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LEGAL WRITING BY KATHERINE O'DONOVAN

A. FAMILY LAW

1. "Family Law and Legal Theory" in W.L. Twining (ed.), Legal Theory and Common Law (Oxford, Basil Blackwell, 1986), pp. 184-194.
2. "Protection and Paternalism" in M.D.A. Freeman (ed.), The State, the Law, and the Family (London, Tavistock, 1984), pp. 79-90.
3. "Legal Marriage - Who Needs It?" (1984) 47 Modern Law Review, pp. 111-118.
4. "The Medicalisation of Infanticide" (1984) Criminal Law Review, pp. 259-264.
5. "Wife Sale and Desertion as Alternatives to Judicial Marriage Dissolution" in J. Eekelaar and S. Katz (eds.) The Resolution of Family Conflict (Toronto, Butterworths, 1984) pp. 41-51.
6. "Should All Maintenance of Spouses Be Abolished?" (1982) 45 Modern Law Review, pp. 424-433.
7. "The Principles of Maintenance - an Alternative View" (1978) 8 Family Law, pp. 180-184.
8. "Legal Recognition of the Value of Housework" (1978) 8 Family Law, pp. 215-221.

B. COMPARATIVE FAMILY LAW

1. "Recent Developments in the Law Relating to Children", in Law Lectures for Practitioners, 1987 (Hong Kong, H.K.L.J. 1987) pp. 171-192.
2. "Conciliation and Reconciliation on Divorce" in M.B. Hooker (ed.) Malaysian Legal Essays (Singapore, M.L.J., 1986) pp. 39-60.
3. "Defining the Welfare of the Child in Contested Custody Cases" (1980) Journal of Malaysian and Comparative Law, pp. 29-60.
4. "Void and Voidable Marriages in Ethiopian Law" (1972) 8 Journal of Ethiopian Law, pp. 439-455.

C. COMPARATIVE LAW

1. "Sexual Freedom" in R. Wacks (ed.) Civil Liberties in Hong Kong (Oxford, O.U.P. 1988) pp. 302-320.
2. "The Legal Profession" in A. Ibrahim (ed.) Survey of Malaysian Law 1979 (Singapore, M.L.J. 1980) pp. 423-436.

D. WOMEN'S RIGHTS

1. "Transsexual Troubles - Discrepancies in Social and Legal Categories" in S. Edwards (ed.) Sex, Gender, and Law (London, Croom Helm, 1985) pp. 9-27.
2. "Affirmative Action" in S. Guest and A. Milne (eds.) Equality and Discrimination: Essays in Freedom and Justice (Wiesbaden, Franz Steiner, 1985) pp. 77-82.
3. "The Impact of Entry into the European Community on Sex Discrimination in British Social Security Law" in J. Adams (ed.) Essays for Clive Schmitthoff (Abingdon, Professional Books, 1983) pp. 87-98.
4. "Before and After: The Impact of Feminism on the Academic Discipline of Law" in D. Spender (ed.) Men's Studies Modified (Oxford, Pergamon Press, 1981) pp. 175-187.
5. "The Male Appendage - Legal Definitions of Women" in S. Burman (ed.) Fit Work for Women (London, Croom Helm, 1979) pp. 134-152. Reprinted in M. Evans (ed.) The Woman Question (London, Fontana, 1982) pp. 344-362.

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Family Law and Legal Theory

KATHERINE O'DONOVAN

I INTRODUCTION

The view that family law is not really law seems to be gaining credence. This is not a new version of the Austinian denial that international law is law properly so called. Rather this view asserts that law cannot deal with family disputes and behaviour, and that law's instrumental functions of conflict-resolution and behaviour-guidance are not applicable to personal and family life. Law's inability is explained by reference to unenforceability or to unsuitability; attempts to deal with family problems are said to bring law into disrepute. In another version of this theme family law stands accused of having so far departed from principle and precedent as to be arbitrary, thereby losing its claim to guide conduct. This, it is alleged, undermines the rule of law. These criticisms of family law express beliefs about law which are tacitly underpinned by legal theory. Through examination of the denial of the title 'real law' to family law this paper seeks to explore the theoretical positions which inform such criticisms.

It would be possible to set about this exercise with the assumption that legal regulation of family and personal behaviour is law insofar as its pedigree passes the appropriate test. Or one might look to the content of specific rules and judicial pronouncements to see whether they conform to certain moral standards for family behaviour laid down by community or authority. The outcome would probably be that much, or even most, of what we call family law would pass these tests. The question pursued here is different. It asks the following: what is it about family law that gives rise to challenges to its authenticity as law? Does that tell us anything about theories of law? Beliefs about law, whether they are held by lawmakers or legal subjects are different from law itself. Yet the two are connected, for if law's authority is held to depend on its reputation and predictability then this presents a challenge to what Simpson calls the 'school-rules concept' of law. And if certain areas of life and behaviour are deemed suitable for morality, but not law, this suggests a view that law has internal limitations which do not relate to its pedigree.¹

II LAW'S DEFECTS IN THE FAMILY ARENA

The assertion that law is unsuitable or unable to deal with family and personal behaviour has a long history. Expressions of this belief can be found in legislative

debates, judicial opinions and academic writings of many periods. Lurking behind this are views about law and about the family. Questions about what law can or cannot do raise wider issues about people, behaviour and social theory. Empirical investigation may provide some answers. But the pervasiveness of the belief that personal matters are 'not the law's business' suggests that we are up against something deep-rooted in social consciousness. It is clear that if this point is to be elaborated the notion of personal matters must be defined. For present purposes family behaviour is identified as personal; however the conception of the personal is broader than, and does not necessarily involve, the family. Legal withdrawal in the recent past from regulation of personal matters such as sexuality and birth control suggests that the uneasiness about law's role in relation to the family may be explained in part by looking at the history of the debate on law and private morality.

Arguments advanced to show law's defects in dealing with the family fall into three groups. The first set posits inability. Law cannot tell people how to behave in their own homes; they will not obey; such rules are unenforceable because the necessary information is unobtainable, unless you put 'a spy under the bed'. What is being expressed here is a statement about the limits of law's hortatory function. It goes something like this: 'It is all very well to exhort people to behave properly in their personal relationships but law on such matters is unenforceable. Therefore it is better not to legislate.'

The second set of arguments propose unsuitability. Law is the 'wrong' mechanism for dealing with personal behaviour, emotions, feelings; it is cold, antagonistic, adversarial and alienating. Families are about love and trust; law is the guarantor of distrust. What is being expressed here is a statement about the limits of law in the resolution of disputes. Against this version of criticism of law is set a vision of another mechanism of dispute resolution which is cosy and friendly, in which there are no winners and losers.

The third set of arguments points to the bad effects of using law on the family. Law is only a negative force which destroys what it intends to help. Its entrance into the family arena escalates existing disputes. This viewpoint has been expressed as follows: 'the mere hint by anyone concerned that the law may come in is the surest sign that things are or will soon be going wrong.'² Again, this suggests a theory of the limits of law as a method of dealing with conflict.

Behind these three sets of arguments about the limits to law's powers in dealing with family matters may lie a fourth argument about law itself. Is it too pure to be sullied by the messiness of domestic life? Certainly the argument that law will be brought into disrepute if it enters areas where it is unenforceable is motivated by a concern to protect law's reputation.

Arguments about law's limits in its exhortatory and dispute-resolution functions present a strong case and are widely advanced.³ What is less widely recognized is that, whatever their claims to empirical evidence in support, these arguments reflect a particular intellectual tradition, that of liberal political philosophy. This is where the recent history of law's withdrawal from the regulation of private morality provides a useful perspective. John Stuart Mill's definition of the limits of law to curtail individual freedom laid down a simple principle: 'that the sole end for which mankind are warranted, individually or collectively, in interfering

with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.'⁴ The application of this principle in the Sexual Offences Act 1967 following upon the publication of the Wolfenden Report in 1957 is well known. So too is the debate between Hart and Devlin on law and morality.⁵ Whatever the merits of Devlin's position, of the crimes in private between consenting adults which he wished to retain, homosexuality, abortion, incest, pornography and prostitution have either been partially decriminalized or some proposals therefor have been put forward.⁶ This suggests that the privatization of personal morality is well on its way.

In relation to family behaviour one could argue that since this matter has been little regulated no privatization can take place. The point is, however, precisely that. This is an area of personal relationships which is private, into which law does not venture, whether for the instrumental reasons suggested above, or out of concern for its reputation for purity.

III LAW'S DEPARTURE FROM PRINCIPLE

The philosophical case against law's intervention in the family stems from the liberal tradition. From academic and practising lawyers has come an argument bemoaning what is identified as family law's departure from true legal character. This arises from the conferral on the judiciary, and on administrators, by Parliament of discretion in deciding matters of custody, childcare, divorce, maintenance, matrimonial property and inheritance. Discretion permits the individualization of justice according to the particular facts of each case. Criticism of this laments the loss of law's hortatory function in laying down rules for the future, lack of predictability, universality or generality of the law, the undermining of the moral authority of the judiciary, and the expansion of litigation as each case seeks its individual adjudication.

As expressed by Atiyah the 'weakening belief in the importance of the hortatory effect of the judicial process has been accompanied by, and has surely been part cause of, a change in the sense of justice itself.'⁷ Individualized justice is a response both to a twentieth-century tendency to view consequences in the short term, and to greater diversity of moral beliefs. Discretion enables the concealment of the values which inform the judicial decision. Atiyah recognizes that there is no longer a consensus on the moral, religious or aesthetic ideals which supported the legal rules and principles of the nineteenth century. Discretionary standards and the redefinition of certain concerns as private mask both the values which are still implicit in legislation and in judicial decisions, and the lack of consensus on matters identified as personal.

Open-ended standards in legislation confer discretion permitting a wide variety of factors to be taken into account in adjudication. Atiyah's doubts about this trend in late-twentieth-century family law relate to his own model of law as serving conflict-adjustment and hortatory functions, and to his concern for 'the generality and universality which the very nature of law seems to require'.⁸ His ideal rule

of law is characterized by generality, neutrality, uniformity, predictability and autonomy. It is his hope that with a return to what he calls principles⁹ law may yet recover its hortatory function. But correct as the analysis may be it is limited to pragmatic instrumentalist legal theory, and the prescription fails to take account of social theories which may help to explain the changes in the rule of law over time.

What does this mean for family law? The response to the recognition of law's instrumental limitations, and to the growth of discretion, has been contradictory. There has been a strong movement in favour of delegalization and privatization of family and personal matters; but when moral panic breaks out law continues to be invoked as 'binding on everyone in society, whatever their beliefs . . . the embodiment of a common moral position', despite the recognition that 'in our pluralistic society it is not to be expected that any one set of principles can be enunciated to be completely accepted by everyone.'¹⁰ Thus the tension persists between the liberal position, which advocates non-regulation or delegalization of matters identified as personal or private, and the absolutist position which advocates regulation on the outbreak of moral panic.

IV DELEGALIZATION

Arguments in favour of delegalization of family law stem from dissatisfaction with law as an instrument for dealing with family relationships; law is seen as the 'wrong' mechanism. And there is also concern expressed by lawyers of various kinds about what family law is doing to the ideal of the rule of law. So the removal of family behaviour and disputes to some other arena is regarded as advantageous for instrumental purposes and for the preservation of law's purity.

Delegalization takes various forms. It ranges from conciliation of divorcing spouses in the settlement of custody and property matters, mediation, the family court, informal negotiation and bargaining, to contractual agreements for personal relations. The common thread linking arguments favouring these methods is the claim that they are new, and are alternatives to legal regulation. Whether either of these claims can be sustained is doubtful.

In an earlier part of this paper the arguments criticizing law's effectiveness in dealing with the family were summarized. It is time to investigate further. It has already been postulated that the intellectual origin of these criticisms lies in liberal political philosophy; however, confirmation has come from empirical research. In the expansion of academic legal scholarship that has taken place in the past 20 years family law was one of the first of the traditional areas of study to be 'broadened'.¹¹ Empirical research on custody and divorce, on the personal experiences of divorcees both as solicitors' clients and as consumers of the judicial process, and on the experiences and attitudes of registrars and lawyers added up to proposals for legal reform from an instrumental perspective.¹² The outcome was a search for a 'nicer', informal, that is non-legal, way of handling these trouble-cases.

Arguments based on a combination of liberalism and empiricism are cogent. With the addition of a third element of expediency it is not surprising that

into and exit from the care of the state are moving from administrative to judicial control.

Explanations for these apparently contradictory tendencies will not be found by taking an instrumental approach to family law. Although delegalization in one area is justified by the search for a 'nicer' way out, judicialization of child-care hearings, with separate representation of the interests of the child, is the result of disillusionment with a process which does not provide traditional legal procedural safeguards. This relates to conceptions of justice embodied in the rule of law in a procedural sense, as exemplified in the work of Lon Fuller.¹⁷ Administrative decision-making on deprivation of parental rights and the coming and going of children into and out of the care of the state is perceived by many as an abuse of legal process. As Neil MacCormick has observed: 'It remains a contested issue whether an aspiration to justice is to be treated as essential to or definitive of the legal enterprise in all its manifestations, or is to be distinguished as a specially urgent demand issued in the name of critical morality.' MacCormick suggests that it matters little, when faced with 'possible unjust exercises of the power of modern states organised under and in the name of "law" . . . whether or not these represent a corruption of law in its ideal essence or simply an abuse of public power.'¹⁸ Yet it is clear in references to natural justice that our conception of law is bound up with ideas of notice, fair hearing, representation and open judgment, aspects of which have been denied in the admission of children to the care of the state, and particularly in parental rights resolutions by local authorities.¹⁹

The choice then appears to be between informalism, in which individualized solutions to disputes are worked out and accepted by the parties, and the formal judicial process. In instrumental terms there is much to be said for the informal approach. It induces parties to submit their disputes voluntarily to conciliation or administrative decision and, in some areas such as divorce and custody, it involves them in working out a private solution, thus enhancing their acceptance of the outcome. Formal justice as an alternative offers openness, ostensible neutrality, and rules. One response to this choice might be to suggest that it depends on the type of dispute in question. Formal justice and procedural safeguards are best for child-care cases, whereas informal methods suit divorce and custody disputes. This can be raised to a higher level by suggesting that personal disputes be settled informally and those between state and citizen formally. But fundamentally the instrumental approach fails to reconcile and explain contradictory tendencies. Furthermore, the evidence is of the proliferation of informal administrative agencies in the modern welfare state with discretion to determine the claims of citizens. For instance, in other areas of law concerning children, such as fostering, adoption and parental access to children in care, social workers as agents of the state have developed informal rules for decision-making. There is no appeal against these to the courts. These rules cannot be placed in the category of formal law; but neither do they fit into my previous description of informal justice. There is no voluntary acceptance of the decision, rather it is imposed, often without discussion, and with no possibility of judicial review. So informalism pervades bureaucratic law.

It has already been suggested that informal methods of dispute-resolution in the family arena are not new, nor are they alternatives to legal regulation. The

assumption that they are reveals a very limited conception of law. This relates to the limitations of instrumentalist legal theory. Informal methods are merely other forms of social control allied to law in a corporate state. To understand this point one has to ask how the family has been internally regulated, given that law has claimed no hortatory function over family behaviour and has limited itself to dispute-resolution when things go wrong. I suggest that the answer to this can be found by looking to theories of the family and to legal structures.

V A THEORETICAL FRAMEWORK FOR FAMILY LAW?

Hitherto the instrumental approach to law has been criticized as inadequate to provide a coherent explanation for contradictory tendencies in legal developments. This criticism is not that instrumentalism is untheoretical, but rather that its hidden assumptions when made explicit are revealed as limited. Before proceeding to an analysis of the inadequacies of instrumentalist legal theory it is important to clarify the point that statements about law, whether in instrumental, therapeutic or welfare terms, are based on beliefs about law. These beliefs in turn are informed by theory, that is, by general and abstract perspectives. In the case of family law, views about people, their relationships to each other and to the world are contained in legal statements. Theories that inform these beliefs must be exposed and examined. The purpose is to clarify and test and, ultimately, to understand and explain.²⁰

My position therefore is that even seemingly untheoretical statements about family law of a common-sensical and pragmatic mode are based on theory. One strategy in theorizing family law is to uncover hidden assumptions concerning both family and law. Bringing these out in the open and subjecting them to scrutiny and analysis will yield fruitful results. To some extent this work is under cultivation. I suggest that, important as such analysis is, there are more fundamental issues which have to be tackled first. This can be illustrated by a deepened critique of instrumental legal theory.

Instrumentalists believe that law in essence is a means to serve certain goals. This is sometimes described in terms of social engineering, and the resources that law brings as machinery are distinguished from its social goals. Robert Summers has identified five different forms of legal techniques for implementing these goals. These range from private arrangements to penalty.²¹ Allied to this are views about the limited efficacy of law. One believer in the limits of law puts it like this: 'laws are often ineffective, doomed to stultification almost at birth, doomed by the over-ambitions of the legislator and the under-provision of the necessary requirements for an effective law, such as adequate preliminary survey, communication, acceptance, and enforcement machinery.'²² This judgment of law according to its perceived limits is based on a misconception of the nature of law. In posing law as an external force to those it purports to control the judgment fails to recognize law's part in constructing experience of the world; how knowledge is possible only through categories and symbols of language; how meaning is produced out of legal ordering of supposed differences.

An early question relates to ways of thinking about claims that people make on each other within families and the expression of these in law. I have already pointed out that law has imposed on itself a self-denying ordinance in its relation to the personal. In the ritual legal opera only certain kinds of song can be performed; only certain persons can sing.²³ Less powerful characters may not be allowed on stage. This point goes to the formulation of ideas, their presentation in language and their legitimacy in law. Elsewhere this has been described in terms of semiology.²⁴ Law is a powerful mechanism for recognizing or hiding the desires and perspectives of those whose lives it governs. In its legal forms it legitimates or ignores the voices under its control. But it goes further than that. Its structure and language may prevent not just the voice from being heard, but feelings from moving to ideas and into speech. Thus some may remain forever the audience without the power to express their point of view.

Points of view could be said to be central to the formal legal enterprise. This is certainly the belief of liberals for whom the heart of the law is 'the open hearing in which one point of view, one construction of language and reality is tested against another. The multiplicity of readings that the law permits is not its weakness but its strength, for it is this that makes room for different voices. . . .'²⁵ This presupposes that all voices have an equal possibility of speech and hearing. Bernard Williams defines the respect that is owed to all persons as an effort of understanding, 'to see the world from his point of view'.²⁶ For him this is an essential component of the idea of equality. As an ideal of law this is attractive, and in going deeper than instrumentalism it raises a number of issues. If equality before the law is to be an equality of voices then there are issues about formal procedures and the extent to which these are accessible to all. There are further issues about the availability of language and concepts to the silent.

Where lies the power to identify and define points of view? In legal procedures personal and family relations have been deemed to be beyond law's limits. The location of certain family members, in particular women and children, in the private domain in which 'the King's writ does not seek to run, and to which its officers do not seek to be admitted'²⁷ ensures their silence. This is taken as natural but is a cultural definition of law's limits produced by those with the power of speech. And, more evidently, formal equality before the law is limited. As Anatole France explained: 'equality of the laws . . . forbids rich and poor alike to sleep under the bridges, to beg in the streets, and to steal . . . bread.'²⁸

Power in the family is not just concerned with the formulation and definition of points of view and the claims family members make on one another; it also affects internal regulation. Instrumentalists should ask themselves the following: in the absence of law who controls the family? Answering this question is a complex matter but I suggest that empirical and theoretical investigation is long overdue. Traditional family law sees no problem of the legitimate exercise of power between spouses because of beliefs in the formal equality of the sexes. Yet it is precisely because this ideology is not lived up to in private, and because the state is involved both in its promulgation and its violation, that feminist theory can take a highly critical moral stance. Looking to internal power and control within the family is one consequent strategy. A second is based on the constitution of the family by structures external to it.

Social theory of the family has a long history of debate on structural explanations, that is on whether family types adapt as appropriate to the social and economic world. What has been less recognized is that legal structures constitute the family and roles within it. If we look to laws external to the family we can begin to develop a body of substantive analyses guided by theory. The economic world in which the family has its being is not just the market, for it is also affected by state allocation of the benefits and burdens of citizenship according to its own criteria. Investigations of public law on taxation and social security reveal how internally the family is constituted by legal structures external to it. The roles of wife and husband are defined in legislation in which the state is concerned with economic redistribution.²⁹ Legal forms not only constitute gender relations but represent ways of seeing roles and relations.

Discussions about structures must not be limited to rather arid chicken-and-egg problems. Much more fundamental issues are raised. Recent work on the history of the family uses structural explanations for family form as an expression of a particular culture and as a mechanism for creating personality types consonant with that culture. This, Lawrence Stone argues, is done through the structuring of relationships, and through methods of children-rearing.³⁰ We should be asking ourselves about the character of individuals which are being produced by the family forms that we have today and about law's part in creating the domestic group. Thus questions about structure can raise deeper issues of phenomenology, whose contribution has been 'to show the ways in which ways of living a life work themselves into complex ways of thinking'.³¹

The preceding discussion of law's self-imposed limits and the consequent silence of those whose lives are largely lived in private is intended to criticize instrumentalism for failing to take account of ideology, 'the sum of the ways in which people both live and represent to themselves their relationship to the conditions of their existence'.³² More difficult is the point made earlier about the lack of language and concepts to enable the silent to speak. The contribution of Saussure's theory of language has been to point out how personal identity and subjectivity are constructed through differentiation.³³ Experience of the world is mediated and made intelligible through discourse. But language and interpretation assume a structure of values of which they form a part. Thus the available language is imposed. How can other viewpoints be expressed? If we are to go beyond nihilism we shall have to devise a strategy to examine this.

My conclusions are that work which looks to family law as instrument is inadequate; the 'school-rules concept' of law overlooks law's part in representing and naturalizing 'the way things are'; law's self-denying ordinance in relation to the personal and the private is a cultural construct and not an inevitable element of ideas of law or justice. The alternative approaches which have been outlined above will lead to a deepened analysis. No doubt there are other ways to criticize the legal opera; these I leave to other critics.

NOTES

- 1 The view that certain matters are unsuitable for legal regulation and should therefore be left to morality is an instrumental view of law's limits. It is quite different from

- Fuller's 'internal morality of law', in which Fuller advanced the thesis that eight procedural requirements such as generality, clarity and prospectivity, must be satisfied before a legal system can be said to exist. See L. Fuller, *The Morality of Law*, (1969) ch. 2.
- 2 O. Kahn-Freund and K. W. Wedderburn, 'Editorial Foreword' to J. Eekelaar, *Family Security and Family Breakdown* (1971) p. 7.
 - 3 E.g. M. A. Glendon, *The New Family and the New Property* (1981); J. Goldstein, A. Freud and A. Solnit, *Beyond the Best Interests of the Child* (1973).
 - 4 J. S. Mill, *On Liberty* (1910) p. 73.
 - 5 H. L. A. Hart, *Law, Liberty and Morality* (1963); P. Devlin, *The Enforcement of Morals* (1968).
 - 6 *The Criminal Law Revision Committee, Fifteenth and Sixteenth Reports on Sexual Offences* (1984; Cmnd 9213 and 9326) have dealt with most of these crimes.
 - 7 P. S. Atiyah, *From Principles to Pragmatism* (1978).
 - 8 *Id.*, p. 29.
 - 9 Julius Stone has criticized Atiyah's use of the word 'principles'. See 'From Principles to Principles' (1981) 97 *Law Quarterly Rev.* 224.
 - 10 *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Warnock Report) (1984; Cmnd 9314) para. 6.
 - 11 See Twining, 'Goodbye to Lewis Eliot. The Academic Lawyer as Scholar' (1980) 15 *J.S.P.T.L.* (NS) 2.
 - 12 E.g. W. Barrington Baker *et al.*, *The Matrimonial Jurisdiction of Registrars* (1977); Davis *et al.*, 'Undefended Divorce: Should S.41 Be Repealed?' (1983) 46 *Modern Law Rev.* 121.
 - 13 N. Hartsock, 'Feminist Theory and Revolutionary Strategy' in Z. Eisenstein (ed.), *Capitalist Patriarchy and the Case for Socialist Feminism* (1979) p. 57.
 - 14 I wish to call personal experience in aid. Some years ago I attended a conference on family law in which a speaker posed a number of cases to the participants for resolution. The first case revealed the dangers of state intervention; the second the dangers of state inaction; the third the desirability of a maternal-preference rule in child-custody cases; the fourth the disadvantages of such a rule. I looked around the room. The participants were reeling. Given their *ad hoc* approach to family issues there was no way they could reconcile the decisions they had made.
 - 15 R. M. Unger, *Law in Modern Society* (1976), pp. 166-200.
 - 16 Special procedure or 'divorce by post' was introduced in 1973. By 1977 it had been extended to all undefended divorce cases. It is now the ordinary and administrative procedure for dealing with divorce.
 - 17 L. L. Fuller, *The Morality of Law* (rev. edn; 1969).
 - 18 MacCormick, 'Contemporary Legal Philosophy: The Rediscovery of Practical Reason' (1983) 10 *J Law and Society* 1 at p. 11.
 - 19 Under the Child Care Act 1980, s.3, a child who comes into care on a voluntary basis can, after six months, be the subject of a 'parental rights resolution' whereby the local authority assumes parental powers. No court hearing is necessary for such a resolution.
 - 20 W. L. Twining, 'Evidence and Legal Theory' (chapter 4 above) pp. 62-4.
 - 21 Summers, 'The Technique Element in Law' (1971) 59 *California Law Rev.* 733.
 - 22 A. Allott, *The Limits of Law* (1980) p. 287. See also R. S. Summers, *Instrumentalism and American Legal Theory* (1982) ch. 12.
 - 23 Nancy Fulton, a participant in my family law course in 1984-5, first made this point to me.
 - 24 Tushnet, 'Post-Realist Legal Scholarship' (1980) *J.S.P.T.L.* (NS) 20 at p. 31.
 - 25 J. Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (1984) p. 273.

- 26 B. Williams, 'The Idea of Equality' in *Philosophy, Politics and Society* (2nd series) (1962; ed. P. Laslett and W. G. Runciman) p. 117.
- 27 *Balfour v. Balfour* [1919] 2 KB 571 at p. 579, *per* Atkin LJ.
- 28 Quoted by Hutchinson, 'From Cultural Construction to Historical Deconstruction' (1984) 94 *Yale Law J* 209 at p. 227.
- 29 K. O'Donovan, *Sexual Divisions in Law* (1985) ch. 6.
- 30 L. Stone, *Family, Sex and Marriage in England, 1500-1800* (1977). See the discussion in C. C. Harris, *The Family and Industrial Society* (1983) ch. 8.
- 31 Tushnet, *op. cit.*, p. 31.
- 32 C. Belsey, *Critical Practice* (1980) p. 42.
- 33 F. de Saussure, *Course in General Linguistics* (1960).

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CHAPTER 5

Protection and paternalism

Katherine O'Donovan

'Even the disabilities which the wife lies under are for the most part intended for her protection and benefit: so great a favourite is the female sex of the laws of England.'

(Blackstone 1765: I, 433)

It is generally assumed that Blackstone was attempting a little irony in the above passage from his *Commentaries*, for he had just described a system which denied a married woman's legal existence. Yet close examination of the context in which he wrote reveals that the common law of the eighteenth century did attempt to mitigate the effects of a wife's legal loss of personality by protecting her from some excesses of a husband's power. In effect what he describes is an assumption by the law that a wife may have been compelled by her husband to commit a felony or to perform some civil legal act such as contract or conveyance. She can therefore be excused or protected.

A rational reaction to such a system would be to suggest that no protection would be necessary were it not for the disabilities created by law. Liberal political thought advocates the grant of equal rights to women so as to put them on a par with men. Mill (1929) states the position clearly. He believes in progress by human beings through the ages and that the grant of formal equality of rights to women is part of the continuing rationalization of society. This concept of equal rights was the philosophical basis for legislation such as the Sex Discrimination Act 1975 and the Equal Pay Act 1970.

Arguments based on formal equality are opposite to arguments based on special rights or on the need for protection. Liberal arguments are committed to creating similarities between women and men where possible and to minimizing differences between them (Radcliffe

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Richards 1982). This leads to the assimilation of women and men and to a denial of special rights. The claim for special rights is sometimes based on biology and sometimes based on gender roles. It is often said that the assimilationist argument ignores these differences between persons and offers a model based only on rights achieved by men and on a male life-style (Elshtain 1981: Chapter 5. Wolgast 1980: Chapter 1). It will be suggested below that this objection can be overcome by a plurality of rights which recognizes heterogeneity in life-styles and differences in biology and in roles.

A second objection to formal equality can be traced directly back to Mill's writing. For he confines himself to formal equality in the public sphere and sees women and men as having quite separate roles in domestic life. Thus he argues:

'When the support of the family depends, not on property but on earnings, the common arrangement, by which the wife superintends the domestic expenditure, seems to me in general the most suitable division of labour between the two persons'

(Mill 1929: 263)

Thus Mill accepts the split between private and public life and fails to see that it is precisely out of this division of labour that many of the problems concerning state policy arise. Mill's position is one of recognizing equality in the public sphere, and of saying that women and men are alike in all important respects. His analysis fails to uncover those sources of inequality between the sexes that lie outside public law.

This paper reviews arguments for and against special rules based on ideas about protection of women. These rules could be said to be contrary to the principle of formal equality. But, as the review reveals, the issues are complex. Protection is a concept which must be carefully analysed. Protection – for whom, why, from what, from whom? The paper does not tackle the even more difficult issue of differential treatment as compensation for lack of formal equality in the past. In analysing the notion of protection it should be separated from ideas about paternalism. Protection may imply a concern about the rights of others that could be labelled paternalistic. Examples can be found, however, where protective policies arise from inequalities, complexities, necessity, or a sense of justice. It is important to note that it is rights that are being protected.

The notion of protection implies inequality and weakness, a power

imbalance which the law is to rectify by its intervention on behalf of the weaker party. This is accepted as unproblematic in relation to children, who are said to lack judgement as to where their own good and interests lie, and also to be unequal to and weaker than adults (Scarre 1980). In relation to children then, adults are the norm. Protection is necessary because children cannot conform to the adult norm. Full competency is adulthood. Childhood means less than full competency and therefore protection.

Consumers are protected by legislation because of the complexities of modern mass production. The rationale is that the individual lacks the knowledge or information to judge, for example, whether certain electrical goods are safe. But consumer protection goes further than that in allowing individuals to change their minds about agreements they have signed (Hire Purchase Acts 1938-65) and in recognizing inequality in contractual bargaining power (Unfair Contract Terms Act 1977). Again this is seen as unproblematic, perhaps because everyone falls into the consumer category, and there is no other norm from which consumers deviate.

In the case of employment contracts, however, there is an opposition between the category employer and the category employee. Yet the safeguarding of employees through employment protection legislation is not challenged as reducing them to the status of children, nor is it said to be against their best interests (Employment Protection (Consolidation) Act 1978). The policy is justified on grounds of inequality of bargaining power between the two categories. It is germane to note that the legal subordination of workers that existed until the nineteenth century was replaced by formal equality. Dissatisfaction with formal equality has led in the past twenty years to a policy of protection (Honoré 1982: 7). The analogy with wives is self-evident.

Examination of explanations for policies of protection of women reveals variety. Certain arguments take the same form as those made concerning children. Women, it is said, lack judgement about their own best interests. They need protection 'for their own good', even if they do not want it. Other arguments emphasize inequalities between women and men arising from the division of labour and disparities of power. Counter arguments insist that protection reinforces inequality and enables continuation of the conditions that necessitated it initially. Submission by, and control of, the protected is the outcome. Adult women, it is said, are equal to adult men and should have the same autonomy. Protection merely cushions and legitimates discrimination. In these arguments the opposing social categories are women and

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men. Rules concerning men are taken as the norm and where special treatment or protection is provided for women this is regarded as deviation, and often as a favour.

It is important to note that in the examples given of children, consumers, the employment contract, and women, clear opposition emerges between the category which is the norm, and the exception, except in the case of consumers. As suggested already, consumers' interests are everyone's interests.

'For her own good'

Legislation providing for differential treatment of women and men employed in factories is called 'protective'.¹ In *Muller v. Oregon* (208 US 412 (1908)) judicial approval for limiting days, times, and hours women could work was based on arguments about lack of physical strength, separate classification of women from men, and motherhood. Examination of motherhood gives a clue as to one major premise. Women's ability to give birth, their social role as mothers, and the health of future generations, are seen as requiring the control of women's working hours. What is revealed is that children are being protected, and for their sake women are being treated differently from men.

An illustration of how the argument based on maternity affects all women, and not just pregnant or hopeful mothers, is contained in *Page v. Freight Hire Ltd* ([1981] 1 All ER 394). A woman aged twenty-three brought an action against her employers for discrimination under the Sex Discrimination Act 1975 because she was prohibited from carrying out her job as a lorry driver under circumstances in which a man would have been permitted to work. The load the lorry was to have carried was DMF, a chemical that had risks for both men and women, but particularly of female sterility and for a foetus inside a pregnant woman. The lorry driver was willing to accept the risks of working with the chemical and to indemnify her employers against risk, but was prohibited from doing so. The Employment Appeals Tribunal held that there was a statutory duty on the employers to ensure the health, safety, and welfare of their employees and that therefore there was no discrimination. The distinction between the protection of any potential foetus and the lorry driver's own interest is not made in the judgement.

This case has two interesting aspects. The first is the point made above concerning the separation of the interests of a potential foetus

from those of the mother, or of women generally. If all women are to be subjected to control for the sake of future generations, then surely this should give rise to compensation and not to disability. Furthermore, this classification of all women as having the same interests and needs in opposition to men overlooks the obvious fact that all individuals classed together do not share the characteristics that differentiate the average class representatives.

The second point is that the lorry driver had made her position very clear, she was divorced and did not want children. She knew the dangers and wished to accept them. The appeals tribunal said:

'We accept that the individual's wishes may be a factor to be looked at, although, in our judgement, where the risk is to the woman, of sterility, or to the foetus, whether actually in existence or likely to come into existence in the future, these wishes cannot be a conclusive factor.'

([1981] 1 All E.R. 394 at 398)

Thus, the employers' judgement of what is for the woman's good is substituted for her own. This 'for her own good' argument was rightly characterized by the Supreme Court of the United States as "romantic paternalism" which, in practical effect, put women not on a pedestal, but in a cage' (*Frontiero v. Richardson*, 411 US 677 at 684 (1973)).

In terms of freedom of contract women, controlled by protective legislation, are not free. It is true that employers can ask for an exemption from the legislation and that many do (Coyle 1980) but the necessity of so doing means that a refusal to employ women is permitted under the Sex Discrimination Act. This is because job working hours longer or other than those permitted under the Factories Act 1961 constitute a genuine occupational qualification. In *E.A. White v. British Sugar Corporation Ltd* ([1977] IRLR 121) the industrial tribunal held that sex was a genuine occupational qualification for a job that entailed Sunday work and that therefore the biologically female employee was not discriminated against since 'the job requires a man because of legal restrictions on the employment of women' (121).² This suggests that the state is paternalistic in claiming to know better than women where their interests lie. The evidence is that women factory workers wish to be free to negotiate their own hours of employment without the constraints of protective legislation (EOC 1979). The 'for your own good' form of argument denies women's capacity to make their own choices.

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Yet the state does have a legitimate role as protector of children, born or unborn, as most discussions of paternalism agree. And it is because of their biological capacity to gestate and give birth that women have been controlled along with children. Complete separation of their interests may not always be possible. As a minimum, however, where the rationale is the protection of any foetus, this should be made explicit and all women should not be included. If the rationale is the assignation of a child care role to women, this should be articulated and women without such responsibilities should be excluded. If these policies were clarified then it might be possible for persons accepting the burdens and benefits of raising future generations to have their life-style recognized through some form of legal rights.

The Equal Opportunities Commission, with its liberal brief for formal equality, advocates the repeal of protective legislation because:

'the hours of work legislation constitutes a barrier – often an artificial one – to equal pay and job opportunities for women. So long as this legislation remains as it is at present, women as workers will be disadvantaged.'

(EOC 1979: 92)

The problem with this, as with all statements of formal equality, is that it presupposes a freely negotiated bargain between women and their employers without any constraints of existing inequalities of power, and trade union intervention. In any case, the contract of employment is no longer freely negotiated. Employers are bound by a system of legislative controls placing considerable limits on their autonomy. Yet state intervention on behalf of employees is seen as evening up the balance of power and preventing exploitation.

The debate over the repeal of protective legislation continues in Britain, but has been resolved in the USA after fifty years of argument. There social reformers opposed repeal in the hope that improved conditions would mean the extension to all workers of shorter working hours, and because of the needs of families of women workers. This is the position that has been adopted in Britain by the Trades Union Congress and by the National Council for Civil Liberties. Feminists in the American National Women's Party first introduced the Equal Rights Amendment in 1923, which, if passed, would obliterate sex as a functional classification in the law. This latter position has been adopted by the Equal Opportunities Commission. In the USA social reformers and trade unions have with-

drawn their historic opposition to the Equal Rights Amendment. It is generally agreed that protective legislation reinforces women's lowly position in the labour market and at home. A society divided on sex or gender lines reinforces male hegemony and preserves the *status quo* (Babcock 1975: 247).

The language in which the Trades Union Congress has opposed the repeal of protective legislation deserves analysis:

'A large proportion of working women are married with not only a house to look after, they have in effect a multiplicity of jobs. Thus the pressures to which they are subject are likely to cause them to overwork against their better judgement. They may not only damage their health and increase the risk of accidents, but have serious effects on the well being of family. In the interests of society generally, . . . the state must intervene to protect women against the combined effect of social and economic pressure.'

(Department of Employment 1969: para. 20)

If paternalism is the substitution of another's judgement for that of the concerned individual on a 'I know what is best for you' basis, then this statement undoubtedly qualifies. Surely women must be the best judges of how to combine their multiplicity of roles. But there is a danger in raising individual autonomy in opposition to protective legislation in that this ignores the fact that family responsibilities, however voluntarily taken on, deprive individuals of autonomy.³

Protection means submission and control

Fitzjames Stephen, the Victorian judge, in an attack on Mill's *Subjection of Women* argued that 'submission and protection' were 'correlative'. 'Withdraw the one and the other is lost, and force will assert itself a hundred times more harshly through the law of contract than ever it did through the law of status' (Freeman and Lyon 1983; 35). If this is so and women are subordinating themselves in return for legal protection, then it may be that they are paying too high a price.

Marriage is presented in the conventional legal literature as an institution for the protection of women, who are said to have advanced, in the past century, from the status of servant to that of co-equal head of the household (Bromley 1981: 109). Yet others attack marriage as 'repressive benevolence' (Barker 1978). Freeman and

Lyon view the protection of marriage with scepticism. They argue that the cry of 'back to the kitchen, we have protected you' is likely to be used not only against independence for married women but also against cohabiting women whose status is being assimilated to that of the married (1983: 177). Marriage laws are a means of control in the guise of protection. This view of surrender of autonomy in return for protection identifies a serious cause for concern. It can be further illustrated by looking at Jeremy Bentham's ideal civil code.

In Bentham's good society the first principle of family law is that the wife is subject to the husband but has a right of appeal to the courts. In advocating a protective role for the courts Bentham rejects the views of those 'who of some vague notion of justice and generosity wish to give to the woman an absolute equality'. For he believes that 'man, assured of his prerogative, is not disturbed by the inquietudes of jealousy, and enjoys it while he yields it' (1931: 231). But if faced with a rivalry of powers, man would become a 'dangerous antagonist'. Whatever our view of Bentham's vision of domestic harmony, his idea of protection seems to be connected with his code's own preference for male authority and power. The protection of the wife comes from law, but the power against which she is to be protected is reinforced by law. Stripped to its essentials the argument is that law confers, woman defers, and law protects.

Bentham's vision has been defended on the grounds that he was a realist conscious of the inequality of women's condition in society and that his demand was for special protection. 'Today, minorities and women ask for the right to be different, arguing that formal equality brings a levelling which will always work in favour of the stronger, and against the weaker, the different, the oppressed' (Boralevi 1980: 43). If this is an argument for legal recognition of heterogeneity and plurality of rights then it is rather different from arguments about protection, and provides an indication of the direction the debate might profitably take.

Redressing the balance

A third form of argument about special treatment is that it results from the law's function as protector of the weak. Inequalities resulting from an imbalance of social and economic power justify consumer protection, so why not housewife protection? Legislation and case law giving non-owner spouses rights in the matrimonial home, or providing for their alimentary needs are a response to inequality.

Some of the problems with this are that it may be taken to imply that women lack full competency; it has to meet the submission and control objection; and it becomes structured in terms of opposition between the two gender categories. Some would deny the existence of inequality. Others say it is a matter for public rather than private law. Yet another suggested solution is that the debate be conducted in gender neutral terms.

Gender neutrality is the preferred American model under the proposed Equal Rights Amendment, and it clearly has an important place in public law. Since 'the very construction of men and women as separate and opposed categories takes place within, and in terms of, the family' (McIntosh 1969: 154) the imposition of neutrality may be an evasion of the issues. As Honoré points out it is misleading to talk 'as if wives supported husbands (financially) to the same extent as husbands support wives' (1982: 64). This raises again the point made at the opening of this paper, that a plurality of rights based on a variety of life patterns must be incorporated into models of equality. If formal equality means that any deviation from a model of rights based on a lifetime's employment in the public sphere is to be regarded as requiring special treatment, then it means very little. Gender neutral language enables the protection of rights based on a variety of factors, including choice of life patterns, and biology.

It has already been suggested that Mill's view of equality was limited by his failure to extend his analysis to private law and the private sphere. It is beyond the scope of this paper to provide an agenda as to how this might be achieved. But what is suggested is that the achievement of formal equality in the public sphere must be followed by material equality in private, or the integration of the two. For assimilation of women to men as required by current ideologies of equality will merely result in the perpetuation of inequality in the private sphere. It is a failure of liberal political thought that it ignores the private sphere and therefore cannot provide an answer to problems of inequality therein. But since the liberal tradition remains dominant in political philosophy and practical politics let us examine whether, within that tradition, special treatment of women is regarded as paternalism.

Paternalism

'The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others' (Mill 1910: 73). Mill's definition of the boundaries

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between public control and the private sphere include an express rejection of paternalism, with an exception for children. If we apply this to the 'for your own good' argument we can concur with Mill in rejecting it. In the case of protective legislation, unless those others protected from harm are the families of women workers, control cannot be justified. It has been argued that protective legislation is not imposed on women against their wills and that the Equal Opportunities Commission survey is unreliable (Coyle 1980: 7). What seems likely is that not all women affected by the legislation share a common position on it, and this illustrates the fallacy of treating women together as a class in opposition to men as a class. If it is for the sake of their families that women factory workers are controlled, willingly or unwillingly, then this should be clarified by the policy-makers.

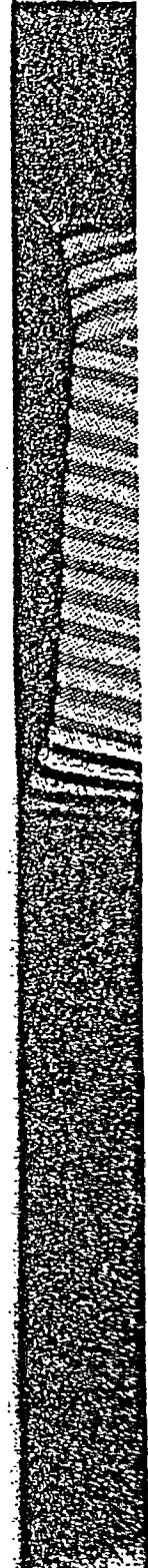
Mill does allow a weak paternalism where individuals are protected from harming themselves because their decisions are impaired through lack of knowledge, lack of control, or undue influence (Ten 1980: Chapter 7). This is why the rights of consumers are to be protected and why contracts tainted by inequality are unenforceable. An impaired decision is not freely made.

Mill's justification of interference to prevent harm to others will permit a plurality of rights that recognizes needs arising from a variety of life patterns. On this view those who are not to be harmed are being protected. What is being protected is their rights. From this we can conclude that it is possible within the dominant liberal tradition to justify what was earlier called 'special treatment'. In order to do so a model of rights which permits a plurality of rights based on different life choices is necessary. For instance, if pregnant mothers are to be controlled for the sake of their babies, this intervention is to protect children's rights. A corresponding duty is placed on the mother. Yet out of this relationship arise other rights stemming from child bearing and raising. Some of these are children's rights; others are the rights of the concerned adult.

We need a new language in which to elaborate claims that persons make upon one another in the private sphere and in which these can be translated into the public sphere. As yet the conclusion is limited to the observation that it is possible within the liberal tradition, and despite its acceptance of the public-private division, to project a model of rights which recognizes heterogeneity.

Notes

- 1 Under the Factories Act 1961, s.86, women's factory hours of work must not exceed nine a day, nor exceed forty-eight a week; the period of employment must not exceed eleven hours a day, nor begin earlier than seven o'clock in the morning, nor end later than eight o'clock in the evening, nor, on Saturday, later than one o'clock in the afternoon; no continuous period of work shall exceed four and a half hours without an interval of half an hour, or if there is a rest period of not less than ten minutes, then the period can be increased to five hours. Under s.89 a woman's overtime must not exceed one hundred hours in any calendar year nor six hours in any week, nor shall it take place in any factory for more than twenty-five weeks in any calendar year. Overtime worked in any one day shall not exceed ten hours, and the period of employment must not exceed twelve hours a day. The times worked are limited to 7 a.m. to 9 p.m. on weekdays. Sunday work is prohibited. It is possible to obtain an exemption order from the Health and Safety Executive and this is done by specific exemption to individual firms. General exemptions are available under s.117 by ministerial regulation for entire industries.
- 2 This case illustrates the injustice of classifying all women together on the basis of biology. The applicant was a transsexual who had moved from the social category female to the social category male. He was dismissed from his job as electrician's mate when his birth status was discovered. The applicant brought proceedings under the Sex Discrimination Act 1975 and the Industrial Tribunal held that the Act only envisages two sexes and the applicant belonged to the female sex. There was no discrimination on grounds of sex because the applicant was dismissed for deception. Furthermore if the applicant had disclosed that he was female the employers would have been entitled to refuse employment, since s.7(2)(f) of the Act permits an exception to be made on grounds of genuine occupational qualification where the protective legislation restricts the employment of women.
- 3 The National Council for Civil Liberties takes the view that the EOC proposals equalize 'down' and not 'up'. Women would simply be as vulnerable as men to economic pressure from employers. Their view is that men should have the same benefits as women in having their days, hours, and times of work restricted. In the meantime, because of their double shift, women need protective



laws. Jean Coussins (1979) *The Shift Work Swindle* (London: NCCL).

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REVIEWS

LEGAL MARRIAGE—WHO NEEDS IT?

THE MARRIAGE CONTRACT. By LENORE J. WEITZMAN. [New York: The Free Press, 1981. 536 pp. (incl. index) \$17.95.]

COHABITATION WITHOUT MARRIAGE. By MICHAEL D. A. FREEMAN and CHRISTINA M. LYON. [Aldershot, Hants.: Gower, 1983. 228 pp. (incl. index). £15.00.]

UNMARRIED COUPLES. By WINIFRED H. HOLLAND. [Toronto: The Carswell Company, 1982. 249 pp. (incl. index) Can.\$32.50.]

THE current plethora of books about cohabitation might be taken to indicate that we have before us a new social phenomenon.¹ This is not so. What is new is legal concern with those who live together without marriage. But there is nothing particularly new about "living tally" as it used to be called. Legal regulation of private relationships is a fairly recent event in human history and it is this intervention that has created the problem of how to handle cohabitation. There can be no doubt that two centuries of legal regulation of marriage, with cohabitation classed as sin and outside law, have given way to the law's attempt to further extend its regulatory function. Mayhew² and Booth³ in their travels amongst the Victorian urban poor reported on the prevalence of cohabitation. John Gillis⁴ has reconstructed the lives of rural people in Wales and elsewhere living tally. Smout⁵ has

¹ See also Anne Bottomley, Katherine Gieve, Gay Moon and Angela Weir, *The Cohabitation Handbook* (London: Pluto Press, 1981); Martin L. Parry, *Cohabitation* (London: Sweet & Maxwell, 1981); Stephen Parker, *Cohabitees* (Chichester: Barry Rose, 1981); John Eekelaar and Sanford Katz (eds.) *Marriage and Cohabitation in Contemporary Societies* (Toronto: Butterworths, 1980).

² Henry Mayhew found that marriage was exceptional among London costermongers. *London Labour and London Poor* (1864), Vol. 1, p.22. E. P. Thompson, *The Making of the English Working Class* (1963), p.56, quotes Patrick Colquhoun's comments in 1800 on "the prodigious number among the lower classes who cohabit together without marriage." Thompson ascribes this to the "absolute impossibility of divorce," but there are other possible explanations.

³ Charles Booth concluded that although legal marriage was "the general rule, even among the roughest class," that "non-legalised cohabitation is far from uncommon" among those marrying later and also after desertion of an earlier partner. He saw such arrangements as a "form of divorce without the assistance of the Court" with no need for legal intervention. *Life and Labour of the People of London* (1903), Final Vol., pp.41-42.

⁴ John Gillis, "Resort to Common Law Marriage in England and Wales, 1700-1850," (1980), *Law and Human Relations, Past and Present Society*, pp.1-25, argues that in the post-Hardwicke's Act era from 1753 some women maintained previous common law practice as a way of retaining a separate legal identity. They continued to marry through private contract as in the pre-1753 days because they did not want to be subjected to the rules on the unity of spouses. The view is expressed by Gillis that the legal regulation of marriage by the state represented "an undisguised triumph of property, patriarchy, and male dominance generally."

⁵ T. C. Smout, "Aspects of Sexual Behaviour in Nineteenth-Century Scotland," in P. Laslett, K. Oosterveen, and R. M. Smith (eds), *Bastardy and its Comparative History* (1980), pp.192-216. T. C. Smout, "Scottish Marriage, Regular and Irregular, 1500-1940," in R. B. Outhwaite (ed.), *Marriage and Society* (1981), pp.204-236. See also Ian Carter, "Illegitimate Births and Illegitimate Inferences" (1977) 1 *Scottish Journal of Sociology* 125-135. T. C. Smout, "Illegitimacy—a reply" (1977) 2 *Scottish Journal of Sociology* 97-103.

done the same for Scotland. There is evidence of customary arrangements for cohabitation outside marriage in North West England,⁶ and of other customs such as "jumping the broom," "living over t'brush."⁷

Demarcation between legal marriage and custom was necessary to the propertied classes with their concern for legitimacy and succession. Helmholz⁸ has documented medieval disputes before the ecclesiastical courts over the existence of marriages. But, as recent research has reminded us, marriage for the mass of people was a private affair, the result of contract.⁹ The Cambridge population group¹⁰ has warned against applying modern concepts and judgments to habits of the past which were informed by quite a different *mentalité*. It is now recognised that what was previously interpreted by scholars as low marriage rate and high illegitimacy rate in seventeenth- and eighteenth-century England was not so interpreted by the protagonists themselves.¹¹ For those who privately contracted marriage were not required to get involved in formalities. Their own agreement sufficed.¹² However, marriage and baptismal records did not reflect this. It is important to stress that the law only outlawed these private arrangements with the passing of Lord Hardwicke's Act in 1753,¹³ and that many couples maintained the old customs by accident or design.

Recent work on family reconstitution from parish and other records suggests that caution must be exercised before drawing conclusions about whether a couple were married or not, as prior to 1753 both private contract and clandestine marriage were upheld by the church courts.¹⁴ It is legal regulation which is the late arrival at this particular feast, and with it came

⁶ Peter Laslett, *The World We Have Lost* (2nd ed., 1971), p.152 refers to the blessing by the vicar in the Duddon Valley of Cumberland of 17 couples who were living together. This took place at Frith Hall in Ulpha in 1730.

⁷ Samuel Pyeatt Menefee, *Wives for Sale* (1981), Chap. 2.

⁸ Richard Helmholz, *Marriage Litigation in Medieval England* (1974), is the classic work. As Martin Ingram, "Spousals Litigation in the English Ecclesiastical Courts, c.1350-c.1640" in Outhwaite (ed.), *op. cit.*, note 5 (*supra*), pp.35-57 reminds us, cases concerning the formation of marriage were the bulk of matrimonial litigation before the English ecclesiastical courts.

⁹ G. R. Quaife, *Wanton Wenches and Wayward Wives* (1979), p.61, argues that most of the acts seen by the authorities as premarital sex were seen by the village community as activities within marriage.

¹⁰ Research on illegitimacy is summarised by Peter Laslett, *Family Life and Illicit Love in Earlier Generations* (1977). For a later discussion of the new research see Peter Laslett, "Introduction" to Laslett, Oosterveen and Smith (eds.), *op. cit.*, note 5 (*supra*). K. Wrightson, "The Nadir of English Illegitimacy in the Seventeenth Century," *ibid.*, pp.176-191 at p.178 refers to the complexity of the issue of what constituted valid matrimony.

¹¹ E. A. Wrigley, "Clandestine Marriage in Tetbury in the late Seventeenth Century" (1973) *Local Population Studies* No. 10, pp.15-21, at p.19. Anthea Newman, "An Evaluation of Bastardy Recordings in an East Kent Parish" in Laslett, Oosterveen and Smith (eds.), *op. cit.*, note 5 (*supra*), pp.141-157 at p.148.

¹² Henry Swinburne, *Spousals* (1686), reprinted in 1978, is a complete study of the law up to the 17th century. It seems reasonable to infer that private definition of marriage formation waned in face of Poor Law and community regulation. See D. Levine and K. Wrightson, "The Social Context of Illegitimacy in early modern England" in Laslett, Oosterveen and Smith (eds.), *op. cit.*, note 5 (*supra*), pp.158-175 at p.173.

¹³ A. H. Manchester, *Modern Legal History* (1980), Chap. 15, gives a straightforward account of the legislation in which he assumes that it was a necessary and rational response to clandestine marriage.

¹⁴ For a recent account of clandestine marriage see Roger L. Brown, "The Rise and Fall of the Fleet Marriages" in Outhwaite (ed.), *op. cit.*, note 5 (*supra*), pp.117-136. Joseph Jackson, *The Formation and Annulment of Marriage* (2nd ed., 1969), Chap. 1, gives a useful summary of the history of formless marriage and clandestine marriage, and of legislative attempts to prevent the latter.

new definitions not only of how to get married but of marriage itself. In defining marriage the state has imposed its own view of what marriage is, whereas previously this had been left to the couple themselves.

Criticism of marriage as an institution in the particular form reified by law has come from a variety of sources.¹⁵ Structural functionalists in the mould of Talcott Parsons argued that the conjugal couple and the nuclear family had been devised to "fit" the needs of industrial capitalism.¹⁶ For Marxists this has been a central plank in their critique of the family under present conditions.¹⁷ One of the major problems with this account has been Laslett's work which has queried the premise that the extended family was destroyed by industrialisation.¹⁸ It is now accepted that the general English pattern, at least from the sixteenth century, was for the conjugal couple to set up household on their own.

In the sixties Laing's¹⁹ and Cooper's²⁰ critique of marriage and families as driving the participants mad had a certain vogue. Counterpointing these writings with today's exaltation of the family as a "haven in a heartless world,"²¹ in which private fantasies ought to be realised away from the interventionism of the law²² shows the change in ideology in the very recent past.

Feminist critical writing has focused on the nature of the marriage relationship, power within marriage, the rights and obligations of the partners, and how these are defined and constituted in law. A variety of modes of analysis have been employed. Using contract as a model, attention has been directed to marriage as a labour relationship in which the wife's unwaged domestic services are exchanged for the husband's financial support.²³ Another form of analysis makes roles within marriage central and shows how legislation, particularly in public law, and case-law combine to allocate different roles to husband and wife based on gender, not sex.²⁴ A third approach has been to look at power within marriage, and this has sometimes been combined with examination of domestic violence.²⁵ Most

¹⁵ See Mark Poster, *Critical Theory of the Family* (1978) for a useful account of general theories.

¹⁶ Examples of this approach can be found in a collection of what were standard pieces on marriage: N. W. Bell and E. F. Vogel, *The Family* (1960).

¹⁷ C. C. Harris, *The Family and Industrial Society* (1983), Chap. 4 gives a summary of this debate. See also Michèle Barrett and Mary McIntosh, *The Anti-Social Family* (1982), pp.85-92.

¹⁸ Peter Laslett, *The World We Have Lost* (2nd ed., 1971), Chap. 4. See also, Alan Macfarlane, *The Origins of English Individualism* (1978).

¹⁹ R. D. Laing, *The Politics of Experience* (1967).

²⁰ David Cooper, *The Death of the Family* (1971).

²¹ The phrase originates with Christopher Lasch, *Haven in a Heartless World, The Family Under Siege* (1977), where he argues that marriage has become the empty space for two withdrawn people assailed by their children and by an army of psychiatric social workers, educationalists, health visitors, etc.

²² Support for Lasch comes from Ferdinand Mount, *The Subversive Family* (1982). See the review by W. T. Murphy (1983) 46 M.L.R. 363-379.

²³ Diana Leonard Barker, "The Regulation of Marriage: Repressive Benevolence" in G. Littlejohn et al., *Power and the State* (1977), pp.239-266. This work is influenced by the French feminist Christine Delphy. See e.g. C. Delphy, "Continuities and Discontinuities in Marriage and Divorce" in D. L. Barker and S. Allen, *Sexual Divisions and Society* (1976), pp.76-89. In this approach and in Delphy's, *The Main Enemy* (1977) patriarchal exploitation is located at the individual level of relationships between men and women.

²⁴ Katherine O'Donovan, "The Male Appendage—Legal Definitions of Women" in S. Burman (ed.), *Fit Work for Women* (1979), pp.134-152. The example from public law is social security law. Hilary Land, "Sex-Role Stereotyping in the Social Security and Income Tax Systems" in J. Chatwynd and O. Hartnett, *The Sex Role System* (1978).

²⁵ M. D. A. Freeman, "Violence Against Women: Does the Legal System Provide Solutions or Itself Constitute the Problem" (1980) 7 B.J.L.S. 215-241. R. Dobash and R. Dobash, "Love, Honor and Obey: Institutional Ideologies and the Struggle for Battered Women" (1977) 1 *Contemporary Crises* 403-415.

recently the bio-political approach pioneered by Foucault and Donzelot has yielded interesting results.²⁶

The common element in these different forms of analysis is that the ideology of marriage studied is derived in part from legal sources. There is room for disagreement over the importance of law in personal relationships because there is little evidence to show that individuals take it into account when making plans.²⁷ Links between law and behaviour and their interaction on each other remain a difficult terrain for exploration. The suggestion that people cohabit because they are critical of legal marriage, or because they want to avoid its ideological assumptions or its financial responsibilities, must be treated with caution.

In considering alternatives to legal marriage it must be remembered, also, that cohabitation is not just part of the alternative culture of the sixties and seventies youth revolt. It has a long history, but has only recently moved back from the sinful category into the acceptable behaviour category. What is being debated now is whether to regard living together as a private arrangement or as quasi-marriage regulated by law. The idea that personal relationships should be privately ordered by the participants is being bruited about.²⁸ In this regard it is not at all clear that it makes sense to distinguish marriage from cohabitation.²⁹

Lenore Weitzman in *The Marriage Contract* wants to move marriage, in addition to cohabitation, into the realm of private contract. In a compelling critique of marriage law she argues that it is a state-dictated contract "based on outmoded assumptions about the family, assumptions often contradicted by the reality of (spouses') own experience but nevertheless applied to them by law" (Intro. xvii). Her case, in relation to American law, is that this unwritten contract, to be found in legislation and case-law, is tyrannical. It is an unconstitutional invasion of marital privacy, it is sexist in that it imposes different rights and obligations on husband and wife, and it flies in the face of pluralism by denying heterogeneity and diversity and imposing a single model of marriage on everybody. The model assumes that all marriages are first marriages for the young, that there will be children, that the marriage will last a lifetime, that the husband will work to support the family, and that the wife will perform childcare and domestic services.

Weitzman shows the discrepancy between reality and ideology. In each chapter in which she analyses the legal tradition she measures doctrine against its social and economic consequences and against the reality of how people live. Looking to matters such as age of marriage, name, domicile,

²⁶ Jacques Donzelot, *The Policing of Families* (1977; Eng. transl. 1979). Anna Davin, "Imperialism and Motherhood" (1978) 5 *History Workshop* 9-65, and Jane Lewis, *The Politics of Motherhood* (1981) have approached questions of legislative interference in, and support for, the role of mother in a similar way.

²⁷ Dawn Oliver, "Why Do People Live Together?" [1981] J.S.W.L. 209-222, conducted a tiny survey of her cohabiting acquaintances to discover that very few knew the legal effects either of marriage or of cohabitation.

²⁸ Mary Ann Glendon, *State, Law and Family* (1977) has described the current period of change in legal regulation of marriage and divorce as "a return to forms of social control other than legal rules concerning the formation, dissolution and organisation of married life" (p.321). She gives a good summary of the trends. Robert Mnookin, "Bargaining in the Shadow of the Law" (1979) *Current Legal Problems* 65-105, argues for "private ordering" as the "process by which parties to marriage are empowered to create their own legally enforceable commitments" (p.65).

²⁹ Most writers advocating the use of contract to regulate personal relationships confine themselves to relationships outside marriage. W. Weyrauch, "Metamorphoses of Marriage: Formal and Informal Marriages in the United States" in J. Eekelaar and S. Katz (eds.), *Marriage and Cohabitation in Contemporary Society* (1980).

consortium, husband's maintenance obligation, matrimonial property, succession, the maternal preference rule in custody cases, she makes out a convincing case against current marriage laws. "The cumulative effect of the restrictions embodied in traditional legal marriage is to enforce the notion that one man and one woman will find happiness if they commit themselves to each other for life" (p.223). The result is "a form of tyranny that rules out individual choice." Conscious of a pluralist society; where serial polygamy is well established, and where many individuals have personal relationships which do not fit the heterosexual monogamous form established in law, Weitzman considers it "reasonable for people in close personal relationships to consider writing a contract that fits their individual needs and lifestyle" (p.225).

It is in the second part of the book in which she argues the case for intimate contracts that I find Weitzman less convincing. From a critique of marriage laws as being based on stereotypes of sex, class, and race, it does not necessarily follow that personal ordering is the only alternative. One might decide to give the state another go. There are considerable problems to be resolved in personal ordering, amongst which the question of court recognition and enforcement is only minor.³⁰

What Michael Freeman and Christina Lyon's *Cohabitation Without Marriage* has in common with *The Marriage Contract* is a preference for private ordering. In a sense Freeman and Lyon do for English marriage law what Weitzman does for the American model.³¹ "We take a feminist stance. We are concerned that women should not be 'protected' by having marriage thrust upon them willy-nilly. Despite pressure groups which argue to the contrary, current laws and policies relating to women in marriage do not favour them. To believe that they do is to ignore the structural dependence of women in marriage" (Preface, vii). In their critique of bourgeois marriage law Freeman and Lyon examine the ideology expressed in social security provisions, family law, protective legislation and conclude that the "structural form" of "patriarchy" is imposed "on social relationships between men and women" (p.31). For this reason they reject the trend towards the assimilation of cohabitation with marriage.

Freeman and Lyon suggest "a drift away from marriage" (p.50) and into cohabitation as a negative response to the ideology of or the financial responsibilities of marriage; as a positive marriage trial; or as an avoidance of legal obstacles to marriage. The trouble is, as they admit, that this is speculative since there is no empirical evidence of any value to confirm or deny these hypotheses. Furthermore, if motivations are so varied, it is hard to devise an answer which suits everyone. This is not to discount the value of ideological analysis, but it does mean that suggested reforms proceed on untried premises. The solution put forward is "the private autonomy approach" in which the law does not attempt to treat cohabitants "as if they were married" (p.189). It is not clear whether the authors are advocating no judicial or legislative intervention in the relationship of cohabitants, or some other legal order different from marriage. Thus on the question of a new legal order they say: "In considering changes we should be careful not to throw the baby out with the bathwater" (p.161); "In an age in which the

³⁰ Information about legal problems of enforcement is contained in Sebastian Poulter, "Cohabitation Contracts and Public Policy" (1974) 124 *New Law Journal* 999-1002.

³¹ The first part of Weitzman's book containing the marriage critique is an expansion of her conceptual article "Legal Regulation of Marriage: Tradition and Change" (1974) 62 *Calif.L.Rev.* 1169-1288.

state concerns itself in, and restricts, so many aspects of our existence, we should be cautious about giving it any greater control over our private lives" (p.189). They explain the private autonomy approach by saying (p.183) that it "does not mean that cohabitants are unable to resort to the law when difficulties arise, for the judiciary, when freed from the straitjacket of quasi-marital relief, has adopted some remarkably innovative legal solutions to the problems of the unmarried couple. . . . The law should not seek to impose rights and duties where such were never the expressed, implied or reasonable expectations of both parties." Private autonomy, then, does not mean a total absence of law. It seems to mean express or implied contract. Yet Freeman and Lyon seem to be saying that private autonomy is different from contract: (p.183). "Human relationships, despite comparisons with contract and business partnerships, cannot be reduced to the level of the marketplace." This is contradicted later in dealing with the argument²² that cohabitation contracts would not be sufficiently flexible to take account of alterations in the parties' life-style over a long period: (p.212) "What those who are concerned with changes overlook is that changes also take place in the situation of parties to commercial contracts which may be discharged under the doctrine of frustration . . . why should cohabiting couples who expressly contract at the outset of their relationship be treated differently from other adults who make contracts? If others are limited by the doctrine of frustration, why should a cohabitant be protected against foolishness, lack of foresight or improvidence?"

Freeman and Lyon are in a bind. On the one hand they object to the assimilation of cohabitation with marriage, partly because of the sexism of legal structures, and partly because of their own espousal of the values of individualism and autonomy. Yet they admit that the problem with express contracts is that their usefulness is limited to the articulate middle-classes; the problem with implied contracts is that their interpreters are likely to be imbued with the patriarchal attitudes so rightly deplored in relation to marriage.

Winifred Holland's *Unmarried Couples* gives a straightforward account of Canadian law. There is no evidence that the solutions adopted there are in any way superior to those found in English law. Canadians also are interested in private contracts and Ontario, Prince Edward Island, New Brunswick, Newfoundland and British Columbia have made legislative provision for couples to draw up cohabitation agreements.

Contracts for private relations are also seen as an answer by the team from Rights of Women who wrote *The Cohabitation Handbook*. This must be one of the few lawbooks to be a bestseller in the alternative bookshops of urban Britain. Dealing with all types of living-together arrangements from households with many occupants to hetero- and homosexual couples, it offers some clear advice on the existing law and on how to draw up a suitable contract. The authors' aim is (p.15) "not just to give legal status to previously unrecognised relationships, but rather to try to create a framework in which women and men can achieve free, equal and independent

²² John Eekelaar, *Family Law and Social Policy* (1978), p.53 states: "To confine the courts to the terms of a contract entered into many years earlier not only risks overlooking changes in the economic situation of the parties which may have taken place over the years, but also the subsequent introduction of new interests, primarily of the children born to or adopted by the couple, but including those of other adult parties who have become involved in their lives."

relationships." However, they put their fingers on one major problem when they admit that a "concept of domestic life organised by individual bargains between unequal partners is not a happy one" (p.12).

There are a number of possible responses to the indictment of legal marriage contained in much recent writing. One is to look to contract. Another is to change existing laws. Both of these alternatives, when examined, reveal that law cannot be considered the crux of the matter. The material base in which the legal stereotyping has its roots is the division of labour. However, if changing legal ideology is considered a worth-while endeavour in itself, or because of its educative value, is contract, then, the answer?

The value of contract as privately created legislation for personal relations is, according to Shultz in a major article on the subject,³³ that the parties have control over substantive marital terms, with the state deferring to and enforcing these. Shultz also holds out certain psychological advantages of contract in reducing marital conflict, in that the process of negotiation clarifies goals and expectations whilst also improving communication. The model for Weitzman and Shultz is the classic contract model, so it is of interest to see what has happened to that model in other legal sectors. Patrick Atiyah³⁴ has explained the classical mode of contract, which reached its mature form in the mid-nineteenth century, as having two characteristics: a mode of contract based on a model of free market transactions; and the contract seen as an instrument of market planning containing a promise for future execution. In the twentieth century this mode of contract has declined along with a continuous weakening in the values involved in individual freedom of choice. This is not to say that individualism and freedom of choice will not, or should not, triumph in the sphere of personal relations in the future for, as Atiyah reminds us, sexual morality has been the exception to the general rule of limitation of individualism by the state.³⁵ It is intended, however, to sound a note of caution and to suggest that it would be profitable for the proponents of autonomy to ask themselves why limitation has occurred in other areas previously regulated by contract.

Weitzman admits to some doubts about the equality of bargaining power of the parties to a marriage contract.³⁶ Her answer is that partners who share an egalitarian ideology will not think it fair or just to impose an exploitative contract on someone they love. Putting one's views in writing is more likely to lead to implementation. On the issue of protecting the weaker partner (usually the woman), Weitzman's view is that it is better to know the terms of a relationship at the beginning "instead of blindly trusting the good will of her intended partner" (p.248). Romantic illusions of being looked after for life will be dispelled. Holland's advice (p.142) is that claims of unconscionability may be avoided if the parties have independent legal advice. Freeman and Lyon clearly regard such concerns as paternalistic and not in the interests of the parties. Yet it seems only too likely that unconscionability would be further developed by the courts in recognition

³³ Marjorie M. Shultz, "Contractual Ordering of Marriage: A New Model for State Policy" (1982) 70 Calif.L.Rev. 207-334. See also Walter O. Weyrauch, "Metamorphoses of Marriage" (1980) 13 Fam.L.Q. 415-440.

³⁴ P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (1979), p.681.

³⁵ *Ibid.* at p.727.

³⁶ At p.242 Weitzman states: "Because private ordering often reflects and reinforces power differences that already exist, there is always the risk that men, who typically have more power, will use that power to impose a contract that is even more unfavourable than traditional legal marriage."

of the imperfect market conditions prevailing.³⁷ One of the causes of the present crisis in family law is that courts see their function as conflict adjustment rather than as legislation.

Freedom to contract the private aspects of personal relations cannot affect public law provisions in social security, taxation, labour law. Whilst the distinction between private and public may be ultimately false, failure to analyse its effects on the roles ascribed to individuals by law is to miss a major part of the drama. Even if intimate contracts were to replace state regulations there would still remain large areas of state policy which continued to make assumptions about appropriate behaviour within the holy family for all the *dramatis personae*. Is the state, with its new consciousness of domain and privacy, really prepared to abandon us to our own devices?

KATHERINE O'DONOVAN*

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The Medicalisation of Infanticide

By Katherine O'Donovan

Senior Lecturer in Law, University of Kent

"The operation of the criminal law presupposes in the mind of the person who is acted upon a normal state of strength, reflective power, and so on, but a woman after child-birth is so upset, and in such a hysterical state altogether that it seems to me you cannot deal with her in the same manner as if she was in a regular and proper state of health."¹

This statement, in its time, represented a new attitude to and a new language about the crime of infanticide. Fitzjames Stephen, the speaker, later wrote that:

"physical differences between the two sexes affect every part of the human body, from the hair of the head to the sole of the feet, from the size and density of the bones to the texture of the brain and the character of the nervous system. . . . Men are stronger than women in every shape. They have greater muscular and nervous force, greater intellectual force, greater vigour of character."²

Placing the two statements together poses the problem neatly. Does the acknowledgement of post-partum depression necessarily lead to statements about inequality of the sexes? Should the crime of infanticide be subsumed under the general law relating to diminished responsibility in homicide cases?

A brief history of the crime of infanticide

The first statute to create a crime of infanticide was passed in 1623.³ It was a sex-specific crime committed by women and confined to bastard children as victims. The offence involved was concealment of death rather than death itself, but the concealment operated as a presumption of guilt of murder. To rebut the presumption a witness had to be produced to give evidence that the child was born dead. Given the secrecy of the pregnancy and birth in most cases, this was difficult. By contrast, the suspected murder of children born in wedlock was treated as any other crime of homicide until 1922. The burden of proof was on the prosecution to show that the child had been born alive and had completely severed its connection with its mother's body.⁴

Aside from the jurisdiction of the King's courts over homicide the ecclesiastical court also dealt with infanticide. Parish priests were instructed to ask their parishioners in the confessional:

"Hast thou also by hyre I-lyne,
And so by-twene you they chylde I-slyne."⁵

¹ J. Fitzjames Stephen, *British Parliamentary Papers* (1866), Vol. 21, at pp.291-292.

² J. Fitzjames Stephen, *Liberty, Equality, Fraternity* (1873), p.212.

³ 21 Jac. 1, c.27, 1623.

⁴ D. Seaborne Davies, "Child Killing in English Law" (1937) 1 M.L.R. pp.203-223.

⁵ J. Myrc, *Instructions for Parish Priests 1359-68* (1902), at p.42.

Helmholz concludes, on the evidence from the Canterbury ecclesiastical courts, that "medieval men did not regard infanticide with the horror we associate with premeditated homicide."⁶

The statute of 1623 was considered harsh. Blackstone said it "savours pretty strongly of severity."⁷ Public attitudes to infanticide by unmarried mothers were punitive, yet for single women in certain forms of employment there was considerable risk of pregnancy. It has been suggested that, in the eighteenth century half the unmarried women under the age of 26 were living-in servants, vulnerable to seduction and rape. Because their good "character" was of economic and social value to them, pregnancy for these women was a catastrophe. Travelling and abandoning the child was not an available option, so concealment and infanticide were likely to follow pregnancy.⁸ Even where the child was born dead, producing a witness to the court was probably difficult because of the secrecy of the affair. According to Blackstone the severity of the statute was mitigated in practice with the burden of proof shifting to the prosecution.⁹

Cases of child murder within wedlock were treated with less harshness. As Blackstone stated: "to kill a child in its mother's womb is now no murder, but a great misprision."¹⁰ The reasons why married parents might not wish to accept a new child into the family could have been economic, or related to some physical problem the child had.

Langer argues that "infanticide has from time immemorial been the accepted procedure for disposing not only of deformed or sickly infants but of all such new borns as might strain the resources of the individual family or the larger community."¹¹ Opportunities for disposing of the child through overlaying, accident, sickness or infanticidal nursing were far greater than those available to single women. Writers on medieval coroner rolls suggest that the absence of records on infanticide may be due to the public attitude, that such matters were insignificant.¹²

In 1803 Lord Ellenborough's Act was passed, repealing the Act of 1623, and placing infanticide trials on the same footing as homicide trials. This change has been interpreted as meaning that infanticide could be committed with impunity: "even the police seemed to think no more of finding a dead child than of finding a dead dog or cat."¹³ Throughout the nineteenth century there were scandals over burial clubs and baby-farming. The law was seen to be in

⁶ R. H. Helmholz, "Infanticide in the Province of Canterbury during the Fifteenth Century," 2 *History of Childhood Quarterly*, (1975), pp.379-390, at p.387.

⁷ W. Blackstone, *Commentaries on the Laws of England* (1775), Vol. IV, p.198.

⁸ R. W. Malcolmson, "Infanticide in the Eighteenth Century" in J. S. Cockburn (ed.) *Crime in England, 1550-1800* (1977), p.192.

⁹ *Op. cit.*, note 7.

¹⁰ *Ibid.*

¹¹ W. L. Langer, "Infanticide: A Historical Survey" I *Hist. of Childhood Quarterly* (1974), pp.353-365, at p.353.

¹² B. A. Kellum, "Infanticide in England in the later Middle Ages" 1 *Hist. of Childhood Quarterly* (1974), pp.371-375; B. Hanawalt, *Crime and Conflict in English Communities, 1300-1348* (1979).

¹³ Langer, *op. cit.*, note 11 at p.360.

disarray. There were numerous acquittals for lack of proof that the child had been born alive.¹⁴ The 1803 Act contained a proviso whereby the jury could, in acquitting the defendant of murder, make a finding of concealment of birth which had a maximum two year sentence. In his evidence to the Commission on Capital Punishment Byles J. stated his belief that almost every case tried for concealment was a case of murder.¹⁵ Trials for concealment increased three fold between the 1830's and the 1860's. There were 5,000 coroner's inquests a year on children under seven in the mid-nineteenth century, yet only 39 convictions for child murder between 1849 and 1864. The victims in 34 of these cases were bastards.¹⁶ Recent evidence from the papers of the Thomas Coram Institute suggests that pregnancy for single female servants was still a social and economic disaster in Victorian times.¹⁷

In the twentieth century a new legal approach to child murder was inaugurated by the Infanticide Act 1922. The Act reduced the offence from murder to manslaughter where a woman caused the death of her newly-born child by any wilful act or omission, "but at the time of the act or omission she had not fully recovered from the effect of giving birth to such child, but by reason thereof the balance of her mind was then disturbed."¹⁸ It has been convincingly argued that the Act was the product, not of nineteenth century medical theory about the effects of child-birth, but of judicial effort to avoid passing death sentences which were not going to be executed.¹⁹ But medical theory provided a convenient reason for changing the law. Judicial evidence to the Commission on Capital Punishment was that juries would not convict for infanticide,²⁰ and that the judiciary were concerned not to have to go through the "solemn mockery" involved in a murder trial. Even where there was a conviction capital punishment was rarely carried out. Despite 39 convictions for child murder between 1849 and 1864, no woman was executed.²¹ From 1905 to 1921, 60 women were sentenced to death, but in 59 of these cases the sentence was commuted.²² It can be said however that in order to avoid "solemn mockery" the 1922 Act required a new pretence: that of endeavouring to fit what happened into medical theories about childbirth producing mental disorder.

The Infanticide Act 1938 reformed the 1922 Act in two directions. It altered the definition of the victims of infanticide from "newly born" to "under the age of 12 months," and it extended the medicalisation of the crime through the addition of language about "the effect of lactation." The cases which brought about the fixing of the age at 12 months illustrate the tension between the

¹⁴ G. Greaves, "On the Laws referring to Child Murder," Transactions of the Manchester Stats. Soc. (1863).

¹⁵ Commission on Capital Punishment (1866), British Parliamentary Papers, Vol. 21.

¹⁶ Seaborne Davies, *op. cit.*, note 4, at p.218.

¹⁷ J. R. Gillis, "Servants, Sexual Relations and the Risks of Illegitimacy in London, 1801-1900" in J. L. Newton et al (eds.) *Sex and Class in Women's History* (1983).

¹⁸ Infanticide Act 1922, s.1(1).

¹⁹ Seaborne Davies, *op. cit.*, note 4, Pt. II, pp.269-287, at p.284.

²⁰ Keating J. in a memorandum to the Commission stated: "It is in vain that judges lay down the law and point out the strength of the evidence, as they are bound to do; juries wholly disregard them, and eagerly adopt the wildest suggestions which the ingenuity of counsel can furnish . . . Juries will not convict whilst infanticide is punished capitally." British Parliamentary Papers, (1866) Vol. 21 at p.625.

²¹ Seaborne Davies, *op. cit.*, note 4 at p.218.

²² Kenny's *Outlines of Criminal Law* by Turner (19th ed., 1956) at p.195.

socio-economic model of the crime, which informed the statute of 1623, and the medical model which informed the 1922 and 1938 Acts. In *O'Donoghue*²³ the defendant who had killed her 35 day old child was sentenced to death and duly reprieved. The admitted facts, on which her counsel based his argument on appeal, were that the mother "was in great distress at the time of the birth for some weeks from poverty and malnutrition, and had only just obtained employment when she killed the child." In an unsuccessful effort to persuade the court that the trial judge was wrong in holding that a 35 day old child was not newly born, counsel also argued that "there was between insanity and sanity a degree of mental derangement which the medical authorities called 'puerperal.'" ²⁴ Thus, a mixture of socio-economic causes and medical theory was used in argument. *Hale*²⁵ was a case in which the mother killed her second child when it was three weeks old and inflicted injuries on herself. The medical evidence was that at the birth of her first child the mother had symptoms bordering on puerperal insanity. The trial judge, claiming himself bound by *O'Donoghue*, directed the jury to find the defendant "guilty but insane."

Medical or socio-economic model?

The Infanticide Act 1938 makes explicit the medicalisation of the crime. It provides for the reduction of the offence from murder to infanticide where the defendant is a woman who causes the death of her child under the age of twelve months by wilful act or omission,

"but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reasons of the effect of lactation consequent upon the birth of the child."²⁶

As the wording makes clear, it is to the process of giving birth, the effect of this on the mother's body, and the hormonal and other processes that are involved in lactation that the statute refers. The idea behind this is that physical processes, whether they are called chemistry or hysteria, can influence behaviour in such a way as to reduce criminal responsibility. There is no apparent consistency to this theory; for if a woman who has given birth within twelve months kills adults or other children, the Infanticide Act does not apply. This suggests statutory acknowledgement that social role change may produce psychosis. But other members of the household, such as fathers, who may also be affected by role change, cannot rely on the Act.

The medical model for the Act has come under attack in recent years. In 1975, the Butler Committee stated that the medical principles on which the Act is based are probably no longer relevant, and that "puerperal psychoses are now regarded as no different from others, childbirth being only a precipitating factor."²⁷ The Committee's view was that the purposes of an offence of

²³ (1927) 20 Cr.App.R. 132.

²⁴ *Ibid.* at p.133.

²⁵ *The Times*, 22 July, 1936, p.13.

²⁶ Infanticide Act 1938, s.1(1).

²⁷ Report of the Committee on Mentally Abnormal Offenders, Cmnd. 6244, (1975) at p.245.

infanticide "are now sufficiently covered by the more recent provision for diminished responsibility."²⁸

The Criminal Law Revision Committee in its Fourteenth Report accepted that there is little or no evidence for an association between lactation and mental disorder, and that this reference should be removed from the Act. However, despite evidence from the Royal College of Psychiatrists that "the medical basis for the present Infanticide Act is not proven,"²⁹ the CLRC argued for the retention of an amended version of the present law. It is clear that both the Butler Committee and the CLRC were uneasy about the medical theory upon which the 1938 Act is based, yet neither found a satisfactory basis for their proposed reforms.

The Butler Committee recognised that "the operative factors in child killing are often the stress of having to care for the infant, who may be unwanted or difficult, and personality problems."³⁰ But if this is so, and if mental disorder is "probably no longer a significant cause of infanticide," then diminished responsibility is not an appropriate defence plea. Even if the Butler Committee's other proposals for the abolition of the mandatory life sentence for murder and consequently of the necessity of a defence of diminished responsibility were to become law there would still be pressure in infanticide cases on psychiatrists "to conform their medical opinion to the felt need for mercy,"³¹ by giving evidence of medical disorder so as to avoid a conviction for murder. The current "stretching" of the law and medical principles because of sympathy for infanticidal mothers would continue, as would the myths that surround the crime.

The CLRC recognised that a medical model for infanticide as a crime is inadequate, and that mental disturbance may arise either from the effects of giving birth or from "circumstances consequent upon the birth." The recommended reform involved the inclusion of the latter phrase in the wording of the statute. From the report it is obvious that the Committee wished to extend the definition of the crime to cover "environmental or other stresses," including poverty, incapacity to cope with the child and failure of bonding. The social and economic nature of these factors was acknowledged in the report although the Committee was careful to link them to "the fact of the birth and the hormonal and other bodily changes produced by it."³² Thus, to enable the court to take account of socio-economic factors, the medical model was retained. The CLRC was definite that cases "where the social and emotional pressures on the mother consequent on the birth are so heavy that the balance of her mind is disturbed"³³ would not be covered by the defence of diminished responsibility.

Conclusion

From its inception as a sex-specific crime in 1623 infanticide has been concerned with theories about women. The initial object of the law was to

²⁸ *Ibid.* at p.251.

²⁹ Criminal Law Revision Committee, Fourteenth Report, Offences Against the Person, Cmnd. 7844, (1980), para. 103.

³⁰ *Op. cit.*, note 27, at p.245.

³¹ A. J. Ashworth, "The Butler Committee and Criminal Responsibility" [1975] Crim.L.R. 687, at p.694.

³² *Op. cit.*, note 29 at para. 105.

³³ *Ibid.* para. 102. The CLRC identified this type of case as "battered baby syndrome."

punish single women for becoming pregnant and for refusing to live with their sin. Thus the crime was created to affect moral and social behaviour. In the nineteenth century the discourse changed.³⁴ Symptoms of temporary madness were discerned including catatonia, hallucinations, delirium and depression. These were labelled lactational insanity, puerperal psychosis, or exhaustion psychosis. In the twentieth century, in order to mitigate the severity of the crime this discourse was utilised by the law. It is only in the past 20 years that explanations for infanticide related to the mother's social and economic environment have been resurrected.

Proposals for reform have vacillated between the two models of the crime. It is not hard to understand why. To admit that social and economic circumstances, or motherhood, may cause crime is to open a hitherto tightly closed box. To deny recognition of infanticide as a separate, lesser crime is to invite juries to refuse to convict for murder. So the solution has been to fudge the issue by retaining discredited medical theory. Edwards has pointed out that nineteenth century discourse on puerperal psychosis was used to justify women's exclusion from participation in public life.³⁵ The danger is that continued emphasis on biological difference perpetuates that reasoning. Yet there is public sympathy for infanticidal mothers based on beliefs about childbirth. Perhaps this has something to do with the mystery of birth itself. F. Tennyson Jesse's prison doctor expresses it thus: "The dark consciousness of the womb was present with every man who had to do with the business, of the womb that was the holder of life, from which every living soul had issued in squalor and pain."³⁶

³⁴ N. Walker, *Crime and Insanity in England* (1968), Chap. 7.

³⁵ S. Edwards, "Medico-Legal Conundrums," paper given to the B.S.A. Conference, (1982).

³⁶ F. Tennyson Jesse, *A Pin to see the Peepshow* (1979), at p.392.

*Wife Sale and Desertion as
Alternatives to Judicial Marriage
Dissolution*

Katherine O'Donovan

University of Kent
Canterbury, England

The current period of change in legal regulation of marriage and divorce has been described as "a return to forms of social control other than legal rules concerning the formation, dissolution and organization of married life."¹ If this is correct, and the case has been persuasively made out, then it may be that lessons can be learned from previous experiences of informal marriage dissolution in England. The specific examples are the custom of wife sale which was practised over a period of about a thousand years, and desertion which continues today. A recent ethnographic study of sale of wives has brought together cases, including some from the twentieth century, in a comprehensive volume.² The custom was known to scholars in the nineteenth century, who regarded it with a mixture of horror and amusement.³

This article does not intend to suggest that there will be a return to earlier customs in the course of future delegalization of marriage and divorce; each age has its own ways of handling its trouble cases. Conditions which produced a custom such as wife sale are not likely to be reproduced. Nevertheless, the past can be a guidance to the future, and the aim of this article is to point to certain constant features of human behaviour and the human psyche, which must be taken into account in any future movement towards extrajudicial marriage dissolution.

THE CHANGE

Professor Glendon has argued that the current process of dejuridification and deregulation of marriage is gradual, and has involved a long period of

discontinuity between social and legal phenomena. The state is redefining what is law and what is non-law. Social conduct has "gradually been pulling away from the law, treating the law as irrelevant. Now the law is pulling away from social conduct, leaving questions . . . increasingly in the private order."⁴ What the historical evidence suggests is that the period when social conduct and law were in harmony was a relatively short period in the mid-twentieth century.

Private ordering of marriage by contract *per verba de praesenti* or *per verba de futuro* was recognized in England until 1753, and lived on in folk custom for much longer.⁵ The current practice of cohabitation outside legal marriage, with or without contract, is a return to this custom.⁶ There is a major difference, however, between the unlegalized past and the delegalization of today. At present, cohabiting couples can fall back on the law to regulate the breakdown of their relationship, if they cannot do so by private negotiation. On matters such as custody of children and property division the courts can be relied upon to settle a dispute between cohabitants. So it is also with divorce. In the case of customary institutions of the past, such as wife sale, there was private ordering to a degree unknown today. Wife sale was outside the law; indeed a few participants were subjected to criminal sanction.⁷ Today's private ordering of divorce takes place above a legal safety net. Despite this major difference, I think that certain cautionary lessons can be learned from the past.

WIFE SALE AS PRIVATE ORDERING

"Let the husband send her packing" was advocated as the remedy for adultery in the eighteenth century.⁸ The practice of walking out on an unsatisfactory spouse and of remarrying without further ado seems to have been common in the unregulated England of the past.⁹ Some sought a more public, more explicit termination of their union. The classic example, from Thomas Hardy's *Mayor of Casterbridge*, was the sale by Michael Henchard of his wife for five guineas.¹⁰ Sale at a fair or a market is the most common form of sale recorded. Usually this was an auction conducted by a cattle dealer. The practice appears to have resulted from the unavailability of divorce to the people: either prior to the introduction of judicial divorce in 1857, or because of the cost thereafter.¹¹ But there was also a tradition of self-regulation of personal relations, as can be shown by looking at marriage contracts.

A variety of forms of marriage was available in England until the passing of *Lord Hardwicke's Act* in 1753. Although the state, through the agency of the church, eventually succeeded in gaining control over marriage, self-regulated marriage was accepted as valid prior to 1753.¹²

Marriage contracts *per verba de futuro* or *per verba de praesenti* were made by the spouses themselves, without outside supervision or interference. Where the transmission of property was not the major object of the marriage, regulation by authority was unnecessary. What was desired was community acceptance of the union, and the opinion of neighbours was the important factor.¹³ Even after 1753 couples continued to “marry” privately. In many cases this was because of ignorance of the law. Some cases arose for religious reasons, for instance where dissenters and catholics continued to marry according to their consciences, rather than according to law. There were also those who did not wish to be bound by the legal effects of marriage. Some women maintained common-law practice as a way of retaining a separate legal identity.¹⁴ The view is expressed by Gillis that the legal regulation of marriage by the state through legislation represented “an undisguised triumph of property, patriarchy, and male dominance generally.”¹⁵

Was wife sale self-regulated divorce similar to common-law marriage? Let us look at some instances:¹⁶

The Times, March 30, 1796:

On Saturday last, John Lees, Stellburner, sold his wife for the small sum of 6d. to Samuel Hall, a fell-monger, both of Sheffield. Lees gave Hall one guinea immediately, to have her taken off to Manchester the day following by the coach: she was delivered up with a halter round her neck, and the clerk of the market received 4d. for toll.

The Times, July 18, 1797:

On Friday a butcher exposed his wife to sale in Smithfield Market, near the Lane Inn, with a halter about her neck, and one about her waist, which tied her to a railing, when a hog-driver was the happy purchaser, who gave the husband three guineas, and a crown, for his departed rib.

The Times, September 19, 1797:

An Hostler's wife, in the country, lately fetched *twenty-five guineas*. We hear there is to be a sale of wives soon at Christie's. We have no doubt they will go off well.

The first recorded instance is of gift rather than sale. During the reign of Edward I, Sir John de Camoys made a gift, by grant under seal, of his wife with her goods and chattels, to Sir William Paynel, “*spontanea voluntate mea*.” On Sir John's death the couple married, and the wife then claimed dower from the estate of her former husband. This was denied by the King's courts in 1302, on grounds of the wife's adultery.¹⁷ From this early example of informal ordering of personal relations, we can establish that the courts did not accept wife gift or sale as dissolution of legal marriage. And there is no evidence to suggest that the courts subsequently accepted such a contractual ending of marriage. So, in the cases of the propertied persons, who had recourse to the King's courts on matters of dower and land, evidence of institutional supervision of the dissolution (and celebration)¹⁸ of marriage was insisted upon.

Despite this lack of legal recognition, wife sale flourished as an informal custom in England, indeed in the British Isles generally, for a period of about five hundred years. Ecclesiastical prosecutions became evident in the sixteenth and seventeenth centuries. In 1696 Thomas Heath came before the ecclesiastical court, presented by the churchwardens of Thame, for living in sin with the wife of George Fuller, "having bought her of her husband at 2¼d. the pound."¹⁹ Wife sales at inns were prevalent for about a hundred and sixty years from 1730 to 1890.²⁰

In what sense can wife sale be said to be private ordering? In a divorceless society it enables self-termination of marriage or of cohabitation, without supervision by the law, and with little expense. Current discussion of private ordering by Mnookin and Kornhauser is of a different nature.²¹ It presupposes a regulation of the postdivorce state by laws concerning custody of and access to children, property relations and financial support. In Mnookin's world of private ordering, the role of the law is to act as a safety net where the negotiations between the parties fail. In that past world, there was no legal back-up for the institution of wife sale, no arbitrator for the couple to refer their differences to; it was genuine private ordering.

Mnookin gives the term "private ordering" to the "process by which parties to a marriage are empowered to create their own legally enforceable commitments."²² This bargaining takes place against a legal backdrop. Legal provisions which give guidance to the divorcing couple as to how to order their affairs are crucial to the agreement that is reached. It is true that the law does not attempt to minimize private ordering, as it did earlier in this century, but nevertheless the outcome of the bargaining process is influenced by the "legal rules that allow the imposition of a particular allocation if the parties fail to reach agreement."²³ Thus, each party's bargaining position depends on its beliefs about how the matter would be decided in court. The question of belief was also crucial to wife sale, as the evidence suggests that most participants believed in the legality of the transaction. But before turning to specific features of similarity between modern private ordering and wife sale, such as belief and bargaining power, general explanations of the institution must be considered.

EXPLANATIONS

The most frequently offered explanation for wife sale is that it legitimated, in social terms, an adulterous relationship. The author of *The Laws Respecting Women of 1777* stated:

if the man has a mind to authenticate the intended separation by making it a matter of public notoriety, thinking with Petruccio, that his wife is his goods and chattels,

he puts a halter around her neck, and thereby leads her to the next market place, and there puts her up to auction to be sold as though she was a brood-mare or a milch-cow. A purchaser is generally provided beforehand on these occasions; for it can hardly be supposed that the *delicate* female would submit to public indignity, unless she was sure of being purchased when brought to market.²⁴

Pillet, a French observer of the custom, agreed: "The purchaser, always a widower or a youth, is usually a connoisseur of the merchandise for sale, who knows her; one only presents her at market as a matter of form."²⁵ But many examples are available of sales where there was no purchaser,²⁶ of sales where the purchaser was a stranger,²⁷ and of sales where the purchaser was married.²⁸

The transaction was perceived by the participants as the equivalent of divorce. In a society where divorce was unobtainable by ordinary people, it is not surprising that such a practice should have developed. Civil divorce was introduced only in 1857 and remained unobtainable to the mass of people until much later. Recourse to the ecclesiastical courts was hedged about with formal requirements, evidence and expense, and in any case, divorce as such was not granted. For rich men, a private Act of Parliament could be obtained in order to divorce.²⁹

There is also evidence of a rejection by ordinary people of the conventions of the law. As earlier stated, common-law marriages in the form of folk customs such as "besom weddings" or "living tally" persisted long after they had been outlawed by statute.³⁰ Henry Mayhew found that legal marriage was exceptional among London costermongers.³¹ Besom weddings provided for both self-marriage and self-divorce. The couple to be married jumped over a besom broom into the open door of the house in front of witnesses. If divorce was desired the couple jumped backwards over the broom.³²

Economic motives can also be discerned in the accounts of wife sale: "the husband . . . as he imagines, at once absolves her and himself from all the obligations incident to marriage," according to *The Laws Respecting Women*.³³ It was commonly believed that the sale transferred the wife as an economic burden from her husband to the purchaser. Kenny's view was that the purchaser insisted on the transaction in order to protect himself from an action for damages from criminal conversation by the husband. The sale was evidence of condonation of adultery by the husband which was a defence against later legal suit.³⁴

Public sale also served the purposes of a *rite de passage* for the parties. Mnookin tends to discount the importance of ceremony to the parties, but other research shows that spouses were taken aback and disappointed at the lack of ceremony and speed of divorce.³⁵ In the case of desertion by a spouse there was no ceremony, but that does not seem to have impeded the formation of a new relationship. Yet ceremonial rites were considered necessary to those couples who had married during the

Napoleonic wars thinking that the soldier-husband of the wife had been killed in action. On the original husband's return a sale took place to legitimate the new relationship. This practice was frequent during 1815 and 1816; the authorities closed their eyes to it.³⁶

Engels laid down a distinction between bourgeois marriage, in which the wife sells herself for financial security, and proletarian relationships based on love:

The proletarian family is no longer monogamous in the strict sense, even where there is passionate love and finest loyalty on both sides and maybe all the blessings of religious and civil authority. Here, therefore, the eternal attendants of monogamy, hetaerism and adultery, play only an almost vanishing part. The wife has in fact regained the right to dissolve the marriage, and if two people cannot get on with one another, they prefer to separate. In short, proletarian marriage is monogamous in the etymological sense of the word, but not at all in its historical sense.³⁷

This might be taken as a description of contemporary marriage in the West, but the point is that in Victorian England freedom to desert a spouse was possessed by the working class.

BELIEFS

In *R. v. Delaval* Lord Mansfield stated:

I remember a cause in the Court of Chancery, wherein it appeared that a man had formally assigned his wife over to another man: and Lord Hardwicke directed a prosecution for that transaction, as being notoriously and grossly against public decency and good manners. And so is the present case . . .³⁸

Notwithstanding this direct statement of the illegality of wife sale, and other prosecutions of the practice, the participants seem to have believed in its legality. The *Record* newspaper of Dudley for August 26, 1859 reported a case where the "husband, in his ignorance thinks — and this repeated three times — she has actually no claim on him."³⁹ Mrs. Dunn of Ripon in Yorkshire in 1881 said: "Yes I was married to another man, but he sold me to Dunn for twenty-five shillings and I have it to show in black and white, with a receipt stamp on it, as I did not want people to say I was living in adultery."⁴⁰ Some believed that sale was the equivalent of legal separation. Others saw it as a transfer of partner, the new husband "stepping into the shoes" of the old.⁴¹

August 31, 1773, Samuel Whitehouse of the parish of Willenhall, in the country of Stafford, this day sold his wife Mary Whitehouse in open Market, to Thomas Griffiths of Birmingham, *Value One Shilling*. To take her with all faults.

Signed Samuel Whitehouse
Mary Whitehouse.⁴²

Some agreements were signed by witnesses. The amount of the toll was occasionally disputed and the *Brighton Herald* of May 27, 1826 gives the following entry in the Brighton Market Book:

May 17, 1826, Mr. Hilton of Lodsworth publicly sold his wife for 30/= upon which the toll of one shilling was paid.

The Magistrates sent for the toll collector to justify the toll charge and he at once referred the bench to the market by-laws as follows: "Any article not enumerated in the by-laws pays one shilling."⁴³

In the private ordering of personal relations beliefs are crucial to the parties' scope of action. Although Mnookin tends to dismiss the argument that the spouses may lack knowledge of rights and entitlements under the law, yet this is a real possibility; and so is the problem of the knowing spouse who takes advantage of the other's ignorance.⁴⁴

BARGAINING

Rules, it is agreed, are bargaining counters in private negotiations. We have already seen that beliefs about rules are crucial to the scope of argument before the bargain is struck. Without rules, will not the strong overpower the weak? Should not the rules protect the weak and create an equality of bargaining power? If so, then the rules, as standards for the negotiation process, are essential. But just as the parties do not bargain in a vacuum, but rather in the shadow of the law, so too the rules do not exist in a vacuum. The rules are a reflection of policy decisions, public opinion, the values of the community, etc. They exist in a cultural context. It is to an examination of that cultural context that we next turn. This will be done by looking at the context of wife sale and then at the context of those legal bargaining counters of today.

The Victorians expressed shock, horror and outrage at Hardy's novel. They denied the existence of wife sale, in spite of newspaper reports.⁴⁵ Yet Menefee has discovered nearly four hundred reported cases and, given the lack of interest in the ways of the common folk, these were surely not all.⁴⁶ The custom was regarded as degrading and brutal. As a reflection of the powerlessness of the wife, even where she agreed to the sale, the practice clearly shows vulnerability and economic dependence.

In Islamic law, a wife who does not please her husband can be sent back to her own kin. Islamic marriage dissolution is one of the great examples of extrajudicial divorce. In countries such as Egypt, Tunisia and Somalia which have reformed the law of divorce, the direction taken has been towards legislative and judicial control.⁴⁷ This change in family law has been away from individual control and private ordering toward state control. It is not intended to suggest that increased private ordering in

English or American divorce would result in an institution such as wife sale or *talaq*, but it is being suggested that a genuine bargain presupposes equality of bargaining power. Equality of bargaining power on divorce depends on a range of matters including preferences of the parties, their economic resources, financial incentives or disincentives, legal constraints, and the cultural context in which the bargaining takes place.

If we consider the cultural context in which wives were sold in the market place or at inns, inequality soon becomes apparent. A man at Baylham, Suffolk, "having a disagreement with his wife" sold her to a local farmer.⁴⁸ The *Gentleman's Magazine* reported the exchange of a wife for an ox at Parham fair, in Norfolk; the wife "was delivered to the grazier with a new halter round her neck, and the husband received the bullock, which he afterwards sold for six guineas."⁴⁹ In this case the sale was the result of a chance encounter. In East Lothian a sale was explained thus:

they being together in John Wood his house drinking and speaking anent fieing of shearers; in the mean tyme James Steill his wife came in, and they fell to speaking anent her; but they all deponed that they cannot tell how that purpose began, but grants that in ane idle toy or merriment the one did sell his wife . . .⁵⁰

The advertising that accompanied the sale is another indication of the powerlessness of the merchandise. An advertisement in 1796 stated:

To be sold for *five shillings*, my wife, Jane Hebland. She is stout built, stands firm on her posterns, and is *sound wind and limb*. She can sow and reap, hold a plough, and drive a team and would answer any stout able man, that can hold a *tight rein*, for she is damned *hard mouthed* and headstrong; but, if properly managed would either lead OR drive as tame as a rabbit. She now and then, if not watched, will make a *false step*. Her husband parts with her because she is too much for him. — Enquire of the Printer. N.B. All her body clothes will be given with her.⁵¹

The halter was the symbol of the yoke of servitude. Its use paralleled the manner in which cattle and other animals were sold at fairs. The following report from the *Doncaster Gazette* of March 25, 1803 confirms the association with livestock property:

The lady was put into the hands of a butcher, who held her by a halter fastened round her waist. "What do you ask for your cow?" said a bye-stander. "A guinea" replied the husband. "Done" cried the other, and immediately paid the money, and led away his bargain. We understand that the purchaser and his cow live very happily together.⁵²

But it seems that public opinion swung against such practices, for ten years later the *Doncaster Gazette*, reporting another sale informed its readers that the populace pelted the participants with snow and mud.⁵³

One husband "with the greatest satisfaction and good humour imaginable, proceeded to put the halter which his wife had taken off, round the neck of his Newfoundland dog. . . ."54 A French visitor to Smithfield, in 1816, reported that a husband who was holding his wife by a cord around her neck allowed her to be inspected by a prospective purchaser "comme il avait examiné quelques instants auparavant une jument que je l'avais vu marchander."⁵⁵

Not all wives were powerless or complaisant. *The Farmer's Journal* of May 5, 1810 tells the following tale:

A young man in Bewcastle, Cumberland, who was not on good terms with his wife, resolved a few days ago to dispose of her by auction. Not being able to find a purchaser in the place where they resided, she persuaded him to proceed to Newcastle for that purpose. Accordingly they set out, and this modern Dalilah laid her plan so well, that immediately on his arrival a pressgang conveyed him on board frigate preparing to get under weigh for a long cruise.⁵⁶

The context in which bargaining prior to termination of marriage or cohabitation takes place is also one of inequality. Cultural attitudes influence the outcome of the issue of child custody, with mothers obtaining custody, care and control in the great majority of cases. In England, at least, this is so marked a feature that the uninformed observer might reasonably conclude that there is a maternal preference rule.⁵⁷ At the same time a myriad of structures in tax law, social security law, and family law impose on the husband the role of family breadwinner.⁵⁸ A great deal has already been written on gender inequality within the family and it is unnecessary to prove the case again.⁵⁹ It must be emphasized that this is not just a matter of legal structures, but also real inequalities deeply embedded in the way in which we live.

Before we proceed too far along the road of private ordering of family relationships, we need to examine the structures and the constraints which surround it. Otherwise there will be a perpetuation of existing inequalities of bargaining power. These will merely move from the public gaze into the shadows.

NOTES

1. Glendon, Mary Ann, *State, Law and Family*, Amsterdam: North Holland Publishing Co., 1977, 321.

2. Menefee, Samuel Pyeatt, *Wives for Sale*, Oxford: Basil Blackwell, 1981.

3. See *Notes and Queries*, Vol. 175, Series 15, 1938, 314 for a list of all the references to wife sale in *Notes and Queries* for the nineteenth and twentieth centuries.

4. Glendon, *op. cit.*, note 1, at 321.

5. Gillis, John, "Resort to Common Law Marriage in England and Wales, 1700-1850" in *Law and Human Relations, Past and Present Society*, 1980.
6. E.g. Bottomley, A., Gieve, K., Moon, G., and Weir, A., *The Cohabitation Handbook*, London, Pluto Press, 1981. For an example from the past see *Notes and Queries*, Series 1, Vol. 7, 1853, 602.
7. *Notes and Queries*, Vol. 176, Series 15, 1939, 95.
8. Anon., *A Treatise Concerning Adultery and Divorce*, 1700, 38, quoted by Mueller, *infra.*, note 9, 563.
9. Mueller, G.O.W., "Inquiry into the State of a Divorceless Society," 18 *U. of Pittsburgh L. Rev.*, 1957, 545.
10. Hardy, Thomas, *The Mayor of Casterbridge*, London: Macmillan, 1920. At 9: "Will anybody buy her?" said the man. "I wish somebody would", said she firmly. "Her present owner is not to her liking!"
11. See McGregor, O.R., *Divorce in England*, London: Heinemann, 1957.
12. Helmholz, Richard, *Marriage Litigation in Medieval England*, Cambridge: University Press, 1974, ch. 2.
13. Laslett, P., *Family Life and Illicit Love in Earlier Generations*, Cambridge: University Press, 1977, 108.
14. Gillis, *op. cit.*, note 5, at 12.
15. *Ibid.*
16. See Ashton, John, *Old Times*, London: Nimmo, 1885, 342-43; Ashton, John, *The Dawn of the Nineteenth Century in England*, London: Fisher Unwin, 1886.
17. Kenny, Courtney, "Wife Selling in England," 45 *Law Quarterly Review*, 1929, 494; Rot. Parl. I, 140; Pollock and Maitland, *The History of English Law*, Vol. II, Cambridge: University Press, 1968, 395.
18. For dower to be payable, the marriage had to be celebrated *in facie ecclesiae*. Other marriages were recognized as valid but there was no dower. Pollock and Maitland, II, *op. cit.*, note 17, at 374.
19. Peyton, S.A. (ed.), *The Churchwardens' Presentments in the Oxfordshire Peculiars of Dorchester, Thame and Banbury*, Oxford Records Society, 1928, 184; quoted by Thomas, Keith, "The Double Standard," *Journal of the History of Ideas*, 1959, 213.
20. Menefee, *op. cit.*, note 2, at 46.
21. Mnookin, Robert and Kornhauser, Lewis, "Bargaining in the Shadow of the Law: The Case of Divorce," 88 *Yale L.J.*, 1979, 950.
22. Mnookin, Robert, "Bargaining in the Shadow of the Law," (1979) *Current Legal Problems*, at 65.
23. *Ibid.*, at 76.
24. Anon., *The Laws Respecting Women*, reprinted from the J. Johnson edition, London 1777, New York: Oceana, 1974, 55.
25. Pillet, R., *L'Angleterre Vue à Londres et dans ses Provinces*, Paris: Alexis Eymery, 1816; quoted by Menefee at 78.
26. *Notes and Queries*, Vol. 176, 1939, 95.
27. *Notes and Queries*, 3rd Series, Vol. 3, 1863, 486.
28. *Notes and Queries*, 1st Series, Vol. 7, 1853, 602; 6th Series, Vol. 3, 1881, 487.
29. Crouch, H., "The Evolution of Parliamentary Divorce in England," 52 *Tulane L. Rev.*, 1978, 513; McGregor, *op. cit.*, note 11, Ch. 1.
30. Gillis, *op. cit.*, note 5, at 2.
31. Mayhew, Henry, *London Labour and London Poor*, London, Griffin, 1864, Vol. 1, at 22.

32. Gillis, *op. cit.*, note 5, at 3.
33. Anon., *op. cit.*, note 24, at 55.
34. Kenny, *op. cit.*, note 17, at 495.
35. Elston, E., Fuller, J., and Murch, M., "Judicial Hearings of Undefended Divorce Petitions," 38 *Modern L. Rev.*, 1975, 609.
36. *Notes and Queries*, 3rd Series, Vol. 4, 1863, at 450; 3rd Series, Vol. 10, 1866, at 29.
37. Engels, F., *The Origin of the Family, Private Property and the State*, London: Lawrence and Wishart, 1972, 135.
38. (1763), 3 Burr. 1434, 96 E.R. 234.
39. *Notes and Queries*, 2nd Series, Vol. 8, 1859, at 258.
40. *Notes and Queries*, 6th Series, Vol. 4, 1881, at 133.
41. *Notes and Queries*, 4th Series, Vol. 10, 1872, at 469.
42. *Notes and Queries*, 3rd Series, Vol. 2, 1862, at 186.
43. *Notes and Queries*, 6th Series, Vol. 5, 1882, at 58.
44. In *Eves v. Eves*, [1975] 3 All E.R. 768, the plaintiff was a minor at the time of the purchase of the home for cohabitation. The defendant told her that, although he would have put the house in joint names had she been of full age, that because of her minority it would be conveyed into his name only.
45. Winfield, C., "Factual Sources of Two Episodes in *The Mayor of Casterbridge*," 25 *Nineteenth Century Fiction*, 1970, 224; Scudder, H.L., "Selling a Wife," *Notes and Queries*, Vol. 188, 1945, 123.
46. Menefee, *op. cit.*, note 2, appendix.
47. Pearl, David, *A Textbook on Muslim Law*, London: Croom Helm, 1979.
Anderson, J.N.D., *Islamic Law in the Modern World*, Conn.: Greenwood Press, 1975.
48. Menefee, *op. cit.*, note 2, at 73.
49. *Notes and Queries*, 3rd Series, Vol. 3, 1863, 486.
50. Menefee, *op. cit.*, note 2, at 73.
51. *Ibid.*, at 75.
52. *Notes and Queries*, 2nd Series, Vol. 1, 420.
53. *Ibid.*, reporting from the *Doncaster Gazette* of February 3, 1815, on a sale at Pontefract.
54. Menefee, *op. cit.*, note 2, at 113.
55. Quoted in *Notes and Queries*, 4th Series, Vol. 10, 1872, at 469.
56. *Notes and Queries*, 3rd Series, Vol. 3, 1863, at 486.
57. See Eekelaar, J., and Clive E., *Custody After Divorce*, Oxford: Centre for Socio-Legal Studies, 1977.
58. See O'Donovan, K., "The Male Appendage — Legal Definitions of Women" in S.B. Burman (ed.) *Fit Work for Women*, London, Croom Helm, 1979.
59. A good summary is provided in Law Com. No. 103 *The Financial Consequences of Divorce: The Basic Policy*, London, HMSO, 1980, Cmnd. 8041.

SHOULD ALL MAINTENANCE OF SPOUSES BE ABOLISHED?

THE issue of whether formerly married persons should continue to have any financial responsibility for one another after divorce is being vehemently debated today.¹ In dispute are a number of questions concerning the ending of marital relationships, injustice to second

¹⁴ Law Com. No. 103, paras. 77-79.

¹⁵ Law Com. No. 52, paras. 46-60.

¹⁶ Law Com. No. 112, para. 33.

* Fellow, Pembroke College, Oxford.

¹ Most of the public debate has taken place in the letter page of *The Times*. See, e.g. September 5, 8, 9, 10 and 17, 1981. The *New Law Journal* has also published a number of letters and comments. See, e.g. (1979) 129 New L.J. 845, 895, 914, 958 1034, 1082.

wives, and, most important, the economic dependence of women on men.² Much of the argument results from a failure to differentiate the actual from the ideal in discussions which often end up in a replay of the sex war. An examination of the actual reveals the institutions and ideologies on which at present the legal obligation of spousal maintenance after divorce rests.³ The ideal can be termed the goal towards which we wish to move. The question can be rephrased: what would the good society look like in terms of maintenance?

The opinion seems to be emerging that, in the good society, there would be no further financial obligation between former spouses after divorce. The Scottish Law Commission has drafted legislation under which maintenance would cease three years after divorce.⁴ However, discretion remains with the court to continue maintenance beyond this three-year limit in order to ensure fair sharing of the economic burden of caring for a child of the marriage,⁵ or to relieve grave financial hardship.⁶ The English Law Commission has recommended that "periodical financial provision should be primarily concerned to secure a smooth transition from the status of marriage to the status of independence,"⁷ and that the court should have power to dismiss a wife's claim for maintenance without her consent.⁸

Academic opinion also seems to be in support of abolition of post-divorce maintenance. Gray bases his argument for abolition partly on comparison with other jurisdictions such as Australia, Germany and New Zealand and partly on a value judgment about the desirability of incentive to women to remain economically independent during marriage.⁹ Eric Clive, Scottish Law Commissioner and professor, thinks that there is "something fundamentally repulsive about this whole idea of dependent women."¹⁰ Ruth Deech regards as "parasites" women who, "by the fact of marriage or regular sexual intercourse, have acquired identical rights to be kept as dependents, valued not by their contributions to a productive society but by their adherence to a particular man and his fortunes."¹¹

Popular opinion appears to agree. In a book written for the "average individual," Tom Harper states that "it is virtually certain

² Marcel Berlins, "How the Scales are Loaded against a Second Wife," *The Times*, September 3, 1981.

³ Katherine O'Donovan, "The Principles of Maintenance: An Alternative View" (1978) 8 *Fam. Law* 180.

⁴ Scot. Law Com. No. 67, *Family Law, Report on Alimnt and Financial Provision* (1981), cl. 13 (3) of the Family Law (Financial Provision) (Scotland) Bill.

⁵ *Ibid.* cl. 13 (3) and 9 (1) (c).

⁶ *Ibid.* cl. 13 (3) and 9 (1) (e).

⁷ Law Com. No. 112, *Family Law, The Financial Consequences of Divorce* (1981), p. 18.

⁸ *Ibid.*

⁹ Kevin J. Gray, *Reallocation of Property on Divorce*.

¹⁰ Eric Clive, "Marriage: An Unnecessary Legal Concept?" in J. M. Eckelaar and S. N. Katz: *Marriage and Cohabitation in Contemporary Societies*, pp. 71-81, 73.

¹¹ Ruth L. Deech, "The Principles of Maintenance" (1977) 7 *Fam. Law* 229-233. 232

that post-divorce maintenance will disappear. Already the principle is under severe attack and many countries have moved well along the path towards its abolition."¹² The Campaign for Justice in Divorce, a pressure group, has had considerable success in publicising its views that maintenance after divorce is unfair. The official statement of policy published in 1978 points to the fact that the majority of petitioners for divorce are wives, who as initiators of the divorce should not expect maintenance. The group also emphasises the degradation of dependency and the injustice to second wives. "The first wife is demeaned by being made dependent on a legal stranger, generally receives an irregular and inadequate income, and is discouraged from attempting to be independent, whilst the second wife is required to work to help maintain her."¹³ Despite the illogicality of deploring both the dependence of the first wife and the independence of the second the Campaign has been very influential. There have been a number of articles in the national press which have posed the issue in terms of a battle between the social categories women and men: "the real victims are men."¹⁴ And, somehow, women are to blame:

"It is about time women started asking themselves why they believe they have a right to walk out of a marriage with a profit. Why should they expect to be maintained in a style they have become accustomed to in marriage rather than the style to which they were used before marriage? What I wonder does a woman sacrifice in marriage that she should be entitled to such handsome compensation when it breaks down?"¹⁵

But the true villains emerge:

"The women's movement is split. One group believes that women should be, and show themselves to be, independent; another believes that men should be screwed in the financial if no other sense: while a third, paradoxically contrives to believe both at the same time."¹⁶

Between September 5-17, 1981, there were 11 letters to *The Times* on the question of post-divorce maintenance. These followed an article by the Legal Correspondent in which he said:

"What is in issue is maintenance to the wife. But should she be entitled to continue receiving maintenance merely because she looks after the children? Millions of working mothers—married or alone—have to make arrangements for their children to be looked after."¹⁷

¹² W. M. Harper, *Divorce and Your Money*, p. 166.

¹³ Campaign for Justice in Divorce, *Policy Statement* (1978).

¹⁴ C. Verity, "The Battered Husbands," *The Spectator*, November 18, 1978.

¹⁵ J. Patyna, "Why Must Men Pay this 'Fine'?" *London Evening News*, August 9, 1978.

¹⁶ A. Watkins, "A Case for Making Bigamy Legal," *Observer*, January 7, 1979.

¹⁷ Marcel Berlins, *op. cit.* note 2.

The letters in response to this were largely sympathetic to the position of the first wife, especially where she was caring for children.¹⁸ However, some of these sympathetic letter writers saw the primary responsibility for one-parent families as resting on the State.¹⁹

What has been the view of feminists on this issue? It has been strangely muted, perhaps because the demand for legal and financial independence for women is one of the cornerstones of the women's movement. The official comments by the Equal Opportunity Commission pointed to "a wide social context in which full equality between the sexes has yet to be achieved," and to the need for adequate provision by the State "to support those for whom private maintenance was either inadequate or no longer available."²⁰ Julia Brophy and Carol Smart have argued that "the concept of equal rights in family law can operate to obscure the structural inequality between husband and wife, fathers and mothers, within the family."²¹ They show how those in favour of the abolition of maintenance use the concept of equal rights to support their position, but without consideration of the economic reality in which the division of labour between wife and husband and legal and social institutions constitute women as dependent within the family.²²

Emerging from this debate is the figure of the woman in question. She is either a "parasite" or an "alimony drone"²³ sitting "upon her powdered bum,"²⁴ expecting "a bread ticket for life,"²⁵ or a victimised second wife who has "to go out to work to supplement the new husband's stretched income."²⁶ This stereotyped picture fits oddly with the "liberated" woman upheld as today's model.

The arguments for the abolition of maintenance after divorce are compelling. They include arguments based on liberty, justice and equality. Most of those involved in the debate would agree that in the good society the dead marriage should be buried. Let us assume, then, that in the ideal society no person would be under an obligation to support a former spouse after legal termination of their marriage.

¹⁸ *The Times*, letters September 5, 1981 (2); September 8, 1981 (3); September 9, 1981 (1); September 10, 1981 (3); September 12, 1981 (1); September 17, 1981 (1).

¹⁹ See, e.g. the letter to *The Times* on September 9, 1981, from the Director of One Parent Families.

²⁰ Equal Opportunities Commission, *Comments on The Law Commission Discussion Paper*, February 1981, p. 11.

²¹ Julia Brophy and Carol Smart, "From Disregard to Disrepute: The Position of Women in Family Law," (1981) 9 *Feminist Review* 15.

²² See, e.g. Hilary Land, *Parity Begins at Home*, E.O.C. and S.S.R.C. 1981.

²³ Rebecca J. Bailey, "Principles of Property Division on Divorce" (1981) 54 *A.L.J.* 191. Mavis Maclean, "Financial Consequences of Divorce: Impact on the Ongoing Family," draft 1981, Socio-Legal Centre Oxford, p 12, has found in an empirical study of divorced that there is no "drone" group and that "mealticket for life" is a myth.

²⁴ Sally Vincent, "Marriage Fines Must Go," *Sunday Times*, February 7, 1982.

²⁵ In *Brady v. Brady* (1973) 3 *Fam. Law* 78, Sir George Baker reduced an order for £3 a week to 10p saying: "In these days of 'women's lib' there is no reason why a wife whose marriage has not lasted long, and who has no child, should have a bread ticket for life."

²⁶ Marcel Berlins, *op. cit.* note 2.

Achieving this ideal depends on the necessary material conditions being present in society. What are these material conditions? I think they would be as follows:

- (a) Equality of partners during marriage including financial equality.
- (b) Equal participation by both partners in wage earning activities.
- (c) Wages geared to persons as individuals and not as heads of families.
- (d) Treatment of persons as individuals and not as dependents by State agencies, such as social security and tax departments.
- (e) Provision for children by both parents, including financial support, child care, love, attention and stimulation.

What are the actual conditions prevailing at present? According to the English Law Commission's Discussion Paper they are ²⁷:

- (a) *The ideology of equality has not been followed by material equality*

Questions of material equality arise in two different areas: within the family and outside the home. Within the family a pattern of male economic dominance and female dependence remains. Family law does not intervene in marriage to compel equal sharing of wages, material goods or ownership of property.²⁸ There is revealing research which shows that women's levels of consumption within the family are lower than those of other members, and that a struggle takes place over the distribution of family income. Women going to refuges from domestic violence have nowhere else to go.²⁹

Outside the home, as the Law Commission points out, "there is a considerable body of evidence which suggests that for many women, and especially married women, opportunities are still largely non-existent and equality a myth."³⁰

- (b) *The dual labour market with low pay and part-time work for women*

The Law Commission's Discussion Paper gives a fair summary of the empirical evidence of lower average wage for women compared to men, their concentration in low-paid jobs, their frustrated desire to work because of child care obligations, priority given to family commitments with a consequent decision to work part-time.³¹ As the

²⁷ Law Com. No. 103, *Family Law, The Financial Consequences of Divorce: The Basic Policy*, Cmnd. 8041 (1980).

²⁸ It is true that occupation rights are protected by the decision in *Williams and Glyn's Bank v. Boland* [1980] 2 All E.R. 408 (H.L.); and that reasonable maintenance can be ordered under the Matrimonial Causes Act 1973, s. 27, and under the Domestic Proceedings and Magistrates' Courts Act 1978, but these piecemeal reforms can hardly be called a code of marriage regulation.

²⁹ Jan Pahl, "Patterns of Money Management Within Marriage" (1980) 9 *Journal of Social Policy* 313-335; Val Binney, Gina Harkell and Judy Nixon, *Leaving Violent Men*, Women's Aid Federation (1981).

³⁰ Law Com., No. 103, *op cit.* note 27, p. 31.

³¹ *Ibid.* pp. 31-35.

Finer Committee noted: "An inescapable conclusion from the many recent studies of women's experience in trying to reconcile the claims of marriage, motherhood and work is the existence of a traditional and deeply rooted double standard of occupational mobility. As a society we pay lip service to the ideal of equality for women whilst practising discrimination in the very area where it hurts most."³²

(c) *The persistence of the concept of a family wage*

So long as the wage and salary structure of society remains geared to the notion of a breadwinner supporting dependent spouse and children, the material conditions of the ideal society will not be attained. Under present conditions the family wage may meet the needs of workers with dependent families.³³ These workers would not necessarily wish to perform the same work for a lower wage. But shorter working hours, longer holidays, job-sharing and other new approaches to employment, could enable these breadwinners of today to share domestic responsibilities equally with their spouses. The spouses would, of course, also be participating in wage-earning activities.

(d) *The failure of government departments to reform social security and taxation law*

Equality of partners in marriage and independence after divorce leads logically to the treatment of persons as individuals by state agencies and not as part of a breadwinner/dependant unit. The Green Paper on the Taxation of Husband and Wife³⁴ recognises that the treatment of wife with husband as a tax unit is not equality of treatment. A fundamental change in the system in which the married man's tax allowance is abolished and the individual becomes the basic unit for taxation is considered in the paper. If this model of independent taxation becomes law then one of the necessary material conditions for equality will exist.

In social security law benefits continue to be aggregated on a head of household plus dependants basis. The Supplementary Benefits Commission acknowledged that this structure impedes the attainment of equality of the sexes but it seems that the State considers reform, other than the cosmetic reform to be introduced in 1983, too costly.³⁵ The denial of the Invalid Care Allowance to married women is a notorious example of their treatment as husbands' dependants. This

³² *Report of the Committee on One-Parent Families*, Cmnd. 5629, (1974) Vol. 1, para. 7.41.

³³ Jean Coussins and Anna Coote, *The Family in the Firing Line*, C.P.A.G. and N.C.C.L. 1981. Michèle Barrett and Mary McIntosh: "The Family Wage" (1980) 11 *Capital and Class* 51-73.

³⁴ *The Taxation of Husband and Wife*, Cmnd. 8093 (1980).

³⁵ S.B.C., *Annual Report 1976*, Cmnd. 6910 (1977). It is proposed that, from November 1983, the claimant will be chosen, not on the basis of gender as now, but as whichever of the couple is qualified in terms of past employment, etc. See R. Lister, *Welfare Benefits* p. 42.

is so also in the case of the Noncontributory Invalidity Pension.³⁶ Putting individuals on an autonomous basis inside and outside marriage is an essential condition for the abolition of maintenance on divorce.

(e) *The burden of child care falling primarily on mothers*

The Green Paper on Taxation confirms "that it is largely family commitments which determine whether or not a married woman is likely to be in paid employment or seeking work."³⁷ By family commitments is meant not only the care of children but also the care of elderly and infirm persons in the household. It has become something of a cliché to summarise the dependence of women in the words "child care." Examination of the notion of child care reveals that it includes not just physical care and protection from harm but also developmental and emotional care. It is well established that it is in the early years that a child's educational potential is at its greatest. It is noticeable that the current debate on maintenance is limited to financial questions without recognition of the fact that time and energy spent caring for children are at least as important as, if not more important than, money. It is true that the English Law Commission's recommendations on the policy objectives of divorce law acknowledge "that the interests of the children should be seen as a matter of overriding importance,"³⁸ but the discussion remains tied to questions of financial support rather than to matters of love, attention and stimulation. No doubt time and energy can be purchased with a wage for child care, but there is little perception even of this. Perhaps it is because the work done by women is customarily accorded little recognition and less value.

Preliminary conclusion

It is true that maintenance after divorce is degrading, but so is dependence in marriage. In this respect it is distinctly odd that the Campaigners for Justice in Divorce continually emphasise the undesirability of second wives working outside the home.³⁹ Surely the second wife should be advised to avoid the trap of dependence into which the first wife fell. If the material conditions outlined above were to be realised would there be dependence in marriage? The answer is no, and the ideology of equality, to which at present only lip service is paid, would become a reality.

If dependence during and after marriage ceased would there be any need for a legal institution of marriage? This is the logical next question.

Why not abolish maintenance during marriage?

The achievement of the material conditions outlined above as necessary for the abolition of spousal maintenance on divorce would

³⁶ Equal Opportunities Commission: *Behind Closed Doors* (1981).

³⁷ *Op. cit.* note 34, p. 66.

³⁸ *Op. cit.* note 7, p. 10.

³⁹ See the official policy statement reproduced in (1980) 130 *New L.J.* 920.

logically be followed by a similar abolition within marriage. Each spouse in the ideal society would be an independent, economically self-sufficient, entity protected by the social security net in case of need. Consequently there would be no necessity for spousal financial support. The "fundamentally repulsive" idea of dependent women would vanish.

Would there be any point in retaining marriage as a legal institution? Eric Clive has argued that certain traditional legal consequences of marriage need not follow from status and could be regulated outside the institution of marriage.⁴⁰ An examination of the status derived incidents of marriage reveals that abolition of marital status in the law would not have significant legal consequences. Incidents of marriage which have been or can be abolished are:

- (1) names of spouses (which have never been regulated in English law);
- (2) the obligation on spouses to live together;
- (3) the obligation on spouses of sexual fidelity;
- (4) the obligation of maintenance;
- (5) the husband's right to rape his wife;
- (6) the criminal offence of bigamy;
- (7) legitimacy of children;
- (8) names of children;
- (9) nationality, domicile and residence;
- (10) the special position of spouses in contract, tort, civil and criminal evidence;
- (11) the special position of spouses in taxation and social security laws.

The obligation of cohabitation and sexual fidelity have little meaning in an era of no-fault divorce. Rape in marriage is likely to become an offence like any other rape in the future.⁴¹ The offence of bigamy either serves to prevent fraud on the State officials who administer the law of marriage, in which case it can be subsumed under the general law of fraud, or to protect dependence in marriage, in which case its value may be questioned.⁴² The Law Commission has proposed the abolition of the distinction between legitimate and illegitimate children. Names of children, in recent years, have been decided by courts on a discretionary basis where parents disagreed:

⁴⁰ *Op. cit.* note 10.

⁴¹ Criminal Law Revision Committee, *Working Paper on Sexual Offences*, November 1980. Charlotte L. Mitra, ". . . For She Has No Right or Power to Refuse Her Consent" [1979] *Crim. L.R.* 558-565.

⁴² G. L. Williams, "Bigamy and Third Marriage" (1950) 13 *M.L.R.* 417-427, 424: "The only social mischief that is necessarily involved in every case of bigamy is the deceit practised upon those who officiate at or before the bigamous ceremony, and the consequential falsification of the marriage register."

a rule is not necessary.⁴³ Nationality, domicile and residence should not depend on marital status but on fact, and this is the direction in which the law is moving.⁴⁴ The special position of spouses in contract, tort and evidence makes an illogical distinction between the married and cohabitants; surely it is the relationship that is relevant, not the status.⁴⁵ Abolition of the special position of spouses in taxation and social security law and the treatment of individuals on an autonomous basis would be a desirable reform. At present status is emphasised in some rules and factual relationship in others.⁴⁶

It can be seen that these changes are already taking place and that the abolition of marriage as a legal institution is feasible. Certain problems do remain, particularly regarding children, and these are considered below. The question must be raised, however, whether the abolition of marriage would bring about the abolition of dependency in marriage-type relationships. Eric Clive says "the long term goal in this area should be the abolition of private dependency by encouraging independence and treating poverty as an individual rather than a family phenomenon. Even before that goal is reached, however, it does not seem necessary to preserve the legal concept of marriage for the purposes of tax and social security laws."⁴⁷ For the abolition of dependency, however, it is not enough to abolish marriage; the positive measure outlined above as belonging to an ideal world will be required.

It is not being suggested here that couples who wish to undergo religious or cultural rites in recognition of their relationship should be prevented from so doing. They would also be free to create a partnership agreement or a contract to regulate their relationship in private law. If maintenance of the partner who undertook additional family obligations was desired, that could be included in the contract.

What about the children?

Even if the dependence of spouses in marriage can be eliminated, the children and possibly, other family members, will remain dependent. This suggests that a legal institution for the raising of children is necessary. Viewed from the perspective of children maintenance takes on a different aspect. Regardless of whether the relationship between their parents is termed cultural, religious, legal or social, children require not only shelter, food and clothing, but also the time, care and attention of adults. So their needs are not merely material, but also emotional. Provision for material needs can be

⁴³ *D. v. B.* [1977] 3 All E.R. 751 and [1979] 1 All E.R. 92 (C.A.). *R (BM) v. R (DN)* [1978] 2 All E.R. 33, 38. *W v. A* [1981] 1 All E.R. 100 (C.A.).

⁴⁴ Domicile and Matrimonial Proceedings Act 1973, s.1.

⁴⁵ T. M. S. Tosswill, "The Accused's Spouse As Defence Witness" [1979] Crim. L.R. 696-701 argues that the spouse-witness can be compelled like any witness, to give evidence for the spouse-defendant.

⁴⁶ e.g. to qualify for widow's benefit a woman must be married, but when claiming supplementary benefit the cohabitant is treated as a married woman.

⁴⁷ *Op. cit.* note 10, p. 73.

made through State schemes or parental legal obligation. Provision of adult time for child care and for emotional needs is more difficult. This is why it has been suggested that an institution of Parenthood should replace marriage.⁴⁸ Examination of the idea of Parenthood as a legal institution reveals that the State does already indicate to parents, both directly through legislation and indirectly through case law and the decisions of State officials, how to behave as parents. Failure to conform to standards laid down by the State may result in loss of the right to parent the child.⁴⁹ But there is no code of parental behaviour as such; the legislation, case law and administration comprise a hotch-potch of piecemeal measures. The State itself is ambivalent. Through the married man's tax allowance it supports the institution of marriage, regardless of whether children are involved. It has been estimated that the abolition of the married man's tax allowance would enable substantial raising of the child benefit paid to people bringing up children.⁵⁰

Viewed from the perspective of children the relationship between their parents can be seen in a new way. It is the dependency of the children that is the predominant material cause of dependency in marriage-type relationships. Only when the cost of that dependency is equally shared by the parents will the dependency of one spouse on the other be eliminated.

Conclusion

This paper started with the question whether all maintenance of spouses should be abolished. The answer given is yes, provided that certain material preconditions are realised. With the abolition of maintenance it is advocated that marriage as a legal institution and status should also be eliminated. However, the dependency of children requires that an institution of Parenthood be developed for their protection. Both parents will have to give equally their time, love and attention to their children. If this results in imposing on fathers the same guilt feelings about the children and the same exhausting struggle to combine home tasks with paid work as now experienced by women, then this is the logical consequence of the elimination of dependency in adult relationships. What must be avoided is the profoundly unjust solution of adjusting the law on maintenance without at the same time changing "existing law, employment practises and the labour market, child care systems and many other areas of social life which relate to the family."⁵¹

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⁴⁸ Belinda Meteyard, "Parenthood v. Marriage" (1980) 10 Fam. Law 206-209; Jill Tweedie, *The Guardian*, May 14, 1981.

⁴⁹ See J. Eekelaar, R. Dingwall and T. Murray, "Victims or Threats? Children in Care Proceedings" [1982] *Journal of Social Welfare Law* 68-82.

⁵⁰ Jean Coussins and Anna Coote, *op. cit.* note 33.

⁵¹ Penny Mansfield and Robert Chester, "Divorce: Why Should a Wife Be the Loser?" *The Times*, February 2, 1982

* Senior Lecturer in Law, University of Kent.

THE PRINCIPLES OF MAINTENANCE: AN ALTERNATIVE VIEW

Katherine O'Donovan – *Lecturer in Law*
University of Kent

In a recent article Ruth L. Deech argued¹ that the law of spouse maintenance on divorce should be reformed so as to be a rehabilitative and temporary measure confined to spouses who are incapable of work because of infirmity or child care obligations. There is much to commend this argument, particularly since it advocates the enactment of the Law Commission's proposals on co-ownership of the matri-

¹ Ruth L. Deech, "The Principles of Maintenance" (1977) 7 Family Law 229.

monial home². The rationale for the proposed change is that under current maintenance law the "legal supposition of female dependency tends to deny freedom of choice to married and formerly married persons; it is widely considered degrading to women and it perpetuates the common law proprietary relationship of the husband and wife even after divorce".³ A similar view is put forward in the recently published and excellent

² Law Commission, No. 52, First Report on Family Property: A New Approach, 1973.

book *The Reallocation of Property on Divorce* by Kevin J. Gray⁴ suggesting that the satisfaction of alimentary needs of spouses after divorce should be seen as a matter of public law for the state and not as a matter of private law for individuals. Mr. Gray's view is that notions of equality of the sexes do not permit the dependency of the wife on the husband. He foresees a movement towards equal division of property on divorce with (at most) rehabilitative maintenance designed to eliminate "marriage-conditioned needs" (p.334). Whilst it cannot be denied that laws based on sexual stereotypes are undesirable and ought to be eliminated what both Deech and Gray fail to see is that the current organisation of family life is premised on the assumption that one partner will sacrifice a cash income in order to rear children and manage the home. The dependence of the non-earning spouse on the wage-earner is inevitable under present family arrangements. This leads in turn to inequality of earning power of spouses. Without a major change in social and family structures the Deech or Gray proposals merely serve to perpetuate an already unfair situation and will not ensure equality.

1. Inequality of earning power

There is much evidence to suggest that in pre-industrial England women outside the upper-class were not their husband's dependents, whatever the common law may have provided.⁵ Borough customs enabled women to participate in business life⁶ and those living on the land cultivated their small holdings. With industrialisation work was separated from the home and the formal legal role of dependent became a reality for most married women, who no longer supported themselves in subsistence farming and who did not engage in wage earning. Their role was that of housewife.⁷ Their obligations, reflected in family law, were to take care of home and children. Failure to do so was sanctioned by society and the law in a variety of ways.⁸

The assumption of the role of housewife on marriage by the majority of women cannot be ignored. Over ninety per cent of women in Britain marry, and in ninety-five per cent of marriages the husband is the chief economic support of the family.⁹ Although married women do work outside the home, composing one-third of the work force, there is a clear pattern of part-time work, shorter hours and lower earnings in work done by women by comparison with work done

³ Deech, *op. cit.*, p.230.

⁴ Professional Books, 1977.

⁵ See Alice Clark, *Working Life of Women in the Seventeenth Century*, London, Routledge, 1919; Mary Beard, *Woman as Force in History*, New York, Macmillan, 1946.

⁶ M. Bateson, Introduction, *Borough Customs*, Vol. II, London, Selden Society, Vol. XXI, 1906.

⁷ Ann Oakley, *Housewife*, Penguin, 1976, Chaps. 1 and 2.

⁸ E.G. Local Authorities have power under SI of the Children and Young Persons Act 1969 to take care proceedings in juvenile courts in relation to children and the court can make a care order if it is satisfied that the child's "proper development is being avoidably prevented

by men.¹⁰ One accepted explanation for this pattern is that duties in the home interfere with women's full participation in work; and the evidence is that, even where both partners to a marriage work, women retain the prime responsibility for home and children.¹¹ Many married women give up work in order to raise a family. In so doing they forego the training and work experience which would enable them to earn more. They are also failing to provide for their future through insurance and pension contributions, as are those who work part-time, although to a lesser extent. No doubt women give up or reduce their employment cheerfully on behalf of their families, but whether they would continue to do so if denied the protection of the law is questionable. The argument can be made that the law affords little protection at present since maintenance is so difficult to enforce¹² but this may be an argument for improving legal protection through, for instance, greater use of lump sum provision rather than for the abolition of maintenance.

The perception that the married woman is treated as her husband's dependent by legal institutions is not new and legislation has already been enacted to lessen that dependence in part; for instance a married woman, not already in the National Insurance scheme does not have the right to opt out of benefits and contributions if she enters the scheme after April 1977.¹³ And if the Domestic Proceedings and Magistrates' Courts Bill becomes law both spouses will have equal obligations to maintain one another and their children during marriage and on divorce.¹⁴ However, in most welfare provisions, Family Income Supplement and Supplementary Benefits there is sexual stereotyping which assumed that the husband will be breadwinner and the wife housekeeper. Recently the Supplementary Benefits Commission has recognised this and proposes that "the social security system should as far as possible play a neutral part, leaving people as free as possible to make their own arrangements in whatever way suits them best"¹⁵ Laudable as such a change would be it would not deal with the question of economic protection of the spouse who undertakes the home and child care responsibilities, thereby lessening his or her wage-earning ability. This is presumably what the present

or neglected".

9 Central Statistics Office, *Social Trends*, 1975, table 1: 12.

10 Department of Employment, Manpower Paper No. 11, *Women and Work, A Review* 1975.

11 R. Rapoport and R. Rapoport, *Dual Career Families*, Harmondsworth, Penguin, 1971. This is reflected in the administration of Child Benefit, where the mother of a child living with both parents receives the benefit.

12 See Report of the Committee on One-Parent Families ("Finer Report") Vol. 1, London, H.M.S.O. Cmnd. 5629, 1974, table 4.9.

13 Social Security Act, 1975.

14 The Domestic Proceedings and Magistrates' Courts Bill is going through Parliament in 1978. See Law Com. No. 77. Report on Matrimonial Proceedings in Magistrates' Courts.

15 Supplementary Benefits Commission, *Annual Report 1976*, Cmnd. 6910, London, H.M.S.O., 1977, Para. 1.12.

law of maintenance purports to do. The fact that it does so inadequately is not necessarily an argument for its abolition, as the law of maintenance contains a recognition of the sacrifice of a cash income by a spouse. This argument was best expressed by Latey J. in *S v S*¹⁶ when he said:

"This wife like so many wives when there are children has come off worse as the result of the breakdown of the marriage. It is a sad fact of life that, where there are children, both husband and wife suffer on marriage breakdown, but it is the wife who usually suffers more. The husband continues with his career, goes on establishing himself, increasing his experience and qualification for employment – in a word, his security. With children to care for a wife usually cannot do this. She has not usually embarked on a continuous and progressing career while living with her husband caring for their child or children and running the home. If the marriage breaks down she can only start in any useful way after the children are off her hands and then she starts from scratch in middle life while the husband has started in youth."

2. The value of work done in the home

Acknowledgement of the contribution to family welfare and wealth of work in the home is essential to a fair divorce process. This is recognised in section 25 of the 1973 Matrimonial Causes Act, although judicial estimations of the contribution vary considerably, as shown in the recent study of the exercise of the matrimonial jurisdiction by registrars in England and Wales.¹⁷ However, such recognition comes only on marriage breakdown and in the course of marriage housework remains unpaid. This means that the housewife does not insure her future through pension and social security contributions. (The Social Security Pensions Act, 1975 section 19(3) allows some years in which a contributor is "precluded from regular employment by responsibilities at home" to count towards retirement pension provided that the contributor is regularly employed for at least twenty years.) But in the generality of family and social security law there is an implicit assumption that housework should remain unpaid when performed by a married woman. (Thus the invalid care allowance is not paid to a married woman who fulfils all the criteria for it, i.e. being engaged in full-time care of a disabled relative,¹⁸ because she is expected to look to her husband for support.) The idea of a family wage adequate to support a wife and children – with the addition of child benefit – has been built into wage structure since the nineteenth century.¹⁹ So the expectation of society is that a wife's work is covered by her husband's wages. On divorce,

¹⁶ *S v S* (Note) [1976] Fam. 18 at 23.

¹⁷ J. Eckelaar and E. Clive with K. Clarke and S. Raikes, *Custody After Divorce*, Centre for Socio-legal Studies, Oxford, 1977.

¹⁸ Social Security Act, 1975, S. 37(3).

¹⁹ Eleanore Rathbone, *The Disinherited Family*, Allen and

without maintenance, the housewife will have little or no income from wage-earning and no National Insurance benefits to fall back on. If she does get a job, as already pointed out her earning ability will be low.

Deech and Gray both propose that on divorce there should be a distribution of property acquired during marriage. Deech suggests that the Law Commission's proposals on co-ownership of the matrimonial home should be enacted. Gray proposes that an equal division of property take place. Both approaches involve recognition that the spouse who works at home is an equal partner in the marriage. But neither fully appreciate that without a regime of community of property true equality cannot be said to exist in matrimonial property law.

3. There is no community of property during marriage

The Law Commission's proposals on co-ownership of the matrimonial home do not envisage a full regime of community of property such as exists in Germany. In English law, during marriage, a spouse does not have the right to know what his or her partner earns; nor is there an enforceable obligation to provide a non-earning spouse with housekeeping money. The only provision on housekeeping is the Married Women's Property Act, 1964 which dictates joint rights in savings from the housekeeping money. The assumptions on which this Act rests are interesting and illustrative: they are that any allowance made for the expenses of the matrimonial home will be made by the husband, and that savings or property derived there from are not the property of the economical spouse but of both, thus indicating that a "housekeeping allowance" as it is called in the Act is not income or wages.²⁰

The regime of separate property of spouses set up by the Married Women's Property Acts 1870-1882 means that a non-wage-earning spouse has little access to property in the course of most marriages. As Professor Kahn Freund has pointed out, this is the reality against which theoretical statements about equality must be measured.²¹ For the majority of couples there will be a period in their marriage when their major asset, other than possible ownership of the matrimonial home²², is the earning ability of the husband. This is why the law gives dependents a right of support after death, and not the fact that they are parasites - as suggested by Deech.

4. The maintenance obligation buttresses other legal provisions

Where a man and a woman live together, whether or not they are married, family and social security law

Unwin, 1924.
20 Married Women's Property Act, 1964 S.I.
21 O. Kahn-Freund, "Matrimonial Property and Equality Before the Law: Some Sceptical Reflections", 4 Hum. Rts. J. 493, 1971.
22 J. E. Todd and L. M. Jones, *Matrimonial Property*, H.M.S.O., 1972 found that only 52% of married couples owned their own home. For the other 48% their only substantial asset will be their wage-earning ability and their savings, including pensions.

assumes that the man is supporting the woman. This is reflected in the much discussed co-habitation rule which deprives a woman living on widow's allowance, widowed mother's allowance, widow's pension, Supplementary Benefit, Family Income Supplement, from drawing the benefit if she cohabits with a man.²³ The first two of these are benefits derived as deceased husband's dependent. Yet there is no suggestion that equality requires that they should be abolished for that reason. Divorce and death are not so dissimilar. In each case the support of the household is removed. Beveridge proposed that divorce be treated in an analogous manner to death by the National Insurance scheme, with an end marriage allowance for six months for the divorced wife, similar to the widow's allowance.²⁴ The comparison of provision for divorced wives with widows is instructive. A widow with children receives the widowed mother's allowance so long as one of her children is under nineteen.²⁵ A widow over forty without children is entitled to the widow's pension.²⁶ But a divorced woman in an identical position would receive little under the proposed abolition of maintenance.

It may be answered that maintenance during marriage is being confused here with maintenance on divorce. But the two are inextricably linked not only with one another but also with welfare provision. Before one part of the edifice is dismantled the whole structure needs a careful survey.

5. Deech's argument

Ruth Deech's argument is ultimately against marriage itself. If the spouse who undertakes housekeeping and child care should not consider marriage as (in part) an alternative career to one which is economically productive, then the answer is either not to marry, or to engage in paid work during marriage. But society does not seem ready for marriages in which both spouses work full-time. The present provision for nursery and pre-school facilities is inadequate. Children are prone to illness and are naturally dependent. Schools are not open for a full working day. And at present there is high unemployment. Participation in the workforce is not necessarily the answer, where there are young children; at least not without major changes in society, with the provision of communal laundries, cheap family restaurants, full-time nurseries etc. And male work attitudes would have to change to enable fathers to share equally in child care functions. It seems unlikely that this will happen. Deech argues that mothers with children should receive maintenance on divorce, and that it is only those who could earn who should be deprived. But withdrawal from the labour market at any time, current or past, affects earning ability, and it is fair that this diminution in earning ability be shared by both spouses.

23 R. Lister, "As Man and Wife? A Study of the Cohabitation Rule", CPAG, London, 1973.
 24 Social Security Act, 1975, S. 24.
 25 Social Security Act, 1975, S. 25.

Deech criticises the use of "grave hardship" as a device to bargain for better terms on divorce. But pension rights are property rights, and the social security system insures a non-working wife through her husband. If society were willing to extend the present recognition of "family responsibility" – which is taken into account for retirement pension²⁷ – to give full National Insurance recognition to work in the home then hardship would be mitigated. And the attempt by the law on divorce to maintain the previous standard of living of the couple, impossible though it may be, surely is a recognition of the contribution made to that lifestyle of work done in the home. And although the tendency of present divorce law to encourage the desire for vengeance is deplorable is it not possible that the prospect of no maintenance after divorce may lead the spouse with less wage-earning ability to resist divorce for the five years possible under current legislation?

6. Gray's argument

It would be impossible here to summarise Gray's comparative evidence adequately. However, certain interesting features of the proposed new approach to maintenance can be pointed out. Two possible approaches to the allocation of property on divorce are identified. These are: (a) the retrospective approach which looks at the past history of marriage and decides what the entitlements of the spouses should be in terms of property; and (b) the prospective approach which emphasises future needs and support (p. 278). In essence what Gray proposes is that the retrospective view should be satisfied by an equal division of matrimonial property and that matters of future support should be passed to the state. He answers the questions whether marriage should give rise to an enduring obligation of spousal support after divorce in the negative and also denies that the financial cost of marriage breakdown is properly a matter of private law (p. 302). Instead, he suggests, it is a matter for the state in the administration of social security institutions under public law to deal with the future needs of divorced spouses. Gray acknowledges that such a new legal approach, "contains a quite remarkable hortatory element, in that it provides an incentive for women to retain a degree of financial independence during marriage and thereby minimise the risk of severe, if not insuperable, disadvantage in labour market terms in the event of marriage breakdown" (p. 299). He does not discuss the changes in societal and family structure which must accompany such a new legal approach. And he fails to see the distinction between the assumption by the state through public law of responsibility for divorced wives and children and the transference of housework to the public economy with full employment. Under the former approach, which Gray advocates, the divorced wife merely swaps her husband for the

²⁶ Social Security Act, 1975, S. 26.

²⁷ Social Security Pensions Act, 1975, S. 19(3).

state (which ensures fidelity through the cohabitation rule). She remains dependent.

Conclusion

It may be tempting to conclude that the arguments put forward here are in support of the status quo. This is not so. They are arguments for a fuller consideration of maintenance on divorce in the context of matrimonial property and welfare provision. Relevant to the discussion is the Guaranteed Maintenance Allowance proposed by the Finer Committee²⁸ and unlikely now to be introduced.²⁹ A very important principle was contained in G.M.A. It was that right to the benefit arose by virtue of having care of a child, not by virtue of having the status of wife or ex-wife. The proposed benefit would have been for children but would have contained an adult portion for the person with care of the child. Different forms of parentlessness were put on a similar footing, for as the child was to be the beneficiary it was irrelevant as to how it became one-parented.³⁰ The lessons to be learnt from this with regard to maintenance of wives are that (a) many wives need maintenance because of their child care responsibilities. If wives' maintenance is to be abolished children's maintenance will have to be increased; (b) the distinction between the treatment of widows and divorced wives is unfair.

28 op. cit. Vol. 1, p.285.

29 S.B.C. Annual Report, op. cit., para. 2.61.

30 See John Eekelaar, "Public Law and Private Rights: The Finer Proposals", 1976 Public Law, 64-83.

The notion that an equal division of property on divorce will wind up the (equal) matrimonial partnership and send the parties on their separate ways as independent individuals overlooks the fact that for nearly half of married couples their sole asset is wages and deferred wages in the form of pensions. The houseworker in such families would get nothing on divorce. This raises an important aspect of law which is dealt with only covertly by both Deech and Gray; that is the symbolic quality of law. At present the statement in the law of maintenance that the wage-earner must support the non-wage-earner is a statement of justice to the non-wage-earner. Admittedly - as the Finer Report makes clear - the law is unenforced and perhaps unenforceable. So the abolition of all but rehabilitative maintenance on divorce would be a recognition of reality. But there would be a new symbolic content of the legal rules. The statement would then be "because of the equality of the sexes a divorced spouse must look to the state for support". For those spouses in the community who do not own property and who divorce will this ensure equality? As Lord Scarman said "it would be a disturbing irony if in family life we were to substitute for the common law powers of the husband and father a *patria potestas* in the agencies of the state as uncontrolled as that of the Roman fathers - but without the natural restraint of fatherly love or family pride."³¹

31 Sir L. Scarman, English Law - The New Dimension, Hamlyn Lecture 1974, London, Stevens, at p.46.

LEGAL RECOGNITION OF THE VALUE OF HOUSEWORK

Katherine O'Donovan
Lecturer in Law at the University of Kent

Introduction

Housework, that is unpaid domestic labour in the home, has in the past ten years become a subject of interest to scholars in several disciplines. Detailed studies have been made of the time allocated by the housewife to such tasks as purchase and preparation of food, cleansing of the home environment and its inhabitants, management of family resources and childcare.¹ Economists have discussed the relationship of unpaid housework to the Gross National Product, the cost of children to their parents in terms of the consumption by the children and the earnings foregone in attending to them at home.² There have been theoretical analyses of the costs of reproduction of the labour force.³ And there have been explanations of why it is impossible to quantify the value of housework.⁴ However, relatively little interest has been shown in the

legal process whereby housework and childcare are valued and quantified, usually in accident cases. Although housework is traditionally unpaid, compensation is awarded by the courts where the family has been deprived of the services of the housewife through the fault of the defendant.

It is proposed in this article to examine cases in which valuation of housework has been made by the judiciary and to analyse assumptions underpinning judicial views of the housewife's role and its value in financial terms. Three legal areas are considered: the consortium action, Fatal Accidents cases and personal injury actions.

The Nature of the Work

Housework is a privatised activity in which the individual or family unit lays down the standards to be met. "There are no public rules dictating what the housewife should do, or how and when she should do it. Beyond basic specifications – the provision of meals, the laundering of clothes, the care of the interior of the home – the housewife, in theory at least, defines the job as she likes. Meals can be cooked or cold; clothes can be washed when they have been worn for a few hours or a few weeks; the home can be cleaned once a month or twice a day. Who is to establish the rules, who is to set the limits of normality, if it is not the housewife herself?"⁵

Professor Galbraith describes the housewife's role as that of household consumption manager whose work is "to select, transport, prepare, repair, maintain, clean, service, store, protect and otherwise perform the tasks that are associated with the consumption of goods".⁶ In a word she is a 'crypto-servant'.⁷

Because housework is not paid but is seen as an integral part of a wife's role and since it is not known exactly what housework entails or where the boundaries of the description lie, and since the work must vary according to circumstances such as size of home, number of inhabitants, standard of living of the house-

1 Audrey Hunt in a Government Social Survey, *The Home Help Service in England and Wales*, 1970 defines a housewife as the person other than a domestic servant who is responsible for most of the domestic duties in the home. Thus a housewife can be either male or female. However, since the great majority of housewives are women I propose to assume for purposes of this article that all are. In the *General Household Survey of 1973* by the Office of Population Censuses it was found that of those classified as "economically inactive", that is persons neither working nor unemployed, the majority kept house (nearly two out of three) and of those who kept house, nearly all (99.4%) were women.

For a useful review of the writings on housework see Nona Glazer-Malbin, "Housework – Review Essay" in *I Signs* 905 (1976). See also Barbara Ann Kulzer, "Law and the Housewife: Property, Divorce and Death", 28 *U. of Fla. L. Rev.* 1, (1975).

2 On the costs of children to their parents see generally the special supplement on this topic in 81 *J. Pol. Econ.* (1973).

3 Nona Glazer-Malbin *op. cit.* note 1, at 917-918.

4 Wally Secombe, "The Housewife and her Labour under Capitalism", 83 *New Left Rev.* 3-24, 1974 at p.11 states: "Domestic Labour is unproductive in the economic sense . . .". Leonore Davidoff's "The Rationalisation of Housework" in D. L. Barker and S. Allen (eds.) *Dependence and Exploitation in Work and Marriage*, (Longman, 1976) pp.121-151, p.150 note 17 refers to "the meaningless of recent attempts to 'cost' a wife . . .".

5 Ann Oakley, *Housewife*, (Penguin, 1976), p.8.

6 John Kenneth Galbraith, *Economics and the Public Purse*, (Penguin), 1975 p.49.

7 *Id.*

hold and energy of the housewife, housework is not popularly considered as work and is not so treated by the law. The emotional energy which goes in to childcare and supportive behaviour in the household is ignored, although such behaviour may be remunerated in the world of paid employment outside the home in occupations such as counsellor or psychotherapist. Just as the definition of housework must vary from individual to individual, so must the time spent on housework. The irreducible minimum for the maintenance of two people is considered to be about 15 to 20 hours per week; for a couple with small children, about 70 to 80 hours per week.⁸

Sociologists have commented on the invisibility of women and housework. Since housework is not considered as work, since it is unpaid and since the work place in common parlance is located outside the home, this major activity in society is over-looked and ignored. We have seen the difficulties of identifying and defining what housework is and indeed the problems of regulating any private activity are well known to lawyers. But this is not a justification for the exclusion of housewives from the protection of the law, which is largely the position at present. The husband is perceived as the employer and the mediator with the outside world. The housewife depends on him not only for bread but also for access to the state system of social security; yet her position is ambiguous. Her contribution to her family's standard of living by her services in the home is recognised by the courts when the family is deprived of them, as will be seen later. And in divorce settlements an attempt is made to measure such contribution. Such recognition of the economic value of housework by the law is generally latent. It is visible only when the family is under stress.

If housework were recognised and classified as work there would be many practical consequences. Housewives would be insured persons under the state insurance scheme. At present there is only minor recognition of work in the home under the Social Security Pensions Act, 1975.⁹ Accidents in the home, a dangerous work environment, would be treated on the same footing as accidents at work, and the housewife would be treated as a worker in her own right rather than as the dependant of a breadwinner¹⁰. Maintenance on divorce would be perceived as redundancy payments

or deferred wages. There would be a re-definition of what is regarded as an unimportant and trivial aspect of life. However, whether this could take place so long as housework remains a private activity is doubtful. This is why many writers have concluded that one of the pre-requisites for women's liberation is the conversion of the work done in the home into work done in the public sector of the economy, at least as far as childcare is concerned.¹¹

Estimating the Value of Housework

The traditional model on which laws affecting the family are based assumes that the husband will be the family breadwinner and the wife will be a full-time housewife, at least so long as the children are young. It is assumed that the husband earns a family wage sufficient for the needs of the family unit. But when that unit is disrupted by an accident to the wife the problem of continuing the provision of household services arises. If a defendant for the purposes of a negligence suit can be identified then recourse to the courts to obtain compensation for the loss of services may be worthwhile. Otherwise the family will have to rely on local social services and on social security.

Where a case involving loss of household services comes before a court, a decision as to the value of such services will have to be made. Placing a value on an activity that is performed for home consumption only is difficult. Since the labour and its products are not intended for exchange in the market-place it has no exchange value, but only use-value. In this it is similar to subsistence farming by peasants who consume all that they produce.¹² And the concept of value is itself fraught with difficulty.¹³ Value is relative to the purposes for which something is valued. In a law-suit involving household services the court's purpose is to compensate for what has been lost, provided the legal rules so permit. But identification of the nature and value of the loss is problematical. Assessments have been made by economists of the contribution of housework to the GNP which suggests that it is quantifiable, although there is disagreement about this.¹⁴ In any case these are of little help as the court is faced with particular and practical problems and not with macro-economic aggregates. The notion of compensation for loss of a housewife's services and particularly those of a personal nature raises difficult questions. Nevertheless the courts made an implicit attempt to restore the value of those services and in so doing are pronouncing on the worth of a housewife in all aspects of her role.

8 Margaret Benston, "The Political Economy of Women's Liberation", excerpted in Glazer-Malbin and Waehrer (eds.), *Woman in a Manmade World* (Rand McNally, 1972) pp.119-128 at p.124. Ann Oakley's study of urban British housewives, *The Sociology of Housework*, (Martin Robertson, 1974) p.94 gives the figure of 77 hours a week housework for the average of the sample studied.

9 S.19(3) of The Social Security Pensions Act, 1975 allows some years in which a contributor is "precluded from regular employment by responsibilities at home" to count towards retirement pension, widow's pension and widowed mother's allowance. The contributor must however have been in 'regular employment' for at least 20 years.

10 S. B. Burman, H. G. Glenn and J. Lyons: "The Use of Legal Services by Victims of Accidents in the Home", 40 M.L.R. 47 (1977) at p.47: "The risk to an individual of accidental death on the home is as high as between a third and a half of that from death in a road traffic accident in the under 65 age group".

11 Benston, *op. cit.* ie note 8, p.126.

12 *Ibid.* p.120 quoting Ernest Mandel.

13 James C. Bonbright, *The Valuation of Property*, Vol.1 (1965), pp.5-6.

Two possible models for valuation of housewives' services are the replacement cost model, usually applied by the courts, and the alternative use model. In replacement cost the calculation is of the cost of replacing the housewife by another person who will carry out the same tasks. Theoretically, this involves identification of the tasks performed by the particular housewife. All or any of the following activities might be relevant: cook, dishwasher, dietician, baker, waitress, private nurse, baby sitter, governess, chambermaid, purchasing agent, veterinarian, laundress, home economist, dressmaker, handyman, hostess, general housekeeper, secretary, gardener, chauffeur and recreation worker.¹⁴ English courts, in an attempt to limit damages, have confined the replacement to the area of housekeeping and childcare, defining housework as a menial activity which can be performed by any unskilled worker. Compensation for intangibles such as love and mother care have, in the past, been excluded. A new tendency to recognise mother love is emerging; and in a society where labour is no longer cheap and women receive equal remuneration with men, replacement cost may give rise to greater compensation than heretofore.

In the alternative use model, also known as opportunity cost, the value of a housewife's services is the price that her time would have commanded in the market had she been continuously employed throughout her period as a housewife; "the value of a housewife's services, and hence the cost to the family if those services are eliminated, is the price that her time would have commanded in an alternative use."¹⁵ The value of training foregone by not being employed is taken into account. The assessment of possible alternative uses and consequently of compensation is influenced by factors such as education, training and previous experience in employment.¹⁷

One economist who has provided a model for valuation of deceased housewives' services in wrongful death actions in the United States has suggested that

the correct approach is to calculate first the replacement cost and then the opportunity cost; compensation is based on the mean between the two amounts.¹⁸ Surprisingly, the author assumes that replacement cost will be higher than opportunity cost, an assumption not necessarily borne out by English cases.

The Consortium Action

The consortium action is a civil remedy available to a husband who has been deprived of the company and services of his wife. It is allied to the servitium action which safeguarded interest in the services of "members of the household who rendered service to the head of it and who had to be kept by him in sickness and in health - sons, daughters, apprentices and so forth".¹⁹ From this source arose the consortium action for damages which was based on the proprietary rights of a husband over his wife.²⁰ Initially the action seems to have been used by husbands in cases of seduction of or adultery by a wife. Since a married woman could not sue or be sued alone in the courts, the action was brought against the adulterer. Even if the wife consented to sexual intercourse or deserted her husband to live with another man the husband had this action for the loss of her comfort and society. Interest in the domestic service of the wife was rarely mentioned, presumably because those with sufficient means to sue in the courts could find inexpensive substitutes, or were not dependent on a wife's services. Since there was no judicial divorce until 1857, it seems that the consortium action, which spawned the civil action for criminal conversation and also the enticement action, was a means of obtaining revenge and compensation.

In the seventeenth century an aggrieved husband whose wife had left him sought compensation in an action of trespass; damages were given by the trial court "for that the plaintiff's wife went with the defendant and lived with him in a suspicious manner".²¹ This seems to have been the first case in which the concept of consortium was introduced. Subsequent cases suggest that where the wife consented to an assault by the defendant - an assault we can suppose was sexual intercourse - the husband could sue alone; "for though the wife consent, that will not excuse the defendant; for she has not potestatem corporis sui".²² The basis of the consortium action was the husband's position of authority and power over his wife, but where this authority ceased, as in death, then there was no

14 Maurice Weinreb, "Household Production and National Production: An Improvement in the Record", *Review of Income and Wealth*, Ser. 20, no. 1 (March 1974) pp.89-102 suggests that in the United States the value of non-market production by married women during the 1960's has averaged approximately thirty per cent of the G.N.P. and close to 40 per cent of the national income. But see the debate on this by Marxist economists: Secombe *op. cit.* note 4, Jean Gardiner, "Women's Domestic Labour", 89 *New Left Rev.* pp.47-58, 1975 and M. Coulson, B. Magas and H. Wainwright: "The Housewife and her labour under Capitalism - a Critique", 89 *New Left Rev.* 59-71, 1975.

15 James T. Newson, "How Much is a Good Wife Worth?" 33 *Missouri L. Rev.* 462 (1968); Thomas F. Segalla, "The Unemployed Housewife - Mother: Fair Appraisal of Economic Loss in a Wrongful Death Action," 21 *Buff. L. Rev.* 205 (1971).

16 Richard Posner, *Economic Analysis of Law* (Boston, 1972) p.80.

17 Daniel Seligman, "You Are What You Know", *Fortune*, March 1975, pp.181-182.

18 Chong Soo Pyun, "The Monetary Value of a Housewife", 28 *Am. J. of Economics and Sociology* 271 (1969).

19 *Internal Revenue Commissioners v Hambrook* (1956) 2 Q.B. 461.

20 Bracton, *On the Laws and Customs of England*, trans. S.E. Thorne, Vol. II, f.155, p.348 "One may suffer an iniuria not only in his own persons of those he has in his potestas, as his children and his wife. A husband may sue for an iniuria done to his wife, but the converse is not true, for wives ought to be protected by husbands not husbands by wives".

21 *Guy v Livesey*, Cro. Jac. 501 (1618); 79 E.R. 428.

22 *Rogers v Goddard*, 2 Show. K.B. 255 (1682); 89 E.R. 925.

action.²³

The enticement action was specifically designed to compensate a husband whose wife had left him for another man. The courts in dealing with enticement tended to take the view that a wife whose husband had been enticed away had lost nothing as her husband was still obliged by law to maintain her, whereas a husband could lose "the assistance of the wife in the conduct of the household of the husband, (which) resembles the service of a hired domestic, tutor or governess; it is of material value capable of being estimated money; and the loss of it may form the proper subject of an action, the amount of compensation varying with the position in society of the parties."²⁴ Compensation was based on "first, the actual value of the wife to the husband, secondly, the proper compensation to the husband for the injury to his feelings, the blow to his marital honour and the serious hurt to his matrimonial and family life."²⁵ In the valuation of the wife there were two aspects, the pecuniary aspect which depended on the wife's fortune and on her assistance in the husband's business, "her capacity as a housekeeper and her ability generally in the home. The consortium aspect is broader and depends on the wife's purity, moral character and affection, and her general qualities as a wife and mother . . . If the wife be of wanton disposition or disloyal instincts, it is obvious that the general value to the husband is so much the less".²⁶ The action was abolished in 1970.²⁷

In the nineteenth and twentieth centuries the consortium action developed into an action for temporary loss of service in the home, medical and other expenses arising out of an accident to a wife. In some cases large amounts of money have been awarded to the husband for the loss of his wife's work in the home. In *Cutts v Chumley*²⁸ £5,000 was awarded to a husband to enable him to employ a housekeeper as a replacement for his wife, an award which the Law Commission considered "not over-generous".²⁹ In *Bath v Chrystal Springs Ltd.* the husband was awarded £6,000 for loss of consortium. On appeal Willmer J. stated:

"It would cost £10 a week for a person to come in while the husband was at work and the £6,000 awarded to the husband was intended to defray that cost and was not excessive. As husband he was legally liable to maintain his wife and therefore that claim was properly put forward on his behalf".³⁰

An attempt to extend the right of action for loss of consortium to a wife failed in 1952 when the House of

Lords made clear that it considered the action an anomaly.³¹ The Law Commission now believes that the action should be abolished and replaced by the accident victim's own action. "We think that anyone within what can loosely be described as 'the family group' should be able to recover, in his own action, the reasonable value of any gratuitous services which he rendered to anyone else within the group before his accident. . . . And any assessment should have regard to the amount of any expenses actually incurred before judgement in replacing the lost services".³² The implication of this proposal is that the housewife would recover the value to her family of her work.

The Fatal Accidents Acts Action

In order to claim compensation for the death of a member of a family the claimant must show that the accident was such that the deceased could have sued if he or she had survived, that the claimant was dependant on the deceased and is within a narrowly specified band of relatives.³³ The most common claims are for the loss of a breadwinner whose contribution to his dependants is assessed in terms of the monetary reward the deceased commanded for his labour in the market less the cost of his personal consumption. This is called the dependency value and it is arrived at by multiplying the annual value by the number of years of dependance in the future. Where the deceased was a housewife the courts acknowledge her family's dependance on her and thus her economic contribution to the family and the question is how to define and measure the dependency value.

Early on in Fatal Accidents cases the courts decided that there would be no compensation for intangibles such as loss of love and companionship or for sorrow. This position, although modified, still holds good today. So the compensation is limited to what the courts believe can be measured in financial terms. The services a wife performed are not investigated and catalogued for purposes of litigation, the usual method of assessment being to estimate the cost of employing someone to work in the home on a daily basis. The fact that the housewife was unpaid has not deterred the courts. "I can see no reason . . . why I should be bound to exclude the monetary loss incurred by replacing services rendered gratuitously by a relative, if there was reasonable prospect of their being rendered freely in the future but for the death."³⁴ Replacement cost is the measure used despite theoretical and practical difficulties which are illustrated below.

"He had been married four years and had one child

23 *Higgins v Butcher*, Yelv. 89 (1606); 80 E.R. 61.

24 per Lord Wensleydale, *Lynch v Knight* (1861) 9 H.L. Cases 577 at 598.

25 per McCardie J, *Butterworth v Butterworth* [1920] P.126 at 142.

26 Id.

27 Law Reform (Miscellaneous Provisions) Act, 1970.

28 [1967] 2 All E.R. 89.

29 Law Commission, Working Paper No. 19, para. 46.

30 (1968) 112 Sol. Jo. 51 (C.A.).

31 *Best v Samuel Fox Ltd.* [1952] A.C. 716.

32 Law Commission, No. 56, Report of Personal Injury Litigation - Assessment of Damages (1973) para. 157.

33 The Fatal Accidents Acts 1976 regulates the bringing of such an action. S.2. provides the right of action for the benefit of wife, husband, parent, grandparent, child, grandchild, and any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased.

34 per Scrutton J, *Berry v Humm* (1915) 1 K.B. 627 at 631.

of three years of age. He had kept no servant, but his wife did all the work of the house and looked after the child. Since the death of his wife he was obliged to employ a housekeeper, whom he paid 5s. a week and her board, and he said he only obtained her at that low rate because she lived next door. He further said that his late wife had herself made the bread and did everything in the house, and that before the war began he found that the house as managed by the housekeeper instead of his wife was costing him 3s. more 20s. instead of 17s. I directed the jury to assess the pecuniary damage the husband had sustained by the death of his wife, omitting all compensation for wounded feelings or funeral expenses, and considering the cost of the wife's maintenance, clothing and pocket money which the husband was saved by her death, the chance of the husband marrying again, and of his or the child's death." (Scrutton J, *Berry v Humm*).³⁵

This statement indicates some of the factors a court will take into account in making its assessment of a deceased housewife's worth. The cost of the deceased's personal consumption will be deducted from the cost of employment of a housekeeper which is a major indicator of replacement cost. Where a housekeeper is already at work evidence of the wages she receives is usually accepted as a fair measure of cost. Evidence from employment agencies is allowed where there is no housekeeper yet at work. There may however be argument that the housekeeper already working is of unnecessarily high quality, costing more than market rate, for instance where the deceased's sister was employed. In allowing such cost, as they have done, the courts are acknowledging that market rate is not the only measure and that personal considerations and quality are relevant.³⁶

A housewife gives not only her time but also her energy and intelligence to her family. Thus she may be more careful in her housekeeping than a replacement, baking bread, making clothes³⁷ and catering frugally.³⁸ She is likely to be better at her job than any substitute and thus worth more.

A replacement will work fixed hours and weeks: "She would expect one and a half days off weekly and at least a fortnight's holiday annually. (I pause only to observe that conscientious mothers of young children cannot take days off, even on holidays they are not relieved of their maternal duties). During periods when a housekeeper was not on duty a replacement would have to be employed at a cost, say, £3 a day".³⁹

In a society where occupations are differentiated and

specialised the housewife's role is multi-faceted. It may require more than one person to replace her. The courts are not sympathetic to such argument; where it was said that to replace a mother of nine would require a housekeeper, one or two maids, a cook, a laundry maid and a children's nurse, the court replied:

"Plaintiffs who put forward their cases in that manner run a serious risk that the court will discount their evidence and they will receive less than their merits".⁴⁰

The replacement of a housewife creates an employment situation where previously there was none. Social security contributions will have to be made, conditions of work may have to be improved and there are general expenses for the employer.⁴¹

In addition to her work in the home the housewife may contribute to the family finances by part-time employment. The extent to which this will be recognised varies according to whether it is classified as pin-money⁴² or as being for the benefit of the family.⁴³ But a wife with no outside employment has been considered to have no income, despite the imputed value of her services.⁴⁴

There is a general rule excluding compensation for intangibles such as sorrow, wounded feelings or loss of love. One of the justifications for this is that such matters cannot be measured. Nevertheless, the courts have wavered as to whether the quality of the work done by the wife and mother, particularly in childcare falls into the category of intangibles. The rule against such compensation is articulated as follows:

"It was clear law that one spouse who had lost the other could not recover anything in respect of loss of companionship in the years following the accident. There was no distinction in principle in relation to the case of an infant, and no damages could be awarded in respect of any element of the child receiving less care than he would have done had his mother survived." (*Pevec v Brown*).⁴⁵

Reservations have been expressed about this view:

"It may be argued that the benefit of a mother's personal attention to a child's upbringing, morals, education and psychology, which the services of a housekeeper, nurse or governess could never provide _has in the long run a financial value for the child, difficult as it is to assess" (*McGregor on Damages*).⁴⁶ Recently the latter view has received implicit judicial support,⁴⁷ and in two recent cases an additional amount

40 *Harman v Price*, The Times July 23, 1954, Kemp, 2nd ed. Vol. 2, p.195.

41 *Feay v Barnwell* [1938] 1 All E.R. 31; *Steer v Basu* 19/12/1968, Kemp, 4th ed. Vol. 1, p.318.

42 *Shaw v Mills*, op. cit. note 50; *Hurt v Murphy* (1971) R.T.R. 186.

43 *Lucking v Havard* 1958 C.A. No. 158. 7/5/58. Kemp, 2nd ed., Vol. 2, p.181; *Collins v Noma Electric* (1962) 106 Sol. Jo. 431; *Pevec v Brown* (1964) 108 Sol. Jo. 219.

44 *Feay v Barnwell* [1938] 1 All E.R. 31.

45 (1964) 108 Sol. Jo. 219.

46 *McGregor on Damages*, 13th ed. (1972) para. 1232.

35 Id. at 630.

36 *Morris v Rigby* (1966) 110 Sol. Jo. 834 (C.A.).

37 *Rowe v Tasker*, 5/7/1961, reported in Kemp and Kemp, *The Quantum of Damages*, 2nd ed., Vol. 2, p.190 (hereinafter cited as Kemp).

38 *Shaw v Mills* 1961 C.A. No. 86, 7/3/61, Kemp, 2nd ed. Vol. 2, p.178.

39 *Hay v Hughes* (1974) 8 Lloyd's Rep. 475 (Q.B.).

was awarded for loss of mother's care.⁴⁷

The new approach is exemplified by *Regan v Williamson* where Watkins J said that compensation for loss of services should include an acknowledgement that a wife and mother does not work to set hours and, still less to rules. She is in constant attendance, save for those few hours when she is, if that is the fact, at work. During some of those hours she may well give the children instruction on essential matters to do with their upbringing and, possibly, with such things as their homework. This sort of attention seems to be as much of a service, and probably more valuable to them, than the other kinds of service conventionally so regarded. The judge raised the weekly figure of dependency from £12.50 to £20 to take account of this and evening and weekend services, but indicated that he was dealing with a "good wife and mother".⁴⁸ Consideration of these factors suggests that a housewife is worth more than a substitute housekeeper and that whilst replacement cost is a fair measure if correctly used, its use in a narrow restrictive manner will result in an underestimation of the value of a housewife.

The likelihood of re-marriage of the husband and of a consequent ending of the necessity for a replacement is taken into account by the court and will reduce what can be expected in compensation for loss of his wife. As we have seen the compensation is generally limited to replacement cost and the re-marriage reduction seems to indicate an assumption that a later wife will accept the role of a former wife including care of existing children and that these services will be rendered gratuitously. The policy is puzzling. As has been shown great value is attached to the services of a wife and mother when a family is deprived of them, but if they are to be provided gratuitously by a new wife, then they are worthless. This raises the economic paradox "namely that if a number of unmarried men, employing paid housekeepers, decided to marry them, then the figures of national product exclusive of unpaid housework, would be reduced".⁴⁹ What is even more puzzling is the legislative decision to abolish consideration of a wife's re-marriage or prospects thereof in fatal accidents case.⁵⁰ It was considered distasteful for a judge to have to put a money value on a widow's chances of re-marriage. But if the policy is to compensate for financial loss then re-marriage should be taken into account for both sexes, if it is assumed that the new spouse will play the role of breadwinner or housewife. If the policy is that of compensation for the loss of an individual (which it has not been hitherto) then re-marriage should be ignored. The tension between the treatment of the

family as an economic unit and the maximization of the autonomy of the individual is obvious here.

The Personal Injury Action

Where the plaintiff in a successful personal injury action can show that as a result of the action there is a need for personal services in the home the courts recognise this with additional compensation. The personal services involved are of the type categorised as housework. Tasks such as laundry, washing, dressing, cooking, feeding, help with bodily functions, nursing and supervising are included - all tasks familiar to housewives with families. The awards are based on the extra work involved in the care of the injured person. At first the courts had difficulty in dealing with this aspect of personal injury cases if the services were provided gratuitously by a member of the family and required the making of a contract of services with specified payment, but this approach has been disapproved.⁵¹ Cases where a housewife was already at work in the house and had taken on new tasks also caused recognition and valuation problems, but rationalisations for dealing with these have developed.⁵²

The measure of the award involves an assessment of the value of the services performed. There have been two approaches. Where outside employment was given up in order to tend the injured person the home tasks are valued in terms of the wages foregone; that is at opportunity cost, despite the fact that the work at home may be more arduous.⁵³ Replacement cost, that is the cost of employing a nurse, would seem a more appropriate measure. Where a housewife takes on additional tasks by tending the injured person replacement cost is used. There is confusion as to the recipient of the compensation, reflecting perhaps a general societal view of the housewife's role. Is the compensation for the injured person or is it for the person doing the work? It is paid to the injured but Lord Denning suggests that this is on trust for the actual worker.⁵⁴ However, in the case of an injured housewife the award for extra work in the home where she was looked after gratuitously by her mother was paid to her, whereas her husband received the cost of employment of a replacement housekeeper.⁵⁵ This suggests that whilst the injured 'employs' the nurse, the husband 'employs' the wife or substitute. Perhaps this is the logical result of the confinement of the consortium action to husbands but it does not square with social security provisions in which a disabled person is paid allowances to obtain services in the home.

47 *Hay v Hughes* (1975) 1 Lloyd's Rep. 475 (Q.B.); [1975] 1 Q.B. 790 (C.A.).

48 *Mehmet v Perry* [1977] 2 All E.R. 529; *Gee and Lowe v Brownsward and FMC Meat* [1977] 6 C.L.Y. para. 102.

49 *Regan v Williamson* [1976] 2 All E.R. 241.

50 Colin Clark, "The Economics of Housework", 20 Oxf. Inst. of Stats. Bull. 205 (1958).

51 Law Reform (Miscellaneous Provisions) Act 1971, S.4.

52 In *Haggard v de Placido* (1972) 2 All E.R. 1029 it was laid down that a legal contract must exist between the plaintiff and the provider of services before the courts would award damages for this item. This was disapproved in *Dannelly v Joyce* (1974) Q.B. 454 (C.A.).

53 *Davies v Tenby Corporation* (1974) 118 Sol. Jo. 549.

54 *George v Pinnock* [1973] 1 All E.R. 926 (C.A.).

55 *Davies v Tenby Corporation* (1974) 118 Sol. Jo. 549.

56 *Fowler v Grace* (1970) 114 Sol. Jo. 193.

57 Social Security Act 1975, S.35.

A disabled person in need of constant attendance is entitled to an attendance allowance,⁵⁷ a mobility allowance,⁵⁸ and a non-contributory invalidity pension.⁵⁹ The latter has been extended to married and co-habiting women who are 'incapable both of work and of performing normal household duties'. Since this pension is £10.50 per week the value imputed to housework by the Department of Health and Social Security can be assumed to be at least that amount, as it is clear that the pension is intended to help purchase a substitute. However a married or co-habiting woman engaged in full-time care of a disabled relative is denied the invalid care allowance granted to others caring for the disabled full-time.⁶⁰ This allowance carries with it full social security insurance and its denial to married women implies that in their case invalid care is not work but just part of normal household duties.

Deprivation of services in the home or additions to them due to personal injury can arise indirectly. Where as the result of an accident a wife deserted her injured husband leaving him with two small children to care for, he recovered £20 per week for the employment of a substitute.⁶¹

Conclusion

Two possible models for judicial estimation of the value of a housewife's services were earlier suggested. As we have seen the courts generally favour replacement cost. Its use is a fair measure of value provided a wide range of factors relating to the housewife's role are taken into account. Furthermore the alternative use model is appropriate both for comparative purposes and in its own right in certain circumstances. A woman who works full-time outside the home is indicating a preference for a cash income; if she decides that her time is worth more to her family at home, then she and her family are placing a higher value on her time than the market does. Yet the treatment of housework by legislation and in the courts ignores such revealed preferences.⁶² One recent example of the application of alternative use costing is *Mehmet v Perry*⁶³ where the husband/plaintiff in a fatal accidents action took on the housewife role full-time and was compensated according to the wages he had foregone. Crucial to this case was the attention needed by the children of the family.

Ormrod L J has suggested that the cost of a foster home for children of a deceased or injured mother might provide a better measure.⁶⁴ But although he clearly considered that this would reduce damages, it is doubtful whether he was right. Colin Clark in 1958

found that the cost of providing institutional care for children under five was nearly twice that of adults;⁶⁴ and the differences clearly represent the additional housework required for the care of young children.⁶⁵ The judiciary has traditionally undervalued the services of the housewife and the introduction of argument based on public services clouds the question of value because it is assumed that no cost is involved if local authorities have a statutory duty of care or if foster parents take on a parenting role for low remuneration.

That the value of housework can be and is quantified has been shown here. Admittedly this is done only in special circumstances of litigation where deprivation of or increase in household services can be raised. The care of children has been recognised by the courts as time-consuming and expensive to buy. At present the courts value the service of the housewife with children at the equivalent of thirty pounds a week – imputing ten pounds for maintenance.⁶⁶ But this valuation is confined to particular areas of the law and is not applied in other areas, for instance in divorce. A divorced housewife who continues to care for her children at home will find that if she receives maintenance for herself from her former spouse this may deprive her of an equal share of assets acquired during marriage.⁶⁷

There is a new tendency in legislation to recognise the value of housework and it seems likely that there will be increasing recognition by society of the contribution of the housewife to the family with small children or infirm persons. The starting point should be an acknowledgement that work at home may contribute to a family's welfare just as much as work outside the home.

65 *Op. cit.* note 64 at p.206.

66 *Regan v Williamson* [1976] 2 All E.R. 241;

Oakley v Walker (1977) 121 Sol. Jo. 619.

67 *Wachtel v Wachtel* [1973] Fam. 72.

58 *Ibid.* S.37A, as amended by S.22(1) of the Social Security Pensions Act 1975.

59 *Ibid.* S.36(2), implemented by S.I. 1977/1312, amending S.I. 1975/1058.

60 *Ibid.* S.37(3), implemented by S.I. 1976/409.

61 *Oakley v Walker* (1977) 121 Sol. Jo. 619.

62 Frederick C. Kirby, "The Housewife and the Economist", 11 *Trial*, 6: (Sept./Ooct 1965).

63 [1977] 2 All E.R. 529.

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B. COMPARATIVE FAMILY LAW

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RECENT DEVELOPMENTS IN THE LAW RELATING TO CHILDREN

by

KATHERINE O'DONOVAN, BCL, LL.M.
Senior Lecturer in Law, Universities of Hong Kong and Kent

I INTRODUCTION

Inconsistencies in legislation

SUBSTANTIVE family law is greatly influenced by the availability of legal procedures to raise issues. Nowhere is this more obvious than in the law relating to children. This dominance of law by procedure means that before one can declare the rights or duties of a parent, child, or third party, one must first ask what procedures are available. Since the subject is largely governed by legislation, statutes and ordinances must be closely examined to determine who can raise what issues in which forum. Unfortunately, the Hong Kong legislation is inconsistent internally, and in its relationship to common law. An illustration of this can be found in provisions relating to minority. For example, Hong Kong adheres to the common law age of majority (21) for some purposes. However, in legislation such as the Matrimonial Proceedings and Property Ordinance (cap 192, LHK 1972 ed) ages of sixteen (section 18(5)) and 21 (section 19(1)) are variously introduced.

Another illustration of inconsistency in legislation can be given by a comparison of the Guardianship of Minors Ordinance (cap 13, LHK 1977 ed) with the Matrimonial Proceedings and Property Ordinance. Under the Guardianship of Minors Ordinance issues between parents, or in the absence of parents, guardians, can be raised in court. The welfare of the child is the paramount consideration, under section 3, in resolving disputes. This provision transcends questions of individual rights. However, under the Matrimonial Proceedings and Property Ordinance, section 18, arrangements for custody on divorce are checked by the court before the grant of a decree nisi. The

welfare principle does not apply; rather the court must, at best, be satisfied that the arrangements for the children of the family are satisfactory. At worst a decree nisi can be made absolute even if the arrangements are unsatisfactory. Furthermore, Hong Kong has failed to enact the provision now contained in the English Matrimonial and Family Proceedings Act 1984 whereby the court making a decision on financial provision on divorce is under a duty to give first consideration to the welfare while a minor, of any child of the family. This has been done by inserting a new section 25 into the Matrimonial Causes Act 1973.

A final example can be drawn from the statutory jurisdiction over particular groups of children. Where proceedings arise from divorce, judicial separation, or neglect to provide reasonable maintenance, the court has jurisdiction over 'children of the family.' The statutory definition in section 2 of the Matrimonial Proceedings and Property Ordinance covers children of the parties to a marriage, and 'any other child who has been treated by both those parties as a child of their family.'

By contrast the Guardianship of Minors Ordinance, section 2 merely states that 'parent' means father or mother. It gives no definition of child, but it is probable that the ordinance does not cover children who are neither adopted nor biological children, but who are 'children of the family.' The Separation and Maintenance Orders Ordinance (cap 16, LHK 1977 ed) compounds the confusion by limiting its custody jurisdiction to 'children of the marriage' (section 5(b)).

These examples of inconsistency, which are not exhaustive, suggest that it is time for the Hong Kong Law Reform Commission to take the statutory and common law relating to children under review. The English Law Commission is, at present, conducting a very thorough investigation of child law. A number of papers have been published (see the Law Commission, *Family Law—Review of Child Law* (published working paper nos 91, 96, 100) 1986).

II PARENTAL RIGHTS AND DUTIES

The scope of parental rights and duties

The concept of parental rights carries the idea that a parent or

guardian is legally empowered to take action in respect of a child. This can be done either by acting on the child's behalf or by making decisions about the child's future. Thus, persons having parental rights are legally empowered to make decisions for or about children subject to those rights.

Parental rights are considerable and primary. This can be illustrated through cases of the exercise of parental rights at will. The possibility exists that parents may take irreversible action without check by court or third party. However, the power of parents may be checked, if someone with standing is prepared and able to question the exercise of parental powers. The wardship jurisdiction is the major procedure available for the questioning of the exercise of parental powers.

Parental consent to medical treatment

Cases on parental consent to medical treatment of their children provide an illustration. In *Re D* [1976] Fam 185 the mother of an eleven year old mentally handicapped girl agreed with a gynaecologist and a paediatrician that the child should be sterilized. The reasoning was that the girl might become pregnant and give birth to an abnormal baby. It was only because a concerned social worker took wardship proceedings that the sterilization operation was not performed. Applying the fundamental principle that the welfare of the child is central to court decisions in wardship suits the court held that it was not in the child's best interests to be sterilised. However, the issue of whether or not the sterilization operation should be performed did not come before the court as an automatic check on parental powers. Furthermore, the judgment in the case does not suggest that the mother's decision exceeded her powers as a parent.

Such issues as sterilization may be referred to the courts for decision. *Re B* [1987] *The Times*, Mar 17 concerned a seventeen year old mentally handicapped girl in the care of a local authority which had parental rights. The local authority proposed to arrange a sterilization operation for the girl and started wardship proceedings to obtain the leave of the court for the operation. The English Court of Appeal held that there was jurisdiction to authorise the operation on a ward of court

in wardship proceedings, but it was a jurisdiction which should be exercised only as a last resort when all other forms of contraception had been considered. In the instant case the evidence was that other forms of contraception were unsuitable.

The court emphasised that there was no question of a natural parent or a local authority having parental rights seeking to have a sterilization operation on a minor performed without the leave of the court in wardship proceedings. Thus, the case seems to be authority for the proposition that this is not a matter within parental rights. The problem however remains that wardship proceedings must be started by some concerned individual. (The court's decision was upheld on appeal to the House of Lords, see [1987] *The Times*, May 1.) In *Director of Social Welfare v Tam and another* (1986) CA, Civ App No 129 of 1986 the Hong Kong Court of Appeal ordered the performance of a surgical operation on a child whose parents had refused their consent to submit the child to surgery. Wardship proceedings were commenced by the Director of Social Welfare. The child was born with spina bifida and developed hydrocephalus and meningitis. The operation was to deal with hydrocephalus and the medical evidence was that, without the operation, the child's condition would be more serious, even into adulthood. The court held that the welfare of the child demanded the performance of the operation.

The court relied on the English case *Re B* [1981] 1 WLR 1421. There a Down's Syndrome child was suffering from an intestinal blockage and the surgeons proposed to operate. Parental consent was refused. The case was an emergency, for without the operation the child's life was threatened. The English Court of Appeal stated that the court must examine 'whether the life of this child is demonstrably going to be so awful that, in effect, the child must be condemned to die, or whether the life of this child is still so imponderable that it would be wrong for her to be condemned to die' (per Templeman LJ at 1424). The Hong Kong case was analogous in that the issue concerned the child's quality of life. However, the cases can be distinguished insofar as the operation in Hong Kong was not necessitated by a life-threatening emergency. The object

of the operation was to improve the child's medical condition for the future. This appears to be a strong case for court intervention in parental decision making. It is less difficult for the court to justify its decision in such cases, than in cases where the choice is between non-treatment or treatment of new-born babies with gross defects who need surgery in order to survive.

Arthur (1981) 78 LS Gaz 1341 concerned the criminal prosecution for attempted murder of a doctor for permitting a handicapped new-born baby to die. The treatment provided by the defendant was summarised by Farquharson J, in directing the jury, as 'no food, save in so far as that included water; that there should be nursing care only, and in the discretion of the nurses the application of DF 118' (dihydrocodeine, a morphine-type drug). The parents had agreed to this treatment and did not want the child to survive. It was accepted that the doctor acted from the highest motives, but intent to cause death was the issue. Medical testimony was that the treatment of the child fell within the current accepted norms of medical practice. After two hours the jury unanimously acquitted the defendant.

It must not be concluded that this case endorses action by a doctor with the intention of bringing about the death of a patient. In his direction to the jury the judge reiterated the point that there is no defence to any act for the purpose of hastening the death of a patient. Deciding where a doctor is doing a positive act, rather than 'allowing a course of events or set of circumstances to ensue' was for the jury in the *Arthur* case.

Medical treatment of a minor without parental consent leaves the doctor open to a suit for trespass to the person. Yet failure to treat, as in the *Arthur* case, may give rise to criminal prosecution. The medical profession is cautious about acting without parental consent. Wardship proceedings provide one mechanism for reviewing and overriding parental decisions. But it is also possible for the concerned doctors to proceed without parental permission. Four different types of cases can be identified, and are considered below.

Refusal of parental permission on religious grounds

It is well established that in an emergency a doctor may treat

a child, or perform surgery, without parental consent. The risk is of civil suit for trespass to the person. But the emergency may justify medical intervention. Necessity has been accepted by the courts as a good defence in cases of emergency. In cases where parents refuse permission for treatment such as a blood transfusion to a child, citing religious reasons, there is a history of medical intervention. The courts have subsequently upheld the medical decision.

In Hong Kong the refusal of parental permission could result in the child being made a ward of court as in the cases already discussed. There is also the possibility of proceedings in the juvenile court under the Protection of Women and Juveniles Ordinance (cap 213, LHK 1978 cd) section 34. Where a child is 'in need of care and protection' the court, the Director of Social Welfare, or a person specified in the section may bring proceedings. Being 'in need of care and protection' is defined in section 34(2). It includes cases where a parent or guardian does not exercise proper care and guardianship and the child is 'exposed to moral or physical danger.' The juvenile court has powers to appoint the Director of Social Welfare to be the legal guardian of the child (section 34(1)(a)), in which case the decision about medical treatment could be made by the new guardian. The court may, alternatively, order the parents to enter into recognizance to exercise proper care and guardianship (section 34(1)(c)). 'Recognizance' could include an undertaking to submit the child to appropriate medical treatment.

Refusal of parental permission on welfare grounds

Parents may take a different view of the child's welfare than do the medical specialists. Wardship proceedings transfer the final decision on the child's welfare to the courts. In *Director of Social Welfare v Tam* the parents felt that the prognosis of the future life of a child born with spina bifida was not good. The doctors took the view that the operation was for the child's welfare. It was then up to the court to decide. The court's view was that, without the operation, the child's future would be even more in doubt. Therefore the operation was performed.

Refusal of parental permission on medical grounds

Where parents take a different view of the appropriate medical treatment of a child, from that taken by medical specialists, courts may be called in to resolve the disagreement. This may be done through wardship proceedings or under section 34 of the Protection of Women and Juveniles Ordinance. In Hong Kong the possibility exists that parents might decide on treatment by traditional herbal medicine against the advice of western-trained doctors. A number of such cases have confronted the American courts.

In the Matter of Joseph Hofbauer (Goldstein, Freud and Solnit, *Before The Best Interests of the Child* (London: Burnett, 1980) 250) was a case where the parents of an eight year old suffering from Hodgkin's disease (a form of cancer) preferred to have him treated by alternative means to radiation and chemotherapy. The New York State Commissioner of Health and Social Services charged that the parents had neglected the child, and sought to remove him from home. The New York Family Court judge held that parents are required to provide adequate medical care but that, of the several alternatives, the parents had simply chosen that alternative 'least acceptable to the conventional medical establishment.' The court refused to override that choice and to find Joseph a neglected child.

On appeal the appellate division of the New York State Supreme Court held that the critical issue was adequate medical care. The principle was laid down that the primary right, duty and privilege to select the type of medical care to be given, and the doctor to administer it, belongs to the parents. However, the parents and the doctor administering the alternative treatment, had conceded that, should the child's condition deteriorate, they would accept conventional medicine. Therefore the lower court's decision was affirmed.

This case is but one among many. In *Custody of Minor* 379 NE 2d 1053 (Mass Sup Jud Ct, 1978) the Supreme Judicial Court of Massachusetts held that 'parental rights . . . do not clothe parents with life and death authority over their children' (at 1063). The court ordered conventional treatment of a child

with leukemia where the parents wished to discontinue treatment by chemotherapy and to treat him through prayer and dietary management. The court stated that there were three competing sets of interest: the child's welfare, the parents, and the state. The court's view was that although medically orthodox treatment involved risk, this risk was minimal when compared to the risk of non-treatment.

Refusal of parental permission on legal grounds

Parents may take the view that there are legal reasons why they should refuse their consent to medical treatment. This may arise particularly in non-emergency situations. *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 provides such an example. The plaintiff argued that the advice given by the United Kingdom Department of Health to medical practitioners on prescribing contraceptive measures for girls under sixteen was unlawful. The department had advised that, in exceptional circumstances a doctor might exercise clinical judgment in prescribing contraception for such minors. The plaintiff argued that the departmental advice was unlawful on the following three grounds: (a) because it is a criminal offence for a male to have sexual intercourse with a girl under sixteen; (in Hong Kong this is so under section 124 of the Crimes Ordinance (cap 200, LHK 1984 ed); (b) because it is a civil wrong of trespass to the person for a doctor to examine a patient without consent; (c) that the advice was an infringement of parental rights. By majority the House of Lords rejected all three grounds holding that in some cases a doctor could lawfully advise or treat a child without involving the parents.

Of particular interest was the rejection by the majority of the argument that parental rights to consent to medical treatment of a child are absolute. The view was expressed by Lord Scarman that the common law rule on consent relates to capacity. Capacity is shown through understanding, the expression of one's own wishes, and by effective authorisation of treatment. Therefore a minor may have the capacity to consent. This is known in American law as the mature minor doctrine. Parental rights were held to derive from parental

duties and to exist only so long as they are needed for the protection of the child; furthermore parental rights dwindle as a child grows older. Once a child can decide for itself on a particular matter, parental rights on that matter terminate at the point of capacity. Lord Denning's views on the dwindling of parental rights expressed in the Court of Appeal in *Hewer v Bryant* [1970] 1 QB 357, were endorsed.

The majority decision of the House of Lords has been criticised as giving too great a discretion to doctors. Although the courts may review parental powers if the wardship jurisdiction is invoked, the confidential nature of the doctor/patient relationship may deny parents any means of reviewing decisions made on the medical treatment of their children, where they are neither informed nor consulted. There has also been criticism of the mature minor doctrine as an uncertain test of maturity. It seems that for each matter on which the minor claims capacity the test of understanding must be applied, in relation to that particular child. This has been contrasted unfavourably with the certainty of a fixed age for qualification to drive or to vote.

In relation to parental rights, then, the law is in a state of flux. Medical treatment brings the uncertainty of the law into the spotlight. We may be critical of the lack of procedures to raise issues of the exercise of parental powers. However, the discretionary nature of family law may not be generally welcomed. It is already the case that many, if not most, decisions in family law are discretionary. (See further O'Donovan, 'Family Law and Legal Theory' in Twining (ed) *Legal Theory and Common Law* (Oxford: Blackwell, 1986) 1984.)

III CUSTODY AND ACCESS

Custody issues between parents can be raised in Hong Kong law under the Matrimonial Proceedings and Property Ordinance (sections 19 and 20) on divorce, judicial separation, suit for nullity, or suit for neglect to provide reasonable maintenance. The Guardianship of Minors Ordinance provides for orders for custody and access on application of either parent (section 10). There is also power for a court order relating to children of the

marriage under section 5(b) of the Separation and Maintenance Orders Ordinance. Finally, custody issues between parents, between third parties, or between third parties and parents can be raised through the wardship jurisdiction. The cautions above concerning the conflicting legislative definitions of child and of 'child of the family' should be noted.

Continuity

An analysis of recent contested custody cases in Hong Kong reveals that, although the courts look to a variety of factors in exercising their discretion in custody matters, continuity has emerged as the major factor. This is in line with English cases and with academic research on the needs of children (see Maidment, *Child Custody and Divorce* (London: Croom Helm, 1984)).

There are two forms of continuity: continuity of relationships and continuity of environment. Most of the literature on the psychological needs of the children of divorce emphasises continuity of relationship. This has also been the approach of the English courts. An order for custody of the children to one parent is generally followed by an order maintaining the occupancy of the matrimonial home for that family group during the minority or schooling of the children.

In Hong Kong a different tendency can be identified. The courts do not distinguish the two forms of continuity, and often it is continuity of environment that emerges as the clinching factor in the judgment. In *Chow Cheung Suk-king v Chow Yan-piu* (1984) CA, Civ App No 180 of 1984 the Hong Kong Court of Appeal, in reversing the order of the High Court, gave judgment granting custody of two children aged five and one to the father. The High Court order in favour of the mother would have necessitated the removal of the children from the paternal grandparents' home. The Court of Appeal considered that the trial judge underestimated both the disruption to the children of the move, and the nature of the new environment. It was 'the care and love and affection which every small child needs' which was the deciding factor for the mother in the trial court. For the appeal court 'the importance for children of this age

that [the] status quo in a loving and caring environment to which they are accustomed should not be disturbed' was one major factor. The other major factor was provided by the preferable conditions in the father's home.

In *C v C* (1979) HCt, DJ No 38 of 1978 the trial judge was loath to disturb the child in the happy environment in which he was living after three moves in two years. Again, continuity of environment, rather than of relationships, guided the court. As Mr Commissioner Bewley observed, the child had spent most of his life with amahs and, regardless of whether the order was in favour of mother or father, their presence would be limited to evenings and weekends, as both were in paid employment.

A recent example which confirms this pattern of judicial decision-making is *Wong Yip Yuk-ping v Wong Sze-sang* (1985) CA Civ App No 116 of 1985. There, Kempster JA, concurring, pointed out that the children had been in the custody of the father in the former matrimonial home for about a year. This case concerned a mother who left home after 'heated brawls.' It is possible that, had the Domestic Violence Ordinance (No 48/86) been in force at the time she made the decision to leave, the emphasis on continuity could have favoured her.

There are certain problems with placing great emphasis on continuity which have not yet been acknowledged by the Hong Kong courts. It is true that social and economic conditions in Hong Kong result in less emphasis being placed on continuity of relationships than in English law. This is because amahs are often employed by middle-class working parents, and among the less well-off both parents tend to be in paid employment. Furthermore, housing conditions are very different from those in England. But continuity of environment as a major factor favours the parent who remains in the matrimonial home with the children. The loving parent who moves out, perhaps wishing to minimise marital conflict and consequent disruption to the children, may lose custody unless the courts move swiftly. Analysis of the cases discussed above reveals that it takes about sixteen months from initial application for custody to final court order. Yet the cases suggest that the Hong Kong courts regard eight months of continuity of environment and relationship as

significant (see *Roslyn Leung Wing-sheung v David Leung Tai-ten* (1985) HCt, MP No 142 of 1985).

Continuity of environment also favours the parent who takes the law into his own hands. In *Lee Wai-chu v Lee Yin-chuen* (1983) HCt, MP No 2678 of 1983 the mother was granted custody of her two children in the Victoria District Court in August 1979. However, in the interim between the original application (December 1978) and the order, the father disappeared with the younger child. In October 1983 the mother with the help of the Immigration Department, established the whereabouts of her son. In the subsequent wardship proceedings custody of that child was granted to the father on the welfare principle. Power J stated that he was fully aware of the conduct of the father but nevertheless 'of particular importance in the present case is that the child is well integrated into his school and is happy and well adjusted in his present surroundings.'

Social welfare reports

If the law moves swiftly some of the problems inherent in the continuity approach may be avoided. It seems that court proceedings are held up by the necessity of obtaining a welfare report. Yet when that report is obtained the court has discretion in deciding whether or not to follow its recommendations. In two of the four custody cases discussed thus far the trial court made a decision contrary to the recommendation of the social investigation report. This is not to suggest that such reports are unnecessary; but perhaps undue delay in the investigation should be discouraged.

Reports by officers of the Social Welfare Department in contested custody cases are also the subject of inconsistent statutory provisions. If the custody proceedings are brought under the Guardianship of Minors Ordinance the officer may be called under section 17(2) to give evidence and be subjected to cross-examination. If the proceedings are brought in the matrimonial causes jurisdiction there is provision under rule 95 of the Matrimonial Causes Rules (cap 179, LHK 1983 ed) for the preparation of welfare reports. However, there is no

provision for the calling of the social welfare officer who prepared the report and for the giving of evidence thereon.

In *Cadman v Cadman* (1982) 3 FLR 275 the English High Court held that the court welfare officer is an officer of the court and not a witness. The officer may or may not be called to give evidence and be cross-examined. This is a matter within the discretion of the judge. This was followed by the Hong Kong Court of Appeal in *Tang Lau Wai-chun v Tang Fung-fat* (1986) CA, Civ App No 142 of 1985 where it was held that in exercising his discretion a judge may decide whether or not an officer should be called.

The child's own preference

To what extent should courts take account of preferences expressed by children to live with one parent? This is one of the factors specified in section 3 of the Guardianship of Minors Ordinance as relevant to the court's decision. Despite the declared policy of the House of Lords in *G v G* [1986] 2 All ER 225 that the appellate court should interfere reluctantly with the discretion of the trial court in custody cases, and only where the judge of first instance 'has exceeded the generous ambit within which reasonable disagreement is possible,' (per Lord Fraser of Tullybelton at 229) failure to take account of a child's views has been ground for reversal on appeal. In *M v M* (1987) The Times, Jan 3 it was held that the trial court's failure to take account of the adamant views of a child of twelve was sufficient ground for allowing an appeal. There it was stated that 'if observing *G v G* principles it was then apparent that the judge had been plainly wrong or had misdirected himself in a relevant respect, the court should then allow the appeal.' The Hong Kong courts have, in a number of cases, granted custody to the parent not preferred by the children. (See O'Donovan, *Note* (1986) 16 HKLJ 430.)

Access

Where a parent is denied custody an order for access is often made. The wardship jurisdiction, the Guardianship of Minors Ordinance, section 10, and the Matrimonial Proceedings and

Property Ordinance, section 19 (as interpreted by section 2) give powers to make access orders. This is at the discretion of the court and the welfare principle will apply. A recent case in the Hong Kong Court of Appeal, *Melwani v Melwani* (1986) CA, Civ App No 39 of 1986 illustrates this point. The judge of first instance denied access to the mother because the child was adamant in his refusal to see her. The judge's view was that there would be considerable upset to the child if the mother, who had been absent from his life, re-entered it. The Court of Appeal was satisfied with the exercise of discretion by the trial judge and refused to interfere.

Access may be seen as a right of children rather than of parents. Therefore, if a child of ten has strong views, it is reasonable to take account of this. However, where the parent with custody alienates the child from the other parent, as was found by the trial court in *Melwani*, this presents difficulties. Empirical research in Britain and the United States shows that children who lose contact with a parent are unhappy and resentful. There is also research showing that this affects the long term development of the child (see Wallerstein and Kelly, *Surviving the Break Up* (London: Grant McIntyre, 1980). Yet it is not possible for courts to force access either on a child or on an unwilling parent.

It might be assumed that Hong Kong children feel differently about the breakdown of their parents' marriage than do western children. However, the empirical evidence suggests that this is not so. KPH Young has found that forty per cent of children interviewed in a study of one-parent families were sad and angry at the departure of one parent. A further 26 per cent missed the absent parents. A particularly interesting finding of this study is that children's feelings about the absent parent vary according to the reason for absence. For example, only five per cent of children of a deceased parent were negative in description of that parent whereas 49 per cent of children of a separated absent parent were negative. One of the conclusions of the report is that there is a statistically significant correlation between the reason for a parent's absence and whether children report the relationship as good or poor.

Where the absence of a parent was due to separation only 49 per cent of children reported face to face contacts. The custodial parents reported only twelve per cent of frequent contacts between absent parent and child and 31 per cent of irregular contacts. This finding is very similar to findings by research studies in Britain and the United States which have estimated that half of non-custodial parents lose contact with their children. Young concludes that, developmentally, children who experience parental loss or separation are at risk (see Young, *A Report on Single Parent Families in Hong Kong* (Department of Social Work: HKU, 1986)).

Models for reform

The English Law Commission, conscious of criticism of the breadth of discretion permitted by law to courts deciding custody cases, has put forward two possible models for reform. These are guidelines and checklists. Guidelines can be found in New Zealand law on custody and in the law of certain American state jurisdictions. Guidelines state clearly the values the court should look to, such as continuity of relationships and maternal preference. These may be placed in order of priority or may be factors to which the court must look in reaching its decision.

Checklists are to be found in the Australian Family Law Act 1975, as amended by the Family Law Amendment Act 1983, and in nearly all the Canadian states. The aim is to ensure that all the relevant considerations are taken into account and to provide some consistency from court to court and case to case. Checklists are more detailed than guidelines and are analogous to section 7 of the Matrimonial Proceedings and Property Ordinance which lists the factors to which the court must have regard in making a decision on financial provision on divorce. The provisional conclusion of the English Law Commission is that a checklist of relevant factors for custody decisions might be helpful.

IV CHILDREN'S RIGHTS

The concept of parental rights is one with which the law is familiar. Less familiar, however, is the concept of children's

rights. The idea is beginning to emerge in Hong Kong that all children should have equal rights under the law. This will be investigated here in relation to illegitimacy.

Illegitimacy

Equality under the law is fundamental to the rule of law and to the United Nations Declaration of the Rights of the Child. To what extent does it prevail in Hong Kong? The Fatal Accidents Ordinance (cap 22, LHK 1980 ed) has been amended to enable illegitimate children to claim on the death of a parent (see Martin, 'Recent Development in Personal Injuries Law' in this volume). However, under the Intestates' Estates Ordinance (cap 73, LHK 1971 ed) illegitimate children have no claim on the intestacy of a parent as section 2 gives a restricted meaning to the words 'child or issue' entitled to succeed, excluding the illegitimate child. Under the English Family Law Reform Act 1969 an illegitimate child has the same rights to share on the intestacy of a parent as a legitimate child (section 14(1)).

A similar picture emerges from study of the Deceased's Family Maintenance Ordinance (cap 129, LHK 1971 ed). Only dependants can make a claim under the ordinance and the illegitimate child does not fall within the definition of 'dependant' in section 2. Children of a valid marriage to which the deceased was a party and children adopted under an order of the Adoption Ordinance (cap 290, LHK 1977 ed) or section 17 thereof, are covered. By contrast, under the analogous English legislation, the Inheritance (Provision for Family and Dependants) Act 1975 an illegitimate child has a claim (sections 1(1)(c), 25(1)). (See *Re Mc C* (1979) 9 Fam Law 26.)

Public opinion in Hong Kong does not support the unequal treatment of children according to accidents of birth. In a survey conducted in 1985 for the Hong Kong Law Reform Commission, 72 per cent of those surveyed favoured equal rights. Eighty-six per cent of respondents thought that the illegitimate child should have the right to claim maintenance from the estate of a deceased father, if he had previously maintained the child. This was in response to a specific question, and it is possible that the 72 per cent response obtained earlier

to the general question on equal rights would favour the child's claim, even where the father had not previously maintained the child. Short shrift was given by those surveyed to the idea that giving rights to illegitimate children will encourage extra-marital relations (62 per cent disagree with that idea.)

The Hong Kong Law Reform Commission has established a Sub-Committee on Wills, Intestacy and Provision for Deceased's Family. The committee's report of October 1986 recommends that on intestacy an acknowledged natural child, a child of the family, and a child adopted in accordance with Chinese custom prior to December 31, 1972, be included on an equal footing with other children. A similar recommendation was made for amendment of the Deceased's Family Maintenance Ordinance with the additional point that 'dependant' covers a person, not a 'child' within the definition, who was being wholly or partly maintained by the deceased immediately prior to death. The effect of this on the illegitimate child, if the recommendation becomes law, is that an acknowledged natural child will have claims on intestacy and under the Deceased's Family Maintenance Ordinance. An unacknowledged child who was being maintained by the deceased, (if such is a possibility) will also have a claim under the latter ordinance. The report does not make clear what 'acknowledgement' means. Presumably it covers cases where there is a court order of affiliation, or a private maintenance agreement.

There is a possibility that Hong Kong is in breach of international obligation in the unequal treatment of illegitimate children. The International Covenant on Civil and Political Rights was ratified by the United Kingdom and extended to Hong Kong in 1987. The Sino-British Joint Declaration states that its provisions will remain in force after 1997. The Hong Kong government is obliged to respect and grant to all inhabitants the rights recognised in the covenant. Where necessary the government has undertaken to enact legislation to guarantee these rights.

One of the rights contained in article 24(1) of the covenant is as follows:

'Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the state.'

Furthermore, article 26 provides for equality before the law and entitlement, without any discrimination, to the equal protection of the law (see Jayawickrama, 'Towards a Human Rights Law in Hong Kong' in this volume).

V DEVELOPMENTS IN ARTIFICIAL REPRODUCTION AND SURROGATE MOTHERHOOD

Contraception enabled people to have sex without procreation. Now science has enabled procreation without sex. In discussing developments in new forms of conception, and new ways to become a parent, it is important to distinguish new technologies from new social arrangements. The idea that a woman might bear a child for another woman is not new. What is new is the idea that such births might be the object of a contract between the child's biological father and a woman to whom he is not married who bears the child for him. No technology is needed. The couple may decide to have sexual intercourse in the traditional fashion. Alternatively the woman may be artificially inseminated with the would-be father's sperm.

Enforceability of surrogacy contracts

Surrogacy contracts have been held enforceable in some jurisdictions. Are they enforceable in Hong Kong law? At common law the status of such contracts is doubtful. In *A v C* [1985] FLR 445 the English High Court held such contracts to be unenforceable. The case concerned a husband whose wife was unable to conceive a child, but who wanted to be a father. He entered into a contract with a woman who was artificially inseminated with his sperm. The woman became pregnant, but on the birth of the child she refused to give it up. The suit by the father was for custody and access to the child, not for

enforcement of contract. Nevertheless the court expressed its strong views on the unenforceability of the contract.

It is likely that such contracts are unenforceable under section 4 of the Guardianship of Minors Ordinance. The section makes an agreement by a parent to give up custody of a child unenforceable, except for an agreement to operate only during the separation of parents who are still married. Furthermore, the Adoption Ordinance (cap 290, LHK 1977 ed) makes it an offence for a child to be given up for adoption on the payment of money (section 22). Since the child of a surrogacy contract will be illegitimate, it is likely that the commissioning parents will wish to adopt the child.

In English law the Surrogacy Arrangements Act 1985 has made surrogacy illegal if arranged by a commercial agency. Agencies, and advertising for surrogates or hopeful parents have been outlawed. So it might appear that surrogate contracts will not trouble the law. That is too rash a conclusion. What happens where an agreement is made, money is paid, and a child is born? If there is a dispute between the parents, albeit not married, or between the parents and third parties the law will be called upon to resolve it. This is what happened in *Re C* [1985] FLR 846. In that case a surrogacy contract was made and the mother was willing to hand over the child to the father. However, the local authority made the child a ward of court as there was concern about the child as the subject of such a contract. The English High Court held that the welfare principle was applicable and that it was in the child's best interests to be handed over to the father and his wife. Therefore, even if such contracts are illegal and unenforceable in Hong Kong law, the application of the welfare principle may have the same result as enforcement.

Artificial insemination by donor services has been available in Hong Kong for some years, provided by the Family Planning Association. A child born as a result of such insemination is illegitimate in English and in Hong Kong law. Therefore the Family Planning Association requires married couples who have requested artificial insemination by a donor to sign an undertaking to adopt the child. However, it is the practice in Hong

Kong, as in England, for the couple to cover up the fact that the wife's husband is not the father by putting his name on the birth certificate. Technically this is an offence under the Births and Deaths Registration Ordinance (cap 174, LHK 1965 ed). It is estimated that two thousand such offences are committed annually in Britain (See Report by the Committee of Inquiry into *Human Fertilisation and Embryology* (Warnock Report) (1984; cmd 9314) para 4.25). Parliament is concerned about the illegitimacy of the child of artificial insemination. The Family Law Reform Bill, introduced in November 1986, provides in clause 27 that a child born as a result of artificial insemination by a donor should be treated as the legitimate child of the marriage unless it is proved that the husband did not consent to the insemination. The donor, in consequence, will have no parental rights or duties. This is already the law in Western Australia under the Artificial Conception Act 1985. Is it not time for Hong Kong to introduce similar legislation?

In vitro fertilisation: the multiplicity of legal problems

In vitro fertilization is now a practice for assisting human reproduction in Hong Kong. If the eggs and sperm placed in the petri dish are taken from a married couple and re-implanted in the wife, no problems of legitimacy arise. There are, however, a series of problems which arise from this new medical procedure. The old securities that the mother or couple to whom a child was born were its genetic parents have broken down. In the past the law dealt with this by the presumption 'pater est quam nuptiae demonstrant.' There was a further maxim: 'mater semper certa est.' No longer is this so. The calling into doubt by science of biological relationships will be followed by the doubting of legal relationships. Law will have to react.

There are now five possible parents of a child. These are the egg mother, the womb mother, the caring mother, the sperm father, and the caring father. Donated eggs and sperm may be mixed in a petri dish and the resulting embryo may be implanted in a woman who leases her womb. The commissioning parents may be genetically unrelated to the child, taking possession after birth. Who at law are the parents? What is the legal status of

the child? If the law answers that the parents are those who have commissioned and paid for the child there are serious policy consequences affecting other areas of child law such as adoption.

Other questions arise in relation to the ownership of donated eggs, sperms and embryos. The French courts have faced the issue of whether a widow can demand the return to her of her deceased husband's frozen sperm for insemination purposes. The return of the sperm by the Centre d' Etudes et de Conservation de Sperme was ordered by the court (see Davies, 'Cryobanking and AIH' (1984) 52 *Medico-Legal Journal* 242-7).

The possibility arises then of a posthumous child conceived after the death of the biological father. At present the child *en ventre sa mere* is legitimate and has the same rights as other legitimate children of a married couple. However, where it was known that insemination took place after the husband's death, or if the child was born much more than nine months after the death, the presumption of legitimacy could be rebutted.

The status of frozen embryos may also be a source of legal problems. At present embryos cannot survive much longer than fourteen days outside the human body, unless frozen. Questions arise about ownership of embryos, their status, the use and disposal thereof. Furthermore, the possibility exists that science may develop an artificial womb in the future. From that could ensue problems of filiation, legitimacy and identification of the parents of embryos carried to term in an artificial environment. These matters are not covered by law.

Research on the human embryo is not, at present, regulated by law in Hong Kong or the United Kingdom. The Warnock Report recommends that research be permitted up to the 'fourteen day development stage' (para 11.30). A majority of the committee (thirteen out of sixteen) recognised that the embryo has a special moral status necessitating the protection of law, but stated that research on embryos can advance medical knowledge and help the treatment of certain human diseases. The evidence was that at around fifteen days the embryo forms the 'primitive streak' which marks individual development. Until then, the majority believed, the embryo is

not sufficiently human to warrant the absolute protection which the law affords to children and adult humans.

A minority of three opposed any form of research on embryos, because of the potential that exists that a human being could develop. The fourteen day period proposed by the Warnock Report is observed in the United Kingdom by scientists on a voluntary basis.

Hong Kong has developed a voluntary code of practice which places on the director of the in vitro fertilization programme decisions about 'use or disposal' of a non-implanted embryo where the couple from whom it has been produced disagree about its fate (South China Morning Post, Feb 2, 1987). Both the Hong Kong and the United Kingdom legislatures should face up to the legal problems outlined above and the moral issues which are fundamental to these legal issues.

VI CONCLUSION

The Hong Kong law outlined above is in sad need of review. Academics and practitioners have an interest in ensuring that the law is internally consistent, accessible, logically ordered and fair. But where the law deals with a group such as children who have no voice, no pressure group, perhaps no knowledge, we should look beyond our immediate self-interest. Justice for children must be a priority in a caring society. Can we say that the review above indicates that Hong Kong law does its best to give justice to children?

CONCILIATION AND RECONCILIATION ON DIVORCE

KATHERINE O'DONOVAN*

INTRODUCTION

Both Malaysian and English law look to breakdown of marriage as the basis for divorce.¹ In English law this is the sole ground for divorce, whereas Malaysian law recognises that the conversion of one of the parties to Islam may be a ground,² as may also the mutual consent to divorce of parties who have been married for two years or more.³ Both jurisdictions place emphasis on the possibility of reconciliation of the spouses as an alternative to divorce. Both have an identical provision for the adjournment of proceedings for divorce "if it appears to the court that there is a reasonable possibility of a reconciliation between the parties to the marriage".⁴ However, with regard to the role of the court in promoting the reconciliation of the parties, Malaysia had chosen a form of words, different from those in the English legislation, requiring the petitioner through rules of court to "have recourse to the assistance and advice of such persons or bodies as may be made available for the purpose of effecting a reconciliation between parties to a marriage who have become estranged".⁵ Furthermore, where divorce is on the grounds of irretrievable breakdown there is a compulsory reference of the matrimonial problem to a "conciliatory body" at which the parties attend without their lawyers.⁶ This mandatory requirement of a reconciliation attempt by the parties takes place prior to the filing of the petition

* Senior Lecturer in Law at the University of Kent at Canterbury.

1. Law Reform (Marriage and Divorce) Act 1976, S.53; Matrimonial Causes Act 1973, S.1.
2. Law Reform (Marriage and Divorce) Act 1976, S.51.
3. *Ibid.*, S.52.
4. Law Reform (Marriage and Divorce) Act 1976, S.55(2); Matrimonial Causes Act 1973, S.6(2).
5. Law Reform (Marriage and Divorce) Act 1976, S.55(1).
6. *Ibid.*, S.106.

for divorce, and therefore is separate from court-centred reconciliation.

Malaysia has gone much further down the road towards compulsory reconciliation than has Britain. Although reconciliation prior to presentation of petition is only imposed in cases of irretrievable breakdown, the court's powers to require reconciliation apply in all cases. Presumably the court is more likely to use its powers in cases of divorce for conversion to Islam, and divorce by mutual consent as cases of irretrievable breakdown will already have been to the conciliatory body. The English legislation requires little attempt at reconciliation, as the form of words used shows. The petitioner's solicitor is required "to certify whether he has discussed with the petitioner the possibility of a reconciliation and given him the names and addresses of persons qualified to help effect a reconciliation between parties".⁷ It has been suggested that the choice of the word 'whether' in the English legislation, rather than the word 'that' was a crucial one,⁸ which leaves reconciliation to the discretion of the solicitor, rather than as a duty on the court, as in the Malaysian legislation. The English provision is drawn from Australian law. Yet there is little evidence to suggest that it has led to successful reconciliation there. An Australian practitioner has discussed the provision as follows:

In my experience, I have never known a case where a client seeking a divorce has shown any interest when the usual procedures as to reconciliation are followed, that is, discussing the possibility of reconciliation and giving him a list of organisations he may consult. Reconciliation procedures as a preliminary to commencing divorce proceedings do seem to be futile and a waste of time.⁹

Ten years of experience of the English provision indicates that it, also, is a failure. Whether the Malaysian provisions with the more active role of the court and with compulsory pre-court reconciliation for some divorces, will be more successful remains to be seen. However, since the Malaysian divorce court is required by law to "act and give relief on principles which in the opinion of the court are, as nearly as may be, conformable to the principles on which the High Court of

7. Matrimonial Causes Act 1973, S.6(1).

8. E.J. Griew, "Marital Reconciliation — Contexts and Meanings", [1972A] Cambridge Law Journal 294, at p.307.

9. T.A. Pearce, "The Broken Marriage — Is Modern Divorce the Answer?" in H.A. Finlay (ed.), *Divorce, Society and the Law*, 1969, 53, at p.59.

England acts and gives relief in matrimonial proceedings",¹⁰ there may be some useful lessons to be learned from English practice.

RECONCILIATION IN PRACTICE

Reconciliation has been defined as "the reuniting of the spouses".¹¹ In English practice a distinction is made between reconciliation through the courts, and reconciliation through counselling from other agencies, such as the Marriage Guidance Council.

In *S. v. S.*,¹² the President of the Probate, Divorce and Admiralty Division of the High Court explained the court's duty to consider the reasonable possibility of reconciliation as follows:

In general, that duty cannot be realistically performed unless at least an attempt has been made to ascertain whether reconciliation can be effected. Moreover, it is generally accepted that reconciliation is often more likely to be successful, both immediately and permanently, if it is negotiated with the help of those who have the requisite personal qualities for, and specialised training in, the work. Under such guidance, further more, even if a reconstitution of the matrimonial relationship cannot be effected, at least the problems arising out of its disruption can often be solved with the minimum injury to the parties or their children.¹³

In order to carry into effect the legal provisions on reconciliation, a practice direction was issued in 1971 providing general machinery for reconciliation in divorce courts as follows:¹⁴

- (a) Where the court considers that there is a reasonable possibility of reconciliation or that there are ancillary proceedings in which conciliation might serve a useful purpose, the court may refer the case, or any particular matter or matters in dispute therein, to the court welfare officer.
- (b) The court welfare officer will, after discussion with the parties, decide whether there is any reasonable prospect

10. Law Reform (Marriage and Divorce) Act 1976, S.47.

11. Report of the Committee on One-Parent Families, 1974, Cmnd. 5629, Vol. 1, para. 4.238.

12. *S. v. S.* [1967] 3 All E.R. 139.

13. *Ibid.*, at p. 140.

14. Practice Direction [1971] 1 All E.R. 894.

- of reconciliation (experience having shown that reconciliation is unlikely to be successful in the absence of readiness to co-operate on the part of the spouses) or that conciliation might assist the parties to resolve their disputes or any part of them by argument.
- (c) If the court welfare officer decides that there is not such reasonable prospect, he should report accordingly to the court.
 - (d) If the court welfare officer decides that there is some reasonable prospect of reconciliation, or that conciliation might assist the parties to resolve their disputes or any part of them by agreement, he will, unless he continues to deal with the case himself, refer the parties to either (i) a probation officer, or (ii) a fully qualified marriage guidance counsellor recommended by the branch of the appropriate organisation concerned with marriage guidance and welfare; or (iii) some other appropriate person or body indicated by the special circumstances (e.g. denomination) of the case.
 - (e) The person to whom the parties have been referred will report back to the court welfare officer, who in turn will report to the court. These reports will be limited to a statement whether or not reconciliation has been effective, or to what extent (if at all) the parties have been assisted by conciliation to resolve their disputes or any part of them by agreement.

In 1972 a further practice direction listed, as examples, persons who were considered suitable to undertake reconciliation work under the Act. These included marriage guidance counsellors, probation officers, and ministers of religion. However, the direction also contained the following statement:

The object of the section and of the rule made pursuant to it is to ensure that parties know where to seek guidance when there is a sincere desire for a reconciliation; it is important that reference to a marriage guidance counsellor should not be regarded as a formal step which must be taken in all cases irrespective of whether or not there is any prospect of a reconciliation.¹⁵

15. Practice Direction [1972] 3 All E.R. 768.

The effect of this passage was to suggest that there was no strict duty on solicitors to attempt to reconcile the parties. As a result the provisions in the Act have had little effect.

There is reason to doubt whether reconciliation through the courts is an appropriate mechanism to achieve the goal. The Denning Committee which reported in 1947 concluded that, once a divorce petition is before the courts, it may already be too late to reunite the parties:

The prospects of reconciliation are much more favourable in the early stages of marital disharmony than in the later stages. At that stage both parties are likely to be willing to co-operate in an effort to save the marriage; but if the conflict has become so chronic that one or both of the parties has lost the power or desire to co-operate further, the prospects sharply diminish. By the time the conflict reaches a hearing in the divorce court, the prospects are as a rule very small. It is important therefore that the general public should be brought to realise the importance of seeking competent advice, without delay, when tensions occur in marriage.¹⁶

Reconciliation through an agency, such as the Marriage Guidance Council, prior to the filing of a petition for divorce may have a greater chance of success. However, that organisation has, itself, been highly critical of the form of the English reconciliation provisions, and of the handling of cases by the legal profession. In their annual report of 1973 they stated:

Our statistics indicate, however, that (the reconciliation provisions of the Act) are proving largely ineffective. Although it is not always possible to establish whether a solicitor's referral has come as a direct result of the Act or not, we estimate that Marriage Guidance Councils have received a maximum figure of 300 such referrals. Seen against the divorcing figure, this is an insignificant number.... It is illogical that someone facing marriage breakdown should be encouraged to go from solicitor to marriage counsellor.... It seems that Parliament has legislated for a cart before a horse.¹⁷

Statistics on the work of the Marriage Guidance Council over ten years show an increase in the work, although it has clearly not kept pace with divorce.

16. Final Report of the Committee on Procedure in Matrimonial Causes, 1947, Cmnd. 7024, para. 22.

17. Annual Report of the National Marriage Guidance Council, 1973.

	1970	1972	1974	1976	1978	1980
Total cases	20,000	23,600	27,500	30,600	29,000	34,000
Total interviews	87,500	102,000	132,000	154,000	161,000	181,000
Interviews with husband	30,000	33,000	38,000	36,000	34,000	36,000
Interviews with wife	51,000	56,000	65,000	69,000	69,000	77,000
Interviews with husband and wife	6,000	12,000	26,000	41,500	48,500	56,000
Interviews with single clients	500	1,000	3,000	7,500	9,500	12,000
Total divorce absolutes	58,000	119,000	113,500	126,500	143,500	146,458

It has been suggested that there is a lack of understanding and co-operation between solicitors and marriage guidance counsellors. The explanations for this are presented as stemming from different work methods, lack of knowledge of each other's work, and the referral mechanism itself.¹⁹ Solicitors are said to take an adversarial approach to divorce and to discourage their clients from reconciliation attempts, lest this should weaken the client's position *vis-à-vis* the other spouse. Counsellors, on the other hand, may treat the couple together, and are interested in exploring feelings, and in changing positions and relationships. Secondly, "co-operation is impeded by lack of knowledge of the work of each other's profession. How can a solicitor know what can be achieved by a counsellor with these potential referrals, unless they talk together?"²⁰ Thirdly, the referral mechanism only comes into play once divorce has been decided upon, and by then the client may be angry and bitter and hostile to the idea of reconciliation.

In *Goodrich v. Goodrich*²¹ it was held by the court that there was no need for solicitors to refer parties to counsellors where there was no hope of reconciliation. In that case the solicitor for the husband certified that he had discussed with the husband the possibility of reconciliation but that he had not given him the names and addresses of counsellors.

18. N. Tyndall, "Helping Troubled Marriages" (1982) 12 Fam. Law 76.

19. *Ibid.*

20. *Ibid.*

21. *Goodrich v. Goodrich* [1971] 2 All E.R. 1340.

The wife had made it as plain as could be that she was not prepared to consider a reconciliation, and the time came when the husband himself felt it was out of the question because of her attitude. In those circumstances it seems to me that there can be no possible objection to this court pronouncing that there was no question of a reconciliation, and therefore no question of any need to refer the husband to any person who might possibly have effected a reconciliation.... Therefore, in my judgment there is no reason why the court should not, notwithstanding that there has been no reference to any persons qualified to give some help in the matter of reconciliation, proceed on its own knowledge to say that it is satisfied that a reconciliation is out of the question.²²

It would be a mistake, however, to define the role of marriage guidance counsellors primarily in terms of reconciliation of married couples. Divorce counselling may take place with one party only, and may be a long term process. The counsellor is therapeutically involved with the client and "the counsellor is helping the client to make decisions for himself, the discussion is in complete confidence and an important ingredient of the relationship between himself and the counsellor is the feeling the client has that the counsellor is not judging him".²³ Thus, marriage guidance work may be directed towards enabling the client to decide whether to remain in the marriage or to divorce. If the decision is to continue to work for change within the marriage, then the counsellor may direct help towards that goal. This may be a long process of therapy, which does not raise any legal issues about marriage or divorce.

One final reason why reconciliation has been a failure in England relates to changes in divorce procedure itself. With the introduction of no fault divorce by making irretrievable breakdown the sole ground for divorce, administrative procedures have gradually taken over from judicial procedures. Since 1970 the courts have experienced considerable pressure from the number of divorce petitions filed, and have responded by giving undefended petitions very little judicial time. A study done in 1973 showed that eighty-five per cent of undefended cases took less than ten minutes.²⁴ Petitioners regarded the proceedings as a mere formality in which they were coached

²² *Ibid.*, at p. 1344.

²³ L.V. Hervey, "Marriage Counselling: A Therapeutic Approach to Marital Disorganisation", in H.A. Finlay (ed.) *Divorce, Society and the Law*, 1969, 35, at p. 50.

²⁴ E. Elston, J. Fuller and M. Murch, "Judicial Hearings of Undefended Divorce Petitions", [1975] 38 *Modern Law Review* 609.

by their lawyers to play a part before the judge. The judge made no investigation of the marriage in seventy-three per cent of cases.

In 1973 a 'special procedure' was introduced for cases of two years separation with consent to divorce, where there were no children of the marriage.²⁵ This procedure means that there is no court hearing of the divorce as such. The divorce process is a matter of opening a file at the divorce court registry, and if the registrar is satisfied that the correct procedure has been followed, he issues a certificate. The file is then passed to the judge who pronounces the decree *nisi* in open court. There is a special procedure list and it is usual for the judge to grant a decree nisi on all the cases on the list at once.

Special procedure was extended subsequently to cover all undefended divorce cases whether or not children are involved.²⁶ Over ninety-nine per cent of cases are undefended and "the requirement of judicial procedures has been shown to be a facade."²⁷ As a result of this the possibility of adjournment for reconciliation is ruled out in all but one per cent of cases.

Aside from the effect of special procedure on reconciliation, there are other reasons for anxiety over its effects. It has been pointed out that:

The continuing insistence on a judicial process (in divorce) is based partly on the traditional belief in public justice, although many "domestic cases" are heard in private, and partly because of the view that a public and solemn judicial divorce process reflects the state's view of the serious nature of the breakdown of the marriage relationship. No doubt there are disadvantages in the judicial process, especially in the adversary process which is so typical of it.²⁸

CONCILIATION

The Law Commission, in its proposals for divorce law reform, saw the objectives of a good divorce law as follows:

1. to buttress, rather than to undermine, the stability of marriage;

25. Matrimonial Causes Rules 1973.

26. Matrimonial Causes Rules 1977.

27. S. Maidment, "Law and Justice: The Case for Family Law Reform (1982) 12 Fam. Law 229.

28. A.H. Manchester and J.M. Whetton, "Marital Conciliation in England and Wales" [1974] 23 International and Comparative Law Quarterly 339, at p. 381.

2. when, regrettably, a marriage has irretrievably broken down, to enable the empty shell to be destroyed with the maximum of fairness and the minimum bitterness, distress and humiliation.²⁹

Objective two refers to conciliation rather than reconciliation. So too does the practice direction of 1971, providing that where "there are ancillary proceedings in which conciliation might serve a purpose, the court may refer the case, or any particular matter or matters in dispute therein, to the court welfare officer."³⁰

Conciliation is different from reconciliation as it does not contemplate the resumption of the marriage; rather its object is to encourage to parties to come to an amicable agreement over their divorce.

Conciliation is not anonymous with divorce counselling because counselling may involve only one party and because counselling may take place on the periphery of the legal process, without addressing legal issues. Furthermore, counselling may continue over a long period, with abstract rather than practical objectives. Conciliation, in contrast, is concerned with helping both parties to reach consensual decisions on specific issues in the short term. These decisions usually have major legal and financial implications and consequences. Therefore, it must be clearly understood that conciliation offers an alternative to contested court proceedings, not a substitute for legal advice and assistance. Conciliators work within a legal frame of reference because 'divorcing parents do not bargain in a vacuum.... They bargain in the shadow of the law'.³¹

As can be seen from the above explanation, conciliation focusses on two areas of legal dispute on divorce: child custody, and property and other financial arrangements.

In Canada, the Toronto Family Court conciliation service defines conciliation as "a process by which the parties are helped to identify and clarify the issues between them and are assisted in making agreement on some or all of those issues — especially, but not limited to, disputes over custody and access to children."³² The American experience of con-

29. Law Commission, *Reform of the Grounds of Divorce*, "The Field of Choice", 1966, Cmnd. 3123, para. 15.

30. Practice Direction [1971] 1 All E.R. 894.

31. L. Parkinson, "Bristol Courts Family Conciliation Service (1982) 12 Fam. Law. 13.

32. *Ibid.*

ciliation suggests that "counselling frequently has resulted in reduced tensions and hostilities to the point where statutory settlements of support payments, custody, visitation and other problems, have been accomplished prior to the final divorce hearing, and which results otherwise would not have occurred without a bitter court contest".³³

Conciliation on divorce can be seen in the context of a legal system which encourages negotiation in other areas of legal dispute such as industrial relations, commercial contracts, race relations. But the adversary approach to divorce has received much more attention than the conciliatory approach. Whether this emphasis has been correctly placed, or whether it has been mistaken can be explored by examining procedures in applications for property transfer and financial provision, and in child custody disputes.

CONCILIATION PRACTICES IN DISPUTES OVER PROPERTY AND FINANCIAL MATTERS

Conciliation in England has taken two forms: in-court mediation by registrars and court welfare officers; and independent services offering private mediation. In 1980 a practice direction was issued by the Senior Registrar for a compulsory pre-trial review of applications for property adjustment and lump sums.³⁴ The object was to allow the registrar to "consider the possibility of settlement of the case, or clarification of the issues. Where the case continues to be contested the registrar will give directions, particularly as to discovery, designed to elicit all necessary information but to save costs by excluding over-detailed requests for it."

The success of this pre-trial review has been studied by a team from Bristol University.³⁵ The thinking behind the new procedure was expressed as follows by a solicitor:

I think a conciliation procedure chaired by the Registrar would help settle ancillary relief claims. 'Thinking' aloud by the Registrar after affidavit have been filed would be helpful. It is my experience

33. L.L. Henderson, "Marriage Counselling in a Court of Conciliation", (1969) 52 *Judicature* 253, at p.256.

34. Practice Direction [1980] 1 All E.R. 592.

35. G. Davis and K. Bader, "Report on Pre-Trial Reviews Held in Lump-Sum and Property Applications at the Principal Divorce Registry", Nov. 1982.

that parties and often their legal advisers do not think in terms of a settlement until the day of the hearing. There is then a last minute 'wheeling and dealing' which I find distasteful, the clients find perplexing, and witnesses who are waiting around to give evidence, beyond comprehension.³⁶

Efforts to reduce the cost of a full-scale hearing before the registrar were partly the reason for review, and even a settlement arrived at before the door of the court can produce a high bill of costs. Another solicitor explained:

Attempts at negotiating finance/property at an early stage in the breakdown are usually unsatisfactory except in the simplest cases. There may however be a case for some sort of pre-trial mediation hearing in finance/property disputes, once all the evidence has been produced and filed. A relatively informal hearing before the Registrar to canvas possible solutions may lead to agreement, avoiding a lengthy contested hearing.³⁷

Following on the practice direction of 1980 the Principal Divorce Registry in London followed a pre-trial review procedure for fourteen months until the experiment was cancelled by a further practice direction in June 1981. The outcome of the cases in which pre-trial review was attempted was as follows:³⁸

	(n=102)
Settled prior to pre-trial review	1 (1%)
Settled at pre-trial review	2 (2%)
Interim or partial agreement	2 (2%)
Not settled: further directions given	59 (58%)
Not settled: no further directions given	35 (34%)
Settled, but only petitioner present and respondent subsequently denied consent	1 (1%)
Appointment not held	2 (2%)

From this it was concluded that the experiment was a failure. The Lord Chancellor commented:

a recent experiment in the Principal Divorce Registry designed to use the pre-trial review for this purpose (conciliation) has had to be discontinued because of its low success rate.³⁹

36. *Ibid.*, at p. 3.

37. *Ibid.*, at p. 5.

38. G. Davis and K. Bader, *op. cit.*, note 35, p. 11.

39. The Lord Chancellor, Lord Hailsham, addressing the Family Law Bar Association, *Divorce and its Consequences*, Family Law Bar Assoc. Conference Report, p. 12, 1981.

The Bristol researchers were interested in why the pre-trial review scheme had failed and examined the files in great detail. They identified three key elements: legal procedure, the financing of the system, lawyers' attitudes. As a reform of legal procedure a preliminary appointment for conciliation was proposed. This would be mandatory in all contested cases. Such a system has now been introduced in London for child custody disputes.

With regard to the attitudes of lawyers it is important to note that the Family Bar Association does not believe in in-court mediation. Rather it is said that negotiations can be left to take place in private between the parties and their solicitors.

...The overwhelming majority of financial problems arising on breakdown are already resolved by negotiations between the parties themselves or their lawyers and it is a relative minority of cases that actually has to be decided by the courts. Within this minority there is thought to be a number of cases where ordinary negotiation has failed and the intervention of a neutral experienced outsider might nudge the parties towards a settlement and might avoid or limit the costly and often unsatisfactory negotiations which take place outside the doors of the Courts; and if the case does after all proceed in the Courts, the recommendation may serve to have narrowed the issues which remain in dispute therein.⁴⁰

CONCILIATION IN CHILD CUSTODY DISPUTES

Despite skepticism about the value of mediation in resolving issues about property and financial applications, there is a measure of agreement that conciliation must be of the greatest importance in child custody disputes. The distress of children on the divorce of their parents is believed by some to be related to delinquency and criminal behaviour. Inspired by this belief the probation service in certain areas has become involved in helping parties "to separate with less trauma, thus minimising the effects of the divorce on children".⁴¹ This concern for children is not just a humanitarian concern for their needs and welfare which may be forgotten by the parents, it is also linked to anxiety about the effect on children of the atmosphere in the home generated by parental hostility and conflict.

40. Family Bar Association, "Ancillary Relief — Conciliation and Arbitration Procedures", First Working Paper, 1982.

41. P. Francis, "Divorce and the Law and Order Lobby", (1981) 11 Fam. Law 69, at p. 70.

A recent study reveals that children are very frightened by the collapse of family structure through divorce, and very stressed by bitterness expressed by parents.⁴² Children can be helped to come to terms with divorce in a number of ways. One of these is discussion with the child to make clear the reasons for the divorce, thus helping the child to understand the parental motives. Otherwise the divorce may come as a bolt from the blue which threatens the security of the child's own world. The maintenance of a relationship with both parents is also of great assistance to children, not just in terms of emotional adjustment to the divorce, but also in terms of their own development towards adulthood. In the light of this research new emphasis is being placed on working out agreements between parents on questions of access in a civilised manner, and making joint custody the norm rather than the exception. On joint custody the authors say:

Central to the notion...is an understanding that it does not mean a precise apportioning of the child's life, but a concept of two committed parents, in two separate homes, caring for their youngster in a post divorce atmosphere of civilized, respectful exchange.⁴³

The policy of conciliation in child custody disputes had found expression in a new practice direction issued by 1982.⁴⁴ This concerns a pilot scheme to be introduced in London for contested applications in matrimonial proceedings for custody, access and variation thereof. The object is "to give an opportunity for agreement to be reached without the bitterness and exchange of recriminations which often develops between the parties when these issues remain on dispute". It is also hoped that agreements will lead to savings in court time and expenses.

The scheme involves a preliminary appointment before the registrar by the parties, their legal advisers and, possibly, any children over eleven years of age. The court welfare officer is present also. The reason given for this early appointment is that "general experience has shown that the earlier a conciliation effort is deployed the more likely is the prospect of success. It is emphasised that it is extremely important that

42. See J. Wallerstein and J. Kelly, *Surviving the Breakup—How Children Cope with Divorce*, 1980. The discussion which follows is a summary of the arguments in the book.

43. *Ibid.*, at p. 310.

44. Practice Direction [1982] 3 All E.R. 988.

no affidavit should be filed or exchanged until after an unsuccessful conciliation appointment or until the registrar has so directed."⁴⁵ The role of the court welfare officer is to mediate between the parties. "If the dispute continues (before the registrar), the parties and their advisers will be given the opportunity of retiring to a private room together with the welfare officer to attempt to reach agreement. These discussions will be privileged and will not be disclosed on any subsequent application. Anything which is said before the registrar on such appointments will also remain privileged."⁴⁶

If the parties agree "the registrar will make such orders as are agreed between the parties". If the conciliation appointment is unsuccessful then the contested case will be dealt with by a different registrar and any inquiries by court welfare officers will be made by a different officer. This should be a safeguard of the parties' position in the dispute, but as will be argued later, there are problems about privilege and confidentiality.

It is too early to ascertain the success of this scheme but a similar system has been in operation in Bristol since early 1977. A study of a small number of cases heard for conciliation shows that where the issue was *care and control* the outcome was:⁴⁷

	(n=16)
Agreement, on arrival at the conciliation appointment	3 (19%)
Agreement, in the course of appointment	2 (13%)
Appointment adjourned	11 (69%)

Where the issue was disputed *access*, however, there was greater success:⁴⁸

	(n=44)
Agreement prior to appointment, appointment cancelled	3 (7%)
Appointment not kept	2 (5%)
Agreement on arrival	4 (9%)
Agreement in the course of appointment	21 (48%)
Partial agreement	1 (2%)
Appointment adjourned	13 (30%)

45. *Ibid.*

46. *Ibid.*

47. G. Davis and K. Bader, *In-Court Mediation on Custody and Access Issues at Bristol County Court—The Observation Study, 1982.*

48. *Ibid.*

A major problem that has emerged from conciliation proceedings on child custody disputes is whether the line between the duty to the court of the welfare officer to safeguard the interests of the child, and the welfare officer's role as mediator is being blurred. Under the English legislation the court, prior to granting a divorce where there are minor children, must be satisfied that arrangements for the welfare of children "are satisfactory or are the best that can be devised in the circumstances".⁴⁹ One of the ways in which the court ascertains whether the arrangements are satisfactory is by requiring an independent welfare report from the court welfare officer, although this is done only in a minority of cases. Thus, the court welfare officer may be involved on the one hand in investigating the adequacy of the parties as parents in order to advise the court on a judicial dispute, and on the other hand may be helping the parents to come to a private agreement over custody. An example of failure to maintain this boundary is the following:⁵⁰

In Leicestershire the divorce court welfare officer's report which was once a request for information has now become an opportunity to mediate. The parties are drawn together to work jointly on their responsibility for their children's future, the work goes on during the "enquiries" and ideally the welfare report merely becomes a retrospective summary of what has been achieved. The parties are not permitted to use the request for a welfare report from the court as an opportunity to relinquish their parental responsibility into the hands of outsiders.

The lawyer, familiar with dispute resolution through the adversarial process, can quickly see the implicit threat to the interests of the parties in the blurring of this boundary. In judicial proceedings privilege, confidentiality, and individual freedom are carefully safe-guarded. There are dangers that mediation or conciliation may be used to gain more information for a welfare report, which is then used in adversarial proceedings. Davis and Bader express their misgivings thus:⁵¹

It is necessary to distinguish between the officer's use of welfare inquiry to promote 'conciliation' and the converse, his use of the mediation appointment to arrive at a better informed report. We have always understood that in the mediation context, there is a clear limit to the authority of registrars and welfare officers.

⁴⁹ Matrimonial Causes Act, 1973, S.41(1)(b).

⁵⁰ P. Francis, *op. cit.*, note 41, at p. 72.

⁵¹ G. Davis and K. Bader, *op. cit.*, note 47 at p. 30.

In-court mediation, as with conciliation through independent services, is based, implicitly if not explicitly, on an understanding that such negotiations are privileged.

It is not just the interests of the parents that are threatened by this blurring of boundaries: so too are the interests of the children. In the desire to achieve a conciliated agreement the mediating welfare officer may overlook the best interests of the child. Yet it is the welfare of the child that should be the primary consideration in custody proceedings.

ISSUES IN CONCILIATION PRACTICE

The success or failure of reconciliation, mediation, and conciliation practices can only be judged when success has been defined. At present conciliators claim a high success rate, but what does success mean? Davis suggests that there are considerable pressures on divorcing couples to come to a settlement and that the quality of the settlement is a matter of private judgment which is difficult to assess. He goes on:

It may be useful to distinguish between settling disputes, that is, putting a stop to overt conflict and, on the other hand, achieving *a resolution*, which may be defined as genuine agreement, or harmony. 'Settlement' may include various forms of disengagement, including withdrawal or surrender—the dispute may no longer be manifest but it remains latent. 'Resolution', on the other hand, implies that both parties are truly satisfied with the outcome. I suspect that settlement is the norm, whilst true resolution is relatively uncommon.

However, before any attempt is made to measure success there are certain issues in conciliation procedures that have to be examined. These are issues of practice such as privilege and confidentiality, compulsory conciliation; issues of substance such as the role of the mediator, inequality of bargaining power of the parties; and finally the issue of judicial resolution of subsequent disputes arising from conciliated agreements.

a. *Privilege and Confidentiality*

In *Pais v. Pais* Baker J. stated:⁵³

It may be that it would be very convenient and just that it should be the law, but in my opinion it is not the law of England and

52. G. Davis, "Conciliation and the Professions" (1983) 13 Fam. Law 6 at p. 7.

53. [1970] 3 All E.R. 491 at p. 493.

Wales that there is a privilege attaching to a priest or other professional man, or to any other marriage guidance counsellors as such.

It is true that the practice direction on child custody application specifically attaches privilege to anything said at the conciliation appointment before the registrar or court welfare officer, but this does not resolve the issue of privilege in other conciliation hearings by independent mediators.

b. *Compulsory Conciliation*

Malaysian divorce law requires the petitioner wishing to divorce on grounds of irretrievable breakdown, to refer "the matrimonial difficulty to a conciliatory body".⁵⁴ It is only after the conciliatory body "has certified that it has failed to reconcile the parties" that the petition can be presented, with certain exceptions.⁵⁵ The conciliatory body may be a religious council for reconciliation, a marriage tribunal, or any other body approved by the Minister by notice in the Gazette.⁵⁶ The conciliatory body has six months in which to resolve the matrimonial difficulty, the parties may be required to attend but are specifically prohibited from being represented by advocates or solicitors.⁵⁷ The conciliatory body, if it is unable to persuade the parties to resume married life together, issues a certificate, which may contain recommendations "regarding maintenance, division of the matrimonial property and the custody of the minor children, if any, of the marriage".⁵⁸

The Malaysian provisions on conciliation, which do not apply to divorce petitions under section 51 (conversion to Islam), or section 52 (mutual consent), suggest that the fault of one of the parties may be raised on divorce. This fault might relate to the breakdown of the marriage (adultery, unreasonable behaviour, desertion)⁵⁹ or to a refusal to reconcile. Since the conciliatory body has powers to make recommendations

54. Law Reform (Marriage and Divorce) Act, 1976, S.106(1).

55. *Ibid.*, the exceptions are contained in the proviso to S.106(1). The exceptions relate to the disappearance or unavailability of the respondent, wilful refusal of the respondent to attend a conciliation hearing, imprisonment of the respondent for a term of five years or more, incurable mental illness of the respondent, or other exceptional circumstances.

56. *Ibid.*, S.106(3).

57. *Ibid.*, S.106(5)(a).

58. *Ibid.*, S.106(5)(b).

59. *Ibid.*, S.54(1). See also SS.58 and 59.

about financial and custody matters, it can take into account the parties' attitude to reconciliation.

Compulsory reconciliation as a social policy has been rejected by Western legal systems. The reasons are usually expressed in terms of unworkability, and violation of personal freedom and privacy. Thus Rheinstein argued against compulsory reconciliation on the grounds that "the right of one spouse to a divorce would depend on a marriage counsellor's guesswork as to the 'curability' of the marriage — in other words the 'right' to a divorce would turn on a matter of prognosticative opinion, rather than on legally provable grounds".⁶⁰ Other writers have referred to "the unwilling revelation to a third party of the most intimate aspects of a human relationship".⁶¹ However, a mandatory court based procedure of a conciliation hearing in which the parties try to come to an agreement over their divorce is now being advocated.⁶² In other words reconciliation is mandatory in Malaysia for some divorces, but not in England for any. But mandatory conciliation procedures may yet be imposed in both jurisdictions.

c. *The Role of the Mediator*

This paper has already suggested that there are problems of definition in the role of mediator; this may also be true of the Malaysian Conciliatory body. Ideally the mediator who is helping couples to reach a settlement should always see both parties together; should not support one party more than the other; should encourage both parties to express their feelings; should not judge the parties.

Where the object of the process is reconciliation then it may be appropriate to see clients singly and to use a therapeutic approach involving psychological exploration and personality transformation.

d. *Inequality of Bargaining Power*

The idea that the majority of divorcing couples negotiate privately between themselves or with the aid of their legal advisers was termed "bargaining in the shadow of the law"

60. M. Rheinstein, "The Law of Divorce and Problem of Marital Stability", (1956) 9 Vand. L. Rev. 633.

61. D.E. Seidelson, "Systematic Marriage Investigation and Counselling in Divorce Cases" (1967) Geo. Wash. L. Rev. 60.

62. G. Davis, *op. cit.*, note 52 at p. 12.

by Mnookin.⁶³ In Mnookin's world of private ordering the role of the law is to act as a safety net where the bargaining spouses fail to agree. Mnookin gives the term "private ordering" to the "process by which parties to a marriage are empowered to create their own legally enforceable commitments".⁶⁴ This bargaining takes place against a legal backdrop. Legal provisions which give guidance to the divorcing couple as to how to order their affairs are crucial to the agreement that is reached. Obviously then, it is of the utmost importance that the spouses know their rights and entitlements under the law.

Rules, it is agreed, are bargaining counters in private negotiations. Beliefs about rules are crucial to the scope of the negotiations before the bargain is struck. Without rules, will not the strong overpower the weak? Do not the rules protect the weak and create an equality of bargaining power? If so, then the rules, as standards for the negotiating process, are essential.

The concept of an unconscionable bargain has been developed in the past decade to deal with cases of inequality of bargaining power. As a concept it acknowledges that there may be differentials of power where parties come together to make a contract, whether within the family, or between strangers. In *Cresswell v. Potter*⁶⁵ the matrimonial home was conveyed to the spouses as joint tenants. After the marriage had broken down an inquiry agent handed the wife a document from the husband's solicitor. The wife signed and subsequently alleged that she believed the document related to the sale of the property on behalf of both spouses. In fact the document was a conveyance by the wife to the husband of her interest in the property. Megarry J. identified three factors which may lead to an unconscionable bargain: poverty and ignorance of one party; sale of the property at undervalue; lack of independent advice. The conveyance was set aside as all three factors were involved. Subsequent cases suggest that one factor may suffice.

In *Backhouse v. Backhouse*⁶⁶ the matrimonial home was in the names of both spouses. The husband got his solicitors

63. R. Mnookin, "Bargaining in the Shadow of the Law" [1979] *Current Legal Problems*, 65.

64. *Ibid.*, at p. 65.

65. *Cresswell v. Potter* (1971) 121 *NLJ* 1160.

66. *Backhouse v. Backhouse* [1978] 1 *All E.R.* 1158.

to prepare a form of transfer of the house into his name and the wife executed the transfer. Some years later, the divorce having become absolute, the wife applied for financial provision. She alleged that she had signed away her share of the house because she was affected by her husband's threats to prevent her from seeing her children. The court was satisfied "that the reason the wife signed over the transfer of the house... was that she felt a sense of guilt at what she had done".⁶⁷ The court found that the wife, in an emotional state, lacked independent advice prior to the transfer of property. She was awarded a compensatory lump sum under the discretionary powers of divorce courts.

With the growth of informal agencies to promote conciliation on divorce the courts will be confronted by increasing problems of bargains struck for the ending of marriage which may reflect inequality. The policy question for the courts is whether to follow the 'clean break' policy recently developed and to insist that the parties stick to their bargain in the interests of ending litigation, or whether to recognise the inequality which has tainted the bargain. If the latter course is chosen then the court will be unsettling the settlement or agreement arrived at privately.

e. *Unsettling the Conciliated Agreement or Settlement*

The English practice is for the bargain struck by their parties or their solicitors as to financial or custody matters to go before the registrar as a consent application. Research shows that registrars do little or no independent investigation on consent applications. At the same time, they do not wish to see themselves as merely rubber-stamping the parties' agreement. Some registrars when interviewed said that they had no worries about making a consent order where both parties were legally represented. Another registrar in the Family Division said:⁶⁸

Consent orders are nearly always a formality. I have not got time and often there is no evidence on the file. In the case of *L. v. L.* (1962) it was said that the registrar should not act as a rubber stamp and should look into every matter... I try to see if it is a reasonable settlement and I ask the wife's solicitors

67. *Ibid.*, at p. 1164.

68. W. Barrington Baker *et al.*, *The Matrimonial Jurisdiction of Registrars*, Socio-Legal Studies, Oxford, 1977, para. 4.24.

if they have weighed the pros and cons but I might do 30 consent summonses between 10.30 and 12 and I would not know the facts at all in most of them... Otherwise, I have not enough time and must assume everything is in order. Frequently, I suspect there are things they do not want me to know and perhaps it would be better for me not to know.

Malaysian law provides for reference to the court of agreements relating to divorce and for "the court to express an opinion, should it think it desirable to do so, as to the reasonableness of the agreement or the arrangement and to give such direction, if any, in the matter as it thinks fit".⁶⁹

In *L. v. L.*⁷⁰ the agreement of the divorcing parties as to the wife's future maintenance was submitted to the court and embodied in a consent order. Upon an application by the wife to re-open the matter the Court of Appeal held that, although the consent order should not be a rubber-stamping exercise, in the instant case both parties were competently advised by solicitors, one of whom was present at the hearing, so there was no reason to re-open the consent order. Davies L.J. said: "I can see nothing unfortunate whatsoever in the transaction, save that in the events that have happened it might have been better for the wife not to have made the bargain which she did".⁷¹

This view of consent orders has been subsequently upheld, although an exception has been established where one party does not make a full and frank disclosure of assets.⁷² It is generally agreed that agreements which become the subject of a consent order can work only if the parties are honest about their assets. Every divorce practitioner knows that full disclosure is difficult to obtain. Whether the agreement is the result of solicitors' negotiations on behalf of their clients, or of conciliation proceedings at which both spouses are present makes no difference. Indeed, conciliation is based on an assumption about the good faith of the parties.

With the growth of informal agencies to promote conciliation on divorce the courts will be confronted by increasing problems of whether to promote 'clean break' in the interests of

69. Law Reform (Marriage and Divorce) Act 1976, S.56.

70. *L. v. L.* [1962] P.101.

71. *Ibid.*, at p.123.

72. *Payne v. Payne* [1968] 1 All E.R. 1113.

ending litigation,⁷³ and therefore to refuse to intervene to upset the agreement, or whether to acknowledge that bargains made at a time of emotional stress may give rise to misjudgement.⁷⁴ If the Malaysian courts take an active role in scrutinising such agreements under section 56, it may be possible to avoid these problems. Given the high level of divorce in England such problems are probably inevitable.

CONCLUSION

The Denning Committee stated:

The preservation of the marriage tie is of the highest importance in the interests of society. The unity of the family is so important that, when parties are estranged, reconciliation should be attempted in every case where there is a prospect of success.⁷⁵

Malaysia has decided on the experiment of compulsory reconciliation on divorce. It is hoped that this will lead, if not to success in every case, at least to conciliation on divorce.

73. *Edgar v. Edgar* [1980] 3 All E.R. 887; *Tommey v. Tommey* [1982] All E.R. 385; *O'Dougherty v. O'Dougherty* (1982) 12 Fam. Law 248.

74. *Camm v. Camm* [1982] *The Times*, 8/12/82.

75. *Op. cit.*, note 16, para. 4.

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DEFINING THE WELFARE OF THE CHILD IN CONTESTED CUSTODY CASES UNDER MALAYSIAN LAW*

It is commonplace that the standard for determining custody decisions in most jurisdictions is that of "the welfare of the child" or "the best interests of the child." But too often it seems that welfare as a concept is an empty vessel into which the judge pours, however unconsciously, his own interpretations, prejudices, and personal experiences. Despite attempts to define welfare the concept remains elusive, and dissatisfaction with the legal standard remains a perennial problem. Efforts in providing content to the concept have recently been concentrated on interdisciplinary collaboration between child psychologists and lawyers. The purpose of this article is to consider whether such an approach could aid the Malaysian courts reaching decisions in custody cases, and the extent to which the courts already interpret welfare in line with the precepts laid down by the psychologists.

The Guardianship of Infants Act 1961 lays down the standard for determining custody cases in Peninsular Malaysia. Section 11 requires that the Court or Judge exercising powers to determine custody:

"shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be."

Sabah law contains an identical provision, and the law of both jurisdictions will be discussed as Malaysian law.¹ Singapore^{1 2}

*I am grateful to Professor Ahmad Ibrahim, Dean of the Faculty of Law University of Malaya for writing an addendum to this article (see page 61). The addendum deals with a number of decisions in the Syariah Courts in Malaysia. See also his article "Custody of Muslim Infants" in [1977] JMCL 19.

¹North Borneo Guardianship of Infants Ordinance, (Cap. 54).

¹²The Guardianship of Infants Act, (Cap. 22 of the Revised Edition, 1970).

and Sarawak,² on the other hand, use the wording of the English legislation, the Guardianship of Minors Act 1971, which is a consolidation of earlier legislation and provides that welfare is to be regarded as the "first and paramount consideration" in the determination of child custody disputes.³ The use of these words in English statute law goes back to 1925,⁴ so there are a large number of precedent cases on which the Singapore courts may draw on the grounds that the statutes are *in pari materiae*.

The Malaysian courts also have looked to English precedent for guidance in the interpretation of section 11 of the Guardianship of Infants Act 1961. But are they correct in so doing? Two reasons for looking to English law and practice can be adduced. Nevertheless, it is submitted that the English cases have no authority in the interpretation of section 11 and that the different wording of the two Acts is crucial to the judicial determination of welfare of the child in either jurisdiction.

The first reason the Malaysian courts give for looking to English decisions in custody cases is contained in section 27 of the Civil Law Act 1956 (which re-enacted section 6(1) of the Civil Law Enactment 1937), and provides:

"In all cases relating to the custody and control of infants the law to be administered shall be the same as would have

² Guardianship of Infants Ordinance (Cap. 93), (Sarawak).

³ The Guardianship of Minors Act 1971 (England and Wales) repealed the Guardianship of Infants Acts 1886 and 1925 and consolidated their provisions into one Act. It made no changes in the substantive law. Section 1 provides:

"Where in any proceedings before any court . . .

(a) the custody or upbringing of a minor ; or
(b) the administration of any property belonging to or held on trust for a minor, or the application of the income thereof.

is in question, the court in deciding that question, shall regard the welfare of the minor as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father."

⁴ The Guardianship of Infants Act 1925 gave statutory effect to the rule that in any dispute relating to a child that the court must regard its welfare as the first and paramount consideration. However, equity had intervened earlier in *R. v. Gyngall* [1893] 2 Q.B. 232 to mitigate the father's absolute right to custody in the interests of the welfare of the child.

been administered in England at the date of the coming into force of this Act, regard being had to the religion and customs of the parties concerned, unless other provision is or shall be made by written law.”

However, the enactment of the Guardianship of Infants Act in 1961 renders obsolete the direct application of “like cases in England”, provision now having been made by the written law of Malaysia for custody and control of legitimate infants.^{4a} Reliance on the Civil Law Act in reasoning creates judicial error.⁵ Thus the role of English cases must be limited to providing assistance in the interpretation of statutes *in pari materiae*. This is the second reason for basing decisions on custody in Malaysian law on English precedent.

The Malaysian courts do not appear to attach any importance to the different wording of the 1961 Act, as compared to the English legislation.⁶ Yet the two statutes can hardly be said to be *in pari materiae*. For the Malaysian court or judge is limited by the language of section 11 to taking account of two matters only: the welfare of the child, which is primary, and the wishes of the parents, which are secondary. The language used in section 11 does not permit other matters to be taken into account. Thus the court’s discretion is limited, although it may reach its own conclusions on what constitutes welfare. English courts, on the other hand, in interpreting the words “first and paramount consideration” have held that this means that welfare is not the sole consideration, and that other considerations may be taken into account apart from the child’s welfare. Here it does seem that the different language contained in the two Acts makes a material difference in their interpretation. There-

^{4a}In *Re Balasingam & Paravathy, Infants* [1970] 2 M.L.J. 74, it was held by the Kuala Lumpur High Court that the Guardianship of Infants Act does not apply to illegitimate children. Therefore, in such cases English law in force in 1956 will apply.

⁵This error was made in *Kok Yoong Heong v. Choong Tbean Sang*, [1976] 1 M.L.J. 292; and in *Chuah Thye Peng & Anor v. Kuan Huan Oong*, [1978] 2 M.L.J. 217.

⁶The difference in language was referred to by Ong Hock Sim, F.J. in his dissenting opinion in *Lob Kon Fab v. Lee Moy Lan*, [1976] 2 M.L.J. 199 at p. 203. But ironically, this opinion was based on two English precedents which have no authority in the interpretation of section 11 of the Guardianship of Infants Act 1961, since they clearly relate to the interpretation of the different English Act.

fore, those Malaysian cases in which "other considerations", outside the welfare of the child and the wishes of the parents, have been borne in mind in arriving at a custody decision have been wrongly decided. This point will be elaborated in the course of discussion below.⁷

THE MALAYSIAN AND THE ENGLISH CASES COMPARED

Discretion is conferred on the decision-maker by the use of the word "welfare" in both the Malaysian and the English legislation. But a form of words such as "paramount consideration" which permits the taking account of other considerations than welfare appears to confer a wider discretion on the English judge than that conferred on the Malaysian judge who is limited to the child's welfare and the parent's wishes. Yet it is interesting to note that the English courts have not taken great advantage of this power to look at other considerations, and only two such have been established. These are the conduct of the parties, and orders of courts outside the jurisdiction. The question of conduct provides a good example of the two possible approaches. In *Re L., (infants)*, the English Court of Appeal gave care and control of two girls aged six and four years to their father, taking the view that the mother had broken up the home by going to live with another man, and thus causing the contest over custody to arise. Lord Denning, M.R. stated that although "as a general rule it is better for little girls to be brought up by their mother," simple justice between the parties demanded that the father should have custody. "Whilst the welfare of the children is the first and paramount consideration, the claims of justice cannot be overlooked."⁸ Thus conduct was

⁷ An example of a case in which "other consideration" than welfare and the wishes of the child have been taken into account is, *Chuab Thye Peng & Anor. v. Kuan Huab Oong*, [1978] 2 M.L.J. 217. In *J. v. C.* [1970] A.C. 688 views were expressed in the House of Lords, at 697 and at 713-4, that all other factors are to be considered only in order to determine welfare.

⁸ [1962] 3 All E.R. 1, C.A.

⁹ *Ibid.*, at p. 4. In *Helen Ho Quee Neo v. Lim Pui Heng* [1974] 2 M.L.J. 51, the Singapore Court of Appeal looked to the conduct of the parents as a factor to be taken into consideration.

weighed against welfare, and was not subordinated to it. Megarry, J. in *Re F. (an infant)*¹⁰ applied the earlier decision of the Court of Appeal, and formulated the process of determining welfare as follows:

“The welfare of the ward is to be the pre-eminent or superior consideration; but that does not mean that I should leave out of account the conduct of the parties . . . the court should consider and weigh all the circumstances that are of any relevance. Quite apart from authority, the word ‘first’ in the section implies that there are other circumstances that are to be considered in this process of consideration and weighing.”¹¹

Despite this formulation, care and control was awarded to the mother who was responsible for the breakdown of the marriage. Lately however, there has been a tendency for the English courts to attempt to confine questions of behaviour to ascertaining the parenting abilities of the parties. On this approach justice between the parties is irrelevant, and conduct as an issue only arises in relation to the determination of welfare.¹² However, the authority of these cases is doubtful, as the views are directly in conflict with the *ratio decidendi* of *Re L*.¹³

In Malaysian custody cases the relevance of the conduct of the parties must be confined to the determination of welfare, and to the regard of the court for the wishes of the parents. It may be that the wishes of a parent who is blameless in the breakdown of the marriage ought to be placed higher than the wishes of the parent who is at fault. But no such decision has yet been made. Conduct was confined to welfare by Raja Azlan

¹⁰[1969] 2 All E.R. 766.

¹¹*Ibid.*, at pp. 767–768.

¹²In *Re D.*, [1973] Fam. 179, at p. 199, Bagnall, J. regarded the question of conduct as solely relevant to the child's welfare, and in *H. v. H. and C.*, [1969] 1 All E.R. 262 at p. 263, Salmon, L.J., in the Court of Appeal said that it was of no consequence which parent was responsible for the breakdown of the marriage.

¹³[1962] 3 All E.R. 1, C.A. But see *S v. S* [1976] 6 Family Law 148.

Shah, F.J. in *Teb Eng Kim v. Yew Peng Siong*¹⁴ where he stated:

“criticisms of the conduct of parents because they transgressed conventional moral code also have no place in custody proceedings except in as far as they reflect upon the parent’s fitness to take charge of the children.”¹⁵

This seems to be the correct approach and the views expressed by Arulanandom, J. in *Marina Nabulandran v. Appiah Nabulandran & Anor.*¹⁶ appear to be consonant with this approach:

“Counsel for the petitioner urged on me that a guilty party should not be shown any consideration at all. This may have been valid in the dark ages when adulterers were even stoned and adulteresses put to death. In the enlightened years of today this court does not hold that a spouse who commits a matrimonial offence, whether the spouse is male or female forfeits all his legal, civil and human rights. A father has as much right to custody of a child as the mother, subject to consideration for the welfare of the child. Spouses who commit matrimonial offences expose themselves to divorce proceedings and there it ends and should end.”¹⁷

DISCRETION

Discretion occurs “whenever the effective limits of the (decision maker’s) power leave him free to make a choice among possible courses of action or inaction.”¹⁸ This choice,

¹⁴ [1977] 1 M.L.J. 234.

¹⁵ *Ibid.*, at p. 239.

¹⁶ [1976] 1 M.L.J. 137. The judge’s decision on custody was reversed on appeal, but no written judgement was given.

¹⁷ *Ibid.*, at p. 138.

¹⁸ Culp Davis, K., *Discretionary Justice, A Preliminary Inquiry*, 1971.

and the freedom it entails for the judge, is a source of uneasiness for lawyers. One reason for suspicion of discretion is the unpredictability of the decision. Where a decision can be justified by a precise rule then there is not only predictability but also acceptance of the decision by the parties. Discretion, on the other hand, may have the appearance of arbitrariness. However, the justification for discretion is that in some areas of the law, especially where individual human problems are being dealt with, there must be flexibility in providing individualised justice. As Wexler observes, in certain legal fields "like punishment, child custody, prison, education, medical care, disability, insurance, welfare, matrimonial problems, etc. . . . one cannot define the cases covered by the rules carefully enough to anticipate the variety of cases that will arise."¹⁹

Given that there are advantages to conferring discretion on the decision-maker in certain areas of the law, then how is discretion to be controlled? Freedom and flexibility must not become arbitrary power. The principal method of control developed by the law is that of review on appeal. This prevents discretion from being absolute and is meant to ensure justice to the parties. In cases of child custody it is clear that the judge has considerable discretion in defining the welfare of the child in Malaysian law, but this is limited by appellate review. Non-reviewability is not an ingredient of discretion.

In recent years the Federal Court has considered its powers to review the decision in custody cases on two occasions. In *Lob Kon Fab v. Lee Moy Lan*,²⁰ Gill, C.J. considered all the factors on which the trial judge had based his decision as to the best interests and welfare of the children and concluded:

"Speaking for myself, it was impossible for me to say that the learned judge had either given weight to irrelevant or unproved matters or omitted to take into account matters that were relevant. Nor was I in a position to say that the

¹⁹Wexler, S., "Discretion: The Unacknowledged Side of the Law," (1975), 25 Univ. of Toronto L.J. 120 at p. 133.

²⁰[1976] 2 M.L.J. 199.

decision of the learned judge was improper, unjust or wrong."²¹

A close reading of the judgement of the then Chief Justice reveals that he was conscious of the wide discretionary powers that trial courts have in matters concerning custody, and that whilst he recognised that review courts have the power to reverse the decision either where the judge has gone wrong in principle.²² or where the relevant consideration are incorrectly weighed,²³ nevertheless the appeal courts are reluctant to interfere.²⁴

This matter was also clarified by Raja Azlan Shah, F.J. in *Teb Eng Kim v. Yew Peng Siong*,²⁵ where he stated:

"The position of an appellate court is quite clear. It is not entitled to interfere unless satisfied that the learned judge had clearly acted on wrong principles, e.g. if he had acted under any misapprehension of fact in the exercise of his discretion by either giving weight to irrelevant or unproved matter or omitting to take into consideration matters which were relevant. The possibility, or even the probability that it would have come to a different conclusion on the same

²¹ *Ibid.*, at p. 202.

²² See *Evans v. Bartlam* [1937] A.C. 473 at p. 486 where Lord Wright stated:

"It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the court is clearly satisfied that he was wrong. But the Court is not entitled simply to say that if the judge had jurisdiction and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied a wrong principle. The court must if necessary examine a new the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order."

²³ See *Blunt v. Blunt* [1943] A.C. 517 at p. 526; *Ward v. James* [1966] 1 Q.B. 273, at p. 293; *Re O. (Infants)* [1971] 1 Ch. 748, at p. 755; Ahmad Ibrahim "Custody Orders — Power of Appellate Courts to Interfere with Discretion of Trial Judge," [1976] 1 M.L.J. 1xx.

²⁴ See *Re F.* [1976] 1 All E.R. 417, at 434.

²⁵ [1977] 1 M.L.J. 234.

evidence is insufficient per se to warrant interference. Giving to some factors lesser weight than the appellant's arguments demanded is also not a sufficient consideration for interference."²⁶

Thus the appeal court may not simply substitute its judgement for that of the trial court as this is not control, but merely a further exercise of discretion. There must be some wrongful reasoning by the judge in exercising discretion before interference at appellate level; and the interference will take place reluctantly. However cloudy the language of reviewing courts in describing their powers, it is clear that the breadth of the trial judge's discretion is recognised. But this is not to suggest that the judge may consider matters not laid down in statute, or read into it language which is not there.

Specification of criteria to which regard must be had in reaching a decision will also impose a constraint on the decision-maker.^{26a} As already discussed, section 11 of the Guardianship of Infants Act specifies welfare as the primary consideration and the parents' wishes as the secondary consideration. No other matters are relevant. The problem is that no criteria for determining welfare are laid down. Thus the choice of criteria and the evaluation thereof remains at the discretion of the judge.

A further area of discretion open to the decision-maker under Guardianship of Infants Act is the choice of orders to be made. Custody may be awarded to one parent, with care and control to the other. This is known as a split order.²⁷ Alternatively, custody, care and control may be awarded to one parent only. And finally, both parents may receive custody,

²⁶*Ibid.*, at p. 239.

^{26a}The Divorce Ordinance 1952, which applies in Peninsular Malaysia, gives absolute discretion to the divorce court dissolving a marriage to "make such orders as it thinks fit with respect to the custody . . . of the children of the marriage" (S. 36(1)). However, even in divorce cases the courts look to the welfare provisions of the Guardianship of Infants Act 1961.

²⁷See the Singapore case *Tey Leng Yeow v. Tan Poh Hing & Anor.* [1973] 2 M.L.J. 53 where custody was awarded to the father, and care and control to the mother.

with care and control to one. This is known as joint custody.²⁸ In deciding which order to grant the judge must follow the provisions on welfare, as laid down in section 11. Thus, there is discretion in ascertaining welfare, and additional discretion in choosing the order to be made.

A NEW FORMULATION OF THE WELFARE TEST?

There has been much debate in the legal literature concerning the advantages and disadvantages of legal standards which give broad discretionary powers.²⁹ Writers unhappy with the vagueness of the welfare test, or with the way the courts have handled it, advocate a return to the rule based approach to custody. The old common-law rules, which gave total and exclusive rights to the father of the legitimate child, did have the advantage of certainty and clarity. But too high a price can be paid for predictability. Nevertheless, the advocates of a rule based system argue that the pendulum has swung too far in the direction of discretion. Is there an alternative approach which combines the concern for the individual which is safeguarded by discretion, with the clarity and predictability of rules? The *discretion v. rules* debate polarises the issue contained in the controversy. A new way of seeing custody problems has been put forward by an interdisciplinary team containing a lawyer, a child psychoanalyst, and a child psychiatrist. This is contained in the seminal work entitled *Beyond the Best Interests of the Child* by J. Goldstein, A. Freud and A. Solnit.³⁰

²⁸ On appeal to the Federal Court in *Teb Eng Kim v. Yew Peng Siong*, [1977] 1 M.L.J., 234 the appellant/father varied his original attitude and conceded that care and control be given to the respondent/mother as decided by the High Court. He requested that custody or joint custody be awarded to him, but this was rejected by the Federal Court as being inappropriate to a situation where the parents are living in different jurisdictions. The appellant relied on *Jussa v. Jussa* [1972] 2 All E.R. 600, where an order for joint custody was made.

²⁹ See Adler, M. and Bradley, J., *Justice, Discretion and Poverty* (1975).

³⁰ The Free Press, New York, 1973. A further volume entitled *Before the Best Interests of the Child* was published in 1979.

The impact of the ideas contained in *Beyond the Best Interest of the Child* can be measured by reference to the number of cases in which the American courts have cited it in giving judgement in contested custody cases.³¹ Despite its American origins the book has had effect on the laws in a number of jurisdictions.³² One reviewer referred to the book as "the most significant piece of legal writing on the subject of family law that I have ever seen."³³ It is hard to find academic articles now published in the field of child custody which do not discuss the authors' views, even if only to disagree with them.³⁴ What then are the ideas contained in this work, and what would be their impact on Malaysian law if accepted by the law-makers? The authors start with a criticism of the "best interests of the child" standard for resolving custody disputes on the grounds that too often the child's interests are subordinated to those of the adults who are competing for custody. In formulating their approach to custody problems the authors are unashamedly partisan, and the child's perspective dominates. A fresh view emerges and all claims based on parental rights, or even on simple justice to individuals, are subordinated to the child's needs. Central to this commitment to the child's side is the belief that the child's development depends upon the continuity and character of the relationship with the adult perceived by the child as parent. It is this perception of parent/child relationship, rather than the *fact of biological parenthood*, that is the basis of the child's attachment to an adult. The authors emphasise that a child's emotional attachment to an adult is based on day-to-day love and attention, and that the

³¹ See e.g. *Torrance v. Torrance*, 1 F.L.R. 2456 (1975); *Filler v. Filler*, 19 N.W. 2d, 96 (1974). Twenty-eight cases are listed by Crouch as containing references to the book. See Crouch, R.E., "An Essay on the Critical and Judicial Reception of *Beyond the Best Interests of the Child*," (1979) *Family Law Quarterly*, Vol. XIII, 49.

³² See the Report of The British Columbia Royal Commission on Family and Children's Law (Berger Commission); and the report by Justice on Parental Rights and Duties in Custody Suits (1975).

³³ Aaron, R.I., (1973) *Utah L. Rev.* 871.

³⁴ The reception of the book has not been entirely uncritical; see the article by Crouch, *supra*, note 31.

person who provides for the child's need will become the "psychological parent". Once such a relationship has been formed it ought to be maintained, if at all possible.³⁵

The authors put forward guidelines for the resolution of custody disputes to which the law-maker or the decision-maker must adhere. These do not remove discretion entirely from the judge, but limit it. The first guideline is that decisions concerning the child's future must safeguard the need for continuity of relationships. In particular, where a relationship with a psychological parent has been established there is danger in destroying that relationship by the imposition of a disruptive relationship from outside. The effects of lack of continuity are documented as ranging from distress, anxiety, and lack of trust of adults, to delinquency and criminality.³⁶ The second guideline emphasises that children have a different sense of time from adults. Therefore delays or uncertainties must be minimised in order to enable the child to make a quick adjustment to any unavoidable change.³⁷ The third guideline centres on what the authors see as the law's incapacity to deal with human relationships in the long term. There are obvious limitations on a court's practical power to control parental behaviour outside the courtroom. Law cannot make the unwilling give love. Life is uncertain, the future is unpredictable, so the decision-maker must recognise this and do the best he can for the child in the immediate future.³⁸

It might be argued that such an obviously American and psychology-based outlook has no place in Malaysian society where religion and the extended family play an important role in daily life. But it will be shown that in contested cases arising under the Guardianship of Infants Act 1961 the judiciary has shown itself sensitive to similar concerns to those proposed in

³⁵ Goldstein, Freud and Solnit, *Beyond The Best Interests of the Child*, (1973), pp. 17-21, (hereinafter referred to as *Beyond*).

³⁶ *Ibid.*, pp. 31-34.

³⁷ *Ibid.*, pp. 40-49.

³⁸ *Ibid.*, pp. 49-52.

Beyond the Best Interests of the Child. Matters to which the courts have looked in determining welfare under section 11 can be summarised as follows: continuity of care;³⁹ the young child's need of a mother's love;⁴⁰ character and behaviour of the parents;⁴¹ age and sex of the child;⁴² custom;⁴³ religion;⁴⁴ the alternative environments offered to the child;⁴⁵ the child's own wishes.⁴⁶ Analysis of the decided cases from the standpoint offered by the authors shows that Malaysian courts are aware of the dangers of disrupting a child's relationships with loved persons and with a familiar environment.

³⁹ *Lob Kon Fab v. Lee Moy Lan* [1976] 2 M.L.J. 199;
Teb Eng Kim v. Yew Peng Siong [1977] 1 MLJ. 234;
Masam v. Salina Saropa & Anor [1974] 2 M.L.J. 59, (Sarawak);
Arumugam s/o Seenivasagam v. Sinnamab (1974) M.L.J. 130.

⁴⁰ This is sometimes known as the tender years presumption, as it is based on an assumption that the mother is the best person to look after a child under the age of seven years. See *Myriam v. Mohamed Ariff* [1971] 1 M.L.J. 265;
Kok Yoong Heong v. Choong Thean Sang [1976] 1 M.L.J. 292;
Lob Kon Fab v. Lee Moh Lan, supra, note 39;
Teb Eng Kim v. Yew Peng Siong, supra, note 39;
Helen Ho Quee Neo v. Lim Pui Heng [1974] 2 M.L.J. 51, (Singapore).

⁴¹ *Marina Nabulandran v. Appiab Nabulandran & Anor* [1976] 1 M.L.J. 137. See the Singapore case *Helen Ho Quee Neo v. Lim Pui Heng* [1974] 2 M.L.J. 51.

⁴² *Yong May Inn v. Sia Kuan Seng* [1971] 1 M.L.J. 280. See The Singapore case *Sim Hong Boon v. Lois Joan Sim* [1973] 1 M.L.J. 1.

⁴³ *Sp. Ponniah Pillay v. Sethamarai d/o Vellasamy* [1954] M.L.J. 175.

⁴⁴ In *Chuab Thye Peng Anor v. Kuan Huab Oong* [1978] 2 M.L.J. 217 religion is taken as a separate consideration from welfare.

⁴⁵ *Re Satpal Singh (an infant)* [1958] 24. M.L.J. 283; *Wong Chen Pob v. Lo Yu Kyau* [1970] 2 M.L.J. 57.

⁴⁶ *Myriam v. Mohamed Arif*, note 40 supra;
Teb Eng Kim v. Yew Peng Siong, note 39 supra;
Arumugam s/o Seenivasagam v. Sinnamab, note 39 supra.
In *Yong May Inn v. Sia Kuan Seng*, note 40 supra, and in the Singapore case *Re Miskin Rowter* [1963] M.L.J. 341, the wishes of the children involved were disregarded. In *Kok Yoong Heng v. Choong Thean Sang*, supra note 40, at p. 294. Arulanandom, J. said "The these cases the court is not bound by the views of minors because of their tender years they are influenced by people around them."

THE GUIDELINES APPLIED

The desirability of providing for continuity of relationships has been emphasised by the Malaysian courts in a number of cases. In *Lob Kon Fab v. Lee Moy Lan*⁴⁷ the parents of three children aged between eight and eleven years were living separately; and the father, who was living in Ipoh, applied to the High Court for custody of the children. The mother and the children had been living in Singapore for the previous five years by agreement between the spouses. Hashim Yeop A. Sani, J. was unwilling to disturb the children, as the mother had made it clear that she would not return to her husband under present circumstances. He therefore vested custody in the mother through application of the welfare principle, but left guardianship in the father.

On appeal the Federal Court confirmed this decision by majority. Gill, C.J., cited with approval the judge's view that it was in the best interest of the infants that they should remain with their mother:

“ . . . the infants should not be deprived of the love and devotion of their natural mother if the mother has been shown capable of giving them.”⁴⁸

In his dissenting opinion Ong Hock Sim, F.J., took the view that a good mother will maintain a joint home for her children with both of their parents. So the mother's conduct was not blameless, and that ought to be taken into consideration. And he further emphasised that the court must consider not only “the disruptive aspect involved in separating the children from the mother who has been caring for them since their birth”, but that “the long term interests of the children must also be taken into account.”⁴⁹ This dissent was based on two English cases,

⁴⁷ [1976] 2 M.L.J. 199 (F.C.); 88 (H.C.).

⁴⁸ *Ibid.*, at p. 201.

⁴⁹ *Ibid.*, at p. 204.

*Re L.*⁵⁰ and *Re F.*,⁵¹ which, as discussed earlier, have no authority in interpretation of section 11 of the Guardianship of Infants Act 1961.

From the standpoint of the authors of *Beyond the Best Interests of the Child* there can be no doubt that the Federal Court was correct in dismissing the appeal. The authors specifically deny that it is possible to take the long term view in these decisions, given the uncertainties of life and the unpredictability of the future.⁵² And we can see that both the High Court and the Federal Court operated on a concept similar to that of "psychological parent" although termed "the natural mother."

Psychological parenthood — although not so called — obviously weighed heavily with Abdul Hamid, J. in giving his decision in the Kuala Lumpur High Court in *Myriam v. Mohamed Ariff*.⁵³ Describing the male infant's joy on seeing his mother, the applicant, in judge's chambers he said:

"I do not think words alone are adequate to describe the expression of love and affection that his eyes seemed to convey when he greeted the applicant, particularly judging from the manner he sat upon the applicant's lap with one arm around her neck. To my mind it would not be in the interests and welfare of this infant that he should be denied of the natural mother's love, care and affection."⁵⁴

In giving custody of this child to his mother the judge was applying the welfare test, which is also applicable under Islamic Law. The Judge's reasoning has been criticised as giving primacy to civil law over Islamic Law,⁵⁵ but it seems that the result would have been the same under either system.

⁵⁰ [1962] 3 All E.R. 1.

⁵¹ [1969] 2 All E.R. 766.

⁵² *Beyond*, pp. 49 & 50.

⁵³ [1971] 1 M.L.J. 265.

⁵⁴ *Ibid.*, at p. 270.

⁵⁵ See Mehrun Siraj, "Current Legislation in Peninsular Malaysia", [1975] 1 M.L.J. xciii.

In *Teh Eng Kim v. Yew Peng Siong*⁵⁶ the emotional attachment of the children to their mother was the major reason why Arulanandom, J. in the High Court in Penang gave custody, care and control to her on her application after divorce. This was despite the fact that the mother was emigrating to Australia, as the judge said that "from an emotional and psychological point of view the court was of the opinion that they would be far happier and better off with their mother, be it they were living in Australia or in Malaysia."⁵⁷ On appeal, the Federal Court upheld the judgement and rejected the father's application that custody or joint custody be given to him, with care and control remaining with the mother. This type of split order is possible, but on this occasion was considered inappropriate. Raja Azlan Shah, F.J., stated:

"The position as I see it is to disregard entirely any concept of parental claim. As the welfare of the children is the paramount consideration, the welfare of these three children prevails over parental claim. The father's claim to make major decisions with regard to his children's future and education enters into consideration as one of the factors in considering their welfare, but not as dominating factor if it is in conflict with their welfare."⁵⁸

Both the High Court and the Federal Court placed emphasis on the youngest child's emotional need of his mother, taking the view that a five-year old is too young to be separated from the mother. But if we apply the concept of psychological parenthood it will not necessarily be the mother to whom the child is attached, but to the person who performs the role which we most commonly call "mothering".

The unsettling effects of change of custody on the infant boy who was the subject of an appeal to the High Court in Kuching in *Masam v. Salina Saropa and Anor.*⁵⁹ was the major

⁵⁶ [1977] 1 M.L.J. 237 (F.C.); 234 (H.C.).

⁵⁷ *Ibid.*, p. 236.

⁵⁸ *Ibid.*, at p. 239.

⁵⁹ [1974] 2 M.L.J. 59.

reason for the refusal of a custody order to the biological mother. Nine days after the infant's birth the mother gave him into the care of the foster parents, and he had been with them for over two years before the case first came before the magistrate on the mother's application. B.T.H. Lee, J. in the High Court considered that "if the infant were taken away from the foster parents after such a length of time the result might be that he would develop a permanent emotional scar." The foster parents had "lavished loving care and affection on the infant" and whilst the possibility of disturbance "ought not to be regarded as a complete bar to any change,"⁶⁰ it was a circumstance to be considered. The court expressed sympathy for the mother but reiterated the magistrate's view that it was the welfare of the infant that was in question, not the welfare of the parties.

The cases discussed above are those of which the authors of *Beyond the Best Interests of the Child* would approve. But what of other cases in which the courts have seen fit to disturb the continuity of care of a child? In *Sim Hong Boon v. Lois Joan Sim*⁶¹ the Singapore appellate court gave custody of a male child to the petitioner father, despite the fact that the child had been living for two-and-a-half years previously with his mother in Australia. Wee Chong Jin, C.J. stated:

"It is said that as the paramount consideration is the welfare of the child it would not be in the child's welfare for him after a lapse of 2½ years from March 1969 till now and during which years the child has become accustomed to a way of life different from a way of life here, to uproot him and separate from him his mother to take up life in totally different surroundings and circumstances. While that is a strong factor which the court must consider, it is equally clear, we think, that in the case of a male infant, at any rate a consideration of the fact that a mother is in a better position to bring up a child is different from the case of a

⁶⁰ *Ibid.*, at p. 60.

⁶¹ [1973] 1 M.L.J. 1.

female infant. In any event it is not the immediate re-adjustment that must necessarily have to take place but in our view throughout the entire period until that child becomes capable of looking after himself, in other words becomes an adult, that ought to be considered.”⁶²

In this case the father had not lived with his son from the time the child was fifteen months. By the time the case was heard on appeal the father will have been a complete stranger to the child. Admittedly this was due to the fact that the mother remained in Australia after going there on holiday, she being an Australian citizen, and the parties having married there. However, it is doubtful whether the infant will have been able to understand the court's reasons for taking him away from the only parent he knew. This raises the question of the behaviour of the parents and, in particular, of child snatching, which is not adequately confronted in the book, and which will be discussed later.

In *Tey Leng Yeow v. Tan Poh Hing & Anor*⁶³ the Singapore High Court reviewed its previous custody order in relation to a boy of eight, custody having been granted to the father on divorce. The mother had left the father before the child was born, and the boy was aged six before he even met his father. On review Winslow, J. said that he would not have given custody to the father had he been aware of the mother's views, but that she did not enter an appearance because she had misunderstood the potition when she had decided not to contest the divorce. He went on to say:

“The father's attitude seemed to me to be prompted by a sense of proprietary rights over the son rather than by any bond of love or affection. I was certainly more impressed by the boy's need for his mother. He was anxious to see his mother whom he had never seen since his father took him over.”⁶⁴

⁶² *Ibid.*, at p. 2.

⁶³ [1973] 2 M.L.J. 53.

⁶⁴ *Ibid.*, at p. 54.

Care and control was given to the mother with custody to the father, and the Court of Appeal dismissed the appeal and cross appeal. From the child's viewpoint the outcome of this case was eventually happy, but he had to endure some months of emotional and educational disturbance before the court put the matter right.

*Re Miskin Rowter*⁶⁵ is a case in which it is particularly hard to understand the attitude of the Singapore High Court to the question of custody, unless the matter is considered solely from the standpoint of proprietary rights of parents. There a ten-year-old child was transferred from the only parents he had ever known to the natural mother, despite his expressed wish to stay with his foster parents. Ah Tah, J. observed that "having regard to the fact that he had been brought up by the respondent and his wife since he was about 16 days old, I thought it natural that he should give the answers which he did," on being questioned by the judge as to his preference.⁶⁶ According to the authors of *Beyond the Best Interests of the Child* this is the kind of disturbance which can lead to depression, emotional scarring, lack of trust in relationships, juvenile delinquency and even criminal behaviour on the part of the child as he grows up.⁶⁷

The infant in *Chuah Thye Peng & Anor v. Kuan Huah Oong*⁶⁸ was only one year old when a change of his custody was ordered by the High Court in Penang. So there may be no lasting effects from the disturbance. However, it was the second change of custody in five months, and thus the dangers attendant to it were greater. The facts were that the biological parents were killed in an air crash, and that they had previously been living with the child's maternal grandmother in the house in which the child had been born. The child, who was then aged seven months, was left in the care of the maternal grandmother in his

⁶⁵ [1963] M.L.J. 341.

⁶⁶ *Ibid.*, at 432.

⁶⁷ *Beyond*, pp. 32 – 34.

⁶⁸ [1978] 2 M.L.J. 217.

normal home. The paternal grandparents applied for custody almost immediately, but it took five months for the case to be disposed of. Gunn Chit Tuan, J. considered the argument that the change of custody would adversely affect the child, but said that welfare was only one of the factors to be considered, and that although special weight must be given to it, that this does not mean that it is the only consideration. His view was that since the child was normal, and since there was no medical evidence, he was not prepared to speculate on any possible adverse effects. "As far as I am aware it is not uncommon in this country for babies of young Alexander's age to be given in adoption without any adverse effects after a change of custody."⁶⁹ And he later stated that he had come to the conclusion "on the balance of probabilities, that although there might be some transient effects of taking the infant away from the respondent, there would be no long term detriment to his health and welfare in the circumstances of this case."⁷⁰

If the viewpoint of the child, Alexander, in this case is considered then we find that he has undergone two disturbances in the course of his first year of life. The first occurred at seven months, when his parents disappeared from his life. The second occurred at one year, when he was forced to leave the only home he had known. According to the authors of *Beyond the Best Interests of the Child* any change of routine of an infant "leads to food refusals, digestive upsets, sleeping difficulties, and crying." . . . Any move "inevitably brings with it changes in the ways the infant is handled, fed, put to bed, and comforted. Such moves from the familiar to the unfamiliar cause discomfort, distress, and delays in the infant's orientation and adaptation within his surroundings." But the effects of a change of environment are less than those of a change of person taking care of the infant: "When infants and young children find themselves abandoned by the parent, they not only suffer separation distress and anxiety but also setbacks in the quality of their next attachments, which will be less trustful. Where continuity

⁶⁹ *Ibid.*, at p. 220.

⁷⁰ *Ibid.*, at p. 221.

of such relationships is interrupted more than once, . . . the children's emotional attachments become increasingly shallow and indiscriminate. They tend to grow up as persons who lack warmth in their contacts with fellow beings."⁷¹

The consideration which swayed the judge in favour of the paternal grandparents were primarily religious. The wishes of the child's father were assumed to be that his son should be brought up in the same religion as himself, the religion shared by the paternal grandparents. The maternal grandmother was of a different faith. Furthermore, Chinese customary law gave precedence to the paternal side in custody cases. Gunn Chit Tuan, J.'s view was that these other factors must also be considered:

"Although the welfare of the infant is of paramount importance, it does not mean that it is the exclusive and only consideration. The use of the word "primarily" by the legislature in the above quoted section implies that there are other circumstances that are to be considered in the process of consideration and weighing. Special weight must be given to the welfare of the infant but this does not mean that other factors should be left out."⁷²

As can be seen from this extract from the judgement, the judge separated welfare from other factors, and welfare seems to have been equated with continuity of care. The idea that other factors, apart from the wishes of the parents, are to be looked at *solely in order to determine welfare* does not appear to have been argued before the judge. And even if the emphasis on religion can be justified as being consonant with the supposed wishes of the father, section 11 mentions both parents, and not merely the father. The residence of the parents with the maternal grandmother, the fact that they left the child with her, both of these are factors from which the wishes of the parents could also be derived. Therefore, it is submitted that this judgement,

⁷¹ *Beyond*, p. 33.

⁷² [1978] 2 MLJ. 217, at p. 220.

whether regarded from the standpoint of the authors of *Beyond the Best Interests of the Child*, or from the standpoint of interpretation of section 11 of the Guardianship of Infants Act 1961, is to be regretted.

The two remaining guidelines proposed by *Beyond the Best Interests of the Child* are that all decisions about a child's future and custody should reflect a "child's-sense-of-time," and that such decisions "must take into account the law's incapacity to supervise interpersonal relationships and the limits of knowledge to make long range predictions." The child's sense of time is explained as follows:

"Unlike adults, who have learned to anticipate the future and thus to manage delay, children have a built-in time sense based on the urgency of their instinctual and emotional needs . . .

Emotionally and intellectually an infant and toddler cannot stretch his waiting time more than a few days without feeling overwhelmed by the absence of parents . . ."⁷³

The authors then propose a minimum of delay in custody decisions concerning children — a suggestion that few can fault. For instance, if the law had moved quickly in the English case *J v. C* the matter would not have taken five-and-a-half-years before final decision was given in the House of Lords.⁷⁴ The dangers of delay are that the child will become attached to those people who are now taking care of him, and so, will be disturbed if moved again. Yet, the delay may not be the fault of those who are attempting to get custody, or to regain it. So, if at all possible, the matter should be treated as urgent.

Certain implications drawn by the authors from this guideline have caused controversy. On adoption, they argue that a child to be adopted should be placed with the adoptive parents immediately after birth, and that the adoption should

⁷³ *Beyond*, p.40.

⁷⁴ *J. v. C.* [1970] A.C. 668.

then be final. The reason they give for this is the avoidance of delay; and the justification is that in the case of biological parents, this is what happens. This would mean that there would be no more supervision of adoption than there is of any parent/child relationship. The Malaysian law of adoption permits placement of a child with the adoptive parents immediately after birth.⁷⁵ But there is a supervision period of a minimum of three months. This seems sensible, as, however much the authors may wish it otherwise, natural parents are in a different relationship to a child than adoptive parents. Parental consent to adoption can be given at birth, whereas in English law the child must be at least six weeks old when the document was executed.⁷⁶ The reason for the English provision is that it is believed that the mother may give consent whilst still suffering from post-natal depression, and that she may later change her mind.⁷⁷ Adoption practice, in fact, ensures that the child remains with the mother until six weeks after birth, during which time the mother has time to reflect. It is difficult to assess the merits of the waiting period of six weeks, but there is some criticism of it as placing primacy upon parental rights.⁷⁸

On divorce the authors of *Beyond the Best Interests of the Child* argue in favour of the custody proceedings preceding the divorce hearing. This would have the advantage of avoiding any delays in deciding on the children's future, and of removing the question of custody from the arena of the divorce. There is evidence to indicate that children may be used as bargaining

⁷⁵ Adoption Ordinance, 1972 (Peninsular Malaysia).

⁷⁶ Adoption Act 1976, S. 16(4), (England and Wales).

⁷⁷ Consent is revocable until the adoption order is made by the court: Adoption Act 1976, s.16(3). But under the American Revised Uniform Adoption Act consent may be withdrawn only if the court is satisfied that this is in the child's best interests.

⁷⁸ Report of the Departmental Committee on the Adoption of Children (The Houghton Report), Cmnd., (5107), 1972. Research carried out for the Houghton Committee revealed that four out of five mothers would have preferred consent to have been final when first given for the adoption of their babies. See Raynor, L., "Mothers, Children and Adoption", *New Society*, 16 March 1972. The Children Act 1975, enables a child to be freed for adoption, in an attempt to overcome the uncertainty and possibility of withdrawal of consent.



counters in divorce proceedings, and that the outcome of the divorce dictates the custody resolution.⁷⁹ But this is only in the minority of contested cases. Most divorces are resolved by agreement. A recent study by the Oxford Socio-Legal Centre found that of divorces where there were minor children, only 6.9 per cent. were contested, and that in only 0.6 per cent. of the uncontested cases was the child's residence changed.⁸⁰ Nevertheless, despite the criticism that the guidelines concentrate too much on litigation and fringe cases, this suggestion is sensible.

The most controversial of the implications of the child's sense-of-time guideline is the proposal that a child be declared eligible for adoption or for a custody order in favour of the psychological parents as soon as "that parent's absence has caused the child to feel no longer wanted by them. It would be that time when the child, having felt hopeless and abandoned, had reached out to establish a new relationship with an adult who is to become or has become his psychological parent."⁸¹ As critics have pointed parents will be reluctant to leave children with grandparents, relatives, friends, or even a paid nurse, if this is the rule. Yet there are occasions, such as death, illness, or accident, where it may be necessary to give a child into the care of such people.

The third guideline, which reflects the authors' view that the law cannot supervise human relationships or predict long-term outcomes of family arrangements, limits the law to immediate decisions. Thus, the law should prefer that families make their own private arrangements for the upbringing of children and limit any state intrusion to interference only when unavoidable. Furthermore, the law should be aware that its predictive ability is limited to choosing from among the available

⁷⁹ Mnookin, R.H., "Bargaining in the Shadow of the Law: The Case of Divorce," (1979) *Current Legal Problems*, 65.

⁸⁰ Eakelaar, J. and Clive, E., *Custody After Divorce*, Centre for Socio-Legal Studies, Oxford, (1977). The authors state at p. 67; "Our study confirms that the major factor taken into account by courts in deciding where a child is to live is the avoidance of disturbance of the child's permanent residence."

⁸¹ *Beyond*, p. 48.

adults the one with the best capacity to become the child's psychological parent, bearing in mind that the younger the child and the longer the period of uncertainty, the more likely that the child will be harmed by discontinuity in its relationships.⁸²

Since the adults competing for custody of the child cannot agree on what will be in the child's best interests, and cannot be free of their own interest in obtaining custody, they cannot be said to fairly represent the child's interests in the contested case. Therefore the authors propose that the child should have party status in his own right and be represented by counsel whose function it is to determine the least detrimental alternative for his client. This proposal for a child's advocate has received almost universal agreement, but it does require state or bar intervention to satisfy it.⁸³

ACCESS

Regulation of access to a child who is the subject of a custody order is at the discretion of the court under section 5 of the Guardianship of Infants Act 1961, but this is subject to the welfare provisions of section 11. In *T. v. T.*⁸⁴ the petitioner/mother had been granted a divorce and given custody of the child of the marriage. Access was granted to the respondent/father twice a week. The mother later applied to the court to deny access to the father. Evidence was accepted by the court as showing that access gave rise to emotional conflicts of loyalties for the child and had a deleterious influence on her behaviour. Gill, J. in the Kuala Lumpur High Court stated that the general principle was to grant access to the non-custodial parent, unless it is in the child's best interest to forbid it. He went on to say:

“The question of access to children whose parents have parted is always a matter which causes the courts a great

⁸² Home Office Working Party on Marriage Guidance, 1979.

⁸³ *Beyond*, pp. 65–67.

⁸⁴ [1966] 2 M.L.J. 302.

deal of anxiety. The cardinal rule is that except in very exceptional cases it would not be right from the point of view of the child to cut him or her off from all access to either of the parents. . . .

The object of allowing access to the father is to see that the child grows up knowing and loving him and not to allow him to share in the custody, care and control which must necessarily remain with the mother."⁸⁵

The judge reduced access to one Sunday morning a month "with a view to avoiding any emotional conflict of loyalties and affection in the mind of the child" and under circumstances which precluded any contact between the parents.

Liberal access is the policy of the Malaysian courts, with lengthy visits by the child to the non-custodial parent in school holidays.⁸⁶ The authors of *Beyond the Best Interests of the Child* do not accept that such a policy is necessarily in the child's best interests. They argue that it must be left to the custodial parent to determine if and when the other parent shall see the child. "Children have difficulty in relating positively to, profiting from, and maintaining the contact with two psychological parents who are not in positive contact with each other. Loyalty conflicts are common and normal under such conditions and may have devastating consequences by destroying the child's positive relationships to both parents."⁸⁷ This proposal has been attacked by critics as underestimating the importance to the child of maintaining contact with the non-

⁸⁵ *Ibid.*, at pp. 304-305.

⁸⁶ In *Myriam v. Mobamed Ariff* [1971] 1 M.L.J. 265, access was granted for half the school holidays and on one week-end in each month on Saturday and Sunday between 9 a.m. and 6 p.m.

In *Teb Eng Kim v. Yew Peng Siong* [1977] 1 M.L.J. 234, access was given at all times and the petitioner was required to give an undertaking to send the children to visit their father in Malaysia at least once a year during the school holidays.

In *Lob Kon Fab v. Lee Moy Lan* [1976] 2 M.L.J. 199 [F.C.]; 88 (H.C.), unrestricted access at all times was granted to the father.

⁸⁷ *Beyond*, p. 40

custodial parent. Others have challenged it as unfair. And it has been pointed out that such a rule might lead to much greater litigation over custody than at present, for the non-custodial parent risks losing the child completely. Added to this is recent evidence which shows that the more amicable the divorce, the better relationship the parents will have afterwards and the easier it is for children to cope with the problem of the break-up of the family.⁸⁸ Thus, it seems that to deprive children of contact with one parent is not for their welfare.

THE LAW REFORM (MARRIAGE AND DIVORCE) ACT 1976

Thus far in this article the argument has proceeded on the basis that all cases of custody are governed by the welfare provisions contained in the Guardianship of Infants Act 1961. This will no longer be the case once the Law Reform (Marriage and Divorce) Act 1976, as amended in 1980, comes into force.⁸⁹ Thereafter different principles will apply where custody issues arise in the course of matrimonial proceedings. Where a marriage is dissolved by divorce or by nullity suit, the new Act will apply, although the relationship of the two Acts is not yet entirely clear. Obviously the later Act represents current thinking on the continuing problem of allocating custody and it is of interest to compare its approach with that of the earlier Act.

The 1976 Act has opted for a more limited form of discretion accorded to the decision-maker in custody cases, than that accorded by the 1961 Act. It spells out in some detail the powers of the court, the factors to which the court must have regard before reaching a decision, the conditions on which custody may be exercised, and the persons who may be entitled to custody.⁹⁰ This enumeration of specific and limited criteria for a decision does assist the control of discretion by appellate review, but it does not necessarily follow that the new provisions are superior to those contained in the 1961 Act.

⁸⁸ Dyer C., "The Divorce Debate 1980: Trying to Get Rid of the Bitterness that Remains," *The Times*, August 6, 1980.

⁸⁹ As yet, no date for the coming into force of the Act, as amended, is known.

⁹⁰ Law Reform (Marriage and Divorce) Act, 1976, Ss. 88 and 89.

Part Eight of the Act is entitled "Protection of Children", and the object is clearly that of ensuring the least detrimental outcome for children whose parents' marriage is being dissolved. Welfare is the paramount consideration in making a decision on custody on divorce, but "subject to this the court shall have regard" to a variety of factors.⁹¹ These are the wishes of the parent;⁹² the wishes of the child, if old enough to express an independent opinion;⁹³ the rebuttable presumption that "it is for the good of a child below the age of seven years to be with his or her mother", with the qualification that "in deciding whether the presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody",⁹⁴ and finally, each child is to be considered separately, its welfare is to be treated independently of the other children of the family, and the court is not bound to place siblings together.⁹⁵

The question that immediately arises is whether factors other than those enumerated above may also be taken into account. The wording of the Act suggests that the answer to this is no. For there would be no point in listing the matters to which the court must have regard, if the legislative intention is to permit other extraneous matters which are not mentioned to be imported into the statute. So, factors such as the age and sex of the child, the character and behaviour of the parents, religion, and custom can only be considered under the welfare test. That is, they can only be taken into account in order to determine what the child's best interests are.

It is not surprising to find that the parents' wishes are to be taken into account before reaching a decision under the provisions of the new Act, as this is specifically mentioned in the 1961 Act. However, the specification of the child's wishes as a

⁹¹ *Ibid.*, S. 88.

⁹² *Ibid.*, S. 88(2)(a).

⁹³ *Ibid.*, S. 88(2)(b).

⁹⁴ *Ibid.*, S. 88(3). To compare the position in Islamic Law see the addendum to this article by Professor Ahmad Ibrahim and see also his article "Custody of Muslim Infants" [1977] J.M.C.L. Vol. 4, 19.

⁹⁵ *Ibid.*, S. 88(4).

matter to which the court must have regard is unnecessary, since Malaysian case-law indicates that the courts already interview children who are the subject of custody suits.⁹⁶ This is generally done as part of the welfare test, although the courts have always made it clear that they are not bound by the child's wishes. The rebuttable presumption in favour of the mother of a child under seven is a new provision. No doubt it is based on the assumption that a young child needs its mother; the courts, as we have seen above, also share this assumption. If the mother is the child's psychological parent the welfare test is sufficient to give custody to her without any necessity for a statutory presumption in her favour. There are cases, perhaps a minority, where children are more attached to the father but the presumption does not allow for these.⁹⁷ The wording of this provision does not make clear how the presumption can be rebutted. Is it rebuttable only by consideration of the "undesirability of disturbing the life of a child by changes of custody", which is the only matter mentioned in the statute? Or can it be rebutted by other evidence? If the courts interpret the provision as rebuttable only by considerations of continuity of care, fathers will be at a severe disadvantage. For the presumption will operate as a rule in favour of the mother, provided she has lived continuously with the child. The father who desires custody, and who has also lived continuously with the child, will be faced with a maternal preference rule, where the child is aged under seven. Furthermore, the continuity of care principle will prevent him from gaining custody at a later date. As argued earlier in this article, it is highly desirable that the principle of continuity of care be recognised and be incorporated into custody rules, but is there any necessity for a rule favouring one parent over the other on the basis of sex? Choice of the most suitable parent for custody was left the discretion of the judge by the 1961 legislation, to be decided on an estimation of the child's welfare. It

⁹⁶ Children have been interviewed by the Trial Court judge in the following cases: *Arumugam s/o Seenivasagam v. Sinnamab* [1959] M.L.J. 130; *Lob Kon Fab v. Lee Moy Lan* [1976] 2 M.L.J. 88; *Teb Eng Kim v. Yew Peng Siong* [1977] 1 M.L.J. 234; *Myriam v. Mohammed Ariff* [1971] 1 M.L.J. 265; *Yong May Inn v. Sia Kuan Seng* [1971] 1 M.L.J. 280.

⁹⁷ See "Developments in the Law — the Constitution and the Family", (1980) *Harvard Law Review*, Vol. 93, p. 1159, at pp. 1333–1338.

is true that the child of tender years was subjected to a presumption in favour of the mother, but this was considered by courts as one factor among many which were to be weighed in determining the welfare of the child. In other jurisdictions where maternal preference is the rule, it is applied as a tie-breaker where the parents are equally suitable for custody in all other respects. The most extreme version of the maternal preference rule is where it can be rebutted only by showing that the mother is unfit to have custody. Under the 1976 Act maternal preference is effectively a rule, but whether the courts will treat the rule as one factor among many in determining welfare, or as a tie-breaker, or as rebuttable only by proof that the mother is unfit, is yet unknown. However, the debate on the advantages and disadvantages of rules as compared to discretion is well illustrated by these alternative possible interpretations.

The 1976 Act takes a much more detailed and rule-orientated approach to the whole area of custody than does the 1961 Act. Detailed provisions lay down the court's powers, those who are eligible for custody, the conditions under which custody may be exercised, and deprivation of custody.⁹⁸ Orders for custody may contain limitations of choice of residence, education, or religion of the child.⁹⁹ Temporary custody, visitation rights, access rights, and possible prohibition on removing the child from the jurisdiction are all provided for.¹⁰⁰ A parent may be deprived permanently of custody by declaration of unfitness.¹⁰¹ This provision, if utilised by zealous counsel, will only serve to increase tension and hostility between the parents and is thus contrary to the interests of the children. It may also cause emotional suffering where a child is involved in the hearing of the evidence.^{101a}

⁹⁸ Law Reform (Marriage and Divorce) Act 1976, Ss. 88, 89, 90.

⁹⁹ *Ibid.*, S. 89(2)(a).

¹⁰⁰ *Ibid.*, S. 89(2) (b), (c), (d).

¹⁰¹ *Ibid.*, S. 90(1). It is not clear how this fits with the maternal preference rule.

^{101a} See Leong Wai Kum, "Legislation Comment on Women's Charter (Amendment) Bill 1979", (1979) Mal. L.Rev., Vol. 21, 327 at p. 347 for criticism of the Singapore proposed amendments. The author's strong objection to the unfitness provision resulted in its deletion at Committee stage.

Laying down specific criteria on which discretion is to be exercised, and limiting the powers of the court to specific detailed matters does facilitate control and review by the appellate court.^{101b} But there are also perils in elaborating discretionary powers. An example may be taken from the new Act. Section ninety-one provides:

“When a child is deemed to be legitimate under section 75, the mother shall, in the absence of any agreement or order of court to the contrary, be entitled to custody of the child.”

The “child deemed legitimate” is the child of a voidable or of a void marriage, with certain exceptions.¹⁰² The way in which the statute is worded and arranged suggests that custody of children of marriages which are annulled goes automatically to the mother. If this is so then such children are deprived of consideration of their welfare by the court. They are also deprived of the possibility of living with the father, even though their welfare might demand it. Why should the children of annulled marriages be treated differently from other children whose protection is the concern of the Act? An incentive may be created by this provision for a mother to seek annulment of her marriage, rather than divorce, in order to ensure that she obtains custody of the children. But this may not necessarily be in the best interests of the child.

CONCLUSION

The difficulties faced by legislative and judicial decision-makers in defining the welfare of a child should not lead to an abandonment of efforts to resolve the problem in custody cases. King Solomon’s solution was to offer a physical division of the child between two claimant mothers. This led the real mother to sacrifice her claim in order to ensure the safety of her child.

^{101b} See Ellsworth, P.C. and Levy, R.J., “Legislative Reform of Child Care Adjudication”, (1969) *Law and Society Rev.*, Vol. 4, 167 at p. 203.

¹⁰² Children of a void marriage will be illegitimate if, at the time of the solemnisation of the marriage, neither of the parties reasonably believed that the marriage was valid, or where the father was not domiciled in Malaysia at the time of the marriage: *Law Reform (Marriage and Divorce) Act 1976*, S. 75(2) and (3) as amended by the *Law Reform (Marriage and Divorce) (Amendment) Act 1980*, S. 21.

Naturally custody was awarded to her. Unfortunately it is not always so easy for the judge or the parties to identify where the child's interests lie. But we can learn something from the wisdom of Solomon, and that is that a parent must be required to sacrifice his or her own interests and desires on behalf of the child.

Two major points emerge from this article: (1) Welfare should be the only consideration of a court concerned with the protection of a child's interests in custody suits, and all other matters should be examined only insofar as they relate to welfare. (2) The legislator must leave to the discretion of the court the determination of welfare; however, certain guidelines should be specified in the legislation. The major guideline must be the principle of continuity of care and the maintenance of established adult/child relationships which are successful and happy. If it is accepted that speed should be the essence of disposal of cases involving children, then the problem of child snatching which may accompany the principle of continuity can be avoided. Rapid dealing with these cases will prevent new continuity from being established. Just as the law moves speedily in the granting of injunctions, so can it act in relation to the welfare of children.

The criticism may be levelled at this article that it overlooks the problem of doing justice to the parties. By placing the child in the forefront of the custody suit a residual problem of unfairness to the parent denied custody because of an inability to maintain continuity of relationship with the child may remain. But the very phrase "justice between the parties" reveals the mistaken emphasis on adult rights, and ignores the fact that the subject of the suit, the child, is not a party. The action for custody should not be viewed as an adversary matter between adult parties. It should be seen as a judicial attempt to provide the best possible future for the child. The child should be recognised as the only important party, and not become a pawn in the proceedings. If this is the case then justice to the child will become the object of the suit.

Katherine O'Donovan*

*Senior Lecturer in Law at the University of Kent; formerly Visiting Lecturer at Universiti Malaya.

VOID AND VOIDABLE MARRIAGES IN ETHIOPIAN LAW

by Katherine O'Donovan*

I

INTRODUCTION

Is there a distinction in Ethiopian law between void and voidable marriages? The writer will argue that the Civil Code when dealing with defective marriages,¹ foresees and regulates only *voidable* marriages of different degrees, but that the concept of a *marriage void ab initio* may be profitably introduced to assist structuring thought about Ethiopian marriage law and deal with certain problem cases not specifically dealt with by the Code.

The terms "void" and "voidable" are found in the Common Law system. They have their counterparts in the laws of Continental European countries. In both legal systems the terms used lack a clearly defined meaning and the transposition of a terms from one system to another is virtually impossible. In the Amharic version of the Civil Code there is no exact term to convey the concept "void" or "voidable".² Nevertheless these terms will be used since they are the most apt terms available for elucidating the law, as will be shown.

* Visiting Assistant Professor of Law, Haile Selassie I University. The author is indebted to Mr. Peter Winship and Professor George Krzeczunowicz for their helpful criticism and comments.

1. An objection could be made that marriages which are defective and can therefore be dissolved should be called "dissolvable". But all marriages are ultimately dissolvable, by death, by divorce or because they are defective under Civ. C., Art. 661.
2. Terminology is a problem. The French version of the Civil Code is fairly consistent in the use of languages but the English and Amharic translations are inconsistent and occasionally positively unhelpful. Where the French version declares certain acts "sans valeur au regard de la loi civile", the English translation is "of no effect under the civil law", and the Amharic is "ዋጋ የሌለው"- Civ. C., Arts. 18 and 44. In other cases where the French declares an act "nul" the English remains "of no effect" and the Amharic is "ፈራሽ" in Arts. 313, 387, 639(2), 640(3) and 638.

The word "nul" in French is translated as "null" in English and "ፈራሽ" or "የማይጸና" in Amharic in Art. 707.

"La nullité" in Arts. 314(1), (2) and 369(3) is translated into English as "nullity" and into Amharic as "ፈራሽ".

"L' annulation" in Art. 623(1), (2) and (3) is translated into English as "the annulment" and into Amharic as "መፍረስ" in (1) and "መሻር" in (2) and (3).

But in connection with the law of contracts "annulé", "annulation" and "nullité" are translated as "invalidated" or "invalidation", the Amharic being "ፈረሰ" or "መፍረስ" in Arts. 1698, and 1699. In Art. 1700, the translation is "ቀረ" or, "መቅረት", in Art. 1701, "መቅረት" and "መፍረስ" in Art. 1808 "ፈረሰ" and "ሰረዘ" in Art. 1809 it is "መርጋት" and in Art. 1801 "መሰረዘ". The author acknowledges the help of Ato Tadesse Tecleab with the Amharic text.

A void act is an empty act. It does not achieve what it set out to do. It does not achieve its intended legal consequences. "Quod nullum est, nullum producit effectum."³ An act is void due to a defect therein which is so fundamental as to deprive the act of its very existence. "A defect may make a juristic act either void or voidable. If the defect is such that the act is devoid of the legal results contemplated, then the act is said to be void."⁴ The conventional wisdom concerning the void act is that it has no legal effect, but this is not strictly so as the act may have effects unforeseen by the actor, such as those of criminal prosecution because of the illegality of the act. The point about the void act is that it achieves no part of its intended legal consequences and insofar as these are concerned it has no effect and can be ignored.

A voidable act is an act which, although it contains a defect, has its intended legal effect. The defect in the voidable act is not so serious as to prevent it from coming into effect.

"An act that is incapable of taking effect according to its apparent purport is said to be void. One which may take effect but is liable to be deprived of effect at the option of some or one of the parties is said to be voidable."⁵

The defect contained in the voidable act is sufficiently serious to enable the act to be subsequently attacked by one of the parties and declared void by the courts. If, however, it is not avoided the act will take effect as a valid juristic act.⁶ One learned writer has suggested that the correct way to view the voidable act is as "an act which gives rise to the intended legal consequences, but at the same time gives rise to a counteractive right which may neutralise those consequences in so far as one of the parties is concerned."⁷

A void marriage, if such exists in Ethiopian law, is one to which there is such a serious objection in law because of a grave defect that, should its existence be in question, it will be regarded as never having taken place and can be so treated by all affected or interested parties. Any court declaration made would merely have the purpose of affirming that the marriage never existed and of clarifying the status of the parties as never having been married.⁸ Any person having an interest therein could petition for a declaration of non-existence of the marriage at any time, even after the death of the parties. Since the parties never had the status of husband and wife none of the normal legal consequences of marriage would follow. For

3. G. Ripert and J. Boulanger, *Traite de droit civil*, (Paris, Librairie générale de droit et de jurisprudence, 1956), vol. 1, no. 1369.

4. G. W. Patton, *Jurisprudence*, (3rd. Ed. by D. P. Derham), (Oxford University Press, 1964), p. 281.

5. F. Pollock, *Jurisprudence and Essays*, (London, Macmillan, 1961) p. 89.

6. For example, Civil Code Arts. 313 and 314 give the minor (or his representative) the right to apply for nullification of an act performed in excess of his powers. If the minor does not nullify the act it remains valid.

7. F. H. Newark, "The Operation of Nullity Decrees", *Mod. L. Rev.*, vol. 8, (1945) p. 203 at p. 205.

8. Art. 724 of the Civil Code provides: "Only the court is competent to decide whether a marriage has been contracted and whether such marriage is valid." This seems to suggest that all cases even those of void marriage, must be referred to the court for clarification of the position.

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instance there would be no community of property, so the surviving spouse could not claim his or her share after the death of the other spouse. Any marriage contract made prior to the void marriage would not come into effect. The wife would retain her own domicile. The children would not be the children of the marriage although they could no doubt prove their filiation as deriving from an irregular union. And the matter could be raised as a defence in other legal actions since all interested parties may concern themselves with a void marriage.

A voidable marriage is quite different from a void marriage. The marriage will be regarded as a valid subsisting marriage unless and until it is attacked. As to the effects of a voidable marriage a distinction must be drawn between a marriage which, although voidable, is never attacked¹⁰ and therefore never avoided, and a marriage which is avoided. In the former case the marriage will be valid and all the normal legal consequences of marriage will follow. In the latter case a further distinction must be made between those marriages which are declared void retrospectively and those marriages which are given effect up to the day of avoidance. It is here that the use of the word "voidable" may be criticised. It fails to distinguish between the act which is not void *ab initio* but is declared void retroactively by a court, and the act which is deprived of all future effect by the court but which retains such effect as it has had up to avoidance.¹¹

Three categories then emerge. The marriage which is *void ab initio*, that is which never came into being or had any effect; the marriage which is *void retroactively*, (*ex tunc*), that is which came into being, would have been valid had it not been found out, but is now deprived of all effect; and the marriage which is *void ex nunc*, that is which is deprived of effect for the future but which holds good for the past. The only category into which the Ethiopian marriage law clearly falls is that of *void ex nunc*.

The Ethiopian law relating to defective marriages does not use the term "nullity" in reference to such marriages.¹² Defects are classified along with death and divorce as a cause for the dissolution of marriage.¹³ The words "application for dissolution" as "a sanction of the conditions of marriage"¹⁴ are used in the Civil Code for what is traditionally called nullification. The significance of the Civil Code terminology is most important. Dissolution of defective marriages has much the same

9. Even if no marriage took place the court must be given the opportunity of clarifying the situation. See G. Ripert and J. Boulanger, cited above at note 3, vol. 1, no. 1319.

10. The right to attack a voidable marriage is generally limited to those closely involved. The question of who has the right forms the basis in French law for the distinction between *nullité absolue* and *nullité relative*. The reason is that where the defect is not serious only the parties have the right to avoid the marriage.

11. Writers on void and voidable marriages are aware of the ambiguity. See Newark cited above at note 7, and the letter it inspired by Latey, M.L.R., vol. 11, (1948) p. 70. See also the remarks by D. Lasok, D. "Approbation of Marriage in English Law and the Doctrine of Validation", Mod. Rev., Vol. 26 (1963) p. 249.

12. Exceptions to this are Art. 369(3) which uses the word "nullity" in reference to marriage; Art. 707 which uses the word "null"; and Art. 623 which deals with the "annulment" of a religious marriage by the religious authorities.

13. Civ. C., Art. 663.

14. *Id.*, Sub-art. (2).

consequences as divorce.¹⁵ This has the advantage of avoiding the problems which arise in French law through the concept of nullité. According to Ripert and Boulanger:

“When a marriage is declared null or annulled, it can no longer produce any effect; and all those which it has produced up to then disappear, since it is reputed never to have existed. The appearance of legitimacy which the fact of celebration has given to the union of these persons is retroactively destroyed by the judicial pronouncement of nullity. Quod nullum est nullum producit effectum.”¹⁶

The French law would seem to fit into the category of marriages void retroactively. In order to get around this difficulty a theory of putative marriage was introduced for those marriages where one or both of the spouses had acted in good faith. The effect of the theory is to render the putative marriage void *ex-nunc* vis à vis the partner in good faith. Such a theory is not necessary in Ethiopian law. A deliberate decision was taken by the draftsman to “leave out all the theory of nullity of marriage, which gives rise to many difficulties, and which in any case is rarely applied because of the exceptional effect of the theory of putative marriage. In speaking of dissolution, and not of nullity, it has been possible to avoid the theory of putative marriage.”¹⁷ Good faith is relevant to Ethiopian law not in determining when the dissolution will have effect but only in determining the consequences of dissolution.¹⁸

II

THE CIVIL CODE PROVISIONS ON INVALID MARRIAGES

Invalid marriages regulated by the Civil Code are those which have been celebrated despite some obstacle or impediment to the union. Such impediments were known to the *Fetha Nagast* and covered obstacles to the union arising from prior relationships, from previous marriage, or from age. Also included were defects arising from the ceremony itself.¹⁹ Such marriages were prohibited and in some cases gave rise to penal sanctions.²⁰ Many of the impediments found in the *Fetha Nagast* have been retained in the Civil Code.²¹ But those relating specifically only to the rules of religion have been dropped.²²

15. *Id.*, Art. 696(2) orders the court to be guided by the rules for divorce in dissolving a defective marriage.

16. G. Ripert and J. Boulanger, cited above at note 3, vol. 1, no. 1369.

17. R. David, *Le droit de la famille dans le code civil éthiopien*. (Milano, Guiffre, 1967), p. 57. Translations of French texts are made by the writer.

18. Civ. C., Art. 696(3).

19. *Fetha Nagast*, (translation, Abba Paulos Tzadua, 1968), pp. 134-144. The various impediments were: relationship by consanguinity or affinity; other relationships, such as that between foster children, godparent and godchild, guardian and ward, master and slave; lack of Christian belief of one party; impotence; bigamy; disease; one party married three times previously; one party a nun; woman aged over sixty; period of widowhood; lack of consent; non-age (woman to be over twelve years, man to be over twenty); lack of form required by the church.

20. *Id.*, pp. 297-299.

21. It was the intention of the draftsman to conserve as far as possible the *Fetha Nagast*. See R. David, cited above at note 17, p. 5.

22. Forms of marriage under the Civil Code (Art. 577) are: civil, religious and customary. An error as to the religion of one's spouse is a ground for an application for dissolution under Art. 618.

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Impediments to marriage in the Civil Code fall into three categories. Firstly there is the impediment to the celebration of the marriage which does not affect its subsequent validity; this type of impediment is merely prohibitory. Contained in this group are marriages celebrated despite opposition²³ and marriages celebrated within the period of widowhood.²⁴ In both of these cases the obstacle to the marriage (opposition by family, marriage dissolved less than six months previously), should prevent the marriage from taking place; if however it does take place, then the marriage will be valid, despite the impediment.²⁵ A criminal sanction may be applied to the authority responsible for the celebration and to the spouses and other parties involved in the marriage.²⁶ But the marriage cannot be avoided because of a prohibitory impediment. It is valid after celebration.

The second group of impediments contains those which ought to prevent the marriage from taking place and which render it voidable²⁷ if it does. These are relative impediments. The distinguishing aspect of this group is that the marriage, although voidable after celebration and thus open to dissolution, can be subsequently validated. This means that the marriage which is voidable after its celebration due to a defect therein can subsequently become valid through the *ex post facto* removal of the impediment or by the passage of time. This process is known as validation.

Those marriages which are initially voidable but capable of validation are those invalid for non-age,²⁸ bigamous marriages,²⁹ marriages of incapacitated persons,³⁰ marriages contracted under duress,³¹ and marriages contracted in error.³²

The concept of validation comes from Canon law.³³ Where a marriage contained a defect but the defect was later cured by cessation or dispensation, if the parties renewed their consent to the marriage it became valid. In practical terms the continuance of the couple in living together was often sufficient to cure the defect if the impediment was not publicly known. The reason for permitting validation was the desire to give stability to marriage where the parties had shown their constancy. In secular law one can observe validation in operation in European countries and in Ethiopia.³⁴

The Civil Code provides that a marriage which is voidable for non-age³⁵ can be dissolved on the application of any interested person or the public prosecutor.³⁶

23. Civ. C., Art. 592. See R. David, cited above at note 17, p. 57.

24. *Id.*, Art. 596.

25. *Id.*, Arts. 619(3) and 620 (3). See F.C. *epoux B.* (Cour d'appel de Douai, Fra., Dec. 28, 1908) *Dalloz*, 1909, pt. 2, p. 102, for an example from French law.

26. *Id.*, Arts. 619(1) and (2); 620(1) and (2).

27. "Voidable" is used here in the sense of "capable of being dissolved" at the option of certain persons.

28. Civ. C., Art. 581.

29. *Id.*, Art. 585.

30. *Id.*, Arts. 587 and 588.

31. *Id.*, Art. 589.

32. *Id.*, Art. 590.

33. F. J. Sheed, *The Nullity of Marriage* (New York, Sheed and Ward, 1959) p. 30. D. Lasok cited above at note 11, p. 257.

34. For example France, Poland and Switzerland, The doctrines of approbation and sincerity in Common Law have partially the same effect.

35. Under Article 581 the age of marriage is eighteen for a man and fifteen for a woman.

36. Civ. C., Art. 608(1).

But this application can no longer be brought once the defect has been removed by the passage of time.³⁷ The marriage is validated by the removal of the defect.

Similarly in the case of an incapacitated person who is married without the appropriate consent,³⁸ once the disability has terminated the incapacitated person has the right to apply for dissolution for six months after the termination only.³⁹ The person who should have consented to the marriage⁴⁰ may apply for dissolution within six months of learning of it only, and in no case after the disability has ceased.⁴¹

In the case of duress⁴² and error⁴³ the right to apply for dissolution is limited to the victim, and he or she has a two year maximum period in which to make the application which must be made within six months of the cessation of the violence⁴⁴ or the discovery of the error.⁴⁵ The limitation of time recognises that the marriage has lasted despite the impediments and suggests that the defect is urged or accepted over time.

The bigamous⁴⁶ marriage is voidable at the instance of the consorts of the bigamous spouse or the public prosecutor.⁴⁷ It is validated on the day when the former spouse dies.⁴⁸

In these cases of voidable yet validatable marriages criminal sanctions are applicable to these persons who knowingly celebrated or took part in a marriage cere-

37. *Id.*, Art. 608(2).

38. A minor needs the consent of his guardian to be married as provided in Art. 309. This requirement would seem to apply only to female minors as a male minor (under the age of eighteen) cannot be married except in the very unusual case of a dispensation under Art. 581(2). A judicially interdicted person is required by Art. 369(1) to have the consent of the court.

39. Civ. C., Art. 615(1) and (2).

40. *Id.*, Art. 615(1) and (3).

41. *Id.*, Art. 615(1) and (3). There is a complete discrepancy here between Art. 615 and Art. 369(3) on the invalidation of the marriage of a person who is judicially interdicted. Art. 369(3) provides that any interested person may apply for a declaration of nullity of the marriage at any time. Art. 615 seems to be the correct version as it is in line with the other provisions in the section on invalid marriage.

42. Duress invalidates consent, and is deemed to exist, where consent is given in order to protect the victim or his immediate family "from a menace of a grave and imminent evil" under Art. 589(1) and (2). For an example in French law see the decision in Pietroni Mathilde c. Serpaggi (Cour d'appel de Bastia, Fra., June 27, 1949) *Dalloz*, 1949, p. 417.

43. Error invalidates consent where an error of substance as to the person of the other spouse is made. Art. 591 limits these errors to mistakes as to identity, religion, health and "bodily conformation". It is not clear what is covered and what is not. French law which is similar has been interpreted to cover cases of mistakes as to nationality and past history, impotence and genuine mistakes of identity. See the note by P. Esmein, *Dalloz*, 1955 p. 242.

44. Civ. C., Art. 617(1) and (2).

45. *Id.*, Art. 618(1) and (2).

46. "Bigamous" in the Civil Code is undoubtedly intended to include "polygamous". However there is room for the objection that polygamy has not been foreseen in the drafting of Arts. 612 and 613.

47. Civ. C., Art. 612(1).

48. *Id.*, Art. 613.

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mony to which there was an impediment.⁴⁹ Despite the criminal sanction the marriages can be validated for the sake of ensuring their stability by enabling them to become valid when the defect has disappeared or is no longer significant.

Absolute impediments form the third category. These obstacles are so grave that they can never be cured and therefore the marriage can never be validated. Only one impediment is absolute; that which prevents the marriage of those who are related by consanguinity or affinity.⁵⁰ If a couple are married despite this impediment their marriage remains voidable. It is open to an application for dissolution by any interested person or the public prosecutor.⁵¹ Since the impediment can never be removed,⁵² it is impossible for the marriage to be validated. Here too there is a criminal sanction for those who knew or should have known of the impediment and who assisted at the marriage.⁵³

Both the marriage to which there is a relative impediment and that to which there is an absolute impediment are voidable under Ethiopian law. The former is voidable until validated, the latter is always voidable. If a marriage in either of these categories is dissolved its prior effects are retained and it is void only *ex nunc*. The consequences of dissolution for invalidity are very similar to those of divorce. The regulation of the matter is left to the courts who are exhorted to regulate the dissolution according to equity, to be guided by the rules for divorce, and to take into account the good or bad faith of the parties, whether the marriage has been consummated, the interest of the children and of third parties in good faith.⁵⁴ Since the voidable marriage is treated as valid until it is dissolved and since the effects are similar to divorce the dissolution is purely prospective. Even in the case of a bigamous or incestuous union the marriage retains its prior presumption of validity after dissolution. There is no example that we could discover of a marriage which is voidable and if dissolved retrospectively void. The policy seems a simple and sensible one, since questions of prior status are avoided.

III

THE STATUS OF THE BIGAMOUS MARRIAGE

The bigamous marriage, as previously discussed, falls into the category of marriages which are voidable yet validatable. To these marriages a presumption of

49. *Id.*, Arts. 607, 611, 614, 616. The case of error is an exception since this is a personal matter. The criminal sanctions referred to in the Civil Code are those laid down in Pen. C., Arts. 614 and 615. But the Penal Code does not provide for all cases foreseen in the Civil Code. It is possible that in some cases where the Civil Code says that a penal sanction will be applied that the Penal Code makes no provision for such sanction. The policy of providing such sanctions is a curious one as it will deter the parties involved from bringing an application for dissolution.
50. *Id.*, Arts. 582, 583 and 584. Compare the three versions of the Civil Code. The English and the Amharic give effect to the bond of consanguinity to the seventh generation whereas the French version says "degree". The bond of affinity has effect to the third degree.
51. *Id.*, Art. 609.
52. The original draft of the Civil Code contained a provision whereby the relationship by affinity would cease upon the dissolution of a marriage. This provision was changed in Parliament resulting in Art. 555. See R. David, cited above at note, 17, p. 51, f. n. 1 and G. Krzeczunowicz, *Twenty-four Problems in Family Law*, (1970, unpublished. Library, Faculty of Law, Haile Sellassie I University), problem 2, and "Quizzes", *J. Eth. L.*, vol. VIII, (1972) p. 203
53. Civ., C., Art. 610.
54. *Id.*, Art. 696(1), (2) and (3). In Swiss law, the consequences of nullity are those of divorce; code civile suisse, Art. 134.

validity is attached until avoided by dissolution. Nevertheless the bigamous marriage is unique in that its validation does not come about automatically after a lapse of time; its validation occurs upon the death of the first spouse. Certain problems are raised by this peculiarity. They turn on the question: What is the status of the bigamous marriage in Ethiopian law? Does it also benefit from the presumption of validity?

Article 585 states: "A person may not contract marriage so long as he is bound by the bonds of a preceding marriage." Nevertheless some persons already married go through a ceremony of marriage while still bound to another spouse. If this happens it is an offence under the Penal Code for one who "being tied by the bond of a valid marriage, intentionally contracts another marriage before the first union has been dissolved or annulled."⁵⁵ Both parties to the bigamous union are punishable. An exception to this rule in the Penal Code is "cases where polygamy is recognised under civil law in conformity with tradition or moral usage."⁵⁶ Since no such exception was made in the Civil Code Article 585 holds sway. It was the intention of the drafter to make such an exception for the Muslim population in Title XXII but due to the overwork of the translators the draft of this title was never translated, never discussed and never proposed to Parliament.⁵⁷ Thus the law of Ethiopia recognises only monogamous marriage.⁵⁸

If a couple are married bigamously either of the consorts of the bigamist or the public prosecutor may apply for dissolution of the marriage.⁵⁹ The burden of proof is on the applicant to show that the first consort was alive on the day of celebration of the second marriage.⁶⁰ The language of the Civil Code is very imprecise here. Firstly the proof required on an application for dissolution should be that the former spouse is alive at the time of application for dissolution, not at the time of the bigamous marriage. This is because Article 613 provides: "The marriage contracted by the bigamous spouse shall become valid on the day when the former spouse dies." Thus the former spouse could be alive at the time of celebration of the bigamous marriage, yet dead at the time of application for dissolution and the marriage would have become valid in the interval. If dissolution of the second marriage then takes place, it is by divorce. Secondly the wording of Article 613, although quite clear, raises the question of what happens when the former marriage is dissolved not by the death of the former spouse as foreseen by Article 613 but by divorce or as a sanction of the conditions of marriage. Will this have the effect of validating the bigamous marriage? The logical answer would

55. Pen. C., Art. 616.

56. *Id.*, Art. 617.

57. R. David, cited above at note 17, p. 8. The proposed Article on bigamy read as follows: "Art. 3487. *Bigamy*. (1) where the husband is of the Muslim religion the dissolution of the marriage may be pronounced only at the request of the public prosecutor. (2) The public prosecutor may not make an application until the date fixed by law, except where the Minister for Justice has made a special request."

58. But since the Muslim population continues to be governed in personal matters by the Kadis and Shari'a Courts under the Kadis and Naibas Councils Proclamation, 1944, Proc. No. 62, *Neg. Gaz.*, Year 3, no. 9, monogamy is not entirely the rule, in fact, despite the repeal of Muslim Law implied by the general repeals provision of in Art. 3347.

59. Civ. C., Art. 612(1). The bigamist is left in the awkward position of having no right to apply for dissolution of the bigamous marriage. He could bring the matter to the attention of the public prosecutor and risk a criminal prosecution.

60. *Id.*, Art. 616(2).

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seem to be yes, since the impediment having been removed there is no obstacle in the way of the marriage. The Polish law which is closest to the Ethiopian law on the matter of validation of bigamous marriages permits validation regardless of the cause of termination of the previous marriage.⁶¹ It may be that the Ethiopian law does not go the whole way with the Polish law because of the criticism which followed the latter. Validation where the previous marriage had ended in divorce was regarded by Polish critics as particularly repugnant because it was thought to encourage divorce.⁶²

Looking at the law on voidable marriages as a whole the validation of the bigamous union fits into the picture very well. Yet the law is fairly revolutionary. Bigamy is a crime and the bigamous marriage is a nullity in most countries. The policy reasons for validation of stability and reward for constancy are less obviously present when there is not even a requirement of good faith. Swiss law will permit validation, where the non-bigamous party acted in good faith.⁶³ In French law a bigamous marriage can never be validated,⁶⁴ although the marriage may be putative as regards the party in good faith. Neither Polish nor Ethiopian law look to *bona fides* before validating the marriage.

It is the bigamous marriage which is neither fish nor flesh, not having been validated, nor yet annulled which raises problems of personal status. If the second spouse of the bigamist leaves him and marries again, will the second marriage be also bigamous? Other countries with similar laws generally allow the invalidity of the first marriage as a defence to a charge of bigamy.⁶⁵ If the bigamous spouse dies while the bigamous marriage still subsists can the marriage be subsequently attacked or will both surviving spouses be legitimate? Fortunately there is no problem concerning the status of the children of the second marriage who can prove their filiation without difficulty.⁶⁶

61. The Polish Family and Guardianship Code (translation J. Gorecki, in D. Lasok, *Polish Family Law*, Leyden, A.W. Sijthoff, 1968), p. 266, Art. 13 provides; "S. 3. A marriage cannot be annulled on the ground that one of the spouses is a party to a subsisting marriage if the previous union has come to an end or has been annulled, unless the previous union has come to an end by the death of the person who had contracted the bigamous marriage."

62. D. Lasok, cited above at note 61, p. 262.

63. Code civil suisse, Art. 122, provides:

"There is no nullity in the case of bigamy, where the preceding marriage has been dissolved in the meantime and where the consort of the bigamist acted in good faith."

64. An application for nullity can be made after the dissolution of the first marriage. There is no analogy with the validation of other defective marriages: bigamy is considered too serious a defect to allow the situation to be regularised. M. Planiol et G. Ripert, *Traité pratique de droit civil*, (2nd ed. 1962, by A. Rouast, Paris, Librairie générale de droit et de jurisprudence) vol. 2, no. 266.

65. In French law the bigamist can raise the nullity of the first marriage as a defence under Art. 189 of the French Civil Code which provides: "If the new spouses oppose the nullity of the first marriage, the validity or the nullity of this marriage must first be decided". Art. 124 of the Italian Civil Code is similar.

66. The children can claim to be the children of a marriage under Civ. C., Art. 740. Alternatively they can claim to be the children of an irregular union under Civ. C., Art. 708 *cum* Art. 745(1). The writer favours the former solution because even if the bigamous marriage is attacked it will be valid as regards the past, and because Civ. C., Art. 708 defines an irregular union as "the state of fact created when a man and a woman live together as husband and wife without having contracted marriage". The bigamous marriage is a case where marriage has been contracted.

In the original draft of the Civil Code there was no doubt as to the status of the bigamous union. It was to have the status of an irregular union.⁶⁷ If the article so providing had been retained there would be an easy answer to questions concerning the rights of the second consort. As it is the question is left open.

A recent case brought a typical problem to light.⁶⁸ The facts were as follows: A probate file having been opened in the Awraja court two parties appeared claiming to be the wife of the deceased. The plaintiff produced two documents of which one was a marriage certificate dated 1940 (Eth. Cal.) in support of her claim. The defendant also claimed to be the wife of the deceased with her five children as heirs. The venue having been changed to the High Court,⁶⁹ the Court held that the plaintiff was the legal wife of the deceased on the basis of the marriage record and the evidence of witnesses. The Court discounted evidence that the plaintiff had declared herself a divorce to the Ministry of Foreign Affairs when applying for a passport to go to Ghana with another man, that it was alleged that the plaintiff had married in Ghana and the fact that the plaintiff had run a bar in Jimma.

None of these facts in itself was held to constitute a divorce. The Court said:⁷⁰

"As can be gathered from the Civil Code Arts 666 et seq., an act of divorce, like that of marriage must follow certain legal procedures. Art. 665(3) states that divorce would take place unless it is done in accordance with the rules laid down by the Code. If the plaintiff entered into a marriage with another person before having dissolved her first marriage with the deceased, then she would be held liable for bigamy; the second marriage, however, cannot invalidate the first one. Moreover, Civil Code Art. 585 provides that no marriage can be entered into as long as the bonds of a preceding marriage are intact. The fact that the plaintiff had owned and was engaged in running a bar cannot be deemed either a procedure for or evidence of a divorce, although it is admittedly a disreputable and anti-social trade.

What the plaintiff wrote to the Ministry of Foreign Affairs (declaring herself a divorce) cannot by itself constitute a divorce either, since under the law the unilateral repudiation of the husband by the wife or the wife by the husband is of no effect. In fact, under Art. 665(1) of the Civil Code, even divorce by mutual consent is not permitted. For all these reasons, the plaintiff's marriage was valid until the death of her husband; there was no legal divorce at all."

The Court then declared the plaintiff the legitimate wife of the deceased, and gave her permission to bring an action to claim her share of common property.

67. R. David cited above at note 17, p. 57, f.n.37. The article was: "The marriage contracted by the bigamous spouse produces the effects of irregular union. On the termination of the union the judges will award damages to the new spouse, if he was in good faith, for the material hardship he has suffered." See also G. Krzczunowicz, cited above at note 52, problem 6 and "Quizzes", *J. Eth. L.*, vol. VIII, (1972) p. 204.

68. *Beletshachew Benti v. Wolde Aregay Megente*, (Addis Ababa, High Court, Civil Case No. 1584/60) (unpublished).

69. Under Civ. Pro. C., Art. 31.

70. Translation by Ato Ayanew Wassie.

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On appeal to the Supreme Court,⁷¹ the Court held that since the plaintiff (now respondent) had⁷²

“abandoned her conjugal residence and lived like a prostitute, applied for a passport saying she was divorced, said she was divorced to members of her community in edirs and mourning houses, never objected to the bigamous marriage of her husband”,

she could not be considered the legal wife of the deceased. In dealing with the judgment of the High Court, the Supreme Court said that the plaintiff's evidence

“does not in any way tend to prove that she was not divorced and that she had lived with the deceased until the time of his death ... It is obvious that marriage and divorce have legal procedures. But, it must be known that, in accordance with the law, in the absence of the instrument pronouncing the divorce, it may well be proved by introducing circumstantial evidence. In view of the fact of respondent's way of life, conduct, and actions we have not found the statement of the High Court that there was no divorce according to legal procedure, to be appropriate.”

The Supreme Court was satisfied that the defendant (now appellant) had been married to the deceased in 1957 (Eth. Cal.) and declared her the legal wife.

It is submitted with due respect that both courts were wrong. Both took the view that there could be only one legal wife. But if the view of the High Court that the first marriage was not dissolved is taken, then the second marriage, benefiting from the presumption of validity since it was never attacked, is also valid. There are three modes of dissolution of marriage, of which dissolution for invalidity is one.⁷³ Both marriages now having been dissolved by death, both wives have an equal claim to the common property.⁷⁴ Even if the first wife could attack the second marriage after the death of the bigamist the effect of dissolution for invalidity would be an award of common property to the second wife.⁷⁵ In any case it is extremely doubtful that an application for dissolution for invalidity can be brought after the death of one of the spouses. If the first consort dies the second marriage is validated under Article 613; if the bigamist or the second consort dies the second marriage is dissolved by death. Polish law makes a specific exception in allowing nullification where the bigamist has died.⁷⁶ No such exception is made in Ethiopian law where the causes of dissolution are treated equally.

The criticism of the Supreme Court decision is that the burden of proof has shifted to the plaintiff to prove that she was not divorced a virtually impossible task under the circumstances.⁷⁷ This is a discordant with Article 707 which provides:

71. *Wolete Aregay Megente v. Beletshacew Benti*, (Supreme Imperial Court, Civil Appeal No. 62-62) (unpublished).

72. Translation by Ato Asfaw Seife.

73. Civ., C., Art. 663.

74. *Id.*, Art. 689.

75. *Id.*, Art. 696.

76. The Polish Family and Guardianship Code, cited above at note 68, Art. 13, 3. s.

77. Although it is intended to require registration of marriage at some time in the future this will be of limited usefulness unless homologation of divorce is also required. See R. David, cited above at note 24, p. 53.

"The person who alleges that a marriage is null or has been dissolved shall prove such allegation."

What is being suggested here is probably startling. Two or even more consorts can claim to be the legal spouses of a bigamist. Two or more spouses can claim a share of common property. Why not? Ethiopian law takes a liberal attitude to the rights of children regardless of whether they are born to the wife or the concubine of the father,⁷⁸ children of a marriage have to share with children outside marriage. Why should this not also be true of spouses? The objection may be made that a bigamous marriage is an irregular union, as intended by the draftsman. A glance at the provisions on the dissolution of invalid marriage should be sufficient to answer that objection and the suggestion that the bigamous marriage has no legal status. Dissolution for invalidity is much the same as divorce and the effects are purely prospective.⁷⁹ The marriage, such as it was, is valid for as long as it lasted. Termination of irregular union is quite a different matter. No common property was created⁸⁰ and the highest expectation is maintenance for the woman for six months.⁸¹

Two serious objections may be made to this conclusion. In practical terms it may be difficult to allocate common property between two spouses of a bigamist or to apportion a pension between them. Community of property starts from the day of marriage⁸² and so the common property would have to be apportioned according to length of marriage. Numerous difficulties and arguments would follow from this. One can imagine only too well the claims that would be made concerning the time of acquisition of the more valuable property, the allegations that would be made concerning personal property. It is also doubtful whether the section on pecuniary effects of marriage had such a situation in view when drafted. The second objection is that the policy of the Civil Code as laid down in Article 585 is against bigamy. Although the draftsman recognised that there was frequent bigamy in Ethiopia and attempted to deal with the situation by giving it the status of an irregular union,⁸³ this solution was rejected or dropped by the Codification Commission probably because there was a desire not to recognise bigamy at all. If this is so then the last situation is worse than the first.⁸⁴

78. However the author does not agree with the view often expressed that there is no illegitimacy in Ethiopian law. Article 721(3) is quite clear that children born outside relationships provided for by the law such as marriage or irregular union and who have not been acknowledged or adopted have a juridical bond only with their mother. It is possible under Civ. C., Art. 770 for a child to prove his filiation by possession of status. On proof of filiation see G. Krzczunowicz, "The Law of Filiation under the Civil Code", J. Eth. L., vol. III, (1966) p. 511.

79. See p. 14 above.

80. Civ. C., Art. 712.

81. *Id.*, Art. 717(1). The Amharic version of the Civil Code says "three months."

83. R. David, cited above at note 17, p. 57.

84. There is a curious reluctance on the part of Ethiopian courts to deal with the problem of bigamy. In three cases of criminal prosecution in the Awraja Court in Addis Ababa none resulted in conviction. In crim. case 453/61 (unpublished) the court held that there was no evidence that the first marriage ever took place. In crim. case 30/62 (unpublished) the first wife dropped the case. In crim. case 218/61 unpublished it was erroneously held by the court that Pen. C., Art. 220 barred the complaint with its three month period of limitation. But in *Prosecutor v. Haile T/Medhin*, (Supreme Imperial Court, Criminal Appeal No. 179/52) (unpublished) a sentence of three months imprisonment for bigamy was confirmed.

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IV

VOID MARRIAGE

Many legal systems contain a concept of void marriage generally referred to as in-existent. An in-existent marriage like a void marriage is empty of effect. Both, in theory, have no need of a court decision to render them completely ineffective. They are themselves void *ab initio*. However, as has been said, there is always a title or an appearance to be destroyed by the court in confirming the in-existence of the act.⁸⁵ Not all writers would agree that the act void *ab initio* is the same as the in-existent act. Many writers consider that the distinction between void and voidable marriage is the same as the distinction between nullité absolue and nullité relative in French or Swiss law or that between nichtige Ehe and aufhebbare Ehe in German law.⁸⁶ But in its true and original sense a marriage void *ab initio* is no marriage at all.⁸⁷

In French law there is a concept of "marriage in-existent"; in German law "Nichtehe" is *ipso jure* void and produces no legal consequences; in Polish law, in Italian law and in Swiss law "non-marriage" can be observed.

The French were obliged to introduce the notion of marriage in-existent to deal with cases "where the law does not declare a marriage to be null, and where on the other hand it is logically impossible to admit that it is productive of effect."⁸⁸ The theory comes to the rescue in cases of identity of sex and want of form.⁸⁹ Planiol, while critical of some applications of the theory, finds that it is justified in those cases "where there is not even the appearance of marriage."⁹⁰ Cases of in-existent marriage are not regulated in the French Civil Code, and the theory is the product of *jurisprudence*.

Polish law, which is similar to Ethiopian law, makes a distinction between voidable marriage and non-marriage, the latter being reserved for marriages "absolutely void for lack of a civil ceremony, that is a marriage celebrated solely according to religious rites or in the absence of a registrar. Also a civil ceremony in which

85. Tronchet, in the discussions of the French Civil Code before its enactment said: "Jamais un mariage n'est nul de plein droit; il y a toujours un titre et une apparence qu'il faut détruire". Fenet, IX, p. 53, cited in M. Planiol et G. Ripert, cited above at note 64, vol. 1 No. 256.

86. D. Lasok, cited above at note 61, p. 53. E.J. Cohn, "The Nullity of marriage", L. Quart Rev., vol 64, (1948) p. 324. The distinction between nullité absolue and nullité relative is based on the right to petition for nullity. The distinction between nichtige Ehe and aufhebbare Ehe is that in the former case the effects of nullity can be retroactive, whereas in the latter the effects are *ex nunc* and the same as divorce. W. Muller-Freinfels, "Family Law and the Law of Succession in Germany", Int'l and Comp. L. Quart., vol. 16, (1967) p. 409 at 432.

87. English law and Continental European law has got itself into difficulties with the various categories due to the influence of ecclesiastical law and the realities of life. Ethiopian Law having had the benefit of these experiences has simplified the matter admirably by having only one category; that of voidable marriage, in the Civil Code. The recognition that a marriage can also be void *ab initio* is a purely logical addition.

88. M. Planiol and G. Ripert, *Treatise on the Civil Law* (12th ed. 1939) (translation, Louisiana State L. Inst., 1959), vol. 1 pt. 1, no 1004.

89. *Ibid.*

90. *Ibid.*

persons of the same sex masqueraded as man and woman would presumably be a non-marriage."⁹¹

In most of the systems that recognise a concept of non-marriage, lack of a civil ceremony or of proper legal formalities is a case of non-marriage.⁹² This would not be the case in Ethiopia where formalities for marriage have a very minor place in the law. If the officer of civil status responsible for a civil marriage does not follow the legal formalities required, he will be liable to a criminal sanction but the marriage will be valid.⁹³ If a religious marriage is annulled by the religious authorities for lack of form or due to some impediment this will constitute a serious cause for divorce but the marriage will be valid in the eyes of the law.⁹⁴ No legal effect will be given to an annulment of a customary marriage by the customary authorities.⁹⁵

It seems likely that a marriage where both parties were of the same sex would be considered void by the Ethiopian courts. Although this may be considered a purely academic proposition cases of this kind have arisen in other countries. Planiol says:

"But judicial records show that the difficulty could arise in practice . . . It is indisputable that marriage assumes that there is a difference of sex between the two persons joined in wedlock. It is radically null when a mistake has been made regarding the sex of one of them, or, what amounts to the same thing, when one of them is not of a specific sex. If there be incontestible identity of sex there is not even the appearance of marriage."⁹⁶

In France a marriage has been declared null because it did not unite a man and a woman,⁹⁷ but care must be taken not to confuse this with impotence or error on the person.⁹⁸

While it is true that the case of identity of sex would seem to be covered by the Civil Code, an examination of the relevant article will show that this is not so

91. D. Lasok, cited above at note 61, p. 53.

92. In France, Germany, Switzerland, Poland.

93. Civil C., Arts. 621 and 622, provided that the definitional requirements of Civ. C., Art. 578 are satisfied.

94. *Id.*, Art. 623(1) and (2). The word "some" in Civ. C., Art. 623, is intended to include "any" in the sense of inobservance of any religious condition or formality.

95. *Id.*, Art. 623(3).

96. M. Planiol et G. Ripert, cited above at note 64, vol. 2 no. 1005.

97. *Darbousse c. Darbousse* (Cour d'appel, Montpellier, Fra., May 8, 1872), *Dalloz*, 1872 pt. 2, p. 48. In this case the wife had no internal sex organs and was said by the court to be more like a man than a woman. The court said that since marriage is a union of a man and a woman it cannot be valid where the wife is not a woman. But see, *per contra*, *Dame G. c., G.* (Cour de cassation, Fra., April 6, 1903), *Dalloz*, 10(4), pt. 1, p. 395, which held the absence of certain sex organs in the wife to be a case of impotence. The court admitted that marriage can be contracted only between two persons of the opposite sex, but held that in this case the wife was recognisably a woman.

98. The French authorities seem to agree that a mere absence of sex organs of one sex does not make a person a member of the other sex. Something more positive is required.

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Article 591(c)⁹⁹ deals with the case where an error has been made by one of the spouses on "the bodily conformation" of the other "who does not have the requisite organs for the consummation of the marriage". Although the effect of marriage is in no way dependent on consummation,¹⁰⁰ the person who was married under the influence of such error can apply for dissolution on the theory that his consent was vitiated in that he would not have married had he known the truth.¹⁰¹ But if the parties are of the same sex there is obviously no marriage, whether a mistake has been made or not, and the so-called marriage is void.¹⁰²

German law considers it a case of *Nichtehe* or *matrimonium non existens* where no agreement takes place at all.¹⁰³ It seems probable that such a marriage would be considered void in Ethiopia. Article 586(1) requires that "each of the spouses shall personally consent to the marriage at the time of celebration." Marriage by proxy is not permitted.¹⁰⁴ Related to the question of consent are the cases of voidable marriage which we have seen earlier, namely marriage of incapacitated persons, duress and error. But in all of these cases specific provision is made for application for dissolution of the marriage. No provision is made for the case where a person had absolutely no intention whatsoever of being married, as for instance where one of the parties did not understand the nature of the ceremony.¹⁰⁵ The lack of understanding might be due to lack of acquaintance with the ceremony or to a befuddled state induced by drink or drugs. Also included in a case of complete absence of consent would be cases where one of the parties answered 'no' at the ceremony or did not answer at all. It was the intention of the draftsman to deal with this question by including a provision making invalid a consent to marriage given by a person ignorant of its meaning, however this provision disappeared.¹⁰⁶

The consequences of a void marriage have been outlined above. Since there is no marriage there are no effects.

99. Article 591 makes a restrictive enumeration of errors. 591(c) covers "error on the state of health or bodily conformation of the spouse, who is affected by leprosy or who does not have the requisite organs for consummation of the marriage." This does not cover wilful refusal to consummate. But the Amharic text use the words "or is unable to consummate the marriage", which words cover cases of impotence and possibly, wilful refusal to consummat.
100. Civ. C., Art. 626 provides: "The effects of marriage shall in no way depend on the real or presumed consummation of the marriage."
101. Id., Arts. 590 and 618. In X.c.X, (Tribunal civil de Grenoble Fra., March 13 and Nov. 20, 1958) *Dalloz*, 1959, p. 495, impotence was held to constitute an error as to the person vitiating consent.
102. The marriage will be void because it does not have the appearance of marriage. If the appearance of marriage is present, i.e., the parties seem to be of opposite sexes, then the marriage will not be void.
103. E.J. Chn, *Manual of German Law*, (2nd Ed. London, British Inst. of Intl. and Comp. Law, 1968) vol. 1. no 488. W. Muller-Freienfels, cited above at note 82, p., 431.
104. Civ. C., Art. 586(2). Dispensation can be given for good cause.
105. See *Kelly (orse. Hyman) v. Kelly* (High Court, Eng., 1932), *T.L.R.* vol. 149, p. 99, where the bride thought the wedding ceremony was a betrothal ceremony. The marriage was held void ab initio by an English court. *Valier v. Valier* (orse. Davis) High Court, Eng., 1925), *L.T.* vol. 133, p 830, was a case where the bridegroom, a foreigner did not realise that a ceremony of marriage was being performed. This marriage was also held void *ab initio* by an English court.
106. R. R. David cited above at note 17, p. 54, f. n. 21. See also G. Krzeczunowicz, cited above at note 52, problem 4, and "Quizzes" *J. Eth. L.*, Vol. VIII, (1972) p. 204

Void marriage was known in Ethiopia prior to the coming into force of the Civil Code. In a case decided by the Addis Ababa High Court¹⁰⁷ a marriage was held void *ab initio*. The facts were these: a civil marriage was celebrated between the parties at the Municipality of Addis Ababa. The parties, who were non-Ethiopians had met abroad and had subsequently agreed by letter to marry. The respondent arrived in Addis Ababa to be married to the petitioner who was working in Ethiopia. From the moment of her arrival the respondent was nervous and, at first, refused to go through with the marriage as arranged. However due to the situation in which she found herself and the pressure of friends she did get married to the petitioner. On the honeymoon she refused to consummate the marriage which was never consummated thereafter. Three weeks later she left Ethiopia having sent a letter of "declaration of divorce" to her embassy.

The High Court held the marriage void *ab initio* saying: "the respondent did not have the intention to consummate the marriage at the time of celebration. This being so one of the essential elements of marriage was lacking."

If this case were to occur today the court would have to look to the Civil Code in order to deal with it. Since consummation has no bearing on the effects of marriage¹⁰⁸ and this is not a case of inability to consummate but of wilful refusal¹⁰⁹ the provisions of the Civil Code would not provide an answer, except possibly to hold the marriage valid for lack of a text declaring it defective. In that case the marriage would have to be dissolved by divorce. It is also possible that the marriage could be held void *ab initio* for lack of intention to marry, which, however, would have to amount to complete lack of consent.

V

CONCLUSION

Only *voidable* marriages are provided for in the Civil Code of Ethiopia. Where a marriage contains a defect and it can be dissolved on these grounds, it is voidable. But unless and until it is avoided such a marriage is valid. If it is avoided the marriage will cease to have effect on the day it is declared void. But it will retain all the effects it previously had. The court declaration will be purely prospective.

Void marriages are not directly alluded to in the Civil Code. It is logical to introduce the concept to deal with cases where there is no marriage because of a fundamental defect in the union. The concept must be limited to cases where the

107. Thorson v. Grayson, (High Court, Addis Ababa, Civil Case No. 151/51, Commercial Division) (unpublished).

108. Civ. C., Art. 626, text given above at note 100.

109. Inability to consummate due to a lack of sexual organs is covered by Civ. C., Art. 591 (c) where an error has been made text given above at note 99. The case where a spouse could consummate the marriage but refuses to do so is not directly covered. However, since the Amharic text refers to inability to consummate, refusal might be held to constitute inability, cf. G. Krzczunowicz, cited above at note 52, problem 8, and "Quizzes", *J. Eth. L.*, vol. VIII, (1972) p. 230

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nature and purpose of marriage are frustrated, for example where there is no consent to marry or no appearance of marriage. The void marriage has no effect since it never came into being.

The law, in regulating defective marriages, must limit itself to these two cases. There is no reason to introduce the notion of voidable marriages which can be retroactively declared void. Such a concept puts personal rights in jeopardy and is undesirable for this reason.

C. COMPARATIVE LAW

"Sexual Freedom" in R. Wacks (ed.) Civil Liberties in Hong Kong (Oxford, O.U.P. 1988) pp. 302-320.

"The Legal Profession" in A. Ibrahim (ed.) Survey of Malaysian Law 1979 (Singapore, M.L.J. 1980) pp. 423-436.

CIVIL LIBERTIES IN HONG KONG (ed. R. WACKS)

(Oxford
University
Press, 1988)

10 Sexual Freedom

KATHERINE O'DONOVAN

THE Hong Kong Law Reform Commission has identified the general philosophy of the territory as 'the provision of a framework within which society may grow and the individual pursue his fulfilment, rather than detailed control of how the individual achieves his goals, unless the protection of others demands it'.¹ Sex category at birth and sexuality affect individual goals. Yet, as this chapter argues, existing legal controls of these matters suggest that Hong Kong's philosophy is not entirely libertarian. Discussion of the legal regulation of sexual preference requires an investigation and elaboration of the philosophy identified by the Law Reform Commission. To what extent does Hong Kong maintain a balance between individual freedom and the protection of others? Are there restrictions on individual freedom even where the protection of others is not involved?

Libertarian ideas about individual freedom are normally associated with John Stuart Mill's *On Liberty* which laid down the principle that 'the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others'.² This principle, sometimes termed 'the harm principle',³ cannot be said to be the only philosophy behind the Hong Kong law on sexual freedom. The law goes further in its enforcement of morality, and in implementing certain public policies.

Sexual freedom is used in this chapter to cover three discrete aspects of sex category and sexuality. These are the preference for members of one sex category as employees, tenants, or creditors, that is, as persons with whom to contract. The second aspect is the preference for members of one sex category as sexual partners. The third aspect raises the question of sex category itself: is there individual freedom to change categories?

Before proceeding to a detailed investigation of these three aspects of sexual preference, it is desirable to provide further elaboration of the harm principle in order to aid clarification. Mill argued that the need to prevent harm in private or in public,

to persons other than the actor, justifies state interference with the actor's behaviour. The harm principle, in short, is an appropriate reason for legal coercion. But Mill went further in arguing that the harm principle is the *only* valid principle for determining legitimate invasions of liberty. Therefore no conduct which fails to satisfy the terms of the harm principle can, in Millian terms, properly be made criminal.

The harm principle is applied in Hong Kong in certain areas, for the legislature has acted in a protective manner by making certain acts criminal. Examples are the Offences Against the Persons Ordinance prohibiting murder, manslaughter, infanticide, and kidnapping,⁴ the Crimes Ordinance prohibiting sexual intercourse with a girl under the age of 16 years,⁵ and the Protection of Women and Juveniles Ordinance giving general powers to the Director of Social Welfare to intervene protectively.⁶ However, as has already been pointed out, although protection from harm is one reason for legislative intervention in Hong Kong, it cannot be said to be the only one. There are laws on the statute book which are justified in other terms. The examination below of areas of sexual preference suggests that the balance between individual freedom and the purposes served by law is difficult to adjust.

A. SEXUAL PREFERENCE AND FREEDOM OF CONTRACT

A society wishing to provide a framework for the pursuit of individual goals without detailed controls might opt for freedom of contract. Nineteenth-century Britain chose this path,⁷ which seems to be consonant with the Hong Kong philosophy. In *Allen v Flood*⁸ the House of Lords held that there is no right of action for refusal of employment. Persons are free to contract as they will. 'An employer may discharge a workman (with whom he has no contract), or may refuse to employ one from the most mistaken, capricious, malicious, or morally reprehensible motives that can be conceived, but the workman has no right of action against him.'⁹ In other words, there is freedom to choose, to discriminate, for any reason whatsoever. From this case it has generally been concluded that the common law provides no remedy for the person who wishes to complain of discrimination on

grounds of race, sex, or some other ascriptive quality. Professor Hepple's view is that the notion of contractual freedom implies 'an absolute right' on the part of the employer to discriminate in the choice of his employees. He argues that as 'discrimination did not arise as a crisp legal problem in the formative years of the law of contract in the nineteenth century, it cannot now be subjected to those rules'.¹⁰ Therefore 'when the firmly-entrenched doctrine of freedom of contract has come into conflict with the post-Second World War concept of freedom from discrimination, it is hardly surprising that the older, better-appreciated freedom has prevailed'.¹¹

The idea of freedom from discrimination is worth some consideration. When race and sex discrimination was perceived as wrong in the mid-twentieth century, most common law jurisdictions passed legislation to remedy what was seen as a social problem. The rhetoric supporting the enactment of the Sex Discrimination Act 1975 in Britain relied on the concepts of freedom and competition.¹² Those jurisdictions which enacted legislation¹³ did not see the further development of the common law to provide remedies for victims of discrimination as a possibility. Support for this view may be drawn from the Ontario case of *Re Noble and Wolf*.¹⁴ There the court stated that it would 'constitute a radical departure from established principle to deduce any policy of the law which may be claimed to transcend the paramount public policy that one is not lightly to interfere with the freedom of contract'.¹⁵

Against this established view can be set 'the flexibility of the law of tort in meeting the novel demands of what the courts perceive to be public policy'.¹⁶ It has been argued that the past practice of the courts 'does not justify the conclusion that, as a matter of law . . . freedom [from discrimination] can never obtain judicial preference over freedom of contract'.¹⁷ Support for this alternative view comes from a later Ontario case. In *Bhadauria v The Governors of Seneca College*¹⁸ the Ontario Court of Appeal held that a common law action may lie for discrimination. The court held unanimously that a plaintiff who can establish that she was refused employment because of her ethnic origin, and thereby suffered damages, has a common law action for discrimination against the potential employer. Although the court's reasoning relied partly on the Ontario Human Rights Code which provides that 'it is public policy in Ontario that every person is free and equal in dignity and rights without regard to race, creed, colour,

sex ...',¹⁹ the common law was called upon to protect these rights. The court saw the common law as containing the fundamental right not to be discriminated against. This right was said to be not merely the creation of statute, but already embedded in the law.

On appeal, however, the Supreme Court of Canada held that such a development of the common law was forestalled by the Ontario Human Rights Code. In the words of Laskin, CJC: 'The view taken by the Ontario Court of Appeal is a bold one and may be commended as an attempt to advance the common law. In my opinion, however, this is foreclosed by the legislative initiative which overtook the existing common law in Ontario and established a different regime which does not exclude the Courts but rather makes them part of the enforcement machinery under the Code.'²⁰ The Supreme Court did not deny the possibility of such a common law action in a jurisdiction where no legislation for the vindication of the right to freedom from discrimination existed. This is consistent with Lord Denning's view that 'it is a cardinal principle of our law that [persons] shall not suffer any disability or prejudice by reason of their race and shall have equal freedom under the law ...'.²¹

Modern studies of sex and race discrimination suggest that being discriminated against affects one's material interest and one's psychological well-being. Self-image and one's sense of self are damaged. In short, the victim is harmed.²² This is recognized in international declarations and conventions which have been applied to Hong Kong by the United Kingdom government. The Universal Declaration of Human Rights,²³ the International Covenant on Civil and Political Rights²⁴ and the International Covenant on Economic, Social and Cultural Rights²⁵ proclaim equality before the law,²⁶ guarantee rights without distinctions of race or sex,²⁷ and recognize rights of equal opportunity in work.²⁸ It is true, however, that the United Kingdom government has not extended to Hong Kong the United Nations Convention on the Elimination of All Forms of Discrimination Against Women.²⁹

Hong Kong has no legislation on race and sex discrimination. Freedom of contract remains largely complete, with the usual common law exceptions. The significance of this and of the United Kingdom government's failure to apply the United Nations Convention on sex discrimination to Hong Kong must remain a

matter for speculation. But the possibility that common law could be developed in Hong Kong to provide a remedy for victims of discrimination does exist. What is interesting is that freedom in the public sphere has not been extended to the private sphere of sexual preference.³⁰

B. CHOICE OF SEXUAL PARTNER

It might be assumed that, as freedom of contract rules the Hong Kong market-place, there is similar freedom in the private sphere of sexuality. This is not so. As already explained, the harm principle requires that the young be protected from sexual exploitation and abuse. But are there similar good reasons for restricting choice of sexual partners for adults who consent to, or contract for, sexual intercourse? Two major aspects of this question will be considered here: homosexuality and prostitution.

1. Homosexuality

In 1865 Hong Kong adopted the English Offences Against the Person Act 1861 in its entirety. Prior to 1861 there was an English statute of 1533 making sodomy a felony 'for as much as there is not yet sufficient and codign punishment appointed and limited by the due course of the laws of this realm'.³¹ According to Blackstone, 'the infamous crime against nature, committed either with man or beast' was treated in indictments as a crime not fit to be named.³² The no-name crime was punishable by death until 1861. Other forms of homosexual activity were either ignored or subsumed under the general law of assault. The English law of 1861 and the Hong Kong Ordinance of 1865 were directed at the act of anal intercourse between persons (buggery) and at sexual acts with animals (bestiality).³³ The English Criminal Law Amendment Act 1885, adopted by Hong Kong in 1901, created the offence gross indecency between males which was punishable regardless of whether the act occurred in private or in public.³⁴ This specification by the law of control over acts by consenting adults in private, and the limitation of the offence to males, has ever since been the source of difficulty and criticism.

The Offences Against the Person Ordinance provides penalties for what are termed 'abominable offences'.³⁵ The maximum

penalty of life imprisonment may be imposed on any person convicted of buggery or bestiality.³⁶ Indecent assault upon any male person, attempts to commit buggery or bestiality, or assaults with intent to commit buggery or bestiality have a maximum penalty of 10 years' imprisonment.³⁷ The commission by any male person of any act of gross indecency with another male person, in public or in private, is a misdemeanour carrying imprisonment for two years. This offence also covers being party to the commission of the act, procuring, or attempting to procure the act.³⁸ Consent is no defence.³⁹

The law's control over private acts between consenting adults was the focus of much criticism in Britain. The Wolfenden Committee Report on Homosexual Offences and Prostitution of 1957 took the view that the law should refrain from entering into the private lives of citizens. It stated that the function of criminal law in relation to homosexuality and prostitution was 'to preserve public order and decency, to protect the citizen from what is offensive and injurious, and to provide sufficient safeguards against exploitation and corruption of others'.⁴⁰ Individual freedom of choice and action in 'matters of private morality' was upheld in the report:

Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality. On the contrary, to emphasise the personal and private nature of moral or immoral conduct is to emphasise the personal and private responsibility of the individual for his own actions, and that is a responsibility which a mature agent can be properly expected to carry for himself without the threat of punishment from the law.⁴¹

This is a classic statement of liberal philosophy and it provoked a change in the law of England and Wales. The Sexual Offences Act 1967 decriminalized homosexual acts in private between consenting males over the age of 21. The Criminal Justice (Scotland) Act 1980 formally brought Scottish law into line with that of England and Wales.⁴²

Not all parts of the United Kingdom adopted the libertarian position recommended by the Wolfenden Committee. Northern Ireland had the same laws governing homosexuality as Hong

Kong until 1983.⁴³ Proposals for change in Northern Ireland's law, having been introduced in the United Kingdom Parliament in 1978, were later not pursued. The reasoning was that a substantial body of opinion in Northern Ireland, covering a wide range of political and religious views, was opposed to bringing the law into line with that of the rest of the United Kingdom.⁴⁴ There are certain parallels with the Hong Kong situation.

In 1983 the Law Reform Commission reported on the Hong Kong laws governing homosexual conduct. The Commission's recommendation, in broad terms, was that consensual homosexual activity in private between males over the age of 21 should not be prohibited by law.⁴⁵ This recommendation has not yet become law. The Law Reform Commission took the view that traditionally in China there was 'a fairly open attitude toward sexual practices; sex was not something to be feared, nor was it regarded as sinful. [The] homosexual act, though generally regarded as repugnant, was tolerated. In the Chinese social setting, people tended to treat it as a private matter.'⁴⁶ The history of the Hong Kong legislation suggests that the condemnation of homosexual conduct as sinful and criminal originated with the colonial authorities dealing with activities among the Armed Forces. The first recorded prosecution was of a soldier of the Royal Inniskilling Regiment who, in 1880, was 'convicted of an attempt to commit an unmentionable offence and sentenced first to three years' imprisonment, which was afterwards increased by Sir John Smale, the presiding Judge, to five years'.⁴⁷

This is not to say that homosexual activity in Hong Kong is confined to persons of European ancestry. The evidence to the Law Reform Commission was that this is not so. What is being suggested is that the view of homosexual acts as criminal, whether or not they take place in private among consenting adults, has been imported.

In 1981 the Hong Kong Police Force gave evidence to the Law Reform Commission that 'homosexuality is widespread in Hong Kong and involves personalities of many different nationalities from every strata of our society. Information gathered from interviews suggests that no less than 1,000 male prostitutes are operating full or part time, serving both resident and transient homosexuals.'⁴⁸ Making its own calculations about homosexuality in Hong Kong the Law Reform Commission concluded that 'it would be realistic to expect that between 125,000 and 250,000

men (between 5% and 10% of the male population) are homosexual, the vast majority being Chinese. It is reasonable to assume that hundreds of thousands of homosexual incidents take place each year, the majority being consensual acts between adults.⁴⁹

In recommending the decriminalization of homosexual acts in private between males over 21, the Law Reform Commission appears to have been motivated largely by pragmatic considerations concerning the administration of justice. The arguments that the law is being deliberately and continuously broken and that the offences remain undetected and unprosecuted strongly influenced the Commission. There was concern that civil servants and others with access to security matters might be at risk from blackmail. And there were allegations that police discretion to prosecute was exercised unfairly.⁵⁰ These pragmatic matters appear to have weighed more heavily with the Commission than questions of personal freedom. But the reaction of certain influential persons and bodies to the limited decriminalization proposal, and the political failure to implement it, seem to have been due to moral views rather than issues of the administration of justice.⁵¹

The European Court of Human Rights has found that Northern Ireland's legislation, which was identical to that of Hong Kong, prohibiting homosexual conduct between consenting adult males in private, is in breach of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁵² Article 8 provides for the right of respect for private and family life, home, and correspondence, and that there shall be no interference by public authority with the exercise of this right, with certain specified exceptions. The exceptions are for national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others. In *Dudgeon v United Kingdom*⁵³ the United Kingdom government admitted that laws permitting action by the police in removing documentary evidence of the applicant's homosexuality from his flat interfered with his right to respect for his private life, which included his sexual life. However the government sought to justify this interference as being justified under Article 8 as necessary for 'the protection of morals' or 'the protection of the rights and freedoms of others'.

By a majority of 15 to 4 the Court held that some degree of regulation of male homosexual conduct is necessary to a democratic society, but defined 'necessary' as implying the existence of a pressing social need. Since the *Dudgeon* case concerned 'a most intimate aspect of private life' there must exist serious reasons before interference by public authorities can be legitimate. Opinions among the majority were that the '[c]onvention right affected by the impugned legislation protects an essentially private manifestation of the human personality'.⁵⁴ After this adverse decision in the European Court of Human Rights, the United Kingdom government brought Northern Ireland's law into line with that of the rest of the United Kingdom.⁵⁵

The importance of this decision for Hong Kong is that moral attitudes towards male homosexuality and public concern about the erosion of moral standards were not accepted by the majority of the Court as sufficient reason for interference with the applicant's private life. In other words the freedom of the individual to manifest his personality in private through his sexual life was given greater importance than views in the community about morality.

It is of interest to note that the law in Hong Kong, as in the United Kingdom, does not penalize lesbian acts between women above the age of 16 which are consensual and in private. The Law Reform Commission recommended that there should be no alteration to this position.⁵⁶ Thus, if the Commission's recommendations for changes in the law governing male homosexuality were implemented, there would remain an inconsistency in the treatment of the sexes. Furthermore the age of consent to heterosexual intercourse for women is 16.⁵⁷ However the Commission's view is that there are differences between the sexes in their attitude to sexuality, as evidenced by the lack of law governing the age of heterosexual consent for men.

2. *Prostitution*

Freedom of contract applied to consensual heterosexual relations among persons above the age of consent might be assumed to pose no problem in Hong Kong. But the issue is complicated by common law and legislation. At common law a contract for the sale of sexual services is unenforceable.⁵⁸ Legislation makes it an offence to run a brothel, to permit premises to be used for

habitual prostitution, to procure a woman into prostitution, and to solicit or loiter for an immoral purposes.⁵⁹ It is not an offence for a woman to be a prostitute, though she may be liable for conviction for aiding and abetting the commission of an offence under the Crimes Ordinance, such as the keeping of a vice establishment.⁶⁰

The Wolfenden Committee recommended that the criminal law should not concern itself with matters of private morality but should aim 'to protect the citizen from what is offensive or injurious'.⁶¹ The outcome, in Britain, was the Street Offences Act 1959 which largely decriminalized prostitution off the streets, whilst providing that it is 'an offence for a common prostitute to loiter or solicit for immoral purposes'.⁶² The law in Hong Kong is similar and the object is to reduce the visibility of prostitution by ensuring that agreement and act take place in private. Legal controls are aimed at persons who exploit women for purposes of prostitution through trafficking, procuring, transferring possession, harbouring, exercising control, and living off earnings.⁶³

It was the view of the Wolfenden Committee that prostitution could not be abolished by law. 'We do not think that the law ought to try to do so; nor do we think that if it tried it could by itself succeed.'⁶⁴ Instead, the Committee believed that strict law enforcement in public is more efficacious if the law ceases to be the guardian of private morality. Hong Kong's prostitution trade has its own particular features,⁶⁵ but the overall legal approach is similar to that of Britain. That this was the intention of the legislator is clear from the speech of the then Attorney General introducing the legislation to the Legislative Council. He made clear his view that it is not the government's intention to intrude unduly into the private lives of its citizens or to establish a code of private morality.⁶⁶

It would therefore seem that the law's approach to matters of private morality is inconsistent, when homosexuality and prostitution are compared. Perhaps this is not surprising. This issue has been the centre of an important modern jurisprudential debate between Lord Devlin and Professor Hart. Lord Devlin argued that a shared morality, reflected in law, is one of the essential elements of society. He pointed to certain crimes such as suicide pacts, homosexuality, abortion, incest, pornography, and prostitution which were brought within the criminal law on the basis of moral principles, despite the fact that they took place

in private between consenting adults.⁶⁷ Devlin's view was that these should be retained as crimes. However, in English law a gradual process of decriminalization for adult consensual acts in private has taken place. Professor Hart was not convinced that Devlin had made out the case for the necessity of a common morality on all issues to the survival of a society. He argued that pluralism may be beneficial and prevents the domination of the minority by the majority on issues of morality.

C. FREEDOM TO CHANGE SEX CATEGORIES?

A new individual arriving into the social world is assigned a sex category. When a child is born, one of the first questions asked is whether the newcomer is female or male. The answer given constitutes the baby's assigned sex; in the social world this affects the individual's future goals, behaviour, identity, personality, emotions, sexuality, and gender role. External genitalia are the sign to the parents, and to those present, of the appropriate sexual classification. Under Hong Kong law there is a duty upon the father, or the mother, or the occupier of the house in which the child is born, or any person present at the birth⁶⁸ to register the birth within 12 months.⁶⁹ The general practice, however, is to register within 42 days, as in such cases no fee is payable.⁷⁰ The sex assigned to the infant is entered on the birth certificate.⁷¹

In the vast majority of cases, the sex assignment at birth is correct; if an error is made, the birth certificate can be amended. However this procedure only results in a change on the margin of the certificate, initialled by the registrar. A clerical error will be corrected, as will an error of fact or substance. In the latter case a declaration by two persons qualified to register the birth, or of two credible persons who satisfy the registrar, will be accepted.⁷² It is unlikely, however, that this procedure is open to those wishing to change sex categories from choice, such as transsexuals. The European Court of Human Rights has rejected the claim that the refusal by the United Kingdom government to alter the birth certificate of a transsexual, or to issue a new certificate, is a breach of the European Convention on Human Rights. In *Rees v United Kingdom*⁷³ the applicant was born with the physical and biological characteristics of a female child. From an early age the child showed a desire to be male and underwent

sex-conversion surgery at the age of 28. The Court took the view that the birth certificate is a record of historical fact only and not proof of current civil status. To require secret alteration of the birth certificate 'would involve difficult problems in many areas of public interest, for example by complicating factual issues arising in family and succession law, which could be overcome only by detailed legislation as to the effects by the change in various contexts and as to the circumstances in which secrecy should yield to the public interest'.⁷⁴ Although Article 8 of the Convention protects private life, the Court's view seems to be that the birth certificate is a matter of public record. However, this does not answer the problems of children born with ambiguous sex indicia. In such cases the failure of the registrar to provide a new birth certificate may cause difficulties in life.

There are two groups of persons in Hong Kong whose individual freedom may be affected by legal classification of women and men as belonging to two different and separate groups. These are persons whose sex indicia are ambiguous, including persons who are intersex; and persons born into one category who wish to move into the other category, or to change sex. The latter group are termed transsexuals.⁷⁵ Laws affecting these persons cover marriage, sexual crime, and public facilities such as lavatories.

Medical research shows that there are seven variables affecting sex determination. These are chromosomal sex; gonadal sex; hormonal sex; the internal accessory organs — the uterus in the female and the prostate gland in the male; assigned sex; and gender role.⁷⁶ Within these criteria there may be considerable variation. For instance, the amount of the hormones oestrogen or testosterone present in the body varies from person to person, and according to such matters as psychological state and monthly cycle. Certain factors may indicate the female sex; other factors may suggest the male. In some cases incorrect assignment in early childhood may have to be corrected at puberty through hormone therapy or surgery. In other cases the patient's gender identity may be so well established that the incorrect assignment has to continue, again with medical help.⁷⁷

Transsexuals, in general, are persons whose genital sex places them in the sex category in which they are raised. An overwhelming conviction that they belong to the opposite category leads them to seek medical assistance. In Hong Kong sex-change

surgery has been performed to convert genitals into those of the other sex. The usual medical requirement is that the transsexual should have lived as a member of the chosen sex before surgery.⁷⁸

Hong Kong law classifies human beings for many purposes as if there were two clearly defined divisions into which everyone falls on an either/or basis. Although medical research no longer justifies the use of biology in treating the legal categories woman and man as opposite and closed, the law continues to operate such a presumption. In general this occurs where legislation uses a classificatory scheme based on sex. Particular areas where the courts are involved in defining sex are marriage, sexual crime, and the use of public facilities.

1. Marriage

The Matrimonial Causes Ordinance, section 29,⁷⁹ declares that a marriage is void if the parties are not respectively male and female. In English law a similar provision has been the subject of judicial interpretation, a precedent which the Hong Kong courts would be likely to follow.⁸⁰ In *Corbett v Corbett*⁸¹ a couple had married knowing that, whereas both had been classified as male at birth, one had undergone a sex-change operation in an attempt to move into the female category. The marriage was a failure and the male partner brought an action to have the marriage declared null and void on the ground that both parties were members of the male sex. The court agreed, taking the view that 'sex is clearly an essential determinant of the relationship called marriage because it is and always has been recognised as the union of man and woman. It is the institution on which the family is built, and in which the capacity for natural hetero-sexual intercourse is an essential element.'⁸²

The view of the judge in this case (Ormrod) was that sex is fixed at birth and cannot change either naturally or surgically. The biological test of sex is the chromosomal, gonadal, and genital test. If all three are congruent, they determine a person's sex. Social and psychological matters of gender identity and role were considered irrelevant for marriage where sex is an essential determinant of the relationship.

A similar approach has been taken in Australia to a genuine intersex case.⁸³ The husband, who had grown up as a male and

who had partial male organs, had undergone surgery to remove the partial female organs with which he had been born. After some years of marriage his wife sought a declaration of nullity and this was granted on grounds of mistaken identity because 'she did not in fact marry a male but a combination of both male and female'.⁸⁴ The *Corbett* case was referred to as an authority.

The marriage in Hong Kong of a person who had undergone a sex-change operation in order to move from the male category into the female category has been held to be a nullity by the District Court. The woman in question held a Hong Kong identity card and a British passport which classified her as female. Her birth certificate declared her sex to be male.⁸⁵ The Court appears to have relied on the authority of the *Corbett* case in determining that the wife was male. The effect of this interpretation of the law is likely to be that hermaphrodites and persons born intersex cannot marry. Neither can post-operative transsexuals, who do not in law belong to the chosen sex, but who are incapable of consummating marriage as members of their assigned sex.⁸⁶

The European Court of Human Rights has rejected a claim that the denial by English law of the validity of a marriage entered into by a transsexual is a violation of the right to marry, guaranteed by Article 12 of the Convention. The Court expressed the opinion that the right to marry referred to traditional marriage between persons of opposite biological sex. 'That appeared also from the wording of the article which made it clear that article 12 was mainly concerned to protect marriage as the basis of the family.'⁸⁷

2. *Sexual Crime*

The decision in the *Corbett* case has influenced the criminal law despite the judge's statement that the decision should be confined to marriage 'for I am not concerned to determine the "legal sex" of the respondent at large'.⁸⁸ In *Tan and others*⁸⁹ the English Court of Appeal decided to apply *Corbett* to an area of criminal law where the sex of the defendant determines guilt. Under section 30 of the Sexual Offences Act 1956, it is an offence for a man to live off the earnings of prostitution. The accused, who was a post-operative male-to-female transsexual, appealed against conviction on the ground that she was not a man. The Court held that for reasons of common sense, certainty, and

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consistency *Corbett* would be followed. Thus the defendant's biological sex remained male.

To understand the implications of this decision for Hong Kong, areas of criminal law which specify the sex of the defendant or victim must be examined. Those areas likely to impinge on the person who is intersex or a transsexual are: rape, buggery, gross indecency by males, offences in relation to prostitution, and unlawful sexual intercourse. The outcome of the *Tan* case is curious. A male-to-female transsexual cannot be the victim of rape, as rape is an offence in which the victim is female. Harboursing, transferring for prostitution, procuring, controlling, and living off the earnings of a woman for prostitution will not be an offence where the woman is a male-to-female transsexual.⁹⁰ Living off the earnings of prostitution is an offence which can only be committed by a male.⁹¹ The purpose is to prohibit pimping. However, a male-to-female transsexual who is a prostitute could be prosecuted for this offence. Also odd is the fact that a female-to-male transsexual cannot be convicted of unlawful sexual intercourse with an underage girl.

Indecency in public lavatories is an offence committed by a female person over the age of five who enters a public convenience reserved for male persons, and vice versa.⁹²

The question of whether a transsexual is entitled to identity documents in the chosen sex category has not been decided in Hong Kong. As already stated it is unlikely that the birth certificate can be changed. As a matter of practice the Immigration Department does issue fresh identity cards in the new name and sex chosen by a transsexual.⁹³ However there is no formal legal procedure or entitlement to such a card. This issue has been the subject of a decision by the European Commission on Human Rights. In *Van Oosterwijck v Belgium*⁹⁴ the Commission held that it is a violation of private and family life to require a transsexual to carry documents of identity manifestly incompatible with personal appearance. The Commission made a finding that the refusal by a signatory state to the European Declaration on Human Rights to recognize gender identity results in the treatment of the transsexual 'as an ambiguous being, an "appearance", disregarding in particular the effects of a lawful medical treatment aimed at bringing the physical sex and the psychological sex into accord with each other'.⁹⁵ Hong Kong is not a party to the European Convention on Human Rights, so this decision has no effect on Hong

Kong law. However it shows how issues of freedom to choose one's gender identity are viewed by civil libertarians.

D. CONCLUSION

Hong Kong law is inconsistent in its approach to issues of sexual freedom. Whereas a philosophy of minimal interference by law can be identified as far as freedom of contract and prostitution are concerned, there is extensive control over homosexuality. Although there are no laws directly affecting intersexuality and transsexuality, persons suffering from these conditions are the victims of legislative schemes based on assumptions which are not consonant with medical research. Perhaps it is time for Hong Kong's legislators to ask themselves whether it is the law's role to intervene in private morality, and further, whether legislative classificatory schemes based on sex are necessary.

NOTES

1. The Law Reform Commission of Hong Kong, *Report on Laws Governing Homosexual Conduct* (Hong Kong, The Law Reform Commission, 1983), p. 6.
2. J.S. Mill, *On Liberty* (London, Dent, 1910), p. 73.
3. J. Feinberg, *Harm to Others* (New York, Oxford University Press, 1984), p. 11.
4. Cap 212, LHK 1981 ed, ss 2, 7, 47C, and 42.
5. Cap 200, LHK 1984 ed, s 124. Unlawful sexual intercourse with a girl under 13 years is a more serious offence under s 123.
6. Cap 213, LHK 1978 ed, s 34 provides wide powers to the juvenile court to make orders for the care and protection of juveniles.
7. P. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, Clarendon Press, 1979).
8. [1898] AC 1.
9. [1898] AC 1, 172, per Lord Davey.
10. B. Hepple, *Race, Jobs and the Law in Britain* (Harmondsworth, Penguin, 1970), p. 155.
11. Hepple (1970), p. 155, see note 10 above.
12. *House of Commons Hansard*, Vol 889 (1975).
13. For example, the United Kingdom, Ireland, Canada, Australia, and the United States.
14. [1948] 4 DLR 123 (Ont. HC).
15. [1948] 4 DLR 123 (Ont. HC). 139, per Schroeder J.
16. I. G. McKenna, 'A Common Law Action for Discrimination' (1981) 1 *Legal Studies* 296, 298.
17. McKenna (1981), see note 16 above.
18. [1980] 105 DLR (3d) 707.

19. RSO 1970 c 318.
20. [1981] 124 DLR (3d) 193, 203.
21. Sir A. T. Denning, *Freedom Under the Law* (London, Stevens, 1951), p. 51.
22. C. McCrudden, 'Institutional Discrimination' (1982) 2 *Oxford Journal of Legal Studies* 303.
23. General Assembly of the United Nations, 1948.
24. General Assembly of the United Nations, 1966, which came into force in 1976.
25. General Assembly of the United Nations, 1966, which came into force in 1976.
26. General Assembly of the United Nations (1948), Arts. 2 and 7, see note 23 above.
27. General Assembly of the United Nations (1966), Art. 1, see note 24 above.
28. General Assembly of the United Nations (1966), Art. 7(c), see note 25 above.
29. Adopted by the United Nations General Assembly on 18 December 1979, this Convention entered into force on 3 September 1981. Both the United Kingdom and China have signed and ratified this Convention.
30. For elaboration of this distinction, see K. O'Donovan, *Sexual Divisions in Law* (London, Weidenfeld and Nicolson, 1985).
31. 25 Hen. VIII c 6 (1533). See H. Lethbridge, 'Homosexuality and the Law' (1976) 6 *Hong Kong Law Journal* 292.
32. W. Blackstone, *Commentaries* (London, n. p., 1765), vol. IV, 217.
33. The Offences Against the Person Act 1861, ss 61 and 62, made committing or attempting to commit buggery offences punishable with maximum sentences of life imprisonment and 10 years' imprisonment respectively.
34. The Criminal Law Amendment Act 1885 was introduced as a private member's bill to regulate female prostitution. The amendment to penalize gross indecency between males was known as the Labouchere amendment after its proposer. There for the first time appeared the famous words 'in private or in public', supposedly based upon French law, although this never penalized such conduct. One writer asserts that it was this law which marked homosexual activities as a crime and characterized the homosexual person as a criminal. He argues that previously the law was directed at acts such as buggery or bestiality but not at a particular type of person. See J. Weeks, *Sex, Politics and Society* (London, Longman, 1981), p. 99.
35. The Offences Against the Person Ordinance, cap 212, LHK 1981 ed. The modern English law was contained in the Sexual Offences Act 1956.
36. The Offences Against the Person Ordinance, cap 212, LHK 1981 ed, s 49.
37. The Offences Against the Person Ordinance, cap 212, LHK 1981 ed, s 50(a).
38. The Offences Against the Person Ordinance, cap 212, LHK 1981 ed, s 51. This provision originated in the Criminal Law Amendment Act 1885, s 11.
39. The Offences Against the Person Ordinance, cap 212, LHK 1981 ed, s 52.
40. Report of the Committee on Homosexual Offences and Prostitution (Wolfenden Report, Cmd 247, London, 1957), para 13.
41. Wolfenden Report (1957), para 61, see note 40 above.
42. Criminal Justice (Scotland) Act 1980, s 80 (1) and (2). The Lord Advocate of Scotland announced in 1967 that no proceeding would be taken in Scotland against individuals in circumstances where no prosecution could have lain in England. This was the policy until the new law came into force.
43. It was amended by Order No 1536 (NI 16) of 27 October 1982.
44. Homosexual Offences (NI) Order, July 1978.

45. Law Reform Commission (1983) ch XI, see note 1 above.
46. Law Reform Commission (1983) para 4.11, see note 1 above. See the report in the *South China Morning Post*, 27 November 1978 of the case of *Bowler*. There the defendant was acquitted by majority of an attempt to commit an unnatural offence. The Acting Attorney General argued that 'with regard to this offence — such was the view of China on it — there was no law in China against it'.
47. Lethbridge (1976) pp. 306–9, see note 31 above.
48. Law Reform Commission (1983), para 5.5, see note 1 above.
49. Law Reform Commission (1983), para 5.27, see note 1 above.
50. Law Reform Commission (1983), paras 5.15 and 5.28–5.30, see note 1 above. See also H. Lethbridge, 'Pandora's Box: The Inspector MacLennan Enigma' (1982) 12 *Hong Kong Law Journal* 4.
51. This was predicted by Lethbridge (1976), p. 326, see note 31 above.
52. The United Kingdom is a signatory of the Convention, permits individuals to bring their cases before the Commission and the Court of Human Rights, and has undertaken to abide by decisions of the Court in cases to which the state is a party. The United Kingdom is also a signatory of the United Nations Universal Declaration of Human Rights, and has applied their provisions to Hong Kong. Art. 12 of the Declaration and Art. 17 of the Covenant are similar to Art. 8 of the European Convention on Human Rights, which was interpreted in the *Dudgeon* case to include the right to sexual privacy. See Chapter 9 in this volume.
53. *Dudgeon v UK* 4 EHRR 149 (1982).
54. *Dudgeon v UK* 4 EHRR 149 (1982).
55. Order No 1536 (NI 19), 27 October 1982, which came into force on 9 December 1982.
56. Law Reform Commission (1983), para 11.56, see note 1 above.
57. See note 5 above.
58. *Jones v Randall* (1774) 1 Cowp. 37.
59. Crimes Ordinance, cap 200, LHK 1984 ed, ss 117, 139, 145, 131, and 147.
60. Crimes Ordinance, ss 117 and 139, see note 59 above.
61. Wolfenden Report (1957), para 13, see note 40 above.
62. Street Offences Act 1959, s 1.
63. Crimes Ordinance, cap 200, LHK 1984 ed, ss 119, 120, 121, 131, 129, 130, 138, and 137.
64. Wolfenden Report (1957), para 285, see note 40 above.
65. See Tsang Hon-kin, 'Wan Chai's "Fish Ball Stalls"' (1982) 12 *Hong Kong Law Journal* 136.
66. Speech by the Attorney General in the Legislative Council, 19 January 1977. For the history of the legislation see H. Lethbridge, 'Prostitution in Hong Kong' (1978) 8 *Hong Kong Law Journal* 149. Lethbridge argues that the retention of a notion of vice establishment, the keeping of which is an offence, will force Hong Kong prostitution on to the streets. Whilst it is true that the Hong Kong and British legislation differ in this respect, there is no evidence, as yet, that the Hong Kong law has had this effect.
67. P. Devlin, *The Enforcement of Morals* (Oxford, Oxford University Press, 1968); H.L.A. Hart, *Law, Liberty and Morality* (Oxford, Oxford University Press, 1963).
68. Births and Deaths Registration Ordinance, cap 174, LHK 1965 ed, s 7.
69. Births and Deaths Registration Ordinance, s 9(2), see note 68 above.
70. Births and Deaths Registration Ordinance, s 9(1), see note 68 above.
71. Births and Deaths Registration Ordinance, s 9(4), see note 68 above. Reference is made to the 'prescribed form' which is contained in the first schedule. The sex of the child is to be specified on the form. Whereas provision has

been made for alteration of the child's name, no provision has been made for alteration of sex.

72. Births and Deaths Registration Ordinance, s 27 (b) and (c), see note 68 above.

73. *Times Law Report*, 21 October 1986.

74. *Times Law Report*, 21 October 1986.

75. For legal accounts of transsexuality and intersexuality, see: G. W. Bartholomew, 'Hermaphrodites and the Law' (1960) 2 *Malaya Law Journal* 83; K. M. Bowman and B. Engle, 'Sex Offences: The Medical and Legal Implications of Sex Variations' (1960) 25 *Law and Contemporary Problems* 292; D.A.R. Green, 'Transsexualism and Marriage' (1970) 120 *New Law Journal* 210; H.A. Finlay, 'Sexual Identity and the Law of Nullity' (1980) 54 *Australian Law Journal* 115; L.J. Lupton, 'The Validity of Post-Operative Transsexual Marriages' (1976) 93 *South African Law Journal* 385; R. Ormrod, 'The Medico-Legal Aspects of Sex-Determination' (1972) 40 *Medico Legal Journal* 78; J. Taitz, 'The Legal Consequences of a Sex Change' (1980) 97 *South African Law Journal* 65; M.B. Walz, 'Transsexuals and the Law' (1979) 5 *Journal of Contemporary Problems* 181; J.M. Thompson, 'Transsexualism, A Legal Perspective' (1980) 6 *Journal of Medical Ethics* 82.

76. D.K. Smith, 'Transsexualism, Sex Reassignment Surgery and the Law' (1971) 56 *Cornell Law Review* 969.

77. J. Money and P. Tucker, *Sexual Signature* (London, Abacus, 1977).

78. Dr S.K. Chow, Surgeon-in-charge, Plastic and Reconstructive Surgery Unit, Princess Margaret Hospital, Hong Kong, reported to a seminar of the Hong Kong Psychological Society on 28 June 1986 that surgery is being performed on transsexuals in Hong Kong.

79. Cap 179, LHK 1983 ed.

80. The statutes are *in pari materia* and the practice is for the Hong Kong courts to follow the English court's interpretation in such cases. *De Lasala v De Lasala* [1980] AC 546.

81. [1971] p. 83.

82. [1971] p. 105.

83. (1975) FLC 90-636; R. Bailey, Note (1975) 53 *Australian Law Journal* 659.

84. (1975) FLC 78-327.

85. Report in the *South China Morning Post*, 30 October 1986.

86. Failure to consummate a marriage renders it voidable. MCO, cap 179, LHK 1983 ed, s 20(2)(a) and (b).

87. *Rees v United Kingdom*, *Times Law Report*, 21 October 1986.

88. See note 79, above at 106.

89. [1983] QB 1053; see also J. Pace, 'Sexual Identity and the Criminal Law' (1983) *Criminal Law Review* 317.

90. Crimes Ordinance, cap 200, LHK 1984 ed, ss 130, 129, 131, 137, and 138.

91. Crimes Ordinance, cap 200, LHK 1984 ed, s 137.

92. Public Conveniences (Conduct and Behaviour) Bye-laws, cap 132, LHK 1977 ed, s 35 (subsidiary AR 3 and 4).

93. Communication from the Attorney General's Chambers, 1 April 1986.

94. 3 EHRR 557 (1980).

95. 3 EHRR 584 (1980). Before the European Court of Human Rights it was held that, by reason of the failure to exhaust local remedies, the Court was unable to take cognizance of the merits of the case.

SURVEY OF MALAYSIAN LAW 1980 (MALAYAN LAW JOURNAL, 1981).

1980

LEGAL PROFESSION

KATHERINE O'DONOVAN

The legal profession in Malaysia is governed by the Legal Profession Act 1976 which is applicable throughout Malaysia but is, at present, confined to West Malaysia.¹ The Act deals with such matters as qualification for admission as an advocate and solicitor,² privileges of membership,³ practising certificates,⁴ establishment of the Bar,⁵ constitution of the Bar Council,⁶ State Bar Committees,⁷ etiquette,⁸ discipline,⁹ remuneration,¹⁰ and taxation of costs.¹¹

Admission

Ways of entering the legal profession present a choice of roads. One leads through articles as a clerk to a principal who has seven years of current practice as an advocate and solicitor.¹² The period of articles is five years but is reduced to three if the clerk is a graduate of a recognised University, presumably in some discipline other than law.¹³ The articulated clerk must complete intermediate and final examinations organised by the Qualifying Board before becoming eligible for admission.¹⁴

The second road is through a course of legal education which gives one the status of "qualified person" under the Act. Section 3, the interpretation section, defines a "qualified person" as follows:

"... any person who —

- (a) has passed the final examination leading to the degree of Bachelor of Laws of the University of Malaya or of the University of Singapore;

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1. Act 166, 1976, s. 2.
 2. Legal Profession Act, 1976, ss. 5, 10-28; by The Legal Profession (Amendment) Act 1978, Act A419, s. 28 was amended to include a new s. 28A-E.
 3. Legal Profession Act, 1976, ss. 35-40.
 4. *Ibid.*, ss. 29-34.
 5. *Ibid.*, ss. 41-46, as amended by Act A419, 1978.
 6. *Ibid.*, ss. 47-67, as amended by Act A419, 1978.
 7. *Ibid.*, ss. 68-75, as amended by Act A419, 1978.
 8. *Ibid.*, ss. 77-79.
 9. *Ibid.*, ss. 99-111.
 10. *Ibid.*, ss. 112-121.
 11. *Ibid.*, ss. 122-127.
 12. *Ibid.*, ss. 20-21.
 13. *Ibid.*, s. 24. The person with a degree in law from an unrecognised University is in an impasse. This degree can neither be recognised for articles nor as giving the status of "qualified person."
 14. The Legal Profession (Articled Clerks) Rules 1979, P.U.(A) 328 regulate registration and examination of articulated clerks. S. 25 of the Legal Profession Act 1976 requires the articulated clerk to satisfactorily serve the prescribed period of articles, and to attend prescribed courses of instruction, and to pass prescribed examinations before enrolment as an advocate and solicitor.

- (b) is a barrister-at-law of England; or
- (c) is in possession of such other qualification as may be notification in the *Gazette* be declared by the Bar Council on the advice of the Board to be sufficient to make a person a qualified person for the purposes of this Act;¹⁵

Paths (a) and (b) on the road to qualification are clear but path (c) is obstacle ridden. For various reasons Malaysians are studying law in institutions outside Malaysia, Singapore and England. The question arises whether those with law degrees from other jurisdictions can be considered qualified persons. In 1978 notification was given under the Act by the then Chairman of the Bar Council that the degree of Bachelor of Laws (LL.B.) from certain Australian and New Zealand Universities would be sufficient to give the holder the status of qualified person.¹⁶ It would seem that there was dissatisfaction with this recognition, perhaps because the LL.B. degree from England was not recognised; or perhaps because, unlike the Malaysian and Singapore LL.B. degree, the antipodean degrees are not professional qualifications. In any case, the 1978 notification was repealed in 1980 and a new notification has been issued.¹⁷

The 1980 notification requires the holders of LL.B. degrees from the listed Australian and New Zealand Universities to undergo "any professional course which qualifies that person for admission to the Bar in Australia and New Zealand" in order to obtain the status of qualified person. This new notification is, however, fraught with problems for those who choose this path towards qualification. Why are LL.B. degrees from other Australian Universities not recognised? For instance, there are Law Faculties at New South Wales, Queensland, Macquaire, Tasmania and Western Australia. What is the status of those persons currently studying at the recognised Universities in reliance on the 1978 notification? The 1980 notification only gives exemption to those successfully completing the LL.B. examinations prior to the 31st March, 1980.¹⁸ How are the words "professional course which qualifies . . . for admission to the Bar in Australia and New Zealand" to be interpreted? Do they refer to University courses required of all aspiring members of the Bar? Whereas in England it is clear that call to the Bar is prior to pupillage, in Australia and New Zealand this is not so.

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- 15. The Qualifying Board's purpose is to prescribe courses of training and education for articled clerks and qualified persons, including the examination of the former. Under s. 5(c) of the 1976 Act the Board makes recommendations to the Bar Council as to qualifications sufficient to confer the status of "qualified person."
 - 16. P.U.(B) 181, dated 18 March 1978. The Universities listed are Melbourne, Monash, Sydney, Adelaide, Australian National University, Wellington, Auckland, Canterbury and Otago. It is not clear why this notification and those subsequent were not issued in the P.U.(A) list, as surely they are subsidiary legislation affecting substantive rights. See s. 18 of the Interpretation Act 1967, Act, 23, as amended by the Interpretation (Amendment) Act 1968, Act 40.
 - 17. P.U.(B) 127, dated 25 March 1980; as corrected by P.U.(B) 416, undated.
 - 18. *Ibid.*, s. 2.

Further more, each state in Australia has its own rules on admission; there is no Australian Bar as such.¹⁹

There remains the larger problem of those students who study law in other jurisdictions. Is it not possible to provide a method whereby they can study and be examined in Malaysian law in order to become qualified persons? The solution to this question, adopted by some countries, is to require attendance at an Institute for vocational training and successful completion of Bar examinations.²⁰

All qualified persons must serve a prescribed period of pupillage.²¹ This lasts for twelve months, but provided the pupil completes a course of instruction organised or recognised by the Qualifying Board, the period is reduced to nine months.²² The position of the articled clerk is less clear. Section 10 differentiates qualified persons and articled clerks for purposes of admission as an advocate and solicitor and sections 11 and 12 deal with the pupillage of the qualified person. So is the articled clerk required to serve pupillage in addition to articles? There is no direct imposition of pupillage on the articled clerk but section 13(3)(c) gives the Bar Council discretion to exempt a qualified person from six months pupillage on the grounds of being an articled clerk in Malaysia. Also, section 5(b) gives one of the purposes of the Qualifying Board as providing for the examination "of articled clerks intending to become qualified persons and to practise as advocates and solicitors"; which suggests that an articled clerk must first turn himself into a qualified person, even though the definition thereof clearly excludes such a possibility. Alas, this is only one of the many inconsistencies contained in the Act.²³

The words "qualified person" are further used in the Legal Profession (Amendment) Act, 1979, Act A419. In response to the resolution adopted by the Bar Council advising advocates and solicitors not to undertake representation in security cases,²⁴ the principal Act was amended to give extensive powers to the Attorney-General to issue a special admission certificate to persons not admissible under the

19. See Sir Garfield Barwick, "The State of The Australian Judicature" [1978] 1 M.L.J. lxiv, where the Honourable Chief Justice points out that the legal profession is fused by law and in practice in South Australia, Western Australia, Tasmania, Australian Capital Territory and Northern Territory. It is separate by law and in practice in New South Wales and in Queensland, and it is separate in practice but fused by statute in Victoria.

20. E.g. The Leo Cussen Institute for Continuing Legal Education in Melbourne, Australia; bar examination courses in the various States of America; Institute of Professional Practice in Northern Ireland.

21. Legal Profession Act 1976, s. 12.

22. *Ibid.*

23. E.g. Omission of the word "or" in the definition of qualified person between s. 3(a) and s. 3(b).

24. See [1978] 1 M.L.J. v.

1976 Act.²⁵ Professor Ahmad Ibrahim has observed that the provisions appear to be wide enough to include "not only a legal practitioner or a judicial and legal officer in Singapore, England, Australia, New Zealand, India, Bangladesh and other Commonwealth countries but also a legal practitioner or a judicial and legal officer in Indonesia, the Philippines, Thailand or even further afield Japan and the People's Republic of China."²⁶ But, it is suggested, that since being a qualified person is in itself a sufficient criterion for the issue of the special practising certificate, any holder of the LL.B. from Malaysia or Singapore, or anyone called to the English Bar is eligible, without serving pupillage or having any further legal office or legal connection.

Generally admission as an advocate and solicitor is by petition to the High Court which has discretion in the matter limited by the provisions of the Act.²⁷ Under section 18 the court may, at its discretion, admit certain specified groups of persons for specific causes.²⁸ This gave rise to litigation in the case of *Louis Blom-Cooper v. Attorney-General, Malaysia & Ors.*,²⁹ where an English Queen's Counsel applied to the High Court for admission as an advocate and solicitor to act as counsel for the defence of a person charged under the Official Secrets Act, 1972. The Attorney-General objected on the grounds that there were no special circumstances or facts to justify the granting of the order and that there are sufficient lawyers of experience in Malaysia to represent the accused. The then Chief Justice, Gill C.J., dismissed the application and there was an appeal to the Federal Court.

Section 18(1) provides for the admission, at the sole discretion of the High Court, and for specific causes of

25. The Legal Profession (Amendment) Act, 1978, Act A419, s. 2(1) inserted a new section 28A into the principal Act, which provides;

"28A. (1) The Attorney General may issue a special certificate for admission as an advocate and solicitor of the High Court (hereinafter referred to as a "Special Admission Certificate") to any person who, in his opinion, satisfied the following requirements:

(a) (i) is a qualified person; or
 (ii) is not a qualified person, but is in possession of a qualification which renders him eligible to practise as a barrister, or as a solicitor, or as an advocate and solicitor, or otherwise as a legal practitioner by whatever name called, or to be employed in a legal or judicial capacity in the service of any government, in any country, or in a part or division of any country, or in any territory or place, outside Malaysia; and
 (b) has been practising as a barrister, or as a solicitor, or as an advocate and solicitor, or otherwise as a legal practitioner by whatever name called, or has been employed in a legal or judicial capacity by any government or by any authority, organisation or body, constituted under any law, or has been sometimes so practising or sometimes so employed, wholly or partly within Malaysia or wholly or partly outside Malaysia, for a period of, or for periods which amount in the aggregate to, not less than seven years."

26. [1978] 1 M.L.J. xciv.

27. Legal Profession Act, 1976, s. 10.

28. *Ibid.*, s. 18.

29. [1979] 1 M.L.J. 68 (F.C.).

"... any person —

- (a) who holds Her Britannic Majesty's Patent as Queen's Counsel or has special qualifications or experience for the purpose of such cause or matters or has been in active practice as an advocate and solicitor in Singapore for not less than seven years immediately preceding the filing of the application for admission;"

In dismissing the application the then Chief Justice reasoned as follows:

"It is common ground that the court has sole discretion in deciding whether or not to allow an application under section 18 of the Act. For the exercise of that discretion the only question is whether the applicant has special qualifications or experience for the purpose of the particular case and whether such qualifications and experience are of a nature not available amongst local advocates and solicitors. That is what Mohamed Azmi J. said in *Re Graham Starforth Hill*,³⁰ with which I entirely agree with respect."³¹

The Federal Court, whilst recognizing that the High Court has wide discretion in the admission of persons falling within the ambit of section 18(1)(a), reversed the decision of the High Court on the grounds that the exercise of the discretion was wrong. It appears that by this the Federal Court meant that there was an error in the reasoning of the then Chief Justice, and this was subsequently demonstrated. The then Acting Chief Justice, Raja Azlan Shah pointed out that under section 18 one of the qualifications enumerated is sufficient.³² The appellant, as an English Q.C., fell within the language of the first category. The Acting Chief Justice went on to say:

"We are therefore of the view that the learned Chief Justice has considered the present case on a wrong principle. He has applied the principle enunciated in *Re Graham Starforth Hill*, *supra*, which is a case under a law which has been repealed. He is clearly wrong. The judge in exercising the new discretion under section 18 is no longer required to have regard that the applicant possesses special qualifications and experience of a *nature not available amongst local advocates and solicitors*. Had there been the intention we feel no doubt that the legislature would have expressed it."³³

The Federal Court did not deny that the High Court has discretion in this matter, so it is clearly not mandatory that applicants falling within the ambit of section 18 be admitted. However, an error in reasoning will always give rise to review on appeal. Whether the Federal Court will still review if there is no error is doubtful, as there is nothing on which to ground the review. In the instant case the Federal Court went on to say that the applicant would be able to assist the court in the specific cause for which he had applied to be admitted and that it was a fit and proper case for the grant of an order under section 18.

30. [1971] 2 M.L.J. 269.

31. [1979] 1 M.L.J. 68, quoted by the then Acting Chief-Justice in the Federal Court.

32. Perhaps the High Court would not have fallen into error if the draftsman had included a comma after each category enumerated in s. 18(1)(a) of the Legal Profession Act, 1976.

33. [1979] 1 M.L.J. 68 at 69.

Admission to practise before the Syariah Courts is governed by State Enactment. The Kedah Mahkamah Syariah Enactment, 1980 covers the admission, and the registration of representatives of parties before the court. Those permitted to be admitted and to be registered as representatives are "any person or advocate and solicitor registered under the Legal Profession Act, 1976 and having sufficient knowledge in the Islamic law."³⁴

Etiquette

Etiquette at the Bar is governed by the Legal Profession (Practice and Etiquette) Rules, 1978³⁵ which are made by the Bar Council under powers conferred by section 77 of the Legal Profession Act. The Criminal Revision Division of the High Court had occasion to refer to the etiquette rules in *Public Prosecutor v. Mohtar bin Abdul Latif*³⁶ where counsel caused the postponement of the hearing of a criminal case on two separate occasions. The case came to court for trial on four occasions and was adjourned for various reasons. Then counsel twice applied successfully for postponement, the second time after giving the court the date as being one of his free dates. Harun J. stated that the general rule is "that trial dates are fixed *at the convenience of the court*, on a first-come-first-served basis. This is fair to all concerned. Public funds are not wasted on idle courts when there is so much work to do".³⁷ The learned judge reminded counsel of rules 2, 6(a) and 24 of the etiquette rules and also of liability to disciplinary proceedings for failure to comply with the rules.³⁸ Since counsel had no good or cogent reason for postponement of the hearing the court remitted the case, which had been in court for over 18 months, for early trial at dates convenient to the Magistrate's Court.

The problem of postponement of cases because of lack of legal preparatory work, or because counsel is engaged to appear in court elsewhere has taxed the court system severely and has resulted in the

34. Mahkamah Syariah Enactment, Kedah Enactment No. 9 of 1980; section 8. Compare section 68 of the Administration of Islamic Law, Enactment, 1978 (No. 14 of 1978) of Johore.

35. P.U.(A) 369 of 1978. See [1980] 1 M.L.J. xxv for the reproduction from *Warta Kerajaan*.

36. [1980] 2 M.L.J. 51.

37. *Ibid.*, at 52.

38. Rules 6(a) and 24 are particularly appropriate. Rule 6(a) provides: "An advocate and solicitor shall not accept any brief unless he is reasonably certain of being able to appear and represent the client or the required day." Rule 24 provides: "24(a) It is the duty of an advocate and solicitor to make every effort to be ready for trial on the day fixed.

(b) An advocate and solicitor shall only apply for postponement of a case fixed for hearing for good and cogent reasons.

(c) Except in an emergency, it shall be improper for an advocate and solicitor to apply for a postponement in the absence of counsel for the other side unless he has given all counsel concerned at least 48 hours notice of his intention."

issue of a circular by the Chief Registrar of the High Court.³⁹ It is not always defence counsel who is to blame. In *Public Prosecutor v. Tan Kim San*⁴⁰ the accused was charged in June 1979 and trial was fixed for February 1980. The prosecution then asked for a postponement to July 1980 on the grounds that the investigation was not yet completed. Harun J. in the Criminal Revision Division of the High Court called for the record and admonished the prosecution. He said that "the police should refrain from the practice of 'arrest first, investigate later'"⁴¹ and pointed out that in the previous six months in the Subordinate Courts in Kuala Lumpur over twelve hundred cases were postponed because the prosecution was not ready to proceed. He advised the Magistrate to discharge the defendant under section 173(g) of the Criminal Procedure Code.

The reason for the postponement is crucial. If it is because of the absence of important witnesses, or because of some other reason such as illness then this is outside the control of counsel. It seems that the prosecution does not have a worse record than counsel generally, for in *Mohamed bin Abdullah v. Public Prosecutor*,⁴² Harun J. revealed that in the three months of July to September 1979 over five hundred cases in the Subordinate Court in Kuala Lumpur were postponed on the grounds that counsel was engaged elsewhere. He went on to say:

"It is common knowledge that there is a backlog of cases waiting to be heard and if a large number of cases are regularly postponed, the backlog will only get worse no matter how many more new Magistrates are appointed. The truth of the matter is that more courts have been established recently to speed up trial and counsel find themselves in more than one court at the same time. The general principle of course is that trial dates should be fixed at the convenience of the court. This is the only way some order can be maintained so that courts sit regularly and public funds are not wasted on empty court rooms with paid staff. For the system to work effectively and efficiently, the prosecution must be ready to proceed with the trial on the appointed dates and defence counsel should not accept a brief if he is already engaged in another court on the same day. In practice, trial dates are fixed well in advance giving ample notice to all concerned and there is no reason why most cases should not be heard on schedule except in the rare case where death or sudden illness has intervened, in short when a trial has been frustrated by some act of God. In the instant case counsel had more than two months' notice of the trial and what was more the dates were fixed to suit counsel's convenience. Unless courts are in full command of their proceedings, the administration of justice will be chaotic and respect for the law that much diminished. In any organisation where a body of men gather together for a common purpose there must be discipline and an acknowledged leader. In a Court of Law, the Bench must necessarily and logically assume leadership and enforce discipline. It can never be otherwise."⁴³

In the instant case counsel for the defence had failed to appeal at the defendant's trial and had not given any explanation for absence

39. Registrar's Circular No. (U) 3 of 1981 entitled *Postponement of Cases*, as amended by Circular No. (U) 3a of 1981.

40. [1980] 2 M.L.J. 98.

41. See *P.P. v. Karumah* [1980] 2 M.L.J. 102.

42. [1980] 2 M.L.J. 201.

43. *Ibid.*, at 202 and 203.

to the Sessions Court. The trial proceeded and the defendant, having elected to remain silent in his defence, was convicted. The defendant then appealed on the grounds *inter alia* that he had been unrepresented. On appeal Harun J. pointed out that the case had already been twice postponed and that great care had been taken to find dates convenient to counsel. The appeal was dismissed as there was no evidence of a miscarriage despite counsel's absence. It is disturbing, however, that counsel should be so neglectful of his duty not only to the court but also to his client.

Two postponements are few when compared to the nine that took place in *Public Prosecutor v. David Noordin*.⁴⁴ From the charge in January 1975 to the first hearing in October 1978 there were no less than seven postponements. The case was then part-heard and postponed twice again. The prosecution was to blame on three occasions and the defence on three occasions. On the other three occasions there were problems with witnesses or medical leave. The Magistrate discharged the defendant, but Harun J. set aside the order and ordered resumption of the hearing from day-to-day.

The Registrar's Circular addressed to Presidents of Sessions Courts and Magistrates lays down that cases are to be postponed only exceptionally. "The general rule is that if the ground advanced in an application for adjournment is reasonably foreseeable no postponement should be granted. Conversely, if the reason is not reasonably foreseeable, it should not be refused".⁴⁵ Examples of reasonably foreseeable grounds are lack of preparation of the case or counsel's other engagements. Unforeseeable reasons are illness or difficulty in locating witnesses. Once trial is fixed the case must be heard within a year with a maximum of three adjournments for good reason. Where the accused is in custody the case should be disposed of within six months with a maximum of two adjournments. After that period if the prosecution is not ready the accused should be discharged. If the defence is not prepared the case should proceed. And, in civil cases, judgment should be given or the case dismissed according to whichever party fails to appear to be prepared.

The duty of counsel to the courts was also discussed by Chang Min Tat F.J. in *Chan Kum Loong v. Hii Sui Eng*,⁴⁶ an appeal from the High Court in Kuching. The appeal concerned a tenancy agreement which had twice come before the Kuching High Court. The prayers and relief sought were identical in both actions and it seems that the matter could have been disposed of when judgment was given in the first suit. However the parties labelled the first action as "preliminary points of law" and agreed to adopt the findings in the second action. The Federal Judge pointed out that a preliminary point which

44. [1980] 2 M.L.J. 146.

45. Registrar's Circular No. (U) 3 of 1981, paragraph 3.

46. [1980] 1 M.L.J. 313 (F.C.)

does not decide the matter between the parties is "an unjustified waste of time and occasions an equally unjustified increase in costs".⁴⁷

The duty of counsel as officers of the court was explained as follows:

"We think it should be said with some emphasis that counsel owe a plain duty to the court for it to function expeditiously, economically and satisfactorily. They must therefore conduct their case so as to enable the court to come to a quick and early decision. The court must also be chary of short-cuts and not be tempted to undertake any course except the one for a proper, expeditious and economical trial on the issues raised in the action."⁴⁸

Poor work by solicitors in the preparation of cases was criticised by Abdoolcader J. in the Federal Court giving judgment on appeal in *Lau Hee Teah v. Hargill Engineering Sdn. Bhd.*⁴⁹ The order drawn up by the first respondent's solicitor to give effect to the High Court decision was defective and inaccurate and the record of appeal prepared by appellant's solicitors was badly prepared. The learned judge concluded:

"The fact that culpability for this deplorable state of affairs is equally shared by both sides does not in any way detract from the gravamen of the stricture anent the callous and cavalier approach to the drafting and preparation of vital documentation."⁵⁰

Discipline

All advocates and solicitors are under the control of the Bar Council, and are liable to be removed from the Roll, or suspended from practice, or censured on the showing of due cause. In *Au Kong Weng v. Bar Committee, Pahang*⁵¹ the Federal Court was called on to hear an appeal from the decision of the Disciplinary Committee of Pahang Bar Committee suspending the appellant from practice for three months. The Disciplinary Committee relied on section 93(2)(b) of the Legal Profession Act which is as follows:

"93(2) Due cause may be shown by proof that the advocate and solicitor in Malaysia or elsewhere—

(b) has been guilty of dishonest conduct in the discharge of his professional duty or of fraudulent conduct or conduct otherwise unbecoming an advocate and solicitor;"

The appellant was found by the Committee to be guilty of conduct unbecoming an advocate and solicitor in that he had broken an undertaking given by him to another advocate and solicitor. The question of review by the Federal Court of disciplinary proceedings was considered and the Chief Justice, Raja Azlan Shah made clear that the court is reluctant to overturn findings of fact by the disciplinary body. He observed:

47. *Ibid.*, at 314.

48. *Ibid.*

49. [1980] 1 M.L.J. 145 (H.C.) and 149 (F.C.).

50. *Ibid.*, at 154.

51. [1980] 2 M.L.J. 89 (F.C.).

"A relationship of trust and confidence between the courts and the members of the Bar is essential for the due administration of justice in this country, and that relationship would be impaired if, on any but the most compelling grounds the courts were to interfere with the finding of the committee in a matter so peculiarly its concern."⁵²

This does not mean that appellants can never challenge the decision of a disciplinary committee constituted under the Legal Profession Act; for there can be good grounds for challenge. As explained by the Chief Justice cases on solicitor's undertaking have laid down that a high standard of proof is required that the undertaking was given in "clear, unqualified and unequivocal terms".⁵³ An appeal can be based on the lack of evidence to support the disciplinary decision. Therefore it is hard to understand why the learned Chief Justice should have indicated such a general distaste for interference. Surely the disciplinary proceedings of the legal profession should be subject to exactly the same rules of judicial review as any other disciplinary proceedings?

However, in the instant case there was an admission of the undertaking by appellant's counsel at the appeal. Since the only issue before the Disciplinary Committee was whether an undertaking had been given, there is little doubt that the Federal Court was correct in its refusal to interfere, even if it laid down too wide a rule for the future.

This was not the first occasion on which these parties had come to court. In *The Bar Committee of Pahang v. Joseph Au Kong Weng*⁵⁴ an application was made by the Pahang Bar Committee to the Kuantan High Court to bar the respondent from practising as an advocate and solicitor on the grounds that he was an unauthorised person within the meaning of section 36(1) of the Legal Profession Act.⁵⁵ The respondent raised a preliminary objection that a State Bar Committee has no *locus standi* to bring any action before a court. This objection was upheld by the court which held that only the Bar Council has power to act in legal proceedings and that State Bar Committees must act through the Bar Council. The court's decision was reached through interpretation of sections 41, 57(e), and 57(j) of the Legal Profession Act.

The question of the standard of proof in disciplinary proceedings was raised by the appellants in *Keith Sellar v. Lee Kwang* and *Tennakoon v. Lee Kwang* before the Federal Court.⁵⁶ The facts were that

52. *Ibid.*, at 92.

53. See *Bhandari v. Advocates Committee* [1956] 3 All E.R. 742 and *T. Damodaran v. Choe Kuan Him* [1979] 2 M.L.J. 267.

54. [1979] 2 M.L.J. 297.

55. S. 36(1) provides:

"Subject to this section, no person shall practise as an advocate and solicitor or do any act as an advocate and solicitor unless his name is on the Roll and he has a valid practising certificate authorising him to do the act; a person who is not so qualified is in this Act referred to as an "unauthorised person."

56. [1980] 2 M.L.J. 191.

in 1975 a Disciplinary Committee was appointed by the Chief Justice to investigate complaints against two members of the Bar. With the coming into force of the Legal Profession Act, 1976 on June 1, 1977 the Disciplinary Committee, in reliance on section 150(1), deemed itself appointed under the new Act. The appellants were found guilty of professional misconduct under section 93(2)(b) of the Act and were suspended from legal practice for twelve months.

The appellants raised two grounds of appeal. The first was whether the Disciplinary Committee had proceeded correctly in applying the 1976 Act since the complaint was made prior to the coming into force of the Act. The Federal Court dealt with this argument by pointing out that section 150(1) specifically deals with the problem of transitional arrangements by providing that complaints made and proceedings undertaken under the earlier Advocates and Solicitors Ordinance, 1947 shall proceed as if made or commenced under the 1976 Act.⁵⁷

The second ground of appeal raised the issue of the standard of proof required by the Disciplinary Committee. The court reiterated what was said by the Chief Justice in *Au Kong Weng's* case *supra*, that is, that a high standard of proof is required and not a mere balance of probabilities. The Federal Court considered that the Disciplinary Committee had adopted the right approach and that there were no grounds for interference with the decision.

Two further points of interest arise from this case. Firstly, the Disciplinary Committee found the appellants guilty under section 93(2)(b) of the 1976 Act of "dishonest conduct in the discharge of his professional duty or fraudulent conduct or conduct otherwise unbecoming an advocate and solicitor." But this was, in a sense, vicarious guilt, as the evidence was that the complaint concerned money paid to the chief clerk of appellants' firm for which the firm's cashier gave a receipt; the money never having been returned to the complainant, nor action taken to purchase the lands towards which the money was paid. However the Disciplinary Committee dealt firmly, and correctly, with appellants' denial of responsibility.

"Solicitors in the course of practising their profession continually receive money on behalf of clients which places them in a position of trust but the very foundation of such trust would be completely destroyed if a Solicitor is able to absolve himself from liability to account for any such moneys by contending that although an official receipt was issued by him or his firm he is able to claim that no such moneys were received by him or his servants in his firm's books

57. S. 150(1) provides:

"Any applications and complaints made under sections 29, 30 and 32 of the Ordinance and any proceedings before a Disciplinary Committee appointed under the Ordinance or before the court under section 33 of the Ordinance shall proceed as though the applications or complaints were made or the proceedings commenced under this Act, and for the purposes of this section any Disciplinary Committee appointed under the Ordinance shall be deemed to be a Disciplinary Committee appointed under this Act."

of account. The Committee cannot and does not accept such a contention and would be derelict in its duty if it did so."⁵⁸

The second point of interest is the question raised earlier by the writer of review of discretionary powers of Disciplinary Committees. In the Federal Court Hashim Yeop A. Sani J. pointed out that "statutes relating to the legal profession now entrust the supervision of advocates and solicitors' conduct to a committee of the profession, for it knows and appreciates better than anyone else the standards which responsible legal opinion demands of its own profession."⁵⁹ The idea is that the profession should regulate itself on disciplinary matters. The judge further referred to the judgment of the Privy Council in *Colin Kenneth McCoan v. General Medical Council* in which Lord Upjohn stated:

"Their Lordships are of opinion that Lord Parker C.J. may have gone too far in *Re a Solicitor*⁶⁰ when he said that the appellate court would never differ from sentence in cases of professional misconduct, but their Lordships agree with Lord Goddard C.J. in *Re a Solicitor*⁶¹ when he said that it would require a very strong case to interfere with sentence in such a case, because the Disciplinary Committee are the best possible people for weighing the seriousness of the professional misconduct. No general test can be laid down, for each case must depend entirely on its own particular circumstances."⁶²

Solicitor's Duty to Clients

In *Tan Suan Sim v. Chang Fook Shen*⁶³ the lack of familiarity of certain solicitors in Penang with the Torrens system of registration was commented upon by Chang Min Tat F.J. delivering the judgment of the Federal Court on appeal from the Penang High Court. The case involved the sale of property in which the vendor awaited receipt of the purchase money before she would execute transfer of the property. An *impasse* was created by the refusal of the purchaser's bank to release the money to purchase the property before the proper charge and transfer had been executed. As the Federal Judge pointed out, under the Torrens system one of the solicitors must act as stakeholder.

"The vendor is required to have faith in her solicitors... In the event she did execute a transfer but her then solicitor made no effort to act as a stakeholder or to explain to her that the only way out of the *impasse* presented not only by the parties but by the requirement of the Torrens system itself is the employment of a stakeholder....

We note that the advice she received from the several solicitors she went to and who are practising in Penang, was that it was the usual practice to receive the balance of the purchase price on the signing of the transfer. That might have been correct in the previous system of registration of deeds practised in Penang until the conversion in 1966 to the Torrens system but it makes the present system workable only if the solicitors for the purchasers and chargees are willing to put themselves professionally and personally at risk. The present

58. [1980] 2 M.L.J. 191 at 192 quoted by Hashim Yeop A. Sani J.

59. *Ibid.*, at 94.

60. *Re a Solicitor* [1960] 2 Q.B. 212.

61. *Re a Solicitor* [1956] 1 W.L.R. 1312.

62. [1964] 1 W.L.R. 1107 at 1113.

63. [1980] 2 M.L.J. 66 (F.C.); [1980] 1 M.L.J. 105 (H.C.).

system can work only if practitioners realise fully its implications and advise their clients accordingly."⁶⁴

The vendor initially used the same lawyer as the purchaser, but changed to a second and to a third lawyer in the course of the dispute between the parties. The second and third lawyers gave evidence in the High Court that they had advised the vendor to wait for payment before signing the transfer of the property. This advice seems to have been accepted as good by the High Court judge, Gunn Chit Tuan J. who said that "the important point as I saw it in this case, was whether the defendant had, contrary to the usual practice, in fact expressly agreed to accept the balance of the purchase price after executing a transfer."⁶⁵ But the evidence of such agreement, if relevant, was the interview the defendant/vendor had with the solicitor who was then acting for both parties.⁶⁶ And, perhaps because she felt that she had not received independent legal advice, she changed her solicitor thereafter. Furthermore, a statement to one's solicitor can hardly be said to constitute an agreement between the parties.

The vendor does seem to have been badly advised and, because of inflation, the loss to her in being forced to transfer her house on the order of the Federal Court for specific performance would be very great. The original contract was signed in 1973, so by 1980 the value of the house must have risen considerably, but of course the purchase price will be that agreed by contract.

The High Court judge did criticise the practice of one lawyer acting for both parties in house purchase transactions, but there is no rule of etiquette preventing such a practice, which is fairly common. In *Ong Kim Khoo v. Gaya Filem Bhd.*⁶⁷ Chang Min Tat F.J. called this a regrettable practice, and said it could raise the issue of whether the vendor had "the full benefit of proper and independent legal advice"⁶⁸ and he went on to give the view of Bray C.J. in *Jennings v. Zihari-Kiss*⁶⁹ as follows:

64. *Ibid.*, at 67.

65. [1980] 1 M.L.J. 105 at 106.

66. The fact that the defendant's erstwhile solicitor gave evidence of communications between himself and his then client is surprising. Such communications are normally considered to be privileged. This makes it even more surprising that the Penang High Court should not only have listened to such evidence but should have also held it to be the crucial aspect of the case. Even worse is the fact that the solicitor in question, who had initially acted for the defendant, appears to have acted for the plaintiff throughout. Thus the plaintiff's solicitor in contentious proceedings gave crucial evidence against the defendant. Is this ethical? Surely the High Court should not have heard this witness on the grounds that he could not be an independent witness. Otherwise the whole solicitor and client relationship is in jeopardy. Furthermore, this appears to be a violation of Rule 5(b) of the Practice and Etiquette Rules, 1978.

67. [1979] 1 M.L.J. 79.

68. *Ibid.*, at 81.

69. [1972] 2 S.A.S.R. 493.

"The undesirability of this (the same solicitor acting for both vendor and purchaser) has often been pointed out by courts, and in my view, it is not only undesirable but wrong, whether the adviser in question is a solicitor or a land agent. It is impossible for the same person to give satisfactory service as the confidential and expert adviser of both parties with conflicting interests. The man who undertakes to serve two masters may easily find himself in the position where he must be false to one and possibly to both..."

Perhaps the Bar Council might give serious consideration to this question when the Rules of Etiquette are amended.

D. WOMEN'S RIGHTS

1. "Transsexual Troubles - Discrepancies in Social and Legal Categories" in S. Edwards (ed.) Sex, Gender, and Law (London, Croom Helm, 1985) pp. 9-27.
2. "Affirmative Action" in S. Guest and A. Milne (eds.) Equality and Discrimination: Essays in Freedom and Justice (Wiesbaden, Franz Steiner, 1985) pp. 77-82.
3. "The Impact of Entry into the European Community on Sex Discrimination in British Social Security Law" in J. Adams (ed.) Essays for Clive Schmitthoff (Abingdon, Professional Books, 1983) pp. 87-98.
4. "Before and After: The Impact of Feminism on the Academic Discipline of Law" in D. Spender (ed.) Men's Studies Modified (Oxford, Pergamon Press, 1981) pp. 175-187.
5. "The Male Appendage - Legal Definitions of Women" in S. Burman (ed.) Fit Work for Women (London, Croom Helm, 1979) pp. 134-152. Reprinted in M. Evans (ed.) The Woman Question (London, Fontana, 1982) pp. 344-362.

GENDER, SEX, AND THE LAW (ed. S. Edwards) (Croom Helm, 1985)

Chapter One

TRANSSEXUAL TROUBLES: THE DISCREPANCY BETWEEN LEGAL AND SOCIAL CATEGORIES

Katherine O' Donovan

INTRODUCTION

"One is not born, one rather becomes a woman", according to Simone de Beauvoir. (1) This much-quoted statement suggests that society rather than biology determines the meaning attached to the category woman. Yet for most women their own experiences probably convince them that anatomy is destiny. Their bodies define them. Their physical differences from men ground their place in the world. So can de Beauvoir's view that woman is socially constructed be sustained, or does culture mirror nature?

English law's approach to issues of sex and gender proceeds on untested assumptions about biological determinism. From the entry on the birth certificate to the drawing up of the death certificate persons are assigned to category female or category male. This affects the regulation of sexuality by the criminal law, employment law, capacity to marry, social security law, and even sex discrimination law. Since the law demands that persons be so classified, have the tests to determine a person's biological sex been statutorily or judicially defined? The answer seems to be that there is no clear test for sexual classification, but there are a variety of practices that vary according to the branch of law in question.

Customary practices are applied in relation to the birth certificate. When a child is born one of the first questions asked is whether the newcomer is female or male. The answer given constitutes the baby's assigned sex. The test is to look at the external genitalia which are taken as a sign of the appropriate classification. This casual glance and categorisation affects the future goals, behaviour, identity, personality, emotions, sexuality and gender role of the child. Under the law the birth must be registered

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within forty-two days, and the infant's birth certificate records the assigned sex. (2)

In the great majority of cases the sex assignment made at birth is correct, but cases of error, indeterminacy, and later dissatisfaction with the assigned category illustrate the centrality of sex category to social structure. Error and indeterminacy can arise for various reasons. Seven variables affecting sex determination have been identified. These are chromosomal sex; gonadal sex; hormonal sex; the internal accessory organs - the uterus in the female and the prostate gland in the male; the external genitals; assigned sex; gender role.(3) Within these criteria there may be considerable variation. For instance, the amount of the hormones oestrogen or testosterone present in the body varies from person to person, and according to such matters as psychological state and monthly cycle. Errors are made when an individual's external organs suggest one category which later turns out to be incorrect, or where there is no predominance among the variables indicating one sex or the other. Dissatisfaction with the assigned category leads to the phenomenon of transsexualism, in which a person believes, despite biological evidence to the contrary, that she or he is inherently of the opposite sex.

It might be thought that in cases of error, and even of transsexualism, the birth certificate could be amended. There is such a procedure available in cases of medically certified error; (4) but the point being made here is that the centrality of sex to social structure and the reflection of this in law creates many of the problems which cannot be dealt with by an amended birth certificate, particularly in relation to transsexuals. This point can be sustained by reference to substantive law such as criminal and family law.

THE SOCIAL CONSEQUENCES OF SEX CLASSIFICATION

Sex assignment, whether correct or incorrect, has enormous consequences for the individual. It is no exaggeration to say that one's whole life is determined by it. Whilst this might be an argument for careful testing of infants, the more important question is whether such a division of people should be so important in the first place. Stoller's research shows that there are considerable variations amongst persons with one biological male having different hormonal patterns and different degrees of maleness from another. (5) Oakley argues further that at the simple biological level

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women and men are not two separate groups: rather, each individual takes a place on a continuum with no single dividing line between male and female. (6) This is supported by the fact that the embryo human being is sexually undifferentiated initially. Normal sex differentiation which commences about forty-two days after conception is determined by the father's sperm. Each ovum contains an X chromosome and the infant's sex depends on whether the fertilising sperm contains an X or a Y chromosome. The XX pattern will develop as female, the XY pattern as male. "Since both the female and the male gonads (primary sex glands) originate from an identical primitive gonad, its cortex (outer layer) can develop into an ovary in the female, or its medulla (centre) can develop into a testis in the male. During this early stage, at about the fifth or sixth week, two sets of ducts, Wolff's and Muller's, also appear in the embryo. The former can develop into the Fallopian tubes, uterus, and upper vagina in the female. At about nine weeks in the development of the normal male embryo, and slightly later in the female, the appropriate duct continues to develop and the other one retrogresses." (7) The gonads, and even the external genitalia, are in their origin more similar than is generally realised.

Despite the similarities in the biological make-up of the sexes, once an individual is categorised female or male significant social consequences follow. Studies of maternal behaviour have revealed that even with newborn infants mothers behave differently according to sex category. (8) This is the beginning of learning what it means to be classified as female or male. As the child develops it will gradually become aware of society's expectations in the way of behaviour, manners, attitudes, activity, and modes of relationship to others. It learns the meaning of being a girl or a boy, that is, its gender role.

Gender is the term used to denote the social meaning of sex categorisation. Sex is determined through physical assessment; gender refers to the social consequences for the individual of that assessment. Gender stereotypes embody society's view of appropriate behaviour for women and for men. These take the form of gender roles, reinforced by law, through which persons conform to their assigned sex and to society's conventions. A further aspect is gender identity which is the individual's psychological experience of being female or male; it is the sense of belonging to one gender category. Gender identity, although psychological, relies on the social construction of femininity or masculinity as its basis.

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The pervasiveness of the social construction of gender is revealed by research at Johns Hopkins Hospital showing that there are people who are sexually concordant at birth - born with the same kind of genitals, gonads, chromosomes, and hormones - who were differentially labelled female or male. The problems and successes these patients had in conforming to their labels, and the difficulties they faced if the label was changed, have revealed a great deal about what it means to be a woman or a man in the social world. (9)

Errors occur in the sexual classification of persons. There may be gonads of both sexes; the initial indicia of genitals may develop in the opposite direction; internal organs may be missing; genitals may not develop; there may be too few or too many sex chromosomes; there may be confusion over assigned sex. Money and Tucker give an example of a child who at birth was labelled male and raised as a boy, because he had a rudimentary penis but no testicles. At puberty breasts developed and an exploratory operation revealed ovaries, uterus and vagina, but no male reproductive organs. Gender identity was so firmly established that the patient's description was "they'd found some kind of female apparatus in there by mistake." (10) His belief in himself as a male was unshaken and male hormones were used to develop external male physical characteristics such as a beard. He married and had a satisfactory sexual relationship with his wife. By contrast another case with very similar external organs at birth was labelled and raised as a girl. At puberty male hormones gained ascendancy over the ovarian hormones. Drug therapy was used to suppress the androgenising effect of male hormones and the woman, who had rejected with horror the idea she might be male, married and gave birth to children. These case histories show the centrality of gender identity to the individual's conception of herself, but they also show how the social construction of gender differentiates human beings who are not necessarily biologically differentiated.

The Australian case C and D (11) provides an example of a person who belongs neither to the female nor to the male category but who is intersex. The hermaphrodite in this case had an ovary and a Fallopian tube on the right side with nothing internal on the left, but had been classified male at birth because of a small penis and a testicle on the left side. Having grown up psychologically and socially as a male, in adulthood he sought surgical treatment for correction of the penile deformity. An article in the Medical Journal of Australia written soon after the

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decision to intervene surgically gives an account of the problem faced by the medical and surgical specialists. It was decided "in spite of the bisexual gonadal structure, the female chromosomal arrangement, the female internal genitalia and the equivocal results of the hormonal assays, there was no doubt, in view of the assigned male sex, the male psychological orientation in a person of this age and the possibility of converting his external genitals into an acceptable male pattern, that he should continue in the sex in which he had been reared." (12) Surgery was performed over a period of time to remove the female internal organs and breasts, and to reconstruct the penis into one of normal size and shape. The patient married, but was later held by the courts to be neither male nor female for the purposes of marriage. In a legal system which insists that persons belong to one or other of the sex categories the intersex illustrates the unnecessary rigidity of, and calls into question the necessity for, this classification.

The case of the identical male twins raised differentially as female and male reported by Money shows how sexuality is differentiated in the course of growing up and not at birth. One of the twins lost his penis through medical negligence at the age of seven months. As a result of advice received at Johns Hopkins Hospital the parents decide to reassign the child's gender, permit surgical intervention, and raise the child as a girl. This happened at seventeen months. Money reports that "by the time the children were four years old there was no mistaking which twin was the girl and which the boy. At five the little girl already preferred dresses to pants, enjoyed wearing her hair ribbons, bracelets and frilly blouses, and loved being her daddy's little sweetheart." (13) By the age of nine the two identical (genetically male) twins showed two clearly differentiated personalities, with sharply differentiated behavioural structure based on conventional ideas of what is gender appropriate.

Regarding domestic activities, such as work in the kitchen and house traditionally seen as part of the female's role, the mother reported that her daughter copies her in trying to help her in tidying and cleaning up the kitchen, while the boy could not care less about it. She encourages her daughter when she helps her in the housework.
(14)

Having been placed in separate gender categories these

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identical twins of the same sex have learned to perform social rôles considered appropriate to their gender.

Gender is socially constructed. It is clear in the examples given above that individuals respond to their experience of gender in the social world by creating their own gender identities. Yet for some people there is confusion when faced with this rigidly bipartite structure in which they must belong to one or other of two categories. In the case of transsexuals their response is to insist that their gender identity is in one category whilst their biological sex is in the other. It is doubtful whether it is necessary for society or for law to present such a bifurcated system. It is likely that the problems faced by transsexuals by the victims of error, and by hermaphrodites, are created by the rigidity of the bisection.

LEGAL DEFINITIONS OF GENDER CATEGORIES

Biological and social classification of women and men as belonging to different and separate categories leads to similar legal classification. Biology forms the material base on which an elaborate system of social and legal distinctions is built. Until recently it was not realised that this base was unsteady. Some medical psychologists and other researchers, have questioned the use of biology to support a dichotomised gender system. They suggest that the categories woman or man are not opposite or closed. Legal reasoning regards these categories as closed. This partly results from a failure to keep up with medical research but it also arises from the nature of legal reasoning itself. The lawyer is continuously engaged on a process of classification. "The law must predominantly, but by no means exclusively, refer to classes of persons, and to classes of acts, things and circumstances." (15) Legal reasoning uses gender as a basis of classification at a number of stages in the legal process. At the legislative stage different rules for men and women may be laid down, or certain acts may be made sex-specifically criminal. Even where legislation is not gender-specific judges and administrators may interpret and apply it as if it is. For instance the word 'person' in legislation was interpreted by the judiciary as meaning 'male person' in nineteenth century cases denying women access to education, the professions, and the vote. (16) Officials when faced with individuals who do not conform to

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their expected social role will, even where the law does not require it, attempt to enforce gender distinctions. (17)

The apparent opposition of women and men has led, in legal reasoning, to the approach in which the individual must belong to one of two categories. This affects aspects of family law, criminal law, welfare law, employment law, and sex discrimination law.

Capacity to Marry

Although gender classifications permeate family law, it was a case on capacity to marry which laid down the fundamental definitions of sex and gender. In Corbett v Corbett a couple had married with the knowledge of the fact that, whereas both had been classified male at birth, one had undergone a sex-change operation in an attempt to move into the female category. The marriage was a failure and the male partner brought an action to have the marriage declared null and void on the grounds that both parties were members of the male sex. The court upheld this view. Sex, it said, "is clearly an essential determinant of the relationship called marriage because it is and always has been recognised as the union of man and woman. It is the institution on which the family is built, and in which the capacity for natural hetero-sexual intercourse is an essential element." (18) Sex, as a concept, seems to have been used here both in the sense of biological category and in the sense of sexual intercourse.

The court went on to distinguish sex as biological category from gender. Dealing with the argument that society recognised the transsexual as a woman for national insurance purposes and that therefore it was illogical not to do the same for marriage, the court said "these submissions, in effect confuse sex with gender. Marriage is a relationship which depends on sex and not gender." (19) Social appearance or gender identity, or other psychological considerations are irrelevant in determining whether a person is male or female; the Corbett case makes clear that the legal test is, for marriage at least, biological.

The respondent in the Corbett case was born with male external genitalia. After treatment with female hormones the respondent had a sex-change operation involving the removal of the male genitalia and the construction of an artificial vagina. The respondent lived as a woman and was issued with a national insurance card as a member of the female gender category. A chromosome test showed that the cells examined were XY, that is the male pattern.

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The biological test laid down by Ormrod J. is "the chromosomal, gonadal and genital tests, and if all three are congruent, the law should determine the sex for the purpose of marriage accordingly, and ignore any operative intervention. The real difficulties, or course, will occur if these three criteria are not congruent." (20) The respondent, notwithstanding matters of gender identity, social appearance, and post-operative female genitals, was classified as a biological male.

It is possible to criticise this decision on a number of grounds. At an individualistic level it may result in hardship to persons who belong to neither the female nor the male sex, and who therefore cannot marry. Transsexuals who have undergone surgery cannot validly marry in their new category, yet in their post-operative state they will be incapable of consummating a marriage as members of their former category. The male twin raised as a female would face this dilemma in English law. On an abstract level the decision reinforces belief in the categories woman and man as closed categories, rather than as points along a continuum.

The Australian case of C and D in which the husband, although raised as a male, was a genuine intersex on whom surgery was performed to bring his body into conformity with his gender identity, illustrates the rigidity of the gender dichotomy. After some years the wife sought to nullify the marriage on the grounds that the husband had been unable to consummate the marriage. The Australian court held that the marriage was null because of an absence of consent on the part of the wife who was the victim of mistaken identity. The explanation was that "the wife was contemplating immediately prior to marriage and did in fact believe that she was marrying a male. She did not in fact marry a male but a combination of both male and female and notwithstanding that the husband exhibited as a male, he was in fact not, and the wife was mistaken as to the identity of her husband." (21)

Critics of the Corbett case, who have called its approach "disturbingly simplistic", (22) argue that the chromosome pattern which can never be changed should be ignored. The genital test should consider the post-operative, rather than pre-operative, state of the genitals. If the apparent sex, that is, genitals, gender identity and gender role are congruent, then the individual should be categorised accordingly. (23) These criticisms are based not only on compassion to individuals but also on logic. It is said that in relation to adultery and rape, two areas of the law

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where penetration of one sexual organ by another is an essential element, no inquiry as to sexual identity is necessary, and that this should be the general approach. The requirement of penetration presupposes an organ capable of penetration possessed by one person, and an organ capable of being penetrated possessed by the other, and that this establishes a sufficient degree of sexual differentiation. The legal test for consummation of marriage is penetration.

Fair though this criticism may be it nevertheless accepts that the law should continue to operate on an assumption that the two sexes are completely different categories. "As a working hypothesis this is not unreasonable, but... it does not quite correspond with physiological reality and is therefore liable to break down from time to time." (24) Concern is expressed because errors may be made, but the premise that the law should be organised on a basis of gender dichotomy is not queried. Hitherto criticisms have been levelled at the lack of logic or of compassion in legal handling of difficult cases and the suggested reform is that the courts should consider a variety of factors including the post-operative state and gender identity instead of one essential determinant of sex.

There is no doubt that Ormrod J.'s approach can be described as essentialist. He said that "the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed either by natural development of organs of the opposite sex or by medical or surgical means." (25) Yet the genuine intersex husband in C and D did not belong essentially to one sex. Neither do many of the patients at Johns Hopkins Hospital. Furthermore, the objective of the medical profession has been to bring the physical appearance of patients into line with gender identity. "Since it is possible to alter anatomy and hormone ratio but not gender identity, finding out which way the child's gender identity inclined was the crucial concern." (26) In many cases this means confirming individuals in the gender category in which they were socialised as children. But to Ormrod J. "a person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage." (27) The judgment does not clarify whether this role is social, sexual, or reproductive.

The legal view of marriage, as evidenced in Corbett, is that the essence of the marriage relationship is heterosexual intercourse. Why is this? The ability to procreate children is not essential to valid marriage, for if this were so, involuntarily

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childless marriages would be void, and even possibly voluntary childless marriages. It is true that marriages which have not been sexually consummated are voidable in English Law, but there have been a number of decisions holding that the use of contraceptives does not prevent consummation. (28) If procreation is not the purpose of marriage, but the law nevertheless requires that the parties belong to different biological categories, then it seems that marriage is not a private matter to be negotiated between individuals but a public institution for heterosexual intercourse.

The essentialist approach presupposes two fixed and immutable categories. All human beings are assumed to fall neatly into one or other category. "Performing the essential role of a woman in marriage", suggests certain fixed social, psychological, and behavioural traits of femininity which depend on biology. My objections to this approach are that it is based on a false premise, that it is not consonant with modern medical theory, that it is undesirable on the grounds of public policy, and that it is largely unnecessary.

The false premise is the assumption of two closed categories into which all human beings can be classified on an either/or basis and the attaching to these of qualities of femininity or masculinity. Whilst it is true that the great majority of people can be so classified biologically, there are nevertheless a minority who cannot be. Social and psychological behavioural traits are socially constructed and "the differences within each sex far outweigh the differences between the sexes." (29) Using the chromosome test might be seen as a way of sustaining the closed category approach, but even chromosomes can be awkward. Cases of XO, XXY may cause problems. Furthermore medical opinion does not support exclusive reliance on chromosomes.

A better approach is to look at a variety of factors concerning the individual as now presented including psychological identity, and to base the conclusion on the sum of these factors, rather than to look at one essential feature. Ormrod J.'s objection to this method was that it is illogical to state that a person belonged to one category at birth but has changed to the other category. Yet Ormrod J. suggested that a person may belong to one category for purposes of contract, employment or social security and to the other for the purposes of marriage."

In some contractual relationships, e.g. life

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assurance and pension schemes, sex is a relevant factor in determining the rate of premium or contributions. It is relevant also to some aspects of the law regulating conditions of employment and to various state-run schemes such as national insurance, or to such fiscal matters as selective employment tax. It is not an essential determinant in these cases because there is nothing to prevent the parties to a contract of insurance or a pension scheme from agreeing that the person concerned should be treated as a man or as a woman, as the case may be. Similarly, the authorities, if they think fit can agree with the individual that he shall be treated as a woman for national insurance purposes, as in this case. (30)

In a system which insists on a dichotomous gender system it seems equally illogical to suggest that a person who is essentially a man for marriage can be a woman for other purposes.

Medical theory according to Money, Stoller and Green, the major modern exponents, favours the adaptation of physical appearance to follow gender identity. This is done in some cases of error, of intersex, and also for transsexuals. Money finds the question whether an individual is really a woman or a man meaningless. "All you can say is that this is a person whose sex organs differentiated as a male and whose gender identity differentiated as a female." (31)

Public policy as expressed in the Sex Discrimination Act 1975 and the Equal Pay Act 1970 is against discrimination between the sexes in certain public areas of life. There is agreement amongst researchers on sex discrimination and by the Equal Opportunities Commission that attitudes which stereotype women or men in particular inflexible ways can lead to sex discrimination. Indeed much of the research suggests that sexual differentiation is socialisation and in education may be inimical to anti-discrimination goals. This is not to suggest that gender identity is unimportant. In a world in which gender is a central principle of social organisation the evidence is that the development of a sense of identity depends on gender identity. It might be otherwise in an androgenous society. However significant gender identity is in a society which is gender organised, the question is whether it is necessary for law to reflect this. If legislative policy goals are aimed at reducing sexual differentiation in the public sphere should the law itself not attempt to eliminate gender distinction

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where possible?

The view that it is unnecessary for the law to classify human beings according to sex or gender can be attacked on various grounds. It can be argued that the great majority of persons do fall into one of two categories biologically. Why should the law not reflect this? Furthermore there are biological functions which can only be performed by one sex, such as menstruation, gestation, lactation. It is necessary for employment laws to recognise this. Another objection can be raised in favour of legal recognition of gender roles, where the state privileges motherhood, for example. Further objections can be based on present realities such as unequal power of women, protection from sexual crime. An androgenous society might be an ideal but empirical evidence suggests that women's special needs must be recognised.

Establishing the case that sexual classification by law is largely unnecessary requires a deepening of the debate on anti-discrimination. It has long been a major tenet of liberal feminists that differentiation of women leads to discrimination. The counter-argument is that needs, life-style, and life-cycle alternative to the dominant male model must be recognised. I have gone into this debate in some detail elsewhere, (32) but the major point I am making here is that the organisation of society on a gender basis exacerbates gender dysphoria, as exhibited by transsexuals.

Criminal Law

The decision in the Corbett case has influenced criminal law despite Ormrod J.'s statement that the "question then becomes what is meant by the word 'woman' in the context of a marriage, for I am not concerned to determine the 'legal sex' of the respondent at large." (33) In R v Tan and Others (33) the Court of Appeal decided to apply the Corbett decision to an area of criminal law where the sex of the defendant is an essential determinant of guilt. Under S.30 of the Sexual Offences Act 1956 it is an offence for a man to live on the earnings of prostitution. One of the accused, Gloria Greaves, who had been born a male but who had undergone a sex-change operation and who lived as a woman, appealed against conviction under S.30. This defendant submitted that a person who was philosophically, psychologically, or socially a woman should not be convicted of an offence limited to men. The crime of living on the earnings of prostitution is based on the model of the pimp who exploits women for

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sexual purposes. In Greaves' case this rationale does not seem relevant.

The Court of Appeal held that for reasons of common sense, certainty, and consistency, the precedent set by the decision in the Corbett case would be followed. Thus the defendant's biological sex remained male despite appearances, gender identity and surgery. The decision in Tan can be criticised for extending Ormrod J.'s definition beyond his specific limitation to marriage and for ignoring gender identity and medical theory, but the point I am stressing here is that prostitution law is held to operate on biological sex and not gender. The court faced with female-specific offences such as that of prostitution in a public place under the Street Offences Act 1956 or male-specific offences under S.30 is obliged to decide what constitutes a woman or a man. Legislation drafted in sex-specific terms creates this problem. What is not inevitable is the decision to focus on biological sex rather than gender.

The outcome is curious. A male to female transsexual cannot be the victim of rape. Heterosexual soliciting by a female prostitute is not a crime for such a transsexual who can, however, be convicted of male homosexual soliciting and face more stringent penalties. (34) A female to male transsexual cannot be guilty of the offence of unlawful sexual intercourse with a girl under sixteen. (35) Consistency, the goal of the court in Tan, remains elusive. At the root of these inconsistencies is sex-specific legislation. The post-operative male to female transsexual is incapable of being raped yet in other legal jurisdictions, such as Canada, the law has been reformed to encompass aggressors and victims of both sexes. (36)

Social Security

April Ashley the male to female transsexual who was the respondent in the Corbett case was issued with a national insurance card as a member of the female category. On her status as a woman would depend such matters as her age for qualification for the state pension. At present this is sixty for a woman and sixty-five for a man. Yet, despite the recognition of the post-operative gender of the transsexual for purposes of issuing a card, the relevant authorities have decided that biological sex is the test to be applied in relation to the age of retirement. (37) This inconsistency calls into question, again, the necessity for the differentiation between women and men.

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Employment

Legislation regulating the hours that women can work in factories and excluding them from mining is presented as being for their protection. This is a matter of debate, but these laws do require a decision as to what constitutes a woman. In E.A. White v British Sugar Corporation the female to male transsexual complained of sex discrimination when dismissed on grounds of deception as to sex. The employer had believed the complainant to be male when the offer of employment was made. Dismissal followed the discovery that the complainant had previously been classified as female. The industrial tribunal which heard the case held that the complainant was a woman. The reasoning was as follows: "The current edition of The Shorter Oxford English Dictionary defines males as of or belonging to the sex which begets offspring or performs the fecundating function. The same dictionary defines female as belonging to the sex which bears offspring. On her own evidence the applicant, whatever her physiological make up may be, does not have male reproductive organs and there is no evidence that she could not bear children." (38) Since the employers required the employee for the particular job as electrician's mate to work on Sundays, and since the protective legislation did not permit a woman to do so, the employers did not dismiss the complainant unjustly.

Sex Discrimination

Sex discrimination legislation in Britain has as its goal the elimination of discrimination between women and men in the public sphere. It operates on an individualistic level through the comparison of a particular woman with a particular man. A person directly discriminates against a woman when "on the grounds of her sex he treats her less favourably than he treats or would treat a man." (39) Individual men can also complain of less favourable treatment by comparison with an individual woman.

The complainant in E.A. White v British Sugar Corporation relied on the Sex Discrimination Act 1975 in making her complaint to the industrial tribunal. The tribunal held that the test for discrimination led to the conclusion that the complainant had not been treated less favourably than a man, because a man who held himself out to be a woman would also have been dismissed. The case makes clear that biological sex, if in question, must be determined for application of sex discrimination legislation, and that courts and tribunals are likely to continue with an essentialist

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approach. It is indeed an irony that in attempting to abrogate sexual stereotypes the means Parliament has chosen is to require all individuals to be classified in an essentialist fashion. Whilst the Corbett test allows for some variation within a category the White tribunal's use of a dictionary definition is crude. The tribunal concluded "the laws of this country and the [1975 Act] in particular envisage only two sexes, namely male and female." (40)

One possible solution to the problem of sex discrimination legislation reinforcing the injustice it attempts to rectify would be for the courts to accept gender rather than biological sex as the criterion for the category woman or man. But, as already argued, there is evidence that gender dysphoria and the transsexual impulse are aggravated, or even created, by society's insistence on gender dimorphism. Furthermore, such a solution remains individualistic and does not tackle the general issue of legal dichotomy between the sexes. As Catherine MacKinnon notes "there is a real question whether it makes sense of the evidence to conceptualise the reality of sex in terms of differences at all, except in the socially constructed sense - which social construction is what the law is attempting to address as the problem." (41)

THE RESPONSE TO TRANSSEXUALISM

Legal writers discussing the problems faced by the transsexual have argued for a more compassionate approach and for flexibility in sexual stereotypes. (42) Examples from other jurisdictions such as Germany, (43) France, (44) Switzerland (45) and the United States, (46) where the post-operative transsexual is classified according to chosen rather than ascribed gender are held up for English law to emulate. Furthermore the European Commission on Human Rights has held that it is a violation of private and family life to require the transsexual to carry documents of identity manifestly incompatible with personal appearance. The Commission found that the state's refusal to recognise gender identity treats the transsexual "as an ambiguous being, an 'appearance', disregarding in particular the effects of a lawful medical treatment aimed at bringing the physical sex and the psychical sex into accord with each other." (47)

This response is understandable, for it permits the maintenance of the gender status quo whilst disposing of the troubling problems of transsexuals. Quite another response has come from feminist criticism of those medical persons, the transsexers, who are osten-

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sibly dealing with a psychological problem, but who are accused of engaging in political shaping and controlling of feminine and masculine behaviour. Janice Raymond argues that the definition of transsexualism as a medical problem and the development of sex conversion surgery has given sovereign power to medical specialists. She sees transsexualism as an attempt to wrest from women the power inherent in female biology and in women's creative energies. This is linked in her thesis to the mutilation of female flesh in footbinding, clitoridectomy and infibulation. "Now, patriarchy is moulding and mutilating male flesh, but for the purpose of constructing women." (48)

Janice Raymond's case is that transsexualism offers a unique perspective on gender role stereotyping in a patriarchal society. By giving examples of statements by male to female transsexuals she supports her case. A central figure in this is Jan Morris of whom Money admits, "most transsexuals embrace the stereotype of their identity, even a person as sophisticated as Jan Morris." (49) As James Morris, a correspondent for the Times, he accompanied the Mt. Everest climbing expedition and scooped the story. The experience is described as "this feeling of unfluctuating control, I think, that women cannot share, and it springs of course not from the intellect or the personality, nor even so much from upbringing, but specifically from the body. ...I never mind the swagger of young men. It is their right to swank and I know the sensation." (50)

Later Morris, after a sex-change operation in Casablanca, had a first experience of "being liked" by a taxi driver in London who "boldly" kissed her "roughly and not at all disagreeably on the lips", after which he said, "There's a good girl" and "patted her bottom." (51) "I like being a woman but I mean a woman. I like having my suit case carried. ...I like gossiping with the lady upstairs. ...And yes, I like to be liked by men." (52) As Janice Raymond points out, Morris switches from one stereotype to the other without understanding the significance of either.

April Ashley, the respondent in the Corbett case was described by Ormrod J. as follows: "Her outward appearance at first sight was convincingly feminine but on closer and longer examination in the witness box it was much less so. The voice, manner, gestures and attitudes became increasingly reminiscent of the accomplished female impersonator." One of the medical experts put his opinion in the words: "the pastiche of femininity was convincing". (53) Neither transsexuals, nor experts, question the gender stereotypes

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against which behaviour is judged. The stereotypes themselves are not confronted but merely frowned upon when acted out by persons of the 'wrong' sex. Faced with this transsexuals cling even harder to their notions of femininity and are resentful of 'Gennies', that is, biological females. "Genetic women are becoming quite obsolete, which is obvious, and the future belongs to transsexual women. We know this, and perhaps some of you suspect it. All you have left is your 'ability' to bear children, and in a world which will groan to feed 6 billion by the year 2000, that's a negative asset." (54)

The argument that transsexualism is a result of socially produced gender role stereotyping is powerful. It is society's definitions of femininity and masculinity and the connection of these to particular physical appearances that create the desire in the transsexual for different sex organs. "The sexual organs and the body of the opposite sex come to incarnate the essence of the desired gender identity and role, and thus it is not primarily the body that is desired, but what a female or male body means in this society." (55) If one accepts Janice Raymond's thesis, then it follows that a society concerned about transsexual troubles would concentrate not on surgery to bring about physical and psychological conformity, but on eliminating the rigidities of beliefs about appropriate gender behaviour.

CONCLUSION

Gender is socially constructed and the law, insofar as it builds on gender dichotomies, is part of that process. An important step in the dismantling of harmful stereotypes is for the law to cease its insistence on classifying people according to sex. To finish, as I started, with Simone de Beauvoir: "Woman is determined not by her hormones or by mysterious instincts, but by the manner in which her body and her relation to the world are modified through the action of others than herself." (56)

EQUALITY AND DISCRIMINATION: ESSAYS IN FREEDOM AND JUSTICE

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AFFIRMATIVE ACTION

BY KATHERINE O'DONOVAN

What arguments can be used to justify policies of affirmative action directed at women and blacks who have been discriminated against in the past on grounds of sex or race? Sandra Marshall concludes that the individual man who loses his place at university because of such policies will feel a justified sense of personal injustice. Before we enter into the counter-arguments two caveats must be stated. Firstly, it is dangerous to assume that women and blacks are in the same position as victims of discrimination. Historically, although both groups have suffered, the reasons for discrimination against them were very different. At present the failures of women or blacks to become professors of philosophy may stem from quite distinct causes. For this reason, and because Sandra Marshall does so herself, I shall concentrate on the position of women.

The second caveat relates to the real world of affirmative action, as I prefer to term what has been called reverse discrimination. The sort of quota described by Marshall does not exist, to the best of my knowledge. American universities, since the decision in the *Bakke* case, have constructed admissions programmes which take account of each individual applicant's qualifications, including matters such as race, sex and ethnic origins. No one factor predominates.¹ However, in the interests of debate I accept the terms of the proponent's arguments.

Traditionally, three types of argument have been marshalled to justify policies of affirmative action. These are utilitarian arguments, distributive justice, and compensatory justice. It is only on the latter that Sandra Marshall focusses. If we consider the case based on compensation we can answer Gilbert as follows:

¹ Justice Powell, who formed part of the majority in the Supreme Court in holding that a special admissions program in which race determines entry is invalid, nevertheless allowed the use of race as a plus factor amongst others. So long as all factors are weighed fairly and competitively for each individual then, 'the applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname.' *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 at 318.

Quotas can be justified in free market terms as eliminating irrational discrimination against women. The quota may approximate to the numbers of women who would be admitted in the absence of irrational discrimination. Such a quota serves as a proxy for sex blind decisions, especially in areas such as academic appointments that are difficult to police.

Compensatory justice

The justification of affirmative action based on arguments about compensation refers to past injustices. Women who were prevented by law from entering the public world of education, employment, politics, will have these earlier *de jure* barriers taken into account when they now attempt entrance. Since women were discriminated against as a group, compensation is due to them as a group. It is true that the individual women who suffered injustices in the past are not those who now benefit from affirmative policies. It is also true that individual men such as Gilbert are not responsible for past discrimination. The policy, however, is designed to compensate not only for lost opportunity, but also for stigmatization. Women have been stigmatized as a group and those who benefit from affirmative action are still affected by the consequences of earlier prejudice.

White males such as Gilbert are not stigmatized. They belong to the dominant group. Gilbert may object that he has not participated in stigmatizing women and that he bears no individual responsibility. His membership of the dominant group is based on an ascriptive quality over which he has no control. Yet he cannot deny that he belongs to a society in which women's subordination is the result of social injustice.² Although *de jure* barriers to women's participation in the public world have been removed, the institutions and ideology that created those barriers continue. These institutions maintain white male privilege.

Gilbert benefits from being a man. He has the advantage of being able to look to examples of achievement of success in the public arena which are overwhelmingly male. That men are more successful than women in terms of liberal values of individualism and marketplace competition is evident from empirical study.³ This gives psychological benefits of belief in self and direction to the structuring of expectations and goals. In an apparent meritocracy men do better than women. In a society where reward is based on deserts average female earnings in 1981 were 67% of those of men.⁴ This has the effect of increasing male confidence and self-respect. Had white males not had the privilege of being born into a male dominated society, women (and blacks) might have developed their talents to equal levels; or they might have developed a different kind of society.⁵

The test of Gilbert's assertion that he is being penalised for an ascriptive quality over which he has no control — being born male — is this. Let us take a counterfactual line. Would Gilbert, had he had a choice, have refused the benefits of being

2 This is one of the assumptions with which Sandra Marshall begins her argument.

3 The 1981 Census Report on Economic Activity in Great Britain (HMSO, 1984) Table A shows that in a 10% sample there were 1,368,145 men in employment by comparison with 828,894 women. Women's work is predominantly confined to service industries and welfare, such as primary teaching, nursing, secretarial, clerical, shop assistant, cleaning and catering.

4 *Social Trends*, No. 13, (1983) 66.

5 My personal view is that one cannot compare men and women in the public sphere alone. The influence of the private on the public must be taken into account.

brought up as a male? He might say: 'If I had known that this would lead to losing a university place, I would not have accepted the benefits.' But these are the benefits that have enabled Gilbert to compete for university entrance. Can he really claim that he wants a university place but without the benefits already received? How can he be sure that he would be in a position to compete without those benefits? And if they are discounted, is this not exactly what happens when policies of preferential treatment are applied? On the other hand if Gilbert admits that, given a choice, he would have accepted the advantages of being born male, 'that advantage... which comes of confidence in one's full membership [in the community] and of one's rights being recognised as a matter of course',⁶ then he must also accept the risks of affirmative action.⁷

The compensation argument, if it is to succeed, must take account of Sandra Marshall's objections. But it is not necessary to argue that 'it is men as perpetrators of wrongs against women' that we are concerned with. In this I consider the analogy between German reparations for the holocaust and reverse discrimination is false. My counter-argument is based not on an idea of reparation for injustice in the past, but on the concept of restitution or unjust enrichment.

'Unjust enrichment' is the name given to the principle of justice which requires to restoration by a defendant of a benefit to the plaintiff. In the eighteenth century Lord Mansfield ordered a number of defendants to make restitution because of 'the ties of natural justice and equity'.⁸ The American Restatement of Restitution lays down the general principle that 'a person who has been unjustly enriched at the expense of another is required to make restitution to that other.' It is not being suggested here that this concept applies with any precision to cases of preferential treatment of women. The utility of the principle is that it gives us a new perspective on this debate.

In positing that Gilbert has been enriched as a man, at the expense of women, it is not being suggested either that Gilbert had a choice or that these benefits be removed. The question of choice has already been dealt with. Indeed it has led us to this point. Recognising the benefits of being brought up as a male does not necessarily lead to reducing Gilbert in his own eyes. Rather, it leads to accounting for unfair advantages that one candidate may have over another when making decisions about university admissions. This is precisely what affirmative action attempts to do.

To sustain the compensation/restitution argument one does not have to demonstrate individual responsibility on the part of a man who is denied a university place when women with the same qualifications as he are not. It is sufficient to show that he has benefitted from past injustices within the social order of which he is part.

6 J.J. Thomson, 'Preferential Hiring' in M. Cohen, T. Nagel, and T. Scanlon (eds.) *Equality and Preferential Treatment* (Princeton University Press, 1977) 19.

7 I owe this argument to Myrl. L. Duncan, 'The Future of Affirmative Action', (1982) 17 *Harvard Civil Rights - Civil Liberties Law Rev.* 503 at 535.

8 *Moses v. Mcferlan* (1760) 2 Burt 1005 at 1012.

Distributive Justice

If Gilbert is to be answered in traditional terms, then a stronger argument for affirmative action can be made from distributive justice. *De jure* barriers to women's participation in the marketplace have been removed. The Equal Pay and Sex Discrimination Acts have made *de facto* discrimination illegal with certain exceptions.⁹ With the enactment of this legislation society has declared as a goal the redistribution of those opportunities and rewards at present enjoyed to a disproportionate extent by white males. Yet the empirical evidence is that women's work is concentrated in certain low-paid industries and services, and that there is unequal participation by women in well-paid and professional sectors of the economy.¹⁰ If the benefits and burdens of the market in education and jobs are to be equally distributed between the sexes, is there a case for affirmative action policies for women?

Relevant considerations in the distribution of benefits and burdens might be past discrimination against women; but the object of the exercise is to neutralise the present effects of such a past. This is where the distribution model is quite different from the compensation model. With the compensation model past injustices call for restitution. Redistribution, however, is undertaken as a strategy to achieve an egalitarian social goal. Past injustice is relevant only insofar as it creates a need for present policies.

The basis on which distribution between the sexes will take place is likely to be need. The outline of a redistributive argument for affirmative action goes as follows: Society is pursuing a social goal of equality between the sexes. At present women and men are not equal in the marketplace, as shown by empirical study. Women's present lack of equality creates a need for preferential treatment. Therefore, in pursuit of the goal of equality society must redistribute opportunities and rewards in favour of women.

A possible objection is that society is discriminating against white males in the same way as women were discriminated against in the past. In other words, injustice is continuing; only the victims have changed. But the position of white males today is not similar to that of nineteenth-century women. It has already been argued that being a man in a male dominated society confers certain benefits. Furthermore the justification for policies which give preference to women is quite different from the justification for nineteenth-century policies favouring men. If we examine this assertion from the standpoint of the male who complains that he has been discriminated against we find no suggestion that he is inferior to women

⁹ The Sex Discrimination Act 1975 makes illegal discrimination on grounds of sex against a man or a woman. Reverse discrimination is prohibited by the Act. The Act only applies to the public world of employment, education, goods and services. It does not affect taxation, social security, pensions, nor the private world of the family.

¹⁰ The 1981 Census Report on Economic Activity (HMSO, 1984) Table A shows that 6% of men and only 1.1% of women have jobs in social class 1.

intellectually or physically,¹¹ nor that his sphere is the home rather than the marketplace,¹² nor even that it is for his own good that he should be altruistic.¹³ There is no attack on his self-respect. The social goal of the policies is clear.¹⁴

Individual white males might further object that they are being required to bear a disproportionate cost of society's pursuit of its social goals. The cost to them is their loss of an educational opportunity. This objection assumes that there are a finite number of university places and that each place allocated preferentially to a woman means a loss of a place to a man. Can this objection be sustained? In the real world of American affirmative action sex is only one of a variety of factors considered by university admissions officers. The Gilbert proto-type of Marshall's argument only claims to be as qualified as his female counterpart. Such male complainants do not lose something they already have. They are not being deprived of property or rights. What they are losing is opportunity.

This debate then is about equality of opportunity. For the male complainants to succeed they must show that the injustice they have suffered is a denial of such equality. This argument presupposes that, prior to the introduction of affirmative action for women, there was equality of opportunity. But if as a result of past or present discrimination women are handicapped then the initial equality does not exist.

Formal equality, as achieved by the removal of *de jure* barriers and the outlawing of *de facto* barriers to women's access to the marketplace, is not substantive equality. The creation of the tort of indirect discrimination, as described by Christopher McCrudden elsewhere in this volume, is one response to this issue. Affirmative action is another. Given the conspicuous absence of women from important sectors of the marketplace the evidence suggests that women do not get an equal start with men. If a group of people have been *de jure* excluded from participation in public life, kept in an inferior station with material, social, and psychological handicaps, and if the assertion is then solemnly made that they compete equally with the dominant group — the result can only be laughter.¹⁵ It is for the proponent to show that there is equal opportunity, and that the market in education and jobs functions neutrally. Neutrality means that the market is not male dominated, responsive to the male life-cycle and life patterns, and male identified.¹⁶

11 *Jex-Blake v. Senatus of the University of Edinburgh* (1873) 11 M. 784.

12 *Chorlton v. Lings* (1869) 4 L.R.C.P. 374.

13 *Muller v. Oregon*, 208 U.S. 412 (1908).

14 See R. Dworkin, 'Reverse Discrimination', in *Taking Rights Seriously* (Oxford, 1978).

15 Adapted from C. Black, 'The Lawfulness of Segregation Decisions', (1960) 69 *Yale L.J.* 421 at 424.

16 Persons identify with the groups to which they belong, and tend to employ and promote those whom they perceive as being like themselves. Do they consider objectively the qualifications of those unlike themselves? Should they think like the lawyer for a male defendant who asked a female judge to disqualify herself because the plaintiff was female? R. Wasserstrom, *Philosophy and Social Issues* (U. of Notre Dame, 1980) 22.

English law does not have a policy of affirmative action. The discourse on sex discrimination is imbued with the liberal model which assumes that equality of opportunity exists. When the debate turns to question this assumption the sceptical laughter will cease.

ESSAYS FOR CLIVE SCHMITTHOFF (ed. J. Adams)
(Aldington, Professional Books, 1983)

VI

THE IMPACT OF ENTRY INTO THE EUROPEAN
COMMUNITY ON SEX DISCRIMINATION IN BRITISH
SOCIAL SECURITY LAW*

Katherine O'Donovan

Introduction

Political opposition to British membership of the European Community centres around the effects of membership on food prices, employment, and the sovereignty of Parliament. Support for membership is based on arguments about wider markets for goods produced in the United Kingdom, and the political strength derived from European unity. Unmentioned now, and unforeseen at the time of entry are the benefits that certain sections of the community have derived from British membership. This paper will look at one aspect of changes in the law which have come about as a result of participation in the European Community; these changes in domestic social security legislation have been made to conform with the Community's commitment to "the task of achieving equal treatment and equal opportunities for men and women in society, and particularly in employment."¹

Article 119 of the Treaty of Rome² requires Member States to abide by the principle that women and men shall receive equal pay for equal work. Community studies showed that Article 119 was in need of support by further measures, and in 1975 a Directive was issued on equal pay (Directive 75/117). This Directive 75/117 concerned the approximation of the laws of Member States relating to the application of the principle of equal pay and was intended to make the principle more effective. The Equal Pay Act 1970, which came into force in 1975, represents the official British effort to acknowledge treaty obligations in this area. The problems that complainants have faced in enforcing the Act in Industrial Tribunals, and on appeal, are well

* I am grateful to Erika Szyszczak for her help.

1 Commission of the European Communities, A New Community Action Programme on the Promotion of Equal Opportunities for Women, 1982-1985, Com (81) 758, p.3.

2 Article 119 of the Treaty of Rome provides: "Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work."

known.³ The European Court of Justice has heard a number of cases which had already been upheld at the European Court Stage.⁴ But as Hepple shows, elsewhere in this volume, the basing of Directive 75/117 on Article 100 of the Treaty and not explicitly on Article 119 has limited the success of these measures.

It might be argued that the principle of equal pay established in Article 119 should be interpreted to cover other benefits arising from employment, including social security. However, two detailed Directives have been issued to implement the Council Resolution of 1974 on the Social Action Programme "which expressed the political will to achieve training and conditions of employment."⁵ These Directives deal with equal opportunity (76/207)⁶ and with social security (79/7).⁷ Before considering the Directives in detail, explanations for Community interest in equal treatment will be considered.

Professor Hepple has explained the process of harmonisation of law in the European Community, and the movement of workers is facilitated if certain universal principles are adopted in social security law in accordance with Directive 79/7. It is not difficult to imagine the problems that would be faced by the migrant woman worker who moves from an equal treatment based social security system to a gender based system. The Social Action Programme produced by the Commission in 1972 contained the following statement on harmonisation of social security provisions:

"It is not part of the intention of the Commission to recommend a uniform system (of social security) or to eliminate the many disparities resulting from different national priorities, needs and values. At the same time the Commission has a clear duty to seek to establish minimum standards of social protection capable of being regularly improved."⁸

On the more abstract level of Community economic policy harmonisation of the general principle of social security laws within each Member State also ensures that products sold within the market are not competitively priced at the expense of individual workers' health and

3 See Jean Coussins, *The Equality Report*, N.C.C.L. 1976; Mandy Snell (1979) *Feminist Review*, 57; Erika Szyszczak (1981) M.L.R. 672.

4 *McCarthy v. Wendy Smith* [1980] I.R.L.R. 211, *Worringham and Humphreys v. Lloyds Bank Ltd.* [1981] I.R.L.R. 145.

5 *Supra*, fn. 1, at p.3.

6 O.J. 1976, L39/40.

7 O.J. 1979, L6/24.

8 Social Action Programme, Bulletin of the European Communities, Supplement 2/75.

welfare. Since a major part of each national social security system is financed by employers' contributions, unfair competition could be engaged in by employing large numbers of women for whom the employers' contribution is lower.⁹ As the then Commissioner for Social Affairs, Hank Vredling said in 1980:

"The Fathers of the Treaty (of Rome) were certainly not devotees before their time of women's emancipation. This Article (119) was adopted purely and simply out of the fear that if women workers were underpaid, national industries would suffer a negative effect as regards their competitive position."¹⁰

Directive 76/207 on equal opportunities covers equality of treatment in access to employment, vocational training, promotion, and conditions of work. The legal basis for this Directive is Article 235 of the Treaty which allows the Council to take detailed measures to implement the Treaty, in this case Article 119. Edward James, then Director General of Social Affairs in the European Commission has stated that:

"It was the Commission's intention that this (Directive 76/207) was to cover social security because in our view contributions people paid when they were in work and the benefits they got when they were out of work, or when they were retired, are an intimate part of working conditions. But the Member States didn't see it this way. They saw all sorts of problems in introducing equal treatment in the social security field, so eventually, in 1976, it was excluded."¹¹

However, in order to give notice to the Member States of the Commission's view that the principle of equal treatment covers social security Article 1.2 of Directive 76/207 makes clear that a subsequent Directive on the matter will be issued.

Equality of treatment in social security law was the subject of Directive 79/7 issued in December 1978. The legal basis of the Directive is, again, Article 235 of the Treaty. Because of the problems over acceptance by the Member States, the Directive is a compromise. It is with this latter Directive and its effect on British social security law that this paper is concerned. The paper will examine British social security

9 Edward James, "The Elusive Harmony," *Benefits International*, April 1978, pp.3-7.

10 Speech of Hank Vredling at EEC/EOC conference on "Equality for Women", Manchester, 28-30 May, 1980; quoted in Rights of Women Europe Group Paper given at the European Conference on Critical Legal Studies, 29 March, 1981.

11 Speech of Edward James at N.C.C.L. conference on Women and Social Security, London, 25-26 November, 1978, transcript p.13.

law prior to the Directive, the content of the Directive including the extent of the compromise, and the gradual implementation and consequent effect on domestic law. Full implementation will not take place until the end of 1984.¹²

(1) *Social security law before the Directive*

There can be no doubt that, until pressure was put on British Governments by the E.E.C. initiatives and by women's pressure groups, social security law in the United Kingdom discriminated against women.

The Sex Discrimination Act 1975 deliberately excluded social security and taxation laws from its ambit,¹³ leaving the State as the most discriminatory body of all. Even where women workers made the same national insurance contributions as men they did not receive the same benefits within the contributory benefits scheme. And despite the fact that equality in such benefits is clearly part of equal pay, the Equal Pay Act 1970 did not cover the issue. The explanations for this policy of discrimination in social security law are complex and operate at various levels; they can be summarised as stemming from three sources: the Beveridge Report, the legal obligation of a husband to maintain his wife, and the financial cost of equality.

In order to understand what is now recognised as discrimination, it is necessary to return to the Beveridge Report which provided the basis for the welfare state. Despite the fact that the Report was written in 1942 when women were participating in the war effort by working in unprecedented numbers in factories and on farms, Beveridge foresaw a society in which "the great majority of married women (are) occupied on work which is vital though unpaid, without which the nation could not continue."¹⁴ Beveridge believed that most married women would not be gainfully employed, a belief which history shows to have been short-sighted, both prospectively and retrospectively. Also

12 Directive 79/7, Art. 8.1 provides:

"Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within six years of its notification. They shall immediately inform the Commission thereof."

The Commission has stated that it will only be possible to ascertain whether the Directive has been correctly applied at the end of 1984. O.J. 1981, C63/25.

13 The Sex Discrimination Act 1975, s.51, exempts from operation of the Act actions taken under statutory authority, where the statute in question predates the Sex Discrimination Act.

14 W. Beveridge, *Social Insurance and Allied Services*, Cmnd. 6404, HMSO, 1942, p.50.

unforeseen was the escalation in divorce leading to a breakdown of marriage rate of one in four.¹⁵

Beveridge's assumption that most married women would confine themselves to unpaid work led to three consequences. The first was that wives were to be treated as dependents in social security legislation, receiving benefits through their husbands. The second was that, if they did engage in paid work, they could elect to pay reduced national insurance contributions: "it should be open to any married woman to undertake it as an exempt person, paying no contributions of her own and acquiring no claim to benefit in unemployment or sickness."¹⁶ The third was that, even if the married woman "prefers to contribute and to requalify for unemployment and disability benefit she may do so, but will receive benefits at a reduced rate."¹⁷

Thus married women had the option either to be insured through their husbands as dependents or to pay a full contribution but to receive less than a single person. The notion that a married woman might need to provide benefits for her dependent children or spouse was not even considered. This has now changed: to women starting to engage in paid employment after April 1977, the married woman's option to pay reduced contributions is no longer available.¹⁸ This is the beginning of the response to the European Community initiative. The position at present is that those married women who pay a full contribution are eligible for benefits as single persons. They cannot receive additional amounts to support their children or husbands unless the husband is incapable of work.¹⁹ Clearly there is no equality of treatment of married women with married men as far as the benefits earned by contributions are concerned. When the Directive is fully implemented this will change.

The legal obligation of the husband to maintain his wife has its origins in the common law doctrine of the merging of the legal personalities of both spouses into that of the husband. Blackstone laid down the effect of marriage on a woman as follows:

"By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated

15 Leslie Rimmer, *Families in Focus*, Study Commission on the Family, 1981, part 4.

16 *Op.cit.*, fn. 14.

17 *Ibid.*

18 S.I. 1975/492.

19 Social Security Act 1975, ss.44(3)(a), 47(1)(a), 66(1)(b); Sched. 20: "he is incapable of supporting himself by reason of physical or mental infirmity and is likely to remain so incapable for a prolonged period."

into that of the husband: under whose wing, protection, and cover, she performs everything."²⁰

Both spouses are under a legal obligation to maintain each other since 1971.²¹ The Married Women's Property Acts 1870–1882 permitted a wife to own separate property from her husband and to have some degree of independent legal existence. Yet the husband's maintenance obligation is still used by policy makers and government officials as a justification for classifying wives as their husbands' dependants. Beveridge's view was that "on marriage a woman gains a legal right to her husband as a first line of defence against risks which fall directly on the solitary woman."²²

This differentiation between women and men and between the married and the single has had far-reaching consequences. It has formed a model for legislation in which it is assumed that married men are breadwinners and their wives are dependents supported by a wage-earner. The model has been criticised as obsolete, discriminatory, and as being based on sexual stereotypes.²³ These criticisms have been made in Britain and in other Community States.²⁴ Nevertheless the model is the basis for all non-contributory social security benefits, of which family income supplement, supplementary benefit, invalid care allowance and non-contributory invalidity benefit are examples.

Family income supplement is a benefit paid to low income families where the claimant is in full-time paid work. The family must contain a child and the claimant must be "one man or single woman engaged, and normally engaged, in remunerative full-time work."²⁵ Thus the

20 W. Blackstone, *Commentaries on the Laws of England*, 7th ed., Clarendon Press, 1977, Bk. 1, p.442.

21 Matrimonial Proceedings and Property Act, 1971, now consolidated in s.27 Matrimonial Causes Act 1973. See also Domestic Proceedings and Magistrates Court Act 1978, s.1.

22 Beveridge, *op.cit.*, fn. 14.

23 Katherine O'Donovan, "The Male Appendage – Legal Definitions of Women" in S.B. Burman (ed.), *Fit Work for Women*, Croom Helm, 1979, pp.134–152; Hilary Land, "Women: Supporters or Supported?" in D.L. Barker and S. Allen (eds.), *Sexual Divisions and Society: Process and Change*, Tavistock, 1976, pp.108–132.

24 See O.J. 1979, C301/32 for a written question concerning Belgian social security law. Also the question in O.J. 1979, C310/10 which states: "It had become apparent that a number of Member States acting on the traditional conception of the man as the natural head of the household, were applying discriminatory treatment to husbands, particularly in matters of pensions and sickness and invalidity insurance."

25 Family Income Supplements Act 1970, s.1(1)(a). If the wife is the family wage-earner there is no entitlement to FIS. See 806 H.C. Deb., cols. 118ff for the attempt by the Labour Party opposition to delete the word "single" before the word "woman" in s.1(1)(a), which would have enabled the woman wage-earner to claim. This reform is now due to take effect in November 1983.

Family Income Supplements Act 1970 specifically precludes a married woman from being the claimant, even if she is the wage-earner who supports the family. The Department of Social Security admits “that in 1975 about 600,000 women were the sole primary earners of a couple where the husband was under pension age.”²⁶ Thus the evidence collected by the policy makers themselves contradicts the stereotype which is explicit in the Family Income Supplements Act. This piece of sex discrimination is directly contrary to Directive 79/7 on equality in social security law, and measures have now been taken to comply with the Directive, as will be shown later.

The law relating to supplementary benefits is another example of legislative sex discrimination. A married or cohabiting woman cannot claim or receive supplementary benefits in her own right if she is living with her husband or any man.²⁷ The man in the relationship must be the claimant. This is the result of legislative policy in social security whereby the man in a relationship is considered to be the head of the household and under an obligation to support the woman. In the case of married couples this obligation, as we have seen, is a reciprocal legal obligation. For cohabiting couples there is no legal obligation of support; nevertheless the policy behind the cohabiting rule is that the unmarried should not be treated more favourably than the married. Again, legislative measures have now been taken to place women and men on a footing of equality in compliance with the Directive.

Invalid care allowance is paid to persons engaged in full-time care of a disabled relative.²⁸ But married or cohabiting women, whether or not they have given up wage earning to undertake invalid care, are not eligible for the allowance. This is because they are expected to look to their husbands or partners for support. Research done by the Equal Opportunities Commission shows that married women caring for the disabled are highly indignant at their exclusion from this allowance.²⁹ But, as will be shown below, the Directive will not affect this piece of sex discrimination.

Non-contributory invalidity pension is paid to men and single women who are incapable of paid employment.³⁰ But for a married or cohabiting woman to be eligible for this pension she must show that she is “incapable both of work and of performing normal household

26 Department of Health and Social Security, *Social Assistance*, July 1978, p.96.

27 Supplementary Benefits Act 1976, Sch.1, para. 3(1)(b).

28 Social Security Act 1975, s.37(3), implemented by S.I. 1976/409.

29 Equal Opportunities Commission, *Behind Closed Doors*, 1981.

30 Social Security Act 1975, s.36(2) implemented by S.I. 1977/1312 amending S.I. 1975/1058.

duties."³¹ The assumptions on which this rule rests are that men and single women can be compensated for their inability to work outside the home in paid employment, but that married women will be supported by their husbands and are only entitled to state help if they have to employ a substitute housekeeper. Again, the Equal Opportunities Commission has mounted a campaign against this discrimination but with no legislative success. Unfortunately, the Directive will not affect this particular benefit.

The issue of cost is probably the major reason why the British social security system does not place women and men on a footing of equality. It has been estimated that it would cost between £50 and £80 million to extend the invalid care allowance to married women.³² And the Directive was said in 1978 to require an additional £25 million of public expenditure, despite the fact that it is limited to contributory benefits.³³

(2) *The Directive on equality in social security law*³⁴

The purpose of Directive 79/7 is to ensure progressive implementation of the principle of equal treatment for men and woman in matters of social security. This means that "there shall be no discrimination whatsoever on grounds of sex either directly, or indirectly by reference to marital or family status" (Art 4.1). Unfortunately, since Article 2 confines the scope of the Directive to persons who have engaged in paid work, either as employees or self-employed, the principle of equal treatment is not universal. It is in line with Article 119 of the Treaty of Rome and, indeed, with general Community policy that only paid workers should be covered. But this reinforces the prevailing view that unpaid work in the home is not really work.³⁵ The Directive covers statutory schemes which protect against sickness, invalidity, old age, accidents at work, occupational diseases, unemployment (Art. 3.1) and includes the scope of the schemes and access thereto; the obligation to contribute and the calculation of contributions; the calculation of benefits including increases for dependants (Art. 4.1).

31 S.I. 1977/1311.

32 Speech of Ruth Lister at N.C.C.L. Women and Social Security Conference, London, 25-26 November 1978, transcript of speech, p.8.

33 *Ibid.*, p.12.

34 See Noreen Burrows, "The Promotion of Women's Rights by the European Economic Community" (1980) 17 C.M.L. Rev. 204; Susan Atkins, "The EEC Directive on Equal Treatment in Social Security Benefits" (1978-79) J.S.W.L. 244-250.

35 Ann Oakley, *Housewife*, Pelican, 1976.

Even though the principle of equal treatment applies to paid workers, nevertheless occupational pension schemes are excluded by the Directive (Art. 3.3). The Commission has issued a working paper containing a draft Directive to extend the principle to occupational schemes which, if enacted, would end many sex discriminatory practices contained in these schemes.³⁶ Survivors' benefits, such as widowers' benefits, are also excluded by the social security Directive, as are family benefits other than those arising from paid work (Art. 3.2). Thus, certain benefits which the worker might have expected to earn for her family, such as a widower's pension, are still excluded.

Article 7 of the Directive contains still more exclusions including: the determination of the pension age and benefits following therefrom; equality of treatment of dependent spouses (husband or wife) in relation to old-age pension, invalidity benefit, injury benefit, or other long-term benefits arising from occupational injury or disease. The Commission intends to eliminate the exclusions contained in Article 7 in the future.³⁷

(3) The effect of the Directive on domestic law

As already indicated Member States have until the end of 1984 to implement the Directive. The United Kingdom government has taken measures to comply by passing the Social Security Act 1980. This Act amends earlier legislation in order to satisfy the Directive. The reforms outlined below begin to come into effect in November 1983;³⁸ they alter the stereotypical picture of women as dependents by enabling them to be treated as the supporters of their husbands and children. The major effect has been in two areas. These are: (a) the granting of benefit increases to women for the support of children and spouse; (b) the recognition that women may be breadwinners in the rules for granting family income supplement and supplementary benefit.

(a) Benefit increases for the support of children and spouse

From November 1984 women will be eligible for the same benefit increases or additions for their children as men.³⁹ Thus the Directive

36 EEC Paper V/338/81-EN.

37 *Supra.*, note 1, Annex I, p.4, to be initiated from 1983 onwards.

38 Ruth Lister, *Welfare Benefits*, Sweet and Maxwell, 1981, pp.23-24.

39 The reforms take place in two stages: from November 1983 married women will be entitled to a child addition provided her husband is not earning more than the dependent adult amount; from November 1984 there is equality of treatment in that no conditions concerning the husband are imposed. Social Security Act 1980, sched. 1, paras. 1(1) and (2).

has outlawed one piece of sex discrimination whereby women had to prove that the husband was incapable of self-support before they received additions for children. This applies to benefits for unemployment, sickness, maternity, widowhood, and to pensions for retirement or invalidity.⁴⁰

Claiming a husband as a dependent prior to the recent reform was only possible where he was incapable of self-support. From November 1983 women receiving unemployment and sickness benefits and maternity allowance will be entitled to an addition for a husband on exactly the same terms as men now receive for their wives. The spouses will be on a footing of equality.⁴¹ It is important to note that these benefits all arise from contributions made as a worker.

The exclusions contained in Article 7 of the Directive have, however, enabled the United Kingdom government to maintain sex discrimination in relation to certain long-term benefits relating to disablement and invalidity, where differential qualifications for dependency additions are still applied according to gender.⁴²

(b) *Recognition of women as breadwinners*

As a result of the Directive both the Family Income Supplement and the Supplementary Benefits schemes have been amended. The Social Security Act 1980, section 7, has amended the Family Income Supplement Act 1971 by substituting the word "woman" for "single woman". The effect of this is to recognise that a married woman is not necessarily a dependent and may be a breadwinner supporting children and husband from November 1983. The position of the Supplementary Benefits Scheme is more complex. It was recognised by the Supplementary Benefits Commission in 1976 that "in more and more families both men and women are combining the role of wage-earner with a share of their joint domestic responsibilities," and that a gender

40 Social Security Act 1975, ss.41(6) and 65(4), as amended by Social Security Act 1980, sched. 1, para. 1(2).

41 Social Security Act 1975, s.66, as amended by Social Security Act 1980, sched. 1, para. 6. Briefly, a man in receipt of long term benefits is entitled to a dependency addition for his wife even if she has earnings of up to £45 (1981-82) and where her earnings exceed this specified amount, the addition is reduced by 5p for every 10p she earns over £45 up to £4. A woman in receipt of long term benefits is entitled to a dependency addition for her husband, but if he has earnings in excess of the addition (£14 in 1981-82) the addition is not paid.

42 Social Security Act 1975, ss.45(1)(b) and 47(1)(a). Susan Atkins, "Social Security Act 1980 and the EEC Directive on Equal Treatment in Social Security Benefits" (1981) J.S.W.L. 16-20.

neutral system was desirable “leaving people as free as possible to make their own arrangements in whatever way suits them best.”⁴³ The Directive has given impetus to this and regulations have been proposed which prescribe conditions under which a couple may nominate one of themselves as claimant. This is in line with *Social Assistance* the review of Supplementary Benefits published in 1978 by the Department of Health and Social Security.⁴⁴

Social Assistance considered three possible methods of bringing about equal treatment of women and men in supplementary benefits law. The first was “free choice” in which a couple would decide which partner should claim. The second was “main breadwinner” under which the partner who had earned more than fifty per cent of the family income during a specified period would be the claimant. The third was that of “nominated breadwinner” which enabled either partner who had been in full-time work for a specified period prior to the claim to choose to be the claimant. This last option has been chosen by the Department against the recommendation of the Equal Opportunities Commission⁴⁵ and regulations have been published laying down the criteria under which the nomination is made by the couple.⁴⁶ It is important to note that at no time did the Department consider giving a married woman the possibility of claiming in her own right as an autonomous individual. The household or the couple remains the unit for social security purposes, and the assumption still remains that one person in the couple is supporting the other, that one is economically dependent. Nevertheless, the new policy by which this is no longer seen as a matter of gender, but rather of social fact, is a welcome change.

The United Kingdom government has decided to exclude from the effect of the principle of equal treatment the state pension age, survivors’ benefits (widows or widowers), and benefits for the spouse of long-term pensioners, as permitted by Article 7.⁴⁷ This means that no reform of the discriminatory rules concerning invalid care allowance and non-contributory invalidity pension will occur. This is understandable insofar as these benefits are not earned by contributions made as a

43 Supplementary Benefits Commission, *Annual Report 1976*, Cmnd. 6910, HMSO, 1977, para. 1.7.

44 Department of Health and Social Security, *Social Assistance*, July 1978, ch.11.

45 Equal Opportunities Commission, *Comments on Social Assistance*, January 1979, para. 3.15.

46 See Ruth Lister, *op.cit.*, note 37, p.42.

47 Melanie Davis, *Women's Rights: European and U.K. Law*, Commission of the European Communities, Oct. 1981, p.8.

worker. It is more difficult to understand the position over the retirement age. Benefits relating to old age are specifically mentioned as being covered by the Directive under Art. 3.1(a) and are workers' benefits. Yet the exclusion by Art. 7 from the principle of equal treatment of the determination of the pension age has significant consequences. The reason is the opposition of Member States to a gender neutral age of retirement.

The Economic and Social Committee of the Community has recognised that "the compulsory earlier retirement for women in some sectors in some Member States constitutes a real source of major discrimination against women."⁴⁸ Earlier retirement means a smaller pension, as does failure to achieve the goal of equal pay. The European Parliament has called for new proposals from the Commission on equalising the pension age,⁴⁹ as has the Equal Opportunities Commission in Britain. This relates to wider issues than the pension itself, and here the complainants may also be men. As the Equal Opportunities Commission points out eligibility for travel passes, free dental treatment, free medical prescriptions, reduced prices for admission to entertainments and swimming baths, and such matters as reduced charges for hairdressing and dry cleaning are all related to having reached pensionable age.⁵⁰ Furthermore, the husband cannot rely on his wife's pension contributions either as a dependent or as a widower. He is not in a position of equality with those women who rely on a husband's contributions. Full equality in social security law when finally accepted by Britain will benefit both men and women.

Conclusion

The Economic and Social Committee in giving its opinion on Directive 79/7 in draft expressed a certain scepticism as to the good intentions and willingness of the Member States in its implementation. As a first step, however, the Directive has forced legislative change. More important, perhaps, has been the change in mentality it has imposed. Now national governments have to justify discriminatory policies; previously these were taken for granted.

48 O.J. 1977, C180/38, para. 2.5. See also O.J. 1975, C 286, 15. 12. and O.J. 1977, C 56, 7. 3.

49 O.J. 1977, C 299/13, para. 9(a).

50 Equal Opportunities Commission, *Response to the DISS Discussion Document "A Happier Old Age"*, February 1979.

MEN'S STUDIES MODIFIED (ed. D. Spender)
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12

Before and After: The Impact of Feminism on the Academic Discipline of Law

KATHERINE O'DONOVAN

Legal academics usually write in complacent terms of the progress made by the law over the past hundred years towards the equality of women with men. 'As we shall see, during the past century the wife's position has steadily changed from something in many respects inferior to that of a servant (who could at least quit her master's service by giving notice) to that of the joint, co-equal head of the family' (Bromley, 1976: 108). Explanations for this change are couched in general terms of 'the movement for the equality of the sexes' (Bromley: 110); and the changes in the law since 1857, when civil divorce was introduced (although not on equal terms for women petitioners), and which particularly occurred with the Married Women's Property Acts 1870-82 are seen as evidence of legal enlightenment. Whilst it is true that the law has changed gradually during the past hundred years and now recognises that women may be independent legal subjects, there has been little attempt in legal literature to analyse and explain the previous subordination of women in law, the processes of alteration, or the remaining injustices.

Legal writers generally consider that it is outside the purview of the lawyer to discuss reasons for legal provisions, other than purely technical explanations. Their job is to deal with the how rather than with the why. This is partly because such explanations are inevitably complex, raising as they do socio-economic questions, and because law-making and the interpretation of law are seen as different tasks, but it is also the case that issues relating to women have remained unperceived, and therefore undiscussed. The law is an instrument of social control in the rational world of men; one of its major functions is the resolution of conflict. It is not seen to enter the lives of women, indeed it does not do so directly. In its regulation of the family the law is concerned not to interfere overtly, but to create a space in which the male head of the household can exercise power and authority. Here the lack of legal provision is as significant as its presence.

The invisibility of women in academic work has evoked a good deal of comment in recent years, but not from lawyers. Since legal academics view their role as that of reporting and analysing actual legal provisions, they do not comment on areas which the law ignores. Until the advent of the Equal Pay Act, 1970 and the Sex Discrimination Act, 1975 the desirability of legislation to enforce equality of women with men was not discussed in British law journals. However, even these two legislative acts only affect the lives of women in the public domain. They leave untouched certain issues of

discrimination by the state itself,¹ and they do not impinge on the private domain at all. Again, the lack of legal commentary on this has been disappointing, but it is symptomatic of the lawyer's outlook. Even women lawyers welcoming and explaining the new legislation have not remarked on its failure to deal with discrimination by the state (Richards, 1976; Rendel, 1978).

The reasons for this invisibility of legal woman stretch further, though, than simple omission. There is abundant evidence of the subordination of women to men and differentiation between them even in the twentieth century (Graveson and Crane, 1957); although as late as 1974 these are referred to as 'slight' by the author of a new textbook on family law (Cretney, 1974: 148). Women traditionally appeared in textbooks only as incapable persons aligned with the insolvent and the inebriate and confined with lunatics and children to a chapter entitled 'legal disabilities'. Textbook writers accepted this without question. The judges, whose handiwork and creation the common law was, offered a number of rationalisations for their perpetuation of male dominance. The traditional judicial attitude to women was that they were not legal subjects but creatures whose 'natural and proper timidity and delicacy unfits (them) ... for many of the occupations of civil life'.² Behind this opinion lay the assumption that (alleged) biological inferiority and social inferiority were to be equated. Rationalisations for this view were couched in terms of male protectiveness or of each sex belonging to a separate sphere, but it is hard to resist the conclusion of Albie Sachs that 'English common law, which has so often been extolled as being the embodiment of human freedom, had in fact provided the main intellectual justification for the avowed and formal subjection of women' (Sachs and Wilson, 1978: 40).

I think it is fair to say that lawyers no longer overtly hold the opinion that women are inferior to men. Accepted however, is an account of the legal position of women in which they are located in the private domain 'in which the King's writ does not seek to run, and to which his officers do not seek to be admitted'.³ Confined to the domestic sphere where 'the house of everyone is to him as his castle and fortress'⁴ women have remained remote from legal discussion. And any challenge to this can safely be dismissed with the comforting cliché of 'separate spheres' or 'separate but equal'. In this analysis a separate social role leads to different legal rights. The assumptions which underlie the allocation of women and men to separate legal spheres are that men are in the public domain of politics, commerce, property, and work. Law regulates only the public domain and confers legal rights on those who work, that is, who are economically productive. Women, being in the private domain which is unregulated by law, are not full legal subjects and are therefore not entitled to the same legal rights as men.

Feminists have attacked the premises which lead to the denial of equal legal rights to all human beings. Their challenge has been made in four main areas, each of which I propose to consider in turn: equality and women's rights; sex-based legal classification; economic implications at current arrangements in family life; and the relationship of women to the state.

¹The Sex Discrimination Act, 1975 gives its purpose as 'promoting equality of opportunity between men and women generally'. Yet it covers only discrimination in employment, education, and the provision of goods and services. It does not affect discrimination by the state through laws on social security, pensions, taxation, and the family.

²*Bradwell v. Illinois*, (1873) 130, 21 L.Ed. 442.

83 U.S. (16 Wall)

³*Lord Justice Atkin, Balfour v. Balfour* (1919) 2 K.B. 571 at p. 579.

⁴*Semayne's Case*, 77 E.R. 194 at p. 195.

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Equality and Women's Rights

For the non-lawyer equality and justice may be synonymous with law. A reading of jurisprudential classics will quickly show that in legal theory this is not so. Legal positivism, the ruling theory, is concerned not with substantive justice but with the concept of law — what it is, how it is defined. A major debate has centred on whether law requires moral content, but since the basic tenet of positivism holds that law is the expression of the will of the sovereign, that is, of those in power, the answer has been negative. The content of legal rules thus depends on the desires of the dominant group in society. Bentham, the revered founder of this school of thought, justified the allocation of power and superior legal rights to men on the pragmatic ground that they already had physical power; but he showed his belief in the more general inferiority of women in describing them as 'delicate, inferior in strength and hardiness of body, in point of knowledge, intellectual powers and firmness of mind' (Bentham, 1948: 58). Bentham's other major contribution to liberal theory of law was utilitarianism, which holds that law and its institutions should serve the general welfare, and nothing else. He called the idea of individual human rights 'nonsense on stilts'.

Hart, the current leading exponent of legal positivism, has acknowledged that Bentham's 'insistence that the foundations of a legal system are properly described in the morally neutral terms of a general habit of obedience opened the long positivist tradition in English jurisprudence' but that this epoch may now be closing. 'Utilitarianism is now on the defensive, if not on the run, in the face of theories of justice which in many ways resemble the doctrine of the unalienable rights of man' (Hart, 1976: 547).

The traditional requirement of justice is that of the generalisation principle. In essence this means that the principle of what is right (or wrong) for one person must be right (or wrong) for all other similarly placed (Singer, 1963). This is incorporated into the law through the operation of precedent. In the past the common law was created by judges looking to what has been decided in previous cases when faced with a legal conflict and choosing which preceding cases to follow. A body of cases known as precedents, was built up. The problem with the classical theory of justice and with precedent is that when faced with a moral or legal problem a decision must be made as to whether the circumstances are essentially similar or essentially different. The determination of whether persons are essentially similar or different is made with reference to the concepts of status and class.

The legal term status has long been used to identify the privileges and obligations of a given individual or class in the currently prevailing social order, with naturally occurring characteristics serving as the means of identifying a certain status. 'Women, lunatics, blacks, Indians, and others have been limited from time to time in their legal rights and capacities by reason of their sex, colour, ethnic background or mental abilities — characteristics over which the individual has little control' (Hunter, 1976: 1043). The concept of status serves to justify the separate classification of women from men and their consequential differentiation by the law.

Demands for women's rights have usually involved a demand for equal status with men. Feminists regard law as a touchstone of the advancement of women's progress towards equality, perhaps without realising that the nature of legal reasoning is to differentiate amongst human beings and to classify them according to this

differentiation. But the feminist starts from a different major premise than does the lawyer. The feminist assumes that all persons are equal and anticipates that they will have the same legal rights, whereas the lawyer starts out with a process of classification. The impact of feminism has been to raise questions about this legal approach.

Questions about equality have caused political controversy in recent years because of demands made by racial minorities and by women. Ronald Dworkin has given considerable attention to the concept of equality. He makes a distinction between the right to equal treatment, 'which is the right to an equal distribution of some opportunity or resource or burden' and the right to treatment as an equal, 'which is the right, not to receive the same distribution of some burden or benefit, to be treated with the same respect and concern as anyone else' (Dworkin, 1977: 227). He gives the example of two children, one dying from a disease that is making the other uncomfortable and says, 'I do not show equal concern if I flip a coin to decide which should have the remaining dose of a drug' (p. 227). This shows, he claims, that the right to treatment as an equal is fundamental, and the right to equal treatment is derivative. He concludes 'we may therefore say that justice as fairness rests on the assumption of a natural right of all men and women to equality of concern and respect, a right they possess not by virtue of birth or characteristic or merit or excellence but simply as human beings with the capacity to make plans and give justice' (p. 182).

The inclusion of rights of women in debates about human rights has been an important step, obvious though it may now seem. 'In a global community aspiring towards human dignity, a basic policy should . . . be to make the social roles of the sexes, with the notable exception of childbearing, as nearly interchangeable or equivalent as possible'. To achieve genuine equality between the sexes, it is vital that 'nobody be forced into a pre-determined role on account of sex, but each person be given better possibilities to develop his or her personal talents' (McDougal, Lasswell, Chen, 1975: 509).

Sex-based Legal Classification

The pervasiveness of classification in legal processes and its centrality in legal reasoning has already been indicated. Formal logic and taxonomies depend on classification and in ancient and medieval thought it was believed that from classification truths would be learned about the world (Woody, 1973). This is no longer believed today and classification is said to be a matter of tradition and administrative convenience. Separate classification of women from men has been challenged by feminists and the repercussions of this challenge have been both academic and practical, for a new way of viewing the world is demanded.

Academic recognition of the chance nature of sex as a basis for legal rights has concentrated on the inequity of using ascribed characteristics to determine a person's legal status. Susan Woody has argued that a distinction should be drawn between classifications based on characteristics which are ascribed and those which are chosen. The ascribed characteristics such as race or sex where used as a basis for classification should be viewed with suspicion, especially where a reduction in personal freedom is involved. Otherwise that dimension over which a person has no control is an occasion for penalty (Woody, 1973). There is however a difficulty with this argument and that of Smith (1976: 122) that a chosen status such as marriage or parenthood is not included

amongst ascribed characteristics as voluntary human action is involved. Smith argues that special rights or duties based on assumed (i.e. chosen) status are not repugnant to equality. But what he overlooks is that these choices are not necessarily made by one sex only and that legal requirements resulting from marriage and parenthood are capable of expression in non-gender specific words such as parent or spouse. As we shall see, gender roles enshrined in the law, and especially those related to marriage and the family, are a major source of inequality between women and men.

In the United States challenges to sex-based classification in legislation have been upheld in a number of cases.⁵ Although the Supreme Court does not apply to this classification as strict a scrutiny as that applied to race or ethnic origins, nevertheless, it requires that important governmental objectives be satisfied by a classification based on sex. American feminists continue to press for an amendment to the Constitution which would outlaw sex as a factor in determining legal rights as follows: 'Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex' (Peratis and Cary, 1978: 44).

Courts in Britain do not have power to review legislative classification for constitutionality, and classification based on sex is not forbidden by law. The Sex Discrimination Act 1975 does not affect areas such as family law, welfare law, tax law and parts of employment law. Here legislative schemes continue to be based on gender roles as husband or wife, and the state itself takes an active part in promoting this division. The idea that all separate classification of women and men should be eliminated has received scant official attention and even amongst feminists there seems to be a division of opinion on this issue. A number of complex questions are raised concerning assimilation of women and men, special provision for women, and affirmative action or positive discrimination (Wasserstrom, 1977: 581). Certain feminists believe in total assimilation of the sexes with no public recognition of biological or physiological differences. The logic of this position leads Shulamith Firestone to advocate the cessation of the current method of child-bearing and the substitution of extra-uterine reproduction (Firestone, 1971: 233). With this view-point can be associated the belief that language must be reformed to eliminate its current gender associations (Jagger, 1974; Lakoff, 1975). Legal discourse is undeniably masculine in character, with its reference to the 'reasonable man', its misogynistic jokes that the reason that legislation refers to the masculine gender only is that 'the male embraces the female', but there has been little discussion on this. Many feminists thus fear that assimilation means women disappearing into a male model of the world, and becoming 'honorary men' or 'social males' (Stacy and Price, 1979: 28).

The argument that the law must continue to classify men and women separately in order to make special provision for women is usually associated with either the biological functions of maternity or a social role within the family. Insofar as biological functions are concerned it may be necessary for the law to protect individuals' reproductive and procreative organs by safeguards at work, maternity leave etc. But social roles and sex are not necessarily synonymous (O'Donovan, 1979: 147), and there

⁵*Reed v. Reed*
Frontiero v. Richardson
Weinberger v. Wiesenfeld
Stanton v. Stanton

404 U.S. 71(1971)
411 U.S. 677(1973)
420 U.S. 636(1975)
421 U.S. 7(1975)

is no reason why, in all other cases, the law should not be couched in neutral terms of 'parent', 'spouse' etc. The protection of social roles by the law is a matter for public policy. The point here is that these roles do not have to be sex based.

Positive or reverse discrimination has been justified intellectually by American legal philosophers. 'The case for programmes of preferential treatment can plausibly rest on the view that the programmes are not unfair . . . and on the view that it is unfair to continue the present set of unjust — often racist and sexist — institutions that comprise social reality' (Wasserstrom, 1977: 622). And although the official British view is that positive discrimination involves the very evil of inequality that it purports to cure, a leading academic lawyer has written that 'the law may have to create inequalities to make up for natural or social inequalities which are not of its own creation . . . and to treat as equal that which is unequal may . . . be a very odious form of discrimination' (Kahn-Freund, 1971: 510).

The general acceptance that separate classification may involve discrimination against women is the major change in this area so far. The Law Commission of Canada has stated: 'It is apparent that substantial progress towards the elimination of such discrimination is seriously impeded by sexually-based classifications in the law governing the primary social and economic relationship between the sexes' (1976: para. 3.3).

Economic Implications of Current Arrangements in Family Life

'At no time has the English lawyer regarded marriage as a mere contract. It must be admitted then that the word marriage, apart from describing a social institution or ceremony, creates a relationship recognised by the law conferring rights and duties' (James, 1957: 21). This statement sums up the legal view of marriage, a view which has been strongly criticised by feminists. In her analysis of the marriage contract, Lenore Weitzman has shown that the marriage contract is unlike any other. Its provisions are unwritten, its penalties are unspecified, its terms are unclear and the parties cannot either write their own terms or vary the existing terms. She has analysed the ways in which present laws assign certain roles and obligations to each spouse and in so doing place an unfair burden on married women. She argues that it is no longer possible to assume, as does conventional marriage law, that marriage is 'the voluntary union for life of one man and one woman to the exclusion of all others',⁶ or as stated in Matthew Bacon's Abridgement, 'a compact between a man and a woman for the procreation and education of children' (1832), or that it is the first marriage, or that there will be a strict division of labour between the couple (Weitzman, 1974: 1169). Weitzman's solution is to suggest a freely negotiated contract between the couple prior to marriage, but John Eekelaar has pointed out that economic circumstances may change over the years as may expectations and that in any case the courts have flexibility and discretion to deal with the circumstances of the marriage (Eekelaar, 1978: 53).

'In most families the husband's duties will be largely conditioned by the fact that he is the breadwinner; the wife will usually be primarily responsible for the running of the home, a duty which may take the form of supervising a large domestic staff or of doing the household 'chores' herself, such as cooking, cleaning, and mending and looking

⁶Lord Penzance, *Hyde v. Hyde & Woodmansee*, (1866) L.R. I P.D. 130 at p. 133.

'after the children' (Bromley, 1976: 112). This view is that of the author of the leading textbook on family law. The statement not only ignores the views of feminist writers, but also shows a failure to appreciate that the law reinforces the allocations of these social roles within the family and assigns rights and duties on the basis of sex.

'Marriage however, is not just a 'natural' or social necessity — though these are the terms in which marriage is frequently seen by the participants, by sociologists and by the judiciary. The interrelationship of unwaged domestic labour and the wage-labour market make marriage an *economic* necessity for nearly all women, and a wife is an economic asset for a man' (Leonard Barker, 1977: 241). Nevertheless, there is little economic security in marriage for a non-wage earner. According to English law agreements between spouses are unenforceable in the courts because they are private, and property belongs to the person who has acquired it, or in whose name it has been registered, usually the husband. The financial plight of the dependent wife and the unfairness of laws which push women into the role of wife and then punish her for not having acquired her own assets has been recognised for some time (see Kahn-Freund, 1971). Feminists have added a new dimension however, by insisting on the economic value of the work done by the housewife (Glazer-Malbin, 1976), and by pointing out how legal and other institutional arrangements coerce women into housewives (O'Donovan, 1979).

Housework as an area of academic study has been taken seriously by sociologists for some time (Oakley, 1974). Recently there is evidence that lawyers also recognise its importance in ascertaining the contribution of spouses to family life, since that is the method of quantification adopted by legislation relating to termination of marriage (Gray, 1977: Ch. II). And the approach of the courts in valuing a wife on her accidental death has also been studied (Clarke and Ogus, 1978: O'Donovan, 1978a). This has led to debates about matrimonial property which remain inconclusive. Even the most enlightened of lawyers seem to regard child-bearing and child-rearing as synonymous: 'The inequality of the sexes dictated by nature imposes a necessary inequality of access to gainful occupation — from the birth of the first child at least until the youngest child begins to go to school the wife's contribution to the family cash income will either cease or be greatly reduced. At other times too, her natural functions as a mother and housewife restrict her earning capacity, (Kahn-Freund, 1971: 504). The English Law Commission is still struggling with this problem, but essentially the solution proposed is that of equal rights in family property for both spouses, with some exceptions. Commenting on this Olive Stone recently stated: 'there are many in the legal profession and perhaps within the Law Commission itself who still hold out against giving the English wife equal rights in the home The Law Commission has finally emerged with recommendations which would greatly improve the position of the non-owner spouse in the matrimonial home but subject to some exceptions that speak both loudly and disturbingly for the power still exercised by those who could still deny legal personality to women, particularly if married' (Stone, 1979: 193).

Certain feminists have put forward a solution to the problem of marital property which harks back to the nineteenth century; it is that of separate property. 'Current English and American law reform efforts in the area of marital property are concentrating on the problem of mitigating the harsh effects of our traditional system of

¹See The Law Commission: Third Report on Family Property (Law Com. No. 86) (1978).

separate property on the situation of the propertyless housewife, through legal devices designed to recognise her contribution by giving her a share in the property acquired by the spouses during the marriage regardless of its source or of how title is held' (Glendon, 1974: 315). Glendon argues that women are no longer housewives but participants in the workforce; 'that marriage exists primarily for the personal fulfillment of the individual spouses and that it should last only so long as it performs this function to the satisfaction of each' (Glendon 1974: 324); and that the modern independent woman would prefer to manage her own property. This approach has been criticised on the grounds that there has been insufficient attention to the relevance of behaviour within marriage and marriage-like relationships and that 'there are aspects of personal relationships which militate strongly toward sharing principles regardless of whether equality is in fact realised' (Westerberg Prager, 1977: 22).

A similar debate has taken place in Britain over the question of maintenance or alimony. Academic lawyers have argued that the equality of the sexes now enshrined in the law requires that maintenance be abolished or strictly limited. This view is exemplified in the work of Gray (1977) and Deech (1977). Gray argues that it is only consistent with no-fault divorce and cultural acceptance of serial marriage that maintenance should be abolished. 'There is, after all, no logical reason why a man should bear financial responsibility in the aftermath of an event which the law no longer declares to be attributable to his fault: a law which imposes such responsibility is in reality an unconstitutional form of taxation' (Gray, 1977: 348). He advocates a limited form of rehabilitative maintenance during the transitional period following divorce, acknowledging that such an approach 'contains a quite remarkable hortatory element, in that it provides an incentive for women to retain a degree of financial independence during marriage and thereby minimise the risk of severe, if not insuperable, disadvantage in labour market terms in the event of marriage breakdown' (p. 299).

Deech argues that the concept of marriage as a partnership of equals is 'incompatible with a maintenance law which rests on a foundation of female dependency' (Deech, 1977: 230); that marriage is thus regarded as 'a career alternative to an economically productive one' and this may reinforce 'the tendency on the part of some to search for a spouse who can provide a life-long meal ticket' (p. 231). She points to anti-discrimination legislation saying that a precondition for its success may be the abolition of dependency in all laws including maintenance. Her conclusion is that the aim of maintenance should be rehabilitative and that it should be permanent only for the elderly and the incapacitated not already cared for by the state.

Criticism of Gray's and Deech's views has been expressed on the grounds that their proposals will not ensure equality, but merely perpetuate an unfair situation for divorced women, who already suffer long-term economic prejudice because of the current arrangements of family life. Neither reformer sees the distinction between continuing existing privatised family life, housework and childcare arrangements which exploit women, whether it is the state or the husband providing financial support, and the transference of these tasks to the public economy. Without such a revolution in family life women will remain dependent in fact if not in law (O'Donovan, 1978b).

This debate has been discussed in the leading British law journal by John Eekelaar who comments that there must be a middle ground between these two positions. However, he goes on to say 'It is possible that, in the justified concern felt for children and wives on the breakdown of marriage, the position of the spouse (usually the

husband) who enters a second marriage after the divorce has received insufficient attention' (Eekelaar, 1979: 268).

The question of economic dependence within marriage is crucial to recent academic writing on the family. A vigorous assault on state social policies which ensure the primacy of the husband as breadwinner has been made by Hilary Land. She has shown how the social security system is based on the premiss that men are breadwinners and women housewives, regardless of the realities, and 'that the British social security system, by perpetuating inegalitarian family relationships, is a means of reinforcing, rather than compensating for, economic inequalities' (Land, 1976: 108). In her work on the taxation system Land has shown that there also the official assumptions contained in the law are that the marriage relationship is unequal. And although the state claims to be supporting the family, it is in fact supporting marriage through the married man's tax allowance, which is allowed regardless of whether there are children (Land, 1978). The difficulty with Land's approach is that she attacks the concept of dependency on the grounds that it does not correspond to the reality of female participation in the workforce, but she overlooks the clear statistics which show the low levels of women's earnings. And elsewhere she admits that the task of caring for the young, the sick and the aged has been allocated by society to women who are usually unpaid, or paid only at subsistence (Parker and Land, 1978).

The Relationship of Women to the State

Conventional legal analysis admits that the state is the source of law either through legislation or through the agents of the state — those officials who administer the law — the judiciary, government servants, the police. However, the state retains a mask of neutrality and impartiality in its administration and creation of the law. Recent research has shown that the content of legal rules is not neutral as far as women are concerned (O'Donovan, 1979), and that the agents of the state are not impartial in their administration of the law. As Albie Sachs has pointed out: 'The notion of impartiality itself is not neutral. It is a value-laden concept that presupposes that it is both feasible and desirable for the machinery of state to operate in a neutral manner 'without fear or favour'. In this context the very idea of neutrality pre-supposes social inequality. To say that judges should be unbiased between rich and poor, white and black, male and female is to accept that these are enduring social categories' (Sachs and Wilson, 1978: 52). Sachs has shown the judicial bias against women in the nineteenth century; and there is evidence to indicate its continuation today, even in the administration of anti-discrimination legislation (Byrne and Lovenduski, 1978).

Family lawyers believe that the role of the state is to strengthen and cherish the family through legal support; and that the woman, as the economically and physically weaker party in marriage, is in need of the protection of the law (Cretney, 1976: 258). Feminists have challenged this assumption on a number of grounds. First, it is argued that the state does not support the whole family. Instead state policies are directed towards the support of marriage (as evidenced by the married man's tax allowance), and towards the support of 'a specific form of household: the family household dependent largely upon a male wage and upon female domestic servicing' (McIntosh, 1978: 255). The kind of marriage that the state reinforces is the breadwinner/housewife marriage in which the husband engages in paid labour and the wife is dependent. Evidence for this can be

drawn from the infamous cohabitation rule in supplementary benefits which denies a woman living with man, whether married to him or not, the access to state benefit in her own right (Land, 1976).

Secondly, it is argued that since the impact of state policy is to continue the dependence of women, even when they engage in waged labour, this provides an excuse for low wages for women. The notion that married women work for 'pin-money' dies hard, and there is clear evidence of average earnings of women being considerably lower than those for men (Stacey and Price, 1979). This view can be supported from social security provisions which deny married women the increases for children received by married men drawing sickness or employment benefit, even though both are paying the same contribution (O'Donovan, 1979). Women are also unable to provide widower's benefits on the same basis as widow's benefits. This goes to indicate that waged work by married women is not treated by the state as being directed towards the support of a family, since it is considered that it is the husband's duty to maintain the family.

Thirdly, feminists argue that breadwinner/housewife marriage supported by the state provides a work incentive for men. 'There are enormous advantages to the economically powerful groups in our society in sustaining the belief that men are breadwinners and women, at most, are supplementary earners, whose primary duties lie in the home. In this way work incentives for men are preserved even among low-wage earners whose wives also have to work to support the family. At the same time it justifies paying women lower wages than men. Women when they enter the labour market do so in the belief that they do not need as high a wage as a man' (Land, 1978: 142).

Fourthly, Veronica Beechey has argued that women's, and above all married women's, place in wage labour is that of a reserve army. They are available to be used in times of economic expansion but at times of unemployment they can 'disappear almost without trace back into the family' (Beechey, 1978). The unemployed married woman is classified as her husband's dependent, with the occupation of housewife, 'not entering the statistics of the 'economically active' until there are job openings' (McIntosh, 1978: 278).

Finally, what is the primary role of the married woman in the eyes of the state? According to contemporary feminist analysis it is that of reproduction of the labour force and of labour power, including the socialisation of future workers. Mary McIntosh has linked the family household system, in which a number of people are expected to be dependent primarily on the wages of the male breadwinner and in which the domestic and caring work is performed unpaid by the wife and mother, to the reproduction of the conditions of capitalism (McIntosh, 1979). She argues that this particular form of household, supported by the state, serves to meet the needs of unwaged individuals — children and sick, elderly or incapable relatives through the unwaged work of the wife and the earnings of the husband. Parker and Land point out that although the state has taken over certain functions which used to be attributed to the family, such as education and housing, it has not taken over the functions attributed to the wife. 'The state less readily shares, let alone takes over, the caring and nurturing work usually ascribed to the dependent wife. Support for the family would seem to be regarded as best achieved via the husband, with least risk to his dominant position. This may be because the subordinate position of women in marriage, and hence the family, is implicitly seen as indispensable yet brittle keystone to the maintenance of long-established inequalities within wider social and economic institutions' (Land and

Parker, 1978: 362). The leading textbook in family law states however: 'In most families the husband's duties will be largely conditioned by the fact that he is the breadwinner; the wife will usually be primarily responsible for the running of the home, a duty which may take the form of supervising a large domestic staff or of doing the household 'chores' herself, such as cooking, cleaning, mending and looking after the children' (Bromley, 1976: 112).

Recent developments in legislation suggest that law-makers recognise that unpaid care in the home should be remunerated by the state (see O'Donovan, 1978a). As female participation in the workforce has increased (see Mayhew, 1976), woman may be less willing to drop out of paid employment to provide care for children, the sick and the elderly. Thus child benefit is now paid to the mother (and not to the parent undertaking childcare) and invalid care allowances have been introduced for those caring for the infirm at home. But here contradictions abound, as with the housewife's non-contributory invalidity pension, for married women are ineligible for the former and can only receive the latter if they can show that they are unable to perform housework. Again, the assumption that a married woman is dependent on her husband is underlined.

From the feminist critique of state oppression of women we can conclude that the state has not and cannot confront its own sexism and stereotyping of women. Social policies are sex-based. Social roles are allocated to women and reinforced by law. Any major change in state policy would involve nothing less than social revolution and the probable removal of the family from the base of society. Such an outcome has already been anticipated by a former Master of the Rolls, Lord Evershed who stated in 1957: 'To what end are we moving? I have read that in Russia the social circle of a man's wife will depend upon her own status rather than that of her husband. . . . Carried to their logical conclusions, such tendencies would appear to lead to the result that husband and wife in law and in form would become . . . partners in the firm of marriage. . . . For my part I greatly hope that the English race will in this, as it has done in many other aspects of life, resist the logical conclusion' (Foreword to Graveson and Crane, 1957: xvi).

Conclusion

It is difficult to analyse change whilst in its midst. Legal philosophy is in a state of flux and academic legal scholarship is undergoing a period of re-thinking which may prove to be fundamental. Feminism has contributed to this change, not least because feminists have adopted inter-disciplinary approaches to academic work and have ignored the traditional boundaries between disciplines. New light has been brought to bear on old problems, as in the discussion of the nature of justice and equality. Areas of study have emerged, such as the legal recognition of housework, where none existed hitherto. Generations of legal scholars have been shown to have been unaware of real social and legal inequalities which now appear obvious. New ways of seeing, new insights into the nature of law and society — these are the feminist contributions.

It would be foolish to argue that all areas of law have been equally affected. Jurisprudence, family law, criminology, employment law, and welfare law are the places of impact so far as the academic subjects within law are concerned. But more important may prove to be the new questions being asked and the new methodology. An illustration of this can be given from legal history. Traditional legal history involved the

collection of reported cases, the analysis and parsing of the opinions of the judges with definite statements about legal doctrine. Non-lawyer historians, on the whole, took little interest in legal history. All this has changed. County archives are being researched to find out how the law treated the common people, hitherto unrepresented in history (see e.g. Carroll, 1976; MacFarlane, 1978; Middleton, 1979). A recent example is an article on witchcraft trials where the author concludes that '... witchcraft charges were a useful method for men to keep women inferior and in fear' (Geis, 1978: 39). Geis accuses Chief Justice Hale who sentenced women to death for witchcraft of 'systematic biases against women' (p. 43). We can contrast this view with that of Holdsworth, a leading legal historian, who said of the death sentences of two 'witches': 'We should remember that the sentence was in accordance with the law, and that the existence of witches was vouched for in the Bible. ... It is probable, too, that his sincere religious beliefs led him to see no harm in the act ...' (Holdsworth, 1966: 578). The deference with which legal scholars regard the past seems to be waning at last.

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6 THE MALE APPENDAGE – LEGAL DEFINITIONS OF WOMEN

Katherine O'Donovan

Role Allocation by Law

'You ought to help her because, after all, she is your mother.'¹ 'You ought to send your child to school.' 'You ought to work hard to support your family.' 'You ought to iron his shirts because he is your husband.' As can be seen, these statements are based on expectations of behaviour from incumbents of social roles in their relations with others. A way of acting is suggested as appropriate conduct from one in a specific relationship with another. However, the ought statement, whilst founded on the fact of a social relationship, varies according to a notion of conduct appropriate to a role. In the example 'You ought to help her because, after all, she is your mother', as Dorothy Emmet makes clear, the obligation to help follows not only from the fact of parenthood but also from a social relationship in which people occupy roles *vis-à-vis* each other. The obligation is moral not legal, and if there is a sanction it will be social.

The legal obligation in the statement 'You ought to send your child to school' does not preclude a moral judgement, but here failure to fulfil the expectations of the role of parent will probably result in legal intervention, as would failure to support one's family. The legal sanction may even be deprivation of the opportunity to play that particular role in that relationship. There may be disagreement among the actors as to suitable behaviour for a role, but where the relationship of the actors has been recognised by the law there will be specified rules to which the community will expect conformity. Such rules are usually referred to as the rights and duties of parents or the obligations of spouses. They may also be termed the minimum requirements for the role, that is, the rules to which all performers of the role must conform. Non-conformity with rules that comprise the minimum role requirement will result in legal sanction. Failure to provide for one's family may lead to imprisonment. A mother who cannot conform to the legal rules of motherhood may find herself deprived of the opportunity to play this role at all, if her child is taken into care. Thus the law gives its view of parenthood and, in so doing, helps to define the parent/child relationship and what a parent is. For a particular incumbent of a

social role a personal definition will be based on norms worked out in the relationship with others, and in particular relationships the norms agreed may be unique to those involved. Nevertheless the legal definition is important because it specifies the minimum role requirement and reflects and informs expectations of how an individual incumbent of a role will behave.

The imposition of roles on the basis of anatomical and physiological differences between people is done by society, with reliance on legal institutions in many instances. Justifications for different treatment of men and women by law are various. They may rest on sex differences but usually it is gender role differences that are invoked. Yet it is the law itself which helps to construct the gender role differences, as is shown below. A distinction must be made between sex differences and gender. Sex differences are the natural anatomical and physiological differences between women and men: for instance, the ability to menstruate, gestate and breast-feed. Gender is the social classification of a person as feminine or masculine. Gender role is the social role allocated on the basis of gender, but which extends much further than mere biological disparity.² Legal institutions support the ordering of society on a gender role basis. That an individual has no choice of sex is clear, but society is free to choose the social consequences, if any, to be attached to sex – that is, the gender role to which the individual must conform. At present the law defines and reinforces gender roles for individuals which do not necessarily have an inevitable connection with sex differences. In so doing the law is inhibiting change and causing hardship to those who do not adjust their personal lives to the gender stereotyped expectations of legal institutions.

Relationships recognised by law are structured and defined by that recognition. Legal rules may constitute the relationship by defining its creation, its consequences and its termination. Other rules may specify behaviour, through the allocation of rights and duties according to role. In marriage the rules, both constitutive and behavioural, are based on gender and their sum constitutes the role of husband or wife.

Having espoused a role, the performers may hope to modify it in practice, but legal rules cannot be changed by personal redefinition. So the legal minimum role requirement will remain. Since marriage is central to the experience of most women, I propose to explore gender role allocation by law in marriage. In 1973, 88.4 per cent of women in the age group 34-44 were married, a further 3.1 per cent were divorced and 1.7 per cent were widowed: a total of 93.2 per cent with marriage experience. Of the age group 25-34, 89.1 per cent had

experience of marriage.³ Despite the fact that 49 per cent of married women were economically active in 1976,⁴ married women are not treated as autonomous individuals by law and social policy. Instead, they are defined in terms of marriage, a unit headed by the husband with the wife as dependant.

The Traditional Legal View of the Married Woman

The traditional view of the legal status of married women is to be found in the *Commentaries* of William Blackstone published in 1765. The *Commentaries*, considered today as 'an excellent primer of English law',⁵ were one of the first compilations of the laws of England, both written and unwritten. In a legal system which looked to court precedent – earlier cases decided in court – for guidance in dispute resolution, Blackstone's writing was enormously influential because for many decades it was considered the most reliable statement of what the law then was. Blackstone laid down the effect of marriage on a woman as follows:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything.⁶

The legal consequences of the absorption of the wife's legal person into that of her husband have been documented elsewhere;⁷ the principal effect was to deny the married woman access to property, to the courts, or to any form of legal action, without the concurrence of her husband.

Legislation has been passed, from the Married Women's Property Acts, 1870-82, to the Guardianship of Minors Act, 1971, in attempts to undo the state of the law as described by Blackstone. This process is usually described as putting 'a married woman in the same legal position as her unmarried sister'⁸ and has not been altogether successful in changing the law, since it has not been formulated in terms of putting the married woman on the same footing as the married man. Consequently, for many legal and administrative purposes, husband and wife continue to be treated as a unit headed by the husband. This will be discussed in detail later; but here I wish to raise the question – less irrelevant than it at first appears to be for our understanding of modern marriage laws – of whether Blackstone was correct in his description, which he ended as follows: 'We may observe, that even the disabilities,

which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England.⁹ No explanation was given by Blackstone for the principle that husband and wife are one person in law, yet his statement was highly influential on subsequent generations of judges and legislators, who used it as a justification for refusing to consider women as persons in their own right.¹⁰ But there is evidence to suggest that, whatever the practice of the courts prior to Blackstone's publication of his *Commentaries*, married women in the seventeenth century were able to take an active part in the economic life of the community. Alice Clark gives details of married women who were accepted members of the business community and of guilds, able to trade as single women and be sued for their debts.¹¹ Similar evidence was found by Mary Beard, who said of Blackstone's principle of the unity of husband and wife that it 'contains a great deal of misleading verbalism, and . . . in upshot it is false'.¹² She accused Blackstone of being a rhetorician who mislead subsequent generations into citing his statement as evidence of women's subjection.

If the statement of the law in the *Commentaries* is correct, it is indeed surprising to find married women in the seventeenth century – who in legal theory were unable to contract or sue – engaging in commerce, and acting independently of their husbands. Their activities cannot be explained by a subsequent change in the law. The common law then and when Blackstone was writing was, so far as we know, based on the same principles. Indeed the earliest English legal textbook devoted exclusively to women's legal position confirms Blackstone's words. *The Lawes Resolution of Womens Rights*, printed in London in 1632¹³ but which seems to have been written in the last years of Elizabeth I by an unknown lawyer, is addressed to women. The work is largely concerned with property rights and rules relating to dower, wife's estates, marriage and widowhood. Many examples are given of the principle that husband and wife are one person:

a women is Covert Baron as soone as she is overshadowed with her husbands protection and supereminency (Book 3; Sec. I).

When a small brooke or little river incorporateth with Rhodanus, Humber or the Thames, the poore Rivolet loseth her name, it is carried and recarried with the main associate, it beareth no sway, it possesseth nothing during coverture (Sec. III).

The Wife must take the name of her Husband (Sec. V); That which

the Wife hath is the Husbands (Sec. IX); her husband is her sterne, her primus motor, without whom she cannot doe much at home and lesse abroad (Sec. XLII).

The text makes clear that 'here wanteth equality in the law, women goe downe stile, and many graines allowance will not make the ballance hang even'. The sympathetic author advises: 'Have patience (my Schollars) take not your opportunities of revenge, rather move for redresse by Parliament . . .' (Sec. XIV).

So although it may be considered that Blackstone was complacent and condescending about the legal status of married women, we cannot say he was wrong, since the earlier book of 1632 confirms his pronouncement. Yet there does seem to have been a dichotomy between legal theory and the lives led by some married women. One explanation for this may be drawn from the use of the word 'Schollars' in addressing readers of the *Lawes Resolution of Womens Rights*. The book was intended for literate women of the propertied classes, just as the *Commentaries* were intended for lawyers. That is why both works are so concerned with property rights on, during and after marriage. English family law draws its character from laws concerned with the concentration and transmission of wealth in the families of the landed classes.

The married women in the seventeenth century found by Clark and Beard to be active in business and in guilds were, in some cases, treated as single women. Borough customs and the special laws of the City of London enabled married women to trade as single women.¹⁴ There seems to have been a divergence between the common law – the law administered in the Royal courts – and 'the law of the smaller folk' which 'lives on only in some of the borough customs'.¹⁵ The latter courts appear to have been more willing to indulge in legal fictions to circumvent the legal consequences of marriage. We may surmise that the classification of a woman as married or single was all-important to the Royal courts because on such matters of status depended the legitimacy of children and, therefore, inheritance, the right of a widow to dower, and questions of property generally. For those with little or no property, there are indications that the legal formalities of marriage may have been less material. Lord Hardwicke's Act, requiring solemnisation of marriage in the Church of England, was passed in 1753 and was the first serious attempt by English law to regulate marriage. Until then formal proof of marriage may sometimes have been difficult. Until 1753 there were three forms of marriage, the most lax of which required the parties merely to declare that they took each other as

husband and wife (*per verba de praesenti* or *per verba de futuro* followed by consummation).¹⁶ Marriage records will certainly have been kept in the Church of England from 1753 because the Act required marriage in church and registration of marriage, and indeed parish records were kept prior to then, but in order to be married it was not necessary to go to church until 1753, and it was only in 1836 that the present system of registration was introduced.¹⁷

Proof of marriage is important today in law, as a comparison of the rights of co-habitees with those of the married will show. Its importance lies partly in the fact that 'upon it may depend rights and obligations owed by or to the State in relation, for example, to tax, social security, and allegiance'.¹⁸ And in establishing claims to children and property on the ending of a marital or quasi-marital relationship, the first legal question is whether the couple were married. However, as has been suggested above, current notions of state-regulated marriage are fairly recent. As Laslett said of the pre-1753 relationships: 'Neighbours decided whether any particular association could be called a marriage'.¹⁹ The modern state, in eliminating local court autonomy, eliminated recognised legal fictions which allowed exceptions to the legal concept of unity of husband and wife. This concept was also taken over in the state's regulation of the citizen through administrative machinery, yet originally the unity of husband and wife served quite different purposes and may have applied only to a small number of relationships in the past.

The Treatment of the Married Couple as a Single Unit

For certain purposes – for instance, the administration of Supplementary Benefit – the household is the unit taken into account, and if there is a man present in a marital or cohabitation relationship he is assumed to be the head and it is he who gets the benefit, if any. There is a scale for householders which is considerably higher than that for dependants. The woman in the relationship will always be classified as a dependant, even if she is working and the man is not. Similarly, for National Insurance purposes, if the husband is present, he is assumed to be the head of the nuclear family – the relevant unit for this purpose – and a woman is expected to look to him for support of their children and, usually, of herself.

Hilary Land has explained the assumptions underpinning the treatment of married women as their husbands' dependants in the social security system. Beveridge's belief that 'during marriage most women will not be gainfully employed' determined the structure of the system.²⁰

Despite participation of married women in work outside the home, they cannot provide benefits for their husbands and children unless the husband is incapable of work; they are treated as single persons, which is an improvement of their position at the time when Land was writing, but continues the stereotype that a married woman does not support a family. Demands have been made in the United States for the benefits a wife receives as a single person to be added to those she receives as a dependent spouse. The argument is that the family is making double contributions for little gain.²¹ However, it is unlikely that such a demand would have support in Britain, since recent developments in social security law have been away from the treatment of the wage-earning married woman as her husband's dependant. This trend has been, in part, a response to legal requirements of the European Economic Community. But the proposed *Directive* on equality of treatment in social security does not envisage provision of equal benefits for spouses and for parents regardless of sex.²²

Symbolic of the man's headship of the household is the surname. English law does not require a woman to take her husband's name on marriage; but the ability to do so is seen as a 'right' in family law textbooks,²³ possibly a survival from the time when the wife – being unable to contract or own property – had the power to pledge her husband's credit for the necessities of life. The question of name is an emotive one, as evidenced by a number of court cases questioning a mother's right to change her children's surname to that which she has assumed. The courts have ruled that a change of name requires the consent of both parents.²⁴ This seems reasonable; but the judiciary bring to this issue the assumption that the child's (first) surname will be that of the father. So, in 1977, where a mother changed her name when pregnant and gave that surname to her child on its subsequent birth, she was considered to have changed the child's name without the father's consent. The court ruled that: 'The child's name is that of his father'.²⁵

The Board of Inland Revenue persists in treating the married couple as a unit, and in assuming that the husband is head and breadwinner. From 1799, when income tax was introduced, husband and wife have been taxed as a unit represented by the husband. The husband was and is responsible for the payment of tax for the couple and therefore all correspondence and rebates are addressed to him. Since 1972, it has been possible for the wife, with her husband's agreement, to elect to be separately taxed on her earned income. She is then dealt with as a single person, but only as regards her earned income.²⁶

The Obligation to Maintain

As a result of the doctrine of unity of the married couple, the traditional rule required the husband to maintain his wife and children, since the law did not recognise any capacity in the wife to maintain herself. The wife's obligation to support her husband and children arose only when the husband was incapable of work. The refusal of National Insurance benefits for her husband and children to a wife whose husband is considered capable of work is officially explained on these grounds. A wife is classified as a dependant, even if she is a wage-earner. The rule that the husband must always support the family is based on a legal rather than a social role,²⁷ but it inhibits choice of activity within the family. The maintenance obligation of the husband is used to justify other legal rules defining wives as dependants, particularly in social security law. The denial of the invalid care allowance to married women is an example of this: unlike the husband, she is not considered to work outside the home (even if she in fact does) and therefore is held not to require a paid assistant to care for the invalid. However, the Domestic Proceedings and Magistrates Courts Act, 1978,²⁸ will impose equal maintenance obligations on spouses, thus removing a major rationale for institutional arrangements that treat spouses according to ascribed gender roles.

The husband's maintenance obligation is the explanation offered for refusal of financial benefits to the wife in a number of situations, yet in legal practice that obligation means very little. During marriage it is virtually impossible for a wife living with her husband to enforce maintenance. This is because the courts are traditionally unwilling to interfere in a marital relationship as just an 'ordinary domestic arrangement'. Behind this lurks the idea that, since husband and wife are a unit, their domestic life is a private world in which the law must not intervene. This was explained by a former Master of the Rolls, Lord Evershed as follows:

It was in the year 1604, not far removed from the date when Shakespeare wrote the lines from *The Taming of the Shrew*

[She is my goods, my chattels; she is my house
My household stuff, my field, my barn
My horse, my ox, my ass, my anything.]

... that, according to Coke's report of the judgement in *Semayne's Case*, it was judicially laid down that the house of everyone is to him as his castle and fortress. More than three centuries later Atkin L.J., in a famous judgement, said: 'The parties themselves are advocates,

judges, courts, sheriff's officer and reporter. In respect of these promises (of maintenance in marriage) each house is a domain into which the King's writ does not seek to run, and to which its officers do not seek to be admitted.'²⁹

An indication of the law's traditional reluctance to enter this private domain was that little legal remedy was provided for domestic violence until the passing of the Domestic Violence and Matrimonial Proceedings Act, 1976.³⁰

Although legal provisions contain a view of marriage in which the husband is breadwinner and the wife dependant, the law does little to protect the dependant-wife during marriage. The conditions of domestic production are unregulated and, as we have seen, there is no enforcement of payment for it. The only legal provision on housekeeping is the Married Women's Property Act of 1964, which provides that where savings are made 'from any allowance made by the husband for the expenses of the matrimonial home or for similar purposes . . . the money . . . shall . . . be treated as belonging to the husband and wife in equal shares'. The gender role assumptions here are obvious, but even more interesting is the fact that the law does not intervene to enforce payment, but only to ensure that the husband retains a half interest in any savings made by a prudent wife.

Family lawyers explain this as an indication that the law is only directed to pathological situations, to family breakdown.

The normal behaviour of husband and wife or parents and children towards each other is beyond the law – as long as the family is 'healthy'. The law comes in when things go wrong. More than that, the mere hint of anyone concerned that the law may come in is the surest sign that things are or will soon be going wrong.³¹

However, should the family breakdown be indicated by the wife deserting or committing adultery, the courts have ruled that she cannot look to her husband for support while they remain married.³²

On divorce a husband's responsibility for maintenance continues, especially where there are children, and a wife too acquires the duty of supporting the children. Thus the sexes would appear to have identical legal roles. However, the judicial attitude becomes apparent from the leading case on the subject, where the provision of future maintenance, known as periodical payments, was the justification for cutting the

wife's share of property acquired during marriage from a half to a third.

If we were only concerned with the capital assets of the family, and particularly with the matrimonial home, it would be tempting to divide them half and half . . . That would be fair enough if the wife afterwards went her own way, making no further demands on her husband . . . Most wives want their former husbands to make periodical payments as well to support them; because after the divorce he will be earning far more than she; and she can only keep up her standard of living with his help. He also has to make payments for the children out of his earnings, even if they are with her.³³

So because of her calls on her husband's future income, a wife does not get an equal share of family assets. But the wife's future dependence, if it exists, is because of her child-care responsibilities; and one of the reasons why she will probably be a low-wage earner after divorce may be because she has foregone training and experience because of marriage.

Judicial imperviousness to women's lot was further evidenced by the following explanation for the award of the lion's share to husbands.

When a marriage breaks up, there will thenceforth be two households instead of one. The husband will have to go out to work all day and must get some woman to look after the house – either a wife if he remarries or a housekeeper if he does not. He will also have to provide maintenance for the children. The wife will not usually have so much expense. She may go out to work herself, but she will not usually employ a housekeeper. She will do most of the housework herself, perhaps with some help. Or she may marry, in which case her new husband will provide for her.³⁴

Clearly the assumptions behind this statement are based on beliefs about the sexes and their roles. One method of testing the neutrality of the judiciary in the interpretation of legal provisions is to try to imagine how the above paragraph would sound if the gender roles were reversed. In the case quoted above, Lord Denning was interpreting the gender neutral language of the current divorce law. That gender neutral provisions can be interpreted in a biased manner is clear from Albie Sachs's work on the male monopoly cases from 1869 to 1929, where the neutral word 'person' was interpreted by the judiciary to mean men only.³⁵

Another example of gender bias can be found in a recent study of

divorce court registrars whose function it is to deal with issues of maintenance, property, and custody of and access to children. Registrars have wide discretion in the exercise of their powers and, consciously or unconsciously, they use it to favour the party in a conflict with whom they identify, or of whom they approve.

My own view is that I think some weight should go in favour of the good wife and I would be likely to order a bad wife less. The local community, which still retains strong traces of its religious upbringing, would respect this view.³⁶

Must one treat all wives in the same way unless they are nymphomaniac or of the worst order – are they to be treated like a faithful wife of 20 years standing who has been nastily and shabbily treated by her husband?³⁷

Although guidance from the higher courts indicates that the wife should be awarded (at least) one third of matrimonial assets, the report suggests that many registrars do not give her even this.

It might be argued that, in order to avoid the stigma of dependence, a wife should forego any claim to future maintenance. But this overlooks two points. First, the courts take the view that a man ought to support his dependants, especially if they are otherwise likely to be supported by the state, and this view is shared by the Supplementary Benefits Commission. Second, domestic production, although unpaid, is treated as being of value by legal institutions where an accident has eliminated the producer of it, or increased the labour involved. This is not the place to go into the details of the domestic labour debate (see Mackintosh in this volume). It suffices to point out that within the terms of legal analysis the courts currently value housework and child care at about thirty pounds a week in actions relating to a wife's desertion or death.³⁸ So, for a woman to be paid by her ex-husband for such services would appear to be merely just.

Recently judges have adopted the attitude that marriage is not a 'bread ticket for life',³⁹ recognising that a woman without children may be able to support herself. But the woman with small children has little alternative to accepting maintenance from her former spouse or from the state. If maintenance is ordered by a court, current statistics show that it will be regularly complied with in only 45 per cent of cases⁴⁰ and that enforcement is difficult. Beveridge proposed that a wife should be paid an 'end of marriage benefit' which would consist

of a temporary separation benefit, similar to widow's benefit, and guardian and training benefit where appropriate. This would have enabled the divorced woman to undertake training for employment, but the idea was rejected by the government in 1944.⁴¹ Of course, in an ideal world where roles were chosen, a woman would not automatically take on the caring role in relation to the children on breakdown of marriage; but, as we shall see, women and men tend to specialise in activities considered appropriate to their gender roles.

Activity Specialisation

There is no direct legal obligation on the wife to specialise in household matters, although by family law and policy it is assumed that she will – as Mary McIntosh has shown in this volume. The most sensible arrangement in a marriage would be for the low-wage partner to specialise in household production, while the high-wage partner specialises in the market. In addition to the disincentive to wives joining a market which pays low wages for many types of 'women's work', families choosing to maximise their income in response to market forces will find that although there are no legal rules requiring the wife to undertake housework and child care, a myriad of structures with legal bases provide disincentives for the husband to do so. These disincentives reflect and reinforce assumptions about women's social role in contexts in which the assumptions may no longer be valid, or at least might not be valid if the legal structures were neutral. That the great majority of married women accept the tasks of housework and child care is undeniable, but so is women's increasing participation in the work force. If legal structures were neutral in role allocation, issues relating to the imposition of domestic production on women might be clarified. It is not intended here to suggest that legal changes would bring about material changes in society, but at least some of the complexities surrounding the question of sex roles and gender roles would be dissipated.

The assumption that a wife or 'some female person' should care for a man's children and do his housework underlies income tax and social security provisions. In the tax system this takes the form of giving additional personal allowances to married men with incapacitated wives and to single parents, but denying it to married women with incapacitated husbands. The allowance reflects the assumption that it is a married woman's unpaid job to care for children and that if she cannot do so, her husband is entitled to financial assistance for someone else to perform the job. In contrast, a woman on her own, even if working, is not considered by the courts as in need of an allowance for a substitute

child-minder. Similarly, other financial provisions are so constructed that they provide incentives for women, where available, rather than men, to undertake a domestic role. The housekeeper tax allowance is paid only where a woman is employed, so a male housekeeper is not recognised for tax purposes. And the daughter's service allowance cannot be claimed for sons.⁴² In social security legal provisions there are a number of examples of gender bias. The invalid care allowance is not paid to married women – presumably because they are expected to do such work unpaid. Where additions for adult dependants are given to those who get the allowance, these are limited to a wife or to 'some female person . . . who . . . has the care of a child or children of the beneficiary's family'⁴³ – so a male dependant with care of children is excluded. The disabled married woman is ineligible for the non-contributory invalidity pension 'except where she is incapable of performing normal household duties'.⁴⁴ The additions for dependants are as shown above.

The award of custody of children in divorce and other matrimonial cases reflects the allocation of the role of child-caretaker to women. A recent study showed that in 81 per cent of divorce court cases and 94 per cent of magistrates' cases custody was given to the mother. Where there was a contest by the father, however, the outcome was not so predictable.⁴⁵ It is clear that women demand custody and men expect them to have it, accepting, not challenging, traditional assumptions.⁴⁶ While this is a fairly recent development in legal administration – until 1886 the law did not recognise any custody or guardianship rights of the mother – since it is combined with other assumptions in the law, it leaves the wife at a financial disadvantage. In order to perform child-care tasks, the divorced woman may need economic support. As has already been stated, she is at a disadvantage in the job market and the maintenance she needs will be used as an argument against her when divorce financial arrangements are made. Yet the maintenance is necessary for child care. Recently, a man forced to care for his two children (because of his wife's desertion after an accident befell him), was awarded twenty pounds a week to hire a substitute – this being the court's estimate of the value of his wife's services less her consumption.⁴⁷ This case indicates that maintenance of a child-caring wife is not full recompense for her work.

In drawing up the pleadings for divorce, the legal profession uses clichés such as that the wife was a 'loyal, faithful and good wife',⁴⁸ or that she did not fulfil her 'wifely duties'. The 'loving and unselfish wife' is entitled to recognition of her good behaviour by the court in

awarding maintenance.⁴⁹

These phrases and the legal provisions discussed above suggest that, despite the judicial view that the law should not interfere in the marriage relationship, there is a definite legal notion of how a woman should act and what being a 'good wife' entails. In other words, the law does not intervene in the unequal economic relationship found in marriage, but maintains – through its provisions, assumptions, judicial and other official attitudes – an ideology of gender roles which ensures that individuals who deviate from these roles are penalised.

Neutralising Sex-based Legal Roles

Differentiation between men and women by law and custom appears to be a feature of all known societies and figures even in Engels's theory of the family, although not as sexual stratification in the early stages of his assumed pattern of evolution.⁵⁰ A society in which there was no official recognition of physiological sex differences between persons would be new to us and we cannot say what it would look like. Sexual integrationists have argued that an individual's sex is an entirely physiological characteristic and is no barrier to sexual integration. This is not to ignore the current form of reproduction which temporarily incapacitates mothers, although some feminists consider this an obstacle to be overcome by extra-uterine reproduction.⁵¹ Any special provision for maternity can be justified as necessary to the infant's well-being rather than being seen as a peculiar right based on gender.⁵²

There seems to be no reason why the law, which has espoused an ideology of equality as evidenced in recent legislation, should continue to reinforce roles by gender-based legal rules and incentives. It would be a fairly simple matter to phrase legislation in gender-neutral terms, thus denying legal recognition to gender roles. The roles of breadwinner, homemaker, and child-caretaker would not necessarily subsequently disappear. It is arguable that social roles are part of the institutions of society. However, these social roles should be based on choice, not on sex. Gender roles are not chosen but imposed on individuals, and that such major social consequences should follow on the slight physiological differences between women and men is increasingly a surprise to scholars.⁵³ The abolition of legal allocation of roles based on gender would increase the areas of autonomy and freedom for people. This argument is not an objection to role-based law but to gender-based law. Indeed, it is clear that a person who provides unpaid services in the home and foregoes a cash income needs the protection and recognition

of the law, and that such a person should receive direct any income, allowances and benefits (such as child benefit) that are intended for the support of domestic production. No doubt there would be problems of proof between couples as to who was performing the home role in the relationship. But these are not insuperable if the emphasis is placed on social function rather than on gender.

To accomplish such a change in legal institutions would require study of those different types of laws. In the area of law relating to current roles in marriage or quasi-marriage, whilst the roles of breadwinner and homemaker might be retained for administrative purposes, these would not be gender-based. Neutral words such as spouse or partner could be substituted for wife and husband. It would be a matter of personal choice for a family to decide its arrangements (although job market constraints would, of course, continue to limit choice). This would not resolve the complex problems of whether the family or the individual should be treated as the unit of account for matters of taxation and welfare, but it would help to expose issues masked by current sexual ideologies. The Supplementary Benefits Commission is actively considering adopting a neutral social security system 'leaving people as free as possible to make their own arrangements in whatever way suits them best'.⁵⁴

Where laws are based on physiological differences between the sexes, I suggest that examination would reveal that the necessity for these laws is more apparent than real. The criminal law protects persons from rape and sexual assault but there is no reason why this should be linked to sex. The South Australian legislature has amended its legislation on sexual offences to encompass male and female aggressors and victims. This has been done by the use of the words 'person' and 'his or her'. Where the criminal law has given special recognition to post-natal depression, this can be subsumed under general rules relating to diminished responsibility.

Legislation that protects women at work from adverse conditions considered suitable for men has been justified by both gender-role differences and physiological differences. Its retention is supported by feminists as part of a general strategy for improving working conditions. Research would indicate whether the rationale for protective legislation was based on role or on physiology. If it is role-based, then it would seem logical that all those persons assuming a particular role in society – for instance, the care of small children – should benefit from protective legislation. If the rationale is physiological, then all persons with similar physiological needs must also be protected.

The third category is gender-neutral or androgynous laws. Where such laws already exist, study would reveal the extent to which, in the course of interpretation, judges and officials bring to their work conventional ideas and assumptions concerning women. As we have seen in the administration of the divorce laws, neutral wording of legal language is not good enough; it may mask deeply ingrained attitudes and prejudices on the part of the interpreter. It is debatable whether the veil of impartiality is more easily pierced when it covers blatantly discriminatory legislation or when legal provisions are ostensibly neutral. In my opinion, non-gender-specific legislation would clarify issues which at present are so often explained as 'that's the law'.

This plea for an end to official ascription of role based on sex is not intended to suggest that legal changes would bring about social revolution or even true economic equality between the sexes. Far more fundamental measures are required for that. However, gender-neutral legislation is a necessary, if far from sufficient, condition for justice to individuals in society.

Notes

1. D. Emmet, *Rules, Roles and Relations* (London, Macmillan, 1966), p. 37.
2. A. Oakley, *Sex, Gender and Society* (London, Temple Smith, 1972), p. 158.
3. Central Statistical Office, *Social Trends No. 6* (London, HMSO, 1975), Table 1.12.
4. Central Statistical Office, *Social Trends No. 7* (London, HMSO, 1976), Table 5.3.
5. G. Jones, 'Introduction: The Sovereignty of the Law', *Selections from Blackstone's Commentaries on the Laws of England* (London, Macmillan, 1973), p. xlvii.
6. W. Blackstone, *Commentaries on the Laws of England*, 7th ed. (Oxford, Clarendon Press, 1775), Bk. 1, p. 442.
7. M. Finer and O.R. McGregor, 'The History of the Obligation to Maintain' in *Report of the Committee on One-parent Families* (Finer Report), Cmnd. 5629, vol. 2 (London, HMSO, 1974).
8. P.M. Bromley, *Family Law*, 5th ed. (London, Butterworths, 1976), p. 108.
9. Blackstone, *Commentaries*, Bk. 1, p. 445.
10. A. Sachs, 'The Myth of Judicial Neutrality: The Male Monopoly Cases', in P. Carlen (ed), *The Sociology of Law*, Sociological Review Monograph 23 (University of Keele, Wood and Mitchell, 1976).
11. A. Clark, *Working Life of Women in the Seventeenth Century* (London, Routledge, 1919).
12. M. Beard, *Women as Force in History* (New York, Macmillan, 1946), p. 82.
13. This book, of which there are two copies in the British Museum, was printed in 1632. The preface is initialled by I.L. and there is a section entitled 'To The Reader' by T.E. T.E. did not know by whom the discourse had been

composed, but implied that the author was already dead in 1632. From T.E.'s description of his decision to have the work printed, we can conclude that he (T.E.) was a lawyer, because he mentioned the Lent Vacation as the time when he added 'many reasons, opinions, Cases and resolutions of Cases to the Authors store'.

14. M. Bateson, 'Introduction', *Borough Customs*, vol. II (London, Selden Society, vol. XXI, 1906), p. cxiii.

15. W.S. Holdsworth, *A History of English Law* (London, Methuen, 1923), vol. 3, p. 535.

16. Bromley, *Family Law*, p. 33.

17. For advice on this matter, I am grateful to Belinda Meteyard, whose M.Phil. dissertation entitled 'Legal and Administrative Provisions as a Factor in the Maintenance of the Marriage Rate' deals with Lord Hardwicke's Act of 1753.

18. Law Commission, *Report on Solemnisation of Marriage in England and Wales*, no. 53, 1973, para. 104.

19. P. Laslett, *Family Life and Illicit Love in Earlier Generations* (Cambridge, CUP, 1977), p. 108.

20. H. Land, 'Women: Supporters or Supported?', in D.L. Barker and S. Allen (eds), *Sexual Divisions and Society: Process and Change* (London, Tavistock, 1976), p. 110.

21. 'The social security system also places a double burden on the married woman who works outside the home. She is forced to pay a full social security tax, but the benefits she receives as an independent worker are not added to those she would be entitled to as a spouse. The family thus pays a double tax when she works, but she collects for only a single worker'. L.J. Weitzman, 'Legal Regulation of Marriage: Tradition and Change', 62 *Calif. L. Rev.*, vol. 62, 1974, p. 1191. In 1973 a bill was introduced in Congress (H.R. 11999, 93rd Cong., 1st Sess.) to enable working women to collect their own pension plus any pension as husband's dependant.

22. *Official Journal of the European Communities*, 11.2.77, No. C34/4, 'Proposal for a directive concerning the progressive implementation of the principle of equality of treatment for men and women in matters of social security'.

23. Bromley, *Family Law*, p. 112.

24. See *R (BM) v. R (DN) (child: surname)* [1978] 2 All E.R. 33; *Practice Direction* 24 May 1976 [1978] 3 All E.R. 451; *Re W.G.* (1976) 6 Fam. Law 210.

25. In *D v. B (otherwise D) (child: surname)*, [1977] 3 All E.R. 751, the mother had left the father of the child she was expecting, and to whom she was married, before the birth. She registered the child's name as that which she had assumed by deed poll before the birth, and which was the surname of the man with whom she went to live. In the Family Division of the High Court, Lane J. considered the law on the matter and stated: 'Applying those authorities to this case, I hold that the mother was incompetent to change the child's surname, by deed poll or by registration of birth, without either the father's consent or an order of the court. The child's surname is that of his father'. The judge did not say what would happen in the case of a married couple with different surnames who had maintained these throughout marriage. The judge, in discussing the issue, used language like 'he should bear his father's name' – a phrase redolent of property rights. Since this paper was written the Court of Appeal has reversed the decision of Lane J. and held that a mother is competent to give her surname to her child. See *Times Law Report*, May 25 1978. It is noticeable that *The Times* published this under the heading 'Child permitted to take name of mother's lover', suggesting that a woman does not have a surname of her own; it is either her husband's or her lover's.

26. Equal Opportunities Commission, *Income Tax and Sex Discrimination*

(Manchester, EOC Pamphlet, 1977), p. 11. Since this paper was written the Finance Act 1978, S. 22 has been passed to enable a wife who is paying taxes on a pay-as-you-earn basis to receive her own rebates.

27. R. Lister and L. Wilson, *The Unequal Breadwinner* (London, National Council for Civil Liberties pamphlet, 1976).

28. This Act, which has just received the Royal Assent, provides: 'Either party to a marriage may apply to a magistrates' court for an order under section 2 of this Act on the ground that the other party to the marriage – (a) has failed to provide reasonable maintenance for the applicant; or (b) has failed to provide or make a proper contribution towards reasonable maintenance for any child of the family.' The Act also proposes that similar provisions apply in applications to the higher courts.

29. Lord Evershed, 'Foreword' to R.H. Graveson and F.R. Crane, *A Century of Family Law* (London, Sweet and Maxwell, 1957), p. xv.

30. Select Committee on Violence in Marriage, *Report*, House of Commons, Session 1974-75, vol. 1, paras. 42-53.

31. O. Kahn-Freund and K.W. Wedderburn, 'Editorial Foreword' to J. Eekelaar, *Family Security and Family Breakdown* (Harmondsworth, Penguin, 1971), p. 7.

32. *Gray v. Gray* [1976] Fam. 324.

33. *Watchel v. Watchel* [1973] Fam. 72 at 94, per Lord Denning.

34. *Idem*, at 95.

35. Sachs, 'Myth of Judicial Neutrality'; A. Sachs, 'The Myth of Male Protectiveness and the Legal Subordination of Women' in C. Smart and B. Smart (eds), *Women, Sexuality and Social Control* (London, Routledge and Kegan Paul, 1978).

36. W. Barrington Baker, J. Eekelaar, C. Gibson and S. Raikes, *The Matrimonial Jurisdiction of Registrars* (Oxford, Centre for Socio-Legal Studies, 1977), para. 2.21, quoting an anonymous registrar.

37. *Ibid.*, para. 2.23.

38. In *Regan v. Williamson* [1976] 2 All E.R. 241, where the High Court considered compensation for the loss of a 'good wife and mother' in an accident, £21.50 per week was awarded after £10 had been deducted for the cost of previously keeping the deceased.

39. In *Brady v. Brady* [1973] 3 Fam. Law 78, Sir George Baker reduced an order for £3 a week to 10p where the marriage lasted only five months, saying: 'In these days of "woman's lib" there is no reason why a wife whose marriage has not lasted long, and who has no child, should have a bread ticket for life.'

40. *Finer, Report*, vol. 1, p. 100.

41. *Ibid.*, p. 147.

42. Equal Opportunities Commission, *Income Tax and Sex Discrimination*, p. 15. The Finance Act, 1978, S. 19 has removed the gentler distinctions in the housekeeper allowance and has also amended the daughter's service allowance to cover 'son or daughter'.

43. Social Security Act, 1975, S. 37 (3) and Statutory Instruments 1976/409, S. 13 (1).

44. Social Security Act, 1975, S. 36 (2).

45. S. Maidment, 'A Study in Child Custody', *Family Law*, vol. 6, no. 7, 1976, pp. 195-200; vol. 6, no. 8, 1976, pp. 236-41.

46. J. Eekelaar, E. Clive, K. Clarke and S. Raikes, *Custody After Divorce* (Oxford, Centre for Socio-Legal Studies, 1977). The authors found that in 73.3 per cent of their cases of breakdown of marriage the children were living with the wife; in the great majority of cases the court confirmed the status quo. The study indicates that 'wives are more tenacious than husbands in their attempts to obtain possession of the children' (p. 9); that husbands in most

cases are content to leave to the wife the task of raising the children; but that where the children were already with the husband the court was unlikely to move them. This suggests that the courts do not necessarily assume that a father is unfit for child rearing.

47. In *Oakley v. Walker* [1977] 121 Sol. Jo. 619, where, because of his accident, a wife deserted her husband, leaving him with two small children to care for, he received compensation of £20 a week to enable him to employ a substitute.

48. 'The wife put in an answer, some part of which is in what has become the standard form of cliché in these cases, alleging that she was a "loyal, faithful and good wife". Just why these three adjectives have crept into the standard form of pleading, I do not know'. Ormrod L.J. in *Le Marchant v. Le Marchant* [1977] 3 All E.R. 610 at 612.

49. *Duchesne v. Duchesne* [1950] 2 All E.R. 784 at 791 (Pearce J.).

50. F. Engels, *The Origins of the Family, Private Property and the State* (London, Lawrence and Wishart, 1972).

51. S. Firestone, *The Dialectic of Sex* (London, Jonathan Cape, 1971), p. 233.

52. A. Jaggar, 'On Sexual Equality', *Ethics*, vol. 84, July 1974, p. 285.

53. E. Goffman, 'The Arrangement between the Sexes', *Theory and Society*, vol. 4, no. 3, Fall 1977, p. 302.

54. Supplementary Benefits Commission, *Annual Report 1976*, Cmnd. 6910 (London, HMSO, 1977), 1.7.



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