PARENTAL RESPONSIBILITY AND STATE INTERVENTION

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Parents are vested with rights and duties over their children by virtue of childbirth. The rights that vest with childbirth become somewhat more complex when matters such as repudiation, acknowledgement, adoption or child-care placement are involved. In basic terms, however, the birth of a child gives rise to parental responsibility.

Generally, parents are assumed to have only the best interests of their children at heart. It is taken for granted that these parents will automatically make the right choices for their children and exercise their parental rights in a manner that satisfies the "natural inclination and aspirations of the children."[1]

In the real world, we are well aware that this is not always the case. In fact, we realize with great sadness that there are an overwhelming number of parents who do not exercise parental responsibility in the best interests of their children. In such cases, does a child have any hope of a happy childhood within a family structure?

The State intervenes when parents fail to provide the responsible care that is expected.[2] On paper, this looks like the obvious solution to what could potentially be a disastrous state of affairs for the child. But then again, those of us who have seen this intervention at work may well think otherwise. Although the State intervenes with the best of intentions, in some situations it achieves a contrary result.[3]

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1. CODE CIVIL [C. CIV.] ch. 16, art. 3B (Malta).

2. *See* Mavis Maclean, *Delegalized Family Obligations*, *in* FAMILY LAW AND FAMILY POLICY IN THE NEW EUROPE 129 (Mavis Maclean & Jacek Kurczewski eds. 1997). Where Mavis Maclean makes an important distinction in identifying:

> 'good' enough parents and those who fail to meet this criteria. The former are reminded of their responsibilities, which survive divorce and are independent of marriage, and are expected to make their own decisions about their children's upbringing as they choose. The latter group [includes those subject] to close supervision, in partnership with their local social services welfare department.

Id. Maclean discusses the popular argument that "the cost of private quarrels should not fall upon the public purse" which is why States do their utmost to encourage parental responsibility since this measure, "while at the same time reducing public costs, offers the government the 'dream ticket' of doing good while saving money." *Id.* at 130.

3. *See* Her Majesty's Stationery Office, Dept. of Social Services, Report of the Inquiry

These situations, therefore, bring forth the crux of the issues under consideration. How does one determine when State intervention crosses the boundary between representation of the best interests of the child, on the one hand, and interference on the other? How does one ensure that the end result is truly in the best interest of the child? How should the child's involvement be solicited when such input is potentially invaluable to the process of determining what is truly the best interest of the child? These are some of the questions that must be resolved in the topic under discussion.

I. PARENTAL RESPONSIBILITY

In early law, and to a considerable extent throughout Roman history, the pivot of the Roman *familia* was the *paterfamilias* who exercised *patriapotestas* over the family and other dependents.[4] We have come a long way from the *ius vitae necisque* [5] and the absolute control that entitled the *paterfamilias* to treat the child as part of his property, where his responsibilities toward the child were largely that of maintenance and economic support.

In most countries of the world today, it is accepted that parents bear the primary responsibility for their children.[6] This means that parents are obliged to "look after, maintain, instruct and educate"[7] their children, with maintenance encompassing essentials such as food clothing, habitation, health and education requirements.[8] Both parents jointly hold this responsibility.

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into Child Abuse in Cleveland in 1987 (1988) (visited Jan. 24, 2001) <http://www.hmso.gov.uk>.

4. *See* Tufts University, *Perseus Digital Library* (visited Jan. 24, 2001) <http://www.perseus.tufts.edu> [hereinafter *Perseus Digital Library*]. Paterfamilias translates to "father of the family." *Id.* Patriapotestas translates to "the power the father has over the members of the family." *Id.*

5. *Ius vitae necisque* translates to the power of life and death and was only exercised in exceptional circumstances. It was subject to the requirement that a *concilium* be convened to hear the case and the *paterfamilias* was bound by the verdict that the *concilium* passed. *See id.*

6. *See* Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 9, at 166, U.N. Doc. A/44/49, 28 I.L.M.1448 (1989) [hereinafter Child Convention]. Many States have accepted and ratified the Child Convention. Article 18 of the Child Convention states "both parents have common responsibilities for the upbringing and development of the child. Parents . . . have primary responsibilities for the upbringing and development of the child. The best interests of the child will be their basic concern." *Id.* art. 18.

7. C. CIV. ch. 16, art. 3B.

8. Maltese Court judgments have been generous in defining educational and health expenses in the best interest of the child. A recent case Miriam Camenzuli v. Joseph Camenzuli, (Cit. 11/94) Court of Appeal June 26, 1997, dealt with the issue of whether the non custodial parent should have to pay the expenses of a cosmetic operation to the remedy "path ears," to pay for a contribution fee to the child's school where such fee was in fact part of the fees, together with expenses relating to school transport, books, uniform and shoes. The Court found that it was in the best interest of the child for such payment to be made and so ordered the non-custodial parent who had sole responsibility for maintenance. It also admonished separated parents as to their responsibilities towards their children at all times, irrespective of their relationship with their spouse.

The problem clearly begins with the assumption of parental responsibility. Assuming that the responsibilities of parenthood are undertaken willingly, the child should be able to sit back and count on unconditional love, care and support for eighteen or so years until the attainment of the age of majority when the time comes to "put away childish things."[9] The reality, however, is that there are parents who do not assume any responsibility when a child is born. In Malta, the mother has no choice but to accept parental responsibility because of the old Latin assumption of *mater semper creta est si vulgo conceperit.*[10] In several other European countries, this rule no longer holds the same weight[11] as a mother may opt for an *accouchement sous* "X."[12] In Malta, the assumption and application of the rule can be avoided if a mother abandons her child shortly after birth so that her connection to it remains unknown; however, if maternity is later established, the mother may be subject to criminal sanctions.

According to Maltese law, the father of the child born out of wedlock is responsible as a parent only if he voluntarily acknowledges the child or when a court declares his paternity.[13] The legal relationship between the father and the child is as though the child were born in marriage.[14] This distinction between a child born within wedlock and one born outside of it has been the subject of much heated debate. Although discrimination against illegitimate children in matters of succession has been declared as unconstitutional,[15] the legislature has yet to put into effect any amendments to remedy the situation.

Unfortunately, some children are subject to parental authority exercised by a parent or parents who have no interest in assuming such authority. Does this imply that such a parent has a lesser obligation than the parent who voluntarily assumes parental responsibility?

An interesting viewpoint on this issue has been raised in a fairly recent Scottish case, *McFarlane v. Tayside Health Board,*[16] where an unsuccessful vasectomy resulted in childbirth. The Scottish court stated that although "the law no longer upholds the sanctity of life as an absolute value," the value of

9. 1 *Corinthians* 13:11 (King James) ("When I was a child, I spoke as a child, I understood as a child, I thought as a child: but when I became a man, I put away childish things.").

10. *See Perseus Digital Library, supra* note 4 ("The mother is always certain, if she conceives openly."); C. CIV. ch. 16, art. 95 ("The mother, even though she has not acknowledged the child, shall have the same obligations and rights as the father who has acknowledged the child.").

11. See generally the laws in Italy, France, and Belgium among other States.

12. Literally translated from the French this means giving birth under the name X, an unknown title.

13. *See* C. CIV. ch. 16, art. 92.

14. *See id.* art. 90(1). Barring the loss of the right to receive legal usufruct over any property belonging to the child which is enjoyed by the parents of the child conceived in wedlock. *See id.*

15. *See* Mario Buttigieg Pro et Nomine v. Attorney General and Prime Minister First Hall, Rikors 544/96 AJM (January 17, 1997) *not appealed.*

16. McFarlane v. Tayside Health Board, [1997] S.L.T. 211.

a child should be held to outweigh all of the costs associated with the childbirth and the failed vasectomy because the law "has not reached the state where family relationships and the worth of a child's existence are values to which it is indifferent."[17] It made no difference to the court that parental responsibility attached to such a birth as a compulsory matter, subject to strict penalties.[18]

The other side of the coin lies in the obligation of the child to obey the parents in all that is permissible at law while being subject to the authority of these parents.[19] Even here, the hand of the State has intervened in several countries to ensure that children are not subjected to physical punishment by their parents.[20] In balance, it must also be pointed out, however, that some States have gone to the other extreme and, pursuant to court rulings, are advocating the reintroduction of caning as a means of chastisement for wayward children.[21]

The decision as to chastisement of a child, presumably in the parents' effort to educate the child, can, therefore, be severely influenced by the State.[22] At one extreme, the parent is prohibited from using any means of force, while at the other end of the spectrum parents who are adamantly against corporal punishment may see their child caned by court order. All such intervention or interference is carried out with the intention of being in the best interests of the child.

Parental responsibility should be carried out in the best interests of the child. Some scholars argue that two kinds of parental responsibility exist.[23] The first type of this responsibility is derived from the status of biological or adoptive parenthood. The second type of parental responsibility is the practical aspect of parenting.[24] With all due respect, it seems hard to accept this description in view of the fact that parenthood, by necessity, imports the exercise of responsibility. It is difficult to imagine one without the other, just as it is difficult to imagine law that is incapable of any practical effect. Whether parents actually accept and engage in the practical aspects of their

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17. *Id.* at 216L-17L.

18. *See* Elaine E. Sutherland, *Scotland: From Birth to Death, in* THE INTERNATIONAL SURVEY OF FAMILY LAW 383, 385-86 (Andrew Bainham ed. 1996).

19. *See* C. CIV. ch. 16, art. 92.

20. See generally the laws in Sweden, Norway, Finland, Austria and Cyprus, where it is unlawful for a parent to hit a child.

21. In 1994, a Singaporean Court ordered the caning of a U.S. teenager. *See* Fay v. Public Prosecutor, [1994] 2 S.L.R. 154. The judgment in Singapore generated support in several American States for the introduction of caning for juvenile offenders. *See* Barbara Ehrenreich, *Caning* (visited Jan. 23, 2001) <http://www.zmag.org/zmag/articles/june94ehren.htm>.

22. *See* C. CIV. ch. 16, art. 154(1) (Maltese law may deprive a parent of parental authority "if that parent, exceeding the bounds of reasonable chastisement, ill-treats the child, or neglects his education.").

23. *See* John M. Eekelaar, *Parental Responsibility: the State of Nature or Nature of State?*, 1991 J. SOC. WELFARE FAM. L. 37, 39 (1991).

24. *See id.*

parental responsibilities is another issue, one that could and should lead to the termination of their parental rights when appropriate.

Although the notion of rights over children has become distasteful over recent years, it is still true to say that parental rights do exist. Parents still retain the right to make a multitude of decisions on behalf of their children. Parents are expected to make these decisions in a responsible manner. Failure to act responsibly, and, indeed, failure to act at all, often leads to the curtailment of such rights. This termination of parental rights, however, does not completely solve the problem. It only leaves the child in a vacuum where someone else must take over the exercise of parental responsibility - and who else is available other than the State?

II. STATE INTERVENTION

The State has a responsibility to intervene when parents do not live up to the responsibilities parenthood thrusts upon them. This liability to provide for the lack of parental care can therefore be viewed as having a subsidiary nature. Having said this, however, it is easily apparent that the responsibility of the State *vis-à-vis* the child is at times far from subsidiary.

The State, for instance, is bound to ensure that children have access to healthcare, education and social security. It is the State that determines the compulsory age at which a child may terminate education, just as the State may order compulsory vaccinations for health reasons. Should the parents make the decision to vary from these norms, they run the risk of incurring State imposed sanctions.

Given that the State-assumed responsibilities are sometimes not simply subsidiary in nature, it may be fair to ask whether the parents actually wish or expect the State to shoulder some of the responsibility in the upbringing of their children. Although they retain the right to choose the school to which they send their children, parents may not prevent their children from attending school unless they are in a position to provide personalized tuition in keeping with State established curriculum. It would hardly be acceptable for parents to decide that employing the child in the family business constituted vocational training sufficient substitute for traditional education. The State would go so far as to attempt to ensure that the child be given time to learn, rest and play without being roped into child labor in the interest of keeping costs down within the family trade.

In Malta, a current trend among a large number of parents is to send their children to additional private lessons to better prepare them for school advancement examinations. This trend is the subject of a heated debate. Parents, caught up in the trend, place a significant burden on their children in that a great number of these children must, after a long school day and accompanying homework, take additional classes with more homework, leaving next to no time for recreational pursuits. Parents are becoming so obsessed with their children's examination results that their children's lives

centers on schooling. The trend is most prevalent when children are between the ages of ten and eleven when entrance examinations to secondary schools are the norm, then later at age sixteen when children attempt to enter college to begin higher education.[25]

In a country where education is given the highest consideration, with sixty-six percent of secondary school children continuing with their studies beyond the compulsory school age of sixteen and at least twenty percent proceeding to tertiary education,[26] this attitude is hardly surprising. However, it is not unknown for parents to send even kindergarteners to additional lessons for help with their numbers or their letters. Would State intervention be justified here where the best interests of children should logically include free time to play?

There is also the subject of health intervention. In Malta, there have been a series of cases where children needed emergency blood transfusions; however, the children's parents, who were of the Jehovah Witness faith, objected to the transfusions. The courts have repeatedly decided in favor of the State Health Authorities by granting the applications and ordering the blood transfusions.[27] Some would argue that a court's decision to grant an application against the parent's wishes amounts to classical State intervention. Others, however, may consider it State interference with parental authority, aided and abetted by the judiciary. Obviously, it is carried out in the name of the best interests of the child.

Few of us would question the prejudicial effect of circumcision on female children, although male circumcision does not produce the same outcry.[28] While traditional practices resulting in facial scarring have been the subject of prosecution, ear and nose piercing is perceived to hardly warrant attention "in a world where children are victimized in so many more harmful ways."[29] How is the line drawn between the State intervening to protect the child and the State standing back to allow the parent, in the exercise of parental authority, the ability to make decisions related to declarations of ethnicity?

There is no issue or question that a State has an obligation to address a child's needs when the parents fail to supply primary needs such as food, clothing and shelter, especially when the child is clearly in need of such care and support. Indeed, it has been suggested that the State has the responsibility of being vigilant in identifying the children who are in such need, even

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25. *See* Ministry of Family and Social Welfare Report, 97 (1996). Available from the Department of Information of the Government of Malta <http://www.msp.magnet.mt/info/contacts.htm>.

26. *See id.* at 95 (1996).

27. *See* Application 327/95, May 14, 1995; Application 481/96, September 23, 1996 (on file with the author).

28. *See* PENELOPE LEACH ET AL., CHILDREN FIRST 204 (Alfred Knopf ed. 1994).

29. Michael Freeman, *The Convention: An English Perspective*, *in* CHILDREN'S RIGHTS: A COMPARATIVE PERSPECTIVE 93, 107-108 (1996).

before any request for assistance is made. As discussed below, the methods employed in identifying children in dire need of assistance are often controversial as they encompass areas where parental discretion and State intervention tend to overlap.

Malta provides care, protection and control for children identified as being in need under the Children and Young Persons (Care Orders) Act. [30] Under the Care Orders Act, the State may intervene when a child is

> beyond the control of his parents . . . or . . . is not receiving such care, protection and guidance as a good parent may reasonably be expected to give and (i) the child . . . is falling into bad associations or is seriously exposed to moral danger; or (ii) such lack of care, protection or guidance is likely to cause the child . . . unnecessary suffering or seriously affect his health or proper development.[31]

Recognizing what constitutes a good parent and the reasonableness surrounding the provision of care, protection and guidance are clearly thorny problems that the law is only too familiar with. To date, the courts have used the "best interest of the child test" in determining whether a parent measures up to these criteria. In cases of doubt, the State comes down on the side of the child, preferring to not take risks while attempting to work with the parents for eventual family reunion wherever possible.[32] As discussed below, however, the efficacy of the machinery for setting the State investigation in progress is entirely another matter.

The law accepts the possibility of parents making the decision to give up their rights over their children. It is a necessary corollary that they are also freed from all ensuing responsibility. It is hard to imagine a more far-reaching act in a parent's life. In one fell swoop, parents may be exonerated from any obligations towards their children, regardless of whether the child and the State are happy about this state of affairs. Parents have the option rarely given to other interested parties at law: they can walk away.

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30. *See* C. CIV. ch. 285.

31. *Id.* at ch. 285, art. 7.

32. *See* Child Convention, *supra* note 6, art. 3. The Maltese courts and administrative authorities put forth great efforts to ensure "the best interests of the child" is a primary consideration. *Id.* For instance, in Nathalie Mifsud v. Ministru ta' 1-Intern u l-Izvilupp Socjali, social workers visited a family after a court clerk reported that the mother had threatened to kill herself in the presence of one of her sons. A report revealed that Mrs. Mifsud's marriage was characterized by violence and that she had been admitted to a mental institution on two occasions. On a subsequent visit, social workers and a psychiatrist witnessed Mrs. Mifsud going into a rage and badly hurting her two-year old son. She confessed to hitting him during her rages and would not give any assurance that the beating would not occur again and did not exclude the possibility that she could even kill him in a fit of rage. A care order was issued and family therapy was recommended. Although Mr. and Mrs. Mifsud sporadically went to family therapy sessions, they eventually reverted back to their violent patterns of behavior. The child was kept under the care order. *See* Nathalie Mifsud v. Ministru ta' 1-Intern u l-Izvilupp Socjali, First Hall Civil Court of Malta (1991).

Where parents choose to forego the baggage that comes with parenthood, there is little anyone can do about it. The State is left to pick up the pieces and attempt to ensure that the child does not lose out too much. It can place the child with a foster care provider in its eagerness to provide an alternative family, or it can facilitate adoption proceedings so that the child may be integrated into a new legal family unit. Failing these alternatives, the State must provide accommodation and care for any child whose parent does not shoulder parental responsibility.[33] The position of the State that intervenes for a child's protection is often complicated by the equally compelling argument that favors respect for parental privacy. This right is enshrined in the Universal Declaration of Human Rights where Article 2 states "[n]o one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence."[34] Furthermore, the European Convention on Human Rights states that "Everyone has the right to respect for his private and family life, his home and correspondence" and "[t]here shall be no interference by a public authority with the exercise of this right except such as in accordance with the law."[35] The concept of parental responsibility itself incorporates a notion that parents have the right to maintain privacy in their family life. Because of this "judges frequently face an impossible decision between the protection of children and the protection of parental autonomy."[36]

The courts are instrumental in protecting family members from having their privacy rights invaded when they determine the boundaries that the State must observe.[37] Therefore, it remains at the court's discretion whether the invasion of such privacy should be carried out when they are overwhelmingly faced with detrimental repercussions for the child. Ultimately, it would appear that State intervention and parental responsibility must look to the judiciary in straining a leash set at the precise balance warranted in favor of the best interests of the child.

III. JUDICIAL INTERVENTION

Elaboration of the law is usually left up to the courts, with the ensuing wide range of interpretations, to determine what is really in the best interests of the child and family under review. It is also an open invitation to the

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33. Initiatives in Northern European countries are veering away from this concept. The father of a child must contribute towards maintenance and the mother must identify the father where this is possible, failing which the State will only supply a minimum of maintenance benefit.

34. Universal Declaration of Human Rights, G.A. Res. 71 U.N., art. 12, U.N. Doc. A/810 (1948).

35. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221, art. 8 §§ 1-2.

36. Emily Jackson, *The Child Mother*, *in* FAMILY LAW AND FAMILY POLICY IN THE NEW EUROPE 43, 48 (Mavis Maclean & Jacek Kurczewski eds., 1997).

37. *See* Cossey v. U.K., App. No. 10843/84, 13 Eur. H.R. Rep. 622 (ser. A) (1991); Dudgeon v U.K., App. No. 7525/76 4 Eur. H.R. Rep. 149 (Eur. Comm'n on H.R.) (1981).

courts to look into the future and attempt to determine what the child's best interests will be in the next few years.[38]

The courts are usually left to interpret the law, while the legislature, when enacting laws, must decide whether to provide stringent rules or instead allow some means of discretionary power to be exercised via interpretation.

Under Maltese adoption law, for instance, in situations where parents do not consent to adoption but adoption is manifestly in the child's best interest, the court can dispense with the consent requirement.[39] The court may decide that for grave and exceptional reasons, the parent's opinion can be overridden and the child can be adopted.[40] Although this measure is often viewed as insufficient, courts utilize it in preference to the time consuming freeing for adoption process.[41] Once children are declared free to be adopted by caring parents who knowingly assume parental responsibility, the current situation of children languishing in children's homes for want of their parents' consent could become a thing of the past.[42]

The court assumes and uses its discretionary power in other areas. In recent times, the most glaring use of the court's discretion is its option to hear the child in matters that are of interest, importance or concern to the child or the child's future. Various legislations have set different ages as the threshold for admission to such hearing.[43] Does this mean that children marginally under this age are to be ignored?

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38. *See* Jackson, *supra* note 36, at 43-55. Discussing the Birmingham City Council v. H (A Minor) case where a 16-year old mother with behavioral problems was judged unlikely to be able to fulfill her child's needs. *See* Birmingham City Council v. H (A Minor) [1994] 1 All E.R. 12. The House of Lords sanctioned the severance of the relationship between the mother and her child. The argument brought by Emily Jackson is that it may not be in the best interests of a 16-year old girl to be burdened with the responsibilities of motherhood, and it is quite plausibly not in the best interests of a baby to have a mother who is an immature adolescent. But to deprive a mother of any contact with her baby, and to deprive a baby of the chance to get to know her mother, are drastic and oppressive actions. Jackson, *supra* note 36, at 52.

39. *See* C. CIV. ch. 16, art. 117(1)(a). This is not to say that Maltese courts do not go out of their way to ensure that all interested parties are heard or called to give consent according to law.

40. *See id.*

41. Freeing for adoption is the process whereby parental rights are terminated or declared at an end and a child is deemed free to be placed under the parental authority of alternative parents. Usually this process flows smoothly, with one set of parents taking over from the other immediately. In freeing for adoption, the adoption or social welfare agency may apply for termination of parental rights itself, rather than the prospective adopters, and then place the child. This method removes the element of risk from the prospective adopters who may be reluctant to care for a child not yet declared "free" to be adopted.

42. Between 1992/1993 there were 434 children in residential care. *See* Reply to Parliamentary Question 589134 (1993). This is not to say that all these children could have been placed in adoption. There is no such breakdown of statistics. Since then, the average number is said to have decreased to about 300 children a year.

43. Malta establishes the age at fourteen. *See* C. CIV. ch. 16, art. 6A. Some States establish the age as young as twelve. See for instance the relevant laws of Denmark and the Neth-

While it is true that children often have access and the ability to be heard in court, what children say is not always fundamental to conclusions reached by the court.[44] In custody cases, while a child's views may be heard the child's desire to reside with one parent rather than the other does not oblige the court to decide the issue according to such wishes. The voice of reason tells us that this is as it should be. Courts are there to weigh all evidence and to reach conclusions in the best interest of the family and all family members, wherever this is possible. The weight attached to children's views, however, should be graded against the compromise to their happiness and to the happiness of the home when the children are ordered to reside with a parent that they are unhappy with.[45] Clearly, the dilemma centers on the balance to be struck between these often competing factors.

IV. THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD AND THE EUROPEAN CONVENTION ON THE EXERCISE OF CHILDREN'S RIGHTS

The United Nations Convention on the Rights of the Child[46] (Child Convention) clearly sets out the duties incumbent on parents by virtue of parental responsibility, and the analogous duty of States to recognize these rights. The Child Convention enumerates these duties in a number of articles.[47] Furthermore, the Child Convention lists a series of civil rights for children in articles 12-16.[48] Article 12, in particular, recognizes the child's right to freedom of expression and participation in the judicial process.[49] It

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44. *See* C. CIV. ch. 16, art. 6A (The court only hears the child if the child's opinion is "deemed opportune.").

45. *See* David Swain, *Family Group Conferences in Child Care*, 9 INT'L J. OF LAW & THE FAM. 155, 166 (1995). The article discusses family group conferences as an innovative feature of the legal system in New Zealand where children are listened to more seriously and their interests are given greater protection. *See id.*

46. *See* Child Convention, *supra* note 6.

47. *See id.*

> [Article 14(2):] States parties shall respect the rights and duties of parents . . . to provide direction to the child in the exercise of his or her right [freedom of thought, conscience and religion] in a manner consistent with the evolving capacities of the child.
> [Article 18(1):] State parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents . . . have the primary responsibility for the upbringing and development of the child. The best interest of the child will be their basic concern.
> [Article 27(2):] The parent(s) . . . have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

Id. arts. 14(2), 18(1), & 27(2).

48. *See id.* arts. 12-16 (These rights include freedom of expression, information, thought, conscience, religion and association.).

49. *See id.* art. 12. Article 12 has been used in France since 1991 and Belgium since 1992

goes so far as to promote judicial participation: "the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child either directly, or though a representative or an appropriate body, in a manner consistent with the procedural rules of national law."[50]

The Child Convention is equally clear on delineating the responsibility of the State in recognizing the role of the parent and in establishing the assistance the State should render to ensure that parental responsibilities are realized.[51] Finally, the Child Convention deals with those areas where the State assumes responsibility for children itself. It sets out a lengthy catalogue of responsibilities to be undertaken by the State.[52] These articles reflect the recognition by the State that the child has both general human rights and special rights in view of the vulnerability of the child and the child's right to preferential protection.

The Child Convention can thus be seen as adopting the famous three P's formula: Protection - the right to be protected against certain forms of behavior such as abandonment, child abuse and exploitation; Provision - the right to have access to certain benefits and services such as education, health care

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by advocates who argue for child rights to participation before the courts.

50. *See id.*

51. *See id.*

> [Article 3(2):] States parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents . . . and to this end shall take all appropriate legislative and administrative measures.
> [Article 5:] States parties shall respect the responsibilities, rights and duties of parents . . . to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.
> [Article 9 (1):] States parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, . . . that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
> [Article 18 (2):] For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States parties shall render appropriate assistance to parents . . . in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
> [Article 27 (3):] States parties ... shall take appropriate measures to assist parents . . . to implement this right [a standard of living adequate for the child's physical, mental, spiritual, moral and social development] and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

Id. arts. 3(2), 5, 9(1), 18(2) & 27(2).

52. *See id.* Arts. 2(1), 3(3), 6(2), 8(1), 11(1), 12(1), 13 (1), 19(1), 20(1), 21, 24(1), 26(1), 28(1), 32(2), 34- 35, 39.

and social security; and Participation - the right to carry out specific activities and freedom of participation in the judicial process.[53]

The State undertakes and shoulders a very long list of obligations. As in the case of parental responsibility, the situation begs the question as to what happens when a State does not shoulder such responsibilities. When a parent fails to provide the child with the qualities pursuant to parental duties and obligations, that parent loses parental authority. What is the result when a State fails to honor its own international commitment of providing the child with those rights it has promised to protect?

As with any international document, enforcement is one of the saddest areas under review. The Child Convention attempted to alleviate this problem by setting up an internal monitoring body in the form of the Committee on the Rights of the Child.[54] The Committee has carried out some worthy investigations, but to date it has reviewed only a small fraction of the reports received, and, it ended its eighteenth session where it only dealt with six reports.[55] Meanwhile, initial reports, dating back to 1992,[56] and recently filed second reports are awaiting review.

Where international feedback is sparse,[57] national goodwill could give force to the Child Convention by setting up an Ombudsman for children, as seen in the Norwegian tradition.[58] Such a measure would ensure monitoring of children's rights within their own territory and would also enable an independent organization to refer a report to the Committee set up by the United Nations or at least to assist in the compilation of the report.[59]

In attempting to offer a solution to the problems under review, it is impossible to overlook the vital importance of regional participation in the monitoring and promoting of children's rights.

The latest development in the field of child rights is found in the European Convention on the Exercise of Children's Rights (Children's Rights Convention).[60] This international agreement was opened for signature and

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53. *See generally* POLITICS OF CHILDHOOD AND CHILDREN AT RISK, PROVISION-PROTECTION-PARTICIPATION (P.L. Heilio, E. Lauronen & M. Bardy eds., 1993).

54. *See* Child Convention, *supra* note 6, art. 43.

55. *See* U.N. CRC document CRC/C/74, March 3, 1998 regarding the eighteenth session May 18 – June 1998.

56. *See id.*

57. *See* U.N. Convention, *supra* note 6, art. 44 (describing "the obligation to present country reports" however, it is a well known fact that many countries have not filed their report.).

58. Norway is not the only State to adopt this trend, it has been adopted by Sweden, Costa Rica and New Zealand.

59. *See* Child Convention, *supra* note 6, art. 44(6) (obliges individual States to publish and circulate its reports throughout their own country.). The efficacy of this article also leaves much to be desired.

60. *See* Council of Europe, European Convention on the Exercise of Children's Rights, Europ. T.S. No. 160, January 25, 1996, (visited August 15, 2000) <http://conventions.coe.int/treaty/EN/cadreprincipal.htm> [hereinafter Children's Rights Convention].

ratification in January 1996.[61] It is envisaged that by strengthening and creating the procedural rights that can be exercised by children themselves, the Child Rights Convention could facilitate the exercise of the substantive rights of children, particularly in family proceedings affecting the child.[62]

V. THE BEST INTERESTS OF THE CHILD

So far, throughout this article, attention has been paid to the role of the parents, State, judiciary and supra-national contributions which aim at looking after the child, providing maintenance, education and health whilst enabling children to realize their abilities, natural inclinations and aspirations.[63]

In conclusion, what remains to be discussed is the involvement of the children themselves in this process. To date, it appears that it is the adults involved who attempt to dictate the actions to be taken when determining the best interests of the child.[64] The British House of Lords stated in *Gillick v. West Norfolk*[65] that the child is expected to be able to make up his mind "when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision."[66]

Recent cases, however, have shown that a court is willing to overrule a child that is competent to make a decision under the criteria of understanding and intelligence when the child's decision is not acceptable to the court.[67] The matter becomes far worse where the child has no independent representation before the courts.

Under Maltese law, a child who is at least fourteen years old may be heard by the court in a matter of fundamental importance to the family, if the court finds it beneficial to permit such a hearing.[68] Where the issue, however, relates specifically to a matter of parental authority, the court, "after hearing the parents and the child if the latter has reached the age of fourteen years, shall make those suggestions which it deems best in the interests of the child and the unity of the family" and may even order that one parent be authorized to decide the issue where it appears the particular parent is more suit-

61. *See id.*

62. EUGENE VERHELLEN, CHILDREN'S RIGHTS IN EUROPE, UNDERSTANDING CHILDREN'S RIGHTS 529 (1996).

63. *See* C. CIV. ch. 16, art. 3B.

64. *See* Child Convention, *supra* note 6, art. 3 ("the best interests of the child shall be a primary consideration," not that the child's best interests will be *the* primary consideration or paramount consideration.).

65. Gillick v. West Norfolk [1985] 3 All E.R. 402.

66. *Id.* at *36 (Templeman, L.J., dissenting).

67. *See* In Re W (A Minor) (Medical Treatment: Court's Jurisdiction) [1992] 4 All E.R. 627. A case of a 16 year-old anorexic girl who tried to starve herself where the Court of Appeals ruled that someone who had parental responsibility over the girl could override her decision to refuse treatment. *See id.*

68. *See* C. CIV. ch. 16, art. 6A.

able to "protect the interest of the child."[69] Following the Report of the Commission to Provide for the Setting up of a Family Court, it has been suggested that the law be amended so as to enable independent legal representation for children, particularly in separation[70] and custody cases.[71]

In cases where couples opt for mediation, the voices of their children may be heard. However, since there are no statistics regarding the impact of mediation involving children, it is difficult to estimate what the potential impact may be in a particular case.[72] Indeed, in the cases where the mediation process is attempted, children are often brought in at a later stage of the proceedings by which time decisions have already been formulated and the meeting is merely one of review to enable the children to hear of the decision rather to play any active role in its making.

Surely one of the main goals of the Child Convention was precisely to ensure participation of children in the making of decisions that concerns them. The Child Rights Convention now awaits commitment from States who agree that children have the right to a voice. Whether States will overcome their tendency towards ventriloquism and realize that the best interests of children require full recognition of the child as an individual remains to be seen. What is clear is that parental responsibility and State intervention will have to make room for a new dimension of child participation.[73]

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69. *Id.* art. 131.

70. Divorce is not part of Maltese law, although recognition of a foreign divorce decree is perfectly legal. *See* C. CIV. ch. 16, arts. 35-66.

71. The author was a member of the Commission that presented the report in December 1997.

72. *See* Michael Richards, *The Needs of Children at Divorce,* FAMILY LAW AND FAMILY POLICY IN THE NEW EUROPE 203, 214 (Mavis Maclean & Jacek Kurczewski eds., 1997).

73. *See* Child Rights Convention, *supra* note 6, arts. 3-5, 9-10.