AN ANALYSIS OF THE EU'S COMMITMENT TO GENDER EQUALITY IN THE CONTEXT OF PRIVATE INTERNATIONAL FAMILY LAW: A CASE STUDY OF INTERNATIONAL CHILD ABDUCTION UNDER REGULATION 2201/2003

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by

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ABSTRACT

This thesis examines the 'space' for gender equality concerns in European private international family law, taking the international child abduction provisions of Regulation 2201/2003 as a case study. International child abduction occurs when one individual, normally a parent, removes a child from their habitual residence in breach of another person's custody rights. This has been regulated on an international level by the Hague Convention on the Civil Aspects of International Child Abduction 1980, which created a civil remedy of returning the child to their habitual residence, as rapidly as possible, with only limited exceptions. Regulation 2201/2003 adopts this Convention as its basis for regulating child abduction, reinforcing the application of the return remedy in abductions between Member States of the EU. The majority of abductions are completed by mothers, normally the primary carer of the child, and some of these abductions are allegedly motivated by a desire to escape domestic violence.

In a doctrinal analysis, using feminist legal tools, this thesis examines whether the EU created a space for the consideration of gender based concerns in relation to international child abduction, as well as addressing other legitimate legal aims pursued when legislating on private international family law in a European context. Private international family law is being developed as an aspect of the political desire to create an Area of Freedom, Security and Justice within Europe, and, alongside gender concerns, the legal aims of private international law, the protection of human and children's rights, and the migration of families and the free movement of persons within Europe should be considered when developing legislative solutions in this context. The implicit role of gender in international child abduction will be analysed, including consideration of

the gendered division of care and domestic violence, and the explicit inclusion of gender concerns in Regulation 2201/2003 addressed. In arguing for a space for gender equality, this thesis examines the balance established between the factors identified and the effectiveness of the strategy of gender mainstreaming in ensuring that gender equality is included in this balance. The competence of the EU to legislate on gender equality issues, including domestic violence, is addressed as part of an analysis of the European citizenship status of women and the commitment to gender equality in the developing sphere of private international family law.

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PREFACE

This thesis reflects the law as of 31st July 2008.

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Diatta v Land Berlin (Case 267/83) [1985] ECR 567

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Decision 2001/470 EC establishing a European Judicial Network in Civil and Commercial Matters OJ [2001] L 174/25, 28th May 2001

Decision No 293/2000/EC adopting a programme of Community action (the Daphne programme) (2000 to 2003) on preventive measures to fight violence against children, young persons and women OJ [2000] L 34, 24th January 2000

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INTRODUCTION AND METHODOLOGY

1. Introduction

The phrase 'child abduction' has powerful connotations but in fact denotes a broad range of situations where a child is no longer in the care of a person with responsibility for that care. Although this situation may be brought about by an individual outside the family structure, the scenario commonly associated with 'abduction', the removal of a child from the care of another, is often accomplished by a parent or another person within the family unit.[1] Abductions of this type may occur within the territory of a State or across an international border.

International parental child abduction constitutes a distinctive challenge in the legal regulation of families across international borders and for the protection of the rights and interests of those involved. The removal of a child from the family unit may have a significant impact on their health and wellbeing[2] and represents a fundamental breakdown of the

[1] This form of 'abduction' was first recognised in the 1970's see I Sagatun, L Barrett "Parental Child Abduction, the Law, Family Dynamics and Legal System Responses" (1990) 18 Journal of Criminal Justice 433, 434. Individuals other than the biological parent may remove a child, but during the thesis the phenomenon will be referred to as 'parental' child abduction.

[2] M Freeman "The Effects and Consequences of International Child Abduction" (1998) 32 Family Law Quarterly 603, 604.

relationships involved. The 'left behind' parent will suffer the loss of their child and the feelings of anguish associated with this experience[3] whilst the abducting parent may themselves regard the removal of the child as a justifiable way of escaping family abuse.[4] In an increasingly mobile open-bordered Europe, which encourages both the creation and dissolution of international families, parental child abduction is a social phenomenon requiring legal regulation which can be achieved through private international law measures. However, providing a legal remedy in this situation which adequately protects and vindicates the rights of all is problematic, particularly since the international dimension adds to the complexity of resolving such cases across jurisdictions and within different legal cultures.

Although regulated by the criminal law in England and Wales,[5] international child abduction has been subject to international treaties which create civil remedies applicable when a child is removed across an international border. The main instrument in this area is the Hague Convention on the Civil Aspects of International Child Abduction 1980 (Hague Convention 1980). A widely ratified international instrument,[6] it has been adopted by all EU Member States and is regarded as one of the

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[3] *Ibid.*, 615.

[4] *Ibid.*, 617; see *op. cit.* Sagatun, n1, 440 arguing that the abduction may be part of a 'power game' on the breakdown of a relationship, a reflection on the emotional disturbance of the abducting parent or an attempt to protect themselves or their child.

[5] In England and Wales section 1, Child Abduction and Custody Act 1985, creates an offence of abduction of a child under sixteen which is committed by a person connected with the child who, without consent, takes or sends the child out of the UK.

[6] At the time of writing, there are 80 contracting States. See http://www.hcch.net/index_en.php?act=conventions.status&cid=24 last accessed 8th May 2008.

most successful private international family law treaties.[7] Under the Hague Convention 1980, international child abduction is the wrongful removal or retention of a child from their habitual residence in breach of custody rights in relation to that child.[8] The Hague Convention 1980 created a remedy of returning the child to their habitual residence[9] as quickly as possible following a wrongful removal or retention.[10] The Hague Convention 1980 provides for only limited exceptions to the operation of this return remedy.[11]

Despite the Hague Convention 1980 being in force in all EU Member States, on the 1st March 2005 Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility,[12] Regulation

[7] Although for criticism see T Johnson "The Hague Child Abduction Convention: Diminishing Returns and Little to Celebrate for Americans" (2000) 33 New York University Journal of International Law and Politics 125.

[8] Article 3, Hague Convention 1980.

[9] Article 12, Hague Convention 1980.

[10] The child may also be returned voluntarily. Article 10, Hague Convention 1980 requires steps to be taken to secure the voluntary return of the child. Return may also be ordered through the enforcement of a custody order in the State the child has been removed or retained in, although this would operate outside of the Convention system which does not require a custody decision to operate under Article 3.

[11] Under Article 12(2), Hague Convention 1980 where the child has been in the State they were abducted to for more than a year and has settled in their environment; Article 13(a) where the left behind parent had consented to, or acquiesced in, the removal or retention of the child; Article 13(b) where returning the child would put them at grave risk of physical or psychological harm; Article 13(2) where the child objects to being returned; Article 20 where returning the child would offend the fundamental rights principles of the returning State.

[12] Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, OJ [2003] L 338, 23rd December 2003.

2201/2003 (colloquially known as Brussels II *bis)* entered into force in all European Union (EU) Member States, except Denmark.[13] It represented a significant expansion in EU law, also regulating the civil aspects of intra-EC child abductions for the first time.

Regulation 2201/2003 was developed as part of the legislative programme associated with the creation of an Area of Freedom, Security and Justice (AFSJ) in Europe.[14] The AFSJ is a wide-ranging policy initiative[15] aimed at contributing to the notion of European citizenship[16] by engaging with policies with impact on citizens' everyday lives.[17] Such political motivation has previously called into question the development of European private international family law,[18] of which Regulation 2201/2003 is part, since it appears to be occurring within a theoretical

[13] As a measure adopted under Article 65, Title IV EC, Denmark is not bound by Regulation 2201/2003 pursuant to the Protocol on the position of Denmark. Both the UK and Ireland opted in to Regulation 2201/2003 pursuant to the Protocol on the position of the UK and Ireland.

[14] Created following the Tampere European Council see: Tampere European Council Presidency Conclusions, 15th-16th October 1999.

[15] Encompassing judicial co-operation in both civil and criminal matters under Title IV EC and Title VI EU respectively, and a common asylum and immigration policy under Title IV EC.

[16] Article 17(1) (ex Article 8) EC, introduced by the Treaty of Maastricht.

[17] *Op. cit.* Tampere Conclusions, n14, paragraph 2.

[18] M Meulders-Klein "Towards a Uniform European Family Law? A Political Approach" in M Antokolskaia *Convergence and Divergence of Family Law in Europe* (Intersentia, Antwerp, 2007), 278.

vacuum with no expressed value or aim beyond contributing to European citizenship and integration.[19]

Despite the policy driver of the AFSJ, the existence of a widely ratified Convention made the EU's intervention in regulating child abduction controversial and its inclusion and structure within Regulation 2201/2003 was subject to intense political negotiation.[20] Under the resulting compromise the Hague Convention 1980 remains in force between the Member States,[21] but its rules are amended by the Regulation.[22] The child abduction provisions of Regulation 2201/2003 are aimed at reinforcing the application of the return remedy between the Member States as it was felt that in too many cases exceptions to the return of the child were being established under the Hague Convention 1980.[23]

Although concerns had been expressed over the use of the exceptions to the return of the child, the Hague Convention 1980 is regarded as successful, providing an effective remedy for international child abduction with a high number of ratifications. However, there has been concern expressed in relation to the effects of the Convention on women. During

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[19] C McGlynn "The Europeanisation of Family Law" (2001) 13 Child and Family Law Quarterly 35, 37; P McEleavy "Brussels II *bis:* Matrimonial Matters, Parental Responsibility, Child Abduction and Mutual Recognition" (2004) 53 International and Comparative Law Quarterly 503, 504.

[20] *Op. cit.* McEleavy 2004, n19, 506.

[21] Article 62(2) and Article 11(1), Regulation 2201/2003.

[22] Article 60, Regulation 2201/2003.

[23] Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility COM(2001) 505 final, 8; P McEleavy "The New Child Abduction Regime in the European Union: Symbiotic Relationship or Forced Partnership?" (2005) 1 Journal of Private International Law 5, 11.

the operation of the Hague Convention 1980 it has become clear that, in the majority of cases, the mother is the abductor. In 2003 Lowe and Horosova found that in 68% of cases worldwide the mother was the abductor.[24] A proportion of these abductions appear to be motivated by the desire of the mother to escape a violent partner with their child.[25] The operation of the return remedy in these circumstances has been questioned as inappropriate.[26] The child is returned to their habitual residence and in most cases the mother will return with them, arguably placing them at further risk of harm.[27]

This thesis will therefore analyse the law relating to international child abduction under Regulation 2201/2003 to consider whether gender equality issues are addressed and accommodated by the EU in the Regulation. The effect of the law relating to child abduction on women will be analysed to

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[24] Although the proportions vary between signatory States: N Lowe, K Horosova "The Operation of the 1980 Hague Abduction Convention: A Global View" (2007) 41 Family Law Quarterly 59, 67. In 1996 70% of abductions in to and out of England and Wales were by mothers: N Lowe, A Perry "International Child Abduction: The English Experience" (1999) 49 International and Comparative Law Quarterly 127, 132.

[25] See for example *Re C (Abduction: Grave Risk of Physical or Psychological Harm)* [1999] 2 FLR 478; *Re M (a child) (abduction: child's objections to return)* [2007] EWCA Civ 260; [2007] 2 F.L.R. 72; *T v T* [2008] EWHC 1169 (Fam).

[26] M Weiner "International Child Abduction and the Escape from Domestic Violence" (2000) 69 Fordham Law Review 593, 596; *Op. cit.* Lowe, Perry, n24, 133; S Shetty, J Edleson "Adult Domestic Violence in Cases of International Child Abduction" (2005) 11 Violence Against Women 115, 120 estimate that a third of US cases as being motivated by domestic violence.

[27] *Op. cit.* Weiner, n26, 599; C Bruch "The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases" (2004) 38 Family Law Quarterly 529; M Kaye "The Hague Convention and the Flight From Domestic Violence: How Women and Children are Being Returned by Coach and Four" (1999) 13 International Journal of Law, Policy and the Family 191, 194; c.f. L Silberman "The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues" (2000) 33 New York University Journal of International Law and Politics 221, 241.

consider the wider question of the 'space' gender equality issues have within the EU legislative framework. The EU is a body which is empowered to pursue gender equality; under Article 3(2) EC the EC is required to pursue equality between men and women in all areas of its activities. As such gender equality issues should have had a 'space' alongside other desirable policies pursued by Regulation 2201/2003.

The adoption of Regulation 2201/2003 within the EC framework provides a new context within which a series of other legitimate legal policy concerns arise. As a Regulation adopted under Title IV EC it deals with the incidences of the policy of free movement of persons within the EU and the consequential migration. Additionally, in the EU there is an increasing role for human rights as a basis for EU action and also an awareness of the effect of EU legislation on children's rights in particular.[28] Finally, as a private international law measure, the EU has developed a model for the free movement of judgments as part of the desire to create a European area of justice which is applicable to the development of European legislation in this area.[29] It will be argued that gender equality also has to be accounted for when legislating in the European framework and it will be considered how this gender equality space could and should be used by the Union. Alongside these legitimate concerns, there should be a 'space' for gender, although gender equality policy may not be the guiding principle in the legislation. All these legal factors are relevant to the development of European private international family law legislation and compete for 'space'.

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[28] See Communication from the Commission "Towards an EU Strategy on the Rights of the Child" COM(2006) 367 final, 4th July 2007.

[29] *Op. cit.* Tampere Conclusions, n14, Part VI; Council of the European Union "Council Report on the Need to Approximate Member States' Legislation in Civil Matters" 13017/01, Justciv 129, 29th October 2001.

This thesis will analyse where gender based concerns may arise in child abduction law, focusing particularly on those issues which are specific to the European context. It will examine whether Regulation 2201/2003 incorporates gender equality issues, the degree of awareness of these issues at Community level, and how the balance between gender equality and other legitimate concerns was struck in relation to international child abduction. The balance of the various factors, the space for gender equality and the ability of the EC to promote gender equality and protect women's interests is the focus of this thesis, providing an insight into the role of European gender equality policies outside the employment context.[30]

Despite the focus in this thesis on gender based concerns about international child abduction, it will not be argued that gender equality should be the dominant concern when legislating in the European Union. It is acknowledged that the other factors identified are also legitimate aims for the law. It will be demonstrated that women's interests should be included when formulating policy in relation to child abduction because their exclusion can have a detrimental impact on women in the operation of legislation. However, the balance to be struck between the different legal factors in legislation, although it should include women's interests, is a matter for law-makers. The balance between the factors established by Regulation 2201/2003 is considered to demonstrate that gender issues were not incorporated amongst the other factors identified. However, the thesis stops short of advocating specific legislative changes because it does not establish a normative framework against which these changes can be assessed. There are a range of possible 'answers' to the legislative problem

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[30] C Hoskyns *Integrating Gender* (Verso, London, 1996), 209.

of child abduction, and the 'answer' advocated will depends on perspective. The point of this thesis is to clearly identify the different factors which may have an influence and to demonstrate, and argue for, the inclusion of gender issues in this legislative balance, using Regulation 2201/2003 as the basis of the study.

International child abduction is taken as the 'case study' because, although it is only implicitly a gender issue, there was acknowledgment of the difficulties some women faced as a result of the operation of the Hague Convention 1980,[31] on which Regulation 2201/2003 was based. McGlynn states:

'It was the area of child abduction that led to some of the more protracted negotiations leading to the adoption of the Regulation and tells us much about the future of Union family law.' [32]

Regulation 2201/2003 is part of a developing agenda at European Union level in relation to family law following the transfer of competence from the third to the first pillar by the Treaty of Amsterdam in 1998, and the role of gender within this structure is an important consideration. As the EU develops, its women's policy should no longer be confined to the economic sphere and needs to be extended into new competencies such as private international family law.[33] The EU has acknowledged this by developing a strategy of 'mainstreaming' gender into legislation, considering the impact

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[31] See *op. cit.* Weiner, n26.

[32] C McGlynn *Families and the European Union: Law, Politics and Pluralism* (Cambridge University Press, 2006), 168.

[33] *Op. cit.* Hoskyns, n30, 209.

of legislation on men and women before it is adopted.[34] Even when legislation is not explicitly aimed at achieving gender equality, gender issues should still have a 'space' within the legislative framework. The EU's ability to balance priorities and incorporate women's interests into legislation outside the employment context will be examined and family law is an appropriate area in which to consider this. As Pylkkånen argues:

'...any legislative action in regard to family life should be both firmly anchored in the reality of differences in bargaining power, and subjected to critical scrutiny in regard to its underlying notions and biases.'[35]

An analysis of child abduction law can therefore expose whether the EU's commitment to gender equality carries through to creating a space for consideration of gender issues in private international family law, amidst other identified legitimate policy concerns not focussed on women. This thesis will therefore examine the current aims of European private international family law and ask the 'woman' question in this context, demonstrating both the place of women's interests in the EU architecture and the EU's approach to gender equality. 'Asking the woman question' means examining the law for its failure to account for women's experience, to consider how legal concepts disadvantage women, and how the law can accommodate women's interests appropriately.[36] Family law is an

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[34] See European Commission "Incorporating Equal Opportunities for Women and Men into all Community Policies and Activities" COM (1996) 67 final, 21st February 1996.

[35] A Pylkkånen "Liberal Family Law in the Making: Nordic and European Harmonisation" (2007) 15 Feminist Legal Studies 289, 300.

[36] K Bartlett "Feminist Legal Methods" (1990) 100 Harvard Law Review 829, 850.

important area in which to ask the 'woman' question because, as Diduck and O'Donovan state, it highlights:

'...the ways in which the legal regulation of private, family, *relations are also about the regulation of social and political relations; they are about the nature and value of dependence and independence, about the balance of social and economic power...* '[37]

The woman question is always a potentially relevant one in legal analysis[38] and is an important part of examining a constantly reforming EU, providing a critique which can address gender in European law and thus provide new insights not only on private international law but also on the EU's commitment to gender equality.[39]

Previous research on private international law in the EU has considered the lack of purpose or aim of European intervention in private international family law,[40] the operation of the rules of Regulation 2201/2003[41] and its potential impact on children and human rights.[42] This thesis, although

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[37] A Diduck, K O'Donovan "Feminism and Families: *Plus Ça Change?*" in A Diduck, K O'Donovan (editors) *Feminist Perspectives on Family Law* (Routledge, Oxford, 2006), 1.

[38] *Op. cit.* Bartlett, n36, 849.

[39] J Shaw "Importing Gender: the Challenge of Feminism and the Analysis of the EU Legal Order" (2000) 7 Journal of European Public Policy 406, 425.

[40] *Op. cit.* McGlynn 2001, n19; *op. cit.* McGlynn 2006, n32.

[41] *Op. cit.* McEleavy 2005, n23.

[42] H Stalford "EU Family Law: A Human Rights Perspective" in J Meeusen *et al* (editors) *International Family Law for the European Union* (Intersentia, Antwerp, 2007); H Stalford "The Rights of the Child in International Family Proceedings: An EU Perspective" [2003] International Family Law 68; *op. cit.* McGlynn 2006, n32.

considering the operation of Regulation 2201/2003, will instead address the difference of the European context, with the added dimensions of European citizenship and free movement of persons, as opposed to an international or a domestic context, and its implications for private international family law. Article 3(2) EC, requiring the EC to pursue a policy of equality between men and women, and its impact will be the focus. Women's interests have not been specifically considered in this context, although the pursuit of gender equality at a European level is a significant focus of research given the EU's expanding competence to regulate discrimination law.[43] Gender mainstreaming at a European level[44] and the EU's approach to notions of equality have both been extensively explored,[45] although there has been little research on how these policies work alongside other areas of competence such as private international law. Academic research has yet to consider women's interests in this area of EU competence or how the child abduction rules in particular will work

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[43] See for example T Hervey, D O'Keeffe (editors) *Sex Equality in the European Union* (John Wiley, Chichester, 1996); A Masselot "The State of Gender Equality Law in the European Union" (2007) 13 European Law Journal 152.

[44] F Beveridge "Building Against the Past: the Impact of Mainstreaming on EU Gender Law and Policy" (2007) 32 European Law Review 193; J Shaw "The European Union and Gender Mainstreaming: Constitutionally Embedded or Comprehensively Marginalised" (2002) 10 Feminist Legal Studies 213; M Pollack, E Hafner-Burton, "Mainstreaming Gender in the European Union" (2000) 7 Journal of European Public Policy 432; J Shaw "Mainstreaming Equality and Diversity in European Union Law and Policy" (2005) 58 Current Legal Problems 255; C Booth, C Bennett "Gender Mainstreaming in the European Union: Towards a New Conception and Practice of Equal Opportunities" (2002) 9 European Journal of Women's Studies 430; E Lombardo, P Meier "Gender Mainstreaming in the EU: Incorporating a Feminist Reading?" (2006) 13 European Journal of Women's Studies 151.

[45] E Howard "The European Year of Equal Opportunities for All – 2007: Is the EU Moving Away from a Formal Idea of Equality?" (2008) 14 European Law Journal 168; S Walby "The European Union and Gender Equality: Emergent Varieties of Gender Regime" (2004) 11 Social Politics 4; M Stratigaki "The Cooptation of Gender Concepts in EU Policies: The Case of 'Reconciliation of Work and Family'" (2004) 11 Social Politics 30; E Lombardo "EU Gender Policy: Trapped in the 'Wollstonecraft Dilemma?" (2003) 10 European Journal of Women's Studies 159.

for women, particularly in cases where domestic violence is alleged. The issue of abductions motivated by an attempt to escape domestic violence for example has, thus far, only been explored in the context of the Hague Convention 1980.[46]

International child abduction and domestic violence is a problem that has already been extensively commented on. This thesis is not intended to try and add to this debate by providing a 'new' solution to this problem, and the thesis questions are directed at EU law rather than specifically on its implementation by Member States.[47] In addition, the scope of this thesis does not extend to examining masculinity and family law[48] and, although children's rights should be addressed by the law relating to international child abduction, this does not form a central theme of the research.[49]

Part 2 will now address the methodology used to achieve the aims of this thesis, the use of doctrinal legal analysis alongside feminist legal theory, and the approach taken to 'women' and their interests.

2. Methodology

[46] *Op. cit.* Weiner, n26; *op. cit.* Bruch, n27; *op. cit.* Kaye, n27.

[47] For the implementation of Regulation 2201/2003 by the Member States see K Boele-Woelki, C González Beilfuss (editors) *Brussels II* bis: *Its Impact and Application in the Member States* (Intersentia, Antwerp, 2007).

[48] On masculinities and the problems with theorising masculinities in the context of family law see R Collier "Feminist Legal Studies and the Subject(s) of Men: Questions of Text, Terrain and Context in the Politics of Family Law and Gender" in A Diduck, K O'Donovan (editors) *Feminist Perspectives on Family Law* (Routledge Cavendish, Oxford, 2006).

[49] This has been examined elsewhere see *op. cit.* Stalford 2007, n42.

2.1. Methodology: Feminist Legal Theory and Doctrinal Analysis

As outlined above, this thesis will address the EU's ability to consider and create space for issues of importance to women in the new area of private international family law, using the example of international child abduction. As a thesis which focuses on 'the woman question', it necessarily engages with issues of feminist legal theory. Feminist legal theory explores how law perpetuates and maintains women's oppression and how this oppression is embodied in law. Conaghan states that there are three common aims to feminist legal theory, although they are all open to debate:

'First, feminist legal scholars seek to highlight and explore the gendered content of law and to probe characterizations positing themselves as neutral and, more specifically, ungendered. Secondly, they are part of a cross-disciplinary feminist effort to challenge traditional understandings of the social, legal, cultural and epistemological order by placing women, their individual and shared experiences, at the centre of their scholarship. Thirdly, feminist legal scholars seek to track and expose law's implication in women's disadvantage with a view to bringing about transformative social and political change. [50]

The feminist aspect of the methodology adopted in this thesis will be based on the first and the third of Conaghan's aims. In engaging with the first of Conaghan's aims, the thesis will explore the nature of international child abduction and the law related to it by considering the role of gender both explicitly, on the face of Regulation 2201/2003, and implicitly, by examining its potential effects. This will demonstrate the role of gender in

[50] J Conaghan "Reassessing the Feminist Project in Law" (2000) 27 Journal of Law and Society 351, 359.

child abduction law and the extent to which this has been accounted for and accommodated in the EU's intervention in Regulation 2201/2003. In relation to the third aim, the competence that the EU has to tackle gender equality will be examined to consider how these competencies might be used to bring about the equality of men and women, by addressing Europe-wide issues such as domestic violence and the effectiveness of current EU equality strategies, such as gender mainstreaming. These two elements of analysis together will establish the role of gender in international child abduction, and examine the competence and role of the EC in developing a space for the consideration of gender equality concerns in this area of European law.

The thesis does not contribute to feminism as a political project, nor does it engage with academic feminist debates. It uses methods already established to provide a feminist analysis of the effects of the law on women and the role of law in gender relations which feature in the context of international child abduction.[51] Feminist tools are used to demonstrate the potential effects of gender in child abduction law following Regulation 2201/2003, rather than to provide a 'feminist' answer to this social problem because of the acknowledged relevance and legitimacy of other European policy factors.

These additional factors and policies which exist within the AFSJ and private international family law must be acknowledged in an EU context given its constitution, attributed competencies and the politically contested nature of its decisions. The space provided for gender concerns is explored alongside other factors of relevance in this context: private international family law, human and children's rights, migration and the free movement

[51] See 2.2. of this chapter for details of the tools adopted.

of persons. The thesis does not therefore adopt a singular 'feminist' perspective because it accepts the relevance of other factors alongside women's concerns, as exposed by a feminist analysis, and addresses whether they have been dealt with effectively in the context of Regulation 2201/2003 and international child abduction.

Although this can be criticised as working within a political system which is state-like, patriarchal and of little use for women, and accepting the legitimacy of other policy aims which are themselves likely to have gendered effects, Walby points out that feminist activity has been re-framed as a discourse within existing systems, rather than an anti-system discourse.[52] The new, evolving political environment of the transnational European Union entity can be utilized in securing women's needs and interests; therefore working with and analysing the system is a legitimate feminist aim.[53]

To explore the other factors of relevance to the legal regulation of international child abduction, doctrinal legal methods of analysis are also engaged. Traditional forms of analysis will be used to highlight the legal aims of the other areas of law identified as relevant. Doctrinal legal analysis focuses on the use of legal texts, legislation and case law in particular, to demonstrate both the content of legal rules and their legislative purpose. The law is being observed 'internally', i.e. from the perspective of respecting the processes of law and legal reasoning.[54] To

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[52] S Walby "Feminism in a Global Era" (2002) 31 Economy and Society 533, 546.

[53] *Ibid.*, 551.

[54] R Banakar "Studying Cases Empirically: A Sociological Method for Studying Discrimination Cases in Sweden" in R Banakar, M Travers (editors) *Theory and Method in Socio-Legal Research* (Hart Publishing, Oxford, 2005), 155.

develop the analysis an approach based on the use of texts: case law, legislation and the publications and policy papers produced by various bodies, particularly the institutions of the EU, will be adopted.[55]

The doctrinal and the feminist method are used to explore different aspects of international child abduction and the relevance of the factors identified to its regulation. These methods are used together to produce an integrated approach highlighting both the space and overlap of the issues identified. The use of both a feminist and a doctrinal approach allows the overlap of the various factors to be identified and analysed, for example a feminist analysis can be conducted in relation to the content and ideology of family law or human rights although these areas of law have independent relevance to the issue of child abduction. The complementary use of these legal methods allows a holistic analysis of the space provided for, and the interaction between, both gender and the other factors identified as relevant to international child abduction.

This thesis is also 'doctrinal' in the sense that it has not pursued an empirical methodology to explore the effect of the law on international child abduction upon women. The thesis is not aimed at exploring the lived experiences of those involved in international child abduction. An empirical methodology would not be appropriate to achieve the aims of this thesis, it would not add to the understanding of the theoretical 'space' provided for gender equality concerns at European level. The analysis is instead focussed on the legislative aims of private international law in the European context, the way in which international child abduction has been regulated and whether this legislation contemplates the impact of the law

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[55] J Mason *Qualitative Researching* (2nd edition, Sage Publications, London, 2005), 52.

on women in particular. The rapidly developing English case law in this area provides an insight into how the law is being used, both by individuals and the courts, and highlights the problems occurring in practice, allowing consideration of the impact of the law on some women affected by international child abduction.[56] This case law based analysis is used to demonstrate the importance of securing a space for gender concerns when regulating international child abduction, alongside the other factors previously identified.

The relevance of, and specific aims pursued by, the legal factors identified will be explored in detail in *Chapter Two.* The feminist tools to be used in the analysis and the definition of various terms will be explored in the next section.

2.2. Defining a Feminist Analysis of Law

Addressing what is meant by 'feminism' as a theoretical approach in law is increasingly problematic. The basic premise of accepting that women are subordinate to men in society and that it is desirable to alter this situation is far too general to act as a description of the nature of feminist scholarship.[57] Feminist scholars are in fact divided over many of the key issues concerning women.[58] This division extends to questions of how to address gender inequalities and defining what women's interests actually are. This is partly because 'feminism' is an approach employed in many different disciplines and many different 'types' of feminism have evolved

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[56] *Op. cit.* Banakar, n54, 148.

[57] A Bottomley *et al* "Dworkin; Which Dworkin? Taking Feminism Seriously" in P Fitzpatrick, A Hunt (editors) *Critical Legal Studies* (Blackwell, Oxford, 1987), 49.

[58] *Ibid.*

over the last century.[59] Indeed, it sometimes appears that there are as many 'feminisms' as there are feminists. Instead of engaging with the furtherance of this debate, which arguably is dividing feminism from women who are not engaged with academia, this section will define the approach adopted for the purposes of this thesis. The key elements of the role of law in gender relations will be identified, which, Walby argues, should provide a nuanced approach which can engage in a practical way with law in a European context.[60]

2.2.1 The Categories of 'Woman' and 'Gender'

The term 'gender' will be used to refer to the social relations between and among the sexes.[61] Shaw argues that this allows the focus of the analysis to be on the differences in power between men and women as groups and how law is constructed so as to exclude the interests of women, who are less powerful.[62] Sex is thus the biological category of man and woman and gender is the socially constructed categories of male and female. Masculine and feminine qualities are socially defined, and therefore are evolutionary, contested and contextual. Social categories are unstable as the definition of these qualities is the product of power relations and evolving social contexts.[63] Law forms part of these power relations both in reflecting and

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[59] For a summary see N Lacey "Feminist Legal Theory and the Rights of Women" in K Knop (editor) *Gender and Human Rights* (OUP, 2004).

[60] *Op. cit* Walby 2004, n45, 9.

[61] J Shaw "Law, Gender and the Internal Market" in T Hervey, D O'Keeffe (editors) *Sex Equality in the European Union* (John Wiley, Chichester, 1996), 286.

[62] *Ibid.*

[63] M Verloo "Multiple Inequalities, Intersectionality and the European Union" (2006) 13 European Journal of Women's Studies 211, 221.

helping to constitute and sustain both the definition of the qualities associated with the categories, and the resulting social expectations.[64]

It is acknowledged that there is considerable debate over the value of using the terms 'woman' and 'gender' and the legitimacy of these labels in academic research. The 'destruction of the subject' means that, in philosophical terms, it is theoretically impossible to generalise about 'women' or 'gender' as a category because this fails to capture the reality of an individual's experience. To ignore the multiple structures and discourses that affect individual lives risks essentialising both their experience and the nature of 'women' as a category.[65] Women's oppression may result from other factors such as race, class or sexuality. Individual women may feel that these sources of disadvantage are actually more constraining to their lives than their gender. Therefore, meta-theorisation about the nature of women's oppression and appropriate strategies for challenging it are arguably illegitimate because women do not have a shared experience, identifiable as the perspective of *all* women, from which to advocate a change in policy or law.[66] The advocacy of a particular normative position thereby becomes impossible because of the interaction of these various sources of inequality and the individualisation of experience.

Although these are not untroubled concepts, the fragmentation of 'women' or 'gender' as categories of analysis does not assist in pursuit of actual

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[64] C MacKinnon *Toward a Feminist Theory of the State* (Harvard University Press, Cambridge Massachusetts, 1989), 160.

[65] *Op. cit.* Bartlett, n36, 835.

[66] *Op. cit.* Conaghan, n50, 366.

change for women because it makes their interests practically impossible to define. The pursuit of women's interests is then rendered vulnerable to other concerns or interests which are more coherent and less contested, which then appear more crucial, and more manageable, to legislators. In an atmosphere where there are no clearly defined policy priorities, this makes gender based arguments even more susceptible to being sidelined against the force of other, more powerful concerns.

Alongside the fragmented nature of the individual, it should also be recognized that legal rules deal in generalities. Feminists must question the nature of the generalisations made but also accept that legal rules, for all their imperfections, operate on this level. To use law means that generality must be engaged with, and general concepts such as 'gender' and 'woman' will therefore be employed. The challenge for feminists is to question the nature of this generality whilst still addressing women's needs in law. Using the category 'gender' or 'woman' must therefore be accepted as valuable in some circumstances, despite the risks attached to a resulting monolithic approach to women's needs. Indeed acting on gender inequality may eventually have benefit for those who experience other forms of inequality for, as Verloo argues:

'Inequalities are found in both the public and the private spheres. They are reproduced through identities, behaviours, interactions, norms and symbols, organisations and institutions, including states and state like institutions. Inequalities are not independent, but deeply interconnected, maybe even interdependent.'[67]

[67] *Op. cit.* Verloo, n63, 224.

These categories remain valuable for the purpose of addressing women's interests in law, but a critical stance must be adopted towards their use to attempt to avoid essentialism.[68] The fragmentation and intersections of these inequalities and varying needs are therefore acknowledged, but not debated in this thesis and the terms 'woman' or 'women' and 'gender' are used throughout.

2.2.2. The Role of Law in Gender Relations

There are three ways in which law contributes to the maintenance of power relations in society and the construction of gender which feminists use to analyse the effects of law on women and gender relations. First, in explicitly differentiating between men and women the law can actively disadvantage women, i.e. the law is sexist.[69] This is addressed by treating all individuals equally, but merely results in hiding difference and men becoming the standard by which women are judged.[70] Secondly, values in the legal system such as 'equality', 'objectivity' and 'neutrality' are male values meaning that legal judgment is judgment against compliance with a male standard, i.e. law is male.[71] The law itself embodies the standard of the male in being objective, rational and in responding to male interests, thereby excluding the experience of women.[72] Thirdly, law is part of the processes in society which produce gendered identities and power

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[68] *Op. cit* Bartlett, n36, 835.

[69] C Smart "The Woman of Legal Discourse" (1992) 1 Social and Legal Studies 29, 31.

[70] *Ibid.*

[71] *Ibid.*, 32.

[72] *Op. cit.* MacKinnon, n64, 163.

relations, rather than the law simply applying to previously gendered subjects, i.e. law is gendered.[73] There is no assumption in this that the law exploits women for the benefit of men; instead the law is part of constituting both male and female identities.[74] Law is not monolithic or unitary and can embody a variety of different aims, but its central role in society means that it is a powerful force in constructing gendered identities.[75]

Women's policies do not therefore necessarily reflect feminist analyses of law: e.g. sex discrimination law uses a male norm to decide whether there has been discrimination.[76] Since law itself has been exposed as male and implicated the construction of the role of women in society it is questionable whether law is a legitimate strategy to actually challenge the oppression thereby created.[77] The law is arguably impervious to women's concerns.[78] However, although law has embodied and perpetuated the oppression of women in society, this does not prevent it being a powerful tool for societal change. This thesis does not argue that law represents 'the solution' to the problem of women's continuing oppression in society, but instead that, if legislating on a topic, the resulting law should accommodate

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[73] *Op. cit.* Smart 1992, n69, 34.

[74] *Ibid.*

[75] *Ibid.*, 37.

[76] See S Fredman "European Community Discrimination Law: A Critique" (1992) 21 Industrial Law Journal 119.

[77] C Smart *Feminism and the Power of Law* (Routledge, London, 1989), 25.

[78] See M Mossman "Feminism and Legal Method: The Difference it Makes" (1987) 3 Wisconsin Women's Law Journal 147.

women's interests, which may eventually change the gendering effects of the law.

2.2.3. The Role of the Public/Private Divide

In addressing international child abduction, the EU is regulating an aspect of family life through law. The family is traditionally regarded as the private sphere, protected from regulation by the state. This is in contrast to the public sphere of the market and public affairs. Theoretically, the law draws a boundary between the public and the private by direct regulation of the public sphere.[79] Regulation of the family is left to other social mechanisms, leaving the family as a place of personal freedom.[80] The degree to which the family is regarded as the 'private' sphere and intervention by the State is legitimate varies over time and depends on the policies adopted by the State as desirable.

This theoretical division operates along gendered lines with the private sphere being the sphere of women, and the public sphere being that of men. Men have had the role of mediating between both spheres because they participate in the private sphere, and traditionally have the power of organising private relations.[81] The element of privacy means that, traditionally, intervention in family life should be avoided by the State.[82] Donovan argues that the State thereby effectively delegates its power of

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[79] K O'Donovan *Sexual Divisions in Law* (Weidenfield and Nicolson, London, 1985), 9.

[80] *Ibid.*

[81] *Ibid.*, 4.

[82] *Ibid.*, 14.

regulation to the husband to control what goes on in the private sphere. The implication is that those in the domestic sphere, i.e. women and children *'...need not look to law to rectify any power imbalance.'*[83] Feminists have identified the family as a significant site of oppression of women, where gender roles are propagated and abuse, such as domestic violence, flourishes.[84] Due to the public/private distinction, women have traditionally been regarded as beyond the reach of legal guarantees and oppression and violence cannot easily be challenged.[85] Direct intervention in the private sphere by the State has increased greatly, but the public/private distinction continues to affect the nature of this intervention and the sensitivity or political nature of legislating to regulate the family.

However, feminists have also questioned the legitimacy of the public/private division by highlighting the fact that State policies and law influence behaviour to encourage a particular form of 'family'.[86] This privileged family form is based on married heterosexual partners, where the mother remains at home as the primary carer for the children, supporting a male breadwinner who participates in the market to maintain the family financially.[87] The role of the State and law in particular, is

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[83] *Ibid.*, 11.

[84] C Smart *The Ties that Bind: Law, Marriage and the Reproduction of Patriarchal Relations* (Routledge & Kegan Paul, London, 1984), 10.

[85] *Ibid.*, 164.

[86] M McIntosh "The State and the Oppression of Women" in A Kuhn, A Wolpe (editors) *Feminism and Materialism: Women and Modes of Production* (Routledge and Kegan Paul, London, 1978), 268.

[87] M Fineman "Masking Dependency: The Political Role of Family Rhetoric" (1995) 81 Virginia Law Review 2181, 2192.

important in conveying and reproducing gender based ideologies and structures such as 'the family', even if it does not intervene in the family structure directly.[88] Fegan argues that law has an important role in this process because:

'...a central feature of legal ideology seems to be public belief in the neutrality of law and faith in judicial impartiality in particular, which actually allow it to act as a significant reinforcer of ideologies.'[89]

Although the law is not a homogenous body with a singular purpose, it still *'...sustains, perpetuates and justifies a consensual view on sex roles and the relative rights and duties of men and women'*,[90] particularly in relation to the family. The family is therefore an explicitly gendered institution, which teaches and propagates gender. The individual and their choices remain central to the organisation of family life, even if the State does have a role in encouraging certain forms of family.[91] Elliot highlights the fact that, although law and welfare systems do privilege some family forms, this does not define how all people organise their family life.[92] State policies affect families in different ways, and other influential factors beyond the State, such as religion are also relevant.

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[88] E Fegan "Ideology After Discourse: A Reconceptualization for Feminist Analyses of Law" (1996) 23 Journal of Law and Society 173, 189.

[89] *Ibid.*, 186.

[90] *Op. cit.* Smart 1984, n84, 21.

[91] N Rose "Beyond the Public/Private Division: Law, Power and the Family" in P Fitzpatrick, A Hunt *Critical Legal Studies* (Blackwell, Oxford, 1987), 73.

[92] F Elliot "The Family: Private Arena or Adjunct of the State?" (1989) 16 Journal of Law and Society 443, 450.

However, the definition of the appropriate roles within the private sphere, the family, is particularly influential on the production of gender relations. The law plays a major role in constructing gender ideologies and identities for private structures which play a role in determining relationships between the sexes.[93] The public/private distinction therefore remains a useful tool for analysing the role of the law, and thus of the State, or in this case the supranational body of the EU, in encouraging family forms and shaping the nature of gender relations and the expectations of men and women. The nature of the ideological intervention in the private sphere by the law can be a useful indicator of the role expected of women in society. It is a distinction which can demonstrate the dislocation of State expectations of gender roles in the public and private spheres from reality as family forms have changed and women have increasingly participated in the labour market.[94] The nature of the public/private distinction is not absolute; instead it denotes a difference in the form or nature of intervention in each sphere, whether direct or indirect, and the perception of legitimacy and sensitivity of legal intervention.

2.2.4. The Meaning of 'Equality'

The way the law 'talks' about the oppression of women in society and conceptualises it as a legal problem is to consider women as 'unequal' to men. Formally women have equal rights under the law but women remain disadvantaged in society. The recognition of this position by feminists has led to closer examination of the concept of 'equality' itself, what it means, and its value to the feminist project.

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[93] *Op. cit.* O'Donovan, n79, 134.

[94] This will be considered further in *Chapter Two*, 3.3.

There are three forms of equality. First, formal equality is the identical treatment of individuals.[95] This does not account for existing social disadvantage or inequality[96] and means that the law seeks to make the position of women equivalent to that of men.[97] It deals only with the identified inequalities the law has accepted as a category of disadvantage and fails to challenge the circumstances giving rise to these unequal effects.[98]

Secondly, substantive equality compensates for the social disadvantages suffered by certain social groups, which may require preferential treatment.[99] Substantive equality can aim at either equality of opportunity, where the starting point is made equal, or equality of results, by use of quotas or preferences for those who are deemed disadvantaged.[100] This is difficult conceptually because achieving equality actually requires discrimination. Highlighting women's differences to men risks invoking stereotypes of female behaviour and reinforcing women's status as the

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[95] *Op. cit.* Howard, n45, 170.

[96] *Ibid.*

[97] D Majury "Strategizing in Equality" in M Fineman, N Thomadsen (editors) *At the Boundaries of Law: Feminism and Legal Theory* (Routledge, New York, 1991), 323.

[98] J Mitchell "Women and Equality" in A Phillips (editor) *Feminism and Equality* (Blackwell, Oxford, 1987), 28.

[99] *Op. cit.* Howard, n45, 171.

[100] *Ibid.*

'Other' by emphasising their difference from the male norm, making them abnormal.[101]

Finally, a pluralist approach to equality should celebrate difference and accept that different identities should be treated according to their own requirements.[102] It is easier to consider this notion of equality during the formulation of policy where its effect on different social groups can be evaluated. It is extremely difficult to conceptualise as a legal strategy because it requires consideration of factors beyond equivalence.

What has resulted from this critique is a variety of approaches in law as Verloo argues:

'At times equality is the advocated goal, sometimes difference, and occasionally the goal seems to be the deconstruction of the categories.'[103]

The continuing problem with the concept of equality is that it is a legal concept and can be seen as a male term enmeshed in the gendered system.[104] This does not mean that it does not have a value in securing legal change because it allows claims to be conceptualised in legal terms. The EU's approach to gender has been in terms of equality and anti-discrimination measures aimed at securing equality. It has largely adopted

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[101] *Op. cit.* Majury, n97, 321.

[102] *Op. cit.* Howard, n45, 173.

[103] *Op. cit.* Verloo, n63, 221.

[104] C Littleton "Reconstructing Sexual Equality" in P Smith (editor) *Feminist Jurisprudence* (OUP, 1993), 111.

the formal conception of equality, although there have been legal developments in relation to equal pay which indicate that a substantive conception of equality may be pursued.[105] The potential and scope for extension of the EU's equality agenda will therefore be central to considering whether the EU can incorporate women's interests into private international law.

3. Thesis Contents and Structure

The following structure addresses these research aims by cumulatively analysing the space accorded to gender issues, amongst other legal factors, in the child abduction provisions of Regulation 2201/2003, and the EU's commitment to gender equality in the developing area of European private international family law.

Chapter Two provides a contextual backdrop of the legal factors competing for space when regulating international child abduction in a European context for consideration in later chapters. The Area of Freedom, Security and Justice and the position of private international law in this political framework will be examined. The relevant areas of law and their aims will be identified as private international law, human and children's rights, family and migration and the free movement of persons in Europe and gender equality. It will be argued that gender equality should be central to the development of law in this area as mandated by the concept of European citizenship.

[105] For a summary see *op. cit.* Howard, n45.

Chapter Three will address the legal regulation of the civil aspects of international child abduction following Regulation 2201/2003. The explicit incorporation and space for gender issues on the face of Regulation 2201/2003 will be considered through an analysis of the provisions and case law of the Hague Convention 1980 and Regulation 2201/2003. The analysis will also consider the private international law aims pursued by the Regulation identified in *Chapter Two,* and the explicit inclusion of children's rights in Regulation 2201/2003 in the international child abduction provisions.

Chapter Four will then consider the implicit role of gender in international child abduction by the child's primary carer and the space accorded to this factor in European law related to the family. European law has adopted a traditional notion of family life which creates a distinction between work and care. This chapter will consider migration and the free movement of persons within Europe to demonstrate that the gendered factor of care may motivate some primary carer abductions. This gendered factor is accorded no space in the provisions of Regulation 2201/2003 because the model of abduction adopted is based on a male abductor. When the return remedy is further juxtaposed with the free movement provisions in European law, the element of care means that women who return with their child following an unlawful abduction to a State other than their nationality may not have a right of residence in the host State. They may have to rely on their child's conditional right to reside to derive a right to remain and care for them, but this demonstrates that women's citizenship status is potentially limited in European law because of the failure to acknowledge the implicit role of the gendered nature of care.

Chapter Five will continue the analysis of the implicit effects of gender in international child abduction by addressing the extreme situation where

primary carer abduction is alleged to be motivated by a desire to escape domestic violence. It will consider the Hague Convention 1980 case law to demonstrate that this gender issue has been accorded very little space because the emphasis has been on pursuing the legitimate private international law aims of the Convention. However, it will be argued that, despite adopting a policy of reinforcing the application of the return remedy, Regulation 2201/2003 could in fact provide a new space for women's interests in these cases, providing a more appropriate balance with private international law concerns. The development of space for claims based on European citizenship will also be considered to demonstrate that, although European law must be human rights compliant, the return remedy is likely to be a proportionate legislative response to child abduction, even where domestic violence is alleged as a motivating factor.

Chapter Six will follow on from the themes developed in *Chapter Five* by examining the EU's role in protecting women who return with their child following an abduction where there is a risk of violence on return. It is therefore considering the space for women's concerns outside the private international law sphere. The law relating to protection from domestic violence in England and Wales will be taken as a case study to expose the difficulties in securing protection from violence through the law in the Member States. Since Regulation 2201/2003 effectively presumes that all Member States can protect the mother and her child on return, arguably the EU should be proactive in guaranteeing a certain level of legal protection for women and children. The EU's Daphne Programmes, which are aimed at preventing violence against women and children, will be considered and the competence of the EU to develop EU-wide legislation on domestic violence analysed. As domestic violence can be conceptualised as a form

of sex discrimination, the EC has competence to develop this type of legislation under Article 13 EC.

Chapter Seven looks again specifically at Regulation 2201/2003 to ask whether, when legislating in relation to international child abduction, the EU had the tools to create a space for consideration of the gender issues highlighted in *Chapters Three, Four, Five* and *Six* during the law making process. The strategy of gender mainstreaming will be outlined and its application at EU level in relation to Regulation 2201/2003 and international child abduction will be analysed from the formative documents of the Regulation. This will bring together the discussion to consider whether the gender issues highlighted had a space during the law making process as is required by the policy of gender mainstreaming. It will be argued gender mainstreaming has, as yet, made little impact in ensuring that there is a space for gender issues in proposals which means that they miss wider questions over women's equality in the family law context.

Chapter Eight will conclude that there are legal aims which should be explicitly pursued in relation to private international family law and would provide theoretical purpose to this legal sphere within the AFSJ project. Women's interests should have a space within these legal aims which would contribute to a notion of European citizenship. Although the international child abduction provisions of Regulation 2201/2003 do successfully incorporate issues relating to children's and human rights, and some European private international law aims, gender equality was neither explicitly nor implicitly addressed. The space for gender equality concerns was extremely limited. As the EC's competence expands, it has to be prepared to concomitantly expand the scope of its gender equality policies, both to addressing gender issues in legislation, but also in addressing sex

discrimination outside the workplace, which may include domestic violence. The balance of factors in relation to child abduction in Regulation 2201/2003 did not clearly encompass a space for gender equality concerns, which is a reflection of the inability of gender equality policies to penetrate beyond the employment sphere in the EU.

Chapter Two

PRIVATE INTERNATIONAL FAMILY LAW IN THE EUROPEAN FRAMEWORK: DEVELOPING LEGISLATION WITHIN THE AREA OF FREEDOM, SECURITY AND JUSTICE

1. Introduction

This chapter considers the European framework, in which the child abduction provisions of Regulation 2201/2003 were adopted, to outline the context for the development of European private international family law. It will establish the relevance and legal aims of private international law, human and children's rights, migration and the free movement of persons in Europe and gender equality, to the development of the law on international child abduction. These factors will be examined in detail to establish the theoretical framework for this thesis to examine the development of European private international family law.

The legal factors identified are those which compete for 'space' in the formulation of legislative rules in European private international family law, and more particularly, international child abduction. In some instances these factors overlap, for example, private international law must be human rights compliant, and where this is the case, this will be considered. It will be argued that it is particularly important to create a space for gender equality and engage with the relevant competences in the EC Treaty as this can help to contribute to a conception of European citizenship and secure equality for women. This framework forms the basis for the assessment of the child abduction provisions in Regulation 2201/2003 which follows in

the later chapters, their success in addressing and balancing the various legal factors identified, and the inclusion and protection of women's concerns.

Private international family law forms an aspect of the political initiative to create an 'Area of Freedom, Security and Justice' (AFSJ) within Europe.[1] It is within this framework that Regulation 2201/2003 was developed. The AFSJ will be examined because, although this project does not provide a teleological framework for the adoption of legislation, it is necessary to consider how this political space should be utilised for the development of private international law. Instead of drawing a framework from the AFSJ itself, a contextualised analysis based on the legal factors identified will be developed.

The AFSJ and the role of private international law in this context will be examined in part two. Part three will consider the aims of private international law, human and children's rights and the free movement of persons and family law, and the importance of ensuring a space for gender equality in this context will be outlined in part four.

2. Private International Law and the Area of Freedom, Security and Justice

The legal basis of Regulation 2201/2003 is Article 61(c) EC, which is part of Title IV EC, dealing with the consequences of the free movement of persons. The law and policies developed under Title IV EC are part of a wider political initiative known as the Area of Freedom, Security and

[1] Tampere European Council Presidency Conclusions, 15th-16th October 1999.

Justice in Europe (AFSJ). On the 15th and 16th October 1999 the Tampere European Council placed the creation of an area of freedom, security and justice at the top of the European political agenda to take advantage of the competencies incorporated by the Treaty of Amsterdam.[2] AFSJ is a cross-pillar initiative encompassing a wide range of policy interests and Treaty competencies including closer judicial co-operation in cross border civil disputes based on mutual recognition, a common asylum and immigration policy,[3] and closer co-operation in tackling cross border criminal activity.[4] The Tampere Conclusions also provided political impetus for the formal development and protection of fundamental rights within the Union, eventually resulting in solemn proclamation of the Charter of Fundamental Rights of the European Union by the Treaty of Nice.[5]

The Tampere Conclusions and the policy initiatives of the AFSJ were further developed in the Hague Programme for Strengthening Freedom, Security and Justice in the European Union.[6] This created a reporting system on the implementation of the Programme by the Commission, thereby demonstrating the political urgency behind the initiative.[7] The

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[2] *Ibid.*, Preamble.

[3] Both under Title IV EC dealing with the incidences of the free movement of persons.

[4] Under Title VI TEU on Police and Judicial Co-Operation in Criminal Matters.

[5] For details see K Lenaerts, E De Smijter "A 'Bill of Rights' For the European Union" (2001) 38 Common Market Law Review 273.

[6] Council of the European Union "The Hague Programme: Strengthening Freedom, Security and Justice in the European Union" 13th December 2004, 16054/04.

[7] The Hague Programme 'scoreboard', *ibid*, 4.

AFSJ is related to the notion of European citizenship, introduced by the Treaty of Maastricht in 1992,[8] and is regarded as giving some substance to this notion.[9] In the Tampere Conclusions it is stated that the AFSJ *'...is a project which responds to the frequently expressed concerns of citizens and has a direct bearing on their daily lives.'*[10]

The AFSJ therefore links a number of seemingly disparate policy areas through the medium of European citizenship to provide political drive and focus on a number of competences. Within this programme however, there are no definite unifying values or aims beyond 'responding' to citizens. Even the title of the project the 'Area of Freedom, Security and Justice' contains potentially conflicting values. There is no clear purpose or framework to which measures aimed at contributing to the AFSJ are linked. Fundamental rights protections are part of the policy portfolio but do not necessarily form guiding principles against which policies are assessed.[11] The AFSJ lacks a teleological aim and, as such, there is a fight

[8] Article 17(1) EC (formerly Article 8 EC).

[9] It has also been linked to the notion of good governance of the Union, as it is a cross-pillar initiative incorporating many of the EU's competences (under either of the 1st and the 3rd pillars of the EU), with a clearer focus of action for citizens to engage with. See Commission "White Paper on European Governance" COM(2001) 428 final, 25th July 2001, point 3.4, 28. See also V Hatzopoulos "With or Without You... Judging Politically in the Field of the Area of Freedom, Security and Justice" (2008) 33 European Law Review 44 arguing that the ECJ has laid the legal foundations of AFSJ by linking the political aims to the completion of the internal market and citizenship, both fundamental EU objectives.

[10] *Op. cit.* Tampere Conclusions, n1, paragraph 2.

[11] Although there is a commitment by the Commission to consider the fundamental rights implications of proposals: Commission Communication on securing respect for fundamental rights in Commission legislative proposals COM (2005) 172 (final). This is to be achieved through impact assessments: see H Toner "Impact Assessments and Fundamental Rights Protection in EU Law" (2006) 31 European Law Review 316 arguing that this method has not yet locked fundamental rights protection into the EU framework.

for meaning and priority of interests in the legislation that originates with the purpose of fulfilling this political project. It is in this context that European private international law is being developed.

Civil law, and particularly family law, is regarded as affecting citizens in their everyday lives and is therefore important for the achievement of AFSJ objectives.[12] It is closely linked to the concept of European citizenship, as private international family law assists those persons who have migrated within the Union, and movement is central to citizenship.[13] Regulation 2201/2003 forms part of this policy of bringing Europe closer to its citizens. In the Preamble it is stated that Regulation 2201/2003 forms part of the project to create an area of freedom, security and justice through a common judicial area.[14] Private international family law is therefore being used to pursue wider policy objectives, deemed essential to the progress of the EU project.[15]

In the Hague Programme, although judicial co-operation in civil matters is still a feature of the policies incorporated under the AFSJ umbrella,[16] it is not politically central to the portfolio when compared to co-operation over

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[12] *Op. cit.* The Hague Programme, n6, 30.

[13] Article 18(1) EC.

[14] Preamble, Recital 1, Regulation 2201/2003.

[15] P McEleavy "First Steps in the Communitarisation of Family Law: Too Much Haste, Too Little Reflection?" in K Boele-Woelki (editor) *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia, Antwerp, 2003), 517; C McGlynn "The Europeanisation of Family Law" (2001) 13 Child and Family Law Quarterly 35, 44; C McGlynn *Families and the European Union: Law, Politics and Pluralism* (Cambridge University Press, 2006), 158.

[16] See Council of the European Union Report on the need to approximate Member States' legislation in civil matters 13017/01, 29th October 2001.

terrorism, and asylum and immigration. Political circumstances mean that the EU can play a headline, publicised role in these areas.[17] However, it remains important to consider the role of private international law in this portfolio, for as McGlynn states:

'While the focus – the fanfares and the protests – are on the immigration and asylum measures of the area of freedom, justice and security, the supposedly more technical field of judicial co-operation gets little attention. This is a terrible error.'[18]

Despite the lack of a headline public role, there has been a wealth of legislation, adopted under Articles 61(c) and 65 EC in relation to judicial co-operation in civil matters, and a number of proposals remain in the EU legislative system at various stages of development.[19] There is clearly a

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[17] In the list of the ten priorities in achieving the Area of Freedom, Security and Justice, judicial co-operation in civil matters does not feature in an explicit role. See http://ec.europa.eu/justice_home/news/information_dossiers/the_hague_priorities/index_en.htm last accessed 7th May 2008.

[18] *Op. cit.* McGlynn 2006, n15, 152.

[19] See e.g. choice of law in divorce (Rome III) which would amend Regulation 2201/2003's jurisdictional rules for divorce and add choice of law rules. Commission Proposal for a Council Regulation amending Regulation 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters COM(2006) 399 final. The UK has not opted in to this proposal which seems to have been defeated, see "Pan-European Divorce Rules Defeated – for now" Family Law Newswatch, 1st July 2008. However, this may produce the first example of enhanced cooperation between willing Member States. See EU Observer 'Divorce Rules Could Divide EU States' 24th July 2008 http://euobserver.com/9/26532 last accessed 25th July 2008. For criticism of the proposals see T de Boer "The Second Revision of the Brussels II Regulation: Jurisdiction and Applicable Law" in K Boele-Woelki, T Sverdrup (editors) *European Challenges in Contemporary Family Law* (Intersentia, Antwerp, 2008). There is also a proposal on maintenance obligations: Commission Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations COM(2005) 649 final. For criticism of these proposals see M Hellner "The Maintenance Regulation: A Critical Assessment of the Commission's Proposal" in K Boele-Woelki, T Sverdrup (editors) *European Challenges in Contemporary Family Law* (Intersentia, Antwerp, 2008). On matrimonial property: Commission Green Paper on the conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and

political desire by some Member States to pursue harmonisation in this area at EU level, as these legislative developments have affected both cross-border family and commercial law disputes.[20] This ambition extends to the contemplation of enhanced cooperation between some Member States on their choice of law on divorce, a 'two speed' approach to harmonisation.[21] The aim is to create a common judicial area where internal borders no longer constitute an obstacle to civil law litigation or the recognition and enforcement of judgments.[22]

The relatively low public profile of judicial co-operation in civil matters has meant that, despite the rapid development of legislation, scrutiny of the purposes and content of this legislation has been limited.[23] The speed of the

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mutual recognition COM(2006) 400 final. For criticism of these proposals see K Kroll "Unification of Conflict of Laws in Europe – Matrimonial Property Regimes" in K Boele-Woelki, T Sverdrup (editors) *European Challenges in Contemporary Family Law* (Intersentia, Antwerp, 2008). On succession see Commission Green Paper on succession and wills COM(2005) 65 final. For criticism see M Álvarez-Torné "The Dissolution of the Matrimonial Property Regime and the Succession Rights of the Surviving Spouse in Private International Law" in K Boele-Woelki, T Sverdrup (editors) *European Challenges in Contemporary Family Law* (Intersentia, Antwerp, 2008).

[20] The most notable legislative developments apart from Regulation 2201/2003 are Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. OJ [2001]L 012, 16th January 2001 (Brussels I); Council Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations OJ [2007] L 199/40, 31st July 2007 (Rome II); Directive 2008/52 on certain aspects of mediation in civil and commercial matters OJ [2008] L 136/6, 21st May 2008.

[21] See EU Observer 'Divorce Rules Could Divide EU States' 24th July 2008 http://euobserver.com/9/26532 last accessed 25th July 2008.

[22] *Op. cit.* The Hague Programme, n6, 26.

[23] For notable contributions see *op. cit.* McGlynn 2001, n15; *op. cit.* McGlynn 2006, n15; N Lowe "The Growing Influence of the European Union on International Family Law – A View From the Boundary" (2003) 56 Current Legal Problems 439.

action in this area, which McEleavy describes as *'frenzied law making'*[24], and the breadth of the proposals developed, means the values and ideologies which are being pursued and embedded in law by this process must be questioned.[25] This becomes even more pressing given the discussions which are developing around the idea and desirability of a substantive harmonised European family law.[26]

The lack of a teleological framework in the AFSJ and Title IV context makes it important to identify the relevant policy aims of a proposal. The purpose of the legislation and the competencies engaged should define its content. The relevant policy issues of these areas should be highlighted and their interactions should be considered in an attempt to draft the most appropriate legislative solution. It should also 'fit' with the rest of the European system and assist with policies such as the free movement of persons and encourage intra-EC migration. As Meeusen states:

'What is needed is a broad perspective, which gives fitting recognition to the goals and purposes of private international law and its links with the underlying substantive fields, while at the same time being adapted to the

[24] *Op. cit.* McEleavy 2003, n15, 511.

[25] M Meulders-Klein "Towards a Uniform European Family Law? A Political Approach" in M Antokolskaia *Convergence and Divergence of Family Law in Europe* (Intersentia, Antwerp, 2007), 279.

[26] See Commission on European Family Law, an academic body set up to examine the possibility of a harmonised family law in Europe http://www2.law.uu.nl/priv/cefl/ last accessed 19th September 2007. For discussion on the feasibility of legal harmonisation of family law see M Rosaria Marella "The Non-Subversive Function of European Private Law: The Case of Harmonisation of Family Law" (2006) 12 European Law Journal 78 and M Antokolskaia "The Harmonisation of Family Law: Old and New Dilemmas" (2003) 11 European Review of Private Law 28.

particular context of EU law (with its greater focus on intra-Community migration).[27]

Regulation 2201/2003, and particularly the issue of international child abduction, is a good example of the 'cross-cutting' nature of legislation. The law on the civil aspects of international child abduction is related to several different legal areas and EU competencies. These areas of law are inter-related and, in some cases, may conflict. However, all need consideration when legislating in relation to international child abduction. First, child abduction is an issue of private international law, as it deals with a cross-border civil dispute and explicitly or impliedly addresses jurisdiction and choice of law in relation to that dispute.[28] As such, it engages with the policy concerns of private international law, in this case, specifically in a European context. As private international law is developed under Title IV, Article 61(c) EC, which refers to Article 65 EC, it is also implicitly a measure aimed at regulating the incidence of free movement of persons and migration within the EU and the completion of the internal market.[29] It is also therefore connected to the concept of European citizenship as a legislative initiative, which is part of the AFSJ,

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[27] J Meeusen "Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution?" (2007) 9 European Journal of Migration and Law 287, 305.

[28] R Schuz "The Hague Child Abduction Convention: Family Law and Private International Law" (1995) 44 International and Comparative Law Quarterly 771, 781-96.

[29] Under the Treaty of Lisbon 2007, Article 81(1), Treaty on the Functioning of European Union, the EU has the competence to develop judicial co-operation in cross border civil matters. Under Article 81(2) TFEU measures should be adopted *'particularly when necessary for the functioning of the internal market'* but contribution to the completion of the internal market appears to no longer be a requirement for the legislation. The position of private international family law is kept distinct from other measures with cross border implications under Article 81(3) TFEU and must be adopted by unanimity in Council after consulting the European Parliament, unless the Council decides to use the ordinary legislative procedure. See M Dougan "The Treaty of Lisbon 2007: Winning Minds, Not Hearts" (2008) 45 Common Market Law Review 617, 641.

and the free movement of persons, which is at the core of the citizenship concept.[30]

In dealing with the consequences of family breakdown and the movement and wellbeing of children, fundamental rights relating to the family and children's rights are potentially also engaged. Finally, as women now carry out the majority of international child abduction cases, it is alleged that domestic violence is a motivating factor in some of these cases,[31] policies relating to women and women's rights are also relevant to the law. The EU's competence to address these areas is less clearly identifiable but will be considered in more detail in the next section.

Any action the EU takes, in the area of private international family law or in relation to gender equality, is of course subject to the principle of subsidiarity under Article 5 EC. Only when the Member States cannot achieve an objective effectively alone, and would therefore be better suited to European-wide action, will it be appropriate for the EC to take action. The EU may have the competence to legislate, but if the same result could be achieved at Member State level, that is where it must be pursued. This is an underlying additional, limiting factor on the legality of any European engagement with the issues identified and discussed in the following sections.

3. The Legal Factors Relevant to European Private International Family Law

[30] Article 18(1) EC.

[31] N Lowe, K Horosova "The Operation of the 1980 Hague Abduction Convention – A Global View" (2007) 41 Family Law Quarterly 59, 67.

Regulation 2201/2003 was adopted as part of the political project to create an Area of Freedom, Security and Justice in Europe. Although the AFSJ itself does not contain clear normative aims, there are several factors which should be considered when legislating for private international law rules, and for child abduction in particular. In an EU context these include first, private international law, secondly human and children's rights, thirdly families, migration and the free movement of persons and finally gender relations and gender equality. This section will outline the first three identified factors, the role of these legal areas in a European context, and the desirable policy outcomes of each. Gender equality and gender relations will be considered in part four.

3.1. Private international law in the European Union context

Three principles: free movement of judgments through mutual recognition, mutual trust and legal certainty, dominate European private international law[32] and have been strictly adhered to by the ECJ.[33] Mutual recognition for the free circulation of judgments is the key aim of European private international law and is favoured over harmonising choice of law rules.[34] The eventual aim is the abolition of exequatur[35] in European private

[32] Although see T de Boer who comments that the parties themselves are interested in substantive justice issues rather than these 'abstruse' concepts see *op. cit* de Boer, n19, 322.

[33] See T Hartley "The European Union and the Systematic Dismantling of the Common Law Conflict of Laws" (2005) 54 International and Comparative Law Quarterly 813, 820, commenting on Case C-116/02 *Erich Gasser v MISRAT* [2003] ECR I-14693, a Brussels I Convention case.

[34] *Op. cit.* Meeusen, n27, 302.

[35] 'Exequatur' is the formal legal proceedings normally required for the recognition and enforcement of a judgment from another State.

international law.[36] The EU, to secure these aims, has adopted continental codes of systematized law.[37]

This approach has been influenced by the success of the Brussels I Convention 1968[38] which harmonised jurisdictional rules and the recognition and enforcement of judgments in relation to commercial and civil matters. This commercial model has been carried over to the private international family law rules, which are therefore focussed on certainty and the mutual recognition of judgments in all but exceptional circumstances.[39] The Tampere Conclusions and the Hague Programme both emphasise mutual recognition of judgments as the basis of European private international family law.[40]

The emphasis on mutual recognition has several distinct effects on the operation of European private international law. It requires that Member States accept the content of all other Member States' laws, however divergent their substantive content may be.[41] It requires mutual trust

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[36] M Tenreiro, M Ekström "Recent Developments in EC Judicial Co-Operation in the Field of Family Law" [2004] International Family Law 30, 30.

[37] *Op. cit.* Hartley, n33, 814.

[38] Brussels Convention on Jurisdiction and Enforcement in Civil and Commercial Matters 1968, now in the form of Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ [2001] L 12/1, 16th January 2001.

[39] S Nott "For Better or Worse? The Europeanisation of the Conflict of Laws" (2002) 24 Liverpool Law Review 3, 15.

[40] *Op. cit.* Tampere Conclusions, n1, paragraph 33; *Op. cit.* The Hague Programme, n6, 26.

[41] *Op. cit.* Meeusen, n27, 304.

between the Member States and their judiciaries that they are all implementing the law effectively on the same terms pursuant to the duty of loyal co-operation under Article 10 EC. All Member State courts must therefore assume jurisdiction over cases on the same grounds and that court should be the *forum conveniens*,[42] or an appropriate court for the case to be heard in, so that other courts respect the validity of the decision. Mutual trust between Member States is effectively compelled by EU legislation as it is required for legal certainty – litigants may be sure that the judgment in one State will be recognised and enforced in another. Member States cannot therefore question any other Member State's judicial system; it must be assumed that it operates perfectly and courts must trust that this is indeed the case.[43]

European private international law, particularly family law, has been 'instrumentalised' to achieve other EC political aims.[44] The legal basis for the harmonisation of private international law is Article 61(c), which refers to Article 65 EC, requiring that any legislation is necessary for the functioning of the internal market.[45] The link between the internal market and migration is used to justify intervention in private international family law alongside the fulfilment of a notion of European citizenship.[46]

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[42] '*Forum conveniens*' means the most appropriate forum in which to litigate a dispute, the legal system which is most closely connected to the dispute in question.

[43] *Op. cit.* Hartley, n33, 820.

[44] *Op. cit.* Meeusen, n27, 305.

[45] Under Article 65 EC the measure adopted must be concerned with: *'judicial cooperation in civil matters having cross border implications... as far as is necessary for the proper functions of the internal market'*.

[46] See *op. cit.* McGlynn 2001, n15 for criticism of this justification.

Normally private international family law is used to deal with the consequences of international migration, rather than *encouraging* migration. The desire to encourage the free movement of citizens within Europe makes the context of European private international family law different. Arguably the importance of private international law lies in achieving these political aims and its form has been modelled to that purpose.[47] Legislation relating to international child abduction in European law may be pursued for political purposes but should reflect the principles of mutual trust, legal certainty and free movement of judgments.

3.2. Human and Children's Rights Protection

3.2.1. Human Rights and Private International Family Law

The EU is increasingly aware of the impact of its legislation on individual rights, including children's rights. Private international family law, and particularly the law on international child abduction, engages human rights in several different ways. The relevant rights will be identified in this section and the next section will consider the complex system of protecting these rights which has developed in the EU.

Addressing the family through human rights norms can be problematic because of the difficulty of accommodating both the different individual's rights, and those collective rights of 'the family'. This is a problem which permeates the issue of rights and the family.[48] For one person to assert rights means that this is potentially to the disadvantage of another family

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[47] V Van Den Eeckhout "Promoting Human Rights Within the Union: The Role of European Private International Law" (2008) 14 European Law Journal 105, 109.

[48] C Henricson, A Bainham *The Child and Family Policy Divide: Tensions, Convergence and Rights* 2005, Joseph Rowntree Foundation, 15.

member.[49] The inherent relativity of rights requires rights to be weighed against one another to decide where the balance of the competing interests lies.[50] This has caused doubt amongst feminists as to the value of rights in this context[51] as they may tolerate and perpetuate the subordination of women.[52] Human rights norms often represent the lowest common denominator and may not encourage particularly progressive notions.

Despite these issues, Goonesekere argues that human rights balance the individual and collective interests to bring accountability to governance and regulation of private relations, making them a powerful ideology to change family law and policy.[53] The law should be human rights compliant and human rights norms form an important ideological value for the EC to pursue when legislating on private international family law.

Private international family law potentially engages the right to private and family life under Article 8, European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR),[54] and Article 6,

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[49] Wilson calls this process a 'zerosum' game and highlights that it disproportionately affects mothers because they often hold rights which human rights principles are used to attack, see R Wilson "The Harmonisation of Family Law in the United States" in K Boele-Woelki, T Sverdrup (editors) *European Challenges in Contemporary Family Law* (Intersentia, Antwerp, 2008), 38.

[50] *Op. cit.* Henricson, Bainham, n48, 15.

[51] C Smart *Feminism and the Power of Law* (Routledge, London, 1989), 151.

[52] F Olsen "Children's Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child" (1992) 6 International Journal of Law and the Family 192, 193.

[53] S Goonesekere "Human Rights as a Foundation for Family Law Reform" (2000) 8 International Journal of Children's Rights 83, 98.

[54] See Application 31679/96 *Ignaccolo-Zenide v Romania* ECtHR judgment 25th January 2000.

ECHR which contains guarantees relevant to a fair trial, particularly the right to have a case dealt with expeditiously under Article 6(1). In a series of cases the European Court of Human Rights (ECtHR) has considered signatory States' compliance with the ECHR when operating the Hague Convention 1980. The ECtHR has made it clear that Article 8 is engaged where a child is removed or retained from a parent with whom they are entitled to a relationship. Article 8 contains a positive obligation on States to act, within the margin of appreciation, to protect the right to private and family life, including action reuniting children with parents, although this is not an absolute right. In *Maire v Portugal* the ECtHR stated that:

'The court considers that the positive obligations that Article 8 of the Convention lays on the Contracting States in the matter of reuniting a parent with his or her children must be interpreted in the light of the Hague Convention 1980...'[55]

In *Monoroy v Romania and Hungary,* the Romanian courts had adopted an interpretation of the Hague Convention 1980 which contradicted its purpose and therefore violated the right in Article 8, ECHR.[56] Article 8 may also be engaged where a return order has been ordered but the enforcement of the order has been significantly delayed.[57] In addition, Article 6(1), ECHR may also be engaged if return proceedings under the Hague Convention 1980 are not heard within a reasonable time. The ECtHR requires Signatory States to exercise *'exceptional diligence'* in

[55] Application no. 48206/99 *Maire v Portugal* (2006) 43 EHRR 13, paragraph 72.

[56] Application no. 71099/01 *Monoroy v Romania and Hungary* (2005) 41 EHRR 37, paragraph 81.

[57] See Application no. 77710/01 *HN v Poland* (2007) 45 EHRR 46.

dealing with proceedings under the Convention.[58] The Hague Convention 1980 is therefore viewed as protecting the rights of the parent and abducted child to be reunited under Article 8, ECHR.

It has been argued that children's rights have been subordinated to that of their parents in ECtHR case law, although the ECHR has increasingly been used to protect children's rights.[59] This focus is demonstrated in the ECHR case law on the enforcement of return orders which state that the child's best interests must be central to any decisions made about the enforcement of the judgment.[60] However, the UN Convention on the Rights of the Child 1989[61] (CRC) protects children's rights specifically, including the right of the child to be heard in decisions affecting them and emphasising the primacy of the best interests of the child.[62] The child also has the right to maintain direct contact with both parents when separated from one of them under Article 9(3), CRC and Article 35 prohibits the abduction of children abroad.

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[58] Application no. no. 77710/01 *HN v Poland* (2007) 45 EHRR 46, paragraph 93.

[59] See Application no. 18249/02 *C v Finland* ECtHR judgment 9th May 2006; L Smith "Recent Developments in Child Law" in K Boele-Woelki, T Sverdrup (editors) *European Challenges in Contemporary Family Law* (Intersentia, Antwerp, 2008), 60; C Forder "Child Protection: Human and Children's Rights" [2006] International Family Law 88, 89.

[60] Application no. 48206/99 *Maire v Portugal* (2006) 43 EHRR 13, paragraph 71.

[61] Adopted by General Assembly Resolution 44/25, in force 2nd September 1990.

[62] Articles 12 and 3, CRC 1989.

In addition, under Article 33, Charter of Fundamental Rights in the European Union[63] (the Charter) the family unit enjoys legal, economic and social protection, although the *type* of family to be protected is unclear and Article 7 of the Charter protects the right to private and family life.[64] The Charter contains explicit provisions for the protection of children's rights under Article 24. It protects a child's right to be heard in matters affecting them and states that all actions relating to the child must be taken in their best interests. These are potentially conflicting rights as they mix the principles of empowering and protecting children.[65] The right of the child to a relationship with both parents is also protected by Article 24(3).[66]

Finally, under Article 23 of the Charter, equality between men and women is to be ensured in *all* areas including work and pay, which is an extension of the rights contained in Article 141 EC on equal pay between men and women. Article 13 EC prohibits discrimination on the grounds of sex and Article 3(2) EC makes the equality of men and women a specific aim of the European Community.

Where human rights arguments have been raised in EU cases, private international law objectives have been upheld and, so far, human rights

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[63] OJ [2004] C 310, 16th December 2004. This has since been revised and 're-proclaimed' by the Commission, Council and European Parliament, OJ [2007] C 303/1, 12th December 2007.

[64] C McGlynn "Families and the European Union Charter of Fundamental Rights: Progressive Change or Entrenching the Status Quo?" (2001) 26 European Law Review 582, 586. This will be explore further in *Chapter Four*, 3.2.

[65] C McGlynn "Rights for Children?: The Potential Impact of the European Union Charter of Fundamental Rights" (2002) 8 European Public Law 387, 397.

[66] See also Communication from the Commission "Towards an EU Strategy on the Rights of the Child" COM(2006) 367 final, 2, which calls the rights of children 'a priority' at Union level.

have come a poor second to the emphasis on mutual trust between Member States and legal certainty in the ECJ.[67] Fawcett argues that:

'The ECJ has been concerned to uphold the objectives of the Brussels system at the expense of human rights considerations, giving more weight to State interests than to an individual's interests. [68]

The ECtHR case law demonstrates that the Hague Convention remedy of return is compliant and protects the Article 8, ECHR right to a private and family life, securing the child's relationship with the parent who remains in their former habitual residence. However, the other rights which are also potentially relevant, including women's rights, are potentially in conflict with this right of the left behind parent to have the child returned as quickly as possible. If women are to be protected from a violent former partner from whom they have escaped abroad with their child for example, this will affect the partner's right to a relationship with the child.[69] How far this is acceptable, and whether the emphasis is on returning children in the vast majority of cases, is a matter for the lawmaker and the courts when they interpret the application of the return remedy. This will now include the ECJ in relation to Regulation 2201/2003 and the enforcement of the return remedy.

Although all these rights are potentially engaged by private international family law, and the law relating to international child abduction in particular, their protection and incorporation into legislation is not a

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[67] J Fawcett "The Impact of Article 6(1) of the ECHR on Private International Law" (2007) 56 International and Comparative Law Quarterly 1, 32.

[68] *Ibid.*, 31.

[69] This is explored further in *Chapter Five*, 5.

straightforward process in Union law. The legal status of the various documents cited above are in some cases uncertain, and the ECtHR only adopts a limited standard of review over EC law. This will be considered in more detail in the next section.

3.2.2. The Legal Protection of Human Rights in the European Union

As the EEC originated as an economic body, the Treaty of Rome 1957 contained no explicit human rights principles. This was envisaged to be part of the jurisdiction of the Council of Europe and its Convention on Human Rights and Fundamental Freedoms 1950. However, as the competence and scope of the EC developed, and following the Treaties of Maastricht and Amsterdam, the impact of both EC and EU action on individual rights has become more pronounced. Since the 1970's the ECJ has had to address the protection of fundamental rights in its case law. As the case law has developed, respect for and the protection of human rights in European law has become a complex and finely balanced area of law. Article 6(1) TEU declares that:

'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.'

Article 6(2) TEU states that the Union shall respect the rights guaranteed in the ECHR. However, the EU is not a signatory to the ECHR following Opinion 2/94[70] where the ECJ ruled that the EU does not have competence to sign the Convention. The new Lisbon Treaty does provide a legal basis for the accession of the EU to the ECHR under Article 6(2), Treaty on the

[70] Opinion 2/94 *Accession of the Community to the European Human Rights Convention* [1996] ECR I-1759.

Functioning of the European Union. However, currently the EU is not formally bound by the terms of the ECHR.

Despite this, the ECJ has developed a significant body of law relating to the protection of fundamental rights within the EU. This process was started by Case 11/70 *Internationale Handelsgesellschaft*[71] and is based on the constitutional traditions common to the Member States. This naturally includes the ECHR,[72] to which all the Member States of the EU are signatories and to which the ECJ now frequently refers, both to the rights contained in the ECHR and the case law promulgated under it.[73] However, the ECJ and the ECtHR may interpret the ECHR differently.[74]

The ECtHR does have limited jurisdiction over human rights breaches in EU, and EC, law. Where the European Union takes action which is implemented by the Member States, if this action is in breach of ECHR rights, the Member States will be made liable for the breach. In *Matthews v UK* the ECtHR subjected EU law to explicit review and found the UK was liable for a breach of rights which was caused by EC law.[75] However, this process of review only operates in limited circumstances.

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[71] Case 11/70 *Internationale Handelsgeschellschaft v Einfuhr und Varraststelle für Getreide und Futtermittel* [1970] ECR 1125.

[72] See Case 4/73 *Nold Kohlen- und Baustoffgrosshandlung v Commission of the European Communities* [1974] ECR. 491.

[73] For a discussion on this see S Douglas-Scott "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*" (2006) 43 Common Market Law Review 629.

[74] Case 46/87 *Hoechst v European Commission* [1989] ECR 2859.

[75] Application No.24833/94 *Matthews v UK* [1999] BHRC 686.

In *Bosphorous v Ireland*[76] the ECtHR made it clear that it will only review EC legislation for compliance with the ECHR where the Member States are implementing EC law,[77] and they have no discretion as to how the rules should be implemented. If the Member States have discretion as to how the rules are implemented, the breach is due to national law and the Member State will be liable as the breach is attributable to their actions rather than those of the EU.[78] If the Member State does not have a discretion as to how the law is to be implemented, even then the ECtHR will not examine the law concerned if it is clear that there is *'equivalent protection'* of the rights concerned in EU law to that provided by the ECHR. There is a rebuttable presumption that EC law is compatible with the rights contained within the ECHR. That presumption will be rebutted where there are *'manifest deficiencies'* in the nature of the protection. The ECtHR will therefore not get involved unless there is an outrageous breach of human rights.[79] The ECtHR's approach shows a level of deference to the ECJ and recognises the autonomy of the EU and its legislative supremacy, but also retains a level of control over EU action.[80] This is a delicate balance accommodating the supranational status of both courts. The standard to rebut the presumption of equivalent protection is arguably worryingly

[76] Application No. 45036/98; (2006) 42 EHRR 1.

[77] The cases thus far have dealt with EC law but presumably the same rules apply to the other EU pillars.

[78] C Costello "The *Bosphorous* ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe" (2006) 6 Human Rights Law Review 87, 107.

[79] *Op. cit.* Douglas-Scott, n73, 638.

[80] *Ibid.*, 639.

high.[81] The level of protection must only be equivalent, not identical, and the focus is on the general level of EU protection of rights, rather than considering the content of the law on a case by case basis.[82]

The Lisbon Treaty of 2007[83] provides a legal basis under Article 6(2) TEU for accession of the Union to the ECHR. It also recognises the rights and freedoms laid out in the Charter under Article 6(1) TEU, although this does not provide further competence to legislate, and the ECHR continues to form part of the general principles of Community law under Article 6(3) TEU.[84] Arguably, following accession to the ECHR, the Charter will become less significant as a source of rights in Community law because of the supremacy of the ECHR. Although the Community will be free to guarantee a higher level of protection, which may be the effect of the children's rights guarantees contained in the Charter for example, the ECHR will form the 'rights floor' against which Community action will be judged.[85] Arnull argues that:

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[81] *Op. cit.* Costello, n78, 102.

[82] *Ibid.*, 105.

[83] The future of the Lisbon Treaty 2007 and accession to the ECHR is unclear following the Irish referendum and their rejection of ratification. See *An Irish Wake-Up Call* The Guardian, 18th June 2008.

[84] The situation with regards to the Charter has been further confused by the negotiation of a Protocol restricting the application of the Charter to Poland and the UK following the ratification of the Lisbon Treaty. Under the Protocol the ECJ does not have jurisdiction to assess the law of the UK and Poland for compliance with the Charter. This appears to be superfluous as the Charter will only be applied to Community law norms at European level, but the situation is so confused that this can only be clarified by the ECJ following ratification. On possible interpretations see *op. cit.* Dougan, n29, 665-671.

[85] Based on Articles 52(2) and Article 53 of the Charter, see *op. cit.* Lenaerts, De Smijter, n5, 296.

'...Union accession to the ECHR would subject the Union to external review for compliance with its requirements by an authoritative, specialist arbiter in the form of the Strasbourg Court.'[86]

One of the reasons for the existence of the equivalent protection doctrine has been the development of an explicit human rights document at EU level. The Charter currently has an uncertain legal status following the Treaty of Nice where it was 'solemnly declared'. Its purpose was to make the protection of fundamental rights at EC level more visible to citizens.[87] It is not binding on the Member States, but the institutions of the EU regard it as authoritative and refer to it in drafting legislation, including Regulation 2201/2003.[88] The ECJ referred to the Charter for the first time in the case of *Parliament v Council,* on the family reunification directive.[89] The status of the Charter following this case is unclear, but it seems likely that the Charter informs the conception of fundamental rights in EU law, currently forming part of the general principles, and will thereby apply to the acts of the institutions and the acts of Member States within EC law.[90] Under Article 6(1) TFEU, which would be created by the Lisbon Treaty 2007, if it does enter into force, the Charter is not incorporated into the text

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[86] A Arnull "From Charter to Constitution and Beyond: Fundamental Rights in the New European Union" [2003] Public Law 774, 786.

[87] *Op. cit.* Lenaerts, De Smijter, n5, 273.

[88] Preamble Recital 33, Regulation 2201/2003.

[89] Case C-540/03 *Parliament v Council* [2006] ECR I-5769.

[90] See E Drywood "Giving With One Hand, Taking With the Other: Fundamental Rights, Children and the Family Reunification Decision" (2007) 32 European Law Review 396, 401-2, stating that this is the most likely interpretation, although it is possible that the Charter is merely a consolidation of the common traditions of the Member States, or alternatively will only be referred to when the legislative intention is that it should.

of the Treaty and the relationship between it and the general principles of Community law will then become a matter for resolution by the ECJ.[91]

Parliament v Council also addresses the status of the CRC in EU law.[92] This Convention has been ratified by the UK, but not incorporated into domestic law, so it is not binding in the UK courts. In *Parliament v Council,* although the ECJ referred to the CRC, and it now potentially forms a ground to indirectly review EC measures, the Court's interpretation of the instrument was limited in scope.[93] This development does reflect an increasing interest in children's rights under EU law across the institutions more generally.[94]

Although the EU is not a body designed for the pursuit of human rights objectives, it does need an effective human rights policy so that its policy initiatives respect and promote human rights.[95] This includes any private international law initiatives although the application of human rights thus far has only had a limited impact on this area of law.[96] Currently any

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[91] *Op. cit.* Dougan, n29, 664.

[92] Case C-540/03 *Parliament v Council* [2006] ECR I-5769, paragraph 37.

[93] *Op. cit.* Drywood, n90, 407.

[94] See e.g. Communication from the Commission "Towards an EU Strategy on the Rights of the Child" COM(2006) 367 final, 4th July 2006. The European Fundamental Rights Agency has recently commissioned research on the rights of the child in EU law carried out by the Child and Family Law Centre, University of Liverpool, and the Ludwig Boltzmann Institute of Human Rights see EU Child Project http://www.liv.ac.uk/law/escfl/EUChild/index.htm last accessed 22nd July 2008.

[95] *Op. cit.* Arnull, n86, 781-2.

[96] See *op. cit.* Fawcett, n67.

private international law measure originating from the EU will not be subject to a human rights challenge in the ECtHR unless there is a manifest breach of the ECHR. Despite this restriction on the application of the ECHR, any rules relating to international child abduction should be human rights compliant both in their drafting and in their operation.[97]

3.3. The Family, Migration, and Free Movement of Persons in the EU

Despite its economic origins, the EC, and previously the EEC, has been regulating the family and the nature of the family through the legislation adopted under the free movement of workers[98] and sex equality[99] provisions contained in the Treaty of Rome. The free movement of workers has required the EU to regulate the cross border movement of families because it was recognised that a worker's migration would be facilitated if they could be accompanied by their family; however this approach has led to a highly instrumentalised approach to the regulation of family life at European level.[100]

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[97] Application No. 31679/96 *Ignaccolo-Zenide v Romania* ECtHR judgment 25th January 2000.

[98] Article 39, (formerly Article 48) EC.

[99] Article 141, (formerly Article 119) EC.

[100] The regulation of the free movement of workers and their families was primarily addressed in Regulation 1612/68 on the freedom of movement for workers within the Community: Regulation (EEC) No. 1612/68, OJ Sp. Ed. 1968, No. L 257/2 p. 475, 15th October 1968. Now this issue is covered by Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States OJ [2004] L229/35, 29th April 2004.

The free movement of workers[101] encourages the formation of 'international families' where the partners to the relationship are not in their home State, and/or may not be of the same nationality,[102] as well as increased diversity of family models following migration.[103] It has recently been reported that approximately 25% of babies born in the UK have one foreign born parent.[104] The success of the free movement of workers provisions and the resulting intra-EU migration means that private international family law becomes increasingly important in managing the effects of international family breakdown.[105] Indeed it has been argued that: *'Migration is not a specific aspect of international family law, but its cause'*.[106] Under Title IV and Articles 61(c) and 65 EC, the EC's competence in this area is limited to regulating the private international law issues which arise in relation to the family rather than the substantive law relating to the family.[107] Since the EU has created an area in which free

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[101] Now more generally free movement of persons under the Article 18(1) EC citizenship right.

[102] Ackers found that relationships were often formed with nationals following migration. Nationals of the same state migrating abroad together accounted for 43% of migrants. L Ackers *Shifting Spaces: Women, Citizenship and Migration within the European Union* (Policy Press, Bristol, 1998), 166.

[103] JY Carlier, S Saroléa "Migrations and Family Law" in J Meeusen *et al* (editors) *International Family Law for the European Union* (Intersentia, Antwerp, 2007), 440.

[104] '*Migration: Record Exodus Leaves Aging Blighty*' The Guardian, 23rd August 2007. Although this statistic reflects all foreign born parents, not just from the EU, it is indicative of the increasingly internationalised nature of relationships.

[105] H Stalford "Regulating Family Life in Post-Amsterdam Europe" (2003) 28 European Law Review 39, 40.

[106] *Op. cit.* Carlier, Saroléa, n103, 439.

[107] Lowe highlights the fact that it is important not to lose sight of these competence issues. See *op. cit.* Lowe 2003, n23, 447. See also M Tenreiro, M Ekström "Unification of Private International Family Law Matters With the European Union" in K Boele-Woelki (editor) *Perspectives for the*

movement and migration is encouraged it is appropriate that the EU takes a proactive approach to regulating family life in the area of cross border relationships.[108]

In regulating family life, the EU can influence how families are defined in law, what is legally defined as a 'family', by basing entitlements in European law on family roles.[109] This process produces responses to the legal structure by families, particularly in relation to their migration behaviour as the right to move and reside in another State is defined by worker and familial roles. Conforming to these roles will give the legal entitlement, giving legitimacy to that family form and their migration through European law which those outside the model cannot achieve. The role of the State, and now the EU, in legitimising some family forms through their recognition in law whilst maintaining that the family is the 'private' sphere potentially has gendered effects. The role of law in particular is important in conveying and reproducing gender based ideologies and structures such as 'the family'.[110] It is important that an understanding of the changing nature of family life is engaged so that the law is relevant and inclusive.

Unification and Harmonisation of Family Law in Europe, (Intersentia, Antwerp, 2003), 186. It is also restricted to measures for the functioning of the internal market see *inter alia* M Fallon "Constraints of Internal Market Law on Family Law" in J Meeusen et al (editors) *International Family Law for the European Union* (Intersentia, Antwerp, 2007); *op. cit.* McGlynn 2001, n15.

[108] *Op. cit.* Stalford 2003, n105, 40. The EU's interest in family law is also linked to the aim of encouraging women's labour market participation, see A Pylkkånen "Liberal Family Law in the Making: Nordic and European Harmonisation" (2007) 15 Feminist Legal Studies 289, 292.

[109] See *Chapter One,* 2.2.3 on the public/private divide and the definition and regulation of the family through law.

[110] E Fegan "Ideology After Discourse: A Reconceptualization for Feminist Analyses of Law" (1996) 23 Journal of Law and Society 173, 189.

State policies and law, and now the law of a supranational entity, the EU, may influence behaviour to encourage a particular form of 'family'.[111] The EU, in regulating the family, has the potential to contribute to this ideology of family life, and therefore to influence individual behaviour. How the law conceptualises a family unit influences what is regarded as 'acceptable' behaviour in society and what constitutes a 'real' family. Although the law may not be consistent in privileging one form of family structure or defined family role, it does contribute to a stratification of desirable family forms.[112] These ideologies can shape individual expectations and aspirations in relation to family life[113] and, although individuals make their own choices within this framework, it is important to expose how the State exploits the roles which are constructed as socially desirable.[114] So Rose states:

'It is misleading to analyse social representations of motherhood, fatherhood, family life and so forth as if they distort experience or impose false consciousness; they are crucial aspects of the process by which individuals constitute their selves and their lives, and come to establish certain 'personal' aspirations and evaluations.'[115]

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[111] K O'Donovan *Sexual Divisions in Law* (Weidenfield and Nicolson, London, 1985), 14.

[112] J Wallbank *Challenging Motherhood(s)* (Prentice Hall, Harlow, 2001), 16.

[113] N Rose "Beyond the Public/Private Division: Law, Power and the Family" in P Fitzpatrick, A Hunt (editors) *Critical Legal Studies* (Blackwell, Oxford, 1987), 73.

[114] *Op. cit.* Fegan, n110, 181.

[115] *Op. cit.* Rose, n113, 73.

The traditional privileged family form is based around a heterosexual married couple with children, where the mother remains at home as primary carer, supporting a male breadwinner who participates in the market to maintain the family financially.[116] However, this model has become increasingly irrelevant as family forms evolve.[117] To varying degrees across Europe, family structures have become more diverse with increasing numbers of single parent households with the rise of no-fault divorces[118] and increases in cohabitation.[119] There have also been moves towards legal recognition of same sex partners in some Member States.[120] Family structures are increasingly fluid over the life course as relationships are dissolved and new families are established.[121]

Individuals are living within changing and developing family structures and the law should adapt to accommodate these social changes. In addition to social changes, Diduck notes that the nuclear family had its roots in a

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[116] M Fineman "Masking Dependency: The Political Role of Family Rhetoric" (1995) 81 Virginia Law Review 2181, 2192.

[117] It may be questioned whether it was ever much in evidence in family practice and this family structure is both classist and racist, not just gendered in its form, see A Diduck *Law's Families* (LexisNexis Butterworths, London, 2003), 21-23.

[118] See B Verschraegen "Moving to the Same Destination? Recent Trends in the Law of Divorce" in M Antokolskaia (editor) *Convergence and Divergence of Family Law in Europe* (Intersentia, Antwerp, 2007).

[119] K Kiernan "The Rise of Cohabitation and Childbearing Outside Marriage in Western Europe" (2001) 15 International Journal of Law, Policy and the Family 1, 4.

[120] See I Schwenzer "Convergence and Divergence in the Law on Same-Sex Partnerships" in M Antokolskaia (editor) *Convergence and Divergence of Family Law in Europe* (Intersentia, Antwerp, 2007).

[121] Eurostat "The Social Situation in the European Union 2005-2006", point 2.2, 10.

particular economic structure based on a man's 'family wage' which can no longer be sustained.[122] Women have increasingly participated in the labour market, entering the 'public' sphere and contributing to the family financially.[123] Market participation has altered women's relationship with the State by adjusting what is expected of women.[124] It is now a clear policy for women to participate in the labour market, even if they are mothers.[125] The dual breadwinner model has been increasingly normalised as desirable and has been encouraged by the EU.[126] This is in evidence across Europe as policy makers, including the EU, link employment and family policy to encourage women's labour market participation.[127]

These developments however have not altered what is expected of 'the family unit' by policy makers and the State. Silva and Smart argue that despite the fluidity of families, the core notions of care, responsibility and obligation remain:

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[122] *Op. cit* Diduck, n117, 23.

[123] *Op. cit.* Eurostat 05-06, n121, point 2.6, 13. Although the presence of children may affect women's labour market participation, particularly where the child is under five years of age.

[124] M McIntosh "The State and the Oppression of Women" in A Kuhn, A Wolpe (editors) *Feminism and Materialism: Women and Modes of Production* (Routledge and Kegan Paul, London, 1978), 268.

[125] There is increasing emphasis on employment as the way out of poverty for single mothers regardless of family responsibilities. See *op. cit.* Wallbank 2001, n112, 16; R Lister "Children (but not women) first: New Labour, child welfare and gender" (2006) 26 Critical Social Policy 315, 322.

[126] M Daly "Changing Family Life in Europe: Significance for State and Society" (2005) 7 European Societies 379, 392.

[127] On the content and development of this policy see *ibid.*, 392; M Stratigaki "The Cooptation of Gender Concepts in EU Policies: The Case of 'Reconciliation of Work and Family'" (2004) 11 Social Politics 30.

'...while there are new family forms emerging, alongside new normative guidelines about family relationships, this does not mean that values of caring and obligation are abandoned.'[128]

The family remains central to the provision of care within society.[129] Although women are now participating in the labour market, this has as yet had a limited impact on their caring responsibilities within the family, which remain broadly gendered.[130] Women's public roles have changed but there has only been some renegotiation of the division of work in the private sphere, largely leaving women to assume the 'dual burden' of both paid work and unpaid domestic caring responsibilities.[131] Despite policies encouraging labour market participation by women, it remains difficult for both men and women to transcend the role of gender within the family structure and illustrates how, even within the changing structures of family life, it is sometimes still difficult for women to resist or adjust their caring responsibilities.[132] Diduck states that:

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[128] E Silva, C Smart "The 'New' Practices and Politics of Family Life" in E Silva, C Smart (editors) *The New Family?* (Sage Publications, London, 1999), 7.

[129] *Op. cit.* Diduck 2003, n117, 3.

[130] Eurostat "The Life of Women and Men in Europe - 2008", 111 noting that, across fourteen Member States women spend more time on domestic duties and child care than men a day by approximately two hours, forty minutes even when both work.

[131] M Fineman "Contract and Care" (2001) 76 Chicago-Kent Law Review 1403, 1430.

[132] *Op. cit.* Fegan, n110, 181.

'...social and economic conditions and ideologies of motherhood, fatherhood and childhood conspire to make degendered parental work difficult...'[133]

The 'ideology of the family' in EU law when adopted as a model for both free movement and private international law will potentially have an influence on migration activity. If the conception of the family is very traditional, those who adopt family structures outside this model may be discouraged from migrating. On the dissolution of the family, the caring responsibilities of those involved or uncertain legal status may encourage migration back to support networks elsewhere, or require individuals to remain in a State in compliance with a custody order. The connection between family changes, employment, housing and migration has become more complex and new forms of migration have emerged in response to increasingly flexible family structures.[134] The importance of 'linked lives', where individuals do not live together but are connected through family ties or a former relationship and the issue of care, are an increasingly important influence on residential choices and therefore on spatial-mobility patterns.[135] The interaction of law, care, and flexibility in the family structure is therefore relevant to the decision to migrate. The flexibility of family structures and their coincidence with the legal concept of 'the family' may then have a marked effect on how people behave.[136] As Bailey and Boyle state:

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[133] *Op. cit.* Diduck 2003, n117, 85-6.

[134] H Kulu, N Milewski "Family Change and Migration in the Life Course: An Introduction" (2007) 17 Demographic Research 567, 575.

[135] *Ibid.*, 576.

[136] See *Chapter One*, 2.2.3.

'For many, the nature of their family relationships begins to dictate their migration behaviour, encouraging or preventing moves over long distances.'[137]

EU law has to acknowledge the increasing flexibility of the notion of 'family' so as to prevent inconsistent legal statuses in various Member States or legal inhibitions on an individual's freedom of movement and assist in enforcing legal obligations such as maintenance.[138] Family is central to migration decisions and it is necessary to look beyond nuclear families to factors such as family breakdown and caring responsibilities and their effect on migration behaviour.[139]

Migration may follow the dissolution of an international family.[140] Factors influencing mobility include: childcare, health system, education and career prospects for children, state benefits including housing and income support, and desire to return 'home' following family breakdown.[141] This

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[137] A Bailey, P Boyle "Untying and Retying Family Migration in the New Europe" (2004) 30 Journal of Ethnic and Migration Studies 229, 236.

[138] S Morano-Foadi "Problems and Challenges in Researching Bi-National Migrant Families Within the European Union" (2007) 21 International Journal of Law, Policy and the Family 1, 8.

[139] *Op. cit.* Bailey, Boyle, n137, 232.

[140] *Op. cit.* Morano-Foadi, n138, 17; *op. cit.* Kulu, Milewski, n134, 575. In a domestic context see R Flowerdew, A Al-Hamad "The Relationship Between Marriage, Divorce and Migration in a British Data Set" (2004) 30 Journal of Ethnic and Migration Studies 339; P Feijten, M van Ham "Residential Mobility and Migration of the Divorced and Separated" (2007) 17 Demographic Research 623.

[141] *Op. cit.* Morano-Foadi, n138, 5.

has significant implications for the movement of children across international borders, whether accomplished lawfully or unlawfully,[142] as primary carers will often attempt to relocate with their child following the dissolution of the family unit.[143] It is usual for individuals to return to their home State where social support networks may remain.[144] It has been argued that this is more common for mothers because they often have the primary care of children and:

'...it is more problematic for women than for men to live outside their own culture when the family splits up and children are involved. Apparently men do not have the same need for a social support network as do women.'[145]

This is the context in which European private international family law is operating. It is necessary to take into account the reality of family structures and family based motivations. These include the rights of the individuals involved, particularly those of children, the difficulties of maintaining cross-border relationships through custody arrangements and combining work and care. It is desirable that an individual's legal status should be clear and the relevant legal structures should have clarity, both in

[142] In England and Wales, under section 13(1)(a), Children Act 1989, if a residence order is in force in relation to the child consent to remove the child from the jurisdiction must be obtained, either in writing from the other individual holding parental responsibility or from the court. The court will consider the request to relocate in the light of the welfare of the child under section 1(1), Children Act 1989, see *Payne v Payne* [2001] 1 FLR 1052. The individual who holds a residence order has the right to remove the child without permission from the jurisdiction for up to one month under section 13(2), Children Act 1989.

[143] *Op. cit.* Morano-Foadi, n138, 10-11.

[144] *Op. cit.* Kulu, Milewski, n134, 576.

[145] *Op. cit.* Morano-Foadi, n138, 9.

drafting and application, so it is unambiguous what legislation applies in what circumstances.[146] It is also important to consider what effect other areas of law have when they interact with private international law, so, for example, the residency status of the parties in a host state and access to welfare benefits. The nature of family law is that it engages with the management of personal relationships. It should therefore attempt to reflect the nature of those relationships, and the circumstances of family breakdown so as to facilitate the protection of the rights and interests of the individuals involved. These issues will be examined in more detail in relation to Regulation 2201/2003 in *Chapter Four.*

The three factors identified, private international law aims, human rights, families and migration, are relevant when regulating international child abduction. Part four will outline why gender equality should also be one of the factors of relevance in a European context and will identify some of the issues arising out of this requirement.

4. The Importance of Including Gender Equality Aims in EU Law

Although the factors previously identified are clearly of relevance to the adoption of private international family law in an EU context, gender equality should also inform EU policy making in this area. Gender equality aims should have a 'space' for consideration and negotiation alongside the other factors identified, and this section will outline how and why this is

[146] Lowe questions the value of several legal instruments dealing with the same issue making it difficult to establish which applies when, making legal advice difficult and litigation complex see N Lowe "New International Conventions Affecting the Law Relating to Children – A Cause for Concern?" [2001] International Family Law 171, 175. He argues therefore that the EU should only take action where other international legal instruments have demonstrably failed, see *op. cit.* Lowe 2003, n23, 479.

relevant in a European context. It will be argued that gender equality should necessarily be engaged as a relevant factor to assist in adding substance to the notion of European citizenship. Gender equality aims are an implicit factor in the development of European law which contributes to the notion of European citizenship and the substantive equality of men and women. The law relating to child abduction in Regulation 2201/2003 can highlight the extent to which this has been recognised and taken into account at Union level. It is important to engage with gender issues in relation to family law as this affects both women and men in their caring obligations and the family has been called '*the primary locus of the oppression of women*'.[147] The relevance of gender equality in a family law context will be demonstrated, highlighting the issue of domestic violence as a form of gender inequality, and the competences, which require the EU to engage with these issues, examined.

4.1. Women and Domestic Violence: Gender Relations in the Family

It has already been highlighted that the provision of care within the family structure remains gendered to a certain extent, despite women's increased participation in the labour market. The law plays a major role in constructing gender ideologies and identities for private structures which determine relationships between the sexes.[148] Violence against women in intimate relationships forms an expression of gender subordination in the unregulated private sphere, where male dominance can go largely unchecked.[149] Due to the public/private distinction, women have

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[147] C MacKinnon *Toward a Feminist Theory of the State* (Harvard University Press, Cambridge Massachusetts, 1989), 61.

[148] *Op. cit.* O'Donovan, n111, 134.

[149] This is explored further in *Chapter Five*, 2. Although men are subjected to violence within intimate relationships, it arguable that this does not have the same gendered social basis as

traditionally been regarded as beyond the reach of legal guarantees and oppression and violence cannot easily be challenged when it occurs in the private sphere of the family.[150]

Feminist analysis of the incidence of domestic violence has revealed it as a systematic social problem.[151] It is argued that the violence forms part of a desire by the abuser to control the woman's actions and exert power over them. This desire to control has its basis in the wider social subordination of women to men.[152] Children are also placed at considerable risk of harm if their primary carer is subjected to violence by a partner.[153] Violence may be a central factor in the dissolution of the family and if violence is involved the risk of harm potentially increases following the separation of

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violence against women. See R Dobash, *et al* "The Myth of Sexual Symmetry in Marital Violence" (1992) 39 Social Problems 71.

[150] C Smart *The Ties that Bind: Law, Marriage and the Reproduction of Patriarchal Relations* (Routledge & Kegan Paul, London, 1984), 164.

[151] J Mooney *Gender Violence and the Social Order* (St Martin's Press, New York, 2000), 98. Council of Europe "Recommendation of the Committee of Ministers to Member States on the protection of women against violence and Explanatory Memorandum" Rec(2002)5 adopted on 30 April 2002 available at http://www.profeministimiehet.net/whiterib/content/texts/rec20025.doc last accessed 13th July 2007 details several reports separately citing the incidence of domestic violence as affecting one in four women.

[152] E Schneider *Battered Women and Feminist Lawmaking* (Yale University Press, New Haven, 2000), 28.

[153] A Mullender, R Morley "What do we know from Research?" in A Mullender, R Morley (editors) *Children Living With Domestic Violence* (Whiting & Birch, London, 1994), 31; J Edleson "The Overlap Between Child Maltreatment and Woman Battering" (1999) 5 Violence Against Women 134, 151; A Appel, G Holden "The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Re-Appraisal" (1998) 12 Journal of Family Psychology 578, arguing that in their US sample there was a 40% co-occurrence, 596.

a woman from her violent partner as he attempts to reassert control over her following the breakdown of the relationship.[154]

However, the power imbalance which may exist within the family structure is largely unaddressed in law and is commonly ignored when forming policy in relation to family breakdown.[155] The individuals involved in family breakdown may now be regarded as having equal bargaining power by State actors.[156] This affects women in particular as they are more likely to be negatively affected by a power imbalance. Pylkkånen argues:

'The dominant (or, prioritised) model today repeats the liberal understandings of equality: women and men are regarded as equal and independent partners. The protection of their privacy and autonomy reflects a notion of harmonious family dissolutions even when it is generally known how much disharmony and even violence is involved.'[157]

The disparity of power distribution within the family structure and the gendered nature of family roles should therefore be addressed in lawmaking in relation to the family. The effect of these power structures and the public/private construct that can help to maintain them should be considered. Wallbank argues that:

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154 C Humphreys, R Thiara "Neither Justice Nor Protection: Women's Experiences of Post-Separation Violence" (2003) 25 Journal of Social Welfare and Family Law 195, 199; R Fleury, C Sullivan, D Bybee "When Ending the Relationship Does Not End the Violence" (2000) 6 Violence Against Women 1383, 1384.

155 *Op. cit.* Pylkkånen, n108, 298.

156 *Ibid.*

157 *Ibid.*

'There is a need to recognise that where the primary caregiver holds a genuine fear of violence or detriment to her and/or the child, it should be the role of family law to send the message that violence against women and children will simply not be tolerated.'[158]

This approach would require the incidence and effect of domestic violence on women and children to be recognised as a part of family life, and tackled. Activism to restrict men's violence against women and provide both legal protection and resources to women affected by this form of violence has now assumed a global importance.[159] It has been addressed to a certain extent by the EU through the Daphne Programmes which fund bodies tackling violence against women and children.[160] This acknowledgement of the existence of gender based violence against women and the need to tackle it via EU law needs to be extended to its incidence and roots in the family structure which affect women's participation in the labour market, rather than focussing solely on the resultant public inequalities.

It is therefore important to engage with women and the role the family can play in inhibiting women's opportunities and citizenship status by obscuring and failing to tackle the violence of a partner. This is particularly

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[158] J Wallbank "Getting Tough on Mothers: Regulating Contact and Residence" (2007) 15 Feminist Legal Studies 189, 196.

[159] S Walby "Feminism in a Global Era" (2002) 31 Economy and Society 533, 540.

[160] Now in its third programme see Daphne III, Decision No. 779/2007/EC establishing for the period 2007-2013 a specific programme to prevent and combat violence against children, young people and women and to protect victims and groups at risk (Daphne III programme) as part of the General Programme 'Fundamental Rights and Justice' OJ L [2007] 173, 20th June 2007.

important in the European context as the equality of women is an aim of the Union and discrimination against women on the grounds of sex is prohibited. The equality of women also has the status of a fundamental right under Article 23, Charter of Fundamental Rights in the European Union. The specific competencies of the EC to intervene to secure gender equality in the Union will be examined in more detail in the next section.

4.2. The EC Treaty and the Scope of Gender Equality

The EC has a long history of addressing discrimination against women, particularly in the workplace, based on Article 141 (ex 119) EC on equal pay. This competence has expanded in scope to cover positive action policies under Article 141(4) and has been added to by Article 13 EC providing competence for combating discrimination based on sex, racial or ethnic origin, religion, disability, age or sexual orientation. Article 3(2) EC also requires the Community to aim at eliminating inequality between men and women. The combination of these competencies provides tools to pursue the equality of men and women as part of an approach to European citizenship.[161]

The EC has developed gender equality policies at an institutional level and has extensively legislated, particularly in the economic sphere on issues relating to equal pay and discrimination in the workplace.[162] The scope of

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[161] Article 23, Charter of Fundamental Rights of the European Union guarantees equality between men and women in *all* areas including work and pay but will not be considered here because of the uncertain legal status of the Charter. It could be said to add to the claim that equality should be pursued as part of a concept of European citizenship.

[162] For a historical perspective on the EC's equality agenda see M Pollack, E Hafner-Burton, "Mainstreaming Gender in the European Union" (2000) 7 Journal of European Public Policy 432. The EC has legislated in relation to equal pay for men and women and prohibiting discrimination in the workplace, now recast as Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation OJ L [2006] 204/23, 26th July 2006. There is also legislation protecting women during pregnancy and maternity leave although under a health and safety competence, see Directive 92/85 on the introduction of measures to encourage improvements in the safety and health at work of pregnant

action has recently expanded under Article 13 EC and a Directive prohibiting discrimination on the grounds of gender when accessing goods and services has been adopted.[163] The ECJ, in implementing the equality guarantees of the EC Treaty, has elevated equal treatment of men and women to the status of a fundamental right.[164] Although the right has economic origins, the ECJ, in transforming it into a fundamental right has guaranteed gender equality in the daily lives of all EU citizens and all areas of EU law.[165]

Alongside this, Article 3(2) EC provides competence for the operation of gender mainstreaming in the formation of policy by the Commission. Gender mainstreaming is the process of incorporating 'gender' into the policy and lawmaking process, addressing issues which affect the sexes differently before the act or law comes into force to 'gender proof' the law.[166] Any draft instrument should be scrutinised for compatibility with

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workers and workers who have recently given birth or are breastfeeding OJ [1992] L 348, 19th October 1992.

[163] Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ [2004] L 373/37, 21st December 2004.

[164] Case 149/77 *Defrenne III* [1978] ECR 1365, paragraphs 26 and 27. This is impliedly strengthened by the judgment in Case C-144/04 *Mangold v Helm* [2005] ECR I-9981, paragraph 75, which recognised the principle of non-discrimination on the grounds of age under Article 13 EC as a general principle of Community law. Non-discrimination on the grounds of sex is also prohibited by Article 13 EC and presumably the same will apply to all the grounds of discrimination in the Article. However, Case C-427/06 *Bartsch*, judgment 22nd November 2008 makes it clear that this principle applies only within the scope of EU law and does not affect national law.

[165] See A Masselot "The State of Gender Equality Law in the European Union" (2007) 13 European Law Journal 152 and Case C-270/97 *Deutsche Post AG v Elisabeth Sievers* [2000] ECR I-929; Case 75/82 *Razzouk v Commission* [1984] ECR 1509.

[166] S Nott "Accentuating the Positive: Alternative Strategies for Promoting Gender Equality" in F Beveridge, S Nott, K Stephen *Making Women Count* (Aldershot, Ashgate, 2000), 262.

the right to equality and non-discrimination which indicates a commitment to ensuring substantive equality of men and women in all areas of European law.[167] As Howard states:

'There appears to be a realisation that prohibiting discrimination and prescribing equal treatment is not enough to tackle the patterns of inequality suffered by some groups in society...'[168]

As part of this process, the Commission also periodically publishes a 'Roadmap' indicating the policies it intends to pursue in relation to gender equality. The most recent Roadmap for the period 2006-2010 focuses on the equal economic independence of men and women, reconciliation of private and professional life, equal representation in decision-making, eradication of gender based violence and elimination of gender stereotypes.[169] To assist the Commission in its pursuit of gender equality a new European Institute for Gender Equality has been established[170] charged with collecting and analysing information on gender equality, supporting gender mainstreaming, carrying out Europe-wide surveys on gender equality, and setting up a dialogue with non-governmental organisations on the subject of gender equality.[171]

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[167] E Howard "The European Year of Equal Opportunities for All – 2007: Is the EU Moving Away from a Formal Idea of Equality?" (2008) 14 European Law Journal 168, 181.

[168] *Ibid.*, 183.

[169] Communication from the Commission "A Roadmap for Gender Equality 2006-2010" COM(2006) 91 final, 1st March 2006, 1.

[170] Regulation No. 1922/2006 on establishing a European Institute for Gender Equality OJ [2006] L 403/9, 30th December 2006.

[171] Article 3, Regulation No. 1922/2006 on establishing a European Institute for Gender Equality OJ [2006] L 403/9, 30th December 2006.

Despite this legislative and political engagement with equality of men and women, the EU's action so far, particularly in the legislative sphere, has had an economic flavour, thereby tackling the symptoms, and not the cause of inequality.[172] This focus has meant that the EU has not clearly or consistently engaged with issues such as the public/private divide or had a meaningful debate over dependency, care and labour market participation, all of which have a significant impact on women's substantive, rather than formal equality.[173] The EU has recognised the need to go beyond formal equality by allowing positive action to try and secure equality of opportunity and actively pursuing a policy of mainstreaming gender,[174] but the focus on employment policy ignores the difficulty of women accessing the public sphere and the abuse and violence women are exposed to in the private sphere.[175]

However, there is a suggestion that this approach is changing under Article 13 EC and Article 3(2) EC. The mainstreaming policy means that all legislative action proposed by the Commission should be examined for its effect on men and women, not just economic measures but also measures adopted in other areas such as private international law. Article 3(2) EC therefore requires positive steps to address gender inequality in all areas of

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[172] E Lombardo "EU Gender Policy: Trapped in the 'Wollstonecraft Dilemma?" (2003) 10 European Journal of Women's Studies 159, 161.

[173] *Ibid.*, 171.

[174] *Op. cit.* Howard, n167, 177.

[175] C McGlynn "EC Sex Equality Law: Towards a Human Rights Foundation" in T Hervey, D O'Keffee (editors) *Sex Equality in the European Union* (John Wiley, Chichester, 1996), 244.

EC law.[176] Additionally, Masselot argues that Article 13 potentially provides a clear legal basis for anti-discrimination measures outside of the internal market context.[177] It has been suggested that Article 13 could widen the ambit of the prohibition on sex discrimination to encompass new issues such as violence against women.[178] The EU already has a programme funding projects dealing with violence against women and children in Europe.[179]

The extension of EU action beyond funding programmes to legislative action on violence against women as a form of discrimination would fulfil Walby's prediction that in non-economic areas of discrimination the EU's intervention has merely been slowed, rather than prevented, as they are connected to economic issues.[180] This indicates that the EU will have to address, not only violence against women, but also notions of family life and care in its lawmaking. Such a change in emphasis could in turn contribute to a less market centred concept of European citizenship.

Article 13 EC incorporates several other grounds of discrimination. The EU has not, as yet, engaged with the intersection of various forms of

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[176] *Op. cit.* Masselot, n165, 154.

[177] *Ibid.*, 155.

[178] S Millns "Gender Equality, Citizenship and the EU's Constitutional Future" (2007) 13 European Law Journal 218, 236.

[179] Now in its third programme see Decision No 779/2007/EC establishing for the period 2007-2013 a specific programme to prevent and combat violence against children, young people and women and to protect victims and groups at risk (Daphne III programme) as part of the General Programme 'Fundamental Rights and Justice' OJ [2007] L 173, 20th June 2007.

[180] S Walby "The European Union and Gender Equality: Emergent Varieties of Gender Regime" (2004) 11 Social Politics 4, 22.

discrimination, which results in the differing experiences of discrimination between groups of women.[181] Although combating multiple axes of discrimination is listed as an aim of the Roadmap for gender equality[182] the EU has thus far assumed that inequalities have the same origin and effects.[183] It has also seemingly ignored the politicisation of inequality and the risk of a hierarchy of inequalities.[184] There has been concern expressed that gender equality is losing ground as a priority in the EU as a result of this hierarchy.[185]

Gender equality policies occupy an equivocal position as both an economic and a social objective which invites ambiguous policy outcomes.[186] This means that although gender equality may be part of the policy formation process, it may be co-opted to achieve another purpose.[187] The nature of the EC's complex and contested policy and lawmaking process, where there are many actors with different political interests, means that the European forum is particularly vulnerable to this.[188] Decision making at

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[181] M Verloo "Multiple Inequalities, Intersectionality and the European Union" (2006) 13 European Journal of Women's Studies 211, 213.

[182] *Op. cit.* Commission, n169, 4.

[183] *Op. cit.* Verloo, n181, 213.

[184] *Ibid.*

[185] *Ibid.*, 214; *op. cit.* Millns, n178, 237; *op. cit.* Masselot, n165, 154.

[186] *Op. cit.* Stratigaki 2004, n127, 34.

[187] *Ibid.*, 36.

[188] *Ibid.*, 51.

EC level revolves around negotiation, compromise and lobbying which makes it difficult for women to be heard. Any benefit to women in legislation may be watered down considerably during the complex law-making process.[189] As Richardson states:

'[The EU's] multinational and neo-federal nature, the extreme openness of decision making to lobbyists, and the considerable weight of national politico-administrative elites within the process, create an unpredictable and multi-level policy making environment.'[190]

Making gender equality central to lawmaking process as a part of European citizenship could help to root this value in the institutional context. It would assist in the 'framing' of a policy problem if gender equality issues are taken into account in the initial stages of policy formation instead of 'adding' issues later to a fully formulated policy.[191] This would in turn provide the basis for any further debate on the issue and a normative standard against which the policy could be assessed. The possibility of using the concept of European citizenship to ensure gender equality is accounted for in private international family law will be examined in the next section.

4.3. The Nature of Union Citizenship and Gender Equality

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[189] F Beveridge, S Nott "Gender Auditing – Making the Community Work for Women", in T Hervey, D O'Keeffe (editors) *Sex Equality in the European Union* (John Wiley, Chichester, 1996), 388. This will be addressed in relation to Regulation 2201/2003 in *Chapter Eight.*

[190] J Richardson "Policy Making in the EU: Interests, ideas and garbage cans of primeval soup" in J Richardson (editor) *European Union: Power and Policy Making* (2nd edition, Routledge, London, 2001), 5.

[191] *Ibid.*, 6.

Article 17(1) EC establishes that a citizen of the Union is anyone who holds the nationality of a Member State.[192] The introduction of the concept of Union citizenship by the Treaty of Maastricht was motivated by dissatisfaction with the European project, and from that point onwards, the institutions have been attempting to address this via policies adopted under the banner of 'citizenship'.[193] It is this motivation that drives the political aims of the Area of Freedom, Security and Justice.

It has become clear that the introduction of citizenship does allow citizens to claim substantive rights from the Union.[194] The nature of some of these rights will be examined at a later point in the thesis.[195] Arguably, the power of the concept of citizenship lies, not in the rights that it awards to the people who are classified as citizens of Europe, but in its potential for developing claims which can be made against the Union.[196] A concept of citizenship allows normative claims about how a community, in this case

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[192] Nationality of a Member State is a matter for national law see Case C-200/02 *Chen v Secretary of State of the Home Department* [2004] ECR I-9925. As Article 17(1) EC is the basis of Union citizenship no cross border element is required for access to citizenship rights, see E Spaventa "Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects" (2008) 45 Common Market Law Review 13, 18.

[193] J Weiler *The Constitution of Europe* (Cambridge University Press, 1999), 329.

[194] Mostly in relation to residence and welfare rights following the exercise of the right to freedom of movement under Article 18(1) EC. See e.g. Case C-184/99 *Grzelczyk v Centre public d'aide social d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193 and Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091. For discussion on the significance of these rights see C Oliveira "Workers and Other Persons: Step-by-Step From Movement to Citizenship – Case Law 1995-2001" (2002) 39 Common Market Law Review 77.

[195] *Chapter Four.*

[196] J Shaw "Importing Gender: the Challenge of Feminism and the Analysis of the EU Legal Order" (2000) 7 Journal of European Public Policy 406, 417.

the European Union, *should* be organised and what values are central to that polity.[197]

It will be argued therefore that women, although historically excluded from citizenship rights, can potentially use citizenship for claims to put women's interests at the centre of lawmaking in the EC. This can be done using tools available in the EC Treaty, identified above, aimed at achieving the equality of men and women[198] which should be used in such a way as to anchor women's rights and interests in the Union's architecture, developing this status to give real and tangible benefits to women.[199] Citizenship should be developed to give everyone in the Union, not just migrants, political and participatory rights in relation to EU policy and decision making.[200] Given that action under the AFSJ is done in the name of citizenship, it is legitimate to ask what sort of Europe is being built for citizens. It will be argued that action based on citizenship should help to build an Area of Freedom, Security and Justice that acknowledges difference and that this should help to provide a purpose, both to the political concept of AFSJ and to European citizenship. This will perhaps add vibrancy to a citizenship concept against which the AFSJ and its associated legislative action can be normatively assessed.[201]

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[197] M Everson "The Legacy of the Market Citizen" in J Shaw, G More (editors) *New Legal Dynamics of European Union* (Clarendon Press, Oxford, 1995), 80.

[198] Principally Article 3(2) EC making equality of men and women a Community aim which is carried out through the mainstreaming of gender; Article 13 EC prohibiting discrimination on the grounds of sex amongst other factors; and Article 141 EC on the equal pay of men and women.

[199] Editorial "Two Speed European Citizenship? Can the Lisbon Treaty Help Close the Gap?" (2008) 45 Common Market Law Review 1, 4.

[200] *Ibid.*

[201] *Op. cit.* Everson, n197, 90.

4.3.1. Equality and the Universality of Citizenship

Citizenship can be viewed as a concept encouraging civic responsibility, or alternatively as giving access to rights and protections facilitated by market activity.[202] European citizenship has been characterised by the features of the latter with its citizens regarded as 'market citizens' meeting the requirements of the market through economic activity.[203]

This concept of citizenship has been regarded as problematic for women as their access to the labour market has been inhibited through expectations of care and discrimination.[204] The traditional concept of citizenship theorised by Marshall[205] assumed that all citizens had the same opportunity to access the civil, political and social rights he outlined since he did not have women 'in focus'.[206] Women's citizenship status was thereby endangered as they did not access the market and had difficulty in obtaining social or welfare rights which rely on this type of economic contribution.[207] Instead, women have traditionally accessed welfare rights through their dependency

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[202] T Purvis, A Hunt "Identity versus Citizenship: Transformations in the Discourses and Practices of Citizenship" (1999) 8 Social and Legal Studies 457, 464.

[203] *Op. cit.* Everson, n197, 85.

[204] S Walby "Is Citizenship Gendered?" (1994) 28 Sociology 379, 385.

[205] T H Marshall *Citizenship and Social Class* (Pluto Press, London, 1992).

[206] J Shaw "Law, Gender and the Internal Market" in T Hervey, D O'Keeffe (editors) *Sex Equality in the European Union* (John Wiley, Chichester, 1996), 295.

[207] *Op. cit.* Walby 1994, n204, 384. Citizenship is also exclusive along other axes of disadvantage such as age, sexuality, race and class, see N Yuval-Davis "Women, Citizenship and Difference" (1997) 57 Feminist Review 4, 17.

on a male partner. Access to citizenship rights is therefore affected by the matrix of gender, race, etc.[208] Violence against women is potentially inhibitive of women's access to citizenship rights as the violence affects their ability to participate in the labour market and encourages women's dependency on their abuser.[209]

As citizenship is universalist in nature, it is not legitimate to treat women differently on the basis of structural disadvantage. Citizenship is premised on universal treatment of acknowledged homogenised members of a community. Citizenship does not redress structural inequalities, resulting in issues such as the gendered division of care, which inhibit access to citizenship rights.[210] All European citizens should be treated the same on the basis of their membership of a European community,[211] despite the fact that structural forces mean that individuals will not be able to access rights associated with that status on the same basis.[212] As Kostakopoulou argues:

'Notwithstanding the language of universality and the transformative impact of Union citizenship, however, we should not lose sight of the

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[208] R Lister "Citizenship: Towards a Feminist Synthesis" (1997) 57 Feminist Review 28, 38.

[209] S Goldfarb "Applying the Discrimination Model to Violence Against Women: Some Reflections on Theory and Practice" (2002) 11 Journal of Gender, Social Policy and Law 251, 257.

[210] M Everson "Women and Citizenship of the European Union" in T Hervey, D O'Keeffe (editors) *Sex Equality in the European Union* (John Wiley, Chichester, 1996), 211.

[211] Not the EC but the community of citizens. Under Article 17(1) EC European citizens have to be citizens of their Member State which may result in different rights but in relation to European citizenship they will have the same rights. On this 'coil' of citizenship see D Kostakopoulou "European Union Citizenship: Writing the Future" (2007) 13 European Law Journal 623.

[212] *Ibid.*, 638.

institutional and structural conditions that underpin the distribution and exercise of citizenship rights.'[213]

Women's citizenship status has therefore been problematic as they either have to accept a patriarchal citizenship based on male characteristics to which they cannot always conform, or argue for recognition of female difference requiring special legal treatment.[214] Lombardo argues that either approach adopts a male model citizen and means that women are not full citizens.[215]

However, if citizenship is an equal status, treating all individuals 'the same' on the basis of that status, it is arguably legitimate to act in the name of that value to try and secure equal access to citizenship rights. In other words, as citizenship speaks of equality of citizens, why can citizenship not be used as a motivating concept to pursue an agenda of substantive equality where difference is valued?[216] Purvis and Hunt argue that:

'...a concept of citizenship which occludes [social] identities and, in turn, the social relations through which they are constituted, reproduced, and potentially transformed, threatens to serve as a legitimating discourse for the maintenance of the oppressions premised on those identities.'[217]

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[213] *Ibid.*

[214] *Op. cit.* Lombardo, n172, 159.

[215] *Ibid.*, 160.

[216] *Op. cit.* Kostakopoulou, n211, 643.

[217] *Op. cit.* Purvis, Hunt, n202, 461.

Indirect action pursuing gender equality in all EU law and policy to fulfil a concept of European citizenship would mean that the Union would have to engage with factors restricting women's opportunity to participate in the Community or access citizenship rights.[218] In this way, citizenship can instigate a dynamic process, challenging the dominant policy frames and providing a normative aim for projects such as the AFSJ. This would mandate the Union to consider the impact of its actions on men and women, and the effect on women of structural impediments such as care, the family structure and access to the labour market, domestic violence and the intersectionality of difference. As Hervey states:

'The gendered elements of those parts of EC law traditionally seen as nothing to do with sex equality should be exposed. Sex equality should be conceptualised as permeating the whole of the Community legal order.'[219]

A citizenship of value for women should embrace both individual rights and political participation and inclusion.[220] Citizenship therefore has to be viewed as integral to the policy making of the institutions and gives citizenship both an institutional and a governance dimension.[221] Shaw argues that citizenship requires institutional innovation at European level

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[218] *Ibid.*, 475.

[219] T Hervey "The Future for Sex Equality Law in the European Union", in T Hervey, D O'Keffee (editors) *Sex Equality in the European Union* (John Wiley, Chichester, 1996), 403.

[220] *Op. cit.* Lister 1997, n208, 35.

[221] J Shaw "The Many Pasts and Futures of Citizenship of the European Union" (1997) 22 European Law Review 554, 562-3.

driven by notions of equality, justice and democracy.[222] Citizenship thereby becomes, not just symbolic, but central to European policy making.[223] The equality notion embodied in citizenship should mandate that the substantive equality of women and men be an integral part of this process. This would give a much higher profile to both substantive and procedural engagement with gender equality at EU level, hopefully resulting in a 'space' for gender equality considerations in proposals for legislation.[224]

Citizenship therefore has the potential to integrate equality norms alongside human rights into the legal, political and social discourse of the institutions.[225] As Masselot states:

'The principle of gender equality as a social and human right also impacts on the notion of citizenship. The evolution of the concept of gender equality shows that it increasingly aims at eliminating social inequalities in a free and just Community without reference to the internal market.'[226]

If women's rights and interests form a central value in the Union's law making structure, steps towards equality could be achieved. Attaching this priority to the concept of European citizenship would further 'fix' its

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[222] *Ibid.*, 563.

[223] *Ibid.*, 564.

[224] *Op. cit.* Millns, n178, 237.

[225] *Op. cit.* McGlynn 1996, n175, 248.

[226] *Op. cit.* Masselot, n165, 155.

importance in the Union's architecture, making it harder to displace during the contested policy making process.[227] It would not necessarily prevent the cooption of gender policies for other purposes,[228] but it would mandate consideration of gender issues and intervention in areas which have thus far been avoided by Union law. Any law making proposal in the area of private international law should therefore be scrutinised for its impact on men and women during its formation as part of the mainstreaming policy under Article 3(2) EC. The EU should be prepared to address issues beyond employment and consider factors such as family structures, care, dependency and violence which inhibit women's access to rights when legislating in relation to private international family law. This policy should be a central feature amidst the other relevant legal aims identified earlier.

5. Conclusions

This chapter has examined private international family law as part of the political drive to create an Area of Freedom, Security and Justice. Pursuant to the development of AFSJ, private international law measures have been adopted under Title IV EC, including Regulation 2201/2003 and the provisions relating to international child abduction. The objectives of the AFSJ itself are relatively undefined and it remains largely unclear what this political creation is intended to achieve beyond connecting Europe to its citizens. Despite this teleological lacuna it has been demonstrated that private international family law is affected by the aims of several areas of law in a European context: private international law, human and children's

[227] *Op. cit.* Richardson, n190, 5.

[228] See *op. cit.* Stratigaki 2004, n127.

rights and increasingly flexible family structures, migration and the free movement of persons.

However, it has been argued that alongside these factors there should be included the issue of gender equality. This should be an implicit factor in all European legislation by virtue of Article 3(2) EC and, if the EC's competences are used effectively, could contribute to the achievement of gender equality and provide value to the notion of European citizenship. Gender equality issues should be given a space in proposals and, if appropriate, in European legislation, including in the field of private international family law.

All of these aims, including gender equality, should ideally be balanced and incorporated into any European private international family law. The following chapters will consider the extent to which these legal aims, and particularly gender equality concerns, have been secured in relation to international child abduction in Regulation 2201/2003. In particular, it will be considered whether the law accommodates or admits the relevance of women's issues in this context or whether this was overborne by other concerns. To do this *Chapter Three* will consider the explicit inclusion of gender equality policies into the child abduction provisions of Regulation 2201/2003. The implicit role of gender in European child abduction law will be considered in *Chapters Four* and *Five,* which focus on the role of the family and care responsibilities and abductions motivated by domestic violence respectively. These chapters will also consider how the other factors identified in this chapter were incorporated into Regulation 2201/2003 alongside the analysis of the 'space' accorded to gender equality concerns.

Chapter Three

THE HAGUE CONVENTION 1980 AND REGULATION 2201/2003: THE LEGAL FRAMEWORK DEFINING AND REMEDYING INTERNATIONAL CHILD ABDUCTION

1. Introduction

This chapter explores the legal framework relating to international child abduction, when it is legally defined as occurring and the policies aimed at remedying and deterring abductions. It addresses the 'space' accorded to gender explicitly on the face of the legislative solution adopted in relation to international child abduction. This is done though a detailed analysis of the law relating to international child abduction to establish how this is regulated and whether any reference to women or gender roles is incorporated into the Hague Convention 1980 or Regulation 2201/2003. This analysis of the explicit incorporation of women's concerns is inherent in the consideration of the legal provisions; it will be specifically highlighted if and when gender concerns have been explicitly addressed. In examining this legal framework the chapter will also highlight the private international law aims pursued and the way in which the law addresses the welfare and rights of the abducted child. Although it will emerge that children's rights are explicitly reflected in the content of the child abduction provisions of Regulation 2201/2003, there is no explicit space in the legislation for factors relevant to women and primary carer abductions.

The chapter will briefly consider the nature of international child abduction, the increase in abductions by the primary carers of children, and

the rights and interests of family members involved in abduction. The Hague Convention on the Civil Aspects of International Child Abduction 1980[1] (Hague Convention 1980), which forms the international basis for addressing the issue of international child abduction[2] and is the most ratified Convention promulgated by the Hague Conference on Private International Law, will then be considered.[3] The legal framework and principles behind the Hague Convention 1980, which aims to remedy and deter the abduction of children across international borders, and forms the basis of the law in Regulation 2201/2003, will be addressed. The provisions of Regulation 2201/2003 in relation to international child abduction and their interaction with the rules of the Hague Convention 1980 will then be focussed on, with reference to the case law so far. The explicit inclusion of any provisions relating to women and children on the face of the child abduction provisions of Regulation 2201/2003 will be considered as part of this analysis.

2. The Problem of Parental Child Abduction

Parental child abduction is an extreme event representing the dissolution of a family unit, which has the potential to undermine relationships and

[1] Incorporated into English law by section 1(2) and Schedule 1, Child Abduction and Custody Act 1985, in force from 1st August 1986.

[2] Few Islamic States have ratified the Hague Convention 1980. Between the UK and Pakistan there exists a Judicial Protocol which operates on similar principles to the Hague Convention 1980, see J Young "The Constitutional Limits on Judicial Activism: Judicial Conduct of International Relations and Child Abduction" (2003) 66 Modern Law Review 823.

[3] According to the Hague Conference on Private International Law website there are currently 80 contracting States: http://www.hcch.net/index_en.php?act=conventions.status&cid=24 last accessed 8th May 2008. From the 3rd April 2007 the EC has been a Member of the Hague Conference following Decision 2006/719 EC on the accession of the Community to the Hague Conference on Private International Law OJ [2006] L 297/1, 16th October 2006. See A Schulz "The Accession of the European Community to the Hague Conference on Private International Law" (2007) 56 International and Comparative Law Quarterly 939.

fundamentally affect the legal rights of those involved. This section will briefly consider the nature of child abduction, which is now carried out largely by mothers, and the difficulties of legally regulating and remedying this event.

The movement of a child across an international border can profoundly affect a child, removing them from their normal environment, which may include schools, their friends and family, into a situation where they may be unfamiliar with the language and culture and with which they may have no previous connection.[4] Even if the child is too young to comprehend the change in their surroundings, this still represents a breach of their right to a relationship with both parents.[5] Removing a child from the jurisdiction may leave the parent from whose care they have been removed in a state of uncertainty for long periods of time and will damage the development of their relationship with the child.[6] As Lowe and Horosova argue,

'...it is basically wrong for children to be uprooted from their home environment by the unilateral act of either parent and taken to a foreign jurisdiction and thus to be separated from the other parent and from their friends and familiar surroundings.'[7]

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[4] M Freeman "The Effects and Consequences of International Child Abduction" (1998) 32 Family Law Quarterly 603, 604.

[5] Article 9(3), UN Convention on the Rights of the Child 1990.

[6] *Op. cit.* Freeman 1998, n4, 615.

[7] N Lowe, K Horosova "The Operation of the Hague Abduction Convention – A Global View" (2007) Family Law Quarterly 59, 70.

Despite the nature of this act being 'basically wrong' the complexity of such cases presents a significant challenge for legal regulation. The removal of a child from the care of a parent is harmful to both, yet in many cases the child is not cared for on a day-to-day basis by the parent from whom the child is separated. In the majority of cases the mother is the abductor[8] and the mother is usually the child's primary carer.[9] As the President of the Family Division commented in *Re G*:

'This is one of those unhappy cases, frequently encountered in this jurisdiction, in which the court is confronted, not with the effective kidnapping and removal abroad of a child from the custody of the primary carer,... but with the removal or retention of a child by a primary carer who, in a state of depression or desperation at her position in an unhappy marriage outside her country of origin, "goes home to mother" in order to enjoy the support and sympathy of her own extended family, taking with her the child or children of the marriage.'[10]

Regulating primary carer abductions raises difficult questions for the law because, although the child should not be removed from the jurisdiction and away from their other parent, the primary carer of the child may feel

[8] Lowe and Horosova found that worldwide 68% of abductions were by mothers although the proportions varied between signatory States see *ibid.*, 67.

[9] Lowe and Horosova found that in England and Wales 85% of abducting mothers were the child's joint, or primary carer see *ibid.*, 68.

[10] *Re G (Abduction: Withdrawal of Proceedings, Acquiescence, Habitual Residence)* [2007] EWHC 2807 (Fam); [2008] 1 FCR 1, 22. In this unusual case, the return of one child was ordered in anticipation that the mother would also return to Canada with their other newborn child who had been born in England and was habitually resident there and therefore not wrongfully removed or retained.

entitled to do so.[11] The removal of the child from the jurisdiction can be achieved lawfully, through an application to the court for a relocation order. In England and Wales this is likely to be granted to a mother who has primary care of the child concerned.[12] The mother may believe that by relocating she is acting in the best interests of the child, and/or escaping domestic abuse, although of course there may be other, less creditable reasons for their actions, including revenge or as part of a 'power-game' on the breakdown of a relationship.[13] However, following an abduction, if the child is with their primary carer they may still be the most appropriate person to facilitate their development, even if this is within another culture.[14]

The difficulty in this situation is that the father loses contact with their child. They therefore lose the opportunity to care for the child and their custody rights in relation to that child may have been breached. This can result in a sense of loss, anxiety and frustration caused by the unilateral act of the other parent. Vindicating the father's rights in this situation does not mean that they become or were responsible for the day-to-day care of the child; just that they have rights in relation to the child which have been

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[11] M Freeman "Primary Carers and Hague Abduction Convention" [2001] International Family Law 140, 142.

[12] Section 13, Children Act 1989. See *Payne v Payne* [2001] EWCA Civ 16, [2001] 1 FLR 1052 giving guidance on the exercise of discretion in applications for leave to remove the child from the jurisdiction. The guidance favours applications made by primary carer mothers – see M Hayes "Relocation Cases: Is the Court of Appeal Applying the Correct Principles?" (2006) 18 Child and Family Law Quarterly 351. This is discussed further in *Chapter Five*, 2.

[13] The causes of abductions by the child's primary carer will be considered further in *Chapter Four*, 2. I Sagatun, L Barrett "Parental Child Abduction, the Law, Family Dynamics and Legal System Responses" (1990) 18 Journal of Criminal Justice 433, 440.

[14] M Freeman "In the Best Interests of International Abducted Children? Plural, Singular, Neither or Both" [2002] International Family Law 77, 82.

breached.[15] A father may care for the child and/or have rights of parental responsibility in relation to them. Although it is clear that fathers are starting to play a role in the care of children, the majority of this caring role still falls on mothers.[16] As Wallbank comments:

'...parental responsibility has failed to translate into an empirical reality that fathers and mothers share equal responsibility in terms of the actual day-to-day care of children, both while the relationship subsists and after it ends.'[17]

There is a distinction between the factual responsibility for the care of the child and the right to provide that care,[18] but whether the law should, or could, draw a distinction between these factors in abduction cases is questionable given the wrongful nature of the action.

The most important factor in this situation however is the effect of the events on the child concerned. The traditional construct of the family has the effect of making children into an adjunct of their parents.[19] This characterisation of children has increasingly been challenged and children

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[15] It is arguably the right to physical possession of the child which has been breached, see S Cretney *et al Principles of Family Law* (7th Edition, Sweet and Maxwell, London, 2003), 535.

[16] C Smart "The New Parenthood: Fathers and Mothers After Divorce" in J Brophy, C Smart (editors) *The New Family?* (Sage Publications, London, 1999), 102.

[17] J Wallbank "Getting Tough on Mothers: Regulating Contact and Residence" (2007) 15 Feminist Legal Studies 189, 191.

[18] I.e. rights of parental responsibility. See *ibid.*, 211.

[19] J Brannen "Reconsidering Children and Childhood: Sociological and Policy Perspectives" in E Silva, C Smart (editors) *The New Family?* (Sage Publications, London, 1999), 143.

are coming to be regarded as independent agents and rights holders.[20] McGlynn argues that this can result in:

'...seeing the child as an individual, rather than a dependent element of the mother, lead[ing] to a relationship not based on the assumed 'naturalness' of motherhood or biological 'maternal bond'.'[21]

The recognition and promotion of children's rights and interests as not necessarily coinciding with their parents should therefore be welcomed.[22] However, Lister has argued that in the process of individualising children's interests, their welfare has been divorced from that of their parents.[23] Although children are autonomous and have agency, particularly when they are very young, they are inevitably dependent to a certain degree on adults around them.[24] The difficulty of respecting children's autonomy whilst protecting their welfare and recognising the interdependence of the parent-child relationship poses a particular challenge in relation to international child abduction.

When a child has been abducted they have been subjected to a forced migration which may affect their relationship with both their parents. The

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[20] *Ibid.*

[21] C McGlynn *Families and the European Union: Law, Politics and Pluralism* (Cambridge University Press, 2006), 91.

[22] R Lister "Children (but not women) first: New Labour, child welfare and gender" (2006) 26 Critical Social Policy 315, 326.

[23] *Ibid.*, 315-6.

[24] M Fineman "Masking Dependency: The Political Role of Family Rhetoric" (1995) 81 Virginia Law Review 2181, 2200.

individualisation of children's rights and interests means that their interests cannot be identified automatically with their primary carer. Younger children in particular though will remain to some extent dependent on their carer and their welfare will not be entirely distinct from that of their carer. Children's welfare should be the primary consideration under Article 3, UN CRC, and the issue of care, and who provides such care, is central to this question. Children's autonomy and rights means that they should have the right to be heard in relation to decisions affecting them if they are of an appropriate age and maturity, although this is not determinative of the decision,[25] and their autonomy should be acknowledged. These are difficult concerns to address effectively when a child has been abducted; time is of importance and the international dimension may mean that the information available regarded the interests and welfare of the child is limited.

Although the unilateral removal of a child from the jurisdiction is 'basically wrong' the increase in abductions by mothers, who are often the primary carer of the child means that the solution is, in this situation, ambiguous. The tensions between 'rights', the factual situation of 'care' and the welfare of the child are difficult to reconcile. The return remedy and its operation under the Hague Convention 1980 have largely been regarded as successful in regulating this situation, providing a practical solution to the issue of child abduction.[26] The next sections will examine the solution provided by the Hague Convention 1980 and Regulation 2201/2003 and will consider in particular whether any gender issues, or consideration of primary carer abductions, have been explicitly

[25] Article 12, UN CRC 1990.

[26] P McEleavy "The Hague Child Abduction Convention 1980 – 2000" (2000) 13 International Children's Rights Monitor 29, 31.

incorporated into the legislative solution through a detailed examination of the terms of the Hague Convention 1980 or Regulation 2201/2003, and the associated case law.

3. The Hague Convention on the Civil Aspects of International Child Abduction 1980

3.1. The Provisions of the Hague Convention 1980: A Summary

The Hague Convention 1980 provides a civil remedy to the parent whose children have been unlawfully removed or retained from the jurisdiction.[27] Article 1, Hague Convention 1980 states that it aims to secure the prompt return of children wrongfully removed or retained, and to ensure that rights of custody and access are respected in all signatory States. These are the underlying policy objectives of the Hague Convention 1980 which give a unique approach to the issue of child abduction, focusing on a remedy of returning the child, rather than addressing jurisdictional issues and recognition and enforcement of custody decisions directly.[28] The Convention does not address the issue of abduction in terms of care or sex roles, instead providing a remedy for those who have custody rights in relation to the child who has been removed abroad.

Lord Browne-Wilkinson in *Re H (Abduction: Acquiescence)*[29] stated that:

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[27] For in depth consideration of the drafting and operation of the Hague Convention 1980 see P Beaumont, P McEleavy *The Hague Convention on International Child Abduction* (OUP, 1999).

[28] L Silberman "Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence" (2005) 38 University of California Davis Law Review 1049, 1053.

[29] [1998] AC 72, 81.

'The object of the Convention is to protect children from the harmful effects of their wrongful removal from the country of their habitual residence to another country or their wrongful retention in some country other than that of their habitual residence.'

The Hague Convention 1980 does not operate to pursue the individual child's welfare, although the enforcement of the return remedy must be accomplished with the best interests of the child in mind.[30] It acts in the interests of children generally in returning them to their home environment following an unlawful abduction.[31] This theoretically gives certainty in application, and is also aimed at deterring abductions.[32] Returning the child reverses the abduction mitigating the trauma caused to the child by being removed from their home environment.[33] It is assumed that the abduction is harmful to the child concerned.

The Hague Convention 1980 operates by defining when an abduction has occurred under Article 3.[34] If the child has been abducted under the terms

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[30] *Op. cit.* Beaumont, McEleavy, n27, 29; Application no. 48206/99 *Maire v Portugal* (2006) 43 EHRR 13, paragraph 71.

[31] To facilitate this process the Convention establishes a network of Central Authorities through which any person or institution claiming that there has been an abduction can apply to for assistance in returning the child under Article 8. Under the terms of a non-exhaustive list in Article 7, the Central Authorities are required to co-operate with one another and assist in discovering the whereabouts of children under Article 7(a), initiating or facilitating legal proceedings to ensure the return of a child under Article 7(f), and providing information about the law of their State in relation to the Convention under Article 7(e).

[32] *Op. cit.* Beaumont, McEleavy, n27, 30.

[33] *Op. cit.* Silberman 2005, n28, 1054. There is evidence that abduction causes distress to children and can have long term effects on their health see *op. cit.* Freeman 1998, n4; G Greif "A Parental Report on the Long Term Consequences for Children of Abduction by the Other Parent" (2000) 31 Child Psychiatry and Human Development 59.

[34] Under Article 4, the Hague Convention 1980 applies to all children up to the age of sixteen.

of Article 3, the remedy of return is engaged under Article 12. There are limited defences to the return of the child under Article 12 and 13. The following sections will examine these provisions in more detail.

3.1.1. Defining 'an abduction': wrongful removal or retention under Article 3

Under Article 3, Hague Convention 1980 an abduction occurs when the child is either removed from the State where they were habitually resident or retained in a State other than that of their habitual residence. These are mutually exclusive concepts.[35] A retention occurs where a child was lawfully removed from the jurisdiction but unlawfully held in the jurisdiction they then entered.[36] A removal is when the child is taken across an international border unlawfully.[37] Under Article 3(a) the removal or retention is unlawful where it is in breach of rights of custody existing under the law of the State they were habitually resident in,[38] prior to the abduction.

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[35] *Re H (Abduction: Custody Rights)* [1991] 2 AC 476, 486.

[36] *Ibid.*

[37] *Ibid.*

[38] A certificate stating the relevant law of the State of the child's habitual residence may be requested from the Central Authority in that State under Article 7(c) and Article 15 Hague Convention 1980. See *Re D (a child) (Abduction: Foreign Custody Rights)* [2006] UKHL 51; [2007] 1 AC 619 on the use of Article 15.

The term "rights of custody", under Article 5 includes the right to determine the child's place of residence.[39] This means that, even if a child does not live with the parent who is left behind following an abduction, they will have rights of custody if they can refuse consent to their child's relocation to another State.[40] Rights of custody may have arisen by operation of law, by administrative or judicial decision, or by an agreement having legal effect under the law of the State of the child's habitual residence.[41] These provisions mean that the scope of the Convention is broad and has the widest possible degree of coverage to address situations where a child has been removed or retained.[42] Throughout Europe following divorce and/or during the existence of a marital relationship in particular, parental responsibility is often legally vested in both parents.[43]

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[39] On the meaning of custody rights see: *Re P (a child) (Abduction: Acquiescence)* [2004] EWCA Civ 971; *Re V-B (Abduction: Custody Rights)* [1999] 2 FLR 192 and *C v C (minor: abduction: rights of custody abroad)* [1989] 2 All ER 465.

[40] *Re V-B (Abduction: Custody Rights)* [1999] 2 FLR 192, where a right to be consulted on the change in location was not a custody right within the meaning of the Convention.

[41] If there is a custody order in force in relation to the child, the abduction may be remedied by the enforcement of the order in the State the child has been removed to or retained in. This is how the Luxembourg Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children 1980, promulgated by the Council of Europe, operated. It is a less popular Convention than the Hague Convention 1980 because it requires a custody order and there are many exceptions to the recognition of the order, see N Lowe, A Perry "International Child Abduction – the English Experience" (1999) 48 International and Comparative Law Quarterly 127, 129. On the drafting and operation of the Luxembourg Convention see T Buck *International Child Law* (Cavendish Publishing, London, 2005).

[42] See *op. cit.* Beaumont, McEleavy, n27. Even so, in cases where a parent has no rights of custody the courts have developed the concept of 'inchoate rights' for the purposes of the Convention so that those parents, predominantly fathers without formal rights of custody, can take advantage of the return remedy. See K Beevers "Child Abduction: Inchoate Rights of Custody and the Unmarried Father" (2006) 18 Child and Family Law Quarterly 499 arguing that this form of rights should be extended to cover unmarried fathers who have no formal custody rights in relation to the child but have a role in their day to day care.

[43] L Hantrais, MT Letablier *Families and Family Policies in Europe* (Longman, New York, 1996), 37.

This division of parental responsibility may mean that a parent is more likely to abduct their child if they take them across an international border because they are more likely to remove them in breach of another person's custody rights.

A child will be protected under the Convention only if they were habitually resident in the State they were removed from prior to the abduction. The phrase habitual residence is a factual concept given its ordinary natural meaning.[44] The child's habitual residence is theoretically independent of that of their parents.[45] However, it is clear that in the case of small children, the child's habitual residence cannot be separated from their parents.[46] Under English law, the habitual residence of a child follows that of their primary carer because children, especially small children, cannot form an intention to become habitually resident.[47] This interpretation of a child's habitual residence remains factual as long as the focus remains on the carer with whom the child has a home.[48]

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[44] Explanatory Report prepared by E Pĕrez-Vera on the Hague Convention on the Civil Aspects of International Child Abduction 1980 available from: http://www.hcch.net/index_en.php?act=publications.details&pid=2779 Last accessed 31st January 2007, 445. For a full survey on the use of the term habitual residence in relation to children under the Hague Convention 1980 see R Schuz "Habitual Residence of Children under the Hague Child Abduction Convention – Theory and Practice" (2001) 13 Child and Family Law Quarterly 1.

[45] *Op. cit.* Beaumont, McEleavy, n27, 91.

[46] *Ibid.*

[47] *Re F (a minor) (child abduction)* [1992] 1 FLR 548, 551, from *In Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, 579; *Re G (Abduction: Withdrawal of Proceedings, Acquiescence, Habitual Residence)* [2007] EWHC 2807 (Fam); [2008] 1 FCR 1, 32.

[48] R Lamont "Habitual Residence and Brussels II *bis*: Developing Concepts for European Private International Family Law" (2007) 3 Journal of Private International Law 261, 267.

Once it has been determined that an abduction has taken place, the Convention's remedy of return is engaged.

3.1.2. The Return Remedy

Under Article 12, where a child has been wrongfully removed or retained for a period of less than a year, the return of the child to their habitual residence should be ordered.[49] The judicial authorities must act expeditiously in securing the return of the child.[50] The rapid return of the child is thought to re-establish the status quo existing before the abduction, and therefore provide stability for the child.[51]

Central Authorities are required by Article 10 to try and ensure the voluntary return of the child. Voluntary resolution is regarded as desirable for the child and for the family. It is thought to encourage resolution of custody disputes when the child is returned, with the increased likelihood of a satisfactory long term solution.[52]

3.2. Defences to the Operation of the Return Mechanism

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[49] Article 12 does not state that the return of the child should be to their habitual residence, although this is the norm. See D McClean "'Return' of Internationally Abducted Children" (1990) 106 Law Quarterly Review 375.

[50] Article 11, Hague Convention 1980.

[51] In practice this is not necessarily the case as the return may be as traumatic for the child as the period away from their habitual residence. See M Freeman for Reunite *International Child Abduction: The Effects* May 2006, 61. http://www.reunite.org/page.php?alias=research20 Last accessed 13th November 2006.

[52] S Armstrong "Is the Jurisdiction of England and Wales Correctly Applying the 1980 Hague Convention on the Civil Aspects of International Child Abduction?" (2002) 51 International and Comparative Law Quarterly 427, 434.

The Hague Convention 1980 ensures the return of the child in most cases so that any decisions on custody may be made in the State of the child's habitual residence.[53] The child's habitual residence is presumed to be the *forum conveniens* for any dispute.[54] There is a prohibition on the State the child was abducted to deciding issues of custody once a Hague Convention application for the child's return has been received.[55] The Perez-Vera explanatory report on the Convention emphasises that the abductor should not be able to benefit from their unlawful action by creating a jurisdictional link with a view to obtaining custody of the child.[56] The operation of the return remedy is supposed to be according to uniform principles[57] to ensure reciprocity of returns between signatory States.[58] There is some criticism that this element of reciprocity is not working between some signatory States and that the mechanism of return is not always rigorously enforced.[59]

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[53] Article 16, Hague Convention 1980 prohibits the courts of the State the child was abducted to from considering issues of the custody until return has been refused or was not sought within a reasonable period of time. A decision under the Convention does not relate to the substantive issue of the custody of the child under Article 19.

[54] R Schuz "The Hague Child Abduction Convention: Family Law and Private International Law" (1995) 44 International and Comparative Law Quarterly 771, 783.

[55] Article 16, Hague Convention 1980.

[56] *Op. cit.* Pĕrez-Vera Report, n44, 428.

[57] *Op. cit.* Silberman 2005, n28, 1057. Uniform interpretation of the Convention is difficult because there is no central adjudicator of the meaning of key phrases.

[58] J Reddaway, H Keating "Child Abduction: Would Protecting Vulnerable Children Drive a Coach and Four Through the Principles of the Hague Convention?" (1997) 5 International Journal of Children's Rights 77, 88.

[59] T Johnson "The Hague Child Abduction Convention: Diminishing Returns and Little to Celebrate for Americans" (2000) 33 New York University Journal of International Law and Politics 125, 134. See also United States Department of State Report on Compliance with the Hague

Within the scheme of the Hague Convention 1980 itself there are exceptions[60] to the principle of return under Articles 12, 13 and 20. Exceptions give flexibility to account for the circumstances of individual cases and the welfare of individual children, although the Hague Convention policies remain paramount.[61] They recognise that returning the child to their habitual residence may not be appropriate in all circumstances, where the environment the child will be returned to is not stable or satisfactory.[62] They account for the situations where other interests counteract the normal principle of returning the child.[63] They are therefore intended to have restricted scope,[64] and the burden of proof is on the abductor. In *Re M and another (children)* the House of Lords has recently given guidance on the application of the Hague Convention 1980 exceptions to return. Baroness Hale stated:

'The Convention contains a simple, sensible and carefully thought out balance between various considerations, all aimed at serving the interests

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Convention of the Civil Aspects of International Child Abduction 2000 – 2005 criticising States for their implementation of the Hague Convention 1980.

[60] The term 'exception to return' is favoured by some commentators whilst others refer to the provisions as 'defences to return'. These phrases are used interchangeably as the provisions result in the refusal to return the child, whatever the terminology.

[61] *Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716, 730; see *op. cit.* Reddaway, Keating, n58, 93.

[62] J Caldwell "Child Welfare Defences in Child Abduction Cases – Some Recent Developments" (2001) 13 Child and Family Law Quarterly 121, 124.

[63] *Op. cit.* Pérez-Vera Report, n44, 432.

[64] *Ibid.*, 434.

of children by deterring and where appropriate remedying international child abduction. Further elaboration and checklists are not required.'[65]

The scope of the exceptions will be considered separately.

3.2.1. Consent or Acquiescence

Under Article 13(a), the child may not be returned if the applicant parent was not exercising their rights of custody, or consented or acquiesced to the removal or retention of the child. The Convention will only protect those whose rights were being exercised in relation to the child prior to the actions of the other parent.[66] Consent or acquiescence can be conditional if the conditions are clear and intended by both parties to be binding.[67]

Consent to the removal or the retention of the child is relevant to establishing the defence under Article 13(a), not to the issue of whether the abduction was unlawful under Article 3.[68] Consent need not be written,[69] and may be inferred from conduct.[70] Consent must be real, and not obtained by fraud or deceit.[71]

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[65] *Re M and another (children)* [2007] UKHL 55; [2008] 1 FLR 251, 267.

[66] *Op. cit.* Pěrez-Vera Report, n44, 433.

[67] *T v T* [2008] EWHC 1169 (Fam), paragraph 70.

[68] *Re P (a child) (Abduction: Acquiescence)* [2004] EWCA Civ 971, [2005] FLR 1057.

[69] *Re C (minors) (abduction: consent)* [1996] 3 FCR 222, 227.

[70] *Re M (a minor) (abduction: consent or acquiescence)* [1999] 1 FLR 171, 189.

[71] *Ibid.*

Acquiescence occurs following an abduction where a parent has *'in fact consented to the continued presence of the children in the jurisdiction to which they have been abducted.'*[72] The focus is on the subjective intention of the parent, and the court should not infer acquiescence from attempts to secure voluntary return or reconciliation between the parties, it must be unequivocally demonstrated.[73] If the parent has acted in a way inconsistent with a desire to have the child returned or has led the abducting parent to believe that the return of the child is not necessary, they cannot subsequently change their mind.[74]

3.2.2. Return places the child at risk of grave risk of harm[75]

Under Article 13(b) a child may not be returned if they will be exposed to physical or psychological harm or will be subjected to an intolerable situation on return. The English courts have adopted a strict interpretation of Article 13(b)[76] stating in *Re C (Abduction: Grave Risk of Psychological Harm)* that:

'...the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not

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[72] *In re H and Others (Minors) (Abduction: Acquiescence)* [1998] AC 72, 91.

[73] *Ibid.*, 90.

[74] *Ibid.*, 89 relying on *In Re AZ (A Minor) (Abduction: Acquiescence)* [1993] 1 FLR 682.

[75] The interpretation and use of Article 13(b), Hague Convention 1980, particularly in cases where domestic violence has been alleged will be considered in more detail in *Chapter Five*, 3.2.1.

[76] Article 13(b) succeeded in *In Re F (a minor) (Abduction: Custody Rights Abroad)* [1995] Fam 224.

trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence.'[77]

A parent cannot rely on their refusal to return as creating an intolerable situation for the child,[78] or the return itself as causing harm to the child in the form of anxiety or disruption.[79] Silberman argues that this strict interpretation of Article 13(b) is correct because it should only succeed where there is imminent danger to the child due to issues such as war or famine, or there is a risk of neglect or serious abuse to the child from which the authorities in the child's habitual residence are incapable, or unwilling, to protect the child.[80] The concern is that a broad interpretation of the defence would undermine the main principle of the Hague Convention in returning the child to the State of their habitual residence.[81]

This defence was supposed to play only a limited role in the original scheme of the Convention[82] as a provision accounting for situations where the interests of an individual child outweighed those of enforcing the return

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[77] [1999] 1 FLR 1145, 1154.

[78] *Re C (a Minor) (Abduction)* [1989] 1 FLR 403, 410.

[79] *Ibid.*

[80] L Silberman "The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues" (2000) 33 New York University Journal of International Law and Politics 221, 235.

[81] *Re C (a Minor) (Abduction)* [1989] 1 FLR 403, 410.

[82] *Op. cit.* Pérez-Vera Report, n44, 434.

principle.[83] Arguably the role of Article 13(b) in protecting children has been disregarded in the interests of enforcing the return remedy.[84] It is clear that the courts in England and Wales require a very high standard for the Article 13(b) defence to succeed, regarding even the return of a child into care in the State of their habitual residence as a tolerable situation.[85]

3.2.3. The child objects to return

Article 13(2) allows the child's objections to return to be taken into account if they are of an appropriate age and maturity. This gives children *'the possibility of interpreting their own interests'*.[86] Before assessing the child's objections to return to the State of their habitual residence, the court will decide whether they are sufficiently mature. Included in this assessment is the validity of the child's reasons in objecting to return, their intelligence, and whether they can consider their best interests independently of others.[87] The court will then assess the nature of the child's objections.

Article 13(2) does not specify the level or quality of objection required.[88] This means that the child's objections will appear valid only if they accord

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[83] *Op. cit.* Reddaway, Keating, n58, 93.

[84] C Bruch "The Unmet Needs of Domestic Violence Victims and their Children in Hague Child Abduction Convention Cases" (2004) 38 Family Law Quarterly 529, 535.

[85] See *Re S (Abduction: Return into Care)* [1999] 1 FLR 843.

[86] *Op. cit.* Pĕrez-Vera Report, n44, 434.

[87] *Re T (abduction: child's objections to return)* [2000] 2 FLR 192, 203.

[88] *Op. cit.* Caldwell, n62, 131.

with those the court believes are reasonable.[89] In some cases, a child's objections were accepted only where they objected to returning to the actual State of their habitual residence. If the objection related to the applicant parent in the Hague proceedings, this objection was regarded as invalid, as the child would be returned to their habitual residence, not to that parent.[90] This is a difficult distinction to maintain, and perhaps too nuanced for a child, a point accepted in *Re M (A Minor) (Child Abduction).*[91]

Since the drafting of the Hague Convention 1980, the United Nations Convention on the Rights of the Child 1989[92] enshrined the right of the child to express their views on matters affecting them, depending on their age and maturity.[93] Although this is not a guarantee that the child's wishes will be followed, it demonstrates an expectation that a child will be heard in proceedings affecting them.

There is no provision defining the method by which the child's views are to be ascertained, which therefore varies according to the procedures of the signatory State. There is no guarantee that the child's objections will be heard and their opinion may be viewed as influenced if the abductor raises

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[89] *Op. cit.* Freeman 2002, n14, 79.

[90] *Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716, 730.

[91] [1994] 1 FLR 390, 395.

[92] Ratified by the UK on 15th January 1992, but not incorporated into English law and therefore not binding on the English courts.

[93] Article 12, UNCRC.

the issue of the child's objections to return.[94] The right of the child to be heard in proceedings affecting them is not secured by the Hague Convention 1980, and it is potentially in conflict with the ideal that the child should be quickly returned.[95]

3.2.4. Child has been in State for a year and has settled

Under Article 12(2), Hague Convention 1980, if the child has been in the State they were abducted to for more than a year, and it can be demonstrated that the child has settled in their new environment, the child may not be returned.[96] This recognises that the child may establish closer connections with the State they were abducted to, making it appropriate for the courts of that State, rather than those of their habitual residence prior to the abduction, to assume jurisdiction over the custody dispute.[97] In English law for the child to be 'settled' requires demonstration that they are physically established in their new community, and that they are emotionally stable and secure, not merely happy.[98] If the child has been concealed, the court will order return, arguing that the child cannot be regarded as settled if their life following the abduction has been hidden.[99]

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[94] Factors recognised in *Re J (children) (abduction: child's objections to return)* [2004] EWCA Civ 428; [2004] 2 FLR 64, 83.

[95] *Op. cit.* Caldwell, n62, 124.

[96] The court retains a discretion to order return, even if the child has settled see *Re M and another (children)* [2007] UKHL 55; [2008] 1 FLR 251, 262 and *F v M, N (by her children's guardian)* [2008] EWHC 1525 (Fam) where the child was returned to Poland, despite having settled in England.

[97] *Re M and another (children)* [2007] UKHL 55; [2008] 1 FLR 251, 262.

[98] *Re N (Minor) (Abduction)* [1991] 1 FLR 413, 417-8.

[99] *Cannon v Cannon* [2004] EWCA Civ 1330; [2004] 3 FCR 438 where the child was hidden for four years.

3.2.5. Human rights objections

Article 20, Hague Convention 1980 allows the return of the child to be refused if this would conflict with the fundamental freedoms and human rights principles of the State requested to return the child.[100] This is intended to ensure the protection of human rights but has restricted scope.[101] Although the UK ratified Article 20,[102] it was not incorporated into English law by the Child Abduction and Custody Act 1985.[103] This means that Article 20 was not binding on the English courts. However, Baroness Hale in *Re D (a child) (abduction: foreign custody rights)*[104] held that the reason Article 20 had not been incorporated was the lack of a human rights instrument in the UK in 1985. She stated that, since the enactment of the Human Rights Act 1998, Article 20 has been part of English law and will have domestic effect.[105] It is as yet unclear what effect this will have on Hague Convention applications, as Article 20 has not been much used internationally.

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[100] On the role and use of Article 20 see M Weiner "Strengthening Article 20" (2004) 38 University of San Francisco Law Review 701; M Weiner "Using Article 20" (2004) 38 Family Law Quarterly 583.

[101] *Op. cit.* Pĕrez-Vera Report, n44, 434.

[102] See: http://www.hcch.net/index_en.php?act=status.comment&csid=651&disp=type last accessed 30th January 2007.

[103] Schedule 1.

[104] [2006] UKHL 51; [2007] 1 AC 619, 643.

[105] *Ibid.*

3.2.6. Court's discretion to return

Even if one of these defences is established, the court retains discretion to order return.[106] There is inconsistency as to how the discretion is exercised between different signatory States.[107] The objectives of the Convention remain a relevant factor in this decision. Return may still be ordered given the importance of deterring further abductions, and preventing abductors benefiting from their wrongful action.[108] Although the welfare of the child may be relevant to the exercise of the court's discretion,[109] it is often outweighed by the court's concern to enforce the return principle to conform with their obligations and ensure international comity.[110]

The approach of the Convention is to deal with children as a collective, protecting the interests of all children rather than the interests of the individual child. This has been questioned given the change in status of children and the increasing role played by their views in decisions affecting them.[111] The welfare of the individual child is considered only when the exceptions to return are engaged and their welfare will then be balanced against the principle of return, judicial comity and respect for international obligations. Return is thought to be in the best interests of the child in most

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[106] The discretion applies to all the defences, including Article 12(2). See *Re M and another (children)* [2007] UKHL 55; [2008] 1 FLR 251.

[107] *Op. cit.* Freeman 2002, n14, 79.

[108] *Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716, 736.

[109] *Z v Z (Abduction: Children's Views)* [2005] EWCA Civ 1012; [2006] 1 FLR 410, 418.

[110] *Op. cit.* Reddaway, Keating, n58, 93.

[111] *Op. cit.* Caldwell, n62, 130.

cases because of the shock of the removal from the other parent, their environment and social circle but this is not normally subject to individual inquiry.[112] The focus of the Hague Convention is on parental rights rather than on children which is now dissonant with more modern notions relating to the role and status of children in proceedings that affect them and the protection of children's rights.[113]

In addition to the increase in international abductions by mothers and the approach to children's welfare, there have been some concerns expressed about the operation of the Hague Convention 1980. Duncan identifies the way applications are processed and enforced, the speed decisions are arrived at, and the over use of defences as particular problems.[114] It is difficult to provide a uniform interpretation of the Convention's provisions because of its nature as an international treaty.[115] The next section will examine Regulation 2201/2003 and its provisions on international child abduction to consider how the law should now operate between Member States.

4. International Child Abduction and Regulation (EC) No. 2201/2003

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[112] *Ibid.*, 123.

[113] *Ibid.*, 130.

[114] W Duncan "Action in Support of the Hague Child Abduction Convention: A View from the Permanent Bureau" (2000) 33 New York University Journal of International Law and Politics 103, 104.

[115] *Op. cit.* Silberman 2005, n28, 1057.

4.1. Legal Base and Development of Regulation 2201/2003

Regulation 2201/2003 was adopted under Article 61(c) EC. Article 61 forms part of Title IV EC, covering issues related to the free movement of persons and was incorporated into the first pillar by the Treaty of Amsterdam. Article 61 EC has the aim of creating an area of freedom, security and justice, with (c) specifying that this aim is to be pursued via policies relating to judicial cooperation in civil matters. This is expanded on in Article 65 EC, which specifies, under (3)(a) and (b), that improving the compatibility of rules of jurisdiction, choice of law and recognition and enforcement of judgments in civil matters are appropriate aims for the Community where this will improve the functioning of the internal market.

Action was quickly taken under Title IV EC in the form of Regulation 1347/2000.[116] The scope and text of Regulation 1347/2000 was largely adopted from the Brussels II Convention.[117] The Brussels II Convention was never brought into force and the text was adopted in the form of Regulation 1347/2000 which was agreed in the Council of Ministers on the 29th May 2000 and came into force on the 1st March 2001. Proposals for the further development of the law in this area were made on 15th August 2000 by the French government.[118] These proposals were for a Regulation

[116] Regulation (EC) No 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ [2000] L160, 29th May 2000.

[117] Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters 1998, OJ [1998] C 221/01. This Convention was drawn up under Article K3 EU, the old Title IV of the Justice and Home Affairs pillar of the EU, before the transfer of competence to the EC pillar. For full details see G Moir, P Beaumont "Brussels II Convention: A New Private International Law Instrument in Family Matters for the European Union or the European Community" (1995) 20 European Law Review 268.

[118] On the transfer of Title IV to the EC pillar, transitional provisions were put in place, part of which allowed the Member States to propose legislation, not just the Commission under Article 67(2). See J Basedow "The Communitarization of the Conflict of Laws under the Treaty of Amsterdam" (2000) 37 Common Market Law Review 687.

for the enforcement of rights of access judgments relating to children.[119] This was rapidly followed by a Commission proposal on the mutual recognition of decisions on parental responsibility,[120] extending the scope of Regulation 1347/2000.[121] This proposal was withdrawn[122] in favour of a new proposal dealing with jurisdiction and recognition and enforcement of judgments in matrimonial and parental responsibility cases and repealing Regulation 1347/2000.[123] This proposal was eventually adopted as Regulation 2201/2003 in the Justice and Home Affairs Council meeting on the 2-3rd October 2003.[124]

Regulation 2201/2003 came into force on the 1st March 2005,[125] in all EU Member States except Denmark.[126] It is broad in scope, promoting the free

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[119] OJ [2000] C234.

[120] Commission Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility 6th September 2001 COM(2001) 505 final.

[121] Commission Working Document "Mutual Recognition of Decisions on Parental Responsibility", 27th March 2001, COM(2001) 166 final, 13.

[122] Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, 6th June 2002, COM(2002) 297 final.

[123] Commission Proposal for a Council Regulation concerning the jurisdiction and recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation (EC) No. 1347/2000 and amending Regulation (EC) No. 44/2001 in matters relating to maintenance, 17th May 2002, COM(2002) 222 final/2.

[124] The development of Regulation 2201/2003 will be explored further in *Chapter Seven.*

[125] Article 72, Regulation 2201/2003.

[126] Preamble Recital 31. Denmark opted out of Title IV EC. The UK and Ireland are able to opt in to Title IV measures, and did so for Regulation 2201/2003.

movement of family law judgments by unifying the grounds upon which jurisdiction is assumed in divorce, legal separation, and marriage annulment,[127] and parental responsibility cases.[128] Recognition and enforcement of the resulting judgment is then almost automatic.[129] Strong emphasis is placed on the unhindered circulation of judgments irrespective of substance, i.e. mutual recognition, and mutual trust between Member State courts.[130] Regulation 2201/2003 intervenes in relation to international child abduction across borders internal to the European Union for the first time.

It was clear from the proposals that some Member States and the Commission wanted to include provisions relating to child abduction to address this issue within the Community framework.[131] However, not all Member States felt intervention was necessary given that the Hague Convention 1980 was in force across the EU and regarded as successful at addressing the problem of abduction.[132] Negotiations on the child abduction provisions remained intensive until a political agreement was

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[127] Article 3, Regulation 2201/2003.

[128] Articles 8 – 15, Regulation 2201/2003.

[129] Chapter III, Regulation 2201/2003.

[130] J Meeusen "Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution?" (2007) 9 European Journal of Migration and Law 287, 302.

[131] P McEleavy "Brussels II *bis*: Matrimonial Matters, Parental Responsibility, Child Abduction and Mutual Recognition" (2004) 53 International and Comparative Law Quarterly 503, 509.

[132] M Tenreiro, M Ekström "Recent Developments in EC Judicial Co-operation in the Field of Family Law" [2004] International Family Law 30, 35.

reached in Council under the Danish Presidency,[133] arguably to avoid the embarrassment of the failure of the Regulation.[134]

The resulting compromise provisions are found in Articles 2(11), 10, 11, 60 and 62, Regulation 2201/2003. The Hague Convention 1980 remains in force between the Member States under Article 62 but is subject to the provisions contained within Regulation 2201/2003 according to Article 60.[135] However, the operation of some of the Hague Convention 1980 rules is altered by Regulation 2201/2003. These changes are largely aimed at reinforcing the obligation to return the child.[136] The concern was to try and preserve the right of the courts of the child's habitual residence before the abduction to hear any disputes over the custody of the child, except in very limited circumstances.[137]

4.2. The Scope and Operation of the Child Abduction Provisions

4.2.1. The Return Remedy under Regulation 2201/2003

Following an abduction, an application for the return of the child is still made under the Hague Convention 1980 according to Article 11(1), Regulation 2201/2003.[138] However, the Regulation contains its own

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[133] *Ibid.*

[134] P McEleavy "The New Child Abduction Regime in the European Union: Symbiotic Relationship or Forced Partnership?" (2005) 1 Journal of Private International Law 5, 14.

[135] For comment on Articles 60 and 62, Regulation 2201/2003 see *ibid.*, 17.

[136] *Ibid.*, 8.

[137] P McEleavy "The Brussels II Regulation: How the European Community has Moved into Family Law" (2002) 51 International and Comparative Law Quarterly 883, 906.

[138] The enforcement of the custody decision that has been breached by the removal or retention of the child in another jurisdiction under Article 28(1), Regulation 2201/2003 would also entail the

definition of when an abduction is deemed to have occurred under Article 2(11). Article 2(11) is similar in scope to Article 3, Hague Convention 1980. Where a child has been removed or retained in breach of custody rights arising under the law of the child's habitual residence by legal judgment, operation of law, or by an agreement having legal effect, the child has been unlawfully abducted and the return remedy will operate.[139] Under Article 2(9), rights of custody are defined as including the right to determine the child's place of residence, as under Article 5, Hague Convention 1980. So far, the English courts have not considered whether an abduction has occurred under Article 2(11) and are still referring to Article 3, Hague Convention 1980.[140]

If a child is deemed to have been abducted under the terms of Article 2(11), the return remedy will operate under Article 12, Hague Convention 1980.[141] The return remedy and the defences to return under Article 12(2) and Article 13 continue to operate under the Hague Convention 1980.

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return of the child. In *Re T & J (abduction: recognition of a foreign judgment,)* [2006] EWHC 1472 (Fam), following the father's removal of the child to England, the mother had pursued a substantive custody hearing in Spain. Judgment had been given, awarding custody to the father of the child in England. In these circumstances, return of the child was refused and the Spanish judgment recognised as the aim of Regulation 2201/2003 had been achieved because the custody hearings were in the State of the child's habitual residence.

[139] If the return of the child is sought the application is still made under the Hague Convention 1980 but in England and Wales it should state that Regulation 2201/2003 is also engaged see *Vigreux v Michel and Michel* [2006] EWCA Civ 630; [2006] 2 FLR 1180, 1194.

[140] See e.g. *Vigreux v Michel and Michel* [2006] EWCA Civ 630. The Irish courts have referred to Article 2(11) and have used the phrase 'rights of custody' in the context of Regulation 2201/2003 and Article 8 ECHR to attribute inchoate rights of custody to an unmarried father to allow him to access the return remedy see *T v O* [2007] IEHC 326. On appeal, although the return of the child was still ordered the Irish Supreme Court did not use this argument, instead referring to Article 3, Hague Convention 1980 and finding that the child had been wrongfully retained see *T v O* [2007] IESC 55.

[141] Article 11(1), Regulation 2201/2003.

However, Article 11 alters how these provisions operate between the Member States to re-emphasise the requirement to return the child.

4.2.2. Time Limit on Issuing of Return Order

Under Article 11(3), Regulation 2201/2003 the court must issue their judgment on the return application within six weeks, unless there are exceptional circumstances meaning that this target cannot be met. This appears to include the issuing of appeal judgments. England and Wales is one of the fastest jurisdictions in dealing with return applications and processing incoming applications takes an average of 24 days.[142] However, in the EU as a whole, Lowe and Horosova found that 85 days were taken for voluntary returns, 103 for judicial returns and 205 days for judicial refusals.[143] These averages are far above the six week deadline set by Article 11(3). Lowe has already argued that ten or twelve weeks would be a better target stating that:

'...there is a clear and urgent need to revisit Article 11(3)...At this stage while there is certainly a case for having an EU obligation, six weeks seems unrealistically stringent.'[144]

The time limit contained in Article 11(3) appears to be mandatory. Comment has already been made by the Court of Appeal on the necessity of meeting this target of six weeks.[145] Concern has been expressed over

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[142] *Op. cit.* Lowe, Horosova, n7, 97.

[143] *Ibid.*, 96.

[144] N Lowe "The Current Experiences and Difficulties of Applying Brussels II Revised" [2007] International Family Law 182, 185.

[145] *Vigreux v Michel and Michel* [2006] EWCA Civ 630; [2006] 2 FLR 1180.

how the courts in England and Wales would meet this strict deadline.[146] Upon repeated failure to meet this deadline the Commission could theoretically take enforcement action against a Member State in the ECJ under Article 226 EC, requiring them to comply with the obligation in Regulation 2201/2003. This may be a drastic remedy and unrealistic if all Member States consistently fail to meet the six week deadline, at which point it may be concluded that the target was unenforceable.[147] However, in England and Wales, the courts have placed emphasis on the necessity of meeting this obligation.

4.2.3. Hearing the Child

Article 11(2), Regulation 2201/2003 requires a child of appropriate age and maturity to be heard in return proceedings following an abduction. Additionally, Article 11(5), Regulation 2201/2003 guarantees the right of the applicant parent in the return proceedings to be heard where the return of the child is refused. The right of the parent defending the return application to be heard is not guaranteed in any way. The focus of the Regulation is on the right of the child to be heard and this has been reflected in the development of the English case law on Article 11(2).

The Court of Appeal in *F (a child)*[148] has confirmed that this is a requirement of the Regulation and the child *must* be heard in these proceedings. Securing this right in national courts is left to national law, so the procedures for hearing the child will vary between the Member

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[146] *Ibid.*, 1195.

[147] A course commented on by Thorpe LJ in *Vigreux v Michel and Michel. Ibid.*, 1195.

[148] [2007] EWCA Civ 468; [2007] 2 FLR 697, paragraph 19.

States.[149] The presumption is that there are procedures already in place for the hearing of the child in court proceedings.[150] There is also no specified age at which a child will be regarded as of an age and maturity to be heard, which will also vary between Member States. The quality of the child's contribution and the value placed on it will vary accordingly. However, the provision does recognise the importance of children's rights, particularly the right of the child to be heard in decisions affecting their future,[151] an issue which is now assuming greater prominence at EU level.[152]

Children's rights are intended to be central to Regulation 2201/2003 with Recital 33 stating that the Regulation *'...seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter of Fundamental Rights of the European Union'*. Article 24 states that the child should be heard in all decisions affecting them if they are of an appropriate age and maturity, that they have the right to care and protection and that their best interests will be the primary consideration in all decisions affecting them. These developments appear to be part of a process of mainstreaming children's rights within the European Union whereby their rights are being explicitly incorporated in relevant

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[149] H Stalford "EU Family Law: A Human Rights Perspective" in J Meeusen *et al* (editors) *International Family Law for the European Union* (Intersentia, Antwerp, 2007), 120.

[150] *Ibid.*

[151] Recognised by Article 12, UNCRC 1989.

[152] C McGlynn "Rights for Children?: The Potential Impact of the European Union Charter of Fundamental Rights" (2002) 8 European Public Law 387, 400. See also Case C-540/03 *Parliament v Council* [2006] ECR I-5769 where the ECJ referred to the UNCRC 1989 for the first time.

legislation.[153] The prevalence and the explicit acknowledgement of children's rights in the Regulation is an important development[154] in conceptualising children and their interests as distinct from those of 'the family'.

Freeman and Hutchinson argue that the child should be heard in abduction proceedings as returning the child to their habitual residence shapes their future and children otherwise feel excluded from the process.[155] Although a child's right to be heard does not mean that their opinion will determine the decision,[156] Article 11(2) has the potential to considerably increase a child's status in return proceedings as this was not a requirement of the Hague Convention 1980. If the child is of an appropriate age and maturity, they should now always be heard in the application which should help to ensure that the child's views are adequately accounted for, and if necessary, accepted as establishing the Article 13(2) defence based on the objections of the child to returning under the Hague Convention 1980.

In *Re D (a child) (abduction: foreign custody rights)*[157] Baroness Hale recognised that the practice of hearing the child under Regulation

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[153] E Drywood "Protecting the Vulnerable in EU Asylum Law: Mainstreaming Strategies in Title IV EC Treaty" Gender and Migration in Europe, FLRU seminar, University of Liverpool, 25th April 2007. See Commission Communication "Towards an EU Strategy on the Rights of the Child" COM(2006) 367 final. This will be considered in more detail in *Chapter Seven*, 3.

[154] H Stalford "Brussels II and Beyond: A Better Deal for Children in the European Union?" in K Boele-Woelki (editor) *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia, Antwerp, 2003), 476.

[155] M Freeman, AM Hutchinson "The Voice of the Child in International Child Abduction" [2007] International Family Law 177, 179.

[156] *Op. cit.* Stalford 2003, n154, 481.

[157] [2006] UKHL 51; [2007] 1 AC 619.

2201/2003 should be extended to Hague Convention applications not affected by the Regulation.[158] She recognised the importance of hearing the child in all abduction proceedings and the risk of the child's views appearing manipulated if they are heard through the abducting parent.[159] She recommended that the child should normally be interviewed by CAFCASS[160] in all child abduction cases for a uniform approach which considers the wishes of children of an appropriate age and maturity as a matter of course.[161]

Given the increased emphasis placed on the application of the return remedy following Regulation 2201/2003 it is questionable whether the child's opinion will have any effect on the issuing of a return order.[162] Lowe argues that:

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[158] *Re D (a child) (abduction: foreign custody rights)* [2006] UKHL 51; [2007] 1 AC 619, 642.

[159] *Ibid.*, 643.

[160] *Re D (a child) (abduction: foreign custody rights)* [2006] UKHL 51; [2007] 1 AC 619, 642. Except in exceptional circumstances the child will not themselves be represented in Regulation 2201/2003 cases following *Re F (Abduction: Joinder of Child as Party)* [2007] 2 FLR 313, 315. In England and Wales, there have been several cases where the child has taken their own representative so the court hears their views, but these remain exceptions: *Re J (children) (abduction: child's objections to return)* [2004] EWCA Civ 428; [2004] 2 FLR 64, *Re M (A Minor) (Child Abduction)* [1994] 1 FLR 390; *C v C* [2008] EWHC 517 (Fam). Thorpe LJ suggests in *Re H (Abduction)* [2006] EWCA Civ 1247; [2007] 1 FLR 242, 246, a Hague Convention case, that the separate representation of children in return applications should only occur in truly exceptional cases because of Regulation 2201/2003's requirement of disposal of cases in six weeks. For comment on the best approach see *op. cit.* Freeman, Hutchinson, n155; P McEleavy "Evaluating the Views of Abducted Children: Trends in Appellate Case Law" (2008) 20 Child and Family Law Quarterly 230.

[161] *Re D (a child) (abduction: foreign custody rights)* [2006] UKHL 51; [2007] 1 AC 619, 642.

[162] R Lamont "The EU: Protecting Children's Rights in Child Abduction" [2008] International Family Law 110, 111.

'Given the summary nature of such proceedings, in which there is a presumption of return save in exceptional circumstances, beyond establishing perhaps wholesale opposition of the child, what is the purpose of hearing the child?'[163]

For example in *C v W and Others*[164] a fourteen year old child's cogent objection to return was not enough to prevent the operation of the return mechanism. In *Vigreux v Michel and Michel*[165] it was stated that the exercise of discretion, following a finding that the child is of sufficient age and maturity to have their views taken into account, is affected by the reinforcement of the principle of the return of the child.[166] The policy of return will weigh very heavily against the child's objections to return succeeding as a defence to the return application.

However, in *Re F (children)(abduction)*[167] the approach of the House of Lords in *Re M (children: abduction),*[168] was considered and the same method for balancing the child's objections to return against the return policy applied to the Regulation.[169] The children's cogent objections to

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[163] *Op. cit.* Lowe 2007, n144, 189.

[164] [2007] EWHC 1349 (Fam); [2007] 2 FCR 243, 256.

[165] [2006] EWCA Civ 630; [2006] 2 FLR 1180.

[166] *Ibid.*, 1192.

[167] [2008] EWHC 272 (Fam).

[168] [2007] UKHL 55; [2008] 1 FLR 251, 267.

[169] [2008] EWHC 272 (Fam), paragraph 64.

returning to Poland were thus accepted by the court.[170] In *Klentzeris v Klenzeris* the children's extreme reaction to the notion of return meant that the application was refused although the case was stated to be 'exceptional'.[171]

Regulation 2201/2003 pursues a policy of consulting the child but without clearly contextualizing the likely actual effect of securing the child's right to be heard. The child's rights have been separated out and individualized from the familial context and the reason for their being consulted is not clearly defined. Securing children's rights was a central policy during the drafting of Regulation 2201/2003.[172] The Economic and Social Committee stated during the passage of Regulation 2201/2003 that:

'The interests of the child are difficult to define but there is no doubt that they should be paramount. The opinion of the (often warring) parents may not always be useful in determining the best interests of a child, as they may be confusing their own emotional needs with those of the child. They may also be using a child as a bargaining counter.'[173]

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[170] *Ibid.*, paragraph 77.

[171] [2007] EWCA Civ 533; [2007] 3 FCR. 580, 586.

[172] *Op. cit.* Commission Proposal, n120, 2.

[173] Opinion of the Economic and Social Committee on the 'Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation (EC) No. 1347/2000 and amending Regulation (EC) No. 44/2001 in matters relating to maintenance'. OJ C 61/76 COM(2002) 222 final, 4th September 2002, paragraph 5.2.5.1.

This reflects a growing political concern with children and the effect of European law on children's rights at European level.[174] Stalford has commented that Regulation 2201/2003 favours a welfare approach to children's rights which reinforces the paternalistic model of dependency, rather than an approach which recognises a child's agency.[175] However, the pursuit of children's rights was conceived as an issue separate from their carer's rights, demonstrating the tendency to individualise the child's needs and interests. Article 11(2) will ensure that the child's objections to returning will remain an important to defence to return, and will be examined further in relation to abductions motivated by domestic violence in *Chapter Five,* 4.1.

4.2.4. Article 11(4) and the grave risk of harm to a child

Article 11(4) regulates the situation where the parent who has unlawfully removed or retained a child raises the Article 13(b) grave risk of harm defence to the return of the child. If it can be proved that there are adequate arrangements for the protection of the child on return, the child will be returned.[176] This further confines the scope of the Article 13(b) defence which was already restrictively interpreted in England and Wales.[177] Article 11(4) appears to be a response to the feeling that some Member

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[174] *Op. cit.* Drywood, n153. This will be considered further in *Chapter Seven,* 3.2.

[175] *Op. cit.* Stalford 2003, n154, 480. See also *op. cit.* McGlynn 2006, n21, 110.

[176] This may create more situations such as that in *Re S (Abduction: Return into Care)* [1999] 1 FLR 843, under the Hague Convention 1980 where the child was returned to social services care.

[177] See *Re C (Abduction: Grave Risk of Psychological Harm)* [1999] 1 FLR 1145. McEleavy argues that it will in fact make little difference to interpretation of Article 13(b) in England and Wales, but will encourage a more restrictive approach elsewhere. See P McEleavy "The Impact and Application of the Brussels II *bis* Regulation in the United Kingdom" in K Boele-Woelki, C González Beilfuss (editors) *Brussels II* bis: *Its Impact and Application in the Member States* (Intersentia, Antwerp, 2007), 321.

States were using the Article 13(b) defence to avoid enforcing the return remedy by interpreting its application expansively.[178]

There is little guidance on what standard of protection is to be reached.[179] In *Klentzeris v Klenzeris*[180] the protections in Greece were insufficient for the purposes of Article 11(4), although the judge at first instance acknowledged the tension of interests at stake in the judgment required under Article 11(4).[181] The provision potentially encourages Member State courts to judge other legal systems, and puts judicial comity under pressure. A court may be unwilling to suggest that the courts of another Member State cannot adequately protect children from harm, returning a child for fear of offending another Member State, despite a lack of effective mechanisms being in place. So, although it ensures that litigation takes place in the appropriate forum, Article 11(4) may place the principle of mutual trust under pressure or alternatively risks exposing children to a grave risk of harm on return.[182] However, Article 11(4) may play an important role in protecting children who have been abducted as part of their mother's desire to escape domestic violence, which will be examined further in *Chapter Five*, 4.2.

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[178] A Schulz "The New Brussels II Regulation and the Hague Conventions of 1980 and 1996" [2004] International Family Law 22, 24.

[179] See *F v M* [2008] EWHC 1467 (Fam). This point will be returned to in *Chapter Five*.

[180] [2007] EWCA Civ 533; [2007] 3 FCR. 580.

[181] *Ibid.*, 585-6.

[182] This will be explored in *Chapter Five*, 4.2 and *Chapter Six*, 2.1.

4.2.5. The Article 11 Mechanism: procedure when the return of the child is refused

The most controversial provisions relating to child abduction are contained in Articles 11 (6), (7) and (8), Regulation 2201/2003. These provisions relate to the situation where a parent who has unlawfully removed or retained a child has raised a defence to the operation of the Article 12 return remedy under the Hague Convention 1980.

All other defences under Articles 13 and 12(2), Hague Convention 1980, apart from Article 13(b), are left unchanged by Regulation 2201/2003.[183] However, if the return of the child is refused under Article 13, Hague Convention 1980, Regulation 2201/2003 puts a mechanism in place under Articles 11(6), (7) and (8) (or 'the Article 11 mechanism') whereby the State of the child's habitual residence retains control over issues relating to the custody of the child and their ultimate return. Anomalously, this mechanism does not apply if the return of the child is refused by virtue of Article 12(2).[184]

Under Article 11(6), Regulation 2201/2003, if the return of the child is refused due to Article 13 the court must transmit, within one month, a copy of the court order and relevant documentation, including transcripts of the proceedings to the court with jurisdiction, or the relevant Central Authority, in the State of the child's habitual residence before the

[183] See *M v M* [2007] EWHC 1404 (Fam); [2007] 2 FLR 1010 where the court found the father consented to the child's removal from Greece to England under Article 13(a), Hague Convention 1980 without referring to Regulation 2201/2003 at all. On appeal the exercise of discretion to refuse the return of the children was assessed under the Hague Convention 1980 case law as being correctly carried out see *Re M (Abduction: Appeals)* [2007] EWCA Civ 1059; [2008] 1 FLR 699.

[184] Article 11(6), Regulation 2201/2003 states that only refusals to return under Article 13 are subject to the Regulation's mechanism.

abduction.[185] It is unclear which court is deemed to have jurisdiction in the child's habitual residence, how that court is seised and how the documentation will reach it.[186] Once the court has the relevant documentation, if it has not already been seised by one of the parties, it must notify them and invite submissions in relation to the custody of the child within three months under Article 11(7). If no submissions are received within this time, the case will be closed. However, if submissions are received, the courts in the child's former habitual residence can adjudicate the substantive custody issues in relation to the child. The resulting judgment may entail the return of the child under Article 11(8). The judgment under Article 11(8) is a substantive decision on the custody of the child, and takes priority over the summary Hague Convention judgment.[187]

There is no time limit on the issuing of the custody order under Article 11(8), although the Practice Guide to Regulation 2201/2003 suggests that a decision should be taken as quickly as possible.[188] As the child is likely to remain in the State they were abducted to,[189] the longer the child remains in that State, the more likely they are to become settled there. If they do

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[185] The need to meet this deadline has been commented on by Thorpe LJ in *Re M (Abduction: Appeals)* [2007] EWCA Civ 1059; [2008] 1 FLR 699, 703.

[186] *Op. cit.* McEleavy 2005, n134, 31.

[187] *Op. cit.* Schulz, n178, 26.

[188] Practice Guide for the application of the new Brussels II Regulation (Council Regulation (EC) No 2201/2003, 27th November 2003), 36. McEleavy suggests that the mechanism will not operate quickly because of the distance and language problems that will arise, see *op. cit.* McEleavy 2005, n134, 34.

[189] Regulation 2201/2003 does not make this clear, but so far in England and Wales the child has remained in the State they were abducted to during the custody hearing.

become settled into their environment, it may be questionable whether it will be in their best interests to return to their former habitual residence. The individual child's best interests will be at issue in the custody dispute, rather than those of all children in enforcing the return principle.

If the custody judgment issued under Article 11(8), Regulation 2201/2003 entails the return of the child to their former habitual residence, it is subject to fast track enforcement under Article 40(1)(b).[190] The judgment will be recognised and enforced without the possibility of refusing recognition and without the necessity of the judgment being declared enforceable under Article 42(1). The judgment has to be certified in the Member State issuing the judgment. Certification should mean that the child was given an opportunity to be heard if they were of an appropriate age and maturity, that the parties were given an opportunity to be heard, and that the court has taken into account the reasons for the refusal to return the child under Article 13.[191] As a self certification system, it is unclear how effective this mechanism will be at ensuring these safeguards are in fact carried out. [192] The ECJ has recently made it clear that once the return of the child has been refused and the courts of the child's habitual residence have been notified under Article 11(6), any further proceedings in the court the child was abducted to are irrelevant. The ECJ stated that:

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[190] Article 40(1)(b), Regulation 2201/2003 only applies in abduction cases where return was initially refused, see Case 195/08 PPU *Rinau* judgment on 11th July 2008, paragraph 74.

[191] Article 42(2), Regulation 2201/2003.

[192] *Op. cit.* McEleavy 2005, n134, 33. So far the English courts have been very explicit in their judgments about the requirements of the certificate see *Re A (A Child) (Custody Decision after Maltese Non-Return Order: Brussels II Revised)* [2006] EWHC 3397 (Fam); [2007] 1 FCR 402.

'...once a non-return decision has been taken and brought to the attention of the court of origin, it is irrelevant for the purposes of issuing the certificate provided for in Article 42 of the Regulation, that that decision has been suspended, overturned, set aside or, in any event has not become res judicata or has been replaced by a decision ordering return, in so far as the return of the child has not actually taken place.'[193]

It is unsurprising given the complexity of the mechanism that the first preliminary reference, Case C-195/08 PPU *Rinau,* to the ECJ on the child abduction provisions concerned its operation. The judgment emphasises that, once the Article 11 mechanism is engaged, the jurisdiction of the courts of the State of the child's habitual residence prior to the abduction is protected and resulting judgments take priority over those issued in the State the child was removed to or retained in.[194]

In England and Wales, in *Re A*[195] the child had been wrongfully retained in Malta and the Maltese courts had refused the return of the child to England under Article 13(b) Hague Convention 1980. In the substantive custody hearing, the return of the child was ordered under Article 11(8), Regulation 2201/2003. The court felt that, although the child had been troublesome, there was no risk of harm posed by their return and the Maltese courts had not considered whether the child could be protected from harm under Article 11(4) on return.[196] However, in *HA v MB*[197] the decision of the

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[193] Case C-195/08 PPU *Rinau*, judgment 11th July 2008, paragraph 81.

[194] *Ibid.*, paragraph 81.

[195] *Re A (A Child) (Custody Decision after Maltese Non-Return Order: Brussels II Revised)* [2006] EWHC 3397 (Fam); [2007] 1 FCR 402.

[196] *Ibid.*, 427.

French courts not to return the child to England because of a risk of exposing the child to an intolerable situation due to the father's violence, was confirmed by the substantive custody decision.[198] The court held that a contact order did not entail the return of the child.[199] This case highlights other potentially relevant factors which may arise in such cases as the father seeking custody was a third country national with no right of residence in the UK. His case was linked to an Article 8 ECHR claim to prevent his deportation on the basis of his right to a family life which would protect his opportunity to develop a relationship with his child. Although this claim was found to be irrelevant to this application on custody of the child it highlights the complexity of cross-border relationships affected by Regulation 2201/2003.[200] The cases in England and Wales using the Article 11 mechanism have provided a workable interpretation of the provisions, despite their complexity, which is in line with their purpose of ensuring litigation in the *forum conveniens*.

The Article 11 mechanism enforces the Hague Convention 1980 ideal that decisions relating to the issue of the custody of the child are heard in the State of the child's habitual residence,[201] even where the return of the child

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[197] *HA v MB (Brussels II Revised: Article 11(7) Application)* [2007] EWHC 2016 (Fam); [2008] 1 FLR, 289.

[198] The potential role of the Article 11 mechanism in cases where domestic violence has been alleged against the parent requesting return will be considered in *Chapter Five*, 4.3.

[199] *HA v MB (Brussels II Revised: Article 11(7) Application)* [2007] EWHC 2016 (Fam); [2008] 1 FLR, 311.

[200] *Ibid.*, 301.

[201] *Op. cit.* Schulz, n178, 25.

is refused due to one of the Article 13 defences. The principle of *forum conveniens* is therefore central to the Article 11 mechanism. However, if a parent has consented to the removal of their child to another jurisdiction, it may no longer be appropriate for decisions relating to the child to be taken in their former habitual residence.

The Article 11 mechanism allows the courts in the State of the child's habitual residence before the abduction to effectively review the decision of the courts who heard, and refused, the application for the return of the child. This appears problematic if the court made a finding of fact in relation to the consent or acquiescence of the parent to the removal or retention of the child under Article 13(a).[202] The court in the State of the child's habitual residence could review that finding of fact. Additionally, the child's views as a basis for refusing return under Article 13(2) could be rejected if the court decides that the child was not of an appropriate age or maturity for their views to be taken into account.[203] The Article 11 mechanism seems aimed largely at the Article 13(b) defence, allowing the courts in the child's former habitual residence, where the risk of harm to the child has been held to exist, to hear full submissions and evidence on the issue. This allows a fuller assessment of the risk posed to the child and ways of counteracting the risk in that State. The refusal to return should reflect real concerns about the child's situation that could not be remedied by engaging Article 11(4), Regulation 2201/2003 to provide protection on their return. In these circumstances a custody order requiring return must ensure the safety of the child.[204]

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[202] *Op. cit.* McEleavy 2004, n131, 510.

[203] *Ibid.*

[204] *Op. cit.* McEleavy 2005, n134, 32.

This process of review potentially allows one Member State court to revisit a decision of another court and impose their will on the court refusing the return of the child.[205] This is unusual in the EU's approach to private international law rules, which relies on Member State courts trusting all other courts to administer the law correctly.[206] This process may undermine the principle of mutual trust. McEleavy argues that the court hearing the custody issues must be careful to respect the reasoning of the court refusing the return of the child, and not engage in an appeal hearing on the issue,[207] which would otherwise breach the mutual recognition rule and affect trust between Member State courts.

This system requires routine, close co-operation between courts and the judges dealing with international child abduction to be effective.[208] It has been argued that the Regulation will actually promote co-operation between Member State courts.[209] However, the complexity of the Article 11 mechanism means that it may be difficult to administer effectively. The complicated rules of Regulation 2201/2003 may delay return applications unless there is proper training and a clear understanding of the principles and the aim of the Regulation across the Member States.

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[205] *Ibid.*, 31.

[206] *Op. cit.* McEleavy 2004, n131, 511.

[207] *Op. cit.* McEleavy 2005, n134, 32.

[208] *Ibid.*

[209] *Op. cit.* Tenreiro, Ekström, n132, 34.

4.2.6. Parental responsibility jurisdiction following an abduction

Article 10 contains specific provisions relating to the jurisdiction of courts over issues of parental responsibility following an abduction.[210] The Hague Convention 1980 does not explicitly deal with the change in jurisdiction over the custody of the child following an abduction.[211] By implication, the courts of the child's habitual residence are given exclusive jurisdiction over custody issues unless one of the exceptions under Article 12 or 13 is established.[212]

Article 10 clarifies this situation by specifying when jurisdiction changes from the child's habitual residence before the abduction to the courts of the State they were removed to or retained in. Article 10 reinforces the jurisdiction of the courts of the child's habitual residence before the abduction. There are only limited circumstances in which the courts of the State where the child was abducted to will have jurisdiction over their custody following the abduction. Article 10 aims to balance the need for the courts with the closest connection to the child to have jurisdiction over their welfare, and the desire to prevent the abductor from benefiting from their actions.[213]

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[210] On interpretation of Article 10 see *HA v MB (Brussels II Revised: Article 11(7) Application)* [2007] EWHC 2016 (Fam); [2008] 1 FLR. 289, 307.

[211] *Op. cit.* Schuz, n54, 780.

[212] *Ibid.*, 781. Jurisdiction following an abduction was instead covered by the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children 1996.

[213] *Op. cit.* Commission Proposal, n123, 12.

Under Article 10(1)(a), if the child is now habitually resident in the State to which they were abducted, and the 'left behind' parent has acquiesced in the removal or retention of the child, the courts of the child's new habitual residence will have jurisdiction over any custody disputes. This allows the assumption of jurisdiction by the courts of the State to which the child was abducted where the Article 13(a) defence is established and they have become habitually resident there. This provision may conflict with Article 11(6). If the return of the child is refused under Article 13(a), Hague Convention 1980, the Article 11 mechanism then operates. The courts of the child's habitual residence prior to the abduction may hear the custody dispute in relation to the child, if submissions are made to that court. It appears that both the courts of the State where the child is now habitually resident,[214] and their former habitual residence have jurisdiction if the 'left behind' parent consented to or acquiesced in their removal or retention.

Articles 10(1)(b)(i) and (ii) allow the courts in the State the child was removed to or retained in to assume jurisdiction over custody issues where the child has become habitually resident there and has lived in the State for a year from when the left behind parent knew, or should have known of the child's whereabouts. The left behind parent must not have sought the return of the child, or, having sought their return, has subsequently withdrawn the application, and the child must have settled in the State to which they were abducted. This means the courts of the State where the child is present, and habitually resident, must wait for at least a year before assuming jurisdiction over custody disputes, despite the fact there has been no application for the child's return. This is a strong reinforcement of the jurisdiction of the courts of the child's former habitual residence and runs

[214] This will depend on how habitual residence is interpreted under Regulation 2201/2003, see *op. cit.* Lamont, n48.

counter to Article 8, Regulation 2201/2003, as the general ground of jurisdiction is the child's habitual residence.

Article 10(1)(b)(iii) allows the courts of the State to which the child was abducted to assume jurisdiction over custody disputes if the return of the child has been sought where they have settled and become habitually resident there, having lived there for a year. However, the return of the child must have been refused under Article 13, Hague Convention 1980 and no submissions should have been made in relation to the custody of the child for the purposes of Article 11(7), Regulation 2201/2003.

The courts in the State the child was abducted to can also assume jurisdiction over custody if, under Article 10(1)(b)(iv), the child has been in the State for one year following the abduction, during which time the left behind parent has known of their whereabouts. The child must be habitually resident and settled in their new environment and, although an application for return has been refused and the court of the child's former habitual residence has ruled on the custody of the child, this does not entail their return under Article 11(8).

These complex provisions are all aimed at defining exactly when the abduction warrants a change in jurisdiction. The next section will examine the ECJ's role in interpreting the abduction provisions to ensure the effectiveness of Regulation 2201/2003.

4.3. The Role and Jurisdiction of the ECJ in Interpreting Regulation 2201/2003

The ECJ has the jurisdiction to hear preliminary references on Regulation 2201/2003 which allows national courts to call on the ECJ for clarification on the scope and interpretation of EC law. This jurisdiction is not under

Article 234 EC, but instead under Article 68(1) EC which limits the ability to make a reference to courts of last instance under Title IV.[215] This will delay proceedings as they make their way through the national courts.[216] Arguably the level of judicial protection under Title IV is therefore inadequate.[217] This poses particular problems in the area of private international family law where time is likely to be important. For example in relation to child abduction, a child may become settled in the State they were removed to or retained in, whilst waiting for a preliminary reference.[218] Lowe has argued that the *Foto-Frost*[219] ruling, which prohibits national courts from finding EC acts invalid, may consequentially be suspended in this area of competence so that national courts can strike down EC norms without waiting for the ECJ.[220] However this seems unlikely given the ECJ's concern to promote the uniformity and supremacy of EC law.[221]

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[215] Under Article 267, Treaty on Functioning of European Union (Lisbon Treaty 2007) the ECJ's jurisdiction is extended and the restriction that the court of last instance only can make a referral is removed.

[216] Editorial "Preliminary Rulings and the Area of Freedom, Security and Justice" (2007) 44 Common Market Law Review 1, 3. This problem has been recognised but Article 68(1) EC has not yet been amended.

[217] *Ibid.*

[218] *Op. cit.* Lamont, n48, 273-274.

[219] Case 314/85 *Foto-Frost v Hauptzollamt Lübek Ost* [1987] ECR 4199.

[220] N Lowe "The Growing Influence of the European Union on International Family Law – A View From the Boundary" (2003) 56 Current Legal Problems 439, 461.

[221] This option has been impliedly rejected in relation to the third pillar of EU law in Case C-355/04 P *Segi v Council* see B Davies "*Segi* and the Future of Judicial Rights Protection in the EU" (2008) 14 European Public Law 309. Although see J Komarek "In the Court(s) we Trust? On the Need for Hierarchy and Differentiation in the Preliminary Reference Procedure" (2007) 32

Even if reference is made to the ECJ, by the time judgment is given in a preliminary reference, which takes about twenty months,[222] the child may have settled in the Member State to which they were abducted and the likelihood of their return is reduced.[223] Significant delay preventing the child's return may place the Member State concerned in breach of Article 6(1)[224] or Article 8 ECHR.[225] In *Iosub Caras v Romania*[226] an unexplained eighteen month delay in Hague Convention 1980 application for the return of a child from Romania constituted a breach of Article 8(1), ECHR as it affected the child's family relationships. If a Regulation 2201/2003 child abduction case was referred to the ECJ and the case took twenty months to be processed, given the context, this may constitute as situation where there is a manifest breach of Article 8, the right to a family life or Article 6(1) requiring a hearing within a reasonable period of time[227] under the ECHR. Under the ECtHR's *Bosphorous v Ireland*[228] formula, the

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European Law Review 467, 477, stating that the *Foto-Frost* rule does not require a reference in every case.

[222] A Moylan "The European Court of Justice and Brussels II Revised" [2006] International Family Law 188, 191.

[223] N Lowe "New International Conventions Affecting the Law Relating to Children – A Cause for Concern?" [2001] International Family Law 171, 173.

[224] Application no. 19055/05 *Deak v Romania and the UK*, 3rd June 2008.

[225] See Application no. 7198/04 *Iosub Caras v Romania.*

[226] *Ibid.*

[227] See Application no. 77710/01 *HN v Poland* (2007) 45 EHRR 46.

[228] Application Number 45036/98; (2006) 42 EHRR 1.

protection of rights provided by the ECJ would not be substantially equivalent and may therefore constitute a breach of the ECHR. Even if this is not the case, the delay in getting a judgment from the ECJ may deter national courts from requesting a preliminary reference, particularly on child abduction where, as Regulation 2201/2003 itself makes clear,[229] time is of the essence.

This problem is already in evidence in the case law. Case C-523/07 *A*, concerning the habitual residence of children, was referenced on the 23rd November 2007 and is still awaiting judgment, although the oral hearing took place in the week beginning 3rd November 2008.[230] In family law, the time factor is particularly acute as the time taken to issue judgment can affect the substantive outcome of the case and the children themselves. This effect was recognised by the ECJ in Case 195/08 PPU *Rinau* where it was stated that *'...as far as concerns young children, biological time cannot be measured according to general criteria, given the intellectual and psychological structure of such children and the speed with which that structure develops.'*[231]

The ECJ is trying to reduce the time over preliminary references generally,[232] but in relation to references arising out of Title VI EU,

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[229] Article 11(2), Regulation 2201/2003 states that judgment on a return application should be given in six weeks.

[230] See also Case C-68/07 *Lopez v Lopez Lizazo* judgment of 29th November 2007, the ECJ gave judgment without an Advocate General Opinion to expedite the procedure.

[231] Case C-195/08 PPU *Rinau* judgment 11th July 2008, paragraph 81.

[232] *Op. cit.* Moylan, n222, 193. Komarek argues that the way to reduce the time limit is to restrict all preliminary references under Article 234 EC to courts of last instance see *op. cit.* Komarek, n221.

concerning police and judicial cooperation in criminal matters, and Title IV EC which includes judicial cooperation in civil matters, a new urgent preliminary referring procedure has been developed.[233] The decision to use this urgent procedure is normally at the request of the referring court which is instructed to outline the matters of fact and law requiring urgency and the risks attached to using the normal procedure.[234] The urgent procedure will only be used *'...where it is absolutely necessary for the Court to give its ruling on the reference as quickly as possible.'*[235]

In the first case under Regulation 2201/2003 using this urgent procedure, the request of the referring court was granted because the child had been abducted and any delay would cause damage to the relationship between the child and the left behind parent.[236] This procedure took two months to produce a final judgment in Case C-195/08 PPU *Rinau,* a child abduction case lodged on the 14th May 2008, with judgment issued on the 11th July 2008. In general terms this is a very quick turnaround for an ECJ preliminary reference. However, the 'gatekeeping' mechanisms of ECJ approval and, usually, a request for its use means that its role may be quite restricted in practice. As yet the ECJ has played only a minimal role in the interpretation of Regulation 2201/2003 but its role may be important to provide a uniform interpretation of the complex child abduction provisions.

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[233] Article 23a, Protocol on the Statute of the Court of Justice and Article 104b, Court of Justice Rules of Procedure. See Information Note on References from National Courts for a Preliminary Ruling Supplement following the Implementation of the Urgent Preliminary Ruling Procedure Applicable to References Concerning the Area of Freedom Security and Justice available at http://curia.europa.eu/en/instit/txtdocfr/txtsenvigueur/noteppu.pdf last accessed 22nd July 2008.

[234] *Ibid.*

[235] *Ibid.*, 2.

[236] Case C-195/08 PPU *Rinau* judgment on 11th July 2008, paragraph 44-45.

In the interests of uniform application of law across Europe the ECJ may consider the terms of the Hague Convention 1980 to ensure that all Member States adopt the same interpretation for the operation of Regulation 2201/2003. Although the Hague Convention 1980 is not part of Community law, the ECJ[237] may also impose uniform interpretation on some of its provisions, particularly the Article 12 and 13 defences which are key to Regulation 2201/2003's operation. Some of the terms in Regulation 2201/2003 are identical to those in the Hague Convention 1980, and any interpretation given by the ECJ may influence the interpretation of the Hague Convention in applications affecting non-EU countries. For example, the term 'settled' is used in Article 10, Regulation 2201/2003 and in Article 12, Hague Convention 1980. It is likely that those two concepts would have to be interpreted in the same manner to ensure consistency in application.[238] One definitive interpretation by the ECJ of key terms such as 'habitual residence' and of the provisions in Regulation 2201/2003 represents one of the significant advantages of having the law relating to international child abduction communitarised. The interpretation of the Hague Convention 1980 can vary between signatory States, causing uneven implementation of its remedies.[239] The ECJ's jurisdiction over the

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[237] Although see Case C-540/03 *Parliament v Council* where the ECJ referred to the UNCRC, despite this not being communitarized. Also see Case T-306/01 *Yusuf v Council of the European Union* [2005] ECR II-3533 where the Court of First Instance ruled on the interpretation of provisions of the UN Charter. However, these cases deal with issues of fundamental rights, which theoretically are part of the EU's *acquis communitaire* and the principles could arguably be said to be derived from the common constitutional principles of the Member States. *Yusuf* is under appeal in the ECJ, see Case C-415/05 P *Yusuf*.

[238] In Case C-165/08 PPU *Rinau* judgment on 11th July 2008, the ECJ referred to the Hague Convention 1980 but did not interpret it.

[239] See for example *Re V-B (minors) (abduction: Rights of Custody)* [1999] 2 FLR 192 for discussion of the different interpretation of Article 5 in various Hague Convention 1980 signatory States. See Silberman 2005, n28, 1062.

child abduction provisions, although in some ways restricted, could therefore assist in the consistent implementation of the return remedy across the EU Member States.

5. Conclusions

This chapter has highlighted some of the tensions and difficulties involved in regulating parental child abduction, and outlined the key private international law policies of the Hague Convention 1980 and their importance to the operation of Regulation 2201/2003. It is clear that both the Hague Convention 1980 and Regulation 2201/2003 do not explicitly include women's interests into the text, both operate on the basis of the formally neutral term 'custody rights'. In this sense the law is not sexist because it makes no explicit differentiation between men and women who abduct their child. It does mean that there is no explicit acknowledgement of the increase in the numbers of primary carer abductions and the broad scope of the notion of custody rights means that the return remedy will potentially be engaged in most cases.

Under Regulation 2201/2003, the child is to be returned to their habitual residence in almost all circumstances, protecting the private international law principle of *forum conveniens*. The premise is to preserve the jurisdiction of the courts of the child's habitual residence to make custody judgments in respect of that child. Pursuant to this aim the Article 11 mechanism protects the right of the courts of the child's habitual residence prior to the abduction, as the *forum conveniens*, to hear disputes over the custody of the child, even when return has been refused under Article 13, Hague Convention 1980. However, although Regulation 2201/2003 is

aimed at securing mutual recognition of judgments between Member States, Article 11(4) and the Article 11 mechanism potentially allow courts to review or judge other legal systems. These provisions will have to be used sensitively to prevent undermining the principle of mutual trust. In addition the six week time limit on the issuing of return applications may be an unrealistic target, particularly if a preliminary reference to the ECJ is made. However, there should be a more uniform implementation of the law relating to international child abduction within Europe because of the ability to seek authoritative rulings from the ECJ.

Alongside the private international law policies pursued, children's rights form a significant focus of Regulation 2201/2003's provisions and a child's right to be heard in decisions affecting them has been recognised and explicitly incorporated into return applications. Regulation 2201/2003 therefore accounts for the interests and rights of children to a much greater extent than the Hague Convention 1980. However, the individualised conception of children's interests in Regulation 2201/2003 risks the obfuscation of the legitimate concerns of their primary carer in particular, resulting in potential negative effects on the child. The difficulties posed by primary carer abductions in the context of flexible family structures and responsibility for care will be considered further in *Chapter Four.* This chapter therefore forms the basis for the discussion of the law in both *Chapters Four and Five* which considers further the implicit effects of gender in the operation of Regulation 2201/2003's child abduction provisions in relation to both primary carer abductions and domestic violence.

Chapter Four

THE IMPLICIT ROLE OF GENDER IN INTERNATIONAL CHILD ABDUCTION: AN ANALYSIS OF CARE RESPONSIBILITIES, MIGRATION AND CITIZENSHIP IN THE EU

1. Introduction

Having considered the legal framework regulating international child abduction, this chapter will address implicit effects of gender in motivating international migration and abductions by the primary carers of children. The traditional notion of what constitutes 'a family' in European law means that the space for addressing primary carer abductions is limited; the links between gender, care and migration were not considered. Although Regulation 2201/2003 itself is an acknowledgment of increasingly flexible family forms, the traditional gendered role of care by women has not been addressed at European level, despite the influence of human rights on European law. The role of gender in family life, and in precipitating the unlawful removal and retention of children within the EU, is implicitly ignored.

The lack of space for gender concerns in European legislation dealing with the family is compounded when the interaction of child abduction law and free movement of persons law is considered. The care of children means that women's access to the right of residence in European law may be inhibited as this may restrict their ability to engage in paid work. Paid work in a host Member State gives the worker a right of residence which is a

right of citizenship in European law. As women may have difficulty achieving the status of 'worker', their citizenship rights may be affected because the gendered division of caring responsibilities is not clearly accounted for.

Although care is not regarded as 'work', preserving the public/private divide in relation to activity deemed non-economic, it has been acknowledged that this care facilitates children's right of residence and on this basis a child's primary carer may conditionally remain in a host Member State with the child. The development and relevance of European citizenship case law in this context, particularly Case C-413/99 *Baumbast*[1] and Case C-200/02 *Chen,*[2] will be considered to demonstrate the developing understanding of the value and importance of the primary carer role which may allow a woman to be legally resident based on her relationship with their child. Her rights are then dependent on her child's right of residence. Children's rights have a space in this context; women's interests only have a space in as far as they facilitate the protection of the child's right of residence.

The notion of family life embodied in Regulation 2201/2003 is informed by a more general approach to family life in EU law that is both instrumentalised and traditional. When Regulation 2201/2003 is considered alongside the free movement of people legislation, the problematic, implicit effect of gender relations in this area of law are multiplied. The approach to 'the family' needs reconsideration across these two areas of law for a more coherent legislative approach which gives space to gender

[1] Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091.

[2] Case C-200/02 *Chen v Secretary of State for the Home Department* [2004] ECR I-9925.

issues, so it is not necessary to rely instead on the ECJ and the European citizenship case law. Giving gender an explicit 'space' in the formulation of law and policy could perhaps help to develop a wider approach to legislative problems which account for the multiple effects of gender and moves beyond the problematic 'blueprint' ideology of the European family.

These issues highlight the implicit role of gender in European law which have the potential to affect women's status as European citizens. The largely unquestioned traditional notions of family life which remain influential restrict space for consideration of implicit gender factors in European regulation of the family. The chapter therefore addresses the migration and family issues which should be accommodated when regulating international child abduction in the EU, but considers the implicit role and effects of gender within this framework.

2. Family Flexibility, Migration and Care in Europe

This section will examine the links between migration, the formation and dissolution of international families, the management of care within the family structure and the incidence of primary carer abductions. The free movement of workers[3] required the EU to regulate the cross border movement of families because worker migration would be facilitated if they could be accompanied by their family.[4] This policy has encouraged

[3] Article 39 EC. The free movement of citizens within the EU is now provided for by Article 18(1) EC.

[4] Primarily regulated by Regulation (EEC) No. 1612/68 on the freedom of movement for workers within the Community, OJ Sp. Ed. 1968, No. L 257/2 p. 475, 15th October 1968. Now the right of citizens of the Union to move is governed by Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States OJ [2004] L158/77. There is also legislation for the free movement of self-employed

both the movement and formation of families across EC borders. The partners in an international relationship are not in their home State, and/or may not be of the same nationality.[5] As well as international family formation, the free movement of workers within Europe also results in international family dissolution.[6] In these circumstances issues of nationality and residence become important for both the jurisdiction of the courts and the management of family relationships across States. The interface between law, migration, international family formation and dissolution, and the role of gender in these processes is therefore an increasingly important issue.[7]

International migration is not just motivated by economic imperatives; family relationships can play an important role in migration behaviour.[8] International family dissolution has implications for international migration of the former partners of a relationship. Individuals may migrate to facilitate care or have their movements restricted by care responsibilities following family breakdown due to family commitments and children.

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persons and for the provision of services but in this chapter the broad concepts of 'workers' and 'citizens' will be used.

[5] N Dethloff "Arguments for the Unification and Harmonisation of Family Law in Europe" in K Boele-Woelki (editor) *Perspectives on the Unification and Harmonisation of Family Law in Europe* (Intersentia, Antwerp, 2003), 37.

[6] The numbers of international marital family dissolutions has been noted by the Commission see "Green Paper on Applicable Law and Jurisdiction in Divorce Matters" COM(2005) 82 final, 14th March 2005.

[7] See K Calavita "Gender, Migration and Law: Crossing Borders and Bridging Disciplines" (2006) 40 International Migration Review 104.

[8] A Bailey, P Boyle "Untying and Re-Tying Family Migration in the New Europe" (2004) 30 Journal of Ethnic and Migration Studies 229, 236.

These are increasingly common factors in migration decisions, particularly for women.[9] Kulu and Milewski use the concept of 'linked lives' to describe the interaction between relationships and migration behaviour, as the continuing link between two individuals can make a location necessary or desirable.[10] For example, the requirement to facilitate child contact following the breakdown of a relationship could mean that migration may be restricted; whereas the desire to access informal care networks, such as grandparents care for grandchildren, would encourage migration back to an individual's 'home' State.[11]

This form of migration is a reflection of the increased flexibility of family forms in Europe. The traditional family form of a heterosexual, marital relationship, where the man works to support the woman who remains at home to care for children, is becoming less relevant. Social changes and economic opportunity means that family structures have evolved with increasing numbers of cohabitants,[12] no fault divorce[13] and new family formation following dissolution resulting in diversified family forms. This

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[9] *Ibid.*, 237; P Feijten, M van Ham "Residential Mobility and Migration of the Divorced and Separated" (2007) 17 Demographic Review 623, 646.

[10] H Kulu, N Milewski "Family Change and Migration in the Life Course: An Introduction" (2007) 17 Demographic Research 567, 581.

[11] *Ibid.*, 576.

[12] Although to varying degrees in different regions of the EU with cohabitation remaining relatively rare in the Southern States and Ireland see K Kiernan "The Rise of Cohabitation and Childbearing Outside Marriage in Western Europe" (2001) 15 International Journal of Law, Policy and the Family 1, 20.

[13] See B Verschraegen "Moving to the Same Destination? Recent Trends in the Law of Divorce" in M Antokolskaia (editor) *Convergence and Divergence of Family Law in Europe* (Intersentia, Antwerp, 2007).

has occurred across Europe to varying degrees.[14] There has been a significant increase in single parent households and households are fluid over the life course following separation and the development of new relationships.[15] As Feijten and van Ham state:

'Increasingly complex family structures, with second spouses, children, and stepchildren are likely to have spatial repercussions on the individual and societal level.'[16]

International families are more likely to migrate on family breakdown[17] and the majority of those moving with children after the dissolution of a relationship in the EU appear to be women.[18] Parental relocation following the dissolution of a relationship may also entail the relocation of any children to another State.[19] The concept of 'linked lives' is important in this trend; following relationship dissolution women may move with their child back to their home State. Morano-Foadi found that:

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[14] *Op. cit.* Kiernan, n12, 20.

[15] Eurostat "The Social Situation in the European Union 2005-2006", point 2.2, 10.

[16] *Op. cit.* Feijten, van Ham, n9, 646.

[17] S Morano-Foadi "Problems and Challenges in Researching Bi-National Migrant Families Within the European Union" (2007) 21 International Journal of Law, Policy and the Family 1, 17.

[18] *Ibid.*, 5.

[19] *Ibid.*, 2.

'A combination of welfare benefits and /or social networks such as healthcare systems, childcare policies and the presence of the extended family have in most cases precipitated return migration.'[20]

Herring and Taylor give career or educational opportunities, the wish to relocate home nearer to family and friends, and the desire to enable a new partner to pursue a career abroad as common reasons for migration.[21]

Women are likely to migrate with their child following relationship breakdown because they remain the primary carers of children in society and may desire support networks to help provide this care.[22] Paid work for mothers has been actively pursed as desirable,[23] but the gendered division of care has remained largely unchallenged by this trend.[24] Although women have increasingly gained access to the market, this has not substantially altered the caring obligations that are still placed largely on women by the gendered nature of the family structure.[25] This has meant

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[20] *Ibid.*, 14.

[21] J Herring, R Taylor "Relocating Relocation" (2006) 18 Child and Family Law Quarterly 517, 524.

[22] J Wallbank "Getting Tough on Mothers: Regulating Contact and Residence" (2007) 15 Feminist Legal Studies 189, 207.

[23] The EU has been active in encouraging women into the labour market but the action taken arguably reinforces women's role as primary carer of children, see M Stratigaki "The Cooptation of Gender Concepts in EU Policies: The Case of 'Reconciliation of Work and Family'" (2004) 11 Social Politics 30, 30.

[24] R Lister "Children (but not women) first: New Labour, child welfare and gender" (2006) 26 Critical Social Policy 315, 318.

[25] M Fineman "Masking Dependency: The Political Role of Family Rhetoric" (1995) 81 Virginia Law Review 2181, 2199.

that, rather than the gendered role of care being transformed and shared equally between partners in a heterosexual relationship, women have assumed a 'dual burden' of work and care.[26] Windebank states that:

'It remains the mothers', not the state's, and not the father's responsibility to organise and conduct domestic and parenting work and to maintain the complex and sometimes fragile balance of childcare arrangements which ensure the well-being in every respect of the child... '[27]

Although women remain the predominant carers of children, there have been increasing moves towards attributing parental responsibility rights to both parents to achieve the aim of 'equal parenting'.[28] Wallbank argues that this is a result of the increase of births outside marriage; parental responsibility is being used to ensure a father's attachment to the child outside marriage.[29] Although aimed at encouraging greater responsibility in relation to the child, she considers that in practice the only effect this has had is to confer rights on the father.[30] She states that:

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[26] M Fineman "Contract and Care" (2001) 76 Chicago-Kent Law Review 1403, 1430.

[27] J Windebank "Dual-Earner Couples in Britain and France: Gender Divisions of Domestic Labour and Parenting Work in Different Welfare States" (2001) 15 Work, Employment and Society 269, 286.

[28] *Op. cit.* Wallbank 2007, n22, 190.

[29] *Ibid.*, 211.

[30] *Ibid.*

'The problem for mothers when 'equality' and 'rights' are used in respect of family life stems from the failure of these abstract concepts to translate into political reality.'[31]

Although fathers may now have equal rights of parental responsibility, in many cases this has not yet translated into equal responsibility for care.[32]

These factors, the increase in international family dissolution, the primary responsibility of mothers for the care of children and the vesting of parental responsibility rights in fathers, means that it is often mothers who wish to migrate, and may abduct children. Lawful relocation can be achieved through gaining the consent of the other holder of parental responsibility or a court order[33] but, if not, the removal or retention of a child to or in a State other than their habitual residence may constitute an unlawful abduction.

The causes of female migration are diverse, but much of the analysis of and law relating to migration is based on a male model which fails to encompass the understanding of gendered migration.[34] The desire to ensure that the child remains in a familiar environment, has close contact with both parents and that any decisions related to their custody are heard in the appropriate forum potentially conflicts with their mother's right to move, effectively inhibiting her migration. If women cannot relocate

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[31] *Ibid.*, 212.

[32] *Ibid.*, 190.

[33] Section 13, Children Act 1989. Relocation applications will be explored in more detail in *Chapter Five* 2.

[34] See E Kofman "Female 'Birds of Passage' a Decade Later: Gender and Immigration in the European Union" (1999) 33 International Migration Review 269.

because their lives remain 'linked' to their former partner through their child, their movements become restricted following the dissolution of the relationship.[35] Morano-Foadi found that women who remained in a State, despite wishing to leave, to facilitate a child's contact with the other parent: *'...viewed this as an exile and as a limitation of their right to move freely in the EU.'*[36] There is an irreconcilable conflict of rights in this situation as women are either compelled to remain in a State with the child without a support network to facilitate contact or the child's contact with the father is restricted.[37] The law in this situation places legitimate emphasis on the child's best interests, the interaction of the responsibility to care with the migration element may act as a restriction on women's subsequent migration. It is a complex relationship and as Morano-Foadi argues:

'The uniqueness of the European structure requires frameworks of analysis which should reflect the fluidity and fluctuation of migration patterns and the legal jurisdictions between which families are shifting.'[38]

Regulation 2201/2003 forms part of the EU's legislative attempts to address the legal effects of international family dissolution. The next section will examine the extent to which non-traditional family forms and the issue of care and abduction were considered in Regulation 2201/2003 and the EU's approach to the notion of the family in private international law.

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[35] *Op. cit.* Feijten, van Ham, n9, 646.

[36] *Op. cit.* Morano-Foadi, n17, 17.

[37] *Op. cit.* Herring, Taylor, n21, 520.

[38] *Op. cit.* Morano-Foadi, n17, 17.

3. The Conception of 'the Family' Adopted for Regulating Child Abduction

The EU, when addressing the family unit, has adopted a very traditional conception of family relationships based around the marital relationship. McGlynn states that, in Europe,:

'...it is the dominant ideology of the family which pervades discussion of law and families and it is against this dominant ideology that the actions of all are measured, with varying disciplinary effects.'[39]

However, the approach to the family unit in recent legislation on the free movement of persons and in private international law in the shape of Regulation 2201/2003 demonstrates an awareness of increasingly flexible family units in Europe. Despite these developments the traditional family is still used as the norm and there remains a failure to recognise both the value of care, and the fact that it is usually women that perform caring roles, particularly in relation to children. It will be argued that these factors are both relevant to the regulation of international child abduction and that the EU failed to adequately account for this, thereby ignoring the circumstances that give rise to primary carer abductions. Despite human rights norms respecting family life being recognised by the ECJ, discussed in 3.2., traditional family norms continue to dominate EU law dealing with the family.

[39] C McGlynn *Families and the European Union: Law, Politics and Pluralism* (Cambridge University Press, 2006), 24.

3.1. European private international family law – what does 'family' mean?

3.1.1. The Exclusionary Nature of Regulation 1347/2000

The initial action taken in relation to divorce and parental responsibility jurisdiction, and recognition and enforcement of judgments appears to confirm that traditional notions of family formed the basis of European private international law. Regulation 1347/2000[40] dealt with jurisdiction over divorce, legal separation and marriage annulment[41] and the recognition and enforcement of the resulting judgments.[42]

Article 3(1), Regulation 1347/2000 covered jurisdiction in relation to parental responsibility where an issue arose during matrimonial causes proceedings. The child must have been the child of both partners in the marriage and been habitually resident in the State where the proceedings commenced. Jurisdiction over parental responsibility issues relating to children not of the marriage, in particular step children, had to be founded on national law.[43] This led to differing regimes for the recognition and enforcement of the resulting judgments. Only judgments issued on the basis of jurisdiction founded on Article 3(1) benefited from the favourable recognition and enforcement provisions of Chapter III, Regulation 1347/2000.[44] This excluded step children from the scope of Regulation

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[40] Regulation (EC) No. 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ [2000] L160, 30th June 2000.

[41] Article 2, Regulation 1347/2000.

[42] Chapter III, Regulation 1347/2000.

[43] Article 8(1), Regulation 1347/2000.

[44] Judgments where jurisdiction was founded on national law would be enforced under the Luxembourg Convention on Recognition and Enforcement of Decisions Concerning Custody of

1347/2000 and clearly prioritised the ideology of a married heterosexual couple. McGlynn argues that *'...the personal scope of the Regulation mirrored the highly restrictive dominant ideology of the family.'*[45]

This particular problem was addressed by Regulation 2201/2003. The primary ground of parental responsibility jurisdiction under Article 8, Regulation 2201/2003 applies to all children and is based on the child's habitual residence. This does not discriminate between children of a marriage and also covers the children of a cohabiting couple, or parents who live apart. Article 12, Regulation 2201/2003 sensibly allows parental responsibility jurisdiction to be assumed by the court hearing divorce proceedings. The child must be the child of one of the spouses and all the holders of parental responsibility in relation to the child must consent to the court assuming jurisdiction over the issue. This includes children not of the marriage within the scope of the parental responsibility jurisdiction and is a significant improvement on the provisions of Regulation 1347/2000.

3.1.2. Regulation 2201/2003 and the approach taken to child abduction

Regulation 2201/2003 attempts to tackle the breakdown of international families and their subsequent migration within the Union. In addressing issues of family breakdown in Regulation 2201/2003 the EU is acknowledging that the policy of free movement of workers has an impact on its citizens:

Children 1980, incorporated into English law by section 12(2) and Schedule 2, Child Abduction and Custody Act 1985. The broad exceptions under Article 10, Luxembourg Convention 1980 give the recognising State scope for refusing the recognition of a judgment.

[45] *Op. cit.* McGlynn 2006, n39, 109.

'Given the increase in movement within the EU, there has been a concomitant increase in the number of marital and other family relationships between citizens and residents of EU Member States. Unfortunately, this has meant an increase in the numbers of divorce, annulments and separations involving citizens of different Member States.'[46]

As such, it is an explicit acknowledgment of diversity of family forms within Europe and aims to facilitate the effective management of relationships across borders following their dissolution. However, the political nature of intervention in this area of law, dealing with the family and the gendered nature of personal relationships, was not addressed during the drafting of Regulation 2201/2003 which was conducted predominantly by experts.[47] Regulation 2201/2003 therefore fails to acknowledge the situations giving rise to primary carer abductions, or the fact that women are predominantly the primary carers of children even when there is a traditional family form, and in doing so potentially reinforces a traditional ideology of the family.

Divorce or relationship breakdown may precipitate further migration.[48] Following the breakdown of an international relationship often the typical

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[46] Opinion of the Economic and Social Committee on the 'Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation (EC) No. 1347/2000 and amending Regulation (EC) No. 44/2001 in matters relating to maintenance'. OJ C 61/76 COM(2002) 222 final 4th September 2002, paragraph 1.2.

[47] A Pylkkånen "Liberal Family Law in the Making: Nordic and European Harmonisation" (2007) 15 Feminist Legal Studies 289, 303.

[48] L Ackers "Citizenship, Migration and the Value of Care in the European Union" (2004) 30 Journal of Ethnic and Migration Studies 373, 381. See also R Flowerdew, A Al-Hamad "The Relationship Between Marriage, Divorce and Migration in a British Data Set" (2004) 30 Journal of Ethnic and Migration Studies 339 on internal migration following relationship breakdown.

response of women is to return to their home State to access family support.[49] It is in these circumstances that abductions may occur as in returning home with their children, women may breach their former partner's custody rights in relation to the child. This would form an unlawful removal under Article 3, Hague Convention 1980 and Article 2(11), Regulation 2201/2003. The child is then subject to the return remedy, and in these circumstances it is likely that the mother, as their primary carer, will return with the child.[50]

The implicit assumption within the Hague Convention 1980 is that the child would be abducted by their non-custodial father following divorce with the aim of securing more favourable custody provision in another jurisdiction.[51] It was presumed that the child would be returned to their primary carer, usually the mother, in their habitual residence.[52] In this sense it was supposed to assist parents who previously had no consistent remedy if their child was taken abroad.[53]

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[49] *Op. cit.* Ackers 2004, n48, 393; *Op. cit.* Morano-Foadi, n17, 17.

[50] M Freeman "Primary Carers and the Hague Abduction Convention" [2001] International Family Law 140, 143.

[51] Explanatory Report prepared by E Pĕrez-Vera on the Hague Convention on the Civil Aspects of International Child Abduction 1980 available from: http://www.hcch.net/index_en.php?act=publications.details&pid=2779 Last accessed 31st January 2007, 428.

[52] *Ibid.*,432.

[53] See A Dyer "To Celebrate a Score of Years!" (2000) 33 New York University Journal of International Law and Politics 1.

The Commission when proposing action in this area used this 'type' of abduction as a justification for the introduction of rules reinforcing the application of the return remedy. The assumed nature of the relationships involved identifies the Commission's approach with that of the Hague Conference when drafting the Hague Convention 1980, twenty years earlier. Although the adoption of the Hague Convention 1980 as the basis of EU intervention eventually ensured political agreement, the EU's proposals should have reflected on the actual nature of family life and child abduction when legislating. The abduction 'scenario' outlined by the proposal portrays the situation of a male abductor who wishes to alter an unfavourable custody decision, retaining the child in a State other than their habitual residence.[54] The assumption is that an abducted child would be returned 'home' to their mother, normally their primary carer.[55] In these circumstances the law is adopting a male standard by assessing an abduction according to largely male experience, i.e. the law is male.[56] There is no space for consideration of the changed nature of abduction, the responsibilities of care and the motivation for resulting primary carer abductions.

The abduction provisions are designed as a deterrent to parental child abduction by preventing the abductor from gaining an advantage from their actions. The return remedy therefore acts in the interests of *all* children, not

[54] Commission Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility COM(2001) 505 final, 6th September 2001, 2.

[55] Freeman 2001 *op. cit.* n50, 144.

[56] C Smart "The Woman of Legal Discourse" (1992) 1 Social and Legal Studies 29, 32.

the individual child,[57] except in the circumstances where the Article 13 exceptions to return are fulfilled. It is assumed that return is best for the child, whatever the circumstances.[58] The norm of best interests is being imposed from outside the family, and is defined by law as being protected by return to their habitual residence. Abduction may harm a child and this is assumed by Regulation 2201/2003 whether the abduction is by a primary carer or not.[59] As an abductor who is not acting in the best interests of their child, a mother's view of the child's welfare is then discounted.

Smart has argued that the ascendency of the welfare of the child has meant that mother's caring role, and interest and knowledge of caring for their child has lost standing in law.[60] Despite women's subjective knowledge of their children's interests, these are now conceived of as entirely distinct, meaning no claims can be made of the basis of maternal care.[61] Yet, Ribbens McCarthy *et al* found that parents constructed their relationship with their children in terms of the children's welfare, resulting in what they term a 'moral imperative' on the part of parents to pursue their children's interests.[62] They also found this imperative to be gendered, with women

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[57] P Beaumont, P McEleavy *The Hague Convention on International Child Abduction* (OUP, 1999), 29.

[58] L Silberman "Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence" (2005) 38 University of California Davis Law Review 1049, 1054.

[59] *Op. cit.* Freeman 2001, n50, 144.

[60] C Smart "The Legal and Moral Ordering of Child Custody" (1991) 18 Journal of Law and Society 485, 486.

[61] *Ibid.*, 491.

[62] J Ribbens McCarthy, R Edwards, V Gillies "Moral Tales of the Child and the Adult: Narratives of Contemporary Family Lives Under Changing Circumstances" (2000) 34 Sociology 785, 789.

consistently putting their children's interests before any other consideration.[63] The law requires women to act in the best interests of their child, but imposes an external, normative standard of 'the child's best interests' which, when this is not met, means that women's knowledge is discounted and arguably denies parents the expression of their needs and rights.[64]

Although it can be argued that focusing on the importance of the mother-child relationship re-affirms the normalcy of traditional family structures,[65] whilst women continue as the primary carers in society that role should be recognised as important for the welfare of children. The primary carer relationship is particularly important and should be legally recognised as such, even if it does not occur within the context of a traditional nuclear family. The law should support care within the family structure as long as this is not restricted to supporting 'acceptable' relationships.[66] It is the *relationship* that should be valued, rather than the assertion of rights by the primary carer over the child.[67] The child and the carer will have other

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[63] *Ibid.*

[64] A Diduck *Law's Families* (LexisNexis Butterworths, London, 2003), 91.

[65] K Quinn "Mommy Dearest: The Focus on the Family in Legal Feminism" (2002) 37 Harvard Civil Rights-Civil Liberties Law Review 447, 480-1.

[66] A Diduck, K O'Donovan "Feminism and Families: Plus Ça Change?" in A Diduck, K O'Donovan (editors) *Feminist Perspectives on Family Law* (Routledge, Oxford, 2006), 8.

[67] C Smart *Feminism and the Power of Law* (Routledge, London, 1989), 156. Focus on formal legal rights over children also prevents examination of inequality in relation to responsibility for children, see J Brophy "Child Care and the Growth of Power: the Status of Mothers in Child Custody Disputes", in J Brophy, C Smart (editors) *Women-in-Law: Explorations in Law, Family and Sexuality* (Routledge and Kegan Paul, London, 1985), 113.

family relationships which must be valued and recognised in law. However, Lister states that we should:

'...acknowledge the links between women's and children's well-being and recognise women's claims for justice in their own right.'[68]

The separation and prioritization of needs is particularly problematic when embodied in law as it then retains a symbolic importance and is difficult to alter allowing assumptions to be made about a child and their interests.[69] They are still expected to act in the best interest of the child by returning with them to their habitual residence following an abduction. To take an example under the Hague Convention 1980, in *Re G,* the elder child had been wrongfully retained in England from Canada. A younger child had since been born in England and Wales and was habitually resident there and therefore not subject to the Hague Convention 1980. In ordering the return of the elder child, the court stated that:

'...I start... upon the assumption that, if I order the return of X to Canada, the mother will feel herself compelled to accompany her and that, in doing so, she will also take Y who is only six months old and dependent upon her love and care.'[70]

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[68] *Op. cit.* Lister 2006, n24, 329.

[69] C Piper "Assumptions about Children's Best Interests" (2000) 22 Journal of Social Welfare and Family Law 261, 269.

[70] *Re G (Abduction: Withdrawal of Proceedings, Acquiescence, Habitual Residence)* [2007] EWHC 2907 (Fam); [2008] 1 FCR 1, 26.

At the same time as being characterised as 'an abductor' a primary carer is still expected to act in the child's best interests. The law is constructing the role of the parent around the needs of all children and is potentially gendering the behaviour of the mother. Once it has been decided where a child's best interests presumptively lie in law, it cannot be easily adjusted and has a symbolic resonance.[71] This is true of the Hague Convention 1980 and is clearly demonstrated in the adoption of Regulation 2201/2003 where the assumption that the return remedy secured the welfare of children (alongside other desirable policies) was unquestioned, and was so important that it merited reinforcement.

The welfare principle creates a standard which parents and particularly mothers as primary carers have to meet, which focuses solely on the risks to children and their needs, without considering the knowledge or interests of the child's carer.[72] The 'moral obligation' to put the presumed nature of children's interests first has become unchallengeable and once it is established where this interest lies parenting is judged against this standard.[73] As parental care remains largely women's responsibility, this means that it is mostly women that are judged against this standard. Wallbank argues that:

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[71] *Op. cit.* Piper, n69, 272.

[72] H Reece "UK Women's Groups' Child Contact Campaign: 'So long as it's safe'" (2006) 18 Child and Family Law Quarterly 538, 561.

[73] *Op. cit.* Ribbens McCarthy, Edwards, Gillies, n62, 789.

As a result, the years of the mother's caring work are marginalized, with the law raising its own experience in similar cases to a position of prominence.'[74]

In relation to international child abduction it also raises the question of whether the return remedy is concerned with the child's welfare or the enforcement of parental rights. Through the return remedy the law is concerned to protect parental rights of access to the child.[75] The law is arguably trying to ensure a continuing connection between the child and father, even if this places the child at risk of harm.[76] Regulation 2201/2003 can then be viewed as vindicating rights over a child without questioning actual responsibility.[77] Rhoades argues that:

'... family law is increasingly concerned with giving effect to rights irrespective of consequences, and decreasingly concerned with searching for the welfare-maximising outcome.'[78]

In reinforcing the application of the return remedy under Regulation 2201/2003 the EU has adopted this approach and has made assumptions as

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[74] J Wallbank *Challenging Motherhood(s)* (Prentice Hall, Harlow, 2001), 81.

[75] The left behind parent has rights of access in relation to the child, not day-to-day care of them, but this is sufficient to allow the operation of the return remedy because the rights encompassed are counted as a right of custody under the broad interpretation of Article 5, Hague Convention 1980, see *Re V-B (Abduction: Custody Rights)* [1999] 2 FLR 192.

[76] *Op. cit.* Wallbank 2001, n74, 4.

[77] *Op. cit.* Wallbank 2007, n22, 211.

[78] H Rhoades "The 'No Contact' Mother: Reconstructions of Motherhood in the Era of the 'New Father'" (2002) 16 International Journal of Law Policy and the Family 71, 84.

to the nature of the family relations involved. The changed nature of child abduction was not examined and the best interests of the child in returning to their habitual residence are assumed. This welfare standard, when infringed by mothers who remove or retain their children means that *'...there is little judicial recognition that mothers might know what is best for their children.'*[79] The reinforcement of the return remedy means that it is perhaps even more difficult for women to get their interests and those of their child heard and respected in return applications.

In reinforcing the application of the return remedy in Regulation 2201/2003 the EU has failed to account for the reality of family breakdown and the circumstances of family members which result in abduction. The EU has ignored the role of women as the primary carers of children and the links between care, migration and international child abduction, the 'underpinnings' of the phenomenon. Although the return of the child[80] may be an appropriate remedy, the changed nature of abduction should perhaps be acknowledged alongside the desire to vindicate custody rights, protect private international law aims and the rigorous enforcement of the Convention remedy. The next section will examine whether a human rights approach could be relevant and whether more progressive notions towards the nature of family life could be derived in this context.

3.2. Can Rights Make a Difference in EU Family Law and Child Abduction?

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[79] *Op. cit.* Wallbank 2001, n74, 66.

[80] Although c.f. L Silberman "Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments for ICARA" (2003) 38 Texas International Law Journal 41, 45 arguing that the Convention has been manipulated in favour of primary carers.

Regulation 2201/2003, although dealing with family dissolution, adopts a conception of the family which remains problematic in relation to child abduction. Goonesekere argues that human rights have the potential to balance the individual and collective interests and bring accountability to the regulation of private relations, making them a powerful ideology to change family law and policy.[81]

The ECtHR adopts a more progressive approach to 'the family', protecting relationships beyond the marital tie and recognising factual relationships under Article 8, ECHR, although these are still based around, or assimilated to, marriage.[82] Toner states that:

'Despite the paradigm of the married couple the ECtHR has insisted that factual reality rather than legal formality is the focus of the enquiry.'[83]

However, including non-marital partners in the definition of family does not mean that they have to be treated the same as marital partners because discrimination to preserve the traditional family remains permissible under the ECHR. It is more progressive than preserving the privileged marital tie, but not much.[84]

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[81] S Goonesekere "Human Rights as a Foundation for Family Law Reform" (2000) 8 International Journal of Children's Rights 83, 98.

[82] See e.g. *Keegan v Ireland* Series A No 290 (1994) 18 EHRR 342.

[83] H Toner *Partnership Rights, Free Movement and EU Law* (Hart Publishing, Oxford, 2004), 81.

[84] *Ibid.*, 82.

It has been argued that the ECHR could help the ECJ develop broader conceptions of the nature of 'family'.[85] The enforceability of rights at EC level is problematic because the external control mechanism of the ECtHR is not as stringent because the EU is not a signatory to the Convention.[86] The internal control mechanisms in the ECJ are also problematic because of their uncertain status and the ECJ's relative inexperience in dealing with concepts such as the family.[87] This makes the idea that human rights are the basis of the legal order and family law legislation questionable.[88] This balance may be renegotiated following the Lisbon Treaty 2007 and the anticipated accession of the EU to the ECHR.[89] The EU will then have to comply with the ideals in the ECHR and will be accountable in a way which has, thus far, not been possible.

In *Carpenter*[90] the ECJ held that EC law on free movement of workers was compliant with Article 8, ECHR. The EC is unlikely to be held in breach of the ECHR in its management of the family because the Member States have a broad level of discretion in their implementation of EC law and the

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[85] *Op. cit.* McGlynn, n39, 17.

[86] C Costello "The *Bosphorous* ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe" (2006) 6 Human Rights Law Review 87, 88.

[87] E Drywood "Giving With One Hand, Taking With the Other: Fundamental Rights, Children and the Family Reunification Decision" (2007) 32 European Law Review 396, 406.

[88] E Caracciolo di Torella, A Masselot "Under Construction: EU Family Law" (2004) 29 European Law Review 32, 46.

[89] Under Article 6(2) TEU. The future of the Lisbon Treaty 2007 and accession to the ECHR is unclear following the Irish referendum and their rejection of ratification. See *'An Irish Wake-Up Call'* The Guardian 18th June 2008.

[90] Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.

breach would then be attributed to the Member State rather than the EC. Even if the Member States have no discretion on implementation, the level of protection in EC law is likely to be deemed equivalent. The presumption of equivalent protection requires manifest deficiencies to be rebutted following *Bosphorous v Ireland.*[91]

In referring to Article 8, ECHR case law in EC cases, the ECJ is legitimating its approach to 'the family' through the use of human rights which therefore have the potential to affect its attitude to family relations.[92] Following the case of *Carpenter*, it has been argued that the EU is moving away from an economic, instrumentalist approach to cross-border family life to one which acknowledges the rights of individuals.[93] McGlynn argues that:

'...the Court of Justice is beginning to take seriously the application of human rights norms to Community law, at the same time as the Union legislature appears to be increasingly convinced by its own human rights rhetoric.'[94]

Alternatively, the case law under the Charter of Fundamental Rights in the European Union, although sparse and not closely reasoned so far, may

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[91] Application Number 45036/98; (2006) 42 EHRR 1.

[92] S Douglas-Scott "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*" (2006) 43 Common Market Law Review 629, 650.

[93] See A Tryfonidou "Jia or "Carpenter II": the Edge of Reason" (2007) 32 European Law Review 908.

[94] *Op. cit.* McGlynn 2006, n39, 113.

form the basis for further developments.[95] The Charter is likely to remain a marginal influence on the content and ideology of EU law even if the EU does accede to the ECHR. However, its impact on children's rights[96] and the conception of the family has been questioned.[97] In relation to 'the family', it has been argued that it has the potential to reinforce traditional notions of the family as it speaks of protecting it.[98] It does address children's rights separately rather than as appendages of their parents or assuming that the child's interests accords with that of their parents.[99] It is arguable that focussing on children's interests alone forgets that '*...the child's rights are first and foremost protected by support for the family*'.[100] The assertion of children's rights at EU level is desirable to ensure that the EU adequately addresses children's issues in all policy contexts. However, this should not prevent the recognition that the relationship between the child and the primary carer is particularly important to the child.

Although the Charter and the ECHR could form the basis of a challenge to the return remedy under Regulation 2201/2003, this is unlikely in practice. Human rights breaches can form a defence to the implementation of EC

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[95] *Op. cit.* Drywood, n87, 400.

[96] C McGlynn "Rights for Children?: The Potential Impact of the European Union Charter of Fundamental Rights" (2002) 8 European Public Law 387, 395.

[97] C McGlynn "Families and the European Union Charter of Fundamental Rights: Progressive Change or Entrenching the Status Quo?" (2001) 26 European Law Review 582, 585.

[98] *Op. cit.* Caracciolo di Torella, Masselot, n88, 38.

[99] *Op. cit.* McGlynn 2002, n96, 400.

[100] C Henricson, A Bainham The Child and Family Policy Divide: Tensions, Convergence and Rights Joseph Rowntree Foundation, 2005, 19.

law.[101] Therefore, it could be argued that refusing to implement the return remedy on the basis that the relationship between the child and their primary carer may be at risk could be a possibility. However, given that the right to this relationship will be balanced against the rights of the left behind parent and the best interests of the child concerned, including their right to a relationship with the left behind parent, this is unlikely to succeed. Human rights are used to vindicate the EU's approach to family law, rather than instigating an assessment of the nature of family life by either the ECJ or the other institutions. Return is the simplest and most effective way of vindicating these rights, but the EU should at least be aware of the changes in the nature of abduction and the link between migration, care and family dissolution. This is particularly relevant to the situation following the return of the child with their primary carer. Part four will examine the residence rights of the primary carer who returns with the child and the implications that this has for women's citizenship status in the Union.

4. Citizenship and International Child Abduction: Gender and Residency Rights Following Return

Regulation 2201/2003 was developed as a response to the success of the free movement of workers within Europe in encouraging migration and the formation of international families. This section will therefore examine how Regulation 2201/2003 may interact with the free movement provisions in the EU, which have embodied traditional notions of 'the family'. The link between free movement and citizenship of the Union will be examined through consideration of the residence status of women

[101] *Op. cit.* Costello, n86, 114.

following the operation of the return remedy, to demonstrate that women's European citizenship status is potentially affected by their role as the primary carers of children. It will be argued that the residency status of women following the issue of an order returning their child to the State of their habitual residence has not been adequately addressed by the free movement provisions of European law. The lack of space for gender issues in both these areas of law compound the effects of gender to affect women who have abducted their child, demonstrating the difficulties that women have in accessing the rights attached to European citizenship. The focus on paid work to achieve the 'worker' status for full citizenship and residence rights places women at a significant disadvantage and means that women may, in some cases, have to rely on their child's right of residence to remain in the State with them as their primary carer following return.

4.1. Citizenship of the Union and the Free Movement of Families

4.1.1. The Importance of Residence to the Concept of European Citizenship

Any person who is a citizen of a Member State is also a citizen of the European Union under Article 17(1) EC. Arguably the most important right attached to European citizenship is outlined in Article 18(1) EC:

'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.'

The free movement of persons is therefore central to the concept of European citizenship. As rights of movement and residence are central to European citizenship, the free movement of persons legislation and the social benefits which can be accessed by a migrant on the basis of these

rights have been the focus of the development of citizenship rights in the ECJ case law. Since the right to move and reside within the Union is so closely linked to European citizenship under Article 18(1) EC, although citizenship itself is based on nationality of a Member State under Article 17(1) EC,[102] citizenship rights are also tiered depending on status.

Directive 2004/38 now forms the basis of the entitlement to move and reside within the Union. The legislation creates a 'tier' of entitlements with the worker as the most privileged and therefore having the greatest access to rights of citizenship, the right of residence and access to social benefits on the same basis as nationals of the host State. Family members have a derived right of residence based on the worker's rights and will also have access to social benefits on the same basis as nationals.[103] Students and those with sufficient financial resources to maintain themselves without becoming an unreasonable burden on the host State's social security system with comprehensive medical insurance, and their family members, have a right of residence.[104] Those without sufficient resources to maintain themselves have no independent right of residence. For example, those without sufficient resources, although Union citizens, do not have the right to move to and reside in another Member State.

Spaventa points out that the reach of the citizenship provisions is much greater than the free movement of workers provisions because the economic element, the provision of services for remuneration as a worker,

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[102] See E Spaventa "Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects" (2008) 45 Common Market Law Review 13, 18.

[103] Article 7(1)(d), Article 24(1), Directive 2004/38.

[104] Article 7(1)(b),(c), Directive 2004/38.

is no longer necessary for the right to move.[105] Although workers remain at the top of the citizenship hierarchy in European law with the right to reside in another Member State and receive social benefits, those who do not qualify as workers now have the right to move also based on Article 18(1) EC.[106] The law on the free movement of persons will be examined in more detail to demonstrate their traditional conception of the family and the provision of care. The law will then be applied to the situation of a woman who has returned to a State other than that of her nationality with her child pursuant to a return order following an abduction.

4.1.2. Regulating the Family: the Traditional Ideology of EC Law

The free movement of workers required the EU to regulate the cross border movement of families and decide *who* can be defined as a family member in law. The free movement of workers and their families was primarily addressed in Regulation 1612/68 on the freedom of movement for workers within the Community.[107] This entitled a worker to move and reside in another Member State[108] with their family. Under Article 10(1), the worker's family was defined as including a worker's spouse, and their descendents if they were below 21 or dependent, and their dependent relatives in the ascendant line.

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[105] *Op. cit.* Spaventa, n102, 15.

[106] Case C-184/99 *Grzelczyk v Centre public d'aide social d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193; Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091.

[107] Regulation (EEC) No. 1612/68, OJ Sp. Ed. 1968, No. L 257/2 p. 475, 15th October 1968.

[108] Article 39 EC; Article 1, Regulation 1612/68.

Case 267/83 *Diatta v Land Berlin*[109] made it clear that the spouse's right of residence was conditional on their relationship to the worker. Once the parties divorced, unless the spouse was also a worker, they had no independent right of residence. The definition of 'spouse' was explored in Case 59/85 *Netherlands v Reed*[110] where the ECJ held that a spousal relationship did not include cohabitants. In addition, a descendant's right of residence is reliant on the individual either being below 21, or dependent on the worker if over 21.[111] These cases emphasise that entitlements under EC law attached to family members who were married to, the child of, or dependent on, a worker. The primacy attached to the worker status alone gave an independent right of residence. Family members entitlements were derived from the worker's.

This interpretation of the family has been criticised because, as Ackers argues:

'When models of migration behaviour translate into a framework of legal rights they tend to reflect and reproduce a specific family form which, in the process, renders as either invisible or deviant all those persons whose family situation in any way deviates from that 'norm'.[112]

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[109] [1985] ECR 567.

[110] [1986] ECR 1283.

[111] Case C-278/94 *Centre public d'aide sociale de Courcelles v Lebon* [1987] ECR 2811.

[112] L Ackers *Shifting Spaces: Women, Citizenship and Migration within the European Union* (Policy Press, Bristol, 1998), 44.

She highlighted that the law is premised on a 'male breadwinner' model of migration whereby the male is the primary earner and the female spouse accompanies him on migration to look after dependent children.[113] This model of migration is divorced from empirical reality[114] as individuals have many different reasons for moving, including migration with their partner.[115] The migration model embodied in Regulation 1612/68 conceptualised the 'European family' as the married, heterosexual partnership where the male takes part in the public sphere of the work, and the female remains in the private sphere of care. Children are conceptualised as adjuncts of their parents with no independent status.[116] Their rights are dependent on the economic and migration activities that their parents pursue.[117]

This ideology of the family is also in evidence in the interpretation of the sex equality provisions of the EC Treaty. McGlynn argues that the ECJ in the application of law relating to pregnancy and maternity leave has consistently reproduced the dominant ideology of motherhood and seeks to preserve the traditional roles of women and men.[118] In Case 184/83

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[113] *Ibid.*

[114] *Ibid.*

[115] *Ibid.*, 163.

[116] *Op. cit.* McGlynn 2006, n39, 50.

[117] H Stalford "The Developing European Agenda on Children's Rights" (2000) 22 Journal of Social Welfare and Family Law 229, 232.

[118] C McGlynn "Ideologies of Motherhood in European Community Sex Equality Law" (2000) 6 European Law Journal 29, 34.

Hofmann v Barmer Ersatzkasse[119] it was stated that Community law did not *'alter the division of responsibility between parents'*. This has led McGlynn to comment that:

'The Court has reproduced, and thereby legitimates, a concept of family which is exclusionary and reactionary and one which limits the opportunities of women, men and children.'[120]

This concept of 'the European family' privileges the status of 'worker' and places women in the private sphere, providing care for dependents. The gendered effects of this conception of work and care will be examined in the next section.

4.1.3. The Importance of the 'Worker' Status and the Value of Care

The status of 'worker' is the highest status in a layered hierarchy with different entitlements attached to each layer, potentially giving rise to 'second class' European citizens.[121] Workers[122] have the highest status with a right of residence in the host Member State and access to social benefits on the same basis as nationals.[123] The status of 'worker' is therefore the most valuable.

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[119] [1984] ECR 3047, paragraph 24.

[120] C McGlynn "Challenging the European Harmonisation of Family Law: Perspectives on 'The Family'" in K Boele-Woelki (editor) *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia, Antwerp, 2003), 223.

[121] R Davis "Citizenship of the Union...Rights for All?" (2002) 27 European Law Review 121, 129.

[122] And self employed persons.

[123] Article 39 EC; Article 7(1)(a), Article 24(1), Directive 2004/38.

It has been made clear that care is not conceptualised as work for the purposes of the free movement of workers provisions. In Case 66/85 *Lawrie-Blum v Land Baden-Württemberg*[124] it was stated that:

'The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'.

The ECJ failed to attach any economic value to the work of care, which is essential for the inevitable dependency to some degree of children.[125] This approach was confirmed in Case 85/96 *Martinez Sala v Freistaat Bayern.*[126] In this case a Spanish national living in Germany claimed a child raising allowance whilst not in possession of a residence permit. She had worked in Germany but was no longer employed. It is clear that care work would not be sufficient for her to fulfil the status of 'worker'.[127] Instead, as she was legally resident in Germany, she fell within the *ratione personae* of the EC Treaty under the citizenship provisions on free movement, Article 8(1) (now Article 18(1)EC), and could not be discriminated against on the basis of nationality in requiring residence papers for access to the benefit.[128] Although she had access to the benefit it

[124] [1986] ECR 2121, paragraph 17.

[125] *Op. cit.* Fineman 1995, n25, 2181.

[126] [1998] ECR I-2691.

[127] Case C-85/96 *Martinez Sala v Freistaat Bayern* [1998] ECR I-2691, paragraph 32.

[128] Under Article 12 EC (ex Article 6 EC), Case C-85/96 *Martinez Sala v Freistaat Bayern* [1998] ECR I-2691, paragraph 62.

was not because of her 'work' as a carer. The public and private spheres were kept rigidly separate, continuing the traditional view of the family where the care of children does not count as 'work' for the purposes of EC law.[129]

The focus on paid work and the expectation placed on mothers to adopt the role of primary carer places them in a vulnerable position under the free movement of workers provisions.[130] Ackers argues that migration poses serious challenges to women in combining paid and unpaid work because of their dislocation from informal support networks and the dominance of the male partner's career.[131] The combination of care and work means that it is difficult for women to retain a labour market position which reflects their qualifications.[132] This meant that, under Regulation 1612/68 women were *'...more vulnerable than men after divorce to exclusion from the Member State of residence of the family.'*[133]

The element of care meant women may not have access to the labour market following divorce, meaning that they would not hold the status of worker and their residency was vulnerable.[134]

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[129] I Moebius, E Szyszczak "Of Raising Pigs and Children" (1998) 18 Yearbook of European Law 125, 129.

[130] T Hervey "Migrant Workers and their Families in the European Union: the Pervasive Market Ideology of Community Law", in J Shaw, G More *New Legal Dynamics of European Union* (Clarendon Press, Oxford, 1995), 106.

[131] *Op. cit.* Ackers 2004, n48, 379.

[132] *Ibid.*; *Op. cit.* Ackers 1998, n112, 198.

[133] *Op. cit.* Hervey, n130, 106.

[134] *Op. cit.* Ackers 2004, n48, 381.

This situation can actually precipitate the mother's unlawful removal of a child from the State of their habitual residence as they returned home for assistance in caring for the child and either financial assistance or work, as highlighted in part one of this chapter.[135] International child abduction is now more likely to be carried out by women, who are likely to be the primary carer of the child concerned. In many cases the parties to the return application are still married; however, some have divorced or never married.[136] If a woman, a European citizen, has migrated within the European Union and then, following the breakdown of her relationship in the State they migrated to, returned 'home' to their State of origin with their child with them, they may abduct the child.[137] If this removal is in breach of the custody rights of her former partner, the return remedy will potentially be engaged under Article 2(11), Regulation 2201/2003.[138] The child will be returned to their habitual residence prior to the abduction and the mother will usually return also.[139]

She will be returning to a State which is not that of her nationality. Her right of residence is therefore derived from European law governing the

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[135] *Ibid.*

[136] 34% of parties were still married when return application was lodged; 24% were divorced; 18% were separated and 20% had never married, see N Lowe, A Perry "International Child Abduction – the English Experience" (1999) 48 International and Comparative Law Quarterly 127, 135.

[137] *Op. cit.* Ackers 2004, n48, 393.

[138] Article 2(11), Regulation 2201/2003.

[139] Article 12, Hague Convention 1980.

free movement of persons within the Union.[140] It has been highlighted that the concept of a 'worker' is inherently gendered because caring and domestic work does not satisfy the definition of a 'worker' under European law.[141] Women are less likely therefore to have access to the most privileged citizenship status in European law and have to rely on rights of residence derived from their worker spouse.[142] This means that women are in a more vulnerable position following the breakdown of a relationship as their derived right of residency may be extinguished. However, citizenship case law has recognised the value of the primary carer relationship and allows those who are not economically active to move in specified circumstances.[143] The residency rights of women in this situation under the new Residency Directive 2004/38 and the citizenship case law will therefore be examined. It will be demonstrated that the lack of space for gender issues such as 'care' in both child abduction and free movement law means that women may have to rely on their child's right of residence to remain in the host Member State on return.

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[140] This section does not address the circumstances of third country nationals within the Union, or the specific situation of the various accession States. The discussion is restricted to residence rights within the EU15, rather than the EU27.

[141] The definition of 'worker' under Article 39 EC is broad, but does not include domestic care work as it is not the performance of a service for another person in return for remuneration see: Case C-85/96 *Martinez Sala v Freistaat Bayern* [1998] ECR I-2691, paragraph 32 following Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraphs 16-17. The definition does include part time work which is not ancillary, see Case 53/81 *Levin* [1982] ECR 1035, paragraph 15.

[142] See generally: *op. cit.* Ackers 1998, n112, 183; *op. cit.* Moebius, Szyszczak, n129, 141-2; M Everson "Women and Citizenship of the European Union" in T Hervey, D O'Keeffe (editors) *Sex Equality in the European Union* (John Wiley, Chichester, 1996); L Ackers "Citizenship, Gender and Dependency in the European Union: Women and Internal Migration" in T Hervey, D O'Keeffe (editors) *Sex Equality in the European Union* (John Wiley, Chichester, 1996).

[143] S Millns "Gender Equality, Citizenship and the EU's Constitutional Future" (2007) 13 European Law Journal 218, 238.

4.2. The New Residency Directive 2004/38 and Residence Following Return

This section will examine the new Residency Directive 2004/38[144] for its approach to family life and its effect on women who have abducted their child and subsequently return to a State other than that of their nationality with their child. Directive 2004/38 had to be transposed into national law by 30th April 2006.[145] The Directive alters the entitlement of the family members of a worker and other citizens entitled to reside in another Member State. It reflects the development of the concept of European citizenship by speaking of the 'free movement of citizens' and adopting some of the case law developed by the ECJ on Article 18(1) EC.

4.2.1. The Residency Provisions of Directive 2004/38

Under Article 2, a family member is described as:

a. the spouse
b. the partner with whom the Union citizen has contracted a registered partnership... if the legislation of the host Member State treats registered partnerships as equivalent to marriage...
c. the direct descendants who are under the age of 21 or are dependents and those of the spouse or partner as defined in point (b)
d. the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b)

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[144] Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States OJ [2004] L158/77.

[145] The UK has implemented Directive 2004/38 in Immigration (European Economic Area) Regulations 2006. However, the Commission has brought an action against the UK for failure to implement, or failure to notify the Commission of implementation, of Directive 2004/38, see Case C-122/08 *Commission v UK*. There is concern over the UK's transposition and implementation of Directive 2004/38, see A Hunter "Family Members: An Analysis of the Implementation of the Citizen's Directive in UK Law" [2007] Journal of Immigration, Asylum and Nationality Law 191.

The definition of a family member has therefore been extended to include registered partners[146] and their close relatives. Descendents of the spouse are also within the scope of these provisions, therefore step-children of the worker are covered by the Directive. However, children and spouses remain dependent on the worker and as such their rights are still parasitic, or derivative.[147] Additionally, cohabiting couples are not included in the definition. The tie of marriage therefore remains privileged in European law as only marital partners have the *right* in European law to accompany a Union citizen under Article 7(d), Directive 2004/38.[148]

Under Article 3(2)(b), Directive 2004/38 the host Member State can admit *'the partner with whom the Union citizen has a durable relationship, duly attested'* in accordance with their national legislation. Therefore, if an individual does not enter a Member State as a worker, but is in a close

[146] This is restricted by the requirement that the registered partnership is treated as 'equivalent to marriage'. Registered partnerships in the UK do not have exactly the same rights and duties attached to them as there are to marriage. It is unclear how this provision will be interpreted. It is possible that 'spouse' under Article 2(2)(a) may include same-sex marital spouses, but this is also unclear as Article 2 provides specifically for same-sex relationships. EU law has a had a restrictive attitude towards the recognition of same-sex relationships, see E Reid, E Caracciolo Di Torella "The Changing Shape of the 'European Family' and Fundamental Rights" (2002) 27 European Law Review 80 commenting on Joined Cases C-122/99, C-125/99 *D and Sweden v Council* [2004] ECR I-451 where staff allowances were not granted to same sex partners and arguing that the concept of family in EU law was at worst a potential violation of fundamental rights.

[147] Article 24, Directive 2004/38 gives family members an independent right to equal treatment giving slightly more independence than Article 7(2), Regulation 1612/68.

[148] The Union citizen may not necessarily be a worker. Under Article 7(b) and (c) they may either have sufficient resources to maintain themselves and their families and comprehensive medical insurance; or they are a student with sufficient resources to maintain themselves and their families and comprehensive medical insurance. Their rights then flow from Article 18(1) EC rather than Article 39 EC on the free movement of workers. This point is confirmed by Case 127/08 *Metock and Others* judgment 13th September 2008 which states that marriage to a Union citizen worker legitimises residence in a host Member State, even where an individual was previously illegally resident.

relationship with a worker, their right of residence depends on variable national law.[149] Although these provisions acknowledge the relevance of cohabitation in these circumstances, the traditional nuclear family form based on marriage is still favoured.

Directive 2004/38 does alter the circumstances of family members where the spouses are divorced. Under Article 13(1) *'divorce...shall not affect the right of residence of his/her family members who are nationals of a Member State'*. This appears to counteract the affect of *Diatta* meaning that family members are no longer as vulnerable following divorce.[150]

Under Article 6, Directive 2004/38 EC all Union citizens have an unconditional right of residence in all Member States for three months.[151] However, after the expiry of the three month period Article 7, Directive 2004/38 applies. This provides that Union citizens have a right of residence in another Member State if they are either a worker,[152] have sufficient resources[153] for themselves and their family so as not to become a burden on the social security system of the host Member State and have

[149] In the UK there is evidence that it takes longer to get a residence permit because of the time taken to assess the nature of the relationship between the parties see *op. cit.* Hunter, n145.

[150] This legislation reflects the ECJ's judgment in Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091.

[151] As long as they do not become an unreasonable burden on the social security of the host Member State under Article 14(1), Directive 2004/38.

[152] Or self-employed; Article 7(1)(a), Directive 2004/38.

[153] Under Article 8(3)(4), Member States may not include a fixed level at which an individual is deemed to have 'sufficient resources' and should take personal circumstances into account.

comprehensive medical insurance,[154] are a student with comprehensive medical insurance and sufficient resources to maintain themselves and their families,[155] or are family members accompanying a Union citizen who fulfils one of the other criteria.[156] Those qualifying as family members are specified by Article 2(2). After five years of continuous residence in the host Member State, the European citizen acquires a right of permanent residence in that State.[157] This applies to family members of a worker and is only lost after an absence of two consecutive years from the host State.[158] The right of residence is retained for as long as an individual fulfils one of the relevant conditions.[159]

Directive 2004/38 represents a step forward in the recognition of different family forms in European law. The increasing fluidity of families has been recognised in Directive 2004/38 by the provisions following the breakdown of a relationship and divorce and the right of residence for step children. However, it still privileges the traditional married family form

[154] Article 7(1)(b), Directive 2004/38 which repeals Directive 90/364 on a general right to residence OJ [1990] L180/26, the so-called 'Playboy Directive' because of the requirement of sufficient resources.

[155] Article 7(1)(c), Directive 2004/38, repealing Directive 93/96 on students OJ [1993] L317/59.

[156] Article 7(1)(d), Directive 2004/38.

[157] Article 16, Directive 2004/38. The citizen who is legally permanently resident will no longer be subject to the other requirements under Article 7, Directive 2004/38.

[158] Article 16(4), Directive 2004/38. During acquisition, the period of continuous residence is not affected by absences of up to six months or twelve months for specified reasons, including pregnancy under Article 16(3).

[159] Article 14(2), Directive 2004/38.

with dependent children over any other. This has led McGlynn to comment that:

'The adoption of the new Free Movement Directive clearly represents a wasted opportunity as regards the concept of family and rights of family members. [The] Directive confirms the exalted status of marriage and seeks more to ensure the continuation of a traditional concept of family than to open up free movement to even more people or to respect the fundamental rights of those in all forms of family.'[160]

The importance of cohabitation has not been recognised effectively by Directive 2004/38. The 'male breadwinner' model of migration remains the ideological basis for migration behaviour, despite evidence that this actually has limited resonance for intra-EU migration.[161] The distinction between 'work' and 'care' has been closely maintained with no acknowledgment of the gendered nature of this distinction. This is justified by reference to the burden it would impose on Member States, but must also be of concern given the interest of the EU in regulating family breakdown through private international family law instruments, and potentially has an impact on women's residence status when they return to a Member State following an abduction.

4.2.2. Women's Right of Residence on Return

For European women citizens who have abducted their child and wish to return to the child's habitual residence with them following the issuing of a return order, if this State is not their State of origin, their status may be

[160] *Op. cit.* McGlynn 2006, n39, 131.

[161] *Op. cit.* Ackers 1998, n112, 44.

uncertain.[162] They have a right of residence for three months following their return, as long as they do not become a burden on the social security system of the host Member State.[163] For women who can find work in the State they return to with their child, they will have the status of worker and their residency is assured. However, as women are likely to be the primary carer of the child and, on return, perhaps parenting alone for the majority of the time, finding and maintaining a job may not be possible.[164]

Most women will withdraw entirely from the labour market at some point in their lives which means that they will have to rely on the derived right of residence for family members.[165] If, on return, a woman is still married to the left behind parent who is a worker they will retain the derived right of residence as a spouse of the worker.[166] Even if a divorce has been finalised, under Article 13, Directive 2004/38 the divorce[167] will not affect the right of residence of the former spouse and family members. This applies even if her former worker husband subsequently leaves the host Member State following the issuing of a custody decision as long as she has actual custody of his children and they are being educated in the host Member

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[162] *Op. cit.* Ackers 2004, n48, 381.

[163] Articles 6 and 14(1), Directive 2004/38.

[164] Migration can significantly affect women's participation in the labour market see *op. cit.* Ackers 2004, n48, 379.

[165] *Ibid.*, 381.

[166] Article 2(2)(a), Directive 2004/38. This is the case where the partners have separated and where the decree nisi has been pronounced. Case 267/83 *Diatta v Land Berlin* [1985] ECR 567.

[167] Or the annulment of the marriage; or termination of a registered partnership.

State under Article 12(3), Directive 2004/38.[168] Therefore, if a woman returns and is not a worker, but is still married or divorced from a worker, or someone otherwise entitled under Article 7(1) to reside, she will also retain her right of residence. However, following the divorce the family member cannot acquire a right of permanent residence without fulfilling one of the Article 7(1) criteria.

If the parties were never married, Article 13, Directive 2004/38 does not apply on the breakdown of the relationship because it applies only where the parties were formerly married. A woman will no longer be able to rely on her former partner's status as a worker to derive her right of residence from him to be admitted under the national rules as someone having a durable relationship with a worker.[169] In these circumstances if she had resided legally in the Member State for five years previously she may have acquired a permanent right of residence in the host State under Article 16(1), Directive 2004/38. This is possible if she has been in a relationship with her partner for five years and had a right of residence derived from his status as a worker. Despite not working herself, she would derive a permanent right of residence. As long as her absence from the State during the period in which she was wrongfully retaining or had removed their

[168] Her right of residence is then derived from the children's, codifying Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091. However see *Ibrahim v Harrow LBC* [2008] EWCA Civ 386 which highlights that Article 12(3), Directive 2004/38 does not protect the family of an ex-migrant worker who ceased to be a worker before their departure from the host State without their family. In this case the mother was a third country national and the children were Danish nationals in education in the UK, but the family did not have sufficient resources to survive without reliance on the State; the application arose out of a claim for housing assistance. The Court of Appeal has referenced questions to the ECJ to establish whether the mother can derive a right of residence from the children following the departure of her Union citizen husband despite the lack of sufficient resources and the lacuna in Article 12(3).

[169] Article 3(2)(b), Directive 2004/38.

child to another State was not more than two years,[170] on her return she could retain her independent right of residence.

However, if a woman has not resided in the host Member State for long enough to acquire a permanent right of residence, is not working or able to derive a right of residence from another worker as a family member, her right to remain in the State with her child on return appears jeopardised. In these circumstances a woman may have to rely on Article 18(1) EC directly to derive a right of residence. Article 18 EC provides a directly effective, if conditional right to reside and can be relied on by citizens in some circumstances for a right of residence in a Member State other than their home State:[171] Article 18(1) is relied upon by non-workers, who lack the entitlement to residence that the worker status brings. They have a right of residence as a citizen, rather than as a worker:

'...a citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the Union, enjoy there a right of residence by direct application of Article 18(1) EC.'[172]

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[170] Article 16(4), Directive 2004/38.

[171] Case C-184/99 *Grzelczyk v Centre public d'aide social d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193; Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091.

[172] Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091, paragraph 94.

In *Baumbast* it was held that any restrictions imposed by the Treaty or by secondary and national legislation on the freedom to move and reside must conform to the principle of proportionality:[173]

'...limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the principle of proportionality.'[174]

So, as Spaventa states:

'...even when the Union citizen fails to satisfy the black letter requirements of Directive 2004/38, she might still gain a right of residence directly from Article 18(1) EC'.[175]

In these circumstances, the mother may be able to derive her right of residence from that of her child if she remains the primary carer of the child, following the case of *Chen.*[176] The child, as a Union citizen, has a right of residence, but this remains subject to the requirement of sufficient resources, so that the child does not become a burden on the host State, and comprehensive medical insurance.[177] The State does not have to provide

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[173] *Ibid.*, paragraph 81.

[174] *Ibid.*

[175] *Op. cit.* Spaventa, n102, 26.

[176] Case C-200/02 *Chen v Secretary of State for the Home Department* [2004] ECR I-9925.

[177] *Ibid.*, paragraph 47.

resources so that the child can vindicate this right of residence.[178] Even if it is disproportionate in these circumstances to remove the woman's right of residence, she will still have to have sufficient resources to maintain her child and herself in the host Member State, and comprehensive medical insurance. Since women are less likely to be financially independent this makes the right less accessible for women. However, if she receives maintenance from the father of the child, this may be sufficient resources to satisfy the criteria and:

'...since the right to reside derives directly from the Treaty, the Member States have to respect the principle of proportionality and fundamental rights before terminating residence. This means that reliance on welfare provision cannot automatically lead to termination of residence, and the personal circumstances of the claimant must be taken into account.'[179]

Even if women have to rely to some extent on social benefits in the host Member State, it still may not be proportionate to remove them. Additionally, given the ECJ's references to Article 8 ECHR, it may be that any removal would then be in breach of the right to private and family life because the child's relationship with their primary carer would be significantly affected.[180]

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[178] See *W (China) v Secretary of State for the Home Department* [2007] 1 WLR 1514; *Liu and Others v the Secretary of State for the Home Department* [2007] EWCA Civ 1275.

[179] *Op. cit.* Spaventa, n102, 29.

[180] Case C-200/02 *Chen v Secretary of State for the Home Department* [2004] ECR I-9925, paragraph 47.

The connection between the child and their primary carer is acknowledged as providing a right to reside for the parent of a Union citizen in another Member State. The mother would have no independent right of residence in these circumstances; it would arise solely out of her care of the child unless she chose to undertake work in the host Member State. Women will be the main beneficiaries of this right as they remain the primary carers of children, but correspondingly because of this they are also more likely to have to rely on this right than men. This goes some way to recognising a fundamental right to family life within the EC and places children's rights at the centre of family relations.[181]

Rose highlights the fact that the legal regulation of structures and statuses relating to the family emerge at different times with different aims resulting in diverse results and effects on individuals.[182] This is evident in European law relating to child abduction and the free movement of persons where the particular conception of family relations results in an uncertain residency status on return for women. The next section will examine what effect this has on women's status as European citizens.

4.3. The Interaction of Abduction and Free Movement Law: The Citizenship Status of European Women

The operation of both the law relating to child abduction and the free movement of persons are affected by continuing division of caring responsibilities within the family unit. Women remain predominantly responsible for caring for children and this affects their rights under Union

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[181] E Szyszczak "Citizenship and Human Rights" (2004) 53 International and Comparative Law Quarterly 493, 496 referring to Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091.

[182] N Rose "Beyond the Public/Private Division: Law, Power and the Family" in P Fitzpatrick, A Hunt *Critical Legal Studies* (Blackwell, Oxford, 1987), 67.

law and, by extension, their citizenship status. The lack of space for consideration of gender issues at European level potentially has compounded effects in the context of international child abduction. In neither area of law are women and their relationship with children 'in focus', the issue of care is not acknowledged as gendered and the links between migration, care and abduction have not been analysed.

The law relating to international child abduction, in presuming that the child has been abducted by their non-custodial carer in the vast majority of cases, returns the child, normally with their mother, to a situation where their residency status may now be uncertain. Their residency status is only assured if they are either a worker, remain married or have divorced, or have resided legally in the host State for five years and are permanently resident there.[183] The primacy attached to the status of 'worker' and marriage ties demonstrate the nature of citizenship rights in the Union. Economic activity is central to access to citizenship rights and, if this is not present, the marriage tie forms the basis of derived entitlements.[184] As Ackers states:

'The key to 'favoured' citizenship is paid employment. It is this 'economic nexus' that gives rise to optimum, independent social status.'[185]

Economic contribution is characterised as central to obtaining full citizenship rights. This is inherently problematic for the citizenship status

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[183] Articles 7(1)(a), 13, and 16(1), Directive 2004/38.

[184] *Op. cit.* Ackers 1998, n112, 183.

[185] *Ibid.*

of women because care is not characterised as an economic activity justifying access to full citizenship rights, although 'work' is conceptualised in a broad sense to mitigate this limitation.[186] The structure of the family and impediments to labour market access are therefore central to the citizenship status of women. The conception of the family and family law mediate the type of citizenship status women can obtain by defining their autonomy, roles and opportunities.[187] The ideological division of public and private becomes important in defining who falls into the public sphere, where full citizenship can be achieved; and who remains in the private sphere, where citizenship status becomes reliant on rights derived from those who participate in the public sphere.[188] Citizenship status is bound up with participation in the public sphere.[189] In this way, assumptions about the nature and role of family members in the private sphere condition the citizenship status that women can achieve.[190]

Full citizenship status through increased access to the labour market has led women to assume the dual burden of work and caring for children because the gendered division of labour has not been renegotiated alongside this increased participation and '*...Community law [is] blind to*

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[186] Case C-85/96 *Martinez Sala v Freistaat Bayern* [1998] ECR I-2691.

[187] *Op. cit.* Fineman 2001, n26, 1418.

[188] S Sevenhuijsen *Citizenship and the Ethics of Care: Feminist Considerations on Justice, Morality and Politics* (Routledge, London, 1998), 4-5; S Walby "Is Citizenship Gendered?" (1994) 28 Sociology 379, 385; R Lister "Citizenship Engendered" (1991) 11 Critical Social Policy 65, 66.

[189] *Op. cit.* Walby, n188, 385.

[190] *Op. cit.* Ackers 1998, n112, 34.

the traditional gendered division of roles within the family.'[191] If women are not willing to assume this burden and withdraw from the labour market, their rights are derived through their marital status making them dependent on a man, rather than on the market.[192] If women make the choice not to marry, their status as carer is not valued for the purpose of citizenship.[193] It is in these circumstances that women who wrongfully remove or retain their child are at their most vulnerable following return.

If women are willing to assume the status of a worker and are in circumstances permitting them to do so,[194] following return they will be participating in the public sphere and have an unconditional right of residence. Walby states that:

'*It has only been by leaving the private sphere of the home that women have been able to gain some aspects of citizenship.*'[195]

This indicates that women are expected to assume the dual burden of work and caring for children to achieve full citizenship status.[196] Although

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[191] *Op. cit.* Moebius, Szyszczak, n129, 133.

[192] R Lister "Women, Economic Dependency and Citizenship" (1994) 19 Journal of Social Policy 445, 448.

[193] *Op. cit.* Moebius, Szyszczak, n129, 129.

[194] Family formation has a significant impact on women's labour market participation see *op. cit.* Ackers 1998, n112, 193-8 on women, work and migration.

[195] *Op. cit.* Walby, n188, 385.

[196] See *op. cit.* Ackers 1998, n112, 250; *op. cit.* McGlynn 2006, n39, 33.

women can hold residency rights through their male partners, these rights are dependent on the relationship, although this has been renegotiated to some extent in relation to divorced women under Directive 2004/38. Lister argues that:

'If married and cohabiting women are to enjoy economic and social rights of citizenship to the full, it is not good enough that they come second hand, mediated by their male partners, so that, in practice, they cease to be rights at all.'[197]

This conception of citizenship rights reinforces dependency within the family structure and keeps the family conceptually separate from the market, essentialised in form and function for the provision of care, mostly by women.[198]

If women are not workers and are not either still married, or divorced, there is also the possibility of women deriving a right of residence from their child following return, arising from their status as a primary carer under *Chen.*[199] This is a right which primarily women will rely on. Reich and Harbacevica argue that this arises out of the factual need to care for children, rather than as being a right derived from the child's right of

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[197] *Op. cit.* Lister 1994, n192, 460.

[198] *Op. cit.* Fineman 2001, n26, 1418.

[199] And Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091. Reich and Harbacevica argue that the concept of a 'primary carer' is undeveloped in the ECJ's citizenship case law. See N Reich, S Harbacevica "Citizenship and Family on Trial: A Fairly Optimistic Overview of Recent Court Practice with Regard to Free Movement of Persons" (2003) 40 Common Market Law Review 615, 632.

residence.[200] However it is conceptualised, it is making women's residency status entirely dependent on their child's needs. This gives primacy to children's rights over that of their mother and, as Lister states,:

'...it is dangerous to represent women's claims as citizens purely in terms of their role as mothers of the next generations of citizens, thereby collapsing their claims into those of their children.[201]

There is space for consideration of children's interests and this is the basis for the development of their independent, though conditional, right of residence. The case of *Chen* however, does give recognition to the value of care to the child and gives a right to women on the basis of that primary carer status. It acknowledges the necessity and value of the caring role of women and potentially means they may reside in the host State following the operation of the return remedy. In these circumstances it is particularly desirable to recognise children as citizens of the Union and their connection with, and dependency to a certain extent, on their primary carer.[202]

Although care has not been recognised as work at EU level, it has been recognised as a necessary role giving access to European citizenship derived rights of residence. The citizenship case law has extended European law to include the non-economically active and thereby

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[200] *Ibid.*

[201] *Op. cit.* Lister 1994, n192, 461.

[202] H Stalford "The Citizenship Status of Children in the European Union" (2000) 8 International Journal of Children's Rights 101, 128.

recognising women's role as primary carers.[203] Millns therefore argues that:

'This recognition of the role of the primary carer of an EU citizen and the consequent granting of rights on that basis is an important step towards valuing the care work that women and mothers do, despite the fact that this typically falls outside the EU's market framework and would not normally be recognised as a basis for according legal rights.'[204]

Citizenship has always been a universal, male standard, achieved through participation in the public sphere, something which many women were excluded from.[205] This is the traditional notion of citizenship at EU level with market participation being highly valued.[206] Women could achieve citizenship if they reached this male standard of market participation.[207] However, the decision in *Chen* may indicate some renegotiation of these boundaries and allows the citizenship provisions to work with the international child abduction provisions of Regulation 2201/2003. Lister has argued that renegotiation is not enough though stating that:

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[203] *Op. cit.* Millns, n143, 234.

[204] *Ibid.*, 235.

[205] *Op. cit.* Walby, n188, 384. Citizenship is also exclusive along other axes of disadvantage such as age, sexuality, race and class, see N Yuval-Davis "Women, Citizenship and Difference" (1997) 57 Feminist Review 4, 17.

[206] M Everson "The Legacy of the Market Citizen" in J Shaw, G More (editors) *New Legal Dynamics of European Union* (Clarendon Press, Oxford, 1995), 80.

[207] *Op. cit.* Walby, n188, 387.

'...radical changes are needed in domestic life and in the organisation of paid employment and state provisions, if women are to be full citizens. This will require changing both our conceptions of citizenship and the structures which fashion citizenship rights.'[208]

Instead of renegotiating the potential effect of Regulation 2201/2003 on residency through the notion of European citizenship, a wider conceptualisation of family life and the role of care, alongside an examination of the motivations behind the migration which results in child abduction, may have moved the conceptualisation of family law in Europe further beyond traditional notions. This wider approach to formulation of policy over this question could account for issues like the residency status of women following return explicitly, during the formulation of legislation. Gender is the implicit factor in these interactions but acknowledging gender issues as having a 'space' may give rise to new questions about how private international law interacts with other areas of European law and policy. Although the citizenship case law can support the operation of Regulation 2201/2003, it would have been more desirable to account for these issues explicitly within Regulation 2201/2003 during the formulation of the legislation.

The intervention in family law has given rise to questions about the nature of the citizenship rights that women enjoy, and the type of family embodied and valued by European law. It seems that a European concept of citizenship may value 'care', and acknowledge the changing nature of the family with the effect that citizenship rights can address the residency lacunae which may be faced by some women following the operation of the return remedy under Regulation 2201/2003.

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[208] *Op. cit.* Lister 1994, n192, 445.

This is important as McEleavy states that *'...Brussels is now in a position to take the lead in respect of family law matters...'*[209] Although the EU's approach to the family remains problematic, there is evidence that a more realistic rights based approach is emerging, particularly in relation to children and care. This is to be welcomed and more consideration of the value of 'care' in a European context encouraged, creating space for acknowledgment of the gendered nature of caring responsibilities and the links between migration, citizenship and care. This also highlights the need for an integrated approach to the free movement of persons within Europe and the development of a relevant, inclusive private international family law which addresses the inter-relationship of the legal issues arising as families migrate within Europe.

5. Conclusions

This chapter has considered the effects of failing to acknowledge, or to provide space for, gender issues in European child abduction law and in the law relating to the free movement of persons. Regulation 2201/2003 represents an attempt to address the effects of the free movement of persons in an EU context. It is part of a more general trend at EU level recognising the flexibility of family structures and the existence of family forms outside that of the married heterosexual partnership with children which formed the basis of the European family model in Regulation 1612/68 and European sex equality law. However, the continuing influence and prevalence of a very traditional approach to family life has a potential impact on what is expected of women with the family, preserving the

[209] P McEleavy "First Steps in the Communitarisation of Family Law: Too Much Haste, Too Little Reflection?" in K Boele-Woelki (editor) *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia, Antwerp, 2003), 512.

gendered role of primary carer of children, and thus on their status as citizens of the EU.

The child abduction provisions of Regulation 2201/2003 are still modelled around an old conception of the nature of child abduction and do not clearly address the links between care, migration and family dissolution. The role of gender and care responsibilities in motivating migration following relationship breakdown and primary carer child abduction has not been acknowledged. The law on international child abduction in Regulation 2201/2003 is therefore implicitly male.[210]

The implicit effect of gender and care are potentially compounded following return to the State of the child's habitual residence. As women are more likely to abduct their child and will often return with them pursuant to a return order, they should be able to reside in a host Member State with the child. However, there is no guarantee of this, although the citizenship case law would probably ensure she had a right of residence based on her care of the child. The case of *Chen* is a welcome acknowledgment of the value of care in European society although the woman's right of residence is dependent on the child. The relationship between the child abduction and free movement of persons provisions is opaque; free movement could be said to encourage abduction but residence in the child's habitual residence following return is not secure. It is more secure than if the abduction occurred outside the European framework, but European citizenship means that the free movement of persons within Europe is the right of all citizens, something which is particularly important in the context of international family dissolution.

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[210] See *Chapter One*, 2.2.2.

Although the EU has gone some way to addressing care and family dissolution it has not clearly considered the role of gender in the law; there is very little space for accommodation of gender issues within this legal framework. The implicit effects of gender, acting behind the legislative face of Regulation 2201/2003, means that the law relating to international child abduction may have a differing impact on women than on men, particularly when the right of residence is considered. The implicit effect of gender will be further considered in *Chapter Five* in relation to abductions motivated by domestic violence, an issue which also primarily affects women. *Chapter Five* will also consider the continuing theme of women's citizenship of the Union, and the importance of the claims that can be made on the basis of this status.

Chapter Five

REGULATION 2201/2003 AND ABDUCTION MOTIVATED BY DOMESTIC VIOLENCE

1. Introduction

One of the reasons cited for the increase in the proportion of abductions perpetrated by mothers is that the removal of the child across an international border is part of a flight from domestic violence.[1] The effectiveness and appropriateness of enforcing the return of the child under the Hague Convention 1980 in these circumstances has been questioned by feminists as placing both the child and their mother at the risk of further violence.[2] This is the most extreme circumstance in which gender plays an implicit role in motivating international child abduction and is arguably where the return remedy has a particularly gendered effect in practice. This chapter will therefore examine the law relating to international child abduction under Regulation 2201/2003 and the space for addressing the effect of the gendered issue of domestic violence as a motivating factor for an abduction in these provisions. It continues the analysis of the implicit role of gender relations in child abduction, begun in *Chapter Four*, by examining this motivation for abduction and the effects and meaning of the return remedy where such violence exists.

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[1] M Weiner "International Child Abduction and the Escape from Domestic Violence" (2000) 69 Fordham Law Review 593, 595.

[2] *Ibid.*, 600.

The approach taken to this type of abduction in the English courts under the Hague Convention 1980 will be used to demonstrate that the emphasis remains on securing private international law aims relating to *forum conveniens* and mutual trust. It will be argued that, although Regulation 2201/2003 places emphasis on the application of the return remedy, it may also have the potential to reconcile the conflicting concerns which arise in cases where domestic violence is alleged, providing space for this gender factor to be considered and addressed. The reconciliation of primary carer abduction, domestic violence, the desire to ensure that the child's best interests and safety are secured, and litigation in the appropriate jurisdiction will be explored. The management of this form of abduction gives a clear indication of the ability of the Union to deal with the effects of gender in legislation and acknowledge and address domestic violence as a particular aspect of power relations within the family.

In this context, the role of the right to freedom of movement for citizens within the Union under Article 18(1) EC will also be considered. European citizenship will be examined to establish whether the return remedy could be regarded as a restriction on the right of free movement, providing further opportunities and space in European law for women to have their concerns addressed in cases where an abduction is motivated by a desire to escape domestic violence.

2. Child Abduction and Domestic Violence

Domestic violence is a problem within all patriarchal cultures[3] including the Member States of the EU.[4] Domestic violence is normally considered

[3] R Dobash, R Dobash "Violence Against Women in the Family" in S Katz *et al* (editors) *Cross Currents: Family Law and Policy in the US and England* (OUP, 2000), 495.

as physical abuse, but also encompasses sexual and verbal abuse, economic coercion and social isolation.[5] Women who experience domestic violence become socially isolated as the abuse develops and the abuser's power increases. Feminists argue that the abuse is based on male dominance in the relationship,[6] which is a microcosm of the wider disadvantaged position of women in society and the social structures of gender.[7] The private, unregulated nature of the family means it can become a place where the power relationship of male over female can exist without challenge. This traditional notion of the private family allowed and even gave rights to men to dominate and control women and the rejection of outside intervention made abuse difficult to challenge.[8] The private nature of the family has proved a major obstacle in obtaining legal change in relation to domestic violence, both in securing protection for the woman experiencing violence at the hands of their partner, and reform of the structures of the criminal justice system.[9]

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[4] J Hanmer "The Common Market of Violence" in L Elman (editor) *Sexual Politics and the European Union: The New Feminist Challenge* (Berghahn Books, Providence, 1996), 132.

[5] E Schneider *Battered Women and Feminist Lawmaking* (Yale University Press, New Haven, 2000), 65.

[6] *Ibid.* Although men are subjected to violence within relationships, it is arguable that this does not have the same gendered social basis as violence against women. See R Dobash, *et al* "The Myth of Sexual Symmetry in Marital Violence" (1992) 39 Social Problems 71; R Dobash, R Dobash *Violence Against Wives* (Free Press, New York, 1979), 9.

[7] *Op. cit.* Schneider, n5, 72.

[8] *Op. cit.* Dobash, Dobash 1979, n6, 7.

[9] R Dobash, R Dobash *Women, Violence and Social Change* (Routledge, London, 1992), 190.

There is a risk of harm to a child associated with domestic violence and abuse to their mother.[10] This arises even if the child is not a direct victim of abuse themselves as the abuse establishes an emotional climate which cannot be hidden, even from very young children.[11] Children living with domestic violence may experience feelings of fear that the abuser will kill their mother or themselves and more general fears about the unpredictability of the abuser's behaviour.[12] They also experience sadness, anger and powerlessness[13] all of which can affect their physical health, education and self esteem.[14] Their relationship with their mother in these circumstances may become closer.[15] It is notable though that some children copy the abuser's behaviour, which can strain the child's relationship with their mother.[16] In general the child's relationship with their father is negatively affected after witnessing their violent behaviour.[17] However,

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[10] J Edleson "Children's Witnessing of Adult Domestic Violence" (1999) 14 Journal of Interpersonal Violence 839, 844. This has been recognised at European level by the Economic and Social Committee who urges the European Council to consider this issue when considering domestic violence against women. See Opinion of the European Economic and Social Committee "Children as Indirect Victims of Domestic Violence" SOC/247, 14th December 2006, point 1.2.

[11] A Mullender, R Morley "Context and Content of a New Agenda" in A Mullender, R Morley (editors) *Children Living With Domestic Violence* (Whiting & Birch, London, 1994), 7.

[12] C McGee *Children and Domestic Violence: Action Towards Prevention* (Jessica Kingsley Publishers, Philadelphia, 2000), 71.

[13] *Ibid.*, 73 -75.

[14] *Ibid.*, 93.

[15] *Ibid.*

[16] *Ibid.*

[17] *Ibid.*, 85.

many children struggle to reconcile the person they love behaving in a violent manner, and some children retain very close relationships with their father.[18]

Children may become incidental victims of domestic violence, if, for example, they are in their mother's arms whilst she is subject to an attack.[19] It must also be noted that there is a concurrence between violence against women and the occurrence within the same family of child abuse by the abuser.[20] If the controlling, male dominance analysis of domestic violence is adopted, the co-occurrence of this violence is a natural extension of the desire to control and hierarchy of relationships demonstrated within the family.[21]

Domestic violence is experienced within the context of social constructions dictating the appropriate behaviour of women.[22] The idealised central role for women within the family, and in society more generally, is regarded as being that of the mother.[23] The interaction of motherhood and domestic

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[18] *Ibid.*, 87; J Mooney *Gender Violence and the Social Order* (St Martin's Press, New York, 2000), 173.

[19] A Mullender, R Morley "What do we know from Research?" in A Mullender, R Morley (editors) *Children Living With Domestic Violence* (Whiting & Birch, London, 1994), 32.

[20] *Ibid.*, 31; J Edleson "The Overlap Between Child Maltreatment and Woman Battering" (1999) 5 Violence Against Women 134, 151; A Appel, G Holden "The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Re-Appraisal" (1998) 12 Journal of Family Psychology 578, arguing that in their US sample there was a 40% co-occurrence, 596.

[21] *Op. cit.* Mullender, Morley, n19, 29.

[22] L Hoff *Battered Women as Survivors* (Routledge, London, 1990), 43.

[23] A Diduck "Legislating Ideologies of Motherhood" (1993) 2 Social and Legal Studies 461, 465.

violence carries particular implications. Feminists argue that women are socialised to a gender role of female responsibility to keep the family together and act in a self sacrificing manner to protect her children.[24] Women may remain in a violent relationship partly due to the cultural pressures placed on women to maintain family relationships. The considerable difficulties of securing housing, financial support, personal safety and often child care also restrict women's ability to leave.[25] These factors may seriously inhibit women's ability to escape a violent relationship. Hoff argues that:

'The authority and influence vested in men at all levels of social life, plus the possibility of using physical violence to exercise power, operate together to obtain a woman's compliance to a violent man's demands'.[26]

Women often make particular efforts to shield their children from the effects of the violence[27] and it may be the developing risk of harm to a child which precipitates a woman leaving a violent relationship.[28]

If harm comes to their child, even where it is caused by their abuser, the mother may be regarded as responsible.[29] Women who fail to protect their

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[24] *Op. cit.* Schneider, n5, 149.

[25] *Op. cit.* Hoff, n22, 42.

[26] *Ibid.*

[27] *Op. cit.* Schneider, n5, 78.

[28] *Op. cit.* Hoff, n22, 203; A Musgrove, N Groves "The Domestic Violence, Crime and Victims Act 2004: Relevant or 'Removed' Legislation" (2007) 29 Journal of Social Welfare and Family Law 233, 240.

children are condemned, and their attempts to protect themselves and their children and negotiate day to day life with an abuser are minimised and ignored.[30] This is particularly evident in child abduction cases where the abduction is presumed to cause harm to all children, outweighing any perceived benefit to the child. Consequently, the mother's actions in leaving the abuser are condemned.[31] This is in sharp contrast to the normal criticism of women who do not leave an abuser, despite their attempts to protect their child.[32] Women are rarely credited with taking steps to protect their child and the 'battered mother' arguably has little chance of being viewed as a competent mother.[33] 'Battered women' are characterised as weak, passive and victimized, and therefore unable to care properly for their children.[34] However, women are not helpless and do resist the violence whilst in the relationship despite the oppression restricting and limiting their choices.[35]

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[29] J Dunlap "The Pitiless Double Abuse of Battered Mothers" (2003) 11 Journal of Gender, Social Policy and the Law 523, 524.

[30] *Ibid.*, 523.

[31] S Shetty, J Edleson "Adult Domestic Violence in Cases of International Parental Child Abduction" (2005) 11 Violence Against Women 115, 134.

[32] *Op. cit.* Schneider, n5, 153.

[33] *Op. cit.* Dunlap, n29, 528. The result of this can be that women are prosecuted under the criminal law for their failure to protect their child who has died at the hands of their abuser. See J Herring "Familial Homicide, Failure to Protect and Domestic Violence: Who's the Victim" [2007] Criminal Law Review 923, commenting on section 5, Domestic Violence, Crime and Victims Act 2004 and highlighting the case of an asylum seeker prosecuted in such circumstances in England and Wales, *Stephens and Mujuru* [2007] EWCA Civ 1249.

[34] *Op. cit.* Schneider, n5, 171.

[35] *Ibid.*, 84.

Violence in an intimate relationship is also experienced within the context of other sources of disadvantage such as race and class, which can have a considerable impact on women's experience and response to violence.[36] Volpp highlights that domestic violence remains cultural even if the term is used as a universal descriptor.[37] However, focussing on 'cultural' reasons has the potential to detract attention from the broader reasons for domestic violence and the deficiencies of mainstream culture in permitting and perpetuating power relations in the family structure.[38] This does mean that domestic violence is experienced differently depending on the particular circumstances of the woman in question[39] which results in individualised responses.[40] This is important in an EU context.[41] Migration is encouraged within the EU by the provision for the free movement of persons and their families between EU Member States.[42] Women who are abused by their

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[36] E Burman et al " 'Culture' as a Barrier to Service Provision and Delivery: Domestic Violence Services for Minoritized Women" (2004) 24 Critical Social Policy 332, 336.

[37] L Volpp "On Culture, Difference and Domestic Violence" (2002) 11 Journal of Gender, Society, Policy and the Law 393, 398.

[38] *Ibid.*

[39] *Op. cit.* Schneider, n5, 63.

[40] *Op. cit.* Volpp, n37, 399.

[41] The vulnerability of migrant women and children in this situation has been recognised by the European Economic and Social Committee, see *op. cit.* European Economic and Social Committee SOC/247, n10, point 2.4.10; Opinion of the Economic and Social Committee on Domestic Violence Against Women SOC/218, point 2.3.11.

[42] Article 39 EC and associated legislation, particularly Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States OJ [2004] L229/35, 29th April 2004. For details see *Chapter Four*, 4.2.

partners following migration may therefore experience even greater social isolation, partly due to the abuse itself,[43] but this may be intensified by isolation from family and community.[44] It becomes easier for men to control women's lives emotionally and physically in a foreign environment where the culture, language and geography are unfamiliar.[45]

In these circumstances women may not be the liberal, independent agents expected by law. Their choices are constrained by a complex web of oppressions and their resistance to this oppression therefore takes on particular forms,[46] including creating geographical distance by taking the child abroad. It is in this context that a mother may abduct her child as women fear leaving their child with their abuser.[47] Physical geographical distance has been shown to reduce the risks of violence[48] and women feel safer where there is distance between themselves and their abuser.[49] Women may escape violence abroad, sometimes returning to a State they

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[43] M Warrington "I Must Get Out: the Geographies of Domestic Violence" (2001) 26 Transactions of the Institute of British Geographers 365, 372.

[44] C Menjívar, O Salcido "Immigrant Women and Domestic Violence: Common Experiences in Different Countries" (2002) 16 Gender and Society 898, 903.

[45] *Ibid.*, 904.

[46] *Op. cit.* Schneider, n5, 84.

[47] *Ibid.*, 166.

[48] R Fleury, C Sullivan, D Bybee "When Ending the Relationship does not End the Violence" (2000) 6 Violence Against Women 1363, 1378.

[49] *Op. cit.* Warrington, n43, 375.

have migrated from, returning 'home' to supportive family and social networks there.[50]

Women who are subject to abuse tend to seek help from informal support networks first.[51] If their support network of friends and family are in another State, it becomes difficult for women to draw on these resources and their assistance in accessing help from the State or a refuge. If they do attempt to draw on the formal networks and resources of the host State, they must first obtain knowledge of them, and language can then form a barrier to accessing help and seeking protection.[52]

The legitimate actions of a mother who experiences domestic violence is constrained to leaving their abuser and subsequently obtaining leave to remove the child from the jurisdiction. In England and Wales, under section 13(1)(a), Children Act 1989, if a residence order is in force in relation to the child, consent to remove the child from the jurisdiction must be obtained either in writing from the other individual holding parental responsibility or from the court. The court will consider the request to relocate in the light of the welfare of the child under section 1(1), Children Act 1989 and can give permission for the child to leave the country if it is in their best interests.[53]

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[50] This is a common motivation for relocation following the breakdown of a relationship even where violence has not been alleged. See *Chapter Four* and S Morano-Foadi "Problems and Challenges in Researching Bi-National Migrant Families Within the European Union" (2007) 21 International Journal of Law, Policy and the Family 1, 14.

[51] *Op. cit.* Dobash, Dobash 1979, n6, 167.

[52] *Op. cit.* Menjívar, Salcido, n44, 903.

[53] The individual who holds a residence order has the right to remove the child without permission from the jurisdiction for up to one month under section 13(2), Children Act 1989.

This may be regarded as a limited option requiring the knowledge and financial resources to apply to the court. This is unlikely to be available, particularly if the woman is still living with the abuser. Although gaining leave to remove the child permanently from the jurisdiction is likely to be granted to primary carer mothers in England and Wales,[54] it is perhaps unrealistic to expect women to pursue this course of action. Given the factual circumstances which women who have experienced domestic violence are in, it does not victimise or undermine women to say that it is unrealistic to pursue these legal avenues. Since accessing injunctions against their abuser can be difficult,[55] gaining leave to remove the child will be equally difficult. Returning to their home State may therefore become their most realistic option. If they also take their child to protect them, they may remove the child unlawfully in the process.[56]

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[54] See *Payne v Payne* [2001] EWCA Civ 16, [2001] 1 FLR 1052 giving guidance on the exercise of discretion in applications for leave to remove the child from the jurisdiction; *Re W (children)* [2008] EWCA Civ 538. One of the major reasons for granting permission to relocate is to prevent unlawful removals of children. The guidance arguably favours applications made by primary carer mothers – see M Hayes "Relocation Cases: Is the Court of Appeal Applying the Correct Principles?" (2006) 18 Child and Family Law Quarterly 351 for criticism of this approach. Herring and Taylor argue that this approach is appropriate but the Court of Appeal's reasoning in *Payne v Payne* is not and should adopt an explicit human rights balancing exercise in relocation cases, see J Herring, R Taylor "Relocating Relocation" (2006) 18 Child and Family Law Quarterly 517. This approach does not extend to other jurisdictions where permission to relocate is not often granted. For a survey of various jurisdictions see A Worwood "International Relocation – the Debate" (2005) 35 Family Law 621.

[55] C Humphreys, R Thiara "Neither Justice nor Protection: Women's Experiences of Post-Separation Violence" (2003) 25 Journal of Social Welfare and Family Law 195, 203 citing financial problems, attachment to the abuser, the abuser's threats and the status of an ethnic minority as particular issues in accessing injunctions.

[56] *Op. cit.* Weiner 2000, n1, 626.

3. Dealing with Domestic Violence under the Hague Convention 1980

If an abuser has custody rights[57] in relation to the child, and if these are breached by the woman's actions in taking the child abroad, the Hague Convention 1980,[58] and now Regulation 2201/2003[59] where the removal is between EU Member States, will be engaged. The child will then be subject to the return remedy under Article 12, Hague Convention 1980. The mother is likely to be the primary carer of the child[60] and will therefore accompany the child on their return.[61]

In these cases there is a tension between the mother's ability to migrate and escape a violent relationship and the child's relationship with their other parent and the desire to protect the jurisdiction of the courts in their habitual residence over decisions which affect them. The Hague Convention 1980 does not act to decide where the child's best interests lie

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[57] Including the right to decide where the child resides Article 5(a), Hague Convention 1980, but not rights of access. In the era of joint custody, it is increasingly likely that a father will have custody rights in relation to a child, especially given the minimal form they are defined as taking under the Hague Convention 1980 and now Regulation 2201/2003.

[58] Article 3, Hague Convention 1980.

[59] Article 2(11), Regulation 2201/2003. The child must also be habitually resident in the State they were removed from. On the appropriate interpretation of habitual residence in relation to international child abduction see R Lamont "Habitual Residence and Brussels II *bis*: Developing Concepts for European Private International Family Law" (2007) 3 Journal of Private International Law 261.

[60] Lowe and Horosova found that in England and Wales 85% of mothers who abducted their child were the primary or joint carer of the child. See N Lowe, K Horosova "The Operation of the 1980 Hague Abduction Convention – A Global View" (2007) 41 Family Law Quarterly 59, 68.

[61] *Op. cit.* Weiner 2000, n1, 630.

in these circumstances, leaving that instead to the courts of the child's habitual residence. Lowe and Horosova argue that even violence does not justify the unlawful removal of a child across a State border and the best court to protect both the child and their mother is the court of their habitual residence prior to the abduction.[62] The abduction of a child may be harmful to the child's wellbeing as they find the abduction traumatic[63] and there are potentially long term effects on the child.[64] However, there is also increasing evidence that domestic violence causes harm to children, even if they do not directly experience the violence themselves.[65]

The approach adopted by the courts in England and Wales under the Hague Convention 1980 has focussed on protecting the jurisdiction of the courts of the child's habitual residence and ordering return in the majority of cases. The focus has been on achieving legal certainty to deter further abductions, to ensure litigation over the custody of the child in the *forum conveniens*. The English courts trust the ability of foreign courts to adjudicate in such cases and protect the child. There is also concern to restore the status quo for the abducted child. This approach has been criticised by feminists for a number of reasons. This section will consider the private international law aims that the courts are keen to protect

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[62] *Op. cit.* Lowe, Horosova, n60, 71.

[63] M Freeman "The Effects and Consequences of International Child Abduction" (1998) 32 Family Law Quarterly 603, 604-615.

[64] Greif found a minority of abducted children had significant problems continuing over time: G Greif "A Parental Report on the Long Term Consequences for Children of Abduction by the Other Parent" (2000) 31 Child Psychiatry and Human Development 59, 67.

[65] See section 2 above. Children may incidentally be exposed to violence, see *Op. cit.* Mullender, Morley, n19, 32; *op. cit.* Edleson, n10, 844. There is also evidence of a co-occurrence of child abuse and domestic violence with Appel and Holden finding a 40% co-occurrence in their US sample, see *op. cit* Appel, Holden, n20, 596; see also *op. cit.* Edleson, n20.

through the strict application of the return remedy, the feminist critique of this approach and the reasons why domestic violence allegations are only rarely successful in establishing an exception to return under the Convention.

The case law of England and Wales will be analysed to demonstrate the approach adopted in cases where domestic violence has been alleged against the individual seeking the return of the child to their habitual residence. The English case law will be used as the jurisdiction of England and Wales is regarded as successful in implementing the Convention and ensuring its effectiveness. Using the case of *Re W (a child) (abduction: conditions for return),*[66] and the judgments from the High Court and the Court of Appeal, amongst other cases, as a focus for the analysis to highlight several aspects of the reasoning in domestic violence cases, this section will examine the approach of the English courts.

3.1. Domestic Violence and the Operation of the Return Remedy

In *Re W (a child) (abduction: conditions for return),*[67] there was extensive evidence at first instance[68] that the father was violent towards the mother, who had unlawfully removed the child from South Africa to England. The alleged abuse included physical violence, threats with a firearm, controlling behaviour and demeaning sexual practices.[69] There was also

[66] [2004] EWCA Civ 1366; [2005] 1 FLR 727.

[67] *Ibid.*

[68] *Re W (Abduction: Domestic Violence)* [2004] EWHC 1247 (Fam); [2004] 2 FLR 499.

[69] *Ibid.*, 501-7.

evidence of the father's attempts to influence witnesses and legal professionals.[70]

The return principle under the Hague Convention 1980 is strictly enforced by the courts even where there are allegations of domestic violence against the parent requesting the return of the child.[71] When domestic violence has motivated an abduction, these women and children are returned to the State where the abuser remains to litigate custody in a post separation situation, where the abuser's violence and intimidation may continue and even increase.[72] Despite this risk, it was stated in *Re W,* that:

'...the robust construction and application of the Convention will serve to militate against the risk and dangers of the wrongful removal or retention of children'.[73]

In some circumstances it is clear that a significant relocation of this nature is distressing to a child and has long term negative effects.[74] However, where the child has been exposed to violence, the interests of the child in

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[70] *Ibid.*

[71] C Bruch "The Unmet Needs of Domestic Violence Victims and their Children in Hague Child Abduction Convention Cases" (2004) 38 Family Law Quarterly 529, 534.

[72] *Op. cit.* Fleury, Sullivan, Bybee, n48, 1377.

[73] *Re W (a child) (abduction: conditions for return)* [2004] EWCA Civ 1366; [2005] 1 FLR 727, 735.

[74] See *op. cit.* Greif, n64, 61-68 and Reunite *The Outcomes for Children Returned Following Abduction,* 39 Report September 2003 available at http://www.reunite.org/WEBSITEREPORT.doc last accessed 17th July 2007.

being removed from that situation must be acknowledged and the desirability of return questioned.[75]

The Hague Convention 1980 was not originally directed at abductions by primary carers, however motivated, and the return remedy often comes as a shock to the mother.[76] The Hague Convention 1980 was originally aimed at helping primary carers to recover their child following an unlawful removal or retention by a non-custodial parent. Now the return remedy has the potential to leave a mother in the position of choosing between care of their child and their personal safety.[77] The harm which is presumed to be caused to children by the act of removing them from their habitual residence means that women are forced to return and are impliedly condemned as bad mothers.[78] The return remedy can therefore prevent women effectively escaping violence and allows abusers to exercise further control over their partners by requiring their return to the State they left.[79] In the context of the male dominance theory of domestic violence, the return remedy represents a reinforcement message giving legal status to the abuser's desire to control the woman's movements, leading Weiner to argue that:

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[75] *Op. cit.* Weiner 2000, n1, 621.

[76] J Pontier "Left Behind Children and Left Alone Mothers: Reconsidering the 1980 Hague Convention on International Child Abduction" Paper given at the Journal of Private International Law Conference June 26th – 27th 2007.

[77] *Op. cit.* Weiner 2000, n1, 630.

[78] M Weiner "The Potential and Challenges of Transnational Litigation for Feminists Concerned About Domestic Violence" (2003) 11 Journal of Gender, Society, Politics and the Law 749, 785.

[79] *Op. cit.* Weiner, n1, 634.

'The simplicity and the speed with which the Convention operates... helps make the remedy of return a particularly powerful weapon for batterers'.[80]

This perspective has been acknowledged to a certain extent by the courts in England and Wales. In *TB v JB*, Hale LJ (as she then was), dissenting, noted the risks faced on return by children in particular, but also mothers, may be unacceptable, stating that:

'Primary carers who have fled from abuse and maltreatment should not be expected to go back to it, if this will have a seriously detrimental effect upon the children'.[81]

Despite this acknowledgment, the private international law ideals remain predominant and are expressed in the judgment of Thorpe LJ in *Re W (Abduction: Domestic Violence).*[82] Any custody dispute should be litigated in the *forum conveniens*, which is presumed to be the child's habitual residence. There are significant problems in addressing substantive allegations in summary proceedings, particularly when assessing evidence and false allegations. Also highlighted are the rights of left behind parents and the nature of the international obligations created by the Hague Convention 1980. To operate efficiently the Convention requires a high degree of mutual trust, reciprocity and consistency which creates legal

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[80] *Ibid.*, 635.

[81] *TB v JB (abduction: grave risk of harm)* [2001] 2 FCR 497, 510. Baroness Hale has also noted the effect of the Hague Convention 1980 on mothers extra judicially. See B Hale "The View from Court 45" (1999) 11 Child and Family Law Quarterly 377.

[82] [2004] EWHC 1247 (Fam); [2004] 2 FLR 499.

certainty and may therefore deter further abductions.[83] These issues have taken precedence in Hague Convention applications in England and Wales and affect judgments in various ways.

In Hague Convention applications for the return of the child, the validity of women's allegations and their testimony may be doubted. This is common in national cases where domestic violence is an issue partly because women's experience is filtered through a male standard.[84] Domestic violence is deeply threatening to fundamental assumptions about the nature of the family. This is often dealt with through denial of the incidence and effect of battering on women,[85] and there are indications of this occurring in abduction cases. The possibility of false allegations to bring about a permanent change of residence leads to a willingness to doubt the abductor's motives.[86] This approach is embodied by Thorpe J's (as he then was) comment in *N v N (Abduction: Article 13 Defence)* that:

'In this province it is obviously of primary importance that abducting parents should not be empowered to defeat the Convention by manipulation or even by the expression of genuine fears and sincerely held feelings.'[87]

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[83] *Re W (a child) (abduction: conditions for return)* [2004] EWCA Civ 1366; [2005] 1 FLR 727, 735.

[84] See *Chapter One*, 2.2.2. See E Stanko *Intimate Intrusions: Women's Experience of Male Violence* (Routledge & Kegan Paul, London, 1985), 13.

[85] *Op. cit.* Schneider, n5, 90.

[86] *Ibid.*, 106.

[87] [1995] 1 FLR 107, 113.

It is assumed that the abductor is causing harm to the child by withholding them from their normal surroundings and the return remedy is therefore aimed at restoring the status quo.[88] The case of *Re W* reflects this characterisation of the 'abductor' by the law despite the allegations of violence. In *Re W* Thorpe LJ was not prepared to accept that the mother was an innocent victim or that she had good reason not to secure leave to remove the child from the jurisdiction because of the violence.[89] This is a common assertion in cases where domestic violence is at issue as a cause of the abduction.[90] It implies that abductors have brought the situation on themselves, which, although they have removed the child which has resulted in return proceedings, adopts a restricted view of causation and does not account for their motivation in doing so. It serves to focus solely on the mother's behaviour rather than that of the abuser, although abduction from the violent situation may be the least damaging option to the child.[91]

For the purposes of a return order under Article 12, Hague Convention 1980, the courts in England and Wales have largely assumed that women and children can be effectively protected from continuing violence in the State of their habitual residence. This has been a notable feature of practice under the Hague Convention 1980. The English courts are unwilling to

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[88] *Op. cit.* Bruch, n71, 529.

[89] *Re W (a child) (abduction: conditions for return)* [2004] EWCA Civ 1366; [2005] 1 FLR 727, 734.

[90] See e.g. *Re H (Children: Abduction)* [2003] EWCA Civ 355; [2003] 2 FLR 141, 146.

[91] *Op. cit.* Weiner 2000, n1, 621.

suggest that States cannot protect women from violence.[92] For example in *Re H (Children: Abduction)* it was stated by the then President of the Family Division, Dame Butler-Sloss, that:

'I do not consider that we are entitled in England to assume that either the father is an uncontrollable risk or that the Belgian authorities would be unable to manage the problem.'[93]

The assumption of effective protection on return negates any associated risks, but arguably places unrealistic faith in the legal system to protect those who have suffered from violence at the hands of a partner.[94] The English courts, in the interests of judicial comity, may instead return the child with undertakings on the part of the applicant parent to try and ensure the safety and viability of the parent and child on return.

In England and Wales undertakings have formed a significant aspect of court practice to address the situation where the child is returned but there is some form of risk presented to the child, and sometimes to their abductor, on return. Undertakings are not an explicit aspect of the text of the Hague Convention 1980. As such they have been criticised as departing from the scheme of the Convention as well as being naïve, as abusers are often capable of flouting legal orders.[95] Undertakings are particularly

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[92] M Kaye "The Hague Convention and the Flight From Domestic Violence: How Women and Children are being Returned by Coach and Four" (1999) 13 International Journal of Law, Policy and the Family 191, 198.

[93] *Re H (Children: Abduction)* [2003] EWCA Civ 355; [2003] 2 FLR 141, 147.

[94] *Op. cit.* Kaye, n92, 198. This will be explored further in *Chapter Six.*

[95] *Op. cit.* Bruch, n71, 541-544.

vulnerable to this as they depend on goodwill and are not enforceable outside of the jurisdiction.[96] They are also not used or well known in civil law systems and are often broken, even where a mirror order has been obtained in the child's habitual residence.[97] In a study conducted by Reunite, an abduction charity, undertakings were given in twelve out of twenty-one cases studied. 50% of the undertakings concerned violence and were mirrored in five of the cases.[98] The undertakings were broken in eight out of the twelve cases, and non-molestation undertakings were broken in all the instances in the study.[99] It was also clear that undertakings were of little use in the State of the child's habitual residence where they were difficult to enforce and were not respected by the authorities of that State.[100] They therefore offer little in the way of protection to the majority of children and women who are returned under the Convention.

All these factors and the emphasis on fulfilling the aims of the Hague Convention have resulted in strict enforcement of the return remedy. Women have attempted to use the exceptions to the return of the child under Article 13 of the Convention to resist the return application, with limited success. The next section will consider how Article 13(b), where there is a grave risk of harm to the child on return, and Article 13(2), where the child objects to returning, have been used in these cases.

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[96] M Freeman "Primary Carers and the Hague Abduction Convention" [2001] International Family Law 140, 144.

[97] *Ibid.*

[98] *Op. cit.* Reunite, n74, 30.

[99] *Ibid.*, 31.

[100] *Ibid.*, 34.

3.2 The Role of the Exceptions to the Return of the Child

3.2.1. Article 13(b) where the child will face a grave risk of harm on return

The Article 13(b) exception to return under the Hague Convention 1980 has regularly been pleaded, arguing that returning the child to a State where their mother has been subjected to domestic abuse, places the child at grave risk of harm.[101] However, it is rarely successful.[102] The courts have held that, as the primary carer has created the situation where the child has been removed themselves, they cannot take advantage of it by refusing to return with the child and claiming that this places them at a grave risk of harm.[103]

Article 13(b) was intended to play only a limited role in the original scheme of the Convention[104] as a provision accounting for situations where the interests of an individual child outweighed those of enforcing the return principle.[105] The English courts are concerned that a broad interpretation of Article 13(b) would undermine the return principle of the Hague

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[101] On the role of Article 13(b) in the Hague Convention 1980 see *Chapter Three*, 3.2.2.

[102] Article 13(b) is the most successful exception to return but still only accounts for 3% of worldwide applications, see *op. cit.* Lowe, Horosova, n60, 84.

[103] *C v C (Minor: Abduction: Rights of Custody Abroad)* [1989] 1 FLR 403, 410 stating that an abductor cannot rely on their own actions for an Article 13(b) defence under the Hague Convention 1980.

[104] Explanatory Report prepared by E Pĕrez-Vera on the Hague Convention on the Civil Aspects of International Child Abduction 1980 available from: http://www.hcch.net/index_en.php?act=publications.details&pid=2779 Last accessed 31st January 2007, 434.

[105] J Reddaway, H Keating "Child Abduction: Would Protecting Vulnerable Children Drive a Coach and Four Through the Principles of the Hague Convention?" (1997) 5 International Journal of Children's Rights 77, 93.

Convention.[106] The English courts are strict in ordering the return of the child to their habitual residence, in line with their international obligations.[107] Silberman argues that this interpretation of Article 13(b) is correct as the provision should be very narrowly construed. She regards abductions as nearly always harmful to a child and to adopt a broad interpretation would mean that *'the Convention will clearly be undermined'.*[108]

Theoretically, following *Re C (Abduction: Grave Risk of Physical or Psychological Harm)* the child will not be returned if the abduction was motivated by one parent's legitimate concerns about a family situation in the child's habitual residence which is harmful to the child's development.[109] However, the role of Article 13(b) in protecting children has arguably been disregarded in the interests of enforcing the return remedy.[110]

For example, in *Re W* it was felt that it was not possible to conclude that the father was violent or posed a risk to the mother and child concerned. It was argued that there was no independent evidence of the father's violence as the mother who had removed the child had never obtained any

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[106] *Re C (a Minor) (Abduction)* [1989] 1 FLR 403, 410.

[107] *Re C (Abduction: Grave Risk of Physical or Psychological Harm)* [1999] 2 FLR 478.

[108] L Silberman "The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues" (2000) 33 New York University Journal of International Law and Politics 221, 224.

[109] *Re C (Abduction: Grave Risk of Physical or Psychological Harm)* [1999] 2 FLR 478, 488.

[110] *Op. cit.* Bruch, n71, 535; c.f *op. cit.* Silberman, n108.

injunctive orders in relation to the father.[111] The summary nature of Hague Convention proceedings in England and Wales means that consideration of allegations are difficult to assess for reliability and truth[112] and details of official interventions form independent evidence of abuse. However, reliance on this type of evidence displays a lack of insight into the effect of domestic violence on women and the availability and effectiveness of legal remedies. Legal assistance is normally of little help to women until they make the decision to leave.[113] The private nature of domestic violence means that there is often no official record of intervention, especially if the woman is abused in a State with which she is unfamiliar. If she is a migrant she may be less likely to rely on State agency intervention. Reliance on official interventions as evidence of a violent relationship means that substantiating the allegations is unlikely in the majority of cases.[114]

In *Re W,* there was evidence that the mother had shot the father during one violent altercation. Women may respond with an incident of violence to the prolonged experience of oppression from their intimate partner.[115] In these circumstances, the incident is likely to be recorded and dealt with by the criminal justice system without the experience of violence at the hands of their partner forming the context of the offence. The behaviour of women

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[111] *Re W (a child) (abduction: conditions for return)* [2004] EWCA Civ 1366; [2005] 1 FLR 727, 733.

[112] *Op. cit.* Reddaway, Keating, n105, 90.

[113] *Op. cit.* Schneider, n5, 52.

[114] Although see *T v T* [2008] EWHC 1169 (Fam) where there the mother had taken injunctive orders out against the father due to his violent behaviour although the judge was still unable to reach conclusions on the nature of the parties relationship prior to the abduction.

[115] *Op. cit.* Dobash, Dobash 1992, n9, 207.

becomes the focus, rather than that of the abuser. This tendency to focus solely on the woman's behaviour is in evidence in abduction cases. In *Re W,* in the Court of Appeal, where the official nature of the intervention in relation to the incident where the father was shot was explicitly referred to, something which was not possible in relation to the mother's allegations.[116]

A lack of judicial understanding of the nature of domestic violence is also evident in other ways. For example in *Re H (Children: Abduction)* there was evidence that the mother had left the father temporarily on a number of occasions. It was implied that by moving the children about for these short periods she had contributed to harming their wellbeing.[117] The implication is that, as she returned, the violence could not be as bad as she claimed.[118] This is a common misconception which ignores the social realities that women face.[119] The difficulty of escaping a violent relationship will often mean that many women are forced by circumstance back into a relationship before they make a final break.[120] Crossing an international border may be part of an attempt to make that final break.

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[116] *Re W (a child) (abduction: conditions for return)* [2004] EWCA Civ 1366; [2005] 1 FLR 727, 729.

[117] *Re H (Children: Abduction)* [2003] EWCA Civ 355; [2003] 2 FLR 141, 149.

[118] *Op. cit.* Dobash, Dobash 1979, n6, 159.

[119] *Ibid.*

[120] *Op. cit.* Stanko, n84, 57.

In *Re W* it was stated that the child need not be a direct victim of the abuse for the refusal to return to take effect under Article 13(b).[121] The removal of a child may be harmful to their welfare due to the change in their surroundings however abusive the family situation they are removed from was. It has previously been argued that children living in an abusive household may be the indirect victims of violence themselves. It must therefore be a concern that a child whose mother is experiencing domestic violence may also experience abuse themselves.[122] However, this risk is not normally regarded as sufficient to prevent the return of the child, as the child is regarded as returning to the State of their habitual residence, not to the requesting parent.[123] The welfare of the abducted child is regarded only as a *factor* in decisions under the Hague Convention 1980; it is not a paramount consideration.[124] Countervailing factors may outweigh the child's best interests and the effective enforcement of the return remedy can prevent the exercise of judicial discretion to refuse to return the child.[125] In *Re W*, the return of the child was ordered, but with substantial

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[121] *Re W (a child) (abduction: conditions for return)* [2004] EWCA Civ 1366; [2005] 1 FLR 727, 738-9.

[122] This has been recognised in English domestic law on contact between a child and their violent father in *Re L (a child) (Contact: Domestic Violence)* [2000] 2 FLR 334 but the Hague Convention's international context appears to alter the balance of considerations. See also *Practice Direction (Residence and Contact Orders: Domestic Violence and Harm)* [2008] All ER (D) 132 (May).

[123] *TB v JB (Abduction: Grave Risk of Harm)* [2001] 2 FLR 515, 542.

[124] *Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716, 730. See N Lowe, M Everall, M Nicholls *International Movement of Children: Law, Practice and Procedure* (Jordan Publishing, Bristol, 2004), 368.

[125] See e.g. *N v N (Abduction: Article 13 defence)* [1995] 1 FLR 107, 114 where it was acknowledged that the welfare of the child was not the paramount consideration, and in the circumstances the discretion was not exercised in favour of refusing return.

undertakings on the part of the father before this could take place. The assessment of whether the child is at risk is, therefore, weighted in favour of the child being returned and the risk being negligible; the harm caused by the abduction outweighs any other risk in most circumstances. Article 13(b) has been of little practical relevance in cases where domestic violence has been alleged and the private international law priorities have prevailed.

3.2.2. Article 13(2) where the child objects to returning to their habitual residence

The child's objections have formed the basis for a refusal to return the child in cases where the mother has been subjected to domestic violence. Even where a child has expressed views objecting to returning to their habitual residence, their objections will be balanced against welfare considerations[126] and the return policy of the Convention.[127] In *Re M (a child) (abduction: child's objections to return)*[128] the child objected to returning to Serbia where her mother had been subjected to harassment and repeated arrest due to the planting of drugs, as the court found, by the child's father. The child regarded Serbia as 'scary' and was fearful of her mother's arrest if they were returned, so the Article 13(2) exception succeeded and return was refused.[129]

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[126] *Z v Z (Abduction: Children's Views)* [2005] EWCA Civ 1012; [2006] 1 FCR 387, 401.

[127] Lowe *et al* argue that in these circumstances return is less likely to be ordered unless countervailing reasons in favour of return can be established, citing *Re D (Abduction: Discretionary Return)* [2000] 1 FLR 24 and *Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716. See *op. cit.* Lowe, Everall, Nicholls, n124, 368.

[128] [2007] EWCA Civ 260; [2007] 2 FLR 72.

[129] *Ibid.*, 77.

It is questionable whether it is appropriate to rely solely upon the child's objections to return in cases where domestic violence is an issue. This puts greater pressure on a child to express the 'correct' opinion and potentially encourages the coaching of children. Although the child is gaining increasing autonomy of decision making, their interests cannot necessarily be detached from those of their mother and relying on their views may lose sight of the fact that the mother, as their primary carer, may be restricted in her ability to care for the child on return. In addition if the child is too young or immature for their views to be taken into account, the Article 13(2) defence is not available. A broader conception than just the child's view should perhaps be acceptable in such cases. The provisions in Regulation 2201/2003 will therefore be examined to establish whether it could provide a broader, more flexible approach in such cases and a balance between feminist concerns and private international law aims.

4. Regulation 2201/2003 – Potential to Resolve the Tensions?

It has already been noted that the aim of Regulation 2201/2003 in dealing with child abduction is to reinforce the application of the return remedy.[130] The changes are largely aimed at strengthening the exceptional nature of refusals to return the child.[131] By reinforcing the return remedy, the EU could place women in the situation where they have to choose between their personal safety and contact with their child if they choose not to return.[132] This arguably reinforces the presumption of adequate protection

[130] See *Chapter Three*, 4.2.1.

[131] A Schulz "The New Brussels II Regulation and the Hague Conventions of 1980 and 1996" [2004] International Family Law 22, 25.

[132] *Op. cit.* Weiner 2000, n1, 623.

for both mother and child from further violence in the State of the child's habitual residence on their return.[133]

However, there are some provisions in the Regulation which may help to resolve the tensions identified above in relation to child abduction and domestic violence and provide space for the protection of women and children during the litigation of custody. The effect of these rules in cases where domestic violence is alleged will be examined with particular reference to the general policy of the Regulation in reinforcing the application of the return remedy. Article 11(2) on the right of the child to be heard in return proceedings, Article 11(4) which alters the operation of the Hague Convention Article 13(b) exception to return, and the potential role of the Article 11 mechanism will be the focus of this examination.

4.1. Article 11(2) on the right of the child to be heard in return proceedings

The views of the child in cases where domestic violence is alleged are likely to continue to be relevant under Article 11(2), Regulation 2201/2003.[134] The requirement that a child of appropriate age and maturity be heard in a return application is already making a significant impact as it has been extended into general practice for Hague Convention cases.[135] Although Article 13(2), Hague Convention 1980 allowed the child's views to prevail over return, there was no requirement for the child to be heard. In

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[133] *Op. cit.* Kaye, n92, 198.

[134] On the role and use of Article 11(2), Regulation 2201/2003 see *Chapter Three*, 4.2.3.

[135] *Re D (a child) (abduction: foreign custody rights)* [2006] UKHL 51; [2007] 1 AC 619.

F (a child) it was stated that the court is obliged to hear the child[136] and not to do so forms a fundamental error on the part of the judge. The children's extreme reactions to the idea of return were an important factor in refusing to return the children in *Klentzeris v Klentzeris*, a case concerning an abduction where domestic violence was an issue under Regulation 2201/2003.[137] In this case, the younger child had threatened to kill himself if he was returned to Greece and was suffering from panic attacks.[138]

The child's opinion is now a necessary part of the decision to return if they are mature enough to participate, although of course their opinion is not binding upon the court. As Regulation 2201/2003 aims to reinforce the application of the return remedy, the role of the child's right to be heard in this context may be problematic as their views are arguably less likely to prevail.[139] Under Article 13(2), Hague Convention 1980, the child's views are still only a factor in the court's decision, although it is a necessary one, and will be weighed against the policy of returning children. The child's objections are not always going to be sufficient to prevent the operation of the return remedy given the importance placed on the principle in Regulation 2201/2003.[140] In *C v W and Others*, a fourteen year old child, who was extremely intelligent, objected to returning to family and

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[136] [2007] EWCA Civ 468, paragraph 16.

[137] *Klentzeris v Klentzeris* [2007] EWCA Civ 533; [2007] 3 FCR 580 where unusually it was not the mother who had removed the children, but an elder sister who was later followed by their mother.

[138] *Ibid.*, 583.

[139] R Lamont "The EU: Protecting Children's Rights in Child Abduction" [2008] International Family Law 110, 111; N Lowe "The Current Experiences and Difficulties of Applying Brussels II Revised" [2007] International Family Law 182, 196.

[140] *Op. cit.* Lamont, n139, 112.

schooling circumstances in Ireland but return was still ordered.[141] Although the child has the right to be heard, even in cases where there has been violence, the reinforced policy of return may weigh heavily against their views operating to prevent return under Article 13(2) Hague Convention 1980.

4.2. Article 11(4) and protecting children from harm on their return

Article 11(4) of Regulation 2201/2003 deals with the application of Article 13(b) of the Hague Convention 1980 when the abduction is governed by the terms of the Regulation. Under Article 11(4), if it can be proved that there are adequate arrangements for the protection of the child, the child will be returned irrespective of the risk of harm. Article 11(4) appears to be a response to the feeling that some Member States were using the Article 13(b) defence to avoid enforcing the return remedy by interpreting its application expansively.[142]

The scope of the Article 13(b) defence may therefore be further confined by Article 11(4), Regulation 2201/2003. To get domestic violence recognised as representing a grave risk of harm to a child under Article 13(b) by the court hearing a return application under the Hague Convention 1980 required judicial understanding of the potential for harm to a child posed by domestic violence, especially where the child is not a direct victim of the violence.[143] Now under Article 11(4) of the Regulation, even if the court accepts that domestic violence represents a grave risk of harm

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[141] [2007] EWHC 1349 (Fam); [2007] 3 FCR 243, 256.

[142] *Op. cit.* Schulz, n131, 26.

[143] *Op. cit.* Kaye, n92, 202.

to a child, thereby engaging the discretion to refuse return under Article 13(b), this will not necessarily prevent the return of the child to their habitual residence.

There is no definition of what will constitute 'adequate arrangements' under Article 11(4). The Practice Guide to the application of Regulation 2201/2003 states that

'...it must be established that the authorities in the Member State of origin have taken concrete measures to protect the child...'[144]

The Practice Guide suggests that the assistance of the Central Authorities in the Member States will be required to establish what level of protection is available,[145] but a great deal of co-operation is needed between the Member States to provide enough information to allow a properly informed decision by the court. There are no specific provisions within Regulation 2201/2003 to facilitate this form of co-operation between the Member States. The court must therefore be active in establishing whether there is protection in place, and assess whether it is adequate.[146] This encourages informal contact between judges dealing with the issues in the national courts.[147] Informal judicial contact may assist in securing

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[144] Practice Guide for the application of the new Brussels II Regulation (Council Regulation (EC) No 2201/2003 of 27th November 2003). Drawn up by the Commission services, 32.

[145] *Ibid.*, 33.

[146] P McEleavy "The New Child Abduction Regime in the European Union: Symbiotic Relationship or Forced Partnership?" (2005) 1 Journal of Private International Law 5, 26.

[147] Thorpe LJ has commented extra-judicially that he believes informal contact with judges in cases with an international element to be a constructive way of resolving cases. Comments made at the Law Society's EU Civil Justice Day "The Impact of EU Legislation on Domestic Family Law" 17th October 2005. Contact is facilitated by the European Judicial Network established by Council

appropriate protection, but it is more difficult to ensure that people's interests are properly represented when action is taken in such an informal way. It may also be that the information received through such contact is not sufficiently reliable, or detailed, for the court to use it effectively.[148] Closer judicial co-operation has the potential to be helpful but should be appropriately managed and Regulation 2201/2003 does not provide any basis to effectively secure the interests of the individual in this process.

Article 11(4) does represent an improvement on the Hague Convention 1980 as it encourages consideration and positive action to secure actual protection on the return of the child.[149] Protection of the child will, in many cases, involve the protection of their mother as their primary carer because their interests are likely to be closely related in these circumstances. Interestingly, in *Klentzeris v Klentzeris,* which addresses the application of Article 13(b) to an abduction caused by domestic violence under Regulation 2201/2003, the Article 13(b) defence did succeed.[150] The protection that Greece offered on the return of the children was insufficient to address the risk of harm to the children given their extreme reaction to the idea of returning.[151]

Decision 2001/470 EC establishing a European Judicial Network in Civil and Commercial Matters OJ [2001] L 174/25, 28th May 2001.

[148] This was a problem in *F v M, N (by her Children's Guardian)* [2008] EWHC 1525 (Fam), paragraph 38.

[149] The nature of the protections available in a domestic context and their effectiveness, will be considered further in relation to England and Wales in *Chapter Six,* 3.

[150] *Klentzeris v Klentzeris* [2007] EWCA Civ 533; [2007] 3 FCR 580.

[151] *Ibid.,* 583. The younger child threatened to kill himself.

However, it should be noted that adequate arrangements need not be effective arrangements. If the arrangements take the form of a refuge place, this may be problematic as a refuge can never form a place where a mother and child can settle, and they may still be vulnerable to abuse. The risk that an abuser will locate them at a refuge will remain, and they will live in fear of that occurrence. This is likely to restrict their movements and is an unsettled existence, potentially detrimental to the child.[152] Even when an injunction has been secured against the abuser in the State of the child's habitual residence, this may not be effective to secure the protection of a women and her child when they return. It is also likely to fail in allaying women's fears of further abuse at the hands of their partner, which is a factor likely to affect the effectiveness of any arrangements made under the terms of Article 11(4) for their protection.[153]

Reunite suggest that Regulation 2201/2003 may make conditions attached to return more effective within the European Union. They would have to take the form of enforceable conditions attached to return, which are *'more substantial than undertakings and appropriate inter-court co-operation'.*[154] In *F v M*[155] it was suggested that, in cases where domestic violence was alleged, under Article 11(4), Regulation 2201/2003 the court was required to return the child if there were sufficient protective

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[152] *Op. cit.* Hoff, n22, 203, noting that some children have problems living with other children in a shelter and that many of these children cannot attend school.

[153] K McCann "Battered Women and the Law: the Limits of the Legislation" in J Brophy, C Smart (editors) *Women-in-Law: Explorations in Law, Family and Sexuality* (Routledge & Kegan Paul, London, 1985), 88.

[154] M Freeman for Reunite "International Child Abduction: The Effects" May 2006, 40 available at http://www.reunite.org/page.php?alias=research20 Last accessed 13th November 2006.

[155] *F v M* [2008] EWHC 1467 (Fam), paragraph 13.

undertakings provided by the left-behind parent. In this case the children were returned to France as the Article 13(b) defence was not established.[156] However, once back in the State of habitual residence, the problem of obtaining enforcement of a judgment arises, particularly if there are limited financial resources available. So in terms of Article 11(4), the protection that these conditions provide may look adequate, but are unlikely to be effective. Undertakings are likely to be even less effective in practice and will still require mirror orders to be enforceable in the State of the child's habitual residence.[157]

Article 11(4) does provide a mechanism to try and ensure that if the child is returned there is some form of protection in place if Article 13(b) is engaged. This is a step forward on the provisions of the Hague Convention 1980 where children could be returned even if there was a risk of harm with no protection required. However, the lack of definition in the terms of Article 11(4), Regulation 2201/2003 leaves the problem of what the courts in the various Member States define as 'adequate'.[158] Article 11(4) may encourage the return of the child and litigation in the appropriate forum, but much depends on how it is utilised in practice to determine whether it addresses feminist concerns such as the safety of women and children who have been subjected to domestic violence.

4.3. The Potential Role of the Article 11 Mechanism

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[156] *Ibid.*, paragraph 17.

[157] See *F (A Child)* [2007] EWCA Civ 468, paragraph 14.

[158] See *Chapter Six* on protection from domestic violence in the Member States and the scope for a role for the EU.

Except for Article 13(b), all other defences under the Hague Convention 1980 are left unchanged by Regulation 2201/2003. However, if the return of the child is refused under Article 13 of the Hague Convention 1980, the Article 11 mechanism will operate under Regulation 2201/2003. The State of the child's habitual residence still retains control over issues relating to the custody of the child and their ultimate return to their habitual residence.[159]

If the other provisions of the Regulation are effective, relatively few cases should trigger the operation of the Article 11 mechanism. The norm will be for the child to be returned. The Article 11 mechanism appears to enforce the Hague Convention 1980 ideal that decisions relating to the issue of the custody of the child are heard in the State of the child's habitual residence, even where the return of the child is refused due to one of the Article 13 defences.

In cases of abduction due to domestic violence the Article 11 mechanism may have unexpected effects. If the return of the child is refused, Article 11(7) means that the custody dispute may be conducted with the child and their mother physically present in the State to which the child was unlawfully removed, even though the habitual residence court has jurisdiction over the custody case. Regulation 2201/2003 leaves it unclear whether the child will remain in the State they were abducted to whilst the Article 11 mechanism operates.[160] However, it appears likely that the child would remain as the provisions relating to the eventual fast track enforcement of the return remedy under Articles 11(8) and 42 would

[159] On the operation and interpretation of the Article 11 mechanism see *Chapter Three*, 4.2.5.

[160] Thanks to Professor L Silberman for this point.

otherwise have little significance. In all the cases in England and Wales so far, the abducting parent had remained with the child in the State to which they were unlawfully abducted.[161]

If the mother and her child do remain in the State to which the child was abducted, this is potentially advantageous. Custody can be litigated from a position of safety in the State to which the child was abducted.[162] There is no formal arrangement within Regulation 2201/2003 to facilitate this process. There is other EU legislation that may be relevant in this context however, for example Regulation 1206/2001 on the co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters.[163] Litigating from the State the child was abducted to means that the risk of abuse from the woman's former partner is reduced because of geographical distance.[164] Although the problems of securing evidence in relation to the violence for use in the custody dispute will remain, this is significant in providing a different approach through which the protection of women and children can be achieved whilst protecting the jurisdiction of the habitual residence court.

If the courts are aware that issues of custody will be litigated in the State of the child's habitual residence they may be more willing to refuse the return of the child under the Article 13 defences. The child's habitual residence is

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[161] See *Re A (custody decision after Maltese non-return order)* [2006] EWHC 3397 (Fam); [2007] 1 FCR 402; *HA v MB (Brussels II Revised: Article 11(7) Application)* [2007] EWHC 2016 (Fam); [2008] 1 FLR 289.

[162] *Op. cit.* Weiner 2000, n1, 699.

[163] OJ [2001] L174, 27th June 2001.

[164] *Op. cit.* Fleury, Sullivan, Bybee, n48, 1377.

presumed to be the *forum conveniens* for the custody dispute[165] and one of the aims of the Hague Convention 1980 is to ensure that custody is litigated there.[166] The Hague Convention 1980 is trying to ensure that the child is returned to a familiar environment, their 'home', but if that environment is a place where a child's mother has been exposed to abuse this may not be appropriate. The new Article 11 mechanism under Regulation 2201/2003 would allow both of these considerations to be accommodated by allowing litigation in the appropriate forum but with the vulnerable parties protected. This would require a less restrictive approach to the interpretation of the Article 13 exceptions, particularly Article 13(b), than is currently in evidence in the English courts but would now be in line with our international obligations.

There have been questions raised about whether the Article 11 mechanism undermines the aim of securing mutual trust between courts which is normally of primary importance in EC private international law.[167] By allowing the courts of the child's habitual residence to effectively review the decision of the court refusing the return of the child, this could undermine mutual trust. However, given the importance attached to securing a hearing in the appropriate forum, and the co-operation which will be required of courts for the Article 11 mechanism to operate effectively, mutual trust becomes a less notable issue.

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[165] R Schuz "The Hague Child Abduction Convention: Family Law and Private International Law" (1995) 44 International and Comparative Law Quarterly 771, 780.

[166] *Op. cit.* Pěrez-Vera Report, n104, 445.

[167] P McEleavy "Brussels II *bis*: Matrimonial Matters, Parental Responsibility, Child Abduction and Mutual Recognition" (2004) 53 International and Comparative Law Quarterly 503, 510.

Klentzeris v Klentzeris, considers the application of Article 13(b) under Regulation 2201/2003 and unusually the defence succeeded.[168] However, Thorpe LJ made it clear in his judgment that the case *'fell into a most exceptional category'*[169] so as yet this approach has not been adopted. However, in *Re M (children: abduction,)*[170] a Hague Convention 1980 case, the House of Lords suggested that establishing that a case is 'exceptional' for the purpose of the exercise of the court's discretion to return the child is not necessary once an exception to the return of the child has been established for the purposes of the Convention. In *Re F (children)(abduction)*[171] the President of the Family Division stated that:

'...the overall nature of the Court's task in performing its balancing exercise as between welfare and other Convention considerations remains the same whether or not the Convention case is governed by Brussels II Revised'[172]

He considered the judgment in *Re M* and concluded that, despite the reinforcement of the policy of return by Regulation 2201/2003, the requirement for 'exceptionality' during the exercise of the court's discretion was not appropriate for use under the Regulation either.[173] This

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[168] *Klentzeris v Klentzeris* [2007] EWCA Civ 533; [2007] 3 FCR 580.

[169] *Ibid.*, 586.

[170] [2007] UKHL 55; [2008] 1 FLR 251, 265.

[171] [2008] EWHC 272 (Fam).

[172] *Ibid.*, paragraph 65. The comment relates to the Article 13(2) defence rather than Article 13(b).

[173] *Ibid.*, paragraph 64.

could perhaps signal a less stringent interpretation in line with that advocated for the purposes of the Article 11 mechanism. In *F v M*, the mother alleged that the father had been violent and that return would therefore place the children at grave risk of harm on return under Article 13(b). The court stated that:

'The evidence the mother produces falls short of the clear and compelling evidence which would be expected to make out the exception to the obligation to return. Not to return immediately would frustrate the policy of the Convention.'[174]

This would seem to emphasise that the interpretation placed on Article 13(b), Hague Convention 1980 will be maintained for the purposes of Regulation 2201/2003. Ryder J later comments that:

'Comity and respect for the policy of the Convention obliges this court, which is a harsh jurisdiction, I readily accept, unless there is the most persuasive, compelling evidence to the contrary, to determine that the French courts are just as capable of fairly investigating and adjudicating on the competing claims of the parties.'[175]

A broader, arguably less harsh, approach to the application of Article 13(b) has been adopted in other jurisdictions. By way of illustration, for example, in *Pollastro v Pollastro* the Ontario Court of Appeal stated that the evidence needed to satisfy the Article 13(b) threshold must be credible, but that *'...returning a child to a violent environment places that child in an*

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[174] *F v M* [2008] EWHC 1467 (Fam), paragraph 17.

[175] *Ibid.*, paragraph 19.

inherently intolerable situation, as well as exposing him or her to a serious risk of psychological and physical harm'.[176]

In that case the child had not been a direct victim of the violence but the risk of harm was acknowledged,[177] and the source causing the risk of harm to the child was regarded as irrelevant. Even if the risk stemmed from the potential removal of the child from their primary care giver, this is sufficient for the defence to be engaged because *'harm is harm'.*[178] This is a much broader interpretation of the Article 13(b) defence and its application to cases where domestic violence is an issue which could be adopted for use under Regulation 2201/2003 as a legitimate interpretation of the scope of this defence.

In *HA v MB (Brussels II Revised: Article 11(7) Application)*[179] the mother had removed the child to France and their return was refused under Article 13(b) by the French courts because the father had been violent towards the mother. The father made submissions to the English courts under Article 11(6) and the custody of the child was litigated in the English High Court whilst the child and their mother remained in France. The father was awarded contact with the child but this was not a judgment entailing the return of the child under Article 11(8), Regulation 2201/2003 and the child was therefore able to remain in France with the mother. This case demonstrates how the Article 11 mechanism could work in domestic

[176] *Pollastro v Pollastro* (1999) Can LII 3702 (ON C.A.), paragraph 33.

[177] *Ibid.*, paragraph 35.

[178] *Ibid.*, paragraph 24.

[179] [2007] EWHC 2016 (Fam); [2008] 1 FLR 289.

violence cases, litigation occurred in the child's habitual residence and there was a full hearing of the allegations and the custody issues with the child's welfare as the paramount consideration.[180] The evidence in relation to the child's welfare and any evidence in relation to official interventions due to domestic violence, although perhaps unlikely, will be in that State. At a substantive custody hearing the issues can be fully explored. If a broader interpretation was placed on Article 13(b) in particular, Article 11 provides a mechanism to account for the refusal to return the child in the appropriate forum and as part of that decision the reason for the refusal to return the child should be considered.[181]

This interpretation of the Article 11 mechanism is not in accordance with its intended purpose within Regulation 2201/2003 of enforcing the return of the child, but it may provide a new element of flexibility when dealing with the difficult issues associated with abductions caused by an attempt to escape a violent partner. The element of protection provided by distance allows for feminist concerns to be addressed whilst still allowing for litigation in the appropriate forum. The space for both private international law aims, and gender concerns in relation to domestic violence can be accommodated through this mechanism. There is an element of disadvantage attached to litigating at a distance which Weiner argues will prevent this sort of mechanism being used inappropriately.[182] These considerations may assist the development of a new broader interpretation

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[180] Under ss. 1(1), (3), Children Act 1989.

[181] So that the fast track enforcement mechanism can operate under Article 42(2)(c), Regulation 2201/2003.

[182] *Op. cit.* Weiner 2000, n1, 702 arguing that this is a better solution than creating a defence of 'domestic violence' which abducting parents routinely take advantage of thereby undermining its effectiveness.

of the Article 13(b) defence to take account of the harm and risk to women and children which is present in these cases. If return is eventually ordered under Article 11(8), hopefully in the substantive custody order there would be orders effective in the child's habitual residence to secure appropriate protection.[183]

The Article 11 mechanism therefore has potential to reconcile some of the tensions created by abduction cases motivated by domestic violence. As Lowe argues, the best court to hear the case on custody of the child is the child's home court. This is protected by the Article 11 mechanism,[184] but whilst still acknowledging that there is a risk of harm if litigation occurs following the return of the child. Much depends on how the Regulation's provisions are interpreted and used in practice. The aim of Regulation 2201/2003 in reinforcing the return of the child in all cases has been in evidence in the case law. Given this emphasis, the Article 11 mechanism may not be used in such a creative way.

Regulation 2201/2003 may provide a more balanced approach with space for both gender and private international law concerns in cases where an abduction is alleged to be motivated by domestic violence. Article 11(4) and the Article 11 mechanism in particular may provide routes through which the court's concern to protect the private international law aims in this area and the rights of the child and the 'left behind' parent can be reconciled with feminist concerns in cases where domestic violence has been alleged. However, in the European context there is the added element

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[183] In *Re A (custody decision after Maltese non-return order)* [2006] EWHC 3397 (Fam); [2007] 1 FCR 402 the return of the child from Malta was ordered by the English High Court despite the initial refusal to return. In *Re A (a child) (custody)* [2007] EWHC 2016 (Fam) the refusal to return the child was confirmed by the custody decision in the English High Court.

[184] *Op. cit.* Lowe, Horosova, n60, 71.

of European citizenship and freedom of movement for citizens which might provide further protection for women in this situation. This will be explored in the next section.

5. Addressing Domestic Violence Abductions within the EU Context: The Relevance of European Citizenship

In child abduction cases, acknowledging that the relationship between the child and their mother as their primary carer effectively means that the mother is forced to return to the child's habitual residence with the child following a return order, raises issues of human rights and European citizenship. European citizenship is largely based on freedom of movement within the Union.[185] Under Article 18(1) EC every citizen of the Union has the right to move and reside freely within the Member States, subject to the limitations and conditions in the Treaty. The ECJ in a series of cases has adopted a teleological approach to the question of Union citizenship, particularly the question of residency and access to benefits through the equal treatment provision in Article 12 EC.[186] This section will question whether these rights could provide another opportunity, or space, in which gender concerns in relation to abduction motivated by domestic violence may be addressed at European level.

Dougan argues that the citizenship provisions have been used by the ECJ to change Member State implementation of Community law to ensure that

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[185] Although see Article 19 EC on voting rights and Article 20 EC on access to embassies.

[186] See C Oliveira "Workers and Other Persons: Step by Step from Movement to Citizenship – Case Law 1995-2001" (2002) 39 Common Market Law Review 77; F Jacobs "Citizenship of the European Union – A Legal Analysis" (2007) 13 European Law Journal 591.

there is appropriate compliance, rather than mechanical rule enforcement.[187] He states that following Case C-413/99 *Baumbast*[188] national authorities, even where Community law restricts the freedom of movement of European citizens, must apply these rules proportionately. This extends to legislation which does not directly affect free movement rights but may affect a person's decision to move, for example access to social security benefits, following Case C-406/04 *De Cuyper.*[189]

The ECJ will therefore require justification of a restriction on freedom of movement for it to be permissible under EU law.[190] Any justification must be based on objective considerations of public interest, independent of nationality and proportionate to the legitimate aim pursued.[191] For a measure to be proportionate it *'...is necessary to establish, in the first place, whether the means it employs to achieve the aim correspond to the importance of the aim, and, in the second place, whether they are necessary for its achievement.'*[192]

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[187] M Dougan "The Constitutional Dimension to the Case Law on Union Citizenship" (2006) 31 European Law Review 613, 635.

[188] Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091.

[189] Case C-406/04 *De Cuyper v Office national de l'emploi* [2006] ECR I-6947 18th July 2006 applying the principle of proportionality to the application of Council Regulation (EC) No 1408/71 on the application of social security schemes to employed persons, to self employed persons and to members of their families moving within the Community as amended OJ [1997] L28/1, 14th June 1971.

[190] M Cousins "Citizenship, Residence and Social Security" (2007) 32 European Law Review 386, 391.

[191] Case C-406/04 *De Cuyper v Office national de l'emploi* [2006] ECR I-6947, paragraph 40.

[192] Case 66/82 *Fromancais* [1983] ECR 395, paragraph 8.

Cousins argues that this test requires the ECJ to be sensitive to the context of the restriction on movement and apply a rigorous standard of review.[193] *Baumbast* signalled that the court may use the principle of proportionality to vigorously defend citizenship rights in relation to free movement. This is potentially of relevance in abduction cases.[194]

Given that the return remedy can act as a restriction on freedom of movement within the Union, it would theoretically have to be applied proportionately. In cases where a woman has moved to escape domestic violence, returning the child effectively means that her freedom of movement is also restricted. If this is disproportionate to the reason for the removal of the child, it could be in breach of Article 18 EC. There are two problems with this argument. The first is that the restriction on the freedom of movement is on the child, rather than on the mother. A similar argument was made in the French case of *Procureur general c. Baume.*[195] As the mother is still free to choose not to return, her right to freedom of movement is not infringed by the return remedy. This ignores the reality of care, particularly where children are very young and the potential importance of the relationship for both the child and their mother.[196] If it is acknowledged that the relationship between the child and their primary carer means that the mother will return, the imposition of the return remedy

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[193] *Op. cit.* Cousins, n190, 395.

[194] E Szyszczak "Citizenship and Human Rights" (2004) 53 International and Comparative Law Quarterly 493, 496.

[195] Cour'd Appel a' Aix en Provence (6e ch.) Role 88/5235, March 23rd 1989, under Article 20, Hague Convention 1980.

[196] The role of care in child abduction is explored further in *Chapter Four*, 2.

in these circumstances could be subject to a requirement of proportionality.[197]

The second problem relates to the issue of proportionality itself. Arguing that the return remedy is disproportionate is unlikely to succeed given the countervailing factors involved including the desirability of the return remedy in deterring abductions and ensuring litigation in the child's habitual residence. The means employed are likely to be deemed legitimate to achieve the aim of litigating custody in the child's habitual residence prior to the abduction, for legal certainty and to restore the status quo for the child.

Although the restriction on the freedom of movement is likely to be proportionate, Dougan argues that the citizenship provisions could be used as a basis for a proportionality review of Community legislation which affects or restricts fundamental rights, not just freedom of movement.[198] Weiner has argued that the application of the return remedy where a woman has abducted a child to escape domestic violence may infringe fundamental rights.[199] In making a woman choose between staying in the State she has removed the child to in safety but letting the child return or returning with the child, risking further violence, a woman's rights to private and family life, or rights to life and freedom from inhuman or degrading treatment are potentially infringed. In terms of the European

[197] The relevance of the relationship between a child and their primary carer has been recognised in two European citizenship cases: Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091 and Case C-200/02 *Chen v Secretary of State for the Home Department* [2004] ECR I-9925.

[198] *Op. cit.* Dougan, n187, 638.

[199] M Weiner "Using Article 20" (2004) 38 Family Law Quarterly 583, 596.

Convention on Human Rights 1950, Articles 8, 2 or 3 may be engaged by enforcing the return remedy in these circumstances.[200] Article 8 is the right to private and family life, Article 2 is the right to life, and Article 3 is the right not to be subject to inhuman or degrading treatment.

If the EU was to engage with fundamental rights in this way, it could mean that the enforcement of the return order could be examined for its proportionality in the light of the fundamental rights which could be infringed. This approach would allow the court to focus, not only on the child's rights, but the mother's right to be free of violence also. It may require the ECJ to appreciate the nature of domestic violence and the human rights breaches involved which is an unknown and interesting factor. The use of human rights in this way would acknowledge the fundamental invasion of rights that domestic violence represents and would link the use of citizenship rights to the redress of gender inequality in Europe. It would provide a new space in which gender equality and human rights can be linked to make claims for women to protect their interests.[201]

However, although human rights may allow women to make claims, Smart has expressed doubt over the use of rights as a concept for women as she believes that rights claims are losing force.[202] Rights can be regarded as *'the ideological superstructure of a particular construction of masculinity'*.[203] Although rights appear to give power to the individual they

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[200] S Chaudhry, J Herring "Righting Domestic Violence" (2006) 20 International Journal of Law, Policy and the Family 95, 97.

[201] See *Chapter Six*, 4.2.2.

[202] C Smart *Feminism and the Power of Law* (Routledge, London, 1989), 149.

[203] S Bordo *Unbearable Weight: Feminism, Western Culture and the Body* (University of California Press, Los Angeles, 1993), 219.

are vulnerable to other rights, higher up the hierarchy. International child abduction may not be the appropriate context in which to try and develop a rights based approach. Following international child abduction, although the mother will have rights, the father and the child also hold rights, which may conflict with those of the mother. So for example, the father also has a right to family life with his child under Article 8, ECHR even if he was alleged to be violent prior to the abduction. Weiner argues that the abuser's right to a family life with their child can be better accommodated in these circumstances than the mother's can, as return is not necessary to protect the father's right but distance is necessary to protect the mother from further violence. [204] Despite this argument, the balance of interests may mean that the return remedy is a proportionate response to the conflicting rights in this situation.

The proportionality review, which is required by the citizenship case law, looks to the balance of rights rather than to protect a particular space for women's interests. It is probably proportionate to infringe a woman's rights in the interests of securing the rights of the other individuals involved, and in the legitimate pursuit of the legal aims of litigation in the appropriate forum and deterrence of further abductions. It would contradict the policy of the Hague Convention 1980, and now Regulation 2201/2003, in returning children in the interests of deterrence and thereby protecting all children, not just the child in question in one particular return application. It does however make explicit the different rights at stake in child abductions and expose balance reached between those rights.[205]

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[204] M Weiner "Strengthening Article 20" (2004) 38 University of San Francisco Law Review 701, 737.

[205] See *op. cit.* Herring, Taylor, n54, 530.

However, in child abduction cases, the private international law factors and the rights of others are likely to prevail in favour of the operation of the return remedy.

The likelihood that this analysis is correct is increased on consideration of Article 20, Hague Convention 1980, which permits the refusal to return the child where fundamental principles relating to human rights in a State's domestic law would be infringed.[206] This defence has not been used in many cases[207] and has been unsuccessful in the English courts. This is partly because Article 20 was not incorporated into English law by the Child Abduction and Custody Act 1985. However, in *Re D (a child) (abduction: foreign custody rights)* it was made clear that Article 20 is part of English law.[208] Despite this, where human rights arguments have been raised in abduction cases they have been unsuccessful. This is because courts feel the return remedy creates an appropriate balance of rights between the parties and will not readily interfere.[209] Weiner argues that Article 20 may be given a greater role under the Regulation 2201/2003 system because the Regulation does not inhibit the application of Article 20.[210] However, human rights have, thus far, had little impact on the

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[206] C.f. L Silberman "The Hague Children's Conventions: The Internationalisation of Child Law" in S Katz et al *Cross Currents: Family Law and Policy in the US and England* (OUP, 2000), 594 arguing that Article 20 is irrelevant to the operation of the Convention as it is superseded by Article 13(b).

[207] There are a variety of reasons for this, see *op. cit.* Weiner 2004, n204, 704.

[208] [2006] UKHL 51; [2007] 1 AC 619, 643 per Baroness Hale. See *Chapter Three*, 3.2.5.

[209] See *S v B (Abduction: Human Rights)* [2005] EWHC 733 (Fam); [2005] 2 FLR 878 and *Re D (a child) (abduction: foreign custody rights)* [2006] UKHL 51 and *Re K (Abduction: Psychological Harm)* [1995] 2 FLR 550 where it was held that Article 20 considerations could not override the provisions of Article 13(b), although this was decided before the Human Rights Act 1998.

[210] *Op. cit.* Weiner 2004, n199, 595.

operation of the Hague Convention 1980 and as the Regulation reinforces the application of this Convention, it is unclear whether there will in fact be any significant effect.

Human rights have not been utilised much in relation to domestic violence generally in England and Wales partly because of the recent adoption of the Human Rights Act 1998.[211] As domestic violence is not often formulated in terms of a human rights violation in national law, it is unlikely to be addressed in these terms in the context of international child abduction either. This is also likely to be the case in relation to Regulation 2201/2003 in the ECJ. Although the EU context provides further avenues for argument, and space for claims on the basis of human rights, in relation to child abduction the provisions of Regulation 2201/2003 are a proportionate response, even where there is evidence of violence.

6. Conclusions

Domestic violence is a social problem occurring across all societies within the EU. It is clear that there is an implicit connection between violence and abduction as women attempt to escape violent partners through geographical distance. The return remedy may then act to expose women and children to further risk of harm on their return to their habitual residence. The return remedy allows the abuser to use the law to force children, and therefore their mother also, to return thereby encouraging the abuser as the court impliedly colludes in their violence. The law is having gendering effects in defining how women should behave when experiencing domestic violence, and how they should respond to an

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[211] *Op. cit.* Choudhry, Herring, n200, 96.

application for the return of the child. There is very little space for the consideration of gender concerns in such cases, the private international law aims are predominant under the Hague Convention 1980.

The English courts approach is clearly aimed at protecting the private international law aims of the Hague Convention 1980, with the emphasis on judicial comity and the effective implementation of the return remedy, and this is likely to continue in relation to Regulation 2201/2003. It is possible that Regulation 2201/2003 will provide opportunities to develop new spaces for the protection of women and children in cases where domestic violence is alleged to have motivated the abduction. The Article 11 mechanism and Article 11(4) of Regulation 2201/2003 may reconcile the private international law aims with the interests of women and children exposed to violence, but this will depend on the acknowledgment of these issues and the interpretation of the provisions. The risks and reality of domestic violence must be acknowledged by the courts to develop this space for use by women and children. Much therefore depends on the courts' interpretation of Regulation 2201/2003, both at a domestic level and by the ECJ, and it remains possible that the emphasis on return will prevail. Although the return remedy could be regarded as a restriction on the freedom of movement of the abductor and their child, however this is likely to be a proportionate restriction. Neither human rights nor freedom of movement claims based on European citizenship are likely to be of much assistance in this context, despite providing more space for rights based claims.

Given the EU's commitments to gender equality the acceptability of the emphasis on the return remedy and private international law aims embodied in Regulation 2001/2003 must be questionable. The implicit gender issues in the operation of child abduction law are not necessarily

accommodated by Regulation 2201/2003; the protections available depend on its interpretation by the courts. There is little space accorded to addressing the gender issues highlighted both in this chapter and *Chapter Four* within the operation of Regulation 2201/2003. As a result the EU may have to address the practical realities that women face on return to the State of the child's habitual residence and the nature of domestic violence policies within the different Member States to ensure appropriate protection on the return of the child. Protections from domestic violence in the Member States and the EU's role in providing protection outside of a private international family law context will be addressed in *Chapter Six*. The drafting of Regulation 2201/2003 and the possibilities for the effective incorporation of women's interests into legislation through the strategy of gender mainstreaming will be considered in *Chapter Seven*.

Chapter Six

TACKLING DOMESTIC VIOLENCE ACROSS THE MEMBER STATES: THE ROLE OF THE EUROPEAN UNION

1. Introduction

As *Chapter Five* demonstrated, by regulating international child abduction, the EU has engaged with a topic with significant implications for women who are subjected to domestic violence. Given that the issue of domestic violence and international child abduction has not been clearly addressed by Regulation 2201/2003, it will be considered whether there is protection elsewhere in European law for women who experience domestic violence. The legal structures to protect women and children from domestic violence on return are *assumed* to be competent to do so effectively and this assumption will therefore be examined in relation to the law in England and Wales. The chapter will address the English context, although in the EU the implementation and protections of the law related to domestic violence will vary between the Member States.

In the light of the variations between Member States law, it will be questioned whether the EU has a role in ensuring a certain level of protection to women and children who are exposed to domestic violence. It is intended to consider whether the EU has the competence to legislate to ensure protection from domestic violence in all Member States and, if so, what form this protection could take. The space for gender concerns relating to domestic violence *outside* of the context of the law relating to

international child abduction will thereby be considered. Instead of focussing on private international law, is there space for gender elsewhere in the EU legal order so that it is not necessary to consider the issues of domestic violence in child abduction law.

The EU has engaged with issues of domestic violence as part of its Daphne Programmes for preventing violence against women, children and young persons.[1] This initiative was begun in 2000 and is based on Article 152 EC, the public health competence. This is not a harmonising competence, so the Decisions create instead a soft, information sharing and grant based system for the dissemination of good practice in relation to violence against women and children in the Member States.[2] The content and aims of the Daphne Programme will be examined to discover whether they help to develop Member State protections. In addition, it will be argued that, as well as taking action under Article 152 EC, the EU has the option to take harmonising action under Article 13 EC relating to measures combating discrimination on the grounds of sex. This would create European wide legislation treating gender based violence as a form of sex discrimination to try and ensure a uniform level of protection from domestic violence across the EU.

2. The Assumption of Legal Protection from Domestic Violence Following Return

[1] Daphne III, Decision No 779/2007/EC establishing for the period 2007-2013 a specific programme to prevent and combat violence against children, young people and women and to protect victims and groups at risk (Daphne III programme) as part of the General Programme 'Fundamental Rights and Justice' OJ [2007] L 173, 20th June 2007.

[2] See Article 3 and 4, Decision No 779/2007 outlining the methods and aims of the Daphne III programme.

2.1. Presuming Protection for the Proper Enforcement of the Return Remedy

For the purposes of a return order under Article 12, Hague Convention 1980, the courts in England and Wales have largely assumed that women and children can be effectively protected from continuing violence in the State of their habitual residence. For example, in *Re H (Children: Abduction)* it was stated by the President of the Family Division, Dame Butler-Sloss, that:

'I do not consider that we are entitled in England to assume that either the father is an uncontrollable risk or that the Belgian authorities would be unable to manage the problem. [3]

The courts in England and Wales return children in the vast majority of cases where a mother had abducted her child allegedly due to domestic violence. This was in spite of the risk of harm potentially increasing following the separation of a woman from her violent partner.[4] The courts have largely assumed that the protections and legal remedies available in their habitual residence will be sufficient to protect a child and their mother. Undertakings may be issued in the meantime to provide protection until the courts in their habitual residence assume jurisdiction over the case, but it is assumed that protection will be provided where appropriate following their actual return.[5]

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[3] *Re H (Children: Abduction)* [2003] EWCA Civ 355; [2003] 2 FLR 141, 150.

[4] C Humphreys, R Thiara "Neither Justice Nor Protection: Women's Experiences of Post-Separation Violence" (2003) 25 Journal of Social Welfare and Family Law 195, 199; R Fleury, C Sullivan, D Bybee "When Ending the Relationship Does Not End the Violence" (2000) 6 Violence Against Women 1383, 1371.

[5] The court may issue undertakings which are voluntary agreements to protect the child and their mother, but these are voluntary and often not enforceable in their habitual residence. See *Chapter Five*, 3.1.; Reunite *The Outcomes for Children Returned Following Abduction* Report, September

In reinforcing the application of the return remedy in general, Regulation 2201/2003 also underlines the presumption that children and their mothers can be effectively protected against continuing domestic violence. Additionally, Article 11(4), Regulation 2201/2003 may bolster the assumption that States will protect women and children from domestic violence on return, even where the Article 13(b), Hague Convention 1980 defence to return because of the existence of a grave risk of harm is established. Although Article 11(4) requires consideration of whether any arrangements to protect the child from harm are in place and are adequate, they need not be effective and this may encourage courts to return children despite the existence of a risk of harm.[6] The assumption that such arrangements can be 'adequate' is based on a belief that the law can protect women, whereas in fact there is no truly effective mechanism of protecting women from men who have abused them.[7] The protections available to women and the effectiveness of law enforcement in relation to domestic violence will vary widely between the Member States with some Member State laws being better than others.[8]

2003, 30 available at http://www.reunite.org/WEBSITEREPORT.doc last accessed 17th July 2007.

[6] *Chapter Five*, 4.2.

[7] M Kaye "The Hague Convention and the Flight From Domestic Violence: How Women and Children are Being Returned by Coach and Four" (1999) 13 International Journal of Law, Policy and the Family 191, 198.

[8] See M Platek "Women, Children and the Law in Poland: Protection or Barrier?" *Addressing gender based human rights violations* 2005 available at http://www.iss.uw.edu.pl/arch/20.05.2005/Platek_Poland.pdf last accessed 14th December 2006; S Cahtzifotiou, R Dobash "Seeking Informal Support: Marital Violence Against Women in Greece" (2001) 7 Violence Against Women 1024; H Constandinidou, K Stavropoulos "Dealing with Domestic Violence in Greece" [2007] International Family Law 201; J Kantola "Transnational and National Gender Equality Politics: European Union's Impact on Domestic Violence Debates in Britain and Finland" ECPR Conference Paper 18-21 September 2003; C Hagemann-White, S Bohn "Protecting Women Against Violence: Analytical Study of the

2.2. The Difficulties of Using Law to Protect Women and Children From Violence

There is a general question over whether the law can ever be effective to protect women and punish abusers. As the criminal justice system and civil remedies are part of the State's structures, and the State as a patriarchal body is the source and enforcer of the law, feminists have questioned whether the criminal justice remedies in particular can ever be effective in combating domestic violence.[9] Law *'...sustains, perpetuates and justifies a consensual view on sex roles and the relative rights and duties of men and women...'*,[10] thus making it difficult to effectively challenge domestic violence through the agency of the State. However, the law is not a unitary entity and as a multifaceted system it is capable of change and positive influence to secure potential protections for women.[11] Despite the nature of the patriarchal State, Dobash and Dobash argue:

'...state intervention remains one of the primary vehicles for attempting to redress injustices in advanced industrial societies. Violence against women in the home is about power, and any form of intervention must be able to

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Effective Implementation of Recommendation Rec(2002)5 on the Protection of Women Against Violence in Council of Europe Member States" CDEG (2007) 3 Rev, 10th July 2007.

[9] J Radford, E Stanko "Violence Against Women and Children: the Contradictions of Crime Control under the Patriarchy" in M Hester, L Kelly, J Radford *Women, Violence and Male Power* (OUP, Buckingham, 1996), 68.

[10] C Smart *The Ties That Bind: Law, Marriage and Patriarchal Relations* (Routledge Kegan Paul, London, 1984), 21.

[11] *Ibid.*, 221.

confront and redress that power. At present the state... is an integral element of this enterprise.'[12]

They argue instead for a pragmatic engagement with the law, recognising that women's needs require some form of intervention, and that eschewing law on theoretical grounds is self defeating.[13] Engaging the law has a symbolic effect in demonstrating the community's rejection of such violence, and a practical effect in protecting some, if not all, women and children.[14] Despite this, there is an awareness of the limitations of legal remedies and the difficulties posed by the cultural and social understandings of the actors in the legal system that may inhibit the application of the law.[15] Even States where domestic violence has been a political and legislative issue for decades have problematic law enforcement mechanisms, and difficulties in securing effective police, prosecutor and judicial responses to a 'domestic'.[16] This represents a significant problem for the protection of women and children when they return to a State pursuant to a return order, or for the protection of women and children under Article 11(4), Regulation 2201/2003. The next section will consider these issues and the effect of presuming protection for women and children who return to England and Wales following a return order under Regulation 2201/2003 and the Hague Convention 1980.

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[12] R Dobash, R Dobash *Women, Violence and Social Change* (Routledge, London, 1992), 212.

[13] R Lewis, R Dobash, R Dobash, K Cavanagh "Law's Progressive Potential: The Value of Engagement with the Law for Domestic Violence" (2001) 10 Social Legal Studies 105, 114.

[14] *Ibid.*, 122.

[15] *Ibid.*, 112.

[16] See *op. cit.* Hagemann-White, Bohn, n8.

3. Protection from Domestic Violence in an Anglo-Welsh Context

This section will explore the protections available to women and children who experience domestic violence in England and Wales. To take an example, if a woman abducts her child from England to Spain to escape domestic violence, on return to England following a return order, there are a number of legal protections available to her and her children if the violence continues. The responses of the criminal law will be considered first, followed by those of the civil law.

3.1. Domestic Violence and the Criminal Law

Any physical violence can constitute a criminal offence.[17] If the police are called, the criminal law contains no offence of 'domestic violence'[18] but if a violent incident occurs, the abuser may be charged under the general criminal law with an assault, which accommodates various degrees of harm. A common assault is an arrestable offence following the Domestic Violence, Crime and Victims Act 2004, which amended Schedule 1A, Police and Criminal Evidence Act 1984. A police officer can arrest a suspected abuser without a warrant giving greater short term protection to those who have been assaulted.[19] More serious assaults may be charged

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[17] Although women's private experiences of violence may not coincide with 'man made' legal definitions of violence in criminal discourse. See *op. cit.* Radford, Stanko, n9, 75.

[18] 'Domestic violence' is not defined anywhere in English law despite pressure to do so, see: H Reece "UK Women's Groups' Child Contact Campaign: 'so long as it is safe'" (2006) 18 Child and Family Law Quarterly 538, 539.

[19] Section 39, Criminal Justice Act 1988 gives a maximum penalty as six months for common assault or battery. An assault is an act by D which causes V to apprehend immediate and unlawful personal violence, see *Savage* [1992] 1 AC 699, 740. This can encompass psychological harm see *Ireland* [1997] 4 All ER 225. A battery occurs where D intentionally or recklessly inflicts

under the Offences Against the Persons Act 1861 as an assault occasioning actual bodily harm[20] or an assault occasioning grievous bodily harm.[21] There may also be the possibility of a prosecution for attempted murder.[22] For sexual assaults there is the crime of rape under the Sexual Offences Act 2003[23] which can be committed against a marital partner.[24] There is also the possibility of a criminal damage charge if there is damage done to a woman's property[25] or a charge of harassment under the Protection From Harassment Act 1997.[26]

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unlawful personal violence on V with 'violence' being any form of touching; see *Rolfe* (1952) 36 Cr App R 4.

[20] Section 47, Offences Against the Person Act 1861. 'Actual bodily harm' is any hurt or injury interfering with the health or comfort of V, see *Miller* [1954] 2 QB 282.

[21] Section 20, Offences Against the Person Act 1861. 'Grievous bodily harm' is really serious harm. *DPP v Smith* [1961] AC 290, 334.

[22] Section 1(1), Criminal Attempts Act 1981, requiring an act which goes beyond mere preparation for the offence done with the intention to commit murder. See D Omerod *Smith and Hogan on Criminal Law* (11th edition, OUP, 2005), 400-419.

[23] Under section 2, Sexual Offences Act 2003 the definition of rape includes intentional penetration by another by a part of their body, or anything else, of the vagina or the anus where V does not consent and D does not reasonably believe that V consents.

[24] *R v R (Rape: Marital Exemption)* [1992] 1 AC 599.

[25] Section 1(1), Criminal Damage Act 1971, requiring damage to property belonging to another, done either intentionally or recklessly.

[26] Section 2, Protection From Harassment Act 1997 makes it an offence to pursue a course of harassment. Harassment can be words or conduct, alarming or causing distress to another, occurring more than once according to section 7. Section 4 makes it an offence to pursue a course of conduct which D knows or ought reasonably to have known would make the V fear an act of violence against them.

However, to be effective as a deterrent and to provide protection to women and children a positive police response is required and prosecutors must pursue the charges. The symbolic condemnation of violence by the law does not mean that practices and the reality of violence will necessarily change.[27] A change in culture is also required. As domestic violence takes place in the privacy of the home, this led to police inaction, leaving women isolated and believing that there was no one to assist them.[28]

Traditionally, the police response has been poor for 'domestics'[29] but a drive to improve policy and practice has improved standards of police investigation and willingness to proceed to prosecution.[30] Musgrove and Groves' findings suggested that police responses had improved greatly with women feeling that the police had been supportive.[31] However, women from ethnic minorities said that they were unlikely to seek the help of the police again and responses remain patchy.[32] Burton found that, particularly where there were children present or involved in some way in

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[27] *Op. cit.* Radford, Stanko, n9, 73.

[28] K McCann "Battered Women and the Law: the Limits of the Legislation" in J Brophy, C Smart (editors) *Women-in-Law: Explorations in Law, Family and Sexuality* (Routledge Kegan Paul, London, 1985), 92.

[29] R Dobash, R Dobash *Violence Against Wives* (Free Press, New York, 1979), 194.

[30] All 43 police forces now have Domestic Violence Officers and the National Centre for Policing Excellence has produced guidance for the investigation of domestic violence. The Home Office has issued a Circular (19/2000) to police forces on best practice in domestic violence cases updated in 2000. See www.womensaid.org last accessed 2nd January 2008.

[31] A Musgrove, N Groves "The Domestic Violence, Crime and Victims Act 2004: Relevant or 'Removed' Legislation?" (2007) 29 Journal of Social Welfare and Family Law 233, 240.

[32] *Ibid.*

the incident of violence, the police were very active in pursuing a prosecution.[33] The fact that children were present meant that the prosecution was viewed as protecting the children, but the violence the woman experienced was subordinated to the risk to the child.[34] Burton states that *'...the police will try to help women who are committed, as they see it, to taking action to protect their children.'*[35] Women were expected to leave a violent partner in order to be viewed as really needing assistance, so if women have returned pursuant to an order following an unlawful abduction, and are in the family home, it may be more difficult to secure police assistance.[36] However, if they return and live away from their former partner who continues to be violent to her and the child, this may encourage police intervention.

Women who return with their child to their habitual residence prior to the abduction may have particular problems in using police services if they are not a national of that State. Menjivar has argued that race and language difficulties may inform a police officer's decision to arrest an abuser and process an offence.[37] The multiple layers of hierarchy and oppression may mean that women are more reluctant to call the police following a violent

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[33] M Burton "Prosecution Decisions in Cases of Domestic Violence Involving Children" (2000) 22 Journal of Social Welfare and Family Law 175, 178.

[34] *Ibid.*

[35] *Ibid.*, 179.

[36] E Schneider *Battered Women and Feminist Law Making* (Yale University Press, New Haven, 2000), 52.

[37] C Menjivar, O Salcido "Immigrant Women and Domestic Violence: Common Experience in Different Countries" (2002) 16 Gender and Society 898, 915.

incident, particularly following the return of their child that State, within the potential remit of further abuse, at the request of the abuser.[38]

Even if the police charge an abuser with a criminal offence following an incident of domestic violence, the decision whether to prosecute rests with the Crown Prosecution Service (CPS). The CPS has guidelines specific to the prosecution of domestic violence cases.[39] Violence is viewed as aggravated by the domestic setting and the safety of victims and affected children is a priority. Cultural factors are highlighted and should not be a reason to refuse to prosecute.[40] The CPS is also conducting a consultation on its Violence Against Women Strategy and Action Plan.[41] This strategy includes domestic violence and harassment amongst other crimes, and aims to improve prosecutions and the support for victims, and increase public confidence.[42] The CPS is developing the strategy in a human rights framework following EU, UN and Council of Europe work placing violence against women in this context.[43] However, to proceed to prosecution there still must be a reasonable prospect of success and that

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[38] *Ibid.*, 900.

[39] CPS Prosecution Guidelines in cases of domestic violence available at: http://www.cps.gov.uk/legal/section3/chapter_c.html#_Toc44571270 last accessed on 2nd January 2008.

[40] *Ibid.*

[41] CPS Violence Against Women Strategy and Action Plan consultation available at: http://www.cps.gov.uk/consultations/vaw_index.html last accessed on 2nd January 2008.

[42] Draft Violence Against Women Strategy and Action Plans, point 3.1.3. Available at: http://www.cps.gov.uk/legal/section3/chapter_c.html#_Toc44571270 last accessed on 2nd January 2008.

[43] *Ibid.*, point 1.8.

means reaching the criminal standard of proof; that it is beyond reasonable doubt that the defendant committed the offence charged.

These strategies may encourage the CPS in pursuing domestic violence prosecutions. Currently there is a high rate of attrition in the prosecution of cases[44] and the CPS will only rarely pursue a prosecution where a complaint is withdrawn, even where a child was involved in the violent incident.[45] Burton found that, where a complaint was withdrawn in such circumstances, prosecutors blamed the complainant for the effect of the violence upon the children.[46] Despite evidence in some cases which would have allowed the prosecution to continue, in only one case did they proceed to prosecute for an incident of domestic violence despite the complainant's withdrawal because a child in the family had suffered a serious sexual assault.[47] The prosecutors did not comprehend the complex reasons behind the withdrawal of complaints including guilt, reprisals and the threat to family relationships.[48] The children were regarded as the 'real' victims of the violence, with blame attached to the mother, and there was little understanding of the emotional and practical difficulties involved in

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[44] Only half of reported cases proceed to conviction see L Ellison "Prosecuting Domestic Violence Without Victim Participation" (2002) 65 Modern Law Review 834; M Burton "Judicial Monitoring of Compliance: Introducing 'Problem Solving' Approaches to Domestic Violence Courts in England and Wales" (2006) 20 International Journal of Law, Policy and the Family 366, 374.

[45] *Op. cit.* Burton 2000, n33, 181.

[46] *Ibid.*

[47] *Ibid.*, 184.

[48] *Ibid.*, 185.

pursuing a prosecution.[49] Where a woman has abducted her child, this attitude may be exacerbated because of the harm presumed to be caused by the abduction to the child and the mother's perceived wrongdoing. However, it may also demonstrate a willingness to leave a violent partner and to support a prosecution.

The government has recently set up a Specialist Domestic Violence Court Programme in England and Wales.[50] The number of specialist courts has increased from seven in 2004 to 50 in 2007.[51] These courts have improved the prosecution rates for domestic violence to 71%.[52] They work by clustering cases for pre-trial hearings, and often trial, by trained judges and specialist personnel, including a victim advocate.[53] There is evidence that these courts can speed up the process, reducing the number of hearings and increasing the number of guilty pleas.[54] This may assist a woman in pursuing an effective prosecution with support and specialist services.

There has also been funding for Independent Domestic Violence Advisors to support women throughout the case and provide information on housing,

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[49] *Ibid.*, 187.

[50] See Specialist Domestic Violence Court Programme available at: http://press.homeoffice.gov.uk/press-releases/domestic-violence-courts last accessed 2nd January 2008.

[51] See *ibid.*

[52] See *ibid.*

[53] *Op. cit.* Burton 2006, n44, 373.

[54] *Ibid.*, 368.

health, counselling and child care, whilst co-ordinating the criminal justice response to the violence.[55] These advisors may be of particular relevance where a woman is pursuing a prosecution following an abduction and their subsequent return, as it may assist in finding permanent housing and support across a wider range of services which may be invaluable if there is a language barrier or a lack of knowledge about local services.[56] This sort of service could address those questions of residency status and access to benefits highlighted in *Chapter Four* which pose particular problems for women who return with the child but cannot work. This does however mean that the Domestic Violence Advisors must be a culturally competent service, understanding cultural differences and particular structural needs[57] but also the issue of international child abduction, its effects on children and the nature of the return order.

3.2. Domestic Violence and the Civil Law

The prosecution of an abuser is only one possible avenue for a woman who has returned with her child to England and Wales following an abduction. There are also civil remedies which have the benefit of a lower burden of proof, on the balance of probabilities, and need not involve the use of the criminal justice agencies. This is a separate route which women may choose to pursue. There is, as yet, no integrated domestic violence court in England and Wales dealing with both the civil and the criminal aspects of domestic violence and the jurisdictions overlap and may conflict where

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[55] See http://press.homeoffice.gov.uk/press-releases/domestic-violence-courts last accessed 2nd January 2008.

[56] *Op. cit.* Menjivar, Salcido, n37, 914.

[57] N Sokoloff, I Dupont "Domestic Violence at the Intersections of Race, Class and Gender: Challenges and Contributions to Understanding Violence Against Marginalised Women in Diverse Communities" (2005) 11 Violence Against Women 38, 51.

there is a civil order with criminal sanctions for breach alongside an independent criminal prosecution. The overlap of the criminal and civil law jurisdictions in relation to domestic violence in English law is increasing, something which may warrant consideration of the courts role in administering the different remedies and penalties. This has been the subject of judicial comment[58] but there has been no attempt to address this issue as yet. A civil order may take several different forms and can be obtained either under Protection From Harassment Act 1997, section 3 or Part IV, Family Law Act 1996.

3.2.1. The Protection From Harassment Act 1997

Section 3(1) creates a civil remedy where a harassing course of conduct has been pursued under section 1(1), Protection From Harassment Act 1997. Harassment can be words or conduct, which are alarming or cause distress to another and which occur more than once[59] The court can issue an injunction to restrain further harassment under section 3(3)(a) and it is an arrestable offence[60] to unreasonably breach this order.[61] An abuser could be subject to a criminal sanction under section 3(9) with a maximum penalty of five years imprisonment. The effectiveness of the order depends on the willingness of the police to pursue a breach of the order.[62] Breach of the order could also be treated as contempt of court, but these proceedings

[58] *Lomas v Parle* [2003] EWCA Civ 1804; [2004] 1 All ER 1173, 1184-5.

[59] Section 7, Protection From Harassment Act 1997.

[60] Section 24(6), Police and Criminal Evidence Act 1984.

[61] Section 3(6), Protection From Harassment Act 1997.

[62] A Diduck, F Kaganas *Family Law, Gender and the State* (2nd edition, Hart Publishing, Oxford, 2006), 458.

would have to be issued by the individual protected by the order. However, the Protection From Harassment Act 1997 is broad in scope and the police can take action on breach of the civil order, making it a flexible tool.[63]

Additionally, on conviction of an offence for harassing an individual or putting them in fear of violence,[64] the court can issue a restraining order to prevent further harassing conduct under section 5. If an abuser unreasonably breaches this order, they are liable for a criminal offence under section 5(5) and can be imprisoned for up to five years.[65] Following the Domestic Violence, Crime and Victims Act 2004, on acquittal of *any* offence a restraining order may be issued prohibiting the defendant from doing anything in the order, to protect a person from harassment if the court considers it necessary to do so.[66] If the defendant then breaches this order it is an offence punishable in the same manner as under section 5. This is a very broad jurisdiction for the courts, and it remains to be seen what use is made of it. Humphreys and Thiara found that the Protection From Harassment Act 1997 was under-utilised[67] in relation to domestic violence cases and that, as yet, the orders were not particularly effective in ending the harassment.[68]

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[63] *Ibid.*

[64] Section 2 or 4, Protection From Harassment Act 1997, see above section 3.1.

[65] Section 5(6), Protection From Harassment Act 1997.

[66] Section 5A, Protection From Harassment Act 1997.

[67] *Lomas v Parle* [2003] EWCA Civ 1804; [2004] 1 All ER 1173, 1179.

[68] *Op. cit.* Humphreys, Thiara, n4, 205.

3.2.2. Part IV, Family Law Act 1996

Part IV, Family Law Act 1996 provides for two different types of order: either a non-molestation order or an occupation order. Occupation orders deal with rights of occupation of the family home[69] and non-molestation orders deal with protection from further abuse. Section 46(1) also allows the court to accept an undertaking from the parties to the proceedings, which is not enforceable without a return to court under section 46(4). There is evidence that the courts are willing to accept undertakings instead of issuing an order, which potentially places women at risk.[70] This mirrors the practice under the Hague Convention 1980 in accepting non-binding undertakings from a parent and ordering the return of the child.[71] If a child is returned following an abduction, and undertakings are the only form of order given by the courts on their return, the position of the child and their mother will remain vulnerable and unprotected. This may be addressed to some degree by a new section 46(3A), Family Law Act 1996 which states that where a respondent has used or threatened violence a non-molestation order is mandated to make breaches punishable as a criminal offence (see further below). This is clear guidance that the courts should issue non-molestation orders for the better protection of women and children.

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[69] See section 33, Family Law Act 1996 for occupation orders where the applicant has a right to occupy the family home (e.g. by virtue of a beneficial interest in the property) and section 35 for occupation orders where the applicant has no right of occupation. Marital partners and cohabitants are dealt with differently by the legislation, see section 41, Family Law Act 1996 for the relevant considerations and R Bailey-Harris, J Wilson "*Mendoza v Ghaidan* and the rights of de facto spouses" (2003) 33 Family Law 575 on the human rights implications of distinguishing in this way.

[70] *Op. cit.* Diduck, Kaganas, n62, 459.

[71] See *Chapter Five*, 3.1.

Non-molestation orders are probably the most relevant form of order where women return with their child to their habitual residence following an abduction. Under section 42(1), Family Law Act 1996 a non-molestation order prohibits a person molesting an associated person[72] and/or a relevant child. Molestation is *'...deliberate conduct which is aimed at a high degree of harassment...'*[73] It therefore encompasses behaviour which is not physically violent. An application may be freestanding or part of any other family proceedings e.g. during the custody dispute following the return of the child, under section 42(2).

When considering whether to issue a non-molestation order, under section 42(5), Family Law Act 1996 the court should have regard to all the circumstances including the health, safety and wellbeing of the applicant and any relevant child. The order can be made for a period of time or until further notice and will prohibit the respondent from *'...intimidating, harassing or pestering the applicant, and from encouraging someone else to do so.'*[74]

There is varying evidence regarding the efficacy of non-molestation orders. The difficulty in funding the application for an order and continuing threats from an abuser may mean that they are hard for women to obtain.[75] They

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[72] Broadly defined following amendment by the Domestic Violence, Crime and Victims Act 2004 to section 62(3), Family Law Act 1996 to include people who are or were married, cohabitants or former cohabitants and those who have had an intimate personal relationship with each other which is or was of significant duration. This is a significant improvement on the focus on marital relationships, see *op. cit.* Musgrove, Groves, n31, 242.

[73] *C v C (Non-molestation Order: Jurisdiction)* [1998] 1 FLR 554, 556.

[74] *Op. cit.* Diduck, Kaganas, n62, 463.

[75] *Op. cit.* Humphreys, Thiara, n4, 203.

do have the potential for the empowerment of women by restoring their control over proceedings, but fear of reprisal and the disclosure of their address may deter women from seeking one.[76] The issue of control may be important for women who have returned with their child following an abduction as this allows them to ensure some element of protection for both her and the child, despite their return. It allows them to re-assume some control over the situation following the operation of the return order. Humphreys and Thiara found that, for some women, (36% of those obtaining protection orders) the use of non-molestation orders following separation was effective to stop the violence.[77] However, for those suffering chronic post-separation violence, the orders did little to stop the abuse and in 36% of cases the violence was continuing.[78]

The Domestic Violence, Crime and Victims Act 2004 inserts a new section 42A into the Family Law Act 1996 which creates a criminal offence of unreasonable breach of a non-molestation order. This allows the police to arrest an abuser on breach of a non-molestation order without a warrant, although this relies on the knowledge and effective response of the police to the renewed violence. This is an improvement on the applicant applying to the court claiming contempt of court, although this remains a possible course of action, and conduct punished as contempt of court will not additionally be punished as a criminal offence.[79] On breach, the maximum penalty is five years imprisonment.[80]

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[76] C Connelly, K Cavanagh "Domestic Abuse, Civil Protection Orders and the 'New Criminologies': Is There Any Value in Engaging With the Law?" (2007) 15 Feminist Legal Studies 259, 267-8.

[77] *Op. cit.* Humphreys, Thiara, n4, 203.

[78] *Ibid.*, 204.

[79] Section 42A(4), Family Law Act 1996.

The enforcement of these forms of order, where the civil and criminal jurisdiction overlaps, depends partly on the effectiveness of the police response following a breach of the order.[81] The extra powers given to the police do not seem to protect women from further violence, as abusers are no more likely to be arrested on breach of the order.[82] Connelly and Cavanagh found that the police response was poor and minor breaches of the order did not result in arrest, therefore defeating the deterrent effect of the order.[83] This may be compounded by the attitude of the courts to women's behaviour and the nature of the violence which, in some cases, is still characterised by stereotypical attitudes of blame, and misconceptions about the nature and seriousness of the violence.[84] These are continuing problems of using the legal system and invoking criminal justice agencies in protecting women. However, some State assistance is necessary to increase both the potential deterrent and the public condemnation of this form of violence, instead of placing all the emphasis on the individual experiencing abuse. It is notable however that the effect of law enforcement within the patriarchal system, even where the law is attempting to protect women, can still undermine these efforts, a factor which must be accounted for in all legal cultures.[85]

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[80] Section 42A(5)(1), Family Law Act 1996.

[81] *Op. cit.* Humphreys, Thiara, n4, 206.

[82] *Op. cit.* Connelly, Cavanagh, n76, 270.

[83] *Ibid.*

[84] *Ibid.*, 275; *op. cit.* Humphreys, Thiara, n4, 206.

[85] C Smart *Feminism and the Power of Law* (Routledge, London, 1989), 2.

3.3. Problems with Assuming Protection on Return

Consideration of the English law on domestic violence highlights a number of issues which are of broader relevance when considering *effective* protection from domestic violence. In relation to the criminal law, the effective enforcement of the law depends on the response and expectations of the criminal justice agencies, particularly the police. This is now an issue in England and Wales in relation to civil orders as well given that breach of a non-molestation order is now a criminal offence.

The complexity of the remedies available in England and Wales means that it may not be clear to someone, particularly if they are not in their home state, how to secure protection from further violence and whether prosecution or a form of civil order would constitute the best course of action. This depends on appropriate legal advice and access to services which, in turn, may be affected by issues of culture.[86] Choosing a civil remedy requires financial resources to apply to court which may not be immediately available given that, following return, a custody dispute is likely to be in process, although a non-molestation order may be obtained as part of this application.[87]

These factors are likely to be of relevance whichever European Member State's legal system to which a child is returned. England and Wales has a developed system of protections and remedies which are arguably comparatively well enforced. In other States, the law is only just

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[86] *Op. cit.* Sokoloff, Dupont, n57, 51.

[87] Section 42(2), Family Law Act 1996.

developing in this area[88] and, even if it appears to be comprehensive, it may not be effective to protect women and children in practice as it is dependent on judicial interpretation and the response of police and prosecutors.[89] Support services outside the law and the State may also be lacking.[90] It is also notable that Member States laws are not uniform in this area, so although they may use the same labels this may be misleading as the same behaviours may not be covered by the label used by the law.[91] The practical consequences are not revealed by a surface examination of the law. The nature of the individual State and the way it delivers its services affects how domestic violence is dealt with, and how women access services and experience the violence against them.[92] Therefore, whilst there is protection from violence in all Member States of the Union, it is by no means uniform or always effective.[93]

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[88] E.g. Hungary where a comprehensive action plan was introduced for domestic violence in 2003 and implemented in 2005. See B Rudolf, A Eriksson "Women's Rights under International Human Rights Treaties: Issues of Rape, Domestic Slavery, Abortion and Domestic Violence" (2007) 5 International Journal of Constitutional Law 507, 519; *AT v Hungary* Communication No.2/2003, views adopted by the CEDAW-Committee on 26th January 2005; Report of the Committee on the Elimination of Discrimination Against Women, 32nd Session, UN Doc. A/60/38(Part I) 27 (2006).

[89] *Op. cit.* Platek, n8.

[90] *Op. cit.* Chatzifotiou, Dobash, n8, 1026.

[91] C Delphy "The European Union and the Future of Feminism" in R Elman (editor) *Sexual Politics and the EU: The New Feminist Challenge* (Bergahan Books, Oxford, 1996), 154.

[92] J Hanmer "The Common Market of Violence" in R Elman (editor) *Sexual Politics and the EU: The New Feminist Challenge* (Bergahan Books, Oxford, 1996), 131.

[93] *Ibid.* For a full survey of the laws of the European States in relation to domestic violence see *op. cit.* Hagemann-White, Bohn, n8; European Women's Lobby Study *Unveiling the Hidden Data on Domestic Violence in the European Union* November 1999.

In a return application, the court's assumption that women and children can be protected from post separation violence is a presumption about an issue which is far from certain. Although it would be inappropriate to make a detailed inquiry into the type and effectiveness of protection on return because of the summary nature of return applications, it is perhaps questionable how far these presumptions should be taken. Judicial comity and *forum conveniens* are strong principles in private international law but should not be pursued to the detriment of individual's well being.

Regulation 2201/2003 is arguably forcing Member States to trust one another's domestic legal systems and protections against domestic violence as part of the emphasis in European private international law on mutual recognition and trust. Mutual trust is essential for the operation and effectiveness of all private international law and for the effective administration of Regulation 2201/2003. However, unusually Article 11(4), Regulation 2201/2003 allows Member State courts to assess the protections provided by another Member State. Although the child may be returned despite the existence of a grave risk of harm as a result of this provision, it may also provide more protection for children, and potentially women also. There is a tension between the emphasis on mutual trust and the element of judgment on other Member States protection systems.[94] It may, to some degree, weaken the assumption of effective protection on return as courts examine the actual circumstances and protections available. The emphasis does remain on return and protection though and given the reinforcement of the principle of return in Regulation 2201/2003, it may be appropriate for the EU to guarantee forms of protection from domestic violence in all the Member States. The feasibility,

[94] See *Chapter Three*, 4.2.4.

appropriateness and action already taken on this issue, and the possibilities for future action at European level, will be the focus of the next section.

4. The EU's Role in Tackling Domestic Violence

There is a history of activism at EU level in relation to domestic violence with the European Parliament's Committee on Women's Rights and Gender Equality and Women MEP's being particularly vocal.[95] Eradicating gender based violence and trafficking now forms a key focus for the European Union as part of the aims of the Roadmap for Gender Equality 2006-2010.[96] The European Economic and Social Committee (EESC) stated that:

'Although the main responsibility for combating domestic violence lies with the Member States, the EESC believes there is urgent need for a pan-European strategy given that the responses of the individual countries vary widely.'[97]

The degree of intervention is limited at EU level by its competence to legislate which has meant that projects are dependent on the political will

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[95] *Op. cit.* Hanmer, n92, 139; European Parliament Report on the Current Situation in Combating Violence Against Women and Any Future Action 9th December 2005 (2004/2220(INI)).

[96] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions "A Roadmap for Gender Equality 2006-2010" COM(2006) 92 final, 1st March 2006, point 4.

[97] Opinion of the European Economic and Social Committee "Domestic Violence Against Women" SOC/218, 16th March 2006, point 1.3.

and innovation of individual women politicians.[98] However, as Walby suggests:

'There has been a globalization of demands to restrict men's violence against women by the use of legal regulation and to provide resources to women who have suffered such violence.'[99]

This development will affect international bodies such as the EU. This section will explore the extent to which this activism has resulted in legislative responses to protect women from violence across the EU, considering first the Daphne Programmes for tackling violence against women and children. Secondly the competence of the EU under Article 13 EC will be examined to contemplate the possibility of legislation characterising domestic violence as a form of sex discrimination, actionable under either the civil, or even the criminal law.

4.1. The Daphne Programmes

The Daphne Programme is based on the Article 152 EC competence relating to public health and was instigated by Anita Gradin, a Justice and Home Affairs Commissioner.[100] This is not a harmonising competence. Article 152 limits Community action to complementing Member State action on public health issues and encouraging cooperation between Member States and providing incentive measures for the improvement of public health, but without harmonising the law.

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[98] M Stratigaki "Gender Mainstreaming *vs* Positive Action: An Ongoing Conflict in EU Gender Equality Policy" (2005) 12 European Journal of Women's Studies 165, 179.

[99] S Walby "Feminism in a Global Era" (2002) 31 Economy and Society 533, 540.

[100] *Op. cit.* Stratigaki, n98, 179.

The Daphne Programme is now in its third phase[101] which will run from 1st January 2007 to 31st December 2013[102] following Decision 779/2007 EC. This Daphne Programme is part of a wider programme on Fundamental Rights and Justice and covers issues of violence against children, young people and women. It is not therefore specific to domestic violence, although its scope encompasses this form of violence against women. Article 2(1), Decision 779/2007 gives the general objective of the Programme as:

'...to contribute to the protection of children, young people and women against all forms of violence and to attain a high level of health protection, well-being and social cohesion.'

Recital 3, Decision 779/2007 highlights the fact that such violence is widespread throughout the Community and constitutes a fundamental rights violation as well as being an obstacle to the enjoyment of safe, free and just citizenship. The Programme is linked to citizenship and rights, as well as being regarded as a health problem. Recitals 12 and 13 recognise the role of domestic violence and also the idea that children witnessing a near relative being assaulted should be regarded as victims.

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[101] Daphne I: Decision No 293/2000/EC adopting a programme of Community action (the Daphne programme) (2000 to 2003) on preventive measures to fight violence against children, young persons and women OJ [2000] L 34, 24th January 2000; Daphne II: Decision No 803/2004/EC adopting a programme of Community action (2004 to 2008) to prevent and combat violence against children, young people and women and to protect victims and groups at risk (the Daphne II programme) OJ [2004] L 143, 21st April 2004; Daphne III: Decision No 779/2007/EC establishing for the period 2007-2013 a specific programme to prevent and combat violence against children, young people and women and to protect victims and groups at risk (Daphne III programme) as part of the General Programme 'Fundamental Rights and Justice' OJ [2007] L 173, 3rd July 2007.

[102] Article 1(2), Daphne III Decision 779/2007.

As the legal basis is Article 152 EC, these issues are framed as health issues and the programme is limited in its actions. The Programme does not harmonise laws, it instead provides for:

'...dissemination and exchange of information, experience and good practices; the promotion of an innovative approach; the joint establishment of priorities; the development of networking as appropriate; the selection of community wide projects and European wide awareness raising campaigns against violence.'[103]

The Daphne Programmes carry out these objectives by providing money grants[104] to organisations working in the area of violence against women, with the focus on cross-border projects.[105] The beneficiaries of these projects include migrants, an important issue in the context of free movement of persons within Europe.[106] The majority of projects have dealt with gender based violence, family violence, sexual violence and violence against minorities.[107] The organisations pursue a range of objectives relevant to Daphne, including exchange of good practice, research,

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[103] Preamble Recital 14, Decision 779/2007.

[104] Article 8, Decision 779/2007.

[105] European Commission "The Daphne Experience 1997-2003", 24. Of the projects funded by Daphne almost all covered more than one Member State and some covered all the Member States of the old EU 15. European Commission "Europe Against Violence: Campaign Messages and Materials from Daphne Programme Projects", 1. Available from http://ec.europa.eu/justice_home/funding/2004_2007/daphne/funding_daphne_en.htm last accessed 21st July 2008.

[106] *Op. cit.* Commission Daphne Experience, n105, 24.

[107] *Ibid.*, 25.

information campaigns and improving the understanding of violence.[108] The projects include providing support to victims and families affected by violence and the treatment of offenders.[109]

The Programme therefore contributes to raising awareness, and increasing protection of women and children from violence, including domestic violence, across Europe. Proposals are evaluated on their contribution at a European, rather than a domestic, level and in providing transferable results with indicators.[110] The aim is to develop transnational comparison and analysis to allow recommendations to be made with relevance across borders.[111] Although the projects have an awareness of difference, the aim is to build this into an analysis of the similarities to facilitate cross border practice exchange.[112] The Commission regards this as supporting the work of organisations, including NGO's, to protect women and children and raise awareness about violence.[113] 12% of projects were felt to have had an impact on Member State legislation and the high level of response indicates that the Daphne Programme meets a clearly felt need within

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[108] *Ibid.*, 29.

[109] *Ibid.*

[110] C Montoya "The European Union, Capacity Building and Transnational Networks: Combating Violence Against Women Through the Daphne Programme" (2008) 62 International Organization 359, 362.

[111] *Op. cit.* Commission Europe Against Violence, n105, 1.

[112] *Ibid.*, 2.

[113] European Commission "Final Report to the European Parliament and the Council on the Daphne Programme (2000-2003)", COM(2004) 824 final, March 2004, 46.

European society.[114] The Commission argues that the Daphne Programme impacts: *'...on slowly changing social perceptions of violence and the development of EU and national policies'.*[115] It is also thought to be *'...contributing to the creation of a common framework and convergence of policies throughout the Member States'.*[116]

These soft forms of intervention allow the Union's policy to extend into the area of gender based violence without an explicit Treaty base.[117] National diversity may demand different solutions and this gives opportunities for deliberation, systematic comparisons and learning beyond the State context.[118] The diversity between Member State laws is an asset in these circumstances, as many different policies on the same issue may be tried out at once.[119] It allows the EU to

'...engage all stakeholders, seek new solutions to seemingly intractable problems, spread best practices, seek common goals without insisting on uniform measures and ensure easy and rapid revisability of norms and objectives as knowledge accumulates.'[120]

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[114] *Ibid.*

[115] *Ibid.*

[116] *Ibid.*

[117] A Schäfer "Resolving Deadlock: Why International Organisations Introduce Soft Law" (2006) 12 European Law Journal 194, 206-7.

[118] *Ibid.*, 196-8.

[119] D Trubek, L Trubek "Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-Ordination" (2005) 11 European Law Journal 343, 348.

[120] *Ibid.*, 347.

This is a form of harmonisation without sanction, involving little centralised EU action, but there is an indirect impact on the content of Member State law. This impact may have cross-border implications because of the regional nature of the projects and the aim of sharing expertise, best practice and information. It provides a new direction which women's movements can utilize to develop expertise and capacity across borders.[121] The Programme can provide money, but also expertise and information to women's groups, and Montoya argues that:

'The distribution of these resources can potentially play an important part in expanding the capacity of local organizations to more effectively combat violence against women.'[122]

However, the conceptualisation of the Daphne Programme may potentially hamper its effectiveness as a means of undermining the incidence of domestic violence, or violence against women and children more generally. The Treaty basis for Decision 779/2007 is Article 152 EC, the health competency, which, even though fundamental rights issues are highlighted and action is directed at violence against women, means the emphasis is on the (formally) gender neutral issue of public health.[123] There is no clear analysis of the gendered nature of such violence or its roots in societal structures. Although the projects receiving funding may

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[121] *Op. cit.* Montoya, n110, 360.

[122] *Ibid.*, 364.

[123] A Krizsán, M Paantjens, I van Lamoen "Domestic Violence: Women's Problem?" Paper given at Second Pan-European Conference on EU Politics, the Implications of a Wider Europe: Politics, Institutions and Diversity, 24-6th June 2004, Bologna Italy, 18.

have a gendered perspective on the issue of violence, there is no guarantee of this. The issue of violence against women and the link with women's social subordination is therefore not recognised in the EU approach.[124] This means that the Daphne Programme has a particular content focussed on the effects rather than the underlying causes of violence.[125] Women's interests have therefore been disconnected from a feminist, or gender specific angle on the issue of violence at EU level.[126] This is indicative of the limited impact of gender equality outside of the employment sphere and illustrates the difficulty that the Union has in dealing with issues of gender and the structural nature of women's disadvantage.[127]

The Daphne Programme cannot guarantee a level of protection for women and children from domestic violence in all the Member States as it does not directly alter either the content or the enforcement of the law. The Daphne Programme should not therefore be relied on as a guarantee of a certain level of protection from domestic violence in all the EU Member States so that courts can trust that women and children will be adequately protected

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[124] *Op. cit.* Hanmer, n92, 143.

[125] *Op. cit.* Krizsán, Paantjens, van Lamoen, n123, 18.

[126] *Ibid.*, 23. Although see N Graham-Kevan "Domestic Violence: Research and Implications for Batterer Programmes in Europe" (2007) European Journal on Criminal Policy and Research for reasons why this may be appropriate. The EU's approach is in marked contrast to the Council of Europe which in Recommendation Rec(2002)5 on the protection of women against violence, adopted by the Committee of Ministers of the Council of Europe, April 2002, adopts an explicitly gendered approach to the problem of violence against women and has instigated a legislative monitoring and best practice scheme based on violence against women as a breach of fundamental rights. The European Economic and Social Committee has however recognised the relevance of this analysis in its approach see *op. cit.* European Economic and Social Committee SOC/218, n97.

[127] H Askola "Violence Against Women, Trafficking and Migration in the European Union" (2007) 13 European Law Journal 204, 204.

following an abduction motivated by domestic violence and a return order under Regulation 2201/2003 and the Hague Convention 1980.

However, the propriety of extending EC intervention to legislating for hard law remedies and protections for those who experience domestic violence is questionable given its limited competence and expertise in addressing gender equality issues beyond the employment sphere.[128] The Daphne Programmes leave the action on domestic violence issues to Member States, NGO's and women's groups with long experience of addressing such issues. The next section will consider whether the EU has the competence and should expand its role into legislating for harmonised legal remedies in relation to domestic, or gender based violence.

4.2. The Potential for EU Intervention Providing Protection from Domestic Violence

The mutual trust element of Regulation 2201/2003 and the reinforcement of the application of the return remedy between Member States means that the courts largely have to accept that a national standard is acceptable protection.[129] Even if the Article 13(b) defence threshold is reached and the court can take an active role in assessing the available protections on return the court has to trust that, on return, the measures outlined will be implemented by the Member State in question and that those national standards will be effective. There is no EU-wide negotiated form of protection or remedy for gender based violence and, in requiring return, this is forcing mutual trust between the Member States. There is therefore

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[128] *Ibid.*

[129] V Mitsilegas "The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU" (2006) 43 Common Market Law Review 1277, 1281 making this point in relation to mutual trust in criminal matters.

an argument for the EU legislating to create its own standards which can then be enforced across all the Member States. The EESC has recently highlighted the fact that violence against women arises from the unequal balance of power between men and women in society,[130] and has commented on the impact of such violence on children across the EU.[131] The EESC has stated that:

'Since domestic violence against women not only reflects gender inequality but also creates it, the EESC calls on the Commission to draw up a comprehensive strategy to address the problem, based on existing Treaty provisions.'[132]

This section will therefore examine Article 13 EC which may be relevant in this context. There are two issues central to the creation of this form of standard for combating domestic violence across Europe: first competence to legislate and the consequential form of the legislation, whether providing for civil or criminal remedies, and secondly the appropriateness of EU intervention. These issues will be dealt with in turn.

4.2.1. Competence to Legislate on Domestic Violence

The European Community has competence to *'take appropriate action to combat discrimination based on sex...'* under Article 13 EC. Any proposal requires unanimity in Council and the European Parliament is only consulted under this competence. If gender based violence is viewed as a

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[130] *Op. cit.* European Economic and Social Committee SOC/218, n97, point 1.1.

[131] Opinion of the European Economic and Social Committee "Children as Indirect Victims of Domestic Violence" SOC/247, 14th December 2006.

[132] *Op. cit.* European Economic and Social Committee, n97, point 1.3.

form of sex discrimination breaching the fundamental right to equality, the EC would have competence to legislate under Article 13 EC. The incidence of domestic violence is primarily committed by men against women, and as such it can be viewed as a form of sexism, reinforcing male power and making women vulnerable to other forms of disadvantage, including physical and emotional harm, and exclusion from employment and economic self sufficiency.[133] As Goldfarb argues the:

'...interrelationship between violence against women and other aspects of gender inequality [including] women's disproportionate rates of poverty and homelessness, as well as the constraints that actual and threatened violence place on women's ability to work, travel, move freely about the world and make choices about their lives.'[134]

Recognising domestic violence as a form of sex discrimination requires acknowledgement that women are subject to violence not only because of the relationship they have with their abuser, but also because of their status as women.[135] Although the violence is perpetrated against one individual, it has a wider effect of placing other women in fear and affecting their behaviour as well as that of an individual who directly experiences such violence.[136]

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[133] S Goldfarb "Applying the Discrimination Model to Violence Against Women: Some Reflections on Theory and Practice" (2002) 11 Journal of Gender, Social Policy and Law 251, 251-2.

[134] *Ibid.*, 256.

[135] *Ibid.*, 266.

[136] *Ibid.*, 267.

Acknowledging domestic violence as a form of sex based discrimination gives public recognition to the nature of this violence and can provide redress for this type of violence. It highlights the broader, group based reasons for the violence beyond the nature of the individual relationship between abuser and abused and challenges the characterisation of the violence as 'private'.[137] This would provide an explicitly gendered analysis of the nature of violence against women, as yet not clearly in evidence in the EU.

Millns has suggested that Article 13 EC may widen the ambit of EC sex discrimination law to include violence against women.[138] Article 13 EC states that it applies: *Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community...'*. This may mean that the Community may only adopt legislation to combat discrimination where the Community already has competence.[139] However, viewing domestic violence as a form of sex based discrimination would mean that the Community would be adopting concrete non-discrimination measures, such as those prohibiting discrimination on the grounds of sex when accessing goods and services.[140] If analogy is needed to other legislation in this area, the Daphne Programmes explicitly deal with violence against women so the EC has

[137] *Ibid.*, 268.

[138] S Millns "Gender Equality, Citizenship and the EU's Constitutional Future" (2007) 13 European Law Journal 218, 236.

[139] I Bryan "Equality and Freedom from Discrimination: Article 13 EC Treaty" (2002) 24 Journal of Social Welfare and Family Law 223, 234; L Waddington "Testing the Limits of the EC Treaty Article on Non-Discrimination" (1999) 28 Trade, Industry and Industrial Relations 133, 135.

[140] See Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ [2004] L 373/37, 21st December 2004.

already assumed competence in some form, although, as yet, not from a non-discrimination perspective.

This approach was adopted in the United States of America in the Violence Against Women Act 1994 where a civil remedy based on sex discrimination, breaching the fundamental right of equality, was created for gender based violence.[141] Although this provision was struck down by the US Supreme Court in *US v Morrison*[142] Goldfarb argues that, before it was struck down, the provision was used constructively and evidence for the gender based nature of the violence was accepted by the state courts.[143]

If the EU wishes to demonstrate its condemnation of domestic violence and provide redress for such violence across Europe it is possible for Article 13 EC to be used as the legal basis for providing a civil remedy. Equality of the sexes is regarded as a fundamental right within the EU[144] and women should therefore be protected from violence motivated by reasons of their sex. If domestic violence is regarded as a form of sex discrimination the Community could provide a civil remedy along similar lines to the US remedy. Women could petition the courts for financial

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[141] *Op. cit.* Goldfarb, n133, 260. US Violence Against Women Act 1994, 42 U.S.C. § 13981. This approach has also been adopted under the Convention for the Elimination of Discrimination Against Women 1979 in *AT v Hungary* 2/2003, judgment date 26th January 2005. See *op. cit.* Rudolf, Eriksson, n88.

[142] (2000) 529 U.S. 598 for breaches of the Commerce Clause and the 14th Amendment to the Constitution i.e. Congress had interfered unduly with the states' right to legislate.

[143] E.g. expressions used during the violence about the nature of the woman was accepted as evidence of the gender based nature of the violence see *op. cit.* Goldfarb, n133, 261.

[144] Case 149/77 *Defrenne III* [1978] ECR 1365, paragraphs 26 and 27; Article 23, Charter of Fundamental Rights of the European Union OJ C 364/1, 18th December 2000.

compensation for the abuse they suffered as a result of gender based violence, breaching their fundamental right to equality.

It is also theoretically possible for the EC to adopt criminal sanctions for gender based violence if it is characterised as a form of sex discrimination under Article 13 EC. The Community can adopt criminal sanctions where necessary for the enforcement of EC law.[145] The ECJ has stated in relation to environmental offences that:

'...when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.'[146]

It is as yet unclear whether this competence is restricted to environmental protection,[147] but the Community should only adopt criminal sanctions where it is both necessary and consistent with other obligations under the Treaty.[148]

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[145] Case C-176/03 *Commission v Council (Environmental Protection)*, [2005] ECR I-7879, paragraph 48.

[146] *Ibid.* For the Commission's response to this judgment see Communication from the Commission to the European Parliament and the Council on the Implications of the Court's Judgment of Case C-176/03 *Commission v Council* COM(2005) 583 final/2, 24th November 2005.

[147] See Case C-440/05 *Commission v Council (Ship Source Pollution)* judgment of 23rd October 2007 which casts doubt on whether this principle has broader application, although Case C-91/05 *Commission v Council (Small Arms)* judgment of the 5th July 2008, paragraph 60, establishes that criminal legislation must be adopted under the EC pillar if it is possible to do so, rather than under the Title VI, EU Treaty, on Police and Judicial Cooperation in Criminal Matters (the third pillar).

[148] *Op. cit.* Commission COM(2005) 583 final/2, n146, 5.

The area of domestic violence protection and sex discrimination is unlikely to be regarded as an area where it is *necessary* for the Community to adopt criminal sanctions, as the Member States will have done so already in various forms. Criminal sanctions would be a more symbolic condemnation of domestic violence at European level, by European society, requiring State action as an infringement of the criminal law. Civil remedies, although more likely as a legislative solution, do not have the same resonance as the emphasis remains on the individual experiencing the violence, rather than condemnation by a community as a whole. If it was possible for the EC to adopt criminal sanctions for gender based violence this would create a harmonised offence relating to domestic violence across the EU. Alternatively, if it adopted a civil remedy, women would have the same rights of redress against an abuser across all the Member States. This would provide a measure of guaranteed redress from violence, and in the case of criminal sanctions, a form of protection as well.

In using the principle of sex discrimination creatively and applying it outside of the employment sphere to the issue of gender based domestic violence, the Community could provide a certain degree of guaranteed protection from domestic violence in all States. By guaranteeing a basic level of protection there may be more willingness to return women and children following an abduction motivated by domestic violence under Regulation 2201/2003. However, this does not mean that this form of action is either appropriate or desirable.

4.2.2. Appropriateness and Potential Effectiveness of EU Intervention

The creation of either a civil remedy or a criminal sanction based on Article 13 EC may sound desirable. However, the idea of a criminal

sanction in particular would be highly controversial and any action in this area may not be appropriate or effective.

In taking action on sex discrimination in this way, the Community may infringe the principle of subsidiarity. Under Article 5 EC the Community may only take action

'...only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.'

Given that all the Member States have some protections in place to combat domestic violence at a domestic level[149] it may be questionable whether the Community would be achieving anything that the Member States alone cannot. This may infringe the principle of subsidiarity. However, if the Community was seeking to provide a basic level of protection or redress for women across the EU, *only* the Community would have the power to define a certain level of protection in all the Member States. This would remain highly controversial, particularly given the very direct form of intervention in the private family sphere that this would entail, and, given that Article 13 EC requires unanimity in Council, may mean that it was politically unfeasible.[150] Waddington argues that the requirement of unanimity poses a major hurdle to ambitious legislation under Article 13 EC because of Member State concerns about conflict with national policy

[149] See *op. cit.* Hagemann-White, Bohn, n8; *op. cit.* European Women's Lobby, n93.

[150] *Op. cit.* Waddington, n139, 140.

and the financial implications.[151] Both factors would be in evidence in the form of legislation suggested.

Additionally, as there is doubt over the effectiveness of the State in securing protection from domestic violence, there has to be greater questions over whether a supranational body with limited competence and lacking in gender expertise should intervene. The patriarchal nature of the State and the use of the law in combating domestic violence have been identified as problematic because of the masculine nature of both.[152] This criticism would extend equally to the EU, which remains relatively impervious to feminist concerns.[153] Whether any legal remedies provided by Community action would be better at combating violence than localised State remedies would be doubtful. However, the fact that the EU was publicly taking action on its commitments to eradicate violence[154] and providing routes for women's redress to secure their fundamental right of equality could perhaps be valuable. Just as engaging with the State is worthwhile,[155] it is necessary to engage also with the EU as sovereignty in areas affecting women is increasingly transferred.[156]

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[151] *Ibid.*

[152] C MacKinnon *Toward a Feminist Theory of the State* (Harvard University Press, Cambridge, 1989), 160.

[153] J Shaw "The European Union and Gender Mainstreaming: Constitutionally Embedded or Comprehensively Marginalised?" (2002) 10 Feminist Legal Studies 213, 226.

[154] *Op. cit.* Commission COM(2006) 92 final, n96, 18.

[155] *Op. cit.* Lewis, Dobash, Dobash, Cavanagh, n14, 114.

[156] J Shaw "Importing Gender: the Challenge of Feminism and the Analysis of the EU Legal Order" (2000) 7 Journal of European Public Policy 406, 414.

The EU however is a multi-level polity. EC law is implemented in the gender order of each individual Member State.[157] Even if such hard law was adopted, protection from domestic violence would still vary between the Member States depending on the particular cultural circumstances, despite European harmonising forces.[158] This domestic implementation 'filter' means that changes towards gender equality may be resisted at a national level where the new law challenges national patterns.[159] The uniform interpretation of EC law can be enforced by the ECJ.[160] This could assist to alter these national patterns, but this would depend on receptive judicial interpretation at the ECJ and a willingness to effectively implement such EC law.

In these circumstances it may be that the Daphne Programme of encouraging best practice and expertise exchange may be more constructive. This is more flexible and is linked to national contexts, which in relation to domestic violence, as a social and cultural issue, may be very important. Given the level of diversity between the Member States, it is questionable whether the EU can effectively legislate for all. In these circumstances, big overarching laws may not be enough to challenge individual circumstances and the difficulties of implementation in the

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[157] M Pollack, E Hafner-Burton "Mainstreaming Gender in the European Union" (2000) 7 European Journal of Public Policy 432, 437.

[158] *Ibid.*

[159] U Liebert "Europeanising Gender Mainstreaming: Constraints and Opportunities in the Multi-level Euro-Polity" (2002) 10 Feminist Legal Studies 241, 247.

[160] The ECJ would have jurisdiction over any Article 234 EC preliminary references on the interpretation of any legislation. The Commission would also be able to bring enforcement action under Article 226 EC for any Member State who persistently failed to enforce EC law in this area.

national legal system. Legislating would give hard, enforceable rights, but this does not mean that women will have access to that right, or that it will be properly implemented,[161] particularly given the nature of the EU.

Legislation alone will never be enough to eradicate domestic violence as much wider social change is needed, but it can form an important symbolic condemnation.[162] Combating violence against women is regarded as a priority for the EU.[163] The European Economic and Social Committee argues that:

'...one of the most important functions of a European policy based on respect for fundamental human rights is to prevent such acts and to establish effective educational, preventive, law enforcement and support procedures.'[164]

In the developing atmosphere focussing on the relevance of fundamental rights at EU level, the nature of domestic violence should perhaps be acknowledged and addressed. It is an enormous social problem and its cost for the women affected restricts their ability to participate as citizens and infringes their fundamental rights. Domestic violence is an aspect of female oppression more generally and as such is a form of sex

[161] *Op. cit.* Goldfarb, n133, 257.

[162] *Op. cit.* Musgrove, Groves, n31, 234.

[163] *Op. cit.* Commission COM(2006) 92 final, n96, 18.

[164] *Op. cit.* European Economic and Social Committee SOC/218, n97, point 1.1.

discrimination.[165] Domestic violence may infringe a woman's right to be free of inhuman and degrading treatment under Article 3, ECHR. Article 3 requires positive State intervention to protect individuals from other people's actions, justifying State action.[166] It may also infringe a woman's right to privacy because of the invasion to bodily and psychological integrity under Article 8, ECHR.[167] There is therefore an obligation on States and perhaps also on bodies such as the EU to act to protect women from this form of violence.[168]

Domestic violence also affects women's ability to participate as citizens. Elman argues that male violence poses a crucial obstacle to women's participation in, and potential to benefit from, European integration.[169] Women's freedom of movement and ability to work may be significantly affected by domestic violence because *'...violence undermines women's ability to function as economic actors and exacerbates their economic inferiority to, and dependency on, men.'*[170]

In a market oriented EU this clearly has resonance. Elman states that:

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[165] S Chaudhry, J Herring "Righting Domestic Violence" (2006) 20 International Journal of Law, Policy and the Family 95, 111.

[166] *Z and Others v United Kingdom* (2002) 34 EHRR 3; *ibid.*, 97.

[167] *Op. cit.* Chaudhry, Herring, n165, 98.

[168] *Op. cit.* Rudolf, Eriksson, n88, 520.

[169] A Elman "Testing the Limits of European Citizenship: Ethnic Hatred and Male Violence" [2001] National Women's Studies Association Journal 13, 49.

[170] *Op. cit.* Goldfarb, n133, 257.

'European citizenship is grounded in free market ideology with its related rights often predicated on calculations of the bottom line and not on the intrinsic value of persons and/or sexual equality.'[171]

To develop citizenship beyond the 'bottom line' the EU should be prepared to try new directions in securing its citizen's rights and protecting them from violence.[172] The focus on sex equality in employment ignores the difficulties women may have in accessing the public sphere due to the violence they suffer in private.[173] Lombardo argues that the reason the EU's gender equality policies have only had limited impact so far is because it has failed to address any issues outside the employment context.[174] She argues that the EU requires a more holistic approach to gender equality which challenges structural disadvantages such as domestic violence.[175] In doing so, the nature of the State, and perhaps the Union, could in fact be changed[176] and women's lives as citizens improved. This would constitute a significant contribution to a peaceful

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[171] *Op. cit.* Elman, n169, 54.

[172] S Walby "Is Citizenship Gendered?" (1994) 28 Sociology 379, 388.

[173] C McGlynn "EC Sex Equality Law: Towards a Human Rights Foundation" in T Hervey, D O'Keeffe (editors) *Sex Equality in the European Union* (John Wiley, Chichester, 1996), 244.

[174] E Lombardo "EU Gender Policy: Trapped in the 'Wollstonecraft Dilemma?" (2003) 10 European Journal of Women's Studies 159, 167.

[175] *Ibid.*, 171.

[176] See M Dempsey "Toward a Feminist State: What does the 'Effective' Prosecution of Domestic Violence Mean?" (2007) 70 Modern Law Review 908.

Europe, respectful of equality and human rights, beyond guaranteeing protection to those who have fled violence with their children.

The Daphne Programme has highlighted the demand for cross-border co-operation on domestic violence in Europe.[177] It is a need apparently also felt by European citizens. In a Eurobarometer survey in 1999, 67% of Europeans believed that domestic violence was an area in which the EU should 'definitely' be involved in.[178] If the EU is genuinely concerned about the equality and human rights of its women citizens domestic violence may be an issue which requires further attention from a gender based perspective. Article 13 EC provides a legal basis for anti-discrimination measures outside of the internal market context and could therefore provide the competence and the opportunity for the Community to pursue such a policy.[179]

5. Conclusions

This chapter has analysed the ability of the EU to tackle domestic violence outside the context of private international law measures, to protect all women but particularly those who are returned to their habitual residence with their child following an unlawful abduction. It is clear that, although the protections from domestic violence available in England and Wales may be improving, the assumption of uniform protection on return may be

[177] *Op. cit.* Commission COM(2004) 824 final, n113, 46.

[178] Eurobarometer 51.0 "Europeans and their Views on Domestic Violence Against Women" June 1999, 103.

[179] A Masselot "The State of Gender Equality Law in the European Union" (2007) 13 European Law Journal 152, 155.

unwarranted. Although only focussing on England and Wales, this analysis is likely to be similar in other EU Member States.

Given that the assumption that the protections from domestic violence available under any national law are satisfactory is to some degree unwarranted, this chapter has examined whether the EU can provide protection *outside* the private international law context through other competences of European law. The EU has been active in condemning violence against women and children but, because of its constitutional nature which relies on attributed competences, its legislative action has so far been limited. The Daphne Programmes, instigated under Article 152 EC provide a soft, non-harmonising approach to violence against women, encouraging NGO action across borders. Its form is responsive to the differing national contexts and projects dealing with domestic violence have been funded, although it is not directed solely at this social problem. The Daphne Programmes, although encouraging national activism do not guarantee protection from domestic violence across the Member States.

In order to guarantee this protection, an examination of the EC's competence to develop legislative measures, applicable across the Member States, based on Article 13 EC, to address domestic violence has been conducted. This form of legislation could aid women's citizenship status, protecting their human rights and their autonomy. Although it has been argued that this is a possibility which could protect women from domestic violence outside the private international law context, it is unlikely to be politically viable to legislate in this context for either civil, or particularly criminal, remedies. As a result, the space for addressing domestic violence as an aspect of gender equality at European level are likely to be restricted by the lack of political will.

Chapter Seven will therefore continue the analysis of the EC's ability to address equality issues including domestic violence through its legislative architecture by focussing on the gender mainstreaming strategy. Since domestic violence cannot clearly be addressed by the EU to protect women on return, it must be questioned whether abduction due to domestic violence was considered during the passage of Regulation 2201/2003 and what space was given to gender equality during the legislative process. The issue of domestic violence will be considered alongside factors highlighted in *Chapter Four* to discover whether the issue of gender was accounted for during the passage of Regulation 2201/2003 and to what extent the European Commission's policy of gender mainstreaming was successful in the private international law context.

Chapter Seven

IMPLEMENTING GENDER MAINSTREAMING: THE DEVELOPMENT OF REGULATION 2201/2003

1. Introduction

This chapter will examine whether the EU architecture has the capacity to create a space for gender concerns during the legislative process. It will focus on child abduction and private international family law to highlight the difficulties of getting issues of gender relations addressed during the negotiation of legislation at European level, amidst the other legal policy factors competing for legislative space. Given that the EU is increasingly dealing with legal areas such as abduction and private international family law more generally it is important that it has the processes and capacity to consider the role and effects of gender during the shaping of legislation. This chapter will therefore examine the Regulation 2201/2003 proposals for any consideration of gender raised therein to analyse the 'space' given to such issues in this context.

At EU level gender equality aims are subject to various political forces, but gender equality is to be pursued in all areas of EC competence under Article 3(2) EC, which will include private international law. This chapter aims to explore how this aim has been carried out through the implementation of the strategy of gender mainstreaming by taking the example of Regulation 2201/2003 and child abduction in particular. Gender mainstreaming is a strategy which the Commission has developed

at EU level since 1996[1] and is aimed at incorporating 'gender' into the policy and lawmaking process, addressing issues which affect the sexes differently before the act or law comes into force. It is therefore aimed at creating a space for gender equality factors in all legislation developed at EU level.

This chapter will examine what a gender mainstreaming strategy is, or what it is supposed to achieve, and whether it was applied effectively in the passage of Regulation 2201/2003. The issues relating to women identified in *Chapters Three, Four* and *Five* will be used to demonstrate that, although the gender mainstreaming strategy has the potential to secure a 'space' for gender issues in proposals on private international law, alongside other legitimate legal aims, this has not yet been achieved and was not a factor in the drafting of Regulation 2201/2003. It will be argued that there is no clear evidence that a mainstreaming policy was applied to Regulation 2201/2003, and furthermore that any notion of equality pursued through mainstreaming at EU level seems to be based on a liberal similarity based conception of equality.

2. What is 'gender mainstreaming'?

2.1. The Development of Gender Equality Policy and Gender Mainstreaming in the EC

Since the Treaty of Amsterdam gender mainstreaming has been based on Article 3(2) EC which requires that *'...the Community shall aim to eliminate inequalities, and to promote equality, between men and women'*. Gender mainstreaming had been a Commission policy for a lengthy period

[1] European Commission "Incorporating Equal Opportunities for Women and Men into all Community Policies and Activities" COM (1996) 67 final.

before this, becoming a formalised policy tool in 1996.[2] The Commission has defined gender mainstreaming as:

'The systematic integration of the respective situations, priorities and needs of women and men in all policies and with a view to promoting equality between women and men and mobilizing all general policies and measures specifically for the purpose of achieving equality by actively and openly taking into account, at the planning stage, their effects on the respective situation of women and men in implementation, monitoring and evaluation'[3]

This definition highlights some of the key elements of gender mainstreaming. It promotes equality between men and women in all areas of policy by considering the gendered dimensions of all policies before they are put into action. It is a pre-emptive strategy, trying to 'gender proof' a policy instead of addressing the consequences of a policy once it is in place.[4]

The EU has a history of addressing the issue of equality between men and women and gender mainstreaming is the most recent strategy. This has

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[2] *Ibid.* For the history of gender mainstreaming at EU level see M Stratigaki "Gender Mainstreaming *vs.* Positive Action: An Ongoing Conflict in EU Gender Equality Policy" (2005) 12 European Journal of Women's Studies 165.

[3] *Op. cit.* Commission COM (1996) 67 final, n1, 2. Mainstreaming has also been encouraged by policies on the equal participation of men and women at European level, see Council Recommendation 96/694 EC on the balanced participation of men and women in the decision making process OJ [1996] L 319/11 and Commission Decision 2000/407/EC relating to gender balance within the committees and expert groups OJ [2000] L 154/34.

[4] S Nott "Accentuating the Positive: Alternative Strategies for Promoting Gender Equality" in F Beveridge, S Nott, K Stephen *Making Women Count* (Ashgate, Aldershot, 2000), 262.

grown from Article 141 EC (ex Article 119 EC)[5] which dealt with equal pay. Booth and Bennett identify three phases in the development of the EU's equality policies: the equal treatment perspective, the women's rights perspective and the gender perspective.[6] The first phase was based on equal treatment of men and women and is illustrated particularly in the equal pay provisions of the EC Treaty and the Directives based upon this competence.[7] Beyond formal legal requirements of equality, the second phase covered positive action which aims to '*...compensate for the adverse effects of differences between the sexes by putting in place positive initiatives to advance and improve the situation of women.*'[8] The aim of positive action policies is equality of outcome based on women's rights,[9] rather than just equality of legal rights and at EU level this has provoked a debate over the legality of positive discrimination in favour of women in the ECJ.[10] The final phase is the adoption, by the Commission in particular, of gender mainstreaming strategies as part of a gender perspective approach based on the valuation of difference and the management of

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[5] Article 141 EC (and ex Article 119 EC) has direct effect. Case 43/75 *Defrenne v Sabena* [1976] ECR 455.

[6] C Booth, C Bennett "Gender Mainstreaming in the European Union: Towards a New Conception and Practice of Equal Opportunities" (2002) 9 European Journal of Women's Studies 430, 432.

[7] See Directive 2006/54 EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ [2006] L204/23, 26th July 2006, on equal access to employment and working conditions, including pay.

[8] *Op. cit.* Nott, n4, 260.

[9] *Op. cit.* Booth, Bennett, n6, 434.

[10] Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051, and Case-409/95 *Marschall v Land Nordrhein Westfalen* [1997] ECR I-6363, concluding that positive discrimination is legal in some circumstances, subsequently confirmed by amendment to Article 141(4) EC.

diversity.[11] Booth and Bennett emphasise that all of these perspectives are part of the EU's approach to equality.[12] However it has been argued that the gender mainstreaming strategy represents a new development in the EU's approach to equality because:

'Tackling inequality is no longer about finding the right policy, but about ensuring all policies are right...'[13]

The commonly cited Council of Europe definition highlights that the participants in the process of gender mainstreaming are not bodies or individuals specifically charged with promoting or securing gender equality, but the normal policy makers as it requires:

'...the (re)organisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy making.'[14]

Chapter Two highlighted that gender mainstreaming can be viewed as an aspect of the development of European citizenship which requires the pursuit of a substantive equality for men and women. The pursuit of equal

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[11] *Op. cit.* Booth, Bennett, n6, 434.

[12] *Ibid.*, 432.

[13] F Beveridge, S Nott, K Stephen "Moving Forward with Mainstreaming" in F Beveridge, S Nott, K Stephen *Making Women Count* (Ashgate, Aldershot, 2000), 278.

[14] Report of the Specialists on Gender Mainstreaming, Council of Europe, 1998, part 1, point 3 available at: http://www.coe.int/t/e/human_rights/equality/02._gender_mainstreaming/eg-s-ms(1998)2rev+1.asp#P92_19122, last accessed 4th July 2008.

citizenship for men and women mandates innovation at European level to anchor equality norms in the policy making of the Community institutions.[15] The next section will examine further the potential of the mainstreaming of gender and what this strategy requires to be effective in changing the approach to equality issues at European level.

2.2. The Potential and Difficulties of Gender Mainstreaming Strategies

Feminists have welcomed gender mainstreaming as a strategy for change focussing on organisational processes, structures and culture which has the potential to challenge embedded assumptions in policy.[16] Beveridge and Nott argue that mainstreaming may eventually widen the view of inequality past economic concerns to all areas of policy making, developing a 'feminist' rather than a liberal state view of 'the problem' to be tackled through legislative action.[17] The widening of policy concerns beyond economic inequality is particularly important in the EU context because of its economic roots and the nature of its equality policies based on Article 141 EC centred around equal pay. In this sense, mainstreaming can be transformative because, as Walby states, it should allow policy makers to *'...grasp more adequately a world that is gendered...'*.[18] By putting gender at the core of policy, the strategy has the potential to change the questions that are asked and the conclusions that are reached about a

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[15] J Shaw "The Many Pasts and Futures of Citizenship of the European Union" (1997) 22 European Law Review 554, 563.

[16] M Daly "Gender Mainstreaming in Theory and Practice" (2005) 12 Social Politics 433, 440.

[17] F Beveridge, S Nott "Mainstreaming: A Case for Optimism and Cynicism" (2002) 10 Feminist Legal Studies 299, 305.

[18] S Walby "Gender Mainstreaming: Productive Tensions in Theory and Practice" (2005) 12 Social Politics 321, 321.

policy and as such has been viewed by feminists as an opportunity to advance gender politics.[19]

Gender mainstreaming has also proved tremendously popular with policy makers, becoming a widely adopted policy tool.[20] However, it is presented as a desirable concept, or process, with no accompanying analysis of gender, gender relations, or the tools to achieve mainstreaming, such as gender impact assessments.[21] Although the definitions adopted by various bodies identified in section 2.1 address the elements of 'gender mainstreaming', it is unclear exactly what mainstreaming is intended to secure and how it should work in practice.

A central problem is identifying the type of 'equality' that mainstreaming pursues as either 'sameness', 'difference' or diversity.[22] The concept of equality to be pursued has an important impact on defining the objectives, and the outcomes, of mainstreaming strategies as it defines whether a policy will countenance addressing the sexes differently depending on their circumstances.[23] Treating men and women 'the same' has been demonstrably ineffective in addressing the substantive inequality of

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[19] *Op. cit.* Beveridge, Nott, n17, 310.

[20] *Op. cit.* Daly, n16, 434.

[21] *Op. cit.* Stratigaki, n2, 175.

[22] *Op. cit.* Walby, n18, 326.

[23] *Ibid.*; M Verloo "The Development of Gender Mainstreaming as a Political Concept for Europe" Gender Learning Conference, Leipzig, 6-8th September 2002.

women and men.[24] Equality is premised on the universal legal subject, which conforms to the male standard. As the dominant group in society it is inevitable that a comparison between the position of women and men seeks to accord the position of men to women.[25] If the conception of equality embodied in mainstreaming strategies is to treat women and men 'the same' it will have the inevitable effect of assessing women's behaviour against the standard of a male norm.[26]

The essentially complex nature of the inequality that women experience is denied by formulaic approaches to equality.[27] Conceptions of individual discriminations fail to account for the intersectionality of discriminatory inequalities, for example the differing experience of a black woman.[28] By focusing on one experience the reality of a woman's experience is lost[29] and women's disadvantage is reduced to biological difference.[30]

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[24] D Majury "Strategizing in Equality" in M Fineman, N Thomadsen (editors) *At the Boundaries of Law: Feminism and Legal Theory* (Routledge, New York, 1991), 323.

[25] *Ibid.*

[26] S Fredman "European Community Discrimination Law: A Critique" (1992) 21 Industrial Law Journal 119, 120.

[27] *Op. cit.* Majury, n24, 323.

[28] O Smith "Ireland's Multiple Ground Anti Discrimination Framework - Extending the Limitations?" (2005) 8 International Journal of Discrimination and the Law 7, 9.

[29] *Op. cit.* Majury, n24, 331.

[30] *Ibid.*, 323.

At a more fundamental level, this approach to equality fails to appreciate or challenge the social disadvantage of women.[31] The law is using the abstract universalising category of the legal subject and ignores the underlying social and economic differences.[32] It deals only with the identified inequalities the law has accepted as a category and fails to challenge the circumstances giving rise to these unequal effects.[33] It creates a formal equality in law, but not a more substantive equality which would fundamentally challenge the gender power hierarchy in both the public and the private spheres.[34]

This debate is therefore central to the pursuit of equality through a mainstreaming strategy. Until the 'type' of equality is defined, it is unclear what an adverse impact on women's interests means.[35] A sameness approach to equality is much less disruptive than addressing the various inequalities that women face, adopting a 'diversity' approach, and asking fundamental questions about social disadvantage and power distribution. Putting the issue of 'gender' and these types of questions at the centre of

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[31] J Mitchell "Women and Equality" in A Phillips (editor) *Feminism and Equality* (Blackwell, Oxford, 1987), 29.

[32] *Ibid.*

[33] *Ibid.*

[34] J Sohrab "Avoiding the 'Exquisite Trap': A Critical Look at the Equal Treatment/Special Treatment Debate in Law" (1993) 1 Feminist Legal Studies 141, 147.

[35] *Op. cit.* Nott, n4, 273.

the policy process could fundamentally change the policy debates, thus having a 'transformative' effect.[36]

To achieve this requires substantial investment in making mainstreaming work in practice. This includes the development of a supportive political and organisational context[37] and training policy actors to consider the complex issue of gender and equality. It is easy to talk of mainstreaming, but to put it into practice is an expensive and time consuming process. Unless this has been carried out, it has been argued that mainstreaming can remain undefined and 'ownerless' as all policy makers are supposed to be involved, preventing any central direction or assumption of responsibility in relation to gender issues.[38]

Mainstreaming itself is inevitably *'...constructed, articulated and transformed through discourse...'*[39] and Stratigaki has argued that, at EU level, gender mainstreaming rhetoric was dominated by male decision makers.[40] This demonstrates that mainstreaming is not a neutral tool and is dependent on the methods and policies governing political interaction.[41]

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[36] E Lombardo "Integrating or Setting the Agenda? Gender Mainstreaming in the Two European Conventions on the Future of the EU and the Charter of Fundamental Rights" ECPR Conference, Marburg, 18th-21st September 2003, 5.

[37] *Op. cit.* Nott, n4, 267.

[38] *Op. cit.* Beveridge, Nott, n17, 299.

[39] *Op. cit.* Walby, n18, 338.

[40] *Op. cit.* Stratigaki, n2, 180.

[41] *Op. cit.* Beveridge, Nott, n17, 302.

This has led to the criticism that the commitment to gender equality becomes contingent on other goals rather than embedded in institutional practices.[42] In addition, Daly argues that policy and law is not determinative of society and it is unclear how a change in governance is expected to effect a change in society, i.e. achieve the equality of men and women.[43]

By placing gender, a feminist issue, and mainstreaming, a governance issue, together,[44] gender equality is made to compete as an *additional* concern in the creation of policy at EU level.[45] The actual policy frames remain unaffected;[46] gender is an additional, not embedded factor, leading Shaw to argue that it has been comprehensively marginalised at EU level.[47] This integrative effect means that gender is more important where the human face of policy is evident, but it is vulnerable to other, more important (and particularly economic) policy concerns, and does not have the transformative effects identified as possible amongst feminists.[48] This

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[42] F Beveridge "Building Against the Past: the Impact of Mainstreaming on EU Gender Law and Policy" (2007) 32 European Law Review 193, 208; *op. cit.* Stratigaki, n2, 180.

[43] *Op. cit.* Daly, n16, 447.

[44] *Ibid.*, 445.

[45] *Ibid.*, 444.

[46] *Op. cit.* Lombardo, n36, 31.

[47] J Shaw "The European Union and Gender Mainstreaming: Constitutionally Embedded or Comprehensively Marginalised?" (2002) 10 Feminist Legal Studies 213, 226.

[48] M Pollack, E Hafner-Burton "Mainstreaming Gender in the European Union" (2000) 7 Journal of European Public Policy 432, 442-452.

demonstrates the core problem with the adoption of a mainstreaming strategy for tackling women's inequality. Mainstreaming does not address the question of power[49] and as such does not necessarily disrupt the liberal, legal status quo.[50]

Despite commitments to gender mainstreaming, the EU has arguably been vulnerable to these concerns in putting the strategy into practice. Lombardo and Meier argue that in a decade gender mainstreaming has not been effectively implemented at EU level.[51] Scepticism has been expressed particularly in relation to the political commitment to the strategy at EU level, and the resources and the institutional capacity available for the mainstreaming of gender.[52] Gender mainstreaming has arguably only had an impact where gender issues were already evident in policy making, such as in DG Employment, and is only just starting to permeate other Directorates General.[53] These difficulties are compounded by the problems of participation within the multi-level EU. The European Women's Lobby, the non-governmental organisation which is the principal source on representation of women's issues at EU level,[54] has only limited resources

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[49] *Op. cit.* Stratigaki, n2, 181.

[50] J Shaw "Mainstreaming Equality and Diversity in European Union Law and Policy" (2005) 58 Current Legal Problems 255, 286.

[51] E Lombardo, P Meier "Gender Mainstreaming in the EU: Incorporating a Feminist Reading?" (2006) 13 European Journal of Women's Studies 151, 151.

[52] S Mazey "Gender Mainstreaming Strategies in the EU: Delivering on an Agenda" (2002) 10 Feminist Legal Studies 227, 238.

[53] *Ibid.*, 236.

[54] The European Women's Lobby is also funded by the Commission.

and, although viewing mainstreaming as an opportunity to feminise EU policy, has to concentrate its efforts on specific areas.[55]

It is in this institutional and policy context that Regulation 2201/2003 was developed. Gender issues should have been considered, but would be another factor amongst the other legal aims identified in *Chapter Two* relating to private international law, free movement of persons and children's and human rights. The next section will therefore explore whether the gender mainstreaming strategy was put into operation in relation to the passage of Regulation 2201/2003, and what effect it had. This will demonstrate whether the criticisms of the gender mainstreaming strategy at EU level are borne out in practice.

3. Gender Mainstreaming and the Drafting of Regulation 2201/2003

Regulation 2201/2003 was adopted under Title IV EC and Article 67(1) EC requires the use of the consultation method of legislating.[56] This means that the European Parliament has only a consultative role and the Council is not bound by any amendments the Parliament proposes. Although a generalised gender mainstreaming policy was in place at Commission

[55] *Op. cit.* Mazey, n52, 238.

[56] Article 67(2) EC allows the Article 251 EC co-decision procedure to be adopted in relation to Article 65 EC five years after the Treaty of Amsterdam came into force. The co-decision procedure has so far only been extended to Article 66 EC under Protocol (No. 35) on Article 67 of the Treaty Establishing the European Community, OJ [2006] C/321 E, 29th December 2006.

level[57] during the drafting of Regulation 2201/2003, the European Parliament's policy was still in development.[58]

It is arguably easier to pursue a gender mainstreaming approach in an area such as family law because it is explicitly gendered in its effects as it addresses men and women's social roles.[59] This section will therefore examine whether mainstreaming meant that an explicitly gendered approach was incorporated in the drafting and negotiation of the abduction provisions of Regulation 2201/2003, addressing the issues raised in *Chapters Four* and *Five* regarding abductions due to domestic violence or the nature of the family. It will explore how the gender mainstreaming strategy has been put into practice, the space given to gender issues and whether the strategy is transformative, changing the policy questions which are asked and the approach to an issue, or is it merely integrative, including a gender perspective in the debates over policy. Either of these approaches is of course preferable to a failure to consider gender issues in any form.

3.1. The Proposals for Regulation 2201/2003 and the Relevance of Mainstreaming

The first proposals on the legislation which became Regulation 2201/2003 were proposals on access rights developed by France rather than the Commission under the provisions of Article 67(1) EC (the French

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[57] Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, 'Towards a Community Framework Strategy on Gender Equality (2001-2005)', 7th June 2000, COM (2000) 335 final, 3.

[58] Committee on Women's Rights and Opportunities 'Report on Gender Mainstreaming in the European Parliament', 26th February 2003, (2002/2025(INI)).

[59] *Op. cit.* Lombardo, Meier, n51, 152.

proposal).[60] This coincided with a Commission working document[61] and proposal for a Regulation[62] (first proposal) on parental responsibility jurisdiction. The proposals were eventually withdrawn[63] and a new proposal developed. This amplified the original proposals, and repealed and replaced Regulation 1347/2000, as it covered matrimonial jurisdiction, parental responsibility, child abduction and the recognition and enforcement of judgments in one document (the second proposal).[64] This second proposal, developed under the auspices of the Directorate-General for Justice and Home Affairs, became Regulation 2201/2003.

The Commission's mainstreaming strategy should have meant that gender and the gendered nature of abduction in particular should have been highlighted and addressed during the drafting and discussion of these proposals. The Commission's 2001-2005 Framework Strategy on Gender Equality states that:

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[60] Initiative of the French Republic with a view to adopting a Council Regulation on the mutual enforcement of judgments on rights of access to children OJ [2000] C 234, 15th August 2000.

[61] Commission Working Document "Mutual recognition of decisions on parental responsibility" COM(2001) 166 final, 27th March 2001.

[62] Commission Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility COM(2001) 505 final, 6th September 2001.

[63] See Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee COM(2002) 297 final, 6th June 2002.

[64] Commission Proposal for a Council Regulation concerning the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility repealing Regulation (EC) No. 1347/2000 and amending Regulation (EC) No. 44/2001 in matters relating to maintenance COM(2002) 222 final/2, 17th March 2002.

'Future Community work towards gender equality will take the form of a comprehensive strategy, which will *embrace* all *Community policies in its efforts to promote gender equality...* '[65]

This document also highlights the persistence of structural inequalities which manifests itself in domestic violence in particular, and argues for an integrated approach to gender equality[66] focussing initiatives on five areas of intervention: economic life, equal participation and representation, social rights, civil life, and gender roles and stereotypes.[67]

3.2. The Implementation of Gender Mainstreaming

3.2.1. The Commission's Proposals

A gender perspective should therefore have been part of the Commission's working document and first proposal on parental responsibility rights as it is a policy with *'...a direct or indirect impact on the lives of women and men.*'[68] However, it is clear from the working document and the first proposal that no gender impact assessment was carried out, and that gender was not integrated into the questions that were asked about the policy area of abduction in particular. The Commission's working document does acknowledge the changing nature of families, the increasing numbers of international families and family breakdowns.[69] The central aim of the

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[65] *Op. cit.* Commission COM(2000) 335 final, n57, 3. Author's emphasis.

[66] *Ibid.*

[67] *Ibid.*, 4.

[68] *Ibid.*, 3.

[69] *Op. cit.* Commission COM(2001) 166 final, n61, 2.

working document is to develop mutual recognition of family law judgments through a Regulation on parental responsibility, and to promote the Tampere aims in developing an area of freedom, security and justice in Europe.[70]

In relation to child abduction the Commission draws on the French proposal which guaranteed the return of a child retained after a period of access.[71] The Commission identifies the Hague Convention 1980 Article 13(b) grave risk of harm defence as needing more limitations on its use to prevent parents from *'blocking the return of the child'*.[72] There is no examination of the reasons for the use of Article 13(b), the motivations for abductions or consideration of abductions by primary carers. This highlights the need for expertise on the part of researchers and policy makers at Commission level on two separate fronts. Gender mainstreaming requires an awareness of, and expertise in, the gendered nature of law and its implementation on the part of all policy makers[73] and this is not in evidence in the working document. The working document and the proposals also demonstrate a lack of expertise in private international law and its operation in practice and it fails to draw upon materials demonstrating why Article 13(b) was developed as an exception to the return of the child and how the return remedy is supposed to operate under the Hague Convention 1980. This lack of expertise and bureaucratic

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[70] *Ibid.*

[71] *Op. cit.* French Initiative OJ [2000] C 234, n60, Recital 13 and Chapter V; *op. cit.* Commission COM(2001) 166 final, n61, 17.

[72] *Op. cit.* Commission COM(2001) 166 final, n61, 17.

[73] *Op. cit.* Walby, n18, 335.

working method at the Commission has been criticised as preventing appreciation of the wider impact of legislation, and is in evidence in relation to Regulation 2201/2003 and international child abduction.[74]

The acceptance of the assumed nature of international child abduction and the failure to address any gender issues arising out of the proposed Regulation is clear in the Commission's first proposal. The objective of the first proposal is given as:

'As people increasingly move from one Member State to another, and families break up and are recomposed, children need a secure legal environment for maintaining relations with persons who have parental responsibility over them and who may now live in different Member States."[75]

Although the free movement of persons has undoubtedly helped to create this situation, as discussed in *Chapter Four,* the assumed nature of the relationships involved identifies the Commission's approach with that of the Hague Conference when drafting the Hague Convention 1980.[76] Despite the growing statistical evidence that it is primary carer mothers

[74] P McEleavy "First Steps in the Communitarisation of Family Law: Too Much Haste, Too Little Reflection?" in K Boele-Woelki (editor) *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia, Antwerp, 2003), 525.

[75] *Op. cit.* Commission COM(2001) 505 final, n62, 2.

[76] Explanatory Report prepared by E Pérez-Vera on the Hague Convention on the Civil Aspects of International Child Abduction 1980 available from: http://www.hcch.net/index_en.php?act=publications.details&pid=2779 Last accessed 31st January 2007, 432.

who now remove or retain their children abroad, not fathers,[77] the abduction 'scenario' outlined by the proposal portrays the situation of a male abductor, having access rights in relation to the child, retaining the child in a State other than their habitual residence to modify the custody decision in relation to the child in his favour in a different jurisdiction.[78] It is presumed that the child is retained from their (female) primary carer.

The proposals regard abduction as an attempt to artificially seize another court with jurisdiction over the custody of the child, which represents a significant failure to challenge the outdated paradigm of international child abduction.[79] Although accounting for the social reality of family breakdown, the social reasons for abductions by women are not even considered or highlighted. This is evidence that the gender mainstreaming strategy was not put into effect in relation to Regulation 2201/2003, and, even if it was, the gender perspective is not changing the frame of the policy question. The approach is integrative, rather than transformative of the policy. This also does little to challenge the assumed gender roles and stereotype of abduction despite the Commission's professed aim of breaking these assumptions down.[80]

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[77] Mothers abducted their children in 77% of English cases under the Hague Convention in 2003. See N Lowe *et al* A Statistical Analysis of Applications Made in 2003 under the Hague Convention of 25th October 1980 on the Civil Aspects of International Child Abduction: National Reports, October 2006, 593. Available at http://www.hcch.net/index_en.php?act=publications.details&pid=3889&dtid=2 last accessed 23rd July 2007.

[78] *Op. cit.* Commission COM(2001) 505 final, n62, 2.

[79] *Ibid.*, 8.

[80] *Op. cit.* Commission COM (2000) 335 final, n57, 4.

The consistent, central concern of the proposals is the treatment and rights of children. The rights of children were the focus of the proposals by the Commission, which referred extensively to the rights contained in the CRC and the Charter and stated that:

'...children need a secure legal environment for maintaining relations with persons who have parental responsibility over them and who may now live in different Member States. [81]

This focus is in part due to Regulation 1347/2000 and its provisions relating to parental responsibility decisions arising out of divorce proceedings.[82] Article 3(1) allowed the assumption of jurisdiction by the court hearing the divorce only where the child was the child of both spouses. This created a distinction between children within one family, for example if there was a step-child and a parental responsibility decision was given as part of a divorce, or between children where judgment was issued on the dissolution of a non-marital relationship. A major aim of all the Commission's proposals was therefore to respect and promote the rights of all children equally.[83] This is reflected in both the Commission's first[84] and second proposals for Regulation 2201/2003: *'The objective of Community action in this context is to protect the child's best interests.* [85]

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[81] *Op. cit.* Commission COM(2001) 505 final, n62, 2.

[82] Regulation (EC) No. 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ L [2000] 160, 30th June 2000.

[83] *Op. cit.* Commission COM(2001) 166 final, n61, 2.

[84] *Op. cit.* Commission COM(2001) 505 final, n62, 2.

[85] *Op. cit.* Commission COM(2002) 222 final/2, n64, 5.

This focus on the rights of the child draws on Article 24, Charter of Fundamental Rights of the European Union. Article 24(1), Charter states that a child's views should be taken into account where they are of an appropriate age and maturity. Article 24(2) states that the child's best interests are the primary consideration in any action taken in relation to them and Article 24(3) gives children the right to maintain a personal relationship with both parents unless it is contrary to their interests. These rights have been put into effect in Regulation 2201/2003 with Recital 19 stating that the child should be heard in proceedings affecting them and Recital 33 stating that the Regulation seeks to secure the rights laid out in Article 24. This is reflected in the substantive provisions of the Regulation; for example the requirement that the child be heard where they are of an appropriate age and maturity in return proceedings under Article 11(2) and the principle of securing the best interests of the child are explicitly addressed.[86]

This successful incorporation of these rights in Regulation 2201/2003 reflects an increasing awareness of children's rights at EU level.[87] There has been no systematic approach to children's interests at EU level, and no children's policy or mechanisms to consider children's interests in policy.[88] McGlynn argues that Article 24 of the Charter is important in the area of EU private international family law as it ensures a focus on children's

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[86] See *Chapter Three*, 4.2.3.

[87] See e.g. Communication from the Commission "Towards an EU Strategy on the Rights of the Child" COM(2006) 367 final, 4th July 2006.

[88] C McGlynn "Rights for Children?: The Potential Impact of the European Union Charter of Fundamental Rights" (2002) 8 European Public Law 387, 387.

rights within families, and it prevents the assumption that children's interests' accord with that of their parents.[89] This was certainly the case in relation to the second proposal, with the Economic and Social Committee stating in its report that:

'The interests of the child are difficult to define but there is no doubt that they should be paramount. The opinion of the (often warring) parents may not always be useful in determining the best interests of a child, as they may be confusing their own emotional needs with those of the child. They may also be using a child as a bargaining counter.'[90]

The interests of the child have been completely separated from that of their parents who are assumed to be acting to the detriment of their child. There is no consideration of how children's rights and interests may be appropriately protected within the family structure or of the obligations of care which women largely assume in relation to children following relationship breakdown. The prevalence of children's rights in Regulation 2201/2003 and the explicit acknowledgement of their rights in particular[91] arguably conceptualises children and their interests as distinct from 'the family'. Children's rights are accepted largely at face value without analysis of their role and purpose and an individualised notion of rights protection within the family structure has been adopted.

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[89] *Ibid.*, 400.

[90] Opinion of the Economic and Social Committee on the 'Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation (EC) No. 1347/2000 and amending Regulation (EC) No. 44/2001 in matters relating to maintenance' OJ [2002] C 61/76, COM(2002) 222 final, 4th September 2002, paragraph 5.2.5.1.

[91] H Stalford "Brussels II and Beyond: A Better Deal for Children in the European Union?" in K Boele-Woelki (editor), *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia, Antwerp, 2003), 476.

The central role of children's interests and rights in the drafting of Regulation 2201/2003 may reflect the development of a child mainstreaming policy at EU level. Mainstreaming of children's rights would have the same aim as gender mainstreaming; the incorporation and accommodation of children's interests during the policy making process to 'child proof' the policy.[92] The mainstreaming of children's rights is actively under consideration by the Community institutions. A European Parliament public hearing recommended the mainstreaming of children's rights as part of the response to secure the rights of children at EU level.[93]

Although the development of a child mainstreaming policy is obviously of benefit in an EU which has largely ignored children, this may represent a challenge to gender mainstreaming. Waddington has argued that Article 13 EC may provide the impetus for an integrated approach to mainstreaming accommodating diverse axes of disadvantage,[94] but the risk is that mainstreaming of different factors of discrimination may mean that the privileged position of women's policies is lost.[95] The drafting of Regulation 2201/2003 does not contain any significant indicators of the existence of an effective gender mainstreaming strategy despite Article

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[92] E Drywood "Protecting the Vulnerable in EU Asylum Law: Mainstreaming Strategies in Title IV EC Treaty" Paper given at FLRU seminar on Gender and Migration in 21st Century Europe, University of Liverpool, 25th April 2007.

[93] Public Hearing Jointly Organised by the committees on Civil Liberties, Women's Rights, Culture, Development, Legal Affairs, and Employment and by the sub-committee on Human Rights, 17th April 2007.

[94] L Waddington "Testing the Limits of the EC Treaty Article on Non-Discrimination" (1999) 28 Trade, Industry and Industrial Relations 133, 145.

[95] *Op. cit.* Mazey, n52, 239.

3(2) EC, whereas children's rights are, rightly, a central focus for the development of the Regulation but without the same legal basis. The adoption of children's rights focused legislation may reflect the particular history of Regulation 2201/2003 and Regulation 1347/2000 but this does not mean that a gendered perspective should therefore be abandoned. It may even be more important to consider the rights of both children and women, which, although they do not necessarily coincide, should be addressed for the appropriate legal regulation of the relationship following an abduction where the mother is the child's primary carer.[96] This is particularly the case where a mother has been subjected to domestic violence because of the impact that this may have on the well being of the child.[97]

Other factors relevant to making law in relation to private international law, and particularly child abduction, which were examined in *Chapter Two* were explicitly considered in the Commission's proposals. In relation to private international law aims, the Commission stated that:

'[These proposals] are premised on a level of trust inherent in a common judicial area that the courts of another Member State can equally protect the child'.[98]

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[96] M Freeman "Primary Carers and the Hague Abduction Convention" [2001] International Family Law 140, 145.

[97] A Mullender, R Morley "What do we know from Research?" in A Mullender, R Morley (editors) *Children Living With Domestic Violence* (Whiting & Birch, London, 1994), 31.

[98] *Op. cit.* Commission COM(2001) 505 final, n62, 8.

Mutual trust considerations were also used to justify the emphasis on the child's habitual residence as the *forum conveniens* for any custody dispute and the importance of preventing any change in jurisdiction away from this forum.[99] The aim was to improve the free circulation of decisions within the Community through mutual recognition of judgments to help create a common judicial area.[100] The increased migration between Member States and the changing nature of family structures within Europe was also recognised by the Commission, which stated that:

'In the family law area, free circulation of decisions has a direct impact on the daily life of people. All the more so nowadays that family links are increasingly formed between nationals or residents of different Member States and family members increasingly choose to live in different parts of the European Union following family breakup.'[101]

Regulation 2201/2003 itself represents an acknowledgment of the changing social reality of family life and the impact of migration between the Member States on children and the family structure. The Commission considers all these elements relevant when proposing action in relation to international child abduction, and in private international family law more generally, but does not address any of the gender issues arising in this context. It does not consider the continued division of care in the family unit, the nature of family structures following relationship dissolution, or

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[99] *Ibid.*

[100] *Ibid.*, 4.

[101] *Op. cit.* Commission COM(2001) 166 final, n61, 1.

the factor of domestic violence, despite the requirement to mainstream issues of gender under Article 3(2) EC.

The Commission's second proposal would have created an EU remedy for international child abduction independent of the Hague Convention 1980 framework. The State the child was abducted to could only take provisional measures (based on a grave risk of harm to the child or their wishes) not to return the child.[102] These provisional measures could be superseded by a custody decision in the State of the child's habitual residence.[103] Only if the custody decision was in favour of the child remaining in the abducted to State did jurisdiction over the parental responsibility of the child transfer to the courts of the abducted to State.

This new remedy was potentially of great benefit to women who abducted their child, motivated by a need to escape domestic violence. If they could obtain a provisional measure preventing the immediate return of the child, litigation over the custody of the child could occur with her and the child in the abducted to State, a place of comparative safety. However, these considerations were not even mentioned in the Commission's proposal. The Commission stated that:

'The solution... is premised on a level of trust inherent in a common judicial area, and is expected to produce a deterrent effect in that it would no longer be possible to bring about a change in the court having jurisdiction through unlawful action.'[104]

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[102] Article 23 see *op. cit.* Commission COM(2001) 505 final, n62, 13.

[103] Article 24, see *ibid.*

[104] *Op. cit.* Commission COM (2002) 222 final/2, n64, 12.

This again clearly reflects the traditional paradigm form of abduction which informed all of the Commission's proposals. That the abduction remedy had the potential to benefit women who abducted their child appears to be accidental rather than the result of an informed gendered assessment of the legal management of international child abduction. The issue of domestic violence, despite being an issue acknowledged as a structural inequality based on gender, is not mentioned at any point in the Commission's documentation in relation to Regulation 2201/2003 and international child abduction. Nor is the differing impact of abduction and domestic violence on women who are also migrants or affected by other discriminatory factors. This failure reflects the weaknesses of the mainstreaming policy in relation to gender in the Directorate-General for Justice and Home Affairs in the Commission.

3.2.2. The Input of the European Parliament

The only body to consider an explicitly gendered perspective on the second proposal was the European Parliament's Women's Rights and Equal Opportunities Committee. It stated that the Regulation:

'... should be supported by the Committee on Women's Rights and Equal Opportunities, provided that the weaker economic and social situation of women holders of parental responsibility is duly taken into account'.[105]

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[105] European Parliament Report on the proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation (EC) No. 1347/2000 and amending Regulation (EC) No 44/2001 in matters relating to maintenance, 7th November 2002, 21.

The European Parliament's Women's Committee therefore acknowledged the different situation of women and its amendments focussed on access to knowledge about legal rights, and the economic disadvantages of women.[106] However, the Parliament only addressed the issue of abductions due to domestic violence in a tangential manner. In its draft legislative resolution it amended Article 56 of the second proposal to encourage central authorities to establish guidelines for cases, including those where there is domestic violence.[107] There is no consideration of the gendered nature of international child abduction in particular.

The European Parliament drafted its gender mainstreaming policy in 2003, but the Women's Rights and Equal Opportunities Committee was at the centre of this process, having initiated its own report on the issue.[108] The Women's Rights Committee clearly understood that women potentially have a different social and economic position to men but this understanding was not extended to considering such gender issues arising in cases of child abduction in more detail. It does adopt a difference approach to equality and equality of access to resources,[109] but this is not sufficient if the full extent of a problem is not explored.[110] Their approach contrasts with that of the Commission. If the Commission was employing

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[106] *Ibid.*, 22.

[107] *Ibid.*, 13.

[108] Committee on Women's Rights and Equal Opportunities European Parliament Report on Gender Mainstreaming, 26th February 2003.

[109] *Op. cit.* European Parliament Report on the Proposal, n105, 22.

[110] Effective gender mainstreaming has proved problematic in the European Parliament, see Committee on Women's Rights and Gender Equality Report on Gender Mainstreaming in the Work of the Committees, 22nd December 2006.

gender mainstreaming as a strategy (which there is limited evidence of) it has clearly adopted a similarity based approach to equality, treating men and women as having exactly the same role and interests in relation to international child abduction. This means that the proposal and subsequent legislation does not address the question of primary carer abductions, domestic violence or the role of women as carers and the interaction of free movement law and residence following an abduction.

3.2.3. The Role of the Council of Ministers

Despite being *'...the European institution closest to citizens, with a long standing commitment to gender equality'*[111] the European Parliament's influence on the final legislative solution was limited in relation to Regulation 2201/2003. As the European Parliament only needs be consulted under Article 67(1) EC the Council is entitled to ignore entirely any gendered perspective brought to bear on such proposals.

There is no explicit mainstreaming strategy in place in the Council.[112] The abduction provisions in the second proposal, when they went to the Council were substantially altered before being adopted.[113] Instead of creating an entirely new European remedy for international child

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[111] *Op. cit.* European Parliament Report on the Proposal, n105, 16.

[112] Although there is some evidence that mainstreaming gender should occur in the Justice and Home Affairs Council see 2624th Council Meeting on Employment, Social Policy, Health and Consumer Affairs 6th-7th December 2004, 29. There are documents which promote gender mainstreaming in particular policy areas, such as post-conflict situations in external relations see e.g.: Council Conclusions on Promoting Gender Equality and Gender Mainstreaming in Crisis Management 2760th General Affairs Council Meeting, 13th November 2006.

[113] Political agreement on the content of the Regulation was reached at the 2529th Council Meeting of Justice and Home Affairs, 2nd-3rd October 2003. Regulation 2201/2003 was adopted by the Council at the 2548th Council Meeting of Justice and Home Affairs, 27th-28th November 2003 without debate.

abduction, concern to protect the status of the Hague Convention 1980 amongst some Member States resulted in a political deal brokered by the Danish Presidency.[114] This solution was adopted in Regulation 2201/2003 with the Hague Convention 1980 remaining in force, and its operation being altered by the Regulation. The political nature of the Council makes this kind of trading inevitable and means that gender issues may be lost amidst other policy priorities. This is a fundamental weakness in the implementation of gender mainstreaming, particularly where the European Parliament is only consulted, rather than having an active input into the content of the legislation during its drafting under the co-decision procedure provided for by Article 251 EC.[115] Article 81(3), Treaty on Functioning of European Union (Lisbon Treaty 2007) preserves the consultation method of legislating for measures relating to judicial co-operation in family law, which represents an explicit choice to continue to allow the Council to exclude the input of the European Parliament. This reduces the opportunity to take advantage of the space for gender concerns available in the European Parliament.

3.3. Mainstreaming Throughout the European Institutions

Mainstreaming has to be effectively secured at all levels of the EU architecture to be an effective strategy in practice. Pollack and Hafner-Burton identified three levels of mainstreaming and gender integration into legislation and policy at EU level, reflecting its nature as a multi-level polity: 1. the supranational Commission, bureaucratic with little experience in some Directorates-General of gender perspectives; 2. the

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[114] P McEleavy "Brussels II *bis*: Matrimonial Matters, Parental Responsibility, Child Abduction and Mutual Recognition" (2004) 53 International and Comparative Law Quarterly 503, 509.

[115] For an outline of the co-decision procedure see A Arnull *et al Wyatt and Dashwood's European Union Law* (5th edition, Sweet and Maxwell, London, 2006), 62.

intergovernmental Council influenced by the politics of securing votes on initiatives; and 3. the implementation of legislation and policy in the differing gender orders of the various Member States.[116]

If the Commission and the European Parliament are active in effectively implementing a gender mainstreaming strategy, gender equality issues should form a part of the proposals that go before the Council of Ministers. At that point, the gender equality issues will be a factor in the Council's deliberations. Even if the decision is eventually taken by the Council to ignore these considerations in favour of other relevant policy issues the gender issues will at least have to be part of the negotiations as a result of the Commission and the European Parliament's drafting. It allows a space for gender equality in the Council's negotiations, even if it is eventually decided that, in the circumstances, other factors mean that gender equality policies should not necessarily be incorporated into the legislation.

Even if issues relating to women and international child abduction had been incorporated into the proposals, this is perhaps unlikely to have fundamentally altered the nature of the return remedy or the balance of considerations that resulted in Regulation 2201/2003 and the provisions on international child abduction. However, it remains valuable to consider the issues affecting women because this results in informed decision making. The failure of the Commission and the European Parliament to explicitly include gender equality issues in the proposals that went before the Council of Ministers represents a failure of the gender mainstreaming strategy in relation to Regulation 2201/2003 as gender equality issues were given no 'space' in the final negotiations.

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[116] *Op. cit.* Pollack, Hafner-Burton, n48, 437.

4. Can the EU 'gender proof' private international family legislation?

The passage of Regulation 2201/2003 and the development of the child abduction provisions demonstrate the weakness of the EU's gender mainstreaming strategy for creating a space for gender equality concerns during the development of legislation, particularly at the Commission. Mainstreaming is intended to help policymakers act without invoking stereotypes, or with 'gender blindness' to change the framing of the problem, and therefore, if appropriate, constructing a different solution.[117] Even where women's rights were considered, the European Parliament focused on a narrow view of inequality and on economic disadvantage, a traditional focus of European concern. The reality of international child abduction and the family circumstances of those who abduct their children were not adequately addressed. The resulting Regulation therefore treats men and women the same under the law, failing to explicitly address circumstances more pertinent to women than men, including domestic violence.

Gender issues are not explicitly addressed on the face of Regulation 2201/2003, as highlighted in *Chapter Three,* and there was no consideration of the implications of Regulation 2201/2003, demonstrated in *Chapter Four* in relation to family structures, migration and care, or domestic violence as considered in *Chapter Five.* The provisions of Regulation 2201/2003 may assist women in the extreme situation where they have crossed an international border to escape domestic violence, depending on the interpretation of the Article 11 mechanism, but this does

[117] *Op. cit.* Beveridge, Nott, n17, 303.

not seem to be the result of active consideration of the problem by the institutions. As *Chapter Six* demonstrated, the assumption that the Member States can protect women exposed to domestic violence in their habitual residence is unwarranted, and the EU, as yet, provides no legally enforceable protection in this situation.

The failure to actively consider these factors during the negotiation of Regulation 2201/2003 means that, on its own definition requiring it to: '*...actively and openly taking into account, at the planning stage, their effects on the respective situation of women...* '[118], the Commission has not effectively carried out its mainstreaming strategy. It is not clear whether a mainstreaming strategy was pursued and if it was, it was not effective to ensure the inclusion of issues relation to gender, abduction and the law. There is no gender impact assessment[119] and the gendered nature of child abduction is not addressed. The fact that it is not clear that gender mainstreaming was engaged with demonstrates that there is no clear evidence of the effectiveness of this strategy, or transparency in the process. It has not engaged NGO's or academics at European level to add to the understanding of gender equality concerns in relation to child abduction during the legislative process and expand the space available for consideration of such issues. The focus of the proposals is on children's rights, a current topic of interest for the EU institutions.

It is clear that the mainstreaming duty added by Article 3(2) EC is currently not enough to incorporate a gendered perspective into legislation

[118] *Op. cit.* Commission COM (1996) 67 final, n1, 2.

[119] Although these have very uneven application and results see H Toner "Impact Assessments and Fundamental Rights Protection in EU Law" (2006) 31 European Law Review 316.

and protect women's interests during the development of proposals. Gender equality, in the same way as private international law, is not an objective per se at EU level, it is part of other objectives and therefore vulnerable to political policy compromises.[120] This means that the approach to gender equality will always be to integrate it into existing policy questions.[121] It will always fail to affect core policy areas or transform processes. This is borne out by the development of Regulation 2201/2003; the policy frame remained unchanged, the important issues relating to women were left unexamined, and those issues which were considered were based on women's economic status. The lack of definition in the aim to be achieved effectively obscures the notions of equality pursued and the effectiveness of any policy measures in achieving it.[122] As Daly argues, mainstreaming then becomes, not a change in approach to gender, but a new way of delivering an established equality policy based on equal treatment.[123] It is therefore questionable whether the EU architecture is effective to secure a space for consideration of women's interests during the development of legislation in the new policy area of private international family law.

The addition of a European Institute for Gender Equality[124] may help the Commission in securing its mainstreaming strategy by providing expertise

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[120] *Op. cit.* Lombardo, n36, 7.

[121] *Ibid.*, 4.

[122] *Ibid.*, 6.

[123] *Op. cit.* Daly, n16, 448.

[124] Regulation (EC) No.1922/2006 on establishing a European Institute of Gender Equality OJ [2006] L403/9, 20th December 2006.

on gender equality which can be called upon by any of the Directorates-General.[125] The Institute is intended to give technical support to the Commission on the promotion of gender equality and integrating gender equality into all Community policy.[126] Although it is intended to be a resource providing expertise on gender issues, it is as yet unclear what the Institute will contribute to mainstreaming, particularly when the issue of gender interacts with another area of law such as private international law. It does have the potential to expand the capacity at the Commission for effective gender mainstreaming although there remains no independent oversight of the conduct of mainstreaming at Commission level[127] and could represent just another addition to a plethora of units dedicated to gender equality in the EU.[128] Masselot argues that the Institute is merely an increase in the Commission's bureaucratic architecture rather than forming part of a holistic policy aimed at securing equality.[129] It does however place gender equality high on the Commission's agenda, and will hopefully be used to provide further expertise and impetus for the effective implementation of gender mainstreaming.[130]

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[125] *Op. cit.* Beveridge, n42, 204.

[126] A Masselot "The State of Gender Equality Law in the European Union" (2007) 13 European Law Journal 152, 167.

[127] *Op. cit.* Shaw 2005, n50, 300.

[128] Including: the Group of Commissioners on Fundamental Rights, Non-discrimination and Equal Opportunities, the Inter-service Group on Gender Equality, the Advisory Committee on Equal Opportunities for Women and Men and the High Level Group on Gender Mainstreaming. See: Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions "A Roadmap for Equality Between Men and Women 2006-2010" COM(2006) 92 final, 1st March 2006, 18.

[129] *Op. cit.* Masselot, n126, 168.

[130] *Ibid.*, 167.

Further impetus for the effective implementation of this strategy could also be provided by a new perspective on mainstreaming at European level, linking it to citizenship and good governance in the EU. The Commission's white paper on good governance in the European Union argues that:

'The Union's credibility will eventually be judged by its ability to add value to national policies and address people's concerns more effectively at European and global level.'[131]

Shaw argues that one element of good governance at European level, and one which can help to provide legitimacy, is the policy of gender mainstreaming.[132] Even though gender mainstreaming was not an element of the Commission's approach to good governance, she argues that mainstreaming would provide a frame of reference to bring gender issues into the public sphere at a supranational level as a general policy aim.[133] This would require participation by bodies with expertise in gender issues, the monitoring of affected officials, systems for the examination of proposals for gendering factors, and benchmarks.[134]

The Commission states that:

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[131] Commission White Paper "European Governance" COM(2001) 428 final, 25th July 2001, 9.

[132] J Shaw "European Union Governance and the Question of Gender: A Critical Comment" Jean Monnet Working Paper No. 6/01, 2.

[133] *Ibid.*, 8.

[134] *Ibid.*, 5.

'A better use of powers should connect the EU more closely to its citizens and lead to more effective policies.'[135]

A better use of the mainstreaming requirement of Article 3(2) EC, adding a gender dimension to policies at European level, something which, in an area such as private international law could not necessarily otherwise be achieved, would therefore constitute better governance. It could also encourage positive action for achieving equality aims outside the public, employment sphere, against a background of developing women's citizenship status in the EU. Mainstreaming can therefore be seen as contributing to both good governance and citizenship for women. The mainstreaming duty should be further 'embedded' in the Community structure, particularly within the Commission, because of its primary role in formulating proposals which can define the tenor of the eventual legislation adopted. This requires both an awareness of gender as a relevant factor when legislating so that the issues are examined, but also expertise in considering how it should be tackled and incorporated into legislative proposals, something which the new Institute for Gender Equality may be able to provide.

Increased participation at European level also assists in connecting citizens to the Community's decision making structure and is a part of good governance, which should encourage the Commission's engagement with women's groups and national experts.[136] This form of indirect action which pursues gender equality in all legislation, not just in 'equality legislation'

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[135] *Op. cit.* Commission COM(2001) 428 final, n131, 8.

[136] See D Obradovic, J Alonso Vizcaino "Good Governance Requirements Concerning the Participation of Interest Groups in EU Consultations" (2006) 43 Common Market Law Review 1049.

or non-discrimination measures could encourage women's participation in the Community legislative process but also provide part of a normative framework for the adoption of legislation in the EU.

This is not to argue that gender issues should be the *only* focus of legislation; instead that, amongst all the policy issues relevant to a given topic, that it should have a space and that an effective mainstreaming strategy should be used to provide this space. This is an integrative approach but it provides the potential to transform the answers to legislative questions. If the gender issues are eventually irrelevant or can legitimately be disregarded in the light of the other factors which are deemed to be more important in the circumstances, at least this will be explicitly acknowledged and negotiated. The Commission has demonstrated in the proposals for Regulation 2201/2003 that it has the ability to identify and incorporate into proposals the principles of private international family law, and to include the protection of children's rights. It should also be able to do the same for gender and the mainstreaming strategy has the potential to encourage gender issues to have more space, not just in this area of law but in others also. To do so effectively would contribute to the good governance of the Union and women's status as equal citizens.

5. Conclusions

This chapter has examined the strategy of gender mainstreaming to establish its role within the Community architecture as part of the pursuit of gender equality and to consider whether it was implemented during the development of Regulation 2201/2003. Gender mainstreaming is based on Article 3(2) EC which requires the EC to pursue equality between men and

women in all areas of activity, which now includes private international law.

The proposals for Regulation 2201/2003 should therefore have been examined for their impact on women, including issues such as the nature of child abduction and abductions motivated by domestic violence. However, on consideration of those proposals there is only very limited evidence that the impact of the legislation on women in particular was accorded any space amongst the other factors addressed. Regulation 2201/2003 demonstrates the problems with the gender mainstreaming strategy: it does not necessarily change the framing of a policy issue and in this instance it also failed to ensure that gender issues were considered as a significant factor in the proposals because this depends on political willingness and awareness.

Other factors identified as relevant to this policy context in *Chapter Two* were considered and, in the case of children's rights in particular, incorporated into the legislation. However, this does not undermine the legitimacy of the gender concerns identified in the thesis; rather it underlines the importance of embedding gender equality in the architecture of the EU as part of a substantive conception of citizenship. The EC has the tools to do this but it has not yet implemented them effectively to address women's concerns alongside the other factors identified in *Chapter Two* and pursued in the child abduction provisions in Regulation 2201/2003.

Despite a lack of evidence for the effective implementation of the gender mainstreaming strategy in this instance, it is important to pursue the aims of the EC Treaty for effective governance and to encourage the development of substantive equality for the purposes of European citizenship. This would arguably encourage the relevance of legislative

action to citizens' everyday lives. Although reinforcement of the gender mainstreaming strategy is needed to fix it further into the architecture of the institutions, especially at the Commission, it does at least give the opportunity to eventually provide a 'space' in a proposal to consider the issue of gender in European law. The gendered factors need not be the dominant aim of the proposal, but if included would at least become part of the eventual negotiations, even if other legal aims are eventually established as more important in the context. The gender mainstreaming strategy therefore is an important aspect for developing the EU's equality policies into developing Treaty competences including private international law, even if this, as yet, has not happened in practice.

Chapter Eight

CONCLUSIONS

This thesis has examined the developing area of private international family law at European level to explore the 'space' for gender equality issues in this new context, using international child abduction as a case study. The application of a gender analysis in this context provides a new perspective on this rapidly developing area of European law. The research has focussed on the child abduction provisions of Regulation 2201/2003 to consider the implicit and explicit role of gender in international child abduction, but also the other legal factors which are relevant to this area of law: private international law aims, migration and family law and protection of children's and human rights. The research has adopted an approach which uses feminist legal methods, 'asking the woman question', to demonstrate the relevance of gender equality issues as a factor in the legal analysis of child abduction, but has also considered and accepted the legitimacy of other legal factors. This method has provided an original approach which permits examination of both the interplay of gender issues in child abduction law, and the incorporation and reconciliation of the other legal factors identified in the child abduction provisions of Regulation 2201/2003. The analysis demonstrates the importance of interrogating legislation developed as an aspect of the Area of Freedom, Security and Justice, not just for gender concerns, but also for its capacity to secure the other legislative aims identified and to protect the rights of individuals involved in international family dissolution in the European Union.

To carry out this analysis the substantive chapters focussed on different aspects of the legal problem of international child abduction and the EU's intervention in Regulation 2201/2003. The legal factors relevant to developing legislation on private international family law in the context of the Area of Freedom, Security and Justice were outlined in *Chapter Two* as private international law, migration and free movement of persons and the protection of children's and human rights. It was argued that gender equality is also a necessary factor in the development of such law, required by the EC Treaty and as an aspect of European citizenship. *Chapter Three* analysed the legal framework in relation to international child abduction following Regulation 2201/2003 and the weaknesses in the protection of the principle of mutual trust between Member States and the restrictions on the ECJ's jurisdiction to interpret the Regulation. It highlighted the fact that although children's rights are explicitly protected, Regulation 2201/2003 does not deal with the issue of child abduction in terms of sex roles or care; there is no explicit incorporation of gender issues.

Chapter Four then considered the implicit role of gender in international child abduction, the gendered nature of migration to care and how the traditional notions of family life compound the effects of gender in European law. The interaction and interrelationship of the law relating to the free movement of persons and that relating to international child abduction is undefined and affected by the gendered nature of caring responsibilities. As a result, women's residence status on return following an abduction is potentially endangered by their primary carer role which affects their citizenship status. The analysis of the gendered reasons for migration and abduction were also the focus of *Chapter Five* which considered abductions motivated by domestic violence. In these extreme circumstances the implicit role of gender is at its most evident in child abduction, yet the emphasis on judicial comity and mutual trust is clearly

enforced. Regulation 2201/2003 in reinforcing the principle of return may adopt this approach, ignoring gender, yet, depending on its interpretation, has the potential to reconcile these approaches and protect women and children exposed to such violence through the Article 11 mechanism in particular. However, given that in most cases under Regulation 2201/2003 women and children will return to their habitual residence following an abduction, despite domestic violence, *Chapter Six* considered the role of the EU in protecting women from domestic violence, thereby examining the space for such gender issues outside the private international law context.

Finally, *Chapter Seven* brought the discussion of the gender issues together to consider the proposals for Regulation 2201/2003 on international child abduction and the strategy of gender mainstreaming. This chapter highlighted that, although children's rights, private international law aims and questions of migration and free movement following family dissolution were considered by the proposals, gender issues had only a very marginal role in the development of Regulation 2201/2003. The gender mainstreaming strategy, although based on Article 3(2) EC, did not ensure that gender equality issues were a factor in the development or the negotiation of the final text of Regulation 2201/2003, demonstrating the weaknesses of both the strategy and the commitment to gender equality.

The problems with the child abduction provisions of Regulation 2201/2003 demonstrated by a feminist analysis of the provisions, particularly those relating to abductions motivated by domestic violence, have allowed wider exploration of the role of gender in European law and the scope of the EC's competence to tackle gender based inequality. It is clear that, although there is potentially the competence to engage with issues of gender equality including domestic violence at European level, the political

will and the expertise required appears to be lacking to further develop the legal protections provided by EC law. This clarifies the marginal space accorded to gender equality outside the economic sphere in European law, despite the development of strategies of gender mainstreaming and the expansion of the Community's competence beyond equal pay by Article 13 EC. Indeed, the 'competition' between different axes of inequality may mean that gender equality will continue to occupy a marginalised position in Community law outside the employment sphere.

As the Community increasingly engages with the rights of children, if this is achieved in an individualised, de-contextualised form as in the child abduction provisions of Regulation 2201/2003, the challenges of informatively addressing gender equality in the family structure and accommodating both the rights of mothers and children will remain ignored at European level. Regulation 2201/2003 is explicitly aimed at protecting children's rights and this has been incorporated into the text, although its success achieving its aim may be questioned. Yet this explicit aim is in stark contrast to the failure to consider any of the gender concerns raised by this thesis and the incorporation of children's rights has been achieved without serious consideration of the familial context in which their rights may best be secured.

The lack of interrogation of preconceptions and assumptions is a notable feature of the child abduction provisions of Regulation 2201/2003. Although the Regulation itself represents European acknowledgment of flexibility in family structures and the increasing internationalisation of families following the success of the free movement of persons policy, the development of the proposals demonstrates that within this context, traditional family notions remain influential. The failure to take the acknowledgment of changing family forms further, to address the changed

nature of child abduction and the links between the gendered role of child care and migration to facilitate this care, meant that an outdated 'model' of abduction was adopted and the increase in abductions by mothers was not addressed by Regulation 2201/2003.

Emphasis has instead been placed on maintaining the European approach to private international law rules which centre on the principle of mutual recognition to secure mutual trust in a common judicial area. Of importance in the context of international child abduction was ensuring litigation in the child's habitual residence prior to the abduction, deemed to be the *forum conveniens*. The reinforcement of the application of the return remedy and the Article 11 mechanism, which, although complicated, is aimed at achieving the return of the child despite the initial refusal to do so, highlight the importance of this principle in child abduction cases under Regulation 2201/2003. However, the Article 11 mechanism and Article 11(4), allowing the assessment of national measures to protect the child where an Article 13(b) Hague Convention defence has succeeded, may have the effect of undermining the principle of mutual trust. The courts of the Member State the child was removed or retained from has the right under the Article 11 mechanism to assess the refusal to return the child and Article 11(4) requires a judgment to be made about the adequacy of another legal system and its protective mechanisms, not normally an element of a system premised on respect for other Member State's judicial processes.

The risk posed to mutual trust by Article 11(4) should be regarded as acceptable if it provides more effective protection to children and their mothers on return. This does not just apply to the situation where domestic violence is alleged against the parent remaining in the child's habitual residence, but also to ensure the viability of their return, housing and

financial support. The notable aspect of the Article 11 mechanism though is the potential it has for the reconciliation of the private international law principles in the European context with the desire to protect women who abducted their child in an attempt to escape domestic violence. Depending on the interpretation of Articles 11(6),(7) and (8), Regulation 2201/2003, this may allow women to litigate over custody of the child and their eventual return to their habitual residence from a position of safety in the State to which they removed the child. However, given the high threshold for the success of an Article 13(b) defence in England and Wales, the use of these provisions may in practice be limited. Practice may well continue in similar terms to that under the Hague Convention 1980 and the importance of private international law principles reinforced in line with Regulation 2201/2003's professed purposes, despite the implicit gender concerns.

Although it adopts the same remedy for international child abduction, Regulation 2201/2003 differs to a certain extent in purpose from the Hague Convention 1980. The Hague Convention 1980 was developed to deal with a specific problem arising in an increasingly globalised and connected world. In contrast, as a whole, Regulation 2201/2003 is actually part of the aim to secure the free movement of persons within the EU by making it easier for people to move between Member States of the EU and have their family status recognised in all States. Private international law in the EU is being used to facilitate migration, not just deal with its negative aspects.

In these circumstances, child abduction potentially becomes easier for a parent to achieve as free movement is facilitated in the European area. International family dissolution may also be accompanied by a subsequent migration, often by women who are still largely the primary carers of children. This subsequent migration may be viewed as a right by women

who have previously migrated within the EU, and it is one of the rights attached to European citizenship under Article 18(1) EC. However, if they relocate with their child in breach of custody rights, the child abduction provisions can effectively inhibit this form of migration. The relationship between this aspect of Regulation 2201/2003 and the achievement of the free movement of persons within Europe is somewhat out of focus, something which is demonstrated by consideration of women's residence status on return with their child to a State other than their nationality. In this context the rights attached to European citizenship provide a 'safety net', allowing a primary carer, usually a woman, to derive a right of residence from their child's right to reside in the host Member State.[1] Although helpful in these circumstances it is notable that the emphasis is once again on facilitating the child's right to remain in the host State, even if it does provide an explicit acknowledgment of the value of care in European law.

These issues also highlight the increasing importance for women of the rights attached to, and the claims that can be made on the basis of, the developing concept of European citizenship. This has been a recurring issue within the analysis and the concept has been utilized to examine women's status in the EU, and as a basis for arguing for the further development of European law to protect women's rights. Women's access to citizenship rights, such as the right to reside in a Member State other than that of their nationality, has been considered. This analysis has included the use of citizenship rights as a basis for claiming that the return remedy acts as a restriction on a woman's right to move and reside within the Union under Article 18(1) EC. In this situation citizenship rights are of

[1] See Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091; *Chapter Four*, 4.

little use to women because the restriction is not placed on their freedom of movement, but their child's. The use of human rights in this context, particularly where the woman removed the child in an attempt to escape domestic violence, has also been addressed although it is likely that the return remedy is proportionate to the aim pursued and therefore compliant with human rights norms. European citizenship remains a tiered, exclusive concept. Rights are still largely accessed through a participation in the labour market, or dependence on an individual who participates. There is development away from this position though; the case of *Baumbast* explicitly recognises the value of care, and citizenship rights can form the basis for the review of European legislation for its compliance with human rights norms.

However, the value of citizenship may lie instead with claims that can be made on behalf of women on this basis. It has been argued that citizenship as a normative concept can provide a stimulus for the pursuit of substantive equality goals through the entrenchment of gender mainstreaming in the European institution's architecture as a part of good governance of the Union. In this sense it encourages the application of gender equality norms to all areas of competence, as required by Article 3(2) EC, as part of an attempt to fulfil the claim of equality of citizens. As a basis for action, the notion of citizenship can further be used to make claims for European intervention on issues such as domestic violence which inhibits women's access to the market, their freedom of movement and infringes their human rights.

The role of European citizenship as a normative basis for policies pursuing substantive notions of equality has not yet been grasped, or acted on, adequately by the institutions. The failure of gender equality policies to take root outside the economic or employment context is, in part, a failure

to look beyond the imperatives of this context. Citizenship potentially provides a route through which this economic approach to equality can be reassessed and amended. Although access to full citizenship rights has traditionally been linked to market contributions, the claim to treat all citizens equally should be mobilised as a basis for action.

The EU has been regarded as a good forum for the pursuit and protection of women's interests and its abilities to adopt binding law has been used to bring forward advances in the equality agendas of several Member States, including the UK. However, the analysis presented in this thesis has demonstrated the limits of the EU's gender equality policies and the weaknesses in its architecture for the protection of women's interests. Gender issues are at best a marginal factor in the adoption of private international law rules; there is no evidence of explicit consideration of gender issues such as domestic violence, or any attempt to incorporate such factors into the negotiation of the child abduction provisions of Regulation 2201/2003. The other factors identified as relevant were to some extent addressed and incorporated into the legislative solution provided for by Regulation 2201/2003 in relation to child abduction, but the gender issues highlighted by the feminist legal analysis in this thesis were not an aspect of this solution. The factor of children's rights in particular demonstrates that the EU is capable of considering, at least to some extent, the human impact of legislation in private international family law, but this was not extended to cover women's interests.

However, the analysis has also demonstrated that the EU does have the *competence* to address the gender issues identified, even if there is no political will or expertise to harness them effectively. This has been done to some extent in the past, and the Daphne Programmes aimed tackling violence against women and children are an excellent example of this

creativity. However, the nature of the EU, with its attributed competences, means that using Article 152 EC, the public health competence, as the primary law basis for the adoption of the Daphne Programmes, shapes the nature of the legislation resulting in a soft, information sharing model instead of harmonising hard law. This may be appropriate in the context of domestic violence where national contexts may be important in constructing the most appropriate legislative solutions.

Domestic violence is a problem across all Member States which, as the European Economic and Social Committee acknowledges, both reflects and creates gender inequality.[2] Given that the EU is presuming that there are the procedures and legislation to adequately protect women and children on return to their habitual residence following an abduction, and is a body pursuing gender equality in the Member States, it may be appropriate for the EC to intervene with hard legislative remedies. This could be based on Article 13 EC which allows the EC to take action to protect women from discrimination. If domestic violence is characterised as a form of sex discrimination the EC could create a civil action, or even a criminal offence to protect and give power to women who have experienced such abuse. There is the opportunity to create space for such gender issues outside private international law, but there is likely to be a lack of political will to do so and the principle of subsidiarity under Article 5 EC may mean that action at EU level is unnecessary, as it is an issue which can be dealt with more appropriately at Member State level.

The research has also considered Article 3(2) EC, which requires the EC to pursue the equality of men and women in all areas of competence. This has

[2] Opinion of the European Economic and Social Committee "Domestic Violence Against Women" SOC/218, 16th March 2006, point 1.1.

allowed the Commission, and also the European Parliament, to develop the governance strategy of gender mainstreaming to incorporate gender issues into all legislative proposals. Despite the failure of this strategy in relation to international child abduction and Regulation 2201/2003, it has been argued that it has the potential, if used with expertise and consistency, to provide a space for gender issues as a factor in the negotiation in all further instruments of this type. Further definition of the aim of gender mainstreaming is needed, whether it is focused on substantive or formal notions of equality, or wider questions of difference and what the purpose of mainstreaming gender is at European level. Clearly, in relation to Regulation 2201/2003 the strategy did not change the framing of the policy in relation to international child abduction. It failed to ensure gender was considered as a significant factor in the development of the proposals. Currently it is of little value in developing legislative solutions which address gender issues, a governance strategy that appears valuable and progressive but lacks substance. It could be given substance, but much more investment in expertise and greater commitment to including the gender factor will be necessary for it to play a valuable role in achieving the professed equality aims of the EU. The EC Treaty provides a basis for the effective inclusion of a space for gender equality as a factor in the negotiation of legislation if used innovatively, creatively and consistently by the institutions, particularly the Commission.

The findings of this research therefore add to the understanding of European gender equality policy in a new context. In particular it considers the effectiveness of the gender mainstreaming strategy in the development of a new area of competence for the EC, outside the workplace or employment context. As such it informs on the nature of the mainstreaming strategy and the EU's potential as a progressive body in pursuit of gender equality. Gender equality should be a factor in the

development of European private international family law, not the dominant concern, but part of the balance of interests which should be incorporated and addressed for the creation of an Area of Freedom, Security and Justice in Europe. The nature of the EU means that it has the capacity to achieve this, providing space for the consideration of gender equality and a new approach to private international law problems as a consequence.

International child abduction was an appropriate case study with which to explore these issues because there was an existent feminist critique of the operation of the Hague Convention 1980. As the provisions of Regulation 2201/2003 are based on this Convention, embracing and reinforcing its policy of returning the child, it was pertinent to engage with the debate in a new context. The European element in particular adds new features, including gender equality policies, but also questions of migration and free movement of persons within the European area and the role of citizenship. There are clearly gender issues, such as domestic violence, which should be considered as part of an analysis of the law relating to child abduction. However, this area of law also provided a microcosm for the consideration of other issues relevant to the development of private international family law in a European context, including the relationship between private international law and the free movement of persons and the influence of the developing concept of citizenship in all areas of European law.

Child abduction also formed the basis for a wider assessment of EC gender equality norms, considering the extent to which the competences in the EC Treaty can be used to develop remedies and cooperation in relation to domestic violence in the Member States. This broader analysis of the child abduction provisions in Regulation 2201/2003 has highlighted the constitutional nature of the gender equality norms in the EU and its close

links to European citizenship for women. It has also provided a focused reflection on the strategy of gender mainstreaming in practice, which has been much vaunted as the most progressive and effective method of integrating gender into all policies and legislative solutions, so that this factor permeates the legal system.

The examination of texts which formed the basis of this analysis was, in this instance, an appropriate methodology to consider the inclusion or exclusion of factors relating to gender equality in relation to international child abduction. The analysis of a series of proposals for a Regulation covering an area of law where a gender based critique was already in existence and with a clear 'human face' demonstrates that, particularly within the European Commission, this strategy has, as yet, failed to embed this value into the system. The use of case law highlighted the implicit role of gender in child abduction law and was sufficient to outline the experiences of some women. It would not have been appropriate, using this methodology, to focus on and explore the experiences of women who abduct their children but this was not the aim. Instead, the aim was to examine the inclusion of the gender factor in European law, and case law provided an appropriate basis from which to explore the relevant legal issues which arose in this context.

However, the research strategy adopted was not solely focussed on the role of gender equality in this context. The research also considered the other factors alongside this issue to give a clearer idea both of the space accorded to gender equality amidst the other relevant factors identified, but also of the approach and inclusion in Regulation 2201/2003 of these other issues. This provides a fresh approach to researching gender equality in the European context which demonstrates how gender equality aims can be incorporated and valued alongside other, equally valuable, legislative

factors. This form of analysis is necessary to construct appropriate legislative solutions which accommodate gender equality but also address other aspects of the social problem in question in the developing competences under the European Area of Freedom, Security and Justice.

It has been an important aspect of this thesis to demonstrate, not only how feminist legal methods can be used constructively to explore the problems with law and its effect on women, but also that this is merely one aspect of the law. Concerns about the operation of the law from a children's rights perspective, or in relation to the private international law principles concerned should also be considered in an attempt to develop relevant, appropriate legal solutions to social, family based problems. Feminism is often conceived of as a negative form of legal analysis, but this thesis has attempted to show that, although gender equality should be a relevant factor, it should be possible to consider its role alongside other factors.

This thesis was originally conceived as a 'feminist' analysis of European intervention in the area of international child abduction; feminist in the sense that it would use feminist legal tools to analyse the problem of international child abduction and advocate an answer which was 'feminist' or was aimed at securing women's rights. However, as the research developed it became increasingly obvious that to focus on feminist concerns about child abduction alone would not provide a sufficiently nuanced analysis, and would be unpersuasive because of the failure to account for the impact that pursuing women's interests may have on the pursuit of other legitimate aims. To provide a 'feminist solution' to child abduction would result in a marginal conclusion which failed to accommodate the other legitimate legislative aims in this complex area of law. It was therefore decided that the other issues identified should be more clearly acknowledged, and analysed to a certain degree, alongside the

gender issues forming the focus of the thesis. The thesis highlights several areas where change may be appropriate and where legislative action may be taken, including on residence rights for women following return or on the interpretation of Regulation 2201/2003. Despite highlighting these areas the thesis has stopped short of making normative recommendations as the argument is instead focussed on the inclusion of gender equality issues in Regulation 2201/2003 and the effect of not including them. It is for future law makers to decide how the balance of the different factors should be struck, but the argument has been made that gender concerns should be included. Hopefully this has been done in a constructive way which offers a more balanced approach than a normative statement of feminist goals in this area of law could provide alone.

The use of feminism in this way has demonstrated that there is no single legal 'answer' to the social problem of international child abduction, but has exposed areas where consideration of gender issues may be appropriate. It may be the case that the return remedy is in fact the best solution to the different concerns that arise in this context, but this does not mean that it is inappropriate to question its aims and operation. Although feminist legal method may provide criticism of the operation of the return remedy, this does not require that the answer should be provided by feminists because other factors may legitimately prevail over this concern. The use of the concept of 'space' has therefore been useful to denote the lack of dominance of gender equality concerns. Using spatial concepts demonstrates that, although space for gender is necessary, space for other issues is also needed, not just to protect these interests, but also to consider their overlap and interaction, such as that between children's interests in the family structure. It is also a concept which links with the European ideal of an 'Area of Freedom, Security and Justice' which is intrinsically linked to the notion of space, i.e. the regulation of the European space. To

analyse in these terms demonstrates how this legislative space is being utilised and can constructively be conceptualised.

This methodology has also allowed a normative analysis of a controversial element of legislative action regulated as part of the rapidly developing, politically driven, Area of Freedom, Security and Justice. Given that the AFSJ has no clear normative aim or content, this methodology developed a contextualised analysis of the child abduction provisions, deriving legal aims from the relevant areas of law and their role in developing European legal priorities. The purpose of the AFSJ is then not a necessary consideration beyond defining some of the EU's legislative priorities, instead the methodology addresses and analyses Regulation 2201/2003 as a measure in its specific legal context. Since the AFSJ policy priorities are themselves fragmented, it is appropriate to conduct a fragmented analysis of the legal measures adopted drawing on a variety of specifically relevant factors. An analysis of asylum and immigration law, or judicial and police co-operation in criminal matters, could draw on the methodology in this thesis, but would address different legal factors and aims to construct an appropriate contextualised analysis.

This research has explored only one aspect of European intervention in private international family law and there is much scope for further research. It contributes to the understanding of the aims of judicial co-operation in civil matters, and specifically private international law, within the framework of the Area of Freedom, Security and Justice. However, private international law is the source of much legislation and is the centre of the political ambitions of some Member States for the future role of the EU, to the point of contemplating enhanced co-operation between some

Member States on choice of law for divorce.[3] However, the focus of much academic research and activity has been solely from a private international law perspective instead of considering its interaction with other elements of the European legal order. There is clearly more scope for research into the European approach to private international law and its role within European law. The EC will have an increasing influence in this field following its accession to the Hague Conference on Private International Law.[4] The European 'model', based on mutual trust and recognition and legal certainty, should therefore be subject to further scrutiny for its effectiveness in promoting European integration and in providing practical workable solutions to cross-border litigation.

As the case law develops further across the Member States the legal practice implications of Regulation 2201/2003 will become clearer. The ECJ's approach to this new area of law, its sensitivity in regulating cross-border family dissolution and ability to expedite preliminary references will also be clarified. This thesis has focussed almost entirely on practice in England and Wales as a jurisdiction which is regarded as being effective in applying the Hague Convention 1980. It has also considered how the rules should be implemented rather than on their practical implementation across the Member States, something which could usefully be the focus of a cross-border empirical study. This could also be extended to considering the measures and institutions in place to facilitate cross-border judicial contact in such cases, how this informal approach is used and its effect in

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[3] See EU Observer 'Divorce Rules Could Divide EU States' 24th July 2008 http://euobserver.com/9/26532 last accessed 25th July 2008.

[4] Following Decision 2006/719 EC on the accession of the Community to the Hague Conference on Private International Law OJ [2006] L 297/1, 16th October 2006, from the 3rd April 2007 the EC has been a Member of the Hague Conference. See http://www.hcch.net/index_en.php?act=states.details&sid=220 last accessed 25th July 2008.

such cases, and whether it does help to create a 'common judicial area'. The work of the European judicial network in this process could form an interesting research focus to establish how the European model for private international law is developed through informal judicial contact.

In relation to the gender equality role of the EU, this research has considered the role of the Daphne Programmes in combating violence against women and children in Europe. These Programmes have not been the focus of research specifically aimed at assessing how they developed or how the money grants are used by the bodies who apply for funding. The Commission has assessed the results of the Programmes, but actual experiences of the bodies who have used the expertise and financial assistance it provides could be investigated to consider how close the links are between the providers of domestic violence services in the Member States and how the service provision varies depending on the national context.

Although not central to the research in this thesis, it has been highlighted that gender equality norms developed at EU level are subject to the 'filter' of the national context which can re-interpret and adapt such norms during their application. This is less of a problem where 'soft' forms of cooperation are developed as the essence of this form of regulation is to accommodate, adapt and learn from these differences. However, for hard law solutions this affects the uniformity and potentially the effectiveness of the law as it may not achieve its intended purpose in the national context. The approach of national courts may be different to that anticipated and, even with the ECJ's role as in providing uniform interpretation for use in all Member States, the national 'filter' still has a potential impact. Examining both ECJ and national court reasoning on the same area of law could be a research focus for many different topics, but it is suggested that

case law on European citizenship, which is expansively interpreted at the ECJ, and received only guardedly in English courts, would be an interesting lens through which to examine this process.

However, this issue could also form the basis of further research to consider how feminist legal theory should adapt to the internationalisation of gender equality questions. In the UK feminism was regarded as an 'anti-State' discourse, with women creating their own localised forms of feminist action outside the State system. Although this continues, the law and the State system has also been used to achieve feminist goals in relation to problems highlighted by feminists, such as domestic violence. However, action in relation to gender equality issues has now advanced further into international spheres, including the United Nations and the European Union. On a theoretical level, this may require changes to the nature of feminist legal analysis. It should be questioned whether concepts and theories developed in national contexts, with action by the nation State in mind, can translate effectively into an arena which, although patriarchal, has contested sovereignty and limited competence. The EU forum provides opportunity for innovation across Europe, but research is needed into how best to take advantage of that innovation on behalf of women in a constructive, practical and relevant manner.

The difficulties of accommodating 'differences' between women's experience of inequality into research and action on women's issues has been a significant focus of feminist legal theory in the past decade. Yet as the pursuit of gender equality shifts further and further from a local level addressing such issues and creating a form of action which helps women achieve equality becomes an even more difficult question. Organising and creating a legitimate representative voice for women on an international level is problematic, yet, without it, strategies such as gender

mainstreaming cannot operate effectively. Although gender mainstreaming has the potential to change the European approach to gender equality, feminists must be alive to the fact that this requires participation and expertise, not just within the European institutions, but also from the academic and activist community. As the scope of European activity increases, this should become a more important issue on the feminist agenda and the relevance of women's issues made clear to enable them to be engaged with and addressed in a constructive manner.

As an aspect of this agenda, this research has examined the role of gender in international child abduction to demonstrate the relevance of gender equality concerns, alongside other legitimate legal factors, at European level. In investigating the complex, contested issue of international child abduction it has highlighted the difficulties of regulating people's family lives across international borders. The EU has played a significant role in establishing the social conditions for the creation and breakup of *international families*, and should have a role in regulating the subsequent effects, including international child abduction. Although there is often no clear legislative solution, it has been demonstrated that more *interrogation* of the nature of the social problems the EU is addressing is required. Protecting children's rights and the EU's aims in relation to the free movement of persons and private international law are important goals, but the EU has an additional responsibility to promote gender equality in all areas of its activities, and it has the tools to do so. Despite the existence of this responsibility, women's position in European law is sometimes obscured by other interests, and consideration of the law relating to international child abduction demonstrates the ease with which gender can be 'lost', a difficulty which fundamentally affects women's citizenship status in the EU. Thus, gender equality norms need to be further embedded within the European architecture, given space in which to be utilised

effectively, to acknowledge and address the continuing role of gender relations in the social life of the European Union.

BIBLIOGRAPHY

BOOKS AND EDITED COLLECTIONS

ACKERS, L, *Shifting Spaces: Women, Citizenship and Migration within the European Union* (Policy Press, Bristol, 1998)

ANTOKOLSKAIA, M, (editor) *Convergence and Divergence of Family Law in Europe* (Intersentia, Antwerp, 2007)

ARNULL, A, *et al Wyatt and Dashwood's European Union Law* (5th edition, Sweet and Maxwell, London, 2006)

BANAKAR, R, TRAVERS, M, (editors) *Theory and Method in Socio-Legal Research* (Hart Publishing, Oxford, 2005)

BEAUMONT, P, McELEAVY, P, *The Hague Convention on International Child Abduction* (OUP, 1999)

BEVERIDGE, F, NOTT, S, STEPHEN, K, *Making Women Count* (Ashgate, Aldershot, 2000)

BOELE-WOELKI, K, SVERDRUP, T, (editors) *European Challenges in Contemporary Family Law* (Intersentia, Antwerp, 2008)

BOELE-WOELKI, K, GONZALEZ BEILFUSS, C, (editors) *Brussels II* bis: *Its Impact and Application in the Member States* (Intersentia, Antwerp, 2007)

BOELE-WOELKI, K, (editor) *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia, Antwerp, 2003)

BORDO, S, *Unbearable Weight: Feminism, Western Culture and the Body* (University of California Press, Los Angeles, 1993)

BROPHY, J, SMART, C, (editors) *Women-in-Law: Explorations in Law, Family and Sexuality* (Routledge and Kegan Paul, London, 1985)

BUCK, T, *International Child Law* (Cavendish Publishing, London, 2005)

CRETNEY, S, *et al Principles of Family Law* (7th Edition, Sweet and Maxwell, London, 2003)

DIDUCK, A, KAGANAS, F, *Family Law, Gender and the State* (2nd edition, Hart Publishing, Oxford, 2006)

DIDUCK, A, *Law's Families* (LexisNexis Butterworths, London, 2003)

DIDUCK, A, O'DONOVAN, K, (editors) *Feminist Perspectives on Family Law* (Routledge Cavendish, Oxford, 2006)

DOBASH, R, DOBASH, R, *Women, Violence and Social Change* (Routledge, London, 1992)

DOBASH, R, DOBASH, R, *Violence Against Wives* (Free Press, New York, 1979)

ELMAN, L, (editor) *Sexual Politics and the European Union: The New Feminist Challenge* (Berghahn Books, Providence, 1996)

FINEMAN, M, THOMADSEN, N, (editors) *At the Boundaries of Law: Feminism and Legal Theory* (Routledge, New York, 1991)

FITZPATRICK, P, HUNT, A, (editors) *Critical Legal Studies* (Blackwell, Oxford, 1987)

HANTRAIS, L, LETABLIER, MT, *Families and Family Policies in Europe* (Longman, New York, 1996)

HERVEY, T, O'KEEFFE, D, (editors) *Sex Equality in the European Union* (John Wiley, Chichester, 1996)

HESTER, M, KELLY, L, RADFORD, J, *Women, Violence and Male Power* (OUP, Buckingham, 1996)

HOFF, L, *Battered Women as Survivors* (Routledge, London, 1990)

HOSKYNS, C, *Integrating Gender* (Verso, London, 1996)

KATZ, S, *et al* (editors) *Cross Currents: Family Law and Policy in the US and England* (OUP, 2000)

KNOP, K, (editor) *Gender and Human Rights* (OUP, 2004)

LOWE, N, EVERALL, M, NICHOLLS, M, *International Movement of Children: Law, Practice and Procedure* (Jordan Publishing, Bristol, 2004)

MacKINNON, C, *Toward a Feminist Theory of the State* (Harvard University Press, Cambridge Massachusetts, 1989)

MARSHALL, TH, *Citizenship and Social Class* (Pluto Press, London, 1992)

MASON, J, *Qualitative Researching* (2nd edition, Sage Publications, London, 2005)

McGEE, C, *Children and Domestic Violence: Action Towards Prevention* (Jessica Kingsley Publishers, Philadelphia, 2000)

McGLYNN, C, *Families and the European Union: Law, Politics and Pluralism* (Cambridge University Press, 2006)

MEEUSEN, J, *et al* (editors) *International Family Law for the European Union* (Intersentia, Antwerp, 2007)

MOONEY, J, *Gender Violence and the Social Order* (St Martin's Press, New York, 2000)

MULLENDER, A, MORLEY, R, (editors) *Children Living With Domestic Violence* (Whiting & Birch, London, 1994)

O'DONOVAN, K, *Sexual Divisions in Law* (Weidenfield and Nicolson, London, 1985)

OMEROD, D, *Smith and Hogan on Criminal Law* (11th edition, OUP, 2005)

PHILLIPS, A, (editor) *Feminism and Equality* (Blackwell, Oxford, 1987)

RICHARDSON, J, (editor) *European Union: Power and Policy Making* (2nd edition, Routledge, London, 2001)

SCHNEIDER, E, *Battered Women and Feminist Lawmaking* (Yale University Press, New Haven, 2000)

SEVENHUIJSEN, S, *Citizenship and the Ethics of Care: Feminist Considerations on Justice, Morality and Politics* (Routledge, London, 1998)

SILVA, E, SMART, C, (editors) *The New Family?* (Sage Publications, London, 1999)

SHAW, J, MORE, G, (editors) *New Legal Dynamics of European Union* (Clarendon Press, Oxford, 1995)

SMART, C, *Feminism and the Power of Law* (Routledge, London, 1989)

SMART, C, *The Ties that Bind: Law, Marriage and the Reproduction of Patriarchal Relations* (Routledge & Kegan Paul, London, 1984)

SMITH, P, (editor) *Feminist Jurisprudence* (OUP, 1993)

STANKO, E, *Intimate Intrusions: Women's Experience of Male Violence* (Routledge & Kegan Paul, London, 1985)

TONER, H, *Partnership Rights, Free Movement and EU Law* (Hart Publishing, Oxford, 2004)

WALLBANK, J, *Challenging Motherhood(s)* (Prentice Hall, Harlow, 2001)

WEILER, J, *The Constitution of Europe* (Cambridge University Press, 1999)

ARTICLES AND EDITED COLLECTION CONTRIBUTIONS

ACKERS, L, "Citizenship, Migration and the Value of Care in the European Union" (2004) 30 Journal of Ethnic and Migration Studies 373

ACKERS, L, "Citizenship, Gender and Dependency in the European Union: Women and Internal Migration" in T Hervey, D O'Keeffe (editors) *Sex Equality in the European Union* (John Wiley, Chichester, 1996)

ÁLVAREZ-TORNE, M, "The Dissolution of the Matrimonial Property Regime and the Succession Rights of the Surviving Spouse in Private International Law" in K Boele-Woelki, T Sverdrup (editors) *European Challenges in Contemporary Family Law* (Intersentia, Antwerp, 2008)

ANTOKOLSKAIA, M, "The Harmonisation of Family Law: Old and New Dilemmas" (2003) 11 European Review of Private Law 28

APPEL, A, HOLDEN, G, "The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Re-Appraisal" (1998) 12 Journal of Family Psychology 578

ARMSTRONG, S, "Is the Jurisdiction of England and Wales Correctly Applying the 1980 Hague Convention on the Civil Aspects of International Child Abduction?" (2002) 51 International and Comparative Law Quarterly 427

ARNULL, A, "From Charter to Constitution and Beyond: Fundamental Rights in the New European Union" [2003] Public Law 774

ASKOLA, H, "Violence Against Women, Trafficking and Migration in the European Union" (2007) 13 European Law Journal 204

BAILEY, A, BOYLE, P, "Untying and Retying Family Migration in the New Europe" (2004) 30 Journal of Ethnic and Migration Studies 229

BAILEY-HARRIS, R, WILSON, J, "*Mendoza v Ghaidan* and the rights of de facto spouses" (2003) 33 Family Law 575

BANAKAR, R, "Studying Cases Empirically: A Sociological Method for Studying Discrimination Cases in Sweden" in R Banakar, M Travers (editors) *Theory and Method in Socio-Legal Research* (Hart Publishing, Oxford, 2005)

BARTLETT, K, "Feminist Legal Methods" (1990) 100 Harvard Law Review 829

BASEDOW, J, "The Communitarization of the Conflict of Laws under the Treaty of Amsterdam" (2000) 37 Common Market Law Review 687

BEEVERS, K, "Child Abduction: Inchoate Rights of Custody and the Unmarried Father" (2006) 18 Child and Family Law Quarterly 499

BEVERIDGE, F, "Building Against the Past: the Impact of Mainstreaming on EU Gender Law and Policy" (2007) 32 European Law Review 193

BEVERIDGE, F, NOTT, S, "Mainstreaming: A Case for Optimism and Cynicism" (2002) 10 Feminist Legal Studies 299

BEVERIDGE, F, NOTT, S, STEPHEN, K, "Moving Forward with Mainstreaming" in F Beveridge, S Nott, K Stephen *Making Women Count* (Ashgate, Aldershot, 2000)

BEVERIDGE, F, NOTT, S, "Gender Auditing – Making the Community Work for Women" in T Hervey, D O'Keeffe (editors) *Sex Equality in the European Union* (John Wiley, Chichester, 1996)

de BOER, T, "The Second Revision of the Brussels II Regulation: Jurisdiction and Applicable Law" in K Boele-Woelki, T Sverdrup (editors) *European Challenges in Contemporary Family Law* (Intersentia, Antwerp, 2008)

BOOTH, C, BENNETT, C, "Gender Mainstreaming in the European Union: Towards a New Conception and Practice of Equal Opportunities" (2002) 9 European Journal of Women's Studies 430

BOTTOMLEY, A, *et al* "Dworkin; Which Dworkin? Taking Feminism Seriously" in P Fitzpatrick, A Hunt (editors) *Critical Legal Studies* (Blackwell, Oxford, 1987)

BRANNEN, J, "Reconsidering Children and Childhood: Sociological and Policy Perspectives" in E Silva, C Smart (editors) *The New Family?* (Sage Publications, London, 1999)

BROPHY, J, "Child Care and the Growth of Power: the Status of Mothers in Child Custody Disputes" in J Brophy, C Smart (editors) *Women-in-Law: Explorations in Law, Family and Sexuality* (Routledge and Kegan Paul, London, 1985)

BRUCH, C, "The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases" (2004) 38 Family Law Quarterly 529

BRYAN, I, "Equality and Freedom from Discrimination: Article 13 EC Treaty" (2002) 24 Journal of Social Welfare and Family Law 223

BURMAN, E, *et al* " 'Culture' as a Barrier to Service Provision and Delivery: Domestic Violence Services for Minoritized Women" (2004) 24 Critical Social Policy 332

BURTON, M, "Judicial Monitoring of Compliance: Introducing 'Problem Solving' Approaches to Domestic Violence Courts in England and Wales" (2006) 20 International Journal of Law, Policy and the Family 366

BURTON, M, "Prosecution Decisions in Cases of Domestic Violence Involving Children" (2000) 22 Journal of Social Welfare and Family Law 175

CAHTZIFOTIOU, S, DOBASH, R, "Seeking Informal Support: Marital Violence Against Women in Greece" (2001) 7 Violence Against Women 1024

CALDWELL, J, "Child Welfare Defences in Child Abduction Cases – Some Recent Developments" (2001) 13 Child and Family Law Quarterly 121

CALAVITA, K, "Gender, Migration and Law: Crossing Borders and Bridging Disciplines" (2006) 40 International Migration Review 104

CARACCIOLO DI TORELLA, E, MASSELOT, A, "Under Construction: EU Family Law" (2004) 29 European Law Review 32

CARLIER, JY, SAROLĚA, S, "Migrations and Family Law" in J Meeusen *et al* (editors) *International Family Law for the European Union* (Intersentia, Antwerp, 2007)

CHAUDHRY, S, HERRING, J, "Righting Domestic Violence" (2006) 20 International Journal of Law, Policy and the Family 95

COLLIER, R, "Feminist Legal Studies and the Subject(s) of Men: Questions of Text, Terrain and Context in the Politics of Family Law and Gender", in A Diduck, K O'Donovan *Feminist Perspectives on Family Law* (Routledge Cavendish, Oxford, 2006)

CONAGHAN, J, "Reassessing the Feminist Project in Law" (2000) 27 Journal of Law and Society 351

CONNELLY, C, CAVANAGH, K, "Domestic Abuse, Civil Protection Orders and the 'New Criminologies': Is There Any Value in Engaging With the Law?" (2007) 15 Feminist Legal Studies 259

CONSTANDINIDOU, H, STAVROPOULOS, K, "Dealing with Domestic Violence in Greece" [2007] International Family Law 201

COSTELLO, C, "The *Bosphorous* ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe" (2006) 6 Human Rights Law Review 87

COUSINS, M, "Citizenship, Residence and Social Security" (2007) 32 European Law Review 386

DALY, M, "Changing Family Life in Europe: Significance for State and Society" (2005) 7 European Societies 379

DALY, M, "Gender Mainstreaming in Theory and Practice" (2005) 12 Social Politics 433

DAVIES, B, "*Segi* and the Future of Judicial Rights Protection in the EU" (2008) 14 European Public Law 309

DAVIS, R, "Citizenship of the Union...Rights for All?" (2002) 27 European Law Review 121

DIDUCK, A, O'DONOVAN, K, "Feminism and Families: *Plus Ça Change?*" in A Diduck, K O'Donovan (editors) *Feminist Perspectives on Family Law* (Routledge, Oxford, 2006)

DIDUCK, A, "Legislating Ideologies of Motherhood" (1993) 2 Social and Legal Studies 461

DELPHY, C, "The European Union and the Future of Feminism" in R Elman (editor) *Sexual Politics and the EU: The New Feminist Challenge* (Bergahan Books, Oxford, 1996)

DEMPSEY, M, "Toward a Feminist State: What does the 'Effective' Prosecution of Domestic Violence Mean?" (2007) 70 Modern Law Review 908

DETHLOFF, N, "Arguments for the Unification and Harmonisation of Family Law in Europe" in K Boele-Woelki (editor) *Perspectives on the Unification and Harmonisation of Family Law in Europe* (Intersentia, Antwerp, 2003)

DOBASH, R, DOBASH, R, "Violence Against Women in the Family" in S Katz *et al* (editors) *Cross Currents: Family Law and Policy in the US and England* (OUP, 2000)

DOBASH, R, *et al* "The Myth of Sexual Symmetry in Marital Violence" (1992) 39 Social Problems 71

DOUGAN, M, "The Treaty of Lisbon 2007: Winning Minds, Not Hearts" (2008) 45 Common Market Law Review 617

DOUGAN, M, "The Constitutional Dimension to the Case Law on Union Citizenship" (2006) 31 European Law Review 613

DOUGLAS-SCOTT, S, "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*" (2006) 43 Common Market Law Review 629

DRYWOOD, E, "Giving With One Hand, Taking With the Other: Fundamental Rights, Children and the Family Reunification Decision" (2007) 32 European Law Review 396

DUNCAN, W, "Action in Support of the Hague Child Abduction Convention: A View from the Permanent Bureau" (2000) 33 New York University Journal of International Law and Politics 103

DUNLAP, J, "The Pitiless Double Abuse of Battered Mothers" (2003) 11 Journal of Gender, Social Policy and the Law

DYER, A, "To Celebrate a Score of Years!" (2000) 33 New York University Journal of International Law and Politics 1

EDITORIAL "Two Speed European Citizenship? Can the Lisbon Treaty Help Close the Gap?" (2008) 45 Common Market Law Review 1

EDITORIAL "Preliminary Rulings and the Area of Freedom, Security and Justice" (2007) 44 Common Market Law Review 1

EDLESON, J, "The Overlap Between Child Maltreatment and Woman Battering" (1999) 5 Violence Against Women 134

EDLESON, J, "Children's Witnessing of Adult Domestic Violence" (1999) 14 Journal of Interpersonal Violence 839

ELLIOT, F, "The Family: Private Arena or Adjunct of the State?" (1989) 16 Journal of Law and Society 443

ELLISON, L, "Prosecuting Domestic Violence Without Victim Participation" (2002) 65 Modern Law Review 834

ELMAN, A, "Testing the Limits of European Citizenship: Ethnic Hatred and Male Violence" [2001] National Women's Studies Association Journal 13

EVERSON, M, "Women and Citizenship of the European Union" in T Hervey, D O'Keeffe (editors) *Sex Equality in the European Union* (John Wiley, Chichester, 1996)

EVERSON, M, "The Legacy of the Market Citizen" in J Shaw, G More (editors) *New Legal Dynamics of European Union* (Clarendon Press, Oxford, 1995)

FALLON, M, "Constraints of Internal Market Law on Family Law" in J Meeusen et al (editors) *International Family Law for the European Union* (Intersentia, Antwerp, 2007)

FAWCETT, J, "The Impact of Article 6(1) of the ECHR on Private International Law" (2007) 56 International and Comparative Law Quarterly 1

FEGAN, E, "Ideology After Discourse: A Reconceptualization for Feminist Analyses of Law" (1996) 23 Journal of Law and Society 173

FEIJTEN, P, van HAM, M, "Residential Mobility and Migration of the Divorced and Separated" (2007) 17 Demographic Research 623

FINEMAN, M, "Contract and Care" (2001) 76 Chicago-Kent Law Review 1403

FINEMAN, M, "Masking Dependency: The Political Role of Family Rhetoric" (1995) 81 Virginia Law Review 2181

FLEURY, R, SULLIVAN, C, BYBEE, D, "When Ending the Relationship Does Not End the Violence" (2000) 6 Violence Against Women 1383

FLOWERDEW, R, AL-HAMAD, A, "The Relationship Between Marriage, Divorce and Migration in a British Data Set" (2004) 30 Journal of Ethnic and Migration Studies 339

FORDER, C, "Child Protection: Human and Children's Rights" [2006] International Family Law 88

FREDMAN, S, "European Community Discrimination Law: A Critique" (1992) 21 Industrial Law Journal 119

FREEMAN, M, HUTCHINSON, AM, "The Voice of the Child in International Child Abduction" [2007] International Family Law 177

FREEMAN, M, "In the Best Interests of International Abducted Children? Plural, Singular, Neither or Both" [2002] International Family Law 77

FREEMAN, M, "Primary Carers and Hague Abduction Convention" [2001] International Family Law 140

FREEMAN, M, "The Effects and Consequences of International Child Abduction" (1998) 32 Family Law Quarterly 603

GOLDFARB, S, "Applying the Discrimination Model to Violence Against Women: Some Reflections on Theory and Practice" (2002) 11 Journal of Gender, Social Policy and Law 251

GOONESEKERE, S, "Human Rights as a Foundation for Family Law Reform" (2000) 8 International Journal of Children's Rights 83

GRAHAM-KEVAN, N, "Domestic Violence: Research and Implications for Batterer Programmes in Europe" (2007) European Journal on Criminal Policy and Research

GREIF, G, "A Parental Report on the Long Term Consequences for Children of Abduction by the Other Parent" (2000) 31 Child Psychiatry and Human Development 59

HALE, B, "The View from Court 45" (1999) 11 Child and Family Law Quarterly 377

HANMER, J, "The Common Market of Violence" in L Elman (editor) *Sexual Politics and the European Union: The New Feminist Challenge* (Berghahn Books, Providence, 1996)

HARTLEY, T, "The European Union and the Systematic Dismantling of the Common Law Conflict of Laws" (2005) 54 International and Comparative Law Quarterly 813

HATZOPOULOS, V, "With or Without You... Judging Politically in the Field of the Area of Freedom, Security and Justice" (2008) 33 European Law Review 44

HAYES, M, "Relocation Cases: Is the Court of Appeal Applying the Correct Principles?" (2006) 18 Child and Family Law Quarterly 351

HELLNER, M, "The Maintenance Regulation: A Critical Assessment of the Commission's Proposal" in K Boele-Woelki, T Sverdrup (editors) *European Challenges in Contemporary Family Law* (Intersentia, Antwerp, 2008)

HERRING, J, "Familial Homicide, Failure to Protect and Domestic Violence: Who's the Victim" [2007] Criminal Law Review 923

HERRING, J, TAYLOR, R, "Relocating Relocation" (2006) 18 Child and Family Law Quarterly 517

HERVEY, T, "The Future for Sex Equality Law in the European Union" in T Hervey, D O'Keeffe (editors) *Sex Equality in the European Union* (John Wiley, Chichester, 1996)

HERVEY, T, "Migrant Workers and their Families in the European Union: the Pervasive Market Ideology of Community Law", in J Shaw, G More *New Legal Dynamics of European Union* (Clarendon Press, Oxford, 1995)

HOWARD, E, "The European Year of Equal Opportunities for All – 2007: Is the EU Moving Away from a Formal Idea of Equality?" (2008) 14 European Law Journal 168

HUMPHREYS, C, THIARA, R, "Neither Justice Nor Protection: Women's Experiences of Post-Separation Violence" (2003) 25 Journal of Social Welfare and Family Law 195

HUNTER, A, "Family Members: An Analysis of the Implementation of the Citizen's Directive in UK Law" [2007] Journal of Immigration, Asylum and Nationality Law 191

JACOBS, F, "Citizenship of the European Union – A Legal Analysis" (2007) 13 European Law Journal 591

JOHNSON, T, "The Hague Child Abduction Convention: Diminishing Returns and Little to Celebrate for Americans" (2000) 33 New York University Journal of International Law and Politics 125

KAYE, M, "The Hague Convention and the Flight From Domestic Violence: How Women and Children are Being Returned by Coach and Four" (1999) 13 International Journal of Law, Policy and the Family 191

KIERNAN, K, "The Rise of Cohabitation and Childbearing Outside Marriage in Western Europe" (2001) 15 International Journal of Law, Policy and the Family 1

KOFMAN, E, "Female 'Birds of Passage' a Decade Later: Gender and Immigration in the European Union" (1999) 33 International Migration Review 269

KOMAREK, J, "In the Court(s) we Trust? On the Need for Hierarchy and Differentiation in the Preliminary Reference Procedure" (2007) 32 European Law Review 467

KOSTAKOPOULOU, D, "European Union Citizenship: Writing the Future" (2007) 13 European Law Journal 623

KROLL, K, "Unification of Conflict of Laws in Europe – Matrimonial Property Regimes" in K Boele-Woelki, T Sverdrup (editors) *European Challenges in Contemporary Family Law* (Intersentia, Antwerp, 2008)

KULU, H, MILEWSKI, N, "Family Change and Migration in the Life Course: An Introduction" (2007) 17 Demographic Research 567

LACEY, N, "Feminist Legal Theory and the Rights of Women" in K Knop (editor) *Gender and Human Rights* (OUP, 2004)

LAMONT, R, "The EU: Protecting Children's Rights in Child Abduction" [2008] International Family Law 110

LAMONT, R, "Habitual Residence and Brussels II *bis*: Developing Concepts for European Private International Family Law" (2007) 3 Journal of Private International Law 261

LENAERTS, K, De SMIJTER, E, "A 'Bill of Rights' For the European Union" (2001) 38 Common Market Law Review 273

LEWIS, R, DOBASH, R, DOBASH, R, CAVANAGH, K, "Law's Progressive Potential: The Value of Engagement with the Law for Domestic Violence" (2001) 10 Social Legal Studies 105

LIEBERT, U, "Europeanising Gender Mainstreaming: Constraints and Opportunities in the Multi-level Euro-Polity" (2002) 10 Feminist Legal Studies 241

LISTER, R, "Children (but not women) first: New Labour, child welfare and gender" (2006) 26 Critical Social Policy 315

LISTER, R, "Citizenship: Towards a Feminist Synthesis" (1997) 57 Feminist Review 28

LISTER, R, "Women, Economic Dependency and Citizenship" (1994) 19 Journal of Social Policy 445

LISTER, R, "Citizenship Engendered" (1991) 11 Critical Social Policy 65

LITTLETON, C, "Reconstructing Sexual Equality" in P Smith (editor) *Feminist Jurisprudence* (OUP, 1993)

LOMBARDO, E, MEIER, P, "Gender Mainstreaming in the EU: Incorporating a Feminist Reading?" (2006) 13 European Journal of Women's Studies 151

LOMBARDO, E, "EU Gender Policy: Trapped in the 'Wollstonecraft Dilemma?" (2003) 10 European Journal of Women's Studies 159

LOWE, N, "The Current Experiences and Difficulties of Applying Brussels II Revised" [2007] International Family Law 182

LOWE, N, HOROSOVA, K, "The Operation of the 1980 Hague Abduction Convention: A Global View" (2007) 41 Family Law Quarterly 59

LOWE, N, "The Growing Influence of the European Union on International Family Law – A View From the Boundary" (2003) 56 Current Legal Problems 439

LOWE, N, "New International Conventions Affecting the Law Relating to Children – A Cause for Concern?" [2001] International Family Law 171

LOWE, N, PERRY, A, "International Child Abduction: The English Experience" (1999) 49 International and Comparative Law Quarterly 127

MAJURY, D, "Strategizing in Equality" in M Fineman, N Thomadsen (editors) *At the Boundaries of Law: Feminism and Legal Theory* (Routledge, New York, 1991)

MASSELOT, A, "The State of Gender Equality Law in the European Union" (2007) 13 European Law Journal 152

MAZEY, S, "Gender Mainstreaming Strategies in the EU: Delivering on an Agenda" (2002) 10 Feminist Legal Studies 227

McCANN, K, "Battered Women and the Law: the Limits of the Legislation" in J Brophy, C Smart *Women-in-Law: Explorations in Law, Family and Sexuality* (Routledge & Kegan Paul, London, 1985)

McCLEAN, D, "'Return' of Internationally Abducted Children" (1990) 106 Law Quarterly Review 375

McELEAVY, P, "Evaluating the Views of Abducted Children: Trends in Appellate Case Law" (2008) 20 Child and Family Law Quarterly 230

McELEAVY, P, "The Impact and Application of the Brussels II *bis* Regulation in the United Kingdom" in K Boele-Woelki, C González Beilfuss (editors) *Brussels II bis: Its Impact and Application in the Member States* (Intersentia, Antwerp, 2007)

McELEAVY, P, "The New Child Abduction Regime in the European Union: Symbiotic Relationship or Forced Partnership?" (2005) 1 Journal of Private International Law 5

McELEAVY, P, "Brussels II *bis*: Matrimonial Matters, Parental Responsibility, Child Abduction and Mutual Recognition" (2004) 53 International and Comparative Law Quarterly 503

McELEAVY, P, "First Steps in the Communitarisation of Family Law: Too Much Haste, Too Little Reflection?" in K Boele-Woelki (editor) *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia, Antwerp, 2003)

McELEAVY, P, "The Brussels II Regulation: How the European Community has Moved into Family Law" (2002) 51 International and Comparative Law Quarterly 883

McELEAVY, P, "The Hague Child Abduction Convention 1980 – 2000" (2000) 13 International Children's Rights Monitor 29

McGLYNN, C, "Challenging the European Harmonisation of Family Law: Perspectives on 'The Family'" in K Boele-Woelki (editor) *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia, Antwerp, 2003)

McGLYNN, C, "Rights for Children?: The Potential Impact of the European Union Charter of Fundamental Rights" (2002) 8 European Public Law 387

McGLYNN, C, "The Europeanisation of Family Law" (2001) 13 Child and Family Law Quarterly 35

McGLYNN, C, "Families and the European Union Charter of Fundamental Rights: Progressive Change or Entrenching the Status Quo?" (2001) 26 European Law Review 582

McGLYNN, C, "Ideologies of Motherhood in European Community Sex Equality Law" (2000) 6 European Law Journal 29

McGLYNN, C, "EC Sex Equality Law: Towards a Human Rights Foundation" in T Hervey, D O'Keeffe (editors) *Sex Equality in the European Union* (John Wiley, Chichester, 1996)

McINTOSH, M, "The State and the Oppression of Women" in A Kuhn, A Wolpe (editors) *Feminism and Materialism: Women and Modes of Production* (Routledge and Kegan Paul, London, 1978)

MEEUSEN, J, "Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution?" (2007) 9 European Journal of Migration and Law 287

MENJIVAR, C, SALCIDO, O, "Immigrant Women and Domestic Violence: Common Experiences in Different Countries" (2002) 16 Gender and Society 898

MEULDERS-KLEIN, M, "Towards a Uniform European Family Law? A Political Approach" in M Antokolskaia *Convergence and Divergence of Family Law in Europe* (Intersentia, Antwerp, 2007)

MILLNS, S, "Gender Equality, Citizenship and the EU's Constitutional Future" (2007) 13 European Law Journal 218

MITCHELL, J, "Women and Equality" in A Phillips (editor) *Feminism and Equality* (Blackwell, Oxford, 1987)

MITSILEGAS, V, "The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU" (2006) 43 Common Market Law Review 1277

MOEBIUS, I, SZYSZCZAK, E, "Of Raising Pigs and Children" (1998) 18 Yearbook of European Law 125

MOIR, G, BEAUMONT, P, "Brussels II Convention: A New Private International Law Instrument in Family Matters for the European Union or the European Community" (1995) 20 European Law Review 268

MONTOYA, C, "The European Union, Capacity Building and Transnational Networks: Combating Violence Against Women Through the Daphne Programme" (2008) 62 International Organization 359

MORANO-FOADI, S, "Problems and Challenges in Researching Bi-National Migrant Families Within the European Union" (2007) 21 International Journal of Law, Policy and the Family 1

MOSSMAN, M, "Feminism and Legal Method: The Difference it Makes" (1987) 3 Wisconsin Women's Law Journal 147

MOYLAN, A, "The European Court of Justice and Brussels II Revised" [2006] International Family Law 188

MULLENDER, A, MORLEY, R, "What do we know from Research?" in A Mullender, R Morley (editors) *Children Living With Domestic Violence* (Whiting & Birch, London, 1994)

MUSGROVE, A, GROVES, N, "The Domestic Violence, Crime and Victims Act 2004: Relevant or 'Removed' Legislation" (2007) 29 Journal of Social Welfare and Family Law 233

NOTT, S, "For Better or Worse? The Europeanisation of the Conflict of Laws" (2002) 24 Liverpool Law Review 3

NOTT, S, "Accentuating the Positive: Alternative Strategies for Promoting Gender Equality" in F Beveridge, S Nott, K Stephen *Making Women Count* (Ashgate, Aldershot, 2000)

OBRADOVIC, D, ALONSO VIZCAINO, J, "Good Governance Requirements Concerning the Participation of Interest Groups in EU Consultations" (2006) 43 Common Market Law Review 1049

OLIVEIRA, C, "Workers and Other Persons: Step-by-Step From Movement to Citizenship – Case Law 1995-2001" (2002) 39 Common Market Law Review 77

OLSEN, F, "Children's Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child" (1992) 6 International Journal of Law and the Family 192

PIPER, C, "Assumptions about Children's Best Interests" (2000) 22 Journal of Social Welfare and Family Law 261

POLLACK, M, HAFNER-BURTON, E, "Mainstreaming Gender in the European Union" (2000) 7 Journal of European Public Policy 432

PURVIS, T, HUNT, A, "Identity versus Citizenship: Transformations in the Discourses and Practices of Citizenship" (1999) 8 Social and Legal Studies 457

PYLKKÅNEN, A, "Liberal Family Law in the Making: Nordic and European Harmonisation" (2007) 15 Feminist Legal Studies 289

QUINN, K, "Mommy Dearest: The Focus on the Family in Legal Feminism" (2002) 37 Harvard Civil Rights-Civil Liberties Law Review 447

RADFORD, J, STANKO, E, "Violence Against Women and Children: the Contradictions of Crime Control under the Patriarchy" in M Hester, L Kelly, J Radford *Women, Violence and Male Power* (OUP, Buckingham, 1996)

REDDAWAY, J, KEATING, H, "Child Abduction: Would Protecting Vulnerable Children Drive a Coach and Four Through the Principles of the Hague Convention?" (1997) 5 International Journal of Children's Rights 77

REECE, H, "UK Women's Groups' Child Contact Campaign: 'So long as it's safe'" (2006) 18 Child and Family Law Quarterly 538

REICH, N, HARBACEVICA, S, "Citizenship and Family on Trial: A Fairly Optimistic Overview of Recent Court Practice with Regard to Free Movement of Persons" (2003) 40 Common Market Law Review 615

REID, E, CARACCIOLO Di TORELLA, E, "The Changing Shape of the 'European Family' and Fundamental Rights" (2002) 27 European Law Review 80

RHOADES, H, "The 'No Contact' Mother: Reconstructions of Motherhood in the Era of the 'New Father'" (2002) 16 International Journal of Law Policy and the Family 71

RIBBENS McCARTHY, J, EDWARDS, R, GILLIES, V, "Moral Tales of the Child and the Adult: Narratives of Contemporary Family Lives Under Changing Circumstances" (2000) 34 Sociology 785

RICHARDSON, J, "Policy Making in the EU: Interests, ideas and garbage cans of primeval soup" in J Richardson (editor) *European Union: Power and Policy Making* (2nd edition, Routledge, London, 2001)

ROSARIA MARELLA, M, "The Non-Subversive Function of European Private Law: The Case of Harmonisation of Family Law" (2006) 12 European Law Journal 78

ROSE, N, "Beyond the Public/Private Division: Law, Power and the Family" in P Fitzpatrick, A Hunt (editors) *Critical Legal Studies* (Blackwell, Oxford, 1987)

RUDOLF, B, ERIKSSON, A, "Women's Rights under International Human Rights Treaties: Issues of Rape, Domestic Slavery, Abortion and Domestic Violence" (2007) 5 International Journal of Constitutional Law 507

SAGATUN, I, BARRETT, L, "Parental Child Abduction, the Law, Family Dynamics and Legal System Responses" (1990) 18 Journal of Criminal Justice 433

SCHÄFER, A, "Resolving Deadlock: Why International Organisations Introduce Soft Law" (2006) 12 European Law Journal 194

SCHULZ, A, "The Accession of the European Community to the Hague Conference on Private International Law" (2007) 56 International and Comparative Law Quarterly 939

SCHULZ, A, "The New Brussels II Regulation and the Hague Conventions of 1980 and 1996" [2004] International Family Law 22

SCHUZ, R, "Habitual Residence of Children under the Hague Child Abduction Convention – Theory and Practice" (2001) 13 Child and Family Law Quarterly 1

SCHUZ, R, "The Hague Child Abduction Convention: Family Law and Private International Law" (1995) 44 International and Comparative Law Quarterly 771

SCHWENZER, I, "Convergence and Divergence in the Law on Same-Sex Partnerships" in M Antokolskaia (editor) *Convergence and Divergence of Family Law in Europe* (Intersentia, Antwerp, 2007)

SHAW, J, "Mainstreaming Equality and Diversity in European Union Law and Policy" (2005) 58 Current Legal Problems 255

SHAW, J, "The European Union and Gender Mainstreaming: Constitutionally Embedded or Comprehensively Marginalised" (2002) 10 Feminist Legal Studies 213

SHAW, J, "Importing Gender: the Challenge of Feminism and the Analysis of the EU Legal Order" (2000) 7 Journal of European Public Policy 406

SHAW, J, "The Many Pasts and Futures of Citizenship of the European Union" (1997) 22 European Law Review 554

SHAW, J, "Law, Gender and the Internal Market" in T Hervey, D O'Keeffe (editors) *Sex Equality in the European Union* (John Wiley, Chichester, 1996)

SHETTY, S, EDLESON, J, "Adult Domestic Violence in Cases of International Child Abduction" (2005) 11 Violence Against Women 115

SILBERMAN, L, "Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence" (2005) 38 University of California Davis Law Review 1049

SILBERMAN, L, "Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments for ICARA" (2003) 38 Texas International Law Journal 41

SILBERMAN, L, "The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues" (2000) 33 New York University Journal of International Law and Politics 221

SILBERMAN, L, "The Hague Children's Conventions: The Internationalisation of Child Law" in S Katz et al *Cross Currents: Family Law and Policy in the US and England* (OUP, 2000)

SILVA, E, SMART, C, "The 'New' Practices and Politics of Family Life" in E Silva, C Smart (editors) *The New Family?* (Sage Publications, London, 1999)

SMART, C, "The New Parenthood: Fathers and Mothers After Divorce" in J Brophy, C Smart (editors) *The New Family?* (Sage Publications, London, 1999)

SMART, C, "The Woman of Legal Discourse" (1992) 1 Social and Legal Studies 29

SMART, C, "The Legal and Moral Ordering of Child Custody" (1991) 18 Journal of Law and Society 485

SMITH, L, "Recent Developments in Child Law" in K Boele-Woelki, T Sverdrup (editors) *European Challenges in Contemporary Family Law* (Intersentia, Antwerp, 2008)

SMITH, O, "Ireland's Multiple Ground Anti Discrimination Framework - Extending the Limitations?" (2005) 8 International Journal of Discrimination and the Law 7

SOHRAB, J, "Avoiding the 'Exquisite Trap': A Critical Look at the Equal Treatment/Special Treatment Debate in Law" (1993) 1 Feminist Legal Studies 141

SOKOLOFF, N, DUPONT, I, "Domestic Violence at the Intersections of Race, Class and Gender: Challenges and Contributions to Understanding Violence Against Marginalised Women in Diverse Communities" (2005) 11 Violence Against Women 38

SPAVENTA, E, "Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects" (2008) 45 Common Market Law Review 13

STALFORD, H, "EU Family Law: A Human Rights Perspective" in J Meeusen et al (editors) *International Family Law for the European Union* (Intersentia, Antwerp, 2007)

STALFORD, H, "Brussels II and Beyond: A Better Deal for Children in the European Union?" in K Boele-Woelki (editor) *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia, Antwerp, 2003)

STALFORD, H, "The Rights of the Child in International Family Proceedings: An EU Perspective" [2003] International Family Law 68

STALFORD, H, "Regulating Family Life in Post-Amsterdam Europe" (2003) 28 European Law Review 39

STALFORD, H, "The Developing European Agenda on Children's Rights" (2000) 22 Journal of Social Welfare and Family Law 229

STALFORD, H, "The Citizenship Status of Children in the European Union" (2000) 8 International Journal of Children's Rights 101

STRATIGAKI, M, "Gender Mainstreaming *vs.* Positive Action: An Ongoing Conflict in EU Gender Equality Policy" (2005) 12 European Journal of Women's Studies 165

STRATIGAKI, M, "The Cooptation of Gender Concepts in EU Policies: The Case of 'Reconciliation of Work and Family'" (2004) 11 Social Politics 30

SZYSZCZAK, E, "Citizenship and Human Rights" (2004) 53 International and Comparative Law Quarterly 493

TENREIRO, M, EKSTRÖM, M, "Recent Developments in EC Judicial Co-Operation in the Field of Family Law" [2004] International Family Law 30

TENREIRO, M, EKSTRÖM, M, "Unification of Private International Family Law Matters With the European Union" in K Boele-Woelki (editor) *Perspectives for the Unification and Harmonisation of Family Law in Europe*, (Intersentia, Antwerp, 2003)

TONER, H, "Impact Assessments and Fundamental Rights Protection in EU Law" (2006) 31 European Law Review 316

TRUBEK, D, TRUBEK, L, "Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-Ordination" (2005) 11 European Law Journal 343

TRYFONIDOU, A, "Jia or "Carpenter II": the Edge of Reason" (2007) 32 European Law Review 908

VAN DEN EECKHOUT, V, "Promoting Human Rights Within the Union: The Role of European Private International Law" (2008) 14 European Law Journal 105

VERLOO, M, "Multiple Inequalities, Intersectionality and the European Union" (2006) 13 European Journal of Women's Studies 211

VERSCHRAEGEN, B, "Moving to the Same Destination? Recent Trends in the Law of Divorce" in M Antokolskaia (editor) *Convergence and Divergence of Family Law in Europe* (Intersentia, Antwerp, 2007)

VOLPP, L, "On Culture, Difference and Domestic Violence" (2002) 11 Journal of Gender, Society, Policy and the Law 393

WADDINGTON, L, "Testing the Limits of the EC Treaty Article on Non-Discrimination" (1999) 28 Trade, Industry and Industrial Relations 133

WALBY, S, "Gender Mainstreaming: Productive Tensions in Theory and Practice" (2005) 12 Social Politics 321

WALBY, S, "The European Union and Gender Equality: Emergent Varieties of Gender Regime" (2004) 11 Social Politics 4

WALBY, S, "Feminism in a Global Era" (2002) 31 Economy and Society 533

WALBY, S, "Is Citizenship Gendered?" (1994) 28 Sociology 379

WALLBANK, J, "Getting Tough on Mothers: Regulating Contact and Residence" (2007) 15 Feminist Legal Studies 189

WARRINGTON, M, "I Must Get Out: the Geographies of Domestic Violence" (2001) 26 Transactions of the Institute of British Geographers 365

WEINER, M, "Strengthening Article 20" (2004) 38 University of San Francisco Law Review 701

WEINER, M, "Using Article 20" (2004) 38 Family Law Quarterly 583

WEINER, M, "The Potential and Challenges of Transnational Litigation for Feminists Concerned About Domestic Violence" (2003) 11 Journal of Gender, Society, Politics and the Law 749

WEINER, M, "International Child Abduction and the Escape from Domestic Violence" (2000) 69 Fordham Law Review 593

WILSON, R, "The Harmonisation of Family Law in the United States" in K Boele-Woelki, T Sverdrup (editors) *European Challenges in Contemporary Family Law* (Intersentia, Antwerp, 2008)

WINDEBANK, J, "Dual-Earner Couples in Britain and France: Gender Divisions of Domestic Labour and Parenting Work in Different Welfare States" (2001) 15 Work, Employment and Society 269

WORWOOD, A, "International Relocation – the Debate" (2005) 35 Family Law 621

YOUNG, J, "The Constitutional Limits on Judicial Activism: Judicial Conduct of International Relations and Child Abduction" (2003) 66 Modern Law Review 823

YUVAL-DAVIS, N, "Women, Citizenship and Difference" (1997) 57 Feminist Review 4

JEAN MONNET WORKING PAPERS

SHAW, J, "European Union Governance and the Question of Gender: A Critical Comment" Jean Monnet Working Paper No. 6/01

CONFERENCE PAPERS

DRYWOOD, E, "Protecting the Vulnerable in EU Asylum Law: Mainstreaming Strategies in Title IV EC Treaty" Gender and Migration in Europe, FLRU seminar, University of Liverpool, 25th April 2007

KANTOLA, J, "Transnational and National Gender Equality Politics: European Union's Impact on Domestic Violence Debates in Britain and Finland" ECPR Conference Paper 18-21 September 2003

KRIZSAN, A, PAANTJENS, M, van LAMOEN, I, "Domestic Violence: Women's Problem?" Paper given at Second Pan-European Conference on EU Politics, the Implications of a Wider Europe: Politics, Institutions and Diversity 24-6th June 2004 Bologna, Italy

LOMBARDO, E, "Integrating or Setting the Agenda? Gender Mainstreaming in the Two European Conventions on the Future of the EU and the Charter of Fundamental Rights" ECPR Conference, Marburg, 18th-21st September 2003

PONTIER, J, "Left Behind Children and Left Alone Mothers: Reconsidering the 1980 Hague Convention on International Child Abduction" Paper given at the Journal of Private International Law Conference June 26th – 27th 2007

THORPE, M, "The Impact of EU Legislation on Domestic Family Law" Law Society's EU Civil Justice Day, 17th October 2005

VERLOO, M, "The Development of Gender Mainstreaming as a Political Concept for Europe" Gender Learning Conference, Leipzig, 6-8th September 2002

REPORTS

REUNITE, FREEMAN, M, *International Child Abduction: The Effects* May 2006. http://www.reunite.org/page.php?alias=research20 Last accessed 13th November 2006

UNITED NATIONS Report of the Committee on the Elimination of Discrimination Against Women, 32nd Session, UN Doc. A/60/38(Part I) 27 (2006).

HENRICSON, C, BAINHAM, A, *The Child and Family Policy Divide: Tensions, Convergence and Rights*, Joseph Rowntree Foundation, 2005

PLATEK, M, "Women, Children and the Law in Poland: Protection or Barrier?" *Addressing gender based human rights violations* 2005 available at http://www.iss.uw.edu.pl/arch/20.05.2005/Platek_Poland.pdf last accessed 14th December 2006

REUNITE *The Outcomes for Children Returned Following Abduction* Report, September 2003 available at http://www.reunite.org/WEBSITEREPORT.doc last accessed 17th July 2007

UNITED STATES OF AMERICA STATE DEPARTMENT Report on Compliance with the Hague Convention of the Civil Aspects of International Child Abduction 2000 – 2005

EUROPEAN WOMEN'S LOBBY Study *Unveiling the Hidden Data on Domestic Violence in the European Union*, November 1999

EUROPEAN UNION MATERIALS

EUROPEAN COMMISSION

Communication from the Commission "Towards an EU Strategy on the Rights of the Child" COM(2006) 367 final, 4th July 2007

Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions "A Roadmap for Gender Equality 2006-2010" COM(2006) 92 final, 1st March 2006

Commission Proposal for a Council Regulation amending Regulation 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters COM(2006) 399 final

Commission Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations COM(2005) 649 final, 17th July 2006

Commission Green Paper on the conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition COM(2006) 400 final, 17th July 2006

Commission "Green Paper on Applicable Law and Jurisdiction in Divorce Matters" COM(2005) 82 final, 14th March 2005

Commission Green Paper on succession and wills COM(2005) 65 final, 1st March 2005

Commission Communication on securing respect for fundamental rights in Commission legislative proposals COM(2005) 172 (final), 27th April 2005

Communication from the Commission to the European Parliament and the Council on the Implications of the Court's Judgment of Case C-176/03 *Commission v Council* COM(2005) 583 final/2, 24th November 2005

Commission "Final Report to the European Parliament and the Council on the Daphne Programme (2000-2003)", COM(2004) 824 final, March 2004

Practice Guide for the application of the new Brussels II Regulation (Council Regulation (EC) No 2201/2003, 27th November 2003)

European Commission "The Daphne Experience 1997-2003" Available from http://ec.europa.eu/justice_home/funding/2004_2007/daphne/funding_daphne_en.htm last accessed 21st July 2008

European Commission "Europe Against Violence: Campaign Messages and Materials from Daphne Programme Projects" Available from http://ec.europa.eu/justice_home/funding/2004_2007/daphne/funding_daphne_en.htm last accessed 21st July 2008

Commission Proposal for a Council Regulation concerning the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility repealing Regulation (EC) No. 1347/2000 and amending Regulation (EC) No. 44/2001 in matters relating to maintenance COM(2002) 222 final/2, 17th March 2002

Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, COM (2002) 297 final, 6th June 2002

Commission "White Paper on European Governance" COM(2001) 428 final, 25th July 2001

Commission Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility COM(2001) 505 final, 6th September 2001

Commission Working Document "Mutual recognition of decisions on parental responsibility" COM(2001) 166 final, 27th March 2001

Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, 'Towards a Community Framework Strategy on Gender Equality (2001-2005)', COM (2000) 335 final, 7th June 2000

Commission "Incorporating Equal Opportunities for Women and Men into all Community Policies and Activities" COM (1996) 67 final, 21st February 1996

COUNCIL OF THE EUROPEAN UNION

Council Conclusions on Promoting Gender Equality and Gender Mainstreaming in Crisis Management 2760th General Affairs Council Meeting, 13th November 2006

2624th Council Meeting on Employment, Social Policy, Health and Consumer Affairs 6th-7th December 2004

Council of the European Union "The Hague Programme: Strengthening Freedom, Security and Justice in the European Union" 13th December 2004, 16054/04

2548th Council Meeting of Justice and Home Affairs, 27th-28th November 2003

2529th Council Meeting of Justice and Home Affairs, 2nd-3rd October 2003

Council of the European Union "Council Report on the Need to Approximate Member States' Legislation in Civil Matters" 13017/01, Justciv 129, 29th October 2001

Initiative of the French Republic with a view to adopting a Council Regulation on the mutual enforcement of judgments on rights of access to children OJ [2000] C 234, 15th August 2000

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

Information Note on References from National Courts for a Preliminary Ruling Supplement following the Implementation of the Urgent Preliminary Ruling Procedure Applicable to References Concerning the Area of Freedom Security and Justice available at http://curia.europa.eu/en/instit/txtdocfr/txtsenvigueur/noteppu.pdf last accessed 22nd July 2008

EUROPEAN PARLIAMENT

Public Hearing Jointly Organised by the committees on Civil Liberties, Women's Rights, Culture, Development, Legal Affairs, and Employment and by the sub-committee on Human Rights, 17th April 2007

Committee on Women's Rights and Gender Equality Report on Gender Mainstreaming in the Work of the Committees, 22nd December 2006

European Parliament Report on the Current Situation in Combating Violence Against Women and Any Future Action 9th December 2005 (2004/2220(INI))

Committee on Women's Rights and Opportunities 'Report on Gender Mainstreaming in the European Parliament', 26th February 2003, (2002/2025(INI))

Committee on Women's Rights and Equal Opportunities European Parliament Report on Gender Mainstreaming, 26th February 2003

European Parliament Report on the proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation (EC) No. 1347/2000 and amending Regulation (EC) No 44/2001 in matters relating to maintenance, 7th November 2002

EUROPEAN COUNCIL

Tampere European Council Presidency Conclusions, 15th-16th October 1999

EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

Opinion of the European Economic and Social Committee "Children as Indirect Victims of Domestic Violence" SOC/247, 14th December 2006

Opinion of the European Economic and Social Committee "Domestic Violence Against Women" SOC/218, 16th March 2006

Opinion of the Economic and Social Committee on the 'Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation (EC) No. 1347/2000 and amending Regulation (EC) No. 44/2001 in matters relating to maintenance'. OJ [2002] C 61/76, COM(2002) 222 final, 4th September 2002

EUROSTAT

Eurostat "The Life of Women and Men in Europe - 2008"

Eurostat "The Social Situation in the European Union 2005-2006"

Eurobarometer 51.0 "Europeans and their Views on Domestic Violence Against Women" June 1999

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW MATERIALS

Accession to Hague Convention on the Civil Aspects of International Child Abduction 1980 http://www.hcch.net/index_en.php?act=conventions.status&cid=24 last accessed 8th May 2008

Ratification table for Hague Convention on the Civil Aspects of International Child Abduction 1980 http://www.hcch.net/index_en.php?act=status.comment&csid=651&disp=type last accessed 30th January 2007

EC Accession to the Hague Conference on Private International Law

http://www.hcch.net/index_en.php?act=states.details&sid=220 last accessed 25th July 2008

N Lowe *et al* A Statistical Analysis of Applications Made in 2003 under the Hague Convention of 25th October 1980 on the Civil Aspects of International Child Abduction: National Reports, October 2006, 593. Available at

http://www.hcch.net/index_en.php?act=publications.details&pid=3889&dtid=2 last accessed 23rd July 2007

Explanatory Report prepared by E Pěrez-Vera on the Hague Convention on the Civil Aspects of International Child Abduction 1980 available from: http://www.hcch.net/index_en.php?act=publications.details&pid=2779 Last accessed 31st January 2007

COUNCIL OF EUROPE MATERIALS

C Hagemann-White, S Bohn "Protecting Women Against Violence: Analytical Study of the Effective Implementation of Recommendation Rec(2002)5 on the Protection of Women Against Violence in Council of Europe Member States" CDEG (2007) 3 Rev, 10th July 2007

Council of Europe "Recommendation of the Committee of Ministers to Member States on the protection of women against violence and Explanatory Memorandum" Rec(2002)5 adopted on 30 April 2002 available at http://www.profeministimiehet.net/whiterib/content/texts/rec20025.doc last accessed 13th July 2007

Council of Europe Report of the Specialists on Gender Mainstreaming, 1998, available at: http://www.coe.int/t/e/human_rights/equality/02._gender_mainstreaming/eg-s-ms(1998)2rev+1.asp#P92_19122, last accessed 4th July 2008

DOMESTIC POLICY DOCUMENTS

Home Office Circular (19/2000) to police forces on best practice in domestic violence cases updated 2000

Crown Prosecution Service Prosecution Guidelines in cases of domestic violence available at: http://www.cps.gov.uk/legal/section3/chapter_e.html#_Toc44571270 last accessed 2nd January 2008

Crown Prosecution Service Violence Against Women Strategy and Action Plan consultation available at: http://www.cps.gov.uk/consultations/vaw_index.html last accessed 2nd January 2008

Crown Prosecution Service Draft Violence Against Women Strategy and Action Plan available at: http://www.cps.gov.uk/legal/section3/chapter_e.html#_Toc44571270 last accessed 2nd January 2008

WEBSITES

EU AREA OF FREEDOM, SECURITY AND JUSTICE TARGETS http://ec.europa.eu/justice_home/news/information_dossiers/the_hague_priorities/index_en.htm last accessed 7th May 2008

COMMISSION ON EUROPEAN FAMILY LAW website http://www2.law.uu.nl/priv/cefl/ last accessed 19th September 2007

EU CHILD PROJECT http://www.liv.ac.uk/law/cscfl/EUChild/index.htm last accessed 22nd July 2008

WOMEN'S AID (domestic violence charity) www.womensaid.org last accessed 2nd January 2008

SPECIALIST DOMESTIC VIOLENCE COURT PROGRAMME http://press.homeoffice.gov.uk/press-releases/domestic-violence-courts last accessed 2nd January 2008

NEWSPAPER ARTICLES

'Divorce Rules Could Divide EU States' *EU Observer* 24th July 2008 http://euobserver.com/9/26532 last accessed 25th July 2008

"Pan-European Divorce Rules Defeated – for now" *Family Law Newswatch*, 1st July 2008

"An Irish Wake-Up Call" *The Guardian* 18th June 2008

"Migration: Record Exodus Leaves Aging Blighty" *The Guardian* 23rd August 2007