended (hereinafter the CCivP). Specific matters concerning minors are regulated by the provisions of the Act of 26 October 1982 on Juvenile Proceedings (Journal of Laws of 2010, No. 33, item 178 as amended – hereinafter the AJP).

- in juvenile proceedings if the juvenile's personal(individual) rights are given precedence (Article 575 of the CCivP), unless the public nature of the hearing is justified by educational considerations (Articles 45 and 53(1) of the CCivP).[4]

The journalist's participation in the hearing is limited to passive listening and observation of the trial proceedings, but he or she may be allowed to take notes or make drawings.[5] It should be stressed, however, that any dissemination of such information must not violate the provisions of the Press Law, the Personal Data Protection Act[6] and the Civil Code.[7]

Recording a court hearing by a journalist

In criminal proceedings, the court may permit the representatives of radio, television, film production and the press to make video and sound recordings from the trial by means of equipment, if this is reasonably in favour of the public interest, and provided that such activities do not obstruct the hearing, and that it is not contrary to any important interest of any participant in the proceedings (Article 357(1) of the CCP). At the same time, the court determines the conditions to be applied to the recording of the trial. Rightly, the court takes its decision after hearing the arguments of the parties to a trial.[8]

As regards civil law, there were no provisions regulating the video or sound recording of processes before 1 July 2010. On that date, the obligation was introduced for **the court** - only if technically viable - to prepare audio records (or alternatively a video and sound recording) of the entire public hearing.

As far as the audio or video and sound recording of a civil hearing by mass media representatives is concerned, the literature on the subject expresses somewhat contrary views that:

- the court itself (irrespective of the parties' positions) takes a decision as to give or not to give consent for the recording of the trial, while restricting the publication of the recording,[9]
- the court may allow the recording only after having secured the agreement of all the parties present,[10] and that
- the consent to the recording incorporates the consent to releasing it in the public domain.[11] Regrettably, the court practice in this regard has not been uniform and a dispute may only be resolved by legislation. It transpires that under the effective Code of Civil Procedure it is justified to assume that it is not acceptable for the court to consent to the recording of the proceedings by a journalist without seeking the approval of the parties who may lose their privacy. The discrepancy between the Code of Criminal Procedure and the Code of Civil Procedure furnishes arguments for this assumption, much like the fact that a microphone or video camera in the court room may prevent natural reactions or behaviour, which is against the nature of justice-seeking. It should be noted that the ban on recording the trial does not rule out the opportunity for the journalist to listen to the proceedings, take notes, etc., that is, gather any necessary data to be able to prepare news coverage on the event.

What is more, it should be noted that the court's and parties' consent to record the proceedings does not entail the consent to making it public: any relevant limitations are stipulated in the Press Law and the Civil Code.[12]

Access to court files

In accordance with the provisions of the Code of Criminal Procedure, the parties as well as their defence counsels, legal representatives and statutory agents may be permitted to examine the files (sentence 1 of Article 156(1) of the CCP). However, these files may also be made accessible to other persons with the consent of the president of the court (sentence 2 of Article 156(1) of the CCP).

4 On the hearing being closed to public, see Miczek, Z. "Jawność posiedzeń sądowych w postępowaniu cywilnym i jej wyłączenia (zagadnienia ogólne)." *Ius et Administratio* 2(2005), pp. 85-93.

5 Sobczak, J. (2008) *Prawo prasowe. Komentarz.* Warszawa, p. 510.

6 Personal Details Protection Act of 29 August 1997 (Journal of Laws of 2002, No. 101, item 926).

7 Act of 23 April 1964 the Civil Code (Journal of Laws No. 16, item 93 as amended).

8 Bieńkowska, B. T. "Spór stron przed sądem w świetle zasady jawności." *Wojskowy Przegląd Prawniczy* (3-4)1997, p. 74.

9 Kordasiewicz, B. (1991) *Jednostka wobec środków masowego przekazu.* Wrocław-Warszawa, pp. 55-56.

10 Brol, J. "Sądowe aspekty prawa prasowego (wybrane zagadnienia)." *Nowe Prawo* 10(1984), p. 10.

11 Sobczak, J. *op. cit.*, p. 516.

12 Stanowska, M. "Udostępnianie dziennikarzom akt sądowych lub prokuratorskich." *Przegląd Sądowy* 10(2001), pp. 78-79.

In the Polish civil committal proceedings, cases are essentially heard as litigious (award of fees or charges, action *in rem*) and non-litigious proceedings (guardianship matters, acquisition of inheritance, abolition of joint ownership). With regard to non-litigious proceedings, pursuant to Article 525 of the CCivP, the case files are available to anyone who is able to sufficiently justify the need to review them; by contrast, in litigious proceedings, only the participants and parties to the litigation have the right to examine such files (sentence 2 of Article 9(1) of the CCivP). It naturally follows that it is not permitted to give access to court files to any individual (including journalists[13]) unless they are participants or parties to the proceedings. In view of the fact that access to files is an opportunity to gather information with utmost care and accuracy and additionally review it (especially by contrasting it with the information obtained throughout the open hearing), the Polish literature on the subject proposes that similar regulations be put in place pertaining to all civil and criminal matters, which would open access to files to journalists upon the order of the president of the court or an authorized judge after the journalist registers interest and reveals the reasons for being interested in a case.

The prohibition on expressing an opinion on judicial rulings

Having been granted access to an open hearing, having recorded it and having reviewed the court files do not entitle the journalist to use (and therefore share) the collected information without any limitation. In particular, Article 13(1) of the Press Law prohibits expression of— in the press, radio and television— an opinion on the outcome of the proceedings before the ruling in the first instance has been given. This regulation is valid for both a criminal and civil process.[14]

It is intended to prevent the mass media's influence over the adjudicating body, as well as protecting the defendant's good name prior to the first instance ruling.

Prohibiting the publication of the defendant's image (eg photograph) and personal data

Of much greater practical significance than the ban on expressing an opinion on the expected judicial ruling is the standard laid down in Article 13(2) of the Press Law which prohibits press publication of the images and personal data of persons who are subject to preparatory proceedings or litigation, and images and personal data of witnesses, the aggrieved or injured parties, unless they give their consent to it. Importantly, in the Polish judicature this ban is assumed to hold also for individuals who are in the public eye.[15] The *ratio legis* of the provision of Article 13(2) of the Press Law is to seek to protect the personal rights of people against whom preparatory proceedings or litigation have been instituted;[16] in particular, it is supposed to protect the person against being stigmatized, and especially that until the final and effective judgement is passed, the defendant is presumed innocent.[17]

The concept of personal data covers all the information that can be used in identifying the protected person. Such data does not only include one's name and surname, date and place of birth, place of residence or identification numbers (PESEL and NIP), but also other information such as family relationships, occupation or place of work, all of them enabling the identification of the person in a specific environment.[18] The disclosure of personal data will occur even when no name is given, yet on the basis of the released press information (one or more details related to the person's physical, physiological, mental, economic, cultural or social characteristics) anyone may be able to infer the person's identity correctly.[19] As regards the image, it is any likeness of the person regardless of the graphics technique used to produce it (especially a photograph, caricature, portrait).[20]

13 Chomicki, S. A. "Udostępnianie dziennikarzom akt sądowych." *Wspólnota* 10(1996), p. 14; Nowińska, E. (2007) Wolność wypowiedzi prasowej. Warszawa, p. 106; Ereciński, T., ed. (2009) *Kodeks postępowania cywilnego. Komentarz*. Vol. 1, 3rd ed. Warszawa, p. 116; Uliasz, M. (2008) *Kodeks postępowania cywilnego. Komentarz*. 2nd ed. Warszawa, pp. 20-21.

14 Nowińska, E., Du Vall, M. (2005) "Sprawozdawczość sądowa." In *Prawo mediów*. Barta, J., Markiewicz, R., Matlak, A., eds. Warszawa, p. 266.

15 Judgement of the Supreme Court of 18 March 2008, IV CSK 474/07, *LEX* 365865 (LEX – Electronic Legal Information System, publisher - Wolters Kluwer Spółka z o.o., Warsaw).

16 Judgement of the Supreme Court of 6 June 2003, IV CKN 191/01, *LEX* 424237.

17 Judgement of the Supreme Court of 29 April 2011, IV CSK 509/10, *LEX* 818564.

18 Judgement of the Supreme Court of 6 June 2003, IV CKN 191/01, *LEX* 424237.

19 Judgement of the Court of Appeal in Poznan of 15 July 1997, I ACa 332/97, *LEX* 62601.

20 Judgement of the Supreme Court of 6 June 2003, IV CKN 191/01, *LEX* 424237.

Due to the revision of the Press Law, as of 14 October 2011, there is no doubt as to whether it is possible – against the concerned party's will – to authorize the publication of personal data and image if specific laws so provide. In such a case, the competent public prosecutor or court may authorize, by evoking an important social interest, the disclosure of personal data and images of people subject to preparatory proceedings or litigation. Such a decision on the disclosure of personal data and images of people subject to preparatory proceedings or litigation can be complained against. The complaint is reviewed by the district court having jurisdiction over the proceedings. The decision issued in preparatory proceedings becomes enforceable once it becomes effective (Article 13(3-4) of the Press Law). In addition, it should be noted that the existing case-law shows that it is not illegal when the journalist reveals the personal data and publishes the image of a person in litigation if such data have already been made public in an official announcement of a state authority (e.g. the Prosecutor General).[21]

There is a dispute in the doctrine whether the limitations of Article 13(2) of the Press Law apply both to criminal and civil proceedings,[22]or only to the former.[23] In the current state of law, it appears that in civil proceedings the publication of personal data and image **is permissible** under the general conditions provided for in the Civil Code, insofar as it does not affect the personal rights of the person concerned.

Summary

The regulations of Polish law discussed above ensure that journalists follow the principles of reliability and integrity; further, they allow the broader public to receive factual information on pending legal proceedings, while safeguarding against civil and criminal liability for an infringement of personal rights, in particular the right to privacy and protection of image. In addition, the media coverage of court trials serves the function of entertainment by reporting sensational news, and fulfils the often underestimated educational function of shaping and influencing the public legal awareness, often preventing the commission of unlawful acts.

Analysis of the rules and regulations currently in force in Poland demonstrates the deficiency, and hence the need for, regulations permitting journalists access to files in civil proceedings. Such an approach would take account of the interest of the justice system and the mass media, since personal access to files may allow the journalist to convey a comprehensive and accurate picture of the legal dispute and parties' arguments. Even a public hearing often fails to deliver that, as the persons taking the floor in the course of proceedings assume that other participants are familiar with the documents contained in the case files. The Polish judicature underlines that neither the rules of the Press Law nor any other legal act make the journalistic coverage of a civil process conditional upon the consent of the parties in litigation to cover it; what is more, nothing prevents the journalist reporting the proceedings from relying on their own findings and assumptions in lieu of the court-assembled material. However, failure to include the court's materials, testimonies, or expert opinions may imply a journalist's bias, and consequently, the accusation of the lack of due diligence and accuracy in collecting and using press materials.[24]

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[21] Judgement of the Supreme Court of 28 January 2009, IV CSK 346/08, *LEX* 520018.

[22] Nowińska, E., Du Vall, M. *op. cit.*, p. 268; Stanowska, M. *op. cit.,* p. 79.

[23] Kordasiewicz, B. *op. cit.*, p. 53.

[24] Decision of the Supreme Court of 26 June 2003, IV KK 84/03, *Orzecznictwo Sądu Najwyższego w Sprawach Karnych* 2003/1/1379.

The efficacy of Restorative Practices: Do they work?

Ted Wachtel

This article is based on excerpts from an upcoming book, "Dreaming of A New Reality, True Stories and Real Solutions: How Restorative Practices Reduce Crime and Violence and Improve Human Behavior and Civil Society" by Ted Wachtel

The International Institute for Restorative Practices is a postgraduate institution headquartered in Bethlehem, Pennsylvania, U.S.A. that offers master's degrees and postgraduate certificates in restorative practices. IIRP also provides professional development in restorative practices through its 150 affiliates and licensees in 15 countries. We are committed to the fundamental premise of restorative practices, that "people are happier, more cooperative and productive, and more likely to make positive changes when those in positions of authority do things *with* people, rather than *to* them or *for* them."

The concept of restorative practices, according to our particular definitional framework, includes "restorative justice" which is a response or reaction to crime or wrongdoing that has the potential to repair harm and restore relationships. But we are also interested in proactive practices that build relationships and a sense of community—that have the potential to prevent wrongdoing and other antisocial behavior.

We are also concerned that many unrealistically look to restorative justice as a singular intervention—such as a restorative conference—and expect it to change the behavior of youth and adults who are habituated in impulsivity, negativity and often substance abuse. For those challenging individuals, instead we look to a setting, such as an alternative school or residential program, which uses restorative practices repetitively and for an extended time period to achieve change.

To that end, my wife Susan and I founded schools and youth group homes, under the aegis of the Community Service Foundation and Buxmont Academy, which since 1977 have served over 10,000 delinquent and at-risk youth and their families in southeastern Pennsylvania, U.S.A.

Evidence for a Restorative Milieu

In 1999 we asked Paul McCold, a criminal justice research scientist, to evaluate our CSF Buxmont programs. He warned us that during the preceding decade, in which he evaluated over 50 youth-serving programs for the New York State Division of Youth, he had been unable to find sufficient evidence to show that any of those programs changed the behavior of the young people they served. So we were delighted when, in the first evaluation of 919 youth discharged during the 1999-2001 school years, McCold found that the CSF Buxmont schools produced positive results in youth in three key performance measures. The "restorative milieu," as McCold termed the environment in our schools, delivered high program completion rates, positive changes in attitude, and most significantly, *more than halved offending* among young people who were in our school program for three months or more.[1]

In a second evaluation of 858 youth discharged during the 2001–2003 school years, which focused on offending, the original finding of a significant reduction of more than fifty percent was repeated. Also, the first group of young people in the initial study, now two years later, still demonstrated a significant reduction in offending.[2] McCold concluded, "The empirical results of these two studies provide strong scientific evidence that *prolonged involvement in a restorative milieu can dramatically reduce reoffending*."[3]

A third, much larger evaluation with 2151 youth during the 2003-2006 school years, including young people from CSF Buxmont's residential and in-home services, again confirmed *the power of our restorative milieu to more than halve offending rates*.[4]

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[1] McCold, P. (2002). *Evaluation of a Restorative Milieu: CSF Buxmont School/Day Treatment Programs 1999-2001, Evaluation Outcome Technical Report.* Bethlehem, Pennsylvania: International Institute for Restorative Practices. p. 14, find it here.

[2] McCold, P. (2005). *Evaluation of a Restorative Milieu: Replication and Extension for 2001-2003 Discharges.* International Institute for Restorative Practices: Bethlehem, Pennsylvania. p. 1, find it here.

[3] Ibid., p. 6.

[4] McCold, P. and Chang. A. (2008). *Community Service Foundation and Buxmont Academy Analysis of Students Discharged During Three School Years (2003-2006).* Bethlehem, Pennsylvania: International Institute for Restorative Practices, p. 6, find it here.

Evidence for Restorative Practices in Schools

The positive research outcomes[5] encouraged us in thinking that we were headed in the right direction in our quest for real solutions and a new reality. We started the "Safer Saner Schools" project and began to provide restorative practices professional development for state and private schools, first in our region and then around the world.

After a decade of working with state schools, the IIRP published a report entitled "Improving School Climate" which highlighted the positive outcomes resulting from the use of restorative practices in individual schools and in whole school districts in Canada, the United Kingdom and the United States.[6] A few examples:

A small suburban school of 874 students in Pennsylvania, Pottstown High School, reduced by half the number of fights, cafeteria violations and out-of school suspensions.

West Philadelphia High School with 913 students, had been on the government "persistently dangerous school" list for six consecutive years. The dramatic decreases in serious incidents led to the high school being removed from the list.

At Kawartha Pine Ridge School District, east of Toronto, Canada, with over 35,000 student in 82 elementary and 18 secondary schools reported an 18% reduction in elementary student suspensions and a 7% reduction in secondary suspensions.

Across more rural Keewatin-Patricia District School Board in Canada, with 5500 students, the number of suspensions fell 65% overall.

Aside from the summary data showing citywide improvements in Hull, England, U.K. that appears in the report, Collingwood Primary School and Endeavour High School have provided us with more detailed data that highlights the remarkable potential of restorative practices in schools.

Collingwood Primary School reported:

- 98.3% reduction in classroom exclusions during lessons;
- 92.0% reduction in exclusions from break;
- 77.8% reduction in number of red cards at lunchtime;
- 75.0% reduction in racist incidents;
- 86.7% improvement in punctuality.

Endeavour High School reported:

- 45.6% reduction in incidents of verbal abuse;
- 59.4% reduction in incidents of physical abuse;
- 43.2% reduction in incidents of disruptive behaviour;
- 78.6% reduction in racist incidents;
- 100.0% reduction in incidents of drug use;
- 50.0% reduction in incidents of theft;
- 44.5% reduction in fixed term exclusions;
- 62.5% reduction in total days staff absence.

Endeavour High School's head teacher further noted that the reduction in staff absences resulted in savings of £60,000 in the cost of supply teachers in the eight months following the introduction of restorative practices.

Evidence for Restorative Justice

The IIRP has also created the Real Justice programme to teach professionals how to facilitate restorative justice conferences, which widen the circle to include more participants than the earlier restorative justice approach, victim-offender mediation.

In 2007, a comprehensive review of research in the United Kingdom and other countries, conducted under the auspices of the Smith Institute, showed that restorative justice (RJ) [primarily restorative conferences]:

- • substantially reduced repeat offending for some offenders, but not all;
- • doubled (or more) the offences brought to justice as diversion from the current system;
- • reduced crime victims' post-traumatic stress symptoms and related costs;
- • provided both victims and offenders with more satisfaction with justice than the current system;
- • reduced crime victims' desire for violent revenge against their offenders;
- • reduced the costs of criminal justice, when used as diversion from the current system;
- • reduced recidivism more than prison (adults) or as well as prison (youths).[7]

In 2012, an Australian research study compared re-offending rates between young offenders who went to court versus those who went through restorative "youth justice conferences" in New South Wales.

[5] None of these evaluations were randomized control trials. Aside from any ethical considerations related to assigning individuals to a control group, courts and schools were not going to refer young people to programs they believed were not likely to be as effective as CSF Buxmont programs so other research methodology was employed.

[6] Lewis, S. (2009). *Improving School Climate: Findings from Schools Implementing Restorative Practices.* Bethlehem, Pennsylvania: International Institute for Restorative Practices. A link to a PDF of the report is available on the main webpage.

[7] Sherman, L. and Strang, H. (2007). *Restorative Justice: The Evidence*. London: Smith Institute.

Not only did the study conclude that conferencing was not any better than the courts in reducing offending, but in their introductory review of previous research studies of conferencing, the two researchers contradicted the 2007 review by arguing that "the studies reviewed provide little basis for confidence that conferencing reduces re-offending at all.[8]

While there is obviously some dispute as to whether restorative conferencing reduces crime, which may be, in part, due to variability in the quality of the conferencing in different jurisdictions, there is strong and uncontested evidence that restorative conferencing *reduces the negative impact of crime*. That alone provides sufficient justification for making "reduction of harm" a fundamental goal of our criminal justice systems.

The 2007 Smith Institute review of conferencing research concurs: "On the grounds of helping victims for the intrinsic merit of that goal, the evidence for RJ is compelling." [9]

Perhaps the most exciting research results indicate dramatic reductions in post-traumatic stress disorder, which often persists for years after the incident itself. Dr. Caroline Angel, at the University of Pennsylvania, studied the effects of restorative conferences on burglary and crime victims and said, "The most striking thing was that conferences reduced symptoms of post-traumatic stress disorder. What you have here is a one-time program that's effective in producing benefits for the majority of people."[10]

Evidence for Family Group Conferences (FGC) and Family Group Decision Making (FGDM)

The IIRP also strong advocates and provides education in another restorative practice, the family group conference. When New Zealand passed a new Children, Young Persons and Their Families Act in 1989, no one could have predicted the revolutionary impact it would have around the world—in social work initially, but ultimately in related fields. The law granted families, whose children might otherwise be removed from their homes, the right to meet and develop an alternative plan before such an action is taken.

The legislation created a process to make this possible and named it a "family group conference" or FGC, which has spread around the world. In North America it later acquired the name "family group decision making" or FGDM.

The most radical feature of this law is its requirement that, after social workers and other professionals brief the family on the government's expectations and the services and resources available to support their plan—the professionals must leave the room. This "family alone time" or "family private time" is when the extended family and friends of the family have an opportunity to take responsibility for their own loved ones. Never before in the history of the modern interventionist state has a government showed so much respect for the rights and potential strengths of families.

A review of research by American Human Association reported positive outcomes for using FGC/FGDM in child protection. "In summary, the collective research showed that, when compared to traditional child welfare practices, child safety plans developed collaboratively by families, their support networks, and child welfare system representative are more likely to keep children safe, result in more permanent placements, decrease the need for foster care, maintain family bonds, and increase family well-being. FGDM can be used to create effective solutions for even the most challenging child welfare situations. FGDM can be used successfully in situations of neglect, domestic violence, substance abuse, and sexual and physical abuse regardless of factors such as age, race, ethnicity, and level of involvement in the child welfare system."[11]

A similar review undertaken for the government of Scotland was supportive but ambivalent. It found that "FGC is expected to be effective in two ways: enabling the wider family to be fully involved in decision-making and planning for children; achieving better outcomes for children."

The executive report of the review concluded that, "FGC was viewed as an ethically sound and practically effective way of working with families whose strengths and resources often remain untapped by mainstream practice…There is however strong agreement, across the literature and those interviewed, that FGC is not a magic formula, but will only deliver improvements to services for children if it is offered as part of well-resourced core services." As for saving money, "The available evidence indicates that FGC is likely to be cost neutral or to provide savings."[12]

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[8] Smith, N. and Weatherburn, D. (February, 2012). "Youth Justice Conferences versus Children's Court: A comparison of re-offending." Crime and Justice Bulletin. No. 160. New South Wales Bureau of Crime Statistics and Research, Sydney, Australia.

[9] Sherman, L. and Strang, H. op. cit.

[10] Porter, A. (2006, August 15) "Restorative practices reduce trauma from crime, study shows." Restorative Practices eForum. Bethlehem, Pennsylvania: International Institute for Restorative Practices, find it here.

[11] Merkel-Holguin, L. (2005) "FGDM: An Evidence-based Decision-making Process in Child Welfare. *Protecting Children*. Vol 10, No. 4. p. 2-3. Englewood, CO: American Humane Association.

[12] Barnsdale, L. and Walker, M. (2006) "Examining the Use and Impact of Family Group Conferencing: Executive Summary." Edinburgh, Scotland: Scottish Executive, find it here.

I believe that this ambivalent finding is due to the wide range of services of varied quality in different jurisdictions.

However, where the conferences are of high quality, the results are more compelling. Eigen Kracht, Dutch NGO (non-government organization) is a world leader in conferencing that developed a reliable cost-effective approach—using non-professionals trained as coordinators and paid on a per-conference basis. "Research shows that Eigen Kracht conferences are effective, even in complex situations where youth care is involved, in cases of domestic violence, as well where so-called multi-problem families are concerned. The costs are relatively low, clients are satisfied, and in most cases the quality of the plan that families make is good, according to family as well as professionals. Most plans are executed, the problems are solved and escalation is prevented. In many cases, Eigen Kracht is effective as well as cost saving. This is because families use their own resources; instead of applying for residential care, as professionals might do, they arrange for help at home and for (network) foster care instead of residential youth care."[13]

In a summary cost analysis of a range of cases, from residential care, foster care and non-residential cases, the "per file" cost of services (including the conference itself) in cases handled through Eigen Kracht conferences averaged €8900 Euros while comparable "shadow cases" handled without conferencing averaged €16,180 Euros in services provided per case—almost twice as much.[14]

Conclusion

While restorative justice and other restorative practices are still early in their development and implementation, the evidence so far shows great promise in cost-effectively impacting antisocial human behaviour and fostering a more civil society.

Ted Wachtel, President, International Institute for Restorative Practices (IIRP)

[13] Eigen Kracht. (2004-2009) "Results and Cost Benefits." From Dutch studies done by various research bureaus and varying in framework and scale, find it here.

[14] Op. cit.

Legislation, penalties and prisons: to what extent do they serve the purpose of citizen safety— and to what extent do they not?

Jean Schmitz

When I was invited to write this article I decided to start by narrating some stories taken from my human and professional practice in Peru. It is my understanding that these brief stories will be a good means to express and illustrate my feelings, opinions and ideas, based on actual experience, to then be able to propose some alternatives for the development of an effective, healthy and inclusive system of citizen well-being.

Scene 1: At the detention centre for delinquent adolescents in Cuzco

A few years ago, when I was visiting the detention centre for delinquent youth in Cuzco, my attention was caught by a boy I came across on the patio because he looked much more like a child than an adolescent. In fact, he was 12 years old and looked very fragile. His body was small and he had an empty look. I asked him how he was doing. In a small voice and with drooping shoulders he answered: “Fine, thank you”. I immediately asked for how long he had not seen his parents. He answered: “I don’t know, it’s been a long time”. This boy came from a distant location. When I looked into his eyes I could not help thinking of my own children. Later I found out the reason for his detention: he had stolen food from a market. He had been detained for five months and had not received a sentence.

How could I not feel upset and uneasy! It is difficult to understand such a thing. Although I did not have all the elements to assess the case and give a final opinion, I found it painful to know the situation of this young boy.

One cannot help wondering whether there is any other way for the authorities to handle this case. How many similar cases can be found in our youth detention centres? How many youth are locked up for a minor crime instead of receiving an alternative to detention or a referral[1] linked to a support programme as provided by the regulations? How many youngsters are not granted the opportunity to be defended and protected as required by law? How does this detention help the victim of the theft to have his own needs and interests satisfied?

Scene 2: At the women youth detention centre Santa Margarita

Not so long ago I used to pay regular visits to the Santa Margarita Centre, the only women youth detention centre in the country, located in the San Miguel district. At that time there were 42 detainees[2], a suitable number for an appropriate rehabilitation programme conducted by competent and motivated professionals. The director, a social worker, was persuaded that it was always possible to find the potential and resources in each detainee to promote positive changes so that on their release they could establish a life plan for themselves.

I used to visit the centre every Monday during the beauty parlour training programme (hairdressing, manicure, and pedicure), taught by a trainer that was very skilled at establishing communication with the detainees and motivating them. At the third visit these young women were no longer embarrassed to practice manicuring my nails or styling my hair. I had achieved my goal of establishing sincere communication, building trust and promoting empathy. This was all I wanted. I did not care if my hair was not so well cut.

I will never forget M.J. who told me her personal history during my numerous visits. She told me that most of the professionals at the centre had treated her very well during the two years and ten months of detention, showing control and respect, discipline and support, authority and affection. She told me that she had had the opportunity to reflect and felt repentance and pain. She felt that she had learned a lot and did not want to be the same person she had been before. She had already traced a life plan for herself: to work at a beauty parlour.

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1 Referral orders grant the prosecutor the power of avoiding the penal process and opting for a responsible social response with effective follow up.

2 As of February 2012, the centre has around 54 feminine inmates.

I was persuaded of her sincerity, her deep reflection and of the fact that she had assumed responsibility. After several visits I had no doubt.

However, as her release date approached, M. J. found herself more and more trapped between two contradicting emotions. On the one hand she had feelings of happiness and enjoyment at the prospect of regaining freedom, of walking away from the prison bars and –God willing, as she used to say – of being able to work at a beauty parlour and start a family. On the other hand, she felt overwhelmed by feelings of anxiety, fear, even panic and rage at the possibility of moving into uncertainty, emptiness, the unknown, the risk of relapsing, the fear of coming across the victims of her offences, the members of her dysfunctional family or any of her "friends" who were still involved in offending and were waiting for her.

M. J. wanted to open the door immediately, but she was afraid of going out walking, she did not know where to go, or with whom to go. Every Monday I could see her smile turn into tears and then the tears turn into a smile again. She was at a loss and had no confidence.

How many girls like her are prepared and sincerely willing to change and become positive, collaborative and productive members of society but lack support at the crucial time of starting a new life? How many young women are willing to cross over the bars and be productive members of the community? What do the society and the state do to acknowledge them as persons, as rehabilitated citizens instead of labelling them as ex detainees? How would the victims of past M.J. offending react on learning of her release?

Scene 3: At a police station of the national police forces in El Agustino

Some five years ago, at the time of starting a pilot project on the application of restorative youth justice in the district of El Agustino, in Lima, of which I was in charge, I witnessed a situation that gave me a mixture of anger, confusion, empathy and sadness. I only witnessed it observing very attentively from beginning to end without participating. I was astounded at the scene. I was not the only witness; there were several people at the police station, both men and women, but most of them appeared detached, as if they were saying: "it is none my business, I will not meddle into this".

A woman had been violently assaulted by three youngsters who ripped away her bag with her personal documents, mobile phone and money. The incident had just occurred, in the daylight, very close to the police station. The woman was upset, she came into the police station asking for help to the policemen to chase the burglars and recover her belongings.

But they paid no attention to her and she continued to shout until a policeman approached her rebuking: "Why are you shouting like this? It is no use to scream, just wait and you will be served at some point".

The victim, quite confused, went on with her complaints, insisting on the urgency. Then, in amazement, she received an even sharper reply: "Wait for your turn, like all the rest, you are not the only one here, or go out to calm down". At this response in an authoritarian tone the woman got very upset and became angry, almost outraged, and verbally attacked the policeman who was not assisting as she expected.

Then the woman looked around seeking support from the other persons there, narrating what had happened to her in a loud and faltering voice, imploring to be assisted. After remaining silent for a few seconds she left the police station in tears and complaining in a broken voice saying that no one was interested in the assaults and delinquency in the streets; and she even accused the policemen of being part of the gang that attacked her.

Unfortunately, this story is not an isolated case. On the contrary: it is very common. The victim was not served as necessary, in a fair, respectful and compassionate manner. This does not mean that policemen should neglect the work they were doing, but at least one of them could have satisfied, even to a minimum extent, the expectations of the victim, the same as when an emergency arises in a medical centre. Could you imagine a physician telling a patient who is bleeding to death to wait for his turn?

Would it have been so difficult for one of the policemen - or the persons who were there, beginning by me – to try and soothe her, *listen to her*, ask her to sit down and give her a glass or water, or just to hold her hand and pat her shoulder by way of comfort? That, by itself, would have changed the situation. The woman would have evolved from rage to affliction, gradually recovering from the shock. But the insensitivity and the detachment of the policeman, and of those of us who were present there, prevailed, victimizing her for the second time.

There is no possible justice if we do not take into consideration the needs and interests of the victims, if those who have suffered damage have no opportunity to have the damage repaired. It is not fair to assign the victim to a mere passive and bureaucratic role as claimant or witness, to tell her to queue, without the chance to have her interests and needs taken into consideration.

Why are victims poorly served and revictimized by the justice system? Why does the justice system focus exclusively on penalizing the offender and in this way "cause pain" to the victim? What position and rights are given to the victims of an offence after the incident takes place?

The legislation

As for the laws on citizen safety, my opinion is that we need to be able to distinguish between the laws having a populist purpose from the laws aimed at a public policy purpose.

The former type of bills –the populist ones– spring out abruptly, following an event that has been in the headlines or a serious crime that has struck the citizens, who in turn react moved by emotions. They spout suddenly, without careful elaboration or reflection, as an impulsive reaction that in medical terms could be defined as *inflammatory*. Death penalty, as an allegedly dissuasive instrument, is probably the most commonly resorted to example of populist promises, even when it would be very difficult to pass such a law due to the constitutional prohibition and the human rights treaties ratified by the Peruvian state. Notwithstanding this, how many politicians go back repeatedly to promote it and announce it as a feasible and imminent measure every time a horrible crime strikes the society, such as a rape or kidnapping followed by death?

In other cases, congressmen react with the proposal of amending an existing law, making it harsher, increasing the penalties, thus adding a further layer of pain to the sanction, without this representing a solution to the needs of the victims and offering no repair. In reality, what those who promote punitive legislations seek is nothing but personal recognition, more popularity and footage in the media. Unfortunately, these laws are passed more rapidly when the situation that gave rise to the project, such as a kidnapping, affects a person who has power or standing and not a common citizen. These are the kind of laws that, following the medical terminology, I describe as *rash.*

Numerous studies prove that the death penalty has never reduced criminality rates anywhere in the world. In the jurisdictions where the death penalty is applied, criminals do not fear killing the victim out of the risk of being identified and sentenced.

Fortunately, within all this confusion, some interesting laws, promoted by civil society, jurists and even enlightened politicians – who do exist – have been proposed. These bills have been the result of the aspiration and public policy criteria to promote social coexistence, the culture of peace and citizen security. They promote measures such as reconciliation, justice-of-the-peace experts in police matters or community judges of Paz in remote communities to promote sincere and long lasting repentance in the offender.

Building on the foundations of this type of regulation, as well as in the progressive principles of the Constitution and on international treaties is key to developing a legal system that may genuinely serve the interests of society at large.

The penalties

It should be noted that the word *penalty* originates in the Latin term *poena* that has a connotation of pain and suffering caused by a punishment. The belief that penalties lead to changing behaviour is the basis for discipline oriented policies all over the world. But this belief is not supported by the evidence. Punishment only has a superficial effect, most particularly when those that infringe the law are at reach of those who have authority.

The theory of pain seeks to produce a series of effects in the members of society, effects that are allegedly positive. For this reason, penalties seek two basic effects: 1) to induce prevention/ deterrence in the members of society; 2) to induce special prevention/deterrence in subjects that have been given a penalty.

Penalty, in most societies, especially the penalty of detention, seeks a retributive effect, similar to the notion of revenge or retaliation, and not the rehabilitation and reincorporation of the convict into the community he or she comes from and belongs to. On the other hand, to what extent are other fundamental elements taken into consideration, such as the three **R**s: Acceptance of **R**esponsibility by the offender, **R**epair for the victim and **R**ehabilitation of the criminal.

Although the theoretical grounds of justice are to contribute to social peace, we must unfortunately admit that most societies have taken the option of making it a synonym of revenge and long lasting suffering. In the United States crime victims or crime victim's relatives are allowed the alleged satisfaction of witnessing the execution of the criminal. What is this but understanding the penalty as a retributive revenge? An intuitive analysis may lead us to the conclusion that, one evil added to another evil cannot but result in a greater evil. The ideal model would be that any person that causes an evil, such as pain or suffering, should make up for it by doing double or triple good to the society and in this way cancel his or her debt. Serious or very serious crimes are very complex and difficult to repair but it is, in some cases, feasible.

We can also assume that institutionalisation of adolescents in secure facilities may be considered by the judge to be a protective and paternalistic rather than punitive or retributive measure. This happens frequently when a judge handles minors in conflict with the law that lead a very unrewarding life in the streets or are members of an extremely dysfunctional family that negatively affects their development. In such cases, many judges consider that depriving adolescents of their liberty may be favourable in that they will have access to basic services such as food, sleeping facilities, obligatory schooling and a team of people to control them, be it guardians or professionals. In general, these judges do not really know and are not aware of how the prison system works.

There is an urgent need for reformulating our notion on penalties and defining what we expect to achieve from them. If the only purpose we seek is to give back the person who has violated the law a strong dose of evil, then probably there are not major changes to be made. However, those who take this position should reflect on the fact that, with penalties applied in the way we all know, our prisons have become schools of crime. This is a road that reproduces indefinitely the dialectics of delinquency and penal repression in a constant feedback.

If, on the other hand, we understand that penalties should comprise the possibility of rehabilitation of the person who violated the law, we should radically change the concept, content and forms of application of such penalties. The basic orientation to take should be reducing the content of inflicted pain to the minimum and promoting a new educational and conciliation approach.

The prisons

In any context, deprivation of liberty is the most difficult and painful sanction criminals can receive, especially when they are assigned to overpopulated and violent detention centres, having a terrible track record and reputation, such as the prison of Lurigancho in Peru. Every country has a “prestige” prison.

In a way we are ashamed of these prisons; then, with the purpose of soothing uneasy consciences, we give in to the temptation of making up new names for detention centres to make them more acceptable to the public. Thus, the well-known juvenile detention centre of “Maranguita” in Peru bears the official name of “Lima Juvenile Diagnosis and Rehabilitation Centre”. This name does not change in any way the way how it operates. This juvenile prison, because this is what it is about, had 350 male adolescent inmates in 2003. At present it accommodates approximately 900 adolescents, without having significantly added human, technical or financial resources.

In many countries, the mere deprivation of liberty has not only proven not efficient in the struggle against the growth of delinquency, but on the contrary, if we consider the rates of relapse, it seems to have promoted it. The penalty of deprivation of liberty does not conclude when the convict leaves the prison, because the stigma and social label of “having been in prison” accompanies the ex-convict throughout his life, like a visible stamp that will prevent him or her from restarting a productive social, labour and even family life.

What is very surprising is that, although most citizens, including politicians, journalists, and citizens at large and victims in particular, are well aware that prisons are not a place where a resocialization program may be conducted and that they are overcrowded schools of crime, they continue to advocate imprisonment, even for minor cases, and exert great pressure on magistrates.

John Braithwaite, a distinguished Australian criminologist, insists on the importance of being able to “separate the deed from the doer”. In other words, he claims that we need to reject all conducts and behaviours that are contrary to law, but not reject the person.

Societies - schools in particular- have come to the conclusion that if those who behave wrongly or commit crimes are forced to undergo punishments involving suffering, it will be less likely for them to repeat wrongdoing. If this held true, then the responsible work of school discipline or the work of the judges in penal courts would be very easy. Upon every deed in violation of the rules, the offender would suffer a certain amount of discomfort. If this punishment could not change the behaviour of the infringer, then the teacher or the judge would simply increase the level of suffering until the inappropriate behaviour is discontinued[3].

Educational discipline and penal justice practices are based on punishment to change behaviours. However, the constant increase in the number of persons deprived of their liberty and students expelled from schools render this approach questionable.

John Braithwaite also raised a surprising question coming from a criminologist. Instead of raising the traditional question in criminology: Why do people commit a crime?, he asked: Why do most people do the right thing most of the time? We could ask the same question about our children or students: Why do most of them behave properly in the street, at home or at school most of the time? Simply because they want the people they are related to think that they are good people.

[3] Introduction to Restorative Practices, Ted Wachtel and Bob Castello. IIRP, find it here.

Citizen safety

For the last few years the term citizen safety has been the focus of debate on initiatives against violence and delinquency in Latin America. This notion is specifically oriented to the protection of citizens and for this reason it differs from the concept of national security that dominated the public discourse in previous decades, which aimed principally at the protection and defence of a state that, on frequent occasions, was not even democratic.

There is not a single definition or interpretation of the concept of citizen safety; on the contrary, there are diverse interpretations whose content varies a great deal, depending on who applies it and when. There is no consensus on the definition of this notion; therefore, its content may range from being very precise and restricted to being very ambiguous and broad. It may contain preventive and proactive as well as response and reactive elements.

A typical definition is that of the United Nations Development Programme (UNDP, in 2006) that defines citizen safety as "the personal, objective and subjective condition of being free of violence or threat of intentional violence or despoliation on the part of others".

In general, to the effects of the law, citizen safety is understood as the comprehensive action of the state, with the cooperation of citizens, devoted to guarantee social coexistence, eradication of violence and the pacific use of services, roads and public spaces, as well as the prevention of crime and misdemeanours.

However, my personal experience in visiting most of the Latin American countries gives me grounds to affirm that government policies on citizen security generally consist of creating and applying repressive, oppressive and restrictive policies: more protection systems, more surveillance, more cameras, more prisons, more restrictions to citizens, more patrolling and greater penalties, instead of providing better responses to the interests and needs of citizens, promoting a culture of peace based on an inclusive and pacific coexistence.[4]

A healthy policy of citizen security serves the purpose of social coexistence and development of a culture of peace. Putting these values at the mercy of the need for security is a serious error that feeds the vicious circle of violence.

Restorative practices as an alternative

Citizens cannot coexist peacefully if the society they live in does not establish principles and values, fix rules and limitations, pass laws and apply measures to those that do not abide by them.

Human relations are not just beneficial and apt to guarantee a harmonic personal, family and social development but can also be painful, belligerent, competitive and utterly negative. To a greater or lesser degree, violence has been present at all times and in all societies.

Even if I wished that none existed, I do not promote closing prisons, but as the UN propose – and I agree – the penalty of deprivation of liberty on the grounds of violating penal law should be always considered as a last resort and for the shortest possible time. This penalty should only be applied to persons that do not qualify for an alternative measure to imprisonment, that is, strictly for very serious cases. I rather insist that justice operators and interdisciplinary teams should do appropriate screening to avoid the imprisonment of individuals that could be treated in an open system, with effective professional support.

Let us start by the youth. Adolescents who infringe the law need us to do something for them, right now, to prevent them from taking the road of delinquency into their adult age. Let us reformulate the content of measures, giving priority to their educational aspect and keeping deprivation of liberty for really serious cases.

Let us act preventively. How? By creating networks, strengthening the links of community life and by equipping community leaders with new skills to face situations of tension and conflict that lead to juvenile crime. Let us act before children who are on the verge of becoming adolescents get trapped in the logic of violence with no return.

Among adults, let us start by the simplest cases. Let us do everything that is within our reach to avoid sending more people to that violence machine and life destroyer that is the prison system.

The notion of restorative practices finds its roots in restorative justice: a new way of approaching penal justice that is focused on renewing and building connections within the community in a world ever more disconnected and complicated, as well as repairing the damage done to persons and human and social relations instead of focusing exclusively on punishment.

There are two effective examples of such advances. In the field of social work, family group meetings on family decision-making processes empower the families to meet privately, without the presence of professionals in the meeting room, to elaborate a plan for the protection of the children in their families that exhibit the greatest degree of violence and negligence (American Human Association, 2003).

[4] Jean Schmitz, Injusticia y Sociedad. Justicia oara Crecer, n. 14, find it here.

In the penal justice system, restorative circles and restorative conferencing allow victims, offenders and members of their families and friends to meet in order to explore how everyone has been affected by crime and, whenever possible, to decide how to repair the damage and satisfy their own needs (McCold, 2003)[5]. In education, circles and groups provide opportunities for students to share their feelings, build relations, solve problems and, when there is a conflict, play a role in approaching evil so that things go well (Riestenberg, 2002).

What would happen if all those that work with youngsters and their families adopted a common strategy to approach youth crime, disruptive behaviours in the classrooms and the rates of school attrition, suspension and expelling?

Restorative practices are a strategy of this kind. The underlying premise, backed by impressive results in many contexts around the world, is that people are happier, more cooperative and productive and have greater probabilities of making positive changes when those that are in authoritarian position do things *with* them, rather than doing *to* them or *for* them. Restorative practices provide a means to manage relations and establish connections and social responsibility, and at the same time provide common ground to repair damage when relations are broken.

Very positive results have been achieved. In 2008, the city of Hull, an economically deprived city in England with a quarter of a million inhabitants that the British Broadcasting Corporation named "the worst place to live in the United Kingdom", decided to train professionals[6] involved in working with youngsters and their families in the use of restorative practices, including social services, the police forces, the schools and other local organizations. Even though the programme is ongoing, Hull has had remarkable results in a variety of social indicators: a reduction in the number of school suspensions, expulsions and poor school behaviour, reduction of absenteeism of students and teachers, improvement in the scores obtained in school examinations, and a significant reduction in the number of crimes committed.

Although the International Institute for Restorative Practices (IIRP) has almost two decades of experience helping others to implement restorative practices, an initiative of this type should actively involve interested local parties. For this reason, in the initiative of turning Barrios Altos into a restorative area, the Latin American Institute for Restorative Practices (ILAPR) and the Metropolitan Municipality of Lima (MML), in collaboration with local community organizations, are planning to train children and family service agencies, the police, the churches, the school, the parents and all those who work with youth and their families in this neighbourhood.

The approach of the Restorative Area is unique. Restorative practices are based in the persuasion that we already have compassionate and competent professionals, adult residents and community leaders in Barrios Altos who will benefit by adopting a standardized and consistent approach that can improve the performance and the behaviour of young people in their homes, in the street, in the school and in the city.

In this way we can elaborate a prevention strategy of juvenile crime, strengthening the community, supporting social cohesion, empowering it, and equipping it with skills to face situations of conflict. The community network thus created will be the best buffer to counteract difficulties that push the young to take the road of violence.

Jean Schmitz, Founder and Director, Latin American Institute of Restorative Practices

[5] See Chronicle January 2012 – Ed.

[6] Up to date, 7.000 professionals have been trained on Restorative Practices in the city of Hull, UK.

Guidelines on action for children in the justice system in Africa

The African Child Policy Forum & Defence for Children International

The text below is made up of extracts from the final draft of the Kampala Conference Guidelines of November 2011 titled "Deprivation of Children's Liberty as the Last Resort" which was commissioned by Defence for the Child International (DCI) and the African Child Policy Forum.

The full version is available here. DCI welcomes any comments or suggestions you may have. Please contact Benoît Van Keirsbilck (bvk@sdj.be).

D. **Overarching principles**

16. The right of children to participate shall be fully respected. It should be recognised that meaningful, effective and well informed participation of children and adolescents not only leads to better understanding and a possible solution to the problems they face, but is also one of the most effective ways to enhance their social development, self esteem as well as respect for others and the need for responsible behaviour. To enable children to exercise their right to participate, sufficient information on how the child may exercise his or her right should be provided by the competent authority, and views expressed by the child should be given due consideration, and decisions or rulings which do not accord with the child's expressed wishes or views explained to the child in language that the child can understand.

17. The best interests of the child shall be the primary consideration in the implementation of actions and decisions concerning children in the justice system, unless, exceptionally, the dictates of the communal good and public policy require otherwise. It must be recognised that the best interests of the child are best determined in a multidisciplinary approach in which the physical, social, psychological and emotional wellbeing of the child can be fully explored.

18. The child's right to non-discrimination shall be guaranteed with special protection to be granted to the most vulnerable children, including children with disabilities, children living or working on the street, the girl child, children affected by HIV/Aids, refugee and displaced children, and children who are separated from their families.

19. The child's right to dignity requires that all children in contact with justice systems be treated with care, sensitivity, fairness and respect throughout the procedure or case, regardless of their legal status or of the manner in which they have come into contact with the justice system.

20. The child's right to survival, protection and development, as provided for in the ACRWC[1] (article 5.2), must be ensured to the maximum extent possible. The death penalty for children shall be absolutely proscribed for any offence committed whilst the child was aged below 18 years, including by any religious or traditional court.

F. **General elements of child friendly justice**

33. Access to justice systems must be possible for children to initiate as parties in own name, in class or collective actions, and via interested parties, legal representatives, parents or guardians pursuing justice on their behalf.

34. From their first involvement with the justice system, and throughout their contact with the justice system, children and their parents must be provided with information and advice in a language and at a level that they understand, relating to:

    a. their rights, what options for non-judicial or judicial procedures exist, the likely duration of procedures, and access to remedies, appeal or review, reparations, and the availability of any independent complaints mechanisms;

    b. the time and place of any court or other relevant hearings;

    c. the general progress or outcome of proceedings;

    d. what protective measures are available and how and where support services can be accessed.

35. Professionals, non-professionals and auxiliary social workforce staff working directly with children in the justice system, including community volunteers where the justice system relies on their services to children in the justice system, must be screened for suitability to work with children.

[1] The African Charter on the Rights and Welfare of the Child (1990).

36. Professionals and auxiliary social workforce staff working with children in the formal justice system and where possible in traditional and religious justice systems, should receive training on child rights in the African context, alternatives to formal judicial proceedings, child development and child protection.

37. Justice proceedings where children are involved should be completed without undue delay and as speedily as possible, bearing in mind children's age, maturity and stage of development, and postponements of proceedings must be kept to the minimum.

38. States must progressively ensure the availability of child rights-oriented legal representation for children in the justice system. Legal representatives dealing with children in the justice system should provide the child with all necessary information and guide the child as to the progress and conduct of any proceedings. Priority should be given to setting up agencies and programmes to ensure the availability of legal and other assistance to children in the justice system, free of charge, and in particular to ensure that the right of every child deprived of his or her liberty to have access to such assistance from the moment that the child is detained is respected in practice. The special needs of children with disabilities to have access to information shall be accommodated in the development and provision of information about the justice system to children.

39. Non-intimidating and child friendly settings shall be made available in African justice systems to the maximum extent possible. States shall strive towards the establishment of specialised courts, recognised in law, in line with child friendly justice principles, and in the absence of specialised courts, regular courts shall be empowered to adopt and implement specialised procedures for children.

40. Due attention shall be paid to the safety and dignity of children who are displaced, illegally retained across borders, or who find themselves otherwise outside of their country of origin. Upon return of the child to the country of origin, adequate family based social reintegration measures should be provided.

41. Children shall not be subjects of justice procedures in military courts, or of martial courts established in times of civil unrest or states or emergency. The decision to intern or administratively detain a child during any period of armed conflict must be reviewed as soon as possible by the detaining authority and further detention must comply fully with the requirements of the Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and these Guidelines.

42. Children who are accused of crimes under international law allegedly committed while they were associated with armed forces or armed groups, should be considered primarily as victims and not as perpetrators. Where possible, alternative accountability mechanisms to prosecution and trial in a criminal court for former child soldiers should be provided for.

H. **Fair trial rights for children in conflict with the law**

44. Children are entitled to all the fair trial guarantees applicable to adults and to some additional special protection.

45. States must ensure that law enforcement and judicial officials, as well as staff at institutions from which children are not free to leave at will, are adequately trained to deal sensitively and professionally with children who interact with the criminal justice system whether as suspects, accused, complainants or witnesses.

46. States shall establish laws and procedures which set a minimum age below which children will be presumed not to have the capacity to infringe the criminal law. Unless already set at above this level, the age of criminal responsibility should not be fixed below 12 years of age, and States must endeavour to progressively raise this age to at least 15 years of age. No child below the age of 12 (or the minimum age of criminal responsibility where this is higher than 12) shall be arrested or detained on allegations of having committed a crime. The importance of effective birth registration systems, as noted in Guideline 23, for the implementation of this Guideline is underscored.

47. No child shall be subjected to arbitrary arrest or detention. Offences which can be committed only by children ('status offences') shall be expunged from the statutes.

48. Law enforcement officials must ensure that all contacts with children are conducted in a manner that respects their legal status, avoids harm and promotes the well-being of the child. When a child suspected of having infringed the penal law is arrested or apprehended, his or her parent, guardians or family relatives should be notified immediately.

49. The child's right to privacy shall be respected at all times in order to avoid harm being caused to him or her by undue publicity and no information that could identify a child suspected or accused of having committed a criminal offence shall be published.

50. Alternatives to criminal prosecution, with proper safeguards for the protection of the well-being of the child, may include community, customary or traditional mediation; warnings, cautions and admonitions accompanied by measures to rehabilitate the child; implementation of programmes of restorative justice such as conferences between the child, the victim and members of the community; and community programmes such as temporary supervision and guidance, or programmes involving restitution and compensation to victims.

51. Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time. Any child who has been arrested for having committed a crime shall be released into the care of his or her parents, legal guardians or family relatives unless there are exceptional reasons for his or her detention.

52. The competent authorities shall ensure that children are not held in detention for any period beyond 48 hours before appearing in a court. Children who are detained pending trial or finalisation of the proceedings shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults. Girl children shall be kept separately from males and boy children. Legislation shall specify a maximum period of pre-trial detention for children, upon the expiry of which a child shall be released from detention whether or not criminal proceedings have been concluded.

53. Pre-trial detention may not be used as a sanction, in violation of the right to be presumed innocent until proven guilty. No child shall be tried for an alleged offence committed whilst below the minimum age of criminal responsibility.

54. Every child arrested or detained for having committed a criminal offence shall have the following guarantees:

    a. to be treated in a manner consistent with the promotion of the child's dignity and worth;

    b. to have the assistance of his or her parents, a family relative or legal guardians from the moment of arrest;

    c. to be informed promptly and directly, in a language he or she understands, of the reasons for his or her arrest and of any charges against him or her, and if appropriate, through his or her parents, other family relative, legal guardians or legal representative;

    d. to be informed of his or her rights in a language he or she understands;

    e. not to be questioned without the presence of his or her parents, a family relative or legal guardians, and a legal representative;

    f. not to be subjected to torture or any other cruel, inhuman or degrading treatment or punishment, any form of physical punishment, or any duress or undue pressure;

    g. not to be detained in a cell or with adult detainees;

    h. to have justice proceedings conducted without the public or the press being permitted to attend.

55. Every child accused of having committed a criminal offence shall have the following additional guarantees:

    a. to be presumed innocent until proven guilty according to the law;

    b. to be informed promptly and directly, and in a language that he or she understands, of the reasons for the arrest or bringing of charges, and if appropriate, to have his or her parents or legal guardians informed of these too;

    c. to be provided free of charge by the State with legal or other appropriate assistance in the preparation and presentation of his or her defence;

    d. to have the case determined expeditiously by a competent, independent and impartial authority or judicial body established by law in a fair hearing;

    e. to have the assistance of a legal representative and, if appropriate and in the best interests of the child, his or her parents, a family relative or legal guardians, during the proceedings;

    f. not to be compelled to give testimony or confess guilt; to examine or have examined adverse witnesses and to obtain the participation of supporting witnesses on his or her behalf under conditions of equality;

    g. if considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law and without delay;

    h. to have the free assistance of an interpreter if he or she cannot understand or speak the language used;

    i. to have his or her privacy fully respected at all stages of the proceedings.

56. In disposing of a case involving a child who has been found to be in conflict with the law, the competent authority shall be guided by the following principles:
    a. The action taken against the child shall always be in proportion to the circumstances and gravity of the offence and in the best interest of the child;
    b. Non-custodial options which emphasise the value of restorative justice should be given primary consideration and restrictions on the personal liberty of a child shall only be imposed after careful consideration and shall be imposed as a last resort after careful consideration and for the shortest appropriate period of time. Non-custodial measures could include:
        i) Care, guidance and supervision orders;
        ii) Probation;
        iii) Financial penalties, compensation and restitution;
        iv) Intermediate treatment and other treatment orders;
        v) Orders to participate in group counselling and similar activities;
        vi) Orders concerning foster care, living communities or other educational settings;
        vii) Referral to restorative justice processes for the furtherance of restorative outcomes.
57. A child shall not be sentenced to imprisonment unless the child is adjudicated of having committed a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response which can result in rehabilitation of the child and reintegration into society. Time spent by a child in pre-trial detention shall be deducted from the period of imprisonment imposed.
58. Children deprived of their liberty shall have the right to maintain regular contact with families and to reintegration services upon release from detention or after serving any sentence.
59. Capital punishment shall not be imposed for any crime committed by children and children shall not be subjected to corporal punishment. The sentence of life imprisonment shall not be imposed for an offence committed whilst below the age of 18 years.
60. Criminal records should be non disclosable upon reaching the age of majority, unless exceptional circumstances exist in the interests of public safety.
61. Transitional justice processes which seek to enhance the accountability of children involved in offences committed during conflict situations shall seek to promote restorative justice solutions aimed at the reformation of the child, reintegration into his or her family and social rehabilitation.
62. These fair trial rights apply regardless of the charges, including charges related to terrorism, brought against the child, and States are reminded that derogation from rights enshrined in the African Charter on the Rights and Welfare of the Child is not permitted even during states of emergency.

I. **Fair trial rights in matters involving child victims and witnesses in any justice proceedings**

63. Child victims shall be treated with compassion and the development of child witness preparation schemes shall be encouraged.
64. States shall ensure that child witnesses are able to give their best evidence with the minimum distress, and children should be protected from hostile or intimidating questioning. Investigation and practices of judicial bodies should be adapted to afford greater protection to children and to respect children's rights without undermining the defendant's right to a fair trial. States are required, as appropriate, to adopt the following measures in regard to child witnesses:
    a. Child witnesses shall not be questioned by the police or any investigating official without the presence of their parents, a family relative or legal guardians, or where the latter are not traceable or where their presence is contrary to the best interests of the child, in the presence of a social worker;
    b. Police and investigating officials shall conduct their questioning of child witnesses in a manner that avoids any harm and promotes the well-being of the child;
    c. A child who alleges sexual abuse shall be given medical treatment immediately but not later than 72 hours of a complaint coming to the attention of the justice system;
    d. Police and investigating officials shall ensure that child witnesses, especially those who are victims of sexual abuse, do not come into contact with or made to confront the alleged perpetrator of the crime; As far as possible, interview and waiting rooms should be adopted to create a child friendly environment. Court preparation programmes to familiarise children with court environment should be implemented where possible;
    e. The child's right to privacy shall be respected at all times and no information that could identify a child witness shall be published;

f. Where necessary, a child witness shall be questioned by law enforcement officials through an intermediary; legal provisions should make it possible for a child's direct evidence in formal justice procedures to be dispensed with where this is allowed by the judge or presiding officer;

g. A child witness should be permitted to testify before a judicial body through an intermediary, if necessary;

h. Video-recorded pre-trial interviews with child witnesses should be presented in lieu of live testimony where resources and facilities permit; the development of such facilities should be encouraged;

i. Screens should be set up around the witness box to shield the child witness from viewing the defendant;

j. The public gallery should be cleared, especially in sexual offence cases and cases involving intimidation, to enable evidence to be given in private;

k. Judicial officers, prosecutors and lawyers should be permitted to wear ordinary dress during the testimony of a child witness;

l. Defendants should be prevented from personally cross-examining child witnesses;

m. Information about the previous sexual history of alleged child victims or witnesses may not be sought or presented as evidence in trials for sexual offences, and religious or cultural exceptions to this principle cannot be permitted;

n. A child's evidence should not be discounted or disallowed purely on the basis of the child's age;

o. Law enforcement personnel, parents and families of child victims of sexual abuse shall refrain from pressurizing the child victim not to testify; wherever possible and appropriate prosecutions for the commission of sexual offences against children should proceed even where the victim refuses to testify;

o. Court proceedings should be adapted to the child's pace and attention span. with regular breaks being provided for and disruptions kept to a minimum.

65. States should endeavour to develop common risk assessment tools for application in a multidisciplinary way in responding to child victimisation. These tools should have immediate child protection strategies and collection of the best evidence as their goals, and training on the use of the tools should be provided to all actors, including health and medical personnel, police and members of the social workforce dealing with child victims.

66. Child victims and witnesses in formal and informal justice proceedings should be protected from threats, intimidation, reprisals or other forms of victimisation.

67. Child victims shall be given information about any opportunity to obtain compensation, redress and psycho-social support, whether this is available at the expense of the perpetrator or the state or any other agency or body. The information should specify whether compensation and redress are available in the civil or criminal justice system or elsewhere. States are reminded that statutory limitations period should not apply where redress or compensation is sought for actions committed whilst the victim was aged below 18 years.

68. States are reminded of the particular risks that extra judicial settlements, including those negotiated between families, pose to child victims and to rights of the girl child in particular where marriage is proposed as the settlement, and actors in affected justice systems should refuse to countenance private arrangements insofar as these do not promote the rights of the child victim.

69. States should enact legal provisions to give effect to the rights and protections accorded child witnesses and victims in these Guidelines, with particular attention to the protection of children's privacy where they have been involved in formal or informal judicial procedures.

70. Due consideration should be given to measures, including interim measures, that remove an alleged perpetrator from the immediate environment of an alleged child victim where the safety of the child is at immediate risk. Removal of the child should be considered a last resort.

71. Judges decisions or outcomes of justice proceedings should be communicated to child victims and witnesses in language that they understand, along with any further information about measures that could be taken, such as appeal or recourse to independent complaint mechanisms.

J. **Justice for children as subjects of civil judicial or administrative proceedings, including alternative care proceedings and family law disputes**

72. Where children are subjects of judicial or administrative proceedings where there is the likelihood of conflict between their interests on those of the guardians or care-givers, they should be provided with separate legal representation, or a guardian ad litem or an independent representative in accordance with national laws and policies.

73. The right to be heard in judicial and administrative proceedings is a right of the child, and the child has the right to exercise the option not to express an opinion.

74. In matters involving family disputes, measures which diminish or avoid the intensification of conflict should be chosen, except where these are not conducive to the best interests of the child.

75. In the ordinary course, actions or measures which would avoid or minimise further legal or administrative proceedings can be deemed to be in the best interests of the child.

76. Actions or measures which do not result in the separation of siblings can be deemed to be in the best interests of the children in the ordinary course.

77. Actions or measures which promote the right to the child to be brought up in a stable family environment, and where this is not possible, an environment closely resembling a family environment shall be deemed to be in the best interests of the child and legal provisions to this effect shall be included in national laws.

78. Actions or measures which protect the child from harm, violence, including family violence, and exploitation, are deemed to be in the best interests of the child and legal provisions to this effect shall be included in national laws.

79. After judgment in highly conflictual family proceedings, guidance and support should be offered to affected children, free of charge to the maximum extent of available resources, by specialised services. Judgements should be implemented without delay. Implementation of judgments by force should be a measure of last resort in family cases when children are involved.

80. Actions or measures which promote the child's ability to maintain a connection with his or her family, extended family and culture are deemed to be in the best interests of the child, and legal provisions to this effect shall be included in national laws.

81. Intercountry adoption of children which has the effect of severing the connection between the child and his or her culture shall be permitted only as a last resort, and when this is in the best interests of the child concerned. States shall enact national legislation regulating intercountry adoption and providing for the designation of a competent authority as specified in the Hague Convention on the Protection of Children and Co-operation in respect of Inter-country Adoption (1993).

82. States shall ensure that national systems for the regulation of alternative care for children deprived of parental care are established and fully monitored. All placement of children in alternative care shall be subject to periodic review, and institutions for the alternative care of children shall be subject to registration, regular inspection and quality assurance processes. These requirements shall form part of national legislation.

83. States shall ensure that orphaned children are assured of the appointment of legal guardians, either by operation of a will, by appointment by a court or other similar structure, or by operation of laws specifying which care-giver, member of the kinship group or other person will hold guardianship.

84. States shall ensure that adequate legislative and enforcement mechanisms in justice systems exist to ensure that children are not wilfully or otherwise deprived of inheritance rights, and due attention shall be paid to the right of the girl child to equality in the distribution or allocation of any estate property.

85. Justice systems shall recognise the primary duty upon parents and legal guardians for the support (maintenance) and upbringing of their children; States shall take appropriate steps to ensure the joint responsibility of both parents, whether married or not, for the fulfilment of this responsibility, and shall take measures, to the maximum extent of available resources, to assist parents or guardians who experience difficulties in the fulfilment of this obligation.

Report on UN events — participation of Justice Renate Winter IAYFJM

1 Violence to children— UN meeting, Vienna January 2012

As past-president of our association as well as in my capacity as member of the Appeals Chamber of the Special Court of Sierra Leone and its past president, I have had the honour to have been invited to major events of the UN, important for the protection of children as well as concerning juvenile justice and deprivation of liberty.

In January 2012 the meeting "Expert consultation on prevention of and responses to violence against children within the juvenile justice system" was held at the UN in Vienna. The invitation came from the Special Rapporteur—on violence against children— to the Secretary General of the UN as well as from the Office of the High Commissioner of Human Rights and United Nations Office on Drugs and Crime **(**UNODC) . The outcome of this meeting was recommendations, based on good practices as presented by the speakers from different member organisations of the Interagency Panel on Juvenile Justice **(**IPJJ) representatives of governments and UN agencies. Those recommendations were formulated during several rounds of discussion and designated to be submitted to the Secretary General for his report.

2 Deprivation of liberty—UNODC April 2012

In April, at the invitation of UNODC, I represented the IAYFJM in the 21st session of the UN Commission on Crime Prevention and Criminal Justice as speaker at the side event on the "Protection of the Human Rights of Children Deprived of their liberty".

I started my presentation by sharing some concrete situations[1] involving children and invited participants to think of what could be done to prevent bad and dangerous situations happening. My main problem is that detention—especially pre-trial detention—is still used in a huge number of Member States, almost automatically. I asked, whether it is really necessary to submit children to pre-trial detention, highlighting that there are only three reasons to keep a child detained (if they are likely to flee, likely to repeat the crime, or likely to hamper the evidence gathering and witnesses' testimonies) and I wondered if there were a lot of children who met these conditions. I underlined that children should only be detained for two reasons: if they were a danger for society or for themselves. I concluded by pleading for a radical change towards a restorative approach.

IAYFJM statement—global study required

At the same event it was possible for me to submit to the Plenary Session an IAYFJM statement which is now part of the protocol of the Session and so will be submitted to the General Assembly in New York for consideration. The statement reads as follows:

Statement of the International Association of Youth and Family Judges and Magistrates (IAYFJM), member of the Interagency Panel on Juvenile Justice (IPJJ)

In efforts to establish child friendly justice systems that ensure institutional violence cannot happen, it is first necessary to consider specifically the issue of the deprivation of liberty of children, as the aim of juvenile justice is first of all rehabilitation of children and not their punishment.

The formulation of standards and norms is usually based on correct and concise data. However, there exists a paucity of data when it comes to correct numbers of children deprived of their liberty, as only approximate estimates are available. In quite a number of Member States, such data are not available even when children are being held in "official" closed institutions.

In order to be able to properly implement the principle of the use of deprivation of liberty as a measure of last resort and to use alternative measures to the loss of liberty wherever possible, it is necessary to have reliable data on how many children are in fact being deprived of their liberty, for what reasons they are being held, where they are being held, and for how long they are being detained.

[1] See infra.

The serious situation of children deprived of their liberty has been documented and researched by various international and non-governmental organizations. However, a global study on the status of children deprived of their liberty is long overdue and should be commissioned. The global study should gather data on children detained in all varieties of establishments, be they official or 'private', whether they are being detained or imprisoned in police stations, in detention centres, prisons and other types of establishments ranging from treatment centres, work camps, boarding correctional schools, penitentiary colonies, specialized technical schools, military camps, psychiatric establishments, hospitals, orphanages, institutions for the physically or mentally disabled, and religious schools, or whether they are confined in airport transit zones, detention centres for immigrants, or are illegally deprived of their liberty, because they are below the age of criminal responsibility etc., etc.

The results of such a study could contribute to developing measures to tackle associated problems such as the over-population of institutions detaining children and the lack of adequate resources for providing assistance to such children – a right of the child recognized by the Committee on the Rights of the Child. Another outcome would be the better application of alternatives to deprivation of liberty which would contribute to a considerable reduction in the numbers of children being held in detention and to the rehabilitation and social integration of children in conflict as well as in contact with the law. Finally the study could develop much needed minimum common indicators to get comparative statistical data.

We would thus request the Commission to consider the urgency of this matter and the value of conducting a global study on the status of children deprived of their liberty, particularly as a most necessary prerequisite to ensure that children are better served and protected by the justice system, and in recognition of the principles contained in all international instruments concerning children.

3 Restorative approach—Office of the High Commissioner for Human Rights (OHCHR) May 2012, Geneva

Finally, in May 2012 at a huge event in UN Geneva, the OHCHR held a Plenary Session and several side events concerning the protection of children. I had the pleasure to participate in the Plenary, once again representing the IAYFJM. I argued for changes in the juvenile justice system with moves towards restorative justice mechanisms. The outcome of the panel discussion reinforced the necessity to go an extra mile to prevent the deprivation of liberty for children.

At a side event I was able to underline the need for more legal options for diversion and alternatives to the justice process for children. Another side event I took part in dealt with the question of children of incarcerated parents, mentioning especially the problems of children with parents on death row. Finally I participated in a side event concerning the age of penal responsibility where the president of the Committee of the Rights of the Child, one of our members and our former president, Jean Zermatten opened the panel discussion. He argued strongly about the fact that Member States opted for lowering this age in General Commentary 10 of the CRC and stated that the mentioned age of 12 was an absolute minimum and not an optimal solution.

It was a busy spring this year but I think child protection and juvenile justice made a few steps forward.

Justice Renate Winter*, Member of the Appeals Chamber of the Special Court of Sierra Leone.

Children deprived of liberty—detention as a last resort

Justice Renate Winter

Maria was 12, when she stole a lipstick and some candies from a shop. She ended up in a closed institution for difficult children.

Pieter was 9, when the rebels came and forced him at gunpoint to hack off the hands of the neighbour's girl. He became a child soldier and was put in prison, captured at 14.

Marja was 6, when she was betrothed to a 65 year old man and 12, when her father raped her. She got pregnant, was sentenced to death by stoning for adultery and died at 14.

Pierre was 8, when he stole three tomatoes on a market place and was put in a police cell together with adult men for seven months, having to trade sex for food.

Mary was 13, when she was accused by her mistress of stealing a golden ring. She was put in pre-trial detention for almost a year without ever having seen a lawyer or a judge. Even though the ring was finally found in the house of the mistress (her son had it), Mary never got any recompense, not even an excuse, for having been imprisoned.

Pjotr was 14, when his parents used him to fight each other during a bitter divorce. His wishes didn't count for anyone and he killed himself after having been sent to a closed institution because he had absconded several times.

Maia was 15, when she was found by police, trafficked, working in a brothel, and denied protection, because she didn't have the courage to testify at court against an international trafficker. In spring, when the ice of the mountains had melted, her body was found. Police declared that that wouldn't have happened if they had been allowed to keep the girl in police custody for illegal immigration until she could have been repatriated.

Marie and Peter were new-born and 2 respectively, when they entered prison with their mother who was sentenced to a 15-years' term in jail. She used to sell drugs for her incarcerated husband to be able to pay for her and her children's small home. They were 4 and 6, when they left prison without any knowledge of the outside world and without anybody they could turn to.

If you do not wish to accept these situations, do something, but do the right thing!

To build more prisons, remand homes, re-education schools, asylums for migrants, closed centres for refugees, you name it…is that the right thing?

Who is going to stop a prison warder if he forces a child to trade sex for food?

Who is going to stop the director of prisons who decides where (in a "good" or "bad" closed institution) a girl should stay, to ask her for her favours?

Who is going to stop children staying with adults in overcrowded cells without any protection the violent behaviour of adult inmates?

Who is going to prevent educators asking children for money in exchange for allow family visits?

Who is preventing staff of remand homes and police from beating up "unruly" children or from sending them to steal or beg on the streets?

Who will see to it that children deprived of their liberty will not be deprived as well of school, health services, vocational training, information and social skills?

To put children in closed institutions for petty crimes because no alternatives are available, to punish them and thus deprive them of their future because, being stigmatised, they will never find work to support themselves, to deny protection even to child victims and witnesses of crime, because neither tools nor laws are in place – those situations are not (and should not be) an option for member States that have ratified the Convention on the Rights of the Child.

It is now almost 20 years, since the CRC has been accepted worldwide. There is a whole library on literature of similarly important documents developing methods to protect children, not only in penal law matters as perpetrators, but in civil and administrative law as parties in their own right too.

It is not documents, treaties, conventions that are missing. It is on the implementation of all available guidelines that we have to focus now. We have

- to change retributive juvenile justice attitudes against restorative approaches to allow for reparation and reintegration instead of putting children behind bars and
- to opt for child friendly institutions for children, closed, semi open and open, that are adapted for reconciling the child with society, instead keeping them a part of it.

We do not need, of course, to do all this. We can continue to send children to prison because they steal, they run away, they are misbehaving, they commit crimes, without ever even caring about why they did it, without ever trying to help them to solve their problems.

But it is no cheap solution. Costs for an adult recidivist offender are much, much higher than giving social and sometimes financial support to a child with troubles and in trouble.

Justice Renate Winter*

André Dunant Obituary

David Kennedy (UK)	Representative (Netherlands)	**André Dunant** (Switzerland)	Louis McHardy (USA)	Lorne V. Stewart (Canada)

A great magistrate has left us….

André Dunant liked to say that he was a magistrate for the small ones ; but—by virtue of the range of his work at home in Switzerland and abroad, it is as a great magistrate that he takes his leave of us—after more than two years fighting a remorseless illness. André Dunant brought to his calling—that of a Youth Judge, *Juge de la Jeunesse*, as it is called in his native Geneva—a passion that few could equal. That passion shone out for his cantonal and Swiss colleagues, but above all during the many missions that he carried out for a number of international organisations and NGOs in the four corners of the world.

He had an excellent academic legal training with several years' practice at the bar, together with the training in social work that he felt was necessary to get a full grasp of the problems that face young people in conflict with the law. So it was only to be expected that he should become a Youth Judge and then President of the Youth Tribunal—a position he held for over twenty-five years to the benefit of a generation of children and adolescents whose occasional mistakes brought them, in some trepidation, to the Rue des Chaudronniers. (One of us still remembers the time when his father, running short of arguments to deal with his stubborn son, threatened to refer matters to Judge Dunant).

In addition to his practical training, André Dunant also had the advantage of sitting alongside some eminent magistrate colleagues, such as Judge Maurice Veillard, an iconic figure in French Switzerland, and Judge Jean Chazal of Paris. He learned a great deal from his contact with them and was inspired by their approach and their great humanity. Moreover, he brought the conviction of a man who knows how to talk to young people with the focus of the great athlete that he was, with a physique that gave evidence of a willpower that it would be better not to attempt to thwart.

So it is no surprise that he quickly became one of the leading lights in the Latin Association of Youth Judges, that the Swiss Society of Youth Justice elected him President, that the IAYFJM entrusted him with the overall guidance of their affairs, and that, on its foundation, he became President of the Veillard-Cybulsky Association (a responsibility he relinquished only last year) which was set up in memory of the work of his teacher. This simple listing of his responsibilities at the highest level speaks of the esteem in which he was held among his peers. His unflagging commitment is shown by his accepting, after he had retired and settled in Valais, the post of President of the Arbaz Pupils' Council to offer his long experience for the benefit of children and adults in difficulty.

André Dunant was an outstanding example of the engaged citizen, keen and always ready to help.

His drive, understanding of the real world and of the every-day decisions that have to be taken benefited his writing—where he preferred short notes to lengthy academic publications. He left a large number of notebooks, written in the hand of a scholar, which will be a goldmine. He frequently set out his views on the issues that arise in juvenile justice; he gave an unbelievable number of courses and directed an enormous amount of professional training, particularly in West Africa.

He held to the ideal of a non-repressive, benevolent juvenile justice that seeks to reintegrate children, rather than simply punish them. One of his crusades was against detention before trial, which is often carried out in those places where the worst violations of children's rights occur. He fought this cause with admirable tenacity.

So let us pay homage to André Dunant as a great magistrate. We hope that his family, his children, his grand-children, and his many friends and admirers will, on reflecting on his life's work and achievements, find the strength to follow their own paths in life.

Jean Zermatten*, Philip D. Jaffé & Michel Lachat* in Sion/Bramois, 11 March 2012

For André — Justice Renate Winter

He was a social worker, a defence lawyer and a judge. Thus he knew how to work with co-experts to assist children in contact as well as in conflict with the law.

He was treasurer and president of the IAYFJM, and knew about all the many problems of the association as well as of all of its pleasant moments. He was the "living memory" of an institution he highly estimated.

He was a juvenile judge, a judge for "the small ones", as he said. Thus he knew about how to deal with children in their own best interest, because he cared about them.

He was a teacher on juvenile justice especially in Africa, where his white hair and his endless patience made him a greatly valued and honoured expert for the protection of children, all kinds of children.

He was a fighter for child rights and his fight continued all his life, most importantly for freeing children legally and practically from the abuse of detention, in whatever institution, wherever.

He was a gifted writer, drafting small and consistent texts that would assist practitioners dealing with children to do their job efficiently. Telling niceties (pulling punches) was not his way; what he wanted to achieve was to reach stakeholders in the juvenile justice sector by depicting reality however unpleasant.

He was a mountain climber and long distance walker. Thus he was aware that one doesn't give up midway, that one has to get to the top, to gain understanding, even if the last part of the path was a hard one. He never gave up, not even in the last difficult years of his life.

He was a friend, a humanist and a believer in the goodness of humankind despite all the horrors he saw done to children and in whatever capacity he worked with them.

But first and foremost he was a friend to all of us who worked with him, learned from him and walked a bit on his way with him.

Relax now, dear friend, you certainly have reached the top of your mountain.

Renate

Memories of a great judge who worked for children — Joseph Moyersoen

I first met André Dunant in 1996, during a seminar on the rights of the child in Abidjan, Ivory Coast, while I was working as a legal consultant for Terre des hommes, Lausanne. I was struck at once by the passion and commitment he had for his work as a judge and President of the Swiss Youth Court.

Each and every one of our subsequent meetings was enlightening to me.

However, his fame and his vocation were not only known to his colleagues in Switzerland, but also all over the world thanks to the many missions in which he took part, particularly in Africa, on behalf of governmental and nongovernmental international organisations.

Among his many positions, I will only mention that he was President of IAYFJM from 1978 to 1982, as well as President of the Veillard-Cybulski Association from its founding in 1986 to 2011.

André always shared his points of view showing his will to fight and act in defence of the rights of the child and for justice for minors. He constantly fought against the repressive perspective of criminal justice as well as against the detention of children in conflict with the law, especially pre-trial detention. One of the thoughts he shared with us, which can easily be found online, reads as follows:

"*On every continent and in a number of countries, the amount of incarcerated children is usually not alarming in itself. What should concern us, however, is that the majority do not belong in prison. [...] Such a child is not yet a 'delinquent'. He only committed a minor offence. He deserves a lesser punishment and, if possible, an educational one. Sending him to prison, the ultimate crime school, even for a few hours or a few days, almost certainly equates to making a real offender out of him. However, this boy will in a few years become a citizen. Each one of us, within his or her capacities, shares the difficult task of preparing him as best as possible for a responsible and dignified future.*" [1]

The last time I met André was in October 2011, during the IDE International Seminar in Sion and, even at a time that was very challenging for him, as he was already greatly affected by his illness, he wished to spend some time with his friends and colleagues.

I thank you yet again, André

Joseph*

[1] André Dunant, "Quelques réflexions sur la justice juvénile dans le monde", February 2003.

Historical Perspectives on Adoption

André Dunant

Cavemen practised adoption.

Unfortunately, we have no archives!

But it is easy to imagine, at the dawn of humanity, a mother of two babies dying, disappearing in a hunting accident or being kidnapped by another clan. In this situation, what happens to the babies? They simply are taken over and brought up by another mother of the tribe. She takes care of them exactly as she would her own children.

It is not yet a full adoption, with all the papers and the "benediction" of the Court, but we are on the way!

The first stories and documents

So many old stories tell the extraordinary adventures of abandoned or stolen children who were taken in by shepherds, princesses or kings and raised as their own children. **Moses** is a famous example of a child adopted into a foreign culture.

"And the child grew, and she [the child's mother] brought him to Pharaoh's daughter, and he became her son. And she called his name Moses, because she said : "I drew him out of the water".[1]

Later Moses broke away from **Egyptian culture** and led his people to the Promised Land.

It is not the same with **Joseph.** Pharaoh gave him an Egyptian name and made "him rule over all the land of Egypt".[2] Unlike Moses, Joseph integrated perfectly into the foreign culture.

The Codex Hammurabi (18th century BCE) is one of the oldest written law codes. It contains provisions on the adoption of children, in particular foundlings. The text, which you can find in Article 3 of the United Nations Declaration of 1986 is very precise about one of the principal conditions to be respected: "The first priority for a child is to be cared for by his or her own parents". Nearly 4,000 years ago, section 106 of the Codex Hammurabi stipulated that before a man can adopt a foundling, he must look for the child's parents, and if he finds them, he must restore the child to them.[3]

In **ancient Rome,** the principal object of adoption was to provide a son and heir to a childless man as a means by which the family line could be saved from extinction. Several Roman Emperors, among them Tiberius and Nero, had been adopted for this purpose."[4]

Under **Justinian Law**, there were two forms of adoption:

- **adoptio plena,** full adoption, limited to the case of adoption by a natural ancestor, such as a grandfather, and
- **adoptio minus quam plena,** incomplete or simple adoption, which does not impair the rights of the natural family, the natural father.

Both kinds of adoption figure in the development of adoption as an institution and are still to be found today. In many legal systems, they exist side by side.[5]

Ancestral and religious traditions

Adoption practices exist all around the world in cultures which are very different from each other, for instance, the **Kikuyu in Kenya,** the **Moluccans in Indonesia, and the Inuit in the North American Arctic.**

The social functions of adoption tend to be very similar throughout non-literate societies. But some aspects are more prominent in one tribal tradition, less so in another. Still very common today are adoptions practised among relatives or people from the same area or culture. These adoptions may serve a range of different functions, such as: relieving natural parents who have many children, providing the child with education or extra care, or helping the adoptive family who may need a girl to help in the home or a boy to look after the cattle.

1 Exodus 2:10.

2 Genesis 41:40-45

3 Cf. Report on intercountry adoption, Hague Conference on private international law, drawn up by J.H.A. van Loon, April 1990, p. 20

4 Report on intercountry adoption, p. 28

5 "Adoption and the law : present situation and new trends", Claire Rihs, in International Child Welfare Review, No 28, March 1976, p. 52

A frequent motive is to preserve property, particularly land, and also to continue the main line of descent of the family. In such cases the interests of the family are clearly predominant. In the instance where adoption serves the purpose of transmission of property, the adoption may involve the whole community and require a public statement by the adopters and traditional ceremonies.

It is important to keep in mind that sometimes it is very difficult to differentiate between what does and does not constitute adoption. In some cases we may hesitate between categorising a **customary practice** as **fostering, guardianship** or **adoption.**[6]

The Hindu tradition puts priority on the spiritual benefit to the adopter and his ancestors. The existence of a male child is necessary for solemnizing the last rites of the adoptive parents.[7]

The Islamic tradition constitutes an exception.
Adoption, with the artificial creation of family ties called **tabanni**, existed in pre-Islamic times and resulted in the complete integration of the child into the new family, including enforcement of the same marriage prohibitions that applied to biological relatives. Precisely because of those marriage prohibitions, the Prophet Mahomet at first declined the offer of Zaid, his adopted son, who had repudiated his wife so that the Prophet could marry her.[8] When the Prophet did finally marry her, the *tabanni* practice could not be maintained. Consequently, the Koran explicitly provides that adopted sons shall not be treated as natural ones and shall not be named after their adopters ("Call them after their true fathers".[9])

In compliance with the Koranic injunctions, Islamic jurists conclude that adoption cannot confer the status of a legitimate child, and even that adoption cannot exist in Islamic law.

That does not mean that a child placed or accepted in a foster family has no legal protection. Let us read what one of the Islamic states, Kuwait, declares six years before the Convention of the Rights of the Child was ratified:

"While some features of adoption are to be found in our laws, they are included in the system of foster care of the child which performs its role in the psychological, health, social and educational care of the child, with the aim of securing a better life for him in the future and granting him nationality as a basic pre-condition".[10]

That kind of foster care is called **kafalah**. Some Islamic countries do allow true adoption for their non-Islamic citizens or residents (e.g. Egypt and Syria) and a few other Islamic States have introduced adoption into their laws (e.g. Tunisia since 1958, and Indonesia).[11]

The Code Napoleon
The Code Napoleon of 1804 marked the beginning of modern legislative concerns with adoption. Napoleon himself wanted adoption for children. He is reputed to have supported the cause of illegitimate children; more generally he takes the view that "men have the feelings which are instilled into them. Thus if an adopted son's feelings are shaped at an early age, he will prefer his adoptive father to his biological father".[12]

However, the Code Napoleon abolished the adoption of minors, only permitting the adoption of adults who in their youth had been cared for by the adopters for six years. The adopter has to be 50 years of age and without descendants. The adoption is a contract and has to be approved by the court.

This new approach worked against homeless, and particularly abandoned, children. It took more than a century, until 1923, before the law made the adoption of minors possible.

The Code Napoleon inspired Spanish legislation—in 1889 the Spanish Civil Code introduced adoption, including minors. Both French and Spanish Codes have served as an example for some Latin American States.

Full adoption, leading to an almost complete integration into the new family, originated in the United States of America.

Generally, however, although adoption exists *de facto* in many societies, it was only after the **First World War** that—under pressure from public opinion and with a view to regularizing numerous *de facto* situations, in particular *de facto* adoptions of orphaned war children—several countries promulgated their first adoption laws, or revised existing laws.[13]

Adoption in industrialized countries
The Second World War and its consequences made the problem of parentless children very acute. This in turn reinforced the concept of adoption as "a unique means of providing parental relationships for children deprived of their natural parents".

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6 Report on intercountry adoption, p. 22 and 24

7 id. p. 30

8 Sura 33.37

9 Sura 33.40

10 UN General Assembly Document A/38/389 of 6 October 1983, p. 23

11 Report on inter-country adoption, p. 26 and 28

12 See F. Boulanger, Droit civil de la famille, tome 1, Paris 1990, p. 80, quoted by J. van Loon

13 Report on inter-country adoption, p. 30 and 32
and Adoption and Foster Placement of Children, Report of an Expert Meeting on Adoption and Foster Placement of Children, Geneva, 11-15 December 1979, ST/ESA/99, p. 2

But it still took some time before this new idea gained wide-spread acceptance.

Around 1960, when the welfare state gained a firm foothold in many industrialized countries, adoption started to be brought within the framework of family and child protection and welfare.[14]

In the early 1960s the Hague Conference started to prepare its Adoption Convention.

Transcultural and interethnic adoptions

Adoption of ethnic minority children – such as **black, Hispanic and native Indian** children in the United States, of native Indian children in Canada, and of Aboriginal children in Australia – may be seen as a transition from the traditional mono-cultural and mono-ethnic in-country adoption towards intercountry adoption in its present form which, more often than not, also involves a cross-cultural and cross-ethnic element.[15]

In Australia **Aboriginal people** have taken the initiative to gain recognition of abuses against their communities and for the special needs of their children. The Supreme Court of the Northern Territory in 1975 responded to these concerns, and several states and territories as well as the federal government have prepared or are preparing legislation in order to better protect Aboriginal children and respect Aboriginal values, e.g. by no longer ignoring traditional *de facto* marriages, and giving preference in placements of Aboriginal children to a parent, members of the child's extended family or other members of the Aboriginal community.[16]

Adoption in developing countries and societies in transition

"In several developing countries resistance to adoption of children from different class, ethnic group, caste or extended family and, in some cases, to the adoption of girls, is strong."[17]

In many parts of **India** boys are preferred over girls, and girls are often difficult to place for adoption.

Korea, which is a major industrial nation in South East Asia, takes an interesting position on adoption:

"….Korea is now a country, like Japan or the US, which is fully able to care for its own, and as such, we do not wish to send our children to foreign countries…….The Korean Government intends eventually to reduce all foreign adoption to near zero. This, of course, will come about gradually as Korean society adjusts to accepting non-related children for adoption."[18]

We can find similar problems in many countries in **Asia, Africa and Latin America.**

That leads us to consider how

Inter-country adoption is developing

Inter-country adoption started developing on a large scale at the end of the **Second World War.** Hundreds of thousands of German, Italian, Greek, Japanese, and Chinese children were adopted in the United States of America. After the **Korean War**, between 1953 and 1981, over 38.000 Korean children were adopted by US families.[19]

Around 1970, in many industrialized countries, birth rates started falling because of easier access to birth control, legalized abortions and because less stigma was attached to single parenthood. Fewer children were available for adoption. The main question then becomes:

How to find a family for this child? (better than "How to find a child for that couple?")

During that period, several Western European countries and Australia adopted many children from Viet Nam, Indonesia, Thailand, and Korea. But the new Government of Viet Nam stopped inter-country adoptions abruptly in 1975.

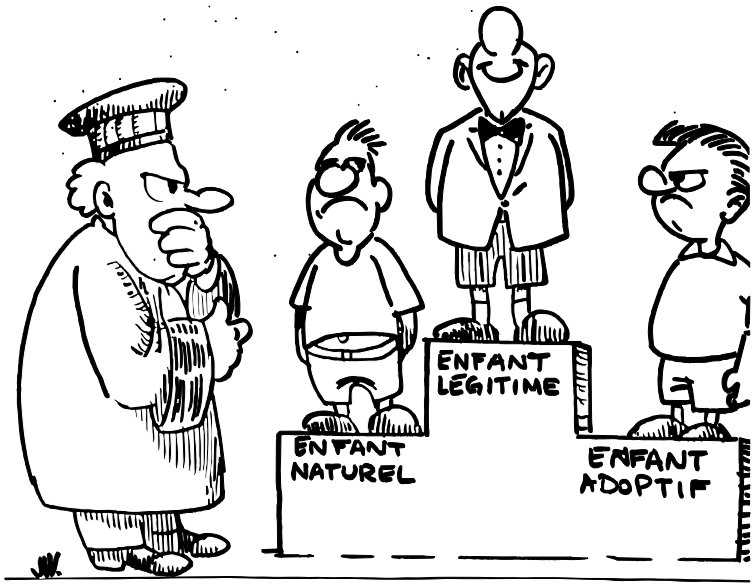
In more and more developing countries resistance to children to be "given" for adoption is growing.

I will not deal here with some contemporary problems sometimes seen as connected with adoption, such as:

- Abandonment as the main cause of children being homeless
- Street children and children on the street
- Refugee children
- Kidnapping and trade of children
- Trade in foetuses and organs of children, etc.[20]

But, in conclusion, simply say that adoption, as practised throughout the centuries, is **still evolving**.

[14] Report on intercountry adoption, p. 34
[15] idem, p. 40
[16] idem, p. 40
[17] Report on intercountry adoption, p. 46
[18] idem, p. 48, quoting a Consul of the Republic of Korea in Washington, DC, in 1990
[19] idem, p. 56
[20] Report on intercountry adoption, p. 62 - 94



André Dunant was a Juvenile Judge and President of the Juvenile Court of Geneva and a former President of our Association. After his retirement in 1996, he practiced as an International Juvenile Justice Consultant and was in charge of many training and fact finding missions in Central and Eastern Europe, Africa, Middle-East and Asia for UNO, UNICEF, European Union, Council of Europe, Terre des hommes and many others.

Treasurer's column — Avril Calder

Subscriptions 2012

In February 2012 I sent out e-mail requests for subscriptions to individual members (GBP 30; Euros 35; CHF 55 for the year 2012 as agreed at the General Assembly in Tunis in April 2010) and to National Associations.

May I take this opportunity to remind you of the ways in which you may pay:

1. by going to the website of the IAYFJM—click on membership then subscribe to pay online, using PayPal. This is both the simplest and cheapest way to pay; any currency is acceptable. PayPal will do the conversion to GBP;
2. through the banking system. I am happy to send bank details to you of either the account held in GBP (£) or CHF (Swiss Francs) or Euros. My email address is treasurer@aimjf.org or
3. if under **Euros 70**, by **cheque** (either in GBP or euros) made payable to the International Association of Youth and Family Judges and Magistrates and sent to me. I will send you my home address if you e-mail me.

If you need further guidance, please do not hesitate to email me.

It is, of course, always possible to pay in cash if you should meet any member of the Executive Committee.

Without your subscription it would not be possible to produce this publication.

Avril Calder

Book Review

The Role of the Juvenile Court Judge: Practice and Ethics by Judge Leonard Edwards, Retired — Judge Margaret Henry

Juvenile Court is different from adult courts and so are the ethics that apply to the judges who sit in Juvenile Court. I recall at an ethics training by CJER early in my Juvenile Court judicial career the instructor saying, "A judge may not accept a gift from any party, ever. No exceptions." My hand shot up. She looked at me and repeated: "No exceptions." I said: "What about a picture from an 8 year old autistic boy who is a dependent appearing in front of me?" She stared at me for a few seconds, and then said, "OK. There is an exception."

There was nothing in writing at that time – more particularly, nothing in Judge David M. Rothman's *California Judicial Conduct Handbook* that supported the position of an exception. Judge Rothman's book is, of course, the gold standard of judicial ethics books. As comprehensive as it is, it does not detail the distinctions in the role of the Juvenile Court judge.

Judge Edwards' new book explains the unique role of the Juvenile Court judge in the context of discussions of ethics. The book takes a very different approach, in structure and content, from *California Judicial Conduct Handbook.* Judge Edwards' book uses hypothetical scenarios that Juvenile Court judges may encounter in their work on the bench, identifies practice and ethical issues, and proposes approaches, offering advice and solutions to the judicial officer. The focus is on practical, ethical issues that the Juvenile Court judicial officer encounters.

The book is well indexed and organized. It is divided into three parts: Running the Juvenile Court, Ex Parte Communications, and Working Off the Bench. Each has approximately 30 sections with several scenarios. The Table of Contents can be used to find an exact discussion of an issue facing a Juvenile Court judge.

The author of this book explains the unique role of the Juvenile Court judge and that judges must not shy away from the responsibilities that come with the role. The Introduction to the book should be mandatory reading for all new judges to the Juvenile Court. Experienced juvenile judges will read the Introduction and think, "Exactly. That explains the difference in our role."

This is a book for specialists – Juvenile Court judges. It should be kept in easy reach of each of us in chambers, right next to the *California Judicial Conduct Handbook*.

Contact Corner — Anaëlle Van de Steen

We receive many interesting e-mails with links to sites that you may like to visit and so we are including them in the Chronicle for you to follow through as you choose. Please feel free to let us have similar links for future editions.

From	Topic	Link
CRIN The Child Rights Information Network	Website	Find it here
	Email	info@crin.org
	Full list of Universal Periodic Review (UPR) recommendations accepted by States	Find it here
DCI – Belgium Defence for the Child International – Belgium	Website	Find it here
	Summer University 2012: 'Caravan of Children's Rights'. Study tour to discover European and UN Institutions	Find it here
IAYFJM	Website	Find it here
IDE International Institute for the Rights of the Child **Jean Zermatten***	Website	Find it here
	Newsletter	newsletter@tdhAchildprotection.org
	International Conference 'Child Rights and the Business Sector: Urging States and private companies to meet their obligations' October 14-17 2012 in Sion, Switzerland	Find it here
IJJO International Juvenile Justice Observatory	Website	Find it here
	Newsletter	newsletter@oijj.org
	The 5th Biennal Conference of the IJJO: 'Criminality or Social Exclusion? Justice for Children in a Divided World' November 5-7, 2012 In London, UK	Find it here
	Green Paper on Child-Friendly Justice: 'Measures of Deprivation of Liberty for young offenders: How to enrich International Standards in Juvenile Justice and promote alternatives to detention in Europe?'	Find it here
IPJJ Interagency Panel on Juvenile Justice	Website	Find it here
	Newsletter	newsletter@juvenilejusticepanel.org
IIRP International Institute for Restorative Practices	Website	Find it here
	The 15th IIRP World Conference: 'Building a Worldwide Restorative Practices Learning Network' August 1-3, 2012 in Bethlehem, Pennsylvania, USA	Find it here
NACCC National Association of Child Contact Centres	Website	Find it here
NRS Child Contact Centres	Website	Find it here
OHCHR Office of the High Commissioner for Human Rights	Website	Find it here
	Report of the Special Rapporteur on trafficking in persons, especially women and children	Find it here
TdH Fondation Terre des Hommes **Bernard Boeton***	Website	Find it here
UNICEF	Website	Find it here
UNODC United Nations Office on Drugs and Crime	World Drug Report 2012	Find it here

European Section Meeting in Brussels, April 2012

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The immediate Past President, Justice Renate Winter, is an ex-officio member and acts in an advisory capacity.

Chronicle Chronique Crónica — Voice of the Association

The Chronicle is the voice of the Association. It is published bi-annually in the three official languages of the Association—English, French and Spanish. The aim of the Editorial Board has been to develop the Chronicle into a forum of debate amongst those concerned with child and family issues, in the area of civil law concerning children and families, throughout the world

The Chronicle is a great source of learning, informing us of how others deal with problems which are similar to our own, and is invaluable for the dissemination of information received from contributions world-wide.

With the support of all members of the Association, a network of contributors from around the world who provide us with articles on a regular basis is being built up. Members are aware of research being undertaken in their own country into issues concerning children and families. Some are involved in the preparation of new legislation while others have contacts with colleagues in Universities who are willing to contribute articles.

A resource of articles has been built up for publication in forthcoming issues. Articles are not published in chronological order or in order of receipt. Priority tends to be given to articles arising from major IAYFJM conferences or seminars.

An effort is made to present articles which give insights into how systems in various countries throughout the world deal with child and family issues; some issues of the Chronicle focus on particular themes so that articles dealing with that theme get priority; finally, articles which are longer than the recommended length and/or require extensive editing may be left to one side until an appropriate slot is found for them

Contributions from all readers are welcome. Articles for publication must be submitted in English, French or Spanish. The Editorial Board undertakes to have articles translated into all three languages—it would obviously be a great help if contributors could supply translations. Articles should, preferably, be 2000 - 3000 words in length. 'Items of Interest', including news items, should be up to 800 words in length. Comments on those articles already published are also welcome. Articles and comments should be sent directly to the Editor-in-Chief. However, if this is not convenient, articles may be sent to any member of the editorial board at the e-mail addresses listed below.

Articles for the Chronicle should be sent directly to:

Avril Calder, Editor-in-Chief,
chronicle@aimjf.org

Editorial Board

MRZ ICJ

Child Rights and the Business Sector: Urging States and private companies to meet their obligations

International Seminar

Organized by

The International Institute for the Rights of the Child (IDE)

In collaboration with

The University Institute Kurt Bösch (IUKB)
International Commission of Jurists (ICJ)
Swiss Centre of Expertise in Human Rights, University of Zurich (MRZ)

Preliminary Program

Course Director: **Carlos Lopez**
International Commission of Jurists

Dates: From 14th to 17th October, 2012

Languages: French and English with simultaneous translation throughout the plenary sessions

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