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## PARENTAGE AND HUMAN RIGHTS: THE CHILD'S POINT OF VIEW<sup>2</sup>

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It is tempting to write of child rights and their recognition as human rights within the sphere of parentage. It is similarly inviting to study the shifting parallels between rights and duties and the obligations set out under parental responsibility. The growing concern for children over the past centuries has been steady and unabated, although its real results have yielded divergent products depending on their geographical distribution.<sup>3</sup>

Instead of dealing with this cataloguing of rights or entering into the debate whether such rights actually exist<sup>4</sup>, this paper will try to answer at least some of the following questions the author has been faced with in family law practice:

1. Is it a right to know one's parentage ?
2. Is it a right to receive parenting ?
3. If affirmative, does the violation of the right to receive parenting imply restitution ?
4. If a parent does not provide parenting, does the duty automatically fall on the State to supply an alternative ?
5. If affirmative, does the violation of the right imply restitution ?
6. What is wrongful or inadequate parenting ?
7. Who decides what is the right kind of parenting ?
8. May the child seek to "divorce" parents on the above grounds ?
9. Is acknowledgment by a parent of a child an intrusion on his family life, where this is being enjoyed with persons other than genetic parents?
10. Within adoption, may a child demand restitution from the biological parent and / or the State where:
  - a. placement of the child has been unsuccessful ?
  - b. the biological parent has intruded on the child's adoptive family without the child's consent ?
  - c. one biological parent has knowingly concealed the identity of the other biological parent or wilfully misled the adopted child about his/her parentage?

In order to answer the first question regarding the right to know one's parentage, some attempt must be made at defining parentage and in ascertaining the extent to which parentage implies the attribution of the legal status of parent. It is clear that recognition of certain people as the parents of a child may depend upon different aspects of the parenting role.<sup>5</sup> One may identify the "psychological parent" to whom the child relates emotionally in early life<sup>6</sup>, the social parent as the person who performs the caring role for the child and the natural parent.<sup>7</sup>

In the light of *Johnson versus Calvert* decided by the Supreme Court of California, the law would seem to be making a marked distinction between legal parenthood which implies the status of parenthood and parental responsibility which grants the power to act as a parent. The law had always assumed the biological truth of a child never having more than two parents at a time, but it has been shown that two mothers are possible in the case where a surrogate mother leases her womb for gestation of another woman's fertilised egg.<sup>8</sup> What is the child's position in such a case?

The act of birth of such child according to Maltese law would include the names of the birth mother and father registered as such. Can the genetic mother insist on her name being entered in the certificate of civil status, particularly where she will be caring for the child? Can a child demand to know the identity of the father where artificial insemination has taken place? At present, insufficient local legislation regulates the complexity of issues that arise through the achievements of science. However, it should be possible to conclude whether the child has any right to knowledge of parentage ab initio, as a matter of principle.<sup>9</sup>

Another question considers the right to receive parenting and asks whether the failure to fulfil this responsibility incurs any form of liability? The United Nations Convention on the Rights of the Child makes provision for States Parties to respect "the responsibilities, rights and duties of parents ..... to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance..."<sup>10</sup>

This would therefore seem to be the authority or power given to parents in making decisions in the best interests of their children. Children are not usually perceived as having any right in what kind of parenting they receive, if indeed they receive any at all.

This issue has been examined from the obverse side of the coin. It has been put forward that parents have the power, authority and interest in the upbringing of their children and there would seem to be no real way to ensure compliance on behalf of the child. What happens where a child adamantly refuses to obey a parent who is giving an order in what he/she considers the child's best interests? <sup>11</sup> The most exemplary case that springs to mind is that of Gillick<sup>12</sup> where the Court of Appeal emphasised the importance of preserving parental authority and saw itself as protecting parents against any infringement of their right to control children up to the age of eighteen.

Although the actions of parents are vital to the well being of most children, it is a sad reality that some children receive little or no care for one or several of a variety of reasons. Whether the State has a duty to intervene on behalf of these children has always been a dangerous standpoint in view of the inviolable privacy of the family. The Courts are always ready and willing to make any necessary decisions in the best interests of the child.<sup>13</sup> But, they must first be seized of the case. This implies that the child must have access to the court or to some person who can make the link. Does this undermine the authority of parents? Is it the role of the courts to intervene where a child has been chastised by parents who have the genuine best interests of their child at heart?<sup>14</sup> However, chastisement can come in many forms. Physical punishment has been subjected to scrutiny in recent years with some states going so far as to reprimand the parent who slaps a child in public.<sup>15</sup>

The right of the child to receive quality care from parents has never been put to the test, although the repercussions where this is lacking are all too obvious. Should it become apparent that the child is being neglected or harmed, either physically or psychologically, the State has a duty to help the family and if this fails, it has the responsibility to provide an alternative.<sup>16</sup>

A further issue for discussion relates to the intrusion of a parent in the family life of a child settled with persons other than his biological parents. A child has the right to privacy and to develop in a safe and secure environment without undue interference. The impact of a visit by an unknown or estranged biological mother or father may be detrimental and places psychological pressure on the child which is avoidable.<sup>17</sup>

Although many legislations provide for the meeting of adopted persons with their biological parents, there are always parents (and children) who taken

short cuts just as children who have been settled in a foster family for years may be faced with an unwanted visit by a parent who suddenly decides to turn up and demand access. Children can do little to control these actions, but the legislator could make such disruptive influences less frequent by imposing sanctions where liberties are taken to the detriment of the more vulnerable.

The opposite state of affairs is also worthy of discussion. May a child demand to have access to a birth parent where this parent refuses it? Although such access may be granted<sup>18</sup> this does not imply that the parent will provide due care and attention which is needed by the child.

All the issues raised in the context of the rights of the child to receive parenting beg the question as to the standards of adequate parenting. Such a definition would be hard to come by although many legislations set out a basic minimum standard to which all children are entitled.<sup>19</sup>

The law takes it for granted that parents always act in the best interests of their children. This assumption ensures that responsibility for the care of children is uppermost in their mind and in their actions. Should this not be the case, the United Nations Convention on the Rights of the Child provides children with a voice to make their opinions heard.<sup>20</sup> Whether state signatories have translated this into a reality is another matter.

## REFERENCES

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<sup>2</sup> This is an abridged form of a paper presented at the XXVIIth Colloquy on European Law on Legal Problems relating to Parentage held in Malta in September 1997 by the Council of Europe (CJ-FA/COLL(97)Paper 3)

<sup>3</sup> Stone Lawrence, *The Family, Sex and Marriage in England, 1977*, p.683 quoted in Therborn, Goran, *Children's Rights since the Constitution of Modern Childhood.*, International Conference on Children as a Social Phenomenon, Billund, Denmark, September 1992, European Centre Report, 1993, p. 1504 Professor Onora O'Neill for instance queries whether children's positive rights are best grounded by appeals to fundamental (moral, natural, human ) rights. She feels that the ethical position of children's rights can be further secured if they are not based on claims to fundamental

rights. *Children's Rights and Children's Lives* printed in *Children, Rights and the Law*, edited by Alston P., Parker S and Seymour J, Clarendon, 1993, pp 24 - 42.

<sup>5</sup> Barton C. and Douglas G., *Law and Parenthood*, Butterworths, 1995, pp.47 - 50.

<sup>6</sup> Goldstein J., Freud A. and Solnit A., *Beyond the Best Interests of the Child*, 1979, Burnett Books.

<sup>7</sup> The definition of natural parent is continually undergoing change, particularly in the light of contemporary possibilities of artificial procreation.

<sup>8</sup> Panelli J. "..... To recognise parental rights in a third party [ i.e. the gestational mother] ..... would diminish [the genetic mother's ] role as mother." quoted in Morgan D., A . *Surrogacy Issue: Who is the Other Mother ?* 1994, 8 *International Journal of Law and Family* 386.

<sup>9</sup> The United Nations Convention on the Rights of the Child ratified by Malta on the 30th September, 1990 at Article 7 (1) states: The child shall be registered immediately after birth and shall have the right from birth to a name and, as far as possible, the right to know and be cared for by his or her parents."

<sup>10</sup> Article 5.

<sup>11</sup> Seymour John, *An Uncontrollable Child*, in *Children, Rights and the Law*, op. cit., p. 1 15 121985, 1 *All ER* 533.

<sup>13</sup> 'Maltese courts, for instance, may "revoke or vary" any directions within a separation process "for the better welfare of the children" Section 60 (1), Chapter 16 of the *Laws of Malta*.

<sup>14</sup> In New Zealand, the Domestic Violence Act 1995 makes it possible for an abused child to obtain a protection order against a parent. Atkin B., *Dealing With Family Violence: Family Law in New Zealand*, 1995, *International Survey of Family Law*, 1995, pp. 383 - 400.

<sup>15</sup> Case of Miller, reported in the British press in 1996.

<sup>16</sup> In many states, children in need of care, protection or control are taken into a care setting or placed with foster carers. The impact of such proceedings on the child is another matter of contention.

<sup>17</sup> Case of X, still sub judice in the Civil Court, Malta, where an unmarried mother registered her daughter in her surname only to find after five years that the father of the child had acknowledged her and given her his surname, although he had no contact with them. Proceedings are pending regarding the right of the child to be known by her mother's surname and for disavowal of her father.

<sup>18</sup> Case of Jeroen, *Nederlands Juristenblad* 1996, afl. 3, bijlage, at 41 cited in Forder C., *Re-thinking Marriage, Parenthood and Adoption*, *International Survey of Family Law*, 1995, pp. 378-379 The Amsterdam Appeal Court, based on Art 7 of the United Convention on the Rights of the Child, concluded that the presumed father was not free to reject all contact with his son and that the court was empowered to take steps to realise Jeroen's right. The Dutch Supreme Court overturned the decision on the basis that there had been an incorrect interpretation of Article 8 of the European Convention on Human Rights and because the defendant had not recognised Jeroen. Proposals have since been presented before the Dutch parliament to remedy this situation.

<sup>19</sup> "Marriage imposes on both spouses the obligation to look after, maintain, instruct and educate the children of the marriage taking into account the abilities, natural inclinations and aspirations of the children." Section 3B, Chapter 16, *Laws of Malta*, This

also applies where children born outside marriage are acknowledged by the father. If no such acknowledgement takes place, the responsibility rests with the mother under the presumption: *mater semper certa est*.

<sup>20</sup> Article 12: 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely, in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.