SCOTS CHILD AND FAMILY LAW:
LIBERTY, EQUALITY AND PROTECTION REVISITED*

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Abstract

In his seminal 1989 article, "Family Law Reform in Scotland – Past, Present and Future", Professor Eric M Clive analysed family law reform at the various stages in terms of three themes: liberty, equality and protection. Adopting these themes as benchmarks, this article analyses developments in the regulation of adult relationships and in child law over the last three decades, highlighting remaining shortcomings and exploring how they might be resolved.

Keywords: liberty; equality; protection; child; parent; family; children's rights; child protection; marriage; civil partnership; polygamy; polyamory; forced marriage; domestic abuse; divorce.

* While this article states the law as at 30 November 2018, it has its origins in a paper presented at the Family Law Academic Network Scotland (FLANS) conference in honour of Professor Eric M Clive held at Edinburgh University on 15 April 2016. For further details of the papers presented, including Professor Clive's own reflections on family law, see: http://www.law.ed.ac.uk/other_areas_of_interest/events/all_events/family_law_academic_network_scotland_conference_2016 [Accessed 30 November 2018].

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INTRODUCTION

In a seminal article, "Family Law Reform in Scotland – Past, Present and Future", published in this journal, in 1989, Professor Eric M. Clive identified the "three great themes of family law reform" since the middle of the 19th Century as liberty, equality and protection, and used them in his analysis of developments in family law in the three stages.[1]

Thirty years later, it is both unsurprising and encouraging that Scots child and family law has moved on. During the early years of this period, the Scottish Law Commission offered plentiful recommendations for reform, some of which were taken up at Westminster.[2] Post-devolution, successive Scottish Governments revisited unimplemented Commission proposals[3] and pursued their own initiatives.[4] International and regional instruments have played their part, with the European Convention on Human Rights[5] (ECHR) being incorporated into domestic law.[6] These efforts have been supplemented by a rich body of scholarly literature, something academics like to believe has an impact on the law reform process.

This article adopts Professor Clive's themes of liberty, equality and protection as benchmarks in analysing child and family law reform over the last three decades, highlighting remaining shortcomings and exploring how they might be addressed.

[1] Eric M. Clive, "Family Law Reform in Scotland: Past, Present and Future" 1989 J.R. 133, 134.
[2] See, for example, the Children (Scotland) Act 1995.
[3] See, for example, the Family Law (Scotland) Act 2006, some of which implemented quite elderly Commission recommendations.
[4] Elaine E. Sutherland, "Child and Family Law: Progress and Pusillanimity" in Elaine E. Sutherland, Kay E. Goodall, Gavin F.M. Little and Fraser P. Davidson (eds), *Law Making and the Scottish Parliament: The Early Years* (Edinburgh: Edinburgh University Press, 2011), p.58.
[5] ETS No. 155 (1950).
[6] Human Rights Act 1998.

ADULT RELATIONSHIPS

A single development dominates any evaluation of the legal regulation of intimate adult relationships over the last thirty years. The Marriage and Civil Partnership (Scotland) Act 2014 marked the culmination of a decades-long struggle for what has come to be known as "marriage equality", with same sex couples finally securing the right to marry and gaining the legal protection that flows from marriage.

The values of liberty and equality were furthered when belief bodies were added to the list of civil and religious celebrants empowered to solemnise marriages and register civil partnerships. "Equality" is somewhat qualified, however, since the legislation continues to accord "A-list" status only to the Church of Scotland and then divides other religious and belief bodies into those on the "B-list", all of whose celebrants may officiate, and the "C-listers", where the body must nominate individual celebrants.[7]

During the currency of the relationship, legal equality was already very much the order of the day by the late 20th Century and most of the gender-based, discriminatory consequences of marriage had long since been abolished.[8] Occasional, anachronistic curiosities, like the defence to a charge of reset, available to wives, but not to husbands,[9] and the right of a widow, but not a widower, to claim the cost of mourning clothes from the deceased spouse's estate,[10] lingered on and were laid to rest only recently.

The liberty interests of those wishing to be freed from an unsatisfactory, formal relationship were enhanced when the periods of non-cohabitation required for a divorce or civil partnership dissolution were shorted from two years (accompanied by the

[7] Marriage (Scotland) Act 1977 ss.8-12.
[8] The most recent pre-1989 "tiding up" legislation was the Law Reform (Husband and Wife) (Scotland) Act 1984.
[9] The common law defence was relevant to a wife who concealed stolen property brought into the family home by her husband. It was applied in *Clark v Mone* 1950 S.L.T. (Sh. Ct.) 69, rejected in *Smith v Watson* 1982 S.L.T. 359 and abolished by the Marriage and Civil Partnership (Scotland) Act 2014 s.7.
[10] Abolished by the Succession (Scotland) Act 2016 s.26.

partner's consent) and five years (no consent required), to one and two years, respectively.[11] The vast majority of divorces now proceed on the basis of non-cohabitation,[12] bringing attendant benefits in terms of privacy, and the wisdom of the reform was illustrated graphically in the recent English case, *Owens v Owens*.[13]

Considerable legislative efforts have been devoted to providing protection in the context of intimate relationships. The free consent of each party was always fundamental to entering a marriage and the legal system has long sought to protect against coercion by providing that, where apparent consent is a product of duress, the purported marriage is void.[14] It became clear, however, that this alone was inadequate in preventing forced marriages, either in Scotland or by a person being lured out of the country for the ceremony[15] and additional measures were put in place. The first is a new civil remedy, the forced marriage protection order, which aims to prevent such marriages from taking place.[16] The second is a new statutory offence of coercing a person to enter a marriage or practising deception in order to entice a person abroad for the purpose of forced marriage.[17]

It was appreciated long ago that general legal provisions, like interdicts or the law on assault, by themselves, provided inadequate protection against domestic abuse and that a more proactive and comprehensive approach was required. In 1981, legislation gave spouses the right to live in the family home, regardless of whether their significant other is the sole owner or tenant, and an abusive partner can be excluded from the home and other places, like a workplace or a child's school, by court order.[18] Civil

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[11] Divorce (Scotland) Act 1976, s.1(2)(d) and (e), as amended by the Family Law (Scotland) Act 2006, s.11.
[12] In 2015-16, 94% of divorces were founded on non-cohabitation: *Civil Justice Statistics in Scotland 2016-2017* (Scottish Government, 2017), p. 29: http://www.gov.scot/Resource/0051/00515767.pdf [Accessed 30 November 2018]. At the time of writing, while the overall statistics for 2016-17 are available, those on breakdown of divorce by grounds are not.
[13] [2018] UKSC 41; [2018] 3 W.L.R. 634.
[14] Marriage (Scotland) Act 1977 s.20A. See, for example, *Sobrah v Khan* 2002 S.C. 382.
[15] *Singh v Singh* 2005 S.L.T. 749.
[16] Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011.
[17] Anti-social Behaviour, Crime and Policing Act 2014 s.122.
[18] Matrimonial Homes (Family Protection) (Scotland) Act 1981.

partners receive similar protection[19] and it extends, often for more limited duration, to cohabitants.[20]

Targeted remedies have been added over the years and there is now a range of interdicts, other court orders and criminal offences designed to protect spouses, civil partners and cohabitants from abuse[21] and to protect all victims, irrespective of relationship status, from harassment,[22] stalking[23] and so-called "revenge porn".[24] Over time, the circumstances for the granting of specific orders have been refined,[25] greater account has been taken of the domestic nature of interdicts[26] and the domestic context of an offence is now an aggravation for sentencing purposes.[27] Finally, in 2018, a specific offence of domestic abuse – that is, intentionally or recklessly engaging in a course of behaviour that a reasonable person would regard as likely to cause physical or psychological harm to a partner or former partner – was created.[28]

It would be illusory to believe that legislation alone will eliminate domestic abuse. In 2017-18, 59,541 incidents of domestic abuse were reported to the police in Scotland, an increase of 1% on the previous year,[29] reflecting only part of the problem since many abusive incidents go unreported. In addition, there is concern that some professionals working in the legal system lack an in-depth understanding of domestic abuse and it is encouraging that the Scottish Government plans further consultation and action to

[19] Civil Partnership Act 2004, ss.101-112 and 135.
[20] Matrimonial Homes (Family Protection) (Scotland) Act 1981 s.18. Initially, the Act applied only to different sex cohabitants and was extended to same sex cohabitants by the Family Law (Scotland) Act 2006 s.34.
[21] Protection from Harassment Act 1997, Protection from Abuse (Scotland) Act 2001, Domestic Abuse (Scotland) Act 2011 and the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.
[22] Protection from Harassment Act 1997.
[23] Criminal Justice and Licensing (Scotland) Act 2010 s.39.
[24] Abusive Behaviour and Sexual Harm (Scotland) Act 2016 ss.2-4.
[25] For example, the Domestic Abuse (Scotland) Act 2011, amending the Protection from Harassment Act 1997 and refining the concept of harassment where it amounts to domestic abuse.
[26] For example, the Domestic Abuse (Scotland) Act 2011 s.3, providing for an interdict to be designated a "domestic abuse interdict", breach of which is a criminal offence, attracting a possible sentence of up to 5 years imprisonment, rather than contempt of court.
[27] Abusive Behaviour and Sexual Harm (Scotland) Act 2016 s.1.
[28] Domestic Abuse (Scotland) Act 2018, s.1.
[29] *Domestic Abuse Recorded by the Police in Scotland, 2017-18* (Scottish Government, 2018).

tackle domestic abuse.[30] When it is remembered that it was not until 1989, the starting point of our enquiry, that a court accepted unequivocally that the law on rape applies within marriage,[31] one gets a sense of both historical deficiencies and the progress that has been made.

It is clear, then, that there has been progress in respect of all three of our benchmarks over the last three decades. That process has, however, been imperfect or incomplete, in places, and gaps and shortcoming remain.

Same sex marriage – but not complete equality

Scots law was hardly a trailblazer in making marriage available to same sex couples[32] and it followed the incremental pattern found in many other jurisdictions,[33] with the final step being preceded by the decriminalisation of homosexuality;[34] recognition of same sex relationships for specific, limited purposes;[35] and the creation of civil partnership, a marriage-equivalent for same sex couples.[36]

Civil partnership was a compromise designed to create a relationship for same sex couples that offered most of the legal consequences of marriage, while avoiding the use of the magic word in an effort to placate those opposed to making marriage more

[30] Scottish Government, *Delivering for Today, Investing for Tomorrow: The Government Programme for Scotland 2018-19* (2018), 104-105.
[31] *S v. H.M. Advocate* 1989 J.C. 469
[32] The Netherlands led the way, in 2001, and, by 2014, Argentina, Belgium, Brazil, Canada, Denmark, England and Wales, France, Iceland, New Zealand, Norway, Portugal, South Arica, Spain, Sweden and Uruguay had followed suit.
[33] William N. Eskridge, "Comparative Law and the Same-Sex Marriage Debate: A Step-By-Step Approach Toward State Recognition" 31 McGeorge L. Rev. 641 (1999-2000); Kees Waaldijk, "Civil Developments: Patterns of Reform in the Legal Position of Same-Sex Partners in Europe" (2000) 17 Rev. Can. Dr. Fam. 62.
[34] Homosexuality was not decriminalized until 1980, when the age of consent was set at 21: Criminal Justice (Scotland) Act 1980, s.80 (repealed). The age was later reduced to 18 and, eventually, to 16: Sexual Offences (Scotland) Act 2009 s.28.
[35] See, for example, the Adults with Incapacity (Scotland) Act 2000, the Protection from Abuse (Scotland) Act 2001, the Housing (Scotland) Act 2001 and the Mental Health (Care and Treatment) (Scotland) Act 2003. The courts contributed to this process: see, *Fitzpatrick v Sterling Housing Association* [2001] 1 A.C. 27 and *Ghaidan v Mendoza* [2004] 2 A.C. 557.
[36] Civil Partnership Act 2004.

inclusive. Like many compromises, it failed since the most virulent opponents were not appeased and supporters of same sex marriage continued to pursue their quest for full and equal recognition. While access to marriage has been secured for same sex couples, full equality has not and there are lingering differences that depend on the sex of the parties.

Different treatment begins at the point of celebration. There is no problem over civil ceremonies since registrars are expected to discharge their duties for all.[37] In the context of religious or belief ceremonies, it will be remembered that distinctions are drawn between different religious and belief groups in terms of which of their celebrants may solemnise marriage for different sex couples. These groups must then take a further, affirmative step – "opting in" – if their celebrants are to marry same sex couples and, even then, no individual celebrant is obliged to do so.[38]

While the legislation is clearly designed to reflect respect for the religious freedom of groups and individuals opposed to same sex marriage, the result is that same sex couples are treated less favourably by being given less choice than are different sex couples. This inequality – and that impacting religious and belief groups more generally – could be eliminated very easily by providing for all marriages to be concluded by means of a civil ceremony, presided over by a registrar, an approach found in other jurisdictions.[39] Couples would, of course, be free to have a religious or belief celebration, if they wished, in addition to the civil process.

So much for solemnisation of marriage, but what of the trappings? Pockets of resistance remain, in the form of unhappy hoteliers and bakers (no butchers or candlestick-makers, thus far), who claim that respect for their religious freedom permits them to decline

[37] *Eweida v United Kingdom* (2013) 57 E.H.R.R. 8.
[38] Marriage (Scotland) Act 1977 s.8(1B) and (1C).
[39] Elaine E Sutherland, "Giving the state sole jurisdiction over marriage would simplify the law", J.L.S.S. online, April 2013: http://www.journalonline.co.uk/Magazine/58-4/1012446.aspx [Accessed 30 November 2018].

service to same sex couples. To do so would be a clear violation of the Equality Act 2010.[40]

At the other end of the spectrum, is the termination of marriage, with divorce being available to different sex couples where the marriage has broken down irretrievably or an interim gender recognition certificate has been issued to either party to the marriage.[41] Irretrievable breakdown can be established only by proving one of four factual situations, known colloquially as: adultery; behaviour; non-cohabitation for one year, accompanied by the defender's consent; and non-cohabitation for two years.

On the face of it, divorce is available to all couples on the same basis. However, the use of adultery to demonstrate irretrievable breakdown merits special mention. Adultery is defined, in a rather old case, as "sexual intercourse … between a consenting spouse and a member of the opposite sex who is not the other spouse."[42] While individuals are not always consistent in their sexual preferences, that definition accommodates most infidelity that occurs in different sex marriages. When same sex marriage became available, the relevant statue was amended to make it clear that the definition of adultery remained unaltered.[43] As a result, a same sex spouse may only found on adultery in respect of infidelity by the other spouse that occurred with a different sex person and not, as seems more likely, if his or her spouse has strayed with a person of the same sex. The path to divorce is not closed off, since same sex infidelity would usually constitute behaviour that makes it unreasonable to expect the pursuer to continue to cohabit with the defender, but there is no escaping the implication that sexual infidelity is viewed differently and, arguably, less seriously, in the same sex

[40] See *Hall v Bull* [2013] UKSC 73; [2013] 1 W.L.R. 3741. In *Lee v Ashers Baking Co. Ltd*, also reported as *Lee v McArthur* [2018] UKSC 49; [2018] 3 W.L.R. 1294, the Supreme Court provided clarification on issues of discrimination, sexual orientation, freedom of religion and freedom of expression. For parallel developments in the US, see, *Masterpiece Cakeshop Ltd. V Colorado Civil Rights Commission*, 138 S.Ct. 1719 (2018).
[41] 1976 Act s.1.
[42] *MacLennan v MacLennan* 1958 S.C. 105, p 109, *per* Lord Wheatley.
[43] Divorce (Scotland) Act 1976 s.1(3A).

context.[44] Yet again, inequality could be eliminated at a stroke – by removing adultery as one of the factual situation demonstrating irretrievable breakdown and addressing all sexual infidelity as a form of behaviour.

Relationship equality

The liberty interests of most of the Scottish population are respected in so far as they may engage in intimate relationships of their choosing largely free from state interference. Subject to wholly-defensible restrictions relating to age[45] and consent[46] and, arguably less-defensible constraints on adult incest,[47] the law has long since abandoned the business of policing individual morals through intrusive measures like the criminalisation of adultery and fornication.

This permissive picture begins to unravel, however, when one turns to the relationships embraced by the civil law. Marriage, civil partnership and cohabitation are recognised by the legal system and, as a result, the parties to them are protected by a range of legal consequences attaching during the relationship and on breakdown. Each relationship is subject to its own definition, not all are equally accessible and their consequences vary, implicating all three of our benchmarks.

Cohabitation

The common law concept of marriage by cohabitation with habit and repute, much loved by academics and law students, narrowly escaped abolition[48] but is now a shadow of its

[44] Another explanation is the reluctance of legislators to acknowledge the sexual dimension of same sex relationships, something that also manifests itself in the fact that incurable impotence renders a different sex, but not a same sex, marriage voidable: Marriage and Civil Partnership (Scotland) Act 1914 s.5(1).
[45] The default age of consent to sexual activity is 16: Sexual Offences (Scotland) Act 2009 s.28. Higher ages apply in cases involving sexual abuse of trust (18 years old) and sexual intercourse between step-parent and a step-child (21 years old): Sexual Offences (Scotland) Act 2009 ss.42-43 and Criminal Law (Consolidation) (Scotland) Act 1995 s.2, respectively.
[46] Sexual Offences (Scotland) Act 2009 ss.12-17.
[47] Criminal Law (Consolidation) (Scotland) Act 1995 ss.1, 2 and 4. For a critique of the law, see, James A Roffee, "Incest: the exception to a principled Scottish sex law" 2012 J.R. 91.
[48] *Policy Memorandum: Marriage and Civil Partnership* (Scotland) Bill (2013), para.153.

former self, largely limited to providing a remedy for succession purposes only where the parties made an ineffectual attempt to marry abroad.[49] One criticism of it, in its heyday, was that it rewarded deception. In contrast, the popular, modern phenomenon of "cohabitation proper" describes the situation where couples live together without formalising their relationship and make no pretence of being married. In the past, while they could sometimes secure redress under general, common law provisions,[50] the legal system largely ignored them save for very limited purposes.[51]

Cohabitation was brought in from the cold by the Family Law (Scotland) Act 2006 and cohabitants (or former cohabitants) who qualify under the statutory definition[52] are now given a degree of protection, benefitting from a range of provisions that apply during the relationship, on breakdown and in the event of a partner's death.[53] They may avoid these consequences by agreement or, in the case of inheritance, by making a will. Seeking redress from a court is subject to fairly short time limits that the court has no discretion to waive and, while some of the ambiguities in the legislation have been clarified,[54] others remain.[55]

The goal of the legislation was never to place cohabitants in the same legal position as married couples and civil partners and the remedies available to cohabitants are very much more limited than the comprehensive scheme provided for those in formal relationships. According a privileged status to marriage has been accepted by the European Court of Human Rights as a legitimate aim under Article 8 of the ECHR.[56]

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[49] Family Law (Scotland) Act 2006 s.3. Since the reform was of prospective effect only, cases involving the old law may yet come before the courts.
[50] *Shilliday v Smith* 1998 S.C. 725. For difficulty created by the interaction between the common law and the 2006 Act, see, *Courtney's Executors v Campbell* [2016] CSOH 136; 2017 S.C.L.R. 387. The case is also known as *Igoe v Campbell*.
[51] See, for example, the Matrimonial Homes (Family Protection) (Scotland) Act 1981 s.18.
[52] Family Law (Scotland) Act 2006 s.25. See, *Gutcher v Butcher* 2014 GWD 31-610; *Harley v Thompson* 2015 Fam. L.R. 45.
[53] 2006 Act ss.26-29.
[54] *Gow v Grant* 2013 SC (UKSC) 1: 2013 S.C. (U.K.S.C.) 1.
[55] These are set out fairly fully in the report of the Justice Committee, *Family Law (Scotland) Act 2006 Post-legislative Review*, SP Paper 963, 6th Report, 2016 (Session 4), paras. 7-39.
[56] *Shackell v United Kingdom*, Application No 45851/99, decision of 27 April 2000 ("marriage remains an institution that is widely accepted as conferring a particular status on those who enter it and, indeed, it is singled out for special treatment under Article 12 of the Convention"); *Yiğit v Turkey* (2011) 53 E.H.R.R.

However, the usual test applies and different treatment will only survive a human rights challenge if the means employed are rationally connected to that aim and proportionate. As the UK Supreme Court demonstrated recently, denying widowed parent's allowance to a bereaved parent who had been cohabiting, when it would have been paid had she been married, fails on both legs of that test.[57] In this, the Court regarded the adverse impact of this different treatment on children as significant.[58]

What are the implications of this for the lesser protection offered to parting and bereaved cohabitants in Scotland? At the heart of the matter lies the very variable motives of couples who cohabit, with some choosing cohabitation, quite deliberately, in order to avoid the package of legal consequences that accompanies marriage, while others misunderstand the law or give no thought to the legal consequences of their actions until it is too late.[59] The greater protection attaching to marriage will not make it more attractive to the ignorant and naïve, since they will not appreciate its significance or will do so only imperfectly. It may make the poorer, informed cohabitant more inclined to marry, but it is unlikely to have that effect on the wealthier, savvy partner. Thus, there is little rational relationship between the current legal approach and promoting marriage. Then there is the matter of proportionality. The current law offers very different packages to spouse and civil partners, on the one hand, and to cohabitants, on the other. A more nuanced and, arguably, more proportionate response would be to attach all the legal consequences of marriage to cohabitation, but permit the parties the same latitude to contract out of them.

Civil partnership

As we have seen, civil partnership was created, in Scotland, as a compromise solution on the road to same sex marriage. Same sex couples now have three relationship

25.The UK Supreme Court shared that view: *Re McLaughlin* [2018] UKSC 48, [36] ("There is no doubt that the promotion of marriage, and now civil partnership, is a legitimate aim").
[57] *Re McLaughlin* [2018] UKSC 48.
[58] *Ibid*, [40].
[59] See further, Elaine E Sutherland, "From 'Bidie-In' to 'Cohabitant' in Scotland: The Perils of Legislative Compromise" (2013) 27 I.J.L.P.F. 143.

options available to them: marriage, civil partnership and cohabitation proper. For different sex couples, the choice is more limited since they cannot register a civil partnership and there is a certain irony in the fact that at the very time Scots law eliminated one form of discrimination, it created another.

It became apparent that some different sex couples who would like to formalise their relationship find marriage unacceptable, but would be happy to conclude a civil partnership – and it is not difficult to see why. While marriage can be concluded by means of a civil ceremony, its religious and patriarchal associations are manifest. Were civil partnership to be extended to different sex couples, their liberty would be served by giving them choice, they would gain the protection of a formal relationship and the benchmark of equality would be met.

Extending civil partnership to all couples was one option considered, but not favoured, by the Scottish Government when it consulted on the future of civil partnership in 2015.[60] The other two options it explored were the prospective abolition of civil partnership, something that has been done in a number of countries once marriage became available to same sex couples,[61] and retaining it for same sex couples only. It made clear that, regardless of the reform option selected, existing civil partnerships would remain valid. Nor does it intend to convert civil partnerships into marriages by legislative fiat, a path taken elsewhere,[62] causing an outcry from those affected who saw what amounts to government-imposed marriage as compromising their liberty.

The Scottish Government delayed making a decision on how to proceed, in part, because it was awaiting the outcome of an English case where a different sex couple challenged their exclusion from civil partnership, founding on Articles 8 and 14 of the

[60] *Review of Civil Partnership - A consultation by the Scottish Government* (Scottish Government, Edinburgh, 2015).
[61] See, Ingrid Lund-Anderson, "The Nordic Countries: Same Direction – Different Speeds", in Katharina Boele-Woelki and Angelika Fuchs (eds), *Legal Recognition of Same-Sex Relationships in Europe* (Cambridge: Intersentia, 2012), 3 at 4.
[62] In a few states in the United States, registered partnerships or civil unions were converted into marriages automatically on a specified date. See, for example, Wash. Rev. Code § 26.60.100(4) and 13 Del. Code § 218(e).

ECHR.[63] The Supreme Court agreed with them up to a point, condemning the government-created discrimination and declaring the Civil Partnership Act (in so far as it applied in England and Wales) to be incompatible with the Human Rights Act 1998.[64] That decision did not resolve the matter, however, since the Court left it to Westminster to decide whether to abolish civil partnership prospectively or to make it available to all couples in England and Wales. The Scottish Government will have to make that decision as well and it duly launched a further public consultation.[65] Days later, the Prime Minister, Theresa May, indicated that different sex couples in England and Wales would be given access to civil partnership.[66] Since it would be open to Scottish couples to head over the border to take advantage of that option, in a sense, the debate in Scotland was over before it began and there is no doubt that liberty and equality would be served by the Scottish Government bowing to the inevitable.

Multi-partner relationships

Scots law does not embrace multi-partner relationships. Any attempt to enter a marriage or civil partnership, while in another, is void[67] and the conduct itself is criminal.[68] While the courts can pronounce on the validity of polygamous marriages and provide relief to the parties,[69] that is not the same thing as accommodating them by having a system in place to address the complexities they present. Should the legal system abandon its attachment to mononormativity, respect freedom of choice and embrace a wider notion of "marriage equality" by offering the option of polygamous marriage?

[63] *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development* [2018] UKSC 32; [2018] 3 W.L.R. 415.
[64] [2018] UKSC 32, at [62].
[65] Scottish Government, *The future of civil partnership in Scotland* (Scottish Government, Edinburgh, 2018).
[66] Frances Gibb, "I will: May promises civil partnerships for all", *The Times*, 3 October 2018.
[67] Marriage (Scotland) Act 1977 s.5(4)(b) and Civil Partnership Act 2004 s.86(1)(d).
[68] Marriage (Scotland) Act 1977 s.24(A1) and Civil Partnership Act 2004 s.100.
[69] Matrimonial Proceedings (Polygamous Marriages) Act 1972 s.2, providing that a Scottish court is "not … precluded" from granting a decree of divorce, nullity, separation or "any other decree involving a determination as to the validity of a marriage" and related ancillary orders in respect of a polygamous marriage.

The form of polygamy found in Scotland is confined to polygyny (a man having multiple wives) and polyandry (a woman having multiple husbands) appears to be unknown. That, in itself, offends against our benchmark of equality and it is the gendered nature of polygamy around the world that has led to its condemnation by a host of United Nations organisations.[70] Similarly, the Supreme Court of British Columbia was addressing polygyny when it upheld the criminalisation of polygamy in Canada on the basis that it sought "to address the harms viewed as arising from polygamy; harms to women, to children, to society and, importantly, to the institution of monogamous marriage."[71]

That final point, that embracing a more inclusive definition of marriage would threaten the whole institution, thereby harming others, is thoroughly familiar from the debate over same sex marriage. It is as fallacious to suggest that permitting polygamy limits the freedom to marry of monogamists as it was to argue that allowing same sex marriage compromised the matrimonial liberty of heterosexuals.

Another old chestnut, employed by the opponents of both same sex marriage and polygamy, is to take a particular facet of marriage, as it is defined at a given time – like the sex or number of parties – and treat it as an essential and immutable requirement. If a relationship does not satisfy the requirement, so the argument goes, then it is not a marriage and respect for equality does not require it to be treated as if it were.

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[70] Human Rights Committee, *Equality of rights between men and women: General Comments adopted by the Human Rights Committee under article 40, paragraph 4, of the International Covenant on Civil and Political Rights*, CCPR/C/21/Rev1/Add 10 (2000), para.24 (polygamy "should be definitely abolished wherever it continues to exist"). Referring to polygamy, as well as early, forced and temporary marriage, the Human Rights Council concluded that, "not all forms of marriage deserve recognition": *Report of the Working Group on the issue of discrimination against women in law and practice*, A/HCR/29/40 (2015), para.26.

[71] *Reference re: Section 293 of the Criminal Code of Canada* 2011 BCSC 1588, [181]. That case arose from the practices of the breakaway Fundamental Church of Jesus Christ of Latter Day Saints whose members sought to avoid criminal penalties by refraining from any state involvement in their plural marriages. Rather than apply for multiple marriage licences, they confined unions after the first to "celestial" (religious) marriages. That strategy was unsuccessful in Canada, but worked in Utah: *Brown v Buhman* 947 F. Supp. 2d 1170 (D. Utah, 2013), vacated *Brown v Buhman* 822 F.3d 1151 (10th Cir 2016) (moot in the light of the Attorney General's undertaking not to prosecute).

It is also worth bearing in mind that the some of the evils laid at the door of polygamy – the exploitation of women and girls and domestic abuse – are sometimes present in monogamous marriage. It is quite possible to imagine a version of polygamy, open to men and women equally and in whatever gender combination the parties choose, that is no more or less oppressive than any other kind of marriage. Whether there is any appetite in Scotland for amending the law to provide for polygamy is open to question – and the Scottish Government has made clear its opposition to such a course[72] – but, then, at one time, there was only limited support for same sex marriage.

It is striking that the Canadian court that was so critical of polygamy was at pains to make clear that it was not criminalising polyamory.[73] Unlike polygamy, which is usually formalised,[74] polyamory is typically an informal arrangement, bearing a closer resemblance to non-marital cohabitation than to marriage. It has been characterised as a "post-modern form of multi-partner relationships unburdened by patriarchal gender roles, heterosexual constraints, or monogamous exclusivity."[75] In this, another crucial distinction between polygamy, as currently practiced, and polyamory is that the latter is open to all. With a little imagination, it would be possible to amend the legislation on cohabitation so that it embraces polyamory. Of course, for some polyamorists, one attraction of the arrangement is the lack of legal regulation. Whether respecting their liberty trumps another of our values, the protection of those in (or leaving) a polyamorous relationship, is a challenge that is also found in the context of two-party cohabitation.

[72] *The Marriage and Civil Partnership (Scotland) Bill: A Consultation* (Edinburgh: Scottish Government, 2012), para. 3.37 ("The Scottish Government has no intention of allowing polygamous marriages to take place in Scotland.").
[73] *Reference re: Section 293 of the Criminal Code of Canada*, paras. 1148 and 1266.
[74] There is usually a religious ceremony which the parties view as creating a valid marriage.
[75] Maura Strassberg, "The Crime of Polygamy" 12 Temp. Pol. & Civ. Rts. L. Rev. 353 (2003), 355.

CHILD LAW

There is no single, dominant development – no equivalent to same sex marriage – that stands out in Scottish child law over the last thirty years. On the international stage, that honour goes to the Convention on the Rights of the Child (CRC),[76] adopted by General Assembly of the United Nations, in 1989; ratified by the United Kingdom, in 1991; and given the following ringing endorsement by the European Court of Human Rights:

> "The human rights of children and the standards to which all governments must aspire in realising these rights for all children are set out in the Convention on the Rights of the Child."[77]

Unlike the ECHR, the CRC has not been incorporated into domestic law, but it is cited routinely in courts across the UK, bringing benefits to children and, incidentally, to adults.[78] In addition, incremental implementation of many of its key provisions has long been underway in Scotland, a process that was strengthened when the Scottish Ministers were placed under a statutory obligation to give active consideration to giving effect to the CRC requirements and to report, triennially, on their progress and plans for the next three years.[79] The Scottish Government has now committed to incorporating "the principles" of the CRC into domestic law[80] and, since many of these principles have already been incorporated, further and more specific information about its plans is eagerly awaited.

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[76] 1577 UNTS 3; (1989) 28 I.L.M. 1448.
[77] *Sommerfeld v Germany* (2004) 38 E.H.R.R. 35, para. 37.
[78] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 A.C. 166; *Re McLaughlin* [2018] UKSC 48; [2018] 1 W.L.R. 4250.
[79] Children and Young People (Scotland) Act 2014 s.1. See, *Progressing Children's Rights in Scotland: An Action Plan 2018-21: Consultation* (Edinburgh: Scottish Government, 2018) and Scottish Government, *Delivering for Today, Investing for Tomorrow*, *op. cit.*, 83.
[80] Scottish Government, *Delivering for Today, Investing for Tomorrow: The Government Programme for Scotland 2018-19* (2018), 12.

The absence of that lone, historic, domestic development does not mean, however, that child law has stagnated – far from it. There have been significant developments: in establishing clear, fundamental principles; in efforts to render the law more systematic; and in addressing specific, important issues.

Three principles, first articulated coherently in the Children (Scotland) Act 1995, now permeate Scots child law. The first requires courts, children's hearings and other agencies of the state to accord paramountcy to the child's welfare, save in very limited circumstances.[81] Bearing in mind that adults determine what will serve a child's welfare, it is clear that this principle is concerned more with protecting children than with their liberty, highlighting a constant challenge faced by legal systems in reconciling the two values when children are involved: what is known as the "rights v welfare" debate.

A degree of respect for the child's liberty, in the sense of empowerment, is found in the second principle, requiring decision-makers to give children the opportunity to express their views and to take account of these views in the light of the child's age and maturity.[82] That right to participate in decision-making is not equivalent to the autonomy accorded to adults, of course, with children's liberty again being restricted by the need to protect them. The third principle also reflects respect for liberty, this time in the sense of freedom from undue intrusion, by mandating that no court order should be made unless making the order would be better for the child than not doing so.[83]

Alongside these general principles, there are specific examples of significant, albeit not unqualified, progress in respecting all three of our benchmark values.

[81] Children (Scotland) Act 1995 ss.11(7)(a) and 16(1) and the Children's Hearings (Scotland) Act 2011 s.25. The child's welfare can be downgraded to "a primary consideration", in the "public", but not "private", law context, in order to protect the public from serious harm: 2011 Act s.26.
[82] Children (Scotland) Act 1995 ss.6, 11(7)(b) and 16(2) and the Children's Hearings (Scotland) Act 2011 s.27.
[83] Children (Scotland) Act 1995 s.11(7)(a) and 16(3) and the Children's Hearings (Scotland) Act 2011 ss.28(2) and 29(2).

From a young person's perspective, nothing impacts (a lack of) respect for their liberty and equality more than minimum age limits. Yet respecting equality simply requires that those who are similarly situated should be treated in the same way. If it is accepted that children differ from adults in crucial respects – physically, developmentally, experientially and so forth – then it is easier to justify disempowering them for the time being, particularly if the goal is protective. That is consistent with the view of the United Nations Committee on the Rights of the Child, that,

> "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose that is legitimate under the Convention."[84]

The message, then, is clear. While being young is not, in itself, a justification for discrimination, different treatment on the basis of age may be permissible if it can be defended on other, objective grounds.[85] Whether all of the current Scottish age limits pass that test is open to question.

The Age of Legal Capacity (Scotland) Act 1991 sought to rationalise aspects of age-related rules when it replaced the sexist, common law concepts of pupillarity and minority[86] with a system more focussed on graduated empowerment[87] and individualised assessment,[88] reflecting the Convention on the Rights of the Child concept of the child's evolving capacity.[89] The reform was not comprehensive, quite deliberately omitting both delictual liability and criminal responsibility,[90] and bright line rules were retained for some purposes.[91]

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[84] United Nations Committee on the Rights of the Child, *General Comment No. 20 on the implementation of the rights of the child during adolescence* (2016), CRC/C/GC/20, para. 21.
[85] See further, Elaine E Sutherland, "Article 2 of the United Nations Convention on the Rights of the Child: Non-Discrimination and Children's Rights" in Marit Skivenes and Karl Harald Søvig (eds), *Child Rights and International Discrimination Law: Implementing Article 2 of the UN Convention on the Rights of the Child* (Oxford: Routledge, forthcoming 2019).
[86] Under the common law, children were divided into pupils and minors, with the latter, more empowered, status being attained by young women on reaching 12 years old, but not by young men until they reached 14.
[87] Age of Legal Capacity (Scotland) Act 1991 ss.1, 2(1), 3 and 4 (transactions).
[88] 1991 Act ss.2(4) and 2(4A) (consenting to medical treatment or instructing a solicitor in a civil matter).
[89] United Nations Convention on the Rights of the Child, art. 5.
[90] 1991 Act s.1(3)(c). On delictual liability, see, Lesley-Anne Barnes Macfarlane, "Rethinking Childhood Contributory Negligence: 'Blame', 'Fault' – But What About Children's Rights?" (2018) J.R. 75.
[91] 1991 Act ss.2(2) and 2(3) (testamentary capacity and consent to own adoption).

The 1991 Act also left untouched a host of, sometimes inconsistent, subject-specific statutory provisions that restrict children's access to particular commodities and activities in the name of protecting them[92] and other members of the community.[93] More recent legislation has done nothing to render age limits any more rational. On the one hand, the tendency has been to restrict[94] and protect[95] young people more and for longer.[96] On the other hand, children are still held criminally responsible from the age of eight (soon to be raised to 12),[97] while young people are enfranchised, in Scotland, from 16 years old.[98]

The promotion of equality underscored the 2006 amendment to the Law Reform (Parent and Child) (Scotland) Act 1986, designed to effect the "abolition of [the] status of illegitimacy".[99] Granted, the gain was somewhat symbolic since, even in 1992, when

[92] Access to alcohol is an obvious example, with a general age limit of 18 being imposed: Licensing (Scotland) Act 1976 s.68.
[93] See, for example, the restrictions on driving a motor vehicle, with the ages being 16, 17 or 18, depending on the type of vehicle: Road Traffic Act 1988 s.101.
[94] See, for example, the restriction on using tanning salons introduced by the Public Health, etc. (Scotland) Act 2008 ss.95-96.
[95] See, for example, the extension of state responsibility to young people it has looked after from 21 to 25: Children (Scotland) Act 1995, s.29(2), as amended by the Children and Young People (Scotland) Act 2014.
[96] The age for accessing tobacco products was raised from 16 to 18: Children and Young Persons (Scotland) Act 1937 s.18, as amended by the Smoking, Health and Social Care (Scotland) Act 2005 (Variation of age limit for the sale of tobacco purchase and consequential modifications) Order 2007, SSI 2007/437.
[97] Criminal Procedure (Scotland) Act 1995 s.41. A child below the age of 12 may not be prosecuted, nor may a person be prosecuted in respect of anything done before reaching that age: 1995 Act s.41A, added by the Criminal Justice and Licensing (Scotland) Act 2010 s.52(2). The Age of Criminal Responsibility (Scotland) Bill, SP Bill 29, 2018, which, at the time of writing, has completed Stage 1 of the legislative process, will raise the minimum age of criminal responsibility will to 12. For a discussion of the evolution of thinking on this issue in Scotland, see, Elaine E. Sutherland, "Raising the Minimum Age of Criminal Responsibility in Scotland: Law Reform at Last?" (2016) 67 N.I.L.Q. 387.
[98] The right to vote, was extended to those aged 16 and over, first, for the Scottish independence referendum (Scottish Independence Referendum (Franchise) Act 2013 s.2) then for Scottish Parliament and local authority elections (Scotland Act 1998 s.11 and the Scottish Local Government Elections Order 2011, SSI 2011/399, as amended most recently by the Scottish Local Government Elections Order 2016, SSI 2016/7). The age for voting for Westminster elections remains 18 years old (Representation of the People Act 1983 s.1) and two Private Member's Bills, designed to reduce the age to 16, were introduced at Westminster in 2017.
[99] Law Reform (Parent and Child (Scotland) Act 1986 s.1, as amended by the Family Law (Scotland) Act 2006.

the Scottish Law Commission recommended the reform,[100] the legal effects of birth status had already been diminished greatly. Since it remains relevant in the aristocratic context, where gender discrimination also reigns, the status has not truly been abolished.[101]

When the Children (Scotland) Act 1995 created a comprehensive framework of parental responsibilities and parental rights and a regime governing their acquisition, operation and regulation and the resolution of disputes, the goal was undoubtedly to bring greater clarity and coherence to the law.[102] That, in turn, furthered the protection of children by articulating the nature of duties owed to them and by whom. In the original version of the Act – and contrary to the recommendations of the Scottish Law Commission – the marital status of a child's parents remained a significant legal marker.[103] It was not until the Act was amended, in 2006, that non-marital fathers who register their paternity were able to acquire responsibilities and rights automatically, something that had been the case for mothers and fathers married from the outset.[104] As a result, many more of their children now have two legal guardians, just like the children of married parents. The operation of that provision is not problem-free and we shall return to it presently.

For some donor children, equality, in the sense of having two legal guardians, took longer to secure. While it was ground-breaking in many respects, the Human Fertilisation and Embryology Act 1990 was unequivocally heteronormative in character when it determined who would be treated as the parents of donor children of different sex couples.[105] It was not until 2008 that statute accommodated the children of same

[100] Scottish Law Commission, *Report on Family Law* (Scot Law Com No 135, 1992), para 17.4.
[101] Law Reform (Parent and Child (Scotland) Act 1986 s 9(1)(c) and (ca)); *Re Baronetcy of Pringle of Stichill* [2016] UKPC 16; 2016 S.C. (P.C.) 1. See further, Sir Crispin Agnew and Gillian Black, "The significance of status and genetics in succession to titles, honours, dignities and coats of arms: Making the case for reform" (2018) 77 Camb. L.J. 321.
[102] That is all the more apparent in the original version since the statute also addressed child protection.
[103] Non-marital father did not acquire parental responsibilities and parental rights automatically, with unmarried parents being given the option of concluding an agreement to share responsibilities and rights: 1995 Act s.4.
[104] Family Law (Scotland) Act 2006 amending the Children (Scotland) Act 1995 s.3. Fathers who registered before the 2006 amendment came into effect, on 4 April 2006, must re-register to benefit from it.
[105] Human Fertilisation and Embryology Act 1990 ss.27-28.

sex couples by providing for the birth mother's partner being treated as the child's second parent.[106]

For other donor children, whether they know that they are a product of donated gametes is often wholly at the discretion of the adults who raise them, since there is no system in place to ensure that they are informed. Assuming the child does know, the further information available will depend on when the donation was made, with some children gaining access to non-identifying information only while, in the future, others will be furnished with details of the donor's identity.[107] In all of this, it seems clear that the privacy of donors, some of whom were promised anonymity, and the recipients who choose to conceal the truth from the children, is being prioritised over the liberty interest of children.

Enormous efforts have been directed at improving child protection in Scotland over the last thirty years,[108] with wide-ranging legislation that seeks to prevent unsuitable people from working with children[109] and court orders designed to keep sexual predators away from them.[110] In addition to the general protection offered by the criminal law, there has been reform of the law on sexual offences that can be committed only against children[111] and efforts have been made to keep pace with developments by creating new offences designed to combat dangers posed by the Internet.[112]

The challenge for child protection, in the family setting, lies in creating an effective system of prevention and, where necessary, intervention, at the same time as

[106] Human Fertilisation and Embryology Act 2008 Act ss.35-47. An expedited adoption procedure is available to accommodate surrogacy: 2008 Act ss.54-55.
[107] Human Fertilisation and Embryology Act 1990 ss.31 and 31ZA-31ZB and Human Fertilisation and Embryology Authority (Disclosure of Information) Regulations 2004, S.I. 2004/1511.
[108] For a discussion of developments, see, Elaine E. Sutherland, "Scotland: Proactive Child Protection: A Step Too Far?" in Margaret F Brinig and Fareda Banda (eds), *International Survey of Family Law: 2017 Edition* (Bristol: Jordans, 2017).
[109] Protection of Vulnerable Groups (Scotland) Act 2007.
[110] See, for example, the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 ss.10-25 (sexual harm prevention orders) and ss.26-36 (sexual risk orders).
[111] Sexual Offences (Scotland) Act 2009 ss.18-45.
[112] Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005, s 1.

respecting the liberty and privacy of children and their parents. Getting the balance wrong can result, either in over-zealous intervention that causes distress and harm to families, or in a failure to respond timeously and adequately, sometimes with fatal consequences.[113]

Passed in the wake of the infamous Orkney case,[114] the Children (Scotland) Act 1995 revised the various court orders designed to enable the local authority to protect children, through mandatory intervention, if necessary, and the operation of the children's hearings system. However, the turning point came with devolution and the adoption of *Getting It Right For Every Child* ("GIRFEC" to the *cognoscenti*),[115] an approach to child protection premised on early intervention, integration of services and the sharing of information between agencies.

Legislation followed, spreading the protective measures across a number of statutes[116] and sometimes translating aspects of social work practice into law. The concept of child "wellbeing", assessed on the basis of the, woefully vague, SHANARRI indicators,[117] was added to the Scottish legal lexicon.[118] Policy and practice have been reviewed and considerable resources have been devoted to new initiatives. Hitherto, intervention in the lives of families had been premised, either on voluntary participation, with the state providing assistance and services,[119] or on the local authority securing a court order

[113] Sharon Vincent and Alison Petch, *Audit and Analysis of Significant Case Reviews* (Edinburgh: Scottish Government, 2012) and *Learning From Significant Case Reviews in Scotland: A retrospective review of relevant reports completed in the period between 1 April 2012 and 31 March 2015* (Dundee: Care Inspectorate, 2016).
[114] *Sloan v B* 1991 S.L.T. 530. There, 9 children from 4 different families were removed from their homes amid allegations of sexual abuse, only to be returned 5 weeks later without the allegations being tested in court.
[115] *For Scotland's Children* (Edinburgh: Scottish Executive, 2001) and *Report of the Child Protection Audit and Review: It's everyone's job to make sure I'm alright* (Edinburgh: Scottish Executive, 2001).
[116] Adoption and Children (Scotland) Act 2007 s.84 (permanence orders) and Children's Hearings (Scotland) Act 2011 (child assessment orders and child protection orders). Exclusion orders remained in the 1995 Act.
[117] SHANARRI is an acronym, reflecting assessment of wellbeing by reference to the extent to which the child is or would be "Safe, Healthy, Achieving, Nurtured, Active, Respected, Responsible, and Included": Children and Young People (Scotland) Act 2014 s.96(2).
[118] Children and Young People (Scotland) Act 2014 s.96. See further, Emma Coles, Helen Cheyne, Jean Rankin and Brigid Daniels, "Getting It Right for Every Child: A National Policy Framework to Promote Children's Well-being in Scotland, United Kingdom" (2016) 94(2) Millbank Q.334.
[119] Children (Scotland) Act 1995 Part II.

sanctioning mandatory intervention. Such an order will only be granted where the local authority has satisfied a threshold test by demonstrating the likelihood of "significant harm" to the child or the like, save in an emergency.[120] Similarly, statutory criteria must be met before a child can be referred to a children's hearing.[121]

The latest innovation in child protection, the named person service, represents a radical departure from that model and takes early intervention to a new level.[122] Under the original plan, (almost) every child in Scotland would be allocated a "named person" automatically without the need to justify the appointment by satisfying any threshold test. The named person would give advice, information and support to the child, young person and the parents; would help them to access services; and would have the power and the obligation to communicate concerns about the child to other agencies. For some parents and organisations, that level of state supervision of parenting was a step too far and they challenged the scheme, with the case eventually reaching the Supreme Court.[123]

It is familiar territory that the overall scheme survived human rights scrutiny, since it is rationally connected to the pursuit of a legitimate aim: child protection.[124] Criticism was reserved for the complex provisions on the sharing of information between agencies that were not sufficiently accessible, making it difficult to gauge whether they were being applied arbitrarily. This rendered these provisions "incompatible with the rights of children, young persons and parents under article 8 of the ECHR"[125] and they fell.[126] The Scottish Government was given the opportunity to correct the defects[127] and, at the time of writing, is still attempting to do so.[128] Whether it will succeed in striking the requisite balance remains to be seen, but it has been given an object lesson: that is,

[120] Children (Scotland) Act 1995 s.76 (exclusion orders) and Children's Hearings (Scotland) Act 2011 ss.35-39 (child assessment orders and child protection orders).
[121] 2011 Act s.66(2).
[122] Children and Young People (Scotland) Act 2014 Part 4.
[123] *Christian Institute v Lord Advocate* [2016] UKSC 51; 2017 S.C. (U.K.S.C.) 29.
[124] 2017 S.C. (U.K.S.C.) 29, [93].
[125] 2016 S.L.T. 805, [106].
[126] Scotland Act 1998 s.29(2)(d).
[127] Ibid s.102(2)(b).
[128] Children and Young People (Information Sharing) (Scotland) Bill, SP Bill 17, 2017.

there are limits on the extent to which it will be permitted to compromise privacy in the name of protection.

Having had its fingers burned so recently, there was concern that the Scottish Government might be reluctant to risk offending some parents' rights groups again by supporting a Members Bill that would remove the defence of "justifiable assault" from parents who hit their children.[129] The issue of physical punishment of children has long been a blot on the Scottish legal landscape and one that, despite legislative efforts to limit parental latitude,[130] has continued to attract wholly-justified condemnation from international human rights organisations.[131] In the event, the Government expressed support for the Bill[132] and, if it passes, may find itself facing further litigation. While making predictions is an inherently risky business, it is likely that the proposed reform would survive a human rights challenge.[133]

Scope for reform

Just as no single reform dominates developments in child law over the last thirty years, no major issues of principle remain to be resolved. Balancing liberty and protection will continue to be testing, but that tension is often more manifest when children, young people and their families are involved. The fundamental principles underpinning Scots child law are, it is submitted, sound. The challenge for the legal system lies in ensuring that they work better – or work at all – across the board, something appreciated by the Scottish Government in its recent consultation on the 1995 Act, Part 1.[134]

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[129] Children (Equal Protection from Assault) (Scotland) Bill, SP Bill 38, 2018, proposed by John Finnie, MSP.
[130] The Criminal Justice (Scotland) Act 2003 s.51, replaced the common law concept of "reasonable chastisement" with the defence of "justifiable assault" and further provided that an assault will never be considered "justifiable" if it involved a blow to the head, shaking the child or the use of an implement.
[131] See, most recently, Human Rights Committee, *Concluding Observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland*, CCPR/C/GBR/CO/7, 17 August 2015, para. 20 and UNCRC, *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland*, CRC/C/GBR/CO/5, 3 June 2016, para. 41.
[132] Scottish Government, *Delivering for Today, Investing in Tomorrow*, *op. cit.*, 82.
[133] *Williamson v Secretary of State for Education and Employment* [2005] UKHL 15; [2005] 2 A.C. 246.
[134] *Review of Part 1 of the Children (Scotland) Act 1995 and creation of a Family Justice Modernisation Strategy: A Consultation* (Edinburgh: Scottish Government, 2018).

Making the fundamental principles work better

For the legal system to accord paramountcy to the child's welfare is wholly defensible, particularly when it is remembered that children are often least able to advocate for, and protect, their own interests. Treating the child's welfare as paramount offsets the danger, either of adopting the, often unspoken, assumption that the interests of children and their parents are necessarily the same, with the result that they are conflated, or of adult rights simply being prioritised over those of children.

For children and young people, the liberty-limiting effect of prioritising welfare is mitigated somewhat by the second of the fundamental principles, requiring decision-makers to respect their participation rights. Here, the challenge to the legal system is one of practice rather than law, and lies in addressing the very real concerns over the extent to which children are, in fact, listened to in the family setting[135] and whether the mechanisms for hearing their voices in court proceedings,[136] in the child protection context[137] and in children's hearings are as effective as they might be.[138] The third of the fundamental principles, requiring the court to refrain from making any non-beneficial order, again, serves to bolster liberty, this time, for both children and their parents.[139]

It is clear, then, that the welfare of the child, while not the only card, is something of a trump card. Yet Scots law does not define welfare and there is no statutory "welfare checklist" of the kind found in many other jurisdictions.[140] It is again familiar territory

[135] Elaine E. Sutherland, "Listening to the Child's Voice in the Family Setting: From Aspiration to Reality" (2014) 26 C.F.L.Q. 152.
[136] For a discussion of the methods by which a child's views may be ascertained, see, *Shields v Shields* 2002 S.C. 246 at [11]. At the time of writing, the Family Law Committee of the Scottish Civil Justice Council and the Scottish Government are examining this issue.
[137] Susan Elsley, E Kay M Tisdall and Emma Davidson, *Children and young people's views on child protection systems in Scotland* (Edinburgh: Scottish Government Social Research, 2013), at [5.6]-[5.8], [5.16] and [5.45].
[138] The Education and Skills Committee of the Scottish Parliament recommended steps that could be taken to improve children's participation in children's hearings: *The Children's Hearings System – Taking Stock of Recent Reforms* (Scottish Parliament Education and Skills Committee, 2017), at [140]-[150].
[139] Children (Scotland) Act 1995 s.11(7)(a) and the Children's Hearings (Scotland) Act 2011 ss.28 and 29.
[140] See, Elaine E. Sutherland, "The Welfare Test: Determining the Indeterminate" 2018 Edin. L.R. 94.

that, back in the mists of 1992, the Scottish Law Commission rejected the idea of a checklist on the basis that it would be necessarily incomplete, might divert attention from other factors which ought to be considered and risked judges taking a mechanical approach to decision-making in order to minimise the prospect of a successful appeal.[141] Following what became a very gendered debate, the 1995 Act was amended, in 2006, with courts being directed to pay special attention to the need to protect the child from abuse, when assessing welfare, and to the likelihood of parental cooperation where that would be required by any order it was contemplating.[142]

As a result, there is now a partial, statutory checklist that emphasises some important factors that are relevant in assessing welfare, but makes no mention of others. A better solution would be to provide the kind of "non-exhaustive and non-hierarchical" statutory welfare checklist recommended, and explained in some detail, by the United Nations Committee on the Rights of the Child.[143] Drafting such a checklist would be challenging, of course, and it can be anticipated that adult interest groups would lobby hard for presumptions of various hues based on claims about what is good for children. That makes it crucial that such claims are not simply taken at face value and that research findings and expert evidence produced in support them are subjected to rigorous, critical analysis. As long as children's rights and interests remain to the fore, the courts and other decision-makers would be provided with more useful and concrete guidance in discharging their task. It may be that this new, improved welfare test would prove so helpful that chid "wellbeing" and the SHANARRI indicators could be returned to the realms of social work practice, where they rightly belong, avoiding the confusion that their continued use in statute is otherwise sure to bring.

Applying the principles

[141] Scottish Law Commission, *Report on Family Law*, *op. cit.*, paras 5.20-5.23
[142] 1995 Act s.11(7A)-(7E).
[143] United Nations Committee on the Rights of the Child, *General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* (2013), CRC/GC/2013/14, para. 50.

As we have seen, the Family Law (Scotland) Act, 2006 sought to remove the concept of illegitimacy from Scots law. To this end, it amended the 1995 Act so that non-marital fathers who registered their paternity acquire responsibilities and rights automatically, just like mothers and married fathers.[144] Yet parental marital status remains a significant legal marker where the child's mother seeks to exclude the non-marital father from the child's life. First, she can refuse to permit him to register his paternity, putting him to the trouble and expense of seeking a declarator of parentage.[145] She can then impede his progress further by withholding her consent to DNA testing of the child, denying him access to crucial evidence. The court has no power to order testing in the face of maternal opposition[146] and, while it may draw an adverse inference from her refusal[147] and courts have done so on occasion,[148] such an outcome is far from guaranteed.[149]

There are no doubt mothers who have good, child-centred reasons for seeking to keep their child's father out of the picture, but there are others whose motives are less noble. The appropriate role, if any, of the father – or, indeed, any other person – in a child's life is a matter to be determined by applying the fundamental principles of child law and it does not serve the child's interests for the legal system to permit the child's mother to delay or prevent the case getting to that stage.

It might be argued that equality would be served by allowing all non-marital fathers to register their paternity without maternal consent, just like married fathers.[150] That exemplifies the danger of conflating adult interests with those of children since such a course would fall foul of another of our benchmarks – protection – by exposing the child (and the mother) to a man registering paternity when he was mistaken or mischievous

[144] Family Law (Scotland) Act 2006 amending the Children (Scotland) Act 1995 s.3.
[145] Law Reform (Parent and Child) (Scotland) Act 1986, s.7.
[146] 1986 Act, s.6.
[147] Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 s.70.
[148] *S v S* 2014 S.L.T. (Sh. Ct.) 165.
[149] *Smith v Greenhill* 1994 S.L.T. (Sh. Ct.) 22.
[150] Another option that would ensure equality would be to require maternal consent for a married father to register, but that would be likely to meet with public opposition and might be open to challenge under Article 8 of the ECHR.

or malicious. A less radical option for reform would be to permit the court to authorise DNA testing in the face of maternal opposition.[151]

Children, in Scotland, experience a variety of family types, with the majority sharing a home with one or both of their parents, while some live with a parent and step-parent, sometimes in blended families, or with other relatives.[152] The 1995 Act acknowledges the role of people other than the child's parents, first, by permitting anyone who has care or control of a child to "do what is necessary in the circumstances to safeguard the child's health, development and welfare".[153] Having parental responsibilities and parental rights is the real ticket to engage in parenting of a child and the second way the 1995 Act recognises non-parents is by permitting anyone with an interest to apply to the court for an order relating to these responsibilities and rights.[154] Step-parents and grandparents have taken advantage of this provision, but each group has long campaigned for greater legal recognition.[155]

Step-parents have lobbied for law reform that would enable them to acquire parental responsibilities and parental rights by agreement with the child's parent.[156] Grandparents have called for an automatic right to contact with a grandchild, sometimes finessing their claim by petitioning for the creation of a right, vested in the child, to contact with a grandparent.[157] Each group argues that what it seeks would serve the

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[151] Elaine E. Sutherland, *"*It is a wise father *…',* J.L.S.S. online, 16 June 2014: http://www.journalonline.co.uk/Magazine/59-6/1014070.aspx [Accessed 30 November 2018].
[152] The 2011 Census recorded 614,000 families with dependent children living in Scotland, 54% being married couple families, 15% being cohabiting couple families and 31% being lone parent families. Step-families made up 8% of married couple families and 29% of cohabiting couple families. See, "Census 2011: Release 3E" (Edinburgh: National Records of Scotland, 2014): https://www.nrscotland.gov.uk/news/2014/census-release-3e [Accessed 30 November 2018]. For this purpose, "dependent children" are children under 16 or between 16 and 18 and in full-time education.
[153] 1995 Act s.5.
[154] 1995 Act s.11(3)(a).
[155] Each campaigned in the lead-up to the 2006 Act: *Parents and Children: A White Paper on Scottish Family Law* (Edinburgh: Scottish Executive, 2000), paras. 2.25-2.45 and proposal 2 (step-parents) and para. 2.44 (grandparents).
[156] Such agreements between parents and step-parents are available in England and Wales; Adoption and Children Act 2002 s.112.
[157] See, the Public Petitions lodge by, or on behalf of, Grandparents Apart on 8 March 2000 and 30 April 2007: Petition PE124 and Petition PE1051. Following the rejection of grandparents' claims during the passage of the 2006 Act, the Scottish Executive produced the *Charter for Grandchildren* (Edinburgh: Scottish Executive, 2006).

child's welfare but, in each case, the goal is to bypass the court where the decision would be reached by applying the fundamental principles. Neither step-parents nor grandparents are homogenous groups. Their relationships with the individual children concerned will vary, one family from another. In short, there is no escaping the conflation of adult interests with those of children inherent in these calls for law reform and the attendant risk of children being commodified in the process.

CONCLUSIONS

In his 1989 article, Professor Clive acknowledged the danger inherent in making predictions before forecasting that "a period of relative stability lies ahead in family law."[158] Very sensibly, he did not indicate how long the period would last. Thirty years is a long time in the law and, as we have seen, much has happened in child and family law. Ironically, as the lead Commissioner on family law projects at the Scottish Law Commission from 1981-2000, Professor Clive was the architect of quite a number of these reforms. How, then, have our benchmarks of liberty, equality and protection fared during this time?

There has been progress in respect of all three. The liberty of same sex couples was undoubtedly served when civil partnership, then marriage, became available to them, bringing the protection offered by these formal relationships. Respect for equality lies at the heart of these reforms and it was inevitable, perhaps, that this would produce a heightened awareness of the unequal treatment of other intimate relationships. In the longer term, the result may be that a menu of relationships – cohabitation, civil partnership, monogamous and polygamous marriage and polyamory – being offered to all of sufficient age and capacity.

That, in turn, presents something of a challenge in terms of our benchmarks. If the goal is to enhance liberty by giving individuals choice, then meaningful choice requires the relationships to differ in significant respects (beyond the obvious of the number of

[158] *Ibid*, 145.

parties). The law can draw distinctions between various kinds of relationship most effectively by attaching different legal consequences to them. That will result in the legal system offering less protection to parties in one kind of relationship than to those in another. Yet experience teaches us that individuals often do a poor job of protecting their interests when matters of the heart are at stake, regardless of how the law classifies their relationship.

The liberty of children and young people has been advanced through greater recognition of them as rights-holders, something that was in its infancy in 1989. Children are now treated more equally, one with another, by the legal system. Often, they are not treated like adults, but they are not adults and a more protective approach may be warranted in respect of them, provided always that a sound justification is provided for the different treatment. The fundamental principles of child law, now clearly articulated in statute, accord paramountcy to the welfare of the child and seek to temper the limit that imposes on their liberty through the obligations to listen to their views and desist from making non-beneficial orders. While reconciling liberty and protection will always be a challenge, the real scope for reform lies in refining the fundamental principles and applying them rigorously.

Ensuring that liberty, equality and protection are reflected in the lived experience of all members of Scottish society requires a great deal more than sound laws and it is not the purpose of this article to offer a blueprint of the socio-economic reforms that would be required to achieve that end. Suffice to say that getting the substantive law right is an essential part of the process.

It is encouraging, then, that child and family law is currently attracting unprecedented attention from government and civil society. At the time of writing, the Scottish Government, the Scottish Civil Justice Council and the Scottish Law Commission all have family law projects underway. Inquiries have been established to examine specific issues and individual Members of the Scottish Parliament are taking the opportunity to initiate legislation. A wide range of non-governmental organisations and individuals are

active in lobbying for law reform. This abundance of interest will undoubtedly produce, sometimes conflicting, recommendation for law reform. If we fail to get the substantive law right, it will not be for the want of trying.