

Rapporteur: Rachel Li

Email: rachelcl@hku.hk

**17 March 13:00-14:00 Esther Erlings**

## **When Parents Violate Children's Right – Possibilities for Parent-Child Dispute Resolution**

### **1. Children's Status within the Family**

- Children have long been considered as an extension and the possession of their parents.
- Starting from the 1970s, children were seen more as full human beings that deserved respect. *The welfarist approach* recognised that at times children would be in need of protection from their parents as parents might not do the right thing for them.
- Parental responsibility focusing on parental obligations was being advocated for, and children's interests were more about *material rights*, such as the right to food, the right to health and the right to education.
- Currently, children are being seen as equal members of the family. Initially parents may impose their beliefs on their children, but as children grow older they become equals to their parents. Children should have their own say, make their own decisions and develop their own identities.
- There is a growing appreciation for children's *identity rights*, such as the freedom of religion, the freedom of expression and the freedom of sexual orientation.
- These issues have traditionally been taken as matters for the parents to decide, but during the last 10 or so years there is a growing recognition that children should be able to rely, enforce and defend their rights.

### **2. Enforcing Children's Rights**

- Children's rights are enshrined in the Convention of the Rights of the Child ("CRC"), yet many states have not implemented the CRC.
- Although treaties such as the International Covenant on Civil and Political Rights ("ICCPR") stipulate children's rights, these treaties do not have horizontal effect. For instance, the Hong Kong Bill of Rights Ordinance (Cap 383)<sup>1</sup> provides for the freedom of religion, yet children can only invoke this right against their government but not their parents.

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<sup>1</sup> The Hong Kong Bill of Rights Ordinance incorporates the ICCPR into domestic laws.

- Domestic laws often only provide for parental rights, parental responsibility and parental authority, thus children are not entitled to rights as rights although parental obligations are often inspired by children's rights.
- The enforcement of children's rights is really about challenging parental rights

### 3. Current Situation of Children's Rights in Hong Kong

- In Hong Kong, a child cannot make direct application to the court to challenge the way her or his parents raise her or him.
- A child can find a next friend to start wardship proceedings for her or him; however there are several entrance barriers.
- To start wardship proceedings one would either rely on child protection or social services. To rely on child protection a child would have to be *harmed* by his or her parents, but currently there is no understanding that a child is harmed if her or his identity rights, such as the freedom of expression and the freedom of religion, are being restricted by her or his parents.
- Moreover, Hong Kong's social services are facing resource constraints, thus services such as counselling are often being prioritised for other areas.
- Lastly, as a matter of cultural practice, it is not common for children in Hong Kong to initiate counselling as a means of resolving parent-child disputes.
- The Law Reform Commission's 2005 report on Child Custody and Access<sup>2</sup> recommends that a system should be established in Hong Kong modelling the UK system where children are given the right of access to court and can challenge parental rights. This suggestion however has not been implemented yet.

### 4. Current Situation of Children's Rights in the United Kingdom

- Children can apply for child arrangement orders since 2014 by virtue of the Children Act 2014 if she or he disagrees with the way her or his parents exercise parental responsibility. For instance, a specific issue order looks at whether a child should have a religious education.
- However, only children who are under 16 can apply for child arrangement orders. The rationale behind this age limit is perhaps that individuals over 16 are considered as competent and mature enough to make their own decisions. Yet given that identity issues usually manifest during puberty, there is a larger chance that a child will wish to challenge parental decisions after she or he reaches 16.
- A major obstacle for children to apply for child arrangement orders is that they have to obtain leave from the High Court. The grant of leave is discretionary. Although the law only stipulates that one has to be mature enough to go through

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<sup>2</sup> Available at: <http://www.hkreform.gov.hk/en/docs/raccess-e.pdf>

the judicial proceedings, the High Court has imposed various additional requirements.

- An example of such additional requirements is that the issue cannot be trivial. There was a case where a girl initiated child arrangement proceedings because she wanted to move in and live with a friend's family. The court however believed that the issue is too trivial and should be resolved within the family.
- Currently there is no reported cases where a child started child arrangement proceeding against parents who were not separated.
- Children can apply for wardship proceedings. This is particularly important for children over 16 years old as they cannot apply for child arrangement orders.
- Child protection is another option but the threshold – *significant harm* – is very high. One has to be severely abused or neglected before the court recognises that there is significant harm.
- Children can also use social services to resolve parent-child conflicts, but social services are of a voluntary nature and parents can refuse to participate. Therefore social services are not very effective for children to enforce their civil and political rights.

## 5. Current Situation of Children's Rights in France

- France is an interesting reference point for Hong Kong as both the French government and the Hong Kong government emphasise that they have a very family-focused culture.
- Children can challenge parents by means of child protection orders. The threshold for child protection order is very low: a child only need to demonstrate that she or he is in *danger*. For instance, obstructing a child's education or raising a child within a certain religious sect will suffice. There are neither established guidelines nor requirements, thus it is quite likely that an identity issue will qualify as "danger".
- Children who are over 13 years old have the right to instruct their own lawyers to initiate child protection proceedings if they believe that they are in danger.
- However, children might be unwilling to bring their parents to court as child protection orders can be stigmatising given their nature as child protection proceedings.
- Social services are available but they are decentralised and voluntary. As a result these services are not very reliable and parents may refuse to cooperate.

## 6. Access to Court for Children: Advantages

- Going to court can be empowering for the vulnerable party i.e. the child because the child is being placed at a level playing field and becomes an equal to their parents in court.
- Formal rules of procedures ensure formal equality between parent and child.
- The establishment of precedents sets important guidelines for other parents by mapping out the boundaries of parental rights. Moreover, it also builds up a law that is respectful of children's rights.
- Access to court is helpful in solving protracted conflicts and at times the court is the only option. This is particularly so given that many parent-child conflicts centre on differences in values.
- Giving children access to court is feasible but safeguards are also necessary. For example:
  - The child must be able to litigate;
  - The court may adopt a no-harm principle instead of the children's interest principle. The no-harm principle looks at rather allowing a child to enforce a particular right (hence limiting parental rights) is harmful to the child, while the interest principle looks at rather allowing a child to enforce a right is of the child's interest.

## 7. Access to Court for Children: Disadvantages

- The family unity argument argues that the court is not the best place to resolve familial disputes and taking a family member to court is detrimental to family unity.
  - In *Planned Parenthood of Central Missouri v Danforth* 428 U.S. 52 (1976), the US Supreme Court addresses this argument by stating that family unity is likely to have already been fractured if family members are taking each other to court: p.75.
- The adversarial nature of court proceedings may, instead of reconciling parent and child, deepen their conflicts and result in parent-child "divorce". The child may not be able to live with her or his parents anymore after the proceedings.
  - Proceedings may not necessarily result in parent-child divorce. A 2012 UK case concerns a girl who wanted to join the Church of England but the mother with whom the child was living with is Jewish. The girl had the father litigated against the mother and won the case. The girl nevertheless stayed with her mother afterwards.
- Judges may not be in a better position to decide on matters concerning moral values given that judges have their own subjective set of values and beliefs.
  - A certain degree of subjectivity is inevitable in all sorts of judicial decisions.

- Legal language may not be capable of articulating arguments, such as moral, ethical and religious arguments, that are difficult to translate into legal notions.

## **8. Alternative Dispute Resolutions**

- Although access to court is necessary, it may not be the first priority in resolving parent-child disputes.
- Alternative dispute resolutions are not widely available in part because children do not have access to court thus there is no alternative to court.
- Moreover, cost is a significant limitation to alternative resolutions as it is unlikely for parents to pay for mediation fees given that their parental authority is being challenged.
- In addition, because alternative resolutions such as mediation are often voluntary, parents may refuse to cooperate.
- In France, the state provides parent-child mediation services. Intake are free and mediation sessions cost about 20 HKD.
- In Hong Kong, the Hong Kong Federation of Youth Groups runs a mediation centre<sup>3</sup>. Unfortunately the Hong Kong Government did not follow up on the development of the mediation centre<sup>4</sup>.

## **9. Alternative Dispute Resolutions: Advantages**

- Mediation aims at re-opening communication and reuniting families.
- Mediation offers solutions that work for the particular participants.
- Mediation allows parties to articulate their arguments in non-legal terminologies, which can be more efficient than legal arguments. For instance, theistic mediation in the US resolves religious disputes between adult children and parents by involving God in the mediation process. Parents are invited to put the matter into God's hands and not coerce their children into manifesting a certain religion. For a religious parent theistic mediation may be a more acceptable alternative to court proceedings.
- Mediation can be empowering.
- Resolving disputes through mediation is very much in line with the position of international organisations, which have been advocating for resolving parent-child conflict through dialogue, understanding each other's stand point and respecting a child's identity etc.

## **10. Alternative Dispute Resolutions: Disadvantages**

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<sup>3</sup> For more information, see: <http://pcmc.hkfyg.org.hk/page.aspx?corpname=pcmc&i=1809>

<sup>4</sup> See the Department of Justice's *Report of the Working Group on Mediation*, 2010. Available at: <http://www.gov.hk/en/residents/government/publication/consultation/docs/2010/Mediation.pdf>

- One of the difficulties in engaging children in mediations is that they may not have the capacity to mediate.
  - Elderly mediation may provide a reference point in assessing whether an individual is competent enough to mediate.
- Power relations between parents and children is another limitation to mediation.
  - Power is a fluid notion. Children in a parent-child relationship often hold a lot of power, such as the power to withdraw love and affection and the power to embarrass their parent in public. Moreover, transformative mediation aims at empowering individuals up to the point that they feel comfortable enough to challenge the authority and enforce their rights.
- There is a lack of formal rules and precedents in mediation. A mediator who is not well-trained may extent prejudices and societal norms.
  - The provision of proper training for parent-child mediation can remedy this situation to a large extent.

### **11. Initial Research Finding**

- The researcher conducted empirical research in Hong Kong, France and the UK regarding parents and children's views on access to court and access to mediation.
- Approximately 1/3 of parents and children are in favour of access to court and access to mediation.
- In Hong Kong, only 16 % of children and 6% of parents support access to court; however a majority of the respondents favours access to mediation.

### **12. Conclusion**

- A border approach needs to be taken towards parent-child dispute resolution. Dispute resolving mechanisms should not just focus on access to court but should look at what is the most effective alternative for the family as well.
- Children should be given access to court in Hong Kong. However a mediation structure should also be provided.
- This is an under-researched field and more research, pilots and participation by parent and children are integral to parent-child dispute resolutions.

### **13. Q&A**

- **Q: How does one empower a child in instances where power imbalance within the family is significant?**
- **A:** It depends on the individual situation. For example, if a child refuses to manifest a certain religion, to parents that is not just a rejection of the religion but a rejection of an identity. In these instances children hold a lot power in refusing love and affection.

However, mediation should not be conducted if there is a genuine power imbalance that would intervene with the effectiveness of mediation.

- **Q: To what extent is funding important in parent-child dispute resolutions? Given that parents are unlikely to pay for court fees or mediation fees, it appears that government funding is imperative. However, if the government actively engages in these disputes, would that not equate to encouraging parents to discharge their parental responsibility on behalf of the state?**
- **A:** The speaker is very aware of the idea as to whether children belong to their parents or the state. She believes that children belongs to themselves. The state has an obligation both internationally and domestically to help children realise their rights. The provision of funding by the state does not equate to the state claiming ownership of the children or accepting the delegation of parental responsibility; the state is merely fulfilling their obligation by providing children with the access to court as well as the access to alternative dispute resolutions.
- **Q: Can the speaker elaborate on how proceedings are initiated in countries where children can bring their parents to court?**
- **A:** Cases involving children are usually confidential, thus information in this regard is not widely available. Very often if a child has a problem, he or she will see a school teacher who introduces the child to a social worker, who then refers the child to legal aid who then organises a case for the child. Very often there is involvement of another party, usually an adult. In the UK, organisations such as Cafcass offers a lot of assistance<sup>5</sup>. In France, children can write directly to the judge.

The main issue is that children do not know where to go and do not know their options. Moreover people like teachers are often not very well-informed in this regard as well. There are very few people who are able to tell children what their rights are and send them on the right path.

- **Q: Would Asian values, such as harmony and filial piety influence Western countries by promoting a preference for mediation over litigation?**
- **A:** There will be more of an influence by divorce mediation used in other countries than necessarily Asian values being exported to foreign countries. Mediation will be more appreciated when children understand what it is. However, there are recent cases in the UK where judges use the word “harmony”. Generally speaking there is a growing appreciation for mediation worldwide. In addition, there may be an increase

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<sup>5</sup> See: <http://www.cafcass.gov.uk/>

in appreciation for litigation in Hong Kong as children are being exposed to Western values and are more willing to assert their rights.