

DISCUSSION PAPER

# GENDER EQUALITY AND WOMEN'S RIGHTS IN THE CONTEXT OF CHILD CUSTODY AND CHILD MAINTENANCE

An International and Comparative Analysis



No. 30, July 2019

**FRANCES RADAY**

FOR PROGRESS OF THE WORLD'S WOMEN 2019-2020

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# SUMMARY

The division of care and responsibility for children, including financial care, is usually determined by the family law of the State. This study identifies some of the most prevalent custody and child maintenance regimes in cases of divorce, dissolution of a civil union and separation of parents. It examines the various regimes with particular emphasis on their impact on gender equality and women's rights.

Until the 19th century, a male prerogative over guardianship and legal custody of children—giving fathers sole authority regarding the child's personal affairs, such as property, domicile, travel, education and marriage—was the norm in Roman law and in secular systems (both common law and civil law). The male prerogative has been rescinded in secular law systems, in accordance with the international human rights law requirement of the elimination of discrimination against women in the family. However, it has been retained in patriarchal religious and customary systems, which are endorsed by those States that maintain theocratic, religious-based or plural legal systems. Thus, both secular and religious or customary laws are relevant in examining current custody regimes.

Three overarching issues relating to custody may negatively impact women's rights: domestic violence,

the ongoing danger of which is often neglected in custody or visitation awards; the weaker bargaining position of women in the family as a result of patriarchal legal, cultural or economic contexts, which will disadvantage them in cases where the custody is subject to negotiation; and interpretation of the best interest of the child in a gender-biased way.

Child maintenance and support is a heavily gendered issue. The majority of custodial parents are mothers, and single mothers with young children are highly prone to poverty. The payment of maintenance by non-custodial parents throughout the child's minority is required by many but not all legal systems. In systems where non-custodial parents have an obligation to pay child maintenance, non-payment can result in both civil and criminal penalties. In the event of default, some States have public support systems. Custodial mothers are not sufficiently protected financially in almost any system because there are often inadequacies in the calculation of custody payments, high percentages of arrears or defaults in payment by the non-custodial parent, few criminal prosecutions and low levels of public support payments. Deficiencies in enforcement and support systems are a significant factor in producing a gender gap in income after divorce and in contributing to gender-based poverty.





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# 1.

## INTRODUCTION

The dissolution of marital relationships involving children has legal, social and emotional consequences, creating difficulties in living arrangements for children and often involving protracted legal battles between parents. The issue of child custody and maintenance or support is a critically important one for gender equality and women's rights. Women may be disadvantaged in law and practice in the decision-making process regarding custody and maintenance. Furthermore, the dissolution of marital relationships tends to increase financial insecurity for mothers. The balancing of the rights and responsibilities between parents is an issue that, among feminists, brings to the fore many of the tensions around the meaning of equality (formal vs. substantive) as well as differences and divisions (differential equality vs. sameness).

The physical custody of the child may or may not be awarded to the legal guardian. In religious law systems such as Islam and Judaism, there is a 'tender years presumption', according to which the sole physical custody of younger children should generally go to mothers. This presumption has been abolished in many secular law systems in recent years in response to demands for gender equality, made by some feminist movements and some father's rights lobbies. These secular law systems have introduced gender-neutral systems of custody that do not, at face value, predetermine that either mother or father is the preferred custodian. Nevertheless, maternal preference in custody arrangements often persists, regardless of the legal environment, and hence women constitute the great majority of children's physical custodians after divorce.

There is a clear State obligation, under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), to ensure equality for women in the family, including as regards their rights and responsibilities as parents;<sup>1</sup> and an

obligation, under both CEDAW<sup>2</sup> and the Convention on the Rights of the Child (CRC),<sup>3</sup> to ensure recognition that both parents have common responsibilities for the upbringing and development of their children. Under both Conventions, the best interests of the child are overriding.

Under international human rights law, States are obliged to implement their treaty commitments in law and practice, and as both CEDAW and the CRC have been ratified by the vast majority of States globally, their equality provisions are widely applicable.

The next part of this paper analyses the formulation and enforcement of parental rights and responsibilities in custody laws, while part 3 analyses maintenance and support systems. Part 4 presents pointers for conclusions and recommendations. Emphasis will be placed on the gender implications of these frameworks for custody and maintenance.

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1. Article 16: To eliminate discrimination against women in all matters relating to marriage and family relations and to ensure that, on a basis of equality of men and women, they must have the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount.

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2. Article 5(b).  
3. Article 18.

## 2.

# CUSTODY MODELS AND ISSUES THAT AFFECT ALLOCATION

## 2.1

### Introduction

Guardianship, which bestows parental legal authority or responsibility regarding the child’s personal affairs, such as property, domicile, travel, education and marriage, is distinguishable from the physical custody of a child. The term ‘custody’ is used in some systems to denote guardianship, and in this report the use of the term in this way will be apparent from the context. Physical custody involves the day-to-day conduct of the child’s life and requires the determining of residence, care, contact or visitation rights. Guardianship and physical custody may be allocated to a sole parent or divided between the parents in cases of divorce, dissolution of a civil union and separation of parents (to be referred to inclusively as divorce).

Historically, the patriarchal model of family, with a male prerogative over guardianship, has been dominant in nearly all countries and legal traditions—for example, all systems based on the Roman law institution of *pater familias* (father of the family) or on the Jewish or Islamic legal codes. The male prerogative over guardianship has now been eliminated in most secular law systems,<sup>4</sup> and countries that still bestow a male prerogative over guardianship tend to be those that defer, in theocratic, religious-based or plural legal systems, to codified religious and customary laws.

Secular law systems have moved to an equality model for guardianship. For example, in Argentina, legislation spells out the parents’ joint role: Both parents have

the right to guardianship, and the consent of both parents is required for significant decisions regarding children under the age of majority, including (i) the marriage of a child; (ii) the emancipation of a child; (iii) the decision of a child to join a religious community, the army or security forces; (iv) the child’s departure from the country; (v) involvement of the child in court proceedings; (vi) disposal, with judicial permission, of real estate or other registered children’s property that both parents administer; and (vii) exercise of the administration of all the child’s property unless one of the parents delegates it to the other.<sup>5</sup>

As noted, physical custody is not necessarily contingent on legal guardianship. In patriarchal systems, the male prerogative does not necessarily bestow physical custody on the father; in secular law systems, equality in guardianship rights does not always

4. The term ‘secular’ is used in this report to refer to legal systems that are not based on religious family law. This classification is used because the sources of legislation in secular- and religious-based legal systems are distinct and produce different issues for discussion.

5. Grosman and Scherman 2005.

provide a totally gender-neutral approach to physical custody. In some secular law systems<sup>6</sup> that are adopting a gender-neutral approach, the term ‘custody’ has been replaced by terms such as ‘parental responsibility’, ‘residence’ and ‘contact’, reflecting a shift from the concept of parental power or possessory rights to an understanding that parents have responsibility for the care and upbringing of children. Physical custody is often a site of friction between the parents—the commonly used phrase ‘custody battle’ reflects the level of conflict that can be present in this process. The allocation of physical custody may also have an impact on entitlement to maintenance payments and thus add an additional source of conflict.

Three models of custody and their impact on women’s de jure and de facto equality will be discussed: (i) traditionalist models of guardianship and custody; (ii) secular law approaches that maintain a tender years’/maternal preference presumption; and (iii) gender-neutral laws and concepts.

Three overriding issues that affect custody allocation between the parents will then be examined: (i) domestic violence; (ii) the balance of bargaining power in contested custody cases and (iii) the best interest of the child.

## 2.2

# Three models of custody and their impact

## 2.2.1. Traditionalist models of guardianship and physical custody

Traditionalist models of guardianship and custody are patriarchal, allocating guardianship to the male members of the family. The patriarchal model has in

6. This includes Commonwealth countries such as Australia, Canada (certain provinces), New Zealand and the United Kingdom. Conversely, Ireland still uses the term ‘guardianship’. South Africa’s Children’s Act 2005 has defined ‘parental responsibilities’ and replaced ‘custody’ and ‘access’ with ‘care’ and ‘visitation’. EU countries include Bulgaria (‘parental rights and duties’), Germany, Malta (‘parental authority’) and Romania. Recommendations to amend terminology (among other changes) in Hong Kong’s Law Reform Commission’s 2005 report have still not been legislated more than 10 years later.

the past been prevalent in nearly all countries and legal traditions whether civil, common, customary or religious law (e.g., Judaism and Islam). Currently, the paternal prerogative in guardianship persists largely in theocratic, religious-based or plural legal systems. These provide exclusive guardianship rights of authority and decision-making to fathers, with or without physical custody rights, which are in some cases provided exclusively to mothers.

The most pervasive of these legal systems is Sharia, which is incorporated into the family law codes of a large majority of the 57 States of the Organisation of Islamic Cooperation (OIC). Others include Hindu, Jewish, customary and mixed systems, which are currently given a measure of legal force in some States. Religious systems for the most part, unlike secular ones, have not adapted much over time, remaining faithful to the letter of religious law even where this is in clear contradiction with the international human rights obligation to mandate equality between women and men in marriage, including in guardianship and custody of children.

In most (though not all) patriarchal religious systems in which the father has exclusive guardianship rights, physical custody is generally—but with important exceptions—allocated to the mother. The allocation of physical custody to the mother is clearly defined in a tender years doctrine in Jewish law and a form of tender years doctrine in Sharia law that makes a presumption that mothers are the more appropriate custodians of young children. This presumption is based on the patriarchal division of roles between women and men in society and the family.

### Sharia in Muslim-majority countries

This paper devotes a separate section to the provisions of Sharia on guardianship and physical custody arrangements because, to the best of our knowledge, an exclusive paternal prerogative for guardianship in modern legal systems is prevalent only in countries that apply Sharia personal law. Most Muslim-majority countries have constitutional provisions that recognize Islam as the state religion and entrench the principles

of Sharia as the fundamental principle of legislation,<sup>7</sup> while a number of constitutions, although they do not formally recognize Islam as the official religion, apply Sharia to personal law regimes.<sup>8</sup> Some Muslim-majority countries do not apply Sharia law as a legally recognized system.<sup>9</sup> Countries following Sharia law tend to follow one or a combination of Sunni schools—Hanafi, Shafi, Maliki, Jafari and Hambali—or Shia. There are variations between the schools regarding until what age the child’s custody should be allocated to the mothers and the situations that can lead to cancellation of a mother’s custody rights.

In the Sharia systems, guardianship (*wilaya*) is male and usually includes the authority to take care of the child’s personal affairs such as marriage, education and discipline as well as legal transactions relating to her/his property or passport and travel.<sup>10</sup> This may severely restrict the mother’s freedom of movement and occupation. It may also make her utterly dependent on the father or another guardian to give permission for the use of money, including social security payments for the child. In some of these theocratic or religious-based systems, women themselves may be subordinated to the control of a male guardian from whom they must obtain permission to travel, marry, exit prison, work or access health care.<sup>11</sup> Tunisia is considered one of the more progressive systems, even though the guardianship is granted exclusively to the father unless he is unable or unfit to exercise this prerogative. A reform in 1993 allowed custodial mothers certain guardianship rights, including decision-making on travel, studies and management

of the child’s financial account.<sup>12</sup> In practice, however, mothers have been blocked from exercising these rights: for example, border police have refused to let women pass without paternal authorization.<sup>13</sup>

Under Sharia, mothers are generally entitled to physical custody<sup>14</sup> (*hadana*) of children up to a certain age. This is seen as a product of the natural affinity between mother and child, particularly small children.<sup>15</sup> The physical custody arrangement also reflects the expectation that the woman provides the domestic labour and care, while the man tends to property and financial affairs.<sup>16</sup> While it can be considered a form of tender years presumption, the ages of children for whom custody is granted may extend well beyond the tender years. The age of maternal custody varies between different legal schools within Islam and is differentiated for boy and girl children: up until between 2 and 15 for boys and between 7 and 15 (or sometimes until marriage) for girls.<sup>17</sup>

As legal guardianship remains exclusively male throughout, and mother’s physical custody of children does not entail decision-making rights for the children, Sharia systems are different from other maternal preference frameworks that grant sole or joint guardianship to the custodial mother. Furthermore, mothers traditionally lose custody if they remarry after widowhood or divorce.<sup>18</sup> The custody will usually go to the father or the father’s family, although in some systems it may go to the mother’s parents. The threat of loss of custody has a grave impact on women’s exercise of their freedom to remarry after divorce or widowhood. Additionally, custodial mothers may be restricted in their freedom of movement. For example, in Tunisia, which largely follows the Maliki school, there is a maximum distance that can separate the residence of the custodial mother from that of the

7. This includes both Arab and non-Arab countries and territories: Afghanistan, Algeria, Bahrain, Bangladesh, Brunei, Egypt, Iraq, Iran, Jordan, Kuwait, Libya, Malaysia, Maldives, Mauritania, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, State of Palestine, Tunisia, United Arab Emirates and Yemen: Rafiq 2014. Special laws within state systems for Muslim minorities also exist—for example, in the Philippines, where divorce is not legal but a Presidential decree regulates the dissolution of marriages for Muslim citizens in line with Sharia law.

8. For example, Indonesia and Nigeria: Rafiq 2014.

9. For example, the Central Asian States of Albania, Azerbaijan, Bosnia-Herzegovina, Kazakhstan, Kyrgyzstan, Tajikistan, Turkey, Turkmenistan and Uzbekistan: Rafiq 2014.

10. Ishaque and Khan 2015: 80.

11. Beckerle 2016.

12. Ben Achour 2017: 268.

13. Ibid.

14. The Arabic word for custody—*hizanat*—generally means to ‘take care of someone’.

15. Ishaque and Khan 2015: 80.

16. Tamanna 2014.

17. Hadjian 2013.

18. In some cases re-marriage to a relative may allow for continued custody by the mother.

guardian father.<sup>19</sup> A custodial mother who moves away or refuses to follow the father's relocation may forfeit her right to custody on this basis.<sup>20</sup>

The introduction of legal reform to improve the rights of women under Sharia systems has been said to be more effective if it refers to an interpretation of Islamic legal principles as a source of reform. In Malaysia, women's groups are increasingly speaking publicly on Islam and have submitted, on the basis of Islamic principles, draft laws for negotiation on reform of discriminatory family law.<sup>21</sup> However, the success of this initiative is not clear. In the use of Islamic interpretation for reform, the concept of *ijtihad*—the exercise of independent reasoning—can only be used by courts to provide legal answers when the Quran is silent on a particular issue. Regarding custody, the concept of *ijtihad* restricts reform to exceptional cases, and an example is seen in the jurisprudence of Pakistani courts.<sup>22</sup> There are incipient signs of change in other countries, such as Bangladesh, where courts have started to lean towards the welfare of the child test, away from strict Sharia law.<sup>23</sup> This may in some cases, such as the mother's remarriage, bestow additional custody rights on mothers, but in others it may deny them the maternal custodial presumption under Sharia.

The allocation of custody to the mother under Sharia law does not represent equality for women and, with few exceptions, exists together with severely restricted rights for them to exercise guardianship authority over the child. The mother's right of physical custody is, most problematically, conditioned on her remaining unmarried, whether after divorce or widowhood.<sup>24</sup>

### Other religious and mixed religious systems

For Hindus in India, the Hindu Minority and Guardianship Act provides guardianship primarily to the father.

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19. Ben Achour 2017: 270.

20. *Ibid.*: 275.

21. Anwar and Rumminger 2007.

22. Ishaque and Khan 2015: 90.

23. Tamanna 2014: 294.

24. A study in Egypt found that 90 per cent of divorced women did not remarry for fear of losing their children: El Din 2016.

In 2015, the Indian Supreme Court held that, although the Act gives the father the right to be the guardian of the property of his child, it does not give him the right to be the guardian of his child's person and specifies that custody should be given to the mother so long as the child is below five years of age.<sup>25</sup>

According to Jewish law, legal guardianship goes to the father and there is a tender years presumption for physical custody by mothers of both girls and boys up to 6 years old. The discrimination against women in Jewish law on guardianship was repealed by Israeli courts, which in the 1950s awarded equal guardianship rights to mothers and fathers, in accordance with the Women's Equal Rights Law. The secular law legislation retained the tender years presumption, according to which—in the absence of agreement between the parties—children under the age of 6 should live with their mother in cases of parental separation, unless special circumstances require a different custody arrangement in the best interest of the child.<sup>26</sup> In 2011, a governmental committee made recommendations that have been incorporated into a controversial legislative proposal shifting to the gender-neutral approach, abolishing the tender years doctrine and adopting the terms 'parental responsibility' and 'parental times'.

In countries where custody arrangements are varied for mixed religious denominations—for example, in Lebanon—different rules apply depending on the parents' denomination, so that Catholics have a tender years presumption until age 2 for both sexes, Greek Orthodox mothers have custody of boys until age 14 and girls until age 15, Shia Muslims have boys until age 2 and girls until age 7 and Druze have boys until age 7 and girls until age 9.<sup>27</sup>

### Customary laws in plural legal systems

Some countries have plural legal systems in which traditionalist laws operate alongside secular laws, allowing citizens to use either system. Often the civil

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25. *Sharma v. Sharma*, Civil Appeal No. 1967 of 2015: Human Rights Law Network 2015.

26. Ben Achour 2017: 268.

27. Fakih and Braunschweiger 2015.

legislation follows the international legal framework providing equality between women and men, but in practice the traditional or customary law may be more widely applied. In plural legal systems that apply customary law, the focus is on the rights of the family rather than the rights of the parent or the best interest of the child, reflecting marital arrangements that have economic and tribal roots.<sup>28</sup> These systems may be patrilineal or matrilineal and may award custody on that basis or to the payer of a bride price. Nevertheless, even where the system is matrilineal, authority over the child is vested in male family members. The customs of various regions within a plural legal system may differ. Thus in Mozambique, for example, a patrilineal system exists in the South and matrilineal in the North, and the vast majority of marriages are according to customary or religious law rather than civil marriage through the state system.<sup>29</sup>

In patrilineal systems, paternal preference applies to custody. In Botswana, for example, where marriage is under customary law, children born in wedlock 'belong' to the father's lineage whereas children born out of wedlock 'belong' to the mother's lineage.<sup>30</sup> In Pacific Island countries, customary law establishes a presumption of custody for fathers (except in Fiji) on the basis that a bride price has been paid.<sup>31</sup>

In matrilineal systems, under certain customary laws in southern Africa (Lesotho, Malawi, Mozambique and Zambia), children are included in the mother's lineage. Mothers are the primary guardians while the eldest maternal uncle is the primary authority in the child's life and fathers have little authority or decision-making power concerning their children.<sup>32</sup> However if a bride price has been paid, the husband receives full custody. The custom of paying a bride price remains widely practised in Southern Africa.<sup>33</sup>

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28. Recently, a law has been introduced in Malawi to provide more coherence between civil and customary law by introducing the best interest of the child.

29. Disney 2008: 125.

30. See Ngeme 2016.

31. Jalal 2009.

32. Rafiq 2014: 275.

33. Rudwick and Posel 2014.

## 2.2.2. Secular law approaches to guardianship and physical custody that maintain a tender years presumption or maternal preference

In secular law systems, there has been a clear shift away from the patriarchal model of guardianship and custody. This can be traced back to social reform initiated in favour of women's rights in the 19th century. Historically, under English common law, fathers automatically received physical custody of children upon divorce. In the early 19th century, Caroline Norton, a prominent social reformer, campaigned for the right of women to have custody of their children. The reformists regarded the bond between mother and child as a natural, nurturing one, rejecting the paternal prerogative to retain custody as "a cruel law" in view of "the love a mother had to her offspring, the delight she received in their smiles, the interest she took in all their sorrows, and the happiness she had in the superintendence of them; ... to deprive her of all this from base motives was one of the most cruel inflictions that could be put on her."<sup>34</sup> This maternalist argument provided great gains for women by negating the patriarchal regime that had deprived them of the right to legal guardianship or legal custody of their children.

The resultant social reform culminated in English legislation<sup>35</sup> that introduced a tender years presumption into secular law systems. It established a presumption of maternal custody for children under the age of 7 with rights of access to the child for the non-custodial parent, and in 1873 extended the presumption of maternal custody until the age of 16. The doctrine spread to many other States due to the influence of the British Empire.

### The tender years doctrine and maternal preference

Various forms of the tender years doctrine have been applied in legislation or by court decision in secular law systems, establishing a presumption of maternal preference that can be rebutted for the good of the

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34. Simkin undated.

35. Custody of Infants Act 1839.

child if the mother is considered unfit. This is supported both by maternalist claims and by pragmatic recognition of women's greater role in child rearing as a social fact in almost all countries and communities.

Thus, while the formal tender years presumption was abolished in many secular systems during the last two decades of the 20th century, maternal preference has still often persisted in custody determination.<sup>36</sup> Furthermore, in practice, even where there is formally joint physical custody, the physical time allotment in many European countries is gendered, with children spending far more time with mothers than with fathers: In Italy, for example, children spend only 17 per cent of their time with the secondary parent, who is the father in 92 per cent of the cases.<sup>37</sup>

In some East Asian countries, although no formal tender years presumption has previously been applied, there is a strong trend to maternal custody.<sup>38</sup> The maternal preference is very evident in Japan<sup>39</sup> and in Hong Kong SAR (China).<sup>40</sup> Likewise in Russian Federation, even though both parents receive automatic joint legal guardianship, and physical residence is determined on the best interest and wishes of the child, in more than 90 per cent of cases the child is placed with the mother.<sup>41</sup>

Currently too, a maternalist approach, advocating the tender years presumption, can partially protect women's rights to parenthood in the context of patriarchal family regimes that deprive them of equality in the family, in law and in practice. Islamic feminists in Egypt have thus successfully argued for greater physical custody rights for women and raising the age of tender years presumption to 15.<sup>42</sup> The jury is still out as

regards the abandonment of a tender years presumption/maternal preference in custody awards for young children, and the merits and demerits of removing the maternal preference must be assessed in the context of gender-neutral arrangements and in the framework of the best interest of the child. Usually it is the context, rather than the doctrine itself, that create inequality of outcomes for women in family law.

### **Transition from the tender years presumption to gender-neutral arrangements**

The tender years presumption has been the object of much criticism by a confluence of feminists, men's rights advocacy groups and rights of the child lobbies. Each of these approaches has provided ammunition from a different perspective for the abolition of the tender years presumption.

Some feminists argue that that "while the presumption generally benefits women who want custody of their young children, it also legitimates and reinforces gender bound roles ...".<sup>43</sup> The tender years presumption also entrenches the idea that "children naturally belong with their mothers, making it difficult for feminists to debunk the myth that a woman's 'natural' role is that of nurturer and caregiver to children".<sup>44</sup> Other feminists note that maternal preference, rather than being viewed as discrimination against fathers, is located in the paradigm of patriarchy, which subordinates women but also comes at a price to men in their gendered role.<sup>45</sup>

These feminist arguments were an influential part of the policy discourse in the introduction of shared parenting models in Western legal systems and were used to justify abolition of the tender years presumption on the grounds that the rule discriminates between women and men. Consequently, gender-neutral arrangements were introduced in a considerable number of secular legal systems, notably in the majority of countries of the European

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36. Belleau 2012: 379.

37. Vezzetti 2014.

38. Brasor and Tsubuku 2012.

39. Japanese Government statistics from 2009 show a strong preference for the mother in divorce, with the mother getting sole custody over all children in 82 per cent of divorces with children involved. While fathers historically had control over the children, most cases today are decided in favour of the mother under the tender-years doctrine. See McCauley 2011.

40. Mellpy 2012.

41. Antokolskaia 2002: 15.

42. Yassari et al. 2017: 12.

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43. Sack 1991: 296.

44. Ibid.

45. Chadha-Sridhar and Choudhuri 2016.

Union (EU)<sup>46</sup> and in the majority of US states. Indeed, in the United States, many state courts have held that “the tender years presumption represents an unconstitutional gender-based classification which discriminates between fathers and mothers in child custody proceedings solely on the basis of sex.”<sup>47</sup>

In South Africa, in 2005, the Children’s Act increased the level of parental responsibility for children without distinction between mothers and fathers except in the case of unmarried parents, where the mother generally has the parental responsibilities. The South African courts had declared the previously applied ‘maternal preference rule’ to be discriminatory, holding that ‘mothering’ refers to caring for a child’s physical and emotional well-being, which can be a component of not only of a mother’s but also a father’s being.<sup>48</sup>

The impact of men’s rights advocacy groups, claiming that the tender years presumption constitutes discrimination against fathers, has also been significant. In Australia, for example, the move to a shared parental responsibility presumption is directly related to lobbying efforts by fathers’ groups.<sup>49</sup> In Israel, fathers’ groups, in addition to lobbying before the treaty bodies,<sup>50</sup> have launched personal attacks against judges, social workers, psychologists, governmental committee members and academics, and their efforts seem to have contributed to the current legislative proposals to abolish the tender years presumption.<sup>51</sup> In contrast, in Canada and in the United Kingdom, the claims of fathers’ groups—for example, that the vast

majority of men are, in fact, equal carers and the belief that the 50/50 shared parenting split is, in the vast majority of cases, workable in material and practical terms—have been largely refuted.<sup>52</sup>

The children’s rights lobbies have advocated putting greater emphasis on the provision of the CRC that a child has a right to maintain personal relations and contact with both parents<sup>53</sup> and reaffirmed that in all actions concerning children the best interest of the child shall be a primary consideration.<sup>54</sup> This framing of children’s rights introduced an additional consideration in determining custody, militating both against sole custody and against the tender years presumption.<sup>55</sup> The latter has been criticized on these grounds because it is a sole custody model and the lack of joint custody means that the non-custodial parent may see the children rarely and does not participate in child-care or child-rearing. In that respect, it fails the ‘shared responsibility’ goal proclaimed in the CRC.<sup>56</sup>

#### **The de facto impact of abolishing the tender years presumption or maternal preference**

In so far as gender neutrality is induced to break away from the exclusive paternal prerogative over guardianship and custody entrenched in patriarchal family law systems, it is clearly a move to eliminate discrimination against women. However, in secular law systems where women and men already have an equal right to guardianship, the move to gender neutrality in physical custody—with its focus on rejection of the tender years/maternal preference presumption—raises more complex questions regarding the kind of equality it will promote.

46. Boele-Woelki et al. 2007.

47. Vasterling 1989: 925.

48. See *Baloyi v Baloyi* (6208/2014) [2015] ZAGPPHC 728 (16 October 2015); SAFLII undated. See also *Inspiring Women* undated.

49. Graycar 2012.

50. For example, in 2011, the United Nations Committee on Economic, Social and Cultural Rights included in its report recommendations for Israel that the Government amend its tender years doctrine so that custody of children up to age 6 is not always given to mothers and that child support should not led to an inadequate standard of living for fathers. See UN CESCR 2011.

51. Hacker 2012: 34.

52. Douglas 2001; Collier 2006. See also Eekelaar and George 2014, Chapters 3.3-5.

53. Article 9(3).

54. Article 3(1).

55. Law Commission of England and Wales 1988. A social view began to prevail, expressed for example by the English Law Commission in 1992, that “children who fare best after their parents separate or divorce are those who are able to maintain a good relationship with them both”. The Charter of Fundamental Rights of the European Union (art. 24.3) and the European Court of Human Rights have reaffirmed the right to respect for family life, by providing that children have a right to be reared by both parents, despite their separation.

56. Grosman and Scherman 2005: 562.



Ostensibly the concept of gender-neutral parenting deconstructs the stereotype of sole female responsibility for parenting. It can be seen as encouraging gender equality by removing the ‘burden’ of childcare from women and freeing them for economic participation and personal advancement. However, in the context of existing social realities of patriarchal families and of gendered division of care responsibilities, it may do little to advance women’s equality in practice and may indeed tend to deepen existing inequalities.

The family is a central locus for ongoing discrimination against women. Women in many legal systems are still subject to patriarchal family law, including inequality in the right to divorce, in property division or in the freedom to remarry. Even where women have the legal right to equality in the family, many families remain economically, socially, culturally and psychologically patriarchal. The discriminatory aspects of family membership for women affect the outcomes of removing the maternal preference in custody while the family context remains patriarchal

It is pertinent to remember that CEDAW recognizes the need to eliminate ongoing discrimination against women, and the State’s obligation is to eliminate such discrimination not only *de jure* but also *de facto*. CEDAW calls for substantive equality (equality of outcome) and not merely formal equality. In order to create an outcome of equality, there are numerous issues in the gender-neutral approach to custody that should be examined within their non-gender-neutral contexts.

- **Care work is gendered**

Empirically, parenting is gendered, as can be seen in research findings regarding hours spent by mothers and fathers on care functions that show women’s greater number of hours in unpaid care work in all societies. Furthermore, parental leave is available solely for mothers in some legal systems and is much more frequently taken by mothers even where it is available to both parents.<sup>57</sup> Shifts in social norms on the division of domestic work and care should take place before the dissolution of a marriage in order to promote

equality, not upon dissolution where it can disadvantage women who had channelled their human capital into a caretaking role during the marriage. While de-gendering of custody arrangements may conceptually remove the ‘burden’ of childcare from women, it may also cancel women’s choice whether to remain the primary caretaker. The arguments put forward by Klaff in 1982 in defence of the tender years doctrine still ring true: A maternal or primary caregiver preference can “deal equitably with the conflict between parental interests by preserving the role choices made by the parents during their marriage”.<sup>58</sup>

- **A gender-neutral presumption will not increase women’s career path options**

The tender years presumption is relevant only to those cases where both parents claim the right to custody. In such cases, if a woman chooses to share custody with the father or forego custody in order to pursue career options, she can waive her right to take custody under the tender years presumption. Hence, the removal of the presumption will not increase women’s options.

- **Women’s bargaining power in the family is almost invariably weaker than men’s**

Women’s bargaining power is weaker on the economic level, because women’s share of the family income and property is lower.<sup>59</sup> On the physical level, women are more likely to be subjected to or inhibited by the threat of domestic violence. In traditionalist cultures and religions, women may be restricted by patriarchal family laws. The removal of the tender years presumption puts the bargaining between parents for the right to custody on an equal footing in a context where they are not in fact equal. It hence leaves the woman vulnerable to pressure in reaching agreement or in fighting for custody.

- **In many legal systems, women are still subject to patriarchal family law**

Inequalities in the right to divorce, in property division or in the freedom to remarry all adversely affect women’s power to fight for child custody.

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57. Offenberger 2014.

58. Klaff 1982: 371.

59. Eswaran 2015: 18 and modules 1 and 4.

### 2.2.3 Gender neutral laws and concepts

Gender-neutral arrangements can be divided into sole parental responsibility and shared parenting models. Each of the systems has different implications for gender equality and women's rights in practice.

#### Sole parenting

The sole parenting model is the primary custody arrangement in some East Asian countries, such as China and Japan, and in some Latin-American countries, such as Argentina,<sup>60</sup> and is formally gender neutral. Sole parenting is also the reserve option in shared parenting systems, in cases where joint parenting is rejected on grounds of conflict between the parents or other considerations regarding the best interest of the child. The sole parenting model avoids conflict or ambiguity regarding the ongoing arrangements for all aspects of the child's life, which benefits custodial parents where the separation and custody are conflictual.

However, the decision as to which parent should take physical custody may suffer from a high level of uncertainty and may increase conflict in disputed custody cases. In China, for example, both parents retain some custodial rights as well as the duty to raise and educate the child,<sup>61</sup> but preference in sole physical custody goes to the parent with whom the child is residing at the time of separation. This has resulted in intense competition and conflict between parents to win the right of custody that can be taken to extremes, and there are cases of kidnapping by one parent in order to establish facts on the ground.<sup>62</sup>

The primary caretaker model gives an explicit and almost absolute preference to the 'primary caretaker parent', defined—in a gender-neutral way on its face—as the parent who: (i) prepares the meals; (ii) changes the diapers and dresses and bathes the child; (iii)

chauffeurs the child to school, church, friends' homes and the like; (iv) provides medical attention, monitors the child's health and is responsible for taking the child to the doctor; and (v) interacts with the child's friends, school authorities, and other parents engaged in activities that involve the child.<sup>63</sup> This list of criteria is usually, but not necessarily, characteristic of mothers. Hence, a primary caretaker presumption can provide validation of gendered caregiving patterns during the marriage.<sup>64</sup>

In other systems, the decision as to which of the parents takes custody is left almost entirely to the agreement of the parties. Thus in Japan, when parents divorce, they must decide which of the two is to assume parental rights and duties after the divorce. Joint parental rights is not an available option under the Japanese Civil Code. In some cases, however, one parent might be chosen to assume custodianship, to continue taking care of the child, and the non-resident parent might maintain parental rights (decision-making authority regarding administration of the child's assets). In fact, 90 per cent of all divorce cases in Japan are resolved by mutual consent. Although some criticize this method for placement of children in such a vulnerable situation and propose legal reform, a system for judicial intervention in divorce by mutual consent has not yet been established.<sup>65</sup>

Where there is sole parental custody, the physical contact of the non-custodial parent is dependent on the arrangement of visitation ('access' or 'contact') rights.<sup>66</sup> Visitation by the non-custodial parent is essential under the International Covenant on Civil and Political Rights (ICCPR) and CEDAW, which require equality between women and men in the family, and under the CRC, which provides that the good of the child requires contact with both parents. In some legal systems, such as Japan, the non-custodial parent has no legal right to visitation, causing severe disadvantage to her/him and violation of the right of the child to have contact with both parents.<sup>67</sup>

60. Grosman and Scherman 2005: 545.

61. Yinlan 2005: 482.

62. Lawyers say judges tend to favour the parent who has physical possession of the child, creating an incentive for a father or mother to take their child to gain an advantage in court. See Thomas 2016.

63. Neely 1984: 180.

64. Laufer-Ukeles 2008: 47.

65. Minamikata 2005.

66. See Family Court of Australia 2013.

67. McCauley 2011.

Sole parenting models do not necessarily have a gendered impact, but the ways of determining which parent is entitled to the sole custody can have one. Where the method of making the determination causes an increased level of conflict between the parents, women's generally weaker bargaining position may put them at a disadvantage. Where, on the other hand, the determination is based on a preference for the primary caretaker, women who wish to take custody will usually have an advantage in achieving it. However, sole parenting models in which the mother is generally the custodial parent may also bring negative consequences for women in their wake. They may create time burdens for the custodial mother that prevent her from developing her capacity to earn an income and increasing her work or career options. They may, in the absence of robust maintenance systems, impoverish custodial mothers. Nevertheless, in cases of high conflict between the parents or of domestic violence, the sole parenting model with the non-violent parent may be the only feasible alternative in order to avoid harm to the child.

### Shared parenting models

According to much of the academic literature globally, shared parenting has become the new norm, implementing concepts of gender equality, de-gendered parenting and the requirement of contact with both parents as fundamental to the best interest of the child.

After a deep meta-analysis of the most serious scientific literature on the topic, a report on parenting young children—which received the endorsement of 110 experts across the world—stated that the evidence supports regular and frequent involvement, including overnights, of both parents with their babies and toddlers.<sup>68</sup> According to one researcher,<sup>69</sup> out of 50 studies published in international peer-reviewed journals between 1977 and 2013, only two showed findings adverse to shared custody, while 11 were neutral or with mixed outcomes and 37 carried absolutely positive results in favour of shared

custody.<sup>70</sup> Nevertheless, this remains an area of ongoing controversy and, furthermore, the parenting report does not indicate which form of shared parenting is the best suited to ensuring the contact of the child with both parents and what counter-indications to shared parenting there may be.

A study by McKinnon and Wallerstein found that factors influencing the success of joint custody arrangements include the age of the child, continuing hostility between parents, parenting styles or values and new romantic relationships.<sup>71</sup> Research indicates that in high conflict cases, joint physical custody is more damaging than any other residential arrangement.<sup>72</sup> Studies that show the benefit of joint custody tend to overlook the difference between voluntary and involuntary joint custody arrangements. As Graycar confirms: “The clear message from the [Australian] research was that parents capable of and interested in shared parenting after separation were those who had tended to share parenting before separation. They were also the parents least likely to have their disputes resolved via legal processes, whether by way of a final hearing or via negotiation in the shadow of the law. The obverse is that those people who do use the law—a law that from 1996 has provided for a legal regime of joint parental responsibility and encouraged ‘shared parenting’—are those least likely to be able to cooperate in the parenting of their children.”<sup>73</sup>

Post is of the opinion that “joint custody demands ideal circumstances and exceptional parents to succeed”.<sup>74</sup> One of her main criticisms is that fathers in joint custody arrangements often tend to leave the child with the mother during their physical custody time and exploit the arrangement merely as a method to reduce child support obligations.<sup>75</sup> A similar correlation was

68. Warshak 2014.

69. Vezzetti 2014.

70. Bergstrom et al. 2015. In countries where high levels of gender equality exist, such as Sweden, this study found that children in joint physical custody suffered from fewer psychosomatic problems than those living mostly or only with one parent, although both reported more symptoms than those in nuclear families.

71. McKinnon and Wallerstein 1986

72. Vanassche et al. 2013 citing Fehlberg et al. 2011.

73. Graycar 2012: 255. See also Fehlberg et al. 2014, especially pp. 221-224.

74. Post 2013: 317

75. Ibid.: 325.

found in a recent Australia Parliamentary Inquiry—that child support thresholds were raised as a frequent consideration in the negotiation of custody arrangements<sup>76</sup> (discussed below in section on child maintenance).

There is a variety of arrangements in the shared parenting model, as can be seen from some country case studies:

- **Approximation**

The Approximation standard, proposed initially by Scott<sup>77</sup> and adopted in the American Law Institute's *Principles of the Law in Family Dissolution*, suggests that the courts should allocate responsibility in a way that 'approximates' the time and caretaking responsibility that existed prior to the separation.<sup>78</sup> Acknowledging as it does the roles of both parents in the relationship and contact with a child, it reduces judicial gender bias in making determinations between parents.

Exceptions to the approximation standard exist to ensure both parents have reasonable time with the child, even if one of them has not had significant involvement in the childcare previously, thereby ensuring that the best interest of the child in maintaining contact with both parents is still implemented without making dramatic changes to her/his daily life. The *Principles* also place strong emphasis on parents resolving their own conflicts over children so parental agreement will displace the approximation standard, except where domestic violence exists.

- **Alternating residences<sup>79</sup>**

Sweden has had an explicit objective to ensure that children have good contact with both parents after their separation and a policy objective to achieve equal parenting during marriage and after separation. Joint legal custody has been available since 1976 and it became the rule in 1982, provided it was in the best interest of the child. It is to be noted that in cases of sole custody as well, Sweden—unsurprisingly in

view of its high level of gender equality—has had a more balanced share of mother/father sole physical custody than in other countries. In 2002, a government committee, studying 125 cases, found 51 per cent maternal residence, 34 per cent paternal residence and 15 per cent alternating residence.<sup>80</sup>

In the 1990s, the practice of joint physical custody by means of alternating residences was introduced and applied even against the will of one parent.<sup>81</sup> A restriction was introduced in 2006, however, stating that the courts should pay particular attention to the parents' ability to co-operate before deciding on joint custody. This practice was nevertheless criticized on the grounds that "Mechanically dividing the time with the child equally between unwilling parents has nothing to do with justice or the best interest of the child".<sup>82</sup> Furthermore, a government committee expressed reservations as to the advisability of alternating residences for children under 3. By 2011, between 30-40 per cent of children were in alternating residential arrangements.<sup>83</sup> However, given doubts about its impact on stability for younger children and the tendency to award shared parenting despite evidence of domestic violence and child abuse, it has been questioned whether the objective of shared parenting has prioritized fathers' interests over the best interest of children.<sup>84</sup>

- **Shared parenting – substantial time**

Australia introduced a significant reform in 1995 to provide children with the 'right to know and be cared for by both their parents', a 'right of contact' and 'parental responsibility', with a new range of orders for 'residence', 'contact' or 'specific issues'. Residence was no longer to be the determining factor in deciding parental responsibility.

In 2006, the Family Law Amendment (Shared Parental Responsibility) established a rebuttable presumption of 'equal shared parental responsibility'. This did

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76. Relationships Australia 2014.

77. Scott 1992.

78. Bartlett 2014.

79. Singer 2008.

80. Ibid.: 41.

81. Ibid.: 40.

82. Ibid.: 46.

83. Blomqvist and Heimer. 2015.

84. Ibid. See also Eckelaar and George 2014, especially pp. 236-237.

not actually create a presumption of equal time, but it came close, because equal time (or ‘substantial and significant time’) was the only outcome that the court was specifically required to consider when ordering equal-shared parental responsibility.<sup>85</sup> The law has been understood and interpreted to mean that substantial involvement of both parents in their children’s lives means both parental responsibility and time spent with children. It thus had quite a normative power in its formulation (“It is a presumption that it is in the best interests of the child for the child’s parents to have equal shared parental responsibility.”) and resulted in a wide perception that in fact it was intended to create 50-50 parenting time schedules. In cases of child abuse or family violence, the presumption of equal shared parental responsibility was rebuttable under the Law, and an amendment in 2011 further provided that violence would receive greater weight than other considerations in determining the interests of the child.

Research into the effects of the legislation concluded that the Law made little difference to existing arrangements, whereby those who could agree on flexible arrangement did so and those in dispute remained so, which had already resulted in increased sharing of physical custody since the early 2000s. In practice, shared parenting arrangements largely plateaued in the years after the Law was introduced. The impact of the new Law was significant in that there was a transformative investment in child-sensitive dispute-resolution processes, which has been credited with bringing about a reduction of conflict and higher satisfaction in shared arrangements.<sup>86</sup>

- **Presumption of joint custody<sup>87</sup>**

In Belgium, in 1995, joint legal custody was introduced by law but did not specify a residential model after divorce, relying only on the best interest of the child as determinant. In 2006, joint physical custody became the default judicial recommendation. A survey carried out in the areas of Brussels and Charleroi found that, though the number of

50-50 equal custody arrangements had doubled since 2004, most of these were the result of an informal agreement between the parents (who seem to prefer this formula in 28 per cent of cases) rather than as a result of a judge’s disposition (who ordered this formula only in 12.8 per cent of cases).

A study<sup>88</sup> of the success of automatic presumption in Belgium concluded—neutralizing such factors as socio-economic status, positive family relationships in more educated, low conflict couples or the quality of the relationship with the parent—that children in joint physical custody were not better off than their counterparts in maternal custody. In line with other research, the study also found that joint physical custody is less beneficial in cases of high parental conflict.<sup>89</sup> In addition, joint custody was found to be less positive for child well-being compared to maternal custody where there was a very good relationship with the mother. Furthermore, rigid time scheduling in order to create shared parenting tended to reflect a power struggle between the parents rather than being the result of a rational decision regarding the best living conditions for the child.<sup>90</sup>

Concluding that joint custody was not better and could sometime be worse than sole maternal custody, the authors found that the joint custody presumption in Belgian law—without reference to further factors such as the child’s best interest—could carry unintended negative side effects.

- **Examples of shared parenting in developing countries**

In developing countries, some aspects of the shared parenting approach are emerging. In Latin America, although there seems to be no uniform adoption of shared-parenting models,<sup>91</sup> some countries, such as Argentina and Mexico,<sup>92</sup> do use de-gendered tests because of an emphasis on the best interest of the child rather than as a gender equality issue. Brazilian family law was amended in 2014 so that

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85. Smyth et al. 2014.

86. Ibid.

87. Vanassche et al. 2013.

88. Ibid.

89. Ibid.

90. Ibid.

91. Motta and Macarena 2013.

92. Begne 2005.

joint legal custody is the default arrangement, even when the parties do not agree, while a ‘balanced’ division of time should be spent with each parent.<sup>93</sup> In India, shared parenting was recommended by the Law Commission in 2015 but has not yet been introduced.<sup>94</sup>

### **The impact of sole and shared gender-neutral parenting models on women’s equality**

Gender-neutral models of sole parenting that are not based on the primary caretaker approach, or of shared parenting that are not based on the approximation approach, are likely to adversely affect women who wish to continue to be the primary carer and who have been in marriages with a division of labour in which they have performed the major share of caring for home and children<sup>95</sup> while their partner or spouse invested their human capital in developing an income-earning capacity. However, a primary caretaker or an approximation approach may ex contra disadvantage mothers or fathers who have been forced for economic survival to work at a distance from their children—particularly evident in the case of migrant workers from developing countries, who frequently spend years outside their countries in order to support the subsistence and educational needs of their children. This leaves limited options in terms of a model that will produce gender justice in all such cases but, at the very least, the economic commitment of the absent parent to the child’s needs should be factored into the considerations affecting the determination of custody.

Some feminist critiques<sup>96</sup> of joint custody regard it as a bargaining chip for fathers who seek to pressure mothers into quick and lower financial settlements of divorce.<sup>97</sup> According to research cited by Post, “Even though courts assume the parents’ desire to nurture the child by continuing contact is the primary reason that divorcing couples seek joint custody, this is true in only one-third of cases. Parents had practical and

economic reasons in addition to emotional ones.”<sup>98</sup> While writers such as Belleau support gender neutrality in the hope that “parents contesting custody are doing so because they are protecting the best interest of their child rather than their cheque-book or their pride”,<sup>99</sup> this critical assumption is not supported by the literature on high-conflict divorce cases.<sup>100</sup>

Nevertheless, the CRC<sup>101</sup> provides that States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interest. The default rule of contact with both parents clearly supports shared parenting or visitation or contact rights on a gender-neutral basis.

## **2.3**

### **Overriding issues that affect custody allocation**

The various models for allocating custody analysed above often assume a level playing field between women and men. In doing so, they do not generally take into account the unequal power dynamics in gendered relations, particularly in the family, the inequality in access to resources of contesting parties and the gender bias of the individuals or institutions that mediate and shape custody allocation in practice. This paper now highlights three overriding issues—domestic violence, unequal bargaining power and gendered interpretation of the best interest of the child—that may affect custody allocation and that are generally under the radar of decision-making in custody cases.

#### **2.3.1. Domestic violence**

While abuse of children is a clear and widely used factor in determining custody arrangements under

93. Soares 2014.

94. Law Commission of India 2015.

95. Sack 1991: 300.

96. Post 2013.

97. Ibid.

98. Ibid.: 317. According to Post, these included partial commitment to the child, workplace demands, holding on to the relationship and softening the blow of the divorce to the other party.

99. Belleau 2012: 384.

100. Brining 2001: 309.

101. Article 9(3).

the ‘best interest of the child’ doctrine, less attention has been paid to a history of spousal abuse, even though the failure to address this may have dire consequences for both mother and child. Dethloff<sup>102</sup> notes that in German judicial practice, domestic violence still plays a fairly minor role in court decisions on parental responsibility. That this issue is little discussed may reflect a flawed assumption that once the marriage ends, the violence will also end. However, spousal abuse does not necessarily end with separation of the parties and, in extreme cases, domestic violence following separation may be lethal for women and children.<sup>103</sup>

The dangers of joint custody and visitation arrangements in situations of domestic violence are far from being resolved. As a matter of course, joint custody and visitation arrangements force battered women to remain in geographical proximity to and in contact with the men who abused them.<sup>104</sup> Furthermore, failure to restrict custody or unsupervised visitation in cases of severe domestic violence may result in tragic consequences for mothers and children, as in instances of revenge infanticide by fathers.<sup>105</sup>

The dangers of such arrangements in the context of domestic violence are clearly demonstrated in the decision by the United Nations Committee on the Elimination of Discrimination against Women (UN CEDAW) in 2015 in *Angela González Carreño v. Spain*.<sup>106</sup> In 1999, Angela González Carreño left her husband, F.R.C., because he had subjected her to domestic violence over several years. Angela was given custody and guardianship of Andrea, their daughter, and F.R.C. was ordered to pay child support and allowed supervised visits. Despite many violent incidents by F.R.C. during this period, in 2002 a judicial order was given allowing unsupervised visits and Angela appealed the decision without success. In April 2003, F.R.C. murdered Andrea and committed suicide.

UN CEDAW concluded that both the violence committed by F.R.C. against Angela and the murder of Andrea were foreseeable. It noted, for instance, that F.R.C. had committed numerous acts of violence against Angela, which Andrea often witnessed; was not held legally liable for ignoring court protective orders; and had been diagnosed with an “obsessive-compulsive disorder with aspects of pathological jealousy and a tendency to distort reality which could degenerate into a disorder similar to paranoia”. It also noted a social services report regarding the need for continuous monitoring of visits between F.R.C. and Andrea.

The Committee found that the State Party had breached its due diligence obligations, since no reasonable steps were taken to protect Angela and Andrea against the violence and, in Andrea’s case, murder. The decision to grant F.R.C. unsupervised visits with Andrea was based on stereotypes about domestic violence that minimized his abusive behaviour and prioritized his (male) interests over the safety of Andrea and Angela; did not take into account the long-term pattern of domestic violence; and did not specify necessary safeguards.<sup>107</sup>

Judges and women’s charities in the United Kingdom are lobbying for legislative change to the presumption of contact for abusive men following an investigation showing a spate of children’s murders by fathers who had been granted contact orders.<sup>108</sup>

A study by Jaffe et al.,<sup>109</sup> consolidating research in this field, points out that multiple, serious conflicting allegations of child maltreatment, domestic violence and parental abuse of drugs and alcohol are commonly raised in high-conflict custody litigation, making it difficult for professionals in the field to substantiate claims. The impact on women is that their allegations regarding domestic violence or child abuse may be dismissed, resulting in custody or visitation decisions that expose them and their children to ongoing danger.

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102. Dethloff 2005: 321

103. Jaffe et al. 2008: 502.

104. Sack 1991: 300.

105. United Nations 2015.

106. UN CEDAW 2012.

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107. United Nations 2015.

108. Laville 2017.

109. Jaffe et al. 2008.

Under Australian law, judges are required to take violence into account in making parenting orders. In practice, research in that country suggests that allegations of spousal violence occur in over 51 per cent of litigated family law cases<sup>110</sup> and that parenting orders in cases with and without domestic violence allegations are not substantially different.<sup>111</sup> Further, the stated objective of a child's right to have contact with both parents has influenced courts to make determinations at interim stages that could leave the child exposed to a violent situation.<sup>112</sup>

Chesler,<sup>113</sup> on the basis of her research in Canada and the United States (as well as in 65 countries around the world over the last 30 years), concluded that “today more and more mothers, as well as the leadership of the shelter movement for battered women, have realized that battered women risk losing custody if they seek child support or if they attempt to limit visitation. Incredibly, mothers also risk losing custody if they accuse fathers of beating or sexually abusing them or their children—even or especially if these allegations are supported by experts ....”

### 2.3.2. Bargaining power in contested custody cases

Women set out from an inferior bargaining position in contested custody battles.<sup>114</sup> In patriarchal family law systems, women have fewer legal rights than men as regards matrimonial property, divorce, guardianship, etc. Economically, women have fewer financial resources and hence have less possibility to employ expert representation. This is compounded by the fact that in most legal systems, legal aid is not available for civil law litigation on custody. The clear implications are that wherever custody is a question for negotiation, mediation or judicial discretion, women are generally at a disadvantage. This inferiority in bargaining power is especially crucial where custody is contested on grounds of the mother's unsuitability or where their objection to paternal custody may be regarded as

obstructive or as failing the ‘friendly parent’ test in systems heavily geared towards compromise. In view of the weakness of women's bargaining power, the removal of the tender years presumption or maternal preference makes it difficult for women to obtain custody. Additionally, there may be gender bias in the courts against women/mothers.

Chesler has challenged the myth that fit mothers always win custody.<sup>115</sup> Based on interviews in Canada, the United States, European and Middle Eastern countries and court decisions, she found that when fathers fight for it, they win custody 70 per cent of the time, whether or not they have been absentee or violent fathers: “Although the majority of custodial parents are usually mothers, this doesn't mean that mothers have won their children in a battle. Rather, mothers often retain custody when fathers choose not to fight for it. Those fathers who do fight tend to win custody, not because mothers are unfit or because fathers have been the primary caretakers of their children but because mothers are women and are also held to a much higher standard of parenting.” Other studies, including 10 state Supreme Court reports on gender bias in the courts, have supported Chesler's conclusions regarding the high percentage of fathers who win in contested custody cases in the United States.<sup>116</sup> Furthermore, Australian researchers have in an empirical study disproved the common assumption that “the Family Court is biased against men”.<sup>117</sup>

In countries with a high level of gender equality, this phenomenon does not appear to be dominant. Thus in Denmark, a survey carried out in 2009 showed that in the cases ruled by court disposition—which amounted to only 10 per cent of cases as almost all custody arrangements are by agreement between the parents—the court ordered sole maternal custody in 44 per cent of contested cases and sole paternal custody in 10 per cent.<sup>118</sup>

110. Jeffries 2016 citing Moloney et al. 2007.

111. Jeffries 2016.

112. Graycar 2012.

113. Chesler 2013.

114. Neely 1984: 177

115. Chesler 2011.

116. Bemiller (2008), Hannah & Goldstein (2010), Neustein and Leshner (2005), Neustein and Goetting (1999), Polikoff (1992), Stahly et al. (2004), Smart and Sevenhuijsen (1989), and Goldstein (2010) for The National Organisation for Men Against Sexism (NOMAS)

117. Melville and Hunter 2001.

118. Vezzetti 2014: 18.



### 2.3.3. The best interest of the child and gender bias

The best interest of the child is an overriding consideration in all custody arrangements. However, there is no consensus as to what actually constitutes ‘best interest’.<sup>119</sup> This means almost any relevant criteria may be taken into account, allowing judges to evaluate highly individualized familial constellations and personalities, and most of these factors are unverifiable even with the use of external ‘verifiers’ such as psychologists.<sup>120</sup> For the purposes of the present report, the child best interest test will be examined only as regards gender bias and women’s rights and not from the perspective of the children’s rights literature.

In China, the primary principle guiding the court’s choice of direct guardian is to promote the mental and physical health of the minor child. Factors that are taken into consideration are nursing mothers, older children’s needs and wishes, grandparental assistance and other special conditions such as child with a disability. Usually judges prefer to maintain the status quo living arrangement for a child between 2 and 10 years old.<sup>121</sup> The inclusion of a criterion of grandparental assistance may well favour father’s custody as, customarily, the husband’s parents live with the couple.

In some countries, rather than being adopted as a legal presumption in itself, the primary caretaker standard has found its way into the best interest test. On the face of it, the primary caretaker standard is gender neutral. In practice, however, it might be considered to draw close to a maternal preference model as women are, empirically, the primary providers of unpaid care. In Singapore, ‘care and control’ (physical custody) is awarded only to one parent using a ‘welfare principle’ that takes into account the primary caregiver, current living arrangements, wishes of the child, wishes of the parents, age of the child, parents’ financial stability and presence of family support.<sup>122</sup> In practice, courts

would only award a father care and control if he had been the primary caregiver prior to the divorce.<sup>123</sup>

The determination of the child’s best interest may be affected by gender bias: Scott and Emery argue that the “standard’s entrenchment is the product of a gender war that has played out in legislatures and courts ... for decades”.<sup>124</sup> Furthermore, resolution of this question may be influenced by the skill of the contesting parents and their lawyers and thus much affected by the relative bargaining power and access to resources of the parties.

Jacobs<sup>125</sup> argues that best interest of the child is inherently gender biased both in terms of the criteria used as well as the judges’ own bias in relation to economic resources, employment, traditional family values and morality.<sup>126</sup> Examples of gender bias in the US courts include: double standards shown by judges, on the one hand, penalizing career-oriented mothers but not fathers for using childcare facilities and, on the other, penalizing homemakers for not being economically stable and not recognizing that working women are still the primary caregiver.<sup>127</sup> In some jurisdictions, courts favour giving physical custody to fathers who have remarried, both inferring that mothers are fungible<sup>128</sup> and ironically reinforcing the presumption that maternal care is important. Judges may give weight to fathers’ superior economic resources while minimizing the value of mothers who have been primary

119. Jacobs 1997: 854.

120. Scott and Emery 2013.

121. Thomas 2016.

122. Guardianship of Infants Act.

123. Singapore Legal Advice 2015.

124. Scott and Emery 2013.

125. Jacobs 1997: 849.

126. *Ibid.* Jacobs notes that custody decisions often include a gendered standard of care such that working mothers are measured against this ‘traditional mother’ standard whereas fathers are measured against a ‘traditional father’ standard. Traditional fathers are not expected to partake in traditional ‘mothering’ skills such as cooking and cleaning or chauffeuring the kids, such that any effort the father makes for these household tasks is seen as remarkable. Mothers are not seen as remarkable for holding down jobs as well as full-time parenting tasks. Each gender is judged according to gendered standards. In addition, decisions tend to overlook that in practice even working mothers still provide most of the day-to-day care of children.

127. *Ibid.*: 856.

128. *Ibid.*: 857.

caretakers of their children, which may have left them with less education and earning potential.<sup>129</sup>

Gender bias has been especially evident in the application of the ‘unfitness’ exemption, which allows for court discretion and has been documented as creating to judicial bias against mothers who do not fit the gendered mould, particularly where mothers were viewed as promiscuous or lesbian.

For example, in 2002, the Supreme Court in Chile refused to grant Karen Atala, a lesbian judge, custody of her daughters on the grounds that, because of her sexual orientation, she could not be a good mother and that custody should therefore be awarded to the father. In 2012, the Inter-American Court of Human Rights issued a contrary ruling stating that sexual orientation was not an impediment to being a mother or father and ordered the Chile to make economic redress to the affected party.

In Muslim-majority countries, the best interest of the child will usually be assessed in accordance with Sharia. Thus, for instance, in Indonesia, which is a liberal majority Muslim state, though the Government has developed procedural rules for both custody and guardianship decisions and a few judges have tackled custody and guardianship cases in ways aiming to realize the protection of the child’s welfare, it is still mainly traditionalism and the conservative Islamic social frame of the parents that shape the concept of the best interest of the child. This means that the tender years presumption will be the default, conditioned on the mother’s not remarrying. The loss of custody on remarriage poses a severe threat of separation from their children for women who want to retain custody.<sup>130</sup>

Critics of the best interest standard argue that it encourages parents to produce evidence of each other’s failings, thus increasing hostility and undermining willingness to cooperate.<sup>131</sup> A severe manifestation of this concerns Parental Alienation Syndrome, in which one parent influences or is accused of influencing the child to reject the other parent.<sup>132</sup> In order to combat some of the adversarial nature of custody litigation, the idea of the ‘friendly parent’ has been legally introduced, giving judicial weighting against parents who are seen as obstructive to the objective of co-parenting or, as is more often the case, preventing contact between children and fathers. In Canada, the Divorce Act requires the courts to take into account the willingness of each parent to facilitate contact.<sup>133</sup> However, friendly parent provisions have been criticized for their lack of sensitivity regarding domestic violence situations, where women may fear raising allegations of abuse. This was found to be the case in Australia, where research into family violence revealed that women did not disclose violence to the court for fear that, if their allegations were rejected, they would be viewed as an unfriendly parent.<sup>134</sup> In Mexico, a criminal complaint can be filed if a parent obstructs access of the other parent to a minor child, with a custodial penalty attached.<sup>135</sup>

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129. Ibid.

130. Yassari et al. 2017: 63-80.

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131. Scott and Emery 2013.

132. Chesler 2013.

133. Elrod and Dale 2008: 394.

134. Graycar 2012: 257.

135. Begne 2005: 536.

### 3.

# CHILD MAINTENANCE AND SUPPORT

## 3.1

### Introduction

Child maintenance may be defined as a regular contribution from a non-resident parent towards the financial cost of raising a child, usually paid to the parent with whom the child lives most of the time.<sup>136</sup> Public agencies may set up systems to supplement child support where there is a default in maintenance contributions by the non-residential parent. This is a heavily gendered issue. The majority of custodial parents are mothers, and single mothers with young children are highly prone to poverty. Divorce as a general rule reduces women's income relative to men's and, where the woman is the custodial parent with the primary care responsibilities, their earning capacity is more limited. Most women are ill prepared for their changed economic circumstances after divorce; they have frequently been the primary caregiver during the marriage and not the primary wage earner and hence have not accumulated labour market experience or economic human capital resources. In this socio-economic configuration, child maintenance or support systems are a crucial factor in mitigating the extent of gender-based poverty among single mothers.

#### 3.1.1 Economic impact of divorce on women

Single parents face a much higher poverty risk than two-parent families. Indeed, research has shown that in the EU25, 32 per cent of single-parent homes were living below the poverty threshold, against 17 per cent of all households with dependent children.<sup>137</sup> The majority of single-family homes are single-mother homes.

Women's disadvantage in the labour market—expressed in lower labour market participation, career interruptions, the gender pay gap and discrimination in promotion—is significantly influenced by unpaid care work during marriage. This further affects their economic potential after divorce. Research on the motherhood penalty suggests that, conversely, men

benefit in their careers from fatherhood, perhaps due to their household being taken care of and because of pressures to be the breadwinner. Part-time work is a major contributor to increased access of women to the labour market, as it offers a solution for women to balance employment and caring responsibilities, but it reinforces the male breadwinner model with women as secondary earners within families.<sup>138</sup>

“The negative economic impacts of divorce on mothers are well documented. Mothers, on average, experience larger drops in their standard of living post-divorce than do fathers, and divorced women as a group are much worse-off economically than are divorced men.”<sup>139</sup> Women's longer-term financial stability is often significantly disadvantaged compared to their male spouses—for example, in earning capacity, pension and other insurance arrangements. As

136. Hakovirta 2011.

137. Beaumont and Mason 2014: 18.

138. See Offenberger 2014.

139. Bartfeld et al. 2012.

Williams notes, “Today a man can invest in his career secure in the knowledge that if his marriage fails, he can walk away with his wallet and enter another marriage with his financial assets substantially intact. He can put his prior marriage behind him in a way his marginalized wife and children cannot.”<sup>140</sup>

A study of six countries in the Organisation for Economic Cooperation and Development (OECD)<sup>141</sup> showed that divorce usually, though not always, had more negative effects on women’s than on men’s equalized household income (net household income, after tax and government transfers, adjusted for the number of household members and the household composition using the current OECD equivalence scale). In all the countries, divorce has a substantial negative effect on women’s equalized household incomes in the short term, but there were variations in the medium and long term impact: In the Republic of Korea and the United States, there was no evidence of recovery over the medium term; in Australia, Germany and the United Kingdom, although over time women’s incomes started to recover, their incomes were still substantially lower six years after divorce than they would have been had they remained married; and in Switzerland, women’s income recovered very quickly to what was estimated it would have been had they remained married.

- In the United States, poverty rates among custodial mothers (31.2 per cent) was almost double the poverty rate for custodial fathers (17.4 per cent), with a particularly high rate of poverty (about 57 per cent) for custodial mothers who had less than a high school education, participated in a public assistance programme or had three or more children.<sup>142</sup> However, women with a higher married socio-economic status experienced a greater relative drop in economic well-being when faced with shared placement.
- In Australia, according to the Department of Social Services, parents who receive child support payments have an average taxable income of \$28,500

(June 2013) while paying parents have an average taxable income of \$46,100. Around 58 per cent of receiving parents were eligible for income support payment from the Government, while 24 per cent of paying parents received income support.<sup>143</sup>

### 3.1.2 The legal frameworks for child maintenance and support

Many countries have legislation defining and framing rules concerning child maintenance. Calculation of the amount of maintenance may be by mutual agreement between the parents, usually in the context of the divorce settlement, or according to a formula established by law. It is to be noted that most EU countries make no distinction between children born in wedlock or out of wedlock, and rules applying to the right for the child (or his/her guardian) to receive child maintenance are the same, except in Cyprus and Germany.<sup>144</sup>

Child maintenance should be seen in the context of article 27 (2) of the CRC which places primary responsibility on parents to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development. In accordance with the CRC, the payment of child support by the non-custodial parent should be regarded as a legal obligation. In States where the non-custodial parent is obliged to pay maintenance, failure to pay is often punishable by law.<sup>145</sup>

In the event of failure to pay by the non-custodial parent, child support is guaranteed in some countries by public agencies: the state, local authorities, national insurance, special funds or administrative agencies.

## 3.2 Calculation of child maintenance

Child maintenance arrangements may be regulated as a part of the divorce settlement and determined

140. Williams 2001.

141. de Vaus et al. 2015.

142. Grall 2013.

143. Commonwealth of Australia 2015: 14.

144. Beaumont and Mason 2014.

145. Ibid.

either by parents, courts and/or administrative agencies.<sup>146</sup> In Austria, Belgium, Canada (Ontario), France, Germany and Sweden, the courts play the leading role in setting payment rates, while public child support agencies take the lead in Australia, Denmark, New Zealand, Norway and the United Kingdom.<sup>147</sup> Often a structured legal formula exists for calculating child maintenance, which begins either with the non-custodial parent's income or with the child's needs and may combine elements of each.

Under all systems, the amount may fall far short of the amount needed to maintain the child's needs at the same level as before the divorce. This has clear implications for the level of gender-based poverty among single mothers. While some maintenance systems account for the need for the payer to maintain a certain living standard, a similar assessment is generally not made of the payee's financial situation.

Systems based on a portion of the non-custodial parent's income

Systems vary widely as regards the mode of calculation and the level of payment. In some, both minimum and maximum levels are set.

- In Chile, the minimum wage is the starting point, where child support should be no less than 40 per cent of the minimum wage for one child, or 30 per cent each for more than one, but cannot exceed 50 per cent of the payer's total wages.<sup>148</sup>
- In Russian Federation, support is set at a minimum one quarter of all parental income for one child, one third for two children and one half for three or more children.<sup>149</sup>
- In the United Kingdom,<sup>150</sup> maintenance calculation begins at 15 per cent of net income for one child, 20 per cent for two children and 25 per cent for three or more children.

146. OECD 2010.

147. Ibid.

148. See Impowr.org 2010.

149. Antokolskaia 2002: 18.

150. Child Support Agency UK 2013.

- In Sweden, maintenance is determined on the basis of both parents' resources so that if one parent earns 80 per cent of the total, s/he should pay 80 per cent of the costs of child support.<sup>151</sup>
- In New Zealand, the calculation begins with a percentage of the payer's income, deducting a 'living allowance' that takes into account whether the payer is in another relationship and/or has other children living in his/her residence.
- In 2011, only half of custodial parents in the United States received full child support payments, and these amounts tended to be an average of \$3,770 per year,<sup>152</sup> which is clearly an extremely low level of support.
- Maintenance in most Muslim-majority countries follow the Sharia principle that provides explicitly for the father to maintain accommodation for his children, but ongoing expense for the child's upbringing and education will be determined by the courts according to the payer's resources.

### Systems based on the child's needs

It is expected in these systems that child maintenance will be used for the child's fundamental expenses such as education, food and clothing.

- In countries with strong public welfare systems, such as Norway, the calculation begins with the standard costs of raising children<sup>153</sup> rather than as a percentage of the parent's income.
- The Law Commission of India<sup>154</sup> recommended maintenance be "reasonable or necessary to meet the living expenses of the child", but this will be determined by the court on the basis of a long list of recommended factors including the financial resources of the parent, the standards of living of

151. Singer 2008: 43.

152. Grall 2013.

153. Section 66 of The Children Act sets out that the parents shall bear the expenses of maintaining and educating their children according to the child's ability and aptitude and the financial circumstances of the parent.

154. Law Commission of India 2015: 64.

the child, the physical and emotional condition of the child, his or her educational and health-care needs or any factors that the court deems fit for the welfare of the child.

### Combined systems

There are systems that combine the incomes of both parents and the living standard of the child in the calculation of the maintenance.

#### 3.2.1 Matching the non-custodial parent's standard of living

In Japan, for example, the basic premise behind child support payments is to give the child a standard of living enjoyed by the parent with the obligation to pay them. These payments can either be determined by a government schedule or through a calculation. Because court-ordered child support payments are based on a formula and are fairly easy to predict, this usually allows divorcing parties to agree on the amount relatively quickly. The court will compare the incomes of the custodial and non-custodial parent and then create a percentage to describe the difference between the non-custodial parent's income and the total income of the two parents. Next, the non-custodial parent will be ordered to pay a percentage of the child's living expenses equal to his or her percentage of the total parental income. The child's living expenses can be calculated either based on actual expenses when the family was living together or as an estimation of what those expenses would be if the family had lived together.<sup>155</sup>

#### 3.2.2 Shared parenting

Calculation of maintenance contributions may be adjusted or reduced in accordance with shared parenting arrangements.<sup>156</sup> A common basis of determining 'shared care' arrangements is 30 or 40 per cent of nights spent at the non-residential home and hence the maintenance may be reduced by an equivalent percentage.

Where the child is alternating residences between parents, it is not always clear how or whether

maintenance should be calculated, as both parents are considered to be fulfilling their duties of care of the child and it has been argued that the system should look at who is bearing the actual costs rather than be calculated according to time and residence.<sup>157</sup> In 2005, the Supreme Court of Canada, in the case of *Contino v. Leonelli-Contino*, held that child support payments are still considered necessary in shared parenting as the calculation must take into account the increased costs of shared custody and the conditions, means, needs and other circumstances of each parent and the standard of living of the child in each household.<sup>158</sup>

The relationship between shared parenting arrangements and child maintenance should account for the fact that time spent does not equal money spent. In addition, shared parenting appears to be 'abused' at times to reduce child maintenance, as raised in submissions to the Parliamentary Inquiry into the Child Support Program in Australia. A leading family relationship service provider noted that "the negotiation of three nights of care per week is a clear consideration for many of our clients as this is seen as the threshold used by Child Support. This means that the child support formula, rather than best interest of children, may drive the negotiation for some separated families."<sup>159</sup>

Once 'shared parenting' is formally established, and maintenance is calculated on this basis, there is a reduced chance for revision in situations where shared care in practice falls below those percentages. This has severe implications for single mothers as research shows that significant numbers of fathers fail to take up their time share, leaving the everyday custody effectively to the mother and, with it, a higher percentage of the costs of child-rearing than appears on the face of the shared parenting arrangement.

#### 3.2.3 Under Sharia

There is no strict obligation under Sharia law for the father to pay maintenance for a child, except for women who are breastfeeding (usually until age 2). Following that, the father retains the obligation to

155. Ohara & Furukawa 2016.

156. For example, the United Kingdom.

157. Singer 2008: 44.

158. Department of Justice Canada 2014.

159. Relationships Australia 2014.

provide a suitable residence for his children and any maintenance should be worked out according to the ability of the father and the needs of the children. In various Muslim-majority countries, such as Indonesia and Malaysia, a legal obligation to pay maintenance for children is imposed on fathers by law. However, some sources report an extremely low rate of payment in practice.<sup>160</sup>

### 3.3

## Enforcement and collection

Enforcement or ‘collection’ of maintenance obligations remains a huge problem worldwide. Methods of enforcing or collecting payment of child maintenance by the non-custodial parent are usually fixed in legislation. They can range from enforced payment, salary deductions, garnishment of income, seizure of assets and bank accounts and, in some countries, imprisonment. However, there are systems in which the obligation of the non-custodial parent to pay maintenance is less clearly established and regulated.<sup>161</sup>

It is very important to have state agencies enforce maintenance payments and not delegate this function to the custodial parent. In general, this is a recipe for conflict between the parents and, in cases of domestic violence, it can expose women and children to further abuse.

### Enforcement procedures

The fact that mothers are more likely to take custody of the child after separation or divorce implies that fathers are most often responsible for the payment of child support as the non-custodial parent. This means that in case of non-payment by the non-custodial

parent, it is most often single mothers who have to deal with enforcement procedures and ask for advances and aid from the state where child support and social benefit is guaranteed.

In European countries, in cases when the non-custodial parent does not want to pay, the first step is usually a court order demanding payment. If this is still not forthcoming, a bailiff can be appointed in order to obtain the payment. Beyond this, the non-custodial parent’s assets such as property or bank accounts may be seized and then sold and, if the situation persists, criminal action may be pursued, possibly leading to imprisonment. In cases when the non-custodial parent cannot pay, the single parent can be provided with public support for child support or social benefits and assistance, in accordance with the social security system of the country.<sup>162</sup>

### Enforcement effectiveness

It can be said that enforcement is not more than two thirds effective in nearly all countries and, in some, less than a third.

Proper enforcement methods can improve enforcement of payment by the non-custodial parent. In European countries, back in 1994, only 43 per cent of single parents received child maintenance payments; by 2004, however, the proportion had increased to 64 per cent. This rise in payment rates was linked to “increased regulation to enforce the payment of child maintenance”. However, in France, Hungary and Ireland, the proportion decreased in the late 1990s.<sup>163</sup>

In Japan, non-payment of child support is seen as one of the main causes of poverty for divorced mothers, with only 34 per cent of divorced mothers having functioning support payment agreement in place<sup>164</sup> and no effective mechanism for enforcing payments or collecting arrears.<sup>165</sup>

160. Child Support Analysis 2017.

161. In Japan, for example, “Some [Family Court] commissioners express the view ... that a parent living with a child should not expect any payment, such as maintenance or emotional damages, from the non-resident parent. Instead, they should make efforts to obtain an income to support the child by themselves, and prepare themselves to give up any payment from the non-resident parent if they remarry. .... Even after an agreement is made, only 17.7 percent of parents continued to make their payment and 15.4 percent stopped paying, and 66.8 percent did not make any payment” (Minamikata 2005: 502).

162. Beaumont and Mason 2014: 26.

163. Ibid.: 17.

164. Other statistics indicate that this is in fact much lower, with only 19.7 percent of divorced single mothers receiving any sort of money from their ex-husbands. See Brasor and Tsubuku 2015.

165. Sean Curtin 2005; Minamikata 2005: 502.

Many US states provide for criminal incarceration in the event of non-payment of maintenance.<sup>166</sup> However, there have been significant shifts in the effectiveness of enforcement depending on the approach of government regarding the insistence on payment by non-custodial parents to the single parent with the child in the household, which is the mother 83 per cent of the time.<sup>167</sup>

Even strong legal provisions both for maintenance amounts and penalties such as in Kyrgyzstan—where the criminal code provides for up to two years imprisonment for non-payment—are insufficient to protect mothers and their children. The criminal code for non-payment has never been utilized, and fathers often leave to become migrant workers, without mechanisms for enforcement or tracking. A new legislative proposal to prevent men who have failed to pay from leaving the country or obtaining driving licences may ameliorate this latter problem.<sup>168</sup>

It is particularly difficult to collect child support payments from non-custodial parents who have left the country of the family's domicile. Lobbying has been underway to improve child support collection internationally by promoting national and regional implementation of the Hague Convention 2007 on the International Recovery of Child Support and Other

Forms of Family Maintenance and the Hague Protocol on the Law Applicable to Maintenance Obligations.

#### **Default by non-custodial parents who cannot pay**

Where non-custodial parents, who are usually fathers, are genuinely unable to pay—for example, due to illness or long-term unemployment—the criminal justice system and incarceration cannot be considered appropriate enforcement methods. In these cases, the only feasible alternative is the public support systems discussed below.

### **3.4**

## **Public support systems**

In public child support systems, States seek to provide support for the custodial parent and recover arrears of unpaid maintenance from non-custodial parents. Most European countries provide advances to the mothers on the not-yet-recovered maintenance payments.<sup>169</sup> There are numerous instances of those non-custodial payer's debts eventually being written off by governments.<sup>170</sup> Denmark recuperates maintenance payments directly from the taxable income of the payer.<sup>171</sup> Public support may also be available to the payer: Finland provides a tax credit for the parent who pays child maintenance.<sup>172</sup>

In case of non-payment of child maintenance by the non-custodial parent, child support for the custodial parent is guaranteed directly by the state in Austria, Estonia, Germany, Hungary, Italy and Sweden. It is guaranteed by special bodies indirectly governed by the state in Belgium, France, Israel and Slovakia, by local authorities in the Czech Republic, Denmark and Finland and by special funds in Latvia, Lithuania, Luxembourg, Poland and Portugal.<sup>173</sup>

166. Solomon-Fears et al. 2012.

167. "When President Clinton signed the historic legislation in 1996, a quarter of the pages of the welfare reform law were dedicated to child support enforcement. These tougher provisions paid off: ... total collections for custodial parents increased by 74 percent ... Unfortunately, this record of success has reversed. ... In 2013, Census data showed that only 45 percent of poor custodial parents had an agreement for payment of child support, down from 58.7 percent in 2003. ... What accounts for this loss of momentum is a legitimate, although exaggerated, concern about being too tough on poor noncustodial parents, the parent who is not living with the child. A false wisdom has emerged in the policy community—from academics to the media—that the child support system forces noncustodial dads to, as the headline of a 2015 New York Times story put it, 'Skip Child Support. Go to Jail. Lose Job. Repeat.' ...The National Child Support Enforcement Association expressed concern about the proposed regulations'over-lenience toward non-custodial parents' and said that parts of the proposed rule would 'undermine the program's fundamental purpose to collect support for children'" (Doar 2017).

168. Institute for War and Peace Reporting 2017.

169. Beaumont and Mason 2014: 22.

170. Yaron 2017. An overview of the Israeli system shows a drop in the collection of maintenance debts by the state system. In 2015, for example, National Insurance transferred 437 million shekels (\$112.3 million) to women in lieu of child support payments, but the state managed to collect only 165 million shekels from their ex-husbands

171. Eydal and Rostgaard 2016: 89.

172. Ibid.: 88.

173. Beaumont and Mason 2014.



The level of public support payment varies in the different systems. Guaranteed state payments, however, may be a basic flat rate social security payment as, for example, in Iceland and Sweden. In the latter, this is at a low level and, in the context of a high level of women's employment and a strong social benefits system, constitutes only about 10 per cent of custodial parents' income. Similarly, in the other Nordic countries, state maintenance payments, though not flat rate, form about 10 per cent of single parents' incomes.

In Germany and the United Kingdom, it is the child maintenance payment that constitutes the greatest proportion of single parents' social benefit income.<sup>174</sup> In Israel, in the case of non-collection, women receive the lower level of the national insurance stipend rather than the amount of the maintenance award, leaving women with a shortfall of 1,000-3,000 shekels a month—an amount that can be up to 40 per cent of the average female salary; furthermore, working women who earn over two thirds of average salary are not entitled to receive the benefit.<sup>175</sup>

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174. Ibid.

175. Yaron 2017.

## 4.

# CONCLUSIONS AND RECOMMENDATIONS

CEDAW guarantees women the right to equality in all aspects of family life, including guardianship and custody. In a reform process of eliminating discrimination against women in family law, secular law systems have rescinded a historically pervasive male prerogative over guardianship or custody of children. Religious and customary law systems have not, with few exceptions, evolved in the same way and are a site of severe ongoing discrimination against women in the family. States have an immediate international human rights law obligation to eliminate the imposition of patriarchal provisions, whether or not they are based on religious or customary law, that deem fathers the sole guardians or custodians of their children or that deny mothers custody on gender-biased grounds such as, for example, remarriage, 'non-conventional gender behaviour' or lesbianism.

In the allocation of physical custody, various forms of tender years presumption or maternal preference have been practised both in patriarchal religious systems and in reformed secular law systems. Formal equality and human rights arguments have been made by feminists, men's rights lobbies and children's rights advocates for abandoning these presumptions in favour of gender-neutral allocations of physical custody. However, caution should be employed in abandoning them in a world where gender difference and inequality remain pervasive, especially in the sphere of families, with parents on an unlevel playing field whether because of economic gender gaps, division of care work or, in some cases, discrimination in the law. Here CEDAW's substantive equality in outcomes should be the yardstick and merely formal equality will further disadvantage women.

Different models of gender-neutral custody have varying outcomes for women. Sole custody, if not

based on the primary caretaker approach or the approximation approach, may go to the father and is likely to adversely affect women who wish to continue to be the primary carer, as they were during the marriage. On the other hand, sole custody by primary carers can result in time burdens and economic hardship for single mothers. Models of custody allocation that produce a high level of conflict between the parents will generally disadvantage women as they have less bargaining power in contested proceedings. This may be partially offset by state intervention with, for example, provision of gender-sensitive training for social service and legal personnel and with legal aid for representation of mothers or, alternately, court-appointed experts who are not retained by either parent.

The best interest of the child is the overriding principle and consideration to be observed in all custody arrangements. Research shows, however, that the assessment of the best interest of the child may be gender-biased against mothers, and this must be corrected. The CRC provides that the good of the child requires contact with both parents. Accordingly, models of custody allocation should secure access for both parents and sole custody must provide visitation rights to the non-custodial parent.

In all arrangements for custody allocation, protection of women against domestic violence must be paramount. It is crucial to take into account the fact that joint custody and visitation rights force battered women to remain in geographical proximity and in contact with the men who abused them. Failure to restrict custody or unsupervised visitation in cases of severe domestic violence may have fatal results for mothers and children.<sup>176</sup>

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176. United Nations 2015.

Parents are obliged under the CRC to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development. This applies to non-custodial as well as custodial parents. The issue of child maintenance and support by non-custodial parents has strong gender implications. The majority of custodial parents are single mothers who are as a group highly vulnerable to poverty, and there is overwhelming evidence of women losing out economically post-separation/divorce. Hence the entitlement to maintenance is key for women's human rights and dignity.

However, child maintenance and support systems are, in almost all countries and contexts, inadequate to provide single-mother families with the income required to maintain a suitable standard of living for themselves and their children, and this contributes to gender-based poverty. The systems of calculation do not sufficiently take into account the discriminatory realities of women's fewer economic opportunities, especially after the dissolution of a marriage in which there was a gendered division of roles. Systems in which the incomes of both the non-custodial and the custodial parent are taken into account in calculating the level of maintenance required for the child to have a standard of living commensurate with the non-custodial parent's income are therefore to be preferred.

Furthermore, the failure to enforce the payment of maintenance obligations by non-custodial fathers results in a high percentage of custodial mothers who do not receive maintenance payments at all. Attaching wages or property in conjunction with criminal penalties can increase the effectiveness of enforcement. However, these methods cannot be effective and will be counterproductive in the case of indigent men who, in contexts of male unemployment and poverty, are unable to pay.

In case of default by the non-custodial parent, public support systems, in which the state advances the payment of support to the custodial parent, are the most viable solution. These systems should improve enforcement mechanisms against the non-custodial parent and, at the same time, provide high levels of public support to the custodial parent in the case of default. The state may seek to recover the arrears from the delinquent parent, but it should do so through its own agents and not require mothers to do so and thus expose them to violent responses. These measures are essential to reduce the poverty of single-mother families.

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