

# **International Family Law, Policy and Practice**

**Cross-Border Influences in the  
Modernisation of Family Justice  
in England and Wales**



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## **CROSS-BORDER INFLUENCES IN THE MODERNISATION OF FAMILY JUSTICE IN ENGLAND AND WALES**

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## Editor's Message

Welcome (at last!) to the second of our 2014 issues of the Centre's new journal, *International Family Law, Policy and Practice*, delay in publishing which has been occasioned by our attempted significant coverage of key issues in the current ongoing modernisation of Family Justice in the new Family Court, including looking at these issues from international perspectives outside all the national work which is taking place in the Family Court's own 'root and branch' programme. We are now months behind our usual publishing schedule although it seems in a good cause as there is some significant contribution to current problems in Family Law in the present issue.

In the early autumn we were simply intending to follow up the Interim report of the Family Court's Children and Vulnerable Witnesses Working Group (which inspired the last issue's introductory account of optimum contemporary processes for taking evidence in the criminal courts) with an article from the Crown Prosecution Service on their approach to taking such evidence. This was because the President of the Family Division (on setting up the Working Group) had paid tribute to the work already done by the Criminal Bar, the Bar's Advocacy Training Council, and in the criminal context generally, to formalise their practices in this respect, compared to which the President had assessed the Family Justice equivalents as being of the sort that were 'tolerated' but clearly not up to scratch in modern times. However, before this article from the CPS could be finalised, the more instantly pressing issue of FGM emerged, not only in connection with the first prosecution of a doctor, apparently for such activity (which turned out to be misconceived, as it emerged that he had merely been obliged to intervene surgically to enable an existing FGM victim to give birth and then reconstructed her tissue as best he could) but also in connection with another case of care proceedings brought by a local authority with a view not only to removing the child concerned from its parents but with the potential outcome of eventual adoption. As a result we have deferred the planned article on evidence taking from children and vulnerable witnesses until the next issue and instead now have an up to date account of protection from child abuse in this field from two leading specialists at the coal face of the current initiatives to combat FGM, which now includes not only the criminal law, the support of the Police but also the powerful jurisprudential support in his judgment in the relevant care proceedings of Sir James Munby, President of the Family Division of the High Court and as such the overall coordinator of the extensive modernisation of Family Justice in the new Family Court.

Meanwhile, the President had also been looking at transparency in Family Justice, which (while he has more than once stated that he considers it essential that none of those who have criticised Family Justice in the past are allowed to continue to believe that it is dispensed by some secret society making decisions behind closed doors) seems to be having a mixed reception, since there is evidence that some people, entirely legitimately, still think that they would rather that privacy in the Family Court continued. This is despite Sir James' Practice Direction early in 2014 stating that in principle all judgments should be published unless the judge in question considers otherwise, even if they are anonymised, and we have certainly heard mixed views when the resulting consultation paper was issued. We have therefore included an interesting article on privacy in the family from an overseas correspondent from Israel which deals with family privacy in general and for its individual members in both Israel and the United States and some other overseas jurisdictions. The position in Israeli law is

particularly interesting, not only as our Centre is currently planning to enlarge our existing close relationships with some Israeli academics with a potential research project, but because Israel, of all countries, has the opportunity to draw on the worldwide connections formed owing to the Jewish diaspora, in particular with US law, where our Centre also has interests. Moreover, as a young country which was establishing itself around the time that Family Law was first discovered as an academic discipline in English Law in the 1940s, Israel has had around the same length of time to develop the law it transplanted to Israel when the state was founded, so that its analysis of the principles of family privacy is timely when we are concurrently thinking about that in England and Wales.

However, while we were temporarily delaying publication for the above reasons, the combined issues of FGM and child protection in care proceedings have also impacted on another article which we commissioned following the more robust approach to non-consensual adoption out of care which emerged from the 2014 Dartington conference, only to find that this too has had some even more robust development during the winter, when the President delivered another defining judgment about the nature and extent of evidence which was expected to justify such adoptions, so that that article too required extensive updating.

Finally, Professor Marilyn Freeman has now published her report on the long term results of childhood abduction and has provided an analysis of the research which is profoundly disturbing and is likely to be followed up by further projects.

Accordingly we are now in a position to publish the current issue and can only comment that the President was right when he said in April 2014 that we stood 'on the cusp of history' in the context of the most significant modernisation of Family Justice for sixty years. Meanwhile we have saved other initiatives in the President's modernising programme for the next issue, which will also follow shortly.

*Frances Burton*

Frances Burton, Editor

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# 'FGM'<sup>1</sup> and care proceedings in the Family Court

Neelam Sarkaria\* and Gerry Campbell\*\*

## Why the Family Court must be prepared for the likely surge in care proceedings involving girls at risk of Female Genital Mutilation (FGM)

*“Given what we now know is the distressingly great prevalence of FGM in this country even today, some thirty years after FGM was first criminalised, it is sobering to reflect that this is not merely the first care case where FGM has featured but also, I suspect, if not the first one of only a handful of FGM cases that have yet found their way to the family courts...”*

*The courts alone, whether the family courts or the criminal courts, cannot eradicate this great evil but they have an important role to play and a very much greater role than they have hitherto been able to play.”*

Sir James Munby, President of the Family Division 2015

## Introduction

FGM has received considerable attention in the media following the key campaigns undertaken by the *Evening Standard* and the *Guardian* newspapers, and concurrent attention across the UK Government to eradicate this abhorrent crime.

Local authorities, amongst other front line professionals, are faced with the responsibility of:

- a. Identifying when a child may be at risk of being subjected to FGM and responding appropriately to protect the child;
- b. Identifying when a child has been subjected to FGM and responding appropriately to support the child; and
- c. Taking measures, which can be implemented to prevent and ultimately eliminate the practice of FGM.

FGM is child abuse and therefore a child protection issue. A statutory duty is already placed on agencies to co-operate to safeguard and promote the welfare of children in sections 11 and 12 of the Children Act 2004. Professionals are also expected to follow the statutory guidance in *Working Together to Safeguard Children* (DfE, 2013), which has status under section 7 of the Local Authority Social Services Act 1970.

To date very few FGM cases have entered the family courts as care proceedings, with the first reported case earlier this year. The authors will explore the likely increase in such cases in the family courts and the role of the professionals involved in safeguarding.

## Background

The World Health Organisation (WHO) has defined FGM as comprising all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons<sup>2</sup>. The WHO has estimated that more than 125 million girls alive today have been cut in 29 countries in Africa and the Middle East<sup>3</sup>.

FGM is rooted in gender inequality that is deeply entrenched in social, political and economic structures. The control of women and girls is at the heart of this harmful traditional practice and governed by a code of honour not dissimilar to forced marriage and other honour-based abuse. The need to control women's and girls' autonomy and their sexuality drives this practice. It is carried out in communities where there is a belief that girls and women who undergo FGM will be more suitable for marriage and achieving womanhood, and is linked closely to the expectation that men will only marry women who have undergone FGM. A girl who has not undergone FGM may face stigma, discrimination and accusations about perceived promiscuity, bringing shame to herself and her family thereby presenting other risks.<sup>4</sup>

There is a clear link with the desire for a proper marriage and societal expectation to deliver social and economic benefits. Both men and women support the practices and anyone departing from the norm may face condemnation, social exclusion and extreme violence. Practices are governed by rewards and punishments where social benefits outweigh the disadvantages of not following the code of honour.

FGM is a breach of human rights and the UK has committed itself to a number of UN Conventions. By

\* Neelam Sarkaria, Criminal Justice Specialist, Chair of the Association of Women Barristers and Criminal Justice Advisor to the Desert Flower Foundation (UK).

\*\*Detective Chief Superintendent Gerry Campbell, Deputy National Policing Lead for FGM, Forced Marriage and Honour Based Abuse.

<sup>1</sup> 'FGM' Female Genital Mutilation, has only recently become generally well known in the UK both as a new manifestation of violence against women and a new form of child abuse.

<sup>2</sup> World Health Authority (WHO), UNICEF, UNFPA 1997.

<sup>3</sup> WHO's Factsheet N241 FGM published 2014.

<sup>4</sup> Equality Now / City University Prevalence Study 2014.

ratifying the Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW) the UK committed itself to eliminate discrimination against women. Article 37 of the UN Convention on the Rights of the Child 1989 (CRC) details the UK's positive obligation in international law to ensure that children are not subjected to cruel, inhuman or degrading treatment. A further positive obligation is outlined in Article 2 of the UN Convention against Torture 1984 (CAT) to take legislative, administrative, judicial or other measures to prevent acts of torture within its jurisdiction.

*The UN General Resolution 2007 has emphasised that custom, tradition or religious beliefs cannot be used as an excuse for avoiding the obligation to eliminate violence against women and girls.*

## 1. The Classification of FGM

The WHO/UNICEF/UNFPA Joint Statement classified FGM into four types. Experience with using this classification over the past decade has brought to light some ambiguities. The present classification therefore incorporates modifications to accommodate concerns and shortcomings, while maintaining the four types. In addition, sub-divisions were created, to capture more closely the variety of procedures, when necessary.

Although the extent of genital tissue cutting generally increases from Type I to III, there are exceptions. Severity and risk are closely related to the anatomical extent of the cutting, including both the type and amount of tissue that is cut, which may vary between the types.

Type IV comprises a large variety of practices that does not remove tissue from the genitals. Though limited research has been carried out on most of these types, they appear to be generally less associated with harm or risk than the types I, II and III, that all consist of removal of genital tissue.

**Type 1 – Clitoridectomy:** partial or total removal of the clitoris and rare cases, only the prepuce

**Type 2 – Excision:** partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora (the labia are 'the lips' that surround the vagina)

**Type 3 – Infibulation:** narrowing of the vaginal opening through the creation of a covering seal. The seal is formed by cutting and repositioning the inner and sometimes outer labia, with or without the removal of the clitoris

**Type 4 – Other:** all other harmful procedures to the female genitalia for non-medical purposes, e.g. pricking, piercing, incising, scraping, stretching and cauterising the genital area [Impact on girls and women's autonomy]<sup>5</sup>

Sir James Munby, President of the Family Division recently adopted the WHO's classification of FGM in relation to type IV, e.g. pricking, piercing, incising, scraping and cauterizing the genital area when considering whether FGM type IV constitutes 'significant harm' in the first case where FGM has been raised in care proceedings<sup>6</sup>. This is the first time that the classification of FGM has been considered in a family case.

## 2. The roots of FGM

The authors maintain that FGM is a form of honour based abuse (HBA), which is best described in the recent draft UK National Policing HBA strategy 'as a collection of practices, which are used to control behaviour within families and/or communities to protect perceived cultural and religious beliefs and/or honour. Such violence can occur when perpetrators perceive that a relative or community member has shamed the family and / or community by breaking their honour code or code of behaviour. An honour code can define a family's mindset, way of life or lifestyle'.

The strategy also acknowledges that 'women and girls are predominantly (but not exclusively) the victims of honour based abuse, which is used to assert male power in order to control female autonomy and sexuality'.

HBA is a cultural phenomenon, which is also driven by superstition and myth rather than religious phenomenon. Commander Mak Chishty, the UK National Policing Lead, has asserted that it is important to recognise that FGM is not religiously sanctioned nor has it been religiously justified; yet for reasons unknown to us it has become historically ingrained in some areas of the world, notably Africa. It is evident that FGM's enforcement for purported religious reasons is a mis-construal and misrepresentation of Islam by its enforcers.

Despite its somewhat obscure origins, it is clear from historical references that FGM predates both Islam and Christianity. A practice initially peculiar to Ancient Egypt, it is believed to have spread with time into the expanses of North, Eastern and sub-Saharan Africa, where it has featured prominently in tribal codes of honour and conceptions of female chastity for centuries. Though its contemporary practitioners

<sup>5</sup> WHO's Factsheet N241 FGM published 2014.

<sup>6</sup> *B and G (Children)* (No 2) [2015] EWFC 3.

are prevalingly Muslim and Christian communities of African descent, it is immensely important to emphasise that there is no scriptural endorsement or justification for this Pharonic ritual. In fact, verse 4:119 of the Koran condemns the act of disfiguring or mutilating God's creation as abominable in the sight of God, and is often cited as evidence for the prohibition of FGM in Islam<sup>7</sup>.

### 3. The scale of FGM in the UK

The authors are of the view that many more cases regarding FGM will enter the care system based on the recent prevalence data from Department of Health and independent research. The 'tip of the iceberg' is now visible and the scale of the problem in the UK is worrying.

*Prevalence data - England and Wales* - A recent study published in July 2014 by City University in London, in collaboration with Equality Now, has provided information from surveys in 28 countries in which FGM is practised, together with information from the 2011 census about women who had migrated from those countries and where they are permanently resident in England and Wales. It is estimated that about 103,000 women aged 15-49, and about 24,000 women aged 50 and over who had migrated to England and Wales are living with the consequences of FGM. The most notable data regarding girls at risk of FGM is that 60,000 girls aged 0-14 were born in England and Wales to others who had undergone FGM<sup>8</sup>. The authors are of the view that the absence of data from 2011 poses a difficulty, and that there is every likelihood that numbers are now much higher.

*Scotland* - Research Tackling FGM in Scotland December 2004 has revealed 23,979 men, women and children born in one of 29 countries identified by UNICEF (2013) as FGM practising in Scotland 2011. The largest community potentially affected by FGM living in Scotland are Nigerians, with 9,458 people resident in Scotland, born in Nigeria. When weighted by the national prevalence rate in their country the largest community, followed by people born in Somalia, Egypt, Kenya, Sudan and Eritrea. There are potentially affected communities living in every local authority area in Scotland, with the largest in Glasgow, Aberdeen, and Edinburgh.

*Recent health data* - Since 1 September 2014

mandatory data regarding the prevalence of FGM is being collated from the 160 acute hospital providers in England. The data details those women who have previously been identified and are currently being treated for FGM related and non-FGM related conditions. For the period September 2014 to December 2014 1946 newly identified cases of FGM were reported nationally of which 47 included patients under the age of 18<sup>9</sup>. This data only refers to the 160 acute hospitals in England and does not include Scotland, Wales and Northern Ireland.

This data coupled with the new mandatory reporting duty<sup>10</sup> introduced through amendments to the Serious Crime Act 2015 (given Royal Assent on 3 March 2015) is likely to have a direct impact on the number of cases entering the Family Court. The duty requires all regulated healthcare and social care professionals, and teachers to report to the police within one month of initial disclosure/identification all cases of 'known' FGM where the instances which are disclosed by the victim and /or are visually confirmed, are limited to victims under the age of 18 years old.

Failure to comply with the duty will not carry a criminal penalty but will be addressed through existing professional body disciplinary frameworks. The authors believed this to be a first stage approach to criminalising professionals (as is the case in France) who do not refer / report FGM cases to the police).

### 4. Duty to Safeguard and Protect

It is evident that given the scale of offending worldwide and in the UK, and the physical consequences for girls and women, a concurrent need exists to safeguard and protect victims and prospective victims from such harmful practices irrespective of the so-called motivation for their perpetration. The safeguarding of children in the UK has or at least should be a well-trodden path for professionals, however the dearth of referrals to the police service from education, social care and health professionals highlights that there is an inconsistent approach to identifying those who are at risk of FGM or those who are living with the consequences of having undergone FGM.

As one of the severest forms of child abuse and a crime, FGM is also a fundamental abuse of a girl's

<sup>7</sup> Commander Mak Chishty

<sup>8</sup> Female Genital Mutilation in England and Wales: Updated statistical estimates of the numbers of affected women living in England and Wales and girls at risk Interim report on provisional estimates

<sup>9</sup> The Health and Social Care Information Centre data published 30 January 2015.

<sup>10</sup> In December 2014 the Home Office issued a paper 'Introducing mandatory reporting for female genital mutilation: a consultation'.



human rights. The authors are in agreement that we must focus our energies on preventing this harmful practice, as once we reach arrest and prosecution for a FGM act, it means that a girl or woman has already undergone FGM sustaining the severe physical and psychological injuries associated with types I, II and III.

The existing safeguarding duty is detailed in the Children Act 2004, section 11, which places a legal duty on statutory agencies to co-operate to safeguard and promote the welfare of children. This is reinforced by the European Convention on Human Rights (ECHR)<sup>11</sup>.

All public authorities and their employees bear a specific duty under ECHR Article 2 to safeguard the lives of those within its jurisdiction and under ECHR Article 3, which stipulates that *'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'*. The WHO<sup>12</sup> lists a diverse range of short to longer term physical and psychological health problems and impacts associated with the practice of FGM, which includes **death**<sup>13</sup> (Mohamud, 1991) caused by haemorrhage or infections, including tetanus and shock.

FGM referrals are also not being made to the police by social care, health and education professionals. In its submission<sup>14</sup> to the UK Parliament's Home Affairs Select Committee the Association of Chief Police Officers<sup>15</sup> (ACPO) referred to Metropolitan Police Service referral data relating to FGM from 2010 – 2013 which states *'...Education made 34 referrals, Health made 17 referrals and Social Care made 57 referrals. There was one referral from the specialist third sector and 6 from the NSPCC'*.

The lack of referrals to the Metropolitan Police Service (MPS) in short has led to an inconsistent approach to safeguard and protect girls and women exposed to FGM in a collegiate and consistent way. More often than not the barriers for non-police professionals referring cases to the police service relate to (professional/client) confidentiality and the professional's concern of what will happen next in terms of action by the police service.

Working Together to Safeguard Children is by no means a new concept to professionals working in the field of child protection. HM Government's 2013

*Guide*<sup>16</sup> to inter-agency working to safeguard and promote the welfare of children depicts the importance of having 'a child-centred and coordinated approach to safeguarding' and further rightly highlights that safeguarding is everyone's responsibility.

The authors advocate that if everyone is responsible then everyone must be accountable too. Furthermore it is essential that this partnership involves affected or practising communities, a position endorsed by the National Policing Lead in his submission to the Home Affairs Select Committee's Inquiry into FGM. Given the deeply held cultural nature of the offending and /or the superstition and myth, which drives FGM it is vital *'that Community Driven Solutions are fundamental to engender and drive sustained change i.e. affected communities must be willing, confident and able to recognise the need to change and begin the long process of changing attitudes to the practice'*. All partners must work with each other, with affected communities and families in preventing FGM as *'everyone who works with children .....has a responsibility for keeping them safe'*<sup>17</sup>.

## 5. Protection

As stipulated above *'safeguarding is everyone's responsibility'*. The authors contend that the protection of girls and women who have undergone or at risk of FGM is everyone's responsibility too, which includes members of the legal profession too. All professionals must give active consideration to the consequences and longer-term impact of their decisions. It is here that the family courts can make the greatest difference in preventing girls from undergoing a harmful practice which has life-long consequences.

In addition to the severe pain during and in the weeks following the cutting, girls who have undergone FGM experience various long-term effects - physical, sexual and psychological.

They may experience chronic pain, chronic pelvic infections, development of cysts, abscesses and genital ulcers, excessive scar tissue formation, infection of the reproductive system, decreased sexual enjoyment and psychological consequences, such as post-traumatic stress disorder.

The authors assert therefore, that FGM must be seen in the wider context of Violence Against Women and Girls and on a continuum of HBA.

<sup>11</sup> [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>12</sup> [http://www.who.int/reproductivehealth/topics/fgm/health\\_consequences\\_fgm/en/](http://www.who.int/reproductivehealth/topics/fgm/health_consequences_fgm/en/).

<sup>13</sup> *ibid*.

<sup>14</sup> Submission to Home Affairs Select Committee on FGM on behalf of ACPO for England, Wales and Northern Ireland para 50.

<sup>15</sup> <http://www.acpo.police.uk>.

<sup>16</sup> <https://www.gov.uk/government/publications/working-together-to-safeguard-children> (para 9, p.8).

<sup>17</sup> <https://www.gov.uk/government/publications/working-together-to-safeguard-children> (paragraph 9, page 8)



The recent draft UK National Policing definition of **HBA**, is:

*'an incident or crime involving violence, threats of violence, intimidation, coercion or abuse (including psychological, physical, sexual, financial or emotional abuse), which has or may have been committed to protect the honour of the family and or community for alleged or perceived breaches of the family and / or community's code of behaviour'.*

The authors share the view that the girls and women who have undergone FGM are more likely to be forced into marriage and suffer from honour-based abuse. There are so-called 'honour cultures' throughout the world where honour is central to how the culture defines and organises itself.<sup>18</sup> Such cultures develop honour codes, which guide acceptable and unacceptable behaviour and identify how honour is obtained and maintained. This is exceptionally important when considering gender roles. In 'honour cultures' men have a role in maintaining honour and quickly responding to perceived challenges and insults using their strength, power and toughness. Females are expected to maintain honour by behaving appropriately through deference, fidelity, modesty, purity and chastity and any behaviours, which do not conform to this are often stigmatized, discouraged and punished, sometimes violently (Vandello & Cohen, 2003). In 'honour cultures' females are seen as the responsibility of the male head of the family<sup>19</sup>. The behaviour and perceived behaviour of females directly impact on their own honour (as viewed by others) and has a powerful impact on the honour of males. Overall this results in the limitation of a female's freedoms and punishment for transgressions or perceived transgressions of the family's code of behaviour or honour. The perception of community members in 'honour cultures' is also a key issue as a man's ability to protect and control females is seen as a measure to which he is able to protect his honour<sup>20</sup> and a public demonstration that a family has honour<sup>21</sup>. In deed a family, which operates an honour system increases and/or sustains the family's standing within the community thereby influencing the marriageability of female family members.

## 6. Civil Protection Orders

Risk assessment and management is an artery, which runs through every HBA case. The level and gravity of crimes perpetrated in the name of honour including FGM clearly illustrates the level of danger or threats of danger, which victims face. This means that HBA cases can in effect be Homicide Prevention operations. The importance of risk management in this crime genre cannot therefore be under-estimated. It is essential not to undermine the impact of the smallest detail, which may have the greatest impact. One cannot dismiss the extremes to which perpetrators will go to, to achieve their aims, highlighting the importance of protective measures within a suite of measures or controls including Female Genital Mutilation Prevention Orders (FGMPOs).

The civil courts already provide useful preventative protection through forced marriage protection orders (FMPOs) introduced in England, Wales and Northern Ireland in November 2008<sup>22</sup> in an area where there are difficulties associated with culture and tradition. This preventative action is key to safeguarding children at risk of criminal offences. A similar process is shortly to be extended to FGM through the introduction of FGMPOs<sup>23</sup>.

The parallels between FGM and forced marriage have been acknowledged by Sir James Munby, when at para [57] of his judgment in the case of *In the Matter of Re B and G* [2015] EWFC 3 he repeated what he said in *Re K, A Local Authority v N* [2005] EWHC 2956 (fam) [2007] 1 FLR 399 at para [85]:

*'Forced marriage is a gross abuse of human rights. It is a form of domestic violence that dehumanises people by denying their right to choose how to live their lives. It is an appalling practice. No social or cultural imperative can extenuate and no pretended recourse to religious belief can possibly justify forced marriage.'*

*'Forced marriage is intolerable. It is an abomination. And the court must bend all its powers to preventing it happening. The court must not hesitate to use every weapon in its protective arsenal if faced with what is, or appears to be, a case of forced marriage<sup>24</sup>.'*

The President clearly stated that every word he

<sup>18</sup> Honor-based violence Policing and Prevention: Roberts, Campbell & Lloyd (CRC Press) pp 18, 19.

<sup>19</sup> Vandello J A and Cohen D, (2003) 84(5) *Journal of Personality and Social Psychology*, pp997-1010.

<sup>20</sup> Honor-based violence Policing and Prevention: Roberts, Campbell & Lloyd (CRC Press) p 19.

<sup>21</sup> Ibid.

<sup>22</sup> The Forced Marriage (Civil Protection) Act was passed in July 2007.

<sup>23</sup> Section 5A Serious Crime Act 2015 due for commencement later in 2015.

<sup>24</sup> Para [87] and [88] *Re K, A Local Authority v N* [2005] EWHC 2956 (fam) [2007] 1 FLR 399.

used here in relation to forced marriage applies with equal force to FGM.

The FGMPOs will provide a helpful tool and will enable local authorities to be ‘*proactive and vigilant*’ in taking measures to prevent girls being subjected to the ‘*great evil*’ of FGM as Sir James Munby has said in his judgment in the case of *In the Matter of B and G*. The President has clearly directed in the same case that courts should not hesitate to use every weapon in their ‘*protective arsenal*’ if faced with an ‘*actual or anticipated FGM case*’.

The Serious Crime Act 2015 provides for FGMPOs for the purposes of protecting a girl against the commission of a genital mutilation offence or protecting a girl against whom such an offence has been committed. Applications for such orders will be made in the civil courts and resemble the existing forced marriage protection orders in operation and design. The court may make a FGMPO on an application by the girl who is to be protected or a third party.

The Forced Marriage (Civil Protection) Act 2007 inserts Section 63C (7) into the Family Law Act 1996 and determines that FGMPOs can be applied for by relevant third parties as determined by the Lord Chancellor. Local Authorities are the only authorised relevant third party<sup>25</sup> named in the legislation although applications may be made by the police. The court may make a FGMPO on an application being made by the person who is to be protected by the order, a relevant third party and any other person with the permission of the court.

The court must consider all the circumstances including the need to secure the health, safety, and well-being of the girl. The authors believe that the procedure for FGMPOs will be similar.

Breach of the FGMPO will be a criminal offence with a maximum penalty of five years’ imprisonment, or a civil breach punishable by two years’ imprisonment.

Under the new provisions an order might contain such prohibitions, restrictions or other requirements for the purposes of protecting a victim or potential victim of FGM. This could include, for example, provisions to surrender a person’s passport or any other travel document; and not to enter into an arrangements, in the UK or abroad, for FGM to be performed on the person to be protected. Controversially measures could also include a requirement that a girl who is at high risk of FGM is required to undergo a medical examination. Clearly

there is an issue regarding parental consent or that of the ‘corporate parent’ depending on the relevant circumstances.

## 7. FGM and Care Proceedings

The first recorded case involving FGM and child protection is *B and G (children) (no2) v Leeds City Council* [2015] EWFC3 and provides clear guidance for future cases of FGM.

This recent case makes the point that a child who has suffered from FGM can be considered to have reached the care proceedings threshold, but that this is not a given, and each case should be considered on its facts, since section 31 of the Children Act 1989 states for a local authority to seek a care or supervision order they must be able to show, that the ‘threshold criteria have been met:

That the child must be suffering, or likely to suffer, significant harm.

And that the harm or likelihood of harm must be attributable to one of the following:

- a) The care given to the child, or likely to be given if the order were not made, not being what it would be reasonable to expect a parent to give; or
- b) The child being beyond parental control.

The *B and G* case involved care proceedings brought by the local authority on the basis that G had been subjected to Type IV FGM, and if she had, what the implications of that were in relation to planning for her and her brother’s future. The local authority was unable on evidence to establish that G either has been or is at risk of being subjected to any form of FGM.

Care proceedings were brought by a local authority in relation to two children, B, a boy, now aged 4 and G, a girl, now aged 3. Both the mother, M, and the father, F, come from an African country. Proceedings commenced in November 2013, triggered by M’s seeming abandonment of G in the street. B and G were placed in foster care. A separate judgment deals with all the other issues in the case (*Re B and G (Children)* [2014] EWFC 43).

Suspicion that G had been subjected to FGM first arose in November 2012 after blood was found in her nappy. A medical examination and report said there was no sign of any circumcision. The question was raised again in November 2013 when the foster carer reported G’s ‘irregular genitalia’. Three expert reports by medical professionals were before the court, and all three experts gave oral evidence.

The local authority’s case was that G has been subjected to FGM, WHO Type IV, in the form of the scar adjacent to her left clitoral hood identified by experts

<sup>25</sup> ‘a relevant third party’ is someone who is appointed to make applications on behalf of others.

who both examined G with the naked eye. Much discussion in court centred over whether G had a small scar on her genitals or not, which led Sir James to discuss the relative severity of this variety of Type IV FGM and male circumcision.

The local authority's case was initially that this constitutes 'significant harm' within the meaning of section 31 of the Children Act 1989, and this alone, assuming the parents were implicated, was sufficient to justify a care plan for the adoption of both children. After Sir James Munby queried this on the first day of the hearing, the local authority modified its position that it would not seek to persuade the court that such a finding without anything more would make adoption proportionate.

Difficulties with expert testimony made it hard to determine if G had been the victim of FGM or not, and there was extensive discussion in the ruling over what type of FGM the child may have been subjected to. Both parents denied that G has ever been subjected to FGM.

The President did however proceed to provide clear guidance for future cases involving FGM and reiterated at paragraph 68 that 'any form of FGM constitutes "significant harm" within the meaning of sections 31 and 100'. He cited Baroness Hale of Richmond in *Re B (Care Proceedings: Appeal)* [2013] UKSC 33, [2013] 2 FLR 1075, para 185, 'that any form of FGM, including FGM WHO Type IV, amounts to "significant harm"'.

The President also went on to distinguish FGM from male circumcision for the purposes of section 31 of the Children Act 1989. Although FGM and male circumcision involve 'significant harm' pursuant to s31(2)(a), the clear distinction between them is with respect to 'reasonable parenting' in accordance with s31(2)(b)(i), FGM can never be a feature of reasonable parenting, whereas society and the law treat male circumcision as an aspect of reasonable parenting.

Sir James said that implications in respect of family law orders will "*depend upon the particular type of FGM in question, upon the nature and significance of any other 'threshold' findings, and, more generally, upon a very wide range of welfare issues as they arise in the particular circumstances of the specific case*" ... *The only further comment I would hazard is that local authorities and judges are probably well advised not to jump too readily to the conclusion that proven FGM should lead to adoption*".

Making suggestions for the future, Sir James drew attention to a "dearth of medical experts" in paediatric FGM.

## 8. Criminal legislation tackling FGM

Family practitioners will need to be aware of criminal legislation in relation to FGM as concurrent proceedings in the family courts and criminal courts could arise.

In England, Wales and Northern Ireland all forms of FGM are illegal under the Female Genital Mutilation Act 2003 and in Scotland it is illegal under the Prohibition of FGM (Scotland) Act 2005.

FGM has been a specific criminal offence in the United Kingdom since 1985, with the introduction of the Prohibition of Female Circumcision Act 1985 (repealed in 2004). In England, Wales and Northern Ireland, the Female Genital Mutilation Act 2003 (brought into force on 3 March 2004) repealed and re-enacted the provisions of the 1985 Act, gave them extra-territorial effect and increased the maximum penalty for FGM.

Like the Female Genital Mutilation Act 2003, the Prohibition of FGM (Scotland) Act 2005 repealed and re-enacted the provisions of the 1985 Act, giving extra-territorial effect to those provisions and increasing the maximum penalty for FGM.

The Female Genital Mutilation Act 2003 affirms that it is illegal for FGM to be performed, and that it is also an offence for UK nationals or permanent UK residents to carry out, or aid, abet, counsel or procure the carrying out of FGM abroad on a UK national or permanent UK resident, even in countries where the practice is legal.

The key points to note are:

- The Act refers to 'girls', though it also applies to women;
- The Act contains the following offences, including an offence of performing the act of FGM on a UK national or permanent UK resident overseas. The offences are:
  - Section 1 - it is a criminal offence to excise, infibulate, or otherwise mutilate the whole or any part of a girl's labia majora, labia minora or clitoris;
  - Section 2 - a person is guilty of an offence if he aids, abets, counsels or procures a girl to excise, infibulate or otherwise mutilate the whole or any part of her own labia majora, labia minora or clitoris;
  - Section 3<sup>26</sup> - it is an offence for a person to aid, abet, counsel or procure the performance outside the UK of a relevant FGM operation;

<sup>26</sup> As amended by the Serious Crime Act 2015, given Royal Assent on 3 March 2015

Section 4<sup>27</sup> - extends the offences outlined in sections 1-3 to any act done outside the UK by a person who is resident in the UK<sup>28</sup>, and where an offence is committed outside the UK, even in countries where the practice is legal, treats the offence as having been committed anywhere in England, Wales or Northern Ireland.

– Defence

No offence is committed by a registered medical practitioner who performs a surgical operation (in the UK or outside the UK by persons exercising functions corresponding to those of a UK approved person) necessary for a girl's physical or mental health. Nor is an offence committed by a registered midwife or a person undergoing a course of training with a view to becoming a registered medical practitioner or registered midwife, but only if the operation is on a girl who is in any stage of labour, or has just given birth, and is for purposes connected with the labour or birth (see section 1 of the Act).

The Serious Crime Act 2005 also inserts a new section 4A and Schedule 1 in the Female Genital Mutilation Act 2003 based on the Sexual Offences (amendment) Act 1992. This provision, due for commencement on 3 May 2015, prohibits the publication of any information that might lead to the identification of a person against whom an FGM offence is alleged to have been committed, giving anonymity to victims of FGM.

Anonymity will commence, once an allegation has been made, for the duration of a victim's lifetime.

The new offence of failing to protect a girl from risk of FGM is also introduced by an amendment to the Female Genital Mutilation Act 2003. Where an offence of FGM is committed against a girl under the age of 16, each person who is responsible for the girl at the time the FGM occurred will be liable.

These changes have been made to close the gaps in criminal law which currently exist.

## 9. Current strategies

The current strategies being used in the UK focus on 4 broad but distinct areas i.e. Prevention,

Protection (and Safeguarding), Prosecution and Partnership, which will be determined by the nature of the professional's core business.

What professionals are clear about is that there must be an absolute focus on Prevention and Protection (and safeguarding) in Partnership to raise awareness amongst affected communities and statutory agency professionals to prevent such harmful crimes from taking place in the first instance. There is no place for cultural sensitivities in tackling and eradicating FGM as such an approach will lead to risk averse decision-making, which will lead to a failure to safeguard vulnerable girls.

The Victoria Climbié Inquiry report<sup>29</sup> examining the death of the late Victoria Climbié (2.11.1991 – 25.2.2000) stated 'There can be no excuse or justification for failing to take adequate steps to protect a vulnerable child, simply because that child's cultural background would make the necessary action somehow inappropriate' (para 16.11).

The authors also advocate, as a consequence of their professional experiences, the need for a strong collaborative partnership approach to safeguarding and protecting girls and eradicating FGM. If we are to realise the objective of eradicating FGM within a generation then all agencies must fully play their part within the coalition of partners charged with working alongside affected communities to achieve this aim. It is only with the unequivocal support, understanding of the need for change and action by affected or practicing communities will we eradicate FGM and safeguard girls and women from such significant harm.

## 10. Conclusion

The Family Court has a key role to play in relation to safeguarding those children at risk. FGM is a harmful traditional practice and the courts must do everything within its power to eradicate FGM within a generation. Judges, lawyers, social care, health, education and law enforcement professionals must develop a strong understanding of FGM which extends beyond awareness to treat it with the seriousness it deserves.

FGM is a transnational problem which requires the development of transnational solution.

<sup>27</sup> The Serious Crime Act 2015 amended the previous reference to a UK national or permanent UK resident. The 2003 Act can capture offences committed abroad or against those who are habitually resident in the UK irrespective of whether they are subject to immigration restrictions, and provided that the offence is committed at a time when the accused and/or the victim is resident in the UK. Equivalent amendments are made to the Prohibition of Female Genital Mutilation (Scotland) Act 2005

<sup>28</sup> 'UK resident' is defined as an individual who is habitually resident in the UK.

<sup>29</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/273183/5730.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/273183/5730.pdf) (para 16.11)

# Family-based Rights in Privacy and other areas of law - an Israeli perspective

Arye Schreiber\*

## Abstract

Mainstream Israeli society is considerably more familistic than American and West European societies, largely on account of socialist, religious and economic influences in Israel, but also, and especially, in reaction to the Holocaust, Israel's precarious security situation and other geopolitical factors. While individualism has been slower to make inroads in some large minorities in Israeli society, all but the most extreme sub-groups of that society have become increasingly and significantly individualistic since the 1960s, and yet as a whole it remains more family-oriented than other liberal societies: this is strongly reflected in several aspects of Israeli law.

The familistic tendencies of Israeli law in general, and specifically family and probate law, are well documented and accepted, and this article explores the familistic characteristics of an additional key area of Israeli law, namely privacy. This includes both decisional privacy – the right to make one's own major decisions as to life and lifestyle, and informational privacy - control of personal data, at least as between spouses. Even as other jurisdictions have largely individualized privacy rights of spouses, Israeli law continues to treat privacy as extending to the family as an entity.

This article examines the social background to the Israeli perspective on privacy, its interaction with the law's perspective on the family, and highlights the unique treatment of family privacy in Israeli law. Several additional recent or emerging areas of law (which treat spouses, immediate family and even extended family as one legal entity or web) are likewise briefly examined, with a comparison to other jurisdictions, notably the USA. In particular: disputes regarding fertilized ova, rights in respect of organ donation, privacy rights of the dead, and familial DNA search are discussed, as well as the law's treatment of 'honour killings', demonstrating that unlike US law, Israeli law generally treats rights in these areas as inherent in couples and families, not individuals.

## Introduction

Largely under the influence of Locke, and later Kant, common law jurisdictions and the USA above all others, have progressively affected the individualization of rights over time. Since the early 1970s these processes have reached new pinnacles, as particularly evident in a family context. Since the 1970s spouses can make life-altering decisions about family life independently of their partners, and children can often make them independently of their parents. Israeli law, was slower to make these changes, and retained a strong family-orientation well into the 1980s. While Israeli law in general has become highly individualistic, the law has retained a strongly family-oriented characterization of family law rights. This article will outline the familistic roots of legally protected privacy, identify and expound upon some familistic influences on Israeli privacy law, and finally will show that in privacy and additional areas - including several areas of law emerging from recent technological innovation and from social change, such as In Vitro Fertilization (IVF), DNA analysis, and organ harvesting among others - Israeli law has retained and even reinforced family-based legal rights.

## The Impregnable Castle –Privacy and the Family in Modern Law

Legally protected privacy in its two most prevalent modern forms is the creation of liberal, capitalist society. One form is informational privacy – meaning control over information pertaining to a person, specifically preventing others from obtaining or using that information; the second is constitutional, or decisional, privacy – basically the right to 'live my life and make my own decisions' without those being governed by the state. The notion of the individual needing protection from the state became much more pronounced as the power of the state grew in the nineteenth century and that protection became realistic with the growth of liberal democracy. With the advent of telegraphy, railroads and newspapers, the process of urbanization, and the population explosion induced by the Industrial Revolution, the need for seclusion

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\* Advocate (Israel), Solicitor (England & Wales). Founder, Schreiber & Co Lawyers, [www.schreiberlaw.co](http://www.schreiberlaw.co)



from the state – constitutional privacy - became more acute, and the need for seclusion from individuals – informational privacy - came into being.<sup>1</sup> Those needs were met by and in the family. The family, along with private enterprise, was mostly beyond the jurisdiction of the state as nineteenth century *laissez-faire* economics matured into political ideology promoting areas in which government should be excluded.<sup>2</sup> Centuries after feudalism had disappeared, this feudal family form survived in Western society, and continued as a separate, non-market domain, off-limits to the state.<sup>3</sup> Consequently, ‘the privacy of the modern family remained rather like that of the medieval family... the locus of privacy clearly remained, at least until quite recently, the unit as a whole - not any particular person.’<sup>4</sup> This applied to both forms of privacy mentioned above. Warren and Brandies, fathers of modern privacy law which they launched with their landmark 1890 article, noted that whereas a person’s constitutional privacy is so strong as to stop the state’s authority at the threshold of his home, informational privacy is completely without protection:

The common law has always recognized a man’s house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?<sup>5</sup>

This ‘rhetorical flourish’<sup>6</sup> nicely analogizes the relationship between constitutional privacy and informational privacy as that of invading a person’s home through front and back doors, and though the substance of their seminal article did not make meaningful use of this analogy it is not accidental that in Warren and Brandies’ analogy it is a person’s home, as an entity, and not the individual, that holds these

rights. Family privacy, both constitutional and, après Warren and Brandies, informational, was seen as inhering in the family. This was reflected in the Universal Declaration on Human Rights (UDHR), which stipulates that ‘No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence...’ (Article 12); note that language, which groups ‘privacy, family, home’ together, is very much in line with Warren and Brandeis’ analogy. This has some dark sides and, for most of history, what happened at home stayed at home, making the home something of an extra-legal refuge in which abusive parents and husbands are basically free of liability for their abuses. In this sense MacKinnon was right that historically privacy has been, among other things, ‘a right of men ‘to be let alone’ to oppress women one at a time.’<sup>7</sup>

As we will see presently, Israeli law has retained much greater family-based rights than other legal systems, and this has allowed family-based privacy rights to flourish in Israel even as they disappear in other jurisdictions : yet as discussed below, Israeli law, like other legal systems, has had to address the excesses of family privacy.

### **Familistic Israeli Society**

Though in many areas Israeli law has promoted highly individualized rights, there are several in which rights are seen as inhering in the family, not in individuals. There follows an introduction to the familistic tendencies of Israeli society, leading to presentation of the influences of familism and individualism on informational privacy and constitutional privacy,<sup>8</sup> which will inform a discussion of additional areas of law in which the tension between these largely conflicting tendencies is evident.

Israeli law has actually placed family, entity-based, rights as a corollary to and component of

<sup>1</sup> Of course, privacy is an ancient notion and need, but in its modern form, it is most directly attributable to the many processes that formed and accompanied the Industrial Revolution.

<sup>2</sup> AF Blakley, ‘Privacy: The Delicate Entanglement of Self and Other’ (2006) *Rutgers Journal of Law and Public Policy*, 3:172, 183. Note the interesting opinion of Teitelbaum and others cited by KM Bridges ‘Privacy Rights and Public Families’ (2011) *Harvard Journal of Law and Gender*, 34:113, 155, that the state always had an interest in the family, and that entity privacy is an exception, not a rule, in family-state relations in history.

<sup>3</sup> JL Dolgin ‘The Family in Transition: From Griswold to Eisenstadt and Beyond’ (1994) *Georgia Law Journal* 82:1519, 1530

<sup>4</sup> *ibid*, 1534, footnotes omitted.

<sup>5</sup> SD Warren and LD Brandeis ‘The Right to Privacy’ (1890) *Harvard Law Review* 4:193, 220

<sup>6</sup> H Nissenbaum, *Privacy in Context* (Stanford University Press, 2010), 95

<sup>7</sup> CA MacKinnon, ‘Roe v. Wade: A Study in Male Ideology’, in JL Garfield and P Hennessey (eds) ‘Abortion: Moral and Legal Perspectives’ (University of Massachusetts Press, 1984) at p. 45, 53

<sup>8</sup> Some scholars have claimed that under Israeli law constitutional or decisional privacy ought not to be considered privacy at all, and is better treated under the rubric of ‘autonomy’ or ‘human dignity’; see M Birnhack, ‘Control and Consent: The Theoretical Basis of the Right to Privacy’ (Hebrew) (2007) *Mishpat Umimshal – Law and Government in Israel* 11, 38. The present writer disagrees, and understands Tene as also considering decisional privacy and informational privacy as two aspects of the same group of rights under Israeli law, see O Tene, ‘The Right to Privacy following the Basic Law: Human Dignity and Liberty: a Conceptual, Constitutional, and Regulatory Revolution’ (2009) *Kiryat Mishpat* 8:39.

constitutional rights. Shamgar CJ wrote:

The family framework does not exist beside the constitutional system; rather it is an integral part of it... This right is expressed in the privacy and autonomy of the family... the involvement of the society and state in these decisions is an exception that must be justified by a reason. This approach has its roots in the recognition that the family is “the basic and earliest social cell in human history, and was, is and will be the foundation that serves and ensures the existence of human society” (Elon J (as he then was) in Civil Appeal 488/77 *Anon et al v Attorney General* [6] p. 434).<sup>9</sup>

As hinted by Elon J and Shamgar CJ, and similarly by Barak CJ who would echo this paragraph in 2004,<sup>10</sup> the family as a legal body capable of rights and duties predates the state, Israel’s quasi-constitutional Basic Laws, and the individualization of rights. Some rights continue to vest in the family and, for the most part, were never fully individualized; this is true in areas such as tax law, and of course traditional family law. But many other areas of law have become less deindividualised and are reverting to a familistic position, most notably privacy law.

In general, Israeli society is very familistic<sup>11</sup> as compared with West European or North American societies. This tendency was enshrined in Israeli law from the outset. In particular, as noted by Triger, the early Zionist movement sought to distance itself from the effeminized Diaspora Jewish man,<sup>12</sup> and to reframe the Jewish man as the macho and manly head of a family. This was especially true after the Holocaust, both in light of the myth of the meek Diaspora Jews who went as lambs to the slaughter, and as nascent Israeli society had to contend with many destroyed families.<sup>13</sup> Following Israeli independence, Israeli law, and particularly family law, played its part by giving religious, rabbinical, courts and chauvinistic religious law exclusive jurisdiction on matters of marriage and divorce.<sup>14</sup> More specifically, though the Equal Rights

for Women Law 1951 mandated complete equality, s.5 of that law left exclusive jurisdiction for marriage and divorce with the religious courts, which under religious law imposed a highly unequal family law. In this way the Jewish Man regained and secured his rightful place as a Patriarch, even as the state developed into an ostensible leader in other areas of women’s rights.

Familism and patriarchy - distinct but related trends - influence the way privacy is perceived, treated and protected. Some of the factors that underlay Israeli familism may also be at the root of the characterization of Israeli privacy. The influence of the Holocaust and the early challenges that faced the state, particularly economic hardship coupled with a precarious security outlook, undoubtedly shaped much of the jurisprudence of the period. Without purporting to describe the entire gamut of social influences on privacy since the founding of the state, we may isolate several of these influences, discussed below. First, political influence, especially from socialism as realized through the Kibbutz movement; second, economics; third, Arab and Jewish cultural influences. These have all militated against privacy rights, and most particularly against individualized privacy rights. Israeli law eventually came to recognize the importance of privacy, and ostensibly established privacy as an individualized legal right. But familistic influences have reentered privacy law through legislative amendment and case law, reverting in part to privacy’s entity-based roots and Israeli law’s entrenched familistic tendency.

Early immigrants to Israel in the first decades of the 20<sup>th</sup> century were largely irreligious and socialistic, and the Kibbutz movement was something of a spearhead movement in Israeli culture. The Kibbutzim (Hebrew plural of Kibbutz) were socialist communes that deliberately communized many aspects of what had hitherto been associated with family life. Though Kibbutzim preserved the traditional model of marriage, the communization of traditional family functions - such as income generation, child-rearing,

<sup>9</sup> Civil Appeal 2266/93 *Anonymous (a minor) v. Anonymous* PD 49(1) 221, per Shamgar CJ, para 7. Shamgar CJ has here omitted to note that Elon J was referring particularly to the Jewish Law jurisprudence. But Elon J applied the logic equally to Israeli law, and Shamgar CJ did the same.

<sup>10</sup> See note 48 below.

<sup>11</sup> S Fogiel-Bijaoui, ‘Familism, Postmodernity and the State: the case of Israel’ (Hebrew) in D Izraeli, A Friedman et al (eds), ‘Sex, Gender, Politics’ (United Kibbutz, 1999), at p.113 and 139 et seq

<sup>12</sup> D Boyarin, ‘Unheroic Conduct: The Rise of Heterosexuality and the Invention of the Jewish Man’ (University of California Press, 1997) and others had, sadly, not written yet or the narrative may have been very different.

<sup>13</sup> ZH Triger, ‘There is a State for Love: Marriage and Divorce between Jews in Israel’ (Hebrew) in O Ben-Naftali and H Naveh (eds) ‘Law on Love’ (Tel Aviv, 2005) at p.185, citing M Palgi, 2003, ‘Gender Equality in the Kibbutz - From Ideology to Reality’, in K Misra and MS Rich (eds) ‘Jewish Feminism in Israel’ (Brandies University Press, 2003) at pp.76-95.

<sup>14</sup> Triger, *ibid*



and more mundane activities such as dining and laundry - certainly had an influence on marriages on kibbutz.<sup>15</sup> Though only a small minority of the population was ever a kibbutz member, the Kibbutz movement had a seminal role and effect in Israeli society in its first decades. Anecdotally, Israel's first prime-minister, David Ben-Gurion, became a kibbutz member and resident in 1953, and retained that membership throughout his return to power from 1954 and until his death. The Kibbutz movement's political party, Mapam, was the largest opposition party in the first Knesset, holding 19 seats in 1948; by 1988 it held just 3 seats, and by 1997 was dissolved. The Kibbutz movement never included more than a sizeable minority of the population, but was the flagship institution of the socialists in Israel. There exists a considerable corpus of literature and research has emerged. Simplifying and generalizing a little, on kibbutzim privacy and the family were both challenged, though marriage itself was never undermined;<sup>16</sup> and despite the occasional images of young women driving tractors and swinging picks, traditional gender roles were mostly preserved.<sup>17</sup> The parents-children relationship, however, was considerably recast; children typically lived in a shared dormitory and not with their families, though they mostly visited their parents every afternoon. This setup disrupted the meaning and role of the biological family. Children on kibbutzim were raised as a communal cohort. "The group [of children – A.S.] defined itself as a family. Privacy was forbidden. In a family there are no secrets. Photos of parents and others were removed from our locked suitcases and collected in a shared album. Every private letter sent to any one of them from Odessa and Kuli... was opened and read to everyone by whoever first got the envelope."<sup>18</sup> Leiblich's survey<sup>19</sup> of studies and literature pertaining to childhood and family life on

kibbutzim reveals a mostly traumatic experience for children, teachers, and parents, especially daughters and mothers. As discussed presently, starting in the 1960s, and culminating in the 1980s, the kibbutz movement lost momentum, and as a result kibbutzim saw a strengthening of the family and its role over time, 'the increase in familistic trends.'<sup>20</sup>

Over the course of the 1960s, and particularly after the 1967 Six-Day War, Israel finally and decisively came within the US sphere of influence, and the Kibbutz movement continued its decline. Birnhack has suggested that the lack of privacy in Kibbutz life was a major factor in the demise of the Kibbutz movement.<sup>21</sup> That claim appears to mix correlation with causation; the rise of privacy and the demise of the Kibbutz movement in Israel were two sides of the same coin, as socialist values were replaced with individualized liberal autonomy. It is no coincidence that Israel's first draft privacy law dates from 1967.<sup>22</sup> Indeed, from that time onward privacy became increasingly prominent in Israeli law; by 1974 the high-profile Kahan Commission was convened, and in 1976 it presented its findings, which ultimately led to the Israeli Privacy Law – 1981. As Israeli socialism and the Kibbutz movement lost influence, privacy gained currency as a notion worth protecting through legislation. The 1980s financial crises in Israel put the nails in the coffin of the kibbutz experiment, as government bail-outs of kibbutzim destroyed what little halo remained for the movement. Market forces beat ideological ones, equality<sup>23</sup> lost to capitalism, and collective rights made way for individualism.

Apart from the role of macro-economics in the demise of the Kibbutz movement, other corollary economic trends have greatly affected privacy in Israel. The poor have a harder time asserting informational

<sup>15</sup> H Doron, 'Varying Spousal Relations in the Kibbutz and the Moshav', in M Palgi and S Reinharz (eds) 'One Hundred Years of Kibbutz Life' (Transaction Publishers, 2014), 104. The kibbutzim did not always include a full communalization of spouses, though the idea has been raised before; notably Socrates advocated for communalization of women and slaves in The Republic's Second Wave; see TR Jones and L Peterman, 'Whither the Family and Family Privacy?' (1999) *Texas Review of Law and Politics* 4:193, 202. See also L Peterman and TR Jones, 'Defending Family Privacy,' (2003) *Journal of Law and Family Studies* 5:71

<sup>16</sup> JB Agassi 'Theories of Gender Equality: Lessons from the Israeli Kibbutz', (1989) *Gender and Society*, 3/2, 160-186.

<sup>17</sup> JB Brenner, 'Women's Issues in Israel', (2008) *Journal of Jewish Communal Service* 83:204, 205, and her sources there.

<sup>18</sup> A Anbari, *Home* (Yediot, 2009), 27, the author's translation, cited by A Lieblich, 'One hundred years of childhood, parenting and family in the Kibbutz,' (2010) *Israel* 17:1, n.41.

<sup>19</sup> Lieblich, *ibid*, at p.1

<sup>20</sup> M Rosner, M Palgi 'Family, Familism and the Equality between the Sexes' (Haifa, 1980), 21; M Palgi, 'Motherhood in the Kibbutz' in B Swirski and MP Safir (eds) 'Calling the Equality Bluff – Women in Israel' (Pergamon Press, 1991), at pp. 261-269.

<sup>21</sup> See M Birnhack (2007) 66

<sup>22</sup> See Z Segal, 'The Right to Privacy vis-à-vis the Right to Know' (Heb.) (1983) *Iyunei Mishpat* 9:175, 194, f.51; see Kahan Commission Report, 1976 (Jerusalem, Ministry of Justice) p.3.

<sup>23</sup> Including the Kibbutz movement's form of putative gender equality: Palgi (2003).

privacy, and are particularly disadvantaged in asserting their constitutional privacy: abortion,<sup>24</sup> arranged and under-age marriages,<sup>25</sup> domestic abuse,<sup>26</sup> poverty and welfare service<sup>27</sup> involvement, and many other areas that invite or involve state intervention in domestic decision-making, make the poor's privacy much more vulnerable than that of the wealthy.<sup>28</sup> Anecdotally the history of Israel's economic development broadly correlates with that of privacy as a protected value at law. Shortly after Independence, in 1949, Israel's government instituted an austerity policy, which continued in full force for several years, and gradually receded over a decade, ending in 1959. The austerity was largely intended to enable the fledgling state to absorb a massive number of immigrants, and austerity was thus part of the ideology of the period. Though Israel is bound by the UDHR which protects privacy, this was the closest Israeli law came to so much as recognizing the value of, much less protecting, privacy as such. Indeed, in 1957 the Israeli Supreme Court ruled plainly that there is no action in information privacy in Israeli law.<sup>29</sup>

Finally, various subcultures in Israeli society have considerable influence on law and the family, and on how privacy is perceived in general and in the family context specifically. Religious, particularly ultra-orthodox, Jewish culture is highly familistic, as is Arab, particularly Muslim Arab, culture. This has been detailed before and at length by Fogiel-Bijaoui,<sup>30</sup> and her arguments continue to be demonstrated by available statistics. A recent report from Israel's Central Bureau of Statistics<sup>31</sup> shows several interesting statistics which were not previously available and further emphasize significant differences which broadly correlate with familism and may be a reasonable proxy for it. For example, Israel's Arab population has a significantly higher number of children per family (4.70 children per

family, compared with 3.54 for the Jewish family), as noted by Fogiel-Bijaoui, but also has almost double the number of family members per room (1.43 versus 0.82) as average Israeli families, though only a slightly lower number of rooms per house (2.33 versus 2.73), meaning a much stronger tendency for sharing living space more closely.

Putting aside 'honour' killings - discussed below, spousal abuse and rape are some of the most extreme and common forms of patriarchal control, and Israel's Supreme Court has long since contended with claims that religious law - Jewish and Muslim - condones spousal rape.<sup>32</sup> Specifically, the law in most jurisdictions had, until recently, been complicit in spousal rape, as famously enunciated at English law in Hale CJ's seventeenth century rule, that a husband cannot be guilty of rape of his wife. In 1962 the Israeli Supreme Court considered Hale CJ's principle and determined thus:

This view is not consonant with human dignity and the dignity of marriage, and is not to be adopted in Israel without express legislative provision. A woman agreeing to marry agrees to intimate life with her husband but does not agree to the use of force, threat of death or threats of grievous bodily injury. She is not a 'driven slave' of her husband's, and is entitled to liberty over her body like her husband is.<sup>33</sup>

In a later ruling, the Supreme Court quoted the above passage and added:

There were times... when members of certain communities in the State or originating in other lands allowed themselves to control their wives through beating. They would beat their wives extensively at any opportunity for insubordination or any other nonsense.

<sup>24</sup> CE Borgmann, 'Abortion, the Undue Burden Standard, and the Evisceration of Women's Privacy', (2010) *William & Mary Journal of Women and the Law* 16:291

<sup>25</sup> PE Beatse, 'Marital Rights for Teens: Judicial Intervention that Properly Balances Privacy and Protection', (2009) *Journal of Law & Family Studies*, Volume 11:2, 577

<sup>26</sup> Domestic abuse correlates strongly with income levels: Shannan Catalano, 2006 US Department of Justice Bureau of Statistics - Intimate Partner Violence in the US; domestic abuse and privacy has been the focal point of feminist critique of privacy in the US, see in particular see A Allen, 'Natural Law, Slavery, and the Right to Privacy Tort' (2012) *Fordham Law Review* 81:1187 and MacKinnon (1984).

<sup>27</sup> Bridges (2011)

<sup>28</sup> As noted by Birnhack (2007), at n.29. See at length Bridges (2011).

<sup>29</sup> Civil Appeal 68/56 *Helen Rabinovitz v Yitzhak Mirilin* PD 11, 1224, 1225.

<sup>30</sup> Fogiel-Bijaoui (1999)

<sup>31</sup> Central Bureau of Statistics (January 29, 2014) "Family day - Families and Households in Israel",

[http://www.cbs.gov.il/reader/newhodaot/hodaa\\_template.html?hodaa=201411025](http://www.cbs.gov.il/reader/newhodaot/hodaa_template.html?hodaa=201411025)

<sup>32</sup> Criminal Appeal 91/80 *Moshe ben Meir v. State of Israel* PD 38(3)281 considered the question, and the court accepted the opinion of Deputy AG Nahum Rakover, later published in the Jewish Law Annual, that there never was a right to spousal rape in Jewish law. See also D Finkelhor, K Yllö, *License to Rape - Sexual Abuse of Wives* (Schuster, 1987), 207 for interesting statistics on marital rape by religious group.

<sup>33</sup> Criminal Appeal 353/62 *Mahmad elFaqir et al. v. Attorney General* PD 18(4) 200, author's translation. In this the Israeli court significantly preempted *People v. Liberty* 485 NYS 2d 207 (NY 1984), and the English HL case of *R. v. R.* [1991] 4 All ER 481.

Anyone who did not beat his wife was not considered a “chief man among his people”,<sup>34</sup> and the more [beating – A.S.] the merrier.<sup>35</sup>

The Israeli Supreme Court thus made clear that individualized rights applied within the marriage, and that the sanctity and inviolability of the home would not prevent the intervention of the state in violence and rape at home. Many laws were amended, starting in the 1970s, to reflect this changed status of the home. As noted extra-judicially by Barak-Erez,<sup>36</sup> now a Supreme Court justice, radical feminism à la MacKinnon led to reform in Israeli law of treatment of domestic violence, violent sexual crime, sexual harassment, equality at work, and restrictions on public displays of offensive images (nudity, pornography),<sup>37</sup> among others. These reforms are outcomes of the surge in individualized rights, as the latter gained increased credence and acceptance and found expression in precedent and legislation. As collectivist socialism waned, individualized rights and privacy blossomed.

This individualization is not, of course, a uniquely Israeli experience. Before the Kahan Commission was convened in 1974, the US Supreme Court had already ruled in *Griswold*<sup>38</sup> and *Eisenstadt*<sup>39</sup> - two cases which basically moved constitutional privacy rights in a family context from vesting in the family to vesting in individuals. Briefly, the *Griswold* court found a Connecticut law prohibiting prevention of conception to violate several constitutional freedoms, such as Fourth and Fifth Amendment rights. The court noted that privacy rights extended to marital bedroom activity, and that the relevant Connecticut statutes were too broad and sweeping and invaded those freedoms. *Griswold* thus expressly attaches constitutional privacy to the marital unit, not to individuals.<sup>40</sup> *Griswold* enshrined in law what Friedman<sup>41</sup> calls the ‘Victorian compromise’

between appearances of propriety and a barely concealed, less restrained, reality; the court would allow people to do as they pleased, but only within the confines of a normative family. That changed in 1973 when *Eisenstadt* was decided. Massachusetts had a law that allowed contraception only for married couples. The Supreme Court found that law unconstitutional and thus ‘transferred the privacy right articulated in *Griswold* from the family as a unit to the individuals who compose that unit.’<sup>42</sup> This transition in the early 1970s in US law, though it predates the Kahan Commission, failed to have any effect on privacy in Israel. Though the Privacy Law relates predominantly to informational privacy, nonetheless the Report cites<sup>43</sup> *Griswold* as authority for a recognized constitutional right to privacy in the USA. Similarly, Ruth Gavison, one of the individuals who has most influenced Israeli privacy law and a member of the Kahan Commission, wrote in 1977:

Even before implementation of the explicit protection of privacy [by enactment of a Privacy Law, further to the Kahan Commission’s recommendations – A.S.] the legal system provides some protection of it, and privacy does not always give way when in conflict with another interest. The police, for example, may not enter one’s house without a permit... The existence of this protection of privacy may justify the conclusion that a right to privacy, admittedly of a limited scope, is already recognised by Israeli law.<sup>44</sup>

Evidently the Kahan Commission sought to claim that the new Right to Privacy embodied in what would shortly become the Privacy Law, was actually not created entirely *ex nihilo* but rather was premised on privacy asserted vis-à-vis the state, as in *Griswold*, on the

<sup>34</sup> Leviticus 21:4

<sup>35</sup> Criminal Appeal 354/64 *Wafiq Naif et al v. Attorney General*, per Berenson J p.139, my translation. Unpublished, but cited in Criminal Appeal 91/80 *Moshe ben Meir v. State of Israel* PD 38(3).

<sup>36</sup> D Barak-Erez, ‘Catharine MacKinnon’s Legal Feminism and the Move from the Fringe to the Mainstream’, in D Barak-Erez (ed) ‘Legal Feminism in Theory and Practice: by Catharine A MacKinnon’ (Resling, 2005), at p.14 et seq

<sup>37</sup> S.214A, Penal Law - 1977

<sup>38</sup> *Griswold v. Connecticut* 381 US 479 (1965)

<sup>39</sup> *Eisenstadt v. Baird* 405 US 438 (1972)

<sup>40</sup> As noted by Bridges, *Griswold* maintains the traditional divide of public and private spheres and, in accordance with liberalist tradition, state interference in the private sphere is illegitimate; Bridges (2011), p.139, but see p.140 f.94

<sup>41</sup> LM Friedman ‘Guarding Life’s Dark Secrets – Legal and Social Controls over Reputation, Propriety, and Privacy’ (Stanford University Press, 2007)

<sup>42</sup> Dolgin (1994) p.1522, footnote omitted. Indeed, the basis for *Eisenstadt* reflects a shift from privacy of the family to more individualized rights, such as integrity of the body and personal autonomy; see Bridges (2011) p.144. This logic was extended, for example, in *Planned Parenthood of Central Missouri v. Danforth* 428 US 52 (1976) the US Supreme Court found that laws demanding spousal and parental consent for an abortion were unconstitutional.

<sup>43</sup> Kahan (1976) p.12, f.14.

<sup>44</sup> R Gavison, ‘A General Right to Privacy’ (1977) *Israel Law Review* 12:155, 166

common law rule – extant for centuries – limiting the state's access to the private home,<sup>45</sup> as well as on Jewish law.<sup>46</sup> Yet none of these particularly supports the kind of individualized privacy rights that the Privacy Law produced; if anything, they all support a family-based approach. The Kahan Commission did not mention *Eisenstadt* but could have done so to support a purely personal privacy right, which is what the Privacy Law envisioned and embodied when passed into law in 1981.

In a 1984 adoption case in which a mother wanted to renege on giving her son up for adoption, Barak J (later CJ), wrote repeatedly that the family is a unit protected by its own privacy right: '...the family cell is the basic unit in social life, and it enjoys autonomy and privacy.'<sup>47</sup> Similarly: 'It is the parents' right to fulfill their duty vis-à-vis their children; this creates the autonomy and privacy of the family cell and negates the involvement of factors external to the family unit.'<sup>48</sup> Here Barak J clearly stated the premise of constitutional privacy in Israeli law before the passing of the Basic Law; the family as a unit is entitled to privacy.<sup>49</sup> This view of privacy inherent in the family was reiterated by Barak CJ who copied these words in a ruling in 2004,<sup>50</sup> long after the passage of the Basic Law: Human Dignity and Liberty. This is in contrast with the individualized rights under the Privacy Law.

Conversely, in line with the Kahan Commission's conception of the Privacy Law as attaching privacy rights to individuals, regarding informational privacy the Supreme Court, led by Barak CJ - who was a member of the Kahan Commission until his appointment as Attorney General - has held that husbands and wives have privacy rights independent of each other.<sup>51</sup> In 2004 the Supreme Court heard a case of a separated couple whose divorce negotiations had broken down. The estranged husband surreptitiously entered their former home, photographed the wife having sex with another man, and submitted the photographs in evidence at

divorce proceedings. On appeal to the Great Rabbinical Court, Dichovsky J noted that:

the Protection of Privacy Law is not suited to relationships between a couple... we think that it is true to say that between a couple there is no separate privacy. The joint privacy of the two is one unit, one stick.<sup>52</sup> This is the nature of married life which makes the private intimacy of each one, into one intimacy... how can one speak of an invasion of privacy by one partner against the other, when the whole essence of marriage is broadening the separate privacy into joint privacy? Even when a couple is estranged, as long as the marriage is not ended or as long as there has not been a [court] order for divorce, there remains and continues a collective privacy to which both are party.<sup>53</sup>

This position of Dichovsky J, in line with his view of Jewish culture and tradition, considers informational privacy as inhering in the family, but not in an individual as against a spouse, even an estranged one. On appeal to the Supreme Court, Barak CJ wrote of Dichovsky J's position:

I cannot agree with this. Marriage does not negate from partners their right to privacy vis-à-vis each other. Each of the partners has a right to privacy vis-à-vis the whole world, including his partner... The autonomy of the individual is also autonomy vis-à-vis a partner. An individual's privacy is also privacy as against the partner.<sup>54</sup>

Against the background of familistic decisional privacy, Barak CJ's opinion highlights just how great a divergence is possible within just a few years for rights that start with common roots. These two forms of privacy have a common jurisprudential past, and now share the quasi-constitutional protection of the Basic Law, yet they have evolved very differently – privacy

<sup>45</sup> *Semayne's Case*, (1604) 77 E.R. 194 at 195 KB

<sup>46</sup> On which the author has detailed his disagreement before; see A Schreiber, 'Privacy in Jewish Law: A Historical and Conceptual Analysis' (2013) *Jewish Law Annual* 20:179

<sup>47</sup> Civil Appeal 577/83 *Attorney General v. Anonymous* PD 38(1) 461, 470

<sup>48</sup> *ibid* p.468

<sup>49</sup> This position of Barak's is not very different from Douglas J's penumbra methodology in *Griswold*. This is ironic given Barak's persistent and harsh critique of *Griswold*'s recognizing rights from penumbra; see A Barak, 'The Judge in a Democracy' (Nevo, 2004), 225, and A Barak, 'Interpretation in Law, Volume III, Constitutional Interpretation' (Nevo, 1994), 136: 'This approach is inappropriate in my view.' And again at 378: Douglas J's approach 'raises difficult interpretative problems.'

<sup>50</sup> Additional Civil Deliberation 6041/02 *Anonymous v. Anonymous* 2004 PD 58(3) 246.

<sup>51</sup> In this he was preceded by *Markham v. Markham* 265 So.2d 59 (Fla 1972); contrast *Beverly Camp Simpson v. John G. Simpson*, 490 F.2d 803, (5<sup>th</sup> Circuit 1974); see RI Zuber, 'Domestic Eavesdropping and Wiretapping: Admissibility of Intercepted Communications' (1992) *The Colorado Lawyer* 21:455.

<sup>52</sup> A reference to Ezekiel 37:17, which portrays two sticks, or branches, becoming one.

<sup>53</sup> HCJ 6650/04 *Anonymous v. Netanya Regional Rabbinic Court* PD61(1) 581, quoted by Barak CJ.

<sup>54</sup> *ibid*. Barak CJ's opinion was not in itself novel; see discussion at Y Gabbai, 'Evidence obtained through Eavesdropping between Partners' (Heb.) (1991) *Hapraklit* 39:552-583, 567 et seq.

under the Privacy Law is completely individualized; privacy under the Basic Law: Human Dignity and Liberty is largely familistic. As we will see below, the familistic tendency of Israeli law finds expression in several additional areas of law, and informational privacy is not as individualized as Barak CJ suggested, and such developments as family veto over privacy rights of the dead suggest a much more familistic conceptualization even of informational privacy.

### **The Survival of the Family in Emerging Areas of Law**

The family continues to have collective responsibility in various areas of tax<sup>55</sup> and family law in Israel as in many jurisdictions, conferring rights and duties on its members, and in this Israeli law is unexceptional. Of particular interest here are several newer areas of Israeli law which reflect the familistic tendencies discussed above, absent in other jurisdictions. These areas have emerged either because of new technological development, or because of Israeli constitutional law changes, specifically the passage of the Basic Law: Human Dignity and Liberty in 1992. Such areas include: custody of fertilized ova; organ donation; and familial DNA sampling in criminal investigation. Rao, Suter, Bridges and other proponents of relational privacy have written on these and other areas at some length, principally regarding US law. The Israeli position is elucidated, highlighting the emerging, or reemerging, familistic tendency of Israeli law, in the next section. Also considered below are some additional areas of law - notably privacy rights of the deceased, in which familistic tendencies are evident and may be growing; and legal treatment of 'honor killings', in which the law and law enforcement must contend with a distinctly familistic crime. This article analyses only a small fraction of the relevant areas of law, and leaves for another opportunity such fascinating areas as victim's rights,<sup>56</sup> posthumous reproduction<sup>57</sup> and others.

### **The right to fertilized ova**

Rao and others have discussed fertilized ova custody cases at length, and only as much as is necessary is repeated here to clarify the Israeli law situation. USA case law preceded Israeli case law in this area and a quick look at leading US cases will elucidate the Israeli law position.

In *Roe v. Wade* the US Supreme Court determined that a woman has exclusive rights to determine what happens with her body, and specifically with her foetus. The court held that 'State criminal abortion laws, like those involved here, that except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved, violate the Due Process Clause of the Fourteenth Amendment, which protects the right to privacy against state action, including a woman's qualified right to terminate her pregnancy.'<sup>58</sup> How would that carry into a case in which the foetus is not in a woman's body? This question was tried in the US in *Davis v. Davis* at the Tennessee Supreme Court.<sup>59</sup> Mary Sue Davis and Junior Davis had been married, and Mary Sue had five tubal pregnancies resulting in ligation of both fallopian tubes. She underwent six failed implantations, and seven fertilized ova were preserved cryogenically pending implantation in Mary Sue's uterus. In the meantime, the Davis marriage fell apart. Mary Sue turned to the court to obtain custody of the ova, and by the time of the Tennessee Supreme Court hearing she was remarried and sought to donate the ova to another childless couple; Junior claimed he had the right to decide whether or not to become a parent, and his own traumatic childhood with a dysfunctional mother and no father led him to decide against his gametes bringing a child into being without a normal family. The Tennessee Supreme Court determined that a decision as to what to do with the ova turned 'on the parties' exercise of their constitutional right to privacy.'<sup>60</sup> The court noted that Tennessee constitutional law privacy followed the same contours as federal constitutional privacy law, and leaned on

<sup>55</sup> Income Tax Ordinance s.40 et seq; s.64B et seq

<sup>56</sup> A Horovitz, T Weigend, 2011, 'Human Dignity and Victims' Rights in the German and Israeli Criminal Process' *Israel Law Review* 44:263, 268; see *Rights of Victims of Crime Law* 2001, s.22

<sup>57</sup> On which generally see DD Williams, 'Over My Dead Body: The Legal Nightmare and Medical Phenomenon of Posthumous Conception Through Postmortem Sperm Retrieval' (2012) *Campbell Law Review* 34:181

<sup>58</sup> *Roe v. Wade*, 410 U.S. 113 (1973), 114

<sup>59</sup> *Davis v. Davis* 842 S.W.2d 588 (Tenn 1992)

<sup>60</sup> *ibid* para 73

<sup>61</sup> *ibid* para 89 on the contours of the privacy right; paras 77, 92-95 on *Griswold*, *Eisenstadt*, and *Roe*.



*Griswold, Eisenstadt and Roe*<sup>61</sup> to consider Mary Sue's and Junior's conflicting rights and aspirations, ultimately concluding in Junior's favor.

*Kass v. Kass*<sup>62</sup> at the Court of Appeals of NY involved Maureen and Steven Kass. They were in the middle of the IVF process, Maureen's sister had agreed to act as a surrogate, then withdrew, at which point, with fertilized ova frozen, they promptly divorced. Maureen wanted custody of the ova; Steven argued that in their consents they had agreed that in such an eventuality the ova are to be donated to the IVF center for research. Although the consents were written between each of the Kassses and the IVF center, the court determined that they constituted an agreement between the couple to donate the ova to research, and it enforced that agreement.

In Israeli law, around the same time as the *Kass* case, frozen embryos were considered by the Supreme Court in *Nabmani*.<sup>63</sup> Ruth and Danny Nahmani were married and Ruth was medically unable to conceive. Their fertilized ova were frozen pending a successful search for a surrogate. In the meantime their relationship fell apart. Ruth refused to accept a divorce, and Danny began a family with another woman. Ruth sought custody of the fertilized ova, and Danny sought a court order preventing that custody. Basically, Ruth claimed that she had the right to choose, much as she would if the ova were in her body;<sup>64</sup> Danny claimed that he could not be forced to become a parent with Ruth as long as the fertilized ova were not actually *in utero*, and the District Court accepted that position.

Ruth appealed to the Supreme Court which subsequently considered the appeal and then allowed a second consideration. Strasberg-Cohen J, writing for the majority in the first appeal, basically agreed with *Davis* which she cited. She characterized Danny's right not to be forced into parenthood as part of his individual right to privacy;<sup>65</sup> the right to be a parent requires the cooperation of another, whereas the right

not to be a parent does not, leading her to give Danny's right preference. Tal J, in a dissent, basically adopted the *Kass* line. Ruth had undertaken IVF – which is fairly traumatic and invasive – in reliance on Danny's agreement to conceive. Danny agreed to become a parent with Ruth by giving his sperm, and in the interest of certainty and predictability the period over which he can renege should be limited. Neither party has the right to destroy the ova they both agreed to fertilize. Tal J specifically noted that the *Davis* court said it would reach the opposite conclusion had Davis wanted the ova for herself, and not for another woman,<sup>66</sup> as indeed Ruth wanted them for herself. Thus, *per* Tal J, the outcome in *Davis* is limited to its facts. Upon a re-trial of the appeal, the majority sided with Tal J, allowing the appeal, and granting Ruth custody of the ova.

Of particular note in the present context is a point argued by Tal J, who noted *Eisenstadt* and argued that although 'in a family context an individual's privacy is recognized, it seems that the right to privacy vis-à-vis the state is generally of greater weight than privacy within the family.'<sup>67</sup> In other words, Danny could invoke constitutional privacy rights to stop the state from interfering with his decision not to have a child; but he could not invoke them against Ruth. The individual's privacy rights vis-à-vis the state are necessarily stronger than his privacy rights vis-à-vis his spouse. This line of reasoning was not raised in *Davis*: *Griswold, Eisenstadt, Roe* and other cases on which *Davis* leaned concerned state involvement in a person's decision making; not involvement by a relative. This is a point made by Shifman<sup>68</sup> with regard to several cases concerning false representation regarding contraception, typically: a woman deliberately misleading her partner into believing that she is on birth control. These cases, like *Davis* and *Nabmani*, generally concern partners' involvement in each others' decisions, not state involvement in their decisions. The majority in *Nabmani* rightly focused on

<sup>62</sup> *Kass v. Kass* 1995 WL 110368, (NY 1995) at para 1.

<sup>63</sup> Additional Civil Deliberation 2401/95 *Ruth Nabmani v. Danny Nabmani* PD 50(4) 661, the original appeal Civil Appeal 5587/93.

<sup>64</sup> As noted extra-judicially by D Barak-Erez, 'On Symmetry and Neutrality: in the wake of the Nahmani case' (Hebrew) (1996) *Iyunei Mishpat* 20:197, Israeli law does not recognize a right to abortion, as such; she points out that abortion is a criminal offence, unless approved by a medical committee. Barak-Erez makes additional important observations, though the most pertinent ones are duly noted by the court (eg. Tal J para 14), since her article predated the Additional Deliberation.

<sup>65</sup> Barak CJ also noted the right to be a parent is derived of the right to privacy: Additional Civil Deliberation 2401/95 *Ruth Nabmani v. Danny Nabmani* PD 50(4) 661, 786.

<sup>66</sup> *Davis v. Davis* 842 S.W.2d 588 (Tenn 1992), paras 108-110

<sup>67</sup> Additional Civil Deliberation 2401/95 *Ruth Nabmani v. Danny Nabmani* PD 50(4) 661, para 11, 717. This is a corollary to Blackmun J's point in *Danforth* that the court 'cannot hold that the State has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy when the State itself lacks that right.' *Planned Parenthood of Central Missouri v. Danforth* 428 US 52 (1976), para 30

<sup>68</sup> P Shifman, 'A Parent Against one's Will – False-Representation regarding use of Contraception' (1989) *Mishpatim* 18:459, 482

what the (estranged) partners could and could not hold each other to. The Israeli Supreme Court argued that the couple, as a couple, had made certain decisions and commitments, and had acted in reliance on those, and Danny was estopped from reneging on them. Tal J did not use the logic of estoppel and reliance so as to force Danny to become a parent; the decision to become a parent was one Danny made when providing sperm for the IVF. Rather, the court essentially stopped him from reneging on that decision. In *Kass* the court did something similar; the court did not decide that Maureen would not become a parent, but held her to her agreement to donate the ova to research. In *Kass* the couple had signed an agreement with the IVF clinic specifically stipulating that the ova would go to research in such a case. By contrast, in *Davis* the court looked for, but did not find, an implied contract dealing with the situation that emerged:

It might be argued in this case that the parties had an implied contract to reproduce using in vitro fertilization, that Mary Sue Davis relied on that agreement in undergoing IVF procedures, and that the court should enforce an implied contract against Junior Davis, allowing Mary Sue to dispose of the preembryos in a manner calculated to result in reproduction. The problem with such an analysis is that there is no indication in the record that Disposition in the event of contingencies other than Mary Sue Davis's pregnancy was ever considered by the parties, or that Junior Davis intended to pursue reproduction outside the confines of a continuing marital relationship with Mary Sue. We therefore decline to decide this case on the basis of implied contract or the reliance doctrine.<sup>69</sup>

That, however, is exactly what the *Nabmani* court ultimately did; it ruled for Ruth based on her reliance on Danny.

Rao<sup>70</sup> poignantly made the same point as Tal J regarding privacy, but then draws a very different conclusion regarding US law: 'Individuals joined in a

close relationship possess privacy rights against the state, not against each other... Accordingly, once dissent divides the individuals in a relationship, their privacy disappears, for the state is necessarily entangled in assigning their relative rights and responsibilities.<sup>71</sup> However, for Tal J and the majority in *Nabmani*, it was not entangled rights and responsibilities that carried the day for Ruth, but Danny's commitment to seeing the process through. In other words: it was the decisions taken by the couple as a couple. To simplify: the Israeli Supreme Court ultimately clarified the partners' commitments. It did not rule between conflicting rights. The impression from *Nabmani* is that it reflects a deeply familistic jurisprudence and stands for the proposition that the family interests can survive the family. Danny and Ruth made decisions as a family, and are held to those even when the family as they envisaged it is no longer.

In short, *Kass* was carried because of signed agreements. *Davis* was determined by a balancing of individualized rights. By contrast the Israeli Supreme Court premised *Nabmani* on the joint commitments and aspirations of the couple, finally concluding that decisions taken by Danny and Ruth together would survive their separation. Tal J reached this conclusion using Ruth's reliance, but we may generalise and suggest that where family-based rights are recognised, the family's decision takes a life of its own and can survive a conflict, and even dissolution of the family.<sup>72</sup>

## Organ donation

While organ donors and recipients are individuals, there are several possible implications for seeing organ donation as entity based activity. For example: a law could insist that immediate relatives of a recipient all become organ donors; or that the family of a donor is entitled to receive organs ahead of other patients.

Israel's Organ Transplant Law 2008 empowers the Organ Donation Steering Committee to determine rules for prioritizing organ recipients. The law expressly allows the committee to consider giving preference to people who have either agreed to act as organ donors, or have actually donated an organ *inter*

<sup>69</sup> *Kass v. Kass* 1995 WL 110368, (NY 1995) at para 68

<sup>70</sup> R Rao, 'Reconceiving Privacy: Relationships and Reproductive Technology' (1998) *UCLA Law Review* 45:1077, 1077

<sup>71</sup> *ibid*, 1079

<sup>72</sup> By way of analogy: a company's shareholders may take a unanimous decision, but that decision will bind even a shareholder who then changes his mind. In several senses, Israeli law appears to recognise a separate legal entity of a 'family'.

<sup>73</sup> Organ Transplant Law – 2008, s.9(b)(4)

<sup>74</sup> See J Lavee, T Ashkenazi, G Gurman, and D Steinberg 'A new law for allocation of donor organs in Israel' (2010) *The Lancet* 375:1131 – 1133. The



*vivos* or after death, and to members of their immediate family.<sup>73</sup> Put simply, a person will be prioritized as an organ recipient if she, or a member of her immediate family, are card-carrying organ donors. The law thus sees receiving and donating organs as a family-based activity and right. The US and UK, by contrast, have no such rule or system in place.<sup>74</sup> In the following section it will be shown that in Israel, in contrast with the US, the family is effectively given veto rights over a donor's decision to donate organs.

### Informational Privacy rights of the Dead

In the nineteenth-century case *Schnyler v. Curtis* the Court of Appeals of New York was adamant that the deceased have no rights to privacy.<sup>75</sup> That case concerned a nephew trying to prevent a third party from making a statue of his deceased aunt. The court ruled that privacy rights die with the person, though a living person's privacy may 'in some cases, be itself violated by improperly interfering with the character or memory of a deceased relative, but it is the right of the living and not that of the dead which is recognized.'<sup>76</sup> This rule was reaffirmed by the US Supreme Court in the 2004 case *National Archives and Records Administration v. Favish*.<sup>77</sup> Favish had filed a Freedom of Information Act (FOIA) request to see police pictures of the body of Vincent Foster Jr, deputy counsel to President Clinton who had been found by five government investigations to have committed suicide. His FOIA request was rejected. The Supreme Court held that FOIA protects the privacy only of the living, but since Foster's family invoked their own right to privacy and not that of the deceased—it was feared that releasing the photographs would renew a barrage of media scrutiny of the

family—they were entitled to protection at law. This is an instance of completely individualized privacy rights, and continues to be the norm in US law and scholarship since Judge Cobb's ruling in Supreme Court of Georgia in *Pavesich*.<sup>78</sup>

By contrast, a relational or entity-based view of privacy would lead to recognition that an invasion of privacy affects a web of people, even after the death of the protagonist, as described by Mills:

“Relational privacy” is not an actual common-law remedy as much as it is an approach to protect intrusions that occur to relatives of a deceased person. Privacy is generally considered a personal right that is held by an individual. That right expires with the individual's death and cannot be claimed by others. However, developing law and public policy have recognized the interests of parents, siblings, and spouses.<sup>79</sup>

With regard to privacy rights of the dead, the Basic Law: Human Dignity and Liberty does not ascribe 'human rights' - including privacy - to the dead,<sup>80</sup> and Israeli law specifically excludes the deceased from legal capacity.<sup>81</sup> Nonetheless, both case law and legislation have to some extent ascribed various rights to the deceased. The Israeli Privacy Law, since a 2011 amendment,<sup>82</sup> includes a provision pursuant to which 'publication of a photograph of the naked body of a deceased person, such as makes the person identifiable, will constitute an invasion of privacy.' The law subjects this to certain alternate exceptions: *inter vivo* agreement, 15 years having passed, or permission from immediate family. A previous amendment which first related to privacy rights of the dead was justified by the legislature with reference<sup>83</sup> to *Skoller* in which Goldberg J protected the privacy – specifically the

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NHS in the UK is exploring following Israel's lead: <http://www.guardian.co.uk/society/2012/jul/27/nhs-organ-donor-optout-transplants>. Singapore reportedly does have a rule like Israel's in force.

<sup>75</sup> *Schnyler v. Curtis* 147 NY 434 (NY 1895)

<sup>76</sup> *ibid* 447

<sup>77</sup> *National Archives and Records Administration v. Favish* 541 US 157 (2004), 168–169

<sup>78</sup> *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68 (Ga. 1905); see at length Allen (2012)

<sup>79</sup> JL Mills, 'Privacy – The Lost Right' (Oxford University Press, 2009)

<sup>80</sup> See M Birnhack, 'Rights of the Dead, Freedom of the Living' (Hebrew) (2008) *Iyunei Mishpat* 31(1):57

<sup>81</sup> Legal Competence and Guardianship Law, 1962, s.1: 'Every person has capacity for rights and liabilities from the end of this birth until his death.'

See at length A Schreiber, 'Privacy: Proprietary or Human Right? An Israeli Law Perspective' (2009) *Intellectual Property Quarterly* 1:99, 102-108.

<sup>82</sup> There are dicta along similar lines, eg: VA 551/99 (District, Jerusalem) *Anonymous v. State of Israel*, para 4.

<sup>83</sup> Privacy Law, Ninth Amendment Explanatory Notes (2005) p.230; the explanatory notes to the Eleventh Amendment (2011) did not actually reference any case law.

<sup>84</sup> Civil Appeal 1917/92 *Skoller v. Djerbi* PD 47(5) 764, para 7.

<sup>85</sup> D Hacker, 2014, Posthumous Dignity through the Prism of Israeli Succession Disputes, Hebrew University working paper, available at: <http://law.huji.ac.il/upload/Daphna.Hacker.Posthumous.Dignity.through.the.Prism.of.Israeli.Succession.Disputes.pdf> (last visited May 26, 2014)

<sup>86</sup> *ibid*

bank accounts - of the dead.<sup>84</sup> As noted by Hacker,<sup>85</sup> Israeli jurisprudence is confused and inconsistent, and in her words displays 'normative dishonesty' in its treatment of the rights of the dead. Yet the Privacy Law's express recognition of the dead's privacy rights seems to derive from Israel's familistic jurisprudence, Mill's 'relational privacy', as demonstrated by the fact that the immediate relatives are granted the rights to waive the invasion of privacy. In other words, the privacy rights of the deceased and of living relatives are actually one bundle of privacy rights.<sup>86</sup>

Some additional recent legislative provisions reflect the same familistic tendency. For example, the Patient's Rights Law 1996 has three important provisions regarding privacy. Section 10 of that law provides that medical staff, and all medical institution employees, must preserve the privacy of the patient during all stages of medical treatment. Section 19 protects medical secrecy of the patient. Section 20 determines the circumstances in which someone other than the patient may obtain information on the patient. In this law there is no mention of the family or relatives; they have no rights whatsoever over the patient's data. By contrast, once the patient is deceased, the Brain-Respiratory Death Law 2008, s.8 provides that when a patient is brain-dead (as defined in that law), the patient's doctor will make reasonable efforts to contact his family and will hear and consider the family's view of the patient's wishes. As demonstrated by Hacker, the families of the deceased tend to interpret or present the deceased's wishes in light of their own. Thus notwithstanding the language of the law which ostensibly grants the family a chance to tell the doctor what the patient wanted or would have wanted, the law in fact gives the family a chance to say what they want done with the brain-dead patient; specifically, if life-support machines can be turned off while the heart is still beating. This decision is critical for organ harvesting since organs cannot be effectively harvested once the heart has stopped, and thereby gives the family a likely<sup>87</sup> veto over organ donation. A draft law proposed in 2013, the Draft Presumption of Consent to Organ Donation Law, would make organ donation the default for all deceased persons in Israel. The proposed law provides that all deceased persons

may have organs harvested from them unless (i) the donor objected *in vivo* and in writing; or (ii) an immediate family member objects. The latter of these would apply even against the express written wishes of the deceased. In other words, family members would be given greater rights over the deceased's organs than the deceased through his own express written instructions.

In contrast, in the USA, as reflected by the Revised Uniform Anatomical Gift Act 2006 s.9, while the family of the deceased may donate organs if the donor did not instruct otherwise, they may not refuse to donate organs against the decedent's wishes: s.8(a). In other words, Israeli law currently gives the family rights in determining death which gives them *de facto* control over organ harvesting; proposed legislation also gives them express veto over organ donation, even against the donor's wishes. US law does neither. Again, Israeli law is shown to be familistic in respect of the rights of the deceased - regarding their image, determination of death, and organ donation.

### **Familial DNA sampling<sup>88</sup>**

A relatively new application of DNA in forensics is the use of 'familial DNA'. Broadly, this involves identifying a criminal based on a partial match of his DNA with that of someone already identified. For example: in 2004 Craig Harman threw a brick off a bridge over a motorway in southern England and hit the cab of a 40-ton truck. The brick hit the driver, Michael Little, in the chest, causing a heart attack and death, though he bravely managed to stop the truck safely before dying.<sup>89</sup> Craig was identified because DNA from blood on the brick was a close match to DNA of his cousin, whose DNA was in police files since he had previously been charged with a crime. This is a good example of the public utility of familial DNA for forensics.

Familial sampling has many legal consequences. For example: a person may be led unwittingly to incriminate a family member; it can reveal relationships, including in various discrete situations such as sperm-donation, surrogacy, adoption, rape, affairs and more; and it can reveal convictions and arrests. In general, there is a concern that every

<sup>87</sup> Likely, not certain, since the physician must consider their views, not necessarily abide by them.

<sup>88</sup> SM Suter, 'All in the Family: Privacy and DNA Familial Searching,' (2010) *Harvard Journal of Law & Technology* 23:309-399.

<sup>89</sup> *ibid*, 323.

<sup>90</sup> Criminal Procedure Law (Enforcement Authority – Search on the Body and Taking Identifiable Information) 1996, section 2(c), section 14 and

cigarette butt, discarded Coke can and recycled envelope can become a source for finding and storing information about our DNA.

In Israel today, there is different treatment for a DNA sample taken from a suspect in a criminal investigation, and DNA taken from someone who is not (yet) a suspect, and one of the differences lies in whether and how police may use the DNA to solve other crimes.<sup>90</sup> DNA taken from a suspect may then be used in order to solve crimes for which that person is not a suspect. By contrast, DNA may be taken from a non-suspect – such as a victim, witness, or someone who is not yet formally a suspect but whose involvement is informally suspected - in connection with a crime, with his permission, but may not be used in connection with any other crime unless the person gives their permission for such a use.

Familial sampling has not yet, to the author's knowledge, been the subject of legislation or case law in Israel, and there is no legislative provision that either prohibits or explicitly allows police use of DNA for familial sampling. One prominent case on DNA evidence may however elucidate the approach courts may take to familial DNA sampling. In *Eitan Parhi v. State of Israel*<sup>91</sup> the appellant (Parhi) had voluntarily allowed the Israeli police to take a DNA sample in connection with a murder case in which he was not, formally, a suspect. In accordance with the aforementioned legislation, the Police were prohibited from using that DNA in any other investigation. As it transpired, Parhi was a repeat and severe sexual offender, and a police officer who happened to be working both on the murder case in which Parhi's involvement was to be ruled out and on an unsolved rape case was able to connect between them. As the police officer concerned testified, she did this based on her unaided memory – she did not try to match Parhi's DNA with that found in rape victims. She simply identified it as the same based on an allele (variant form of a gene). However, the police were prohibited from comparing the DNA from Parhi with the database; they had actually promised Parhi it would not be used in any other connection. Parhi claimed that the breach of the promise made the evidence

inadmissible. The Supreme Court leaned on the earlier landmark Supreme Court case of *Issacharon*<sup>92</sup> and agreed. Following *Issacharon*, Levi J writing for the majority in *Parhi* noted that the breach of the promise not to use the evidence in any other case was a breach of Parhi's right to due process and right to privacy, and ultimately disallowed the DNA evidence, while allowing his rape conviction to stand on other evidence. The court stipulated that in this case the privacy rights and the due process rights are intertwined.<sup>93</sup> The court expounded at length on Parhi's rights to due process and to privacy. Both rights are personal. However, a careful look at s.32 of the Privacy Law might just lead to a different conclusion for familial sampling. The law provides (author's translation): 'Material obtained through breach of privacy will be inadmissible in court, without the victim's consent...' subject to certain caveats. The law does not stipulate that the breach must be of the suspect's privacy; strictly read, evidence obtained in violation of another's privacy would be inadmissible.

In contrast with *Parhi*, which involved the privacy rights and due process rights of one person, in familial sampling these would be separated, presumably leading to more flexibility in finding admissibility, since s.32 is personal, and the person whose privacy is breached would have to claim that the evidence obtained thereby is inadmissible. Such a claim would be unlikely where the person whose privacy was breached is no longer alive, not aware of the breach, or perhaps caught between a rock and a hard place - having to choose between publicising a prior conviction, for example, and attempting to challenge the admissibility of evidence in someone else's trial (presumably that of a relative). As privacy rights become increasingly familialistic, DNA taken from, say, a dead person, may be found inadmissible in incriminating his son.

In contrast with the norm in the USA where familial DNA search is growing as a police technique in crime-solving,<sup>94</sup> Israeli police currently make no use whatsoever of familial DNA search,<sup>95</sup> though under current legislation there is nothing that appears to prevent it. On the contrary, Israel's Genetic

14A.

<sup>91</sup> Criminal Appeal 4988/08 *Eitan Parhi v State of Israel*.

<sup>92</sup> Criminal Appeal 5121/98 *Issacharon v Military Prosecutor* PD 61(1) 461 (2006).

<sup>93</sup> Criminal Appeal 4988/08 *Eitan Parhi v State of Israel*, para 12,18

<sup>94</sup> Sutter (2010) p.324 et seq.

Information Law 2000, s.1, with that law's purpose:

The purpose of this Law is to regulate the conducting of genetic testing and the provision of genetic counselling, and to protect the right to privacy of the person subject to such testing in respect of identified genetic information, but without derogating from the quality of the medical treatment, medical and genetic research, the advancement of medicine and the protection of public welfare.

Note that the law is intended to protect the right to privacy not of anyone, but only 'of the person subject to such testing.' The law is thus expressly aware of the prospects of DNA being used to violate the privacy of others. However, Section 32 of the law stipulates:

The security authorities and the law enforcement authorities may make use of DNA samples in their lawful possession for the following purposes only: (1) for the purpose of identification in criminal proceedings, in a criminal investigation, uncovering or prevention of crimes, for the purpose of discovering and apprehending offenders as well as putting them on trial, and anything relating thereto (hereinafter – criminal proceedings)...

Note that nothing in this provision limits the person to be identified by use of the DNA. In other words, this section 32 does not state, for example, that DNA in the lawful possession of the police may be used only to identify the person from whom the DNA was taken, or may only be used to identify a victim of crime, or a suspected criminal. It may be used in any process or proceeding relating to crime. Though one cannot say with certainty why Israeli police do not, or at least do not openly, use familial DNA sampling, perhaps this is motivated by a familistic approach to privacy rights which, as demonstrated above, has already taken hold at the legislative and court levels. As suggested by Suter,<sup>96</sup> a relational or family-based

rights perspective would lead to avoiding familial search and this is poignantly demonstrated by reference to the Israeli law and reality.

## Honour Killings

An 'honour killing' is generally where a girl or woman is murdered by her own family members after engaging in some sort of romance or sexual activity out of wedlock. Sometimes just a handshake or a kiss leads to murder, and sometimes the murder victim is murdered because she became pregnant from rape. In other cases, the 'honour' is violated by cultural, not sexual, missteps: for example, refusal to enter an arranged marriage, a conversion to another religion, or other ways of leaving the culture and norms of the society in question. In all its horrible forms, this is a crime that can only exist in a highly familistic culture, and is still practised by certain minority groups in Israel.

A Knesset research report published in 2001 purportedly showed that law enforcement in Israel treats 'honor killings' as it does all other murders,<sup>97</sup> and that the law itself recognizes no leniency when a murder is an 'honor killing'. The report rightly quotes from Lindenstrauss J's ruling in the District Court that it is inconceivable that in the Israeli legal system we will recognize the notion of protecting the family's honor as a grounds for leniency, which could lead to cases such as the one before us being recognized only as manslaughter, not murder. Such a determination is a like a license, a legitimization, for anyone to murder when his 'family honor' is violated.<sup>98</sup>

There is evidence that though many minority communities in Israel still tolerate, or perhaps even encourage, 'honour killings', as a whole there continues a gradual move toward disapproval and discouragement of the crime.<sup>99</sup> Research from the late 1990s suggests that law enforcement in cases of 'honour killings' is lackadaisical.<sup>100</sup> In that spirit, in 2010 Dr Ahmed Tibi, an Israeli Member of Knesset, emphatically claimed that law enforcement was more

<sup>95</sup> Personal communication (December 30, 2012) by director of DNA database, Israel Police – Criminal Identification Unit.

<sup>96</sup> Suter (2010) 364.

<sup>97</sup> A phenomenon generally treated as regular murder in Israel: see R Werzberger, (2001) Knesset Report: 'Murder for "Dishonoring the Family"': <https://www.knesset.gov.il/mmm/data/pdf/m00085.pdf>. Note: in Israel the American spelling of 'honor', rather than the English version 'honour' is used, thus the Israeli/American spelling is retained in direct quotations. Ed.

<sup>98</sup> Criminal File (Haifa) 217/95 *State of Israel v Amar Hason Tak-Mah* 98(2) 1998, 3487.

<sup>99</sup> S Sakhafi, 'Murder for "Dishonoring the Family"' (Hebrew) (2009): [http://www.clb.ac.il/uploads/journal\\_article3.pdf](http://www.clb.ac.il/uploads/journal_article3.pdf).

lenient with honour killings than murder in general, and proposed the Draft Law for Prohibition of Use of Expressions that Encourage Violence 2010 to prevent use of the phrase 'honor killings', claiming that this caused law enforcement and society generally to treat such crime leniently. Of particular interest here, according to his proposal, the family of the victim - except of course the criminal - could sue for up to 50,000 NIS anyone who labels the murder an 'honor killing' in the media. Tibi's proposal was not passed, but would have denied the perpetrators the reputational benefit of preserving honour, and would instead brand them with the stigma of murder; conversely, the victim and her family would not have to bear the stigma of her 'indiscretion' and could claim their place among full-fledged murder victims. In other words, by prohibiting the right to characterise the crime in family terms, the familistic motive for the crime, and familistic claims to leniency for any punishment, would be mitigated. At the same time, Tibi's proposal recognized that very same familism and gave it expression by allowing the family the right to sue; in other words, they could be hurt by someone suggesting their relative was legitimately killed for violating their honour, and could sue for that. In that sense, Tibi's proposal ironically reinforced the very familism that lies at the heart of both the motive and the claimed justification for the crime.

The US by comparison has not had to contend with 'honor killings' as a phenomenon, as it is thankfully rare, and in all cases is treated as murder. The prospect of leniency on account of the violation of honour was not even raised in the most famous of US 'honor killing' cases: in 1991 Zein Isa, enlisting the help of his wife Maria, murdered their daughter Palestina ('Tina'), who had started dating an African American, on account of which her mother later described her as a 'whore'.<sup>100</sup> The FBI actually audio recorded the murder - which was instrumental in convicting Maria - since Zein was under FBI surveillance in connection with the Abu Nidal terrorist organization. Many interesting legal issues arose, specifically around the admissibility of the FBI

recordings, and also around the claimed duress of Maria by Zein; but no claim was even proposed that 'honor killing' is less than murder.

In summary, familism is a major factor in the horrific phenomenon of 'honor killings'. In this case, a familistic culture views the very familism as the motive and justification for murder, whereas Israeli law gives familism no credence, and it does not mitigate the severity of the crime. Despite very clear claims by the Knesset Report, it is not clear to what extent law enforcement addresses these murders as it does other murders, but Tibi's proposal would have used the familism underlying the crime to work against the criminals, by denying them the cultural justification they seek. Here we see an instance in which Israeli law may need to be more familistic in order to address a 'familistic crime'.

## Conclusion

In addition to the State of Israel's post-Holocaust reality and narrative, beyond the rubric of this article, several factors - such as the strong influence of socialism and collectivism, economic hardship, and various subcultures' influential familistic norms - all encouraged a familistic, entity based approach to privacy rights in Israel. Despite the systematic individualization of rights in Israel from the 1960s onward, several areas of Israeli law - especially areas that have emerged recently based in particular on technological innovation and on the passage of the Basic Law: Human Dignity and Liberty - show signs of being treated as entity-based rights vesting in a family as a unit. These include privacy rights, rights to fertilized ova, rights in connection with organ donation, familial DNA sampling, and privacy rights of the dead. Likewise the terrible phenomenon of 'honor killings' brings into focus the way that Israel's familism can affect its law, and vice versa. Further study of additional areas of law would reveal the true extent of the familistic trend in Israeli law, and further elucidate the catalysts and outcomes of the resilience and resurgence of the family in Israeli law generally, and privacy law in particular.

<sup>100</sup> Fogiel-Bijaoui, (1999), 114.

<sup>101</sup> *State of Missouri v Maria Isa* 850 S.W.2d 876 (1993), 882



## **Parental Child Abduction: The Long-Term Effects - A research summary Marilyn Freeman \***

This research project began in 2011<sup>1</sup>. However, initial research work in this field had begun many years before with the authors's earlier reports which considered the outcomes for returned children following an abduction (2001<sup>2</sup>, 2003<sup>3</sup>) and the effects of international child abduction (hereafter 'Effects') (2006<sup>4</sup>).

In the Effects project, both abducting and left-behind parents spoke of the effects of the abduction on their children. These effects included: physical symptoms of stress; the learning of coping strategies such as 'blanking out'; a lack of faith in the legal system and adults; a general lack of trust; and tensions in family relationships when the child was returned following abduction. It appeared that the return of the child, when it occurred, was often a time of great confusion and stress. Some parents spoke movingly of the profound psychological barrier which had been created between the abducted child and the left-behind parent because they both knew that they had survived this period of separation which had resulted in their losing faith in their reciprocal need, so that their post-abduction relationship was informed by the knowledge that they could live without each other. The parents also described how difficult they found this situation in light of the prevailing attitude towards the child's return which they summarised as: 'The kids are back. That's the end of it'. The lack of post-return support was a recurring theme for both left-behind and abducting parents.

Very unusually, the Effects project included interviews with abducted children. More than two-thirds of the children (70%) had been abducted by their primary carer mothers. These children did not experience their mother as an abductor. The remaining children (30%) were abducted by their fathers who were not considered by the children to be their primary carers. In these cases, the children tended to see their

father as an abductor. However, even those children who did not see themselves as having been abducted felt angry and confused by the court battle and the insecurity of their living arrangements. Their trust in one of their parents, and sometimes both, was compromised, and all the children were found to have been adversely affected in different ways by the abduction, notwithstanding their ages and stages of development. In particular, they reported that the return can be as upsetting and stressful as the original abduction.

During the course of the Effects project, a small group of adults abducted as children made contact as they had heard about the research and wanted to participate in the project. They confirmed the effects of abduction on them as being seriously negative. Examples described by the interviewees related to the extreme confusion and guilt they felt towards the abducting parent, as well as the feelings of shame and self-hate emanating from the abduction and from being torn and having to make decisions 'which destroy the lives of those you love'. They viewed the effects of abduction as 'lasting', and their problems of loneliness and self-harm, as 'entirely attributable to the abduction...which destroys your life'. They were very appreciative, however, that 'someone wants to know what happened' and reiterated the importance of research in this area.

In addition to what we had learned in the Effects project from the perspectives of both the adult and child interviewees, the reports of the adults abducted as children confirmed the need for more empirical research to be undertaken on this issue. This led to the current research project being undertaken<sup>5</sup>, as a small-scale qualitative study to find out about the lived experiences of those who had been through an abduction many years earlier; and to learn whether, and how, the participants felt that the abduction had

\*Professor Marilyn Freeman, Principal Research Fellow, University of Westminster, Co-Director of ICFLPP.

<sup>1</sup> Appreciation is expressed to the Faculty of Law, Governance and International Relations at London Metropolitan University for its initial financial support for this project. The full report is available on the ICFLPP website, [www.famlawandpractice.com](http://www.famlawandpractice.com).

<sup>2</sup> Pilot Project into Outcomes for Returned Children, March 2001, undertaken for reunite. Available at [www.reunite.org](http://www.reunite.org)

<sup>3</sup> Outcomes for Children Returned following an Abduction, September 2003, undertaken for reunite. Available at [www.reunite.org](http://www.reunite.org)

<sup>4</sup> International Child Abduction – The Effects, May 2006, undertaken for reunite. Available at [www.reunite.org](http://www.reunite.org) <sup>5</sup> Sincere gratitude is expressed to Take Root, a US organisation devoted to previously abducted children, for its assistance with obtaining the US component of this research sample, and whose help with this project has been of such great value.

affected their lives, and if those effects had continued long-term. Clearly, as we were looking at long-term effects, we needed a sample where the abductions had taken place at a time significantly earlier. Abductions in this sample occurred between 10 years and more than 50 years before the interview took place. Of course, this means that most of the abductions occurred before the implementation of the 1980 Hague Child Abduction Convention so that it is possible that this may have affected the outcomes for these children, and that the outcomes may have been different at earlier points in time. It is also worth noting that the periods of time away before reunification, if it occurred, were substantial. For the majority (68.76%) of those reunified, this did not occur until more than 5 years after the abduction, and more than one third of the reunifications (34.37%) occurred after 10 years.

Once again, it is possible that outcomes may have been different where reunification occurred earlier.

Thirty-four adults participated in the study, of whom thirty-three had been previously abducted as children, and one was the non-abducted sibling of an abducted child participating in the research. The sample of thirty-four interviews related to thirty separate incidents of abduction. Each participant was interviewed by this author, as Principal Investigator (PI) and author of the report, during the period 2011–2012 with an opportunity provided to each participant to update by email in July 2014. The sample was recruited primarily in the USA and UK and was acquired through personal and professional contacts working in the field, word of mouth, and via the assistance of Take Root, an organisation for previously abducted children, funded by the U.S. Department of Justice and located in Washington State.

Those interviewed repeated much of what had been learned from the earlier research, but did so from the perspective of a previously abducted child, very many years after the abduction. They spoke repeatedly about the difficulties they experienced with intimate relationships; their constant sense of insecurity; their lack of ‘connection’ and problems with attachment; their loss of self-worth; their inability to trust; their depression and mental health problems. They

described the rage that they still feel about what happened to them, and the way in which they believe that abduction is generally misunderstood. They reported the problems they had on reunification when it occurred, and how people do not understand the situation because you often do not know who it is that you are being reunified with – those you go back to are no longer the same people as those you left behind as they, too, have been changed by the abduction experience. They had no doubt that the abduction had affected their lives, and that this was ‘a lifelong thing’: and they wanted others to know about this, especially parents thinking of abducting their children. They were adamant that abduction is not just a domestic dispute, and certainly not a victimless crime. They stressed that there needs to be more awareness of abduction, and why it matters, and ‘why it is not OK’.

The key findings of the current research are based on a classification system which divides the reported effects into three categories: Very Significant Effects; Effects; and No Real Effects:<sup>6</sup>

(a) **‘Very significant effects’** are those where the interviewee reported:

- (i) Attempting to see, seeing, or having seen a counsellor, therapist, psychologist, psychiatrist or similar; or
- (ii) being diagnosed with a condition like post-traumatic stress; or
- (iii) having suffered a psychotic episode or breakdown; or
- (iv) having been admitted to a hospital or other institution with mental health issues; or
- (v) having suffered depression or attempted suicide.

(b) **‘Effects’** are those which do not fall into the above classification, but where the interviewee reported other effects such as having problems with:

- (i) trust in relationships; or
- (ii) lack of self-worth; or
- (iii) fear of abandonment; or
- (iii) panic attacks.

(c) **‘No real effects’** are where the interviewee reported having had:

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<sup>6</sup> It is emphasised that caution must be exercised in the use of these qualitative findings as they result from the interviewees’ personal perspectives both as to the cause of the effects described, and the degree of impact of those effects on their lives, as well as the author’s system of data classification. Additionally, the sample numbers are relatively small, and there was no opportunity for a control group in the project. It is not therefore suggested that these qualitative findings are generalisable.



- (i) minimal; or
- (ii) no effects from the abduction.

On the basis of the above classification, very significant effects were reported by 25 interviewees (73.53%). This reveals an apparently high level of mental health problems in this abduction research sample.<sup>7</sup>

The report considered any distinctions which may exist where the abductor was the child's primary carer. Sixteen of the interviewees reported abductions by either sole or joint primary carers (10 mother sole primary carers, and six joint primary carers). Thirteen of the sixteen interviewees who reported abductions by either sole primary carers or joint primary carers also reported suffering very significant effects from the abduction (seven sole primary carers, and six joint primary carers). Of the remaining three sole primary carer abductions, two interviewees reported effects, and one interviewee reported no real effects.

The report also considered whether abductions undertaken for protective reasons resulted in different outcomes in terms of the effects on the abducted children. There were only four such cases within the research sample, three of which concerned abductions which may have been for the protection of the child, the other concerned an abduction which may have been for the protection of the abducting mother. In the 'child protection' abductions, the children described having very significant effects (2) or effects (1) from the abduction. In each of these cases, however, the children were unconvinced of the protective nature of the abduction even though the abductor might have believed that to be the reason for the abduction. In the only interview where the interviewee described the abduction by the primary carer mother as being to protect the mother from further abuse the interviewee did not report suffering effects from the abduction. She completely accepted the truth of her mother's reason for the abduction and thought her mother had acted correctly. This raises the question of whether, when the abducted child knows,

or believes, that the abduction is for protective reasons, the effects are considerably lessened. No reliable conclusions can be drawn on this matter from this small-set data. However, Baroness Hale in her foreword to the report, has identified that this might be an area where more research is required.

The lack of support and after-care for abduction victims and their families was an important message from the interviews in the current research project. The interviewees identified the vast difference in the way that society views stranger abduction, and its approach to parental abduction. They believe that parental abduction is considered to be unimportant because the children are with one of their parents in these cases. This demonstrates a lack of understanding of what may be involved in a parental child abduction where many of the same dangers and horrors may face the child as in a stranger abduction, including physical and sexual abuse, neglect, and exposure to crime. The interviewees explained that they felt there is no time limit to the need for aftercare because 'it takes time to know what it has done to you, and how you are feeling'.

The report concludes with recommendations concerning our need to protect children from the harmful effects of abduction, both in terms of preventing abductions from occurring as well as providing appropriate support and care for those who have been abducted<sup>8</sup>. The report makes a final request on behalf of the interviewees, and that is for parental child abduction to be understood for what it is, an important matter with potentially extremely serious negative effects for the child (and others including future generations), the impacts of which may continue into adulthood affecting well-being, health, personal relationships, choices, and outcomes. It is not a benign victimless event which "sometimes happens within families". We are failing these children, and the adults they become, and our society as a whole, if we do not hear what they have told us and act accordingly.

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<sup>7</sup> Although clearly no direct comparison is possible as, for example, it is not known whether the problems reported by those in the research sample occurred within the same time period, it may nonetheless be contextually interesting to note the figures from Public Health England for Community Mental Health Profiles 2013 where one in 4 people in the UK will suffer a mental health problem in the course of a year <http://www.nepho.org.uk/cmhp/>

<sup>8</sup> These recommendations are being discussed with interested parties to consider the best way of taking them forward.

# New Perspectives on Adoption

Amir Rahman Azadi\*

## Introduction

Some time ago, when *Webster v Norfolk County Council (Webster)*,<sup>1</sup> probably the saddest case in Child Law, was the inspiration for the research for this article, the most obvious question was why are adoptions the only child law orders that cannot be reversed, even when expert evidence on the basis of which they were made turns out to be completely incorrect, as in the Websters' case?

One can only say 'probably' the saddest, (despite the Websters' continued loss of their children when it was finally shown that the care orders which ended in their adoption were based on flawed medical evidence) as there is more than one angle which from which one can look, and thus the perceptions are dependent on the perspective of the reader.

Lobbyists for an increase in the adoption statistics would be the opposite of sad as this was another family where three children were re-homed, out of the care of the local authority, an outcome where otherwise the alternative is normally for children to remain in care indefinitely. Indeed the enhancement of this adoption exit from care was one of the strongest recommendations of the Family Justice Review<sup>2</sup>, which pressed for means to be found for these otherwise disadvantaged children to have early access to a stable new life in a loving family which they can permanently call their own. This in turn resulted in a project to speed up such obviously urgent adoptions, which culminated in the government acceptance of all the FJR and their implementation in the Children and Families Act 2014<sup>3</sup>.

However, in turn, the changes made by that Act, instead of being the positive solution hoped for by the FJR, was, at the time of the 2014 Family Justice

Conference, (February 2014, before the Act was even passed in its final form) was already revealing further potential for adoption errors, highlighted in the papers delivered at the conference by two exceptionally experienced Child Law practitioners, leading Family Silk from 4PB Chambers, Alex Verdan QC, ('Recent Developments in Adoption') and well known West Country judge, Her Honour Judge Katherine Marshall ('Are we clear where we are going?')<sup>4</sup>.

This time, the error identified was not evidence as obviously flawed as in the Websters' case, but an entirely new problem: worryingly inadequate judicial reasoning in some cases coming before the courts, indicating uncertainty that the crucial basis for adoption orders – that there is 'no alternative' – had been insufficient for the ultimate step of a non-consensual non-reversible order, as identified by the Verdan and Marshall papers. More worryingly, their concerns have been further supported later in 2014 by two appeals *A v A* and *B and G (Children)*<sup>5</sup>, personally heard by the President, Sir James Munby, who gave strong judgments in both cases, in neither of which the original adoption decision turned out to be evidentially justified. The second of these, *B and G (Children)*, which concerned suspected FGM (a topically prevalent child abuse concern despite its criminalisation 30 years ago) also concerned potentially unreliable medical evidence and the issue of whether, even if FGM was established, adoption was a proportionate response, depending on the type<sup>6</sup> and despite the President's firm condemnation of this as an objectionable practice for which he not only accepted but strongly endorsed the view that local authorities should be vigilant.

Thus there is now a newer question arising from

\*Jansons, Solicitors, Birmingham.

<sup>1</sup> *Webster v Norfolk County Council* [2009] EWCA Civ 59. Caroline Gammell, *The Telegraph* 11 February 2009 'Adoption Stands Despite Possible Miscarriage of Justice'.

<sup>2</sup> Final Report, November 2011, available at <https://www.gov.uk>.

<sup>3</sup> Section 3 relaxed former restrictions on adoption by removing the former requirement to give priority to ethnicity when placing a child for adoption and s 14(2) imposed a new 26 week limit on all child proceedings which were not in some way complex, which commentators agreed at the time was likely to lead to hasty decisions potentially increasing the incidence of errors.

<sup>4</sup> Published in the *Family Law* commemorative issue of the conference, (2014) 44 *Family Law* in May 2014.

<sup>5</sup> *A v A* [2015] EWFC 11 and *B and G (Children)* [2015] EWFC 3, [2015] EWFC 27 and [2015] EWFC 43.

<sup>6</sup> See the article elsewhere in this issue by Sakaria and Campbell which defines the types.

these developments: ‘Are the Verdan and Marshall concerns and the two recent cases before Munby, P, only the tip of the iceberg?’ Or has this (obviously well meant) speeding up of adoptions recommended by the FJR in fact created a new cache of flawed judicial decisions?

This is clearly a most serious issue because, while in these two recent cases prompt hearings by the President have *succeeded* in heading off adoption orders, once such orders have taken effect (even when such evidential mistakes as in the Websters’ case are uncovered) there is normally no way back from an implemented adoption order, even one made on an incorrect diagnosis. This is because one of the key principles of child law, that in any decision in relation to its upbringing, the welfare of a child or children is paramount, a modified form of which now also features in the contemporary statutory adoption process of the Children and Adoption Act 2002<sup>7</sup>. Thus it is considered essential for the certainty required if a child is adopted into a new family that any adoption order is final and can be relied on as permanent.

This exceptional final status of an adoption order seems especially unfair when orders based on other significant mistakes about parents’ treatment of their children can, and have been, reversed, such as in the case of the overturned conviction of the late Sally Clark for the apparent murder of her 2 small sons in *R v Clark*<sup>8</sup>, after the flawed nature of the statistical evidence on which she had been convicted was discovered, unfortunately only at a time when she had already served three years of her sentence.

### Ongoing Issues in Adoption

Inevitably, these 2014 developments once again highlight the operation of adoption, in which the absolute finality of such non-consensual orders in English law is not replicated in any other jurisdiction in the world, making the next obvious question ‘Are

there better alternatives to adoptions which might avoid its draconian effects if and when an evidential mistake is made? – for example, had the two recent appeals not been successful the parents involved would, like those of the three Webster children, had to endure the desolation of permanently losing them to adoption orders, which once made (providing the orders have followed correct legal procedure), could not be set aside: since, on the basis of the child’s welfare, such orders are irreversible other than in highly exceptional and very particular circumstances.<sup>9</sup>

In the *Webster* case, the orders were apparently originally duly justified by expert medical evidence, which at the time the original adoption orders were made convincingly deluded the courts and local authorities into believing that the parents had abused their children,<sup>10</sup> although it was ultimately discovered this had not been the case.<sup>11</sup> Although the court later recognised the misdiagnosed medical evidence,<sup>12</sup> there was apparently no way to rectify either that mistake or the order made on the basis of it.<sup>13</sup> As a result, the Websters were left with ‘the worst kind of injustice: one that cannot be remedied’<sup>14</sup>.

One perspective is that the courts took the correct stance by not revoking the adoption orders.<sup>15</sup> However, another perspective (which might perhaps be the majority view) is sympathy with the Websters and a feeling that the courts were unjust, as conceded by Wall LJ who presided over the Court of Appeal hearing, and incorrect in their reasoning not to revoke these adoptions and that the merits had been sufficiently strongly with the parents that they should have been able to recover their children, despite disappointment of the adopters who might have another chance to adopt other children.<sup>16</sup> Apart from these conflicting perspectives, there was conceded by Wall, LJ, a clear miscarriage of justice, a situation for which there would normally be some rectification procedure.<sup>17</sup>

However, while it has now long been too late for

<sup>7</sup> Although this was an Act – including the new welfare test it introduced - which did not in fact apply to the Websters’ case as it was not in force at the time of their original orders or their appeals.

<sup>8</sup> [2003] EWCA Crim 1020,

<sup>9</sup> *Ibid*, at 149.

<sup>10</sup> *Ibid*, at 97.

<sup>11</sup> *Ibid*, at 56.

<sup>12</sup> *Ibid*, at 30.

<sup>13</sup> *Ibid*, at 177.

<sup>14</sup> Jonathan Herring, ‘Family: Revoking adoptions’ (2009) 159 NIJ 377, at page 1.

<sup>15</sup> *Ibid*, at page 3. Herring states: ‘...the result may have been the correct one’.

<sup>16</sup> *Ibid*, at page 3. Herring expresses the view: ‘...the reasoning is not such that would convince the person in the street’.

<sup>17</sup> *Webster v Norfolk County Council* [2009] EWCA Civ 59, at 148. Wall LJ: ‘...they have suffered a serious injustice’.

the Websters (until their children reach 18 when they may well seek out their birth parents) lessons have clearly been learned from this case, as is evident in the keen practitioner comments from the Verdan and Marshall papers, which indicate that the Websters might not have been the only family to suffer inappropriate disposals of care and adoption proceedings in which their children were to be taken away, and also in the two recent robust decisions of the President of the Family Division of the High Court who has, while repeatedly affirming elsewhere that adoption should not be shunned where it is appropriate for a particular case, did dismiss, with significant criticisms, these two cases in which he found that the local authority's basis for care proceedings with a long term plan for adoption was completely inadequate.

Moreover, he clearly felt sufficiently concerned to spell out in considerable detail the most basic principles required in care cases leading to adoption in *A v A*<sup>18</sup> (in which he said that the case caused him 'great concern' as the local authority had had to show that 'nothing else would do' but adoption, and had entirely failed to do so) so that he felt he needed specifically to go into the criteria to be satisfied and the standards to be shown which were absolutely required in such cases.

Before going on to these recent authorities, this article first explores the reasons for which adoption orders cannot be reversed, as happened in the Websters' case,<sup>19</sup> despite production of new evidence proving that the parents had not abused their children<sup>20</sup> since if there may have been an epidemic of *A v A* type cases, especially if this has previously gone unremarked, it is clearly one of the most important features of the drive to achieve more beneficial adoptions out of care and needs to be addressed lest the cure should be worse than the disease. In doing this it is necessary to look at the legal effects an adoption order has on the natural birth parents, the prospective adopters and the adopted child, and finally looks for alternatives to existing adoption orders, which do not contain the severe degree of harshness

and irreversible finality of the present law.<sup>21</sup>

This means examining the following:

1. What is an adoption in practical as well as legal terms?
2. Where did the rigid rule of the irrevocability of adoption originate? What are the exceptions?
3. How do these rules affect the power of the courts to reach justice with certainty? Where do the courts draw the line in achieving justice and certainty?
4. What should the courts consider first: the welfare of a child or the principle of irrevocability in adoption?
5. Would the judgment in *Webster* have been decided differently had the Adoption and Children Act 2002 been applied, as s 1 of that statute concentrates more on the welfare of a child than its predecessor, the Adoption Act 1976?
6. Is there potential for further reform of adoption law, which suggests Parliament might change the irrevocable nature of adoptions?
7. In the meantime are there other alternatives to adoption which would avoid the Webster result?

First, the facts of the *Webster* case must be reviewed, in order to support understanding and nexus between the questions set out above.

### **Facts and Case analysis in *Webster v Norfolk CC***

Mr and Mrs Webster, a married couple, had three children: A, B and C. Towards the end of 2003 child B was taken to a Norfolk hospital having suffered multiple fractures. The hospital and local authorities believed the injuries were non-accidental and that one or both parents had caused them. Thus, an emergency protection order<sup>22</sup> was obtained for children A and C.<sup>23</sup> In due course, all the children were put into care with specialist foster parents, whilst care proceedings had started.

<sup>18</sup> See n5 above.

<sup>19</sup> *Webster v Norfolk County Council* [2009] EWCA Civ 59.

<sup>20</sup> *Ibid*, at 36.

<sup>21</sup> *Re B (Adoption: Jurisdiction to set aside)* [1995] Fam 239, at 251G-H.

<sup>22</sup> Children Act 1989, s 47.

At first instance, Judge Barham, quickly dealt with the case in one day;<sup>24</sup> deducing from findings of expert medical evidence that B's injuries were non-accidental that Mr and Mrs Webster were the possible perpetrators.<sup>25</sup> The Judge was criticised on two points: first, for completing a case of such magnitude in one day, and, secondly, for the question he posed: "There are two issues which I have to decide in connection with these proceedings; firstly, did (child B) suffer non-accidental injuries, and, secondly, who are the likely perpetrators of these injuries?"<sup>26</sup> One can deduce from the question that the judge had predetermined the result.

This took place in 2004, when Judge Barham made a care order in relation to the children. Subsequently, the children were also freed for adoption.<sup>27</sup> At the time the Adoption and Children Act 2002 had not yet come into force despite its enactment date two years previously.<sup>28</sup> Thus the rules in the Adoption Act 1976 applied.<sup>29</sup> Therefore, the court did not need not dispense with the consent of the parents, as it had satisfied one of the grounds laid down in the 1976 Act.<sup>30</sup> During late 2005, the unfortunate happened to the Websters; the children were placed for adoption. The court believed that the unanimous diagnoses of the medical experts were sufficiently compelling to suggest that the injuries were non-accidental. Two placements were made: children A and B in one placement together and child C in a separate placement.<sup>31</sup>

In 2006 Mrs Webster became pregnant and gave birth to another child, Brandon, in Ireland. The Websters had gone there to avoid their child being taken away by the local authority owing to the past

allegations (and indeed findings). Despite this, on their return, the local authority intervened and started care proceedings in relation to Brandon. However, on this occasion the local authority decided to do a residential assessment which the Webster passed with ease.<sup>32</sup>

Accordingly, Holman J discontinued the care proceedings relating to Brandon.<sup>33</sup> In light of this, fresh medical evidence emerged in relation to child B. This new evidence strongly suggested that the injuries B sustained were caused by scurvy and iron deficiency rather than abuse.<sup>34</sup> At the time this was unknown to the clinicians as it was a condition which was uncommon, and indeed unheard of in the West in modern times. However, although it was raised by Mrs Webster's junior counsel during the cross-examination at first instance, the medical experts failed to acknowledge the possibility.

Following a successful appeal, after a second attempt,<sup>35</sup> the Court of Appeal decided to hear the case but not directly in relation to the three children,<sup>36</sup> as the local authorities stated that the Websters had no 'locus' to appeal.<sup>37</sup> The Websters were adamant in trying to set aside the adoption orders made in relation to the three children, which had, however, been made on the basis of the incorrect medical evidence, which was the decisive factor in the judgments of Judge Barham and (subsequently) Munby J (as he then was) who was involved in interim proceedings in relation to media coverage of the case at the stage that care proceedings in relation to Brandon were in transit to Holman J.<sup>38</sup>

In the Court of Appeal, Wall LJ then concluded the matter, in a judgment appearing to rely on many (occasionally somewhat vague) justifications, and

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<sup>23</sup> *Webster v Norfolk County Council* [2009] EWCA Civ 59, at 111.

<sup>24</sup> *Ibid*, at 117.

<sup>25</sup> *Ibid*, at 116.

<sup>26</sup> *Webster v Norfolk County Council* [2009] EWCA Civ 59, at 183 and 184.

<sup>27</sup> *Ibid*, at 34.

<sup>28</sup> Adoption and Children Act 2002, it came fully into force on 30 December 2005.

<sup>29</sup> Adoption Act 1976, s16(2).

<sup>30</sup> *Ibid*, s16(2): that the parents or guardian has seriously ill treated the child.

<sup>31</sup> *Webster v Norfolk County Council* [2009] EWCA Civ 59, at 34.

<sup>32</sup> *Ibid*, at 35.

<sup>33</sup> *Ibid*, at 37.

<sup>34</sup> *Ibid*, at 36.

<sup>35</sup> *Webster v Norfolk County Council* [2009] EWCA Civ 59, at 71.

<sup>36</sup> *Ibid*, at 178.

<sup>37</sup> *Ibid*, at 74.

<sup>38</sup> Now President of the Family Division of the High Court of England and Wales and recently, in the new Family Court, taking a particularly strong view not only of more recent judgments making care orders with a longer term plan for eventual adoption, following the concerns raised at the FJC's 2014 Conference, but also in relation to the issue of transparency in Family Proceedings to which he has given significant priority since his appointment as President of the Family Division,



which, with respect, appeared to lack the sufficient analytical and just application of the law in all areas,<sup>39</sup> which, coupled with the discretion that the judiciary possesses in relation to child law, could have achieved the fair, just and (most importantly) correct result of the stance taken by Baroness Butler-Sloss in the unusual 1991 case of *Re M*<sup>40</sup> where such an appeal was allowed.

Moore-Bick LJ agreed with Wall LJ without further substantive opinion.

Wilson LJ in his judgment provided more justifications, but again, with respect, they do not appear to suffice. In particular it does not appear that, if the appeal had been allowed, this decision would have had a negative effect on future prospective adopters.<sup>41</sup> This will be discussed further below.

### **What is an adoption in legal terms?**

The concept of adoption was introduced in 1926.<sup>42</sup> This was owing to the “pressing social need for child protection and the formalisation of adoption”.<sup>43</sup> However, the legislation had been delayed for some time; the concept of planting a child into a new family forever was welcomed with reservations by parents. This is ‘because of the abhorrence of the common law to alienation of parents’ right to their children’ as Moss enunciated with clarity in a contemporary article.<sup>44</sup>

An adoption order is made by the court.<sup>45</sup> It completes permanent<sup>46</sup> legal transference of status<sup>47</sup>,

together with ‘parental responsibility’<sup>48</sup> from the birth parents of the child in question to the prospective adopters.<sup>49</sup> This is the only order known to the law which has such profound consequences<sup>50</sup> and England and Wales is the only jurisdiction in the world which promotes non-consensual adoption in this way. This concept of finality appears to be formidable for many families and individuals<sup>51</sup> although in some cases an ‘open’ adoption order might be made, permitting the birth family to remain in contact with a child, particularly if the contact sought is between siblings.

Thus under a correctly made adoption order, a child becomes a full legal member of the family of the adopters, the adopted child, as a matter of law, is treated ‘as if born a child of the adopters’.<sup>52</sup> This leaves the natural birth parents with no rights as their bond in law is extinguished. However, this point is arguable, with the aid of the European Convention of Human Rights,<sup>53</sup> and will be examined further below. Ultimately, an adoption order may be ‘set aside’ in highly exceptional and very particular circumstances.<sup>54</sup>

### **Where did the principle of irrevocability originate and are there any exceptions?**

The current legislation on adoption is the Adoption and Children Act 2002.<sup>55</sup> It came fully into force on 30 December 2005. This Act repeals its predecessor: the Adoption Act 1976.<sup>56</sup>

Although adoption law is entirely statutory,<sup>57</sup> there

<sup>39</sup> *Webster v Norfolk County Council* [2009] EWCA Civ 59, at 175.

<sup>40</sup> See *Re M (Minors) (Adoption)* [1991] 1 FLR 458, per Butler-Sloss LJ (as she was then) ‘...a most unusual case and, in the circumstances and for the reasons I have sought to give, I think it right that the appeals should be allowed’ at 459F.

<sup>41</sup> *Ibid.*, at 204.

<sup>42</sup> Adoption Act 1926.

<sup>43</sup> Finola Moss ‘Family: A social panacea?’ (2009) 159 *NLJ* 538, at page 1.

<sup>44</sup> *Ibid.*

<sup>45</sup> ‘Court’ used to mean at the time of the Webster adoptions, subject to any provision made by virtue of the Children Act 1989 Sch 11 Pt 1, the High Court, a county court or a magistrates’ court: Adoption and Children Act 2002 ss 144(1), 147, Sch 6. Now it also means the unified Family Court set up by the Crime and Courts Act 2013.

<sup>46</sup> *Re B (Adoption Order: Jurisdiction to Set Aside)* [1995] Fam 239, per Sir Thomas Bingham MR (as then) ‘The act of adoption has always been regarded in this country as possessing a peculiar finality’ at 251G.

<sup>47</sup> Adoption and Children Act 2002, s 67(1).

<sup>48</sup> Meaning of ‘parental responsibility’ see the Children Act 1989 s 3; and para 151 (definition applied by the Adoption and Children Act 2002 s 147, Sch 6.

<sup>49</sup> Adoption and Children Act 2002, s 67(2).

<sup>50</sup> See *Re B (Adoption Order: Jurisdiction to Set Aside)* [1995] 3 All ER 333 at 337, per Swinton Thomas LJ, and at 343 and 681 per Sir Thomas Bingham MR.

<sup>51</sup> See *Re B (adoption order: jurisdiction to set aside)* [1995] 3 All ER 333, in *Webster v Norfolk County Council* [2009] EWCA Civ 59, *Re PW (Adoption)* [2011] EWHC 3793 (Fam).

<sup>52</sup> Adoption and Children Act 2002, s 67(1).

<sup>53</sup> European Convention of Human Rights, art 8 (right to privacy and family life).

<sup>54</sup> See *Re M (Minors) (Adoption)* [1991] 1 FLR 458, per Butler-Sloss LJ (as then) ‘...a most unusual case and, in the circumstances and for the reasons I have sought to give, I think it right that the appeals should be allowed’ at 459F.

<sup>55</sup> Adoption and Children Act 2002.

<sup>56</sup> Adoption Act 1976.

<sup>57</sup> Burton, F, *Family Law* (2012), Routledge, Taylor & Francis, page 449, 2<sup>nd</sup> ed, (2015) page 502.

appear to be no provisions regarding the principle of irrevocability, especially at the point where an adoption order has been legally completed. There are provisions to revoke placement orders<sup>58</sup> and return of a child if an adoption agency is involved.<sup>59</sup> However, these provisions clearly reiterate that they only apply if the child has not yet been formally adopted.<sup>60</sup> There is nothing in the Act that regulates the revocation of a completed adoption.

This directs the attention to common law; where previous judgments may be binding in other cases. Although, it is said that precedent does not apply strictly in family and child law cases, this clearly is not entirely the case. It appears the judiciary adheres strictly to the *stare decisis* doctrine in some cases.<sup>61</sup> To support that point further, in *Re M*,<sup>62</sup> Baroness Butler-Sloss (as she now is) set aside an adoption order. She emphasised in the judgment, that 'I do not want the setting aside of this adoption order in these circumstances to be thought of as being some precedent for any related set of facts in some other case'.<sup>63</sup> This tends strongly towards the significance of precedent in the decision making process. Accordingly, precedent clearly is usually followed regardless of the type of case and in this case has tended towards a grave miscarriage of injustice.<sup>64</sup> It could be argued that had Baroness Butler-Sloss not inserted the statement above, the overall decision could have inclined towards a different result in *Webster*.<sup>65</sup>

In *Webster*,<sup>66</sup> it appears that Wall LJ relies somewhat on precedent from the previous case *Re B*,<sup>67</sup> which laid down 'some' emphasis as to the reasons why adoptions could not be set aside. Swinton Thomas LJ states 'In my judgment such an application faces insuperable hurdles. An adoption order has a quite different standing to almost every other order made by a court... Unlike certain other jurisdictions, there

are no other statutory provisions for revoking a validly made adoption order. Parliament could have so provided if it had wished to do so'.<sup>68</sup> It seems that Swinton Thomas LJ finds what appears to be the problem – the fact that Parliament has not legislated in relation to revoking a validly made adoption order. Even then, it should be the court's duty to propagate justice over what appears to be omissions on Parliament's part. On the other hand, some Judges may feel that this gap cannot validly be filled by judge made adjustments. It seems that unlike Parliamentary legislation, judge made law would not be set in stone which appears to be a core problem.

Swinton Thomas LJ states further, that adoption can only be set aside where there has been procedural irregularity.<sup>69</sup> There are several examples of this: such as when notice of proceedings has not been served on the mother (*Re F (R) (An Infant)*);<sup>70</sup> or fraud has been used to obtain the order (*Re RA (Minors)*);<sup>71</sup> and a fundamental breach of natural justice in an adoption made overseas (*Re K (Adoption and Wardship)*).<sup>72</sup>

He concludes with an interesting point, but which, with great respect, seems to undermine the importance of child welfare and justice. 'There is no case which has been brought to our attention in which it has been held that the court has an inherent power to set aside an adoption order by reason of misapprehension or mistake. To allow considerations such as those put forward in this case to invalidate an otherwise properly made adoption order would, in my view, undermine the whole basis on which adoption orders are made...'<sup>73</sup> In essence, it can be asserted a mistake is a procedural error. Therefore, if such a mistake is a decisive factor in which the adoption was made, surely that is a procedural error and thus, has the status to be set aside.

*Re M*,<sup>74</sup> is an example, in which an adoption order

<sup>58</sup> Adoption and Children Act, s 24.

<sup>59</sup> *Ibid*, s 30-35.

<sup>60</sup> *Ibid*, s 24(2)(b) and s 30(1)(a).

<sup>61</sup> *Webster v Norfolk County Council* [2009] EWCA Civ 59, at 160.

<sup>62</sup> *Re M (Minors) (Adoption)* [1991] 1 FLR 458.

<sup>63</sup> *Ibid*, at 459F.

<sup>64</sup> *Webster v Norfolk County Council* [2009] EWCA Civ 59.

<sup>65</sup> *Ibid*.

<sup>66</sup> *Ibid*.

<sup>67</sup> *Re B (adoption order: jurisdiction to set aside)* [1995] 3 All ER 333.

<sup>68</sup> *Re B (adoption order: jurisdiction to set aside)* [1995] Fam 239 at 245C.

<sup>69</sup> *Re B (Adoption Order: Jurisdiction to Set Aside)* [1995] Fam 239, at 245C.

<sup>70</sup> *Re F (R) (An Infant)* [1970] 1 QB 385.

<sup>71</sup> *Re RA (Minors) (1974)* 4 Fam Law 182.

<sup>72</sup> *Re K (Adoption and Wardship)* [1997] 2 FLR 221.



is 'actually' set aside. 'Actually' is emphasised because in that case an adoption was validly made, then set aside, whereas in the cases mentioned above, adoptions had not been validly effected, because of procedural error. However this raises a further argument, as to whether it is possible to set aside something which has not been validly effected in the first place. Nevertheless, this point will be elaborated further below.

The case of *Re M* mentioned above (where the adoption was unusually rescinded) is discussed next, and in fact contains some bizarre facts which cannot be replicated under the current adoption legislation, or perhaps even easily comprehended due to the strangeness of the facts.<sup>75</sup> In that case a mother and her 'new' husband adopted her two daughters (i.e. the mother of the children, along with their new step-father adopted the children), to which the natural father of the children had consented. It soon appeared that the mother was terminally ill with cancer and she soon passed away. This left the daughters with the step-father, who was unable adequately to care for them. The courts overturned the adoption so the children could return to their natural father.

First, a natural parent cannot adopt his or her own child under the new legislation.<sup>76</sup> It was one of the absurdities of the previous Adoption Act.<sup>77</sup> Secondly, this is the only judicial decision which appears to include a validly made adoption and is based on previous legislation.<sup>78</sup> In logic, one might question how it can be labelled a 'proper' adoption when a mother adopted her own child, but regardless of the absurdity it was the law at that time and it allowed a parent to adopt his or her own child with another.<sup>79</sup> However, the point of the matter is that in that case it appears that the courts did the 'right' thing, which is to put the welfare of the child first. Then, secondly, the principle

of irrevocability: unfortunately, this was also the case in which Baroness Butler-Sloss said that the judgment was not a precedent for future cases.<sup>80</sup> Therefore, this apparently non-precedent was not taken into account in *Webster*.<sup>81</sup>

To return to the point of setting aside procedural irregularities which do permit an adoption order to be rescinded: despite the case of *Re M* above,<sup>82</sup> it appears that it is claimed that 'only' procedural irregularities are set aside.<sup>83</sup> One point the courts have failed to address is how can one put aside something which has not been effected in the first place. A parallel example is that of a divorce. There are two ways to end a marriage. One is annulment and the second is dissolution by divorce decree.<sup>84</sup> Annulment signifies that the marriage had not in fact been valid in the first place, thus, there is no marriage to dissolve. If a marriage was not legally valid, the law says that it never existed.<sup>85</sup> Then there are marriages which have been validly effected (by satisfying the requirements of marriage), which means that union cannot be annulled, as it is a legally formed marriage.<sup>86</sup> This distinction is readily understood in the Law of Nullity and Divorce.

What appears to be taking place in Adoption is that, in such reported cases as there are, the judiciary claims to be able to, and to be, reversing adoptions which, procedurally, have not been correctly made, but the underlying reasoning then states that the basis for reversing an adoption is solely because, owing to procedural irregularity, the adoption had not been effective (when in at least the one case of *Re M* this is plainly not the situation).

There is also the question of how one can reverse a status which has not been effectively created in the first place. On the basis of the Marriage and Nullity or Divorce analogy, there clearly can be no reversal of a status which has not yet been created, surely there

<sup>73</sup> *Re B (Adoption Order: Jurisdiction to Set Aside)* [1995] Fam 239, at 249B.

<sup>74</sup> *Re M (Minors) (Adoption)* [1991] 1 FLR 458.

<sup>75</sup> Adoption and Children Act 2002.

<sup>76</sup> Adoption and Children Act 2002, s 51: a step parent or unmarried partner can apply on his or her own, instead of the natural and step-parent applying together which meant that the natural parent was in fact adopting their own child. A concept which seems absurd.

<sup>77</sup> Adoption Act 1976.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> *Re M (Minors) (Adoption)* [1991] 1 FLR 458, at 459F.

<sup>81</sup> *Webster v Norfolk County Council* [2009] EWCA Civ 59.

<sup>82</sup> *Re M (Minors) (Adoption)* [1991] 1 FLR 458.

<sup>83</sup> *Ibid.*, at 74.

<sup>84</sup> Decree Absolute.

<sup>85</sup> Matrimonial Causes Act 1973, s 12.

<sup>86</sup> *Ibid.*, s 1.

would have to be a correctly effected adoption in order to reverse that adoption. It thus clearly appears to be a flawed system which traps people like the Websters. Herring criticises the justifications used in *Webster*:<sup>87</sup> “What sense is there in being willing to overturn an adoption based on failure to serve the correct papers, but not based on a fundamental failure of expert evidence?”<sup>88</sup>

## Effects of adoptions on parties

### Birth parents

Unfortunately, as mentioned above, the birth parents lose all their right to their child once an adoption order is legally completed.<sup>89</sup> However, that does not mean that there are no other ways to have such rights. The *European Convention on Human Rights Article 8* may assist some parents to do this.<sup>90</sup> *Article 8* provides a right to respect for one’s private and family life.<sup>91</sup> However, it can be argued that once the adoption is complete the birth parent cannot use *Article 8* as there are no legal ties between them and the child.<sup>92</sup> For example the authorities argued in *Webster*,<sup>93</sup> the parents have no ‘*locus*’, connoting they could not legally object.<sup>94</sup> Nevertheless, it is established in *Johansen v Norway* that once family life is established under *Article 8* it seems that the right to respect for it is never lost.<sup>95</sup>

In *Webster* Wall LJ added ‘In my judgment,<sup>96</sup> the European authorities do not assist Mr and Mrs Webster’.<sup>97</sup> Respectively, there appears to be no reasoning offered in Wall LJ’s statement for this view. Also, no attempt was made in examining whether the provisions could have applied to Mr and Mrs Webster, especially, whether there was a justification for the

interference made by the local authorities which could have been a breach of their rights under *Article 8*.<sup>98</sup>

### Adopters

It appears that there is a ‘strong preference for strangers’ rather than reunification of the child with its birth parent.<sup>99</sup> Prospective adopters get all rights, such as parental responsibility and the legal status,<sup>100</sup> such that the adopted child is as if he or she had been born from the adopter.<sup>101</sup> Radical provisions like the above can create insuperable hurdles for the birth parents to challenge findings which may not be true.<sup>102</sup> Even if the allegations are true, this sets the threshold higher for those parents who go through rehabilitation in order to be capable of caring for their children.<sup>103</sup> Also, once a placement order is made and parents wish to reclaim the child, they would have to apply to court for permission to revoke this placement order.<sup>104</sup>

*Re A (a Minor)* illustrated the point made above,<sup>105</sup> that the courts have set hurdles which may be too high to surmount. Terms like ‘change in circumstances’ and to ‘have a real prospect of success’ requirements which must be met before the court even gives permission for the appeal to be heard for the court to reverse such orders. This is effectively an insurmountable burden for any parent, and coupled with the inherent delay of further assessments to rehabilitate a relationship is not for a child’s ‘welfare’.<sup>106</sup>

Such transference of legal status creates great conflicts which may even be too difficult for the courts to adjudicate. In cases like the Websters’, who have been caused grave injustice, if the case had reached the European Courts, posing the question ‘who has

<sup>87</sup> *Webster v Norfolk County Council* [2009] EWCA Civ 59, Jonathan Herring Family Law, 5<sup>th</sup> edition, Harlow, Pearson Longman, 2011, p 690.

<sup>88</sup> Jonathan Herring, “Family: Revoking adoptions?” (2009) 159 NLJ 377, at page 3.

<sup>89</sup> Adoption and Children Act 2002, s 46(2)(a).

<sup>90</sup> European Convention on Human Rights, Art 8.

<sup>91</sup> *Ibid*, Art 8(1): Everyone has the right to respect for his private and family life, his home and his correspondence.

<sup>92</sup> European Convention on Human Rights, Art 8.

<sup>93</sup> *Webster v Norfolk County Council* [2009] EWCA Civ 59.

<sup>94</sup> *Ibid*, at 74.

<sup>95</sup> *Johansen v Norway* (1996) 23 EHRR 33.

<sup>96</sup> *Webster v Norfolk County Council* [2009] EWCA Civ 59.

<sup>97</sup> *Ibid*, at 175.

<sup>98</sup> *Ibid*, Art 8(2): There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

<sup>99</sup> Moss, F, “Family: A social panacea?” (2009) 159 NLJ 538, at page 2.

<sup>100</sup> Adoption and Children Act 2002, s 67(2).

<sup>101</sup> *Ibid*, s 67(1).

<sup>102</sup> *Webster v Norfolk County Council* [2009] EWCA Civ 59.

<sup>103</sup> *Re P (A Child)* [2007] EWCA Civ 1265.

<sup>104</sup> *Warwickshire County Council v M* [2007] EWCA Civ 1084.

<sup>105</sup> *Re A (a Minor)* [2007] EWCA Civ 1383.

<sup>106</sup> Finola Moss ‘Family: A social panacea?’ (2009) 159 NLJ 538, at page 2.

the right to family life under *Article 8*,<sup>107</sup> the birth parents or the adopters?” it would have been interesting to see what the court could have decided... perhaps the Websters could have come out victorious. It can be imagined that whatever the result both parties could have been heartbroken; the birth parents to have lost their natural children forever and legal parents battling for their legally adopted children.

Overall it appears that currently if a ‘Webster’ type adoption is irreversible, birth parents are left with many obstacles and no rights, and meanwhile adopters benefit greatly and their parental rights are protected.

### Adopted Children

Finally attention must divert to those who should always be at the centre of consideration during these life changing procedures: the children. This is because it affects them for the rest of their lives; in a way that it cannot be rectified even if they challenged it.<sup>108</sup>

A change which should have been implemented from the beginning is the consideration of the welfare of the child *during the adoption process*. Although, the Children Act 1989 established a welfare checklist for use in Children Act 1989 proceedings<sup>109</sup> which has led to wide respect for the principle that children’s welfare is paramount, it has not been used by the courts in adoption prior to the most recent Adoption Act.<sup>110</sup> Now the Children and Adoption 2002 Act contains a similar provision which acknowledges the welfare of the child although its wording in fact focuses more on the child’s ongoing future rather than within the adoption process itself.<sup>111</sup> Unfortunately, this Act was not in force during the process of the *Webster* case.<sup>112</sup> Had it been in force it could have changed the outcome if the courts adhered to the checklist.<sup>113</sup>

As mentioned above, if, an adopted child decides, once it has reached adolescence, to pursue its roots the

adopted adult will freely be able to pursue its natural parents.<sup>114</sup> There are good reasons for this.

In *Re B*,<sup>115</sup> the appellant was in his thirties. He was adopted at the age of three months by an orthodox Jewish couple. However, his natural father was Muslim Arab from Kuwait and his mother a Roman Catholic. He decided to settle in Israel, but he was denied on the suspicion of being an Arab spy. He was also denied in Kuwait. He sought to have the adoption set aside. However, he was refused by the court. This left the appellant with an improper ethnic identity.<sup>116</sup> Although in this case which had particularly unfortunate ethnicity consequences, an adopted adult can normally find his biological origins under the present law without changing his adopted status and no one can stop him associating with his birth parents. What he cannot do is reverse the adoption.

This is just one of the failures and negative effects of an adoption. However, that does not mean that there are no successful cases. Michael Gove, formerly the Secretary of State for Education, was adopted at four months.<sup>117</sup> Owing to social stigma, his natural mother gave him up. It seems that it has been a positive outcome for him, although it seems from media reports, which may or may not be accurate, that he does wonder about his natural mother, with whom he has not had any contact.

It is difficult to say whether adoption is the answer for all children in care. The appellant in *Re B* wanted to reverse the adoption on cultural and religious grounds because his legal status restricted him from pursuing his natural origins.<sup>118</sup> Had he known at the time he was adopted and been given the chance to decide, knowing that he would not be able to re-connect with his natural parents, it seems unlikely he would have agreed to an adoption. Whereas for Michael Gove, if he chooses to seek his natural

<sup>107</sup> European Convention on Human Rights, Art 8.

<sup>108</sup> *Re B (Adoption Order: Jurisdiction to Set Aside)* [1995] Fam 239.

<sup>109</sup> Children Act 1989, s 1(3).

<sup>110</sup> Children and Adoption Act 2002.

<sup>111</sup> *Ibid*, s 1(2) and s 1(4).

<sup>112</sup> *Webster v Norfolk County Council* [2009] EWCA Civ 59.

<sup>113</sup> Adoption and Children Act 2002, s 1(2) and s 1(4) welfare checklist, Children Act 1989, s 1(3) welfare checklist.

<sup>114</sup> Depending when born, but since 1976 able to obtain original birth certificate once 18: Adoption Act 1976, s 51 for adoptions prior to 30<sup>th</sup> December 2005, after that date, Adoption and Children Act 2002 s 80-81.

<sup>115</sup> *Re B (Adoption Order: Jurisdiction to Set Aside)* [1995] Fam 239.

<sup>116</sup> *Webster v Norfolk County Council* [2009] EWCA Civ 59, at 161.

<sup>117</sup> Andrew Pierce ‘My birth mother knows who I am, but I’ll never try to track her down’ *Daily Mail* 23 April 2010.

<sup>118</sup> *Re B (Adoption Order: Jurisdiction to Set Aside)* [1995] Fam 239.

mother, he may do so as in his case the legal status does not obstruct him.

Although, adopted children have the right to their original birth certificates,<sup>119</sup> there is no guarantee of success in locating their birth parents, which is one of the many adverse effects of adoption.

### Power of the courts

Although the courts claim that they have no inherent power to set aside adoption orders,<sup>120</sup> on the basis that adoptions are permanent<sup>121</sup> judicial discretion in relation to all child orders must surely be considered, since it seems to have been exercised in the two cases mentioned. The law, however, does not in fact explicitly state that a judge cannot revoke such an order,<sup>122</sup> and in cases of monstrous miscarriage of justice or and lack of ethnic identity, it would seem that discretion should be appropriate as was the case in *Re M*.<sup>123</sup>

Wilson LJ emphasised the need for certainty in the *Webster* appeal to the Court of Appeal. However, should even certainty be sacrificed where the result is injustice? If one adoption order were set aside, would it have really damaged adoption law generally and discouraged the prospect of future adopters from adopting through a perception that birth parents might appear to have more power than they?<sup>124</sup> This is definitely not generally the case under the present system where a result as in the *Webster* case can occur.

Herring has collected figures from 2006 which show that there were just fewer than 5,000 adoptions and one in six were step parents. The latest records of 2011 shows a drop down to 4,777;<sup>125</sup> although no revocation of adoption orders has been made. There is no evidence that a revocation would have discouraged or undermined the apparent vast importance of adoption for many children. It

illustrates that the importance and need for adoption has dropped. There does not appear to be the pressing social need it once had.<sup>126</sup> The social norms have indeed changed; single mothers are not stigmatised, nor are co-habiting couples. Although these were situations once considered “sin” and which were viewed with disgust, society has changed, and the law needs to keep pace in order to circumvent the draconian effects of its rigidity.

There is another point to be made on precedent: recently the Court of Appeal accepted an appeal of a family law case on grounds that *stare decisis* did not apply when decisions of the court were wrong.<sup>127</sup> From this a further point comes to mind: as in criminal law, the family justice system needs to adopt the *modus operandi* of *double jeopardy*. This allows cases to be re-opened and re-heard on the basis of new evidence. This too needs to apply in Family and Child law, as it is a sensitive area. Lack of such provision proved to be a flaw in the *Webster* case<sup>128</sup> where the birth parents had to appeal and show ‘good’ legal reason to do so, rather than to obtain the justice which they deserved. Also, the harshness of the application of the well known criteria for the rules laid down in *Ladd v Marshall* for acceptance of new evidence on appeal<sup>129</sup> proved to be a huge obstacle.<sup>130</sup> Wall LJ stated that he firmly believes that first of the three conditions in *Ladd v Marshall*<sup>131</sup> was not met by the Websters, and further stated that they should have sought second opinions, had they done so they could have secured the evidence for the trial.<sup>132</sup>

The law and rules are in place to achieve justice with certainty, not to disregard justice to achieve certainty.

### Lessons for the future...

The draconian affects of adoption should now be

<sup>119</sup> Depending when born, but since 1976 able to obtain original birth certificate once 18: Adoption Act 1976, s 51 for adoptions prior to 30<sup>th</sup> December 2005, after that date, Adoption and Children Act 2002 s 80-81.

<sup>120</sup> *Ibid*, at 74.

<sup>121</sup> *Webster v Norfolk County Council* [2009] EWCA Civ 59, at 63.

<sup>122</sup> *Re B (adoption order: jurisdiction to set aside)* [1995] Fam 239 at 245C.

<sup>123</sup> *Re M (Minors) (Adoption)* [1991] 1 FLR 458.

<sup>124</sup> *Webster v Norfolk County Council* [2009] EWCA Civ 59, at 204.

<sup>125</sup> National Office of Statistics “Information on adoption statistics” 2011.

<sup>126</sup> National Office of Statistics “Information on adoption statistics” 2011: In 1974 there were 22,502 adoptions. The figure has dropped down to 4,777 in 2011.

<sup>127</sup> David Burrows ‘Evidence, Practice and Procedure: *Stare Decisis* Does Not Apply Where Statute Overrides’ Familylaw.co.uk 2013.

<sup>128</sup> *Webster v Norfolk County Council* [2009] EWCA Civ 59.

<sup>129</sup> *Ladd v Marshall* [1954] 3 All ER 745

<sup>130</sup> *Webster v Norfolk County Council* [2009] EWCA Civ 59, at 180

<sup>131</sup> *Ladd v Marshall* [1954] 3 All ER 745

<sup>132</sup> *Webster v Norfolk County Council* [2009] EWCA Civ 59, at 180

canvassed. This does not mean that the concept of adoption is inadequate; it is the way in which it is regulated which seems sometimes to generate ill effects.

First, the welfare of the child should be the starting point. This means local authorities need to take more care to *assess* whether it would really be in the best interest for the child to be adopted before jumping to conclusions that the birth parents must be harming them. In correlation, more support needs to be provided to birth parents; in a way which does not undermine them. Also, asking what the child desires, at least those that satisfy *Gillick* competence.<sup>133</sup>

Secondly, either Parliament should amend adoption legislation to enable an adoption to be reversed where there is a strong case as in that of the *Websters*, or the judiciary using their discretion should establish a test which actually sets aside adoption in 'highly exceptional and particular circumstances', especially if there is evidence to support it.<sup>134</sup>

Thirdly, in cases like *Webster*,<sup>135</sup> the court needs to take the initiative to advance ways that could aid the prospect of justice with certainty. This could be such as getting second if not third opinions from medical experts to confine the chances of mistaken evidence. Also, spending longer (instead of shorter time) in court to assess the suitability of adoption, rather than hurrying to pass orders which past cases have shown may need to be re-heard or undone.

## Reforms

In the last two or three years that it has been in office, the Coalition Government has announced two initiatives which are crucial to making adoption work better<sup>136</sup>: contact between birth parents and children in care or about to be adopted, the placement of sibling groups for adoption.

These two were absent in *Webster*.<sup>137</sup> Firstly, there was no contact between the children and the parents and secondly, the children were split up.<sup>138</sup> However,

on the other hand a reform already effected to speed up adoption is the recent enactment in the Children and Families Act 2014 which now allows disregard of the former attention to racial and ethnic matching, which could be of concern in view of the result in e.g. *Re B* above<sup>139</sup> where such mismatching clearly contravenes the welfare checklist and the child's human rights.

## Alternatives

The New Labour Government in its long period of office 1997-2010 legislated to provide the special guardianship order, which was introduced in December 2005, and which enables a secure legal relationship between the child and the guardian, while preserving the legal relationship between the birth parents and the child. This order normally lasts until the child is 18, which is the age which the child has the right to seek it origins.<sup>140</sup> In addition, as opposed to adoption the local authority provides financial support to guardians for care of the child. This may explain the expeditious process of adoption, since until April 2008, local authorities were receiving large cash incentives for reaching Government targets based on the number of children adopted out of care.

Nevertheless, if care is failing children, it does not necessarily mean that adoption is an infallible solution. Pam Hodgkins of NORCAP<sup>141</sup> comments that 'the incidence of suicide and accidental death...among young men who have been adopted is frightening'.<sup>142</sup> Despite evidence like this the Government fails to acknowledge that the legal promotion of public adoption to support a failing welfare system is based on the presumption that adoption *per se* will be for a child's welfare,<sup>143</sup> not to mention the number of children re-entering the care system after adoption breaks down.<sup>144</sup>

To make the concept of adoption successful, the ill effects need to be removed. As the current law stands, there may be others who now suffer as the *Websters* did.

<sup>133</sup> *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402.

<sup>134</sup> *Webster v Norfolk County Council* [2009] EWCA Civ 59.

<sup>135</sup> *Ibid.*

<sup>136</sup> Government Discussion Paper July 2012.

<sup>137</sup> *Webster v Norfolk County Council* [2009] EWCA Civ 59.

<sup>138</sup> *Ibid.*, at 34.

<sup>139</sup> n107.

<sup>140</sup> Adoption and Children Act 2002, s 80-81.

<sup>141</sup> The former Adult Adoption charity (which went into administration in 2013) and of which she was Chief Executive.

<sup>142</sup> *Hansard* 21 November 2001.

<sup>143</sup> Moss, F. 'Family: A social panacea?' (2009) 159 *NLJ* 538, at page 4.

<sup>144</sup> *Ibid.*



# **International Family Law, Policy and Practice**

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Cross-referencing should be kept to a minimum, and should be included as follows in the footnotes:

Author, title of work + full reference, unless previously mentioned, in which case a shortened form of the reference may be used, e.g. (first mention) J Bloggs, *Title of work* (in italics) (Oxbridge University Press, 2010); (second mention) if repeating the reference - J Bloggs (2010) but if the reference is already directly above, - J Bloggs, above, p 000 will be sufficient, although it is accepted that some authors still use "ibid" despite having abandoned most other Latin terms.

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- Schedule 1 to the Children Act 1989
- rule 4.1 of the Family Proceedings Rules 1991
- Article 8 of the European Convention for the Protection of Human Rights 1950 (European Convention)

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- Children Act 1989, Sch 1
- Family Proceedings Rules 1991 (SI 1991/1247), r 4.1 (SI number to given in first reference)
- Art 8 of the European Convention

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- J. Bloggs and J. Doe 'Title' [2010] Fam Law 200

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