

Gender Equality and Rights of Women

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In many parts of the world, promoting the rights of women in family life remains a key human rights objective because family law systems are structurally patriarchal – that is, women are subordinated to men in terms of rights both as partners and parents. Typically, the subordination of women in the family reflects their subordination in the wider society.

English folklore has it that “the hand which rocks the cradle rules the world”; but in reality, in countries of the western legal tradition as well as elsewhere, these have in the past been two quite distinct roles and were assigned to different genders. Women were seen as the custodians of the hearth, and the notion that they could, or should, also play a role in public life was a quite alien one. While the western legal tradition emphasised the importance of the individual, the individuality of women and children was often hidden within the family unit, headed by the husband and father. The family was regarded largely as a private domain free from the law’s intrusion, while the law reinforced male headship of the domestic unit.¹

While structural patriarchy has been all but eliminated from the law in countries which derive their heritage from the Judaeo-Christian tradition, cultural patriarchy remains an issue, and finds its most negative outworking in terms of coercive and controlling domestic violence.² Dealing appropriately with the issue of domestic violence is one of the major challenges for countries, whatever their cultural history. The balance between an emphasis upon the continuing role of both parents, and the protection of women and children from family violence, has been at the heart of debates about shared parenting laws.³

To find solutions to the issues arising from violence in family relationships, it is first necessary to have an accurate understanding of the problem. There has been a very strong tendency in the past, to define domestic violence in a homogenous way as being perpetrated mainly or entirely by men, and characterised by a desire to control and oppress women. Undoubtedly, some male violence is characterised by desire for patriarchal domination, and

Received: 16.07.2020

Accepted: 18.08.2020

Published: 19.08.2020



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is sometimes accompanied by other forms of abuse such as sexual abuse, verbal abuse, financial abuse and social isolation which together have the effect of subjugating and controlling women. Nonetheless, the statistics on the prevalence of violence, and the extent to which men report assaults upon them (albeit that the violence tends to be less serious) do not sit comfortably with such a one-size-fits-all characterization.⁴ Domestic violence cannot be understood only in terms of male control or patriarchal attitudes.

Even still, male violence remains the most serious issue from a public health perspective. Work on the typologies of family violence has begun to bridge the gulf between different perspectives,⁵ leading to more nuanced and sophisticated assessments of how a history of violence should be considered relevant to post-separation parenting arrangements.⁶

There has been near universal acceptance of the UN Convention on the Rights of the Child. Article 12(1) of the Convention provides that States should “assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.” Article 12(2) specifically concerns court proceedings. It provides that the “child shall in particular be provided an opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body.” This has been identified as one of four general principles which underpin the more specific rights provided by the Convention.⁷

Article 12 does not specify *how* it is that children’s voices should be heard in proceedings that affect them. It does not dictate that children should give evidence, nor that they be separately represented – although those are possible ways in which Article 12 may be given effect. There is nothing inconsistent with Article 12 that the child’s voice should be heard through an appropriate social science trained professional, preparing a report for the Court. Nonetheless, Article 12 has acted as a stimulus to evaluate practices in those jurisdictions that have not hitherto given proper voice to children in parenting disputes as a matter of routine procedure. It has also acted as a rallying cry for children’s rights advocates who have been promoting children’s participation in various fora in any event, and who have been able to use this provision of international law to build a bridge to the lawmakers, judges

and policy experts.

The focus on children's participation rights in recent years is a consequence not only of the UN Convention but also a result of a distinct shift over the last few decades in thinking about children in both psychology and sociology.⁸ Children are no longer seen as the passive recipients of parental influence, the targets of socialization within and outside the family nor as 'objects of concern'⁹ in relation to outside intervention. They are now seen as social actors who are shaping their own lives, and influencing the lives of those around them, particularly their parents and siblings.

In Europe, the issue of children's participation has been given further momentum by the European Convention on the Exercise of Children's Rights (ECECR).¹⁰ This Convention applies to family proceedings, and in particular to those proceedings involving the exercise of parental responsibilities such as residence and access to children. Article 3 of this Convention provides that a child of sufficient understanding shall be granted the right to receive all relevant information, to be consulted, to express his or her views and to be informed of the possible consequences of compliance with these views and the possible consequences of any decision.¹¹ Article 4 provides that the child shall have the right to apply for a special representative where internal law precludes the holders of parental responsibilities from representing the child as a result of a conflict of interest with the latter. Article 5 requires Parties to the Convention to "consider granting" children additional procedural rights including the right to apply to be assisted by an appropriate person of their choice in order to help them express their views; the right to apply themselves, or through other persons or bodies, for the appointment of a separate representative, in appropriate cases a lawyer; the right to appoint their own representative; and the right to exercise some or all of the rights of parties to such proceedings. Other provisions of the Convention concern the roles of judges and separate representatives for children.

This has been operationalised in the domestic laws of numerous European countries. In France, for example, legislation was passed in 2007 which gives children the right to be heard by the judge if they so choose.¹² This is intended to be the normal way in which a child will be heard, with an interview by another professional such as a child psychologist being



utilised only if it is in the best interests of the child to be heard this way. The judge must also examine whether a refusal by the child to be heard is well founded.¹³

Family law jurisdictions in other parts of the world are also now exploring how children's voices can better be heard in the legal process.¹⁴ In Australia, a variety of approaches have been trialled.¹⁵ In particular, there has been great interest in the practice of child-inclusive mediation, in which the views of the children, interviewed separately, are fed back to the parents.¹⁶ In an evaluation of a pilot project, McIntosh and colleagues showed that child inclusive mediation has greater benefits for parents and children than mediation in which the children's voices were not heard.¹⁷ However, the cohort in that study were of a higher educational level than in the general population. Child inclusive mediation is in its infancy still in Australia and further research is needed on how well it works when operationalised in the resource-constrained environment of publicly subsidised mediation services and across the population. A small qualitative study of child-inclusive mediation in New South Wales has produced less encouraging findings than in the McIntosh et al pilot study.¹⁸

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