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BIRTH IN OR OUT OF WEDLOCK:
DOES IT MATTER ANY MORE? —
THE PARENT AND CHILD ORDINANCE 1993



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Introduction

The Parent and Child Ordinance (PCO) came into force on 19th June 1993.¹ It has four major objectives, namely: i) to reduce the legal disabilities associated with illegitimacy of children; ii) to consolidate and amend the law relating to paternity, legitimacy, and legitimation; iii) to make provisions for the determination of parentage in cases where birth or pregnancy results from medical treatment services and iv) to provide for the use of scientific tests in determining parentage in court proceedings. When the PCO is examined as a whole, it becomes clear that its most important objective is to reduce as much as possible the legal disabilities associated with illegitimacy of children. Section 3 of the PCO is the key provision which appears to encapsulate this goal. It states that from the coming into force of the PCO any relationship between two persons shall, unless the contrary intention appears, be construed without regard to whether or not either of them, or any person through whom the relationship is deduced, is or was at any time an illegitimate person.²

This lecture considers how the foregoing objective is attained. It analyses the provisions of the PCO while at the same time locating this new Ordinance in the existing law governing the status of the child in Hong Kong. The central concern of this lecture and around which most of the arguments are organised is an investigation of the question

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¹ Parent and Child Ordinance (No 17/93)(Commencement) Notice 1993 (LN 86/1993) made under PCO s 1(2), which brings the PCO into operation on 19 June 1993, except for that part of section 19 concerning the item relating to the Guardianship of Minors Ordinance (Cap 13), which came into operation earlier on 19 March 1993.

² Based on section 1 of the Family Law Reform Act 1987 (UK).

whether or not it matters any more (in the eyes of the law) for a child to be born in or out of wedlock?³

This presentation is divided into seven sections of which the first is this introduction. After briefly considering the main object underlying the determination and allocation of parentage under English common law, the lecture discusses the various exceptions to the common law principle that an illegitimate child has no recognised parents.⁴ In the fourth section I examine the PCO criteria for determining parentage and the extent to which these depart from the old common law notion of linking marriage to the status of children. Also considered here is the question of how the PCO defines parentage in cases of children born as a result of medical procedures designed to assist conception. The fifth section looks at the provisions of the PCO which aim at removing the legal disabilities associated with illegitimacy. These include provisions designed to give the child greater economic security and social status. In the sixth section are examined three remaining areas, namely, citizenship, guardianship, and domicile, in which illegitimate children are still treated in a discriminatory manner. I conclude by noting that although the PCO has neither totally abolished illegitimacy as a legal concept nor eliminated all the disabilities of illegitimacy, it has nonetheless, made a commendable effort towards the attainment of both objectives.

The law governing the determination of parentage

The legal significance of determining a child's parents lies primarily in the law's concern to identify a person or persons who are to be held responsible for the care and upbringing of that child.⁵ Furthermore, parental responsibilities may only be claimed by a person who is legally recognised as a parent or who is otherwise entitled to exercise parental

³ Being born during wedlock includes all children conceived during wedlock but born after divorce, nullity or the death of the father, and those who are born out of wedlock but whose parents have subsequently entered into a marriage with one another.

⁴ Although the term 'illegitimate child' (used here to refer to a child born out of wedlock), is now widely considered to be old fashioned due to its judgemental connotations, I am compelled to use it in this lecture in order to focus more closely the central theme and also to remove the risk of conceptual confusion. For a discussion of the conceptual problems involved in avoiding the use of the term 'illegitimacy' see P M Bromley & N V Lowe, *Bromley's Family Law* (London: Butterworths, 8th ed 1992), pp 286-288.

⁵ Bromley & Lowe, note 4 above at 285, and S M Cretney, *Elements of Family Law* (London: Sweet & Maxwell, 1992), p 215.

rights.⁶ It is for this reason that the law is concerned to define a parent in order to distance that person from other people who may have specific but nonetheless limited responsibilities over a particular child.

Thus the concern of the law to identify a parent is best illustrated by existing law which defines who is to be a parent. Section 2 of the Guardianship of Minors Ordinance (Cap 13), for example, defines a 'parent' to mean a father or mother. And section 2 of the Adoption Ordinance (Cap 290) (before its amendment by the PCO) defined 'parent,' in relation to a child who is illegitimate, to mean 'his mother, to the exclusion of his father'. Section 5 (a) of the Adoption Ordinance vests a right to a mother to consent to the adoption of her illegitimate child but denies the same right to the father of the child who is not legally defined as parent for this purpose.⁷

The above examples clearly show a close connection between a person's status as a legal parent and the parental responsibility which the law attaches to that position. But the status of parentage is not merely derived from the genetic tie between the child and the parent. It is also highly determined by the relationship of marriage between the genetic father and the child's mother. Hence, the law governing the question: 'Who are this child's parents?' is complex because it is not merely concerned with identifying the genetic link but also with the legal relationship between the father and the child's mother. In sum, the requirement that a man must not only be the genitor but also a legal husband of the child's mother is the foundation of the legal distinction, in many jurisdictions including Hong Kong, between a legitimate and an illegitimate child.

The statutory law governing the legitimacy of children in Hong Kong originated from the English common law which also applies the same criterion.⁸ An excellent illustration of the common law's notion of parentage is found in its refusal to recognise an illegitimate child as

⁶ This includes adoptive parents, guardians, and other authorised persons or institutions standing in loco parentis with regard to a particular child.

⁷ The PCO has now amended section 2 of Cap 290 to include the father in cases where he 'is entitled to exercise any right or authority in relation to the child by virtue of an order of a court under section 3(1)(d) of the Guardianship of Minors Ordinance (Cap 13).'

⁸ It is significant that although Chinese customary law has its own rules governing the determination and allocation of parental rights and responsibilities (and these rules are more liberal than English common law), they were swept away during the major reforms of Hong Kong family law which took place in the early 1970s.

possessing any parents at all.⁹ Although common law was very scrupulous about birth during wedlock, as the essential condition to the assignment of the status of legitimacy (and hence the basis for allocating a parent to a given child), it was not as keen to establish precisely the genetic tie between the child and that child's father.¹⁰ Thus, when the question of who was a child's father fell to be determined, the common law presumed a child's father to be the legal husband of that child's mother as long as such a child was conceived or born during the subsistence of a valid marriage.

This common law presumption remains heavy and may only be rebutted by evidence sufficient to discharge a high standard of proof, ie proof beyond reasonable doubt.¹¹ Here again, the test for determining parentage was not designed specifically to reveal the child's genetic father but merely to define the person who was to be regarded as 'father' for purposes of taking on parental rights and responsibilities.

As to the question of who is a child's mother, the common law did not provide an equivalent presumption because it is said that motherhood is a fact which can be amply demonstrated by parturition.¹² Although this assumption went unchallenged for many years, recent developments in human assisted conception, especially in vitro fertilization (IVF), have shown that a child can have more than one mother. Even then, and despite this development, the test of motherhood has not been abandoned. In this regard the PCO has refused to recognise any other woman as mother of the child in cases where the mother who bears the child is not the genetic parent of that child.¹³

⁹ In this regard Cretney has noted that the legal consequence of defining an illegitimate child as *filius nullius* ie 'the child of no one was that a child was not only a stranger to his natural parents and relatives but had 'no legal right to succeed to property or to receive maintenance or to any other benefits derived from the legal relationship of parent and child' (note 5 above at 208).

¹⁰ Whereas it is accurate to say that English common law developed this presumption during an age where no scientific means existed for determining paternity, it is also true that the protection of the marriage institution and family life generally worked in favour of discouraging scientific determination of parentage.

¹¹ See Cretney, note 5 above at 199, and Bromley & Lowe, note 4 above at 272.

¹² As noted by Lord Simon in *The Amphill Peerage* [1977] AC 547 at 577. See also Bromley & Lowe, note 4 above at 261 and 269.

¹³ Section 9(1) of Parent and Child Ordinance (No 17 of 1993) states that 'a woman who is carrying or has carried a child as a result of the placing in her of an embryo or sperm and eggs, and no other woman, is to be regarded as the mother of the child'. It may be argued, following Bromley & Lowe, that since PCO does not operate retrospectively, there will be cases where the common law would be properly applicable to determine the question of competing legal motherhood (see note 4 above at 262).

Having regard to the foregoing illustrations it is submitted that the English common law adopted an unscientific view of parentage, and more so of fatherhood, by placing little emphasis on the genetic tie between a child and his/her parent and focusing instead on the marital relationship between the parents of that child.¹⁴ It is not surprising therefore, that as a result of the discriminatory legal consequences attaching to child illegitimacy, many countries including Britain, have enacted legislation to modify the common law. This object has been achieved by enacting a series of piecemeal legislation over time in which exceptions for certain categories of illegitimate children have been created to enable them to enjoy the same rights as legitimate children. These exceptions are considered below.

Exceptions to the *fillius nullius* rule

There are four important statutes which create the exceptions to the common law rule that an illegitimate child has no recognised parents. They are: the Legitimacy Ordinance (Cap 184); the Affiliation Proceedings Ordinance (Cap 183); the Adoption Ordinance (Cap 290) and, to a lesser extent, the Matrimonial Proceedings and Property Ordinance (Cap 192).

The Legitimacy Ordinance

The main object of the Legitimacy Ordinance (1971) was to amend the English common law relating to children born out of wedlock by providing for their legitimation on the marriage of their natural parents. Section 2 of the Ordinance defines a marriage to include all forms of marriage recognised in Hong Kong.¹⁵ Having thus identified the various forms of marriage, the Legitimacy Ordinance then declares via section 3 that where a man and a woman enter into a relationship of marriage, as defined above, and have previously had a child before marriage, they

¹⁴ Perhaps it is worth mentioning here that marriage in many cultures has been viewed as the socially approved institution in which children are to be born and raised. The common law in this sense reflected existing English social attitudes and moral beliefs which were also reinforced by canon law and Christian doctrine.

¹⁵ These include a marriage contracted in accordance with the Marriage Ordinance; a modern marriage validated by the Marriage Reform Ordinance; a customary marriage declared to be valid by the Marriage Reform Ordinance; and a foreign marriage recognised in Hong Kong.

shall assume full parental responsibilities over that child or person, on the coming into force of the Ordinance or on their marriage, whichever takes place last.¹⁶ The legal effect of the Legitimacy Ordinance was to change the common law by legitimating all children born out of wedlock but whose parents had subsequently married one another. But in cases where the parents did not enter into a formal marriage, only the mother would be recognised as parent and the child would be considered illegitimate. Hence, under section 10(1) such a child shall be entitled to succeed his/her mother's property on her intestacy but not the property of his/her father.¹⁷

Another exception created by the Legitimacy Ordinance concerns the rule governing the validity of marriage. Section 11 provides that where a marriage between a man and a woman is void ab initio and therefore, legally non-existent at any given time, the couple would, nonetheless be recognised as parents to any child conceived or born after the marriage if both or one of them reasonably believed that their marriage was valid. On the other hand, where the relationship between the parents is defined to be a voidable marriage, any child born between the parties would be considered as their child, for all purposes as if such child had been born during a valid marriage between the couple.¹⁸

Parentage under the Adoption Ordinance

The Adoption Ordinance also created a second exception to the common law rule. This ordinance was first enacted in Hong Kong in 1956 and is derived from the English Adoption Act of 1926.¹⁹ Until 1972 adoption of children was possible both under Chinese customary law as well as under the Adoption Ordinance. In 1972 adoption of children under

¹⁶ Section 3(1) states that: 'Subject to the provisions of this section, where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Ordinance, the marriage shall, if the father of the illegitimate person was or is at the date of marriage domiciled in Hong Kong or had or has at such a date a substantial connection with Hong Kong, render that person, if living, legitimate from the commencement of this Ordinance, or from the date of the marriage, whichever last happens.'

¹⁷ Provided that the mother does not have other surviving children who are born during wedlock. This section has now been repealed by PCO.

¹⁸ A voidable marriage is considered by law to be valid until set aside by a court of competent jurisdiction. However, under common law, the decree setting aside such a marriage has always declared such a relationship to have been void from its inception and special provisions had to be made to save the status of the children from the retroactive operation of the nullity decree (ss 20(2) and 20B of MCO (Cap 179)).

¹⁹ Leonard Pegg, *Family Law in Hong Kong* (Singapore: Butterworths, 2nd ed 1986), p 230.

Chinese customary law was abolished.²⁰ The aim of the Adoption Ordinance is not to identify a parent but rather to make it possible for a child, who has no parents or whose parents are unable or unwilling to assume parental obligations towards that child, to acquire a new set of parents or a parent.

Section 13 of the Adoption Ordinance states that upon the adoption order being made, all rights, duties, obligations and liabilities of the parents or guardians in relation to the infant shall be vested in and be exercisable by and enforceable against the adopter 'as if the infant were a child born to the adopter in lawful wedlock.'²¹ Furthermore, the infant is legally deemed to stand in relation 'to the adopter exclusively in the position of a child born to the adopter in lawful wedlock.' It is significant that the Adoption Ordinance defines parentage by reference to a deemed marital relationship between the child's parents. This is perhaps not surprising because marriage is viewed as providing a criterion for defining legal relationships between persons. Hence, where marriage does not exist the law has to create a fictional marriage tie in order to establish comparable social relations.²²

The enactment of the English Adoption Act of 1926 was seen by many foster parents (and others in similar circumstances) to be a triumph over the ancient common law which did not permit anyone to give up one's parental rights or any child to acquire substitute parents. But once the law was enacted, it became possible also for unmarried parents or persons who had pre-marital children to utilise the new law to acquire legally recognised parentage which, as noted above, they could not

²⁰ Section 25 of the Adoption Ordinance states that after 31st December 1972, an adoption in Hong Kong may be effected only in accordance with this Ordinance provided that this provision shall not in any way affect the status or rights of persons already adopted under Chinese law and custom.

²¹ According to section 13 (ACO) only the following rights are specifically enumerated, namely, the future, maintenance and custody of the infant, including all rights to appoint a guardian and to consent or give notice of dissent to marriage. In view of the foregoing provisions it is arguable whether an adoption order confers upon the adopted child a legal status equal to that of a legitimate child. For further discussion see Elizabeth Phillips, 'Adoption of Hong Kong Minors by British Citizens' (1986) 16 HKLJ 390, and Bromley & Lowe, note 4 above at 455.

²² But this remains an imperfect fiction because an adopted child does not enjoy full legal equality with a child born in wedlock. Moreover, by reason of belonging to (at least) two families, an adopted child stands in prohibited degrees of consanguinity with his or her adoptive parents and with all the near relatives of his/her family of birth.

acquire under the common law.²³ In sum, the law of adoption demonstrates yet again how the harshness of the common law was circumvented in order to enable certain children to acquire legal parents.

Parentage under the Affiliation Proceedings Ordinance

The third exception is to be found in the Affiliation Proceedings Ordinance. The object of this Ordinance was not to legitimate a child but rather to provide for a procedure by which a man (ie the putative father), could be identified in order that he may be compelled to assume limited legal obligations towards his child.²⁴ These obligations include the duty to maintain the child. It should be noted that, despite its title, an affiliation order does not filiate a child to the family of his/her putative father, in the sense that the putative father becomes a parent for all purposes. The relationship between such a child and his/her parent, unless otherwise upgraded, remains narrowly defined and is not similar to a parent and child relationship created by marriage.²⁵ This is indicated by the minimal legal obligations which the law imposes on the putative father.²⁶ In the case of the child's mother, section 10(1) of the Legitimacy Ordinance, as noted above, applies.

²³ It must be noted here that the Adoption Ordinance does not permit two unmarried parents to adopt a child jointly. Only a parent and his or her spouse may apply to adopt a child of either of them and if successful, the adoption enables the child to be legally integrated into the new family unit. The option for the unmarried parents is to legitimate the child by subsequent marriage (s 5(2) and 5(4) Cap 290).

²⁴ The term 'putative father' is ironic in two senses. First it refers to the crude and unreliable test applied to determine who should be ordered to maintain the child of a single woman. Secondly, it also demonstrates the reluctance of the law to declare a man to be a father of an extra-marital child. Perhaps this is further demonstrated by the limited obligations such a man has towards his 'putative child.' As will be shown, the changes brought about by the PCO ensure greater economic protection to illegitimate children.

²⁵ Note that a putative father has a right to consent to the adoption of that child if he is contributing towards the child's maintenance (s 5(a) Cap 290). But where the putative father wishes to create the relationship of parent and child, in the sense in which we have so far considered these words, he would have either to marry the child's mother or, if this is not possible, to legally adopt the said child. This function of the law of adoption has often puzzled people who are not acquainted with the strange ways in which the law defines parentage.

²⁶ Note that before the enactment of the PCO a putative father was initially obliged to maintain his child up to the age of 16 years. Only special circumstances, such as the child being engaged in full time study, justified the provision of maintenance beyond that age (ss 8-9 of APO (Cap 183)).

Parental obligations created by the MPPO

The Matrimonial Proceedings and Property Ordinance (MPPO) (Cap 192), was enacted in 1972 and its main purpose is to regulate financial provision and the reallocation of property on the dissolution of marriage. Its only relevance to this discussion is that the MPPO defines 'a child' (under section 2) to include an illegitimate child, thus extending to all children the benefit of any orders which a court can make on the termination of marriage.²⁷ In the next part of this lecture, I discuss the changes made by the PCO to extend legal protection to illegitimate children who are either not included in the exceptions we have examined above or are inadequately protected.

The new criteria for determining parentage

Four important changes have been made relating to the procedure and criteria for proof as well as allocation of parentage. The first is that the law relating to the presumption in favour of legitimacy has been expanded. Second, the PCO has lightened the standard of proof required to displace the presumption of parentage. Third, the PCO has made provisions for the use of scientific tests in the determination of parentage and fourth, it has created a new category of parents arising from scientifically assisted conception.

The first presumption

Section 5 (1) of the PCO creates two types of legal presumptions as to parentage. The first is that a man shall be presumed to be the father of a child if he was married to the mother at any time and if there arises by virtue of that marriage a presumption of law that the child is the legitimate child of that man. This is a statutory codification of the

²⁷ Section 2 defines a child in relation to one or both parties to the marriage to include 'an illegitimate child or adopted child of that party or, as the case may be, of both parties...' Also the same section defines a child of the family to mean: 'in relation to the parties to a marriage ... a child of both parties and any other child who has been treated by both as a child of their family.' It has also been held that an illegitimate child (if recognised by his/her father) can claim benefit under the Fatal Accidents Ordinance Cap 22. See *Kam Ying v Man Chi Tai* [1967] HKLR 201 and Pegg (note 19 above at 185).

common law presumption and is not new to Hong Kong.²⁸ However, what is new is that the PCO has amended section 11 of the Legitimacy Ordinance in two respects. According to section 11, a child of a void marriage shall be treated as legitimate if at the time of conception of the child (or at the time of the celebration of marriage, if later) both or either of them reasonably believed that the marriage was valid.

There were two problems with this formulation. The first problem was that it tended to place the burden of proving 'reasonable belief' upon the party wishing to rely on the presumption and this would be difficult to discharge in certain cases, especially where the original parties to the marriage had died. The second problem was that it was doubtful whether 'a mistake of law' as to the validity of a given marriage could be said or considered to be reasonably held. Section 19 of the PCO has solved the problem by adding subsections (4) and (5) to section 11 of the Legitimacy Ordinance. Subsection 11(4) states that the foregoing presumption shall apply 'notwithstanding that the belief that the marriage was valid was due to a mistake as to law.'²⁹ And subsection 11(5) states that 'it shall be presumed for the purposes of subsection (1), unless the contrary is shown, that one of the parties to the void marriage reasonably believed, at the time of the conception of the child (or at the time of the celebration of the marriage if later), that the marriage was valid.'³⁰ The general effect of these two amendments is that it is now extremely difficult to prove that a child of a void marriage is illegitimate.

²⁸ See also s 14(1) Legitimacy Ordinance, Cap 184 which defines the legally recognised forms of marriage. But also see Pegg who has perceptively noted that civil and Christian marriages are not included here presumably because these forms of marriage are self-evidently valid and the legitimacy of children arising from them has always been presumed under English Common law, which is applicable to Hong Kong (note 19 above at 183).

²⁹ This new provision is based on section 28(2) of the Family Law Reform Act 1987 and is intended to make it clear that a mistake of law can support a 'reasonable belief' in the validity of a marriage. It should be noted further that the section does not cover cases where a child is born before the parents enter into a void marriage. See *Re Spence* [1990] Ch 652 and a Comment by Douglas on the first instance decision in (1990) *Journal of Child Law* 2 at p 56; and Bromley & Lowe, note 4 above at 281.

³⁰ This follows section 28(2) of the Family Law Reform Act 1987 (UK) and is intended to establish clearly that the burden of proof lies on the person wishing to challenge the child's legitimacy. See Bromley & Lowe, note 4 above at 281. Moreover, section 19 of PCO has removed the words 'act of intercourse resulting in the birth' from s 11(1) Cap 184 in order to include children born as result of scientifically assisted conception.

The second presumption

The second presumption created by section 5(1) of the PCO is that a man shall be presumed to be the father of a child if he has been registered as the father of that child by an entry made in any register of births kept by the Registrar of Births and Deaths under any Ordinance. This presumption is not based on the marriage relationship at all but merely on the registration of birth. Indeed it reinstates the legal position existing in Hong Kong before 1971 whereby registration of a child's birth constituted an acknowledgement of the child by his natural father.³¹

What is particularly significant about the new presumptions is first, that marriage is no longer the only criterion applicable in the determination of parentage. And second, the definition of marriage has been widened, thus leading to the possible consequence that a larger number of children would become legitimate. Hence, the presumption of paternity will arise even in cases where the marriage between the parents is void. The result is that the old link between marriage and legal parentage has been substantially weakened. It seems that the emphasis is now directed at the fact of fatherhood as a recognised legal status and away from the relationship of marriage formed between the father and the child's mother.³²

Lightening the burden of proof

As noted before, the standard of proof required to displace the presumption of legitimacy under the common law is 'proof beyond reasonable doubt.' This has now been changed by section 5(2) of the PCO. It states that the presumption of law as to the child's legitimacy arising by virtue of marriage of the child's mother at a time related to the conception or birth of the child may be rebutted by proof on a balance of probabilities.³³

³¹ See Pegg, note 19 above at 186-187, and The Law Reform Commission of Hong Kong, *Report on Illegitimacy* (Hong Kong: Government Printer, No 28 Para 1.18). The possible consequences of this presumption must be kept in mind particularly because of the fact that a father of an illegitimate child may only acquire parental rights and responsibility through a court order (s 3(1)(c)(ii) GMO), and yet, such a father may jointly (with the child's mother) register the birth of his illegitimate child (s 12(2)(a)BDRO).

³² See A Bainham, 'When is a Parent not a Parent? Reflections on the Unmarried Father and his Child in English Law' (1989) 3 *International Journal of Law and the Family* 208; and Christina Sachs, 'The Unmarried Father' (1991) *Fam Law* 538.

³³ This follows section 5 of the Law Reform (Parent and Child) (Scotland) Act 1986. But also see section 26 of the Family Law Reform Act 1969 (UK) which makes comparable provisions. But the effect of section 26 (above) has been subject to conflicting judicial interpretation. See especially *S v McC*, *W v W* [1970] 3 All ER 107 HL and *Serio v Serio* (1983) 4 FLR 756. See also Bromley & Lowe, note 4 above at 272.

Before going any further we should note two significant trends which emerge from the new provisions of the PCO. The first is that, although birth during wedlock has not been abandoned as a basis for determining legitimacy of children, the definition of marriage has been considerably widened to such an extent that it comes closer than before to the status enjoyed by unmarried cohabitants.³⁴ The implications of this for the concept of child legitimacy will be considered later. The second trend is that whereas the old common law emphasised marriage as the basis for assigning child legitimacy and, by the use of a strong presumption of paternity, appeared unconcerned with the identity of the genetic father, the PCO now shows greater willingness to accord recognition to the child's father. The consequence is that as the importance of marriage in allocating legal parentage is gradually diminished, there is a corresponding increase in the significance of establishing true paternity. The foregoing observation appears to be amply supported by the statutory institutionalisation of scientific evidence (considered below) as a means of establishing paternity in legal proceedings.

Scientific criteria for determining parentage

Section 13 of the PCO provides that in any civil proceedings in which the parentage of any person falls to be determined, the court may give a direction for the use of scientific tests to determine whether or not a party to the proceedings is the father or mother of that person. The court may exercise these powers either on its own motion or on an application by any party to the proceedings. Such power also includes the direction for the taking of bodily samples from that person or any party to the proceedings.³⁵

Before discussing the powers of the court and how such powers can be exercised under section 13, it is helpful to consider first the relationship between the use of scientific tests in determining parentage, on the one

³⁴ In certain Commonwealth jurisdictions such as Tasmania, New South Wales and Ontario, a child born to cohabitants is presumed to be a child of the couple. In Hong Kong, the HKLRC considered the possibility of extending a similar presumption to children of cohabitants but rejected the idea on the basis that, unlike marriage, cohabitation was difficult to establish. See also Bromley & Lowe, note 4 above at 271–272.

³⁵ This follows section 23 of the Family Law Reform Act 1987 (UK). It must be noted that the court has no power to give direction for scientific tests unless there is disputed paternity in those civil proceedings. Moreover this must be only in cases where the determination of paternity is material to the issue being tried in those proceedings. See also Bromley & Lowe, note 4 above at 274–276.

hand, and the practical value of legal presumptions as to parentage under section 5 of the PCO, on the other. Section 15(2) provides that where in any legal proceedings in which the parentage of any person is to be determined, and a presumption of law exists to the effect that the person is legitimate, the court may, nonetheless, exercise its powers under section 13 to determine the parentage of that person. Moreover, where direction is given by the court under section 13 PCO and such direction is not complied with, the court will be entitled to dismiss the claim for relief notwithstanding the absence of evidence to rebut the presumption of parentage. The result is that an applicant can no longer hide behind the presumption created by section 5 of PCO in order to frustrate any reasonable efforts to establish a person's parentage. In other words, it is not a good argument for a party who has failed (without reasonable excuse) to comply with directions by the court under section 13 to say that he or she should, nonetheless be entitled to relief simply because the legal presumption under section 5 has not been rebutted by the other side.

The overall effect of section 15(2) is to subordinate the presumption of law as to parentage to the more reliable test based on scientific evidence. This is clearly another provision which further weakens the presumption as to parentage and its implied link to child legitimacy. Thus, at the beginning it was a strong presumption (under common law) which was difficult to rebut. Now it has been reduced to a much weaker presumption which can be displaced by the applicant's mere refusal to comply with the direction of the court (under section 13) to submit to medical tests.

Notwithstanding the above observations, it must be noted that the court is not bound by the results of any tests. Furthermore, the court retains the discretion to issue directions for scientific tests under section 13. It will refuse to give such directions, for example, where it would be contrary to the best interests of the child.³⁶ Moreover, where the direction of the court under section 13 is not complied with, for whatever reason, the court retains discretion to draw appropriate inferences, if any,

³⁶ Presumption of parentage may be upheld against a demand for scientific tests where it is in the best interests of the child to maintain the legal protection. See for example in *Re F (Minor: Paternity Tests)* [1993] 1 FLR 225 where Callman J held that it would be unfair to expose an infant to the risk of losing the presumption of legitimacy when in all probability the court's declaration would not lead to the reallocation of parental responsibility.

from that fact as may appear to it proper having regard to all the circumstances (s 15(1)). In sum, the discretionary powers given to the court in such circumstances are intended not only to safeguard the best interests of the child in appropriate cases, but also to provide a smooth transition between the old and the new law.³⁷

The court's power to declare parentage [and legitimacy]

The PCO's concern to establish true paternity (which has been noted above) is also very clearly reflected in the new provisions governing the declaration of parentage. Section 6 of the PCO enables any person to apply to the court for a declaration regarding his or her parentage.³⁸ The new provision is not subject to the condition, as was the case before, that such an application should be part of or incidental to other proceedings such as custody, inheritance or citizenship.³⁹ It is presumably now recognised that a declaration of one's parentage (and hence legitimacy) is an entitlement which should be available to anyone who wishes to have his/her legal status declared unless to do so would manifestly be contrary to public policy.⁴⁰ Perhaps to avoid abuse of process, the PCO prohibits the court to which an application for declaration of parentage and/or legitimacy has been made, from making 'any declaration for which an application has not been made' (s 6(6)). Furthermore, it prohibits any court from making a declaration (whether under PCO or other law) 'that any person is or was illegitimate' (s 6(8)).⁴¹

³⁷ This point is stressed by the House of Lords in *S v S* [1972] AC 24. See also *Re JS (A Minor)* [1980] 1 All ER 1061 CA.

³⁸ Based on section 56 of the Family Law Act 1986 (UK).

³⁹ Section 49 MCO Cap 179.

⁴⁰ A declaration of status was refused by Baker P in *Puttick v AG* [1980] Fam 1, to the petitioner (Astrid Proll), a German citizen who, in the course of evading criminal prosecution in Germany, had arrived in Britain on a forged passport and lied to obtain a marriage licence and thereafter had married a British national. Baker P held that it would be contrary to public policy to grant a declaration to the petitioner who had shown such disregard of the law. Bromley & Lowe (note 4 above at 70-71 and 284) are of the view that section 58(1) of the Family Law Act gives statutory effect to the *Puttick* decision.

⁴¹ A declaration of parentage/legitimacy/legitimation, is binding not only on the parties to the suit but also on all other persons including the Crown. In view of this, the Registrar of the court making the declaration is required to notify the Registrar of Births and Deaths so that the latter can up-date the official register. Furthermore, the significance and wide-ranging effect of the court's declaration has always been recognised; and thus section 7 (PCO) retains the old provision (under s 49 of MCO) which provides for the participation of the Attorney General in these proceedings either at the invitation of the court or by intervention under section 7(2)(a).

Legal parentage in cases of medical intervention

The PCO also provides for the determination of legal parentage in cases where birth or pregnancy is brought about by scientifically assisted human reproduction (SAHR). The subject of SAHR continues to be controversial due to the many legal and ethical problems it raises.⁴² In this regard, Hong Kong has adopted some of the provisions contained in the Human Fertilisation and Embryology Act (1990) of the United Kingdom. During the debates on the Parent and Child Bill, it was disclosed that the Hong Kong government had not yet formulated any policy on the regulation of SAHR because it was still waiting for the Committee on Scientifically Assisted Human Reproduction (SAHR) to complete its report. However, because SAHR treatment was not unlawful and was actually being provided in the Territory and abroad, the government felt that there was a need to 'provide a proper mechanism to determine the legal parentage of children born as a result of such treatment services.'⁴³ This lecture does not deal with these important questions. What is considered here is the extent to which the provisions of the PCO aim at allocating parentage on the basis of a child's genetic ties with his/her parent (as opposed to the test of marital ties between the child's parents) and at applying a scientific criterion in the determination of parentage.

Section 9 of the PCO defines the term 'mother' (in cases where birth or pregnancy is brought about by medical treatment) to mean exclusively that 'woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs.' No other woman is to be legally regarded as the mother of the child notwithstanding the fact that the egg or embryo consisting of that other woman's egg was implanted in the

⁴² See the *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (the Warnock Report) Cmnd 9314 and more generally, R Lee & D Morgan, eds *Birthrights: Law and Ethics at the Beginning of Life* (London: Routledge, 1989).

⁴³ See Legislative Council Debates 10 March at 2412. It must be pointed out however, that the Chairman of the Committee on SAHR, Dr Leong Che-Hung was not impressed with the government's argument. He stated, for example, that his committee had indeed already submitted its final report back in May 1992 and that it had made some specific recommendations which could have been integrated in the PC Bill at that stage. Two significant recommendations were not included. The first is that AID should not be performed on a single woman and the second is that surrogacy should be permitted only in cases where the commissioning parents are also the donors of the genetic material from which the embryo is created (see Legislative Council Debates 10 March at 2414-2415).

carrying mother.⁴⁴ This section applies no matter whether the medical treatment takes place in Hong Kong or abroad.

The thrust of this section is clearly to give priority to the 'carrying mother' no matter who donated the genetic material leading to the creation of the embryo and ultimately to the conception and birth of the child. In this regard, the principle (now largely undermined by scientific developments), that motherhood is self-evident, has been retained with an extra statutory reinforcement. Since no reference is made to the marital status of the carrying mother, it should be assumed that marriage is not relevant to the determination and allocation of motherhood. It is submitted therefore, that since section 9 does not define parentage by reference to the marital status of the child's parents it departs from the old common law criterion for the allocation of parentage.⁴⁵ The question however, is whether section 9 of PCO allocates parentage entirely on the basis of genetic ties between the child and the parent. The answer to this question may well depend on whether the carrying mother is also a genetic mother of the child or whether she is merely carrying an implanted embryo formed from the genetic material of a man and another woman.

We should now turn to the definition of father in similar circumstances ie where birth or pregnancy results from medical intervention known as SAHR. Section 10 of PCO defines the term 'father' to mean the husband or male partner of a woman who is defined as 'mother' under section 9 of the PCO. Two conditions must exist before a man can acquire the legal status of father. The first condition is that he should consent to the placing in his wife or female partner, the embryo or the sperm and eggs or to her insemination.⁴⁶ The second condition is that he will be regarded as father under section 10 only if the sperm leading to

⁴⁴ This is based on section 27(1) of the U K Human Fertilization & Embryology Act 1990.

⁴⁵ But as we shall see below, where such a mother is a married woman and her husband has consented to the medical treatment, her husband shall be regarded as a father of her child even when it is clear that he is not the genetic parent of that child.

⁴⁶ It must be noted here that the consent of the male partner is not expressly mentioned in the PCO but is (hopefully) to be presumed from the fact that child's mother (under s 9) together with her partner 'obtained treatment services in the course of which the embryo or the sperm and eggs were placed in the woman or she was artificially inseminated's 10(3)(a). The earlier wording contained in the PCO Bill (apparently derived from section 28(3)(a) of the UK Human Fertilisation and Embryology Act 1990), which referred to 'a man' instead of 'a male partner' was rejected by the Legislative Council on the ground that it was too general. See HK Legislative Council Report, 10 March 1993 p 2412.

the creation of the embryo carried by the woman has not been obtained from him.⁴⁷ In order to remove any doubts as to which person is to be regarded in law as the father under these particular circumstances, section 10(4) categorically states that where a person is regarded as the father of a child as defined above, no other person is to be regarded as the father of that child. And subsection 10(6) puts additional emphasis by providing that where the sperm of a man other than the other party to the marriage or the mother's male partner (mentioned above) was used to bring about birth or pregnancy, the donor of the sperm is not to be regarded as the father of that child.⁴⁸

The definition of father, discussed above, is certainly not based on the genetic tie between the child and the father. On the contrary, it is a precondition that the father must not have provided the genetic material from which the child has resulted. On the other hand, section 10 PCO does not comply with the old common law's definition of parent by reference to the marital status of the child's parents. This is because although, on the face of it, the marital tie between the child's parents is put into account, yet a male partner to an unmarried mother may also be legally regarded as parent if he meets the two conditions noted above. Furthermore, to the extent that the criterion includes void and voidable marriages and excludes married couples who are judicially separated (section 10(8)), it cannot be said that the marital criterion is particularly significant in determining who should be defined as parent.

In sum, the determination and allocation of parentage under section 10 and, to some extent, under section 9 of PCO, is specifically intended to enable childless couples, who are either married or living together in a quasi-marital relationship, to become parents. Since it is recognised that one or both parties are infertile, the only way the couple can have children is through medical intervention whereby the genetic material of other people are used to create a child for the couple. In this regard, the law has followed science in an effort to deal with the consequences of infertility among couples. This latter device may be viewed as the more recent addition to adoption of children which, until recently, was the

⁴⁷ Based on section 28(3) of the UK Human Fertilization and Embryology Act 1990.

⁴⁸ S M Cretney has noted that this provision contains the risk of giving rise to fatherless children in cases where a husband or male partner can successfully show that he did not consent to the treatment or in cases where a single mother obtains such treatment (note 5 above at 204).

only recognised way by which a couple in a similar situation could have a child. Before concluding this section I wish to consider the provisions of section 12 PCO which empowers the court to sanction surrogacy arrangements between a married couple and a woman who carried the child.

The legal position of surrogate parents

Although Cretney is right in arguing that surrogacy contracts are not necessarily related to the use of artificial fertilization techniques and as such are not 'a modern development',⁴⁹ yet surrogacy has become implicated in the science of human assisted reproduction and it is thus becoming difficult to keep the two developments apart.⁵⁰ Even then this paper does not tackle the legal or ethical issues raised by surrogacy. My object is merely to consider how the PCO determines and allocates parentage and how its approach can be related to the definitions of parent under sections 9 and 10 of the PCO.⁵¹

Section 12 of the PCO appears to be designed to accommodate cases of surrogacy. It makes provisions which empower the court to make parental orders, under specific conditions, providing for the child to be regarded as the child of a husband and wife, one or both of whom donated the gametes which resulted in the conception of that child.⁵² Section 12(1) provides that where the child has been carried by a woman, other than the wife, as a result of placing in her an embryo or sperm and eggs or her artificial insemination, the court may make an order providing for a child to be regarded in law as the child of the parties to a marriage.

The rest of section 12 makes detailed provisions intended first, to ensure that the woman who carried the child, and who is otherwise

⁴⁹ See note 5 above at 201.

⁵⁰ One explanation for the close association of the two approaches is that biological science has made it possible for a woman who is capable of producing eggs but who, for some reasons, cannot carry a child to full term, to remedy her biological shortcoming through surrogacy arrangement.

⁵¹ At the time of enacting the PCO, the Hong Kong legislature was of the view that statutory regulation of scientifically assisted human reproduction (SAHR) should wait for the report of a special committee appointed for that purpose. However, because it was recognised that there existed in Hong Kong a number of children born as result of SAHR, and that since SAHR was not unlawful, it was necessary 'to provide a proper mechanism to determine the legal parentage of children born...[under such circumstances]'. See Legislative Council Reports, 10 March 1993, p 2412.

⁵² Based on section 30 of the Human Fertilisation and Embryology Act 1990 (UK).

defined as mother under section 9, gives free consent to the issuing of a parental order, and secondly, that the applicants are domiciled as well as resident in Hong Kong. Section 12(5) states that before the court can make a parental order, it must be satisfied that both the father of the child (ie where the father is not also the applicant) and the woman who carried the child, have freely and with full understanding of the legal consequences of the proceedings, agreed unconditionally to the making of the order.⁵³ Furthermore, the court must be satisfied that no money or other benefit has been given or received by the husband or the wife. The provision aims at discouraging behaviour which is calculated at inducing the recipient to agree to the arrangement.⁵⁴

Another condition which must be fulfilled before the court can make a parental order is that an application for a parental order must be made within six months of that child's birth.⁵⁵ It is also essential that at the time when the application is made and when the parental order is granted, the child in question must be residing with one or both of the applicants and at least one of the applicants must be domiciled in Hong Kong, have been habitually resident in Hong Kong for at least one year preceding the date of application, or have a substantial connection with Hong Kong. The applicants must also be at least 18 years old at the time of the application.

As may be gathered from the above discussion, section 12 does not seek to establish a child's parentage as such. It is clear that the child in relation to whom an application for a parental order is made, has a mother under section 9 and perhaps a father under section 10. Therefore, the object of section 12 is to enable gamete donors, or one of them, who have previously entered into a surrogacy arrangement to become the new parents of the child in the same way as the law of adoption operates to create new parent-child relationships. Where one of the original parents refuses to consent to the application, the child will maintain parental ties with the original parents.

⁵³ Provided that in the case of the carrying mother such consent must be given after six weeks following the birth of her child.

⁵⁴ Expenses reasonably incurred or other payments which may be initially or subsequently authorised by the court are not forbidden (s 12(7)). The object of the law is similar to that enshrined in section 22 of the Adoption Ordinance (Cap 190).

⁵⁵ In the case of a child born before the commencement of this section, then the application for a parental order must be made within six months of such commencement.

Having regard to the earlier modifications made to the rules of common law relating to the legitimacy of children, and in view of the more recent changes introduced by the PCO, it is tempting to argue that illegitimacy is a withering legal concept. This question is considered in the next part of this lecture.

Is illegitimacy a withering legal concept?

In considering the extent to which illegitimacy in Hong Kong is to be viewed as a withering legal concept, a good starting point is section 3 of the PCO. The section states in effect that from the coming into force of the PCO any relationship between two persons shall, unless the contrary intention appears, be construed without regard to whether or not either of them, or any person through whom the relationship is deduced, is or was at any time an illegitimate person.⁵⁶ Although at first this section might give one the impression that illegitimacy has totally disappeared from our law, this is not the case at all. In this section of the lecture, I examine the approach taken by the PCO to remove the legal consequences of illegitimacy.

Section 19 of the PCO has amended several Ordinances so as to eliminate most of the legal disadvantages attaching to illegitimacy.⁵⁷ These changes can be broadly divided into three categories. The first category includes those legal provisions designed to guarantee to an illegitimate child equal access to property rights. They cover entitlement to maintenance, to intestate succession, to pension as a dependent of the pensioner and to economic support from the net estate of a deceased parent. The second category includes entitlements associated with the

⁵⁶ Section 3(1) states that 'In any (a) Ordinance or publication of the Government in the Gazette having legal effect (whenever enacted or published); or (b) other instrument or document, made after the commencement of this section, references (whether express or implied) to any relationship between 2 persons shall, unless the contrary intention appears, be construed without regard to whether or not either of them, or any person through whom the relationship is deduced, is or was at any time an illegitimate person.'

⁵⁷ The amended statutes are: the Guardianship of Minors Ordinance (Cap 13); the Intestate Estates Ordinance (Cap 73); the Deceased's Family Maintenance Ordinance (Cap 129); the Civil Aviation (Births, Deaths and Missing Persons Ordinance (Cap 173); the Civil Aviation (Births, Deaths and Missing Persons) Regulations (Cap 173); the Births and Deaths Registration Ordinance (Cap 174); the Legitimacy Ordinance (Cap 184) and the Adoption Ordinance (Cap 290). See also the Pension Modifications Ordinance (No 3 of 1993) and the Pensions Ordinances and Regulations (Miscellaneous Amendments) Ordinance (No 4 of 1993).

child's social status and legal identity. These include the child's right to parental guardianship, to domicile, to citizenship, to have a surname and to be registered. The third category, and this has already been considered above, is the child's right to have his or her parentage rationally determined by law. Although these entitlements do not constitute discreet categories, they are, nonetheless, best considered separately in order that we may identify their relative importance to the child.

The child's access to property

The PCO has amended subsection 10(2) of the Guardianship of Minors Ordinance (GMO) (Cap 13) by adding three new paragraphs namely, paras (c), (d) and (e). These new provisions respectively authorise the court, on an application for custody of a minor (whether or not such a minor is legitimate), to make any one or more of these orders against a non-custodial parent or both parents if custody is granted to a third party. These include an order for periodical payments in favour of a minor, an order requiring transfer of property for the benefit of a minor, and an order requiring the settlement of property for the benefit of the minor. The same powers are available to the court under section 12 GMO in cases where there is disagreement between joint guardians and under section 11 GMO where the court has power to exclude a surviving parent from having guardianship rights over the child.⁵⁸

These new powers are significant because they are much wider than the power available to the court under section 5 of the Affiliation Proceedings Ordinance (APO) (Cap 183). The APO is the only statute which, until 1993, enabled a single mother to obtain a limited order for her child's maintenance.⁵⁹ Now the court has jurisdiction under GMO to make the same orders which previously had been available only to the

⁵⁸ Provisions similar to those added to section 10(2) (b) (above), have been added to sections 11(1)(b) and 12(b) of GMO.

⁵⁹ As noted by the Hong Kong LRC, an affiliation order obtained under section 5 does not guarantee economic security for a child of a single woman to the same extent as a child of a married couple. The latter is economically protected within the context of matrimonial proceedings under the relevant legislation (see HKLRC paras 2.10–2.16).

children of the family under the relevant statutes.⁶⁰ But then it seems unavoidable to ask why the APO has not been repealed in view of the fact that the PCO and the recent amendment to the GMO make better provisions for the determination of parentage and for seeking financial and property orders in favour of illegitimate children.

The existence of the APO in the statute book is an additional ingredient to the available cocktail of remedies in this branch of the law, some of which are clearly superfluous. Inevitably, this situation also adds to the labours of lawyers who have to figure out which remedy is more effective, quicker to obtain and perhaps also cheaper for the client, than the others. It has been said once before and I agree, that the law governing children in Hong Kong is internally inconsistent.⁶¹ The problem of inconsistency cannot be discussed here although it is obvious from the overview I have given in this lecture that there are just too many statutes in Hong Kong dealing with the single subject of children.

But I must return briefly and more specifically to the APO and show why it remains in the statute books and what relationship, if any, it has with the relevant provisions of the GMO. An examination of the Legislative Council debates on the PCO Bill shows that the Government had originally proposed to amend the APO in order to remove certain provisions which were considered discriminatory to illegitimate children and their mothers.⁶² However, the government withdrew these proposals before the enactment of the PCO on the ground that a thorough study of the entire APO was required to ensure that it was not inconsistent with the Bill of Rights Ordinance. As a result of an objection by the Legislative Council Ad Hoc Group (that the study

⁶⁰ This has been achieved by deleting sub-section 3(2) of GMO which excluded illegitimate children from its application. Furthermore paras (c) and (d) have been added to 3(1) of GMO to give the court jurisdiction to make financial orders and property transfer in favour of all minors irrespective of whether or not these are born in wedlock. This amendment enables all children to have equal economic support which has previously been available to legitimate children under section 3 of Separation and Maintenance Orders Ordinance (Cap 16) and to children of the family under sections 8, 5, 6 and 10 of the Matrimonial Proceedings and Property Ordinance (Cap 192).

⁶¹ See K O'Donovan, 'Recent Developments in the Law Relating to Children' in *Law Lectures for Practitioners 1986* (Hong Kong: Hong Kong Law Journal Ltd, 1987) at 171-192.

⁶² These include first, the removal of a fixed time restriction of 12 months within which mothers must apply for relief (s 4); second, the removal of the requirement that such remedy is available only to a single woman (s 3); and third, the elimination of the need to corroborate the applicant's evidence (s 5). It was also proposed to enlarge the powers of the court in such proceedings so that it could make orders similar to those which a court can make in favour of children under the MPPPO (Cap 192).

would take too long), a compromise was struck whereby the government agreed to extend the GMO (s 10) to all children. Hence as noted by Mrs Miriam Lau, the effect of section 10 of the GMO is that 'either parent of an illegitimate child could apply for maintenance under the GMO without having to resort to the APO.'⁶³ But until the APO is repealed, an ill-advised or unrepresented single woman could easily apply under the APO for remedies which are clearly more restrictive than what she can get for her child under the GMO.⁶⁴

Another statutory modification has been made to enable a child born to unmarried parents to inherit part of his or her father's property on his death intestate. This has been achieved by repealing paragraph (a) of section 2(2) of the Intestate Estates Ordinance (Cap 73) which defines an intestate's child to mean 'a child of a valid marriage to which that person was a party.' Therefore, the repealing of para (a) leaves the way clear for the application of section 3 of the PCO with the result that previous distinctions between legitimate and illegitimate children are eliminated.⁶⁵

The Deceased's Family Maintenance Ordinance (DFMO) (Cap 129) has also been amended to remove from the definition of the term 'dependant' child, all references to marriage. The amendment enables any child of the deceased (whether or not legitimate) to receive appropriate maintenance from the net estate of the deceased.⁶⁶ It must be stressed that section 4 may be invoked only if the court is of the view that no reasonable provision has been made for that person.⁶⁷

⁶³ See Hong Kong Legislative Council Reports 10 March 1993, pp 2413-14.

⁶⁴ The question as to the relationship between the GMO and the APO, including whether or not APO is consistent with the Bill of Rights Ordinance, has been raised recently by the High Court in the case of *L v C* (MP No 4167 of 1993), but this case cannot be considered here.

⁶⁵ As already noted, section 3 of PCO provides that in any ordinance 'references whether express or implied to any relationship between two persons shall, unless the contrary intention appears, be construed without regard to whether or not either of them, or any person through whom the relationship is deduced, is or was at any time an illegitimate person.'

⁶⁶ Such maintenance may be ordered by the Supreme Court under section 4 of the Ordinance (Cap 129) which empowers the court to order payment out of the net estate of the deceased for the benefit of a person qualifying as dependent.

⁶⁷ Under the new provisions, a dependant child, in relation to a deceased person includes all the minor sons, other sons (whether minor or major) who are incapable of maintaining themselves due to some mental or physical incapacity, all the unmarried daughters, all adopted children and all children conceived but not yet born at the time of the deceased's demise.

With regard to the child's entitlement to support from the parent's pension payments, three additional statutes have been amended to enable an illegitimate child to become a beneficiary to any pension rights of his/her parent. They are: the Surviving Spouses and Children's Pensions Ordinance (Cap 79); the Widows and Orphans Pensions Ordinance (Cap 94); and the Pension Benefits Ordinance (Cap 99). The amendments to the above statutes have been effected by the Pension Modifications Ordinance, No 3 of 1993 and the Pensions Ordinances & Regulations (Miscellaneous Amendments) Ordinance No 4 of 1993 which now define 'a child' for purposes of pension benefits to include an illegitimate child.⁶⁸

The child's social status and legal identity

The above sub-title provides a convenient umbrella under which we can examine certain forms of protection which the PCO has now extended to children born out of wedlock. These include the child's right to have a recognised guardian, to have a specific domicile, to have a surname, to be registered and more importantly, to acquire citizenship. Each of these entitlements has significant implications for the welfare, moral and material development of the child. They are also the means by which the legal system can effectively impose on parents and third parties certain obligations for the benefit of the child.

In this connection, the PCO has abolished the mother's exclusive guardianship rights over her illegitimate child by repealing section 3 (2) of the GMO. This amendment enables the father to acquire 'some or all of the rights and authority that the law would allow him as father if the minor were legitimate' (s 3(1)(d)). A High Court judge or a judge of the District Court is empowered under the new section 3(1)(d) of the GMO to hear an application by a father in order to determine whether or not and if so, how much of the legally exercisable parental power may be vested in him. Before the court can grant any parental rights and authority to the father, it must first be 'satisfied that the applicant is the father of an illegitimate child.' And in deciding how much parental rights and authority should be vested in the applicant, the court shall regard the welfare of the child as the first and paramount consideration

⁶⁸ See section 2 of Cap 79, section 2 of Cap 94 and section 2 of Cap 99.

(amended section 3(2) of GMO).

Another amendment to the GMO relates to the jurisdiction of the court under section 4. The section provides, *inter alia*, that where parents disagree as to any matter affecting a child's welfare, they may apply to the court for directions. However, until its amendment, section 4 applied only to legitimate children. Now the PCO changes this position by extending the same right to all parents whether married or not. The legal effect of this amendment is that a child, irrespective of whether his or her parents are married to one another, is now entitled to the protection and guardianship of both parents.⁶⁹

The law governing the registration of births of illegitimate children has also been amended by the PCO. Although it is still not obligatory for a father to register the birth of an illegitimate child, the amendment now permits him to register the child under certain circumstances without the consent of the mother. Previously, such a father could only register the child by making a joint application with the mother. Moreover, both parents were required to appear and sign in the register (section 12 of Births and Deaths Registration Ordinance (BDRO) Cap 174). The problem with the law as it stood then was that the consent of the mother was still required even in circumstances where the law already acknowledged the man to be the father of the child.⁷⁰ Now the PCO has repealed section 12 of the BDRO and replaced it with a new section 12 which provides, *inter alia*, that a father of an illegitimate child is entitled to apply to have his illegitimate child registered on the production of a certified copy of a relevant court order declaring him to be the father.⁷¹

A new element added by the PCO to the BDRO is the provision for re-registration of the father of an illegitimate child in cases where the birth of such a child was originally registered without indicating who the

⁶⁹ It should be emphasized again that the parental rights and obligations of an unmarried father may only be enjoyed as a result of a court order on application by the father either under section 3(1)(d) or under section 10 of the GMO.

⁷⁰ This would include cases where an affiliation order was made requiring the father to maintain the said child.

⁷¹ A relevant order includes the following: a declaration of court under Part IV of the PCO, that the person is or was the father of the child; an order of the court under the GMO (Cap 13) section 3(1)(d) granting that person any right or authority in relation to the child; and under section 10(1) GMO granting the father custody or access to the child; or under section 10(2) GMO requiring the father to make any lump sum or periodical payment in respect of the child; or an order of the court under section 5 of the Affiliation Proceedings Ordinance (Cap 183) adjudging that person to be the putative father.

child's father was. The preconditions for such re-registration are contained in section 12A of the BDRO and are similar to those applicable in cases of first registration.⁷²

Section 12B of the BDRO is another new provision which also permits re-registration of birth following a court declaration of parentage or legitimacy under section 6 of the PCO. The Registrar of the court which makes the declaration is required under section 6(4) to notify the Registrar of Births and Deaths of the particulars of this declaration. In the event of receiving such details the Registrar of Births and Deaths may, if it appears to him that the birth of that person should be re-registered, authorise the re-registration of the person named in the declaration. In order to enhance the new status of the child, section 12D of the BDRO restricts the supply of certified copies of any previous entry in the register of births which concerns any child whose particulars of births have been re-registered under sections 12A, 12B, and 12C of the BDRO. The restriction is that no certified copy of such past records may be supplied without the consent of the Registrar of Births and Deaths.

Does birth in or out of wedlock matter anymore?

We come now to the final question and that is whether birth in or out of wedlock matters any more? Though we would wish the answer to be otherwise, the true position is that *it still matters for a child to be born in wedlock*. A number of legal disabilities remain which continue to oppress an illegitimate child. These are considered briefly below where the lecture also looks at the reasons for their retention in the present law.

No automatic guardianship rights to fathers

It has been noted above that the new section 21 of the GMO states that a person who is the natural father of an illegitimate shall not be treated

⁷² There are four situations where registration may be made: i) cases where it is requested jointly by both parents; ii) or requested by the mother on production of a declaration made by the mother that such a man is the child's father and a statutory declaration made by the father to the same effect; iii) or at the request of the father on production of a declaration that he is the father of the said child and a statutory declaration made by the mother stating that the man is the father of that child; iv) or at the request of the mother or the father on production of a certified copy of a relevant court order and (where the child has attained the age of 16 years) the written consent of the child to the registration of the applicant as his or her father.

as the father of that child unless he has legal custody of the child under section 10(1) of the GMO or has applied and obtained a court order granting him 'some or all of the rights and authority that the law would allow him as father if the minor were legitimate.'⁷³ The effect of this amendment is to make it clear that parental rights and obligations may only be acquired by a father of an illegitimate child through an application to the court.⁷⁴

It is clear from the foregoing provisions that the father of a child born outside marriage is not automatically obliged, nor indeed, is he entitled to assume parental responsibilities towards his child. The issue of granting a father of an illegitimate child automatic parental rights was considered at length by the Hong Kong LRC. The Commission considered the fact that since a man can father a child under varied circumstances some of which may not be intimate or long term, it would be unsafe for the mother and child to grant all fathers automatic legal parentage without the intervention of the court. Hence, although granting automatic parental rights to such father would remove the distinctions between legitimacy and illegitimacy, the Commission was not convinced that this objective was desirable under all circumstances. The best approach, the Commission thought, would be to adopt a procedure which upholds and safeguards the principle of the best interests of the child rather than merely pursuing formal equality (Paras 5.33 and 5.13–5.16). It was recommended therefore, that a father of a child born outside wedlock must not be granted automatic parental rights without giving an opportunity to the court to consider the matter. This recommendation has been enacted in the new section 21 of the GMO (Cap 13).

Perhaps it should be noted here that when the above statutory provision was enacted in England and Wales in 1987, considerable criticism was raised against it. Consequently, in 1989 the Children Act modified the position by providing that a father can also acquire parental

⁷³ As in other matters under GMO, only a judge of the High Court or the District Court has jurisdiction to make such orders.

⁷⁴ Other options include legitimation of the child by the subsequent marriage between the natural parents or by the adoption of such a minor.

responsibility by agreement with the mother.⁷⁵ It is to be hoped that the HKLRC, which is currently studying custody and guardianship, will pay some attention to these concerns⁷⁶

No equal citizenship rights

The right to citizenship is another area where children born out of wedlock suffer discrimination. The starting point is section 50(9) of the British Nationality Act of 1981 (BNA), which also applies to Hong Kong.⁷⁷ It states that: 'a relationship of father and child shall be taken to exist only between a man and any legitimate child born to him.' This means that a father has no recognised parental relationship with his illegitimate child.⁷⁸ On the other hand sections 15 and 16 of the British Nationality Act specify the circumstances under which a child can acquire BDT citizenship. The most relevant parts provide that:

- (i) a person born in Hong Kong after the commencement of the Act will become a BDT if at the time of birth his/her father or mother is a BDT or if his mother or father is settled in Hong Kong (s 15).
- (ii) a person born outside Hong Kong will become a BDT if at the time of his/her birth his father or mother is a BDT otherwise than by descent; or his father or mother is a BDT and he is serving outside Hong Kong in a designated service (s 16).

When section 50(9) is read together with sections 15 and 16 of the same Act, the result is that a child will be denied a right to citizenship because he or she is illegitimate (see KHLRC Paras 2.26–2.27). This would occur in two hypothetical, but nonetheless plausible, situations.

⁷⁵ See s 4 Children Act 1989; J M Eekelaar 'Second Thoughts on Illegitimacy Reform' (1985) Fam Law p 261 and Bainham (note 32 above at 280). It could be argued on the other hand that because s 5(1)(b) of the PCO creates a presumption of parentage in favour of a man whose name has been registered as 'father', and since such registration can be effected, *inter alia*, by the joint application of the child's mother and that man, therefore, a father of an illegitimate child can acquire parental status simply by jointly registering the birth of his illegitimate child. If this submission is sound, then the HK legal position is, after all, not very far from the UK position where, under s 2(1)(b) of the Children Act, a father of an illegitimate child can acquire parental responsibility by agreement with the mother.

⁷⁶ Athena Liu, 'Parent and Child Bill 1992: Reforming the Law on Illegitimacy' (1992) 22 HKLJ 336 at 351.

⁷⁷ See Schedule No 6 of the British Nationality Act which designates Hong Kong as a 'dependent territory.'

⁷⁸ Under the same section (50(9)) a mother shall be taken to have parental relationship between herself and any child born to her irrespective of her marital relationship with the child's father. See also Bromley & Lowe, note 4 above at 140–142.

The first situation is a case of an illegitimate child born in Hong Kong, whose father is a BDTC but whose mother is neither a BDTC nor settled in Hong Kong. The second is a case of an illegitimate child born overseas, whose father is a BDTC but whose mother is not a BDTC or is a BDTC by descent. In either case, a child born under these circumstances would be denied a right to citizenship which is available to a legitimate child.

When this problem was considered by the HKLRC, it was found that the English LRC had suggested, in an earlier report (No 118) that the British government should consider changing the law in order to enable an illegitimate child to have the same citizenship rights once fatherhood had been established. However, because citizenship was a matter for the UK government (and not for England & Wales), the English LRC had not made definitive recommendations. In 1987 the Family Law Reform Act, which implemented the Law Commission's recommendations, did not attempt to alter this position.⁷⁹

In view of this state of the law, the HKLRC also felt, much like the English and Scottish LRCs, that it could not make recommendations which the Hong Kong Government would have no power to effect. However, it fully endorsed the views of the English Commission that it was unfair to maintain the present situation whereby certain children are discriminated on grounds of their parent's marital status (para 5.36).

Legal parentage and the child's domicile

The Hong Kong law governing the domicile of natural persons is the same as that of England and Wales. As noted by the HKLRC in its report, a legitimate child acquires on birth, his/her father's domicile, as his/her domicile of origin. On the other hand, an illegitimate child takes his or her mother's domicile on birth. As long as the child remains a minor, his/her domicile will change with that of the father or mother according to whether the child is legitimate or illegitimate. On attaining majority age, a former minor may change his or her domicile of origin by acquiring a domicile of choice but, in certain cases, the domicile of origin can revive to fill the void where such a person loses his/her domicile of choice.

⁷⁹ Bromley & Lowe have noted, and with justification, that it is a matter of regret that the British government felt unable to change this discriminatory rule especially in view of the fact that now parentage can be scientifically established with greater accuracy than before (see note 4 above at 285).

The major function of domicile is to establish a relationship between an individual and a particular legal system. It is based on the primary consideration that a child should acquire the domicile of a parent who has legal responsibility towards him/her and, presumably, with whom the child resides. It might be argued then, that where the law has been changed to remove most legal distinctions between all children irrespective of whether or not their parents are married, the law of domicile should be modified accordingly to reflect this policy.

This issue was again considered by the HKLRC which noted that a joint report of the English and Scottish Commissions had criticised the current state of the law relating to domicile and had made recommendations for change. In their recommendations, which have not yet been implemented, the two Commissions proposed that there should be two rebuttable presumptions as to a minor's domicile. The first is that where parents have the same domicile and the minor resides with one or both of them, then the child's domicile should be presumed to be that of the parents. But where the parents domiciles are different, the child's domicile will be presumed to be that of a parent with whom the child permanently resides. As the law now stands, an illegitimate child whose parents have a different law of domicile will acquire the domicile of the mother even if the child is residing with the father and the mother lives outside Hong Kong. Indeed, should the mother later change her domicile, for example, by marrying a person other than the child's father, then the child's domicile will also change to follow that of the mother. This is certainly not a desirable result and cannot be in the interests of that child.

It appears that the main reason why the HKLRC Commission did not make specific recommendations for changing this aspect of the law was that it considered the matter to be outside its mandate, mainly because domicile also affects legitimate children. Although the Commission's view of its mandate might be debatable, this paper can not open the debate here. What can be said, nonetheless, is that the HKLRC preferred the English and Scottish approach where reform in the law of domicile was considered to be a separate matter requiring another study presumably with a different focus (Para 5.37). As we move towards 1997 one would like to see some positive measures directed at the solution of this problem.

Conclusion

The enactment of the PCO has placed Hong Kong among those jurisdictions in the Commonwealth which have recently reformed their laws on the status of children. Apart from the major reforms effected in England and Wales since 1969, other countries such as Australia, Ireland, New Zealand and Scotland have made important changes in their law governing the child and these reforms have been, to a limited extent, influential in the enactment of the PCO.⁸⁰ Hence, although Hong Kong's special relationship with Britain makes it more likely that the territory will adopt (sometimes uncritically) many of the reforms made in Britain, it is clear that in making its recommendations, the HKLRC has taken a broader view by also examining the reforms in child law which other countries have made.

Also the enactment of the PCO is a result of conditions which are specific to Hong Kong. In this connection, it will be recalled that in the 1986 Law Lectures for Practitioners, Katherine O'Donovan strongly argued for reform of the law governing the status of children in Hong Kong. She stated that the law relating to children in Hong Kong was neither internally consistent, accessible, logically ordered nor fair to children.⁸¹ She pointed out that in certain respects Hong Kong was in breach of international law because some provisions of its laws discriminated against children of unmarried parents.⁸² The ICCPR which, inter alia, prohibits discrimination on grounds of birth was ratified by the United Kingdom on May 20th, 1976 and immediately extended to Hong Kong.

⁸⁰ In 1969 New Zealand enacted the Status of Children Act which totally removed all legal distinctions between children born in and those born out of wedlock. On the other hand, a number of provisions have been adopted from the Irish Status of Children Act of 1987 and the Law Reform (Parent and Child) (Scotland) Act 1986. But a greater debt is owed to the drafters of several English statutes from which a number of sections have been adopted. These include the Family Law Reform Act (1969); Family Law Act (1986); the Family Law Reform Act (1987); and the Human Fertilisation and Embryology Act (1990).

⁸¹ See Katherine O'Donovan, 'Recent Developments in the Law Relating to Children' *Law Lectures for Practitioners 1986* (Hong Kong: Hong Kong Law Journal Ltd, 1987) at p 171.

⁸² This was contrary to Articles 24(1) and 26 of the International Convention on Civil and Political Rights (ICCPR). Both articles make provisions for equality before the law, for equal protection of the law and for prohibition of discrimination based on any grounds including one's birth.

Following these developments the Hong Kong government asked its Law Reform Commission, in 1989, to evaluate the law relating to 'legitimation and illegitimate persons' having particular regard to the provisions of the ICCPR and to recommend appropriate changes in the existing law.⁸³ Earlier in 1984, the HKLRC had also been referred to the topic of intestate succession and provision for deceased person's families and dependants. Here again, the subject of illegitimacy had been raised. In this connection, the HKLRC had noted that Hong Kong law was in conflict with international conventions in so far as it discriminated against illegitimate children in matters of inheritance.⁸⁴ While the HKLRC continued with its work on illegitimacy of children, the relevant provisions of the ICCPR were enacted locally in 1991 in the form of the Hong Kong Bill of Rights Ordinance (Cap 383), which came into operation on June 8th, 1991.⁸⁵ These events have no doubt been significant in shaping the process which has led to the enactment of the PCO.

Despite the progressive and far reaching changes brought about by the PCO, the legal concept of illegitimacy persists in our law and indeed, as noted above, illegitimate children are still disadvantaged in matters of guardianship, citizenship and domiciliary law.⁸⁶ Now that the Bill of Rights is part of our law, it is very unlikely that legal discrimination based on birth can pass the test of consistency with the Bill of Rights when the occasion presents itself.⁸⁷ Furthermore, since the United Nations Convention on the Rights of the Child will be extended to Hong Kong (hopefully) this year, it is all the more important that further efforts should be made to bring total legal equality between all children in Hong Kong.

⁸³ See The LRC Report on *Illegitimacy* (No 28) p 1.

⁸⁴ See LRC Report on *Law of Wills, Intestate Succession and Provision for Deceased Persons' Families and Dependants* (No 15) para 1.9 p.4.

⁸⁵ As Article 20 (ICCPR Art 24) and as Art 22 (ICCPR Art 26).

⁸⁶ To the extent that succession to peerage and other titles of honour is of any importance to Hong Kong, one must mention that an illegitimate child is still excluded from these benefits, as is the case in Britain. See Bromley & Lowe, note 4 above at 285.

⁸⁷ It is reported that the government is currently reviewing the Affiliation Ordinance in order to remove provisions which are inconsistent with the Bill of Rights Ordinance. It is submitted that this effort should be extended to all those areas mentioned in this lecture, where illegitimate children continue to suffer discrimination. See Legislative Council Reports 10 March 1993 p 2413.