# TOWARDS A NEW PERSPECTIVE IN THE CREATION OF THE PARENT-CHILD RELATIONSHIP :

## A Comparative Analysis of the Laws of Scotland and Greece

A Thesis Submitted for the LL.M. degree

by

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to my parents

Eytychios and Paraskevi

C O N T E N T S

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The material contained in the following thesis has not previously been published by me in any form.

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SUMMARY

The creation of the parent-child relationship, producing a state of dependency and also concerning society's existence, has always been a matter of great social interest and consequently of compulsory legal regulation. The traditional concept, however, perceiving children as an extension to their parents and therefore pursuing the satisfaction of their interests by showing concern over whether the parent relationship measures up to approved social norms, is extensively challenged by the attention given to the child's independent membership in the social setting. His interests increasingly receive independent social recognition notwithstanding that the role of the parent in his life remains of paramount importance. This change of principle, as far as the child's interests are concerned, seems to leave without justification the so far diverse policy as regards biological procreation, the discriminatory status attributed to some natural relationships and the role that adoption comes to play in remedying defects of status. The ideal solution on the other hand seems to be to give legal recognition to any natural relationship and for adoption to have the role of creating a parent-child relationship where that with natural parents cannot come into existence or, though existent, functions against the interests of the child. However, such radical change in policy would overturn a long lasting tradition and strike against fundamental principles involved in the creation of the parent child relationship. The issues are manifold and will be examined along with the existing law and the reform needed. The nature of the task undertaken by this study is partly determined by the choice of the legal systems selected for examination. They present a number of similarities in their approach to the matter developed upon basic principles of Roman law. On the other hand Scots law, by being largely a common law system, presents certain dynamics in

its adjustibility to new conditions whereas Greek law as a codified system adheres more to the traditional development of the law and has certain advantages in terms of legal certainty.

On the basis of the fundamental assumption that a two parent family is the most promising unit for bringing up children both laws have been developed so far in a way that attempts to absorb all children submitted to their jurisdiction into a family unit formed by their parents. Accordingly for a child born to a married woman the legal relationship afforded to the child is a complete one and comes into existence by legal fiat. Thus the child is presumed to have been begotten by her husband or the man subsequently married to her. Also a child may be legitimated with the subsequent marriage of his parents or in Greece by a court decree if the parents cannot marry.

The status so accorded to the child enjoys strong legal protection but nevertheless receives considerable criticism in respect to its functioning under present social conditions. By being a purely legal construct resulting in an artificial and inflexible reception of status it is doubted to have succeeded in upholding the marital family in social opinion. Additionally, by incorporating a certain family stereotype doubts may be expressed as to whether it comprehends the current state of man-woman relationships and the effects of this on the composition of the nuclear family. The diverse factors affecting the existence of the parental relationship make it insecure as a basis for determining the child's status by reference to it. Instead the introduction of the concept of parenthood is recommended, with applicability to cases of 'illegitimacy' if this status is to be abolished (Chapter one).

Discrimination against children whose parents' unit does not measure up to approved social norms dates back to early organized societies. It

is regarded as having arisen from certain social needs mainly concerning the welfare of the family as a basic social institution and as Varying in correlation with the importance attached to those needs. In parallel it was supported for moral, religious and pragmatic reasons; this type of discrimination enduring in its own right and thus affecting the extent to which the law has reflected changes in social needs. A number of improvements have come in the rights of children born out of wedlock under the pressure of current humanitarian policies. However, as it is shown, legal discrimination, though not the sole factor, has contributed to the creation of circumstances adverse to the interest of both parents and children. It is argued that the discrimination cannot nevertheless be justified in terms of other social ends: for example, that the evidence does not support the view that a distinction between legitimacy and illegitimacy is necessary to sustain marriage as a social institution; that the rates of illegitimacy are not materially affected by the extent of the legal discrimination and accordingly it cannot be said to serve any real purpose in terms of deterrence, and in any event in the present context legal discrimination is no longer consonant with the predominant social mores nor can it be justified as a punitive reaction to the circumstances under which pregnancies out of wedlock take place. On the other hand the indications are that although married parents constitute the appropriate forum for rearing children, the parent child relationship can be maintained independently of the personal or legal relationship between the parents. Various countries have started readjusting their laws in recognition of the facts referred to above, either by abolishing the status of illegitimacy or by improving the legal relationship with the natural parents. Certain recommendations have been put forward with regard to Scots and Greek law, though not all of them as radical in nature as those adopted by many countries. The merits of the various approaches are discussed and preference is given to the abolition of the status of illegitimacy altogether. (Chapter two).

In view of this change of policy selected aspects concerning the establishment of the relationship with the parents needs further consideration. The argument is put forward for introducing "licensed" paternity for children born out of wedlock - an idea that has to be rejected as inappropriate for the establishment of biological relationships, as sexually discriminatory and prejudicial to the child's rights. As regards the paternity of children born or conceived in wedlock, because marriage has undergone a democratic transformation, the present state of the law may be preserved as long as the presumption of paternity is maintained upon facts free of policy considerations. The same cannot, however, be suggested for informal relationships without resulting in arbitrary solutions. Paternity of children not covered by a presumption or fiction must be established by voluntary acknowledgement or of a court decree. Voluntary acknowledgement is considered as the first option to be given to the father. Thus it has to be simple enough and easily accessible without thus running counter to the public importance of the fact acknowledged. This purpose may be served with the registration system in Scotland subject to the following changes : voluntary acknowledgement should amount to proof in rem, the father should be entitled to enter his name whether or not the mother agrees and this should amount to full proof if not contested or otherwise attested within a reasonable period and finally acknowledgement should be possible prior to the birth. In Greece acknowledgement currently may be made by the father or the paternal grandfather with a notarial deed or will and operates in rem unless disproved. For this method there is suggested a need for further attestation of the father's declaration and repeal of the right of the grandfather to acknowledge the child. As an alternative to voluntary acknowledgement is considered the judicial recognition of paternity, when the father omits to acknowledge the child. That the emotional and material interests of the child lie as much with the father's relatives as with the father himself outweighs any objections to establishing

a complete relationship with the unwilling father. For the same reasons and in order to prevent the best evidence from becoming obsolete the action must be compulsory once a reasonable period for the parent to acknowledge the child has been allowed. Also, due to the importance of the matter, the issue should preferably be treated in an independent law suit. The finding of the court, which, for Scotland, would appropriately be the Sheriff Court and for Greece the City Court of three judges, must operate in rem and attribute to the child all rights and duties recognised in the parent child relationship. Proceedings could be initiated by the mother or the child through his guardian and in the last resort by a guardian ad hoc appointed by the public prosecutor, and should be directed against the father and on his death against his relatives. The action should be raised prior to the child's birth and within three months after birth after which the right should revert to the public prosecutor. With regard to proof it is suggested that there should be a tightening up of the conditions to minimise doubts, abolition of the exceptio plurium concubentium and extensive use of scientific evidence. In relation to the latter, blood test evidence seems to offer secure proof - a fact that is presently not acknowledged by either law. An advanced system of blood testing, however, provides positive exclusion of paternity or high probability of who may be the father and therefore should be acknowledged as of primary evidence for a neutral judgemental system. Preferably such evidence should be supported by customary evidence and the court should have the power to order such evidence whenever necessary and even against the will of the individual. Other evidence like the duration of pregnancy or anthropological tests might also be used, though only with caution because of its relative value while lie detector tests have to be rejected altogether as unethical. (Chapter three).

Adoption, as a formula artificially creating a parent-child relationship, may be used as an alternative to find substitute parents for the child whose natural parentage is not established or, though established, malfunctions. In this respect it may operate as a social measure susceptible to detailed state control and thus may incorporate a number of elements of what is termed today "licensed parenthood". (Introductory considerations to part two).

The institution dates back to ancient civilizations and throughout history it has assumed many different forms and functions relevant to the dynamics of the needs in the contemporary family. In ancient cultures the function of adoption was primarily to ensure continuity of the childless family for the purposes of inheritance and ancestral worship. In a number of instances adequate consideration was given to the need to provide for consolation for the emotional strains of childlessness. Roman law shaped adoption in accord to the existing needs of society providing for adrogation of adults to provide an heir and a child for the childless person and adoption to increase the size of the family. Justinian advanced the methods in the forms of adoptio plena, placing a related child as a child of the adopter, and adoptio minus plena with the simple purpose of providing an heir. A combination of the latter forms was inherited by the civilian legislations of the recent past and among them is the Greek Civil Code. Scots law, on the other hand, like many common law systems ignored adoption until early this century. It was first introduced in 1930 for the benefit of parentless or neglected children - a concept later adopted by civilian legislations. Within this scheme the welfare of the child is inextricably involved in any adoption, reflecting a general social concern not only to save the child but to do so in the best possible way. This priority of the child's interests became the subject of bitter litigation in jurisprudence in its relation to the

interests of the parents (whether natural or adoptive). As a social measure it was bound, too, not to be destructive to the lives of other persons concerned. This threefold conflict it is left to the court to resolve under the general guideline that the welfare of the child is the first and most important consideration. Courts so far have adopted the form of a comparative assessment in this context - an approach which is found to intensify frictions between the parents and to leave unanswered questions as to whether the natural relationship could be saved by other means. It is recommended that instead the decision should be in two parts, first an assessment of the natural family to be followed, when adoption is held the proper solution, with an assessment of the placement. The issues to be faced by the court in deciding for a particular placement are various and refer to almost every aspect of the parent-child relationship. Health and physical fitness are of paramount importance for their bearing on the upbringing of the child. The same applies to the character and morality of the applicant while wealth comes as of secondary concern. Home environment is also an important factor along with other family circumstances, in terms of their effects on the happiness and psychological welfare of the child.(Chapter four).

In line with the importance attached to the welfare of the child there is evident a tendency in the laws to reduce legal prescription in order to increase judicial and administrative flexibility in arranging adoptions. Thus the basic requirements are for the child to be within the limits of age and personal status so that it can be in a proper sense the child of the adopter. For the applicant, apart from domicile, the laws also refer to questions of age and status. The complex arrangement of the Adoption Act 1958 required repeal by the 1978 Act, setting the lower limit at the 21st year to avoid the risks involved in teenage marriages. In Greece the high limits of the civil code were

lowered to the age of 35 by the LD 4532/1966 and to the age of 30 with the LD 610/1970 (with the allowance for adopting at the age of majority where there are special reasons). The relatively high limits in Greece relate to the fact that the law adheres to single applications and to the condition of childlessness. Nevertheless, the choice of the age limit in both countries is based upon assessment of the experience required to perform parental roles in the artificial relationship of adoption. The married status of the applicant is a prime requirement in Scots law whereas in Greece it is implicitly involved. Exceptions are allowed on separation, disappearance of the spouse or on his mental illness. Scots law is directly concerned for the child to be adopted jointly by two spouses and permits adoption by single persons only exceptionally while Greek law, adhering to single applications, permits a married person to adopt with the consent of the other spouse. The old formula of childlessness, though generally deplored, constitutes a rigid condition in Greek law which may be waived only under exceptional circumstances. Thus, a person having legitimate issue is permitted to adopt only if it suffers from an incurable disease, which involves rather a difficult family environment, and to legitimate a de facto relationship. With regard to adoption of natural children, step children and adoption by relatives, though this is generally permitted, current policy regards it as only rarely suitable since it makes no substantial difference to the care of the child and extinguishes the relationship with the other parent. The latter could become an aspect of considerable importance in adoptions by a natural parent alone or jointly with the step parent if any distinction between children born in and out of wedlock were to be removed. (Chapter five).

Probably the most crucial and controversial aspects of adoption emerge with the parental agreement. It is with this requirement that the court

has to make essential assessments about the natural relationship and to award or refuse decree irrespective of whether the parents had agreed to the child's adoption or the court had been requested to dispense with it. Since each law initially requires the free and unconditional agreement of the parent his attitude illustrates clearly the degree of awareness that he has about his capacities to bring the child up. The matter nevertheless touches biological parenthood and, therefore, involves a number of issues in relation to the reform suggested earlier. The natural father has no power to agree to the child's adoption unless by the rights attaching to voluntary acknowledgement in Greece. In Scotland he may challenge the proposed adoption by applying for custody and in Greece by proceeding to voluntary acknowledgement. The proposal to give natural fathers the right to agree to adoption was met with objections from many quarters though neither satisfactorily nor altogether convincingly as to why the unmarried parent should have different treatment from the married one. Thus it is considered to be a positive step both to secure that effort is made to trace him and require his agreement. Complications may arise with the mother's husband if the mother alleges him not to be the father. The matter may be best resolved with a declarator of bastardy though it is suggested that it might also be resolved by the court in the relinquishment procedure. The propositions of Houghton alter the amount of proof needed to rebut the presumption and additionally are found prejudicial to the child's interests. The matter nevertheless involves further complications because of the diversity in the attitude of the spouses and the question of the true paternity of the child so that the solution of custody becomes rather dubious. Probably a way out of this problem could be given by the court making extensive use of its inquisitorial powers. A body assuming parental rights has no consenting power but a guardian has, and his agreement is always needed in Scots law and it is in Greek law if there are no parents to consent.

The power of the court to dispense with parental agreement is exercisable in circumstances which contrast with what is considered as appropriate performance in parental rights and duties and may be classified under the following headings :

(a) Unfitness or neglect of parental duties including abandonment or neglect, illtreatment and failure to discharge parental duties. The grounds included in this section prove objective failure in the duties and therefore culpability in the conduct of the parent may be of little importance. However the grounds have been treated by the courts with considerable caution so that they have been successfully invoked only in extreme situations involving considerable risk to the child. A more flexible construction of the grounds under this heading may avoid such risks and at the same time may resolve problems faced in both jurisdictions if the decision to place the child for adoption follows that on the survivability of the natural relationship. In this respect an effort is made to assign a central meaning to each ground and define the scope of its application. The power of the court may also be exercised

(b) if agreement is unattainable because the parents cannot be found or suffer from mental illness; and (c) if the parent is acting unreasonably. The latter is one of the most frequently invoked and contested grounds in Scots law and probably demonstrates more than anything else the difficulties in maintaining a balance between the conflicting interests. Its application has given rise to what has been described as two distinct schools of judicial thought: the one following the special construction requiring a degree of blameworthiness in the parental conduct while the other, the natural, giving weight to the welfare of the child, considering it possible for the parent to act unreasonably even when there is no element of culpability or reprehensible conduct. This approach, as adopted by the House of Lords, received the support of the Houghton Committee so that today it is acclaimed as the one and only construction

of the ground. However, the ground can successfully be invoked only with a particular placement in mind and therefore courts may be faced with problems given the increasing use of anonymity and the introduction of relinquishment procedure. The concept of a two-part decision as described above is argued to be the proper approach for this case also. In Greek law, unreasonableness of the parent is not expressly provided in the grounds for dispensing with agreement though it may be supported under the grounds of abuse of right. The power of the parent to withhold agreement under the welfare policy for the adoption of minors arguably has lost its character as a natural power. Comparing the grounds under which parental agreement is required it becomes obvious that the right of the parent receives consideration where the parent-child relationship appropriately exists. Therefore, it rather becomes a functional right as with the rest of the parent-child relationship and as such is subject to judicial control. (Chapter six).

The reduction of legal prescription along with the introduction of adoption as a social measure makes the adoption procedure, whether judicial or extra judicial, one of the most critical aspects of the order. Thus both laws provide for an adoption service which, under Scots law, is delegated to the local authorities or adoption agencies. These have the duty to provide for a comprehensive service including facilities for making proper assessments for the initial placement and for dealing with any problem that may arise before and after the order. In Greek law departments of local social services and certain infant centres are charged with investigatory duties in relation to placements and with after care supervision. Consequent on the advanced adoption service in Scotland the law prohibits private placements - an aspect still lacking in Greek law. Special care is given in the laws to prevent the trafficking of children and the court may direct such terms and conditions in the

order as it thinks appropriate for the welfare of the child. A duty is assigned to the adoption agencies in each country to prepare a report for the court. In Greece this is the only report prepared for the court whereas in Scotland an additional one is prepared by the Reporting Officer and is more concerned with the natural relationship. A special procedure introduced in both laws permits the parent to relinquish parental rights to an adoption agency in advance and has been introduced with the purpose of easing their situation and eliminating the uncertainty about the future of the placement. Under this procedure Scots law shows adequate concern for the protection of the parent's rights whether he agrees or not to the making of such an order as well as for his desire to be informed of the child's future, and even allowing him to apply to resume parental rights. In Greek law such procedure can be used only with the concurrence of the parent and is irrevocable. Scots law also nevertheless complements the pre-order procedure with further requirements. The child has to live with the applicants for sufficient time for the necessary assessment of their suitability to be carried out and this period may not be disrupted by removing the child from them. The same prohibition applies for children under the care of local authority if a person who has provided a home for the child for a certain period gives notice to them of his intention to apply for adoption. From then on the child is deemed a protected child and is subject to intense supervision. A notice of the hearing has also to be served to the persons concerned under each law.

The extensive use of social work in arranging adoptions does not in any way diminish the role of the court in either country. The Court, which for Scotland is the Sheriff Court or the Outer House of the Court of Session and in Greece the City Court, retains its power in upholding or rejecting any decision taken so far and may endorse a variety of different

assessments and arguments. It has the power to appoint an expert assessor to help with evidence and a person to defend the interests of the child. Under Scots law it will have further assistance from the report of the Reporting Officer on matters concerning the dissolution of the natural relationship. The only drawback to be noticed is that this involvement starts late in the process which is inadequate in respect to the importance of the duties involved.

On the basis of the wide power of the court it is argued that the order should be considered as a judicial act, which has consequences for the validity of the order given non compliance with certain conditions. As to its revocation, this is possible under Scots law if the child adopted by his natural parent has been subsequently legitimated while in Greek law it is permitted on a variety of grounds. Thus the order may be revoked if there is danger to the child's welfare, upon reasons justifying disinheritance or upon ingratitude towards the adopter. With regard to the status conferred by the order, in both laws it is that of legitimacy with the major distinction that under Scots law the natural relationship is extinguished in all respects whereas in Greek law it remains virtually un-affected. This, of course, is a major defect in the order since it runs counter to the effort to integrate the child in the new family. (Chapter seven).

# I N T R O D U C T I O N

To the many who are concerned with the current position of the parent-child relationship certain aspects of this study will come as something not entirely new. The diversity of the laws, in terms of the recognition they afford to biological procreation as the basis of the parent-child relationship, is a subject that has constantly aroused interest, however furtively, in its long history. Nevertheless, everybody acquainted with the matter is aware of the importance attributed to the parents in the child's life and how this has affected the revival of interest in adoption as a measure either for radical intervention in a dysfunctional relationship or to find substitute parents for the parentless. The problems involved in each area of the law are familiar to all lawyers, sociologists and social workers, though seen from a different perspective and thus not always compatibly in terms of recommendations. These are known, too, to have a commitment to different priorities in their respective tasks and a different emphasis on certain values. This, somehow unavoidable, division has, however, resulted in all too great a distortion of approaches in an area requiring cohesion and coordination in perspectives. A jurisprudence, that seeks to render justice and equity in legal reasoning, finds its way not without difficulty amidst these diverse approaches and frequently has been torn between the attraction of opposite poles. It can be argued, however, with the certainty that one is allowed in a society which is constantly moving, that the situation has become somehow clearer recently with regard to the position that legislation is bound to take towards biological relationships and the role of adoption as an alternative to or substitute for natural parenthood. First impressions have been reassessed while a variety of alternatives, suggested and frequently

tested in the battle-field of life, have manifested inadequacy. Thus the conditions now seem mature enough for using this experience as a basis for a rethinking of the relationship, especially since a growing consciousness of the rights of the child points alarmingly to some fundamental misconceptions in the area.

Once put on the agenda of social scientists the problems appearing in the parent-child relationship, and the relationship itself, have seen a flourishing of analysis and concern. And the weight and significance of their observations have resulted in what can be seen as one of the greatest shocks ever received by dogmatic legal thinking. As far as family law is concerned its basic philosophies have reflected, as they still do to an extent, an authoritarianism founded upon concepts of a social deontology not altogether reliable in its perceptions and probably never submitted to a thorough examination in its implications. Without either exaggerating or over-simplifying the matter it may be argued that family law appears to be replete with doctrines comprehending rigid lines of human behaviour which prevailed at a time when enforcement was possible or justifiable, but which are generally understood to be outmoded in terms of present realities and the prevailing trends of contemporary thought.

The parent-child relationship, being a state of dependency and one undoubtedly of diverse social interest, has always been the subject of compulsory legal regulation and thus affected by legal philosophies and sociological influences. Being reflected in the traditional idea that sees children as an extension of their parents who ought to and should be responsible for them until they become independent, the legal regulation of the relationship accords to whether the parental relationship measures up - fully or partially - to prevailing social

norms. Marriage, as a form of parental unit featuring permanency and promising constant care for the child, has been selected to play a key role. The imposition of this standard, however, has not been irrelevant to the acknowledged interest in the family as a bond holding society together and the "securing point" of its existence. The same assumptions determine whether the relationship will receive society's support or censure, this resulting in discrimination against children born out of wedlock. However, this combination of reason and tradition in the law is presently at the centre of intense and bitter jurisprudential controversy. Drastic changes brought with industrialization, the wars and social upheavals recently experienced, urbanization, the advent of consumer society and the social revolution of the sixties have profoundly changed ways of life and altered traditional outlooks, creating a demand for the questioning of traditional values. Further, an ever growing consciousness of the rights of the child has brought to the forefront the law regulating parental status and the necessity of discrimination.

An increased examination of social disorganization by various commentators has led to reforms in the substantive rights of both legitimate and illegitimate children, this tending to accelerate in recent times. To appreciate their value, in respect to illegitimate children, however, one must bear in mind that these have been problem orientated reforms, weakening to some measure the bastions supporting discrimination. The important aspect of this process, however, is that it has brought the gradual redefinition of the parent-child relationship. The child is no longer seen as a continuation of his parents, importance being attached to his independent social membership. His welfare and the satisfaction of his rights enjoy the express concern of the state

which constantly reinforces its right to intervention in all aspects of the parent-child relationship. It was not, however, until the very function of parental roles in the marital family had been questioned and the single parent had been credited with the possibility of bringing his child up that the importance of the social membership of the child started gaining significance for his legal status. The demand appeared for a new equilibrium securing complete recognition of the child's rights irrespective of the parental relationship that had produced them. This has been recognised as a basic fairness to the child whose rights have to be equal at a social level. In comparison, therefore, with what was done in past decades, it seems that the situation calls for a complete reversal of the objectives to be achieved, with a view to removing the traces of a vanished past and to bringing law into harmony with contemporary reality.

This change of principle also affects the role of adoption. As a method creating a complete relationship between a strange child and a parent it retains its value as a radical alternative to dysfunctional natural relations. Its scope, however, has been extended by seeing it as a respectable way of covering up illegitimacy and legalizing the position of children joining families which had been reconstituted by new marriages. It can be readily appreciated from the foregoing that it is necessary to restore the method to its primary function in accordance with the new dimension given to the child's status and the concepts and needs of our time.

The tasks undertaken by the study among other reasons determined also the selection of the systems to be considered. Both have been informed by Roman law principles and therefore share certain similarities.

On the other hand Scots law has developed largely as a common law system and thus is more responsive to contemporary needs. In this respect it is of great help in revealing various stages of policy development in relation to natural parenthood and at the same time presenting positive information helping to overcome the inherent conservatism of the law making process. A fine example of this is in terms of the fears expressed over the attribution of succession rights to the natural child and the fact that in the 15 years of their operation they have not raised any substantial difficulties. Another example is the significant step made by the Children Act 1975 which recognises the importance of the natural parents, irrespective of the family status of the child. The Act considers it to be in the child's best interests and thus as his first claim and right to grow up with its own natural parents where continuous care can be maintained and biological and psychological bonding develop simultaneously. Consequently, any form of intervention has been given the aim to restore the child to his family unless the latter is impossible. Also in terms of adoption, unlike Greek law which has a long tradition and is influenced by this, Scots law is distinguished by its purity and clarity of purposes, largely by virtue of its recency. The two laws, therefore, provide an interesting basis for comparison.

The primary task of the present study therefore will be to survey the laws of Scotland and Greece establishing the nature of relationship with the natural parents and testing them in the light of present social conditions. This is carried out in the first part of the study, which also examines proposals for reform in relation to the evidence obtained from this assessment and in line with the new dimension given to the child's interests in its social membership.

In the second part the institution of adoption is considered as a means to secure the importance attached to parents for the development of a child by a relationship of the proper calibre. Emphasis is placed on the fact that adoption must remain a mechanism of last resort, and its aims and scope are defined accordingly, as well as on its position as a measure lacking a practical alternative of the same standard, this having a particular significance for the qualifying conditions of the adopter.

The coexistence in the law of two methods of establishing parenthood is not without problems and requires careful definition as to the scope of their application. It is of importance to prevent the existence of adoption from being prejudicial to the rights vested in the blood tie with the natural parents, as well as to prevent the emphasis on the natural relationship from running counter to the importance of the parents for the daily care of the child. The problem is connected to a fundamental issue in current legislation on children: protective intervention as against protective prevention, which is a highly contested matter among legal and other commentators. It must be recognised that to establish a boundary between the two is extremely difficult for the legally orientated person, since the leap from natural to artificial paternity involves a variety of other measures which, though legally recognised, operate within the framework of the welfare services and have an application according to the circumstances of each case. The issue, however, has received some attention in an attempt to assign a central meaning to the principles that should govern the orientation of the child's status.

As may be understood from the foregoing, the study is inextricably

involved with law, which is treated by the traditional comparative legal method discussing systems concurrently and examining them issue by issue. At the same time attention is paid to not obscuring important relationships in the interaction of independent issues within each system. By the terms of reference, however, consideration is given to non-legal material in an effort to trace and formulate an idea of the present social context. This process has not always been troublefree since it has revealed the lack of a collective and systematic approach to the wide range of factors relevant to the central issue and therefore, in a number of cases, a failure to offer any coherent basis for legal activity. Also, bearing in mind the difference in perspectives and aims, caution needs to be employed in the use of these materials.

Where existing law and practices are concerned the aim will be to avoid interfering with legislation if it is found to be responsive to the demands that emerge. In addition, where a need for change appears, attention will be given to whether the matter can be resolved by interpretation and, if not, to whether the need can be accommodated within an already existing practice. In the belief that the making of detailed recommendations is not a task that can appropriately be handled by an individual work, I shall refrain from doing so where major changes are required. Instead, there will be offered an examination of possible solutions or contributions relative to the problem, analysing these on their merits and assessing their suitability. The main legal material used will be Case and Statutory law in respect of Scotland and the Positive law along with precedents in respect of Greece. Also, extensive use will be made of commentaries in respect of each system. Where it appears that there is no Scottish precedent

it will be necessary to illustrate the arguments by reference to English material, for while it is appreciated that the two legal systems are distinct they appear, in the main, to have developed their approaches in parallel.

# P A R T  O N E

## THE ACQUISITION OF RIGHTS AND DUTIES

## THROUGH BLOOD RELATIONSHIP

# I N T R O D U C T I O N

This section is concerned with the creation of a legal relationship between a parent and his child with reference to the blood relation existing between them. Universally, biological parenthood is treated as the source of the recognition of legal links between a parent and his natural offspring. This is, then, expected to have had a considerable influence on the formation of the relevant laws of Scotland and Greece. On the other hand, from the very distinction between legitimate and illegitimate children, it becomes obvious that the two countries do not readily accord the same status to any child which,by reason of its birth, is submitted to their jurisdiction. A child which seeks to acquire legal rights from his parents can be faced with various forms of recognition, mainly generated from rules referring to the conditions of his birth or to his acknowledgement by the parent. A fundamental question would be, therefore, what kinds of recognition - if different - the two countries have accorded to their children and what conditions have to be satisfied in each case.

Moreover, as long as the concern of this study is to assess the satisfaction of children's rights in Scotland and Greece, it is of primary importance to reassess, in the context of the present section, possible aspects of discrimination in the acquisition of a different legal relation with the parent. Thus, attention is directed towards the legal obstacles,whether they be of absolute character or not, which generate the discrimination, and whether it is justifiable to preserve them any longer. Particularly, in respect of the illegitimate child this field of the present law contains a number of anomalies and it is not doubted that reform is necessary. It is suspected that on the basis of a trivial morality

is maintained one of the most severe forms of neglect and discrimination against this class of children, which attributes an inhuman and irrational aspect to the law. Therefore, in view of the social as well as the legal importance of the matter the raison d' etre of any discriminatory aspects of the law will be commented on as widely as possible and certain suggestions for reform will be made.

Prima facie, relevant to this section are the "semi-legitimate" children created by divorce and/or remarriage of the custodian parent. It is assumed that certain provisions are laid down to preserve unaltered the privileges enjoyed by the child in relation to both of his natural parents but one cannot, however, ignore the fact that, whatever the protection is, certain differences may exist between them and their legal equals in the new family. However, since the matter relates more to the operation of rights, it will be more appropriately dealt with if discussed along with the child's substantive rights in the relevant part of this study. The marriage may also open another dimension in the child's rights, mainly arising from the relationship of affinity. However, what concerns the present study are possible legal rights and duties that may directly bind the spouse and the child. Therefore, the existing provisions - if any - will be examined from the angle of their operation within the step-relationship and not within the wide scope of the affinity kinship in the part dealing with the child's substantive rights.

The area of the law which relates to the above questions is mainly that of stipulations in the positive law. Nevertheless, it is expected that certain aspects of procedure may play an important role in the subject. Accordingly, besides a review of the substantive

law the rules of procedure will be given coverage as long as it indicates any discrimination concerning protection for the legal status of the child.

The possible legal stages in the child's life are best revealed by describing: first, the situations whereby the child obtains the status of legitimacy either by reference to the marriage of the parents or by an acknowledgement; second, the relation with each parent in illegitimacy and the methods available for improving defects in the relationship by means of affiliation.

# C H A P T E R  O N E

## ESTABLISHMENT OF A COMPLETE RELATION WITH BOTH PARENTS

### A. LEGITIMACY

#### I. Principal approaches in the two laws

By legal definition, under Scots and Greek law, a child born to a married couple has complete legal relationship with his parents. This is to say, a fully-fledged membership of the family of both parents generated from the fact that either its conception or its birth took place within marriage. The long standing maxim of the civil law "mater semper certa est etiam si vulgo conceperit: pater vero id est, quem nuptiae demonstrant"[1] appears to have an indispensible application in both jurisdictions for the creation of the relationship. Thus, maternity is ascertained through birth, a fact which may be easily proved by ordinary means of evidence while paternity, since it is rather difficult to prove, comes into existence by legal fiat. The husband is presumed to recognise in advance, as his own, the children born to his wife.[2]

However, because maternity is traced through birth, while paternity is presumed as that of the husband, the legitimate status of the child becomes a purely legal construct. Each law may, therefore, utilize different considerations in terms of its inception and extinction. Thus, it is expected that the concept of legitimacy may not simply rely on the fact that, at the time of birth, the mother was married. It may be related to a number of particular presumptions, like the presumption of intercourse, conception resulting of that intercourse and the period of gestation, according to the rules of law and morality dominating each particular system.

Consequently, there may be a different approach, if the circumstances of the conception of the child do not make it legally or morally clear that the husband is the father. For instance, if the child is born shortly after marriage so that it could not have been conceived within marriage. Obviously, the mother, at that time, was neither legally nor morally bound to have intercourse with the person with whom later she effected a marriage. But even with conception within marriage, fatherhood is by no means certain. The high incidents of adultery make an absolute assumption to be unreal and arbitrary. It is necessary, therefore, to examine when and upon what conditions procreation by the husband is considered probable so that the child would be deemed legitimate. In relation to the legal conceptualism of legitimacy, the legal existence and the legal validity of the marriage of the parents may give rise to different approaches in each law. For example, marriage which does not have a formal foundation in each law is not sufficient for raising the presumption for the husband. Furthermore, even if it has a legal subsistence but with certain defects it may raise a presumption against the husband though this will depend on the nature of the defect.

Once legitimacy has been established, the implications of the presumption become of great importance for the child. Earlier, it was implied that paternity is not certain but is normally presumed for the husband, because of the probability which exists that he is the father. In relation to this probability, each law can insist on accepting his paternity and normally will not require its attestation. This practice, presumably, manifests years of experience and is rooted in the very nature of marriage. Actually, the stability and nature of the relation universally opens the way for the legislature

to take for granted certain facts and to credit married parents with a complete set of rights and duties in relation to their children. As a matter of fact, this de jure acquiescence to the relationship is transferred passively in the prevailing opinion of society. However, such assumptions are helpful as long as they are true. But, if the husband disputes his paternity, should the presumption remain in force and, if not, by what means should it be overruled? This is a double-edged question so far as, in the way the presumption is raised nowadays, it may offer clear protection for the child's interests. Also, in point of simple justice towards a legitimated child, there may be a strong reason for protecting the status. On the other hand, if the husband has doubts as to his paternity, he will hesitate to comply with his duties. In connection with the above hypothesis, it is expected that provision is made in each system for the disavowal of paternity. Of particular interest are the means sufficient in each law to overturn the presumption, as well as the persons entitled to take the action. Also of significance are other interests underlying this protection of the child.

## II. The scope of the presumption for children conceived or born in wedlock.

In this case, in conferring legitimacy, both jurisdictions are primarily concerned with conception of the child within the marital life of the parents. Nonetheless, failing conception, if birth occurred within wedlock, this, under certain circumstances, may have the same effects. Hence, in Scots law, a child born to a married woman "if born sufficiently long after the marriage or sufficiently

soon after its termination, that it could have been conceived in wedlock, is presumed begotten by her husband and, therefore, legitimate".[3] Similarly, articles 1465 and 1466 of the Greek civil code presume the child conceived during the mother's marriage as the natural offspring of the husband, if born no less than 180 days from the date of its celebration or within 300 days of its termination.[4]

A child born after the termination or dissolution of the marriage is considered illegitimate in both laws, if it could not have been conceived in wedlock. Thus, in Scotland, a child born beyond 10 months after the dissolution of the marriage is illegitimate.[5] Nonetheless, the period may be shortened or extended in specific circumstances.[6] In Greece, according to article 1470, a child born later than 300 days from the termination of marriage is illegitimate, and no evidence or admission of paternity could alter the status of the child.[7]

Furthermore, both laws coincide in raising a presumption on behalf of a child conceived before and born after marriage. Such presumption is readily available to cover any pre-marital conception, but, depending on the circumstances, it may be considered weaker or stronger than the brocard pater est quem nuptiae demonstrant. Particularly, because paternity is presumed otherwise than by conception in marriage, the presumption may derive its enforcement from evidence tending to prove pre-marital intercourse between the parties, or knowledge of the pregnancy of the wife before marriage. On the other hand, when marriage took place at an advanced stage of pregnancy, paternity of the husband may prove irresistible.

Under Scots law, the presumption pater est quem nuptiae demonstrant applies exclusively to a child who could have been conceived in marriage. For a pre-nuptial conception, there is a presumption hominis et facti different in character and strength, but in its effects as powerful as the presumption raised in nuptial conceptions.[8] This presumption is raised ipso facto in any pre-nuptial conception, whether it is obvious or not that the husband is the father. However, the law has been developed in so far as the presumption can be successfully invoked as much on account of explicit evidence indicating that conception could have been occasioned by the man who subsequently married the mother, as by inference from the conduct of the husband, after discovering the pregnancy of his wife. This is illustrated by Gardner v. Gardner[9], where it was held that the presumption applied in the case of a man who had arranged to marry a woman to his knowledge pregnant and where there had been opportunities of pre-marital intercourse between them. Both knowledge of the pregnancy and pre-marital intercourse had to be sufficiently proven. The ratio of the case was applied and developed in a number of subsequent cases. Thus, in Reid v. Mill,[10] it was held that, besides great intimacy, great familiarity followed by marriage raises a presumption as to the paternity of a child almost as strong as if it were born justo tempore. And this may hold, even though intercourse was not admitted or proven beyond reasonable doubt. In Kerrs v. Lindsay[11] the marriage itself raised a strong presumption against the husband. In this case, the husband knew of the conception beforehand, and intercourse with the defender (other than the husband), approximately at the date of conception, was admitted and corroborated. The defender had confessed to a witness that he suspected himself to be the father, while familiarities with the husband were proven after the probable date of conception. However, the fact that he had

married the woman was viewed "as an attempt to do his best to repair a wrong he had done" to her.[12] In subsequent decisions this approach was extended, so that the presumption stands as long as the husband, knowing or not of the pregnancy, takes no action to disclaim the child when he has grounds for suspicion.[13]

In Greek law, for a child who could not have been conceived in wedlock, there is a readily available legal fiction of legitimacy which is transformed to an almost irresistible presumption if the husband admits paternity or if it is so proven against him. According to article 1468 "a child born in less than 180 days from the date of marriage is deemed legitimate, unless the husband within three months from the date he first obtained knowledge of the birth, controverts his paternity with a declarator notified to the registrar of births". The right of the husband, however, is revoked and the presumption covering the child becomes irresistible if birth was connected to circumstances converging to establish his fatherhood. Specifically, a declarator against the presumption of article 1468 "is precluded and, if submitted, fails to affect the status of the child, if (1) the husband knew of the pregnancy of his wife before the marriage; (2) it appeared in the registration report that he himself or a specially appointed representative attended the delivery without raising any objection; (3) it was proven that he had had extramarital intercourse with his wife at the relevant time; (4) the husband acknowledged in whatever manner the born child".[14]

Apparently, the grounds just mentioned operate on the same spectrum of proof as in Scots law and have the same effect on the presumption. However, in Greek law, if there is one of the afore-mentioned grounds, this is sufficient to abolish the right of the husband to declare

the child illegitimate.

If the child is born before the date of marriage, neither law raises a strong presumption against the husband. The fact that delivery had occurred shortly before marriage, or that paternity had not been admitted to date has not been treated, in either law, as evidence converging to indicate the husband as a father.[15] There is, however, one exception under Scots law which should be mentioned here, to wit, if the child is born prematurely and because of that prematurity the wedding, which had been arranged for a certain date, had taken place after the birth. In this case, the child is covered under the presumption applying to ante nuptial conceptions.[16]

There may be conflict within the presumption, if a woman, who is widowed or divorced or whose marriage has been annulled, remarries while pregnant. In such a case, under Scots law, a declaration of paternity may be needed if there is no paternity otherwise admitted or disclaimed.[17] In Greek law, if the mother remarries within 9 months of the termination of the former marriage, in violation of the relevant prohibition - provided that neither husband disputes their paternity - article 1467 assumes the child to be that of her former husband, 'if it were born within the first 270 days, while, if born after, is deemed legitimate of the present one. The presumption is rebuttable and evidence providing the contrary could establish or rebut paternity for either party.[18]

A matter which calls for attention, in the present section, is the way the two countries deal with the period of gestation. The point is examined not only for the completeness of the present discussion but

because of its deterministic appearance in the operation of the presumption. Besides, it is contested whether the presumption of gestation should constitute a rule of law or should be permitted to fluctuate in the light of medical evidence.

In the first place, both laws adhere to a legal presumption of conception ranging, in Scotland, from six to ten months, and in Greece, from 180 to 300 days prior to birth.[19] However, according to the prevailing opinion in Greece, the presumption is irresistible and evidence tending to extend or reduce the period is inadmissible.[20] On the other hand in Scotland, the problem has been treated more realistically. Thus, without departing from the prescribed period of gestation, it is admissible to prove that the period of gestation could exceed the ten months.[21] As Walker and Walker point out "while the courts are regarded as having judicial knowledge of the normal period of gestation, the question of whether a clearly abnormal period is a possible one is decided in each case in the light of medical evidence led and the maturity or otherwise of the child at birth. When the period diverges largely from the normal, the burden of proving ... illegitimacy is more easily discharged".[22]

The case may be rather uncommon but the fact that Scots law envisages the possibility of correction from the normal degree of development of the child is to its credit, because it indicates an interest to sustain true relationships. A good example would be the case where conception had occurred the day before a husband's fatal accident and when gestation exceeded the normal period. The child would have been regarded illegitimate in circumstances whereby the kinship with the father's relatives would be of paramount importance for the child.

The last but decisive aspect determining the scope of the presumption is the marriage between the parents. It has been quite obvious from the analysis on the merits of the presumption that almost every aspect of the legitimate status of children under Scots and Greek law is founded by reference to the marriage of the parents. There are a number of questions to be answered in respect of this strong association of legitimacy with marriage and the topic will be opened again. However, the aspect which is to be examined now concerns the legal validity of the marriage of the parents and whether certain defects in the marriage are permissible in the attribution of legitimacy.

Under Scots law, the marriage of the parents raises the presumption, if it is formal and lawful.[23] The irregular marriage does not raise it, though previously in a marriage by habit and repute this was possible, if a declarator had been issued by the Court of Session. In this case, a marriage certificate is available for the registration of the child. If, otherwise, the marriage of the parents is defective, the effects of the marriage on the legitimacy of the child vary according to whether the marriage is void, putative or voidable. The problem appears to have some complexity because children of a void marriage are not accorded legitimacy .[25] Moreover, some concessions are made in respect to marriages which possess the status of a putative marriage. This is to say a void marriage for which at least one party - "honestly though erroneously" - believed that they were under no legal impediment to marry and consequently did marry. The error of the parties, however, should be one of fact and not of law in order to be accepted within the limits of bona fides.[26] For example, if one party entered the marriage in ignorance of the

existing marriage of the other party, the children would be considered legitimate. On the contrary, if he/she entered the marriage knowing of the bigamy of the other party, while believing that the new marriage would revoke the previous or that it does not impede the party from marrying again, in this case the children would be illegitimate. Also, it is an error of law if the party was aware of the other's insanity and believed that this did not prevent him/her from entering into marriage with the insane person. It is a question of fact, on the other hand, if the party entered the marriage in good faith, ignorant of the insanity. Though a putative marriage has legitimating effects upon the children, nonetheless, it is argued that the same marriage may not have this effect upon all the children. According to Fraser if the child had been conceived after both of its parents had discovered that their marriage was void, the child would probably be illegitimate.[27]

As to the voidable marriage, it also had legitimating effects. The case, however, is of little interest because a marriage in Scotland is considered voidable only on grounds of impotency.[28]

Greek law has a more pragmatic approach so that any marriage formally celebrated according to the stipulations of articles 1367 and 1371 of the Greek civil code legitimates the natural issue of the parties whether it will turn out to be void or voidable. As regards those marriages, the rule is that, once celebrated, they are regarded as valid until declared null by a court. The decision reverses all the results for the spouses but leaves unaltered the status of the children. It is irrelevant for the existence of the marriage whether the parties had entered the marriage in good or bad faith, and this should simply affect the consequences of the marriage upon

the spouses.[29]

The only exception provided to the legitimating effects of a void marriage concerns children born or conceived in a marriage void on the grounds of incest, if consummated between siblings or relatives of the same line. Those children, by legal fiction, are deemed natural children with the rights of a voluntarily acknowledged child. Children of marriages between further collaterals are deemed legitimate.[30]

The marriage raises the presumption of legitimacy under both Scots and Greek law as long as it legally exists. If the parties are informally separated, the marriage is considered an existing one and the children born to the wife are presumed begotten by her husband. But the presumption is not raised if the parties have been judicially separated a mensa a thoro. The husband, in this case, is not entitled to access to his wife.[31]

Aside from any comments which one could make in respect to the operation of the presumption within these stages of marriage, - a matter which is dealt with later in the protection of the child in legitimacy - there are some points to comment upon, as regards the void and putative marriage in Scotland and the marital formalities in Greece. The distinction between void and putative marriage in Scots law clearly manifests a transmission of the parents' faults to their children. Indeed as Clive observes in his valuable analysis on "Void and Voidable Marriages in Scots Law", the sanctions of void marriages are severe and unfair which nevertheless in the present state of law "bear most heavily on children and which may penalize the innocent rather than the guilty".[32] Moreover, with

reference to the functions of the consequences of voidness he finds them to be less a sanction and more a result of the application of the general principle in question. Thus, since the sanction has the purpose to protect that principle the extent to which nullity as a consequence can be justified depends on the importance accorded the general principle. Consequently in the instance of bigamy or insanity maybe there is at present no demand for such downgrading of the principle of monogamy and the principle that a judicial act requires an element of mental awareness. Nor is there any need to modify the principles in order to prevent hardships.[33] But when the question comes to why the action is brought by the other spouse, the obvious answer is that the spouse acts in order to be relieved of an apparent tie when the relationship ceased to work. It is not brought to punish anyone, or to uphold any fundamental principles.[34] Therefore, aside from the legal justification in holding a marriage ineffective ab initio, if there is bad faith among the parties, or if it is done in violation of the law, it is possible to alter its consequences so as to prevent the unjust consequences to children.

In support of this, one could add that a void marriage has some semblance of marriage and a public nature. The parties will usually have gone through a marriage ceremony and those formalities clearly emphasize, after the Marriage (Scotland) Act, 1977, that there is a social interest for the marriage to be expressed publicly, i.e. for the interests of third parties and society. Thus, in relation to social concern for children, it can be argued that it would be more appropriate to associate them with the external than the internal side of the marriage for the following reasons: the concept of the putative marriage, in its legal sense, is fictional as long as the contract remains defective and is subject to reduction. In this

context, legitimacy may be considered as a reward for the good faith of the innocent party which implies concern rather for the marriage than for the child itself. Moreover, both the inception and extinction of legitimacy moves from the principles of the presumption and depends on the proof and the declarations that the parents may present. This correlation, presumably, will turn out to be against the child because with its interests are connected the interests of the innocent party. The logical course would be for the party, liable for the defects of the marriage - in a stage where there is no remedy to preserve it - to try to remove the burden of its consequences, whatever the consequences would be for the child. A way out of these problems, apparently, would be a uniform approach to children of both putative and void marriages, or as Clive puts it "a desirable change of the law should include - an amelioration of the harsh and unfair consequences of nullity (i) by providing that children of void marriages shall be legitimate and (ii) giving the court power to make suitable financial provision."[35]

As regards Greek law, despite its broad recognition of children of both void and voidable marriages, illegitimacy becomes highly probable because of the formalities of marriage. The civil code enunciates a principle whereby a marriage, which has not been solemnised according to the religious formalities of the parties, is a non-existent marriage.[36] A strict rule in article 1367 renders irregular a marriage where one party is Christian Orthodox, if it is not solenmised according to the rituals of this church and by a canonical priest.[37] A marriage celebrated according to the lex regi celebrationis, if contravening this provision, is irregular.[38] As regards marriages between persons of different Christian dogmas or of different religions, the marriage would be irregular if not celebrated according to the

rituals of each dogma or each religion.[39] In the light of these restrictions, the possibility of a marriage being considered irregular and the children illegitimate is highly probable. Primarily, there is no provision for legitimizing children conceived within the civil marriage of Greek subjects residing abroad. But is also restricts marriage to persons belonging to a non-recognised religion which could create de facto cohabitation and de jure illegitimacy.

Before entering on the legitimation and the protection of legitimacy it is necessary to concentrate on some concluding remarks in order to clarify some essential principles underlying the inception of legitimacy.

For the law of both countries, biological paternity is not the fundamental fact sustaining legitimacy. It is a fact, which, if it occurred within marriage, confers the status of legitimacy upon the child. This is not restricted, however, only to cases where the child had been conceived and born in wedlock. Provision is made to be so deemed for a child born to a woman who was at the time of conception, or at the birth or at any time between, validly married to the father. Some distinctions, on the other hand, are observable between a child conceived in marriage and a child born in marriage. For the former, the brocard pater est quem nuptiae demonstrant provides a resolution where there is presumed intercourse between the parties, and conception of the child from that intercourse, so that the birth of the child, after a period of gestation verifies conception in wedlock. Therefore, legitimacy conferred, according to the above presumption, is not a result of ascertainment of paternity but it is so presumed because the circumstances of the birth of the child comply with the law. The

presumption is readily enforceable in any nuptial conception and normally is not founded on attestation. For a child conceived before but born within wedlock, the presumption applies ipso facto but appears to be less strong. It has a suspensible application until it is verified explicitly or implicitly in the circumstances which surround the child's birth. In general it needs admission by the husband or evidence implying such acknowledgement. A peculiarity noticed in this case is that the marriage is treated as evidence of paternity if pregnancy was so obvious so that it could be assumed that one of the intentions of the parties was to legitimate the child. The more obvious or known is pregnancy, the more it manifests itself in such intentions and strengthens the correctness of the presumption.

As regards marriage, it is observable that all the interest in both jurisdictions is concentrated upon its legal existence. By requiring marriage to be valid and lawful concern is directed to securing a parental relationship of some permanence. This may imply that there is a strong interest, in both countries,in the child living in a stable relationship, approved and socially acceptable and operating proper rights and duties for the child. This view, however, is contradicted by the fact that separation and divorce are more probable nowadays. It is also contradicted by the fact that legitimacy is conferred on offspring of defective marriages despite the fact that most of the latter are irremediably subject to reduction. It should be admitted, of course, that the number of legitimate children who grow up in the marriage of their parents is high compared with those whose parents' marriage have been dissolved or annulled. Nonetheless, however, the contradictions in the law demonstrate an absolute legal typology of the association of marriage with legitimacy and suggest

that, besides the interests of the child, the protection of social interests is implied. Towards the establishment of this view is indicated the distinction between children of void and putative marriages in Scotland and between religious and non-religious marriages in Greece.

## B. LEGITIMATION

The child may acquire the status of person born in wedlock under both jurisdictions with the subsequent marriage of the parents after its birth. Furthermore, in Greek law, legitimation by a court decree is possible and the child acquires the status of legitimacy in relation to both parents, although it is not recognised as having been born in wedlock. The Scottish equivalent to this method of legitimation is per letter principis.[40] Thus, although the cases recorded are rare,[41] it is held that the bastard could, perhaps, be legitimated by royal letters of legitimation. However, as this does not correspond to the usual procedure accessible to the general public, it is beyond the scope of the present study and will not be treated here.

A similar method inherited from the Byzantine tradition was present in Greece with the reinstatement of Byzantine legislation after the liberation. The Legislative Ordinance of 1926 had advanced the method to legitimation by an "act of the Ministry of Justice" which remained in force until its repeal by the civil code in 1940. The reasoning behind the repeal was that the administrative authority could not provide sufficient safeguards for an impartial application of the method and, therefore, it had to be submitted to the judicial sector.[42]

Currently, Scotland bases its law on legitimation in the Legitimation (Scotland) Act 1968 which codified and reformed the principles of the common law, while Greece treats separately legimation per subsequens matrimonium in articles 1556 - 1559 of the Greek civil code and legitimation by a court degree in articles 1560 - 1567 of the Greek civil code.

In the two jurisdictions variations principally revolve around the questions of whether all classes of illegitimate children should be legitimated or whether some should be debarred, on account of the canonical view requiring no impediment to exist during the child's conception; or whether a void or voidable marriage should have a legitimating effect. Sufficient resource for any inadequacies arising in Greek law comes from the legitimation by a court decree, although, in an overall assessment, the method appears to have major defects. Moreover, as long as the marriage alone does not raise any presumption, the way results may be obtained for a child born to the parties is disputed. A problem which may also be confronted, in Greek law, regards the legitimation of the child for whom there is presumption in operation.

As has been pointed out in the introduction, both jurisdictions discriminate against illegitimate children. Therefore, prima facie, it appears that legitimation still preserves its original value, in so far as the subsequent marriage, coupled with admission of paternity, remains a valuable device to establish legally paternal responsibility. The same is argued in Greek law, for legitimation by a court decree. One could perceive, on the other hand, that these remedial measures, in the context they operate, mainly re-strengthen the institution of marriage and supply reasonable excuses against the enactment of an

equal status for both legitimate and illegitimate children. One should not, for example, ignore the fact that the Canonists offered the privileged retroactivity of legitimacy to the child's conception while Greek legislation has allowed legitimation by court decree where there is an impediment to marriage between the parents and there is no issue of any existing marriage.

I. Legitimation per subsequens matrimonium

1. In Scotland, as Walker[43] points out the Common law, preserving both the views of Civil and Canon law, took the position that a child born out of wedlock was held legitimated per subsequens matrimonium if the natural parents were under no legal impediment to marry at the time the child was conceived and subsequently did marry. The bar in the Common law to categories of children being legitimated derives ultimately from Canon law, where the doctrine was introduced on equitable grounds for children born before and after marriage.[44] Namely, by legal fiction, the marriage was deemed to have been retroactively effective as from the date of the child's conception, so that the child would be considered as conceived and born within wedlock. Accordingly, an impediment existing at the time of the child's conception prevented this fictional retroactivity taking effect.[45]

In practice, this view was treated cautiously by Scottish courts, due to the odd situation which could have occurred if the mother married a third party after the child's birth and, then, having been widowed, married the father of the child. In fact, the concept of retroactivity has been seriously questioned in Kerr v. Martin[46] where the mother's illegitimate child could have gained priority over the several children of her prior marriage. The court, faced with

such a situation, took the view that legitimation should be based simply on considerations of justice and expediency, which resulted in the first loophole concerning retrospectivity. Arguably, the decision is inconsistent with any theory giving retrospective effects to the natural parents' marriage.[47]

Moreover, apart from retrospectivity itself, the bar of impediment became the object of criticism as failing to fulfill the purposes of its enactment. Namely the Scottish Law Commission, in its memorandum on legitimation, advocates its removal by reason that the survival of this bar cannot be justified on social grounds. In their view, the bar, mainly originating from the prejudice against adulterous intercourse, as weaking the institution of marriage, is a misplaced concept. Any marriage during the continuation of which the spouse has children by or to a third party is already virtually defunct. It is equally idle to suggest that the abolition of the bar would lower public morality since it is dubious whether consideration for the welfare of possible issue ever deterred any adulteror or fornicator. On the contrary, they found that "it penalises children who themselves are innocent by discriminating between them and not only their brothers and sisters conceived in marriage but also those who can be legitimated under existing law."[48]

A solution may appear in adoption, although it is rather a paradoxical suggestion for reasons discussed below. Firstly, it introduces a legal fiction whereby another fiction is considered inconsistent. Simultaneously, it is inconsistent from the point of both substantive law and justice for a natural parent to be acknowledged as fit and proper under the law of adoption but not under the law of legitimacy. Secondly, as the Commission itself noted from a practical perspective

procedure is burdensome and circuitous and points to the anomalous and ambivalent attitude in the law.[49]

The statute law has alleviated this situation, so that currently, a child conceived at the time when the parents were under legal impediment to marry may be legitimated by the subsequent marriage of the parents. Furthermore, the child is deemed legitimate from the date of marriage by virtue of section 4 of the Legitimation (Scotland) Act 1968. Hence, where the parents of an illegitimate child had married each other before the commencement of the Act,[50] and the child was alive at the date of marriage,[51] as well as the father being domiciled in Scotland,[52] the child was deemed legitimate as from the commencement of the Act,[53] if the marriage under common law did not effect legitimation.[54] The same applies to the descendants of the child if it had died before the commencement of the Act, as if the bastard had been legitimated from that date.[55]

Along with the remedy for children who could not have been legitimated previously, section one repeals the common law provisions, so that if the parents of the illegitimate child did marry after the commencement of the Act, the father is domiciled in Scotland, and the child is alive, the marriage legitimates the bastard from the date of marriage. Marriage for the purpose of the present Act includes putative and voidable marriage.[56]

Greece, on the other hand, inherited from the Roman law the doctrine of legitimation <u>per subsequens matrimonium</u> but effective from the date of marriage.[57] In the present law, by virtue of article 1556 of the Greek civil code, the illegitimate child acquires the status of legitimacy with the subsequent marriage of

his parents, if it is alive,[58] from the date of marriage.[59] The marriage legitimates the child provided it formally exists even though void or voidable.[60]

It should be noted that neither Scots nor Greek law refuses to extend legitimation to the legitimate or legitimated descendants of the child in question.

2. Although in principle, the method is provided on behalf of children for whom the presumption of legitimacy does not apply, there are still certain categories of illegitimate children excluded.

Thus, under Scots law, the child of incest cannot be legitimated, but no other children are excluded ab initio.[60a] Other instances where marriage may fail to affect the status of the child are when the parties had entered marriage in bad faith, or if it relates to a child for whom a presumption of paternity already exists and there is insufficient evidence to rebut it.

In Greek law a more strict approach premised in the impediments to marriage prevent the child of adulterous intercourse from being legitimated if the parents have been convicted for adultery and the decision is final.[61] Further, complications for this child may arise when the presumption operates for the former husband who has an exclusive right to disavow paternity. Thus, although the parents may not have been convicted for adultery, the child can never be legitimated by the subsequent marriage, if the former husband, for whatever reason, refuses to challenge the presumption of paternity.

Other disqualifications as well derive from the impediments of incest and differences in religion. The child of incest can never acquire a complete status, while the illegitimate child born to parents of whom the one is Christian and the other of different religion can never be benefitted by this form of legitimation since the marriage of those parents is prohibited by law.[62]

3. As a rule, in both jurisdictions, marriage legitimates any illegitimate child born to the parents and does so independently of the intentions of the parents or the consent of the child.[63] The marriage in itself, however, does not prove the husband's paternity, nor does it ever give rise to any such presumption for any illegitimate child of the mother.[64] Therefore, as an additional precondition, proof is required that the parties in the marriage are the natural parents of the child in question. Such proof normally finds its place under Scots law in a declarator for legitimation.[65] Specifically, in accord with the Registration Act 1965 where a child has been registered as illegitimate, entry may be made in the Registrar of Corrections as to its legitimation only where such legitimation has been founded in a court decree.[66] Moreover, by virtue of section 20(1)(c) of the same Act, the Registrar General may, in case of legitimation, authorise re-registration of the birth, "but not where paternity of the bastard has not been registered, unless with the sanction of the sheriff on the application of both parents, or the survivor or on behalf of the legitimated bastard, after intimation and inquiry".[67] Such declarator may be instigated, even after the spouses and the child's death, by his descendants.[68] Equitably, it is open to proof after the death of the parties involved that although the mother was married, the child was illegitimate.[69] The proof required for a declarator of legitimation cannot be assumed to be the same for all instances.

When it concerns a child for whom a presumption already applies, the proof must operate on two levels. In the first place, strong proof must be provided to overrule the presumption for the former husband as well as proof that the child in question is the issue of intercourse with the present one. For the latter, as well as for an illegitimate child for whom paternity has not been registered relaxation of the evidence as in actions of affiliation and aliment could be suggested.[70]

Although in Scots law, as a rule no presumption is raised and paternity need admission or proof and a declarator of legitimation, a certain "weak" presumption is held to apply, rooted on the bare fact that the man had married the woman to his knowledge having an illegitimate child.[71] Thus, if the child for any reason had enjoyed the status of legitimacy by common and unbroken reputation for a long period, this is not to be taken away if there is no evidence to prove the husband as the father.[72]

Greece creates in article 1557 of the Greek civil code an obligation for the parents to declare the child as their natural offspring after their marriage by serving a notice to the Registrar of the area where the marriage was solemnised.[73] Moreover, the article states that omission by the parents to declare the child does not affect a child born to them, while a judicial admission of paternity concerning the husband of the mother operates as declaration of legitimation.[74] The construction of the article provides that a declaration to the Registrar is unnecessary if the child has been voluntarily affiliated by the father[75] or if paternity has been judicially established before the marriage.[76] The child, if the parent has omitted to

make such a declaration, may raise an action against the husband with the object of proving his paternity.[77] It is suggested that the conditions of judicial affiliation should apply for such an action but free of the time limits of article 1544.[78] Due to the nature of the action, a petition is permitted to be submitted long after the marriage or even by the descendants of the child.[79]

A peculiar retroactivity of the husband/child relation is argued, if the husband admits paternity not by declaring the child to the Registrar but in a notarial deed or in his will so that such admission satisfies the conditions of the voluntary acknowledgement of the child. It is suggested that, in this case, rights and duties which are included in such acknowledgement take effect retrospectively from the date of birth, while legitimation qualifies the operation of any right not included in such action.[80]

In Greek law, the declaration by the parents does not need ab initio corroboration. Thus, if it is false, it is suggested that it may be contested by applying analogically the grounds and procedure in use to rebut a voluntary acknowledgement.[81]

II. Legitimation by a court decree

In Greece, the status of legitimacy may also be acquired through a court decree[82] by any illegitimate child, with the exception of the child of incest.[83] Such status may be acquired on the application of the father or by the child after the father's death, if legitimation per subsequens matrimonium is unlikely. However, such application is debarred if the father has any issue by marriage. The relevant provision of the Legislative Ordinance 1926 permitted the legitimation only with the consent of the child. The civil code overpassed this

development and re-instated the Justinian law whereby legitimation was prohibited if this could affect rights of the children of the family or if legitimation per subsequens matrimonium was possible.[84]

1. The court on the request of the father may award a decree if the conditions of article 1561 are fulfilled and the application concerns his natural child.[85] Proof of paternity is not normally needed.[86] Under specific circumstances, however, and because he bears exclusively the right to apply, the father may be requested to provide proof in order to support the validity of his application.[87] On the other hand, he does need to prove that marriage between him and the natural mother is impossible or difficult to obtain so that legitimation of the child per subsequens matrimonium is unlikely. In addition, he needs to provide evidence that he is without issue by marriage.

Particularly, according to article 1561(2) the father is required to prove that at the date of the hearing, marriage between him and the mother (natural mother) was impossible due to her death or for other "serious reasons".[88] In the first decade following the introduction of the civil code, the term "serious reason" was construed as to permit legitimation only on the grounds of objective impossibility. Thus, unlike Byzantine law, the impossibility of marriage was assessed exclusively on the existence of legal and/or de facto impediument, without permitting the parties to prove personal disagreement or other reasons which made marriage unlikely for them.[89] Consequently, the grounds were satisfied only if the mother had lost the required capacity to contract a marriage,[90] or if there existed a legal impediment between the parents, or even, if the mother was of unknown residence and could not be traced.[91]

On the other hand, recently there has been a turn towards subjective impossibility whereupon the immorality of either party or their difference in character, so long as it supported a confident prediction that the marriage between the parents was not likely to survive, and the court may, in this case, consider the conditions satisfied.[92]

Prior opportunities to marry cannot invalidate evidence referring to current impossibility. Nonetheless, if the child was conceived during a betrothal or after a promise of marriage, the assumed intentions of the parties to marry may make the establishment of subjective impossibility rather difficult. Depending on the circumstances, the court may reluctantly accept personal reasons, provided those sufficiently reverse the reasons which, in the first place, led the parties to consider marrying each other.[93]

Furthermore, decree may not be granted if the father is with issue by marriage at the date of the hearings. Specifically, article 1561(1) debars legitimation of a child if the father has a legitimate issue. This has been construed as to include a child born in wedlock or a child legitimated per subsequens matrimonium prior to the date of hearings. Legitimation, on the other hand, is permitted if the father is with judicially legitimated issue who have died without leaving legitimate descendants.[94]

2. In addition to the compliance with the above conditions, certain consents have to be provided. Namely the child in question must give his consent through his legal guardian.[95] He may withhold consent but this is subject to the control of the court, which, under specific circumstances, may dispense with it on the grounds

of abuse of right. Within this legal frame, denial of consent is considered not justified, where there is only the belief that legitimation may cause undue hardship to the child or that it may fail to serve the child's best interests. On the other hand, the child may withhold consent, if it suspects that the applicant is not his natural parent, or if it could prove that the parent's past conduct demonstrates as impossible the development of a parent/child relationship between them.[96]

Moreover, if the legitimating person is married to a third party, her consent is necessary, unless it is difficult to attain due to her mental illness or other reasons.[96a] As such, the decision 63/1971 of the Appeal Court of Athens[97] enumerates it as the presumed death of the wife or her absence in a place where communication with her is thought to be impossible. Denial of consent may constitute abuse of right if ill-motivated. The same decision provided that a "simple" denial not supported with serious reasons, or a withholding of consent under circumstances of informal separation, are not sufficient grounds for dispensing with her consent.

Consent, if formally provided, according to the prevailing opinion is irrevocable, though it may be invalidated on the grounds of fraud or duress.[98]

Moreover, two interesting provisions of the civil code grant posthumous legitimation to the child after the father's death or to the child's descendants after the child's death. According to article 1564 of the Greek civil code the child may apply to be legitimated after the father's death, provided the father had named the child as his in a will or public document. Legitimation after the death of the parent is also subject to the same conditions concerning his legitimate

descendants, and the marriage between the natural parents. Thus, if the deceased was with no issue by marriage and at the date of his death there existed a legal impediment preventing him and the mother from getting married, the child may, validly, apply for its legitimation. The death of the parent is considered as an impediment only if it occurred shortly after delivery so that the parents had not had the chance to arrange marriage.[99] The consent of the widow of the deceased, according to the prevailing opinion, is not required.[100] There are, however, disagreements based on the need to protect her financially, particularly after the husband's death.[101] The reason that a wife's consent is needed is in essence to give her the opportunity to protect the interests of her marriage, which may be affected by the legitimation of the child. Such an interest ceases after the termination of the marriage and remain only in relation to financial rights upon the estate of the deceased. In addition to these conditions, the child must have been named by the father as his in a will or public document.[102] Specifically, a birth certificate signed by the father, a notarial deed affiliating the child or his application to legitimate it, all are documents that satisfy the present conditions. Also a will made before a notary affiliating the child, even though later invalidated or revoked, still satisfies the requirement of a public document.

On the death of the child, the father under the same conditions may apply to legitimate the descendants of the child. The descendants themselves, however, do not have the right to apply on the death of the father and grandfather. Legitimation is granted, in this case, only if the descendants or their legal guardian consent to the legitimation.[103]

When a decree has been issued, the child from that date is deemed legitimate of the father and other ascendants in the paternal line.[104] An exception to the aforesaid is the judicial legitimation of the child after the death of his father, whereby legitimation retroacts to the date of the death.[105] Results are also extended to the descendants of the child and they are deemed as legitimate grandchildren.

Before ending this section, it is necessary to make some comments concerning the treatment of the mother in the course of a judicial legitimation, as well as about the protection of the child throughout the proceedings. The mother under the present law is the person mostly affected in the sense that the relationship with her child remains that of illegitimacy whereas the father sui generis, after the legitimation, acquires the representation of the child and decisive rights in arranging his life through the patria potestas. Taking into account that in most cases the judicial legitimation would concern children at the age of puberty, the concentration of power in the father would be risky at this stage of the child's development, since decisions would be taken by someone not in close contact with the child. Similarly the consequences are unfair to the mother since she would not have a sufficient share in the administration of the child's affairs. It should also be noted that in the case that the father would forfeit patria potestas, the right of representation does not transmit to the mother.

Furthermore, her involvement in the proceedings is rather minimal; the only right allowed her is that she may intervene in the lawsuit like any third party with a lawful interest, providing evidence

against the paternity of the applicant or against compliance with the relevant conditions. At the same time it is the case that the child may withhold consent to his legitimation if he believes that there is no basis for the development of a parent-child relationship with the father. The person most likely to have direct knowledge of the matter is the mother, and, if she is not the appointed guardian, the child could be burdened with a paternity which may count against him in the long run. Some systems, in order to balance the situation, provide for the consent of the mother to be necessary.[106] On the other hand, the approach of the Gazi Committee[107] is to give a prior right to the mother in the guardianship and care of the child, and to consider the father as a second alternative.[108] This resolution protects the relationship with the mother and also upholds her active involvement in the child's life. Irrespective of the remedy offered by the proposition of the Gazi Committee, whether this method should continue to be available depends upon the extent of reform needed on illegitimacy. Thus, this subject will be returned to later in this thesis.

## C. THE PROTECTION OF THE CHILD IN A LEGITIMATE PARENT/CHILD RELATIONSHIP

This field of law operates on two levels. The first is in the resistance to the presumption before evidence tending to bastardise the child and the second is in the kind of parental union regarded as proper to care for the child.

As has been pointed out earlier, married women are supposed to

bear children to their husbands, and in the majority of cases this is true. However, a small minority remains for whom this presumption is invalid, and both the husband and the child have a strong interest in removing any legal link between them. If such a link were retained it would be an arbitrary one and would be regarded with frustration by both parties. On the other hand, illegitimate pregnancies, by married women, do not constitute the rule but the exception. Also, not every illegal affair results in an extramarital conception. The probability, therefore, of a child being the husband's is regarded as high. This is so deeply rooted in the opinion of society that almost every marital birth passes unquestioned. Moreover, not every father has an interest in his "child". Commonly, in the past one came across failures to disclaim the child and in the majority of cases this was rather due to false claims than to the peculiarity of the situation. It is expected, therefore, that the presumption could be reargued in each law, by contrary proof, showing that the child could not be the issue of the husband with the wife. Nonetheless, it is presumed that such proof will deviate from the ordinary means of evidence and will be confined to clear persuasion that the child is illegitimate. Further, peculiarities are expected when such proof is directed against the presumption of an ante-nuptial conception. Because this presumption derives its power from evidence or admission of paternity, the more clearly it was demonstrated that the child belonged to the husband, the stronger would be the protection of the child. It should be noted, on the other hand, that there is an inconsistency in this inference. Conception may have taken place at a time when the parents were under no legal obligation as spouses. Thus, the possibility of the child having been begotten by another man exists.

If, therefore, the proof against a presumption is standing otherwise than by express admission, i.e. if the husband had exposed himself to such an inference by assisting his wife during her pregnancy or refusing publicly to repudiate her and the child, there is a strong possibility of his conduct being motivated by an interest in saving the reputation of his wife and his marriage. Any tendency in the law, therefore to treat such a presumption as an absolute should be treated with some scepticism as regards the interests of the child.

Two important procedural questions go along with the right to disavow paternity. One concerns the persons who may challenge legitimacy. In this case is it to be restricted to persons with a primary interest, as the parents, or to be open to everybody who has a lawful interest to protect? Prima facie, it appears as an exclusive family right. Nevertheless, it involves matters of social interest and under certain circumstances it is expected to be open to persons like the public attorney or to relatives of the parents to be entitled to challenge the presumption. The second question refers to the time and the proceedings suitable for such action. Obviously, evidence of the extramarital conception of the child is not available in advance in all cases. There is, furthermore, a strong reason for precluding such right after a certain period. The child may have enjoyed the status for a long period, been treated as legitimate in its own family and so known to society, which makes the presence of some restrictions desirable. Moreover, should the presumption be open to challenge in any context or only in special "status proceedings"? The question of legitimacy does not seem to be of a nature permitting

answer as an incidental question in other than especially provided proceedings.

The second section on the protection of legitimacy concerns the kind of parental unions within which it is raised. Frequently, the impression gained from the law is that the primary reason for raising the presumption in marriage is identification of paternity and protection of the child. It is widely acclaimed that the nature of the institution offers sounder grounds for identifying the father and provides a stable and endurable union, which it is believed will protect the child as long as this is needed. Nonetheless, it was observed that, for raising the presumption, the continuation of the marriage was not the primary concern. Only its legality and morality appeared to be an important factor. Furthermore, from day to day experience, one comes across unmarried but cohabiting parents, who serve the interests of their child far better than those legally linked by marriage. In this context, it is still to be seen whether it is always necessary to restrict the complete relation only to children conceived in marriage or whether there are grounds for it to be extended as well to other parent/child relationships.

I. Disavowal and Contestation of Paternity

The disavowal of the child by the mother's husband. In general both countries allow for the possibility of rebuttal of the presumption of paternity, but because the position in favour of legitimacy is very strong, this procedure is admitted only on very serious and limited grounds, resulting in the impossibility of the mother's husband being the father of the child. Specifically, the grounds upon which the presumption may be disproved operate on two levels covering the areas of physical and factual impossibility. According to the first, it must be proved that the child could not have been conceived by the husband due to his physical impotency.[109]

This is a universally accepted ground and finds its resolution in medical evidence so that there are no specific peculiarities between the two laws to comment upon. According to the second ground, which may be revoked if the husband is potent, it is required to prove that there exists a de facto impossibility of the child having been conceived by intercourse between the spouses. There is a difference of approach in this particular point in that Scots law is focused on the lack of intercourse between the parties and accords less emphasis to the possibility of access, while Greek law shows a primary interest in access and less in the lack of intercourse.[110] Thus, Scots law does not insist on proof that access to the wife by the husband was impossible, but the court has to be satisfied that intercourse did not take place between the spouses at any time during the period in which the child might have been conceived.[111] On the contrary, in Greek law weight is attached to evidence demonstrating non-access by the husband[112] and, given cohabitation, only under specific circumstances, illness or proven emotional weakness being among them, will proof of the lack of intercourse be admitted.[113] As to the amount of proof required, both concur in requiring clear and convincing proof that the child could not have been conceived of the husband. Neither law, however, pushes to an extreme requiring absolute impossibility, but proof may not be considered satisfactory if there is only the bare inference that illegitimacy is more probable than legitimacy.[114] Particularly, it has been repeatedly held and applied in a considerable number of Scottish cases[115] that there is no room for approaching the question of legitimacy from a point of view of a mere balancing of probabilities. Nor even as a question where the ordinary rules of onus of proof alone apply. Similarly, the term "obviously impossible" of article 1471 of the Greek civil code was met with a similar consideration so that the proof is insufficient if not conclusive of the impossibility of the child

having been conceived of the husband.[116] Thus, in both laws, the presumption cannot be re-argued merely by evidence of the adultery of the wife, nor by evidence of the parent alone, unless sufficiently corroborated in the light of independent evidence.[117] There are two instances, however, where the rule of direct evidence is deviated from and the presumption may be rebutted by inference. In the first, which appears in both Scots and Greek law, the presumption may be rebutted, if non-access is inferred from evidence of the unreasonably short pregnancy after the first cohabitation following the husband's absence, or of unreasonably long pregnancy after the last cohabitation since his absence.[118] The second, which appears only in Scots law, refers to the case where a married woman brings an action for affiliation and aliment against a man other than her husband and, therefore, by inference rebuts the presumption albeit the husband having had access to her at the relevant time.[119] However, given cohabitation between the spouses, the standard of proof increases when compared with what is sufficient in informal separation.[120] In such cases, sufficient ground may be considered the sterility or necrospermia of the husband[121] or the different race of the child,[122], while other major deviations in colour or results of blood tests may not in themselves be adequate to overturn the presumption.[123]

Following the peculiarities of proof, a number of different issues exist in each law with reference to the evidence admissible in a declarator of bastardy. While both agree that the parties may call witnesses, invite other evidence or make use of other statements or relevant documents,[124] when it comes to the personal testimony of the parents, the position alters considerably. It was widely felt in both jurisdictions that, due to their presumed interest in the ongoing

litigation, the testimony of the parents is only of relative credibility. Consequently, parents or other parties with a personal interest have been normally disqualified as witnesses and the use of secondary evidence was promoted in their stead.[125] For the latter, however, it was suggested that, if related to the parents, credit ought to be given to it where it is not connected with the present action. Thus, in Scots law, "statements of the parents, made without reference to present or prospective litigation, and especially if these statements were made under circumstances which naturally called for explanation"[126] are received in evidence but little credit is given to their statements if made in the prospect of the present judicial proceedings. However, evidence or testimony, whatsoever, related to the parents has had a different confrontation since the end of the 19th century. In Cole v. Homer[127] it was held that, in a declarator of bastardy, if the mother is alive, she is the best witness to be examined, while in Burman v. Burman[128] it was held that the declarations of both spouses, if free from suspicion concerning their personal conduct, is the best evidence to be received. However in Imre v. Mitchell[129] the position altered so that weight was attached to the testimony of the parents if confirmed with objective evidence. In Greece, on the other hand, due to the nature of the litigation, testimony of the parents, still is not admitted. However, if the mother has confessed that the child is illegitimate, this under certain circumstances may be treated as secondary evidence.[130]

As regards the presumption raised for an ante-nuptial conception, as was discussed above, this is only a prima facie presumption, and becomes final with admission or evidence of knowledge of the pregnancy or of intercourse between the parents.

For such a case, in Scots law, it is permitted for the husband to

rebut the presumption with direct evidence tending to prove that he was ignorant of the pregnancy or that he did not have intercourse with the mother prior to marriage. Emphasis, however, has been placed on his knowledge of the pregnancy and, if proven, the presumption becomes almost irresistible.[131] There is also the possibility of a parent who had falsely acknowledged the child as his bringing evidence rebutting the presumption on the grounds of his error.[132] Such evidence, however, is met with strong reluctance in Scots law, especially when there is an express recognition of the child. A parent who on evidence gives lie to all his previous conduct is looked upon unfavourably, while, if he has once acknowledged the child as lawful, his testimony cannot afterwards be used to overcome the presumption.[133]

In Greek law, the father may disclaim the child with a simple declaration[134] but his right to do so may be extinguished if there is prima facie evidence proving him to be the father.[135] Even if there is no such evidence, the right becomes obsolete if not exercised within three months of him first receiving information of the birth.[136] Thus, it is argued that the right does not revive if he omitted to submit a declaration or acknowledgement of the child even though in the light of posterior evidence it may appear that he is not the father. In the latter case, the opinion of Greek jurists is divided between those supporting the absolute preclusion of any revival and those who find it possible for the husband to disclaim the child if he has been the victim of fraud or duress in assuming the child as his own.[137] Neither side, however, supports a reclaiming on the grounds of essential error. Specifically, supporters of the absolute preclusion argue that his right to contest paternity should become extinct after the specified period, because it is

almost impossible to conclusively persuade a reasonable man that the woman with whom he had extramarital intercourse could not have had connection with another man. Therefore, it can be presumed, that the person indicated as the father by the marriage was ready to bear all the consequences of the pregnancy, or if not, he could have expressed his negative wish within this period.[138] However, according to the second opinion, which seems to be the more reasonable, the possibility exists of the husband having been victimised and it would be rather arbitrary to preclude his action if such is the case. He may have been defrauded in assuming the child as his, or may have hesitated to disclaim it due to excessive pressure exercised by the wife or other relatives.[139] Moreover, even if it is evident that he knew of the pregnancy, this is not conclusive because he may have entered the marriage as a result of his interest in the mother, her pregnancy having little effect on him.

Although the rule is that legitimacy should be destroyed as a result of judicial proceedings,[140] the status of the child would have been exposed to considerable risk if the decision is taken in connection with other claims which do not reflect the gravity of a decision of status and to which other principles of policy apply. Thus, proceedings may be introduced in each law, in a principal action, or may appear as an intervening lawsuit in any context in which the question of paternity is relevant. Moreover, both laws insist on treating a declarator of bastardy as the crucial and central question which should be decided exclusively on its merits. Hence, when the question of paternity is raised, in connection with legal proceedings related to the enforcement of a right, or the establishment of a claim to property, or the making of an order for the custody and maintenance of the child, it would never be decided in conjunction

with the connected claims but will be the subject of an intervening lawsuit.[141] The only exception to the rule appeared recently in Scotland where a conclusion for a declarator of bastardy of a child was included in an action of divorce.[142] In this precedent, however, the criterion for such connection was that illegitimacy of the child was crucial to both conclusions of the summons, so that the pursuer, to succeed in the conclusion of divorce, had to prove the child a bastard. Consequently, it cannot be said that the case is more one of divorce than one of declarator of bastardy. Moreover, it was revealed that while the main reason for preventing connection of declarators of bastardy with other claims is the different standards of proof required for each case, this cannot be maintained if one is connected with an action of divorce. The proof in both cases has to be "beyond reasonable doubt" while the nature of evidence admissible for each case appears to have a close similarity, so that the course of proof will not deviate from the already existing practice.

In relation to the gravity attributed to the proceedings both laws restrict the litigants to persons who justify a lawful family interest. Although, however, both define the mother and the child as defendants[142a] there are certain differences in the persons who may be regarded as appropriate to bear the right. Namely, under Scots law, besides the husband, the right is allowed to the mother and the child itself,[143] or collaterally[144] by any one claiming a lawful interest.[145] In the instance of the mother, and perhaps of the child, if she is trying to rebut the presumption by inference, because the child prima facie belongs to her husband, she possibly cannot raise an action of affiliation and aliment against a stranger without his concurrence.[145a] Moreover, action for a declarator of bastardy has been allowed at the instance of "the heir-at-law of the husband of the alleged bastard claiming to succeed

on the failure of a conveyance by the husband to his wife and her heirs, she having predeceased without issue ..."[146]

In Greece, on the other hand, the right is recognised only to the husband who can initiate proceedings himself or by appointing a special representative. In the event of his death, the right is passed on to his heirs-at-law.[147] If the mother is deceased, the action must be directed against the child and the mother's heirs otherwise it is unacceptable.[148] Neither the mother, nor the child have any right to contest legitimacy, though it is argued that the mother should be permitted to raise an action as an heir of the husband.[149] Where the husband refuses to contest legitimacy, the mother and the child may be protected through the principles of the abuse of right, i.e. if the child had been widely reputed as illegitimate or the husband's refusal is ill-motivated.[150] This approach, however has been widely disfavoured, because it exposes both mother and child to the risk of stigmatization, and because the grounds of abuse of right have such a relative application so that it is only in a few cases that the mother could have succeeded in establishing the true paternity of the child. Thus, the Gazi Committee proposed a particular reform for this article, according to which the right to contest legitimacy is extended to the mother,[151] an independent right is given to the child, exercisable for one year after it attains majority.[152] The same right is extended to its guardian ad litem, with the permission of the court,[152] and to its heirs for six months after the child's death.[153] This proposal has not yet been incorporated into law.

Another difference concerning the procedure refers to the restrictions of time imposed for initiating an action for disavowing paternity. Under Scots law, the presumption may be attacked well after the husband's

death or even after the death of all parties involved.[154] Greek law, on the other hand, tends to limit the period so that the child's status is not at risk for long after birth. Specifically, it gives the husband one year after obtaining knowledge of the birth to accomplish the disavowal, and three months to his heirs, if the right had not become obsolete during his life.[155]

As a result of a successful disavowal or contestation of paternity, the child concerned will lose the designation of a person born in wedlock.[156] Moreover, the child may be designated as adulterous with further consequences in Greek law. Namely, if in the course of the hearings intercourse with a specific person is established, the husband may succeed in obtaining the conviction of his wife and her alleged paramour. This will impede them from marrying and legitimating the child.[157]

In general, however, in both jurisdictions, the child will lose the fullest set of rights and obligations in its relationship with the husband. This also will occur in its relationship with the mother under Scots law, while in Greek law the child will retain full rights and duties in respect of her, subject to minor alterations due to its illegitimate status.[158] The general inference that one could extract from the procedure on rebutting the presumption of paternity is that the protection of legitimacy as a protection of status has been satisfactorily achieved in both laws. In particular, the standards of proof are high and the evidence admissible is carefully selected, so that the risk to the child of losing the designated status on the basis of insufficient evidence is eliminated. Moreover, despite the fact that the scope of the presumption has remained unchanged one should note that its rebuttal has been facilitated in favour of

determining the real father. And this task is achieved without affecting the importance of the presumption which has retained all of its original value. Particularly, the weight of proof tends to be concentrated on proving whether the child could have been conceived after intercourse between the parents, rather than on proving mere access to each other. This signifies a more sensitive approach towards the issue of paternity and awareness of the adversity, which may be caused to the child, if the presumption is maintained on the basis of the stereotypes dominating its application. This approach appears more emphatically in Scots law. In Greek law, however, where access still receives considerable attention some major defects are discernible. It is rare, for example, for the presumption to be over-ruled in cases where the spouses had taken precautions to avoid pregnancy, or in cases where, during the critical time, they were on unfamiliar terms so that intercourse between them was unlikely. However, this "legal logic" may fail to convince the husband of the possibility that the child had been conceived by him and, as a result, he may act indifferently towards the child's interests.

Moreover, the seriousness with which both jurisdictions confront the question of the status is to their credit. Both pay particular attention to the establishment of independent proceedings when the status appears to be an issue of the ongoing litigation. This precludes any possibility of exposing the decision of status to the influence of other prevailing policies in claims of different nature and gravity.

It should be said, on the other hand, that there are instances where the resolution of the law may produce a critical situation for the

child. For example, the absolutism dominating the presumption of antenuptial conception in certain cases may be unreal since pregnancy is not the sole motive for getting married. Also, in Greek law, the right to rebut the presumption is restricted to the husband and his heirs-at-law. To counter balance those defects, it should be preferable to apply the presumption in the same manner as in other areas, i.e. by adopting a more flexible approach towards evidence showing that conception took place by the person who married the mother. Also as the Gazi committee rightly proposes for Greek law, it should be mandatory to supply the mother and the child with a right to contest the status.

## II. Marriage and Legitimacy

Although some concern is expressed in the two systems for the determination of the true paternity of the child, the situation is not clear yet as regards the future position of the legislation towards biological parenthood. Apparently, the decline in the strength of the praesumptio juris signifies to a certain extent an ideological shift away from the concern for a stable legal family towards a pragmatic approach regarding the paternity of the child. On the other hand, marriage remains the controlling element for a parent-child relationship. There are sound arguments in favour of the association, since the nature of marriage makes it easier to identify the parents and additionally offers the advantage of a more or less permanent unit to bring up the child. However, non-compliance with the laws of marriage is a frequent phenomenon which in a considerable number of instances results in the birth of a child. Irrespective of the birth status of the child in a sociological setting, there is an ideological displacement, so that

paramount consideration is no longer given to the traditional norms of the family, nor to the alleged father's interest to contest the presumption. The interest of the child is, increasingly, gaining independent recognition, which is expressed in its right to challenge the relation with the mother's husband, but more importantly in the attention paid to its established membership in a social setting.[159] Due to this social concern for the child, extensive reform has been carried out to improve the status of children born out of wedlock so that, currently, one can sustain the argument that the existence of a marriage relationship between the parents is of very little consequence to the rights of the child.[160] However, despite the improvements in the children's rights, there still remains a substantive difference between the children born in wedlock and those born out of wedlock as regards the legal recognition of the relationship with the parents. For children born in wedlock the relationship with the father is sui generis enforceable, whereas for children born out of wedlock this matter is left to the discretion of the individuals involved. In result, many children born out of wedlock remain fatherless though it is obvious who fathered the child, or it can be easily proved. On this understanding it might be fit for family law to recognise a similar degree of concern in the case of a child born out of wedlock in order to establish the parental relationship.

It should be made clear, in the first place, that the ideological shift noticed in the concept of legitimacy has appeared in a rather weak form. Neither did it bring any major changes in the content of the presumption, nor did it devaluate in any respect the amount of proof required to rebut the presumption. It simply changed the approach towards legitimacy from a purely moral one towards a more

pragmatic one. Thus this approach may be understood as a result of the current changes in sociological attitudes, which affected the construction of the relevant law. For instance the emphasis on and improvements in the rights of the child may have swung the pendulum towards concern for the biological relationship. In this respect such emphasis may be anticipated as aiming to update the law of legitimacy with other aspects of children's legislation. However, pressure for change did not arise exclusively from the importance attributed to children's rights. A change of social attitudes towards men-women partnerships may have had a considerable influence upon the concept of legitimacy. Indeed the ever-increasing phenomenon of unformalized relationships has directed attention as much to the rights of the consorts as to the children born of such relationship. The idea of giving recognition to children of such unions is not unknown in the two jurisdictions. Scots law, for instance, in the case of a relatively established association has adopted a method of giving some kind of immediate legal recognition by recognising irregular forms of marriage. Greek law,on the other hand, for a child born to two cohabitees attributes the status of voluntary acknowledgement whether the relationship with the father is established as a result of a judicial order or by an act of the father. 160a Even so, however, it is known that there are many different situations comprehended within the broad area of unformalized relationships and many result in the birth of a child. That child may be attributed to the ex-husband of the mother. Equally, however, the male partner may be presumed to have fathered a child of his ex-wife and, therefore, to have to pay aliment notwithstanding that he has a de facto family to support. Therefore, a thorough examination of the functioning of the presumption of legitimacy in the present social context seems essential in order

to advance any proposals on the desirable content of future legislation. To attempt such an analysis, however, presents not inconsiderable difficulties since it concerns a background transformation of the man-woman relationship and a policy delegating the institutionalisation of children within families formed by marriage. It involves a wide range of arguments, not altogether distinct, which can be identified in terms of morality, social welfare and welfare of the child.

a. 1. It is argued that by maintaining the marital family this serves to uphold moral standards. This element of morality in the context of illegitimacy corresponds to values never clearly defined and therefore appears with considerable fluidity in its composition. Consequently its discussion is not free from difficulties. As a matter of fact, the correlation between monogamous marriage and legitimacy in its moral aspect has been taken for granted for centuries. By being a concept surrounded by the dogmatism of religion, it rarely became the subject of open debate or was publicly challenged in terms of its usefulness or validity. Normally, one finds arguments against illegitimacy as a cause of moral decay, but rarely a positive opinion explaining why legitimacy served morality. Nonetheless, it is not inconsistent to assert that the gap between natural and legal parenthood remains unbridgeable and that that is mainly due to moral concerns. For example, to advocate a pragmatic approach for the parent child relationship often means encountering barriers which are rooted in a conditioning, dating back hundreds of years and which must be overcome - that parenthood in wedlock is the morally proper way for bringing up children.

The soundness of this argument becomes apparent if one looks at the way in which the question of legitimacy is confronted in the judicial setting. The contrast between legitimacy and illegitimacy has been treated in moral terms so that the judgement for certain was "prejudiced" against illegitimacy and contained a bias in favour of the status attributed through the marriage of the mother.. In Scotland, since the medieval period, this approach appears to be the fundamental view of the courts on declarators of legitimacy and bastardy. Thus, it appears to have been well settled at the time of Erskine, who appraising the proof required to rebut the presumption, explained that "the favour of marriage is so strong, and the securing of the point of legitimacy so important to society that it cannot be defeated but by direct evidence".[161] In the same context, Lord Patrick in the fifties in Ballantyne v. Douglas[162] observes that "the presumptio juris expressed in the maxim (pater est ...) ... is jealously maintained by the law since for many reasons it is desirable that the legitimacy of children born in lawful wedlock should not readily be in doubt".[163] A more child-centred view, though not free from moral elements and aversion towards illegitimacy, was held in Imre v. Mitchell.[164] The Lord President, confining himself to the child, provides that "the law (of Scotland) has always regarded the label of illegitimacy as involving a taint which courts will be slow to attach to any child unless the circumstances clearly warrant it. For once the label is attached, it will almost certainly accompany the child to the grave. It is unnecessary to speculate whether this approach is based on considerations of public policy or of fairness to the child whose fate in the world is being decided at a time when the child is too young to stand up for itself." However, more current decisions, without departing from this ideological frame, appear to avoid appraising moral views

and stick to the presented facts.[165]

In Greece, on the other hand, the plain rule of articles 1465-66 of the Civil Code leaves little room for the expression of opinion by the judge in lawsuits regarding the status of the child. Nevertheless, in the literature, in the construction of the two articles, the moral importance of the family, formed by the institution of marriage, is extensively appraised as constituting the proper unit to care for children. The moral and philosophical arguments in support of the connection of a complete status with marriage vary accordingly, but the importance lies in the fact that this view is taken unquestioningly and without any effort to argue on the merits of a different family structure.[166]

2. Can, however, this monopolising of the nurture of children in monogamous marriage have any proper foundation in the religious teaching? The conclusion drawn to this question by the Church of England in its interesting study Fatherless by Law[167] is that such intention in nowhere implied in the Bible and that anyway, because of the different social conditions reflected in the text, any effort to get direct guidance from this source for the present will be disappointing. As they state the word "bastard" is rarely referred to in the Old Testament. In one case it is used to designate a person of mixed race[168] a discrimination also frequently upheld among people in East Mediterranean and especially between Greeks on citizenship bases. In another case, however, it is stated that "A bastard shall not enter into the congregation of the Lord"[169] and as the study explains, the context suggests that here too the meaning is 'one of mixed race'. However, it is possible that it means an 'unattached' person, i.e. one not in

a proper family setting. If so, it would indicate a feeling that such a person was not totally 'proper', having a defect in his origin and status not unlike the physical defects mentioned in the previous verse.[170] Indeed, it is difficult to decide which of the two explanations is more valid, since due to the high mortality rate in infants at the time[171] and the stigmatization of childlessness,[172] any child was wanted.[173] Further, as the study observes, there was no strict need for any children to be born out of wedlock, ~~since there was no strict need for any children to be born out of wedlock,~~ since there was no strict insistence on monogomy, betrothal was hardly distinguished from marriage and intercourse with a virgin who was free to marry, if discovered, necessitated marriage.[174]

In the New Testament, the word 'bastard' occurs in Hebrews where it is said that if we are not chastened, God is treating us as 'bastards and not sons', which according to the study implies weak parental responsibility in the case of illegitimacy.[175] Nevertheless, in another instance[176] Christ was characterized as 'born of fornication' which implies attribution of stigma if there is a "black mark" in the child's birth.

However, whether this social stigmatization was carried as far as to determine the parent-child relationship, cannot be answered clearly from biblical evidence. In complete contrast with the reaction on parental disobedience to morals, the Old and New Testaments are fruitful of concern for the fatherless children, and this support is suggested without distinction to the birth status of the child.[177] A reasonable explanation for this connection may be found in the revival of Christianity in the Hellenic state cities. In such states there was a certain control upon descent to protect citizenship and at the same time this implied certain consequences to the citizenship status of the child.[178] Besides, Greeks were monogamic and therefore this may be an explanation for

Christianity adhering to monogamous sacred marriage and stigmatizing other unions. The former was a well established institution with specific social purposes so that influence should not be precluded.[179]

In effect, however, monogamy has led to a great increase in the number of illegitimate children who remain fatherless and without parental support. On this understanding, as the previously mentioned study of the Church of England explains, since someone had to care for these children it was not difficult for the economic costs and difficulties of care, which were burdensome to the community, to lend strength to the moral disapproval which a monogamous or would-be monogamous society attached to the means whereby the illegitimate child had come into existence. The few texts in the bible putting 'bastards' into a class apart could easily be used in support of a policy which 'shamed' the illegitimate child, instead of - if anyone was to be shamed - the illegitimate parents.[180]

b. A clearer view may be obtained by examining the practical reasons presented for delegating the institutionalization of children within the normal or conventional family. Today, such a family has tended to be equated with the nuclear family, that is, with parents and dependent children in a household of their own.[181] If that family then is formed by marriage, since marriage conceives a parental legal unit of permanence with clearly defined roles, it is claimed that, by institutionalizing the child in the family, the child will enjoy emotional and material security and therefore its normal development is more predictable. The extent to which this is actually so in the second half of the twentieth centurey, and if it is not, howe widespread are the variations in the form of the parent child relationship will be considered in the following pages.

Married parents, at least in theory, stand for mutual identification and reciprocity of feeling to a degree where they felt confident to enter a life long union. This is foreseen as having a direct bearing on the spouses' attitude towards children of the marriage since, from a healthy parental relationship, would stem affection and concern for the child. Nevertheless marraige provided the basis for the construction of the conventional family model, susceptible to legal regulation and assuming what Rapoport et al[182] have commented on as a "Darwinian" fitness of all the elements to one another and to the environment. Hence the conventional family, as Lambert and Streather[183] summarize it, has the following elements:

" i. The male head of the household, the father, is the sole economic provider

ii. The female head of the household, the mother, is the homemaker, and responsible for domestic care and the socialization of the children. She is a helpmeet to the husband, providing support for him in his struggle for the family's survival.

iii. The children are helpless and dependent, vulnerable, and malleable. They must be nurtured full-time by the mother (or mother surrogate) only, as emotional stability is essential.

iv. The family is a private institution and within it individuals can fulfil their most important needs. This fulfilment is based on the foundation of the economic income provided by the husband (where necessary supplemented by the state). Only when economic and material needs have been met do expressions of psychological and social needs for love, esteem, self-expression and fulfilment emerge within the family.

v. Healthy families produce healthy individuals, who adjust to social roles."

The effects of a normal family in a psychological context has been sufficiently appraised by Soddy[184] who describes :

" In a normal (family) ... the relationships are triangular - mother, father and young child. Each parent brings up the child as if it were a kind of present to the other parent. The mother encourages the child to relate to the father and in so doing herself withdraws a little distance from the child. This enables the child to get a little distance from his mother, and leaves him free to pick up personality contributions from both sides. Both parents contribute to his development, his character. In this way the child can achieve a sense of identity which is not the same as that of either his mother or his father. He gets a bit of both; he is different, unique, and a person in his own right." Given normality in the family the fulfilment of parental obligations comes as a natural consequence without further need for express enforcement since each member identifies on the other part of his own self.[185]

It is unnecesary to enter on a detailed analysis of the effects of a healthy family environment for the child since such a task has been carried out in a number of longitudinal and population studies of child development.[186] It should be noted, however, that these tend to show that children living in a good environment, whether defined by material conditions, family size, parental interest or other factors, are most likely to do well in terms of attainment, adjustment and physical development.[187] Inevitably emphasis is placed upon the parental relationship and in this context marriage appears to have the following advantages:

i. The spouses are legally bound in an endurable relationship so that they as parents will provide continuous care for their children.

ii. The nature of the conjugal relation gives rise to an expectation that each child born to the wife is begotten by the husband. Hence, the presumption of paternity.

iii. Given certainty of paternity each parent plays its role from the child's birth without need for prior attesting of the biological relation.

These elements embody certain assumptions about what a family should be to secure the continuation and wellbeing of society and have resulted in the formulation of policies prejudicial to illegitimate children. This policy is discussed on its merits on the next chapter and here attention is paid rather to the reception of status and the diversity of family life under present social conditions as signifying whether the advantages claimed for the child, if brought up in a legal family, can still be sustained.

Although, in terms of legal prescription, most effort is directed to facilitating the reproduction and care of children within families formed by marriage, such in fact occur both inside and outside wedlock. Marriage nevertheless retains the major share in terms of reproduction and has produced the better results in terms of child care, facts recognised even by the firmest supporters of the abolition of the status of illegitimacy. For example, Alec Samuels recognises the potentialities of marriage in bringing up children so as to suggest that " ... as an institution (marriage) should certainly be strongly encouraged and supported in every possible way".[188] Also Dr. R. R. Williams (The Bishop of Leicester) amidst his approval of reform that would "make the best of a bad job for the sake of the child" feels bound to state that "nothing can replace those benefits of status, security and love which normal married parents can convey to their children ...".[189]

In the same fashion the English Law Commission clings to the notion that only a normal nuclear family can provide a secure, caring background in which to bring up the child. In their view, the problems of one parent families are likely to remain a feature of births out of wedlock since the law can make only a limited contribution for them in the sense of removing the legal handicaps of the child, thereby avoiding exacerbation of factual disadvantages in the child's position.[190]

Whether the high acclaim and success of families formed by marriage is due to the merits of the institution or to its continuous support is not entirely clear. The question probably will not be answered until empirical research has been carried out for the various family patterns in circumstances showing equal treatment by the state.

However, what really conditions the policy in favour of the marital family is the assumption that this family is most desirable and real and in this respect as Lambert and Streather[191] point out "avoids both intellectual and empirical issues and can be morally coercive". The traditional family, as created by marriage and legitimacy, can be criticized in its legal context for the following reasons.

(a) the reception of the status of legitimacy disregards diversity of sex relations and family life;

(b) the law by incorporating the traditional family in a rigid legal concept fails to comprehend disfunction of the family in the social context;

(c) in relation to the previous point the law fails to adjust to change in the family as a natural consequence of dysfunctional aspects of the traditional concept; and

(d) it avoids giving attention to the potential for independent recognition of the child's rights.

1. The artificial reception of the child's status has been strongly criticized by Professor Clive [192] in his valuable analysis on aspects of illegitimacy in Scotland. He deplores further support of the concept of legitimacy altogether as failing to correspond to current social needs. In his view, the concepts of legitimacy and the thereby legal family only reflect the old stereotype that legitimacy is the common situation where a child has been produced by its married parents who undertake the responsibility of bringing it up, while illegitimacy is an unfortunate situation where the child was born after a casual encounter between a man and the mother who afterwards abandons her and the child to their fate. To counter this image, he provides the following examples which illustrate situations comparable in both Scotland and Greece.

   1. The child of a stable, two-parent family will be illegitimate if the parents have never married each other. There are many children in this position. Socially, they are certainly not fatherless. Legally, they are illegitimate.
   2. On the other hand, the child of a casual encounter will be legitimate if the parents go through a civil (or religious) marriage ceremony, even if they never live together and get a divorce as soon as possible. The bit of paper which is the marriage certificate makes all the difference to the child's status, even though it is socially meaningless in these circumstances. To put this in another way, if the father is willing to assume his responsibilities, the child will be legitimate, if the mother says : "I'll marry you, but won't live with you", but will be illegitimate if she says "I'll live with you but won't marry you". Could anything be more ridiculous?
   3. Another situation, which has featured in the law reports illustrates the artificiality of the concept of illegitimacy. A married couple have been separated for years. A divorce is pending. They

meet by chance, have a few drinks, get sentimental or lustful and have sexual intercourse. Neither has any intention of resuming cohabitation. The divorce goes through a few months later. A child resulting from that casual encounter would be legitimate. If the intercourse had taken place shortly after, instead of shortly before the divorce, the child would have been illegitimate. On such technicalities do the rights of children depend.

4. A child is born illegitimate. The father goes off to Canada. Forty years later the father returns for good and marries the mother. The "child" now in his forties and making his own life in another part is legitimated by the subsequent marriage of his parents. Nothing in this factual position has changed but the magic of the marriage ceremony is so powerful that he suddenly acquires, not only a new status, but also the obligation to support his parents should they become needy.[193]

The above illustrations sustain two fundamental arguments against the concepts of legitimacy (a) it is a technical legal concept perceiving sexual relations as based upon an antiquarian stereotype and (b) in consequence to the first, the status of the child is established upon an artificial presumption unrelated to the actual elements of the family. The factors supporting these arguments are mainly confined to the on-going disuse of formal marriage by sectors of the population, as a result of the emancipation of women and change in sex relations which ultimately affects the legal subsistence of the parent-child relationship. In this respect, criticism is directed towards the failure of the law to come to terms with the current social trends and adopt a more pragmatic approach for the status of the child.

2. As Fiona Stuart [194] observes unformalized cohabitation features as an indispensable characteristic of modern societies but its formation nevertheless is governed by different principles and realities. So far the popular trend is to treat cohabitation as ultimately leading towards marriage a presumption that can no longer be supported, due to a radical change in attitudes and social conditions. Until the last few decades women were totally dependent upon men for support and a marriage certificate was regarded as a guarantee of financial security. Therefore, the decision of a woman to assume cohabitation with a man would not be otherwise than to preclude an intention to live together permanently and to consummate the marriage in the near future.[195] In this context the inducement of devices like the common law marriage in Scotland, the legitimation per subsequens matrimonium in both countries, have among their aims the purpose of compensating defects in the status of the child if born to the parents during the cohabitation period and at the same time to decrease the rate of illegitimacy.

This century, however, is characterised by the increasing emancipation of women along with the increasing popularity of marriage, which seems to suggest that fewer social and legal restraints and more equality and freedom for women led to what Titmuss describes as the "process of 'democratizing' marriage".[196] The marriage pattern which emerged in this process became more demanding and less susceptible to compromises from either of the partners. "We are more inclined now than we used to be" point out Slater and Woodside, "to demand a capacity for response between the partners, to look for intellectual and temperamental compatability, as well as purely material welfare, in addition to the ordinary social and parental satisfactions. The more we demand in these respects, the more frequently, perhaps, we shall have to count our failures, but also the higher may be our level of achievement".[197] This development

was further complemented in recent years by sex discrimination legislation which terminated the financial dominion of men and made it more possible for women to exploit their involvement in the production process and their earning capacity to the full.[198] A marriage certificate, therefore, no longer functions as an incentive towards financial security. On the contrary, many partners in cohabitation make the conscious decision to concentrate on their careers, and in this situation many couples, although deeply committed to each other, may see little purpose in allowing their relationship to become regulated by the marriage law, since career prospects may eventually force them to terminate their relationship.

Apart from career prospects, cohabitation features in society for a variety of other reasons and in very different circumstances. The couple, although deeply committed to each other, may disapprove of formal marriage in principle. However, their personal and emotional commitment may be eqaal to that found in many marriages. More frequently, however, this may be due to the religious persuasion of each or both partners. It is not uncommon to discover the situation where immigrants have performed marriages according to their national customs and where this union has been refused recognition as contravening public order. This is a common occurrence in Greece if either of the partners belongs to a religious sect which is not recognised or where one of the partners is Christian and the other of a different religious persuasion. Even if they wish to marry their marriage is prohibited.[199] Moreover, the parties to cohabitation, one or the other, or both, may be married to someone else and cannot obtain a divorce because of laws which make it impossible or expensive to end a former marriage, or because there is a religious objection to divorce, or merely because the former spouse wishes to frustrate the other spouse. Nevertheless, this alternative

may be classed as a temporary trial period between one marriage and the next. Even elderly people incline towards cohabitation since marriage would affect their eligibility for pensions. However, the important cases, and probably the ones that attract the most controversial arguments, are those between persons free to marry. It is submitted that under normal circumstances cohabitation for them constitutes a trial period during which the parties try to assess whether they are sufficiently compatible to make their relationship permanent in the eyes of the law, but equally may be casual and of short duration, being, perhaps, merely a short term convenience.[200]

Increasingly, therefore, cohabitation is becoming either the permanent choice of couples who cannot, or are unwilling to, place their relationship within the confines of family law, or an experience desired by many young partners. Moreover, admittedly such incidents are unlikely to decrease and ultimately it is entirely appropriate for the law to take some kind of cognisance of them.

So far attention has concentrated on children and the internal economic relations of longer run informal partnerships. It is submitted that for children of such relationships the law exacerbates the variance in the reception of the status since the child clearly enjoys the advantages of a family care, suffering only a legal handicap. Change, therefore, is desirable and overdue.[201] As to economic relations it is recognised that there is a need to regulate them in order to ensure that neither of the partners suffers undue hardship. The idea is either to recognise certain relationships, which feature a considerable degree of dependency by reference to selected grounds and tests leaving a considerable amount of judicial discretion to prevent injustices; or to introduce a neutral system which, without giving privileged status to any form of

cohabitation, would solve the practical problems which arise.[202] Neither of the propositions goes as far as suggesting assimilation of the situation of cohabitees to that of a married couple. It is widely felt that the two should remain distinct.[203] A third approach adopted by Susan Blake[204] deplores the idea of giving considerable cognisance to cohabitees. Instead she proposes that if the declining popularity of marriage among sectors of the population " ... is due in part to the law of marriage rather than to an alteration in moral views, then it may be that the law of marriage should be changed to stem that decline". This proposition envisages a quality and quantity of reform to cause a minimum of change to the status quo in family relations and constitutes an aspect of the contemporary legal policy of both countries.[205]

It is unnecessary to become any further involved in discussing the legal subsistence of the parental relationship for the following reasons.

(a) Informal relationships whether of long run or short term convenience occur in various circumstances and it seems unlikely that they will all take a certain form. Inevitably only a limited number of them will be recognized. If the recognition precludes any power of status for children, this will lead us into repeating the same circle of classification and discrimination and nevertheless this will undermine the legal ground upon which is founded the presumption of conception in wedlock.

(b) Evidence on de facto and de jure families shows that the legal subsistence of the parental relationship no longer has compelling importance. As indicated in the next chapter, illegitimacy occurs both inside and outside wedlock and under a variety of circumstances. Therefore attention to the parental relationship will have a limited effect in decreasing the rate of illegitimacy.

(c) Past experience shows that the introduction of devices facilitating the attribution of a status, though useful, has worked on a limited scale and not always satisfactorily. The legitimation of the child has been a minor reason for the parents to enter into marriage and it is unlikely to become a major one, with the current trends in sex relations. Besides it is generally accepted that marriages entered into primarily for the purpose of ensuring that an expected child is not born illegitimate are especially at risk. In a large proportion of marriages where the wife is young and pregnant failure of the marriage is quite probable.[206]

The important points, therefore, concerning the attribution of the status of the child are the following. There is a state of flux with regard to the factors leading to the construction of man woman relationships. Such relationships tend to have a personal and individual character from which it is difficult to extract general patterns. The main tendency, however, for the partners is to seek mutual fulfilment and satisfaction and the decision about the future of their relationship is taken on that basis. The consideration of the legal position of the child has a lesser weight in the decision to form a conjugal relationship.

3. Notwithstanding the artificial attribution of the status the advantages claimed for the child if born in wedlock largely depend upon the continuation and stability of the parental marriage per se. The increasing rates of divorce, separation, as well as the high number of parents working alone far from the family residence,make it difficult to argue on the basis of actual daily care in the legal family as before.[207] Similar factors which lead to the increase of unformalized relationships affect the continuation of marriage.[208] Thus in Scotland, the rate of divorce from an annual average of about 2,300 in the early sixties in

1970 was 4,809 and in 1971, 5041 and in 1972, 5,796 and it is likely to continue in the same mode.[209] These figures represent final judgements of actionsof divorce and to this should be added the actions refused and those which never came to the court. As the Finer Committee points out, a considerable number of spouses part without formality or make their own agreement and nobody can estimate in how many cases this happens.[210] However, the important points are that the higher rates of divorce fall within the first fifteen years of marriage[211] and from all judgements those concerning couples with children increased from two thirds in early sixties to three quarters in the early seventies.[212]

A similar picture is obtained from statistical data in Greece against the total of 2804 divorce actions delivered in 1961, the number reaches 3,675 in 1971, 4,517 in 1977 and has a slight drop in 1978 to 4,322.[213] An increase is noticeable also in the number of cases in which the court refused to grant an order. Thus, from about 300 in the early seventies the number in 1977 was 552 and 1978, 578. Particularly from the marriages dissolved in 1978, 2,847 involved children and the number involved in 1,500 orders was 2,290.[214] Also from the total of 4,322 orders 2,511 concerned couples who had been married for less than 15 years.[215] Those numbers, however, do not give the actual picture of defective parental relationships in Greece. The number could have been even larger were couples not prevented from dissolving formally their marriage by the unrealistic grounds for divorce under the Greek Civil Code. Namely, the Code permits divorce mainly in the instance of "subjective liability of the defender". Thus, if for any reason the innocent party does not show an interest by raising the action, divorce cannot be obtained even though the separation lasted for a considerable number of years. Due to these reasons, Greece faces today the problem of the so-called 'dead marriages' which are estimated to exceed 20,000. Moreover, a number

of couples, approximately double the above figure, live in a compromise situation, simply sharing the same household and pretending to be husband and wife.[216] Proposals to change the law have been presented and to an extent materialized with a Bill introduced to Parliament for discussion in 1976.[217] Also from the results of a research carried out by I.C.A.P. Hellas S.A.[218] in ten Greek cities in March 1977 it appears that the majority of public opinion would welcome such change. However, the reaction of the church to such proposals was unexpectedly strong (and in this were involved certain para-religious groups) so that the Bill was modified to solve the more acute cases.[219]

4. At the other end of the spectrum it is argued that marriage by its very nature provides certainty of paternity, which in relation to the benefits claimed for the children of marriage perhaps function to support their immediate and indisputable availability. The argument appeared early in jurisprudence at a time when women were under the absolute authority of men and adultery was one of the most severe crimes. Thus it became possible to argue realistically in favour of the presumption of legitimacy, to compensate for arguments against the stability of the legal family and most important, to maintain the impossibility of linking a child born out of wedlock with his father. This affected , however, the context of the law of legitimacy. It became possible to depart from the idea that a complete parent-child relationship is possible only in a permanent union and to concentrate upon the formality of the parental relationship. The two jurisdictions have followed the same path, since it has been the law in Scotland and Greece that children of certain defective marriages may be legitimate.

Is it possible , however, to argue today that marriage would deter either of the partners from having an illicit affair, so as to claim certainty

of paternity with the same authority? "Married women" admits Lord Patrick[220] "do bear children to men other than their husbands, especially when they are living apart from them, and the large number of divorces thus occasioned which followed the enforced separation of spouses during two recent wars shows that the event is not a rare one". Currently, relationships in which at least one party is married may be occasioned for a variety of reasons and rarely are they aimed at the construction of a new family. The emancipation of women, their involvement in the production process, has altered the standards of the relationships between the two sexes and has decreased the tolerance that either can show for an unhappy relationship. Thus a steady increase of adultery, it is observed, committed by both sexes makes implausible the certainty of paternity in marriage or that marriage in itself eliminates the rate of births out of wedlock.

This change of morals affected the current legal policy so that in Scotland adultery presently is only an evidential basis for divorce. In Greece where it still constitutes a criminal act invoking six months imprisonment, public opinion is pressing for change. In fact the results of the survey carried by I.C.A.P. Hellas[221] shows 54% of the population believes that there are justifiable cases of adultery involving a married man and 47% believes the same for a married woman. Also two thirds of those questioned envisaged it as appropriate to remove all the punitive aspects of the law and treat adultery only as grounds for divorce. Moreover, there is the tendency in modern legal systems, but to a lesser extent in the two jurisdictions, to treat conception in wedlock as only conditionally proving that the husband had fathered the child and to reduce the amount of proof required to overturn such a presumption.[222]

It may be believed, therefore, that marriage in its legal form is perceived as the most promising unit to bring up a child and in this respect is worthy of support. It is not convincing, however, that support should be given to distinguish between the two classes of children and discriminate against illegitimates on account of the formality of the parental relationship. Today, we have a change in man-woman relationships which increases the number of children who either de facto or de jure would be deprived the care of a two parent family. The number of divorces and separations show that what is really perceived as essential for the children cannot be secured insofar as its materialisation depends upon the parental relationship which operates upon a different basis. Besides de facto family units occupy an even larger part of our social life and, in a considerable number of cases, involve children. Such children cannot be classified other than as de jure illegitimate since they enjoy parental care and live under circumstances almost identical to families formed by marriage. Also because of the economic independence that both male and female aspire to today, the one parent family is far from being rejected altogether in terms of welfare security for the child.[223] On this understanding the arguments on behalf of the connection of marriage with a complete status not only seem to have lost their significance but sidestep situations that need attention in favour of a superficially neat and attractive legal presumption.

At the other end of the spectrum, humanitarian policies put forward by modern societies wish to ameliorate the situation by giving recognition to the interests of the child. So far, improvements have been made to the substantive rights of the child but, with minor exceptions, they have taken place in a piecemeal and pragmatic way and on account of the explicit distinction between children born within and out of wedlock. Recently, however, attention has concentrated upon the concept of

"parenthood" as a status independent of legal regulation as to its attribution. The concept incorporates elements of the jus naturalis and certain elements of the law of legitimacy are summarised in the following fundamental principles.

(a) Each child is the product of a man and a woman whom it is entitled to know as its parents; and they should be responsible for its upbringing.

(b) Just as parenthood in wedlock continues to exist even when the relationship that conferred the status has been dissolved, parenthood should be a status for life, irrespective of the method according to which paternity has been ascertained.

(c) Differences in parental rights and duties should arise not as a result of the circumstances of the child's birth, but from facts concerning their fulfilment and with the purpose of facilitating their operation.

The possibility of applying that concept in the laws of Scotland and Greece will be the objective of the following two chapters of the present part.

# C H A P T E R  T W O

## ILLEGITIMACY

### INTRODUCTION

Since both systems delegate the task of socializing children to the legal family, the problem of the legal position of illegitimate children is expected to be complex and peculiar. The natural truth expressed in the maxim "maternity is a matter of fact, whereas paternity is a matter of opinion",[1] applies as well in the case of Scotland and Greece, so that the natural parent-child relationship has always been in a state of flux. Unlike legitimate children, illegitimate ones were usually at the centre of contemporary policies aimed at bolstering marriage and thereby the creation of the legal family. Ideology, religion and the social realities in each country have played a decisive role in the formulation of those policies and consequently in the restrictions in the status of the illegitimate children. With one exception[2] the policy towards illegitimacy, in both countries, was that illegitimate children should remain inferior in terms of parental rights and duties to legitimate or legitimated offspring.

Besides the inherent difficulty of raising any presumption of paternity in advance resulted in the distinction between affiliated and non-affiliated children. This, in fact, is an innate controversy concerning illegitimacy and one which still lacks a solution for it is difficult to suggest any formula resolving the matter. The consequence for the child is the limited status, vested in the affiliation act, to remain in legal limbo until paternity be admitted or proven. The child is totally dependent on the care and support of the mother, who has usually limited

resources to cope in a period where the child needs undisturbed attention. State intervention may provide alternatives to fulfil the vacuum, but this is usually in an auxiliary form. And it comes into operation when the rights and duties derived from family law have been fulfilled inadequately in the particular case. Thus, the burden of providing for the child is primarily imposed upon the mother, while she may share it later with the father or the state. Obviously, the prejudice against illegitimacy has had a considerable influence in the tolerating of this situation.

Illegitimacy, however, needs special attention since the classification of children may prove to be against the social interest. Statistical information of the two countries shows that the rate of extra-marital conceptions is increasing despite the severe stigmatization and consequences of illegitimacy. In such event, the context of the policy requires to be re-examined at length since maintaining the distinction may be without any practical significance and at the same time cause disorder and social inequality. A reform of the law, accompanying this review on the policy, will bring legislation close to the social reality which it aims to control.

Secondly, an inferior status for children born out of wedlock exposes the child to undue risk at a stage of its life when support for its proper nurture is mostly needed. Current legal policies in the two countries face the problem through affiliation proceedings, state assistance or various other measures ranging from care orders to adoption. Affiliation orders are specifically designated to alleviate the financial problems of the mother in bringing up the child. The support, however, is limited. Thus, fewer mothers try to secure assistance from the father and instead they place the child for adoption

or try to cope with the problems themselves. However, evidence shows that most single mothers want to bring up their child themselves and give up the idea or place it for adoption when realizing the consequences that this could have for both of them. This indicates that the protective task of the law dysfunctions in this area, besides, indicating a conflict in the current legal policy of the two countries. The policy adopted is to support and maintain the natural relations as being the appropriate means for bringing up a child. In illegitimacy the law leaves such relations to be destroyed.

Third, the interests of the child are gaining increasing recognition under the humanitarian policies for children accepted by the two countries.[3] In relation to this an inferior status for the illegitimate, apart from being incompatible with current social conditions, would mean an excessive burden on the social funds in order to achieve equitable facilities for all children. The burden already exists and will continue to exist under equal status for both classes of children until the ascertainment of paternity. However, with higher living standards in the current social policy, if the illegitimate child will not be linked with his father the expenses for the welfare service will be particularly high.

However, on account of this brief review of some basic aspects of illegitimacy, the problem which the present study faces cannot be simply restricted to the acquisition of rights and duties through a paternity action. Obviously, this will be the theme of one of the two chapters devoted to illegitimacy, since it is the area which materialises the satisfaction of the legal rights of the child in each country. Prior attention, however, must be given to a variety of aspects related to illegitimacy. Thus, in due course, the policy behind the

discrimination will be examined as to whether it has any practical significance in the sustaining of marriage and legal family and as to whether it comprehends the current social conditions and interests. At this stage it will be necessary to refer briefly to the basic historical stages of the law in each country to illustrate problems that may arise from the legal tradition. Also it is a well known fact that legal continuity predicts success in the suggested reform. Therefore, it is necessary to align possible proposals with the existing legal tradition. This requires an analysis of the basic aspects of the policy and a brief description of the factual background of illegitimacy. This will be followed by a reassessment of illegitimacy, a review of the international trends for reform and the proposals made for Scotland and Greece. Finally, the models for reform will be examined and will be assessed on their merits.

## I. THE HISTORICAL DEVELOPMENT OF THE LAW

In a brief review of the historical background of the problems of the legal position of illegitimate children, the following points are noteworthy:

(a) At the outset discrimination against children whose birth did not fall within the legal family patterns was not unknown in Ancient Greece though directed more to protect citizenship than the legal family itself.[4] Thus in Athenian Law the status of children born in a concubinage or to the marriage between an Athenian and a foreign woman was restricted to some basic rights. Similarly, the law of Sparta had discriminative stipulations to preserve the class of Spartans from the classes of Perioikos (neighbours) and Helots (slaves).[5]

In Roman law, where the legal family received the utmost of its power, the illegitimate child was generally ignored. At the outset the

ancient pagans did not attach importance to the union that produced the child and therefore it was possible at least theoretically, for a pater familias to expose any child even of obscure origins within his family.[6] However, with the Roman city consisting of a collection of families, and the Roman family strictly monogamous, a person who could not trace a descent through a pater familias had no country name or god, and was not entitled to the protection of the law.[7] His position, however, was more unfortunate because due to the concept of agnation, signifying the structure of the legal family in Rome, the child could have no mother since a woman could legally have no descendants.[8] Later, however, the child became attached to his mother due to the rise of jus naturale.[9] Under this philosophy write Robbins and Deak,[10] "cognation came to be regarded as the natural basis of kinship and the natural basis of the family. As such, the law began to accord the cognate the right to succession and aliment. But while the natural child remained a stranger to its father, all children, whether legitimate or illegitimate, became the cognates of their mother. In effect, under the cognatic theory, there was no such thing as legitimate maternity, for the legitimate child in its relations with its mother could not be distinguished from the illegitimate child. The accordance of any property rights to the illegitimate child was thus not the result of any legislation directed towards his betterment, but merely the logical and necessary consequences of the structure of the Roman Family".

In the Roman Byzantine period this position deteriorated as a result of the inducement of religious condemnation of extra-marital relations. According to M. Tzouganatou Gasparinatou[11] from the time of Constantine and onwards the influence of religion was such that

the illegitimate child remained without protection, ignored, i.e. in its right to seek out the putative father. Exceptions appeared only in the radical legislation of some Emperors like Justinian, for instance to be repealed soon after.

It was Constantine who first classified children according to the union which produced them, and made the child's property right contingent on the class to which he belonged. In this classificaton the legal status of the child was interconnected to the legal formality of parental union. With regard to those born in informal union, it distinguishes between children of incestuous and adulterous intercourse on the one hand (damnato coitu) and those born in concubinage, prostitution, and other forms of illicit unions, on the other hand (liberis naturales). Constantine also suppressed the rights of all illegitimate children against the mother except the rights of those children born in concubinage.[12] In his time, Christian morality actually began to force its way into the family law and affect the legislation on illegitimacy. Two more innovations worthy of mention are connected with the name of this Emperor. Firstly, Constantine introduced to Roman Law the doctrine of legitimation per subsequens matrimonium. Second, in attempting to discourage concubinage he forbad the father to make the child any gifts, a right which the father had previously exercised. Subsequent emperors, however, permitted the de cujus to give one twelfth of his property to the liber naturalis but if he had no legitimate heirs, one quarter could be given. At this period the illegitimate child had no right of aliment against his father and no right in the succession to his father's property.[13] The situation changes with Justinian on the Byzantine throne. After his triumph over the Church in the 'Stasis of Nika', the Emperor

became the indisputable source of legislation and he introduced remarkable changes in relation to illegitimacy. Confining his attention to the liberi naturales he increased the portion the father could give to his natural child. Failing legitimate issue, he could by will give them half his fortune. Also if the father had died without a legitimate descendant the natural child could succeed in the intestate succession to one-sixth of the net assets otherwise the legitimate heirs, precluding his right had to aliment the illegitimate child. Surprisingly, there was a reciprocity recognized in those rights.[13a] However, Justinian did not supply other illegitimate children with rights. The possible explanation for this preference towards children of concubinage is that the institution was widespread among the lowest classes which could not afford the obligations of the marriage. Moreover, concubinage had a strong resemblance with the institution of marriage at the time of the Christian era so that it may have been felt that some recognition should be given to those children.[14] "So common did this become" points out Robbin and Deak, "that the words fili or liberi in the testaments of men of a low class were regularly construed to include natural children. We may say that instead of liberis naturalis being given rights, they were deprived of their status of bastards by concubinage being given a judicial status. At least as late as 400 AD the church recognised concubinage as a status and when in 1530 concubinage was forbidden in all its forms, being entirely superceded by marriage, children born in such a union fell to the condition of other bastards.[15]

(b) Thus a severe attitude to illegitimate children is observed in Medieval Europe. Under this, every bastard had a right to aliment against his father but no succession rights were given to such

children. The important point onthe other hand, is that the church as well as family law had invaded the jurisprudence of public law.[16] As a result, the child was deemed as a non-existent person, barred from public offices, from appearing as a party or witness in the court, penalities for his death were reduced to farcical levels and burial was denied him. Moreover, if the child had died without lawful issue his property escheated to his Lord.[17] How much of this was due to a clearly religious influence, it is difficult to assert since a noble bastard suffered no disabilities, and was considered as part of the family, and had no obligation but to conduct himself like a gentleman.[18]

(c) Early Common law without going as far as to maintain direct punitive consequences treated the child as filius nullius, depriving it from any kinship and inheritance rights. The motivation for this approach derives from the principles of Feudalism and the law of familial property, while religion had played an important though not principal rôle.[18a] In fact, one could perceive the cooperation of the two authorities in the sense that feudalism found a basis of support in religion. In terms of consequences the concept filus nullius was carried to its logical extreme.[19] Neither parent had a readily enforceable right to the custody and guardianship of the child while the child could not inherit from the parent nor had it any quasi legitimacy as to its mother.[20]

(d) However, as regards Scots law, though primarily a Common law system, it developed upon Roman law principles and therefore deviated from this approach at an early stage. Thus, although the father was refused the right to custody of his natural child, the mother has always been recognized as the natural custodian.

"This right of the mother," maintains Lord President Inglis in Brand v. Shaws[20a] "is purely a personal one, and cannot be insisted in after her death by any one named in her will as her representative. An application by the mother of an illegitimate child for delivery of it to her custody is prima facie a just and legal title to its custody, and I am not disposed to throw any doubt upon the competency of such an application in the Sheriff Court, where there are no special circumstances which can be pleaded against her legal title. The title cannot possibly pass to any one else. The mother cannot convey it by deed, either inter vivos or mortis causa". Also in Macpherson v. Leishman[21] the same judge describes the right of the mother to custody as being "no doubt absolute" and states that in all ordinary circumstances it must be enforced. It seems that the concept of Roman law expressed in the maxim "mater semper certa est etiam vulgo conceperit ..." had had a considerable influence in the formulation of the relation with the mother under Scots law. Nonetheless, the concept of filus nullius has always precluded any actual improvements in this area. Therefore, the consequent development in Scots law on this point has been a compromise view between the two principles where in the natural mother-child relationship specific rights were supplied to the extent of the legitimate relation while in other cases rights had been in one-sided relationship or ignored altogether. Thus the right of custody has been supplied along with the obligation to maintain the child. At a certain stage this was enforced reciprocally so that the child was bound to support her, if she be in indigent circumstances.[22] In Samson v. Davie[23] the principle behind this was held to be the law of nature as in Roman law. "The natural obligation between mother and child is as strong whether the child be legitimate or illegitimate, and therefore, as a legitimate

child is under an obligation to support its mother, so also must an illegitimate child be under the same obligation".[24] This rule had been changed soon as inequitable because the child was deprived of most of the financial benefits that could justify reciprocity.[25] Moreover, since the introduction of the institution of adoption in Scots law at the beginning of this century, the mother was supplied with the right to consent to her child's adoption.[26] Succession rights were never recognised in favour of, or through illegitimacy at Common law[27] and those rights have been one of the latest innovations in the law of Scotland.[28]. Also the child is not deemed a blood relative to its mother nor are different bastards by the same mother in any way connected.[29] An exception has always been made for the marriage impediment and is induced in the Marriage (Scotland) Act 1977 where in marriage between persons falling within the forbidden degrees whether through consanguinity of affinity is debarred, "even where traced through or to any person of illegitimate birth".[30]

On the other hand, in the relation with the father, old Common Scots law maintained the Common law approach. The concept of filius nullius was taken to its most tolerable limits and the relation recognised bore little resemblance to a family law relation. "A natural father" said Lord Stowell,[31] "in the language of the law is only a father by repute of an illegal ... character ..." and Lord Jeffrey[32] comments that "the person so called is he who, from contact with the mother, is liable in the burdens of paternity without any of the privileges". Also the Lord Justice Clerk (Inglis) in Corrie v. Adair[33] states of the bastard, "Not only has he no father, but no proof can give him a father; nothing can do that but marriage between his mother and his putative father.

... the only relation is that the father is to a certain extent, and under certain conditions, liable to aliment the child". However, the relation provided could be specified in the following rights and duties. The father was obliged ex jure naturalis to maintain the illegitimate child jointly with the mother. He also had the obligation to compensate the mother to a sum for her inlying expenses due to delivery.[34] The father had no right to custody[35]. However, he could offer to undertake the obligation to provide aliment in the less burdensome way by taking the child in his house to maintain it in natura,[36] and in this respect his right to custody arose entirely in defence against a claim for aliment. He had no right on the other hand to insist otherwise in an action for custody of the child.[37] Furthermore, the father of a bastard had no common law right of patria potestas[38] nor any right to the administration of the child's legal affairs.[39] Nor were they deemed as blood relatives.[40]

At the end of the nineteenth century, however, some emphasis was placed upon his natural bond with the child which gave rise to improvements in the relationship. Lord Watson in Clarke V. Carfin Coal Co[41] points out that the concept of filius nullius although true in its legal sense it is untrue on a natural sense. Commenting on the implications of the ascertainment of paternity on regarding the child as having a mother but not a father, he observes that "The phrase is unobjectionable so long as it is only meant to express that the maternity of a bastard is, comparatively speaking, a matter of certainty, whereas its paternity may be a matter of doubt, and in some cases, the father may never be identified. It becomes in my opinion mischievous when it is used to convey the suggestion that after the father has been ascertained by admission

or by judicial proof, the natural tie which connects him with the child is more slender and less enduring than that which binds the child to its mother."[42] As to the pre-code Greek law it is observable that until the twentieth century the legal position of the natural child was regulated by pure Roman Byzantine law as it had been developed by the end of the Byzantine empire.[43] The fact that during the Ottoman occupation the administration of family law had fallen into the hands of the clergy had suspended any progress in the matter. However, since 1915, there have appeared the first drafts of bills aiming at the protection of illegitimate children[44] which resulted in the most progressive piece of legislation ever enacted in Greek Family law, the Legislative Decree of 30.4.1926. This Decree in fact assimilated legitimate and illegitimate children and provided retroactivity of the rights of the illegitimate child to its birth.[45] This Decree had a short life of three months and was replaced by the L.D.14/27 July 1926, which provided a relationship with the mother comparable to that she had with legitimate children and permitted the judicial and voluntary recognition of paternity. The relationship with the father in voluntary recognition and its equivalent complete judicial recognition of paternity was that of legitimacy[46] save the following exceptions. The father was without rights of patria potestas over the child, nor had he any rights to custody equal to that of the mother. Moreover, the child's portion on intestacy and his legal rights in testate succession were half of a legitimate child if the father was with legitimate issue.[47] For a child for which paternity had been judicially ascertained the same Legislative Decree provided only a limited right to aliment according to the social position of the mother.[48]

(e) This century, however, marked the law of illegitimacy with various and undoubtedly progressive pieces of legislation in both countries. In Scotland with the Illegitimate Children (Scotland) Act 1930 the relationship with the father has been improved to equalize the duties and rights of both natural parents. Namely Section 2 of the Act supplies the father with a right to apply for custody and removes his right to meet a claim for aliment by assuming custody of the child. The same Act in Section one makes the father and the mother jointly and severally liable as debtors against the claim of the child for aliment. In the area of succession, following the recommendation of Russell Committee[49] which was designed to elevate the bastard for the purposes of succession to a parent's estate, from a status inferior to that of a legitimate child,[49a] the Succession (Scotland) Act 1964 and its reform, the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 supplied the illegitimate child with the same rights of intestate succession to their parents as legitimate children. The same right is recognised to the parents if the child had died without being survived by his own family.[50] In the adoption, though, the father still suffers a major disability since he has no right to veto the adoption of the child, although with the Children's Act 1975 he has the right to prevent the adoption by applying for custody. Also the Adoption (Sederunt) Act 1959 supplied him with the right to be heard and his wishes to be taken into account for the adoption of the child. Also the father, like the mother, has been granted the right to adopt his illegitimate child.

In Greece on the other hand the introduction of the civil code brought forward minor modifications in relation to the L.D. of 1926. Specifically article 1530 of the Greek Civil Code preserves

the Roman law principle so that the natural child has the same position as a legitimate child, with regard to the mother and extends it to relatives in the maternal line.[51] The child receives the mother's maiden name but in an effort to integrate the child with the step father it permits the husband to give his name to the child if both mother and child agree to this.[52] In the relationship with the putative father things remained as they were under the L.D. 1926.[53] An improvement came later with the permission for the parent to adopt his or her own illegitimate child. However, the proposals of the Gazi Committee, which are currently as a Bill before Parliament, supply the natural mother the right to administer the child's affairs (art. 83 to reform art. 1530) and the same right is supplied to the father who has voluntarily acknowledged the child, in an auxiliary form, if the mother has for any reason forfeited her rights. (Art. 86 to reform article 1537). The same bill brings forward some improvements in the aliment due to the judicially affiliated child (articles 89-91 to reform articles 1545-6-7). As to the complete judicial affiliation the committee declined to offer the father the right to communicate with his child or to administer its affairs if the mother had forfeited the right. (Article 93 to reform article 1555)

With those developments one can see a trend to improve the facilities for the illegitimate child. Modern law no longer proceeds upon the assumption that the illegitimate child is filius nullius. The child now has rights to support and of inheritance from his parents and they in general have rights of custody. Nevertheless the child remain subject to disabilities since reform is stamped by the desire to preserve unaffected the legal family. The remaining disabilities relate to rights important for the

child in his childhood and appear in a varying degree according to their bearing to the protection of the legal family. Thus, the right to custody which is exercisable on equal bases among married parents in respect of the children of the marriage in illegitimacy is regulated in a manner anticipating no actual relation between the parents and discriminating against the father. Specifically the mother is considered to be the natural custodian of her child. The father on the other hand is supplied with a right to apply to the court to gain custody of the child but in awarding custody to him the court will regard the welfare of the child as first and paramount consideration. There is also the case of judicial affiliation in Greek law where no such right is supplied to the father. How far the present derives from the difficulties in regulating such situations is difficult to answer. However, as Professor Clive observes the difference would have been minimal if equal rights were given to both parents providing for judicial discretion to resolve disputes between the parents.[54] With regard to maintenance unlike legitimacy where there is a reciprocal right among descendants and ascendants and the father has the primary reponsibility to maintain the child, in illegitimacy both parents have to share the expenses according to their means, taking into account their prior responsibility towards a spouse or any children of marriage. Also maintenance obligation is not reciprocal in illegitimacy. The equal responsibility of the parents in maintaining the child seem to be more in tune with current conditions and it is suggested that is should extend to legitimate children.[55] As regards reciprocity the matter is under review in Scotland. However the tendency seems to attribute rights to the parents on account of their conduct during the child's minority. As regards guardianship neither the

father, nor the mother has any right to represent the child by operation of law. In Scotland the court has to appoint a special guardian when the child needs representation while in Greece an ad hoc guardian is appointed to represent the child until it reaches majority. Succession rights are given to the child more or less in substitution to its right to be alimented by the father's estate. In Scotland, it can choose between the two while in Greece in voluntary acknowledgement the child would secure its aliment by succession rights upon the father's estate and in judicial affiliation by claiming aliment from the father's heirs. Kinship is not recognised whatsoever in illegitimacy, unless as an impediment of marriage, with the exception of the relationship with the mother and the maternal line in Greek law.

## II. REVIEW OF THE POLICY AND THE REASONS BEHIND THE DISCRIMINATION AGAINST ILLEGITIMACY

Adhering to the position that stability of the legal family is a worthy goal, both countries permit discrimination against illegitimate children in order to support the institution of marriage and the legal family thereby created. The core of the argument is that by providing an equitable status for both legitimate and illegitimate children marriage would cease to be signified as the approved unit for the procreation of children. Consequently, the moral importance attached to marriage will be diminished and, at the same time, concubinage and other forms of illicit relations will be encouraged.[56]

On account of this view, social paternity, as created by birth of the child to a man's wife, typically has been viewed as of controlling importance in settling the legal status of the child. Reaction to its birth starts when social and biological paternity do not coincide in a

mother's husband. Thus, if the child is of adultery or is born to an unmarried mother, its birth is considered as an act against the marriage and the legal family and as such deserving reprobation.

a. To this end ideology and religion have played an important role. Traditionally human consciousness, in response to the more or less clearly perceived needs of a particular social context, has viewed temporary liaisons as a threat to society and thus they frequently were appraised in an ideological context.[57] These philosophical positions found a suitable outlet in the institution of marriage and consequently its security was required whatever the sacrifice might be. Often this was expressed in religious terms. Organised religion then elevated this opinion to a spiritual level. Christianity, which concerns both countries in question, following the same path, considered children born out of a non sanctioned union - today lawful marriage - as a sin which turned into flesh.[58] This position proved to be the most inhuman and anti-Christian consideration ever provided for natural relations, since it maintains discrimination as a religious gospel. Perhaps too, the classification made by Justinian, which has carried most weight into modern law, is based upon religious influence since it distinguishes classes of illegitimate children according to the degree of sinfulness involved in their conception. For instance, natural children of stable concubinage which was a semi-approved union, and natural children of casual liaisons of single persons enjoyed preferential treatment in terms of legitimation, recognition and succession rights over spurious children such as offspring of incestuous, adulterine and un-natural relationships like the sacreligious children of priests, or those of prostitutes or promiscuous women, to whom was allowed a limited alimentary claim.[59]

It is not completely clear if religion has been the main factor in modern society in insisting on birth in lawful marriage. Legal family features as the basic social unit from the Classical period but the pagan ancients attached less importance to it, concentrating their attention upon descent of the same citizenship. Justinian, as already mentioned, was prepared to recognise the children of concubinage. Obviously, the Christian Church, interested in the sanctity of marriage as a religious sacrament, opposed birth in unsanctioned unions. However, even until early medieval times (perhaps until the Council of Trent) the Catholic Church unlike the Orthodox, following St. Paul's dictum "Better they marry than that they burn", was prepared to countenance, as marriage in some sense, many unions which later were frowned on for lack of formality.[60]

b. Even if religion has not been the decisive factor in regarding informal family structures as deviant, certainly it has provided suitable support for feudal attitudes and modern social policy. As said earlier, in the feudal system bastards of noble origin were not despised but marriage was regarded honourable. Emphasis was put, however, on bastardy, for reasons concerning the distribution and inheritance of land. According to Kiralfy and Routledge the landed classes have the desire to conserve their inheritances, particularly in times where marriages were matters of property and posterity, and the likelihood of casual liaisons was high; and also because under the feudal system of forfeitures the lords had a vested interest in maintaining the disability of the bastard to inherit, since the land of a man who died without legitimate issue was left to his lord.[61]

Later times have seen the growth of welfare policy in the form of

religious and charitable institutions to care for needy people for which was later substituted welfare provision by the State. Illegitimate children, because they suffered from lack of parental recognition and consequently care, attracted most of the charitable aid to the disadvantage of other needy people and to the economic burden of the society In this context informal family structures were deplored as being unstable and unworkable in their social and economic sense.[61a]

c. The leap, however, from an ambiguous, and often problematic, status to a stigmatized one tends to be small. The dysfunctions of illegitimacy start to attract attention as to its implications on the welfare of society. Certain assumptions then start to develop about the function of the family in its social setting to take the form of what we know today as the conventional family model. This model as revealed by Skolnick and Skolnick,[62] embodies the following fundamental assumptions.

   i. The nuclear family is universal. Any form of extended families, and the wider society is simply a combination of nuclear families.

   ii. It is the key institution for the survival of society.

   iii. The nuclear family is based on a clear-cut biologically structured division of labour between male and female, the male being the breadwinner and protector and the female the housekeeper and emotional mainstay.

   iv. This family structure has the fundamental purpose to socialise children - that is to tame their impulses and instil values, skills and desires necessary to run the society.

Such assumptions about family-society integrity indicate the degree

to which a family context elicits society's support or censure. Given, therefore, that illegitimacy deviates from those fundamental assumptions, from this follows the labelling of both parent and children. As Ferri[63] observes, illegitimacy became "the obvious target for attack as a causal factor in numerous social and psychological ills and often the search for explanatory factors goes no further". Such an approach determines the sociological treatment illegitimacy receives. By being regarded as deviant in terms of the existing context, illegitimacy is frequently negatively evaluated in the literature and negatively sanctioned in the law, which can be summarised in stigma, exclusion from lineage and family, economic disadvantages by discrimination in taxation rates or in access to social security benefits.[64] It is not entirely clear if the neglectful attitude towards illegitimacy in this transitional period is based upon any empirical assessments of social conditions, or whether it derives from what are essentially sociological and political assumptions about the way society should work. According to Grace Abbott[65] the latter seems to be the case when she writes: "The duty recognised by the state was the one of preventing or reducing illegitimacy and the dependency that it created. Under the double standard of morals public opinion held the mother to be the offender, and the question was assumed to be how women could be kept from transgressing the moral and statutory law. The early legislation was not based on any scientific study of the causes of these extra-matrimonial relations even so far as the women were concerned. Such a study we now know would have involved considerations of such personal factors in the mothers as feeble-mindedness, ignorance of the biological facts of life, high sexual suggestibility, lack of industrial proficiency and personal development. It would have revealed the influence of family standards and ideas,

poverty in the home, and immoral and unsympathetic parents. Education, early employment and the type of employment, would have been discovered to be present in the chain of causes that led to this deviation from the legal and social standard. The presence of a socially inferior race, the position of women and the community attitude towards pre-marital relationships, especially after betrothal, would also have been found to influence the illegitimacy rate of a nation. Any consideration of these causes indicates how futile punishment of the mother would be in most cases and that, no matter what policy of prevention the state adopted, there would be children born out of wedlock whose needs and rights the state should consider. Enlightened selfishness as well as sympathy for the innocent victims required a programme for the care of children. But reliance was placed on deterrence. Harsh punishments for the mother and denial of legal rights to the children were relied upon to reduce illegitimacy. To protect the victims of these illegal relationships would, it was believed, increase the number of illegitimate children." This view is further complemented by Kriesberg[66] who argues, "Many of the difficulties faced by mothers and children in female headed households are not inherent in that family structure. The difficulties in part stem from the expectations of others about what is normal family, from the socially limited alternatives deemed appropriate for women and the specificity of sex roles".

d. Such a view of the social functions of the family, appropriately termed by Ryan[67] as "the victim blaming ideology", may be held responsible for the conservative attitude to change in the family law system. As the Finer Committee points out "Most people are brought up to think of marriage as central to their personal security and to the wellbeing of society. They are therefore quick to

interpret changes in the institution as threatening evidence of moral decay. During the last hundred years, many proposals to ameliorate the situation of wives and children have been criticised, not as being bad in themselves but as securing the welfare of individuals by undermining the integrity of monogamous marriage".[68] Such an attitude is clearly demonstrated by the social attitude towards reform aspiring to remove the distinction between legitimate and illegitimate children altogether. In such cases it is observed that public opinion, apart from particular concessions that it is prepared to make on specific rights of the child, becomes more conservative and defensive in its views. Probably, a vast amount of background work will be needed to convince society that such prejudice is unreal and equalization of the two classes of children will leave unaffected or rather benefit the existing social order.[69]

To complement the social-moral perspective it has been argued that illegitimacy is a neglected status because both parents and children do not make out a case for them in principle. On this argument socio-moral views are taken for granted and emphasis is placed on the variance between law and illegitimacy. This is to say that since the birth of the child took place in a union lacking legal formality accordingly it cannot be legally supported. This extends to affect as much the establishment of paternity as the rights which should flow from the relationship.

As a matter of fact because the mother is under no legal obligation to have intercourse exclusively with the alleged father, the paternity of the child is regarded as being uncertain. This 'uncertainty' is the frequently presented argument against proposals

for improving status with regard to the natural father and proves to be a decisive one due to its appearance of realism. However, this argument has some validity for propositions suggesting raising a presumption of paternity in informal relationships. From a point of view of legal deontology it is not appropriate to link legally the child with the consort of the mother since intention to procreate is not formally expressed as in marriage. This does not justify, however, the reluctance of the present legislation to respond with confidence to any methods, legal or otherwise, that could provide a practical and legally acceptable outlet for the problem.

It is partly upon considerations of the uncertainty of paternity that are argued for the limited rights of illegitimate children, since a complete status is not justified by certainty of paternity and a limited one prevents excessive hardships in cases of injustice.[69a]

In this context and with the old punitive approach still reflected in the law, clearly the concept of first andparamount consideration being for the welfare of the child, has not yet invaded this area. The policy still aims to protect society against the illegitimate child rather than to protect the child as a member of the society. Improvements have been made to better the position of such children but every improvement has been in line with the traditional perspective that illegitimacy should remain inferior in order to protect the legal family. Accordingly it may be appropriate to examine what both children and society have experienced in consequence of this policy, and whether it can be sufficiently justified in the present social context.

## III. THE FACTUAL BACKGROUND

At the centre of this policy is the child who must suffer the consequences of labelling and neglect usually with a young mother behind him struggling to change the situation. Maybe it is unnecessary to this discussion to detail the struggle of those children to cope emotionally and materially, as the subject has been exhausted in a number of works.[70] However, for the completion of this part, the most distinct situations that may result from the discrimination against illegitimacy require a brief consideration.

1. A small, though still alarming for the effectiveness of social services, number of children die before they are one year old.[71] This is mainly due to premature birth resulting from the fact that the mother did not seek ante-natal care in time or owing to poverty, did not feed herself properly or worked too long or too hard during the pregnancy.[72] The assistance given her in the area of family law provides a lump sum to cover her aliment and inlying expenses for a small period before and after pregnancy. Even so, however, this help rarely comes on time, nor does it extend to cover all the necessary expenses involved.

2. Over one fifth of the total number of illegitimate children find their way into the controversial process of adoption. This topic is discussed on its merits in the second part of this study but it should be noted here that the high proportion is due more to the mother realising the impossibility of keeping her child than to lack of interest. In fact, the unsettled and complicated emotional problems that the child may have and the lack of certainty that the outcome will be a happy one, have persistently forced unmarried mothers to part from their children with a view to adoption. Such a solution is considered by them because, at least artificially, they can secure a two-parent family and a proper home for their child. However, the solution is now considered only by a

declining number of mothers due to improvements in women's social position.

3. A large number of children will be brought up in a two parent family whether formed by his natural parents or by one natural parent and his/her spouse. Namely, a number of children, proportionately higher in urban than in rural areas, will be brought up in unofficial families formed by both natural parents. These cases, apart from the emotional strain caused by the legal uncertanty of the relationship, have produced fairly satisfactory results.[73] Some children will be legitimated per subsequens matrimonium, while others may find a home in the family, formed by the mother and a husband other than the father. In almost all cases of the latter category the mother tries to secure a place for the child in the newly formed family and usually succeeds. However, the cases vary whether the child will secure a permanent home with them mainly depends on circumstances. There have been cases where the man has made it clear to the mother that he will marry her only if she will part with her child. In those cases attempts by the mother to keep the child have usually been in vain. In a considerable number of cases, on the other hand, the husband accepts the child, either admiring the mother for her determination and courage in retaining it or simply adapting to her wishes. Complications may arise, however, when the family produces its own children. This may affect the feelings of the husband for the strange child. Also it may be a cause of dispute between the spouses in which case the mother may even reject the child, feeling that it causes disturbance within her family.

4. A relatively small number find their way to the grandparents' house with or without the mother living with them; and a few "a precarious and therefore extremely important few" as Wimperis points out, grow up

with the mothers alone.[73a]

When the mother takes the decision to return to her parents for assistance if they will accept this , it is almost certain that, after the first shock, the situation usually develops fairly naturally. Depending however, on the age and capacities of the mother, her role may be substituted by the grandmother. This may prove to be rather risky insofar as it can cause emotional conflict in the child, who in recognising the person of his mother, may start wondering why he is receiving maternal attention from a person other than her. Also it is not advisable for the child to grow up with the grandparents if the mother's deviance of family pattern is due to her troubled childhood.[74]

In these situations, writes Wimperis, "it seems that in returning the child to the home where its mother grew up disturbed emotionally, one risks the perpetuation of a social process whereby one generation of deprived children provides the parents of the next generation of deprived children". However, as she continues: "But it would be unkind, as well as unjust, to have this as the last word upon the grandparents' role. In personal care and in money, they often contribute more to the child than its own father may ever do, and this without a shadow of legal obligation. The desire to help their child and grandchild often leads middle aged and elderly couples, at a time of life when they might expect to take things more easily, even when they have retired and have few financial resources for themselves,to take on the great burden of making a home for their grandchild, conceived so unexpectedly and in such unhappy circumstances."[75]

5. A small proportion of children - difficult to specify in number - grow up in the hands of lone mothers. This small proportion, however,

should not distract attention from the fact that when the total number of children in these circumstances are counted up, the number becomes significant. It is anticipated that some thousands of children in each country live with the mother alone, under circumstances giving rise to acute problems for the mother and the child. Dr. Doris Odlum commenting on these situations points out that 'for the few who really want to keep the baby with them the way is very hard. Both financially and socially the odds are heavily against and only rarely do succeed.[76] A detailed account given by Dr. Christine Cooper[77] describes the life of those children as follows : "The child is cared for in constantly changing circumstances, being moved about among relatives and friends, taken round to different lodgings by the mother, or put in and out of day or residential nurseries. He often has periods in the care of the local authority's Children's Department, and finally may be removed from his mother's care to an institution or foster home. Here his behaviour is usually difficult or delinquent, and this may result in further changes of care. This unfortunate fate is suffered by many illegitimate children and there is an urgent need for steps to be taken to prevent such treatment. The mother is usually vacillating in her attitude to the child being alternately over-protective and neglectful. He is unable to attach himself permanently to his mother or a reliable substitute, and develops into the affectionless, delinquent adolescent who, as Bowlby has pointed out, only too often produces illegitimate children himself and the cycle is repeated."[78]

The roots of the troubles of the mother and her child may be largely identified in the financial difficulties that she faces rather than in her inability to cope with the child. There may be an element of inability since usually the child is the first she has had and she is inexperienced but mostly the problems are due to the fact that unless she withdraws from

work she cannot confine herself to bringing up the child. Usually, she is forced immediately after delivery to go out looking for a job to maintain herself and the child. To this, if added the fostering fees, that she usually has to pay to free herself to work the problem becomes even worse. Actually, foster placements are largely in use by lone mothers, who treat them as a temporary expedient. Nevertheless, due to the circumstances, in a number of cases this situation may continue for a considerable period, certainly until the mother is able to secure the necessary financial resources. In consequence this situation usually results in the breakdown of the emotional bond between mother and child due to lack of contact. Or, in finding the fostering expenses too much of a strain, it brings about a reduction in the visits of the mother until finally she disappears altogether abandoning the child to the foster family. In the latter case, however, the matter may not end so readily for the mother. After a marriage or a financial settlement suddenly she may swoop down and take away a puzzled child who has meanwhile settled very happily with the foster parents."[79]

6. Natural children in public care

For a large number of illegitimate children the alternative of public care is not an unknown. Many have spent some part of their childhood in public care while others have remained there from early infancy up to the age of majority. The reasons vary and may not be entirely due to discriminatory policies on illegitimacy. But in the majority of cases the children may be received into care and thus deprived of normal home life. In the short stay cases children are received into care because of the mother's temporary inability to deal with the child due to her illness, imprisonment or eviction from her house, while in thelong stay, she may have abandoned the child or proved permanently unable to cope with it. Wimperis[80] classifies the latter category to the following main groups:

a. Those who have no homes because the natural parents have died or deserted them or are destitute or incapacitated. Those are received into the care of local authorities in Scotland or of a local department of National Aid in Greece.

b. The children who have been removed from their home, either for rehabilitative or for preventative purposes. In both cases, usually danger to the child's moral and physical development is observed either because of its own misbehaviour or because of its home conditions, to the extent that it would not be right for it to remain in it.

c. Those who have some mental or physical handicap of their own that calls for institutional care since it is eitherimpossible for them to be kept in the house or it is difficult for a single working mother to provide the attention needed.

## ILLEGITIMACY REASSESSED

So far, the development of the law has been examined, the policy behind this legislation and the most serious ways where the effects of illegitimacy make their presence felt in the child's life. The point which became clear is that the child itself bears most of the moral blame for its birth and suffers all the social and legal consequences for an act for which it has no responsibility at all. Also in the previous chapter consideration was given to the disfunctions of the conventional family as well as to the present state of relationships between the two sexes. The point made there was that of the failure of the law to comprehend the current family patterns. One dimension not analysed so far, however, concerns the relationship between discriminatory policy on the one hand and sexual behaviour and the fluctuation of the rates of illegitimacy on the other. The task of this part then is to determine whether marriage needs any support, and whether the deterrence argument had any effects on sexual behaviour,

and on the rates of illegitimacy in order to formulate a clearer view of current conditions and the policy needed. In the next part it is necessary to consider the international trends in respect of illegitimacy and the propositions for reform in Scotland and Greece respectively. Finally, models for reform are examined, along with certain considerations to be taken into account in the construction of these models.

## IV. MARRIAGE AND ILLEGITIMACY

The aspect of the policy which, perhaps is most vulnerable to cricitism concerns the need to support the institution of marriage. Titmuss[81] in the fifties pointed out the increasing popularity of marriage, probably as a result of the removal of social and legal restraints and equality and freedom for women. The thesis is further confirmed with the publication of the Finer Report[82] which describes the increasing popularity of marriage as one of the most significant features of recent time. In Britain alone, the annual total, from about 253,000 each year at the beginning of this century, has risen to 357,000 in 1971 and, though this is due to a great extent to the growth of the population, "part of this increase reflects also a growing propensity to marry". In actual numbers the Committee found that the proportions having married before attaining the age of fifty are 95 per cent for males and 96 per cent for females. In this respect they feel bound to accept that such percentages represent what Professor Grebenik and Miss Rowntree described as "as near an approach to practically universal marriage as has been achieved in this country".[83] In Greece from the census data of 1961 it appears that celibacy is at medium rate ranging from 5 - 9%. The statistical data for the population up to the age of 44 shows that 90.5% of males and 91.8% of females had been married at least once at this age.[84] The percentage, however, could be even higher if the present marriage law, with its outdated regulations, did not restrain a percentage

of the population, especially women, from getting married.[85]

The above numbers show that a minority of about 5 per cent of the population have never experienced matrimony. This number, however does not correspond to the percentage of the population which may be anticipated as a threat to the institution of monogamous marriage, because of a clear opposition to its principles. From it, one should deduct the homosexuals, persons suffering from ill-health preventing them from undertaking the responsibilities of marriage and others under a permanent legal impediment like those suffering from insanity or those standing in the agamic ranks of clergy. Then, the percentage left is small to be regarded as a potential influence on society. Nevertheless as long as this percentage stands with beliefs against formal marriage it is illogical for society to expect them to change their opinion by imposing severe consequences on illegitimacy. They may be indifferent to stigma and nevertheless prepared to face the legal handicaps in the relationship with their children.

Alongside propensity towards marriage there has been a continuing fall in the average marital age which has some significance since illegitimate births to a great extent occur between young consorts.[86] The mean age of first marriage in Scotland shows a steady decrease so that from an average of 27.1 and 24.8 for men and women respectively for theperiod 1946-1950, it falls to 24.9 and 22.8 at 1961-1965 and 24.2 and 22.4 for 1971.[87] At the same time the proportions of persons having their first marriage under twenty increased rapidly. From an average of 2.7 for men and 14.8 for women for the period 1946-1950 it increases to 9.5 and 28.5 for 1961-1965 and 12.8 and 31.6 for 1971.[87a]

For Greece, though, there are no tables available showing the same tendency, a lowering in the average marital age is expected. At the census of 1961 it was 28.4 for males and 24.9 for females so that the country

was classified among those with high rates of first marriage. Due to recent changes in life-styles there may be a lowering of about 2 years for men though no substantial change may be expected for women.[88]

The increasing popularity of marriage and the fall in the mean age of marriage are demographic developments of persuasive social importance. However, they have not attracted extensive study and they are not fully understood yet. An analysis of the census data of 1961 made by the Registrar General suggested that the change had affected all occupational groups in society with a higher proportion among unskilled and manual workers.[89] Studies attempting to investigate whether the change can be attributed to social and economic changes, security of jobs and incomes conclude that there is no real connection between such factors and the decision to marry.[90] Perhaps, behind these developments there is a change of principle so that financial security, acquisition of properties or other social class related factors have lost most of their significance for a decision to marry.[90a] However, what these numbers do really suggest is that marriage is undertaken in every increasing proportions by all sections of society so that to try to bolster it further in social opinion is somewhat superfluous.

The popularity of marriage does not necessarily imply that a higher proportion of children will be brought up in a stable parental family. The incident of marriage breakdown in the view of the Finer Committee has become a major social phenomenon and one which is unlikely to go away.[91] and this has tended to be equated by social commentators with deterioration in the state of health of the family.[92] Behind this has been seen the twentieth century emphasis on the welfare and happiness of the individual, frequently regarded as the cause of family decline and deterioration of parental responsibility. Sociologists like Fletcher,[93]

for example, have however strongly argued against those accusations, rejecting the charges altogether - a position later supported by the Finer Committee. The Committee declined to accept pathological situations as the main factors for divorce and nevertheless considered it to be "unhistorical and socially unrealistic" to interpret marriage breakdown "merely or exclusively as a concern of social pathology".[94] Later commentators confine the reasons people resort to divorce or separation to the alteration and increase of standards in the conjugal relations as such. These have been understood by Lambert and Streather[95] not to be incompatible with the fundamental belief in the stability of the family as a system. An analysis given by Eekelaar[96] indicates factors in the marriage breakdown as including premarital behaviour, age, economic conditions but he also points out less conventional and not yet fully understood factors concerning the spouses themselves. For example, he sees as a possible factor increased life expectancy among married women, since birth control and progress in general medicine has reduced the risks and increased the span of active life among them. Nevertheless, accompanying the emancipation of women and the growth of the 'romantic' conception of marriage, Titmuss[97] and Eekelaar[98] see a heightening of the expectations of each party, in particular the women, as to the quality of marriage, which makes greater the probability of disappointment. Personality differences, then, between the parties occupy a place among the complaints which may bring about the dissolution of relationships, with personal defects most prominent and with sexual difficulties and incompatibility still high on the list.[99] The involvement of such factors, of course, does not point to any kind of pathological situation but nevertheless reveals what Lambert and Streather[100] describe as a "considerable fluidity of the composition of families within this system". The increasing risk then of the child not being brought up in a two-parent family cannot be

ignored. On the other hand it should be recognised that couples seeking high standards of compatibility are more likely to settle a normal family with beneficial implications for the child.[101]

It is important to recognise, however, that as standards increase, this will affect not only the parents' partnerships, but also the way the parental functions are carried out. The standards of child care have altered considerably this century. Fletcher[102] points out that rather than the parent being stripped of his functions by policies concerning child care, more specialized demands are made on the family by a society which expects a responsible undertaking of far more social commitments. His child caring role, however, is neither defined nor unlikely to change. Titmuss[103] summed up the role of the modern parent as tending to be "a highly self conscious, self regarding affair to which society continually adds to the sense of personal responsibility among parents. Their tasks are much harder and involve more risks of failure when children have to be brought up as individual successes in a supposedly mobile, individualistic society rather than in a traditional and repetitious society ... More decisions have to be made because there is so much more to be decided, and as the margin of felt responsibility extend so does the scope for anxiety about one's children". Ferri[104] sees the behaviour, values and attitudes of the present parental generation as possibly having little relevance since " ... fluid and diversified society needs adults equipped to act in a variety and often changing roles".

How far the burdening of parental roles has contributed to marriage breakdown is difficult to establish. None of the divorce grounds clearly relates to domestic activities in child care and parental failure has never been investigated with regard to its bearing on the stability of the conjugal relationship.[105] The complexity of the parental role,

however, indicates that cooperation of the spouses, though essential in bringing up the child successfully, is becoming less likely to be achieved. To an extent then it may produce a desire to dissolve an unhappy relationship if it is causing deterioration in the parent's caring attitude, irrespective of the fact that this will result in an increase in his responsibilities.

The position of the parent as a divorcé attracts particular attention in disentangling the status of the child from the legal relationship that produces it. It is accepted that parental concern fluctuates according to the change in the circumstance of the parent and on account of the terms in the relationship between the custodian and a non-custodian parent. What really remains unaltered is the very existence of the parent-child relationship which needs to be regarded and maintained by both parents and children. Meteyard[106] in her interesting analysis of the conflicting importance of the concepts of parenthood and marriage reveals the nature of parenthood as being a status "independent of legal regulation" which "continues to exist even when divorce has dissolved a marital relationship". Nevertheless, she feels bound to stress the importance of giving particular attention to this aspect since "... the dependence of children either on their parents or on the community as a whole, is inevitable and tends to be prolonged rather than the reverse in our technologically advanced society".[107] Ferri[108] finds that this dependency occupies most of the attention of parents with borken homes. In every aspect of parental involvement and aspirations the results indicate that a majority of parents in all types of family situations show an interest in their children's current progress, and concern for their future development and success. The analysis also of Murch[109] on justice and welfare in divorce points out the anxiety of both parents and children to retain their roles and contact after the dissolution of the marriage.

Variations occurred only when the relationship had experienced a degree of brutality. Specifically, their position in organising access, as summed up by the same study indicates that the essence of the relationship remains and what is affected is how this will be expressed under the new conditions: " ... access problems are often symptomatic of a fundamental dilemma facing divorcing parents. This is how to disengage from the broken marriage while preserving a sense of being a parent with a part to play in the children's future. Some cannot resolve it and give up their parental role, others strike an amicable balance between these conflicting demands, and yet others argue and fight. Parenthood normally assumes a coalition between spouses. Arrangements about access reflect the way the family's social structure is reorganized, how parental responsibilities are redefined and new boundaries drawn around the family relationships. These adjustments take time. They often proceed by painful trial and error before the family as a whole and its individual members can discover an acceptable equilibrium."[110]

The attitudes of divorced parents are full of contrasting dimensions and need detailed consideration before any guidance is derived from this aspect of the relationship for the construction of a different approach to the status of the child. However, what is revealed and what has not yet attracted particular attention for study, is that aspect of the parent-child relationship, perceived to be created and maintained exclusively in marriage, can be maintained outside wedlock provided that the biological relation is supported with a considerable degree of certainty. The possible outcome of such research may be proof that the conjugal relationship is not of paramount importance in the development of the parent-child relationship. However, this may be of essential importance if marriage is primarily perceived and maintained on account of the needs of the spouses. Such tendency explicitly appears among the factors

concerning the dissolution of marriage and earlier in the changes in the construction of relationships between the two sexes. Most probably then other factors predominate, such as the existence of children, during the regular marital life. In such a case the rearing of children within the family may prove to be considered by each parent primarily as a personal obligation in which he may cooperate or receive assistance from the other parent.

## V. ILLEGITIMACY AND LEGAL POLICY

It is difficult to state with any certainty the extent to which the stigma against illegitimacy has affected sexual behaviour and the ratio of births out of wedlock. The norms adopted in legal policy, whether identified in religious convictions and morality of in child care and society's protection, aim to impose society's values upon intimate personal behaviour and thus control intercourse outside wedlock. Thus, as Louis Blom Cooper[111] explains, it "pre-supposes that ordinary citizens preface their licit and illicit sexual intercourse with a study of recondite rules of family law" in order for the deterrence argument to be effective. Whether the argument is properly conceived is under consideration. The conditions and trends concerning extra-marital relations may be of deep seated social origin and therefore the influence which legal measures can have will probably be very limited. Nevertheless, the deterrent argument incorrectly assumes that the responsibility of the individual towards social norms and his responsibility as a parent are two elements firmly interlocked and interacting. Characteristically, Dr. R. Williams[112] states, "I do not want to suggest that all illegitimate pregnancies arise from a merely animal activity, but it is worth saying that paternal responsibility is a specially human phenomenon and we shall not expect it to develop except in situations which have become characteristically human. There is a real connection between the institution of

marriage and the dignity of humanity. The fact that in these all too common situations the girl is left with a baby is completely in line with animal life." Such generalizations about the concept of responsibility have been strongly opposed recently either in principle or on the bases of evidence obtained from de facto families. "It is hard in any event", states Louis Blom Cooper[113] "to justify translating moral principles into legal rules where to do so is to inflict scarring social wounds on blameless children, simply on the basis of the law's discrimination between so-called responsible and irresponsible parents." The task in the following pages then is to give a quantitative analysis of the problem and make some observations about the fluctuations of illegitimacy and the factors affecting its rate. Then, it is necessary to recall some of the instances that may result in an illegitimate conception and assess their causes in relation to the aims of legal policy. Finally, the position of the child is to be seen and whether it is justifiable to discriminate against him.

a.1 Statistical data in both countries although illustrating clearly the size of the problem, falls short of providing reliable information on the effectiveness of the deterrence approach. The rates of illegitimacy fluctuate in such a way, irrespective of the measures taken against it and other decreasing factors, so that any information they give is rather baffling.[114] Thus, while it might be expected that factors like the continuous stigmatization, the lowering in the marital age, the increasing propensity towards marriage in effect would lower the rate, such trends cannot be confirmed in either country.

In Scotland, for the pre-war period, the illegitimate births used to range from 4 - 5 per cent per year to reach a peak of nearly 9 per

cent during the years of war. A rapid increase is also recorded for the years of the First World War and the period of the economic crisis between the two wars. Since the war, the ratio appears to have decreased - as the disturbance in social relationships from the emotional tensions of the War and the movement of people start to eclipse - and it reaches a minimum of about 4 per cent in 1958.[115] Since then a regular increase is observed, so as from 4.4 in 1960 the ratio became 5.8 in 1965, 7.7 in 1970 and 8.5 for the year 1972.[116] For the year 1977 Clive states the number of illegitimate births to be 5.968 and moreover estimates the population of illegitimates in Scotland alone to range at about 200,000 and to be likely to increase since the rate of illegitimate births increases steadily each year. To give then the exact size of the problem in Scotland he writes: "Imagine a city the size of Aberdeen, and you have some idea of the extent of the problem. If the citizens of Aberdeen were subjected to special discriminatory laws on succession, maintenance, guardianship, parental rights and so on, there would be an outcry and immediate reform. Yet, that is the situation we have in the case of the scattered population of illegitimate people".[116a]

In Greece, on the other hand, although the problem in terms of illegitimate births is comparatively not so acute, it is estimated that the rate runs variably to 1.6 - 1.9 per cent of all live births per year so that children born illegitimate are about 1500 - 2000 in number each year and the total population of illegitimates is about 70,000. Extra-marital conceptions are steadily increasing and are put down mainly by illegal abortion.[117] The ratio before the second world war was about 1.4. The ratio during the war and following civil war is presumed to be higher

than that, But it is difficult to present any reliable information since records were not kept in those disturbed times. However, the ratio resettles as society starts living normally to be 1.5 in 1957 representing 2.630 illegitimate births. The amount of illegitimate births since then present a drop to 1737 in 1968, 1725 in 1969, 1067 in 1970 (the lowest ever recorded) 1681 in 1971, 1657 in 1972 and 1574 in 1973 but the ratio remained unaltered.[118] Except in the periods associated with social unrest the rate of illegitimacy presents minimal fluctuations and small increase. This pattern is not irrelevant of course to long term rhythmic fluctuations in general fertility, the availability of abortion, the increases in the population, but those explain changes in the rate rather than the causes of illegitimacy per se and its occurrence.

a.2 Changes in the marital status of families brought a corresponding fall in the number of children in the families. Gill, from evidence on families in Aberdeen, has shown that the trend from a five or six towards a one or two child family appears to be firmly established.[119]

Lambert and Streather[120] on the basis of data from the Central Statistical office argue the steady fall in the birthrate between 1964 and 1975 to indicate that small families have become the norm, notwithstanding that predictions based on short-term trends have proved in thepast to be unreliable. However, the decrease of births in wedlock has been explained by Hartley[121] and later by Gill[122] to be partly the cause for the rapid increase of the ratio of illegitimate births since the amount of such births presents smaller fluctuations. In Greece, as J. van der Tak states,

referring to the work of Valaoras, the decline in the fertility rate (most probably due to abortion) is quite acute not so much as regards the fall in itself, but mainly because of its implications on the reproduction of the population. The total fertility rate per woman from 3.7 in the 1930s decreased to 2.3 in the 1960s which means that parents are just slightly more than replacing themselves.[123] Later studies, however, point out a probable decrease in the population[124]. Astonishingly, on the other hand the ratio of illegitimacy follows a same pattern at times when the ratio of illegitimacy in other countries present a steady increase. In 1960s and early 1970s when the drop in the family size and the general fertility became explicit, the ratio of illegitimacy presents a similar decrease dropping to just over 1,000 in 1970. Since then although it has increased, it nevertheless follows closely fluctuations in the general fertility.[125]

a.3 The availability of abortion is also a factor to be taken into consideration for understanding the ratio of illegitimacy. Both countries provide for abortion for medical and socio-moral reasons though in Greece the grounds are more restrictive,[126] so that it can be argued that abortion is illegal for other than medical reasons. Scotland for over a decade now has experienced a rather liberal abortion law with the introduction of the Abortion Act 1967, which is seen primarily as a result of the movement favouring legislative intervention to reduce the amount of human suffering, improvement of the status of women and the concern over the 'population problem' than on its bearing upon illegitimacy and its consequences.[127] However, it must be recognised that the Act facilitates a legitimate avenue and a short term solution for illegitimately pregnant women to avoid such maternity, a concession that must be

understood for the children, on account of over-riding importance given to the stable legal family.[128] Specifically, abortion in Scotland today is legal for a confirmed pregnancy if two doctors agree that continuing the pregnancy would be a greater risk to the mother's life, or risk to her mental or physical health or health of her children, than terminating it; or that there is a serious risk that the baby is abnormal or deformed. To construct the grounds of risk to the mother's health or her existing children, housing conditions, state of marriage, number of children, income, and the nature of changes the child would bring into the mother's life[129] are to be taken into account.

The flexible grounds for and the availability of abortion under the National Health Service undoubtedly are factors contributing to the decrease of the amount of illegitimacy. However, to understand the extent of this happening in Scotland, one should take into consideration other relevant factors. In Scotland, a high proportion of the population are Catholic and the Catholic church is against abortion. Due to religious convictions, therefore, a proportion of the population is disposed unfavourably towards abortion. Besides, the decision to abort is in the hands of medical practitioners. They have the duty to interpret the law and apply it in the particular case. Consequently, the availability of abortion depends on such variables as the doctor's attitudes, how to find two doctors to agree and how well the case is presented to them. In fact, the fluidity in the composition of the grounds, the absence of any publication of precedents of medical interpretation in the light of the above variables, makes abortion more a benefit for the privileged than a legal right. The proportion of women who are refused abortion tend to vary between hospital regions and social

class. Gill[130] from his study of trends in Aberdeen suggests that in both private and public sectors there is some evidence to support the view that women in the upper socio-economic groups, who have most to lose by any stigmatisation, are more successful in obtaining abortions. They tend to be more verbally skillful and capable of presenting their case in a manner most likely to invoke the doctor's sympathy and hence his acquiescence to their request. Women from the lower socio-economic groups on the other hand tend to suffer two handicaps. Usually they are deficient in this type of role-playing and, further, they may be uninformed of the possibility of abortion or uncertain about how to obtain one.

Relevant to the contribution of abortion in relation to the rate of illegitimacy, of course, is access to contraceptive methods. In Scotland, where that concern is high, the need for abortion is reduced. In 1977, the number of legal abortions was 7,283 showing a ratio of 0.71 of women aged between 15 and 44. Approximately another thousand women went from Scotland to England to have an abortion.[130a] In the same year the number of illegitimate births was 5,968. These numbers may suggest that contraception is widely practised in Scotland and could equally suggest, if certain drawbacks in the law of abortion were removed and the class of related handicaps imposed by religion were disregarded, that the illegitimate pregnancies were wanted pregnancies. However, under the present circumstances such assumption may be made only to a proportion of illegitimate births, which presumably is not low.

In Greece, on the other hand, abortion is available for other than medical reasons, if conception resulted from rape, abuse of a

person incapable of resisting, seduction of a girl less than 15 years old and incest.[131] No other grounds are provided to prevent a married or unmarried woman from experiencing hardship from an unwanted pregnancy. Besides, it should be noticed that family planning services are rather poor, although frequently the need for their development has been urged.[132] As a result, advice on contraception from the public sector is non-existent and illegitimate pregnancies are controlled by illegal abortion. Risatakis[133] finds illegal abortion to be much more frequent than in many other countries, and that with the increase of urbanisation it has become easier for a greater proportion of the population to secure it. She estimates the number of illegal abortions among married women alone to be as high as to approximate to 150,000 per year, while Chatzoglou[134] refers it to be over 300,000 for married and unmarried women together. It is difficult to understand why the abortion problem has not yet served to stimulate interest in the prevention of unwanted pregnancies and the tolerance of the state towards illegal abortion. Naturally, one should expect preventive measures which involve less risk, like contraception which accords more to the permissible attitude towards extra-marital intercourse. Abortion then comes to be the last resort mechanism for alleviating the consequences of unfortunate and often unforseen pregnancies.[135] For this uncaring policy, however, the state cannot be held to bear the entire responsibility, in so far as the reaction of the church to contraceptive methods and abortion has been both strong and influential, though not rational and not representative of the present social situation in the country.[136]

b.1 Many attempts have been made to uncover the underlying causes of conceptions out of wedlock. The story goes back to the implementation

of the Bastardy clauses of the 1834 Poor Law Amendment Act which gave rise to a discussion on the impact and efficacy of the deterrence approach. The introduction of registration supplied reliable information about the rates and at the same time permitted a close observation of the fluctuation and factors behind an unwed pregnancy. Theories start to develop explaining the causes of illegitimacy primarily concerned with the single mother notwithstanding that due consideration was given to a married woman becoming illegitimately pregnant. Some of the theories attribute illegitimacy to personality and look at the individual for causal explanations,[137] while others, adopting the social welfare approach, are more problem orientated.[138] With this category of theories emerges the lenient attitude towards illegitimacy without need of departing from the dominant value system. The psychiatric theory of Young in the fifties, concerned with the emotional disturbance of the unwed mother, provided the basis for her being absurdly defined as ill or mentally sick.[139] Welfare theories then shifted the emphasis to the problematic nature of the circumstances of illegitimacy.[140] In turn, severe stigmatization was in part abandoned since society became able to offer sympathy and support without having to condone the immorality of the sexual activity.[141] Sociological explanations on the other hand, inquiring into the norms, attitudes and function of illegitimacy, adopt historical or anthropological perspective often by observing the development of laws and customs in various societies.[142] The indisputable contribution of these theories is their success in bridging a gap in our perspective on illegitimacy. Before the appearance of this type of analysis persons becoming illegitimately parents and their offspring were regarded as outsiders irrespective of the sympathetic or unsympathetic attitude towards the incident.

With this type of analysis it was confirmed that the causes and other factors related to illegitimacy are inherent in the social system and in this respect it brought us closer to understanding illegitimacy as an indispensable feature of our society and increase our acceptance of it.

However, the theories explaining the causes of illegitimacy and the dependency created, although they widen our knowledge of the causes of illegitimacy, do not offer particularly successful explanations nor are any more convincing ones likely to be forthcoming.[143] Nevertheless, illegitimacy, despite stigmatisation, appears regularly and, in this respect, what is frequently left without particular consideration is the very validity of the legal policy. Understanding the causes of illegitimacy is one thing and they probably will never be comprehended in full depth. But to try to eliminate these causes and reduce the incidents by legislative acitivities is quite another. For centuries now, human sophistication in response to more or less clearly perceived social needs identifies in the legal discrimination against illegitimacy the task of preserving a value system and of reducing intercourse outside wedlock and illegitimate pregnancies. At the same time illegitimate births have appeared on a regular basis in a ratio frequently irrelevant to restrictive attitudes towards intercourse outside wedlock. Nevertheless, this ratio appears to be unaffected by factors like propensity towards marriage and low marital age. On the basis of these findings, given our inability to explain and understand illegitimacy, recent commentators tend to accept unwed pregnancies as a phenomenon with longstanding causes of deep seated social origin, so that punitive legislation and their implementation have only limited effect.[144] Notwithstanding

such observations, the punitive aspect of the law has been seen recently by the English Law Commission to be unjustifiable discrimination, especially where the child is concerned.[145] The last comments lead us to question the rationality and necessity of legal discrimination within the present social context, to ask whether it is justifiable in terms of its effectiveness and what will be the advantages, if any, of removing the distinction.

b.2 As indicated earlier, despite contraception and abortion, 5 - 6,000 children in Scotland and 1,500 to 2,000 children in Greece per year join the class of the unfortunate illegitimate. Most of the children will be born to unmarried mothers in their teens or early adulthood,[146] while a considerable number will be born to married mothers or, at least, to women who would describe themselves as married in a census. The majority of those children will have the status permanently attached to them, either as a result of the law ( parent's marriage impeded), or as a result of defects, legal or otherwise, in the relationship that had produced them. Others will be under this status only temporarily or not at all if the mother marries the father, or if the child is passed off as of the husband's in an existing or subsequent marriage. Of the children who remain permanently illegitimate some will live in a stable de facto family, or will be accepted in the family formed by one of the parents and other person.[147] However, the bast majority of those will be born to a mother in her adolescent or early adulthood who at that stage has to cope alone with the problems of the child.[148] Such situations are typical in illegitimacy and may be met in any class of society and in any geographical area. Such change of patterns have been recently confirmed by the studies of Illsey and Gill[149] and Gill[150], who

from evidence obtained in Scotland show a shift in the location of high illegitimacy since the second World War from rural areas, which were usually blamed for moral decay, to urban areas. At the same time they observe a change in the ratio of illegitimacy among social classes. Until then, illegitimacy was regarded pre-eminently as a lower class characteristic, whereas since the war the higher rates have been recorded among middle classes. Probably such trends cannot be clearly supported for Greece. Proportionately higher rates may appear in urban areas and among the lower classes since they have less access to contraceptives and it is rather difficult for them to obtain abortion.[151]

However, the figures of illegitimate births in comparison to intercourse outside wedlock by both married or unmarried persons is probably what Teper finds to be in relation to adolescent girls "only the tip of the iceberg".[152] People become sexually active outside marriage for a variety of reasons and under circumstances such that it is often difficult to predict and more or less difficult to control.

b.3 The case of a married woman traditionally has been seen to be relatively simple for hers will usually be an example of an unabalanced relationship or of a broken marriage. The same reasons may be seen behind the case of a married man committing adultery.

Because of alterations in the relationship of the two sexes a radical change is observed in the marital relationship and corresponding social attitudes. Both men and women today regard marriage primarily as an emotional partnership and have more independence and power of choice to admit openly their dissatisfaction

with a specific marriage and to withdraw if fulfilment is not achieved. Correspondingly, a married person is less likely to be involved in an extra-marital relationship without just cause. Whenever he or she does so, it is primarily for the purpose of finding the emotional satisfaction lacking in the conjugal relationship and therefore the withdrawal from it is more or less permanent. Deviations from this pattern are probable in marriages primarily entered into for the purpose of acquiring property, or as a matter of convenience, or because the marriage was arranged and failed to produce love among the partners. In the latter case the spouse may tolerate the situation because of the social pressure upon him. Because of the different incentives there, it is more probable that partners in such marriages will be involved in furtive or fleeting extra-marital relationships depending on the degree of interest that they still have in the reasons that forced them into marriage.

The gradual redefinition of marriage from a consensual to an emotional partnership has had an impact upon the law and social attitudes towards adultery. As Gill[153] observes, the conception of marriage as an emotional partnership which evidently "is most widely held in middle class groups and in larger urban centres" has "weakened". sanctions against extra-marital sexual relations notwithstanding that the laws relating to divorce are "still somewhat restrictive, thus encouraging consensual unions and hence the birth, not merely of illegitimate children, but of illegitimate families". The corresponding social attitude is more encouraging. Society today seems more ready to justify the spouse of a defective marriage who seeks fulfilment in an extra-marital affair, unless he or she hypocritically plays a double role.[154]

The latter mostly invokes social aversion and probably constitutes what presently can be described as stigmatisation of adultery. In this context, however, it is expressed against the spouse more as a concern for his personality than for his act being anticipated as a threat for the institution of monogamous marriage and the existing status quo. Not many people on the other hand will label as dishonest the spouse who refuses to preserve a defective marriage and look forward to finding happiness in another union.

In the light of those changes, the chances for a married woman to be illegitimately pregnant or for a married man to father illegitimately a child, are rather high. These circumstances, however, do not constitute a clear provocation of social morals except in a few instances. Therefore, we must recognise the need to make the law more compatible with this conception of marriage to prevent hardships for both the partners and the children and avoid further damage to it as an institution. Above all, however, it is necessary for the punitive aspects of the legislation to be extinguished since the stigma relating to the act of adultery apart from being rarely attached to it nowadays, refers to an act of a parent per se, so that it does not justify legal reaction against the child.[155]

b.4 The case of unmarried consorts is more complex when it results in an illegitimate pregnancy mostly because the option of marriage is open to them. However, the case now involves a variety of issues calling for consideration which ultimately minimises the degree of responsibility of the unmarried partners for exposing themselves to the risks of an unwed pregnancy.

In the first place, the position of youth in society is a field in which far-reaching transformations are taking place. Although education extends over more and more years, dependence of the young on their parents has begun to loosen earlier. The involvement of adolescents in social life begins sooner too, and increasingly they invade areas which until now were reserved for adults. Maturity therefore, seems to set in at an earlier stage than it did before, although this has attracted little attention so far. The line of demarcation between adolescence and adulthood is confused in both society's and parents' eyes and has been more of less standardized at a certain age or with educational or marital stages on the child's life. Consequently parents fail to follow the child's life, to give the proper advice to him when needed and to prepare him adequately for involvement with certain aspects of life. On the contrary, the widely held parental attitude is simply to place prohibitions on the child until such time as they find him fit to respond to life. Frequently one hears parents say to their children "you are too young to marry" or "at your age one must not be involved in a love relationship" and in many instances such advice happens to be given to an adolescent who has already experienced more than one relationship and had suffered because of his ignorance.[156]

b.5 Secondly, among the facts that continuously occupy a greater part in the life of the unmarried person are relationships with the other sex. Variables here occur according to the age, education and family background,[157] but what mostly attracts attention is the fact that social forms of such relationships tend to be inevitable in the unmarried person's life as more or less the natural precursor of marriage. There are three factors to be

taken into consideration on this matter: the difference between sexual maturity and social maturity, the changing attitude towards sex and the impact of the high regard for marriage in increasing the incidence of pre marital relations.

As Leslie[158] points out, that some boys and girls display signs of sexual arousal in childhood and engage in sexual behaviour before puberty are facts now widely accepted. A number of studies engaged in observing the sexual development of both boys and girls have had surprising results as to both the degree of development of early adolescents and the number of them involved in intercourse before marriage or before majority. The studies of Kinsey on sexual behaviour of both males[159] and females[160] should be mentioned here, especially in relation to his observations on sexual development. The study for males shows that 57% of adults recalled sex play before adolescence.[161] For females it was shown to be 27% but 14% had reached an orgasm by the age of 13.[162] Studies on teenage sex patterns in United States shows that among unmarried girls of the ages of 15 - 19, 18% of the 15 year olds were sexually experienced and, by the age of 19, the figures rose to over 55%.[163] The study of Teper[164] on the patterns of adolescent pregnancy in Scotland shows that the rate for unmarried pregnancies among teenagers more than doubled between 1962 and 1974, since when it has been stable at about 12 births per 1,000 unmarried women aged 15 - 19. The contribution of teenagers to illegitimate live births from a ratio of 22 in 1962 reached 36 in 1975, corresponding to 2,297 births. Nevertheless, as she shows from 10,400 pregnancies of teenagers in 1975, 73% represent conceptions outside wedlock and 41% (2,297 births, 1,935 abortions, 39 still births) were unmarried at the time of the outcome of the pregnancy.[165] Of course,

those numbers are used as indications as to the degree of involvement of adolescents in sexual activities since attempts to measure the incidents as such have faced substantial problems and as yet remain without proper results.[166] Although, however, we cannot establish the actual involvement of adolescents in sex it is submitted - and this includes Scotland and Greece - to be substantial.[167] With reference to pre-marital intercourse in general, the ratio may be over 95 for men and over 85 for women[168] if sex liberation in recent years and the propensity towards marriage are taken into account. These factors are discussed below but it should be said here that relaxed attitudes towards sex, the recognition of sex as a positive pre-requisite for a variable marital relationship and the tendency to avoid ill-prepared marriages make it more likely for men and women to experience sex before marriage.

With such the probability of unmarried persons having sex , the negatives emphasized in socio-parental attitudes tend to ignore the risk of an illegitimate pregnancy altogether. Parents usually adhere to the stereotype of social maturity and close their eyes or refuse to accept the idea that their 15 year old child may become a parent. Even if they acknowledge such a possibility they tend simply to advise their children not to involve themselves in pre-marital relationships. At the same time the child experiences sexual arousal and as he comes of age this develops into a positive natural expression requiring satisfaction. To eliminate such feelings is impossible without interfering with nature. And thus the task which the parents refuse to perform is to advise the child on how to handle problems in its relationship with the other sex, how to use contraception and especially as to what is the

nature of any relationship, and what impact conception would have on its future.

Another factor to be taken into consideration is the changing attitude of the younger generation towards sex and the conflicting situations that it produces for young partners. Until recently, sex was undesirable because of its association with child bearing and child rearing. In parallel, patterns of feminine socialisation until the recent past have tended to exacerbate this situation by preparing the woman almost solely for the wife-mother role.[169] Since then women have started to gain control over their fertility and to become involved in social life in ways which led to newly emerged norms of sexual behaviour. The watershed is usually regarded as the mid sixties which show a dramatic increase in intercourse among unmarried persons as a result of what Hartley[170] describes as the consequence of the combination of ethos of individualism, the welfare state, and a mass society subjected to 'ceaseless sex bombardment'. Liberal changes in public attitudes towards sex are regarded as the most significant characteristic of this period, which firstly with reference to the marital life and secondly with reference to the individual gains the position of a natural pleasure in which everybody is entitled to indulge.[171] Sex education started to feature first with the media communication and gradually became acceptable as a subject to be taught in schools. In addition, as the age of first marriage fell, teenagers started to be mixed with their sexually experienced peers. This situation perhaps persuaded many young people to subdue to a lesser degree their interest in sex, being consequent upon the younger generation's propensity to accept the adult generation's definition of sex as pleasurable and enjoy-

able and to take the view that such pleasures are as applicable to the young as they are to the adults."[172]

b.6 The invasion of sex into social life occurred nevertheless with remnants of double standards of sexual morality still prevailing. Approved intercourse remained restricted to the marital bed and as a result society has not yet fully accepted the need for unmarried people, i.e. adolescents to have access to contraceptives. This increases the risk of conception and probably is one of the main reasons for the recent increase in teenage pregnancies. Contraceptive techniques require preparation which creates a conflict since the unmarried teenager is not supposed to have intercourse and nevertheless he or she has to anticipate the sexual act with some preparation if the risk of becoming an illegitimate parent is to be avoided.[173] This means that he or she must acknowledge in advance that intercourse may take place and admit to it him or herself or to someone else who can give proper advice about contraception. Imagining now, a young woman in this position, it is easy to assess what degree of responsibility she has for not having been prepared for the worst. She probably would have to tell her red-faced parent(s) that she is likely to be at "immoral risk", in order to receive any advice. If not the parent, at the best, she may have to have the taunting smile, or the puritan aversion of the doctor or the chemist to whom she goes for contraception.

The propensity towards marriage and the high standards of the marital relationship have not been without impact on relationship norms and premarital sexual behaviour. Today, there is an inclination among people to consider it unwise to enter the institution of marriage without being assured that the relationship will be a viable one.

The risks anticipated for an unbalanced relationship are not unreal and have frequently been of paramount concern, i.e. in relation to teenage marriages. Eekelaar[174] refers to the works of Goode,[175] on the personal histories of 425 divorcee women, of Locke[176] of Burgess and Cottrell[177] and of Terman[178] and makes the following points on the implications of pre-marital acquaintance for the success of marriage. Short acquaintance is far more likely to lead to an unsuccessful marriage than a longer one. Goode's results show that 70 per cent of the divorcees were engaged less than six months which supports Locke's earlier results. On the other hand, Burgess and Cottrell, and Terman showed from random samples of happily married couples that a far lower percentage had been engaged for periods of less than three months. Of course, as Eekdaar points out in respect of those observations, there is no such thing as an optimum period and everything seems to depend upon the degree of acquaintance that the partners obtain of each other. The same author refers to the relatively high degree of risk if marriage took place under any kind of pressure, e.g. that of pregnancy. Investigations on the matter shows double risk if the conception of the child led to the case of a 'shot-gun' marriage.[179]

Hence the marked tendency in society today to proceed to term with premarital relationships to avoid hasty, ill-prepared marriages, has influenced a change of norms and attitudes on the matter. Since both partners are going to live on equal terms, it is recognised that they have the need to assess their character compatibility. Nevertheless, due to the important role of sex in the marital relationship an ability to perform skilfully and knowledgeably during intercourse has been recognised as a pre-requisite for sexual compatibility.

in these circumstances, it is perhaps not surprising that more and more unmarried people are tempted to exploit any aspect of life with their partner and obtain as much knowledge as possible about how life will be with him or her.[180]

The increase in pre-marital relations has been frequently regarded as indicating a teenage promiscuity and irresponsible behaviour. This stereotype is mainly supported on evidence which shows an increasing incident of intercourse among teenagers and an increasing rate of illegitimacy. The image conveyed on the other hand by Kantner and Zelnik[181] from evidence received in the United States is that of young girls involved in serious heterosexual relationships. Half of the girls in the sample said that they had intercourse with the man they expected to marry and they participated in intercourse very rarely. 25 per cent of the experienced girls had intercourse only once or twice and at the time of interview nearly half of the girls had not had intercourse for a month. Leslie[182], upon evidence received in 1976, finds girls to be generally unprepared to respond to a heterosexual relationship either by being quite ignorant of reproduction or by making ineffective use of contraception. Almost three quarters had never used contraceptives or used them only occasionally and over 65 per cent were unable to answer multiple choice questions about the time of greater pregnancy risks. The risk of them becoming pregnant, therefore, is obvious. Hence, it may be argued, the increase in the role of pregnancies among adolescents.[183]

b.7 The adjustment of public opinion to those changes in unmarried life is slow and, as has been said, dominated by double standards. Sex outside marriage remains wrong according to the dominant value

system and therefore its protection is defective. A more lenient view of premarital intercourse and the illegitimacy thereby created, emerged as it became explicit that the individual could not be entirely responsible for behaviour, the roots of which are inherent in human nature and the consequences of which are the outcome of social indifference towards the problems of certain sections of the population. However, the change is in line with the traditional concept that pre-marital intercourse goes with the mutual intention to marry and occurs when marriage appeared clearly ahead.[183a] If marriage then did not take place and the child was born illegitimate this was understood to be a bare accident or misfortune deserving society's sympathy,[184] which lessened the desire to punish the incident.

Gill[185] however, finds a class dichotomy in attitudes towards the mother and her child. Middle and upper class parents resist the temptation to punish their daughter for her behaviour and prefer to come to terms with illegitimacy than to force her to legitimate her position in a hasty marriage. Nevertheless they bring more pressure on her to release the child for adoption. Lower class parents on the other hand have a more lenient attitude and although the unmarried mother will certainly be rebuked, the overall reaction to her situation is to consider her unlucky. Frequently then, they accept her and the child into the family. This difference may not be irrelevant to the limited effect that the middle class value system has upon lower social groups. An important observation on the other hand made by Christensen[186] concerning the labelling of illegitimacy reveals the difference between the success rate of marriage with pregnant brides and those without them to be less in a society which attaches less stigma to illegitimacy and extra-marital sexual behaviour. Eekelaar[187] commenting upon this,

envisages it as a normal expectation since the pressure upon unsuited partners to marry in order to "throw the cloak of respectability over their pre-marital behaviour" will be less in such a society. Such realism, it is submitted is dominant in the attitude of younger generation to illegitimacy. In line with their desire to make life more realistic they stigmatise less the immorality of extra marital intercourse and confine their attention to the risk in which the mother involves herself, given the probability of conception. This emerges clearly from concern that the relation with the father is not legally secured and even if established, provides an incomplete status, which may turn out to involve problems if he proves to be indifferent towards her and the child.[188] Within this tendency it is clear that there is a distinction made between the quality of the act that the person commits and the consequence of the application of the legal rules and sanctions which society applies to it. The act in itself is largely accepted by that group and they express concern about the situation in which the mother and the child may find themselves due to the definition that society gives to their position and to the restrictions of resources attached to that status. Nevertheless, a clear cut line is explicit in the attitude of the younger generation which distinguishes between relations with the other sex - tending to accept them as normal - and the task of parenthood in respect of which they demonstrate an increasing sense of responsibility.

Such approach reflects social realities if one takes into account that the attitudes of natural fathers in recent years disprove the stereotype of irresponsibility attached to them, by showing a growing desire to assert their parental claims over the child.[189] In both countries this desire finds an outlet in

legislation currently in force empowering the father to claim custody or prevent his alienation from the child in adoption. The necessity of such legislation is well confirmed by recent studies which show that among single parent units the developments in terms of care arrangements for illegitimate children were from fatherlessness rather than towards it.[190] The cycle of familial claims, however, is not yet complete and probably there is a necessity to facilitate their fulfilment, given no basis for discrimination exists. The problems of one parent families stem in part from the expectation of others as to what is normal family.

Kriesberg[191] is quite firm in his view that the problems of single households "are not inherent in that family structure" which supports Sprey's earlier assertion[192] that "the absence of the father can be aggravated, decreased or neutralized due to the effects of other conditions such as the availability of funds, relatives and community services." Not unjustifiably, therefore some quarters concerned with women's rights opposed the option of removing the status of illegitimacy altogether as coming "when for the first time, a few women are in a position to have children alone without poverty or dependence and to take over the functions of a marriage - to give children material support and a tolerable place in society which does not rely on the patriarchal family." [193] The belief that the problems derive from anachronistic attitudes and policies, many of them flowing from a misunderstanding of the ways in which the family system changes, is also expressed by Chester[194] when observing the impacts of English divorce law in the context of European trends. In the light of those observations, it is obvious that current attitudes towards illegitimacy, although

liberated from a punitive approach and rather sympathetic, leave out of consideration the impact of the norms attached to policy in the development of the problems. As Lambert and Streather[195] point out "society is not usually prepared to accept that it can actually cause the problems through, for example, stigma, legal disabilities and poverty. Rather the causes are attributed to the person, who is regarded as problematic, and it is thought that there would be no problem if there was no deviation". Perhaps this point needs particular attention in our approach to the problem since it changes entirely the context and perspectives that must define future legal policy.

c. In conclusion to the above discussion, what became explicit was the need to take illegitimacy for what it really is : the product of forces inherent in human nature which develop consequent upon the current social conditions. Accordingly, the function of the law by definition is limited. Legal discrimination is still in force demonstrating gross ignorance of the background conditions of extra-marital conceptions and gross negligence in relation to the problems created for the mother and her child. The remnants of the old punitive approach aiming to protect society against the child instead of protecting the child against society are still reflected in the law under the face of a sympathetic indifference. Certain points, however, arising from the above discussion prove that even this legal indifference is no longer justifiable.

Statistical data in both countries confirm the universal pattern that the rate of illegitimacy in periods of social stability represents a small proportion of births and fluctuates in accordance with the population and the general fertility, whatever the legal

consequences and social attitudes are. Exceptions have been recorded only in periods of crises, major social changes, social unrest or wars, to settle down as soon as the disturbance has passed.

Since marriage is a well settled institution in social opinion to try to bolster it further seems unnecessary. The majority of people want to and do get married, with a very tiny minority rejecting it in principle. So far, however, as the latter base their opinion on socio-philosophical considerations, it seems unrealistic for society to expect them to change their opinions by imposing severe consequences on illegitimacy. Given the propensity towards marriage, the formation of a legal family is in the mainstream of the life of people. Therefore, the low ratio of illegitimacy and its minimal fluctuations in periods of social stability must be understood as a homogeneous inclination towards the family formed by marriage, rather than the consequence of any effective deterrence by the law.

Almost every person has involved himself in pre-marital relationships and among these intercourse has taken place at a rate of about 90 per cent; also, a great proportion of married persons have committed adultery at a certain stage of their life. The surprising low rate of illegitimacy demonstrates that there is no real danger for the socialization of children within the family and real social concern for the child to live in a two-parent stable family.

Illegitimate conceptions are largely the product of relationships anticipated to be necessary for the institution of marriage. Even when such a relationship does not constitute a 'trial period' for

the partners, the higher standards in the relationship with the other sex and the position of sexual intercourse in the life of the individual make casual encounters inevitable. To anticipate that the low illegitimate reproduction rate is the result of legal deterrence on sexual behaviour is rather ambivalent, with parallel use of both contraceptive methods and abortion. An unwanted pregnancy can now be avoided so that it seems improbable that such fears still influence sexual behaviour to any substantial extent.

The age most affected is that of adolescence and early adulthood where people are more likely to become involved in those experiences unprepared. The double standard of social morality has the most adverse consequence upon them since they may be more sensitive to the social norms and at the same time feel the need for a partnership. An adult without difficulty in such situation will give weight to the second whereas the younger and more innocent will try to compromise between the two which in a number of cases will result in a pregnancy.

While complete extra-marital relations increasingly become part of life inadequate consideration is given to the prevention of pregnancies. Social opinion, despite the law and its position against the products of extra-marital relationships, increasingly gives more credit to them and understands them as involving principles and elements that are respectable and useful for the future of marriage. Unsanctioned unions therefore have become the natural precursor of a first marriage or are used as a trial period between a first and second marriage, so that to try to control them is unrealistic. With the dominant values still reflecting, however, restriction on intercourse to the marital bed, contraception has not been

seriously taken amongst the matters that must concern the social policy. However, with adolescents invading the area of sex, which needs skilful preparation, the lack of positive policy on contraception has crucial implications for our society.

Due to the social awareness of the difficulties in parental roles and the concern for the child to be brought up in a secure family, an illegitimate pregnancy is rarely a wanted pregnancy. Unless the concern for society is satisfied, the individual will be reluctant to become involved with child rearing. On the other hand current social conditions are permissible to unsanctioned intercourse, while the conception occurs during an act of considerable pleasure constituting a natural expression of emotional feeling. The essential contradiction of the legal norms given these conflicting objectives is only too apparent. What the legal discrimination in this context really aims at is for "ordinary citizens to preface their ... intercourse with a study of recondite rules of family law",[196] to think of and to anticipate the consequences and to use contraception or preferably to abstain from sexual activities. This is expected to be achieved under circumstances of emotional excitement, mutual attraction and probably at that stage of the persons' lives when they exchange promises of marriage or may be completely unaware of the possibility and the implications of a conception. Probably it may be expected that the more mature of them will use contraception, though this is by no means absolute since the parties may become intimate after having alcohol or in a place where contraceptives are not available. The younger and more inexperienced, however, are more likely to be at risk. Given, on the other hand, that the individual is inclined to consider reproduction when the conditions have matured, we have to accept that such pregnancies are mostly

accidental occurrences without any intention to expose a child to the risk of illegitimacy. Nevertheless it is difficult to establish an element of deviance from social norms because the persons concerned may be disposed favourably towards marriage and due to unexpected complications fail to legitimate their relationship. Equally, however, the parents may have formed a stable cohabitation or either or both of them be living a promiscuous life. As a consequence a child is born. For the former, the legal discrimination at that time is of little significance. For the latter, indeed there is a paradoxically romantic misconception of the deterrence argument, since it is totally illogical to expect to rehabilitate the irresponsible parent by not imposing responsibilities for his child on him. However, apart from the case of the irresponsible man who had intercourse with the mother abusing her in a moment of weakness, pregnancy may result from a crime committed against the mother (like rape, seduction, etc.) and in this case we are faced with the incidents mostly expected in the present social context.

d. The role of the law.

In the field of illegitimacy it is perhaps even more obvious than elsewhere that it is impossible to model real life in strict accordance with abstract ideals by applying legal rules. The role of the law therefore, must be regarded as much more modest, although law is undoubtedly by no means unimportant for the development of family life in general. Indeed as Eekelaar[197] points out protection must be available when the family environment threatens harm to any of its members. Individuals also are at risk when a family unit disintegrates. "If the law cannot prevent this, it can assist in the adjustment which individuals must face". Given that those must

be the minimal tasks, he envisages the functions of modern family law to be "protective and adjustive". By definition, therefore, legal discrimination is becoming infelicitous.

Marriage will continue to prevail in social life as a norm of well balanced partnership within which the education and care of the children would produce the most satisfactory results. The existence of this pattern, however, should not preclude the possibility of a comprehensive relationship being constituted with the parents where a marriage does not exist. On the contrary, it must direct us to finding a remedy which resembles most closely the characteristics provided in marital situations. The existing alternatives of legitimatation per subsequens matrimonium, adoption, fostering and step-parenthood, despite overwhelming support by the state, prove inadequate to absorb all illegitimate children or to remedy the cases where the natural mother is determined to keep her child. Frequently it is asserted that this is impossible since the natural fathers usually prove to be indifferent. In addition, the appearance of extortionate litigations against persons irrelevant to the child's conception has further obstructed the enactment of favourable solutions in this area.[198] However, the most important factor in there not being significant progress in this area is the lack of public interest.[198a]

So far the duty of the law has been to keep the father from any real involvement in the life of his natural child. Besides the need to link the child with his father has remained outwith the scope of provisions concerning public order. Instead it has always been left to the discretion of the individual, who has been motivated for personal considerations to bring a paternity action. And even this

has always been regarded with some circumspection since the paternity of the child was considered as a matter of legal uncertainty.

The need for express public concern for the relationship with the parents is probably the area where the law has not yet experimented. Although it has never been acknowledged by society that in illegitimacy, like in legitimacy, there is a certain interest in linking legally the parents with the child, that concern is widely expressed by recent commentators.[199] By placing the rights of the child as foremost in importance, they confine their attention to the possibility of enforcing legally a parent-child relationship independent of the legal formality in the relationship of the parents. As regards the uncertainty of paternity it is submitted that that concern may be largely satisfied today with advanced methods of blood typing and other scientific safeguards. Evidence of cohabitation has shown that this is possible to achieve. The same seems to be suggested from evidence obtained from divorced parents, the majority of whom show an unaltered concern for their children after the dissolution of marriage. Equally it could benefit marriage in the sense of democratizing it further since its inception would be exclusively a concern of the partners. Additionally, it will eliminate irresponsibility and perhaps to an extent will deter some people from not legitimating their relationship to avoid the burden of the child since this will no longer make any difference. More important, however, in terms of social order, this approach will eliminate the anomalous situations of parentless or deprived children so frequent in our society, since parenthood would be established in any possible case and the parents would be primarily responsible for its needs. This is expected to have a certain

impact on welfare services since such a process would remove some of the burden from them, and therefore they could become more effective and improve their standards. Of course, such improvements would not extinguish the problem of one parent households nor remove the social stigma altogether. It will take time for society to adjust in these situations. However, it is important for the law to aid and to come to terms with such families to protect the child and ensure its wellbeing to the greatest possible extent.

## VI. THE STEPS FORWARD

### a. International trends towards illegitimacy.

Many countries have already achieved substantial equality between legitimate and illegitimate children while others are moving in the same direction. The country which sets the pace of what is today regarded as desirable by many civilised countries is most probably Norway, where early in this century (1915), the child's rights in relation to both parents ceased to be dependent on the formality of their relationship. Yet, the rate of births outside wedlock in that country runs as low as 5 per cent while in the neighbouring Sweden which retained discrimination until recently, the ratio reached peaks of 20 per cent.[200] The law of Arizona was changed to the same effect in 1921 and that of Oregon in 1957.[201] New Zealand and all Australian States, except Western Australia have recently passed similar legislation. Particularly Section 3(1) of the Status of Children Act 1969 of New Zealand is today recognised as the guiding spirit for reform. This section reads as follows:

> 'For all purposes of the law of New Zealand the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are

or have been married to each other, and all other relationships shall be determined accordingly."[201a]

France in 1972 enacted a new article in the Code Civil which, in general, provides that the illegitimate child has the same rights and the same duties as the legitimate child.[202] Similar reform was effected in West Germany[203] with the reform of the B.G.B. by the N.E.G., and in Portugal.[204] The Austrian parliament enacted a law in 1970 that gave children substantial equality, with exceptions in the area of inheritance.[205] Since 1968 in the U.S.S.R. the illegitimate child has had full legal equality under Soviet law;[206] and the same has been achieved constitutionally by a number of other Eastern European countries.[207] In some Latin American countries, equality has also been achieved through constitutional reform.[208] In particular, Panama's Constitution of 1946 as amended in 1961 provides: "Parents have the same duties with respect to their children born out of wedlock as towards their children born in wedlock. All children are equal before the law and they have the same rights of inheritance in intestate succession".[209] Also Uruguay's Constitution of 1967 contains the provision that : "Parents have the same duties towards children born outside of wedlock as towards children born within it".[210]

In Ontario, Canada, a law was passed in respect of the status of children in 1978, equalizing the status of illegitimacy with that of legitimacy. Reports prepared for four other Canadian Provinces recommended abolition of the status of illegitimacy. The report concerning the Province of Quebec was published in 1977 and suggested reform of the entire Civil Code. In respect of the establishment of the parent-child relationship, the report suggested the introduction of the concept of filiation. For facilitating the proof of paternal

filiation it retained the presumption of paternity against the mother's husband on the basis of birth instead of conception in wedlock. A similar presumption is proposed for de facto unions against the man cohabiting with the mother.[210a] A report also favourable to the abolition of any distinction between legitimate and illegitimate children was published by the English Law Commission in 1979.[210b] The two last mentioned reports, since they are recent and one concerns a civil law system while the other a common law, have been frequently used as a source of reference in this study.

The trend towards equalisation of the status of children has also been facilitated by the Council of Europe which in its Convention of 1975 on the legal status of children born out of wedlock suggested that the legal position of such children be assimilated to that of legitimacy.[210c]

b. Proposals for the two countries

Opinions of jurists and proposals for future reform in each country differs diametrically: in Scotland there is a strong movement towards the abolition of illegitimacy altogether, which started with the proposals of the Russell Committee on the Law of Succession.[211] The major premise of the report published by them states that "Whatever may be said of the parents, the bastard is innocent of any wrongdoing. To allot him an inferior, or indeed unrecognised, status in succession is to punish him for a wrong of which he was not guilty".[212] This attack on the succession rights was a most effective one, since it struck at the main stronghold of discrimination. Thus, M.E. Meston(1966)[213] with reference to this Report observes that the law of succession as it stands as "archaisms completely inadequate for modern conditions" and "it is with great pleasure, therefore, that one can welcome the prospect of further improvements ..." on the basis of this report. Moreover, E. Clive (1979)[214] assessing the current situation points that "the remaining legal differences are comparatively unimportand and it would not be a major legal step to sweep them away altogether. Nevertheless, the fact that legal differences are now slight does not mean that there is no problem. The very existence of the separate status of illegitimacy is in itself a blot on our society and our legal system. Only by removing all remaining

legal difference can we get rid of illegitimacy as a legal concept."

In the same fashion, Fiona Stuart[215] reports that due to minimal differences between children, especially in cohabitational circumstances "reform is clearly overdue ... since it is unfair to penalise the child merely by reason of the circumstances into which he is born". Also the Scottish Law Commission in its memorandum on aliment[216] has proposed that the alimentary obligation of the parent towards his illegitimate child should be the same as that towards a legitimate child. Nevertheless, the Commision has the entire law on illegitimacy under review and its report is expected.

In Greece the gap between legitimate and illegitimate status remains even greater due to the innate distinction between voluntarily affiliated (and the so assimilated) children and those for whom paternity has been judicially established. Although the former category enjoys a status almost similar to that of the legitimate child the second is supplied only with a limited right for support, a distinction deplored today by many Greek scholars.[217] The latter propose a uniform status for every child for whom paternity has been established, equal to the one existing for the voluntarily affiliated child.[218] This proposal, however, is not included in the draft submitted by the Gazi Committee.[219] Removing the concept of illegitimacy altogether is still out of consideration, although the differences between legitimate and voluntarily affiliated children are minor and there would be no real problems in sweeping them away. In fact, it is still argued in Greece that the removal of all the differences between children will involve risk to the legal family.[220] Gazis considers the assimilation possible of illegitimate children to legitimate only when the father has no other issue. He assets that the assimilation of the two classes of children brings friction to the legal family, a danger which does not exist for the family of a childless father.[221] However, this opinion has to be rejected for various reasons. Namely, the idea introduces a discriminatory distinction between illegitimates

per se; it re-instates the old-fashioned formula of childlessness which has received much criticism in relation to adoption;[222] for such cases there is the ready formula of judicial legitimation;[223] and finally, the children which will be mostly affected by this formula are the adulterines which already suffer considerable discrimination under Greek law.[224]

From the above review of these modern trends it can be seen that many countries have achieved equality and that others are tending to do so. At the same time, in Scotland there is strong support for removing the distinctions, while in Greece, although the need to improve the status is recognised, there is still vacillation as to whether this should be carried out to the same extent. This position is unjustifiable as much on account of the current trends in the country as to its legal tradition and its consistency on the status of illegitimate children. It was always the law of Greece that a child born out of wedlock should be legitimate for the maternal line, and, if voluntarily acknowledged or completely judicially affiliated, would enjoy the status of a legitimate child in relation to the father with only minor restrictions in succession rights and guardianship. Therefore, the step forward is a small one and it would be a major improvement if the distinctions were removed.

c. The models for reform.

The field of choice in this area contains two principal approaches

i. abolition of the discriminatory legal consequences of illegitimacy by making selective reform in the relevant areas of the law; and

ii. the radical approach of abolition of the status of illegitimacy and all its consequences and placement of the children under a uniform law.

These models are represented in the views of the English Law Commission in its working paper on illegitimacy,[225] and since it is considered as the most current and comprehensive legal work for reform on illegitimacy the two models will be discussed in line with the Commissions views on the problem.

(a) Abolition of the adverse consequences of illegitimacy.

According to this model the concepts of legitimacy and illegitimacy are preserved, but certain steps are taken to remove by reform the practical and procedural consequences of illegitimacy. In the view of the Commission this would involve abolition of the affiliation proceedings and the child would be given a legal right for support from both of his parents; also he would be capable of succeeding on intestancy as a legitimate child.[226] Furthermore, the model envisages a selective reform which may be regarded by many as advantageous in refusing to remove all discrimination against the natural father. The correctness of such an approach is further supported by arguing that because of the wide range of possible factual relationships between the father on the one hand, and the mother and the child on the other, it is necessary to restrict certain rights that would extensively involve the father in the child's life. Thus, if the father wishes to participate in the child's upbringing, the court, on account of his welfare, could make the appropriate order. But if the father has nothing to offer, it would on this view, be wrong to give him rights.[227] For such cases there is a reference in the paper to the rapist or the father who became so after a casual encounter with the mother; and it is asserted that for those parents to be supplied prima facie with rights may involve risk to the child until such time as the mother initiates proceedings[228] to exclude him. However, as the Commission

admits, those arguments could not have any real significance, since in practice, such a father would not seek to exercise rights. But in the case where he did, the court is bound to override his rights if to do so would be in the child's best interests.[229] Obviously, this answer is not entirely satisfactory because the necessity of taking legal proceedings to divest the father of his rights may in itself be distressing to the mother - so much so that it could, for example, affect her decision about placing the child for adoption, if the result were that the father had to be made a party to the proceedings. Also, it would be necessary for the mother to take legal proceedings if she wanted to secure herself and the child against the risk of intervention by the father.

However, those arguments have to be balanced against the difficulties that may arise in giving a statutory definition to the classes of fathers entitled to parental rights. And if such a step is taken, a similar rule should apply for specific categories of mothers, otherwise such exclusion would be arbitrary and unjust. Moreover, statutory exclusion of specific fathers may produce unsatisfactory results in particular cases. To take, for instance, the father who became so after a casual encounter with the mother - nothing precludes his showing a genuine interest in the child, notwithstanding the fact that he is indifferent towards the mother. Also nothing precludes his desire to cooperate with her in the administration of the child's affairs. On the other hand, by excluding him, the protection offered benefits more the mother who will be able to cover up the incident. By this, however, we return to the old-fashioned ideas that illegitimacy is a disgrace and

that intercourse should take place only between married persons.

Nevertheless, the Commission considers possible the imposition of certain restrictions in relation to the adoption of the child in specific cases, notwithstanding that this will take effect by a court order. Also in relation to the birth registration, if the father wants to enter his name against the mother's wishes, he should be entitled to do so only if a court order has been issued upon his request recognising him to be father, or if he has been ordered to pay maintenance. This, it is believed will exclude indirectly the father who is without any actual link with the child. Finally, the Commission considers the exclusion of the donor of an A.I.D. child in favour of the mother's husband.[230]

(b) Abolition of the status of illegitimacy.

"It may be" states the Commission "that the biggest discrimination suffered by a person born out of wedlock is the legal characterization of him as illegitimate";[231] and it seems that this characterization has survived despite the multilateral pressure for rights for illegitimate children. Actually, although reform has frequently been initiated against the inferiority of the status, the concept of illegitimacy in itself rarely became the subject of a reformatory movement. Moreover, although discrimination terms of parental rights has been much diminished, the legal charactization of a child as illegitimate has preserved its original humiliating form. Accordingly, the concept of illegitimacy along with its consequences constitutes the second model for reform under consideration by the Commission. It aspires, beyond the mere assimilation of children, to

remove the "caste labels which help artificially to preserve the social stigma attached to illegitimacy".[232]

In the view of the Commission, "Such change would help to improve the position of children born out of wedlock in a way in which the mere removal of the remaining legal disabilities attached to illegitimacy would not. No change in the law relating to illegitimacy would help to improve the economic position of a child born out of wedlock insofar as he suffers from being the child of a "one-parent family; but an illegitimate child suffers a special disadvantage which does not affect the child of a widow or divorcee. He has a different status, even if the incidents of that status do not differ greatly from those attached to the status of a legitimate child; attention is thus focussed on the relevancy of the parents' marital status".[233] Thus, they suggest that the law can help to lessen social prejudices by anticipating that the parents' relationship is irrelevant to the child's legal position. This view is supported by the argument that whatever changes occur, they may still fail to secure to the desired extent a normal family unit, or to secure support, since the father may not be in a good financial position, but at least, it removes "the additional hardship of attaching an opprobious description" to the child.[234]

In respect of the abolition of the distinction, both parents would have equal parental rights and duties unless and until a court ordered otherwise. As to the risk involved prior to divesting the unsuitable parent of rights, this risk does not arise only in relation to children born out of wedlock, and ,

therefore, should not be allowed to govern the issue. Furthermore, probably in most cases the father's position should be recognised because he will be making a contribution to the child's upbringing either compulsorily or voluntarily.

Further advantages of this model - apart from removing the stigmatization - is that it automatically recognises situations of fact and prevents the mother from taking the decision alone as to whether the father should have further involvement in the child's life. The decision should not be entrusted to the mother alone but should lie within the discretion of the courts, which are bound to regard the welfare of the child as of first and paramount consideration.[235] An additional reason in favour of this model is that if the concept of illegitimacy is to be retained - as the first model perceives - this necessarily will prevent major reform. Namely, if the concept will continue to signify the particular class of children, obviously it will preserve its present context.

From a jurisprudential point of view it will be inconsistent to carry out extensive beneficial reform in favour of a class of children whose existence at least officially is socially deplored. Therefore, having in mind that as a matter of fact those situations would need more attention than that of the two parent family, at present the most that the law could do would be to assimilate legally the two classes on the grounds of equity. Any special attention shown beyond that point would strike against its dominant values of the law.

In view of the above considerations, the prima facie inference

is that the additional advantages of removing the concept altogether outweigh the disadvantages of giving all fathers parental rights. Thus, the abolition of the concept of illegitimacy is to be preferred against the approach of reforming the disabilities. Hence, there would be no legal distinction between the children born to parents who are married and those born to unmarried parents. Therefore, the law applicable to legitimate children would apply to all children and the court would have the discretion to resolve disputes on account of the welfare of the child.

# C H A P T E R  T H R E E

## THE ESTABLISHMENT OF PATERNITY

### INTRODUCTION

In the present law of the two countries there is no legal concept for illegitimate children from which the inference of paternity can be drawn. Illegitimate paternity is a matter which cannot be directly adduced by any evidence or legal presumption so as to bind the child *ab initio* to its natural father. Thus, prior to formal establishment of paternity, the child lacks any legal links with his natural father and is deemed as no-one's natural offspring.

The paternity of such a child in either jurisdiction is open to admission or ascertainment according to appropriate legal proceedings. Normally, under Scots law, this takes effect by an action for affiliation and aliment[1] notwithstanding that situations of fact enjoy considerable recognition for specific purposes. Thus, if the father voluntarily undertakes the obligation of sharing the maintenance of the child with the mother, the court has to take into account his wishes with regard to the adoption of the child, his opinion on the child's custody and his intentions, before relinquishing parental rights on behalf of an adoption agency.[2] Such obligation, on the other hand, is never enforceable in itself and, in a case of discontinuation of payments, the mother has to bring an action for affiliation and aliment. But a finding in such action is not clearly one that declares a status nor does it operate *in rem*. The child in the eyes of the law remains *filius nullius*, and the finding of paternity made in this action cannot be used to enforce rights other than those referred to in the petition.[3]

In Greek law, the relation with the father may be through an act of voluntary acknowledgement or by a court order. Both operate in rem declare paternity and recognise a status.[4] A relation, evident otherwise than by those acts, is refused recognition. Thus, where a stable cohabitation exists among the parents and where the child had been publicly and constantly treated as his natural offspring by the father or where the father has admitted paternity, those instances are treated as evidence admissible in affiliation proceedings but fail to produce a recognition of the relation. Moreover, the weak presumption of paternity, against a man who was alleged, in criminal proceedings, i.e. in an action for abandonment in pregnancy, or rape, to have had intercourse with the mother at the time conception, is treated as evidence of paternity without in itself providing a declarator of status for the child.[5]

As regards the status provided after the acknowledgement of paternity, this section of Greek law is a field beset with variations. For example, if the father has voluntarily acknowledged the child, the act confers on the child all the rights and duties of a legitimate child in relation to the parent himself, save only some exceptions.[6] On the other hand, if paternity is judicially established, this provides the child with a right to support. Moreover, judicial establishment of paternity may confer the results of a voluntary acknowledgement for certain classes of 'not so very illegitimate children'. The so-called "complete judicial acknowledgement" is provided in favour of children conceived under circumstances where the mother was dependent on the alleged father, being engaged to or cohabiting with him, or, if conception is the result of rape, seduction, or abduction, for which the alleged father is responsible.[7]

As to the children who can be affiliated, the methods are open to any illegitimate child. An indirect restriction, however, more emphatic in

Greek law, arising from the exceptio plurium concubentium may prevent establishment of paternity in respect of children born to a promiscuous mother. However, this restriction emerges rather from the difficulties of proving paternity than by reference to the children themselves. This brief review of the situation as it stands today reveals that the enforcing cause of rights and duties in illegitimacy is the act of acknowledgement.

In accordance with the position taken, however, that the status of illegitimacy should be abolished altogether, it is important to ensure that the relationship with both parents will be available from the child's birth. This is necessary in order to achieve satisfactory equality between children born in wedlock and those born to unmarried parents. Therefore the basis of the status will be the fact of procreation as it is understood by the jus naturale, requiring appropriate legal enforcement.[8]

In the context of this proposal, the concept of "duty of support" which governed the formulation of the current law would cease to have any significance and would be replaced by the concept of "parenthood", as it operates for a child born in wedlock.[9] This suggests the formulation of a presumption similar to that governing births in wedlock, or the introduction of a procedure which, in a quick but safe way, would establish the relationship with the father.

Therefore, in the first place, the role that the welfare of the child could have in the formulation of this procedure will be examined. Secondly, the possibility of placing reliance on evidence of primary fact will be discussed, together with the possibility of formulating a presumption of conception for specific cases. Necessarily such evidence, if any, will

be examined from a point of view of whether it raises any formal assumption to deal with the future of the presumption of legitimacy.

Provided that the results obtained from the discussion on the evidence of primary fact are not satisfactory, attention would be directed to the present methods available for the establishment of paternity, and whether they can be of help, if suitably recast. In the present system, we can distinguish two classes of methods

a. those involving voluntary acknowledgement of paternity and

b. those providing establishment of paternity by a court order.

The former category is of particular importance, since it is expected that, under an equal status, many parents would act rationally by voluntarily acknowledging their child. It would be necessary, on the other hand, to secure formality in those acts, as well as that they be carried out under a non-administrative authority. For the second category of methods, which have to be retained for the unfortunate situations where there is dispute as to the paternity, or where the father refuses to acknowledge the child, there are a number of points to be considered. At the outset, due to the importance of the matter, it is necessary to consider whether the question should be treated as an independent issue, and not simply as an incidental issue in proceedings aimed at obtaining some other order, i.e. to the jurisdiction of what court should the issue be submitted; who should be entitled to seek a finding, or declaration, of paternity as such; against whom should the action be directed; what should be the time limits for raising such an action; and finally, what evidence should be admissible under the new principles.

PRELIMINARY MATTERS

I. THE ROLE OF THE WELFARE OF THE CHILD IN THE FORMULATION OF THE PROCEDURE.

The core of the concern of the English law Commission relates to the welfare of the child. Inevitably, this principle governs part IX, as well, of the Working Paper, where the procedure and evidence for the establishment of paternity is discussed. However, notwithstanding that no attempt has been made to suggest any statutory exclusion of any class of fathers from having automatic entitlement to parental rights, nevertheless the Commission considers it possible to prevent a father, with a "wholly unmeritorious case" (e.g. the rapist) from compelling registration of his name by applying the welfare tests. This is restricted to cases where such a father is trying to enter his name by means of a unilateral declaration. But when there is an actual link with the child by a court order, or when he has demonstrated to the court that it was appropriate to make a declaration of parentage, the Commission suggests awarding the father an unrestricted right to enter his name.[10]

On account of this recommendation the prima facie impression is that the Commission fails to draw a border-line between the creative cause of the status of the child, on the one hand, and the role of the welfare of the child in the administration of the rights arising of that status on the other hand.[11] Entirely properly the welfare principle inspires the suggested reform of illegitimacy and should continue to govern the administration of the rights in the parent-child relationship. However, when this concerns the establishment of paternity, there are certain reasons for deploring the idea of imposing disqualifying conditions for certain classes of fathers. First, according to the distinction made about the "duty of support" and the concept of "parenthood", biological

truth becomes the decisive factor in the process. Therefore, complete equality between the two classes of children would be fictional if not provided in the same manner. For instance, when the presumption of paternity is raised for a child born in wedlock it is raised and can be rebutted only on evidence of paternity or non paternity. Secondly, unrestricted establishment of biological paternity is an inevitable consequence of the idea of equal treatment for both sexes. Since, therefore, maternity cannot be subject to a priori limitations, the same should be recognised with regard to the relationship with the father. Thirdly, establishment of paternity implies a family status so that even when there are objections about the character of the father it is not appropriate to prejudice the relationship with paternal relatives. On this understanding it is observable that the approach of the Commission in general, presents one major defect and nevertheless follows a resolution dimensionally opposite to that adopted by the two jurisdictions. First the Commission fails to suggest any procedure whereby if paternity has not yet been established in respect of the child, for imposing a duty on the public authorities within a reasonable time after the child's birth, to seek out the father. Such a duty is already imposed on the public authorities in Denmark and Norway and, as Åke Malmstrom points out, this type of system "is still more favourable for the children". In these countries, it is not correct to speak only of admissibility of actions for paternity. The purpose of the legal rules is to promote, through public assistance, either a recognition by the father or an action against him.[12] Instead the Commission leaves the matter to the discretion of theparents or other persons related to the child who may accordingly seek out the establishment of the relation subject to the condition that this serves the interests of the child. The child himself is supplied with an unqualified right,[13] which is of doubtful value, because during its minority it will be dependent on the discretion of the guardian and by the time the child has the capacity to exercise the right himself, paternity may have lost most of its significance for the child's life.

Second, the welfare principle, as it is known in the two jurisdictions, is

applicable to the administration of specific rights of the relationship. As such, it has been the centre of contemporary policies and its content is considered as being in a state of flux, so that it can be easily readjusted as the policy changes. As regards the principles which are creative of a family relationship, on the other hand, the two jurisdictions adhere to the idea that such principles must be endurable and resistant to changes in society. Namely, Scots law, though a common law system, at an early stage based the right to seek out the illegitimate father and the obligation of the father to share the expenses with the mother on the jus naturale,[14] and as such it has been treated as an inalienable right attributed without distinction to any illegitimate birth. The same is seen in the case of Greek law.[15] As Lasok observes in relation to voluntary recognition of paternity, which can also be considered to cover judicial recognition, if the conferred status proves to be of a doubtful value, yet it is open to the law to provide a corrective and invest the mother or the appropriate public body with a power of opposition. Ultimately, the court may decide the issue in accordance with the well-known formula of the welfare of the child.[16]

This approach should be preserved because it makes the establishment of paternity invulnerable to contemporary policies from which illegitimacy has suffered considerably in the past. Moreover, it prevents the facilitating of a speculative approach towards paternity, which would per se introduce discriminations in illegitimacy. A proper solution, on theother hand, in respect to the intended reform, one could find in subsection 1 of Section 3 of the New Zealand Status of Children Act. This reads "For all purposes of the Law of New Zealand, the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other, and all other relationships shall be determined accordingly". Ths section has been criticised as too widely drafted so that it needs restrictive interpretation to prevent absurdity but nevertheless is considered to assimilate

the lineage by which a relationship is established.[17] Similarly, the Report on the Revision of Quebec Civil Code envisages recognition of paternity the natural alternative where the presumption of paternity does not apply. Thus, article 269 of the draft reads "If paternity cannot be determined by applying the preceding articles, paternal filiation of a child may be established by voluntary acknowledgement of paternity or by judgement.[18]

## II. EVIDENCE OF PRIMARY FACT

a. The idea of giving credit to facts from which the inference of paternity can be drawn is not an unknown one in either jurisdiction.[19] Traditionally, the marriage of the mother and the alleged father subsisting at the child's birth has been placed in a special position in that it is by itself sufficient - although not conclusive - evidence of the husband's paternity of the child.[20] Also, other facts from which such inference can be drawn (cohabitation, betrothal etc.) is frequently given special evidential value. The problem with those facts, however, is that, though they include probability of paternity, they do not provide for an express admission nor directly prove paternity. For example, in a state of cohabitation or betrothal, the parties stand in a situation which legally does not contain the intention of giving birth to children. Moreover, when the child was conceived in circumstances where the mother was in a state of dependence upon the alleged father, or as a result of a sexual offence upon her, though such is strong evidence for his paternity, it is nevertheless by no means conclusive. In fact, the reliability of the evidence varies as much as the relationship of the natural parents.

Before closing the matter, it is necessary to add a few more words about the cohabitation, which, prima facie, provides the more suitable

conditions for raising a presumption of paternity. As a matter of fact, cohabitation is treated by many jurisdictions in the same ways as marriage. For instance, in Tasmania, if the parties cohabit for twelve months prior to birth, or in Ontario, they were involved in "a relationship of some permanence", the child born is prima facie treated as that of the man with whom the mother was associated.[20a] Also the Quebec Civil Code as revised in 1977 specifies that the "de facto consort of the mother of a child born during the de facto union is presumed to be the father."[21] Similarly, the Greek Civil Code, in article 1555, provides complete judicial recognition for the child, if the parents were cohabiting at the time of conception, on the grounds of a strong presumption that, at the relevant time, the mother was exclusively having intercourse with the putative father.[22] However, the problem with those situations, as well as others similar, as raising a presumption of paternity, e.g. if the man had provided aliment to the child, is that their probative value varies from case to case. Namely, cohabitation is by no means self-proving like a marriage, where there is an indisputable fact from which to start applying the rules of nature. Moreover, any contribution paid for the child has some weight only when there is no other reasonable explanation for the man's act. On the other hand, it is disputable if further evidential value attached to those facts would make a real contribution to the law, so far as, unless the contrary is proven, under the present law the court would reach the natural inference that the man in question is the father.[23] Therefore, taking into account that the value of "a 'prima facie evidence rule' lies in its general applicability without further evidence",[24] and the wide range of circumstances that may appear in a conception out of wedlock, the construction of a rule inferring paternity of that child, without further assistance from the law, is almost impossible.

Hence, it may be inadvisable to go beyond the present methods whereby establishment of paternity is provided by means of voluntary or judicial recognition.

b. The rule of article 1555 of the Greek Civil Code

Having concluded that paternity of an illegitimate child should be established formally by one of the above mentioned methods the question that arises in relation to Greek law is whether other primary evidence should continue to signify a finding of paternity. According to article 1555 of the Greek Civil Code if the action is raised during the father's life time and the conception took place under special circumstances assuming acts of intercourse to have taken place between the parties, the order would have the results of a voluntary acknowledgement.[25] These as stated in article 1555 are: (a) conception had to have taken place at a time when the parties were formally engaged.[25a][26] (b) if the mother had been raped, abducted or seduced by dishonest means, and the act constitutes liability of the father according to the provisions of the Penal Code.[27] Physical violence may not be essential to a finding of liability of the alleged father, nor have mitigating circumstances or mental deficiency or other circumstances rendering the crime unpunishable been regarded as preventing the application of the article.[28] It is sufficient to prove the objective characteristics of the act and the order will have the results of voluntary acknowledgement. (c) If the alleged father and mother were living in concubinage[29] during the period of conception,[30] the father was appointed guardian of the mother, or had her in his custody, or the mother was in any way dependent on him.[31] However, such facts are by no means conclusive as to the defendent being the father and, therefore, should not anticipate further search for the real father. Moreover, in accord with the view taken that the finding

of paternity should have a uniform effect, the rule of article 1555 should be repealed. On the other hand, such facts possess evidential value and therefore may continue to be treated as strong evidence in applying the presumption of conception.

c. The presumption of legitimacy under the new approach towards parenthood.

The presumption 'pater est quem nuptiae demonstrant' necessarily involves the question of paternity of the child. In this respect the presumption is a valuable one and should be preserved as a presumption of paternity. In fact, the experience gained so far from its operation within marital situations supports the opinion that the presumption could continue to determine the paternity of the child without resulting in arbitrary solutions.[31a]

With equality for both classes of children, the presumption would lose its fascinating importance so that the disposition of both courts and parents towards the paternity of the child would be more sincere. However, although the presumption would lose part of its importance, as regards the attribution of a distinct status, nonetheless, it retains all of its value as regards the creation of the parent-child relationship. This seems to suggest that the presumption of paternity must be retained in its present form. However, it may be neccessary to alter the standards of proof required to rebut the presumption of birth in wedlock, unless the same standards are introduced for the protection of paternity of a child born out of wedlock. In New Zealand express alteration is not introduced. Section 5 of the Status of Children Act 1969 presumes the child to be the husband's in the "absence of evidence to the contrary". In relation to this wording, as Turner

observes, it is not easy to say whether the quantum of proof has been changed. The absence of any epithet to characterise the evidence needed (such as cogent) suggests that a slight degree of existence would suffice. "But it is possible that the courts will not lightly overturn the common law, in the absence of clear legislative mandate."[31b] Also in Quebec there is no express alteration though the assumption can be made that, whatever the quantum of proof, it will apply equally to both children whose status is established by birth and to those who are established by an act of acknowledgement.[32]

However, in relation to the law of Scotland and Greece what differentiates the proof is rather the policy than the facts behind the conception of the child. The presumption of conception enjoys strong protection because it is felt to be desirable to maintain the status of legitimacy, not because it is always true or because the evidence present does not illuminate sufficiently the allegation that the child is illegitimate. In turn in the context of equality between children what really should continue to differentiate the relationship with the parents is that, unlike the family formed by marriage, the parents of a child born out of wedlock do not constitute an autonomous social and legal unit. This for certain would continue to have implications in the administration of rights which seems to give weight to arguments for not decreasing considerably the quantum of proof needed. A fair solution may be to maintain the same proof for either case, sufficiently strong to protect the status presumed or established for the child, focussed on the facts of the case and free of policy considerations.

Prima facie this solution has the advantage that it would attribute weight to the act of acknowledgement by increasing the awareness of the parents as to the nature and implications of their declaration.

This may act as a deterrence against fraudulent declarations. Besides contestation of disavowal of paternity may lose its great importance by imposing the condition that loss of a designate status cannot be successful, unless paternity of another man is sufficiently indicated. However, whether these recommendations can be realized depends on the authority of the methods of acknowledgement and their safeguards.

There is one more point which calls for attention in Scots law, the distinction between putative and void marriage. For the latter, which fails to raise the presumption of marriage, a more sensible approach would be to start considering paternity as that of the 'husband'. As the Commission explains "The invalidity of the marriage does not cast doubt on the validity of the assumption that the parties actual cohabitation is "as husband and wife", and it is accordingly perfectly proper to draw the same inference as to the paternity of any children as would be drawn, if the marriage were valid."[33]

## THE METHODS

### III. VOLUNTARY ACKNOWLEDGEMENT OF PATERNITY

The problems with this method of acknowledgement of paternity arise from the fact that the father himself invokes the presumption of conception against him. He performs an act probative for a relationship. Thus the questions that first arise are what credit should the law give to this act on his part as well as how formal this act must be.[34] Should he be required to produce some confirmatory evidence, or should a unilateral declaration by the father be sufficient, leaving it to the mother, the child or any interested party to contest paternity? Whichever approach is followed, acknowledgement must be legally formal and must be carried out in a way which would

reveal, as far as practicable, a biological truth, so that the relationship it seeks to establish will enjoy a general recognition.[35] Given the need to provide for a formal instrument, should this be carried out before an administrative authority in contrast to the more independent judicial authority or public notaries, knowing that administrative services are in close relation with contemporary policies and more vulnerable to influence by the government in power? Also, if it were necessary for the father to produce evidence, which of the above bodies could give sufficient guarantees for a competent evaluation of the evidence produced? Answers to the above questions will determine whether the act of voluntary acknowledgement provides the necessary safeguards, so far as to be treated as final and effective erga omnes. There are two more points to raise before commencing the discussion of voluntary acknowledgement. To achieve complete equality with children born in wedlock paternity of the child must be determined shortly after its birth, notwithstanding that this must be also permitted any time, during the pregnancy. The same is dictated by the interests of the child.[36] Thus, the procedure that would be adopted must be speedy, flexible and readily accessible to resolve the matter quickly and easily, so that the child will not remain fatherless for long. Moreover, the father, who must be encouraged to acknowledge the child, should not be hampered by a troublesome procedure.[37] Also in relation to the need for the child not to remain fatherless for long, it may be appropriate to impose time limits within which he must acknowledge the child. An additional reason for doing so is that in case he refuses to comply, it must be possible to raise the action of paternity before the evidence becomes obsolete or loses its value.

## A. VOLUNTARY ACKNOWLEDGEMENT UNDER SCOTS LAW : THE EXISTING BACKGROUND

### PROPOSITIONS AND COMMENTS

1. Under Scots law voluntary acknowledgement of paternity as it is understood by many continental systems - by means of an independent instrument executed by the father recognizing a legal relationship between him and his illegitimate child - does not exist in any clear form.

A sort of voluntary admission of paternity may be implied if the father willingly assumed for himself the obligation of contributing towards the maintenance of the child, but this has only evidential value. Thus if he has not made arrangements for future aliment, even though he has admitted paternity, the mother must constitute her claim for such by a court decree.[38]

A more strong case of voluntary acknowledgement of paternity is supplied through the registration of the child. The law as it stands after the Registration of Births, Deaths and Marriages (Scotland) Act 1965 permits entry of the name of a person as the father of the child on the joint request of the mother and the person acknowledging himself to be the father. The person cannot be treated as acknowledging himself to be the father unless he attends personally at the registration office with the mother and signs the register, in presence of the registrar together with her.[39] In a case where information is supplied by the mother alone, in order for the registrar to enter the name of the father the mother must produce a declaration stating that the said person is the father and a statutory declaration by that person acknowledging himself to be the father.[40] The registrar cannot register the birth of an illegitimate child on information supplied by the father alone nor can he ask for his name to be

entered in the Regiser of Corrections, unless he applies after the death of the mother to the Sheriff within twelve months from the birth of the child and the Sheriff orders the Registrar General after intimation and inquiry to enter the applicant's name. There are two more cases where the name of the father may be recorded in the Register of Corrections if this has not been done at the registration of the child's birth. This can be done if a decree of paternity has been granted by a competent court, in which case the Clerk of the Court must notify the Registrar General of the import of the decree, if there has been no appeal on the expiration of the time within which an appeal could have been made, or if there has been an appeal, on the conclusion of the appellate proceedings. Second, it can be done if a declaration by the mother naming the father and a statutory declaration by him made within twelve months of the birth acknowledging paternity is produced to the Registrar General.[41]

2. For the similar registration system of England the Law Commission asserts it has a built-in procedure for acknowledging paternity in cases where no presumption can be derived from the mother's married status.[42] Consequently, they suggest that the formal adoption of an independent instrument by legislation will be superfluous and insist on the best solution being to ensure that the registration system is sufficiently flexible to enable the evidence of paternity to be derived from the registrar. Besides they see an instrument recording an agreement between the parties as to the child's paternity as having an evidential value but not as to be given any special status.[43]

Nevertheless, this form of acknowledgement seems to be an important procedure for Scotland since from the 5,968 illegitimate live births

in 1977 the fathers attended the registration and acknowledged paternity in just under half of those cases and 110 more signed statutory declarations acknowledging paternity.[44] This, if compared with the 80 decrees of paternity relating to births registered in Scotland intimated by Sheriff courts to the registration authorities,[45] this form of acknowledgement seems an important and indispensable feature for the Scottish law on illegitimacy. However, there are some unsatisfactory points related to this procedure calling for further attention:

3. In the first place, it is necessary to recognise this form of acknowledgement as proof in rem. The background on the subject is not encouraging at all since the rather recent proposals of the Russell Committee reject this view,[46] and there is an extensive judicial practice whereby any acknowledgement or finding on paternity is treated as an incidental finding for a specific purpose. Namely, as Meston points out in view of that Report, the Russell Committee envisages that " ... no form of recognition or acknowledgement, however formal, should amount to conclusive proof of paternity. This is because of the danger of fraudulent declarations, either by a man of straw who agrees to play the role of father, or by someone with a view to sharing in the bastard's estate on the latter's death. Equally the majority of the Committee rejects the principle that some form of voluntary recognition should be the only proof of paternity."[47] As regards the unfavourable practice, this refers to the Sheriff court practice according to which, on discontinuation of aliment, it requires as a rule the craving of the initial writ to contain an express conclusion that the defender is the father.[48] This practice has two important effects. First, it re-opens the question of paternity even though the father had admitted it and the child is so

registered, which means that no voluntary acknowledgement of paternity sustains itself unless confirmed by a Sheriff's order; and second, it opens the question of paternity at immaterial times or even unfavourably for the child's interests. However, where the parents jointly had registered the child and it appears to the registrar that there is something untrue about their declaration one solution could be to hand the case to the Sheriff who would resolve the matter. However, such cases are rare and the proposal gives a judicial power to an administrative body. Therefore, it is preferable to suggest that unless the declaration appears untrue beyond doubt the registrar should enter the name of the "father". As regards the real father or party claiming an interest to contest such entry, he could bring an action for a declarator of paternity or non-paternity with the ancillary conclusion for putting the defender 'father' to silence. This offers a more balanced approach since a man would rarely accept complete responsibility for a child who is not his offspring. If he wants to do so there is the alternative of adoption.

Secondly, the registration of the name of the father exclusively depends upon the wishes of the mother. This forms an utilitarian approach towards the establishment of paternity unacceptable in the formulation of natural relations. The father on the refusal of the mother to sign the register with him, is left only with the solution to seek out the issue of a declarator of his paternity. This alternative is incompatible with the view that the voluntary acknowledgement of paternity must be facilitated by an easy and trouble-free procedure. Moreover, this option may be used by the mother to try to force the father to enter a marriage with her. Therefore, it would be preferable if the statute were modified so as to permit the Registrar General to accept a statory declaration by the father

alone. The statutory declaration by the father should be treated as *prima facie* evidence of that fact and, at the same time would constitute proof against the person who made it. On receipt of the declaration the Registrar General could make a preliminary note in the register and inform the parties interested if they wished to raise objection to such an entry. Such note would become final constituting proof *in rem* if the mother or the person exercising parental authority over the child does not raise any such objection within reasonable time, or raises but fails to disprove the truthfulness of the declaration. If an objection were raised the case would be sent to the Sheriff, who, after intimation and enquiry, would ajudicate upon the paternity of the child.[49] This is suitable in a legal context since the registration of the child is an administrative and not a judicial function, so that the registrar could act only on the basis of an unchallenged evidence of paternity.[50] If the case is handed over to the Sheriff the person disputing the paternity would bear the burden of proof. This is a more balanced approach bearing in mind that no man will accept responsibility for a child unless he believes himself to be the father and that it is easier for the mother to prove intercourse with another man at the relevant time than for the father to prove intercourse with a mother who is unwilling to recognise him as the father of her child.[51]

Finally, the procedure fails to provide for acknowledgement of paternity in advance. This may be partly satisfied if the man signs a statutory declaration in advance and the mother produces it along with her declaration to the registrar at the time of registration. Supposing, however, that a putative father is due to emigrate and the mother, in view of his emigration, is reluctant to declare him as the father of her unborn child, intending to place it for adoption or to assume

for her self exclusive rights over the child. For such cases it seems necessary for a statutory declaration made by the father, to be accepted and made effective in advance.

## B. VOLUNTARY ACKNOWLEDGEMENT OF THE CHILD IN GREEK LAW

### 1. The present law.

In Greece acknowledgement made by the father is considered as the primary method by which an illegitimate child gains status vis a vis his father while judicial acknowledgement is considered as a complementary procedure.[52] It is available to any illegitimate child for which there is not a presumption[52a] or acknowledgement[53] of paternity even if the child is unborn[54] stillborn[55] or adopted.[56]

An acknowledgement typically is declared by a notarial deed but may be accomplished on the testament of the father,[57] and it is irrevocable.[58] Acknowledgement cannot be deduced from the mere mention of the name of the father on the birth certificate, nor from the mention of his name in a court's decision if he has admitted paternity in other than affiliation proceedings.[59] His express intention to affiliate the child has to be deduced either from a unilateral declaration to the notary or from a clear and convincing mention made in his will.[60] Moreover, although the acknowledgement of paternity is irrevocable, acknowledgement made in a private testament may be later affected either by a holograph will or by a will made before a public notary, if it contains an express intention to invalidate the previous one on the point of acknowledgement. It then produces results from the date of its publication. However, a will made before a notary, which makes acknowledgement of the illegitimate child, cannot be revoked on the part that contains acknowledgement of paternity, as containing an affiliating declaration.[61]

The voluntary acknowledgement of the child exclusively depends on the act of the father who exercises a personal inalienable right.[62] Nevertheless, after his death, presumed death, or incapacitation[63] the right transmits to the paternal grandfather.[64] Either of them must exercise the right in person and his declaration has to be free of terms and conditions.[65] It is not, therefore, an act susceptible of representation[66] which prima facie seems to create undue restrictions of the cases where the method can be used. However, it is argued that, due to the nature of the act, it has to be carried out by the father or grandfather himself and in case that the father is a minor person[67] the law provides sufficient safeguards to protect him if he has been defrauded in making the declaration.[68] In fact, although acknowledgement is irrevocable, it is generally agreed that it may be invalidated if made in a state of fraud, error or duress.[69]

CHALLENGE OF THE ACKNOWLEDGEMENT

There is no requirement for the affiliating father or grandfather to give positive proof of the paternity of the child. Nor is the declaration subject to any corroboration, but held to signify a status till disproved. Moreover, the mother's or the child's approval for the affiliation is not legally required. Even if they disapprove of the acknowledgement, the father or the paternal grandfather effectively recognises the child.[70] However, the law permits challenge of the acknowledgement by any person claiming a lawful interest if that person can prove that he who acknowledged the child is neither the father nor the grandfather of the child.[71] Persons that could have such interest are named as the child and his heirs, the mother or any person with an interest connected to the acknowledgement.[72] However, the child and the mother may bring the action without need to provide proof of their interest, while third

persons have to prove along with their application possession of a significant personal, pecuniary, or moral interest justifying their petition.[73] The proof needed is the same as in the disavowal of paternity of a legitimate child.[74] Proceedings must be initiated in the Magistrates' Court of the area of the defender[75] within three months from the time that the party has been first informed of the affiliation but no longer than two years from the date of acknowledgement.[76] Different terms apply when the pursuer is the father or grandfather himself, contesting the acknowledgement as made under duress, fraud or error. The period for him to apply is defined up to two years, from the time he first realized his error, but not longer than twenty years after the acknowledgement.[77]

In general the method in its existing form is considered satisfactory and fulfils adequately the purposes of acknowledgement. However, there are two objections that one could raise concerning the lack of any requirement for the father to produce evidence on the truthfulness of his declaration and the other the entitlement of the grandfather to acknowledge the child. Indeed, although the intention is to provide for a trouble-free procedure it is absurd to permit the father to acknowledge the child and recognise this acknowledgement proof in rem without providing any proof on the truthfulness of his declaration. In order to eliminate this inconsistency one could derive valuable information from the revision of the Quebec Civil Code and especially from articles 272 and 273. Namely according to article 272 "Acknowledgement of paternity or of maternity constitutes proof against the person who made it". This is to say that acknowledgement binds only the person who made it for it is "unwise to allow a person to acquire rights with respect to a child and to obligate the members of his family, by merely making an admission. Status of persons comes under public order, and no person has the right to create or affect another's

status by a mere declaration".[78] However, this acknowledgement operates in rem if otherwise confirmed. Article 273 reads "Acknowledgement also constitutes proof as regards third parties if it is indicated on the act of birth or made by a person who has contributed towards the maintenance or education of the child. Acknowledgement of paternity also constitutes proof as regards third parties if the mother declares it to be truthful; acknowledgement of maternity constitutes proof as regards third parties if consistent with the attestation of delivery or if the father declared it to be truthful". The signing by the father of the act of birth is treated as sufficient corroboration of the presumed facts since it proves that throughout pregnancy he believed himself to be the father. Also continuous contribution towards the child's support is deemed an indication sufficient to prove the seriousness of an acknowledgement. Finally recognitition by the other parent also appears to be sufficient corroboration of the truth of any acknowledgement.[79] However, because there is the possibility for a dispute to exist between the parents, it may be advisable to avoid the involvement of the court and to include other instances which can corroborate the truth of any acknowledgement and especially facts that show that the father publicly and constantly treated the child as his.[80]

As regards acknowledgement by the grandfather, which seems to be a remainder of the extended family in its patriarchic form, this rather devalues the credit that should be given to the act of acknowledgement. It is made by a person remote to the circumstances of the child's conception. Thus acknowledgement may appear to be more vulnerable to attacks because the grandfather can neither produce strong evidence nor has the knowledge of the circumstance to disprove contrary evidence. Therefore it is preferable that the matter be submitted to the

decision of the court if the father cannot acknowledge the child.

## IV. THE JUDICIAL ESTABLISHMENT OF PATERNITY

If the issue of paternity should otherwise be raised, then it may have to be settled by a court, preferably under a procedure for obtaining a declarator of parentage. There are strong grounds for believing that if the paternity action should be available, such action should be the alternative to use if acknowledgement by the father is not provided within reasonable time; and moreover the matter should be treated as an independent issue in specifically provided proceedings, as opposed to a preliminary issue of incidental consideration in proceedings aimed at getting some other order.

The main ground concerns the advantages to the welfare of the child if his family lineage is established. In this context it is of essential importance for the order to reveal a natural truth and be free of considerations on the immediate benefits of the child if paternity is established. There are, then, two matters which call for attention. To avoid disputes of the parents over custody and cognate matters to distract attention from the tie of blood which is the main objective of proof, or to influence otherwise the issuing of an order and to prevent important evidence of becoming obsolete.

In the first place it is of utmost importance for its long term welfare to back the child with a family relationship even though in the short term it seems inapparopriate to maintain real contact with the father. Care and support may be needed and the grandparents in the paternal line may be a good alternative. Moreover, future entitlement to property - in the country or abroad - may turn on the issue and it may be inadequate to the interests of the child to leave the matter to

be resolved at the date of distribution. Besides the emotional importance for the child to have his paternity settled is emphasised. As the English Law Commission argues "The child, or indeed those claiming to be his parents, may think it emotionally important to have the issue judicially determined. The right to know the facts about one's origins is increasingly recognised, and it would be unsatisfactory if the law provided only artificial means (such as an application for a nominal award of maintenance) for doing so".[81] Support on this aspect of the child's welfare, however, does not stop in the views of the English Law Commission. The need for the child to be secured by a present father-child relationship and to think of himself as "part of a family continuum" is supported by the Church of England[82] and has been the concern of several individuals.[83]

In respect of the gravity of those reasons, the widely shared recommendation among them concerns itself with the need to provide for an instrument, if paternity is not settled at the child's birth or is not voluntarily recognised.[84] The appropriate instrument to serve that purpose has been considered as the declarator of paternity. However, the background in Scotland in relation to the force of such an order is not promising at all, nor is there a general agreement in the literature about the scope of application and immediate effects of the order. The views are manifold referring to whether such a declarator should be the only judicial method of establishing paternity or whether a finding in proceedings aiming at getting some other order would have the same effect; and whether is should be available along with voluntary acknowledgement or in addition to it, leaving reasonable time for the father to acknowledge the child.

The Russell Committee reporting some time ago on the succession rights

of illegitimate children had examined the possibility for statute to provide for a declarator of paternity and such a declarator to be proof in rem. However, the Committee retained the concept of the "half-way" relationship of the affiliation order on the basis that permitting a declarator would encourage a purely speculative litigation, since it might never have any practical effect; for a father, after a declaration of paternity may either not die intestate or divest himself of his property in his lifetime.[85] This approach of the Committee is understandable since they were concerned with successional rights which emerge when actual links with the father are of little importance to the child. On the other hand, the recommending for a declarator of paternity would have certain effects on other rights involved in the relationship and moreover would contravene the concept of filius nulius which has been the foundation stone of the law on illegitimacy. However, considering it as an official inquiry into the matter, which inevitably would influence future reform, such a low key approach is scarcely acceptable. As Meston points out, "the occasions are extremely rare when a parent is prepared to divest himself irrevocably of his whole estate or to convert it wholly into heritage". And he continues "In any event, it is to be hoped that future legislation will prevent such invasion of legal rights. In these circumstances, a declarator of paternity during the father's lifetime would be very unlikely to be pointless and one might think that, in Scotland at least, it should be permitted. Such a declarator would, presumably involve a pure question of personal status, and under the present law would fall within the exclusive jurisdiction of the Court of Session. It would seem, however, that the Sheriff Court would be a more appropriate forum."[86]

The view that there is room for a declarator of paternity is also

shared by the English Law Commission, who, although not considering it to be the sole way for recognising paternity judicially, envisage the importance of such an instrument for taking advantage of the proper evidence in time.[87] Difficulties in obtaining evidence are also faced in Scotland following the Law Reform Miscellaneous Provisions (Scotland) Act 1968 which on the basis of the recommendations of the Russell Committee gives the illegitimate child the right to legitim over the father's estate. The Committee clearly experienced considerable difficulty with the problem of proof of paternity. As they have noticed, there is much to be said for hearing evidence while the facts are recent and both parents are alive. Arguably the best evidence may no longer be available or has lost its importance since the interpretation put on it may have changed considerably by that time. Moreover, the parents or other persons that could be subject to blood tests or to giving evidence in person may have disappeared or be dead, like the putative father, by then.[88] The time factor, therefore, would operate against the child, and the later the issue is raised the less successfully it may be so. This concern is also shared by the English Law Commission.[89]

Since evidence, however, has a direct bearing on the force of the order, the willingness as well of the parents to supply the evidence is a concern to be satisfied. Thus, the context and time in which the issue of paternity is raised is a matter that needs careful consideration. For instance if the issue of paternity is involved incidentally in proceedings for getting some other order, the position of the father towards the issue largely depends on whether he accepts the other claim or not. To quote from Samuels "In practice it is believed that paternity is comparatively rarely a contested matter in affiliation proceedings, the amount of financial provision being

much more commonly in issue, so the size of the problem of establishing paternity is quite small in litigation terms." [90] The involvement of a disputed matter other than that of paternity puts strain on the father so that he may thus be less willing to cooperate. In addition, complete lack of cooperation may be expected when the issue is raised after the father's death in the instance of his heirs defending claims on the father's estate. The same risk, however, is apparent in relation to the mother. Take, for instance, a mother who is anxious to retain possession of her child and defends an action for declarator of paternity along with a claim for custody by the father. It seems likely that, if there is the slightest possibility of her losing the child, she will deny intercourse with the putative father.

On the other hand, one should not ignore the fact that if the issue of paternity is treated as an incidental issue in a wide range of applications to the court (e.g. in custody maintenance, succession etc), the saving of time and cost is quite considerable and, therefore, such an approach may be favourably regarded. In fact, this approach is considered as a possible one by the English Law Commission, which suggests that a finding of paternity in such an action should appear on the face of the order and, as a substantive decision for the child, would be capable of giving rise to an amendment in the register.[91] Moreover, the Commission suggests that such a finding should be registered only if the decision enforces immediate rights or obligations.[92] Also to facilitate future claims by the child it is suggested that "any reference to a finding of paternity in a case where no substantive order is made would be tantamount to the making of a declaration of paternity" and the child should be able to get information through its "unrestricted access to the courts for such a purpose."[93]

The choice between the two alternatives is not an easy one so far as the issues that they raise are extremely important. However, there are some additional reasons to be considered which may favour the idea of independent judicial proceedings.

The primary objective that judicial proceedings need to satisfy is to place the illegitimate child in a regular family relation to the father and his relatives. This implies a change of principle for the future since the more certain the finding the more the order will be accepted by the persons concerned and by society. That is to say, under the present law fatherhood gives rise only to economic consequences and the law does not require biological evidence of paternity. Thus, it is sufficient to prove sexual intercourse between the mother and the alleged father ata time such that the child might be his. So far, however, as it is necessary for the decision to operate erga omnes the conditions for establishing paternity must be changed and tightened up. It becomes necessary to furnish positive proof that the man indicated really is the biological father of the child. It may be no longer sufficient to show that he might be so. And probably in certain cases it will be necessary to push to the extreme by requiring two proofs, one positive, specifying that the man had sexual intercourse with the mother such that (and only at a time such that) by the laws of nature he might be the father; one negative, showing that there is nothing to suggest that he might not be the father, or another person is indicated as such. Second, it is arguable that there is a general social interest in the issue, apart from the already mentioned emotional interest of the persons concerned to resolve the question of paternity early. Two particular cases illustrate this aspect. The first concerns tax payers who have a moral right to demand that the natural fathers undertake their obligations to

support their children so that help from the national funds come only when claims cannot be satisfied from private sources. The second refers to the interests of the family. For instance, a man who has had a child out of wedlock and omits to tell his wife about it when marrying her. Of course, he ought not to be silent about such a thing, and it is believed that husbands in general do make confessions. But difficulties would arise if he did not act as he ought. And it cannot be denied that it causes hardship to the widow if at her husband's death she has to give up part of the common property to a child whose existence she did not even suspect.[93a] For that very reason the approach towards paternity gets another dimension in the light of which the establishment of paternity ought to prevail over "temporary considerations as to the welfare of the child". Therefore, if the establishment of paternity is permitted only under proceedings directed at getting some other order, this will exclude us from two important options: first of suggesting that affiliation proceedings must be the next step to be taken if the father refuses to acknowledge the child and second of removing the right to initiate proceedings from the exclusive discretion of the individuals to a public body which would exercise it on a supplementary basis. This change of principle, as implying the paternity action to be compulsory, is submitted to be undesirable as a major invasion to the privacy and personality of the individual. The matter has been dealt with by the Russell Committee which rejected the idea of involvement of public bodies in investigating illegitimate births on the assumption that this practice "would not be acceptable to the public opinion" of Britain.[94] On the other hand such a proposal is made by the Church of England where the father did not voluntarily recognise and the mother failed to bring the action of paternity within six weeks.[94a] In their view there should be provision for the appointment of a

guardian ad litem to bring such proceedings on behalf of the child. The idea differentiates the interests of the child from that of the parent and provides for a "statutory protector" of the child who would bear the responsibility of bringing the action of paternity. This proposal comes very close to what can be regarded as sui legis entitlement to parenthood, though not satisfactorily conceived since they envisage the possibility of leaving it open to the authorities to take no action in cases where this seems inadvisable to the interests of the child. This proposal is further discussed by Levin who supports the view of giving assurance to the child by having his paternity established notwithstanding that such concern should not cause undue hardship to the mother by involving the father in her personal life.[95] Professor Clive, on the other hand, clearly supports the compulsory establishment of paternity irrespective of different considerations on the interests of the parents. In his opinion, to make proceedings obligatory and compel the parents to participate "might strike some people as an invasion of privacy but the child has rights too and it seems to me that the child's right to a father should prevail over the qualms of the adults involved." He concludes it to be essential that "it should not be left to the mothers to get the fathers to the register".[96] Similarly Meteyard considers it inappropriate to allow a woman to deny to the child a knowledge of the identity of his father since his role remains important even though he does not make his presence 'over-intense" in the child's life.[97]

However, this approach, apart from the protection that it offers specifically to the child, to the family and to society in general, involves one more matter which makes its acceptance necessary. So far as it was suggested that the presumption of paternity against

the mother's husband will continue to operate in the same way as before from the point of view of legal deontology, it is necessary to secure sui legis the establishment of paternity for the illegitimate child, in an early stage of his life.[98] On the basis of this recommendation we turn, therefore, to examine the particular aspects of the paternity action, giving due consideration to the established practices in each country.

## V. THE EXISTING LAW AND THE REFORM NEEDED

### A. THE NATURE AND FORCE OF THE ORDER AND THE POSSIBLE ALTERNATIVES

#### 1. SCOTLAND

Currently under Scots Law it is competent to seek a declarator that one is the child of a designated father, if this is a fact leaving patrimonial consequences or consequences in relation to status.[99] Nevertheless, an action for affiliation and aliment is essentially of declaratory nature, decree being declaratory of the defender's paternity of the child.[100] However, whether this consideration concerns the nature of the decree or its practical consequences it is a matter strongly disputed. Declarator of paternity is subject to the exclusive jurisdiction of the Court of Session and is effective in rem while the decree of a sheriff dealing incidentally with an issue of personal status such as paternity is res judicata only as between the parties to the action.[101] To quote from Lord Blackburn in McDonald v. Ross[102] "The decree of the Sheriff 'finding' that the defender is the father of an illegitimate child may not have the same legal effect as attaches to a decree of declarator, but the results of the 'finding' may be just as far-reaching upon the defender's future as the results of a decree of declarator would have been." However, the majority of judges in the aforementioned case held that the obligation of the

father of an illegitimate child to contribute to its aliment "arises purely ex debito naturali, and the establishment of paternity of the child in an action of affiliation and aliment .... has '... no legal consequences of any kind except as between the father and the mother - to make the former debtor to the latter for ... an equal share of the child's aliment."[103] A similar consideration in Silver v. Walker[104] describes that "an action for affiliation and aliment is really nothing more than an action for payment of a debt, and strictly speaking it is not a declarator of status. The illegitimate child has no legal status in any proper sense".[105] As Lord Mackay explains in the same case, according to the Sheriff Courts (Scotland) Act 1907[106] "a finding of paternity against the defender ... forms an indispensable feature of the decree in all actions of affiliation and aliment in which the pursuer succeeds," but such finding is prefaced incidentally to the pecuniary conclusion of the case, and is good for that purpose" but not declaratory, or judgements in rem."[107]

On the other hand, the declaratory essence of the particular action had been competently argued by the minority of the judges in McDonald v. Ross. "The word status" says Lord Sands "is a somewhat ambulatory one, and in certain aspects an action in regard to the paternity of an illegitimate child is not regarded or treated as an action to determine status. But such an action has undoubtedly certain elements of an action to determine a status. Status in the law of marriage and of parent and child is a relative term. It fixes a relationship between the party concerned and other party - husband and wife, parent and child. From this relationship certain rights flow. In the case of an illegitimate child, a determination of paternity fixes a relationship between the child and the father which endures during the joint lives of the father and the child, and transmits against

the representatives of a deceased father."[108] Also, in the same case Lord Morison holds it competent to bring a declarator of paternity of an illegitimate child even though there is no conclusion for aliment. "The truth" he says "is that the primary purpose of an action of affiliation is to ascertain the paternity of the child, and the pecuniary consequences only follow the determination of the question ... The death of the child in no way alters the character of a decree of absolvitor which may be pronounced. It would, in my opinion, have been competent for the pursuer here to have abandoned her claim for inlying expenses and aliment and insisted only on a judgement on the question of paternity raised at the beginning of the initial writ ...".[109]

This particular view today could have a considerable foundation in the statutory law of the country. Thus it provides for a declarator of paternity (the Illegitimate Children (Scotland) Act, 1930)[110] and treats it as the basis of other than alimentary orders.[111] A similar foundation for rights on the basis of the order can be met also in statutes concerning the custody or adoption of the child.[112]

The important point, therefore, for Scots law is the extension of this approach to govern the action of paternity. Namely, the independence of an action for affiliation and aliment should be retained, but the question of paternity must become the principal issue in the proceedings. Moreover, the order should bring into force all rights and duties of the relationship but it should be permitted for the court on account of the welfare of the child to consider as an ancilliary claim changes in the relationship or suspension of a number of rights. However, no application should be competently submitted if the issue is a claim arising from the relation prior to ascertainment of paternity, nor court should have the jurisdiction to treat a man as the father

of an illegitimate child adjudicating on a de facto situation, if that man has not formally acknowledged the child, or if paternity has not been established against him. Finally, the finding of the order should be effective as res judicata erga omnes resolving the question of paternity once and for all subject only to reclaiming or appeal on evidence showing that the particular person is not the father, or indicating another person to be so.

2. GREECE

Judicial recognition of paternity in Greek law, as well as issues on the existence or voidness of a voluntary acknowledgement, is subject to the special procedure of articles 615-622 of the Code of Civil Procedure.[113] Under the same procedure fall declarator of paternity and declarator of bastardy.[114] Moreover, it is competent to connect with this claim for award of a certain amount in respect of the aliment of the child.[115] However, entitlement to claim aliment is based on the formal recognition of paternity and retroacts to the date of birth.[115a] Provided that the decree of the court finds the defender to be the father the rights and duties attributed to the relation operate ipso jure, and the father owes aliment to the child whether he has been ordered to provide or not.[116] Moreover, such a finding operates erga omnes[117] save the exemptions of article 618 of the Code of Civil Procedure. Namely, "Decisions rejecting or accepting ... (c) the acknowledgement of paternity of an illegitimate child ... are effective in rem, so far as they are subject neither to cassation nor to rehearing by the supreme court".[118] Thus, the decision declaring paternity, to operate in rem should not only become final but also irrevocable. The reasoning behind this deviation is attributed to the fact that litigations of this nature, due to their importance for public order, should not be exposed to the risk of issuing contradictory decisions.[119] However, a strong exemption

provided in part 2 of the same article states that "the decision is not res judicata for a third party not invited to the hearings if he claims for himself a parent or child or patria potestas relationship". Therefore, the decision is not res judicata for the non invited mother, or child or for a man claiming to be the father of the child. However, since the nature of the order recognising paternity for the illegitimate child has the same qualities as a declarator of paternity, and since it is effective in rem there is no alteration to suggest at least for this aspect of the order

B. JURISDICTION

Two important matters in relation to jurisdiction to hear applications for parentage declarations would need to be decided. First, which of the courts of each country should exercise jurisdiction, and second, in the residence of which of the litigants should such applications be competently submitted?

In Scotland such an action would involve a pure question of personal status, and under the present law presumably would fall within the jurisdiction of the Court of Session.[120] However, the court that exercises jurisdiction upon actions for affiliation and aliment is the Sheriff Court and it would seem to be the more appropriate forum due to its prolonged experience in the field.[121]

In Greece the action of paternity like others concerning a parent-child relationship is subject to the exclusive jurisdiction of the three judge City Court (Polymeles Protodikion).[122] Only litigations concerning the care of the child or access by a non custodian parent are subject to the jurisdiction of the one judge City Court, (Monomeles Protodikion),[123]

but if connected with one of the litigations concerning the parent-child relationship may competently be brought before the Magistrates' Court.[124]

There is no reason for altering this jurisdiction, e.g. by transferring proceedings to a higher court or by recognising a special jurisdiction to criminal courts adjudicating on a sexual crime committed againstthe mother to investigate obiter the paternity of the child. The paternity action must remain within the civil courts since the key question is the existence of a physical relationship between the alleged father and the child. The circumstances behind the conception count only to their bearing on proof. However, to protect the privacy of the individual involved an additional safeguard that may be introduced is to hold hearings in camera.

As regards the second question it is generally accepted by both laws that the main ground of jurisdiction is the defender's residence.[125] Nevertheless both provide-for the better protection of the mother and the child who are in an inferior position - the possibility of bringing the action in the area where the petitioner resides.[126] However, as the Scottish Law Commission[127] admits those provisions "require review ... because of the uncertainty as to how the action should be categorised for jurisdictional purposes. There have been cases in which jurisdiction has been founded on the ground that (a) the child's conception was a delict committed in the sheriffdom, and (b) the defender has been personally served with the initial writ in the sheriffdom. There are sound policy reasons for allowing an action to be brought in such circumstances where the father returns to the sheriffdom and receives personal service of the summons but the legal basis seems unsound and (as happens when the right thing is done for

the wrong reason) has been questioned on the unexceptional view that the action is for debt not debit".[128]

The right recognised to individuals to raise the action should by no means extend to determine the progress of the proceedings. The judge, once the action is raised, should be ex officio obliged to take care of the progress of the case. The case may be dismissed only if the father acknowledges the child.

C. PERSONS ENTITLED TO BRING THE ACTION AND THE DEFENDER

Today due to the peculiarities that appear in actions for affiliation and aliment attention is focussed upon the mother as the proper person to bring the action. Nevertheless due to the fact that she is not tutor of her illegitimate child there is considerable confusion as to whether she acts on behalf of the child or in her own name. Namely, under Scots law the mother, in order to obtain a contribution to the child's aliment, may bring the action against the alleged father. And it is argued that she has been permitted to do so to avoid the inconvenience of appointing a tutor or curator ad litem.[129] Nevertheless in a number of cases it has been considered that the mother is the creditor and claims for herself.[130] On the other hand it should not be ignored that the right to bring the action has been also supplied to the child and there are recorded cases where the child, after the mother's death, has brought the action through his tutor.[131] Furthermore, whenever assistance has been given from social security funds, statute has supplied the local authority and the Supplementary Benefit Commission with the same right as the mother to bring the action for affiliation and aliment.[132]

In Greece, according to article 1590 of the Greek Civil Code the mother

or the child is entitled to bring the action. Each of them has an independent right[133] justified for the mother by her maternal capacity[134] and for the child by his illegitimate status[135]. No other person or body could bring the action unless appointed legal guardian acting on behalf of the child.[135a]

Obviously in the proposed reform the concern that the action comes to satisfy is the establishment of paternity while enforcement or administration of rights is an ancilliary question which may or may not be included. On account of this change in approach there are certain points to be discussed in relation to the persons that should be considered eligible to apply.

The question of eligibility must centre around the child, who must have an unqualified right to apply. Other possible applicants must be considered in terms of the role they may have in its life. In any event, because the situations vary and it may be the case that paternity has not been established in an early stage the right supplied to the child should last for his lifetime. In addition, one could treat as eligible the parents or other close relatives of the child claiming a lawful interest, whether moral or proprietorial[136] as well as the welfare authorities or the public prosecutor. However, as the bases of their involvement vary,it is necessary to make certain comments prior to any decision on eligibility. At the outset, because a child under the age of majority is not capable of suing in his own name any of the above persons having actual custody of the child must be eligible to bring the action within the time limits specified below. As regards the person claiming to be the father it appears that he must be entitled only to acknowledge the child. However, if an action is raised and he is not made a party to

the proceedings such person should be entitled to intervene with evidence as to his paternity, or to appeal against an order or act of acknowledgement. As to the right of the mother there are certain reasons dictating the preservation of her right. In the first place if the child's paternity is not established she will bear the whole responsibility for the child and secondly she is the key person as regards the proof of paternity and her involvement is, therefore, necessary. Consequently, her right to apply must be preserved and in any case she must become a party to the proceedings because she is the most proper person to provide evidence. However, the right of the mother to raise the action depends on such variables as her own financial position and her attitude to the natural father. The danger is that, if for some reason, there is not sufficient stimulus to the mother to take action, then the child may, by default, be left without a father recognised by law.[137] Therefore, it is advisable not to rely exclusively on her for raising the action. With regard to other relatives the situation is rather less clear. Their interests vary in degree and content so that one cannot state a general rule as to whether they could serve the purpose of the action. Also they lack real knowledge of the circumstances of the conception and of the degree of the relationship between the defender and the mother. Hence, there is no guarantee that reliance could be placed on their sustaining a case as pursuers.

Failing the mother, the custodian or the child bringing the action, the practical alternative is the state. Earlier it was considered that paternity actions should be compulsory and as possible bodies to exercise the right on behalf of the state were suggested the public prosecutor or the welfare services by appointing a tutor ad hoc. The office of the public prosecutor is considered preferable

to the welfare authorities because, from a practical point of view, the Public Prosecutor could have easier access to the Register and to the agenda of the Court. Also it would prevent disrupting the task of the welfare authorities by involving them in a case of pure private litigation without need for intervention.[138]

As regards the persons against whom the action should be directed the law currently in both countries specifies the father[139] and on his death his heirs[140]. In the latter case, however, it would be more appropriate if the defenders were made the father's relatives in the order of their alimentary obligation towards the child and only if such relatives do not exist against the heirs.

However, because the order is of a declaratory nature, it may be considered appropriate to provide wider assurance to the litigants or other interested persons, when they cannot be served, or, if served, when they cannot be expected to take part in the proceedings, even if it is desirous for them to attend. Protection is also needed as well for the public interest. Thus, it may be necessary to impose the duty on the registry of the court to serve notice to the office of Public Prosecutor, or to allow him of his own accord to apply for leave to intervene in the suit where this is considered necessary or desirable.[141]

D. TIME LIMITS

The important questions relating to limits are (a) whether the alleged father should be given a chance to acknowledge the child and consequently whether the mother should be able to initiate proceedings prior to the child's birth or shortly after birth and (b) whether there should be any upper limit for the rights exercisable by persons

other than the child.

The Illegitimate Children (Scotland) Act 1930 adopts the solution that the mother from the third month prior to delivery and thereafter may bring an action for affiliation and aliment by producing a sworn declaration before a justice of the peace or magistrate that the defender is the father of the child and a certificate by a duly qualified practitioner that she is pregnant certifying the pregnancy and specifying the probable date of conception.[142] However, the court cannot issue a declarator of paternity prior to the birth nor can it receive proof or order any payments, but, if the action is undefended or if paternity is admitted by the defender, the court may grant decree for payments in respect to the mother's inlying expenses and for periodical sums for the child's aliment, beginning at the date of the birth.[143]

The Greek Civil Code adopts the opposite approach in that, without precluding the possibility of the action being raised prior to birth it considers the right to prescribe within five years from the date of birth for both mother and child.[144] The position as regards the right to raise the action prior to birth is unclear and though some argue that it is permissible for the mother to resolve the matter prior to birth,[145] others reject the idea either because it is difficult to specify the probable date of conception prior to birth, or because the mother as acting ex jure proprio and not on behalf of her unborn child cannot base the action on the fiction of article 36 of the Greek Civil Code.[146]

However, delays in raising the action operate against the chances of success in establishing paternity and it seems sensible to permit

the mother to bring the action prior to birth. If the mother's allegations are reasonably substantiated there is no reason for not taking this step. Nevertheless, such a right on the part of the mother should not operate against the opportunity of the father to acknowledge the child. Therefore it should be necessary for her to serve formal notice to the father inquiring whether he intends to acknowledge the child. If the father omits to proceed the mother could competently apply to the court.[147]

On the other hand, it is not in the interest of the child to leave the right at the discretion of individuals for considerable periods nor is it fair to leave the matter hanging over the alleged father's head for a long period. Therefore, if the father omits to acknowledge the child and the mother or the custodian fails to bring the action, within three months from the date of birth, proceedings should be initiated by the public prosecutor who would be entitled to carry out an official investigation in the matter and appoint a curator ad hoc to defend the child.[148] These restrictions, of course, should not apply to the child himself who should be eligible to bring the action any time in the light of new evidence as to his parentage. This resolution is adopted in the belief that the time runs against the possibility of establishing paternity to the most adequate extent. Thus the Public Prosecutor, on information received from the mother or the Registrar that no paternity has been acknowledged, must make inquiry in the registry of the court to see if the action has been raised. If not, he must initiate proceedings inviting the mother to give evidence in such circumstances the mother should be obliged to name the possible father or fathers of the child.

## VI PROOF OF PATERNITY IN JUDICIAL PROCEEDINGS

a. The answer to the question of how paternity is proved could affect to a great extent the degree to which a finding by the court would be really accepted. It is strongly believed that the order of the court can be made genuinely effective or virtually meaningless, depending on the methods and reliability of proof used for this purpose. As a matter of fact an allegation of paternity is easily made, and the finding has serious consequences for both child and parents. On that very reason the Russell Committee partly based its proposal that an existing affiliation order should not of itself be conclusive proof of paternity. They assert that "there are grounds for supposing that there are cases in which the mother successfully selects the man who is the best prospect". [149] Moreover, the issue is full of emotive factors which may distract attention from the real value of the evidence presented. Therefore, it is right that considerable care be taken in determining the issue. On the other hand, however, due to the variety and peculiarities of illegitimate conceptions proof beyond doubt cannot be considered a realistic goal. To a certain extent some concessions on the degree of proof may appear necessary so far as they do not devalue the acceptability of the order.

The problem is a complex one and the formulas suggested vary accordingly. A Samuels is of the opinion that the issue of paternity " ... is just one more civil law issue, and there is no logical reason why the ordinary burden of proof, on balance of probabilities, should not be applied, and there is no logical reason for any special rules of evidence, such as corroboration, although as a practical matter the court should naturally take due account of the presence or absence of corroboration". [150] This view may be con-

sidered appropriate to rely on so far as there are sufficient judicial means facilitating its reversal by the interested parties.[151] However, the main objection against this approach is that one would arrive at a conclusion on its correctness after the order had been made. Moreover, such a conclusion would have a relative value since its validity mainly depends on whether the parties had taken advantage to reverse the order.

Another approach adopted by Norwegian law suggests that paternity will not be declared unless a high degree of probability supports its determination.[152] The arguments for tightening the conditions of proof claim that "the imposition of paternal obligation on the basis of weak evidence will cause unjust hardship to persons who are held liable and will not serve the interests of the child or those of society".[153] The high degree of probability exists in Norwegian law if proof of a positive character is provided showing that the defender could be the father, and negative proof, meaning that no circumstances are established that make it seem unlikely that he is the father.[154] No other limits are set requiring a prima facie case be built on predefined circumstances nor could a defence based on the exceptio plurium decisively prevent the establishment of paternity. Particularly, on the basis of ordinary evidence used in civil actions reinforced by physiological and scientific evidence, Norwegian courts try to investigate whether the person indicated to be the father really is so. Moreover, if the exceptio plurium cannot be overcome the court will hold the man against whom there is a substantial probability to be the father. This is not to say, of course, that the court will pick out the man whose paternity is most probable, but apart from the relative preponderance of probability on his paternity, in order to hold him as the father, the court must be satisfied on the

basis of all evidence that there is nothing making it unlikely that he is the father.[155] The overall impression from this brief description of the Norwegian approach is that to a certain extent the court appears to be overburdened with complex evidence and procedure which is time consuming and expensive to operate in many respects. Nevertheless, it presents decisive advantages which make it preferable to a simpler method. It is flexible enough to treat every possible case while on the other hand it prevents injustice by employing scientific evidence which could destroy any false allegations. It is worthwhile, therefore, to examine if it is possible to introduce aspects of this system into the two laws.

b. In Scotland and Greece the paternity action relies on the application of a presumption of paternity[156] which is raised upon proof of positive character showing that the putative father did have intercourse with the mother at the time of the child's probable conception. Negative proof is admissible for the defence of the alleged father and usually takes the form of evidence tending to prove the impossibility of the child having been conceived as a result of intercourse with him, or to show that another man could have been the father. As well as this it is competent in Greek law to bring evidence to prove the mother's general immorality. In this case the action will be dismissed.

As to the proof of positive character the pursuer has the onus of proving intercourse with the defender at such time that according to the rules of nature he could have been the father. To establish her allegation she is permitted to use ordinary evidence applicable to every civil action.[157] To compensate for the scarcity of, or the difficulty in obtaining, evidence there is permitted in such an action some relaxation of the rules of evidence.[158] Moreover,

the court may in penuria testium make certain inferences on account of the conduct of the parties and the whole circumstances of the case.[159] Because of this, the establishment of an allegation against a man with whom the mother had intercourse may be viewed as too simple. Therefore, prima facie it may appear necessary to tighten up the rules of evidence. On the other hand a fact that should not be ignored is the peculiarities of the circumstances of each illegitimate conception, and the individuality that characterises the case. Therefore, such a task could not be carried out without restricting the instances where a paternity action could be brought before in the courts.

The danger of a too readily founded allegation the law could overcome by accompanying the proof with evidence of scientific nature which appears more independent and reliable and may be trusted by both parties. The matter, due to its importance in altering the defensive attitude of the possible father, will be discussed later, after considering the present means of defence employed by both laws.

c. At present, a person against whom an allegation of paternity is made may present evidence showing either that he cannot be the father or that another person may be so.[160] In addition in Greece it is competent to prove the mother's general immorality. A variety of circumstances have been considered to make it unlikely for an objective point of view that the defender is the father. His impotency and sterility are relevant.[161] Moreover, other circumstances like the birth of a child of other race, or the pre-existing pregnancy of the mother though by no means conclusive have been viewed as having certain significance in the matter.[162] For instance, if the child belongs to a race different from that of the

parents this may be used in disproving an allegation of conception as a result of intercourse with the defendant. Also, if it is possible to arrive at some conclusion of the probable date of conception from the degree of maturity of the child, proof of intercourse subsequent to that believed to have started the child may overcome any allegation of impregnation by the defender.[163]

Furthermore, the defender may introduce evidence of acts of intercourse between the mother and another man at the probable date of conception and thus waive the presumption of paternity. When such intercourse is proven in both laws there is a strong possibility that the pursuer will fail. For example, in Scots law, if the evidence indicates that it is equally probable that either of them is the father the court has to refuse to make an order.[164] Only if the evidence makes it more probable for the defender being the father would the pursuer suceeed.[165] On the other hand in Greek law there is employed the wider concept of "serious doubts" whereby the defendant may try to prove intercourse with another man in order to create doubts on the validity of the pursuer's averments.[166] However, by proving intercourse with another man, unlike in Scots law, the case will not be dismissed, since the exceptio plurium applies only in the conditions of art 143. But the court will not resolve the case on the basis of probability and it will order further proof to be taken.[167]

If the mother lives a promiscuous life, under Scots law, she cannot sue both or all her paramours, nor can she elect which one to sue.[168] She must sue the one whom she believes was the father and establish his paternity of her child.[169] In Greece on the other hand the law does not give her the opportunity of presenting evidence and the case will be dismissed without review on its merits if the mother has

been guilty of "notorious misbehavour".[170] The mother's action will be dismissed on the grounds of notorious misbehaviour if the court has been satisfied that at or about the time of the conception of the child the mother was a common prostitute or was involved in extra-marital relations without any discretion among various paramours.[171] Presumably, such a defence it is easily justified and it is not so much designed to punish the mother for her immorality as to recognise the difficulty of determining which of the men is the father.[172] However, this a priori exclusion is difficult to accept and it should be better to give her an opportunity, as in Scots law, to adduce evidence against the person who she believes to be the father. While, however, it is easy to follow the rationale of the second defence, the way the first defence is treated is undoubtedly difficult to justify. The fact that the defender may prove intercourse with another man and that this under Scots law makes his paternity less probable, or that in Greece it creates "serious doubts" on the pursuers averments, is an outdated approach in terms of the implications that this would have for the child and the means available today to resolve such matters.

At the outset such a decision is denying a relationship with the father apart from its implications for the child's welfare as involving an assumption of the sexual promiscuity of the mother during the period of conception may serve to remind the child of that very fact during the whole of its adolescence. This means placing a severe psychological strain on the child, in which case it may be better not to allow the action at all. The child may find refuge in the thought that the father had deserted them and it is difficult for him to be traced.[173] In some cases, at least, it may be very clear which of say two or three men, who had intercourse with the mother prior

or at the time of conception,is the father. This may be so because the inherited characteristics of the child points to one man as the father or because one or two are excluded by blood tests. The evidence in such a case should no doubt be treated cautiously. But it is too threatening to the child's welfare and too tolerant toward irresponsibility to permit a defender to produce two other men who had intercourse with the woman at the relevant time without making them parties to the proceedings but simply leaving the pursuer alone to establish a new case against them.[174] Before, however, taking a final position on the approach that should be established towards this commonly used defence it is essential to offer a brief review of the position with regard to scientific evidence.

## V II GENETIC TESTS

### A. BLOOD TESTS

1. There can hardly be any real doubt that the most effective means of protecting a father from a false claim of paternity and of preventing him in a satisfactory degree of collusively disclaiming the child is by scientific evidence of blood group. It has long been known that blood exhibits characteristics - classifiable into certain groups - which are transmitted from generation to generation in accordance with inviolable laws of heredity.[175] Thus, at the present stage of medical knowledge, a comparison made between the blood characteristics of the father, the mother and the child can clearly establish non-paternity in all cases where the results of this comparison show a biologically impossible constellation of blood types.[176]

Nevertheless, the method may provide affirmative proof of the defender's paternity by placing him within the group of possible fathers. If,

for instance, an allegation is made that the woman at the material time had had intercourse only with two men and the blood tests exclude the one, the other must be the father.

At the extreme, paternity can be all but determined positively without the support of other evidence, if very rare genes are found in the blood of the putative father and the child. It is believed that with very rare genes "the possibility of coincidence being responsible is so remote as to make the odds astronomical".[177] But, in the last resort, if the genes displayed in the child's blood, without being very rare, are considered uncommon, the probability of paternity may be computed for any given case that did not otherwise provide exclusion. The usefulness of such computation in estimating the probability of a given person being the father has been acknowledged for both children conceived in marriage and for those born outside marriage. For instance, in S v S[178] and W v Official Solicitor[179] for a legitimate child it was held "that if they, the uncommon genes, were not derived from the husband they could only have been derived from one man in a thousand, then the result of the test would go a long way towards proving (in the sense of making it more probable than not) that the husband was in fact the father because it would be very unlikely that the wife had happened to commit adultery with the one man in a thousand who could have supplied this uncommon characteristic. And if it appeared that only one man in a hundred or one man in ten could have been the father, if the husband was not, that might go some way towards making it probable that the husband was the father. Such an inference might not be lightly drawn, but it should not be ruled out".[180] For the determination of illegitimate paternity, the opposite course is considered. In Scandinavia,

for instance, cases where the result did not produce an exclusion, or where the weight of very rare genes cannot produce a de facto inclusion, are pursued on the basis of a "blood group paternity index" according to which the probability of paternity is estimated. As Krause explains "that index compares the frequency of a given father-mother-child blood constellation in a sample of actual fathers with the blood constellation in a sample of non fathers and is related to the constellation obtained in the case in question. If the resemblance exceeds 95 per cent, the result is reported tothe court".[181] Results below this percentage are considered as circumstantial evidence, but treated as of particular value when the relative likelihood of paternity of several possible fathers is being compared. Nonetheless, it is not beyond expectation that, by advancing the probability, estimations all but obviate whatever need there once may have been for the exceptio plurium.[182]

It follows from the above brief discussion on blood tests that, for specific cases, they provide evidence of high credibility whereas in others they may only supply, with sufficient indications, a clue to who among the mother's paramours could be the father. Thus, apart from their value in confirming or destroying assumptions of paternity they can also guide the investigation of the child's paternity towards the right direction.

In relation to these valuable characteristics of blood test evidence the question to be asked is whether it could have a decisive role in the process of proof. The answer to this point cannot be an easy one in so far as it depends on a variety of factors relating to the current development of the methods, their reliability and the safeguards employed, as well as on sociolegal speculations

as to the implications that the imposition of such practice could have on the freedom of the individual.

2. At present, in Scotland and Greece, there is no generally expressed desire to base proof in a paternity action around blood test evidence. The main reason for holding this position is that such evidence is based on research which is always on the move - so that the possibility of further discovery or development is not to be ruled out.[183] Thus, courts without denying the value of blood tests generally have been somewhat reluctant to accept them unconditionally as conclusive proof, i.e. if they contradict customary evidence.[184] However, the prima facie impression of the uncertainty and flux of the present state of knowledge of blood analysis, alters considerably if one makes a distinction between discoveries that will overturn present theory on blood tests and discoveries that will make them more reliable. In this respect the latter seems more likely to occur since the present knowledge is based on years of intensive research under high laboratory standards.[185]

Nevertheless, while in the use of blood tests as positive proof of paternity, scientists accept the relative credibility of this evidence at present, when it comes to the point of affirmative proof, they claim that the chances of error are almost non-existent. The position of both countries towards such use of blood tests is that evidence so obtained indicates, but never provides complete proof of non-paternity. Particularly, in Sproat v. McGibney[186] a note appended to the interlocutor of the appellant decision the Sheriff upheld the opinion of the sheriff substitute, who had preferred the non-medical evidence, points out that in the present state of medical knowledge as to blood groupings and their relevance in

relation to questions of heredity, it would be highly dangerous for a Court of law to prefer that evidence to all the remaining evidence in an action of affiliation. This is especially so when for a considerable period during the pregnancy of the pursuer the defender believed that he was the father of the child and where he has led no evidence whatsoever to point to any other man being the father". And the note continues : "Accordingly, in my view, the law of Scotland for thepresent is that where there is non-medical evidence in an action of affiliation and aliment which does not corroborate the medical evidence the medical evidence of blood tests per se is not enough to exclude paternity".[187] The rationale for precluding exclusion of paternity on blood tests rests on the consideration that they cannot be accepted "as infallible or as of absolute reliability", but stop short of a standard of infallibility.[188] Thus, in the aforementioned case, on an unfortunate comparison between finger print and blood test evidence the exceedingly rigid view was expressed that "without the taking of much care and the exclusion of artefacts, evidence of blood tests cannot be demonstrated and applied with the unrelenting reliability of the finger print system with, among other excellences, its visual aids and ascription of digital impressions to the actual person involved."[189]

The position in Greece is almost identical. According to Tousis the courts cannot go further than accepting blood test evidence as judicial presumptions. This is mainly due to the state of flux in our knowledge about its methods. Moreover, she argues that the judge is not obliged to accept the conclusion of experts and he has as much right as the doctors have to mistrust scientific inventions.[190] This position is complemented by Michaelidis Nouàros who further argues that apart from its

acceptance as judicial presumptions blood test evidence should be treated as "a presumption of particularly high probative importance", that could throw serious doubts on the paternity of the child.[191]

However, by no means in Greek law can blood test evidence overturn a contrary inference from non-medical evidence, nor could medical evidence itself constitute a case if not supplemented by non-medical evidence.[192]

The conditions under which blood tests are carried out in the two countries are not irrelevant to this position and it is necessary to comment upon the matter since it seems the most significant aspect of the reliability of the tests.

Unfortunately, blood test evidence, unlike the finger print system, can never supply the court with first hand unelaborated knowledge of the relation between the blood of the child and that of the parents. It has to rely on doctors to take the samples, make the necessary analysis and report to the court. This process involves the risk of impersonation of the parties involved, as well as the risk of tests being carried out by practitioners who are not duly qualified in the field, or do not offer the necessary guarantee of impartiality required by the judicial process. Such risks are not precluded in either country since there is no meticulous system of identification to secure that the parties in court are the parties who attended for examination. Nor is it facilitated by a service operating according to a uniform procedure for every case, which would employ complex and advanced types of blood analysis with a highly developed safety factor that would assure accuracy of the results they report. The latter defect is the

most crucial so that it would be better not to admit blood tests into evidence at all than to admit unreliable evidence under the guise of scientific truth.

Scandinavian countries, in order to minimize those dangers, provide a centralized blood typing facility with high safety standards comprising specialization and close supervision over highly skilled laboratory personnel; 'blind' double testing of samples with careful, independent rechecking by a third person of any discrepancies that are reported, careful maintenance and daily testing of testing agents and tight control over the identification of samples and over other clerical aspects of the testing and reporting process. In addition, they operate efficiently with the courts with a standardized routine in the process of sample taking, laboratory analysis and report to the court. For the latter they provide a comprehensive and understandable form for the medically inexperienced judge, which reveals any possible hint as to the paternity of the child.[193] The system operates so successfully that according to Krause "The courts rely heavily on the medical evidence" and "The reputation for accuracy of the laboratories is such that the parties and their lawyers usually rest their case with the medical evidence".[194]

3. Given that the necessary safeguards have been provided, the issue that the use of blood tests raises is whether questions of paternity should continue to be answered by means of human reasoning or whether we should adhere to those facts indicated by nature. In other words what weight is to be ascribed to this evidence, especially when it conflicts with customary evidence.

Prima facie a well balanced decision, whether assisted or not by blood tests, may enjoy due respect as much by the individuals concerned as by society as a whole. But it may still fall short of convincing everybody, because the involvement of the human factors exposes the decision to the risks of misjudgement and does not deter the parents from presenting fraudulent evidence. Thus, as a matter of basic fairness to both child and parents, it is desirable that in every case which may cast doubt upon the paternity of a child, a full investigation should be made before any decision be given in order to avoid the slightest ambiguity in the matter. With blood test evidence in use that concern may be largely satisfied. However, in certain cases, the result might be that the child was proven not to be that of a particular person even though believed to be so according to human reasoning on facts presented. If blood tests are properly carried out the possibility of deviation is very remote and the chance of error is less significant than that attached to the testimony of witness. However, as Ross points out, the knowledge of this possibility will impress itself with special force on the mind of the judge. "The judge often believes - rightly or wrongly - that he can estimate the credibility of witnesses by observing their demeanour and appearance. There often arises in him, as the result of the proceedings before him, a strong conviction as to the true story behind the tales. Even if the judge, using his brains, knows, in theory, that there are sources of error in the formulation of this conviction, this knowledge does not affect his feeling of certitude in the same way as the exactly calculated risk of error admitted in the biological proof".[195] Indeed in Imre v. Mitchell Lord Russell states : "If, however, the blood test evidence cannot properly be regarded as inadmissible, the question still remains whether

it is sufficient, of itself, to negate the strong inference of paternity in favour of the second defender (the father) which is supported by the other circumstances disclosed in the evidence.[196]

Similarly in Sproat v. McGibney the sheriff found it difficult to accept a contrary inference from medical evidence since in the preceeding period the defendant presented himself as the father of the child. In this case, however, there was a justifiable suspicion of impersonation of the defendant in the sample taken so as to question the validity of blood tests per se.[197] To take the hypothesis, on the other hand, that the child is born to a mother under circumstances of cohabitation, in a state of dependency or after a criminal act against her but the child is not that of the man indicated by these circumstances: in this case, there is, however, an obvious inference as to fatherhood and it is quite natural for a number of mothers to try to establish paternity on these more convenient grounds. The question that requires consideration, therefore, is whether it should be permissible for such plausible facts to preclude any further effort towards seeking out the biological father or whether the old approach to proof should be replaced by a system not involving judgements of value.

The issue may have controversial implications for both the child and the mother. The person who is indicated as the father may have been prepared to accept the child as his and with the blood tests he is precluded from doing so. Also, the child may be linked with a father with whom it is impossible to develop any real relationship. For the mother, after the disclosure of her commitment to another man, the result may be to bring about the breakdown of her long-term relationship with, at the same time paternity being proved

against a person who shows little concern for her and the child. On the other hand, the question that remains open is whether the person associated with the mother, who can be held as the father on the basis of ordinary evidence, is really convinced that he had fathered the child or superficially accepts it to be so because of his feelings for the mother. What then would be the endurability of the parent child relationship? That person may try to disclaim the child as soon as his relationship with the mother breaksdown or the real father would try to contest paternity on his behalf. The child himself may sooner or later try to trace his origins. It is necessary, therefore, to look favourably upon a neutral decision excluding a subjective estimation of the evidence. As Omrod, J., put it in Re L[198] " ... questions relating to the welfare and upbringing of the child should be based as far as possible on facts, and that decisions relating to peoples' lives should not be confused by the artificial results of the application of legal presumptions ... ".[199] In this context blood test is the proper solution since they invest the decision with a high degree of legal certainty, presumably higher than that afforded by other means of proof.[200]

This change of principle implies a change of the hitherto accepted belief that the disadvantages of paternity that are not coherent with the reasoning of society outweighs the desirability of seeking the real father.[201] Should society, however, accept readily an order issued exclusively on blood tests evidence? That order would be based upon a piece of paper issued from a laboratory, processed in an unknown way and to an extent unconceivable to most people. Thus, it may be appropriate to support the order with customary evidence since it would have the same effect as on the judge in creating a feeling of certitude in society.

This is not, of course, to suggest an individualizing estimation of the evidence. Blood tests would amount to independent and absolute proof and the judge would be obliged to search for the facts that can substantiate the finding. Having reached this position the point that requires consideration is whether the court would have the discretion to order blood tests or whether they could do so only with the consent of the parties to the litigation and, if the former, whether there is a need to make submission to blood tests compulsory in every case.

The question of testing against the will of an adult party as well as the right of a child unable rationally to consent have been the focal points of intense and bitter litigation in jurisprudence. It has been considered that to carry a test upon an unconsenting person would amount to an assault against 'the inviolability of the human body' and nevertheless that such a stipulation contradicts the principle of impartiality of the judge.[202] Thus, presently, there does not appear to be any power in the courts hearing paternity cases in either country, to order the parties to submit blood tests. This step can be taken only on the request of one of the litigants with the consent of the others. Nonetheless, an unreasonable refusal to submit to a blood test may lead to the drawing of an unfavourable evidential inference where that party is concerned.[203]

However, whatever are the theoretical considerations for not compelling the parties to undergo blood tests, a point to be secured is the availability of this evidence, due to its importance in the action. Unless, therefore, the law is changed, the court is denied access to the best evidence. This induces an undue discrimination against children born out of wedlock because it omits to facilitate their

right to a father, as does the presumption of paternity for children born in marriage.[204]

As to whether blood tests should or should not be used in every action prima facie, as this step involves expenses for the parties, such an approach should be avoided, unless the state undertakes the initial cost. If the parties are to continue to bear the expenses the need to be satisfied is for the implementation of legislation empowering the use of blood tests whenever this appears necessary to serve the ends of justice. This could reasonably be achieved either by empowering the court to order blood tests in every litigation in which doubts are cast on the paternity by the preliminary investigation, or at the request of either party. In the latter case it must be obligatory for the court to accede to such a request.

The final problem to be considered is who could submit such a request in respect of the child. One person that could appropriately be considered is the curator ad litem of the child. However, as the decision of requiring or not blood tests has serious implications for the child, concern has been expressed as to whether that person could competently serve this purpose.[205] Another person is the mother, though again it is doubtful whether her personal interest in the litigation would always coincide with the general interest in finding the true father. A third approach adopted in England empowers the court to take the decision for the child. The basis of this approach is that two difficulties in particular are avoided when the courts take the decision. In the first place the curator is spared a decision which is clearly too important to be taken by someone only casually involved,[206] and secondly, the question is

avoided of the curator of the child having to participate in a decision that would have a permanent effect on the status of the child, a role in principle limited to parents or to persons exercising parental authority and the courts. Due to its advantages, therefore, this approach deserves positive consideration in relation to opinions holding competent the mother or the curator ad litem.

B. OTHER METHODS

Blood testing is not the only method used to achieve certainty as to the paternity of the child. Other methods are being experimented with to complement blood test evidence though one, which is the duration of pregnancy, has long been in use along with ordinary evidence. Apart from the former, other such methods are anthropological investigation and even lie detector tests undertaken in countries with a criminal law approach to the incident of illegitimacy.

1. The duration of pregnancy. The probative value of the duration of a particular pregnancy in relation to proven acts of intercourse has been discussed elsewhere in this study.[207] However, with regard to a birth out of wedlock, this method is of significant importance in determining the probable date of conception and consequently in confining investigation to the person or persons with whom the mother had had intercourse at the particular time.[208] Greece solves this problem by specifying a definite time limit, in that a period of gestation may range from the 300th to the 18th day prior to birth,[209] while Scotland operates a lower framework in that an act of intercourse, outwith those limits, may be held to have resulted in a particular pregnancy.[210]

It may be necessary, however, upon proof of intercourse with more then one man, for a more specific time of conception to be

determined by correlation with information as to the child's weight, length and other details showing whether the pregnancy was normal, short or long.[211] In this respect such information may supplement blood tests if the latter has not shown exclusion of all but one of the mother's paramours and in the preliminary investigation may indicate the persons for whom tests might be carried out.

2. Anthropological investigation. A new method and, therefore, not well tested in terms of its validity in determining paternity is the use of data concerning inheritable characteristics. Among scientists the method is regarded as promising so that according to Kester, "the data at the disposal of the physical anthropologist contains sufficient information to determine in 19 out of 20 cases, at a level of three sigma significance (99.73 plus probability) whether a given individual is the parent of a child in question".[212] The method is based on comparing a set of some 70 heritable traits, measurements and other factors.[213] However, the value of those tests is currently disputed by many scientists,[214] but some countries admit those tests as a supplement to inconclusive blood tests.[215]

3. Lie detector tests. The tests are used in a few jurisdictions in the United States but elsewhere this method in general is disregarded or considered as valueless. A particular study in the States carried out by Arthur and Reid[216] claims startling conclusions concerning the veracity of parties and witnesses in paternity proceedings, but unfortunately this study omits to bring directly in issue the accuracy of the results of the lie detector test.[217] Nevertheless, other countries, mainly European, clearly distrust the usefulness of those tests and some express ethical concern about their introduction.[218]

F OOTNOTES

CHAPTER 1

A.1 For Roman Law see N.5II.2.4. Hereafter the maxim for convenience will be referred to in its shorter and widely known form pater est, quem nuptiae demonstrant or as the presumption of legitimacy.

2. Tousis, A., Family Law, 4th ed., (Athens: Sakkoula, 1979). Vol 8, p.5; Gardner v. Gardner (1876) 3R 695; Krause H., "Creation of Relationships of Kinship"in A.G. Chloros (ed), International Encyclopedia of Comparative Law, Vol 4. (Persons & Family), Ch. 6, (The Hague and Tubingen: Mouton and J.C.B. Mohr (Paul Siebeck), 1976), pp.14-15.

3. Walker, D.M., Principles of Scottish Private Law, 2nd Ed. (Oxford: Clarendon Press, 1975) Vol. 1, p.303. Not every child conceived in marriage is legitimate unless begotten by the husband: Bell, Principles par.1626. For an extensive analysis of the application of the presumption of conception in wedlock see Gardner v. Gardner (1877) 4R (H.L.) 56; Also S. v. S. 1977 S.L.T. (Notes), 59.

4. Tousis, Family Law, op. cit. Vol B p7 and n(7); A.P. 866/1977 No. 7, 26:697, A.P. 372/1962, E.E.N. 29:874.

5. Stair, iii, 3, 42.

6. See infra same section and under C.I.

7. G. Michaelidis Nouaros, Family Law (University Text Book), Athens: Sakkoula, 1972), p.216

8. Kerrs v. Lindsay (1890) 18 R.365.

9. Gardner v. Gardner (1876) 3 R.695; (1877) 4 R.(H.L.) 56. In Lord Gifford's words in this case "where an avowed and open courtship has taken place, and there have been opportunities of access, and, thereafter the man marries the woman in an advanced state of pregnancy, knowing that she is so, and hurrying on the marriage, ... for that very reason ... (it cannot be said that the presumption of paternity is absolutely conclusive, but ... (it can be said) that it is almost as strong as such a presumption can be". (per Lord Gifford, (1876) 3 R 695). And the same judge in the same case in the House of Lords laid down the law in the following statement which was unanimously accepted. "Where, as in the present case, a man marries a woman who at the time of marriage is in a state of pregnancy, the presumption of paternity from that mere fact is very strong, and is, perhaps in almost all such cases, in entire accordance with the actual truth. Still further, where the pregnancy is far advanced, obvious to the eye, or actually confessed or announced, as in the present case, to the intended husband, a presumption is reared up which, according to universal feelings, and giving due weight to what may be called the ordinary instincts of humanity, it will be very difficult indeed to overcome." (1877) 4R. (H.L.)56.

10. Reid v. Mill (1879) 6 R.639 per the Lord Justice Clerk at p.641.

11. Kerrs v. Lindsay (1890) 18 R.365 especially per pages 366-367.

12. ibid. per the Lord Justice Clerk p. 369.

13. Walker, Principles of Scottish Private Law, op cit. p.303; Application of the presumption was refused in Hastings v. Hastings 1941 S.L.T.323 where the husband left his wife after discovering that she was pregnant. For the importance attached to salient facts in drawing an inference for the paternity of the husband see Imre v. Mitchell 1958 S.C. 439 per Lord President at p.463.

14. Art. 1469 of the Greek Civil Code

15. Smith v. Dick (1869) 8.M.31.

Brooks Executrix v. James 1970 S.C. 147, i.e. pp 148-149; Imre v. Mitchell, supra per Lord Carmont, p. 469. For Greek law c.f. articles 1556 and 1468 of the Greek Civil Code. See also supra Legitimation per subsequens matrimonium.

16. Imre v. Mitchell per the Lord President p.463.

17. "Proof of Paternity", 1959 S.L.T. 209, especially at p.210.

18. Spyridakis, J. and Perakis E., Civil Code : Family Law, Vol 4, (Athens: Sakkoula 1977), art 1467 notes (1), (2); Balis G., Family Law, 2nd ed. (Athens, 1961) par. 124.4.

19. Stair, iii, 3, 42; Article 1465.2 of the Greek Civil Code.

20. Vallindas G., Civil Code : Family Law, Vol 4, (Athens: Zacharopoulos) pp 121, 125. G. Michaelidis Nouaros, Family Law, (University Text Book), p. 216; Appeal Court of Athens, 2241/1970, NoV, 12: 172.

21. The cases present particular difficulties, i.e. as when the husband will be excluded if the period was held to be normal. For a detailed discussion see Lord Fraser, Parent and Child and Guardian and Ward, 3rd ed. by James Clark (Edinburgh: Green & Sons, 1906), pp 13-17 and the authorities cited there. If birth occurred after an abnormally long time and the marriage has been dissolved, see Williamson v. McClelland 1913 S.C. 678, at p.680; also S.v.S. 1977 S.L.T. (Note) 65; The more the presumption deviates from the normal, the easier to rebut it until there comes a time when it is not raised at all.

22. Walker and Walker, The Law of Evidence in Scotland (Edinburgh-Glasgow 1968) p.174. See also Preston-Jones v. Preston-Jones [1951], 1 All.E.R. 124 (H.L.) at pages 128, 130, 135-6 and per Lord MacDermott, pp 139-140.

23. Walker, Principles of Scottish Private Law, p 302, 303; Clive, E. and Wilson, J., The Law of Husband and Wife in Scotland (Edinburgh: W. Green & Son, 1974), p.182; Deans J.F. v. D. 1912 S.C.441; Fraser, Parent and Child, p.1.

24. Fraser, Parent and Child, p.2.; Swinton v. Swinton (1862) 24.D.833.

25. Clive and Wilson, The Law of Husband and Wife, p.182 also Clive, E. "Void and Voidable Marriages in Scots Law", (1968) 13 Juridical Review, 209.

26. Fraser, Parent and Child, pp 27-33; Walker, Principles of Scottish Private Law, p.304, and authorities cited by both writers.

27. Fraser, On Parent and Child, p.29.

28. Clive, "Void and Voidable Marriages", op cit, p.212 and n.(29). idem,

"Legal aspects of illegitimacy in Scotland", 1979 S.L.T.233, p.234.

29. Art. 1382 (1) of the Greek Civil Code; Appeal Court of Athens, 2120/1956, E.E.N. 23:912.

30. Art. 1382 (2) of the Greek Civil Code.

31. Montgomery v. M.(1881) 8 R.403; Steedman v. S. (1887) 14 R.1066; Ballantyne v. Douglas 1953 S.L.T. (Notes) 10. Vallindas, Family Law, p.37, 122; Tousis, Family Law, Vol A pp 310-311 and Vol B p.8 and n. (9). However, in Greek law the child is prima facie legitimate and such an order is treated as a strong judicial presumption in an action for disavowal of paternity, see A.P. 65/1929 Themis 40: 369, A.P. 179/1941, E.E.N. 8:280.

32. Clive. "Void and Voidable Marriages", op.cit. p.216.

33. ibid. pp 217-8.

34. ibid. pp 218-219.

35. ibid. p.236.

36. Late in the Byzantine era (11th century), Emperor Leo VI the philosopher imposed by his famous Novel 89 the religious celebration of marriage. With this novel the Orthodox church secured jurisdiction over the entire Family Law since it acquired control over the basic family institution. From this period and throughout the Othoman occupation Family Law became a matter of canon and civil law. During the Othoman Empire the privileges ceded by the Sultan conferred on the Ecumenical Archbishop of Constantinopolis legislative and judicial power over family law and other civil matters related to occupied peoples. In this process the entire civil justice was transferred to the clergy which retained this jurisdiction until the reinstatement of the Greek state. Under the new status there has been preserved a right for the assembly of the Greek Church to express an advisory opinion on matters related to family law. This has resulted in frequent conflicts between parliament and church which has either frustrated proposed reform, or induced retrogressive modifications to bills before parliament. Recently such conflicts emerged with the proposals of the Gazis Committee with numerous debates as to whether this right should be preserved. See editorial article in "The Vima of Sunday" of 11.2.1979 "What will happen when Church and State will be Separated", Also in newspaper "Ta Nea" October 1979, Lina Alexion, "Civil Marriage: The State is Afraid of the Church",; Argyriadis Alkis "The Reform of Family Law in Greece" in A. Chloros (ed) The Reform of Family Law in Europe, (Netherlands: Kluwer, 1979), pp 139-149, pp 139, 140, 145-146- Mouzelis N., Modern Greece - Facets of Underdevelopment (London: MacMillan Press Ltd., 1978), pp 188-9 (note 36), 159 (note 33), 140, 146.

37. Appeal Court of Thessaloniki, 537/1967. Armenopoulos 22: 203; AP 137/1964 Nov. 13:511.

38. Nicoletopoulou-Krispi, E., "Irregular Marriage and the Children Born in this Union", No. V, 21:705, (1972). Relevant too the City Court of Piraeus, 395/1970, Arch. Nom. 22:65.

39. Article 1367.(1) of the Greek Civil Code.

B.40. Fraser, On Parent and Child, p.51-2.

41. ibid. p.52 and cases cited there.

42. Article 25 of the L.D. 14.7.1926. For discussion on the reasons see Roilos G. (-Koumantos, G.), Family Law, 2nd/3rd ed. (Athens: Sakkoula 1965-66), p.408.

43. Walker, Principles of Scottish Private Law, p.327. See also F. Lyall, "A Legitimate Restatement", (1968) 13 Juridical Review 288-293, p288; Mr. and Mrs. X (pets) 1966 S.L.T. (Sh.Ct) 86.

44. The concept of legitimation per subsequens matrimonium was introduced temporarily by Constantine to encourage marriage with a concubine. Zeno and Anastasius did the same, the latter being specifically involved in widening the scope of its application. Two years after his death the legislation was repealed until the reign of Justinian who laid down new rules, among them the condition that the woman must have been capable of marriage at conception or birth of the child (Novels 12.4, 18.11, 78.4). These rules were met with approval by Pope Alexander III (1159-1181) and became part of the law since then. (Codex Juris Canonici, can. 1116), See F. Lyall,"A Legitimate Restatement" op. cit. pp 288-9.

45. Report of the Scottish Law Commission, on "Reform of the Law relating to Legitimation per subsequens matrimonium", Cmnd 3223 (Edinburgh:HMSO 1967), par.2, 3. Also Lyall, "A Legitimate Restatement", op. cit. p.289.

46. Kerr v. Martin (1840), 2D.752.

47. As a matter of fact in Kerr v. Martin (supra) it has been disputed whether Canon Law did form the basis of Scots Law, though one may advert to the remark of Lord Fullerton who states "When we find that in a particular branch of the law, appropriate to the ecclesiastical courts, a general rule of the canon law, which those courts certainly administered, has been adopted into our own manicipal system, it would be difficult to deny, on reasonable grounds that that was the source from which we adopted it". per Lord Fullerton p. 794.

48. Cmnd. 3223, par. 4, p.6.

49. ibid. par. 4, p.6, and par. 13, pp 7,8 for the recommendations.

50. Sect.4(a) Legitimation (Scotland) Act 1968.

51. Sect.4(c)

52. Sect.4(b)

53. Sect.4(d) (I)

54. Sect.4(d)

55. Sect.4(d)(II)

56. Sect.1(1); Must be public and solemn.

57. Article 28 of the L.D. 14.7.1926; A.P. 86/1941 (Plerum), E.E.N. (9), 11:151.

58. Roilos (Koumantos), Family Law, 1558.4.

59. Tousis, Family Law, Vol B, p.196; A.P. 179/1941. Themis 52:455; A.P. 274/1941. Themis 53:145, City Court of Athens, 5034/1946, Themis 57:365.

60. Appeal Court of Athens 4657/1953, Arch. Nom. 5: 1954.

60.a Kerr v. Martin

61. Art. 1368 of the Greek Civil Code.

62. Art. 1382(2) which assimilates them to voluntarily acknowledged illegitimate children. Art. 1353 of the Greek Civil Code prohibits marriage between a Christian and a person of different religion. The article has been criticised as contravening the clause adopted in article 13(1) of the Constitution which proclaims religious freedom (see Spyridakis, Civil Code 1353 n.3., also supra note 36.) The child, however, will be legitimated if the parents consummated a marriage in contravention of the prohibition since the marriage is held as void but with legitimating effects. Relevant, the AP 62/1972, No. V.20.622- see also Tousis Family Law, Vol A, pp 54-5, J. Spyropoulos, comments in E.E.N. 5:433.

63. Hume v. Macfarlane 1908 S.L.T. 123, where it has been provided that consent of the child to its legitimation, as required in Roman Law, has never formed a part of Scots law. For Greek law, see AP 24/1938, E.E.N.:286; AP 179/1941, Themis 52:455; Vallindas, Family Law, p 202; Spyridakis, Civil Code, 1556, note 2, Tousis, Family Law, B p 193 and note (4).

64. Imre v. Mitchell op. cit. per Lord Carmont at p.469; Art. 1556 of the Greek Civil Code; Vallindas, Family Law, p.203.

65. Bosville v. Lord MacDonald 1910 S.C.597; Brooks Exrs. v. James 1970 S.C.142.

66. Registration of Births, Deaths and Marriages (Scotland) Act, 1965, SS, 44, 48.

67. Walker, Principles of Scottish Private Law, p.328. Section 21 of the Registration Act 1965 was construed in Mr. & Mrs. X (pets) 1966 S.L.T.86, as to require evidence that the parties of the marriage are the parents in order for the Sheriff to authorise the Registrar General to record the decree.

68. Brooks Executrix v. James.

69. Smith v. Dick (1869) 8 M.31.

70. In Brook's Executrix v. James, supra, it has been suggested that in order to establish paternity it is permitted to balance the probabilities. p.154.

71. Gardner v. Gardner, (1876) 3 R.695, (1877) 4 R (H.L.)56, per Lord Gifford at p.723 and 59 respectively.

72. The most recent example in Brooks Executrix v. James, i.e. at p.154.

73. Art. 14 of the Law 344/1975 "On Registration Deeds".

74. Art. 1557(2) of the Greek Civil Code. For the pre-code law article 22(2) of the L.D. 14.7.1926.

75. Balis, Family Law, par. 170(1); Opinion of Public Prosecutor of Magistrates Court of Kavala, 4/1965 No.V. 14:86.

76. Tousis, Family Law, Vol B, p 195, Spyridakis, Civil Code, 1557 note 3. Also reference in Note 75 supra.

77. Balis, Family Law, 170,1; G. Michaelidis Nouaros, Family Law, (University Text Book), p.301; A. Tousis, Family Law, Vol B, p194 and note (10).

78. Vallindas, Family Law, p.203.

79. The right is of those aiming to reinstate for the future the appropriate situation for the relationship deriving from a family legitimate relation, therefore it is considered indefeasible c.f. articles 1557(2), 1558 and 248 of the Greek Civil Code.

80. Roilos (-Koumantos), Family Law, 1556.8, p.403 and 1532.8 p.315.

81. ibid. 1556.9,10; City Court of Pireaus, 7/1972, E.E.N. 39:864.

82. Article 1560 of the Greek Civil Code.

83. Article 1565 of the Greek Civil Code for pre code law see article 21 of the LD. 14.7.1926; see also Tousis, Family Law, Vol B p.202.

84. Compare Novels 74, 89 and article 1561 of the Greek Civil Code with article 26 of the L.D. 1926. For further discussion see Roilos (-Koumantos) Family Law, pp 412-413

85. According to article 1560 of the Greek Civil Code proceedings must be initiated by the father in the Magistrates Court of his residence (art.740 (1a) of the Code of Civil Procedure). He must appear in person, even though a minor or interdicted person, to be questioned on the issues of his petition: Tousis, Family Law, Vol B p.198 and note (7); Balis, Family Law, par. 171.1.

86. Appeal Court of Athens, 2415/1947, Themis 58:553.

87. Vallindas, Family Law, p.203.

88. Roilos (-Koumantos) Family Law, p.414.

89. AP 382/1903, Themis 14, 582.

90. Spyridakis, Civil Code, 1561.

91. Tousis, Family Law, Vol B, p197 and note (4); Consular Court of Alexandria 152/1915, Themis 31:29 where a difference in religion was held to satisfy the condition of marriage being impossible.

92. City Court of Veria 7/1971, Arch. N. 22:14P; For details on the instances of impossibility see G. Michaelidis Nouaros, Family Law (University Text Book) p.304. Contra: Tousis, Family Law, Vol B, p.198 note (4). Roilos (-Koumantos), Family Law, 1561.4 p.414.

93. Spyridakis, Civil Code, 1561, n.2; Roilos (-Koumantos), Family Law, Vol. B.p.198. Contra Vallindes, Family Law, p.206, who suggests the tests of permanent impossibility for the past and present.

94. Roilos (-Koumantos), Family Law, 1561.5, p.415. Sypridakis, Civil Code, 1561 note 1; Vallindas, Family Law, p.205; Tousis, Family Law, Vol. B, p197 and note (3).

95. Articles 1561 (3), 1662 of the Greek Civil Code.

96. Art. 281 of the Greek Civil Code; G. Michaelidis Nouaros, Family Law, (University Text Book,) p.305.

96a. Art. 1562 of the Greek Civil Code.

97. Arch. Nom. 22:227.

98. Spyridakis, Civil Code, 1562, note 1.

99. Appeal Court of Athens, 912/1970, Arm. 26:891; City Court of Kavala, 472/1959, E.E.N. 26:799 i.e. at p.802; AP 9-10/1952, E.E.N. 19:299.

100. AP 9-10/1952 (supra), Balis, Family Law, par 171.4; Tousis, Family Law, Vol B, p. 200 and n(1).

101. G. Rammos, Legitimation of Persons Born out of Wedlock by a Court Decree, (Athens 1955), p26.

102. Appeal Court of Athens 517/1967, Arm. 22:201.

103. Spyridakis, Civil Code, 1563 notes 1, 2; Tousis, Family Law, Vol B p.201.

104. Art. 1567 (1) of the Greek Civil Code.

105. Art. 1567 (2) of the Greek Civil Code.

106. See Krause H. "The Creation of Relationships", pp 27, 29-34.

107. After the appointment of a five member committee by the decision 108696/1975 of the Minister of Justice, which under the chairmanship of Professor Gazis surveyed and reported on the areas of the law which contravene the art. 4(a) of the Constitution (on legal equality between the sexes), the same Minister with his decisions 106926/1976 and 953/1977 appointed a 17 member committee under the chairmanship of the said Professor Gazis which prepared a Bill at Law reforming the parts of law which cause sexual discrimination according to the clause of art. 4(2) of the Constitution. The Bill basically leaves unaffected the status distinctions though it brings forward some substantial modifications in relation to the rights and duties of the parents: Greek Republic-Ministry of Justice, Draft of Law: For modifying regulations (Athens : National Stationery, 1979). Hereafter it will be referred to as Bill of Gazis Committee

108. Art. 95 of the Bill to reform article 1567.

C.109. Walker, Principles of Scottish Private Law, p.303. Fraser on Parent and Child, pp5-6. The cases are rare in Scots law because usually the marriage is annulled. For medical evidence Sandy v. Sandy (1823) 2 S.453. Article 1471 of the Greek Civil Code.

110. c.f. MacKay v. MacKay (1865) 17 D.494 and article 1471 of the Greek Civil Code.

111. Coles v. Homer &. Tulloch (1895) 22.R.716; see also W.M. Gloag and R. Land Henderson, Introduction to the Law of Scotland p681 and authorities cited in note 10. Edinburgh : Green & Son, 1968)

112. Article 1471 of the Greek Civil Code; AP 866/1977 NoV 26:697. Probably the law has been developed so as to require non access because the article premises, as indicative examples showing obvious impossibility for the child being conceived by the husband's emigration and impotency. Similar, however, in the pre-code law: Novels 6.50, 1.6; AP 179/1941, E.E.N. 9:280.

113. According to Tousis (Family Law, Vol B, p19) impossibility of having intercourse may be derived from other reasons than those mentioned in

article 1471 (supra). Thus the AP 372/1962 (E.E.N. 29:854) had given a wider construction to the term "being abroad" so as to include imprisonment of the husband, his absence in another part of the country. (see also Spyridakis, Civil Code, 1471, note 4), the de facto separation of the couple because one of them undergoes a hospital treatment (for the case of the husband in mental hospital see Appeal Court of Aegean Islands 209/1930, Themis 42:77) or because the circumstances indicating separation (City Court of Athens 5015/1942, E.E.N. 11:45), are considered grounds making it highly probable that intercourse did not take place between the parties. Nevertheless if the parties were on unfamiliar terms so that it was unlikely for them to have become intimate at the probable date of conception, proof against the presumption is admissible : AP 65/1927, Themis 40:369; AP 179/1941, E.E.N. 9:280.

114. Ballantyne v. Douglas, 1953 S.L.T. (Notes) 10, per Lord Partick at p.11; Appeal Court of Athens, 2241/1970, No.V . 19:192.

115. Ballantyne v. Douglas; Burman v. Burman 1930 S.C. 262; Imre v. Mitchell op cit. per Lord President pp 261-2,; MacKay v. MacKay (1855) 17 D.494. Also see for discussion "Proof of Paternity," op. cit. p.209 fd.

116. Balis, Family Law, par 127.7; Tousis, Family Law, p23; Appeal Court of Nauplion, 23/1967, E.E.N. 34:955.

117. MacKay v. MacKay, op cit. per Lord Curriehill, P 496; see also cases in note 115. For Greek Law Appeal Court of Athens 2241/1970 (supra), Appeal Court of Nauplion 23/1967 (supra)

118. Walker, Principles of Scottish Private Law, p.309; Currie v. Currie 1950 S.C.10; Tousis, Family Law, Vol B, p.23 and note (12).

119. Reid v. Mill (1879) 6.R.659; Ballantyne v. Douglas.

120. S. v. S.; For Greek law see Tousis, Family Law, Vol B, p.23 and note (12).

121. Walker, Principles of Scottish Private Law, p.303; For Greece see Balis, Family Law, par. 127.1.

122. S. v. S.; Tousis, Family Law, Vol B, p.25 note (15).

123. Blood tests along with other anthropological investigations are discussed in chapter three (infra). However, in neither country has such evidence yet received the degree of credibility that it actually deserves. Imre v. Mitchell, op cit. "The illegitimate child", 1969, S.L.T., 93, p.94. Appeal Court of Athens 1579/1969, Dikaiosyni 1.235, the same court 2241/1970, No. V . 19:192, Valindas, Family Law, p.126.

124. For review of the authorities regarding evidence admissible on declarators of bastardy see Burman v. Burman; for Greece AP 413/1971, No. v, 19:1111.

125. Burman v. Burman, per Lord Murray p.364. Appeal Court of Patra 74/1958, Arch. Nom. 2:208.

126. Tennent v. Tennent (1890) 17R.1205.

127. (1895) 22 R.716.

128. op. cit. per Lord Murray, p.368.

129. op. cit.

130. Tousis, Family Law, p.24 and note(14)

131. Gardner v. Gardner, per Lord Gifford; also note 9 supra

132. Imre v. Mitchell per the Lord President p.463.

133. Imre v. Mitchell per the Lord President pp 463-465. Previously, however, it was held that once the father had acknowledged the child that acknowledgement was irresistible (see Erskine, Institutions, ed. Nicolson, 1, vi, 49.

134. Art. 1468 of the Greek Civil Code; an extract of the declaration must be attached to the child's birth record (art. 1468(2) Greek Civil Code) Omission to do so, however, does not affect the force of the declaration (City Court of Thessaloniki 719/1973, No V., 22:405.) The declaration is irrevocable (Tousis, Family Law, p.13).

135. Art. 1469 of the Greek Civil Code.

136. Art. 1468 of the Greek Civil Code; The procedure of articles 1471-1475 applies exclusively to conceptions in wedlock (Balis, Family Law, par. 125.8; City Court of Thessaloniki, 719/1973, No. V 22:405). If a declaration has been submitted in contravention of the grounds of article 1469 of the Greek Civil Code the child through his tutor or his mother (Appeal Court of Thessaloniki 885/1973, Arm. 27:693) may appeal against the declaration (art. 583 subseq. of the Code of Civil Procedure) or bring an action to be recognised as the legitimate offspring of the marriage (Balis, Family Law, par 125.9). If it succeeds the decision extinguishes any effects of the declaration from the date of birth (Tousis, Family Law, Vol B, p14 and note (10).)

137. Tousis, Family Law, Vol B, pp 12-13; also infra in notes 138-9.

138. Vallindas, Family Law, p.124.

139. Roilos (-Koumantos), Family Law, 1469 (4). Also Tousis, Family Law, Vol B, pp 12-13.

140. Imre v. Mitchell (supra), Rose v. Ross 1897 S.C. 605; Article 1472 of the Greek Civil Code.

141. Phillips Trustees v. Beaton 1938 S.C. 733; Brook's Extrx v. James 1970 (supra); For Greek law article 620 of the Code of Civil procedure before the Magistrates sitting in a special session (articles 615-622, of C. Civ. Proc.)

142. Brown v. Brown 1972 S.L.T. 143, i.e. p.145.

142a. S. v. S. (supra); Article 619 of the Code of Civil Proc : City Court of Thessaloniki 675/1973 E.E.N. 41:216.

143. Brodie v. Dyce 1872 11 Macph. 142; Ballantyne v. Douglas (supra), MacKay v. MacKay (supra)

144. Robertson v. Robertson(1894,)2 S.L.T. 353.

145. A & A. (pets) 1947 S.L.T.

145a. Gaffney v. Connerton 1909 S.C.1009; Wilkinson v. Bain 1880 8.R.72, per Lord Justice-Clerk, p73.

146. Walker, The Law of Civil Remedies, p.120.

147. Appeal Court of Athens 6881/1973 No V. 22:379. If he had acknowledged the child explicitly or implicitly his right is extinguished. (Appeal Court of Athens 1543/1969, Arch. Nom. 21:563. Appeal Court of Nauplion 23/1967 E.E.N. 39:955; Article 1475 of the Greek Civil Code.

148. Art. 619 (1) of the Code of Civil Procedure.

149. A.P. 148/1948, E.E.N. 11:479.

150. G. Michaelidis Nouaros, "About the Meaning of Functional Rights and their Abuse" in Honorary Volume in Memory of Professor Maridakis, (Athens University, 1967), p.1. atsp. 32-36; Relevant too the AP 372/1962 Hellenici Dikaeosyni 3: 709.

151. Art. 42 of the Bill to reform art. 1472 of the Code.

152. Art. 44(1) of the Bill to reform art. 1474. G. Michaelidis Nouaros, "The Reformation of Family Law in the Light of Modern Developments", No. V 24 : 113-124 (1976) pp 116-118.

153. Art. 44 (2) of the Bill.

154. Coles v. Homer.

155. Art. 1474 of the Greek Civil Code.

156. Walker, Principles of Scottish Private Law, p.326; Tousis, Family Law, Vol. B., pp 28-29.

157. Art. 1363 of the Greek Civil Code; AP 1020/1972 No. V 21:597.

158. Walker, Principles of Scottish Private Law, p.326; Article 1530 of the Greek Civil Code.

159. Eekelaar, John. Family Law and Social Policy, (London: Weidenfield and Nicolson, 1978), i.e. part two Chapters 4 and 5; Krause, H. "The Creation of Relationships,"op. cit. pp 7 - 12. G. Michaelidis Nouaros, "The Reformation of Family Law", p.121-124. Idem 'Functional Rights" pp 32-36.

160. See for example Clive "Aspects of Illegitimacy", p.234. Stuart, Fiona, "Cohabitation : The legal consequences" (1980) 25 Journal of the Law Society of Scotland, 7, 48, pp 7, 8, 51.

160a. See Bates, Frank, "Irregular Unions and Social Policy", 1980 S.L.T. 149-153. Art. 1555 of the Greek Civil Code.

161. Erskine, Institutions, ed. by Nicolson T., V I, 49 as cited in Imre v. Mitchell (supra) p.462. Underlining mine.

162. 1953, S.L.T. (Notes)10 .

163. Per Lord Partick, p.11. Underlining mine.

164. 1958 S.C. 439. per Lord President pp 461-462.

165. Brown v. Brown, 1972, S.L.T. 143; S. v. S. 1977 S.L.T. 65.

166. Kordogiannopoulos, Paulos M., "The Legal Safe-guarding of the Greek Family in its major expressions,"1959, E.E.N. 26, 177- 187, passim. Panagiotakos, P. Manual on the Marriage Impediments (Athens: Sakkoula 1959). The development of this perception of marriage in Greece is more or less a historic tradition with uninterrupted continuity dating back to the classical period. The Greek family had in its classical period a religious character and so did marriage. This tradition was preserved throughout the Roman Byzantine period (Tousis, Family Law, Vol A, p 37 ff) to be inherited in Greek Law of Modern times. The civil code followed the same paths by trying to preserve and reinforce the religious morality of the Greek family. Characteristically, as Professor Papantoniki provides, the dictators Metaxas at the ceremony of the enactment of civil code in his speech stated " ... the basic element of our society, the family, must be preserved and strengthened, keeping always and its religious character ("The Modernising of Family Law". Politis part 33, March/ April (1980)).

167. Church of England, Fatherless by Law : The Law and the Welfare of Children designated Illegitimate (London: The Church Information Office, 1965).

168. In Zech 9.6 ibid p6. See for Greek law in Chapter 2(I) Historical development of the Law.

169. Deuteronomy 23.2 ibid p.6.

170, ibid. p.6. See also Friedmann, Law in a Changing Society, (New York 1959), p.251; Krause "The Creation of Relationships", p.3.

171. Church of England, Fatherless by Law, para 7. p.5.

172. Ibid. par. 7 p.5.

173. Ibid. par. 6 p.5.

174. Ibid. par. 9 p.6. The only penalty was that such a wife could not be divorced (Deut. 22.28-29). This view, however, cannot be clearly supported because the change in attitude against persons with a black mark attached to their birth appears rather severe in Deuteronomy. As the title implies (Deutero: second, nomos : law) the collection probably is a reformatory one aiming to control the race. In this respect sexual relations as affecting descent may be of primary consideration so that marital relations could not be so loose. This change of attitude becomes explicit in the passage of Deuteronomy (23.2) which apart from excluding the bastard himself from the congregation of the Lord, extends it even to his tenth generation.

175. 18 Hebrews 12, 8, ibid par. 11 p.6.

176. Christs enemies, in John, 8.41, ibid par. 11.

177. Ibid. p.12 pp 6-7 and instances referred to there.

178. See infra chapter 2, part I. The only exemption recorded is that referred to by Oligardios (Phendoxenophon) in Lakedaemonion Politia I, i.e. 7-9) which supports the view that it was allowed in Sparta for someone to have intercourse with a woman out of wedlock if this was for the provision of healthier descendants; see Tousis, Family Law, Vol A, p.38 and note (7).

179. For analysis of the monogamic structure of the Greek family, see Folsom, J.K. The Family and Democratic State, New York: Wiley 1936 pp 86-87; Leslie, G. The Family in Social Context, 4th ed. (New York : Oxford University Press, 1979) pp 154-158. As regards the possible influences on Greek and Roman family systems of christianity, idem p 163-167.

180. Church of England. Fatherless by Law, par 13. p.7.

181. See for instance Laslett, P. Household and Family in Past Time, (London : Cambridge University Press, 1972).

182. Rapoport, R. et al, Fathers, Mothers and Others, (London : Routledge and Kegan Paul, 1977). as cited by Lambert L., and Streather J., Children in Changing Families (London : The MacMillan Press Ltd., 1980), p.18.

183. Ibid. p.19.

184. Soddy, K., "The Role of Society", in N.CU.M.C., (ed) The Human Rights of those born out of wedlock : A consideration of need and how they might be met. (London 1968), p.65-73, p.68.

185. On this understanding, the Scottish Law Commission in its memorandum No. 22 put under consideration the possibility of removing the legal obligation for support between parents and children in the legal family. Sc. L. Com., Family Law : Aliment and Financial Provision, Vol 1,2. Memorandum No 22 (Edinburgh 1976), Vol 2. par. 2.6 to 2.8 pp 4-6.

186. See for example, Davie, R., Butler, N.R. and Goldstein, H. (1972), From Birth to Seven (London : Longman with N.C.B., 1972).

187. Ibid. also Lambert and Streather, Children in Changing Families, pp 10-12.

188. Samuels, A.,"Abolish Illegitimacy" (1979), 9, Family Law 131-135, p 132.

189. Dr. R. R. Williams (The Bishop of Leicester), "The Right to a Father" in N.CU.M.C. ed. The Human Rights of those Born out of Wedlock, op. cit. 52-57, p.52.

190. The (English) Law Commission, Working Paper No. 74, Family Law : Illegitimacy (London : H.M.S.O., 1979). par. 5.1, p.7.

191. Lambert and Streather, Children in Changing Families, p.20; for analysis, pp 20-23.

192. Clive, "Legal Aspects of Illegitimacy", op. cit.

193. Ibid. p.233.

194. Stuart, F. "Cohabitation : The legal consequences," op cit.

195. Ibid. p. 7. Other commentators, however, reject the idea that such desire were ever present in such relationships; see for example: Carter, Ian, "Illegitimate births and Illegitimate Inferences". Scottish Journal of Sociology, I, (1976-77), pp125-133.

196. See Titmuss, M. Richard, Essays on the Welfare State, 3rd Ed. (London : Allen & Unwin Ltd. 1976), p.98, also Chapter 5.

197. Slater, E. and Woodside, Moya, Patterns of Marriage : A study of marriage

relationships in the Urban Working Classes, (London : Cassell & Co. Ltd., 1951), p.126.

198. See Stuart, "Cohabitation : The legal consequences", p.7.

199. See for discussion G. Michaelidis Nouaros, "The Reformation of Family Law", pp 118 - 119. Kostaras, George "About the Reform needed to be introduced in family law", E.E.N. 43: 315-318 (1976), p.315. Ansay Tugrul, "The problems of migrant workers in Europe", in A. Chloros (ed) Family Law Reform in Europe (Netherlands : Kluwer, 1979), Chapter XIII pp 323-337.

200. For references to the instances of cohabitation and their implications see Stuart "Cohabitation : The Legal Consequences", op. cit; Gay Moon, "The Rights of Cohabitees", L.A.G. Bulletin, December (1978) 288-291. February (1979) 39-41; Blake, Susan "To Marry or not to Marry" (1980), 10 Family Law, 29-32; Bates, "Irregular Unions and Social Policy". op cit.

201. Stuart, "Cohabitation : the legal consequences", op. cit. p.51.; Levin, Jen. "Cohabitees - 2 children", L.A.G. Bulletin, January (1979), 15-17. Idem. "Reforming the Illegitimacy Laws", (1978) 8 Family Law, 35-39, p38. Samuels, "Abolish Illegitimacy", op. cit.

202. As Stuart("Cohabitation : the legal consequences", p.8) points out, this has been the objective of reform of marriage Law in Sweden. For a more detailed analysis on the issues involved, see Eekelaar, Family Law and Social Policy, pp 52-57. Also in relation to Scots Law, see Bates, "Irregular Unions and Social Policy", op. cit.

203. Eekelaar. Family Law and Social Policy, p.58. Stuart "Cohabitation : The Legal Consequences" op cit. p.53. Bates, "Irregular Unions" op.cit. p.153.

204. Blake, "To Marry or not to Marry" op. cit. p.32.

205. Such attempts had been made in Scotland with the Divorce (Scotland) Act 1976, Marriage (Scotland) Act 1977 while in Greece as already mentioned it is carried out in a wider scheme aiming to reform the entire family law.

206. See Eekelaar. Family Law and Social Policy p33-36.

207. Both countries show a particularly high mobility of their labour forces which has been intensified with the rise of unemployment. Besides employment in the fishing and the shipping industry which engage a great proportion of the population in each country, make parental deprivation for long or short periods a frequent phenomenon (see for brief discussion Pantelouris, E.M. Greece : An Introduction (Glasgow : Blueacre Books, 1980), pp 135-137; Mouzelis, Modern Greece, pp 99-101, 125.

208. Eekelaar, Family Law and Social Policy, pp 31-40; Gazis, A. "Report on the Draft of Law : On modification of the provisions on divorce of the Civil Code" in Spyridakis, Civil Code, Vol 4, op cit. par. A.1 .

209. See D.H.S.S., Report of the Committee on One-Parent Families (Finer Report), Cmnd 5629 Vol 1, II (London : HMSO, 1974), Vol I, p 44, table 3.16

210. Ibid. par. 3, 39 p.44.

211. Ibid. table 3.19 p.46.

212. ibid. Table 3.19 p.46.

213. Tousis, Family Law, Vol. A, p.313. Also National Statistical Service of Greece, Statistics of Justice : Civil Justice, Criminal and Rehabilitative of the Year 1978, (Athens : National Statistical Service 1979), p.30, Table 16.

214. For the applications for which decree has not been granted see Statistics of Justice 1978 table IV p.8. while for the children involved in the orders of 1978, table 15, p.30.

215. cf. ibid, Table 14, p.30.

216. Kostaras "About the Reform ... in Family Law" op. cit. pp 316-318; G. Michaelidis Nouaros, "The Reforming of Family Law", op cit. pp 119-120 Argyriadis Alkis, "The Reform of Family Law in Greece", op. cit. pp 145-149. Characteristically the Minister of Justice in the introductory report of the Bill defines its purposes. "First in a sincere formulation of the procedure of divorce, to eliminate collusive decrees and the black-mailing connected with them and second in the dissolution of marriages which are irretrievably broken down because of the prolonged separation of the spouses..." see "Introductory Report of the Bill 'On Modification of the Provisions on Divorce of the Civil Code'." in Spyridakis, Civil Code, Vo. 4 ...; Also Gazis "Report on the Draft of Law 'Modification ... of Divorce'" op. cit. par. A1 and B3.

217. The original Bill still has not become a law.

218. For the gallup poll by ICAP Hellas, see Akrita Helena "The Greek, Adultery and 'Automatic' (divorce)" Period Tachydromos, April 1977, 14 - 16.

219. For the reaction of the Church see the works referred to in note 36 (supra). However, this reaction comes as a surprise and more or less is incompatible with its tradition in the distribution of Justice throughout the Ottoman dominion. As Gazis points out from the tenth century when it became customary for Clerical courts to have jurisdiction on divorce actions and until the reinstatement of the Greek nation they have shown a remarkably liberal attitude in interpreting the gounds of divorce. Thus, though basically they applied Roman-Byzantine law which recognised limited grounds of divorce nevertheless, they were particularly flexible in their interpretation so that irretrievable breakdown of marriage, irrespective of the responsibility of either party and prolonged separation were among the well recognised grounds. When jurisdiction was transferred to civil courts they applied the grounds of Byzantine law according to the scientific methods of interpretation which inevitably reversed the established practice and made the law out of date. Unfortunately neither the Greek courts nor the legislature proved sensitive enough to change the law despite social pressure. The only "progress" was that courts avoided inquiry into collusive actions (it is estimated to be at 50 per cent of the overall orders are for "objective breakdown of the conjugal link" - the orders under this ground are normally 80 percent of all orders) and extended the reasons that could establish 'objective breakdown of the link'. In the various attempts to change the law (the unsuccessful law 2228/1920 brought about a number of discussions so that attempts were made in 1929 and a Bill was introduced in parliament in 1939 but never became law due to the dictatorship which followed; a second one in 1965 was equally unsuccessful;) the Church in the first place accepted as a ground for divorce separation for ten years (in 1958) later to change its position to one against any kind of reform in the law

of divorce. "Report or the Draft ... 'On Modifications on Divorce". p. cit. B1, 2.

220. Ballantyne v. Douglas per Lord Patrick, p.11.

221. Akrita H. "The Greek, adultery and the 'automatic' (divorce)", op. cit.

222. For example, English law, WP 74 par 9.10. pp 107-108.

223. Levin "Reforming the Illegitimacy Laws" op cit. who places a particular emphasis on the influence that the Finer Report had on the matter; see also Chapter 2, II and IV.

CHAPTER 2

1. Krause, 'The Creation of Relationships', p.3.

2. The L.D. 30.4.1926 which had a life of three months.

3. See, supra, introduction

4. Tousis, (Family Law, vol. B, p 137 note (4) ) states that according to Isiaius (On the Bequest of Philoktitas, par 47) the Solonian legislation was particularly hard excluding completely the child from thepaternal family and succession. Normally such children were the products of relationships with women of non-Athenian legitimate descent.

5. M. Tzouganotou Gasparinatou, The Judicial Recognition of Paternity : Complete-Incomplete, PhD. Athens University (Athens, 1975), p.11, 12.

6. Kiralfy, A. and Routledge, R. "A Historical Perspective of the Child Without Family Ties", 1. The Journal of Legal History, 165-181 (1980), p. 166; also Tousis, Family Law, Vol B, p.137, note (4).

7. Robbins, H. and Deak, F. "The Familial Property Rights of Illegitimate Children : A comparative Study", (1930), 30 Columbia Law Review, 309-329, p.310.

8. ibid. p.311; Leslie, The Family in Social Context, p. 159-160.

9. Maine, Ancient Law, 10th ed. (1884), p.141 note (2)

10. "The Familial Property rights", op. cit. p.311.

11. The Judicial Recognition of Paternity, p.12.

12. Robbins & Deak, "The familial property rights", op. cit. p.312.

13. ibid. p. 312.

13a. ibid, p. 314.

14. See for discussion on the so called matrimonium non justo in Leslie, The Family in Social Context, pp. 161-163.
Initially in the most conspicuous way this exploitation took place in the top socioeconomic order which Leslie attributes to an alteration of morals so that marriage became primarily a matter of personal satisfaction and convenience. Both men and women used to get married for financial gain or not married at all. Matrimonium non justo degenerated into men taking mistresses much as in modern society. Prostitution increased markedly. The drop in the marriage rate became a matter of concern and by the time of Christ, legislation was passed penalizing the unmarried. Single adults were disqualified from receiving inheritance. p. 162-163.

15. Robbins & Deak, "The Familial Property Rights", op. cit. p. 314.

16. ibid, p.315.

17. Krause, "The Creation of Relationships", p.4.

18. Siebert. Des concubines et du droit relatif au concubinage (1938), p.1.;

Kiralfy & Routledge, The Child Without Family Ties", p. 167.

18a. Meston, M.C. "Bastards in the Law of Succession", 1966. S.L.T. 197-203; Gill, Illegitimacy, sexuality and the status of women, p. 299; see also infra note 61a.

19. Pollock and Maitland, History of English Law (1905), p. 423.

20. Hooper, The Law of Illegitimacy, (1911), p.22.

20a. (1888) 15 R.449.

21. (1887) 14 R.780.

22. Inveravon v. Raeburn (1856) 1 Shf. Crt. Dec. 192.
Taylor v. Spottiswoode (1857), 2 Shf. Crt. Dec. 31.

23. (1886), 14 R.113.

24. ibid. per Lord Justice-Clerk Moncrieff.

25. Clarke v. Carfin Coal Co. (1891) 18 R.(H.L.)63, per Lord Watson : "It humbly appears to me that to impose upon illegitimate children, to whom the law denies the status of blood relationship, all rights of succession a liability to maintain parents, who in the most charitable view have done them a great wrong, would be harsh and inequitable". p.20.

26. See Trotter, On Children Acts, Child Adoption and Juvenile Courts (Glasgow, 1938) and infra cht. 7.

27. Walker, Principles of Scottish Private Law, 326.

28. Sect. 4. Succession (Scotland) Act 1964.

29. Clarke v. Carfin Coal Co. (Supra), per Lord Watson "At common law the mother is, as much as the father, an utter stranger in blood to her child and by natural law the father is as nearly related to the child as it is the mother". p.70.

30. Sect. 2. Marriage (Scotland) Act, 1977.

31. Horner v. Liddiard (1799), Croke's Report, p.188 as cited by Fraser. Parent and Child, p.148.

32. Weepers v. Kennoway (1844), 6D. 1166, p.1173.

33. Corrie v. Adair (1860) 22 D.897, p.900.

34. Short v. Donald (1765) M. 442.

35. The father is not entitled to demand the custody of the child; he has no right of any kind as regards the child. He is under an obligation and nothing else; Per Lord Justice Inglis in Corrier v. Adair. supra at p.900.

36. Corrie v. Adair (supra); Macdonald v. Denoon 1929 S.C. 172

37. Fraser, Parent and Child, p. 161.

38. ibid pp. 147-8- By being a child filius nullius the father had no power or authority over him any more than an ordinary stranger; see also

Clarke v. Carfin Coal Co. supra and Corrie v. Adair supra.

39. ibid p.148 and Corrie v. Adair supra. The father could not appoint a guardian of his bastard child.

40. Walker, Principles of Scottish Private Law, p.326 and supra note 32.

41. (1891) 18 R (H.L.) p.66.

42. ibid. Per Lord Watson, p.70.

43. See Prachikan, C., Greek Family Law, 2nd ed. (Athens, 1945) par 147 p.386. f.f. Argyriadis "Reform of Family Law in Greece" op cit. p.140.

44. As Roilos (-Koumantos) states the first Bill appeared in 1915 presented by S. Tsaggrin and the second in 1920 presented by G. Maridakis (Family Law, p 297).

45. see ibid. p.297. The Decree appeared in a period of social unrest and reflects a desire for radical change in the matter. However, the move preceding this Decree intended only a relative protection of the illegitimate child and so did the Decree which took its place three months later.

46. Article 16 of the L.D. 1926.

47. ibid.

48. Articles 17 and 18 of the L.D. 1926.

49. Report of the Russell Committee on the Law of Succession in Relation to Illegitimate Persons, Cmnd. 3051, (HMSO, 1966).

49a. Cmnd 3051, par. 50. For a detailed analysis on the proposals of the Committee see Meston, M.C. "Bastards in the Law of Succession", 1966 S.L.T. 197.

50. Clive, "Aspects of Illegitimacy, op. cit. p.235. Meston, M.C. "The Law Reform (Miscellaneous Provisons) (Scotland) Act 1968" 1968 S.L.T. 213.

51. Tousis, Family Law, p.140. See also authors referred to supra in note 46.

52. Article 1531 of the Greek Civil Code. Also Argyriadis, 'Reform of Family Law in Greece', op. cit. p.143.

53. It is not entirely clear if the Government of that time, aside from its conservative spirit, was prepared to adopt a hard line against illegitimates by abrogating most of the progress that had been made with the L.D. 1926. Without any doubt the L.D. even in its conservative form (version of 14/17 July 1926) was ahead of its time. But 25 years later when the Civil Code was enacted the situation had changed considerably so that there was the need to extend and improve the protection offered by the L.D. The present and forthcoming needs had been understood by the rapporteur of the family law part of the Civil Code who had suggested radical and innovative changes in the relevant law. It was most unfortunate, however, that the enactment of the Civil Code was marked by the policy of the dictatorship of Metaxas and the conservative government of Tsaldaris who won the elections in 1946. Metaxas entrusted the revision of the draft of the Civil Code to a single member, Professor G. Balis who reformed the Code in a more conservative spirit. Characteristically in the introductory report of the Code it is stated that "As regards the law on illegitimate children, the provisions concerning their recognition or legitimation are inspired by the effort to leave unaffected the legal family and especially the children produced

in it. Such effort is necessary not only for supporting the institution of marriage, but is dictated by essential justice to the legal family and especially to its children". )op. cit. in Tousis, Family Law, Vol B p. 136, note 2a). After the war there was a movement to replace this Code of 1940 by a new Civil Code which was drafted in some haste though in progressive spirit by Professors K. Triantaphyllopoulos and G. Maridakis. This Code, was put into effect by the Law No. 777/1945 as from 23 February 1946 by the Liberal Government of Th. Sofoulis to be repealed soon after by the conservative government of K. Tsaldaris which by a decree of 7/10 May 1946 enacted that the Civil Code of 1940 was deemed to have come into force on 23 February 1946 (see Argyriadis, "Reform of Family Law in Greece", op. cit. p.140.) Due to those unfortunate events the present legislation reflects the pre-war spirit as adopted in the L.D. of 1926. Probably the Metaxas government was intending to tighten up the law but as Roilos (-Koumantos) states the long life of the 1926 decree binds the legislature not to move backwards in the matter. (Family Law, p. 299). The criticism against the Civil Code in the light of post war conditions was manifold and severe. Characteristically K. Triantaphyllopoulos (Ancient Problems of Modern Laws, Armenopoulos 17: 472 ،1963) states "Some social provisions are deficient in the Civil Code due to the political system under which it was completed, as indicatively happens with the law for illegitimate children". Since then, however, - the only change is the permission to adopt the illegitimate child. (see infra ch. five, section VI) Suggestions have been made to improve the rights conferred in judicial recognition of paternity but the Gazi Committee, without changing the basic structure of the Civil Code has brought forward piece meal changes of the rights (See also infra section V, the steps forward).

54. Clive "Aspects of Illegitimacy", p.234.

55. ibid. p. 234. Also article 28 of the Bill prepared by the Gazi Committee

56. see Dr. R. R. Williams "The right to a father", op. cit. pp 52-57. Krause, "The Creation of Relationships", op cit. pp 8-9. Tousis, Family Law, Vol A, pp 36-42 and vol B. pp 135-137. Fraser, Parent and Child, p.144. Michaelidis Nouaros, "The Reform of the Family Law", op. cit. p. 123. Tzouganatou Gasparinatou, The Judicial Recognition of Paternity, p.9.

57. State intervention to protect the family had started from the classical period in Greece, but it was marked with the desire to preserve the patriarchic family. Therefore, concubinage and other forms of illicit unions were not particularly deplored. It was Christian ideology which took a firm position against them which resulted in their severe stigmatization. Tousis, Family Law, Vol A, p.38 and Vol B, p.138.

58. Krause "The Creation of Relationships", op. cit. p.3; Also supra note 57.

59. ibid. p.4. See also Kiralfy and Routledge, "The Child without Family Ties", op. cit. p.166.

60. ibid. p.167 and references in note 15.

61. ibid. p.167.

61a. Eekelaar, Family Law and Social Policy, pp 6-7, 66-7. According to Gill, (Illegitimacy, Sexuality and the Status of Women, pp 299-300) it was the Elizabethans who first drew distinctions between children born in and out of wedlock. By about 1575 bastardy had become a problem and the Elizabethans, increasingly concerned with the problem of poverty, wanted

to ensure that individual transgressions of the developing norms of sexual behaviour and matrimony did not involve the community, the parish, in subsidising children born outside marriage. From then on official Britain joined the followers of the Roman Law in condemning illegitimacy. The 1576 Act aiming to reduce the cost of illegitimacy involved public condemnation of reproduction outside marriage and the lewd behaviour which gave rise to it, as well as support for the norm of child bearing within marriage and consequently for the institution of marriage itself. In the following two hundred years the importance of marital life received increasing acknowledgement so that the Bastardy clauses of the 1834 Poor Law Amendment Act present a further hardening of society's attitude. The Commissioners were at pains to express their disapproval of illegitimacy because of the costs that this form of reproductive behaviour imposed upon the community. Indeed and in accordance with the principle of less eligibility upon which the whole Act was based, the Commissioners recommended, partly successfully, that the lot of the unmarried mother and her child should be made even more unenviable than it had previously been.

62. Skolnick, A., and Skolnick, J.W. Intimacy, Family and Society, (Boston Mass. Little Brown, 1974).

63. Ferri, Elsa, Growing up in a one-parent family: a long-term study of child development (Windsor : NFER Publishing Company, 1976), pp 11-12.

64. Lambert, L. and Streather, J., Children in Changing Families, (London : the Macmillan Press Ltd., 1980), p.21.

65. Albott, Grace, "The Child and the State" in The Child of Unmarried Parents (University of Chicago Press, 1938), Vol II, par. 3. p 493-4.

66. Kriesberg, L. Mothers in Poverty (Chicago : Aldine, 1970)

67. Ryan, W. Blaming the Victim (New York : Panthean, 1971).

68. Cmnd 5629 par. 2.7, p.7.

69. See Lambert and Streather, Children in Changing Families, p.30. Krause, "The Creation of Relationships", op. cit. p.8, 9, 10.

69a. Rbiolos (-Koumantos) Family Law, pp 292-299.

70. To refer to but a few : Wimperis, V. The Unmarried Mother and her Child (London : Allen and Unwin, 1960); Hartley, S.F. Illegitimacy, (Berkeley : University of California Press, 1975) Gill, D.G. Illegitimacy Sexuality and the Status of Women (Oxford : Blackwell, 1977). Wynn, M. Fatherless Families, (London, Michael Joseph, 1964). Lambert and Streather, Children in Changing Families; Ferri, Growing up in a one-parent family, op. cit.

71. See Teper, Sue. "The Pattern of Pregnancy amongst adolescents and teenagers in Scotland and its relationship to recent trends in national fertility", 2, Scottish Journal of Sociology, 229-246., p 231 (1978-9); Wood-Risotakis, Anne, An Analysis of the Health and Welfare Services in Greece, (Athens : Centre of Planning and Economic Research (Special Studies, series B), 1970) pp 121-124. The matter has been discussed in detail by Wimperis (The Unmarried Mother, op. cit) which argues that the hazards of being illegitimate in Scotland were much greater if one could judge by the rate of neonatal deaths. In 1954 74 per cent of natural children died within their first year. The same year the rate in England was 26 per cent. A decrease in the number is observable as the antenatal and post natal care in the whole community starts slowly to reach the illegitimate child (p 246). However, as she observes, the ratio of neonatal deaths of illegitimate children is unlikely to be the same as with legitimate because

they are normally first babies where the death ratio is higher, but mainly because of the strong association between illegitimacy, poverty and poor health. (p.242). High rates of neonatal deaths in illegitimacy are also argued by Gill (Illegitimacy, Sexuality and the Status of Women op. cit.) to be because the stigma prevents the mother from accepting the maximum benefits from maternity care and in addition forces a number of mothers to commit infanticide to escape the strictures which will be imposed on her (p.308). For the similar picture in Greece see : Michaelacopoulou Nancia, "The Children of Bad Luck", Journal Epikaira, (May 1974), 42-47

72. Wimperis, The Unmarried Mother, pp 246-247. See also "The Children of Bad Luck", Epikaira, op. cit.: Risatakis, Health and Welfare Services in Greece, pp 123-4, 126.

73. Wimperis, (The Unmarried Mother, pp 249-253) points out that a large proportion of illegitimate children grow up with both of their parents as members of unofficial families. The evidence gathered in some follow-up studies presents for children of those unions a surprisingly encouraging view since many families appeared to lead stable and happy lives and to do their best for the children. The problem that such families usually face is the constant strain in their effort to make the situation resemble the social stereotypes about family. As she explains "generally the truth must be concealed from the neighbours, who can be cruel if they find out, and often the children themselves are uncomfortably aware that some secret is being kept from them. Some families, to conceal their position, move to another district, which means that in times of crisis they may be far away from the friends and relatives to whom they would have turned for help. If the union should break down, the family is in a much less favourable position than a legal family; the mother cannot claim maintenance for herself at all, and for the children only if she has, or can obtain, an affiliation order". p.251. Dr. Christine Cooper "The Illegitimate Child" (Practitioner, April 1955) also observes for unofficial families that in many cases this works well, and is probably the best solution if the mother can cope with running a home. Nevertheless, the situation can give rise to insecurity and anxiety for the children, especially when the union is an unstable one.

73a. Wimperis, The Unmarried Mother, p. 242.

74. See ibid, pp 257, 258; also Soddy, "The Role of Society", in N.C.U.M.C. The Human Rights of those born out of Wedlock, p.68.

75. Wimperis, The Unmarried Mother, p. 258.

76. In National Council for the Unmarried Mother and her Child, "Discussion on Illegitimacy" (Annual Report, London 1947).

77. Cooper, C. "The Illegitimate Child". Practitioner (April, 1955).

78. As cited by Wimperis, The Unmarried Mother, p.255.

79. Wimperis, The Unmarried Mother, p.262.

80. ibid. p.277 et sequ.

81. Titmuss, Essays on the Welfare State, pp 98 - 101.

82. Cmnd 5629 par. 3.8, p.25.

83. Grebenik, E. and Rowntree, Griselda, "Factors Associated with the Age

of Marriage in Britain" in Proceedings of the Royal Society, Series B, Vol. 159, 1964, p.180, as cited in Cmnd 5629 par 3.8 and n.3. p.25.

84. Estimations extracted from the work of Dixon, R.B., "Explaining Cross-Cultural Variations in Age at Marriage and Proportions Never Marrying", Population Studies, 25 (1971), 215 - 233.

85. Apart from the already mentioned provisions on divorce and the impediments of marriage by reason of religious difference and conviction of adulterers Greek Family Law is characterised by a number of retrogressive regulations governing the conjugal relationship. The most striking of all is without doubt the clause laid down in article 1387 which provides the legal superiority of the husband, "The husband is the head of the family and decides on everything which concerns the married life, provided that his decision does not constitute an abuse of right". Moreover, the next article laid down that the wife receives the surname of the husband and article 55 defines her residence as that of the husband. In the same fashion there is the obligation for the parents to provide a dowry for their daughter and the so called "Mucian Presumption" according to which the moveable matrimonial property possessed by either spouse is presumed to belong to the husband and his creditors except that intended for strict personal use of the wife. Further restrictions debar the wife from being involved in commercial activities or remunerative work without the consent of her husband or to take any decision that could run counter to his rights deriving from patria potestas over his children.

86. For discussion on the decrease in the age of first marriage see Titmuss, Essays on the Welfare State, Ch.5. For the rates of young women who had experienced unwed pregnancies in Scotland, see Teper, "The pattern of pregnancy amongst adolescents ..." op. cit.

87. Cmnd 5629, table 3.4, p.27.

87a ibid. table 3.5, p.27.

88. See Dixon, "Explaining Cross-Cultural Variations in Age at Marriage and Proportions never Marrying", op. cit. table I.
The reasons for the small changes for males and the even smaller ones for females lay primarily with the system of education in this country, the high age of majority and the compulsory military service which made it unlikely for a high proportion of adults to be seriously involved with life before their 23rd year.

89. Cmnd. 5629 par. 3.11 and table 3.6 (B), pp 28-30.

90. ibid. par 3.11 p.28 where the Committee cites the work of Grebenik and Rowntree (op. cit. supra in note 83, p. 194) as concluding towards the lack of a close correlation between such factors and the falling age of marriage.

90a. ibid. par 3.2, pp 22-3.

91. ibid. par.5, 3.26 to 3.59 pp 38-60, and par. 3.65 p.62., 3.68, p.63.

92. See for example Wilson, B. "The Teacher's Role : A sociological analysis" British Journal of Sociology 13, (1962) 15-32. For a more recent discussion on the impact of changes in man-woman life styles within the family see Pringle, M., "The changing roles and expectations of men and women" and idem "Patterns of Parenting" in Pringle, M. (ed) A Fairer Future for Children" (London : The MacMillan Press, Ltd., 1980).

93. Fletcher, R. The Family and Marriage (Harmondsworth : Penguin, 1962)

94. Cmnd 5629, p.312 p.23.

95. Children in Changing Families, p.24.

96. Eekelaar Family Security and Family Breakdown, (Harmondsworth : Penguin 1971) pp 36-44.

97. Titmuss, Essays on the Welfare State, pp 98-99.

98. Eekelaar, Family Law and Social Policy, p.39.

99. See Cmnd 5629 Vol 2, pp 166-168; for Greece, Statistics of Justice op. cit. table IV, p.8 and 14, p.30.

100. Children in Changing Families, p.24.

101. See Pringle, A Fairer Future for Children, pp 6-8.

102. The Family and Marriage, op. cit.

103. Titmuss, R.M. The Family, (London : National Council of Social Service, 1953), as cited by Ferri, Growing up in a one-parent family, p.13.

104. ibid. p.13

105. The grounds for divorce are strictly related to the persons of the spouses in both countries as are the regulations governing the construction of marriage. Although the personality and conduct of each spouse has a certain impact on the child rearing role of the other spouse, it has been never recognised as a primary reason for dissolving the conjugal relationship unless it has badly affected the relationship of the spouses as such. See also Titmuss, Essay on the Welfare, p.100.

106. Meteyard, B. "Parenthood v. Marriage" (1980) 10 Family Law, 206.

107. ibid. p. 207.

108. Growing up in a one-parent family, chapter 11.

109. Murch, Mervyn, Justice and Welfare in Divorce (London : Sweet and Maxwell, 1980), i.e. pp 57-59.

110. ibid p. 93.

111. "The Right to a Father", in N.C.U.M.C. The Human Rights of those born out of Wedlock, op. cit. p. 48.

112. "The Right to a Father", in N.C.U.M.C. The Human Rights of those born out of Wedlock, op. cit. p. 54.

113. Supra as in note 111.

114. The observation was first made by Laslett, P. and Oosteveen, K. "Long term trends of Bastardy in England" Population Trends 27 (1973), 255) in relation to the trends in England and tends to have been accepted as a fundamental issue in examining illegitimacy. See for example Cmnd 5629 par. 3.60, p.60; also Eekelaar, Family Law and Social Policy, pp 14-19.

115. Gill, Illegitimacy, Sexuality and the Status of Women, pp 3-5; Wimperis, The Unmarried Mother, p.24.

116. Numbers taken from Cmnd 5629 table 3.35 page 60.

116a. Clive, "Aspects of Illegitimacy," op. cit. p.233.

117. Wood-Risatakis, Health and Welfare Services in Greece, p.125.

118. ibid. p.125; also Wimperis, The Unmarried Mother, p. 24 et seq.: Michaelopoulou "The Children of the Bad Luck" op. cit.

119. Gill, Illegitimacy, Sexuality and the Status of Woman, pp 177-179. p.178. In actual numbers the legitimate births declined from 99,314 in 1962 to 61,629 in 1975. Also in 1962 for 11,000 women the birth had been preceded by 4 or more deliveries. The corresponding number in 1975 was just over 210 women. See Teper, "The Pattern of Pregnancy among Adolescents and Teenagers in Scotland", op. cit. p.230.

120. Children in Changing Families, p.24.

121. Hartley, Illegitimacy, (Berkeley : University of California Press, 1975).

122. Gill, Illegitimacy, Sexuality and the Status of Women, 10-11, 174-176, 177-179.

123. van der Tak, Jean, Abortion, Fertility and Changing Leglislation : an international review (Massachusetts : D.C. Heath and Company, 1974) p 23 Table 2.8, p.77.

124. Ministry of Coordination, Population of Greece: Progress Speculations (Athens : Centre of Planning and Economical Research, 1978).

125. See National Statistic Service, "Natural Movement in the Population in Greece", Year Books for 1960 - 1970 (Athens)

126. c.f. sect. 1 of the Abortion Act 1967 and article 304 of the Penal Code. Also infra.

127. Gill, Illegitimacy, Sexuality and the Status of Women, pp 303-306.

128. ibid. p.304.

129. Section 1 (II) (2) of the Abortion Act 1967; Hunter, Eveline, Scottish Woman's Place : A Practical Guide and Critical Comment on Women's Rights in Scotland (Edinburgh : E.U.S.P.B., 1978), pp 123-4.

130. Gill, Illegitimacy, Sexuality and the Status of Women, pp. 309-310.

130a. Hunter, Scottish Woman's Place, p.125.

131. Article 304 (5) of the Penal Code.

132. van der Tak, Abortion, Fertility and Changing Legislation, p.77. The author, referring to the work of Valaoras, (V. "The epidemiology of abortion in Greece" a paper presented at the international Planned Parenthood Federation Sixth Conference of the European and Near East Region, Budapest, Spetember 1969), states that a 1966 national survey of 0.5 per cent of fertile couples in the country disclosed 1 abortion to 5 live births in villages and 1 to 1 in Athens. Forty per cent of surveyed women used abortion as the preferred method of family limitation, in contrast to roughly a third using coitus interruptus and another third

using other traditional methods or no contraception. See also for experts opinions and estimations in Michalacopoulou N., "After the Revolution of Sex, the Revolution of Abortions", Journal Epikaira (1975), 40-44.

133. Risatakis, Health and Welfare Services in Greece, p.126, referring to the estimations made by Valaoras (see supra note 132)

134. Danai Chatzoglou, "Reform of the Family Law : a hidden aspect of the problem", Journal Politis, no 33, (March/April 1980).

135. Gill, Illegitimacy, Sexuality and the Status of Women, p.336. Friedmann, Law in a Changing Society, pp 237-8. Michalopoulou, "The Children of Bad Luck" op. cit. p. 45. idem "After the revolution of sex the revolution of abortions", op. cit. pp 41-42.

136. Michalopoulou, "After the revolution of sex, the revolution of abortions" op. cit. p.40.

137. see Young, M. Out of Wedlock, (New York, McGraw Hill 1954), Wimperis, The Unmarried Mother, op. cit.

138. See Wynn, M. Fatherless Families (London : Michael Joseph 1964) Kriesberg, L. Mothers in Poverty (Chicago : Aldine, 1970).

139. Gill, Illegitimacy, Sexuality and the Status of Women, pp 237 - 239.

140. Lambert and Streather, Children in Changing Families, p.30. et. seq.

141. Gill, Illegitimacy, Sexuality and the Status of Women, p302, 239-242.

142. Ryan, Blaming the Victim; Hartley, Illegitimacy; Gill, Illegitimacy, Sexuality and the Status of Women; Goode, W.J. The Family, (Englewood Cliffs, N.J. : Prentice Hill 1964)

143. Cmnd 5629 par. 3.60 p.60; Eekelaar, Family Security and Family Breakdown, pp 30-31.

144. Eekelaar, Family Law and Social Policy, p.44 ; Gill, Illegitimacy, Sexuality and the Status of Women, p.300. 302-313.

145. W.P. No. 74, part III, par. 3.1 - 3.7, i.e. 3.2

146. This change of pattern should not be understood only as an increase of the incidences among unmarried girls. As explained below due to altering attitudes towards sex there is an increase but this increase is partly artificial. Due to recent changes in divorce laws and in the attitudes of married partners the amount of separated women who become illegitimately pregnant has been reduced substantially.

147. Wimperis, The Unmarried Mother, in a survey in a midland town reports 40 per cent of all illegitimate children to be born in a relatively stable union. Eekelaar, (Family Law and Social Policy, p.18) however, states that the Perinatal Mortality Survey, on which the 1958 Cohort Study is based, revealed that 61 per cent of mothers of illegitimate children were single; of these, 86 per cent were not cohabiting. (Crellin, Eileen, Pringle, M.L. and West, P., Born Illegitimate London : National Foundation for Educational Research in England and Wales, 1971, p.24 and Table A2.1.) But of all mothers only 17 per cent were cohabiting. However, Gill, (Illegitimacy, Sexuality and the Status of Women, p.295) finds that almost one third of all illegitimates had not experienced episodes of single

parentage.

148. Gill, Illegitimacy, Sexuality and the Status of Women, pp 10-11, from data from Aberdeen, indicates that since 1958 when married, widowed or separated women contributed a 50 per cent of all illegitimate births there is a decline in the incidents to 40 per cent in 1963 and 28 per cent in 1966. The cases among unmarried mothers on the other hand start to increase. Teper "The pattern of pregnancy among adolescents and teenagers in Scotland", op. cit. states that teenagers alone had contributed in 1975, 36 per cent of illegitimate births in contrast to 22 per cent in 1962. As regards the rate among women aged 20-24 she observes this to show a definite decrease since 1972, p.231.

149. Illsey, R. and Gill, D.G. "Changing trends in Illegitimacy" 2, (1968) Social Science and Medicine, 415.

150. Gill, Illegitimacy, Sexuality and the Status of Women, Ch. 1.

151. See authors cited supra in notes 132-3.

152. Teper, "The pattern of pregnancy among adolescents and teenagers in Scotland" op. cit. p.229.

153. Illegitimacy, Sexuality and the Status of Women as cited by Lambert and Streather, Children in Changing Families, p.33.

154. At least this seems to be the fundamental reason for removing all punitive sanctions on adultery in Scotland and introducing the general and flexible ground of "irretrievable breakdown of marriage" as the sole ground for divorce. Such change is strongly supported by public opinion in Greece, see Akrita, El. "Greeks, Adultery and the 'Authomatic (divorce)'" op. cit. See also for the change in public attitude, Gill, Illegitimacy, Sexuality, and the Status of Women, p.197.

155. See Kilbrandon Report. Cmnd. 3223 par. 5, p. 6. Majello, U. "The Rights of Children born outside marriage and the Principle of Equality in Law" in Bates (ed) The Child and the Law (N.Y. : Oceana Publications, 1976) Vol 2 497 - 506, i.e. 498, 499.

156. The dangers stemming from lack of parental understanding has frequently attracted the attention of doctors and sociologists, Furstenberg, F.F. ("Birth Control Experience among Pregnant Adolescents : the process of unplanned parenthood", Social Problems, 19 (1971) 192-203) points out that pregnancy often is a function of the unavailability of contraceptives and that well meaning mothers who oppose premarital sex hoping to protect their daughters against pregnancy may actually be making them more vulnerable to it. The same concern is expressed by Professor Kaskavelis. A. Koutifari, M.P. for the attitudes of parents and the policy on contraception in Greece : Michalacopoulou "After the revolution of sex, the revolution of abortions", op. cit. p.40, 41-42.

157. Gill, Illegitimacy, Sexuality and the Status of Women, pp 50-55, 165-174. Leslie, The Family in Social Context, pp 363 - 382.

158. The Family in Social Context, pp 363-4.

159. Alfred C. Kinsey, Wardell B. Pomeroy and Clyde E. Martin, Sexual Behaviour in the Human Male, (Philadelphia : W. B. Saunders Company, 1948), as cited in Lisley, ibid, p.363.

160. Alfred C. Kinsey, Wardell B. Pomeroy, Clyde E. Martin, and Paul H. Gebhard, Sexual Behaviour of the Human Female, (Philadelphia : W.G. Saunders Company, 1953), as cited in Lisley, ibid p.364.

161. ibid, p.363.

162. ibid. p.364.

163. ibid. p.371.

164. Teper, "The Pattern of Pregnancy amongst Adolescents and Teenagers in Scotland", op. cit. pp 230-231.

165. ibid pp 232-3.

166. The problems of this kind of measurement have been discussed in detail by Pearson, with regard to minor unmarried girls. (Pearson, J.F. "Social and Psychological aspects of extra-marital first conceptions" Journal of Biosocial Science 5, (1973) 453-496.)

167. Gill, Illegitimacy, Sexuality and the Status of Women, i.e. p.19. Michalacopoulou, "After the revolution of sex, the revolution of abortions", op. cit.

168. The difference is partly artificial because women get married at a lower age than men (see supra). To a certain extent, however, it is true because of the remaining restraints towards sex in feminine socialization.

169. Gill, Illegitimacy, Sexuality and the Status of Women, p.298-9.

170. Hartley, Shirley M. 1966. "The Amazing Rise of Illegitimacy in Great Britain" 44 (1966), Social Forces : 533.

171. Gill, Illegitimacy, Sexuality and the Status of Women, pp. 189-199, 305

172. bidi. p.305.

173. The most striking example of this conflict appeared in the case Christine Main or Bell v. Robert McCurdy (Ayr Sheriff Court A12/78) where Sheriff Neil Gow tried to introduce the concept of contributory negligence to affiliation cases. In his interlocutor (unreported) of 2nd August 1979 he says : "It has never been the practice to table a plea of contributory negligence in a case such as this but I think the proved facts allow room for a similar argument along somewhat similar lines. The pursuer was having sexual intercourse quite regularly with the defender from March 1976 but she took no contraceptive precautions although she appears to have known about the Pill. It appears that she was more afraid of her mother catching her on the Pill, than of actually falling pregnant. The Pill appeared to have been available to her, because during the summer her mother found an unopened packet of contraceptive pills in her bedroom. In my opinion, in this modern day and age when a young girl knows about contraception and has a supply of contraceptive pills available for her own use, and readily embarks on a regular course of sexual relations with her boyfriend, she must be taken in law to have voluntarily assumed the risk of falling pregnant and can only have herself largely to blame if that unfortunate event occurs subsequently." As cited by Mathie, Alistair D. "Anomalies in Aliment" 1980, S.L.T. 61 at p.64 (underlining mine)

174. Eekelaar, Family Security and Family Breakdown, pp 36-7.

175. Goode, W.J. After Divorce, (Free Press, 1956), Republished as Women in Divorce (Free Press, 1965).

176. Locke, H.J. Predicting Adjustment in Marriage : A Comparison of a Divorced and a Happily Married Group (Holt, Rinehart S. Winston, 1951).

177. Burgess, E.W. and Cottrell, L.S. Predicting Success and Failure in Marriage (Prentice-Hall, 1939).

178. Terman, L.M. Psychological Factors in Marital Happiness, (McGraw-Hill, 1938).

179. Eekelaar. Family Security and Family Breakdown, p.37.

180. Gill, Illegitimacy, Sexuality and the Status of Women, p.305. Leslie, The Family in Social Context, p.384.

181. Kantner, J.F. and Zelnik, Melvin, "Sexual Experience of Young Unmarried Women in the United States", Family Planning Perspectives, 4 (1972), p.9-10. as cited in Leslie, The Family in Social Context p 372.

182. ibid. p.372.

183. Gill, Illegitimacy, Sexuality and the Status of Women, p.305.

183a. A different view, however, is given by studies particularly concerned with illegitimacy in the last two centuries in Scotland. Though they confirm premarital intercourse to be the norm, nevertheless they decline to accept the intention to marry ever present in such relationships. Commonly marriage followed pregnancies but, in a considerable number of cases, as a forced marriage. The destruction and mobility of the peasantry, the mode of housing farm workers, immigration and other factors behind the demographic changes of that time are considered to leave little option to plan a permanent partnership. See for example, Carter, "Illegitimate Births and Illegitimate Inferences", op. cit.; Smout, T.C. "Illegitimacy : A Reply" in Scottish Journal of Sociology, 2 (1977-8) 97-104; Roberts, A. "Illegitimacy in Catholic Upper Banffshire" in Scottish Journal of Sociology 3 (1978-9) : 213-224.

184. ibid. p.303, 304. Also Soddy, "The Role of Society" in N.C.U.M.C., The Human Rights of those born out of wedlock, p.67.

185. Gill, Illegitimacy, Sexuality and the Status of Women, ch. III, IV and pp 306-307.

186. Christensen, H.T. "Cultural Relativism and Premarital Sex Norms" 25, (1960) American Sociological Review, 31, as cited in Eekelaar, Family Security and Family Breakdown, p.37.

187. ibid p.37.

188. This is the obvious conclusion taking into consideration the realistic approach of the younger generation towards sex, while they have a number of reservations about the functioning of the one parent family.

189. L. Blom-Cooper "The Right to a Father" in The Human Rights of those born out of wedlock, p.47. Clive "Aspects of Illegitimacy", op. cit. p.236, 237.

190. See for example Gill, Illegitimacy, Sexuality and the Status of Women, p.295.

191. Kriesberg, L. Mothers in Poverty, (Chicago : Aldine, 1970)

192. Sprey, J. 'The Study of Single Parenthood : Some methodological considerations" in Schlesinger, B. The One Parent Family : Perspectives and Annotated Bibliography (Toronto University Press, 1969)

193. "Rights of Women", Papers 1979. Conference on Illegitimacy, as cited by Deech, R. "The Reform of Illegitimacy Law" (1980) 10 Family Law 101, p.102.

194. Chester, R. "Divorce Laws and the One-Parent Family", Concern 20 (1976) 24-28.

195. Children in Changing Families, p.28.

196. Blom-Cooper "The Right to a Father" in The Human Rights of those born out of Wedlock, p.48.

197. Eekelaar. Family Law and Social Policy, p.44, 46.

198. Roilos (-Koumantos), Family Law, pp 277-8 states that in contrast to the 'major moral certainty' that a child conceived in wedlock belongs to the husband, the certainty is far less in sexual relations out of wedlock mainly because it is rarely believed that an unmarried woman once involved in intercourse has been so only with the father of the child (p.298 and not. 1). This stereotype of course points to the pathological situations and its validity has been frequently challenged in sociological studies. On the basis of this image the argument is brought forward that unless the protection of illegitimate children is relative and inferior to that of legitimate there will always be the fear of extortunate litigations and scandalous trials. To support the argument he refers to the story of the Rule in French law creditur virgini se praegnantem asserenti, which became the cause of considerable blackmail, and in his opinion, the principle reason for prohibitng the recognition of paternity in the Napoleonic Code - (p 297, 298 and note (2)). The Report of the Russell Committee on the Law of Succession in Relation to Illegitimate Persons (Cmnd. 3051), though in favour of giving inheritance rights to illegitimate children, nevertheless maintained similar fears for the possibility of fraudulent declarations on the paternity of the child (see Meston "Bastards in the Law of Succession", op. cit. i.e. p.199.

198a As Arnholm C.J. "The New Norwegian Legislation Relating to Children", (1959) 3, Scandinavian Studies in Law 9-20, provides, the rule of the Code of Napoleon forbidding attempts to establish the paternity of illegitimate children ("la recherche de la paternite est inderdite") was motivated by a sociological consideration, viz. that society had no interest in establishing the descent of the child ("L'Etat n' a aucun interet a ce que la filiation des enfants naturels soit constatee ") p.15.

199. see for example authors supra in notes (193) and (196) also Eekelaar, Family Law and Social Policy, pp 10-11. Idem Family Security and Family Breakdown, pp 211-215. Mr. Justice Scarman in The Human Rights of those born out of Wedlock, pp 1-5, i.e. p 4, 5. Malmstrom, A. "Children's Welfare in Family Law" (1957) 1 Scandinavian Studies in Law 123-136; Church of England, Fatherless by Law, Chapter 4.

200. Krause, "The Creation of Relationships" op. cit. p.9, 10-11. Arnholm "The New Norwegian Legislation", op cit. p.12. which records a decrease from 6-7 per cent in the 1930s to about 4 per cent in the 1950s.

201. Clive, "Aspects of Illegitimacy," op. cit. 236.

201a. Sackville, R. and Lanter A. "The Disabilities of Illegitimate Children in Australia : A preliminary analysis" in (1970) 44, Australian Law Journal 5 - 13, 51-64 S.P. no 74, par 3.17 pp 29, 30; Clive, "Aspects of Illegitimacy", op. cit. p.236; Eekelaar, Family Law and Social Policy, p.263, for details on the New Zealand Act pp 263-265.

202. Tzouganatou Gasparinatou, The Judicial Recognition of Paternity, p.17, 382-3.

203. ibid. p. 16, for details on the reform, pp 374-7.

204. ibid. p.16.

205. Krause, The Creation of Relationships, p. 11 and note 46.

206. ibid. p. 12

207. ibid, P.11 and notes (51) and (52).

208. Bolivia (art. 195) Guatemala (art. 86(2)), Uraguay, Panama, Equador (art.89) in Krause, "The Creation of Relationships", op. cit. p.11.

209. Art. 58, as amended in 1961: In Krause supra p.11.

210. Art. 42, in Krause, supra, p.11.

211. Civil Code Revision Office, Report on the Quebec Civil Code, Vol 2. (Quebec : Editeur official, 1977). Vol II, par.I, p.118.

212. W.P. no 74, 1979.

213. Clive, "Aspects of Illegitimacy, op. cit. p.236.

214. Cmnd. 3051. There is, however, strong opposition i.e. from legal quarters. See Meston, "Bastards in the Law of Succession", op. cit. 203.

215. ibid, p.19.

216. "Bastards in the Law of Succession", op. cit. pp 197-8.

217. "Aspects of Illegitimacy", op. cit. 234, see also conclusion in p.237.

218. Stuart, "Cohabitation : the legal consequences", op. cit. p.52.

219. Memorandum No 22, proposition no 6, par. 2.18, pp 12-3.

220. Tzouganatou Gasparinatou, The Judicial Recognition of Paternity, p 11,20,21. Michaelidis Nouaros "The Reformation of Family Law", op. cit. p.122. Kostaras "About the Reform needed to be Introduced", p.317, A. Gazis, "The Necessary Reform of the Family Law" (1976), 23 No V. 1025.

221. See supra in Nouaros, Kostaras and Gazis. Nouaros, however, suggests the following improvements in the position of illegitimate children. He proposes reciprocity in alimentary claims and succession: the aliment for the judicially recognised child to be analogous to the social position of both parents which removes the class dichotomy dominating the aliment due, with extension of the period that the mother should receive

aliment if she became unemployed due to pregnancy or ante or post natal illness; The repealing of article 1463 par. 2. so that the child will become a relative to the father: the reform of and making more realistic the exceptio plurium concubentium.

222. See articles 82-93 of the Bill.

223. Nouaros, "The Reformation of Family Law", op cit. p.123.
Gazis, "The Necessary Reform of Family Law", op. cit. p.1029.

224. Gazis, ibid. He suggests a reformed reenactment of the art. 27(2) of the L.D. 14.7.1926 so that the child to be judicially legitimated after the death of the father is subject to the following conditions :
The father was single at the time of conception, was cohabiting with the mother to whom he has given a promise of marriage, and had died or has been incapacitated before the submission of the application or the celebration of marriage.

225. See infra chapter 5.

226. See supra chapter 1 subchapter B

227. See supra for conditions in note 143 and article 1363 of the Greek Civil Code.

228. W.P. No 74, pars. 3.8 - 3.16 pp 23-29.

229. ibid. par. 3.8, p.23

230. ibid. par. 3.9, pp 23-24.

231. ibid. par. 3.11, p.25.

232. id.

233. ibid. p.3.12 and 3.13, pp 25-7.

234. ibid. par 2.10, p.13.

235. ibid. par. 3.14, p.27.

236. ibid par 3.15, p.27.

237. ibid. par. 3.15 p. 28

238. ibid. par. 3.16 pp 28-29.

CHAPTER 3

1. Smith, T.B. A Short Commentary on the Law of Scotland , (Edinburgh 1962), p.369.

2. Adoption of Children (Scotland) Act, 1959 sect. 8(C); Sect. 18 (7) of the Adoption (Scotland) Act 1978. Section 2(1) of the Illegitimate Children (Scotland) Act 1930. See also infra in chapters 6 and 7.

3. Silver v. Walker, 1938 S.C. 595; see also infra on judicial recognition of paternity.

4. Art. 618 of the Code of Civil Procedure. See also Tzouganatou Gasparinatou, The Judicial Recognition of Paternity, p.215, 259-261, 326-327; Tousis, Family Law, Vol. B, pp 145-146, 164.

5. Appeal Court of Athens 2613/1970, Armen 25, 143; 1109/1970. Armen, 24 : 191, AP 146/1951, FEN 17 : 520.

6. Art. 1537 of the Greek Civil Code.

7. c.f. Art 1555 with 1545 of the Greek Civil Code.

8. As Lord Justice-Clerk (Inglis) provides in Corrie v. Adair (1860 22 D. 897) the obligation of the father to aliment his child arises "entirely ex jure naturali and is one of those natural obligations to which the municipal law of this country has seen proper to give legal effect ..." p.900. In Greece this has been the matter of a dispute among scholars i.e. with regard to the creative or probative nature of the act of acknowledgement. Peculiarities of the rights and duties in illegitimacy led a number of scholars to accept the order as creative of a relationship. Courts with an uninterrupted continuity of decision have acknowledged the recognizant nature of the order primarily of the blood tie existing between the parent and child. For detailed discussion, see Tzouganatou Gasparinatou, The Judicial Recognition of Paternity, pp 210-217, and authorities cited there. As Lasok D., "The Legal Status of the Putative Father" (1968) 17 International Comp. Law Quarterly 634 observes with reference to continental systems (which also applies to the two jurisdictions) with recognition of paternity " ... the biological link or the tie of blood is given a legal significance. In other words it becomes the main objective of proof". p.644. The same element is the hidden objective of a declarator of paternity or bastardy with the distinction that the marital status of the parents differentiates the legal force of the order.

9. This implies a change of principle so that the act establishing paternity will have the same consequence as a marriage certificate in relation to the paternity of the child; see also Meteyard, 'Parenthood v. Marriage' op. cit.; For the opinion of the Church of England on the matter see Fatherless by Law, par. 46, p.23.

10. W.P. No 74, par. 9.18, 9.19, pp 113-4.

11. For the significance of such distinction see Lasok, "The Legal Status of the Putative Father", op. cit. pp644-5.

12. Malmstrom "Children's Welfare in family law", op. cit. p.132.

13. W.P. no 74, Proposition no 54 and par. 9.40-9.41, pp 126-7.

14. See supra note 8.

15. The exceptio plurium concubentium must not be seen as a de jure alienation of the right since neither of the mother's paramours is debarred from acknowledging the child. It rather points to the impossibility of establishing the paternity of the child.

16. Lasok, "The Status of the Putative Father", op. cit. p.646. He nevertheless provides a general distinction between factual physical relations and legal relations which might, though need not, be comprised in a notion of parental authority or custody. The former as indicated is the right of the citizen, the latter depends on social policy, p.648.

17. Neville Turner, J. Improving the lot of children born outside marriage - a comparison of three recent reforms : England, New Zealand and West Germany, (London : National Council for One Parent Families, 1973), pp 4-5.

18. C.C.R.O. Report on the Quebec Civil Code, Vol I, p.107 and Vol. II part 1, p.186.

19. Roy v. Purman 1958, S.C. 334; Art. 1555 of the Greek Civil Code.

20. See supra in Chapter one.

20a. See W.P. no 74, par. 9.12, p.109.

21. Article 266 of the Draft of the Quebec Civil Code.

22. Roilos (-Koumantos), Family Law, art. 1555 (12) p.396. Tzouganatou Gasparinatou, The Judicial Recognition of Paternity pp 87-90; AP 648/1970, No V 19:169. Though cohabitation in itself does not have any legal status for the consorts or the child the regular share of the same dwellings by the consorts as a result of the existence of a stable relationship between them invoked the results of the complete judicial recognition for the child. AP 173/1962 (Plerum) No V, 15 887, Appeal Court of Athens 133/1970 Armen. 24 : 444 : Contra Balis, Family Law, para 168; AP 13/1933, Themis, 44 : 156, supporting continuous uninterrupted cohabitation.

23. W.P. No 74, par 9.12, 9.13, pp 108-110.

24. ibid. p. 109.

25. The results of voluntary acknowledgement do not rest ipso jure in the order on proof of any of the special circumstances referred to in the Code but have to be declared in the decision of the court. Tzouganatou-Gasparinatou, The Judicial Recognition of Paternity, pp 273-4.

25a. A betrothal in existence, not later consummated AP 268/1966, No. V. 14 : 1132.

26. In the previous law simple promises of marriage were sufficient (art. 15 of the L.D. 14.7.1926.) The Civil Code had tightened up the conditions requiring formal engagement producing fiscal effects according to articles 1346-1369 of the Greek Civil Code. AP 912/1972, Vol B, 21, 352. This is to say promise of marriage by persons having legal capacity of marrying, consent of the parties and lack of marriage impediment. Tzouganatou Gasparinatou, The Judicial Recognition of Paternity, pp 57-59.

27. Articles 336, 327, 328 and 339 of the Penal Code.

28. See for detailed analysis in Tzouganatou Gasparinatou, The Judicial Recognition of Paternity, pp 62-79.

29. See supra and note 22.

30. According to article 1465 (2) of the Greek Civil Code. It may not be essential for the mother to cohabit with the father or to be dependent on him throughout the entire period of the probable date of conception (300 - 180 days prior to birth) - Roilos (-Koumantos), Family Law, 1555 (3) p.397. Scientific evidence proving the duration of a particular pregnancy may be relevant in deciding whether conception took place in cohabitation, or other states of dependency.

31. Arts. 1601, legal guardian; 1599 testamentary guardian; Guardian ad hoc 1602, 1662. Also the co-guardian of article 1597, the substitute guardian 1606, of the temporary guardian 1603(2) and the guardian of the interdicted (1686). Custody under article 1524 of the Greek Civil Code, or 1628, 1629, 1663 (Custodian appointed by the court) and 1503, 1505, 1806 on divorce or separation. Dependency according to Michaelidis Nouaros, Family Law, (University Textbook) par. 203, p.288, must be understood to be legal, financial or personal, on a person having power over the mother or legal or moral influence. It is irrelevant if the mother agreed or consented to the act due to the increased responsibilities and the moral nature of the duties of the custodian or guardian. See Tzouganatou Gasparinatou, The Judicial Recognition of Paternity, pp 82-3.

31a. See WP. no 74, par. 9.9 - 9.11, pp 107-8. Similarly the draft of the Quebec C.C. see art 266.

31b. Neville Turner, Improving the Lot of Children, op cit. p.24.

32. Article 276 reads as follows : "Any means of evidence which can establish that the husband or the de facto consort is not the father of the child is admissible", and article 288 "Any means of evidence is admissible to contest an action concerning filiation".

33. W.P. No 74, p.108 See also supra in Chapter 1.

34. The method of acknowledging a family relationship by unilateral declaration without the cooperation of the public authority is unknown to the two jurisdictions. The status of persons comes under public order so that the act needs to be of a public nature (see comments on art. 272 of the Quebec C.C. Report on the Quebec Civil Code, op. cit. Vol II, (1) pp186-7.) According tothe definition given by Colin, A. (La Protection de la descendance illegitime" in Revue Trimestrielle (1902), p 272) voluntary acknowledgement is the formal legal declaration according to which the acknowledging father declares the child to be his from an extra marital relationship as well as that he wishes the legal consequences related to the act of acknowledgement to become effective in the relationship. This approach seems to prevail in French and Belgian Jurisprudence while in Italy it is seen as a "confession" of paternity. see Roilos (-Koumantos) Family Law, 1532 (4) p.311. As the legal basis to provide parental rights and obligations is also seen by Lasok "The Legal Status of the Putative Father", op. cit. p.646.

35. The problem faced here is the counterpart of that with evidence of primary fact. The issue there was how to sustain formality of the relationship in order to draw an inference of paternity by applying the presumption of conception. With the act of acknowledgement the father invokes the presumption against him and what is left in doubt is whether he

had actually had intercourse with the mother at the relevant time.

36. See "The Illegitimate Child, 1969 S.L.T., 93; Clive "Aspects of Illegitimacy", pp 236-7.

37. Lasok, "The Legal Status of the Putative Father", op. cit. p 646. In his view acknowledgement in modern practice serves as the less painful and certainly more effective alternative to affiliation proceedings. The method has been much favoured by the Church of England (Fatherless by Law, Chapter 4, i.e.par 36), and has been suggested by a number of current commentators concerned with the abolition of the status of illegitimacy in common law jurisdictions, see for example, Samuels, "Abolish Illegitimacy" op. cit. p.133; Levin "Reforming the Illegitimacy Laws", op cit. p.37.

38. Oncken's J.F. v. Reimers (1892) 19 R.519. Robbie v. Dawes, 1924 S.C. 749.

39. Walker, Principles of Scottish Private Law, p.320.

40. "Registration of Births etc. : A modern code" 1965 S.L.T. 197, pp 198-9.

41. ibid. p.199.

42. W.P. no 74, par 9.14 p.111; the same approach is adopted in the draft of the Quebec Civil Code, c.f. articles 266 and 282.

43. W.P. no 74, par. 9.24 p.117

44. Clive, "Aspects of Illegitimacy", op. cit. p.236.

45. ibid. p.236.

46. Cmnd. 3051, par. 42, 43.

47. Meston "Bastards in the Law of Succession", op cit. p.199. For criticism on the difficulties and the recommendations made by the Committee for the proof of paternity see Sackville and Lanter, "The Disabilities of Illegitimate Children in Australia", op. cit. pp60-1.

48. See for example for discontinuation of aliment, MacKenzie v. Scott 1980 S.L.T. (Notes) 9. Supplementary Benefit Commission v. Black 1968 S.L.T. (Sh Ct) 90; For the Sheriff Court practice see Sheriff Courts (Scotland) Act, (1907), Sched. I rule 82. McDonald v. Ross, 1929 S.C. 240; Silver v. Walker, 1938 S.C. 595; See also infra under IV and V.

49. See for a similar approach in Samuels, "Abolish illegitimacy", op cit. p.133; also Levin "Reforming the illegitimacy laws", op cit. p.37.

50. See W.P. no 74, par. 9.14, p 110.

51. See Levin "Reforming the Illegitimacy Laws, p.37. Objections against this proposal are manifold, mainly arising from concern for the mother. See Deech, "The Reform of Illegitimacy Law" p 103; Hayes, M. "Reports of Committees - Law Commission Working Paper No 74 : Illegitimacy" (1980) 43 Modern Law Review, 299-306. See also N.C.J.M.C. The Human Rights of Those Born out of Wedlock, per Dr. Olive Stone pp 57-8, also anonymous per p. 63.
Further objections have been expressed by the Russell Committee (Cmnd 3051) over fears for fraudulent declarations by men to establish a claim against the property of the child.

52. According to the Statistics of Justice, for the year 1978 there were

submitted 52 petitions for judicial recognition of paternity of which the court accepted 31, p.27, table 9. Voluntary acknowledgement of paternity was also recognised in the pre-code law. Article 7 of the L.D. 1926 provided that "The illegitimate child may be acknowledged by his father, and if he is dead, or lacks capacity due to incurable mental illness, by the parental grandfather".

52a. Opinion of Attorney General of AP 6/1966, No.V. 14 : 455; Opinion of Public Prosecutor of Magistrates of Thessaloniki 5/1971, No.V. 20 : 142; City Court of Athens, 5034/1946, Themis 57: 365; Roilos (-Koumantos), Family Law, 1532 (5), p 312; Spyridakis, Civil Code, Vol 4, 1532 (3) and 1540 (1).

53. See City Court of Athens 5034/1946, Themis 57: 365 and comments by M. Arsenis in this decision.

54. Tousis, Family Law, Vol V, p.144 and note (4). Roilos (-Koumantos), Family Law, 1532 (6), pp 312-3.

55. Roilos (-Koumantos), Family Law, 1532 (6), p.314. contra Michaelidis Nouaros, Family Law, (University Textbook), p.281. Balis, Family Law, par. 161, 5.

56. Roilos (-Koumantos) Family Law, 1532 (6), p.312.

57. Art. 1533 of the Greek Civil Code. The reasons for requiring formality according to Roilos (-Koumantos), (ibid 1533/7a, pp 319-20) are to invest "major guarantees" in the act, to provide the child with safer proof as well as to be distinguished from judicial or extra judicial admissions by the father which have only evidential value.

58. Art. 1534 (2) of the Greek Civil Code, Tousis, Family Law, Vol B p.149, and note (20).

59. Vallindas, Family Law, pp 154-5; Roilos (-Koumantos), Family Law, 1533 (7) p.320.

60. There is no need for the use of formal expressions in the acknowledging deed or will. However the intention to acknowledge the child must be explicit: AP 101/1958, Neon Dikaion 14: 457; AP 1329/1974 No. V 23:859; Roilos (-Koumantos), Family Law, 1533, (8) (a).

61. Tousis, Family Law, Vol B p 149. Michaelidis Nouaros, Family Law (University Textbook), p.283.

62. There is no restriction on the right of the father to acknowledge the child nor does its exercise depend upon any terms or conditions. His wife's consent is not needed when he is married : Appeal Court of Thessaloniki 187/1957, No. V, 5:683; nor is acceptance of acknowledgement by the child necessary : AP 101/1958 E.E.N. 25 : 601; AP 1329/1974 Nom. V. 23 : 859. In accord with the view that paternal acknowledgement merely declares and does not create paternity, voluntary acknowledgement, by being free of terms and conditions, presents characteristics inherent to the presumption of conception in marriage. It differs, however, in the sense that in legitimacy the cause for raising thepresumption pre-dates birth (marriage certificate) whereas in acknowledgement it is developed later.

63. The incapacitation required is in its factual sense. Therefore, the right transmits to the paternal grandfather even though the father has not been formally incapacitated : Spyridakis, Civil Code Vol 4, 1532 (5)

Roilos (-Koumantos), Family Law, 1532 (10) p317; Tousis, Family Law, Vol B, p.143 and note 1(b).

64. The grounds are inclusive. Thus analogy is prohibited-Spyridakis, Civil Code, 1532, (6).

65. Article 1534 of the Greek Civil Code.

66. Tousis, Family Law, Vol. B, p.143.

67. ibid. Vol B, p.148; Roilos (-Koumantos), Family Law, 1534, (6), p.322.

68. ibid. 1534 (6), (7), pp 322-324.

69. Vallindas, Family Law, p 185; Balis, Family Law, para 161 (7); City Court of Karditsa 6/1976, E.E.N. 43 : 496. Appeal Court of Thessaloniki 336/1937, E.E.N. 4 : 793.

70. See supra in note 62; Also Tousis, Family Law, Vol B, p 145, 147.

71. Art. 1535 of the Greek Civil Code.

72. Appeal Court of Athens 236/1949 E.E.N. 17 : 101; Tousis, Family Law Vol. B. pp 150-1.

73. Spyridakis, Civil Code, 1535 (1); Roilos (-Koumantos), Family Law, 1535 (9), p.325.

74. The contestant has to prove that intercourse between the acknowledging father and the mother did not take place at the probable date of conception. The use of blood tests is admissible. See Michaelidis Nouaros "The proof of paternity using blood test, according to our law". (1966), 22, E.E.N. 289. Also Faramanos, G. "The analysis of blood as evidence in civil litigations", (1964) 12, No. V. 65-70. For the objectives of proof in general see Tousis, Family Law, Vol B, pp 152-3.

75. Under the same procedure as in disavowal of paternity of articles 615-622 of the Code of Civil procedure. See Chapter 1 C. supra.

76. Article 1536 of the Greek Civil Code.

77. Article 127 of the Greek Civil Code.

78. See C.C.R.O. Report on the Quebec Civil Code Vol II, Part 1, pp 186-7.

79. ibid. p.187.

80. This can be evidence showing uninterrupted possession of status upon any adequate combination of facts indicating the truthfulness of the acknowledged relationship, i.e. the presentation of the child to the paternal relatives; evidence indicating involvement of the father in less serious aspects of the child's life (visits to his school, hospital, etc.)

81. W.P. no 74, par. 9.33 pp 122-3.

82. Fatherless by Law, Chapter 2, i.e. pars. 16, 17, pp 8-10.

83. See per Lord Scarman, per L. Blom Cooper and Dr. R. Williams, in The human rights of those born out of wedlock, p.3. 47-8, 52-56 respectively; "The Illegitimate Child" op. cit. p.93.

See also comments by Maidment, Susan "The Marckx Case" (1979) 9 Family Law, 228.; Samuels "Abolish illegitimacy", op cit. p.133; Levin, "Reforming the Illegitimacy Laws" op. cit., p.38; Meteyard, "Parenthood v. Marriage", op. cit. p.208.

84. See for example supra Samuels, p.133- Levin, p.37.

85. Cmnd. 3051 par 36-44, i.e. par 40; See for discussion Meston "Bastards in the Law of Succession", op cit. p.199.

86. ibid, p.199

87. W.P. No 64, p.9.33, p.122.

88. Meston "Bastards in the Law of Succession", op. cit. p.199.

89. W.P. No. 74, pars. 9.33-9.38, pp 122-125.

90. "Abolish Illegitimacy", op. cit. p.132.

91. W.P. no 74, par. 2.27, pp 118-9.

92. ibid. par 9.28, p.119 and 9.40 p.126.

93. ibid. par. 9.28, p.119

93a. The point was first raised by Arnhol, "Parent and Children", op.cit. p.16 and is further discussed by Deech, "The Reform of Illegitimacy Law", op. cit. p.102 in relation to the position of the wife in selected cases.

94. Cmnd 3051 par. 41; See also Meston "Bastards in the law of succession" op. cit. p.199.

94a. Fatherless by law, par 56, pp 27.28.

95 "Reforming the Illegitimacy Laws", op. cit. pp 38-39.

96. "Aspects of Illegitimacy", op. cit. p.237.

97. "Parenthood v. Marriage", op. cit. pp 208-9. i.e. p 209.

98. See also comments by Deech, "The reform of illegitimacy law", op. cit. pp 103-4.

99. Macaulay v. Hussain 1966 S.C.204 ; Grant v. Countess of Seafield 1926 SC 274, p.290; D. Walker, The Law of Civil Remedies in Scotland, (Edinburgh : Green and Son Ltd. 1974), p.120.

100. Walker, Civil Remedies, p.121.

101. Turnbull, v. Wilsons and Clyde Coal Co. 1935 S.L.T. 309, per Lord President Clyde, p.312.

102. 1928 S.C. 240 at p.249.

103. MacDonald v. Ross, supra per Lord President p.244.

104. 1938 S.C. 595.

105. Per Lord Justice Clark (Aitchison), p 597. See also per Lord MacKay, p.599.

106. See supra note No 48.

107. Per Lord MacKay at p.598-9. See also Turnbull v. Wilsons and Clyde Coal Co., supra

108. Per Lord Sands, p.248. Underlining mine.

109. Per Lord Morrison, p.252.

110. Section 3(1) of the Illegitimate Children (Scotland) Act, 1930.

111. For instance in Section 1(3) and in Section 2(1) of the Act. An effort to resolve the matter has been attempted by Section 11 of the Law Reform (Miscellaneous Provision) (Scotland) Act 1968, though not satisfactorily. The section which will come into force on such date as the Secretary of State may appoint, provides that a person who has been found to be the father of the child in affiliation proceedings will, in any subsequent civil proceedings, be taken to be the father unless the contrary is proven. The practical importance is submitted to be that even a decree in an undefended action of affiliation and aliment will establish paternity for the porposes of giving the child rights of succession in the father's estate leaving it to those concerned to disprove paternity: See Scottish Law Current Statutes (1968). (Edinburgh : Green and Son Ltd.), 70/11; Also Meston, "Law Reform (Miscellaneous Provisions) (Scotland), Act 1968", op. cit. p.213; "The Illegitimate Child", op. cit. p93.

112. Section 2(1) of the Illegitimate Children (Scotland) Act 1930 presumes establishment of paternity as entailing a right to apply for custody; Section 18(7) of the Adoption (Scotland) Act (1968) requires investigation on whether the natural father intends to apply for custody while section 65(1) of the same Act treats the father and paternal relatives as relatives of the child.

113. Article 614 of the Code of Civil Proc.

114. See chapter 1(c) supra. Also articles 614, 620 of the Code of Civil Proc.

115. Article 614(2) of the Code of Civil Proc.; AP 41/1953 Themis 64 : 257.

115a. Tzouganatou Gasparinatou, The Judicial Recognition of Paternity, p.216, 327. Tousis, Family Law, Vol B, p.164; AP 14/1953 E.E.N. 20:440 Appeal Court of Crete 57/1959, E.E.N. 27 : 201.

116. Tzouganatou Gasparinatou ibid, p.326.

117. Appeal Court of Athens 858/1962. No. V. 11:949.

118. Article 618(1) of the Code of Civil Proc.

119. Tzouganatou Gasparinatou, The Judicial Recognition of Paternity, pp 259-60.

120. See Sheriff Courts (Scotland) Act, 1907, Sect. 5(1).

121. For the Jurisdiction of the Sheriff Court on those actions see

Macdonald v. Ross, and Silver v. Walker supra. Also Meston "Bastards in the Law of Succession", op. cit. p.199.

122. Art. 18 of the Code of Civil Proc.

123. Art. 17(1) of the Code of Civil Proc.

124. Art. 615 of the Code of Civil Proc.

125. Sheriff Court (Scotland) Act 1907, sect. 6. Articles 22, 23 of the Code of Civil Proc., Appeal Court of Athens 1543/1953, E.E.N., 20 : 478.

126. Article 616 of the Code of Civil Proc.; Tzouganatou Gasparinatou, The Judicial Recognition of Paternity, pp 219-220, and note (1) in p.220. Sheriff Court (Scotland) Act 1907, section 6(3), (c); Moreover, by statute, if the father resides in another part of a United Kingdom law district and the act of intercourse in question took place in Scotland the action of affiliation and aliment may be brought by the mother in the Sheriffdom where she resides; Section 8 of the Maintenance Orders Act 1950 as amended by the Social Work Scotland Act 1968, Schedule 8 and Supplementary Benefits Act 1976, Schedule 7, par 9.

127. Memorandum by the Scottish Law Commission, (on Aliment) in Cmnd 5629, Vol II, Appendix No 6, p.151. ff.

128. ibid. p.221-2 and cases cited there : Drennan v. Smith (1887) 3 Sh. Ct. Rep. 326; Carrigan v. Phillips (1905) 21 Sh.Ct.Rep.335; McIntosh v. Nilsson (1935) 51 Sh Ct.Rep. 137.

129. See Memorandum no 22, pp 135-6 and quotation of the case McKenzie v. Glendinning (1899) 15 Sh.Ct. Rep. 224, as cited in note 29 p 136; Also p. 139 and case cited in note 48.

130. ibid. p.139 and cases cited in note 49.

131. Robertson v. Hutchison. 1935 S.C. 708, (mother dead); Beattie v. McLean (1894) 10 Sh.Ct.Rep.217 (mother alive); Campbell v. Money (1896) 12 Sh. Ct.Rep173 (mother dead).

132. Social Work (Scotland) Act 1968, S.81. Supplementary Benefit Commission Act 1976, S.19.

133. The mother can bring the action irrespective of whether she is appointed guardian of her child, has his custody or not. AP 146/1951, E.E.N. 18 : 520; Appeal Court of Athens 522/1955, N. Dikaion 11 : 315; City Court of Eyros 97/1969, Hell. Dik. (1970) : 621.

134. AP 173/1964, No. V 12 : 616.

135. M. Tzouganatou Gasparinatou, The Judicial Recognition of Paternity, p.98.

135a. Art. 1540 (2), 1662, 1651 of the Greek Civil Code; City Court of Thessaloniki 1489/1970, Armenop 25 : 1105. For the permission of the family council as required by article 1651, in exceptional circumstances see Appeal Court of Thessaloniki, 307/1960, No. V. 8 : 814.

136. W.P. no 74, par 9.40, pp 126-7.

137. "The Illegitimate Child", op. cit. p.93;

138. For the similar formula in Denmark see Skalts, Vera, in The human rights of those born out of wedlock, pp 9-10; Church of England, Fatherless by Law, par 56, pp 27-28, W.P. no 74, par 9.41, p.127.

139. Corrie v. Adair (1860), 22 D 897. Article 1540 (1) of the Greek Civil Code. The action against the father in Greek law is raised not because he had intercourse with her but because she had specifically conceived by him ; Tousis, Family Law, Vol B, p.160.

140. Fraser, Parent and Child, pp 149-150; Oncken; J.F. v. Reimers (1892) 19 R. 519; Hare v. Logan's Trs. 1957 S.L.T. (Notes) 49. The claim against the heirs is claim of debt and therefore had to be provided for by the executors of the estate. Statute altered this situation when the illegitimate children were given the same succession rights as the legitimate children: Section 4 of the Law Reform (Misc. Prov.) (Scotland) Act 1968.
For Greek Law, article 1540(2) "The action is raised against the heirs of the father if he died prior to or after confinement." AP 859/1975, No. B, 24 : 170; also article 1553 which provides the child with a special claim to aliment out of the deceased father's estate.

141. Such safeguards have been recommended by the English Law Commission: W.P. no. 74, par 9.45 p. 129 and W.P. no 48, Declaration of Family Matters, (London, HMSO, 1973), pp 60-4.

142. Section 3(2) of the Illegitimate Children (Scotland) Act, 1930.

143. Sect. 3(1) of the Act.

144. Article 1544(1) of the Greek Civil Code. The same limits are set in article 88 of the Bill of the Gazi Committee. But if the child is covered in birth by a presumption or fiction of paternity this period starts from the date when the decision of the court became final. Art. 1544(2) of the Greek Civil Code.

145. Spyridakis, Civil Code, Vol 4, 1540, note 1; Tousis, Family Law, Vol B, p.159.

146. Tzouganatou Gasparinatou, The Judicial Recognition of Paternity, pp 105-7. Contra Roilos (-Koumantos), Family Law, 1540 (11), p345 and note (3). It seems however, that a tutor bonis acting on behalf of the unborn child can raise the action to protect its induced rights. art. 36 of the Greek Civil Code.

147. Probably the court in such cases should refrain from issuing a final order until the child is born. Appropriately, however, it can take security measures in respect of the mother's aliment or current expenses concerning the pregnancy.

148. Church of England, Fatherless by Law, p.28; Krause, "The Creation of Relationships", op. cit. p.41, 49 with reference to the law of Norway.

149. Meston, "Bastards in the Law of Succession", op. cit. p.199; see also supra in Chapter 2, note 198.

150. Samuels, "Abolish Illegitimacy", op. cit. p.132.

151. Against corroboration is also the English Law Commission WP No 74, par

9.47, p.129. Corroboration as it applies today (by requiring the averments of the pursuer to be substantially confirmed by other evidence, i.e. witnesses or proof of relevant facts (for detailed analysis see Walker & Walker, Law of Evidence in Scotland, Chapter XV pp 176-180)) as a rule must be repealed. Decisions on the other hand on the balance of probabilities do not provide a sufficient degree of certainty and additionally may provide grounds for justifying the father in acting indifferently towards his child if he asserts that he is doing so because of doubts on whether he is actually the father.

152. Krause, "The Creation of Relationships," op. cit. p.42.

153. Inn stilling til Odelstinget XXIII (Oslo, 1956), 12; as cited by Krause, ibid p.42.

154. Arnholm, "Parents and Children", op. cit. p.18; Lov. No 10, par 21.

155. ibid pp 19-20; also Krause "The Creation of Relationships", op. cit. p. 42-43.

156. In Scots law a presumption of fact is raised against any person who is proven to have intercourse with the mother prior to or at about the date of conception; Fraser, Parent and Child, p 169, et seq. and cases cited there. In Greek law intercourse proven to have taken place between the 300th and 180th day prior to birth raises a strong presumption against the alleged man unless otherwise is proven. Article 1541 and 1465 (2) of the Greek Civil Code; see Michaelidis Nouaros, Family Law (University Textbook), par. 204, p. 290; It is not necessary to specify the date of conception : AP 623/1970, No. V. 19 : 29, nor that the particular intercourse resulted in the pregnancy: AP 277/1971 No. V. 19 : 871, the presumption is rebuttable : City Court of Thessaloniki 77/1973, 28 : 814.

157. Tait v. McMillan (1875) 12 S.L.R. 589; Young v. Nicol (1893) 20 R. 768; AP 479/1940, Themis 52 : 125.

158. Walker and Walker, Law of Evidence in Scotland, p.176; Tousis, Family Law, Vol B, pp 165-66.

159. Roy v. Pairman, 1958 S.C. 334 per Lord Justice-Clerk Thomson, p.336. also Walker, Principles of Scottish Private Law, pp 321-2 and cases cited there: Tzouganatou Gasparinatou, The Judicial Recognition of Paternity, pp 249 - 251.

160. The proof must be complete : Robertson v. Hutchison, 1935 S.C.708; Tousis, Family Law, Vol B, p 166 note (22). City Court of Thessaloniki 77/1973 Arm. 28 : 814.

161. Tousis, Family Law, Vol B, p. 166, note (22). McDonald v. Gilruth (1874) 12 R. S.L.R. 43.

162. Havery v. Brownlee, 1908 S.C. 424; Tousis, Family Law, Vol B, p167. note (23).

163. Appeal Court of Athens 5166/1975, No. V. 24 : 191. Buchanan v. Finlayson, (1900), 3 F. 245.

164. Butter v. McLaren 1909 S.C.786; Robertson v. Hutchison (supra). For taking additional proof see Pirie v. Leask, 1964 S.C. 103

165. c.f. Robertson v. Hutchison (supra) and Sinclair v. Rankin 1921 S.C.933, i.e. per Lord Justice Clerk, p.935; See also Walker & Walker, Law of Evidence in Scotland, p.178.

166. Tzanganatou Gasparinatou, The Judicial Recognition of Paternity, pp 137-8. It has not been decided yet in Jurisprudence if the father has to discharge a heavy onus in order to rebut the presumption of conception. It has been argued that by analogy as the mother has to produce complete proof of intercourse he must prove completely that the child has not been conceived by him. Contrary to this, it is argued that he has to shake the rebuttable presumption employed in article 1541 and therefore sufficient evidence decreasing the credibility of or creating serious doubts about the pursuer's averments may under circumstances be sufficient for rebutting the presumption. For discussion see ibid pp. 130-135.

167. Contrary to the instance of "notorious misbehaviour" when serious doubt has been created, the judge cannot dismiss the case as unacceptable. He is bound to deliver a judgement either accepting the basis of the action or to assoilzie the defender. There is a difference in the objective of proof, however, in the sense that the pursuer has to prove intercourse at any time between the 300 and 180 day prior to birth, whereas the defender has to prove that the mother did not conceive by him. It has been argued so far that the judge by employing customary evidence has to decide whether the mother had conceived by the defender or not (ibid pp 144-5). The objective of proof, however, is different in each case and unless we accept that proof of intercourse with another man in the same period is a reason for dismissing the order - which is unlikely to have a proper foundation in Greek law - the judge must exercise his power under article 344 of the Code of Civil Procedure if complete proof is not provided. Thus, he may adjourn the proceedings ordering additional proof to be taken - a necessity that may appear frequently when scientific evidence is widely employed in such actions (see infra).

168. Walker, Principles of Scottish Private Law, p.322. Butter v. McLaren, 1909 S.C.786 per Lord Dundas at p.788, 789 and 800.

169. It has been recognised as a prerogative of her sex for her to have the right to declare to whom, of her paramours, the child belongs : McLaren v. McCulloch (1844) 4 D 1137 a right which later has been taken away. Robertson v. Hutchison (supra) i.e. per Lord Justice-Clerk (Aitchison) "Paternity is a fact of physical relationship which must be proven as a fact, and is not a matter within the choice of a woman" p 714; Butter v. McLaren 1909 S.C. 786; see also Hannan v. Anderson, 1935 Sh. Ct. Rep. 300.

170. 1543 of the Greek Civil Code. AP 277/1971, Nov. 19 : 871.

171. For the application of the exceptio plurium concubentium is needed continuous and repeated involvement with men presuming carnal connection; City Court of Thessaloniki, 2861, 1971, Hell. Dikaiosyni (1172) : 108.

172. AP 277/1971, No. V . 19 : 871.

173. Arnholm, "Parent and Children", op. cit. p.16.

174. For the current trends of the legislation in abolishing the exceptio plurium concubentium, see Krause "The Creation of Relationships, op.

cit. 49-50.

175. Wiener, "Determination of non-paternity by means of blood groups", American Journal of Medical Science, (1933), 186, 257 p.258.

176. Ross, A. "The Value of Blood Tests as Evidence in Paternity Cases", (1958), 71. Harvard Law Review, 466, p.467.

177. Sussman, Blood grouping tests (Springfield, Illin., 1968), p.38, as cited by Krause "The Creation of Relationships," op. cit. p.50.

178. [1970] 3 All. E. R. 107.

179. [1972] A.C. 24.

180. ibid per Lord Reid at p.42.

181. Krause, "The Creation of Relationships", op. cit. p.53.

182. According to Arnholm "Parents and Children", op. cit. p. 19-20, the likelihood must be substantially greater than that in favour of anybody else - greater even than the paternity of a possible father who is unknown."

183. Sproat v. McGibney, 1968 S.L.T. 33, Appeal Court of Athens, 937/1962, Hell., Dik. 4: 100; Tousis, Family Law, Vol B, p.163.

184. Imre v. Mitchell, 1958 S.C. 439 per Lord Wheatley at p.450; Sproat v. McGibney, supra pp 36-8; Appeal Court of Athens 1027/1972, Armen. 26 : 742.

185. Ross, "The Value of Blood Tests", op. cit. p.468. Krause, "The Creation of Relationships", op. cit. p.50.

186. Supra.

187. p.37, 38.

188. p. 36.

189. p. 36. Relevant is Imrie v. Mitchell, supra, per Lord Wheatley at p.450 and per Lord President at p.465.

190. Tousis, Family Law, Vol. B, p.163.

191. G. Michaelidis Nouaros. "The proof of paternity using blood tests" op. cit. p.295; Blood test evidence was held as a judicial presumption in the Appeal Court of Athens 1027/1972, Armen. 26: 742. See also supra for the implications of serious doubts as to the pursuer's case.

192. Appeal Court of Athens 1027/1972 supra, and 4773/1976, No. V. 25 : 75; Appeal Court of Thessaloniki 486/1969, Arm. 23 : 831.

193. Krause, "The creation of relationships", op. cit. p.52; The latter aspect in fact constitutes a major premise in the proceedings for " ... this kind of evidence is something new and unaccustomed, based on investigation and theories which the judge is not able to control and hardly able to understand. The opinions of experts put before him cannot awake in him the same feeling of personal conviction that customary evidence may " : Ross, "The Value of Blood Tests", op. cit. p.467.

194. Krause, "The Creation of Relationships", op. cit. p.52. See also Arnholm, "Parents and Children", op. cit. pp 17-8.

195. "The alue of Blood Tests", op. cit. p.468.

196. Supra at p.471-2.

197. Supra per Lord Walker, at p.39; see also for comments : "Affiliation - blood tests - need for identification", (1969) 14 Juridicial Review, p.57.

198. [1967] 2 All E.R. 1110.

199. p. 1115.

200. For further discussion on the issue see Ross "The value of blood tests", op. cit. pp 471-481.

201. See per Lord Scarman in The Human Rights of Those Born out of Wedlock,, pp 3-4; also comments of Hayes M. "The Use of Blood Tests in the Pursuit of Truth" (1971) 87 Law Quarterly Review, 86-93, on the tendency of the courts to favour the independence of the blood tests; also S. v. S. [1970] 3 All. E.R. 107 per Lord Reid at p.112 and per Lord MacDermott at p.117, 118; S. v. McC, [1972] A.C. 24, per Lord Hudson at p.57.

202. Tousis, Family Law, Vol B. p.163; Tzouganatou Gasparinatou, The Judicial Recognition of Paternity, op. cit. p.167. Clive, "Aspects of Illegitimacy", op. cit. p.237; Church of England, Fatherless by Law, pp 43-4; Eekelaar, Family Security and Family Breakdown, pp 214-5; Hayes, "The Use of Blood Tests", op. cit. p.86 ff.

203 Whitehall v. Whitehall 1958 S.L.T. 268; Imre v. Mitchell, supra per Lord President at p.465-6 and per Lord Russell at p.471; Appeal Court of Thessaloniki, 694/1970 Armen. 24 : 982; Appeal Court of Thraki, 134/1970 Armen. 25 : 607; Magistrate's Court of Florimes, 52/1971 Armen 25 : 60. In favour of the discretion of the judge to order blood tests earlier decisions of Greek courts : Appeal Court of Athens, 2131/1939. Dikaiosyni, 12 : 15; City Court of Athens, 2073/1947, E.E.N. 16 : 134; see also Tzouganatou Gasparinatou, The Judicial Recognition of Paternity, p.167, 243-244. For the position in England, see S. v. McC (1970) 3 W.L.R. 366 and [1972] A.C. 24 (in favour and against the power of the court to order the blood of the child to be taken).

204. Church of England, Fatherless by Law, p.44.

205. "The Illegitimate Child", p.94; Imre v. Mitchell, Supra per Lord Carmont and Russell.

206. Allardyce v. Johnston, 1979 S.L.T. (Sh.Ct.) 54.
"The Illegitimate Child", p.94; this has to be distinguished however from the "dative guardian" appointed to represent the child on a permanent basis. He may appropriately take crucial decisions concerning the child "as a parent". See also Tzouganatou Gasparinatou, The Judicial Recognition of Paternity, pp 98-103.

207. See supra in Chapter 1.

208. Tzouganatou Gasparinatou, The Judicial Recognition of Paternity, p167-8, 244.

209. See supra note no 165 and Tousis, Family Law, Vol. B. p.166.

210. McDonald v. Main (1897) 4 S.L.T. 252; Cook v. Rattray (1880) 8 R.217; Jamieson v. Dobie, 1935 S.C. 415.

211. This approach is adopted in Germany, where there are tables on periods of gestation computed by statistical methods which show the probability that a particular act of intercourse produced the child. However, because of the variables involved this method must be used to supplement evidence.

212. Keiter, "Advances in Anthropological Paternity Testing", (1963), 21, American Journal of Physical Anthropology, 81, as cited by Krause, "The Creation of Relationships", op. cit. p.54.

213. ibid. p.54

214. Wiener, Book Review : 7. American Journal of Human Genetics, 218-219 (1955), in Krause, ibid p.54.

215. Denmark, East Germany; In Scotland and Greece such evidence is admissible but is open to the judge to assess freely its value: S.v. S. 1977 S.L.T. 65; Tzouganatou Gasparinatou, The Judicial Recognition of Paternity, pp 242-3.

216. Arthur and Reid, "Utilizing the Lie Detector to Determine the Truth in Disputed Paternity Cases", (1954) 45 Journal of Criminal Law, Criminology and Police Sciences, 213.

217. Krause, "The Creation of Relationships", p.55.

218. ibid. pp 55-6.

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# TOWARDS A NEW PERSPECTIVE IN THE CREATION OF THE PARENT-CHILD RELATIONSHIP :

## A Comparative Analysis of the Laws of Scotland and Greece

A Thesis Submitted for the LL.M. degree

by

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# P A R T  T W O

## ADOPTION

## INTRODUCTORY CONSIDERATIONS

Adoption as it is understood in the present law is the publicly approved irrevocable transfer of a child from one legal family, which failed to serve its welfare, to another. In this respect it is a mixed institution that features characteristics of both family law and social policy. From a historical point of view, however, the institution is not a modern one but rather one which has undergone a transformation in its purposes. In fact, adoption was well known in ancient Greece and in Roman law as a device to produce descendants, initially for the purposes of ancestor worship and later to provide heirs. In the so-called despotic form the institution was transmitted into civil legislation of the 19th century[1] and was subsequently made part of the Greek civil code. With the introduction of Legislative Decree 3245/1966 the objectives of the institution were changed for adoptions concerning persons below the age of 18. Adoption ceased to be exclusively a matter of private law but took on strong elements of social policy so that today it comes to be viewed as a device to help childless couples to children and, more, parentless children to parents. The current Legislative Decree 610/1970, which replaced the Decree of 1966, operates in line with this philanthropic approach. In Scotland, on the other hand, as in many Common Law jurisdictions, legal adoption was unavailable until early in this century.[2] It was first introduced with the Adoption of Children (Scotland) Act of 1930 aiming to fill the gap left by the lack of parental care provision in the welfare network. The initial purpose, therefore, was to serve the interests of the child and, within this basic frame were enacted the subsequent 1958 Act and the 1978 Adoption (Scotland) Act, currently in force.

However, adoption is regarded today as a device for creating parenthood

under circumstances advancing the welfare of the child which requires careful consideration in relation to the concept of legal family as well as to that of natural parenthood. For a number of reasons, some explained in the previous chapters, the two jurisdictions consider it appropriate to delegate the bulk of the responsibility for the upbringing of the child to his natural parents. It is suggested that the welfare of the child is best secured within his own nuclear family if it is a happy and stable one. Within the wider natural family too, there may be a strong bond which it is better to preserve.[3] But some natural parents, it is clear, will refuse to exercise the rights and concomitant obligations arising from the relationship, while other persons will, for a number of reasons, be only too anxious to assume them. In such circumstances, with adoption, the legal relationship with the natural parents is replaced by that with the adopters and the child is treated henceforth, for most purposes, as if he had been born to the adoptive parents.[4] However, from regarding the relationship with the natural parents as irremediably broken or as non-existent to the vesting of the rights in a stranger is a long process with crucial implications for both sets of parents and the child, with a number of questions to be answered. For instance to what extent has it been made certain that it is impossible to ascertain the natural father before placing a child born out of wedlock for adoption, or to what extent has the survival of the natural relationship been assessed before the decision to alienate the child from his natural parents has been taken.

Furthermore, neither current law nor practice preclude by definition the adoption of one's own child. Nevertheless, it is suggested that adoption by a parent of his or her own child may not in some circumstances be appropriate, at least from the child's point of view, or even that, in general, adoption is not appropriate for a parent's

own child.[5] Indeed as a device capable of creating situations equivalent either to that of the legal family, or, in terms of the parent-child relationship, to that of legitimacy, adoption has often been abused in order to remedy the odd consequences of illegitimacy. In fact where illegitimacy was a problem adoption was frequently suggested to be the proper solution. This however merely emphasise the irregularity of the parents' union to a point where the damage to the case of illegitimates may be considerable either in depriving the child of any link with the other natural parent or in distracting attention from the demand for equality by offering a compromise as an alternative.[6] Moreover, adoption has been used as a remedy for the consequences of a breakdown of marriage and to integrate the child in a newly formed family. In such circumstances, without disputing the fact that in a number of cases adoption has offered a valuable service to the children, it is argued that in others it has functioned mainly to bolster the concept of the legal family, whenever biological parenthood has failed to do so. However, it is necessary to recognise adoption for what it is, namely "an artificial and legal relationship; not to read into it something of the nature of a real substitute for a natural relationship".[7] Probably this is the strength and not the weakness of adoption for "there is a growing acceptance that bringing up children by adoption is basically different from bringing up natural children".[8]

The tentative conclusion, then, is that adoption should not be used as a compromise solution to a demand for reform in certain areas of family law, nor should it be used, unless strictly necessary, to alienate the rights of the ex-spouse or of the natural parent in order to produce traditional family circumstances for the child.

Why then is there a need to maintain such a radical institution with

the objective of creating artificial parenthood. In fact, there are many different forms of child care comprehended with the broad area of child welfare measures but none of them provide a cure for problems remediable in family circumstances. In a broad sense, the problems regarded as remediable by adoption can be classified under the term "factual parental failure in his duties towards the child". In this context adoption should be distinguished from a pure institution of family law and should be placed among the welfare measures aiming to provide a family therapy for a certain problem as Fisher puts it "as a social service for the child only where there is no other viable actual or legal family relationship".[9] In respect of this broad definition of the scope of adoption the fact that becomes clear is that one should deal with adoption on a flexible basis both in itself and also in relation to the wider more comprehensive social service of which adoption forms only a part. Indeed the need for adoption under welfare policy emerges from the belief that the family is the most adequate way to care for the child whose parents had failed to do so, unless that child presents particular difficulties requiring therapy of a different nature - namely, guardianship, custody, fostering, or commitment to a residential establishment. These are measures aimed at providing therapy where a child's problems are classified as temporary. Adoption, in this context, poses an exceptional solution because, by integrating the child in a new family, it removes the child permanently from his troubled environment and at the same time places it within a context designed to provide care and maintenance for life. To fulfil the latter purpose adoption presents certain distinct advantages notwithstanding that it has certain disadvantages as well.

In the first place adoption has the advantage of being a radical solution cutting off any tie with the natural family and creating a new artificial tie between adopters and adoptee as if the child was born to

them in marriage. Second, it provides the option of choosing the parents of the child and the circumstances in which the child will be brought up. Third, it is a family institution and as such it is subject to all measures provided for the family by family law, notwithstanding that as an institution which involves minor persons it is susceptible to welfare considerations and intervention by the state. In the latter context adoption is accessible to additional patronage by the welfare authorities and can be financially subsidised or granted certain official facilities and in general can have the active support of the state for the broad protection of the child.[10]

On the other hand, so far as adoption features irrevocable transfer from one family to another, it involves dangers in the case of unsuccessful placement, being a measure without practical alternative of the same standard. Consequently the child may have to return to its earlier misfortune and, most probably, pass through the same procedure for a new placement.[11]

Moreover, adoption has crucial implications for two sets of parents. The natural parents will suffer the emotional strain of being deprived of their child, while the adoptive family will have to readjust their lives and accept an increase in responsibilities to accommodate the new member of the family. However, the most significant drawback to be noted arises from a practice prominent in the past and still open to revival. Traditionally adoption has functioned to provide children for the childless, this having a considerable effect on the choice of children that could be placed. Adoptive parents usually applied for adoption in the interests of completing their family, either because they were childless, or had just one child, and accordingly came to be selective about the background of the child. Until recently it was possible to satisfy such selectiveness because

illegitimate children , as the main source of adoptees, were placed from infancy and, therefore, as unshaped by environment. But with the recent legislative improvement and with the prospect of assimilation of all classes of children, many potential adopters may not be provided with this option. On the contrary, the institution may come to cater for placements that require greater skill, for example in facilitating the placement of children from very troubled backgrounds for whose rehabilitation today in family circumstances it is almost impossible to provide. Therefore, although the concern of the adopters to complete their family provides them with an interest in having the child, special care must be taken to assess such adopters against persons with more altruistic interests.[12]

Having considered the need for and the advantages and disadvantages of adoption, it is time to turn to the children that the institution should benefit.

As a matter of fact the law of the two countries does not generally contain any provisions specifying the categories of persons to whom preference should be given when adoption is contemplated. Prima facie they seem to permit the adoption of any child if that child falls within the age limits[13] However, an indirect restriction is posed in Section 6 of the Act and by article 2(1) of the Decree which requires that any adoption should serve the welfare of the child. Among the factors then to be taken into consideration is whether his welfare could be better served if ties with the natural family were preserved. In this context it is difficult to enumerate instances but broadly speaking one might confine adoption to cases where there is danger to or maladjustment of the child's welfare either because there is no natural family to care for it or,

though one exists, it is beyond any hope of protecting the child. On this basis, adoption may be considered in cases where the treatment of the child by its parents is socially disapproved of and the problem is susceptible to remedy in family patterns.[14] Such circumstances may apply as much to children living in a two-parent family as to children born out of wedlock, orphans, neglected or abandoned children and in general to any child living in unsettled conditions under a legal or other status and whose case can be better served by adoption.[15] And similarly, the welfare of ex-inmates of residential establishments can be facilitated if placed with persons qualified to help them to return to normal life. The same applies to handicapped children if placed with patient persons who have the time and willingness to care for them.

In view of the tasks of the institution of adoption in creating a functioning parent-child relationship on the basis of promoting the welfare of the child, the concern of this section is an analytical survey of the legal and other procedural aspects of this area of the law. This will employ four chapters. In the first, the historical development of the law and of policy toward the child in adoption will be considered; in the second the qualifications for and conditions of adoption; in the third the consents required; and in the fourth the procedural aspects and the effects of the placement.

# CHAPTER FOUR

## THE DEVELOPMENT OF THE LAW AND THE WELFARE OF THE CHILD

### A. HISTORICAL BACKGROUND

#### I. Adoption in ancient Greece

Traces of adoption as an institution creating blood ties between strangers can be found in the Homeric period, as well as in many legal systems of the ancient world.[1] It was a well recognised practice in countries of the Near East and the Mediterranean and probably the Greeks borrowed it from there. Colquhoun in his study A Summary of Roman Law suspects the country of origin to be Egypt because "many Grecian customs may be traced (back) to Egypt" so that "it is not impossible that adoption may also be of Egyptian origin".[2] On the contrary, Isaeus in the Estate of Menecles makes a statement which implies that adoption was well known and practised from anterior periods in "Barbarian" countries and that the Hellenic practice was influenced by them.[3] However, taking into account the facts that evidence confirms its existence in such countries[4] but that there is no evidence to prove either Colquhoun's hypothesis or Isaeus' assertion it will therefore remain uncertain what social purpose and needs adoption came to fulfil in the first place. Colquhoun's hypothesis is, perhaps, supported by an instance of advanced mode of adoption from the Old Testament[5] where the child was surrendered to a childless person with the cooperation of secular and religious authorities (also essential elements of adoption in Greece). Equally, one cannot deny that the origins of Hellenic religious customs are also present in other Mediterranean countries, and can be seen as a mixture of elements from various neighbouring peoples.

However, although the origins of the institution are lost in time there

is reliable written evidence that it flourished in Ancient Greece. Apart from Isaeus, Demosthenes[6] left evidence of provisions vested in Athenian adoption laws, mostly enacted by Solon. Spinellis and Sachor-Landau refer to Aristotle, who mentions the law of adoption drafted by Philolaos for the inhabitants of Thebes,[7] Herodotus discussed Spartan adoption practices[8] and Isocrates referred to those of Aegina.[9] Moreover, they refer to the Cretan Law of Gortys as regulating conditions of adoption.[10,11] The same authors also state that the main reason for adoption flourishing in Ancient Greece was that "the various states made it mandatory so that childless families would not disappear and along with them the income derived from their taxation".[12] However, irrespective of whether or not adoption has been facilitated within the context of state policy, there is evidence of the types and conditions of adoption in Ancient Greece which shows clearly a concern to fulfil the needs of the individual involved.

Early evidence concerning the practice of adoption in the Athenian state describes the objective of the institution as aiming to fulfil the needs of the childless, either in alleviating the childlessness as such or in providing the continuation of the family line. Thus, it was permitted for an Athenian citizen to adopt a male or female child solely as a consolation for the misfortune of not having issue of his own body. In this context, childlessness was a prerequisite and the child was integrated within the family of the adopter, placed in his agnatic line.[13] Adoption also vested natural rights and obligations and the child was deemed as issue of the marriage of the adopter and submitted to his potestas. The child could inherit from the father and the latter was barred from prejudicing the rights in succession of the child.[14] Only occasionally however would a man adopt a woman as his daughter, because this would not in itself directly provide a

person properly qualified to perform the family rites.[15] The normal practice concerned the adoption of male children[16] by an adopter "being of sound mind, ... in his life time, or by will contingently on none being born after his death, or if born, dying under age".[17] The stimulus behind this practice was to prevent the family from becoming extinct for the want of male heirs who would worship their ancestors and pray to the Hephestious Gods. In such adoptions most probably a sacred ceremony was performed where the adoptee entered the sacred rites of the adoptive family.[18]

It is worth pointing out that each objective of adoption had its own value in the Athenian society despite the fact that writers usually emphasize the need to prevent the agnatic line from becoming extinct. Most probably this is explained in terms of a failure to distinguish between the norms of the Athenian family and the patriarchic norms that governed the Hellenic family of anterior times. Indeed, religious beliefs and their concomitant patriarchic tendencies, though present in the Athenian family, were not of primary concern and adoption was focussed, to a great extent, on alleviating the emotional strains of childlessness. This is sufficiently supported by the fact that the law permitted the adoption of females as well as males. In the Hereditary Portion of Menecles Isaeus describes adoption as the only refuge from "loneliness, and consolation in the life" of the childless.[19]

## II. Adoption in the Roman Law

Adoption was transmitted from Greece to the Romans where it acquired a more integrated development. During the Republic, private religious law strongly favoured the existence of children in families. As Colquhoun states "the private sacred rights inherent in Roman families ..., were always jealously preserved by each succeeding generation"; moreover "The decemviral law, too, enjoined their preservation sacra

privata perpetua memento, and persons were seriously blamed who allowed or caused them to be lost".[20] However, because pure religious beliefs did not remain the only motive for submitting a child to an alien family, the institution required also to fulfil the practical needs of Roman society.[21] Thus the transfer of parental authority from one person to another was possible in two distinctive modes - adrogation and adoption - with different procedures, status and results; the use of either mode was dependent on the interests of the adopter, providing the relevant conditions were satisfied. Therefore, a person who wanted to continue his agnatic line had to adopt a person who was sui juris, following a procedure before the comitia calata[22] where both the intending father and son were open to interrogation. The procedure required the cooperation of a religious body as well to determine whether in all circumstances the proposed adrogation would be lawful and justifiable.[23] The next steps in the procedure were the creation of the patrias potestas by order of the people (populi auctoritate) and the renunciation (detestation) by the adrogatus of his erstwhile sacra and acceptance of those of the new family.[24]

The effects of adrogation was to place the adrogatus and his family under potestas of adrogator. This extended to his property also, like a succession inter vivos. However, certain liabilities of the adrogatus were retained if burdening his own property.[25] The rank and privileges of the new family were vested in the person of the adrogatus if he passed from a plebeian to a patrician gens, but he would lose part of them if he passed from a patrician to a plebeian one.

On the other hand, adoption strictu sensu was an institution where the transfer of a person alieni juris was effected, from one potestas to another under private law procedure. Though its origins are not clear

it existed in the Republic[26] and Thomas places it in a later period than adrogation.[27] However, if the Hellenic system was transferred to Rome the formula may have been retained in the same context, namely to provide a child and an heir without reference to further purposes concerning metaphysical devotions. Thus, it was applicable to both sexes and extended even to somebody having issue of his body.

The procedure was informal and could be performed in three ways; at home by the Quiritian law of ownership, by testament and officially before the competent authority.[28]

The cardinal aim of adoption was to provide an heir and transfer authority from one person to another in instances where obligations to continue the existence of the family were of secondary concern. Therefore, though the child was treated as a natural one, adoption affected only himself, and, if he had children, these remained in the potestas of his natural father unless they were adopted as well.[29] In all other respects, the child was deemed born to the adoptive parent in lawful marriage and could inherit through him and add to his own name that of the adopter.[30] The adoptee remained cognatically related to his previous family and succeeded only cognatically to the estate of his natural family.

A number of formalities and concomitant conditions were settled for adrogation and adoption. Firstly, in adrogation only Roman citizens could participate either as adrogatus or adrogator because only they could appear before the comitia calata. Moreover, the adrogator had to be over sixty years of age and married without children of his own. Marriage was necessary to discourage celibacy and the age limit was essential as till then one could have had children. Women and pupils were excluded from the proceedings as well as deaf and dumb

persons, because of their inability to understand the procedure.[31]

Adoption itself was less formal and followed the procedure of requiring the adopter to be potentially capable of begetting an issue and old enough to be father of the child but not necessarily married.[32] Adoption in the status of grandchild was also permitted, provided there was the necessary age gap of two adolescences.

Changes for either mode of adoption were introduced in practice at the Republican and early Imperial periods lasting until the days of Justinian who considerably altered the form of adoption. Firstly, by the end of the 1st century, Galba introduced the adrogation *per scriptum principis*,[33] which removed the technical bar preventing adrogation of *impubes*, and women.[34] In the new procedure the adrogatus did not have to attend the *comitia* so by the time of Antoninus Pius, the adoption of an *impubes* was permitted subject to numerous safeguards for the child's interest.[35] Maybe this period should be seen as a decisive stage in evolving a policy towards children.[36] Indeed at this time there is also to be seen the first defeat of absolute parental authority in order to protect the child. The state assumed power to deny any placement unless it served the interest of the child by requiring "a stringent inquiry to be made into the advantages of adrogation for the boy".[37] Furthermore, Antonius Pius, in order to protect the property of those adrogated, provided that the adrogator must give an assurance of restoring the property that the child brought with him to those entitled, if the adrogatus died while still *impubes*, and, moreover, he extended this to the instance of his being disinherited or emancipated without just cause, in which event the adrogatus was entitled to claim his own property and ¼ of the adrogator's estate.[38] Adrogation of women also became possible *per scriptum principis*, though

it was not common in pagan times, as they could only prolong the family for one generation. However, after the period of Antoninus Pius, it became a recognised practice.

In the course of time the material needs became regarded as more important than religious beliefs and this resulted in the adoption of persons without submitting to the potestas of the adopter but simply by undertaking rights and obligations of the natural child.[39] With these changes adoption by a woman became possible, in the first place to alleviate the loss of her own children[40] and later by the Novel 17 of Leo, without restrictions save that she satisfied the conditions.[41]

An innovation introduced at that time by Justinus was the prohibition of adoption by the natural parent of his child born to a concubine. This was confirmed by Justinian in his Novels.[42]

Another important enactment concerned the age difference between adopter and adoptee. Namely, in relation to the maxim "adoption imitates nature", an age difference of a full adolescence, that is to say 18 years, was required, as it would be un-natural for the son to be approximately the age of, or to be older than the father.[43] This was laid down in this mode by Justinus, though incidence of its abuse was known in earlier times when Claudius was adopted by a plebian younger than himself, in direct violation of the existing usage.[44]

In the Justinian period two types of adoption were formulated in an attempt to promote in-family adoptions. However, there is some suspicion that Justinian introduced these changes to override the inconvenience of children found without succession rights in the agnatic line, because they left the natural family and afterwards were

emancipated by the adopter.[45] These types of adoption had different effects with regard to whether or not the persons involved were blood relatives or strangers.[46] Therefore, when a child was given for adoption to an ascendant in the paternal or maternal line, this was considered adoption with full effects and resulted in a complete relationship (adoptio plena), while, when the adopter was a stranger, the adoption had limited effects involving succession rights (adoptio minus plena).[47] In the first instance the child was removed from his parents' home and authority was submitted to that of the adopter. He/she was then deemed as his legitimate descendant with natural parent-child reciprocal rights and obligations. The second type, without affecting status with the natural family, provided an intestate heir for the adopter. The child remained in its natural home under the authority of the natural parents and had succession rights and the compulsory portion in their estate.

III. The Post Byzantine period and the rise of the new state

Adoption as advanced by Justinian remained in Greece till the end of the 19th century.[48] However, because the practice of private law under the Ottoman occupation was submitted to the clergy, who proved to be keen in preserving the Byzantine tradition, adoption in this form was soon outdated. A reform, attempted by the decree of 1874, affected the conditions and procedure in some measure but failed to make any major innovations. As a result formal adoption was replaced by de facto placements in the form of permanent fostering or child caring contracts. The first, mainly developed in customary law, provided an obligation for the child to respect the quasi-adopter (psychogonea), to offer his services to him and for the parent to maintain the child and establish him or her financially.[49] The second was closer to de facto adoption and could be effected with a formal "child caring contract"

containing a promise of aliment and an irrevocable donation post-mortem.[50]

IV. End of Nineteenth and beginning of Twentieth Centuries

The codification of the nineteenth and twentieth century followed a narrow path by simplifying the Justinian legislation and unifying it into one system with characteristics of adrogation and adoption minus plena. In Greece the first attempt to establish a uniform practice was made with the Law 2310 which recognised the similar rights and reciprocity in inte state succession for either mode of adoption and restricted the relationship to the persons of the adopter and adoptee.[51] The drafters of the civil code planned a similar framework but placed emphasis on the institution of adrogation, as regards the qualifications and conditions, and on adoption minus plena, as regards the results of the adoption. For the latter, however, they introduced two distinct modifications: (a) certain rights and duties in relation to the natural family remained in force side by side with, or alternatively to, the rights of the adopter;[52] (b) reciprocity in intestate succession between adopter and adoptee was repealed but it was retained in relation to the natural family.[53] Otherwise, they kept a high age limit for the adopter reduced from 60 (as it was in adrogation) to 50 years of age,[54] as well as childlessness[55] as a necessary prerequisite of the applicant. Other distinct characteristics of adoption in the civil code are the prohibition against prejudicing the rights of the adoptee by applying for a second adoption,[56] although it was permitted to adopt more than one child in the same order,[57] and the prohibition against someone adopting his own natural child.[58] There are also no restrictions as to the age of the adoptee, One could competently apply for the adoption of an adult provided that one satisfies the conditions and that one is older than the adoptee by a full adolescence.[59]

The rise of the welfare policy in relation to adoption in Scotland and Greece in the twentieth century.

As in many common law jurisdictions the institution of adoption was not recognised in Scots law though de facto adoptions were very common.[60] The basic characteristic of those placements was that, whatever the solemnity in the agreement handing the child to another person, it was always open to a parent to reclaim the child.[61] Legal force in placements was first given with the Adoption (Scotland) Act, 1930 which was at the time regarded rightly as a basic innovation in the law. As Fisher points out it was enacted only after a considerable struggle.[62] Fears were expressed about the possibility of finding far more parents anxious to get rid of children by way of adoption than persons prepared to adopt them. This, though, was a consistent misjudgement as the facts later demonstrated.[63] In fact, it was not until after two Committees, the initial one in 1920 and the second in 1925, had reported favourably on legal adoption that adoption was legalized by statute.[64] Indeed in M.O. Stone's words " ... legal adoption in this country provides an example which must be unusual, if not quite unparalleled of the complete failure of authority, executive and legislative, no less than judicial, to gauge the force and direction of social pressures. For this the judges must bear the initial responsibility, since it was they who persistently upheld the inalienability of parents' rights, however neglectful or incapable of parental duties parents might have proved".[65]

However, whatever the basis of the struggle, the important point about the enactment is that the modern concept of adoption was incorporated in the Act. Following the well established approach in custody cases directed towards the welfare of the child, provision was made so

that no adoption order could be granted unless serving the welfare of the child, which had to be of first and paramount consideration. Clearly such stipulation could prevent any undue alienation of parental rights. Because of this balanced setting of the institution within the welfare network no significant changes were made to adoption legislation for a considerable time, even taking into account those suggested by the Hurst Committee reporting some twenty five years later.[66]

The Adoption Act of 1958,[67] the Adoption (Sederunt) Act 1959,[68] the Adoption Act 1964,[69] and the Adoption Act 1968,[70] followed a similar pattern. Nevertheless, the present Adoption (Scotland) Act, 1978, a result of the proposals of the Houghton Committee,[71] made a considerable number of important innovations which will be dealt with in the following chapters. The innovative attempts of this Act should perhaps come as no surprise for recent years have seen the enactment of reforming legislation affecting the legal position of children to a major extent and are no doubt part of the impetus of an increasing desire to safeguard and promote the welfare of the child.[72]

In Greece, on the other hand, the stipulations of the civil code were inherently inadequate to manipulate adoption as a welfare device in the service of children. The reasons were manifold - relating to the historical objectives of the institution, the conditions prevailing at the time of the preparatory works and the concept of the family that the drafters had in mind. Agni Rousopoulou in her article "The reform under consideration for the law of adoption"[73] expresses the opinion that, during the preparation of the civil code, the drafters had in mind a close agricultural family so that they impregnated the law with the duty to consolidate the childless, as well as with precautions against the exploitation of young labourers by way of adoption.[74]
A similar view seems to be supported by Daes,[75] while

G. Michaelidis Nouaros, without disregarding the ideas contained in the relevant articles, in a more pragmatic analysis, stresses both the impossibility of the drafters forecasting such needs, as well as the necessity for the adoption law as provided in the civil code for the more general needs - present and future - of the Greek society.[76] Therefore, he regards the stipulations of the civil code as a useful part of the legislation, worthy of preservation,[77] a view which is also shared by Agni Rousopoulou[78]. Admitting , on the other hand, the inadequacy of the civil code to implement adoption as a social service, he explains the causes as lying in the mixed origin of the legislation on adoption, which resulted from fundamentally different concerns than the welfare of the child. As a solution he suggests the enactment of a decree to be in parallel force with the civil code aimed at governing the adoption of minor persons.[79] The appreciation expressed by Nouaros was shared by many Greek jurists[80] so that by the early sixties it had matured into the idea of reforming the adoption law and directing it towards the welfare of the child. The only point that caused some disagreement was whether the task should be carried out by substantial reform of the civil code or by an independent decree. The second opinion prevailed and the law 4532/1966 passed through parliament for non-emancipated adoptees below 18 years of age. It should be noted, however, that the Scottish history is repealed in Greece as regards the struggle to pass the law. In 1959 the Ministry of Justice appointed a committee to reform the law on adoption but its proposals did not come to anything. It was only after the International Convention on Adoption of the Council of Europe that a new committee was appointed which drafted the Legislative Decree 4532/1966.[81] This Decree now has been reformed and consolidated by the Legislative Decree 610/1970 which brought in a considerable number of changes.

V. The Basic Characteristics and Structure of the Law in the Two Countries.

What characterises the law in both countries today is an effort to take proper advantage of the option in the law of adoption to choose the parents of the child both by avoiding undue risks in the placement and minimising the sacrifice to the rights of the natural parents. To this end, the Adoption (Scotland) Act 1978 in the first part deals with the Adoption service in its narrow and in its broad sense. Thus Sections 1 - 5 and 8 - 11 deal with various aspects of the operation and functions of adoption services while Section 6 makes provision so that no decision would be taken without giving first consideration to the welfare of the child. At the same time, Section 7 provides for taking into account the wishes of parents as to the religious upbringing of the child. Part II of the Act relates to the adoption orders themselves. It starts by defining the adoption order and the period that the child has to stay with the adopters prior to adoption and continues with the qualifications and conditions for married and single applicants. This part also refers to the consent of the parents, relinquishment procedure, transfer of parental rights from one adoption agency to another, the notice that has to be served to the local authority, the reports that have to be prepared, restrictions on the making of an adoption order, as well as interim orders and the care of the child on the refusal of an adoption order. Part III of the Act refers to the care and protection of children awaiting adoption. Thus, there is provision against removing the child if adoption has been agreed or parental rights have been relinquished or if the applicant has provided a home for the child for the past five years, as, also, for the return of the child, if it has been taken away in breach of the above conditions. Moreover, this part provides for the return of children placed for adoption by adoption agencies and specifies

the conditions for return if the child has not been placed for adoption. One of the most important aspects of this part is the definition of "protected children" and the local authority's duty to secure the wellbeing of those children, to take care in removing them from unsuitable surroundings, the duties of persons caring for protected children to notify the local authority of change in their address, and finally offences and miscellaneous provisions related to protected children. Part IV relates to the status of adopted children by giving the meaning of 'adoption order' and stating the status of an adopted child. Within this section are contained stipulations concerning the citizenship of the child, the pensions payable to children, insurance, the effects of the order on succession and inter vivos deeds, and miscellaneous provisions relating to status. Part V covers the registration and revocation of adoption orders and conventional adoption orders, deals with the Adopted Children Register, the revocation of an order made in respect of the natural parent of a child born out of wedlock if legitimated per subsequens matrimonium, the annulment of overseas adoptions and supplementary provisions. Finally, Part VI contains miscellaneous and supplementary provisions concerning adoption of children abroad, penal provisions, evidence of agreement and consent, specifies the competent courts, the proceedings for special hearings, the offices of the curator ad litem and reporting officer, the service of notices and other procedural aspects.

In Greece, regulations concerning the adoption of minors are stated in the Legislative Decree 610/1970 and in the Royal Decree 795/1970, while those aspects of positive law and procedure not included there are to be found by reference to the civil code and the code of civil procedure. In the first place, in relation to the adoption service, article one of the Royal Decree 795/1970 in paragraph one prescribes the institutions entitled to act as agencies for adoption

within Greek territory and the bodies that should cooperate in adoptions abroad. Paragraphs 3 and 4 of the same article relate to aspects of the decision making process of those services, namely whether they should provide the applicant with the certificate of suitability and the basic structure of the certificate. In article 2 of the said decree there is provision for a welfare investigation for applicants residing abroad and article 3 specifies the bodies that should perform the follow up reports on the wellbeing of such children. Article 4 makes provision for maintaining a General Confidential Register in the Ministry of Justice, for annual reports that should be submitted by adoption agencies to the Ministry, as well as for supplementary provisions concerning the availability of personnel in bodies operating as adoption agencies.

In relation to qualifications and conditions, the procedure and the results of adoption are those provided by Legislative Decree 610/1970. In the first part it deals with the prerequisites of adoption by stating the conditions of the welfare of the child, the age of the adopter, the conditions of childlessness and exceptions from the rule, provides for the possibility of applying for further adoption while the previous is still in force, the conditions of the age difference between adopter and adoptee and for the consent of the spouse for a single married applicant. The second part of the decree relates to procedures preserving the application of the relevant part of the civil code but supplementing it with provisions for the cooperation of an adoption agency in the welfare investigation, the conditions for giving parental consent and dispensing with consent. Also the same part deals with the relinquishment procedure and aspects of the confidentiality of adoption. In part three the results of the order are stated. These are mainly as in the civil code, save the changes are that the court can order additional measures for the benefit of the

child and even dissolve the adoption if it is in the child's interest; and that the adopter cannot bring an action for dissolution of adoption before the child is sixteen years of age. Part four deals with adoptions where the applicant is a foreign subject and part five provides penal provisions for protecting the service of adoption and the wellbeing of adopted children. Finally, in the sixth part there are supplementary provisions concerning reform of articles of the civil code and the code of civil procedure related to adoption, as well as reform of the nationality law and the law on registration deeds.

## B. THE WELFARE OF THE CHILD

It has already been indicated that the question of the child's welfare is inextricably involved by law in any adoption order and that this question is the decisive one irrespective of the formal qualifications of the applicant. Both Section 6 of the Act and article 2(1) of the Decree impose a general duty on anybody involved to promote the welfare of the child. Thus the Act prescribes that "In reaching any decision relating to the adoption of a child, a court or adoption agency shall have regard to all the circumstances, first consideration being given to the need to safeguard and promote the welfare of the child throughout his childhood and shall so far as practicable ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding". In the same spirit the Decree provides that "Adoption is allowed only when it serves the best interests of the adoptee". In its construction, the circumstances of the case are taken into consideration notwithstanding that priority should be given to the welfare of the child.

The dimension given to the process of adoption by those provisions makes the decision a complex affair. At the outset adoption as a welfare measure is an institution submitted to societal interests in their wide and narrow context. Thus it has to produce an outcome satisfactory to the general public, notwithstanding that it has also to reflect a beneficial arrangement for the long term welfare of the child without doing unreasonable sacrifice to the interests of the two sets of parents. This means that a chain of decisions be taken on the balance of a child centred process and yet conduce to the long term welfare of society. The involvement of the latter has a particular significance in the decision. The society's interest stands in the middle of any decision to differentiate assessment, and nevertheless imposes its own standards which several times will coincide with the interests of each parent, but in quite a few , depending on the circumstances, stress or diminish their significance. This complex aspect of welfare will be dealt with in terms of its principles in the following pages while specific references concerning its effects for the construction of the law will be found in subsequent chapters.

I. The welfare of the child in its relation to the interests of society.

The major premise that one could perceive from the institution of adoption defines it as an alternative constructive and preventative plan which society offers, primarily to substitute for the care and security expected from a natural parent to his child and, secondly, to preclude disorganisation in the life of each individual concerned.[82] The same premise is observable, either explicit or implicit whenever child welfare is emphasized as important. Undoubtedly, it will result in society's own interest. Thus the social concern in adoption could be understood in terms of saving the next generation of children from

a similar predicament and ensuring that they will be brought up sharing the approved social values. Society then has invested part of its existence in adoption, so that "each time the cycle of a grossly inadequate parent-child relationship is broken, society stands to gain a parent capable of becoming an adequate parent for children of the future".[83] For that very reason the interests of the child may to an extent outweigh that of the parents, whether the two conflict or not.

II. The priority of the welfare of the child

On account of the wide implications of the welfare of the child, due care is taken to secure priority for his interests and their satisfaction in the best possible way.

Priority is provided in the Adoption (Scotland) Act, 1978, by requiring "first consideration" to be given to the welfare of the child in the sense of being considered not first in order but as the most important consideration. This thesis was advanced by Lord Simon of Glaisdale in A and B (petrs.)[84] who puts the consideration of the child's welfare as follows: "The test whether the refusal to a given consent is unreasonable is an objective one, to be made in the light of all the circumstances of the case (some of which may not be within the knowledge of the party refusing consent). Although the welfare of the child is not the sole consideration, it is a factor of great importance, because a reasonable parent attaches great weight to what is best for his child. On the other hand, although the test is objective the court is not entitled simply to substitute its own view for that of the natural parent in question."[85]

The process from the 1958 Act, where the welfare of the child was

regarded as of first and paramount consideration - as it was and is in custody disputes - to the dictum of this case and its statutory envisaging as being of first importance but not as necessarily over-riding all other considerations, involves a wide range of arguments worthy of receiving some attention.

One of the noticeable inadequacies of the former law was its failure to provide positive guidance on the weight to be given to the child's interests when reaching decisions which might ultimately lead to his adoption. The Adoption Act of 1958 was silent on the importance that had to be attached to welfare but merely stated that the court in deciding whether to make the order has to be satisfied that it would be for his welfare. Consequently it was left to the courts to try to solve that vexed problem and indeed judicial decisions played a crucial part in the present enactment. The courts were conscious of the irrevocable nature of adoption and of the need to balance the different interests involved. Thus, in contrast with the tentative view taken by the Houghton Committee in their Working Papers, that in interpretation by the courts of "unreasonably" in relation to the withholding of consent, to resolve conflict in adoption, "the welfare of the child should be the paramount consideration"[86] subsequent decisions have given to the parents a right to veto adoption, even if adoption was shown to be for the welfare of the child. They had derogated from this privilege only in cases where the parents by blameworthy conduct had deprived themselves of the 'right' to such a right.[87] Characteristically, Lord Simon in the above mentioned case, quoting Lord Hailsham of St. Marylebone L.C. in Re . W, points out that "Two reasonable parents can perfectly come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable. The question in any given case is

whether a parental veto comes within the band of possible reasonable decisions and not whether it is right or mistaken. Not every reasonable exercise of judgement is right, and not every mistaken exercise of judgement is unreasonable. There is a band of decisions within which no court should seek to replace the individual's judgement with his own. The primacy of the natural parent's right is thus vindicated."[88] On a narrow construction of this opinion, however, the approach that could have been formulated was that of taking the welfare of the child into account indirectly, by looking at the matter from the point of view of the parent, and regarding such a view as a matter of great importance. The fact that is ignored by such a construction, however, is that the purpose of the provision was simply to counterbalance considerations of paramouncy in the child's welfare which had given purely speculative consideration to the child's welfare and caused undue sacrifice to the natural parents' rights. Moreover, such construction, to a great extent, bases considerations of unreasonability on the parents' opinion which considerably diminishes the social purpose of adoption. In its turn, the Houghton Committee in their Report had no criticisms of the general spirit embodies in the decisions, Re W and A and B (Petrs)[89] but nevertheless felt obliged to fix a uniform statutory approach towards welfare to avoid uncertainty instead of leaving the matter to the discretion of the courts.[90] To their reasoning the welfare of the child was of "such importance that the duty of the court to give it first consideration should be embodied in the statute law".[91] It is believed that in settling on the term "first consideration" they made a compromise between the view that in adoption cases, as in custody, the child's interests should be paramount and the conflicting view of the parents' rights as held in Re W and A and B (petrs).[92] Another view advanced by Bevan and Parry[93] speculates that the test of first consideration is a compromise between the

government's original proposal requiring "full account" to be taken of the need to safeguard and promote the child's welfare and the view that as in custody and guardianship matters, his welfare should be the "first and paramount consideration".[94] The suggestion of the government, however, is considered to be meaningless because the courts are bound to take into account every relevant fact in order to protect the child. In the opinion of the House of Lords "To invite the courts or adoption agencies simply to take full account of the need to safeguard and promote the welfare of the child is doing no more than to remind the courts that they are not to forget that the welfare of the child is one of the issues that they are considering."[95] However, the essential reason provided for the rejection of the paramountcy test was the irrevocability of the order, this justifying special weight being given to the interests of the natural parent. "We have come to the conclusion (it is stated in the report) that, if the child's welfare were declared to be paramount, the test of whether the mother was withholding consent unreasonably could not remain. The choice, therefore, appears to lie between two approaches. The first approach is along the lines of the House of Lords' decision in Re W, retaining the existing grounds for dispensing with consent but taking account of the long-term welfare of the child in deciding whether the mother is acting unreasonably. The second approach would be to abandon the existing grounds for dispensing with consent, including the unreasonableness test, and to give the courts a general power to dispense with parental consent to adoption if they were satisfied that to do so would be for the long-term welfare of the child, this being the first and paramount consideration."[96] They rejected the second mentioned approach and concluded "We think that the law should recognise that there are a number of interests to be considered and put the interests of the child

first among them. It seems to us that the objective reasonableness of the mother is an appropriate test, and that in deciding whether she is withholding consent unreasonably the court should take into account all the circumstances, first consideration being given to the effect of her decision on the long term welfare of the child."[97]

The enactment of this recommendation was generally welcomed as giving a good guide to balancing the conflicting interests. Nonetheless it has not passed without objections and it has been suggested that on a logical construction of the section the attempt has failed and paramountcy prevails. A. B. Wilkinson,[98] who puts forward this argument, finds that according to the section there should be "a scale of interests among which the child's interest regarded from the standpoint of the need to safeguard and promote its welfare throughout childhood, will be ranked first in the sense of being given greater weight than any other single interest but not necessarily greater weight than the other interests considered together - to give it greater weight than the combined other interests would of course be to make it paramount."[99] Later referring to the three kinds of interests (child, natural parents and adoptive parents) he observes that the interests of the two sets of parents are necessarily opposed and if greater weight is given to the child's interest than to either of the other two interests then the decision must go in the direction which the child's interest indicates and that will be so no matter how much weight is attached to either of the other two interests provided always it is less than that attached to the child's. Finding the context of this arithmetical calculus inevitably involved for the proper construction of the section he concludes that the welfare of the child becomes paramount and suggests, as an alternative solution to this conclusion, abandoning altogether the scale of interests the Committee and Lord Simon of Glaisdale had postulated. Such solution then, according

to him, inevitably will deprive the term "first consideration" of any real meaning and it becomes no more than an exhortation to attach importance to the child's interests.[100]

However, aside from any objections as to the capacity of a logical construction to meet the social purposes intended by the legislature this approach omits to take into consideration two important factors that courts have to consider before making any decision. First the widely acknowledged importance of natural relationships in the life of the child, the preservation of which the court has to consider somehow or other, and second, that the placement itself necessarily has to satisfy the interests of the child, otherwise it would not have been considered in the first place. Therefore in a direct comparison between the two sets of parents in almost every case the welfare of the child would dictate adoption and of course in this setting it becomes paramount. Such direct comparison however by no means is emphasized in an Act which provides the alternative of custody to prevent alienation from the natural relationship. And it should be mentioned here that a claim for custody enjoys prior consideration in relation to the application for adoption and may successfully challenge the application on the basis of inferior standards to those offered by the applicants. Consequently one should not read into the wording of section 6 a classification of and challenge to interests but two independent decisions, one concerning the situation with the natural parents and one with the adopters, which, if brought together, constitute the basis for the adoption order.[100(a)] This thesis is further discussed in relation to consent and here attention should be directed only towards the meaning of the term "first consideration". In fact the term is intended to regulate the relation between the welfare of the child and the legal position of the rights of the natural parents on the one hand and to assess the offer made by the adopters in

relation to the particular child on the other hand. It is, therefore, a basis given to the court to oppose the legally powerful parental rights whenever it is satisfied on the evidence before it that the relationship with the parents either has no factual existence or, if existing, if further maintained would irretrievably damage the welfare of the child in the long run. Given that the court has reached this conclusion the term first consideration in relation to the applicants should be seen as empowering the court to overcome a duly qualified application in terms of legal conditions and family circumstances, if it thinks that the welfare of the particular child would be properly served by this. That I think, appears to have been the intention of the Houghton Committee when it accepted that bringing up a natural child is quite different from bringing up an adopted one and when it submitted any adoption application to the challenge of a custody claim. Also the same spirit seems to be adopted by Lord Simon in A and B (petrs), when charaterising the test as an objective one, and by Lord Hailsham in Re W, in the considerations that he offers on the band of reasonable decisions.

As regards Greece, on the other hand, according to article 1578 of the Greek Civil Code the court could authorise the adoption if the legal requirements have been complied with and if satisfied that on the evidence presented on the moral and financial position of the adopter the adoption would benefit the adoptee. This provision, however, like the entire system of adoption in the Greek civil code is proven to correspond inadequately with the modern concepts concerning the satisfaction of the best interests of the child. Welfare investigation was restricted to the persons legally affected by the relation - the adopter and the child - without giving any consideration to the family and the surroundings which the child had to leave. In addition, the

standards applied in the moral investigation were low, so that unless the applicant had run directly counter to principal social values, his or her application could meet the requirements of article 1578 of the Greek civil code. The crucial defect of the article, however, is that it omits to take into consideration the causes of the placement. Therefore, it was possible for a child to find its way to adoption, given the consent of the parent or guardian, without any investigation as to the necessity of cutting him off from his natural parents.

Presently, in view of the more general wording of article 2(1) of the L.D. and the new system it has introduced, the court undoubtedly is in a better position to protect the adoptive child. However, as is commonly done in civilian jurisdictions, the legislature provides the court and the social agencies only with general guidance and then leaves it to them as enforcers of the law to secure that this sound but vague provision does not become a dead letter.

The area of choice left to the courts and agencies is exceptionally wide. Article 2(1) of the L.D. under the wording "adoption is allowed whenever it is in the interests of the adoptee" concentrates the weight of the decision on the welfare of the child and its collateral societal welfare but no other indication is given as to the criteria to be applied in assessing whether a decision will redound in the interest of the adoptee or not. However, the article so far has been construed according to teleological methods of interpretation and the courts have come to the conclusion that full consideration should be given to all the circumstances of the case so far as the purpose of adoption cannot be served unless it is proven that the child is parentless or in the hands of unfit parents and that the adopters can meet adequately the needs of the child.[101] From the point of view of legal methodology such conclusion is possible

inductively by applying the argumentum a contrario since the wording of the article does not formally preclude other considerations from being taken into account.

Indeed, as regards the real weight attached to the welfare of the child the situation is rather obscure. The basis on which consideration is given to the child's welfare resembles the second approach suggested by the Houghton Committee[102] to the extent that the court has to be satisfied that adoption would be for the long term welfare of the child, but the test of paramountcy is not legally established. On the other hand, from decisions taken in the battlefield between the right of a parent to veto adoption and the welfare of the child the certain conclusion is that the welfare is of overriding importance. No other indication is given as to what will be its weight when conflicting with the interests of the natural parent, or of the adopters. In order to indicate what this may be I offer a brief review of the principal areas of the Legislative Decree and of some decisions where the court has dispensed with parental consent.

In the first place prior to consent the social work department has to communicate with the parents and carry out an investigation of their circumstances and their reasons for giving or not giving consent.[103] However, the concern shown for the parents' interests presents certain peculiarities because adoption does not result in a complete severance of the ties of the child with his natural family and at the same time the grounds provided for dispensing with parental consent are rather limited. For the former, it can be said that the contrast between the conflicting interests is not that acute, because, to the damage of the order, rights and duties of the natural parents are retained as a second alternative if the order fails, and the parents are provided with a right to access to their "ex-child", unless this is taken away

by the court. The court has the discretion to take the initiative of removing the right having regard to the circumstances of the case,[104] or on the application of the adopter or the procurator fiscal as an ancillary claim to the application or thereafter, if communication with the parents can be damaging to the child.[105] The court forms its opinion after investigating the character, morality and other circumstances of the natural parents.[106] For the latter, on the other hand, despite the broadening of the power of the court to dispense with consent in relation to the grounds of Greek civil code, alienability of parental rights is restricted to circumstances where the relationship lacks a factual existence[107] and to circumstances where the parent abusively withholds consent for a child boarded in a social institution where there are grounds justifying his forfeiting parental authority.[108]

Those provisions imply that there is conflict between the interests of the parents and that of the child; in fact, that of the parents would not need substantive consideration since the order is not irrevocable and does not extinguish parent rights altogether. Also, by the time the court would have power to dispense with consent the parent would have been proven unfit beyond doubt. The latter seems to be confirmed by the rationale mentioned in the Introductory Report of the Legislative Decree for introducing the grounds of abusively withholding consent. In practice, they assert, quite often mothers refuse to consent for unreasonable, selfish or neurotic reasons and they mention the case of a mother who refused to give her consent, yet who attempted to strangle her child almost every time she visited him in the institution. There is also mention of a case of another mother who did not consent to her child's adoption because she wanted him to suffer as much as she had in her life.[109] Given the guidelines in the report and the peculiar grounds for dispensing with parental consent the allowances in respect of the rights of the parents to withhold consent indicates

that paramountcy to the child's interests does not apply. Nevertheless, one could expect the welfare to be of paramount consideration because with the reserve of ties with the natural parents adoption resembles a more advanced form of fostering than adoption in a current social setting.

On the other hand, in a decision [110] given immediately after the enactment of the L.D.4532/1966 the welfare of the child was held to be the decisive criterion for both dispensing with parental consent and declaring the child adopted. Also in another case, where the grounds of "abusively withholding consent" had a clear application, the court dispensed with the consent of a mother who had left her child for the four years since his birth in social institutions because of her financial and social difficulties. The child was left there with the purpose of adoption and the mother had confirmed her intentions three months prior to the hearings. On refusing to appear and give her consent the court found that she had withheld consent abusively because a reasonable parent in her position would have taken into consideration the interests of the child. The important point, however, in this decision is the obiter dictum of the court, connecting the welfare of the child with the social interests. Adoption, held the court "is not a private contract, it is a matter which interests the whole society and has the purpose, not to provide childless couples with descendents, but to serve the interests of the adoptee, i.e. those left in nurseries and other social foundations, by securing on their behalf the possibility of being brought up within a healthy family environment." [111] The ratio decidendi of these decisions approximates the welfare of the child to the notion of being of "first consideration". If in conflict with the interests of the parents, it will prevail over them even though the parents have not been

culpable in conduct. Furthermore it will be considered in relation to the long term welfare of the child and social welfare

III. The content of the "welfare of the child".

Although what is best in the interests of the child's welfare will clearly depend on the relevant circumstances, it is possible to discern certain aspects of welfare which have been regarded as important. Article 9(1) of the Legislative Decree 610/70 defined those aspects in order to give a general guideline to the social services on the areas where they must place emphasis. A similar selection of important aspects of the welfare in respect of Scots law is provided in the Adoption of Children (Sederunt) Act 1959 in Section 1(iii) and Section 6 which specify the matters to be investigated by the curator ad litem. From the provision cited in the laws, for reasons of convenience, general areas such as health and physical welfare, morality, happiness, psychological welfare, material welfare, religious welfare and finally other aspects of importance for the specific child, have been extracted for discussion.[112] Before proceeding, it must be noted, however, that while a particular application may be disqualified in the applicant falls below the median standard in one aspect, such failure cannot be compensated for by rising above it in another.

The facts of a particular placement are infinitely variable so the aspects discussed below are often overlapping and interlocking. As Professor E. Clive points out "The concept of welfare cannot be reduced to neat mutually exclusive categories and sub-categories. It is a question of fact and degree, to be resolved in the end of the day by a value judgement which will be more or less difficult according to the circumstances."[113]

First, as regards health and physical welfare, these more than anything else stand out to be observed by the judge and personnel of the social services and are of great concern since the order may involve a child who lacks a strong resistance to illness or physical dangers.[114] Particularly Section 1 of the Act of Sederunt provides that "There shall be lodged along with the petition itself:- (iii) A medical certificate as to the health of the petitioner or each of the joint petitioners, except where the petitioner or one of the joint petitioners is a parent of the child," and in Section 6(o) "The considerations arising from the difference in age between the petitioner and the child if such difference is less than the normal difference in age between parents and their children", also in 6(p) "... on the ability of the petitioner to bring up the child."

In the L.D. article 9(1) requires close investigation to be carried out as to "health" and "his abilility to bring the child up properly". In accordance with those provisions a person seeking to adopt the child should himself possess health not tainted by illness and should not be accustomed to habits or ways of life that would expose the physical welfare of the child to risk. As such, one could mention ungovernable temper, alcoholism, drug addiction, indolence and indifference and, in general, inadequacy in dealing with life's affairs, as well as inadequacy in meeting the child's physical needs. The same should extend to the non-applicant spouse or other members of the household so far as contact with them will be influential on the child, or if success in the "physical" side of adoption partly rests on their cooperation.

Second, attention should be given to the morality and character of the applicant to secure the child's moral welfare. This matter, though always a prominent consideration, presently assumes paramount importance

for the order. The applicant enters into the criteria of the child's education which is a prominent base for deciding the placement and in this respect his moral character counts more than ever. Probably this aspect of the welfare will be significant if to satisfy the order there is "the need to safeguard and promote the welfare of the child throughout his childhood"; and the need to rear the child properly.[115] Therefore, Section 6(f) and (p) of the Act of Sederunt require investigation as to whether the petitioner understands that the order "will render him responsible for the ... upbringing of the child" and on "such questions or matters, including an assessment of the petitioner's personality and, where appropriate, that of the child, as having a bearing on the mutual suitability of the petitioner and the child for the relationship created by adoption, ...". Also article 9(1) of the L.D. asked for a close assessment of the "character" (ethos) of the applicant, and his "ability to bring the child up properly" (in terms of moral qualifications).

However, it should be noted that to assign a central meaning to this matter is most inappropriate because relevant values vary between social classes and places and also because the importance of such qualifications vary from placement to placement. In general, a person may be considered unfit if he or she is or poor morality or it is suspected that the general education of the child would be exposed to risk by "evil" teaching or corruption. However, the task that the court has to perform consists of a multilateral assessment of values existing in the family inter se as well as of the reputation that the applicants have in their society. Thus factors that articulate a view on the stability of the applicant's marriage, their reputation as a couple, their faithfulness, should be taken into account besides acts that imply personal unfitness to have custody of a child.

For the latter one could specify acts which could warrant deprivation of custody or forfeiture of parental authority, like convictions for criminal acts, dishonesty, cruelty to children, drug addiction, immoderate drinking, which manifest irresponsibility, as well as either of them indulging in such acts as are considered repugnant and abhorrent to the feelings of society.

As to religious persuasions, as a matter of character and morality this does not seem to have any particular significance for the placement. Where it is ascertained that there is no moral danger for the child, the involvement of religious persuasions becomes of secondary concern, even when the natural parents want to give some importance to the matter. The Act of Sederunt in Section 6(n) requires investigation of the petitioner's religious persuasions while in Section 7 of the Adoption (Scotland) Act 1978 it is stated that "An adoption agency shall in placing a child for adoption have regard (so far as is practicable) to any wishes of the child's parents and guardians as to the religious upbringing of the child". Greek law on the other hand is silent on the matter with the exception of interstate adoptions. Article 14 of the L.D. provides that the children are to be given to families of Greek descent and where there are no such families preferably to families having the same religion as the adoptee.[116] Given, however, that nearly all Greek subjects belong to the same religion there is no real need to enforce legally such consideration, though as made explicit by the law on interstate adoptions such intention exists. It is, therefore, at the discretion of the courts in both countries to take religion into account and they may be bound to do so if adoption concerns a child of age of understanding who had become accustomed to a certain religion, and changes of religious values would disturb the normal development of his character.

In relation to personality and morality of the applicant the court may experience considerable difficulty if the assessment concerns the adoption of a step child. If the spouse is rejected as unfit and there are no grounds to deprive the natural parent from having the care of the child this may have odd consequences, as much to the marriage as to the child himself. On the one hand, it reflects a disapproval of that union to care for that child and may operate as a warning to the natural parent to prevent involvement of the other party in the upbringing of the child. It may also make the parent sceptical about his or her choice of partner. On the other hand the child will be deprived of the legal security which both parents are ready to offer, while as a matter of fact he will remain with them. The problem could become even greater if the natural parent is a mother responsible for the child's maintenance who had given up her job on marriage. Therefore, the court should seize every opportunity of avoiding such confusion or disturbance by making a custody order and in the last resort if there is a need for the child to be adopted, to award an order provided that the natural parent is capable of controlling the situation.

A third aspect which assumes prominence where physical and moral welfare have been secured, is the happiness and psychological welfare of the child. In Section 6(p) of the Act of Sederunt concern is expressed for "the mutual suitability" of the parent and child and this concern is manifested by the law in various ways. Section 6 of the 1978 Act provides that the court and agency " ... shall so far as practicable ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding". To the same end Section 6(p) of the Act of Sederunt makes a duty of the curator ad litem "The ascertainment,

so far as is practicable, of the wishes and feelings of the child, regarding the proposed adoption". Nevertheless, a similar investigation is required as to the reasons that the petitioner wishes to adopt the child,[117] on "Particulars of all members of the petitioner's household and their relationship (if any) to the petitioner", and "why, in the case of a petition by one of two spouses the other spouse does not join in the petition".[118]

Article 9(1) of the Greek Legislative Decree requires investigation of the possibility of "adjustment of the child within the adoptive family", "the reasons why the applicant wishes the adoption" and his "family circumstances". This manifold manifestation of the weight attached to these criteria indicates the crucial importance, but also the complexity, that the psychological settlement of the child may have. Circumstances in the adoptive family, though good, may not be appropriate for the happiness of a specific child. The child, on the other hand, may suffer disturbance not curable in family patterns or may have been well established with his natural parents and unhappiness, however acute, may be transient or may even increase if the child is removed for adoption. Because of its complexity, therefore, the investigation is not a task to be carried out by the agency or the court alone. The cooperation of medical personnel experienced in the field may be thought necessary since such matters are not always open to immediate observation.

Wealth and material welfare are of secondary concern today though treated as significant when affecting other aspects of the welfare. Section 6(e) of the Act of Sederunt requires investigation on "whether the means and status of the petitioner are such as to enable him to maintain and bring up the child suitably, and what right or interest

in property the child has"; Section 6(f) on whether he "understands ... that the order ... will render him responsible for the maintenance ... of the child" and Section 6(c) on the "particulars of the accommodation in the petitioner's home and the condition of the home". Similarly, article 9(1) of the Greek L.D. mentions among the matters that should be taken into account "the family circumstances and the property of the applicant".

In respect to this aspect of welfare either as a reason for placing the child for adoption or for deciding the suitability of specific applicants, the role of financial assistance to the family plays an important role. It is unlikely in a system where there are sufficient housing facilities and assistance to parents who bring up children, for a court to be forced to ignore the wishes of a non-blameworthy parent because he cannot provide sufficiently for his child. Even more, it will avoid the creation of friction between the two sets of parents, because if adoption is granted largely on that ground, it almost certainly would not be enough to convince the natural parents of their unsuitability. On the other hand as regards the adopter it would not be proper to exclude suitable couples by reason of their low income. However, given that we are not at a stage where each family has a sufficient income to maintain its children the factor of wealth retains some importance in the overall assessment of welfare. But it is not any concern of the courts today that the child become richer by the order. Provided that the applicant can guarantee reasonable maintenance of the child, wealth is taken into consideration only for its bearing on other aspects of the child's welfare, e.g. if the order concerns a child who participates in many recreational activities or is so intelligent that it is certain he will undergo higher education, the court would have to take into consideration whether the applicant

could meet the expenses involved. It also has to see if any wealth conflicts other welfare criteria, eg, if it comes from suspicious sources, or if there is a risk of deterioration and the child is likely to be deprived of essential needs.

The final aspect that signifies the welfare of the child is the importance of the interests of both parents in adoption. The thesis advanced on custody by Professor Sarpe is that the best interests of the child can only be adequately realized by considering the interests of all parties involved has a fundamental involvement also in taking any decision for adoption.[119] By law, the court requires to have regard for all the circumstances of the case and should not under-emphasize the interests of the parents, for example, if this is likely to cause social disorganization. For this purpose there is distinguishable in the law a positive protection for the natural parents and the applicants through the right to consent, to be notified, to be protected if they have fostered the child for a certain period, to keep their identity secret, and to have their wishes taken into consideration. The former is dealt with elsewhere in this study, while the latter will be considered below.

In practice the most complex part of an adoption decision is to realise the weight of the wishes of the parents, to assess their truthfulness and predict the parental reaction if the adoption order comes into conflict with parental wishes. Normally, there is a disharmony between reason and emotion, not only in cases where the court had dispensed with parental consent but also where the parent was forced to act "reasonably" and consent for the child's benefit. For instance, in the case of a parent who experiences poverty or, due to his/her age and understanding, cannot correspond properly to the needs of the child

and acts reasonably after being convinced that the child will be better if adopted it is preferable to avoid adoption for two reasons (a) he or she will experience distress and (b) the future of the placement is unpredictable. In time, if the parent improves his situation, he may regret that he became "reasonable" and decided "out of love" for the child, to agree to the adoption. Most probably he will try to secure the child's return, and the earlier in the process the improvement, the worse his reaction and stress will be, when realizing the ineffectiveness of such efforts. This situation would be further aggravated if the court had dispensed with consent under circumstances where the parent was in real difficulties but still had genuine feelings for the child. On the contrary, for an indifferent parent, such decision will act beneficially because it will remove the burden created by the child.[120]

Therefore, to realise the wishes and feelings of the natural parent is a complex task and difficult to comprehend at length. Whatever weight is given to them, the solution will be far from pleasant for the parents. The blood ties may have been excluded to an extent by the state intervention, but are emotionally still alive, causing complications and inner conflict in the parents' lives.[121] Therefore, if adoption is going to have the function of preserving society without destroying its present structure, one should attempt first to facilitate the preservation of the natural relationship. By choosing the "easy way" of adoption, without exhausting all other alternatives, society will solve one of its problems at the probable cost of creating another.

Concern for the interests of the adoptive parents, on the other hand, is equally great because successful adoption depends upon them. Both laws insist on consideration being given to the reasons why they want to adopt, with the purpose of ascertaining their intentions towards

the child and of making sure whether they seek the fulfilment of certain emotions in adoption and if proper to coordinate them with those of the child. In this respect, herewith, the courts in many cases may be forced to make a compromise between the old and the new objectives of adoption provided that this will not affect the priority of the child's interests. But between purely emotional motivation and aiming to leave an heir, or to complete a family, the first should be looked upon favourably without of course precluding the possibility that a childless couple, who primarily seek to accomplish a family might not bring the child up properly. However, the important point is to secure for the adopters satisfaction and happiness since this has a direct bearing on the child. Therefore, their wishes and feelings must be taken into consideration as far as possible.[122]

# C H A P T E R  F I V E

## QUALIFICATIONS AND CONDITIONS

### INTRODUCTION

Domicile, residence, age and marital status have been the legal conditions governing eligibility to adopt. Additionally, in Greece there is the condition of childlessness as revised by the L.D.610/70. With the exception of domicile these conditions have also been relevant in determining the eligibility of the adoptee. Both the 1978 Act and the L.D. 610/1970 make changes with regard to each, mostly with the purpose of increasing the judicial and administrative flexibility of courts and agencies. Nevertheless, with respect to Scotland, the Act does not alter the rule that, apart from a joint adoption by a married couple, only one person is allowed to adopt, but it does impose certain restrictions on adoption by a married person, natural parents, relatives and step-parents. The Greek Legislative decree, on the other hand, adheres to adoption by a sole applicant notwithstanding that, by tightening up the welfare investigation, a single applicant qualifies only with difficulty for the adoption of a child below the age of majority.

### I. CONDITIONS FOR THE ADOPTIVE CHILD

With regard to the eligibility of the child to be adopted, both laws re-enact the limitations that it must be under the age of 18[1] (not to be exceeded by the date of the hearing)[2] and must not be or have been married, since parental authority is not exercisable over a forisfamiliated child.[3] In addition, the law has set down lower limits, making the child eligible for adoption. Thus, in Scotland, when the child is to be adopted by a parent, step-parent or a relative

or it is placed for adoption by an agency, it must be at least 19 weeks old and, in any other case one year old, before an adoption order is made.[4] In Greece, a direct limit is not provided but a parent cannot give consent unless the child is 3 months old.[5] This makes foundlings or abandoned children eligible for adoption from their birth.

Further restrictions on the eligibility of the child are imposed in terms of its age difference with the applicant, and in Greece in terms of its adoptive status. In conformity with the brocard "adoptio naturam imitatur" Scots law requires the existence of an age difference to make the relation appear normal,[6] while Greek law specifies the difference as no less than 18 years, unless the applicant is the spouse of the parent in which case an age difference of 15 years is considered sufficient.[7] It is also stipulated in Art. 5(2) of the L.D. 610/1970 that a child who is the subject of an existing valid order cannot be re-adopted by another person for the duration of the order except by the spouse under the same or posterior proceedings.[8] In Scotland on the other hand the child can be given for further adoption provided the consent of the adoptive parent is given.[9]

The basis of the conditions concerning eligibility of the child is rooted in modern adoption policy. The child cannot be adopted unless such time has elapsed as is considered necessary to assess whether the natural relation is preservable or not. Moreover it excludes children who cannot be subjected to parental control by reason of age or legal status. This is done because adoption is expected to have an impact in the rehabilitation and nurture of the child. The trust placed in this direction upon the adopters is such that almost

all aspects of the child's life are subject to their discretion. The only reservation is that, whenever adoption fails, there is the power either to revoke it (in Greece) or to place the child for a new adoption (in Scotland).

## II. DOMICILE OF THE ADOPTER.

Under the former law a person applying to a Scottish court for a national adoption must have been domiciled in Scotland or England.[10] The rule is extended to include domicile in any part of the United Kingdom or in the Channel Islands or the Isle of Man for a single applicant[11] or at least for the one of the spouses in the case of a married couple.[12] In Greece for a national adoption the applicant must be a Greek subject. Domicile itself does not qualify a foreign subject residing in Greece to apply, thus avoiding the restrictions on removal of the child.[13] A Greek national, however, who resides abroad is subject to no such restrictions.

## III. THE AGE OF THE APPLICANT

This condition has undergone a variety of changes, these being articulated by changes in the aims of the institution as well as by changes in the concept of maturity. It can be observed that in both systems the minimum eligible age in exceptional circumstances coincides with majority and is settled far above the age of marriage or of fertility.

(a) The process of the establishment of the present age limits has been one beset by various stipulations and philosophies. In Scotland, the limiting factor of age in terms of eligibility appears with the introduction of the institution in 1930. It was confined to 25 years of age provided that the application concerned a child 21 years younger.[14] But causa cognitio it was "lawful

for the court, if it thinks fit, to make the order notwithstanding that the applicant is less than twenty one years older" when "the applicant or one or other of the joint applicants and the child are within the prohibited degrees of consanguinity.[15,16] The Adoption Act of 1958 enunciated more complex arrangements whereby a natural parent could adopt his natural child without restrictions as regards age. In the case of a relative, applying alone or jointly with the other spouse, each had to attain the age of 21. For a sole applicant, stranger to the child, the limit was kept to 25 years while in the case of a joint application with the other spouse the one had to be 25 and the other at least 21.[17]

Unlike Scots law where age limits were as low as the age of majority, Greek Civil Code retained the severe limits of adrogation without room for causa cognitio. Article 1568 fixed the minimum age for the adoptive parent at 50 on the rationale that at this age the chances of someone producing his own children are minimal. The Committee appointed by the Ministry of Justice in 1959 to reform adoption law had envisaged the preservation of those limits, while empowering the court to lower the limit in specific circumstances.[18] A second committee appointed after the Hague Convention in 1963 proposed in its draft the age of 35 years, which was later promulgated as law 4532/1966.[19]

The relatively low age limits adopted by Scots law are understandable if one takes into consideration the fact that, from its introduction, legal adoption was directed at the welfare of the child,[20] while arbitrary criteria, like childlessness, as a ground for adoption, were generally deplored.[21] The concern was how to secure fit persons to care for the child and to make the relationship appear

as normal as possible. In this respect age limits had to be the lowest acceptable for social parenthood. Nevertheless, a preferential treatment of the parents and relatives arose from the need to provide illegitimate children with a status but also from the fact that professional assessment of the suitability of the adopters was considered unnecessary to or was rarely involved in these adoptions. With the improvements in the status of those children such need was minimized so that at the reporting of the Houghton Committee, the situation was mature enough to permit alteration of the policy.[22] Thus, the Committee placed weight on the social service side of adoption and thereto adoptions by relatives merely change the legal nature of an existing factual relationship. Such practice, therefore, could cause erosion in the aims of the institution, not withstanding that it tolerated the exclusion of parents from any relation with their children by reason of adoption by the other parent.[23] Within this ideological shift the limit of 25 years was replaced with the age of 21 for both relatives and non relatives subject to professional assessment of their suitability.[24] The rationale offered for the further lowering is that the age of 25 was an obstacle to considering some suitable couples while the proposed age would "give the opportunity of testing the strength of teenage marriage".[25]

In Greece, as said, the age limit in the civil code was 50 to ensure the childlessness of the applicant. The rationale , however, was soon at the centre of severe criticism as misconceiving the relevancy of age to childlessness as well as for overlooking the implications of the limit for both the adoptions performed, and the children in need of adoption. Indeed this age as an assurance of permanent childlessness, is not trustworthy, insofar as infertility normally appears a decade above and below for men

and women respectively. In addition, the existence of permanent barrenness can be medically proven so that it is not necessary for somebody to wait until this age. There is some suspicion therefore, although it was never explicitly or implicitly admitted by anybody, that the civil code was overly concerned with the possibility of legitimate or legitimated children. Thus, it took the extreme position in order to preclude the chance of the adopter having children by a second marriage. Of course, the implications of such extremism was severe because a person of that age could rarely act properly as parent of an infant and the scarcity of adopters was such that Greece because a source of export of children. The civil code, without distinction, permits adoption of minors and adults so that persons over fifty could lawfully apply under a simple procedure for the adoption of a child. G. Michaelidis Nouaros, expressing his objection to this, points out that the limit would be rational if the code excluded the adoption of minors; but rearing children demands rigorous physical and psychological powers and a long life span, which cannot be satisfied by persons over fifty who usually turn to adoption expecting the affection of the adoptee.[26] In consequence the number of Greek applicants could not absorb the children available and many children found their way to be adopted abroad. This possibility was facilitated by article 23 of the Greek Civil Code (Private International Law Section) which provides that "The substantial conditions of adoption are regulated by the law of the nationality of each party". Thus, foreign applicants qualifying under their own law were eligible to adopt a child in Greece without being of fifty years of age. The occurrence of the phenomenon was frequent because many used to take advantage of the provision to avoid trouble with the natural family or because of the waiting list in their own country and the child was taken

abroad without any substantive investigation on the circumstances of the placement.[27]

(b) The complex provisions of the Adoption Act 1958 and the rather high limit of age of the L.D.4532/1966 have been repealed. The law as it stands today in Scotland after the 1978 Act is that in all cases the applicant or joint applicants must be at least 21, and in Greece after the L.D.610/1970 the applicant has to be 30 and in exceptional circumstances 21 which is the age of majority.[28] It is important to notice that for the first time in Scotland an age limit is imposed on the natural parent as a prospective adopter, and that Greek law has retained exceptions to the age limit if there is a good serious reason. Specifically for the latter, article 3 of the L.D. indicates as such reason the loss of any hope of the applicant having children of his own or if the applicant wishes to adopt the child of the spouse. Both laws do not spell out any maximum age but it is left to the consideration of the court when it adjudicates on the suitability of the applicant.[29]

Between the legal stipulations of each system one may observe a basic difference which is the preservation of a rather high limit in Greek law as well as some similarities concerning the structural approach to eligible age, and the legal or other qualifications expected by the applicant of that age.

In the first place the difference in the age limit is due to a different approach to the personal status of the applicant. Unlike many modern systems which adheres to adoption by a couple irrespective of their having children or not, Greek law goes in the opposite direction. Thus the law still preserves childlessness

as a prerequisite and overall inclines to adoptions by a sole applicant. In this context the high age limit has the double limitation of testing childlessness and nevertheless, since the care of the child is at least legally entrusted upon a sole applicant (single or married), of setting an age limit assuming more experience. In support of this came the exceptions in age provided in the L.D. Article 3 envisages as good reasons the "applicant losing the chance of having his own children and the adoption of a step child". Both circumstances imply marriage and shared responsibility between two persons so that excessive demand for experience became unnecessary, and creates the circumstances for the condition of childlessness.

However, it is relevant to mention here that the two examples mentioned are indicative and reasons of equal importance may permit an exception. As such, the physical feebleness of the woman could be relevant, making it difficult for her to bear a child, the existence of a hereditary disease in either spouse, suspected danger to the health of the wife if she became pregnant or to the child itself. Also although the wording of the article implies that such reasons must exist in the person of the applicant the variety of possible cases requires a more flexible interpretation to realise the spirit of the law. If, for example, an adult husband, of a wife below the age of majority who is physically unable to bear children applies and receives a favourable report and the application is rejected because he himself is capable of producing children, such interpretation would be excessively severe. It would be more appropriate therefore to evaluate such reason with regards to the couple themselves.

As regards step-children whose adoption should be permitted under this provison these must be the legitimate, legitimated or adopted children of the other spouse, or the illegitimate child of the wife.[30] With regards to an illegitimate child of the husband prima facie it should be included in this category. However, as explained earlier the relation with the father, if not reformed, has such a variety that this category should be included only for voluntarily affiliated children because only these fathers have a right to custody of their children.[31]

In the second place, it can be seen that neither law specifies any other qualifications in relation to age. The matter is entirely left to professional assessment and the discretion of the courts. Nevertheless, however, the age limits as provided give a different image of adoptive parenthood than that for biological parenthood. Neither of the two laws envisages, in any instance, the eligible age of marriage, nor does it permit a person without legal capacity to become an adoptive parent.

This is explainable in terms of the reservations that societies in general have against teenage marriages and the parents' responsibilities on adoption. The Latey Report (the Report of the Committee on the Age of Majority) provides the following aphorism in its criticism of teenage marriages: " ... make the wrong contract and you suffer for a year or two and perhaps make an adult trader miserable for a few months - make a wrong marriage and you may suffer for a lifetime and spoil the lives of your children after you".[32] A similar view is expressed by Professor Rood de Boer in pointing out that in Western societies with the purpose of protecting their children people take the position that they should not themselves bear children

before having a carefree life without responsibilities and without having the necessary experience to plan their future properly.[33]

The matter did not escape the attention of the Houghton Committee which when the evidence before them indicated a high rate of breakdown of teenage marriages revised their proposition that majority should be the age of eligibility.

An alternative considered was to permit adoption to couples who have been married for a time sufficient to prove stability of their marriage.[34] This solution, however, presents the defect that it hampers professional assessment. The circumstances vary from case to case and the survivability of the marriage remains open to question irrespective of its length. Moreover with this solution applicants who have been married for the specified period would have a special claim to be considered suitable, whether their marriage is in danger or not, since by law that marriage is deemed stable.

The remaining alternative was to specify the minimum eligible age and leave the court to formulate its own views on the evidence presented. The Committee found, however, that its initial proposal on the 18th year (the age of majority) "is a young age at which to face up to all the implications of taking responsibility for someone else's child. A minimum age of 21 would ensure that teenage marriages which appear more vulnerable would have been tested by time. We, therefore, recommend that a minimum age for adopters should be retained and that it should be the age of 21 for both husband and wife in all cases".[35]

A similar argument may also be considered valid for the limits

settled in Greek law. Apart from the reasons stated for the high limit of thirty years, in cases where the law permits exceptions those do not go beyond the limit of 21st year (although the age of marriage starts from 14 and 18 for girls and boys respectively given parental consent). The matter has not been specifically considered in respect of adoption but criticisms on the issue in the law of marriage have presented reservations of equal importance.[36]

The issue of age is not irrelevant to the function of parenthood as it has been formulated with the recent shift towards the social side of adoption. All liabilities of the parent in respect of a strange child with the order are vested to the adopter and he is rendered exclusively responsible for the upbringing, maintenance and representation of the child. In his duties he is expected to respond in a manner serving the welfare of the child. Therefore, the two laws have selected an age which assumes ability to understand the nature and purpose of the order on the part of the adopter, as well as indicating he will be reliable in fulfilling his duties.

## IV. THE STATUS OF THE APPLICANT

The eligible age, as settled in both systems, is a condition made basically on assessments concerning the personal status of the applicant. Among them the marital status of the applicant plays the most important role since this signifies whether a complete family unit will care for the child or not.[37] The approach of law appears to be different towards this question.

The present Act, unlike its predecessor the 1958 Act, no longer permits adoption in favour of one of the spouses if they are living together

with the consent of the other spouse. The change, which was not recommended by the Houghton Committee, is designed to encourage joint applications. On the other hand, section 15 makes it possible for a single person or, in specific instances, for one spouse alone to adopt a child.

For the single applicant such instances are not specified but as the Committee explains it is a concession made in favour of parents with illegitimate children because it is evident that in certain cases such adoption will be beneficial to the child. For a married applicant it is permitted on the other hand in strictly restricted circumstances, namely those which under the former law were grounds for dispensing with the other spouse's consent.[38]

As regards Greek law, although this theoretically deals only with individual adoptions, it nevertheless implicitly envisages marriage as a qualification sine qua non for the applicant.[39] Setting the eligible age at 30 is done on two accounts. At this age a person normally has made up his mind about marriage and, if not, is neither likely to consider adoption, nor, if he did, to qualify under the welfare requirements. In respect of the latter it must be said that the policy adopted by many countries is also followed in Greece. Adoption is seen as a form of care emerging from the participation of the community in the problems of children when arising from lack of parenthood and curable in family circumstances. The position firmly kept in both introductory reports is that the real need of children is to become members of a complete family which can look after their growth and education in a manner beneficial to them.[40] Nevertheless, article 9(1) makes explicit this purpose because it practically requires a self efficient household to care for the child.

This conclusion is further supported by the fact that Greek law permits exceptions from the age limit under circumstances that clearly imply the existence of a marriage between the applicants. However, Greek law differs from Scots law in that it does not show a due concern for the child becoming legally the child of both spouses. This may turn out to be a considerable defect for the placement, if for any reason the non-applicant spouse changes his position towards the child.[41]

Nevertheless, that it is still permissible for an unmarried applicant to adopt, must not be considered as having a diluting effect on the aims of adoption. The preservation of this freedom is right, considering that its exercise could cover circumstances where the order would seem to be exceptionally beneficial for the child.

That sole applications should continue to be allowed appears to be also the view of the Houghton Committee. Evidence to them had shown that adoptions by a sole natural parent, had in many instances beneficial results to the child, other than improving its legal status.[42] Moreover, cases where the applicant (a single person) has de facto cared for a child over some time and is willing to adopt it, could be regarded as similarly beneficial to it. In such cases, whenever it corresponds with the welfare requirements, the legitimation of the de facto relationship certainly secures the interests of the child and, if the child is settled with the applicant, prevents undue emotional disturbance.[43] Furthermore, this particular category of applicants is worthy of preservation in view of its clear intentions towards the child. The single person normally proceeds to an adoption from the desire to care for an individual child, whereas, with married applicants, the motives are mixed and usually concerned with childlessness.

The inference, therefore, is that adoptions by an unmarried person, although inferior in terms of financial and custodial guarantees, need not be discontinued if there is sufficient ad hoc evidence that the interests of the child will be properly served. But, insofar as in such cases there is no possiblity of turning to the other spouse in the event of unexpected changes of circumstances or negligence, it is important that courts take all available precautions before making an award to an unmarried applicant.

## V. ADOPTION BY A MARRIED APPLICANT ALONE

A. Earlier in Scots law the possibility for a married person to adopt alone under exceptional circumstances was referred to. The court, to consider such applications, has to be satisfied that

i. the other spouse cannot be found or

ii. the spouses have separated and are living apart and the separation is likely to be permanent or

iii. the other spouse is by reason of ill health, whether physical or mental, incapable of making an application for an adoption order.[44]

In the first and second instances most probably mature separation is presumed between the couple so that either they share nothing in common or the circumstances are such that preclude reunion of the spouses.

1. Namely, in the case of an applicant whose spouse cannot be found there is no specific precedent in order to understand what weight had been given to the intentions of the party to cease from living with the applicant. If applied by analogy with those decided for a parent, who cannot be found, to give consent,

the criterion for deciding for the spouse would be to declare him missing if all reasonable steps to trace him had been taken and these had not produced any results.[45] But in the cases of the applicant, it is important that the court make an effort to understand from the circumstances of the disappearance the intention of the missing party and whether reunion is probable since both must be taken into consideration for the welfare of the child.

2. On the other hand, the concept of being separated and living apart is well known in matrimonial causes and decisions thereon are relevant by analogy. For the particular case, however, the court must take three factors into account before deciding whether the separation is that required by law :

i. whether the separation involves fiscal effects,

ii. whether it is supported with evidence proving permanency, and

iii. where the couple are actually living apart.

For the first condition, any legally recognised form of separation, from the informal to the most formal, would seem to be sufficient.[46] The condition, however is interlocked with the other two. Therefore only a judicially separated couple may satisfy the conditions since they are deemed not to be living together. But even so due to the absence of express definition in statute, it may be that there is a rebuttable presumption to that effect.[47] Thus, it is possible that the parties are separated in the physical sense but still living together and vice versa. For example, the husband's work may require him to be away for long periods at a time, or the couple may have separated in the physical sense

but may still be living under the same roof. The possible cases seem rather confusing for an understanding of whether the couple is living apart and whether the separation is a permanent one.

As regards the third condition, English courts have made a distinction with regard to such spouses, holding that spouses are living apart when they cease to share the same services even under the same roof.[48] Despite the fact that these cases refer to divorce, Freeman suggests that "There is no reason why this test should not be applicable here, though it is doubtful whether an adoption order ought to be made in such circumstances, bearing in mind that the welfare of the child is the first consideration."[49] Indeed such difficulty exists bearing in mind that the function of the provision is to ensure that the separation is mature enough to have enabled the couple to cease sharing the same dwelling, with each settled into his own household. This would enable the agency to assess the environment where the child would be received and to ensure that no direct contact between the child, the adopting parent and the other spouse, with whom relations may be tense, would be such as to disturb the child emotionally.

Also separation has to be permanent. A way out of this problem, it is suggested, is a close inquiry into the circumstances.[50] However, this would be meaningless and against the condition of Section 14 ofthe Act if not carried into proof that the parties are unwilling to reconcile, on the basis of objective evidence, or that the parties have proceeded to a stage in divorce proceedings such as the issuing of a divorce order.

3. Finally, the circumstances of incapacity are limited by the 1978 Act only to the instances of ill health, physical or mental. According to Bevan and Parry the ground relates to joining in the application for, rather than agreeing to, an adoption order. Thus it applies to instances where the spouses are physically separated, i.e. because the one is in hospital and cannot be said that they have separated and are living apart in the legal sense, as well as when the spouses are living together.[51]

The provision has been criticized as introducing a "strange anomaly" in the Act because it permits someone with an incapacitated spouse to apply, irrespective of whether they live together or not, while it fails to do the same for someone with a spouse in good health.[52] The criticism, however, cannot sustain because the ground provides a concession against the policy that adoption should be promoted among joint applicants. It aims to meet the rare case where the one spouse applies to adopt a child fostered out in the family, or his or her natural offspring, while the other being unable to understand the nature of the order or being unable to perform parental duties has to remain out of matters. It is then left with the court to consider, whenever a spouse suffering ill health lives with the applicant, if the circumstances of the family are conducive to the child's welfare and take the necessary precautions to avoid unexpected complications.[53]

In respect to adoption by a married person alone, it is suggested that if the other spouse recovers of reappears and cohabitation is resumed after an order is made, the couple

should apply for a joint adoption order.[54]

B. In Greece, as explained earlier, the policy is that the child should be placed within a family. Consequently, marriage becomes a qualifying prerequisite for the applicant notwithstanding that the law adheres to adoptions by a sole applicant. On this basis the involvement of the couple in adoption is governed by different principles. Namely, according to article 6 of the L.D. 610/1970 "A married person cannot adopt without the consent of the other spouse, which must be provided in the form of a notarial deed or with a declaration before the court at the hearing of adoption. The court, nevertheless, may allow the adoption order without that consent in the instance of overt prolonged separation of the spouses, as well as when due to mental illness or other serious reason the agreement of the other spouse is unattainable".

The conditions for the spouse to apply without the consent of the other are similar to those permitting the married applicant to apply alone under Scots law. Thus, with respect to mental illness it has been provided that a judicial deed incapacitating the spouse is not needed, but it is sufficient if the spouse presents evidence proving inability of the other either to understand or participate in the adoption.[55] Similarly for a good reason in the circumstances the decision 386/1964 of the Arios Pagos held consent unnecessary if the spouse is of unknown residence and cannot be traced back.[56] Furthermore it may be argued that such reason exists when the spouses are physically separated because the other is undergoing long term hospital treatment.[57] Furthermore, in respect of the evident prolonged separation of the spouses this may be either formal or informal, and should exist

at the date the application is made. However, this ground is of particular significance because it is one of the rare instances where Greek law recognises de facto separation.[58]

Relevant to the above grounds is whether the court can dispense with consent on the grounds of abuse of right if the spouse withholds consent unreasonably. Answer to this question, however, should be given after considering the reasons for requiring the consent of the spouse and its significance for the welfare of the child.

One rationale of consent being necessary is that the spouse's rights and duties and marital relationship with the applicant will be decisively affected by the adoption order.[59] It would be arbitrary, therefore, if one party created such a legal relationship without the approval of the other party.[60] A different approach, more coherent with the welfare ideal, without underestimating the importance of the spouse's rights, envisages consent as a need emerging from the role that the other spouse would have in the relationship created. Namely it aims to secure that the spouse undertakes the obligations of a step parent and that, if the order is made he or she will serve and promote the welfare of the child. Thus, consent, apart from its function to protect the interests of the spouse, expresses the spouse's intentions towards the proposed adoption.[61] This is not of course to say that he or she undertakes a direct obligation towards the adoptee, but only incurs one indirectly through the conjugal relationship with the applicant's spouse.[62]

In relation to the different approaches on consent there is also disagreement as to whether consent should take precedence over any hearings as well as to its consequence for the order if proved

to be defective. For applications submitted under the civil code procedure, supporters of the contractual or mixed theories on adoption[63] because of their concern with the interests of the spouse, had viewed consent as a subjective prerequisite exercisable by and on behalf of the spouse. In this context, consent not given prior to hearings could be provided at any stage of the first instance proceedings or before the appeal court.[64] The opposite approach sees consent as a constitutive element for the qualifications of the application that should exist before any discussion on the merits and as revocable only before the first hearings.[65] On the first basis an order awarded without a legally effective consent is voidable. The spouse, whose rights have been affected by the order is entitled to bring an action to overrule the order. The voidability of the order is remedied if the spouse had died without bringing a petition seeking for the adoption to be declared void.[66] In accordance with the second approach an order granted with neither consent nor its dispensation is void as lacking one of its constitutive elements.[67] Reasons justifying exemptions or the dispensing with consent are subject to the judgement of the court and any erroneous judgement does not entail voidness of adoption.[68]

In relation then to the conditions for consent in the Legislative Decree 610/1970 there are certain observations to be made for existing theory. If consent is necessary in order to protect the rights of the other spouse in separation where those rights are still operative the article dispences with the need of having the consent of the spouse.[69] Moreover, a similar exclusion is provided for the mentally ill spouse although in accord to this approach his rights need far more protection. Especially for this case, it should

be noted that the L.D. treats consent as an exclusively personal matter so that a mentally ill spouse cannot be represented in the consent by his guardian.[70] Irrespective of the conditions of the article, if consent could be provided at any stage of the proceedings, as the theory asserts, nevertheless it must be considered revocable within the same time limits if the spouse can provide irrebuttable evidence on change of the circumstances justifying him in withholding consent. However, according to the clear sense of article 1575 of the Greek civil code any agreement given to or for adoption should be free of terms and conditions and can be revoked only prior to any hearings if given with a notarial deed, while it is irrevocable if given before the court. In accord with the above consideration it should be said that the rationale for requiring consent of the spouse for adoptions under the Legislative Decree 610/1970 relates more to the participation of the non applicant spouse and should be treated not as a mere agreement but as an undertaking of certain responsibilities. A spouse who ceased cohabitation or is incapable of performing parental duties is unlikely to undertake responsibilities and as such is excluded.

In relation then to the case where the court is asked to dispense with the consent of the spouse on the grounds of abuse of right, in view of the need to protect the spouses' rights this has been considered possible only if the spouse withheld consent without just reason.[71] Given on the other hand the importance attached to the welfare of the child in the L.D., it seems rather unwise to take such a step because the spouse is going to have an active role in the future of the placement. However, for the rare case where the spouses have been separated without this separation existing for long, but it being unlikely that cohabitation will

resume, it should be permissible for the court to dispense with consent on the grounds of abuse of right.

## VI. CHILDLESSNESS

The two systems treat the matter of childlessness in entirely different ways. In Scots law where there has been a significant reduction in legal prescription on eligibility such matters are left unregulated. However, despite the fact that the 1958 Act disregarded childlessness as a prerequisite for adoption this did not prevent some agencies from preserving the rule in their own constitution or refusing to place children with prospective adopters who already had children of their own. This approach has been first attacked by the Hurst Committee which found such regulations to be unfortunate,[72] while the Houghton Committee took a firmer line, by recommending that such rules and practice be altogether rejected. No express prohibition, however, is embodied in the 1978 Act but in the Committee's view the exclusion of couples with children of their own is an 'arbitrary criterion; each case should be considered on its merits, from the point of view of whether adoption is likely to be for the child's welfare, and that agencies and courts should not themselves attempt to formulate rigid rules on what constitutes suitability, or unsuitability to adopt.[73]

In Greek law, childlessness is a well preserved condition of eligibility, present in the pre-code[74] and civil code law and reappearing in the L.D. 4532/1966[75] and 610/1970. In relation to the latter, article 2(2) states as a sine qua non prerequisite for a competent application the lack of legitimate descent for the applicant. This includes the legitimate or legitimated child of the applicant,[76] and their descendants or the descendants of an adoptive child born after his adoption.[77]

Having an adoptive child no longer prevents further adoption by the parent as it used to under the civil code and the L.D. 4532/1966.[78] A child given for adoption is still deemed as the legitimate offspring of its natural parents, insofar as adoption neither extinguishes the relationship with the natural family[79] nor their rights and duties altogether.[80] A stillborn child prevents adoption[81] while a child born out of wedlock according to the clear sense of article 2(2) does not debar adoption, even if there is voluntary affiliation, where the rights and duties with the parent approximates to that of legitimacy.[82] As to the legitimate child who is presumed dead the Magistrates' Court of Ioannina in its decision 89/1947[83] refused to grant an order, stating that a mere ignorance of the child's whereabouts should not allow its parents to proceed to an adoption unless decree declaring the child legally dead has been issued. However, this might constitute serious reason for the conditions of article 4 of the L.D. 610/1970 (infra).

With this provison the L.D. remains within the traditional conception of the interests of the adoptive child as being in conflict with the interests of children of the applicant; and thereto holds the extreme position being concerned not only with the interests of the nuclear family but with that of the entire descent. Indeed as the raison d'etre of requiring childlessness is presented the need to prevent prejudices inherent in families with natural and adoptive children. The opinion was and somehow remains that the position of the adoptee is precarious and inferior to that of the natural child. Recent studies, however, reject this argument, inclining to the view that such frictions, whenever they exist, are of minor importance or not sufficient to prevent placements in families with children of their own. Their common observation is that problems are exclusively created by the parents and that this is not beyond remedy because they can easily learn to create

warmth and emotional understanding in their families.[84] A second argument views childlessness as a need to protect succession and alimentary rights of the legitimate descendant. The argument enjoyed remarkable attention by Greek scholars and seems to be the decisive one taking into account that childlessness includes the entire descent of the parents which has a little to do with his nuclear family.[85] Against this argument, however, one could state that such rights are not absolute and the parent has the discretion to prejudice them, i.e. by appointing the child to its legal portion in the estate.

The hollowness of the arguments then was appreciated by the Committee of the Ministry of Justice which in line with the provisions of the European Convention,[86] suggested apart from a lowering in the eligible age, abolition of childlessness altogether.[87] The Legislature had partly rejected this proposal, reinstating childlessness. This must be viewed with some scepticism since at the age of 30 childlessness cannot be secured as a permanent condition. Spinellis and Shachor-Landau in respect to the enactment assert that "Although it may be argued that a childless couple will prove kinder towards an adopted child, there being no possibility of discrimination between natural and adopted children, this is not inspired merely by the interests of the child. The provision rather savours of the old idea that an adoption comes essentially to fulfill the interests of the adopting parents."[88] This conception of the condition seems to express well the ideology behind childlessness since the arguments in favour of its preservation are not within the bounds of the interests of the child. To argue on the other hand for the abolition of childlessness from Greek law is not an easy task to perform since it cannot be supported with empirical evidence. Long term fostering has never been seriously practised with families with children on their own and Greece remains among the

few countries which have never experimented with the coexistence of natural and adoptive children in the family. Unfortunately such experiment is not in prospect because the present Decree fails to provide for the child to have his home with the applicant prior to the order, when the weight of such ambivalent arguments could be easily clarified.

## VII. EXCEPTIONS FROM THE REQUIREMENT OF CHILDLESSNESS

The formula has been partly relaxed by article 4 of the L.D.610/1970. According to this the court may waive the condition (childlessness) and permit the adoption of one only child to a parent having a legitimate descendant if the descendant suffers from an incurable disease or there is a serious reason to consider the adoption notwithstanding that equal consideration should be given to the interests of the natural child. The article is a modified version of article 4 of the draft of the L.D. 4532 which was introduced under the pressure of the European Convention. It is a pragmatic provision aiming to conciliate the opposite approaches of the Committee and Parliament and as such lacks any empirical and theoretical justification.[89] The article in its present form corresponds to two cases of different orientation. The first, like childlessness, emphasises the interests of the parent, permitting him to adopt when his descendant suffers an incurable disease. The second is aimed to legitimate de facto relations in cases where the child has been cared for for some time by the applicant and they are willing to give legal effect to their relationship. Both are subject to the conditions that the parent may apply for the adoption of one only child and that the interest of the legitimate descendant will be respected with equal consideration.

The conditions for the prospective adopter to apply having a severely

ill child prescribe (i) the existence of one only descendant, (ii) who suffers from an incurable disease (iii) so severely that either there is no hope for him to survive or the illness or handicap is of the nature precluding him from taking part in social life. This interpretation is given in accord with the condition of childlessness and presumes a situation whereas the applicant has been substantially deprived of the joy of having a child.[90] Moreover, according to the letter of the law, an applicant with more than one sick child is excluded. However, from a teleological point of view, because he stands in the same state of deprivation, it seems appropriate to permit him to apply if that adoption would preclude dangers for the welfare of either child.

The second exception waives the requirement of childlessness when there exists a serious reason compelling the adoption of the child. Such qualifying reasons have been indicated as the adoption of a neglected, abandoned or orphaned child fostered over some time by the applicant's family; and has the purpose of legitimating a de facto relationship.[91] An opinion expressed by G. Michaelidis Nouaros gives nevertheless another dimension to the meaning of the term 'serious reason". According to him the court may authorise adoption by someone who already has a legitimate offspring if that person wishes to adopt a child of the other spouse.[92] This approach is undoubtedly of value for a parentless child. In general, however, this suggestion is subject to the reservations expressed for adoptions by relatives since such a step would eradicate substantially the relationship with the other natural parent and his relatives, without altering the factual circumstances of the child.

Petitions submitted under the conditions of article 4 of the L.D. are subject to the restriction that the application should concern the adoption of one only child. This is stated to secure the important

end that the inclusion of another child will not place too great a burden on the family. The manner, however, of so doing is rather unsuccessful. Maybe there is an acceptable rationale justifying the restrictions for applicants with a sick child, i.e. if that child needs intensive care, but nevertheless it imposes undue restrictions on the flexibility of courts and agencies to assess situations. To take for instance the case where a whole family unit has been cared by the applicants, with this restriction the children must either separate or await a childless adopter to adopt them. Thus various questions arise in respect of the children's future. In the first place they may have become part of the caring family and suffer considerable distress if removed, and even if we take for granted that children are quite flexible in adjusting themselves to new situations, it is difficult to predict if they will fit happily in the new family. On the other hand, to separate them is most undesirable since as has been pointed out, children, and especially parentless ones, learn brotherhood in its ultimate meaning in childhood.[93] The condition therefore, is incompatible with the concept of the welfare of the child and like childlessness savours of the old ideas when adoption was intended to console the childlessness of the applicant.

Aside from the misplacement of the exemptions in the modern concept of adoption, there is a particular difficulty in making welfare assessments under those circumstances. Article 4 of the L.D. imposes the duty on the court to have due consideration to the interests of the natural child. In relation, therefore, to the welfare of the adoptive child the line appears to be either that adoption is permitted whenever none of the children is to be in an inferior position and below the acceptable standards, or that it is permitted when it leaves unaffected major interests of the legitimate descendant. The situation is complicated

in terms of legal and social arguments and unfortunately is scarcely discussed in Greek Jurisprudence. The choice of the first may result in a concession to the progressive nature of the process of adoption while choice of the second may cause undue deterioration of the interests of the natural child.

In German jurisprudence the line taken for the similar situation is that a parent with natural children can adopt insofar as adoption does not contravene major interests of the natural child, either presently or in the near future. Proprietorial rights of natural children are not of decisive consideration.[94] If we apply the same consideration in Greek law there are still some dilemmas in choosing the first or the second approach for maintaining a fair situation in the rest of the substantive rights for either child. A general proposition made by Nouaros seems to incline to mutual concessions and balance between the two welfares under consideration.[95] This, however, is easy to achieve when adoption concerns a child fostered by a family with healthy children. On the other hand to assess aspects of the welfare with a family having a sick child or even to try to predict what care would the adoptee receive within this family is most difficult. Unexpected problems should always be taken into account. The mother's time may be restricted by complications in the health of the child. She may, for example, be forced to stay at the hospital at a time while the child is attending. And, aside from the question of time, the maintenance and emotional affection needed for either child seems to be in the same state of danger. Parents normally are not reluctant to spend money in order to try to cure their sick child and it is not unknown in such circumstances for families to spend their entire resources to this end. Moreover, the situation of the sick child may attract the greatest attention of the mother to him so that the adoptee may feel emotionally

deprived. To this should be added the observation made by the committee appointed by the Ministry of Justice that due to the intensive life in such families the adoptive child may have to offer more than the necessary services in the adoptive family and may be considerably deprived of play-time.[96]

The above observations make the decision of which line to take rather difficult, or in any case not of such broadness as to give a satisfactory solution to most cases. The coexistence of the children in the family should not result in devaluation of either child's interests. Therefore, the first line seems to cover reasonably well cases where health complications for the natural child are predictable. If, however, deterioration in his health is to be expected the court is bound a priori to refuse consideration unless the means and position of the parents can secure permanency of the satisfaction of the welfare of the adoptee. Inevitably economic factors come to have an important role as well as the employment situation of the mother - which thus discriminates against the lower middle and working classes.

The approach requiring preservation of the major interests of the natural child, on the other hand, starts from the position of his rights and considers whether or not there is room for adoption without in the long term damaging any of those rights.[96a] This approach, apart from the fact that it leads to the same discrimination against the parents, fails to give any guidance on what must be the relationship between the rights of the natural child and that of the adoptee. Prima facie the court may be justified in granting an order if this will result to the interest of the adoptive child, irrespective of the better nature of rights preserved on behalf of the natural child. This, however, produces a discriminatory situation within the family. If

on the other hand, the aim is to maintain a balance, to what extent would the rights of either child diminish in the case of complications and are such risks permissible at times when the number of adopters available is far greater than the number of children awaiting adoption?

Whatever the method applied, this will not resolve the problems of such placements. There would always be outstanding the uncertainty for the adjustibility and for after-effects in the placement, for both parents and children. Parents with a seriously ill child have learnt to deal with the problems considered and may find it difficult to adjust themselves to the needs of a normal child. They are in an inferior position even to inexperienced parents because the latter can be more flexible to this end. Their position can be seen as even harder if it is taken into account that they have to cope with the roles of nurse and parent at the same time. Moreover, rearing the child besides their own, they may have emotional conflicts as far as the child will stand as a constant reminder of their inability to give birth to a normal child. Dr. Iris Knight in her study on placements in families with handicapped children points to the realisation by the parent that they must turn to another to produce a normal child for their family. This is a shock to them of uncertain duration which has occasionally resulted in the failing of the adoption. Even in brief shocks emotional complexities may determine the future of adoption with traumas to themselves and the adoptee.[97]

As to the children themselves, they pass through so many stages as they grow up that it is almost impossible to assess effects on their character. It is suspected, however, that a child who is physically limited but with a normal intelligence may suffer from distress as he watches the introduced child do all the things that

he has been unable to do, with the consequent feelings of failure which may create mutual antipathies. Moreover, the adoptive child may be disturbed by his brother's incapacities if he is warm and loving. The emotional disturbance may be worse if the natural child's illness results in death.

The inference from the analysis on the exception in article 4 of the law 610/70 is that placements in families with a seriously ill child are rather critical and of unpredictable consequence. Without disregarding the need for finding a remedy for the problem of these parents the radical and irrevocable effects of adoption may be argued to render adoption inappropriate for such situations. However, if it appears in the court's opinion that there are enough safeguards for the interests of both children it would still be preferable for the order to be granted only if a sufficient probationary period has occurred prior to adoption. As to the children who have been cared for by families who wish to adopt them, the conditions of the article are inadequate to meet situations where it is evident that the family is getting on without problems. The condition restricting the number of adoptees to one, motivated by the same reasons as the requirement of childlessness, turns the article to a circumstantial remedy, leaving out of consideration the adoption of family units. The major disadvantage of the article, however, is that it is a confirmation of the requirement of childlessness, out dated in relation to current purposes of the law 610/70 and as such worthy of repeal.

## VIII ADOPTION OF CHILDREN BY PARENTS OR RELATIVES

A rather controversial matter in both legal systems is the adoption of the child by his parent alone or jointly with his or her spouse and the adoption of children by other relatives. The recent trend in adoption figures in Scotland suggests that the number of adoptions by

parents and step-parents has increased and is likely to continue to increase and that adoptions by a parent alone though declining are still considerable in number.[98] Furthermore, in Greece, though there are no figures to prove it, a similar situation should be expected since the Committee appointed by the Ministry of Justice to reform the law advocates such adoptions as suitable means to improve the legal position of the children.[99] Obviously adoption by relatives is fundamentally different from adoptions by non relatives and it is sufficiently clear that the law as it stands in the two countries today is more focussed on meeting the particular difficulties arising from the placement of the child with strangers than on the creation of a relationship in its legal sense. The latter constitutes only one aspect of the entire process but in this category of adoptions it becomes the one, exclusive task. The practice of such adoptions started from the very distinction between legitimate and illegitimate children and the new family era in the life of the child with the marriage or remarriage of the custodian parent. Many parents in order to create a relationship equivalent to that of legitimacy or to integrate the child within the new family started adopting their children. Not astonishingly such practice is suggested by the European Convention on Adoption which states that "if adoption improves the legal position of a child a person shall not be prohibited by law from adopting his own child born out of wedlock."[100] As a result of this adoption, the relationship with the other natural parent will become extinct and be recreated in respect of the other, the applicant exclusively or jointly with his/her spouse, although there may have been no real need for altering the faily circumstances under which the child lived. On the other hand, adoption by relatives need not necessarily be harmful to the child. Indeed the possible classification of the adoptive types attract varying difficulties. The circumstances vary from case to case as well as the effect of the order on the child's

rights, so that no general rules can be laid down. Thus, in the following pages there will be offered an analysis of adoption by a parent alone, a parent and step-parent and by other relatives when it concerns an illegitimate and legitimate child. In respect of illegitimate children, specific reference will be made to the circumstances as they will be transformed if any discrimination is removed.

Adoption by a parent alone

1. In Scotland, although the law never was explicit in the point, it is submitted that the reason for permitting such adoptions is mainly to improve the legal position of illegitimate children. The natural child did not count in law as a member of either its father's or its mother's family, who had no responsibility towards it. So the child's position was legally safeguarded only if its mother or father or one of the family adopted it.[101] To this end the Acts of 1930 and 1958 permitted adoptions by a parent alone notwithstanding any restriction on their age and the order was usually awarded without questioning their suitability. In addition the 1958 Act first introduced the concept of complete severance of natural ties and attention was paid to the fact that the mother would not be left alone to maintain the child by providing that where a single mother adopted her illegitimate child the adoption could not supersede any decree of affiliation and aliment or any agreement whereby the father had undertaken to make payments for the child's benefit.[102]

This kind of adoption indeed was needed at a time when the rights of custody and aliment in respect to illegitimate children were statutorily introduced but not yet fully developed, while succession rights were not yet recognised. Since then, however, the law has

been rapidly developed and today it could be said with confidence that the defects of the relationship with natural parents are such that the benefit to the child if adopted need not outweigh the disadvantages of the extinction of the relation with the other parent. In this train of thought, the Houghton Committee considered adoption by natural parents alone unnecessary and not to be encouraged. On this view adoption neither confers upon the mother rights and responsibilities towards the child which she did not have before nor any upon the father except an automatic right to the child's custody.[103] As to the stigma of illegitimacy as they explain, prima facie, the adoptive relationship will alleviate the worries of the single mother in that in future when dealing with affairs of her child she would not have to admit to his illegitimate birth at any time. However, for the mother adoption cannot alter the facts that she was unmarried when the child was born, and that he was born illegitimate, a fact well-known to people in her neighbourhood.[104] As to the use of adoption to exclude the harmful interference of the other parent in the child's life the Committee insisted that custody was the appropriate means of settling disputes between the parents and recommended use of adoption only in exceptional circumstances. The adherence to custody nevertheless accords to their view that adoption could be emotionally damaging in the long run as an attempt to hide the facts instead of informing the child of his origins.[105]

By placing emphasis, therefore, on the undesirability of excluding the other parent, the Act imposes restrictions on the mother or father applying alone. Thus an application by a mother or father is only possible where the court is satisfied that (a) the other natural parent is dead or cannot be found or (b) there is some other reason justifying the exclusion of the other natural parent.[106]

This is submitted as applying to both legitimate and illegitimate children, but as indicated mainly refers to the latter. It is highly unlikely that a parent alone will apply to adopt his or her legitimate child since he will be able to rely on his rights on the death of the other spouse. In circumstances other than death, for instance, if the other spouse cannot be found the conditions for dispensing with the parent consent on that ground should be complied with.[107] As to some other reason justifying the exclusion of the other parent it is submitted that must be a reason relating to the child's welfare and section 16(2) primarily contemplates the circumstances which would justify dispensing with the other parent's agreement. However, in respect to the cooperation of the parents in performing parental duties there may be some ground for permitting adoption to the parent only if the other has persistently or seriously ill-treated the child. Even so, however the chances of awarding an order to the one parent in respect of a legitimate child are minimal. If the parent applies after being separated from the other spouse, since the Act encourages parent and other relatives to seek custody the court will expect the mother to rely on this right and so may refuse the order.[108]

In illegitimacy on the other hand applications under the present section could be more easily sustained. For instance the mother may want to sever links with the father because it would be in the child's interest to restrain him from his repeated and allegedly vexatious applications for custody or, because of the mother's disappearance, the father wants to adopt the child.[109] However, in the view of Houghton Committee abandonment or rejection by the natural father should not be regarded as sufficient reason for allowing the mother to adopt alone.[110] There is something

unsatisfactory about this reasoning on the point that abandonment would seem to be just as good a reason for cutting off the legal links with the other parent. However, taking into account that in illegitimacy the relationship with the parent is not ipso jure operative the ground of abandonment may be artificially created by the mother's omission to make the father aware of the child's existence, or even by her refusal to cooperate in finding the father - thus the need to introduce steps to ascertain paternity before considering abandonment.

The entire subsection, nevertheless, has been challenged as to its necessity. It is suggested that it should be possible to deal with single-parents adoptions by using the concept of the welfare of the child in its relation to the grounds for dispensing with parental consent, without having a special provision. The key question assuming the consent of the other parent is unnecessary, or is given, or is dispensed with, is really whether it is in the child's interests to replace the natural relationship by an adoptive one.[111]

2. In Greek law on the other hand the adoption of illegitimate children was prohibited until recently. Article 1569 of the Greek civil code (no longer in force for adoption of minors or infants) states that "The parents cannot adopt their illegitimate child." The justification presented for the prohibition was that the fictional means of adoption is not the proper way for restoring natural relations.[112] This, although in principle correct, nevertheless reflects a desire to keep the Roman-Byzantine tradition,[113] and is an echo of the hostile attitudes of the 19th century against illegitimacy.[114]

The article is not the result of the work of the drafters of the

civil code but was imposed in the final version of the code by the revising committee and accordingly lacks any record defining its scope and meaning.[115] Furthermore, its vague form was of little help to its interpretation since the article does not make any distinction between affiliated and non affiliated children. One opinion has argued that the prohibition refers to those who were affiliated because only with those children is the natural relationship established, while the other goes further in asserting that what matters is the biological relationship and not the legal, so the prohibition refers to both categories.[116]

The L.D. 610/70 removed this prohibition. Article 2(3) states that "adoption of an illegitimate child by his natural parent is permitted, without the restrictions of article 4, save the provisions of articles 1530 to 1567 of the civil code". This is to say that the parent who wishes to adopt his illegitimate child can still apply, irrespective of being childless or not, and for the adoption of more than one child, provided that the application concerns his illegitimate offspring. Nevertheless, such an order should not prejudice any rights and duties arising from the natural relationship or by any act of acknowledgement or legitimation.

As submitted in the introductory report, this article is an affirmative permission to resolve problems of interpretation that appeared in the LD. 4532/1966. The initial purpose of the drafters of the first Decree was to permit adoption of illegitimate children and therefore they omitted to reinstate the prohibition of article 1569 of the Greek civil code. Thus in accord with article 1 of the aforementioned decree which states that no article of the civil code should apply for adoptions of minors unless specifically

mentioned and with the lack of specific prohibition in the Decree, it was intended to be possible for someone to adopt his own child.[117] The lack of specific mention, however, caused confusion as to interpretation which the later article seeks to resolve. But even in its present form the article is beset in a different context with all the problems that appear in the civil code. For instance should it be permitted for someone to adopt his illegitimate child even though he has not formally acknowledged it, or should formal acknowledgement always be needed? Prima facie the purpose of the article is to remove discrimination and provide a wider assurance on behalf of illegitimate children. As such, therefore it must have a wide application to cover all cases. But because adoption by parents is given privileged treatment, to avoid abuse it must be necessary to provide proof of paternity either by means of an affiliation order, or by producing strong evidence of paternity - sufficient, for example, for the issuing of an order on the paternity of the applicant. The order on the other hand should not prejudice rights arising from the natural relation. Therefore, the parent must be free to proceed to a formal acknowledgement after an order is made.

Although not explicitly stated, it is submitted that the provision applies to the mother as well as the father. Admittedly, it primarily affects the latter. It is highly unlikely that the natural mother alone will want to adopt her illegitimate child. In terms of legal status, the relationship, though regarded as illegitimate, nevertheless links the mother with the child with all rights and obligations as if it was born to her in lawful wedlock.[118] The order then contributes nothing but to confer automatically the right of guardianship over the child to the mother.[119] But, in any event, under article 1662 of Greek civil

code, on her request, the court may appoint her guardian of the child if she is a fit person. In this respect similar criteria will apply as in article 9(1) of the L.D. 610/1970. Even this need, however, will become obsolete, if the Bill of the Gazi Committee becomes law, since it suggests giving to the mother the right to exercise parental authority over her child.[120]

It remains, therefore, to see whether it should be permissible for her to apply in order to conceal the illegitimate birth of the child and avoid stigmatization. The Committee of the Ministry of Justice envisages such a need[121] and particularly G. Michaelidis Nouaros is of the opinion that "such adoptions could ultimately be advantageous for the child particularly by virtue of the fact of the effect of conferring on the child the status of an adopted child, a status almost the same as that of a legitimate child, without revealing to the public the child's illegitimate birth."[122] This suggestion at first sight seems to remove a number of problematic circumstances from the mother-child relationship. On the other hand it remains questionable whether this can be achieved in practice or whether the advantages of adoption could outweigh the disadvantages of hiding from the child the truth about his origins.

In the first place the question is whether there is a real need for providing for such adoptions in Greece. A study made in the late sixties by the "Infant's Centre Mitera"[123] has shown that from 53 cases studied only 20 mothers were determined to keep their children while the others had either lost real interest in the child or had failed to plan realistically for its future.[124] Obviously in respect of the first twenty the provision had nothing to add to

the policy to assist mothers to retain their children. For the remaining thirty three the study does not indicate whether they decided to give up rearing the child themselves because of social stigmatization or because of financial difficulties or indifference towards the child. Risataki in her study on health and welfare services, points out that the factor of stigma is a great problem for the unmarried mother in Greece and undoubtedly she will be rejected by and alienated from those who ought to help her without thinking twice. Especially in most provincial areas there is little chance of her being given assistance by her parents and she may be forced to leave her home and village.[125] D. Maganoitou, however, puts the problem in a different context, in a report carried out by the journal "Epikaera".[126] Without underestimating the effect that the stigma has on the unmarried mother in Greece she is of the opinion that this is not the decisive factor for her to part with her child. The difficulties for the mother mainly lie in how to handle the daily care of the child and in financial problems.[127] A similar view is shared by people interviewed in the same report, emphasis being placed upon the fact that the mother is left without help at a time when emotional links with her child have just started to take a real form.[128]

Inevitably the question to be considered is whether adoption could in itself alter the attitude towards the mother and create a different understanding. Unfortunately, the observation made by the Houghton Committee in the same context in Britain seems to remove any such hope. The mother was unmarried when the child was born and it was born illegitimate. Thus if the stigma is the decisive cause, the illegitimate birth of the child will remain a well known fact unless the mother moves into another area. Otherwise adoption will help her only in dealing with public

services or people away from her own surroundings. As well as this the Houghton Committee had pointed out that to hide the facts of the birth is more likely in the long run to cause damage to the child than be of any real help. Finally, it should be added that to engage in such a measure in Greek law, where the child is deemed legitimate in his relationship with the mother, without other end than that of avoiding stigmatization points more to the defects of policy towards single mothers than to any improvement in the situation.

As regards the illegitimate father, as discussed elsewhere, the Greek law distinguishes between judicial affiliation and voluntary and full judicial affiliation with different rights and duties for each case. Therefore, adoption may either improve the status or alter it basically for each case. In this respect alterations and improvements that adoption may introduce in each case should be first examined, e.g. the future of the aliment due by the father and the effects which adoption may have on the relation with the mother.

The voluntarily and completely judicially affiliated child according to the clear sense of article 1537 of the Greek civil code unless the contrary is provided in the law, has the rights and obligations of a legitimate child. A contrary provision is that of article 1660 which provides that the illegitimate child is subject to guardianship under a guardian appointed by the court. The court may appoint the father guardian on his request. In this context the only alteration in parental rights to be considered is that of patria potestas which the child lacked as illegitimate.[129] As to custody and succession rights, with adoption the parent has an

automatic right to custody[130] and the child doubles his portion in intestacy and its legal portion in intestate succession.[131]

In respect to patria potestas it should be noticed that the concept has been severely criticized and it is due to be abolished in Greek law. Particularly in the Bill prepared by the Gazi Committee in article 53 it is proposed that the doctrine be replaced by parental care, a right to be exercised by both parents which includes representation of the child, custody and administration of his property.[132] The Committee also propose in article 82 that the illegitimate mother should have the parental care of her child. The same right applies to the voluntary affiliating father, whenever the mother has forfeited the right or is incapable of performing her duties, but it excludes the father from any right to the illegitimate child's property.[133] This, in fact, is the main distinction between guardianship and patria potestas under the civil code, the latter being a right never conferred on a guardian. However, the Gazi Committee in article 97 propose that with adoption the "parental care will be conferred on the adoptive parent but should by no means revive to the natural parents, in the case that the parent forfeits his right. The natural parent retains only the right to have custody of the child." According to the Bill, therefore, the mother will lose the right of parental care. The same would happen, however, under the civil code and the relationship with the mother will be severely restricted. On the other hand the alterations that the order would make in cases of voluntary acknowledgement of paternity are to submit the child to the care and control of the father and double its hereditary portion. This can otherwise be achieved under guardianship legislation and by making a proper will. In the case of a father to whom paternity had been "completely judicially" established

the only change that the order will make in relation to the Bill is to give the father a right to parental care.[134]

The situation is different as regards the relation of a father and his illegitimate child when paternity has been judicially established. The child neither is a relative of the father in legal terms nor acquires any rights, apart from an alimentary claim. For this situation no substantive change is proposed in the Bill. Therefore, if such a child is adopted by its father the order will improve its status to a considerable extent.[135]

However, the force of two points which give a totally different view on the value of adoption in those circumstances should not be underestimated. Judicial ascertainment of paternity does not preclude the right of the father to proceed to affiliate the child voluntarily. Also, establishment of paternity by a judicial order follows a dispute either because the putative father doubts his paternity or because, as a result of disagreement with the mother, he had refused to acknowledge the child. In both cases, therefore, his fitness to care for the particular child should not be treated in isolation from the background circumstances in order to establish whether the father has changed his feelings for and attitude to the child. Evidence on the matter is difficult to obtain and therefore the ambivalent character of such applications would outstand problematically for the court. Therefore, it would be better were an order awarded to this father only in exceptional circumstances and after extensive welfare investigation.

Joint Adoption by a parent and step-parent

Within this area are included: adoption by a natural mother and her

husband in Scotland; adoptions by natural father and his wife in Scotland and Greece; adoption of a legitimate child by one parent and his or her spouse in Scotland. Further, in the case of Greece it includes the adoption of an illegitimate child by its mother's husband, and the adoption of any legitimate or legitimated or adopted child by the spouse of the existing parent. This peculiar distinction arises from the fact that in Scottish law, a step-parent cannot share parental rights with the natural parent by adopting the child. Instead, it is necessary for the rights of the natural parent to be relinquished and revested equally between them.[136] In Greece on the other hand, it is possible for the spouse to adopt alone the legitimate child of the other without this having any effect on the other's rights. The same applies if the order concerns the natural child of the mother but not that of the father.[137]

This kind of adoption represents a high proportion of the adoptions involving biological parents in both countries and mostly it is used by the mother of an illegitimate child and her husband.[138] The reasons however, behind such adoptions are for the child to be completely accepted into the new family unit, to change the child's name and birth certificate and the step parent to acquire jointly with the parent full legal rights and obligations in respect of the child. But though there is a positive advantage to the child in being adopted under these circumstances since it is reunited with normal family life, such considerations arise in quite different contexts for each country and raise a number of crucial questions to be answered.

In Scots law, where rights of the natural parent become extinct such adoption cuts the child off from one side of his natural family. This has the consequence that natural parents, grandparents and

other relatives cease to be legally related to the child, and the right of the parent to have access to its child falls before right of custody of the adoptive parents. Such situations have grown in number and there have been recorded instances where adoption was used by one parent as an instrument to alienate the child from the other. Scottish courts were aware of the fact and always made a close inquiry into the necessity of severing the ties with the natural relatives which resulted in a variety of decisions either refusing or granting the order.[139] In the view of the Houghton Committee on the other hand, extinguishing the child's link with one half of his own family was inappropriate and could be damaging.[140] Apart from the fact that, in principle, they opposed adoptions which did not create a new family relationship, they felt that, if adoption were used in this way, it might conceal from the child the reality of his family background and that this in itself could be particularly harmful. This was considered as sufficient reason for depreciating adoption of legitimate and illegitimate children by the parent and step-parent and instead recommending extension of guardianship law to enable step-parents to be appointed guardians of the child.[141] By offering this alternative parental rights would in many respects be successfully conferred upon step parents but, as they themselves admit such do not amount to being recognised in law as the child's parent, an aim achieved by the single step of adoption instead by taking a number of separate steps.[142] Also in the crucial question of illegitimate children, where the benefits are obvious, the Houghton Committee felt that the guardianship solution would also be appropriate. Thus, without wishing to prohibit adoption of step children they recommended that both in the case of legitimate and illegitimate children, their adoption should only be considered in exceptional circumstances and when guardianship had not been thought appropriate.[143]

The Act gives effect to their recommendation in Section 14(1) which empowers the court to consider the application as one for custody under Section 53(1) of the Children Act. It should be admitted, however, that this does not offer an attractive alternative where the status of the child is concerned because such orders can be varied, the step-parent can discharge his duties and the child does not receive the family name. Moreover, from a point of material rights, the child can only demand aliment as far as it is accepted as a child of the family.

In Greek law, on the other hand, adoption by a parent and step-parent seems to be particularly beneficial in many cases because of the less stringent effects of the adoption order. Without affecting the rights of the child in relation to the other parent, it places the child as a member of the family. However, this inevitably raises questions of custody of the child when the other parent is showing concern for it - a matter that has to be taken into consideration before granting an adoption order in respect of the child.

The preferential treatment for adoption by step parents in Greek law was discussed elsewhere[144] and the present text examines only certain peculiarities which may arise in cases of divorce or dissolution of the marriage where the child has been adopted by the spouse. In this case, unless the order has been revoked, the ordinary divorce proceedings apply and custody may be awarded to either of the natural or the adoptive parents. If, however, either of the natural parents remarries and the new step-parent wishes to adopt the child he cannot apply if the order remains in force.[145] On the other hand, the adoptive parent's spouse is entitled to adopt the child which appears to be an unjustifiable discrimination. Therefore, in these circumstances there needs to be some provision, permitting the further adoption of the child notwithstanding

its adopted status.[146]

Adoption by other relatives

The main objection against adoption by other relatives is that the adoptive relationship in this context essentially differs from and distorts the underlying natural relationship. Care by non-parental relatives is a natural incident of the wider family relationship of which the parent-child unit is only a part. Therefore, guardianship is considered a viable solution because it retains the relations as they are. If the child is adopted by relatives, on the other hand, the real circumstances are hidden from him and if later discovered may be even more damaging than other forms of adoption. The child may suddenly realise that his "father" is his grandfather and his older "sister" his mother.[147]

Possible advantages to the child from adoption by relatives must, however, be recognised (as in adoption by parents) in certain cases - for example, where the child is an orphan in respect of both parents - and it is not suggested that such adoptions should be prohibited.[148] But again, the court hearing the application should first consider whether guardianship would be more appropriate in all the circumstances.

# CHAPTER SIX

## PARENTAL AGREEMENT (CONSENT)+

Although there is a variation in the strength of the adoptive relation between Scottish law and Greek law, both involve severance of the ties with the natural family and placing of the child into the adopter's family. Both, therefore, adhere to the principle that termination of the natural relation will be possible only with parental consent. In cases where parental rights are vested in a person other than the parent, the law requires the consent of that person and may also ask for the consent of the child itself, after it has reached a certain age. On specific grounds, however, the laws empower the courts to take the critical step of dispensing with parental consent. The grounds making consent unnecessary are :

(a) when the parent has formally lost parental authority, or

(b) when the circumstances demonstrate his unsuitability as a parent, or

(c) when he has abandoned the child.

Both laws also deal with the question of when effective consent may be given and provide for a relinquishment procedure in which consent is secured in advance on behalf of an adoption agency.

Apart from the legal consideration consent has also to be seen as a key opening the way to a new family status. Therefore, the conduct of the parties, and the circumstances under which consent was provided, taken in relation to what, in each country, the order is expected to achieve, determine to an extent the welfare of the child as well as

+(In the present text the terms 'consent' and 'agreement' are used interchangeably as is the case in most of the literature. However, 'consent' is more appropriately related to the earlier law and 'agreement' to the later.)

the future of the order. It comes as no surprise that many parents who gave their consent under adverse conditions, later regret the loss of the child and try to obtain it back. Judicial records show instances where parents regret giving their personal consent or, although fully aware of their inability to cope with the child, refuse to respect the court's decision to dispense with their consent and try either to reverse the order or otherwise to destroy the relation. The law takes certain precautions to prevent the occurrence of conflicts but it is still open to question whether the legal provisions are effective by themselves to cope with the problem.

It is also pertinent to inquire as to what light the rules relating to consent throw on the strength and value attributed to the natural relationship, and what changes should be brought forward in respect of consent of the natural parents. In each system there is a diversity of view concerning the basis on which the welfare of the child is to be determined.

## A. AGREEMENT OF THE PARENT AND/OR GUARDIAN

### I. Legal Provisions

According to Section 16(1) of the Adoption (Scotland) Act 1978 whenever the child has not been freed for adoption, an adoption order cannot be made unless the court is satisfied that each parent or guardian of the child

i. freely and with full understanding of what is involved, agreed unconditionally to the making of the adoption order (whether or not he knows the identity of the applicants), or

ii. his agreement to the making of the adoption order should be dispensed with on a ground specified in subsection (2).

In Greece, if a child's parentage has been established on both sides, both parents must consent to the adoption, unless deceased or otherwise unable to consent. Article 1577 (2) of the Greek civil code as modified by article 11(a), (b) of the Legislative Decree 610/70 formally prescribes that - "the consent, given before the court or a reporter judge, of both parents is necessary, or of one of them if the consent of the other is unattainable due to mental illness or other reason."[1] For the unattainable consent the Legislative Decree provides that the court itself must decide that such consent is unattainable.[2] The same applies when the consent of both parents is unattainable[3] while they are alive. But unlike Scots law, the guardian's consent (whenever appointed) is not needed. His consent is only required if there is no parent alive to consent to the child's adoption.[4]

The law as stated above calls for comments on the following matters. In the first place there is the question of when and how an effective consent is provided. Second, to whom the law refers as parents in respect of the natural procreators of the child and of what should be the position if the distinction between children born in wedlock and those born out of wedlock is removed. In this context it is of importance to consider the position of the mother's husband, if the presumption of conception operates against him. In addition, there are the matters of when a guardian's consent is needed and what the position is when parental rights have been assumed in respect of a local authority in Scotland and a social institution in Greece.

## II. When and how an effective agreement can be provided.

One of the major problems faced by the law of both countries is how to secure consent to represent a mature decision of the parent so that temporising or regrets or revocations be reduced to a minimum. For

example, both systems prohibit a mother from validly agreeing to adoption prior to the birth or within the period following immediately after the birth. The idea is that the mother cannot fully appreciate the gravity of her decision until the child has arrived or she has recovered from the immediate stress of the birth.[5] Countervailing to this comes the argument that a required delay in the surrender of the child will aggravate the psychological difficulty experienced by the mother ,[6] and, indeed, may prevent a successful placement. Actually the attachment of the parent to the child is a common fear for the future of the placement, especially among adoptive parents and as a result they may tend to adopt children from institutions or in their infancy.[7] Similar arguments have been mustered in connection with the question of revocation of consent. The systems make all possible effort to reduce altogether such instances but actually disallow revocation only in a few cases.

In Scots law, section 16(1) of the Adoption (Scotland) Act 1978, envisages effective the consent of the parent or guardian when he agrees freely and with full understanding of what is involved generally and unconditionally to the making of an adoption order. The consent of the parent or guardian must be freely given and not obtained through improper pressure or fraud, and after making the parent aware of information not only about the legal consequences of adoption but also "all the information he/she may require about the character and circumstances of the adopters and their home, short of information, which may disclose their identity", if the latter is so requested by the applicants.[8] However, though for the validity of consent, the knowledge of the identity of the applicants is irrelevant[9] it seems important for the parent to give consent with future circumstances of the child's life in mind insofar as it will help his understanding of

"what is involved".[10] It is no longer possible for the parent to insert a condition as to the child's religious persuasion. However, according to section 7 of the Act, the agency may have regard to such requirements if it appears as a wish of the parent as far as practicable. This section in fact replaces section 4(2) of the Adoption Act 1958 following the recommendation of the Houghton Committee. The Committee felt that making such a condition should cease to be possible because

(a) there was no way of making adopters fulfill undertakings given;
(b) the law might turn against the real interests of the child by unduly restricting the choice of the adopters; and
(c) because, in principle, this contravenes the complete severance of the legal relationship.[11]

Agreement must be operative at the time of making the order. In this type of case any agreement signified earlier may be withdrawn right up to the last minute, subject to the power of the courts to dispense with it.[12] Where the parent or guardian does not attend the hearings, documentary evidence of consent is admissible as follows. A written document signed before the Reporting Officer must be issued signifying the consent and the identity of the parent by naming him or by a serial number.[13] The document may be executed prior to or after the commencement of the proceedings and if attested is admissible without further proof of signature.[14]

Where the document signifies the consent of the mother, it is not admissible unless the child was at least six weeks old when it was executed. Similarly, consent orally provided by the mother is ineffective if given less than six weeks after the child's birth.[15] The object of this rule is to prevent the risk of the mother succumbing to any pressure, financial or otherwise, and allow adoption before

she has recovered from the stress of childbirth.

In Greek law, article 1577 of the Greek civil code[16] requires the consent of the parents to be given in person before a court of competent jurisdiction or when they want to secure secrecy of their identity in a separate session of the court or before the rapporteur.[17]

Behind this rule is the need for the court to obtain first hand knowledge of whether the consent of the parents is given freely and they are aware of the gravity of the order. This, however, can be relatively readily achieved because the parent whatever his age or circumstance undertakes alone the overall responsibility, unless there is a sign of mental illness. The guardian's consent is not needed besides that of the parent nor is the curator's agreement required for an effective consent by an adolescent parent.[18] These precautions are necessary because adoption is performed by a judicial order and as such appeals for consent given under illegal pressure, fraud or error are inadmissible.[19] Moreover, like Scots law, the parent is entitled to receive information about the applicants insofar as they do not contravene the required secrecy. An exemption provided by article 10(2) of the Legislative Decree, however, permits the parent to give written consent in exceptional circumstances. According to this the consent is validly given if executed by a notarial deed signifying parental consent, provided that it concerns a parent living abroad or under a temporary impediment of whom consent cannot be dispensed with.[20] For example, a parent undergoing a hospital cure or serving in a remote area who cannot leave his post is entitled to this facility.

Also Greek law tries to assure that the mother's consent is not given

in haste and without a full opportunity to consider the implications of adoption. This is attempted by giving no legal effect to consent executed prior to the child's birth and less than 3 months after the birth.[21]

Consent must be free of terms and conditions,[22] otherwise it is invalid. Also Greek law is indifferent to the question of religion with the exception of interstate adoptions where it is advisable for children to be given to families of Greek descent and, where there are no such families, preferably to families having the same religion as the adoptee.[23]

III. The consenting parent

a. In Scots law, the consent of each parent of a child born in wedlock is always required.[24] The same is recognised on behalf of the adoptive parents with regard to any further adoption of the child.[25] For an illegitimate child the consent required is that of the mother,[26] and even when the mother is herself a minor, it is still her agreement that must be provided.[27] In such a case, the mother herself may need the protection of a guardian ad litem but her agreement is validly given even without this protection.[28]

The definition of the parent under the 1978 Act[29] does not include the putative father[30] even if he seeks custody of the child, but he is named as consenting guardian[31] if he has been awarded custody by an order under the Illegitimate Children (Scotland) Act 1930,[32] or the Guardianship of Minors Act 1971.[33] His right, however, to apply for custody, while an application for adoption is pending, has been reinforced, besides his right to be heard in the adoption hearings. The Reporting Officer has a duty to invite the

putative father to appear and be heard in the adoption proceedings, if he is liable to contribute to the child's maintenance under a court order or agreement.[34] But notwithstanding formal links with the child, if the Reporting Officer learns of the existence of the father he must inform the court as to the existence of such a person and whether he wishes to be heard by the court, so that the court may consider whether to give the father notice of the application.[35] No obligation, however, is imposed so far on the Reporting Officer or the court to seek out the father of an illegitimate child. The concern of the Houghton Committee merely confined to encouraging the involvement of the putative father in the planning of the child's future and, therefore, where he had been concerned in the child's upbringing and maintenance the Committee recommended that he should be made a respondent in the proceedings.[36]

These duties of the Reporting Officer have also a particular significance in making the father aware of his right to apply for custody while an application for adoption is pending, but their major importance is in the relinquishment procedure. According to section 18 of the Adoption (Scotland) Act 1978 no child will be freed for adoption unless the court is satisfied that the person claiming to be the father of the child - not being guardian - has no intention of applying for custody or, if he did apply, that that application would be likely to be refused. The section may be seen as aiming to prevent any drastic challenge to the agency's rights, because they would be opposed by the custody order, but nonetheless provide an early consideration of the father's position. Contact with the father is secured at an early stage and, more important, the court has ex officio to investigate his

intentions and see whether a successful application by him seems likely.

It is to be said here, however, that neither the invitation to attend the hearings nor the right to apply for custody vests in the father any right to veto adoption. Therefore, the upshot of his application may be that he may not be able to convince the court that his having custody would be in the interests of the child's welfare, even though had he been the father of a legitimate child in the same circumstances, his agreement could not have been dispensed with.

In Greece if a child's parentage has been established on both sides, both parents must consent to the adoption, unless deceased or otherwise unable to consent.[37] If the father is dead, the mother alone consents to the adoption and she does not need the agreement of the family council.[38] The consent of the parent is required even if he himself is a minor person[39] or has forfeited parental rights and duties,[40] unless the child has been in the care of a social institution,[41] or the withholding of parental consent constitutes an abuse of right.[42] No right to consent is recognised on behalf of an adoptive parent and for further adoption the consent of the natural parent is needed.[43]

In the case of an illegitimate child, besides the mother,[44] only a father with whom parenthood has been "voluntarily" or "fully judicially" established need give his consent.[45] If fatherhood has been "judicially" established, the father's consent is not needed.[46] As in Scots law, the status conferred on the relation is limited and a putative father is deprived of any consenting

authority. Even if he is appointed guardian of his natural child, provided that the mother is alive, his consent to the child's adoption is not required.[47] But a family right is recognised on his behalf, justifying an invitation to attend and be heard in the hearings and his views must be taken into account in evaluating the welfare of the child.[48]

In respect to the provisions of the 1978 Act it can be seen that under Scots law the putative father has no real right to be involved in the child's future unless he is able to obtain custody. If, as his duty, he has responded to financial or property obligations in respect of his child and maintains human relations only, then he is entitled merely to have a weak say or to contest the application by applying for custody. This approach of the Committee, though an improvement, is not satisfactory. First, it is submitted in the report that fathers should be identified in all possible cases, a recommendation of equivocal nature since it is not clear how much pressure the Committee thinks ought to be put on the mother to reveal the name of the father.[49] Also it is recommended that a putative father who is known should always be notified of the relinquishment proceedings.[50] But then it rests upon the agency to appraise the court of the father's position which in turn has the discretion to decide whether he should be notified of the proceedings. This would seem to involve an unbalanced assessment of the circumstances of the natural father particularly as regards the participation of the agency, which is an incompetent body to appraise such matters. The adoption agency is a specialized body of administrative nature having the purpose, in cooperation with other social services, to assess and report on the facts. The agency cannot assess any matter referring to the orientation of the child's status, nor has it any

right to prejudice this orientation. In the particular circumstances the natural relation has certain legal effects that count for the child. The agency therefore, can report only if the relationship has been given effect, so that its involvement cannot start unless the claim to ensure the relation with the father is legally safeguarded. In respect to the latter, the claim presently is channelled through the mother who has the discretion whether or not to reveal the identity of the father. She also keeps the contact with the adoption agency and it is her story and circumstances that will signify the agency's report. In this context the Committee seem to support the perpetuation of the view that the mother has the one or the other way been victimised in her relation with the father and treats the matter as if she has all right on her side. Thereto the circumstances vary and it seems unjust that the putative father should have rights so greatly inferior to hers. Furthermore, as the English Law Commission points out, even when it is decided that the father should be heard his position before the court is usually a weak one, primarily because in the past it has been felt that the advantages to an illegitimate child of losing the status and stigma of bastardy outweigh any disadvantage of losing all legal links with his natural father.[51] And there is reason to believe that a similar assessment on this matter could be made in respect to the distribution of justice in any coutry which distinguishes between children born in wedlock and those born out of wedlock, so as to perpetuate the, somehow, arbitrary exercise of justice, when the question at hand is the loss of the status of legitimacy.

The present law, however, is not without its supporters. Hayes[52] for instance believes that the protection offered to the natural relationship thereby gives adequate recognition to the father

without prejudicing the welfare of the child. In practice, she asserts, the rights of the natural father requires legal recognition first when the mother applies jointly with her husband and second when the child is placed with strangers. For the former case the court can only make an adoption order where it is satisfied that adoption would better promote and safeguard the welfare of the child than would an order making the child's stepfather his custodian. And it seems that courts will be more inclined to custodianship than adoption as has happened in the analogous situations of divorce. For the latter case Hayes accepts as sufficient protection for the father his right to apply for custody or to be heard in adoption proceedings.[53] However, the observations made in this particular part of the article anticipate the right of the mother in making known the identity of the father as an absolute one and in this respect fails to comprehend that this right is outweighed by the far superior right of the child to a father.

In Greek law, similar problems may be faced in cases where paternity has not been established yet, or if it has, links the child and the father with the limited status recognized in judicial establishment of paternity. For the former both problems arise since there is nothing to prevent the mother placing the child for adoption prior to giving the father any chance to acknowledge the child and, as in the latter, it is not certain what weight a court should place upon the wishes and feelings of a person naming himself as the father of the child. Perhaps his position in relation to the putative father in Scotland is superior in the sense that he can acquire effective rights by means of an act of voluntary acknowledgement but it is far inferior if he is not formally linked with the child, and the father is unlikely

to succeed in an objection to the proposed adoption. Therefore, the outstanding problems for Greek law are whether the child should be placed for adoption before any efforts are made to identify the father, and, further, if the father's right to consent to adoption should be recognized for the case of judicial establishment of paternity.

The problems faced today in both jurisdictions are interconnected to the reform of illegitimacy and therefore will be discussed along with the arguments raised on whether the father of a child born out of wedlock should be given the right to consent to his adoption.

In the first place, in respect to the need to identify the father prior to making an order, in the chapter dealing with the reform of illegitimacy there are proposed specific time limits for taking the step to establish paternity. It must be considered whether those limits should be exhausted before any adoption order is made.

In practice, there may be a number of problems for doing so. For example, the child may linger in an institution or with foster parents while the father is traced, and delay is a crucial factor which has a direct bearing on the process of bonding the child with the adoptive parents.[54] Moreover, the delay may be particularly damaging to the mother if she has no chance of keeping the child and had decided to part with it from its birth. Perhaps she would vacillate about her decision and at the very end still have to give it away if the efforts to trace the father had been in vain. Thereto legal systems with advanced procedure on

the establishment of paternity, like Denmark for instance, do not restrict her right to give the child for adoption straight away without any particular obligation to consider the father.[55]

However, without underestimating the difficult position of the mother and the dangers for the child this resolution is not the more satisfactory one, if one takes into account the implications there may be in the long run for both mother and child. Would she regret her decision or could adoption have been avoided if paternity had been established. In fact there is an undue prejudice to the rights of the child in this process and it may be more advisable to explore the alternative of the paternity action before taking the step of an adoption order. To a large extent, of course, the effectiveness of this rule depends on what obligations would be imposed on the father in respect of the mother and her child, and on what assistance has been given to her in the meantime. The comprehensive service described as operating in Denmark, comprising trained social workers, lawyers, psychiatrists and gynaecologists assisting the mother throughout the pregnancy and the paternity suit, along with financial aid at that time, may be a suitable solution. The results of the procedure there are quite astonishing because in over a half of the cases paternity is voluntarily admitted and it is seldom (about 8%) that paternity is not established. Also only 2-3% of unmarried mothers give their children away for adoption.[56]

As to the point whether the putative father should be given a right to consent to the child's adoption this has received considerable attention with the prospect of removing the distinctions on illegitimacy. The views vary and the arguments mainly express

concern about the conduct of the father. Clive for instance believes that to require the father's agreement to be obtained or formally dispensed with in all cases, could make life difficult for adoption agencies. Therefore, he suggests as a solution that his agreement only be required if he appeared on the register of births, but to provide that his view could be taken into account in other cases if he chose to come forward. If he is interested enough to acknowledge the child, his agreement would have to be obtained or dispensed with. Otherwise he would only have a right to be heard if he cared to come forward but there would be no obligation on the adoption agency to seek him out.[57] Also Turner regards it as a necessity to give a consenting right to the father who has acknowledged the child as if the child was born to him in marriage.[58] For the rest, he envisages the need to take the best possible steps to ensure that notice of the proposed adoption is served on the putative father, or all possible putative fathers of a child born outside marriage.[59] Both views are given in consideration that complete equality with the fathers of legitimate children would not be feasible without compelling every unmarried mother to reveal the identity of the father.[60] Also both views are in line with the solution given in Greece in relation to the voluntary and judicial establishment of paternity, which is in itself, not entirely satisfactory.

The English Law Commission has been more radical in the matter. With the abolition of the status of illegitimacy they envisage the father as one of the child's natural guardians (as if under the present circumstances it was born to him in lawful wedlock) whose agreement should be required unless there are grounds to dispense with it.[61] Above all, the Commission disfavoured any

departure from the principle that a man should not be deprived of his rights without being given a chance to be heard. In their report nevertheless, the Commission tentatively takes the view that deviations from the principle may be allowable in extreme circumstances, but in this step due consideration should be given to the interests of the father. Namely, they anticipate the need to make available a procedure under which an application to dispense with a father's agreement could be made ex parte without any attempt to serve notice on him.[62] For the views of the Commission fear was expressed that the involvement of the father will cause delay and may deter mothers from even placing the child for adoption.[63] The problem of the delay was dealt with earlier and the observations made there are also relevant to this aspect of the proceedings. As to whether this will deter mothers from placing the children for adoption the Commission suggests that under the relinquishment procedure the question of parental agreement would be resolved early and before a placement is made.[64]

In conclusion, therefore, it should be said that the described involvement of the putative father in adoption proceedings, without prejudicing the welfare of the child, opens the way for his real involvement in the child's life. The views of the Commission are in line as much with the need for complete equality between children as with the purpose of adoption being to fulfill the exclusive needs arising from parental failure and not needs of status. Therefore it is the approach that should be looked at in reforming the law on illegitimacy.

b. The consent of the mother's husband as such is not required but

the consent of the father of a legitimate child is and difficulty may arise if the wife alleges her husband not to be the father of the child, while he is so deemed by law. From a legal point of view, he is the father and his consent is needed, unless the presumption has been successfully overcome by evidence to the contrary. Such evidence may be produced in a main hearing or in an intervening lawsuit, and may be brought by either parent in Scotland, while in Greece it is a power that is in the process of being recognized to the mother. If it is exercised under normal conditions there is nothing to fear,but if the mother brings such allegations in terms of the process of consent, the matter becomes rather complicated. For instance, in the case of a mother willing to place the child for adoption and an unwilling husband a degree of suspicion must attach to either party's allegation as to the child being of the husband or not. There is also the position of the natural father to be considered if the child is illegitimate. On the other hand, the alternative of giving custody to the husband is not a solution in this case so long as he continues to live with the mother of the child. There are also difficulties for the court in how to handle the problem. For instance would it be appropriate for a court hearing on adoption to deal with the mother's averments or should the consent of the husband be asked for? Moreover, should the husband be informed early of his wife's adultery?

In Greece, as the law stands, the court, prior to any judicial admission of the extra-marital conception of the child, has to consider the position ofthe father as the only person entitled to bring a declarator of bastardy.[65] The mother cannot raise any objection and defend the action with evidence or oath unless

acting as an heir of a deceased husband, a case in which his consent obviously is not needed. Nor can the court consider ex officio the status of the child before strong evidence has been led by the mother.[66] If the husband, despite the wife's allegations, insists on his paternity, the court has to ask his consent, but if he raises an objection or brings an action for a declarator of bastardy, the hearings are suspended until the issue of a decision on the child's status. This position will alter considerably when the mother is granted the right to bastardize the child[67] and the situation will then, to a greater extent, resemble that in Scotland today. Therefore, the following discussion in respect of Scots law will be valid for Greek law unless otherwise indicated.

As the Houghton Committee admits, previous judicial confrontation of the question of the child's status by British courts, on hearings in adoption, had not been unanimous in approach. Many courts accepted evidence of non-access presented by the mother while others insisted on the husband's consent and, notwithstanding, considered it their duty to inform the husband of his wife's adultery.[68] Accordingly the Committee being of the view that, if paternity appears to be in doubt, the matter must and should be solved by the court of adoption made an effort to consolidate the different practices of various courts in a uniform procedure, looking at the problem from a substantive point of view. In this respect they felt it to be essential both to prevent the danger of allowing a mother to bastardise her child without supporting evidence and to restrain the husband from becoming obstructive to the child's adoption.[69] Before entering any discussion on the merits of the proposed procedure it should be mentioned here that although Scottish courts were rarely faced

with such question, the matter has a direct bearing on the 1978 Act. The Act is not explicitly concerned with the issue of paternity in adoption. However, it adheres to the legal definition of the term parent and nevertheless emphasises the need to look upon facts on paternity from a substantive point of view which materializes the recommendation of the Houghton Committee that such matters should be resolved by the court of adoption.

At the outset the Committee distinguished between relinquishment procedure and hearings on a specific adoption and provided a method of confrontation for the wife's allegations mainly applicable to the first.[70] Averments provided on a specific adoption are left to be resolved with a declarator of bastardy, probably because the risk of collusion is higher there than where the rights are being transferred to an adoption agency. The fact that the mother may have information about the personality and family of the adopters, which reduces the strain of being deprived of the child,may well be a motive to use illegal means if the husband stands as a barrier to the adoption and she is unwilling or unable to keep the child. Another fact,not to be ignored, is that when a mother reveals the extra-marital conception of the child under such circumstances a disagreement between the couple as regards the future of the child is probable. Thus, a degree of falsification is to be suspected in the evidence and a chance should be given to her husband to collect and present his own. In this respect the interval between the application to free the child for adoption and the order provides this opportunity. Also because the rights are vested in the adoption agency it is easier to correct errors by revoking the order.[71]

As the relinquishment procedure, the Committee, in the first place without departing from the law, advised the courts to accept applications joined in by the husband if he remained the father before the law.[72] However, they considered applications by the wife alone, concessively acceptable, only when she adduced evidence against his paternity.[73] While the adoption agency must specify in the report that the paternity of the child is disputed, the Committee suggested no information should be passed to the husband until the evidence presented by the wife had been corroborated.[74] The court should order the wife to attend the hearings and, on the basis of the evidence presented, consider whether it was satisfactorily proven that the husband was not the father and need not be involved.

The Committee, in recommending initial exclusion of the husband, was mindful of the fact that there had been a number of cases where the requirement of agreement had produced endless delays in tracing the husband and harmful effects when he was traced. Thus they suggested the husband should not be involved at the preliminary stage of the proceedings, leaving it to the discretion of the court to bring him in if not satisfied of non-access.[75] For the particular recommendations it can be said that there had been the case in Scots law where the issue of paternity was raised and resolved in the process of adoption without any involvement of the husband in the light of decisive evidence proving the illegitimate status of the child. And it can be argued that there is no reason for courts to depart from this practice under similar circumstances insofar as the time factor is very important when a plaeement has been decided. Further it may prevent undue strain among the spouses, e.g. if the birth of the child had not determined the future of their marriage.[76]

However, the crucial problems in relation to the recommended procedure lie on the weight that should be given to the wife's evidence, which affects the amount of proof required to rebut the presumption. The suggestion is that the court, after considering independent evidence besides that of the wife should, on the balance of probabilities, issue an interlocutor for the paternity of the child.[77] Indeed this recommendation begs the real question: What degree of importance is to be attached to the presumption pater est quem nuptiae demonstrant when the issue of paternity is raised in adoption proceedings? There may be a degree of devaluation of the presumption before the obvious advantages of the placement. The relationship with the persons who by law are deemed to be the parents appears irretrievably broken down so that prima facie there seems no need to maintain it, one way or the other. However, the matter is far more complicated and there are a number of points to be looked at before reaching any conclusion. An obvious cause for concern is whether the evidence by the mother would be unprejudiced or whether she would try to make things easy for herself. Also whether the decision would be unbiased to the question of paternity. As it appears from the recommendationsof the Committee there is the possibility of the case being resolved without any involvement by the husband, which increases the danger of the child being given for adoption if the mother's evidence is convincing, even though the husband is the father. There is an argument that there is less risk of perjured evidence being presented in a declarator of bastardy but this is questionable when there is the possibility that the hidden intention of the mother is to give up the child.[78] The Committee, aware of the danger, recommended that preference and weight should be given to independent evidence.[79] Although

this suggestion has been looked upon favourably in Scots law[80] nevertheless, independent evidence has never decisively supported a declarator of bastardy if failing to provide conclusive proof of the paternity of the child. For instance in the case A and A (Pets)[81] the court in the light of independent evidence, held the child to be illegitimate, because it was proven that the husband was serving abroad at the probable time of conception. On the other hand, in Ballantyne v. Douglas[82] case the court, in an informal separation of two years duration upheld the presumptio juris considering possible access by the husband, even though on the evidence presented legitimacy was less probable than illegitimacy.[83] Cases like the former could be resolved in the manner suggested by the Committee but when the facts show illegitimacy more probable than legitimacy or do not preclude any risk of falsification the presence of the husband seems important early in the proceedings. The reason being that courts usually feel uneasy when faced with the possibility of perjury as suspected in one-sided evidence. In addition, one party's evidence though itself not convincing, may gain stature in the light of facts and arguments presented by the other party.

Ballantyne v. Douglas along with Imre v. Mitchell[84] highlight the above aspects of the procedure. Moreover, they show both the extent to which Scottish courts are prepared to make a concession in the face of circumstances which obviously better the child's interest and what should be suspected in a case, where the further aim of the contender may be other than bastardy itself.

In Ballantyne v. Douglas the advantage to the child if

declared illegitimate was considerably higher than if the presumption were sustained. The mother had made use of the part of the register provided for married women, not claiming the husband to be the father of the child and then brought an action of affiliation and aliment against a man with whom she had proved to have had intercourse at the relevant time. On account of the evidence presented, illegitimacy was highly probable but it failed to convince the court because without the husband's evidence paternity could not be indisputable. As a matter of fact however, it was not in the interest of the child to maintain the presumption because illegitimacy was almost certain, the husband had neither provided aliment, nor maintained any human relations with the child nor appeared to have any intention to maintain it, in the future. Also the illegitimate status of the child was confirmed by the mother's conduct. However, the court although there was an advantage to the child if declared illegitimate refused to take his welfare into account in its judgement. If the same standards apply analogically when the further object is the adoption of the child any risks to the rights of the child emerging from his birth in wedlock would be considerably eliminated.[85]

Indeed the circumstances of Imre v. Mitchell highlights the dangers that may appear whenever the purpose behind bringing a petition is other than that of a finding of bastardy itself.

Imre with the object of circumventing a decree of custody for her daughter, brought an action against Mitchell, her former husband, in which it was concluded for declarator that the child was a bastard on averments that she had intercourse with another

man at the relevant time and not with Mitchell and for a decree putting him in silence from asserting paternity of the child. The child was legitimized "per subsequens matrimonium" shortly after its birth and entrusted to Mitchell's custody when the couple was divorced on the grounds of Imre's adultery. The Lord Ordinary granted decree in the pursuer's favour but in the reclaiming motion by Mitchell the court recalled the interlocutor of the Lord Ordinary and assoilized the defender Mitchell. The story of the pursuer in the above case, namely that she had had intercourse with another man (a Pole) at the relevant time, and that she left custody undefended because she was in an unsettled stage of her relationship with her next husband Imre, and that she presented the child to Mitchell because he insisted in marrying her and readily accepted the expected child, was believable and sufficiently supported with evidence. Her evidence had the power to reduce the possibility of error on paternity of the Pole, while, for her as a person it was made clear that she could have used Mitchell to solve the problem created for her by the birth of the child. On the other hand, Mitchell's evidence was sufficient to prove that he had had intercourse with her at the relevant time but could not clearly argue that he was the father. From the point of probabilities, however, the balance was against him being the father. Against him was also the welfare of the child. He was a bachelor and his sister had the actual custody of the child, while the mother, in her new marriage, was living a normal life and her husband appeared to have genuine feelings for the child and supported his wife's petition. In fact the mother could provide a normal environment which was lacking on the father's side.[86]

However, on appeal, the credit given to the pursuer's explanations, in the first place, was overtaken by the confinement to the salient facts, from an objective point of view.[87] Facts like the presentation of the child to Mitchell as his own and having registered and baptized it as his own, the undefended decree of custody which the pursuer tolerated unreduced since 1951, and the fact that the pursuer could not establish some honest and convincing explanation which could have justified her having falsely acknowledged the child, appeared to the court as strong evidence that the man, when married under such circumstances, had believed that he was the parent of the child. Moreover, the court felt that he must have known the connections with the mother at such time, that she who was to his knowledge with child when he married her might have been with child by him.[88] On account of this, the court upheld legitimation of the child per subsequens matrimonium and required direct proof against the presumptions, a matter which could not be sufficiently met by the pursuer's evidence. Without any underemphasizing of her misconduct at the time of conception, it was felt by the court to have been sufficient evidence against her, if the issue had been adultery, while, inappropriately, it lacked the heavy proof required when the presumption stands.[89]

In respect of the above discussion it can be said that in terms of existing law as well as in terms of the proposed reform on illegitimacy the procedure suggested by the committee must undergo a number of changes. In the first place the Committee had in mind a speedy procedure which is desirable in the adoption process. On the other hand, balancing of probabilities never was incorporated within the methods used in Scots law to evaluate

evidence on issues of paternity. Similarly evidence of the nature of an oath, a sworn declaration or affidavit, accepted as sufficient by the Committee[90] may under these circumstances not be sufficient in Scots law. From a statement made in Imre v. Mitchell, it appears that such evidence could be of application only to cases where paternity has not yet been admitted by the conduct of the husband.[91] And so far there is no reason to depart from either of the above principles of proof in Scots law. Therefore, it becomes doubtful whether the Committee's primary objective of establishing a speedy and flexible procedure would achieve real success under Scots law.

Nevertheless, it may appear to be an utopian ideal to try to maintain arguments delaying the dissolution of a relationship which is near its end. However, as soon as it opens the way which may assist in the child's welfare, this step becomes imperative. Normally, as may be suspected, in a considerable number of cases mothers will take advantage of the procedure either if there is a dispute between her and her husband about the child's adoption or they are living apart and she wants to be released from her duties as a parent. Whatever the case may be the suggestion of excluding the husband may turn out to be against the child's interests. If the husband disagrees, either as a father or step father, with the rights over the child being relinquished, he may do so out of affectionate feelings for the child and, therefore, the alternative of giving custody to him should be considered.

In any case a matter of significant importance is the true paternity of the child. Under Section 18 of the Adoption (Scotland) Act 1978, the court has an obligation to consider the position of

the natural parent. And if the relationship with the father of children born out of wedlock is to be altered this parent would have a right to give agreement to the child's adoption. For that reason it is important that the decision of the court in the relinquishment procedure must reveal the true paternity of the child. This is not satisfactorily secured if the mother, who is apparently unwilling to retain any sort of obligation towards the child, is given the right to invite and present evidence alone. It is of essential importance for the court to get the utmost information about the case, so that the presence of the husband and the presentation of his own evidence may give dimension to the facts presented. Thus, the suggestion of the Committee that if the husband claimed paternity and agreed that the child should be adopted a fresh application by both parents and the agency could be made [92] fetters the court from carrying out any investigation of the true paternity of the child. Such claims by the husband normally follow after certain evidence on the illegitimacy of the child has been presented. Therefore, it may be more appropriate to determine the future steps in relation to such evidence. It is possible to question the validity of the husband's declaration[93] and derive some idea as to whether there is any collusion on the averments of either side. Normally no mother seeks to bastardise her child without good reason and of her evidence, in the first instance, it can be assumed that either the child is illegitimate and the position of the natural parent has to be considered, or that the child is legitimate and the husband disagrees to the adoption. The conduct of the husband in the second instance therefore may be explained as an alternative to ease things for his wife. For example, perhaps his wife has convinced him to agree to the child's adoption, in

which case there are grounds for examining whether he could carry on the care of the child alone. On the other hand, if the child is illegitimate, he may be acting so as to rule out the prospect of a successful appplication for custody by the natural father, which would mean his wife retaining certain liabilities for the child. Therefore, it is necessary to secure a more independent approach towards the question of paternity if it is raised under such circumstances and, particularly, to ensure that if any averments in relation to the status of the child are brought forward they will be given a detailed examination in the light of the evidence of all possible parties.

c. In Scotland, the local authority which has assumed parental rights over the child, and in Greece, the social institution which has the care of the child are not parents for either the purpose of the Scottish Act or the Legislative Decree respectively. According to Section 74(3) of the Children Act 1975, which replaces section 16 of the Social Work Scotland Act 1968, the local authority or voluntary organization has no right to consent to or refuse to consent to an order freeing the child for adoption or to the child's adoption. Also a contrario from article 11 of the Legislative Decree 610/70, it appears that the exercise of parental rights by a social institution does not include consent to the child's adoption in Greece.

## IV. CONSENT OF THE GUARDIAN

As has been said before, the consent of the guardian of the child is always required besides that of the parent under Scots law, while such need ceases before a consenting parent in Greece. For the purpose of the Adoption (Scotland) Act 1978, however, the person appointed by

deed or will in accordance with the provisions of Guardianship of Infants Acts 1886 and 1925 or the Guardianship of Minors Act 1971 or by a court of competent jurisdiction is defined to the guardian of the child.[94] The father of an illegitimate child is also deemed of the same authority when he has custody of the child by virtue of an order under section 9 of the Guardianship of Minors Act 1971, or under section 2 of the Illegitimate Children (Scotland) Act 1930.[95] The definition given is confined to persons having the legal custody of the child and excludes anyone exercising those rights under a care order.

In Greek law, a guardian is defined the person appointed to exercise parental authority over the child,[96] by a court deed[97] or in the will[98] of the deceased parent, or ipso jure.[99] Greek law, like Scots law, distinguishes between a care ofder and guardianship and excludes from the right to consent persons having only the actual custody of the child.[100]

As mentioned above, a major difference between Greek and Scots law as regards the need of the guardian's consent is that in Greece, his consent is not required when there is a parent alive. In this respect Scots law is more concerned with parental rights while Greek law concentrates on the natural relationship. This is rather unrealistic, especially when the parent has forfeited parental rights or the adolescent mother of an illegitimate child is asked to take alone the weight of the decision. The help of an independent consenter in such circumstances would prevent immature decisions or decisions against the best interests of the child.

## B. DISPENSING WITH PARENTAL AGREEMENT

The great majority of adoptions are obviously performed with parental agreement. The court may be asked, however, to dispense with parental

agreement either in a hearing on a specific adoption or in the relinquishment procedure, if a parent's rights have been terminated or are considered as improperly exercised according to applicable provisions of the law. The law does not provide clear distinction between the right of a parent to refuse agreement and the power of the court to dispense with it. It rather indicates, in general provisions, situations where agreement of the parent is refused contrary to the interests of the child, and on account of the circumstances of the case, permits the court to decide whether parental agreement is no longer needed. Insofar, however, as the main purpose of requiring the agreement of the parent is to ensure that his rights have not been arbitrarily destroyed, instances where the law permits dispensation with his agreement are contrasted with what is considered as appropriate exercise of parental rights.[101]

I. Legal Requirements

The Adoption Scotland Act 1978 in section 16(2) provides that the adoption may be awarded without parental agreement if the parent or guardian :

a) cannot be found or is incapable of giving agreement;

b) is withholding his agreement unreasonably;

c) has persistently failed without reasonable cause to discharge parental duties in relation to the child;

d) has abandoned or neglected the child;

e) has persistently ill-treated the child;

f) has seriously ill-treated the child and because of the ill treatment the rehabilitation of the child within the household of the parent or guardian is unlikely.

In Greek law parental consent may be dispensed with if there exists

a) permanent mental incapacity or other serious reason on the part of either or both parents or

b) if the child is of unknown parentage or a foundling[102] and, finally,

c) when the parent of a child, received into the care of a social institution, abusively withholds his agreement while having neglected the child in the sense of article 1524 of the Greek civil code so that the adoption of the child becomes impossible.[103]

The grounds on which article 1524 of the Greek civil code permits the court to dispense with agreement are when the parent either infringes or neglects his duties with respect to the custody and maintenance of the child or maladministrates the child's patrimony so that the property of the child is at risk. Moreover, the court has the power to dispossess a parent of his duties and provide the agreement by its own decision, if refusal of parental agreement constitutes an abuse of right.[104] This authority of the court is exercisable when denial of agreement would involve a disproportionate disadvantage to the child, or in the event of a serious and permanent neglect of parental duties or indifference towards a child who has not been committed to the care of a social institution.

From the above description, it can be seen that in both laws there are three principal areas where agreement is considered unnecessary:

a) unfitness and neglect of parental duties;

b) unattainability of agreement due to legal incapacitation or other reason concerning the person of the parent;

c) unreasonable acting of the parent in withholding agreement.

Following this classification an attempt will be made in the next few pages to discuss each ground permitting dispensation of agreement under the laws of Scotland and Greece.

II. Unfitness or neglect of parental duties

This section is concerned with the natural and legal duties of the parent from an objective point of view. Therefore the corresponding intentions of the parent may be effectively irrelevant. Only exceptionally are any concessions provided on behalf of parents whose conduct had attributed little to the deterioration of the child's welfare. As a general observation, however, it can be said that the grounds included in this section are the most critical because the person accused of failing in his parental duties may be either unaware or unconvinced of his failure.

a. In Scots law as stated above, a person has failed in his parental duties, or is considered unfit to retain them in the following cases:

   a) he has abandoned or neglected the child

   b) he has persistently failed without reasonable cause to discharge parental duties and

   c) he has persistently ill treated the child or done so so seriously that the rehabilitation of the child within his household is unlikely.

   These grounds are unlikely to apply in normal circumstances, e.g. when the parent has taken the initiative of the placement for a parent will have had little chance to fail to discharge parental duties, neglect or illtreat the child and place it for adoption.

1. An early definition, provided in a custody case defined abandonment or desertion as the state where "a parent leaves the child to its fate".[105] Statutory definition on the other hand, concentrates on the effects of abandonment on the child and defines it as the state where the child is left by his parent in a manner "likely to cause him unnecessary suffering or injury to health".[106] Both definitions denote the same conduct by the parent and imply a degree

of criminal liability, although it is tentatively suggested that the civil standard of proof applies.[107] They differ only in the emphasis they place on the effect that this conduct has on the child.

In relation to adoption, however, it is questionable whether the above definition of abandonment and neglect could have a clear application. In accord with section 6, the welfare of the child is of first consideration and adoption as a social measure is designed to have preventative application. Accordingly, if criminal liability of the parent is taken as the criterion for applying this ground, this could fetter intervention where deterioration of the child's life is due to non culpable conduct by the parent. A parent, for example, who leaves the child in the care of friends or relatives and keeps checking up regularly to ensure that he is alright has not abandoned the child in the legal sense. This type of consideration points to the parent and, though indicating concern for the results his conduct may have on the child, fails to meet the consequences on his welfare in full measure. Moreover it is doubtful whether this type of rejection of the child could be brought under the ground of persistent failure to discharge parental duties since the parent does not exercise parental duties vis a vis him, or whether it could successfully invoke the ground of unreasonably withholding consent. Indeed there is some difficulty in drawing a borderline to the scope of each ground but there are some instances of non culpable neglect where adoption is necessary but cannot be achieved by applying other grounds for dispensation with consent. For instance in the above example, it is neglect if the parent had entrusted the child to incompetent persons even though he keeps up regular visits, or if the child needs permanent parental care because this half way

family is emotionally damaging to him. It is necessary, therefore to distinguish between parental concern when the child is entrusted to other persons and the satisfaction of the child's welfare in the hands of those persons, and it seems that abandonment in its civil sense points rather to the latter. It is more likely for instance to be considered as abandonment in a case where the child is in the care of persons who would not be considered as proper custodians or fail to meet the emotional needs of the child and the parent calls in almost daily, than when it is left in the hands of competent people and the parent visits it rarely. Especially as to the visits of the parent, these have been held in a number of cases to have a negative effect since they disrupt the regularity of the child's life.[108]

Another factor to be counted is whether this situation is transient and, in this case, whether the child's welfare would be served if it was returned to its parent. If the separation is long-lasting due to parental indifference, it appears advisable to suggest adoption, even if the child is left in the care of competent people. The same could be said if the child is entrusted to incompetent people for any period, since that for sure will have results harmful to the child.[109] The fact that the child will have associated the visits of the parent with any undesirable experience at the hands of such people leaves little room for reconstituting the natural relationship. In cases where the child has been temporarily separated from the parent, who is anxious to retain it, and remains in the hands of competent people, presumably it will be a question of fact and degree whether he has abandoned the child. The age of the child, the indications that the parent-child relationship will revive and the suitability of the home of the parent are all factors to be taken into account.

Obviously abandonment and neglect exist under the meaning of the present Act if the parent is found liable under the criminal law for deserting the child. In the less severe cases, however, if abandonment is due to facts beyond the control of the parent, his conduct and wishes must be taken into account, but always the decisive criterion should remain the long term welfare of the child.

2. A parent has failed without unreasonable cause to discharge parental duties when "without abandoning or neglecting the child ..., has shown no genuine interest in him and has no reasonable excuse, such as ill-health or lack of suitable accommodation, for his behaviour."[110]

This ground first appeared in the 1958 Act and reappeared in the 1978 Act with slightly modified terminology but with the same purpose and scope of application. In the 1978 Act, in order to achieve uniformity in the terminology, instead of the expression "obligations of a parent or guardian" is employed the term "parental duties".[111] Aside of this change in terminology the ground still has the purpose of resolving problems in the gap between abandonment and unreasonably withholding consent, by securing a fair balance between the interests of the child and the rights of a parent.[112] It is not difficult to foresee, on the other hand, that with the current difficulties in applying the term of unreasonability in the relinquishment procedure or with the increased use of anonymity in adoption applications this ground may be of fairly wide application in cases where the child needs to be cut off from his parent even though his placement has not been finalized yet.

In an early application of the ground under English law, it was

held as to include not only the legal duties like the "duty of a parent to maintain his child in the financial or economic sense", or the duty to protect and promote his material welfare, but also "the natural and moral duty of a parent to show affection, care and interest towards the child".[113] Despite this promising formulation in subsequent cases the ground has been applied with considerable caution and under circumstances next to abandonment or neglect in terms of gravity and assuming a degree of culpability on the part of the parent.[114] Thus, as Bevan and Parry point out "The most likely instances of this ground being successfully invoked are those where the child is in the care of a local authority either by virtue of a care order or by resolution of the authority made because of parental failure in bringing up the child".[115] Besides in cases where the parent had directly parted with the child to the prospective adopters his conduct was tested against the kind of criteria which are relevant to such resolutions. Nevertheless, in a few instances the court instead of applying the present ground applied the test of unreasonability in withholding agreement.

Thus in Re P[116] it was held that the mother of two illegitimate children with whom she had parted from birth had failed in her moral obligations because she never considered the possibility of taking the children to live with her though cohabiting with the putative father for the previous four years. Besides it was observed that she had shown little concern for their welfare and seldom turned up to visit them. With respect to her legal duties to maintain the children she had paid no more than £29 for their maintenance although she was supported by the putative father, a man earning no less than £12 a week, and although she had drawn £94 Family Allowance in respect of the children. On account of these circumstances the court held that she had clearly failed to

discharge the obligations of a parent and that it had for itself the discretion to dispense with her agreement. On the other hand, in Re M (an infant)[117] an eighteen year old mother anxious to conceal her pregnancy arranged for foster parents to take over the child immediately after birth, with the view to adoption. In the meantime she gave formal consent whereupon an application for adoption was made. Later (after six months) she withdrew her consent and claimed the child although she had never visited the child. Under the circumstances the court held that her consent could not be dispensed with because failure to visit the child after deliberately placing it for adoption does not per se constitute persistent failure to discharge parental duties. But in the particular case, the court was bound not to decide otherwise, by the rationale of Re C.S.E. (an infant)[118] where it was held that not visiting the child may be best for it if this prevents emotional disturbance.[119] In Re D (minors)(adoption by parent and step-parent)[120] the strength of the natural relationship was further emphasized. Thus, albeit the father had defrauded his maintenance obligations and refused to visit the children, except occasionally, and under satisfactory circumstances, the court held that he could not be deprived, insofar as it had not been proven that "he had washed his hands of them".[121] In the same case it has been provided that the fact and degree of failure[122] must be of "such gravity, so complete, so convincingly proven that there can be no advantage to the child in keeping continuous contact with the natural parent who has so abrogated his duties that he for his part should be deprived of his own child against his wishes".[123] A similar reasoning was followed in Re H [124] (adoption by a parent and step-parent) where the father had sporadically provided maintenance and contacted the child whenever it was convenient to

him. The Magistrate had dispensed with his consent on the ground that he had failed without reasonable cause to discharge the obligations of a parent, but the Divisional Court reversed the finding, considering the conduct of the parent as satisfactory in the circumstances. In the court's opinion he was loving as a father because he had visited the children, communicated with them albeit fitfully, when in employment responded to the maintenance due under the court order and that the instability in his life did not prove that no advantage accrued to the children from contacting the father. In addition the court in refusing the order took into consideration that the children would be deprived of any link with the father and his relatives without this resulting in any major benefit to their position. They were to stay with the mother and stepfather (the applicants), a unity, which would not be upset in the future.

In the last two cases, the applicants were parent and step-parent, which alleviates the gravity of parental failure. It can be considered, for instance, that the presence of the mother and her efforts will remedy any harm caused to the child by the indifference of the father. Therefore, courts in placing reliance on her conduct have been tolerant with the father and his behaviour throughout the separation. Thus, in Re D, Baker, P. argued that "when marriage breaks down, the husband will often withdraw or drift apart from the family temporarily, particularly when, as in that case, he is living with another woman".[125] However, if the same circumstances had appeared in a foster placement, where the anxiety to achieve normality in the child's life is primary, such allowances for parental conduct becomes rather critical.[126]

The ground has not been clearly construed so far in Scots law and,

therefore, it is difficult to make any specific comments on its application. There are instances, however, where the ground could have been successfully invoked as for example, in the case X v Y.[127] In this case, the mother of an illegitimate child, who was placed with foster parents within two weeks after birth, withheld her consent in an application for adoption by the foster parents even though she had shown no concern for its welfare and had made no arrangements for taking the child back. In fact the child was to return to the local authority and it was left to them to decide what further steps should be taken. However, although there was an element of parental failure since the child's infancy, the Sheriff-substitute instead of applying the present ground, brought into consideration the question of whether consent was unreasonably withheld. Because the petitioners had required anonymity in which case it is not possible to hear the application even in camera, the sheriff, faced with difficulty in assessing whether consent was unreasonably withheld, remitted the issue to a reporter.[128] The upshot of this case was for consent to be dispensed with as unreasonably withheld. The mother, it was held, had not shown genuine interest in the child nor could she meet his future needs. Moreover, it was felt that her position was a permanent one, so that the care order ought not to be extended. The way that the case was handled, however, indicates that the sheriff, instead of questioning the obvious circumstances concerning the fitness of the mother in parental duties, took the more secure step of examining whether consent was unreasonably withheld. Perhaps due to her age and the circumstances of the case it was difficult to hold her responsible for persistent failure to discharge parental duties, but, nevertheless, for the same reasons one could not expect a reasonable decision from her. Therefore, it might have been better to try to convince her with a decision confined to assessment of her own circumstances, than to remove the child from her with a

decision which includes this element but nevertheless could cause frictions between her and the adoptive parents.

On account of the above discussion the observation to be made is that the ground under its present construction normally applies to a non custodian parent who has failed to respond to his limited duties to such a degree and for such time that it is justifiable for him to be deprived of his duties. Persistent failure has been taken to indicate that the parent disregarded his duties and is proven to be beyond any hope of showing concern for the child. This is assessed in view of the damage caused to the child's welfare by placing emphasis either on the period or on the degree of parental failure. Nevertheless, a degree of culpability on the parents' conduct has been seen as a prerequisite.

Another matter to consider is whether it is possible to provide a wider construction on the ground of persistent parental failure to resolve problems which arise by applying the tests of unreasonableness in the relinquishment procedure or in adoptions where the applicants have required anonymity. In the first place because unfitness in parental duties has been seen in relation to the culpable conduct of the parent, unless the latter is observed, the court may find it difficult to dispense with parental agreement if the circumstances of a placement have not yet been assessed at length. Indeed no law has been developed so far to substitute for the present comparison between the natural and adoptive family. On certain occasions the court decided on the unreasonability of the parent by making the assumption that he should rely on the guarantees offered by the institution and therefore provide his consent.[129] This resolution is to an extent satisfactory but may lead to the same problems because it places

the circumstances of the parent as the hypothetical opposite of an adoption placement. Also this solution is somewhat fictitious because there is no uniform practice in adoption and the fact that any decision will be taken, having in view the welfare of the child, may not be sufficient for the parent who is usually anxious to know the circumstances of the future life of the child. Therefore, in these circumstances to ask him to rely on adoption per se and act with reasonableness seems unjusfied. But even when the decision is taken in view of a specific placement there is the possiblity, in the case of two children with the same needs and the same family circumstances, for the court to reach a different decision because the circumstances of the placements are different. A question, therefore, to be raised is whether the court should look at the circumstances of the natural family inter se irrespective of the decision on the child's adoption.

In this case, the criterion for deciding on parental conduct would be based on what in society's opinion is an average parent. With this in mind the first questions that the court should ask are whether the parent is aware or could be made aware of his duties and, second, whether he lives up to them. The finding may be either that he is unaware and by no means could become so, in which case failure is present and of permanent existence (subjective failure); or that although he understands them he refuses to live up to them in which case the court must examine whether his conduct is tolerable in terms of law, social standards and the welfare of the child (objective failure). In the first instance the degree of incompetency of the parent to bring the child up properly in relation to the effect on its welfare must signify whether the failure is persistent. The lack of reasonable cause may be taken in this case as his inability to appreciate the

parental duties instead of other external circumstances. In the second instance persistency may be assessed in relation to the conduct of the parent and its effects on the welfare of the child in respect of the existing alternatives like custody or guardianship which, if applied, could offer the option of a remedy for the natural relationship. In borderline situations the 'just causes' presented for parental failure should count in favour of the natural relationship. Also in respect to both types of parental failure, so far it has been required to expressly indicate that the parent has failed in his duties estimated in terms of time and measures that have been applied, but should not be carried any longer to the degree of proving that the parent "washed his hands of the child". Perhaps in such cases parental failure is proven beyond doubt so that dangers of destroying the natural relationship without just reasons are considerably eliminated. However, this standard includes a number of dangers for the child so that it is better if this degree of proof is abandoned.

3. The illtreatment of the child as a ground for dispensing with agreement appears in statute in two distinct forms, as persistent ill-treatment and serious ill-treatment. Due to the gravity of the grounds an attempt was made in Parliament to permit the courts to dispense with the agreement required for the adoption of a child in charge of a parent or guardian who had ill-treated a second child while under his care. The proposed amendment was withdrawn when some of the difficulties were pointed out.[130]

Persistent ill-treatment appears in the statute as a self efficient ground for dispensing with parental agreement and it is free of the

concurrence of any other grounds. The court, therefore may intervene in the relation, even though the parent or guardian performs his legal and moral duties and, in general, cannot be regarded as unaffectionate towards the child, if he on repeated occasions treats the child maleficiently. No intentional conduct or other particulars are indicated in the statute to signify the relevant conduct of the parent. However, observing the ground in relation to the rest ofthe same category, persistent ill-treatment appears to be the frequent commitment of acts resulting directly or indirectly in injury to the health and happiness of the child. Namely, the brutal behaviour of the parent, his indifference to the child's illness, his disregard of the child's need for entertainment are acts that fall within the scope of ill treatment because they affect the physical and emotional welfare of the child. For a parent or guardian it does not appear that his conduct need be of a kind and degree rendering him responsible in the criminal sense of the term. Even conduct due to his irascibility or frivolity, as long as it appears in a degree and frequency making probable harmful effects of a permanent nature to the child's physical and emotional welfare, should suffice for the requirement.[131]

Serious ill-treatment, even when not persistent, is itself sufficient for dispensing with agreement subject to the condition that the rehabilitation of the child within the household of the parent or guardian is unlikely. This takes effect with the recommendation of the Houghton Committee which speculated that, though a single incident does not preclude the possibility of the child being rehabilitated with the same person, under certain circumstances this may become impossible.[132] Accordingly they

recommended serious ill-treatment to be incorporated in the reasons for dispensing with parental agreement so far as due to such events, the parent/child relationship is irretrievably broken or its spirit turned into an irremediably hostile or indifferent one. Conduct of a criminal kind may be taken into account, in this instance, to signify ill-treatment due to the singular nature of the event. This, however, should not prejudice the gravity of the condition in subsection(5) since what characterises ill-treatment as a ground for dispensing with parental agreement is the likelihood of the child's rehabilitation irrespective of the criminal liability of the parent. In this context, it is submitted that the likelihood of the child's rehabilitation may also be related to other factors like the imprisonment of the parent or the commitment of the child into care.[133] Also, if the mental condition of the parent has been so deteriorating as to create the unlikelihood.[134]

A problem pointed out by Bevan and Parry in relation to this ground is that the provision will place a heavy onus on adoption agencies and reporting officers in assessing the likelihood of rehabilitation especially since the Act omits to provide the limits against which the likelihood has to be set. The omission will be especially relevant in instances where the ill-treatment can be related to poor housing accommodation and attendant pressures on the parent. However, as they observe with the increasing and understandable practice of local authorities of instituting care proceedings in cases of child abuse, these problems will be resolved and this ground for dispensation will quite often be invoked.[135]

b. In Greek law, the parent is deemed unfit to retain his rights and duties

(1) when he has deserted the child in a manner that the child is regarded as being of "unknown parentage" or in a state of abandonment, and

(2) when the child has been received into the care of a social institution and its adoption prevented because the parent abusively withheld his agreement although he has shown a lack of interest that jeopardizes the child's health and moral welfare.[136]

In relation to the above ground three cases of parental unfitness can be distinguished in Greek law, which in terms of gravity are classified as follows. First, unfitness arising from the absolute absence of the parent-child relationship. It is submitted that this includes cases where the identity of the parents of the child is unknown. Second, unfitness arising from the omission of the parent to fulfil parental obligations towards the child so that the latter is considered as being in a state of exposure to danger according to the conditions of the law. And third, unfitness arising from the omission of the parent to fulfil his obligations to the extent that (without the situation being regarded as that of exposure of the child) there have been, nevertheless, negative effects on the child's welfare and the child is submitted to the care of a social institution. As it appears from the comparison between the subparagraphs A and C of article 11 of the L.D.410/1970, the institutional care of the child is not a prerequisite in the first two cases mentioned.

1. In Greek law a child is deemed of unknown parentage or a foundling when the identify of neither parent is known or can be otherwise traced. Such a situation may be considered to arise when the

child is found in front of the door of a house or institution or has escaped the attention of its parent and is picked up by a stranger and any inquiry to trace its relations has ended in vain.[137] In respect of illegitimate children, the child is deemed of unknown parentage if the mother is dead or has disappeared, and the same applies to a judicially affiliated child for the purpose of the present article.[138] The power of the court to deal with parental agreement in the present case emerges from the unknown identity of the parents per se and not from the effects that the lack of parental care may have on the child. Therefore, since it is confirmed that the steps taken to trace the parents have ended unsuccessfully the child may be subject to adoption and the court is entitled to dispense with parental agreement.[139] However, because the circumstances vary from case to case it may be considered appropriate to extend the period of inquiry by means of a foster placement, if the welfare of the child is susceptible to this extension. This will eliminate the risk of the child being adopted and then its parents appearing and trying to reverse the order.

2. Abandonment under Greek law is regarded as the state where"the parent has exposed the child in an unassisted condition," as well as when the parent "being in charge of the child deliberately omits to show the expected care and protection or to fulfil his alimentary obligations".[140] This definition given in Criminal Law distinguishes between complete abandonment and omission to fulfil parental duties. The former refers to any parent who has completely deserted his child and this presumes danger to his health and life. As such, although it includes lack of concern by the parent, it mainly points to the lack of any link between the parent and the child. The latter refers to a parent in charge of the child or responsible

for carrying out certain duties towards it where because of his omission to do so the child is exposed to danger. Under criminal law a prerequisite in both cases is the culpable conduct of the parent.[141] This element doubtfully responds to the intentions of the legislature with adoption and therefore may not be incorporated. Namely, in almost every case of complete abandonment it is difficult to ascertain the basis behind the child's desertion and to try to do so may result in endless delays. The present ground places weight on the position of the child and is little concerned with whether its position is the result of a criminal act by the parent, so that, like Scots law, Greek law focusses on rescuing the child from the state of abandonment with the solution of adoption whenever the latter is appropriate to his welfare.

The L.D. does not make a distinction between the two cases of abandonment and therefore there may be some difficulty in invoking the ground for both cases. In the introductory report it is submitted that the purpose of permitting the court to dispense with parental agreement is to expand the usage of adoption as an appropriate measure to be ordered by the court if the parent neglects his duties.[142] The stipulation is inspired mainly from article 352 of the French civil code, as it was reformed by the Law of 1958 to permit the court to dispense with parental agreement in respect of the parent "who evidently was indifferent to the child, thus exposing to danger his morality, health or education ..."[143]. On the other hand the term "exposed child" in the introductory report is used indistinctly but nevertheless appears under the same heading with children of unknown parentage. Thus prima facie it may be taken to apply exclusively to cases of complete abandonment excluding cases where the parent refuses to show

concern for the child or neglects his duties and still maintains contact. However, the parent has put the interests of the child at danger and the child is considered exposed in the legal sense even though both still live under the same roof and the parent refuses to provide for it. Also a father, who neglects his duties towards his children and his ill wife[144], or the father of a child born out of wedlock, who is bound to care for it, if he refuses to do so and the child cannot be supported by its indigent or sick mother[145] has abandoned the child in the legal sense.[146]

In terms of family law, the consequence of such acts for parental rights and duties may be for the parent to forfeit irrevocably his right to exercise parental authority over the child. Namely, according to article 1525 of the Greek civil code the parent[147] forfeits all rights and duties whatsoever related to parental authority in respect of a particular child[148] if he has been sentenced to at least one month's imprisonment for a criminal act against the life, health or morality of the child. The child then is submitted to the exclusive care of the otherparent or a third party.[149] Such consequence to parental rights may be effected if the parent is found liable of exposing to danger the interests of the child since such acts attract imprisonment of at least six months.[150] Nevertheless, the same consequence may be effected in respect of minor acts against the child. Particularly according to article 312 of the Greek P.C. the parent may be convicted to at least three months imprisonment if with his "persistent harsh behaviour"[151] or by "maliciously neglecting his obligations"[152] he became the cause "of body injury or damage to the health" of the child.[153] Such obligations may be those having an effect on the health of the child,

such as obligation to maintain, to provide a home and clothing for the child and to care for his health and overall protection.[154] Under those circumstances provided that the parent has been convicted to at least one month's imprisonment the relationship is terminated ipso jure. Otherwise it is subject to revision according to the stipulations of article 1524 of the Greek civil code.

In relation now to adoption, if a child, in either of the above cases, is placed for adoption and the innocent parent agrees, the court may find itself in great difficulty if the party who neglected his duties withholds his agreement.[155] It may perhaps be possible for the court to dispense with his agreement on the grounds of abuse of right, or as abusively withheld in accord with the conditions of article 11(C) of the L.D. 610/1970. However, successful application of the first grounds mainly depends on the overall circumstances of the parent in his relation to the child. Therefore, it has a relative value for the present case. In relation to the second of the grounds, on the other hand, a prerequisite is for the child to have been submitted to institutional care as a result of simple failure in parental duties as prescribed in article 1524 of the Greek civil code. The above discussed instances of abandonment, however, constitute a more severe case which may invoke not only the measures of article 1524 but the complete severance of the relationship.[156] Besides, whether the child has been received into institutional care or not mainly depends on whether the other parent had undertaken the entire responsibility for the child throughout this period.

Following this ascertainment, it can be suggested that the term "exposed child" should be taken to refer as much to the case of

complete abandonment as to neglect of parental duties whether it resulted in the parent forfeiting parental authority or not. Consequently, the court must have the authority to dispense with parental agreement in both cases for adoption for what really matters are the circumstances of the child's life from a substantive point of view. This accords with the rationale provided in the introductory report for dispensing with the agreement of the indifferent parent who exposed to danger the morality, health or education of the child. Adoption seems the only proper alternative in the circumstances. For the latter, the comments made in Scots law in respect to the degree of parental neglect and its effects on the child are also competent in relation to Greek law.

3. The ground referred to in article 11(c) of the L.D. 610/1970 resembles that of "persistent failure without just excuse to discharge parental duties", of Scots law, as it has been applied by the courts. Thus the court may dispense with parental agreement if the parent has failed in his duties in the sense of article 1524 of the Greek civil code, which covers the wide range of acts involved in parental authority, and abusively withholds his agreement to the child's adoption. Moreover, this power of the court is by law restricted to children undergoing institutional care. The discretion of the court does not extend to children still in the care of one of its parents even though the other had failed in his duties in the sense of article 1524 of the Greek civil code and the custodian parents intend to place it for adoption. The court may, perhaps, be able to dispense with that parent's agreement, if he refused to agree under circumstances that constitute an abuse of right.

The stipulations of article 11(c) assume the existence of

three conditions in order to invoke the ground. First, the conditions of article 1524 of the Greek civil code must be complied with; second, the child must be under institutional care; and third, the parent must abusively withhold agreement.

As regards article 1524, this provides that "if the parent fails or infringes his duty to protect the child" or "if due to the indigence" of the parent, or "maladministration of the child's property", this property is in danger, "the court on the request of the other parent, the nearest relatives, or the public prosecutor, may order any proper measure, i.e. to appoint a third person to the representation or care (of the child), or to appoint a trustee to administrate his property". Whether the parent fails in or infringes his duty to protect the child or maladministrates his property has been construed in the precedents to refer to acts that could have immediate effect on the child's welfare or could have an undesirable influence on his character and morality. Thus, it has been considered appropriate to discharge the parent from his duties, if he refuses to provide aliment to the child, or has failed to maintain a reasonable degree of interest towards the child, e.g. in education, health and care needed.[157] The same has been considered if the parent has exercised severely his rehabilitative power upon the child, engaged it in unhealthy or inappropriate employment for his age, or has involved the child in immoral acts.[158] Nevertheless, within the scope of the article there have been included acts which assume the parent to be a bad example to the child. Herewith concern is expressed for the influence that the parent may have on the morality of the child. Thus, if he is a habitual drunkard, an inmate or keeper of a house of ill-fame, or if he has been engaged in open and notorious adultery or

fornication, it may be considered that he is unfit to perform parental duties and that, therefore, the child should be entrusted to the care of another person.[159]

Another requirement is that the child must have been received into care by a social institution. The child may have been entrusted to the institution by the parent, or may have been so received because the overall conduct of the parent "badly influences (its) general protection and maintenance" and therefore the parent has been declared "morally unfit" by a Committee of the Child's Protection of the Regional Centre or by an Office of Social Assistance.[160] In either case the authority takes care of fostering the child.

However, there is something unsatisfactory with respect to this somehow extended legal prescription in the present ground. A child normally is received into care if being born out of wedlock, the mother has given up the idea of bringing it up alone, or if being born in wedlock or being acknowledged by the father, neither parent is capable of fulfilling his duties properly. But unless the parent has taken the initiative to entrust the child to the institution or to place it for adoption, the child may be the subject of an order only after the utmost of parental failure has been observed and after undergoing long and possibly damaging institutional care. It is questionable whether a child who has undergone this experience would appreciate normal family circumstances. Therefore, some power should be given to the court to dispense with parental agreement the child is not the subject of a care order, where the failing parent refuses agreement and the other, being unable to care for the child, agrees to his adoption. Furthermore, in the case of

parents who live apart if the care of the child is to be handed from one to the other by reason of parental failure it may be advisable to examine whether it is unlikely that the other parent will be able to care for the child properly and, if not, to place it straight for adoption, exercising the power suggested above in respect of the agreement of both parents.

For the court to dispense with parental agreement, the parent must abusively refuse to consent to the child's adoption. The 478/L969 decision of the City Court of Athens[161] in accord with the recommendations made in the introductory report of the L.D. 4532/1966[162] defined as abusive refusal the withholding of agreement which is motivated not from any interest for the child but from "hostile feelings" or "vile impulse". Although the court in deciding whether the circumstances of the case[163] constituted an abusive refusal of agreement to the child's adoption confined its attention to a consideration of the 'just causes' presented by the parent for his conduct, emphasis was placed upon investigating the parental interest in the child. This was done in an effort to assess whether the relationship could be preserved and whether this would serve the needs of the child as they have been altered in the course of his institutional experience. On this understanding, it can be said that in assessing whether consent is abusively withheld for a child undergoing institutional care, reference should be made to the previous conduct of the parent as well as to the prospects of him resuming the care of the child. Thereto, the parent may be regarded as unaffectionate towards the child either on account of his previous behaviour or on his refusal to provide agreement without having made any arrangements to meet the future needs of the child. In the presence of either or both of the above factors the court may dispense with parental agreement if the

parent-child relationship is unlikely to revive. However, in reaching any decision the welfare of the child must be of first consideration.

Another point to be discussed is whether it is permitted for the court to dispense with parental agreement if the child is received into care primarily for other reasons than parental failure or whether the two elements are interlocked for invoking the ground successfully. It is generally accepted that behind the commitment of a child into care for instance for "antisocial behaviour" lies a degree of parental failure. To this article 2(3) of the compulsory law 2724/1940 accords parental rights in respect of that child to the institution throughout the period of the order. The problem is created by the fact that in Greece there is the practice that children with prior convictions or under the care of a rehabilitative institution should not be placed for adoption.[164] Also in the precedents there has been emphasized the need for a strong correlation between the inability of the parent to cope with the child and his institutional care. Namely in the decision 478/1969 the court paid particular attention to the fact that the child had been deliviered to the nursery because the mother could not live up to her duties for social and financial reasons.[165]

However, there is a real doubt as to whether this opinion is properly founded in the law. One can assume that the interpretation given to the term institution in the LD. 610/1970 includes those entitled to carry out welfare investigations which as a rule do not accommodate this category of children.[166] But in respect of article 16(c) there is no affirmative reference to the institutions named in article 1(1) of the Royal Decree 795/1970, as in other parts of the Decree. So a wider construction of the term

'institution' is possible. The main reason for suggesting this construction is that in case of parental failure, in the sense of article 1524 of the Greek civil code, institutional proceedings for antisocial behaviour on the part of the child are generally expected. Therefore, it is rational to allow ex-inmates or even inmates of rehabilitative institutions committed there for minor crimes to be adopted, if the care of another family seems promising for the reconstruction of their character.[167]

III. Unattainability of parental agreement

a. In Scots law, agreement may be dispensed with on the ground that the parent or guardian "cannot be found or is incapable of giving agreement".[168] This is permitted to the court, if it is satisfied that either every reasonable step has been taken to trace the parent for the purpose of giving formal agreement[169], or there are no practical means for communicating with him. The latter corresponds to a somewhat extended interpretation of the ground provided in Re R,[170] where it was thought that if anyone attempted to communicate with the parents, this might have involved them in danger because of the political situation there and the position of R. as a refugee in Britain.

The ground does not, however, dispense with the need to serve notice at the last known address of the parent. However, this becomes a rather procedural formality before evidence on the unattainability of parent's agreement, than an obstacle to the jurisdiction of the court to hear the application.[171]

Incapability, on the other hand, of giving agreement includes either the state where the parent suffers mental deficiency to an extent that he cannot be aware of what is involved by consenting

to the proposed adoption; or the state where he is ignorant of the proposed adoption and cannot as a practical matter be made aware of it. The latter has been considered for the parents in Re. R and could be extended to include parents who in general are unaware of the institution of adoption.[172]

b. In Greece on the other hand, according to article 11(b) of the Legislative Decree 610/70 agreement is deemed unattainable for the parent suffering mental illness or for whom there is other serious reason rendering it impossible for him to agree formally.[173] In both cases the court decides after hearing the opinion of the nearest relatives of the child if practicable.[174] Serious reason for the present purposes constitutes the existence of a permanent impediment making it impossible to get his formal agreement after taking all reasonable steps. Thus, it has been accepted that the unknown residence of the parent suffices to meet the requirements as well as the impossibility of communicating with him, even when there is positive information that he is alive.[175] Moreover, the same applies if the parent suffers such physical disability that he cannot be aware of the meaning and gravity of the order.[176]

## IV. Acting Unreasonably

a. In the process of its application the ground of unreasonably withholding agreement became the main cause of contested litigation over adoption because it demonstrates more clearly than any other of the relevant grounds the impossibility of maintaining a balance between the conflicting interests. When examining the scope of Section 6 of the 1978 Act the uncertainty over the criteria that should be taken into account to signify the reasonableness of the parental decision has been considered at length. As said there, the enactment of section 6 does not altogether remove the problems encountered

in the earlier law,[177] because it is still disputed whether the criteria on the welfare of the child would apply to the resolution of such questions. Although this will make little difference because precedents range from considering the welfare of the child "first(and)... in some cases (to) ... be paramount"[178] or of "potent ... (and perhaps) the foremost consideration",[179] nevertheless, those views have been formulated on the merits of particular placements and as such fall short of having a unanimous acceptance. Indeed the uncertainty on the matter has given rise to what Lord MacDermott in the early seventies termed "the emergence of two distinct and conflicting schools of judicial thought" in assessing the unreasonableness of the parent.[180] According to one school, the word 'unreasonable' should be given a 'special' construction as to assess the circumstances from the parents' point of view and should be read as including some degree of blameworthiness. According to the other, the word 'unreasonably' should be given a "natural" construction, it should be interpreted from the child's point of view and should not be read as requiring a degree of blameworthiness.[181] However, this understanding points more to the gradual increase of the attention paid to the interests of the child as opposed to the rights of the parent and as such rather refers to two distinct periods of Scots law than to the formulation of two coexisting schools of interpretation. Morover, the history of this dispute demonstrates more than anything else the need to provide a method of assessment where the tests on the welfare of the child should balance the circumstances of the natural parents and the prospective adopters in a manner acceptable by both and nevertheless applicable as much to the relinquishment procedure as to the case of a specific placement.

In early cases, the emphasis tended to be on the rights

of the parents. Courts were of the opinion that in the decision making process the judge should be primarily concerned with the conduct of the parent notwithstanding the importance attached to the child's welfare. Thus it has been excused as "eminently reasonable" to withhold consent since the effect of an adoption order is to destroy the parent-child relationship.[182] A similar concern for parental rights is observable in a number of English decisions. This was taken to the extent that the parent could be held to be unreasonble only in exceptional circumstances, irrespective of the advantages to the child's welfare if adopted. Thus it was possible for the withholding of parental agreement to be considered reasonable, insofar as it was not whimsical, in bad faith or arbitrary, even though the parent had forfeited his right to have care and custody of the child.[183]

In the early sixties there appeared a shift of emphasis from the importance accorded to parental rights towards the welfare of the child. The real challenge, however, came with the AB v CD (1963) (Petrs.)[184] in which the welfare of the child was held to have a clear significance in terms of the reasonableness of the parent's decision. In this case it was provided that a reasonable parent would attribute great importance to the child's welfare in taking his decision.[185] The logical consequence of this reasoning was for the element of liability required for dispensing with parental agreement to undergo a gradual devaluation until its dismissal by the House of Lords. In Re W(1971)[186] the House reaffirmed the need for objective considerations on account of the welfare of the child and brought an end to decisions veering between accepting or ignoring "culpability" as being an essential element of unreasonableness. The chance appeared with the "special" construction given to the term "unreasonably" earlier by the Court

of Appeal in the same case. Here Sachs, L.J., while stressing the penal nature of the provision assets that "To resolve the contests between a parent and proposed adopters on the basis that normally the correct test is to take the course which is in the better general welfare interests of the child is plainly wrong. It ignores the necessity first to establish culpable conduct by the parent".[187] Similarly, Cross, L.J. expressed the view that the ground envisages a degree of unreasonableness not falling short of positive misconduct, and talked of shutting the parental eye to a blameworthy degree to the very serious circumstances to which the parent was exposing the child.[188] However, it is submitted that this approach never met with much favour in Scotland[189] and actually in the same period as Re W, the Court of Session, with its decision in A v B and C[190] gave legal effect to the "natural" construction of the term "unreasonably". In this decision the court upheld the opinion of the Sheriff substitute as responding to the right tests of the child's welfare since he took into account the benefit to the child of adoption not only from the material point of view but also spiritually and morally, and made up his mind having in view the long term welfare of the child. It is important to notice that in formulating a view on what the future of the child would be, the Sheriff paid much attention as to whether the natural parents' union had any permanence and whether it was likely for the child to be placed at risk again. Also attention was paid to the vacillating attitude of the mother and to the fact that the driving force against her giving her consent was her husband.[191]

The decision of the House of Lords in the same case, reaffirmed the need for a natural construction of the term. The court referred, with approval, to the opinion of Lord Denning in In Re L,[192] about a

reasonable mother giving great weight to what is better for the child so that it is possible to act unreasonably, even if there is no element of culpability or reprehensible conduct in her decision to withhold agreement.[193] This has been formulated as the need to answer the question of the reasonableness of the parent by looking at the matter through the parents' eyes, while objectively and on all facts. Accordingly, a parent's decision which takes into account the welfare of the child falls within the band of reasonable decisions, notwithstanding that on certain facts two persons may well reach two different decisions and both be reasonable.[194] According to Lord Reid's opinion on the matter -

> "... a reasonable parent, or indeed any other reasonable person, would have in mind the interests or claims of all three parties concerned - the child whose adoption is in question, the natural parents and the adoptive family. No doubt the child's interests come first, and in some cases they may be paramount. But I see no reason why the claims of the natural parents should be ignored if the mother were deeply attached to the child and had only consented in the first place because of adverse circumstances, it would seem to me unjust that on a change of circumstances her affection for the child and her natural claims as a parent should be ignored. And the adoptive family cannot be ignored either. If it was the mother's action that brought them in in the first place, they ought not to be displaced without good reason ... So to balance those claims is not an easy task. Often we are dealing largely with future probabilities ... so we cannot be certain what will be in the child's best interests in the long run. That seems to me to be an additional reason for giving considerable weight in proper cases to the claims of the natural parents and the adoptive family." 195

However, as one can foresee from the above statement the reception of this development is not free from problems, e.g. the instance of a parent who has not shown any blameworthy conduct in the way that he has fulfilled his duties but the overall performance has turned out to be damaging to the child's welfare. The problems are likely to appear with the increased use of anonymity by the adoptive parents and the introduction of the relinquishment procedure. The court may be called on to dispense with parental agreement as

unreasonably withheld, even though there is no evidence of a placement.[196] Indeed, it is a problem to find grounds for assessing whether the parent is unreasonable, if that parent withholds his agreement in ignorance of the future offered his child. It may, perhaps be extremely difficult to convince that parent of the necessity of the order and for that reason one can see a logical basis for the requirement of culpable conduct by the parent. There exists the parallel problem for the court as to how to predict in such circumstances that the order will be for the welfare of the child. Up to now, such decisions were taken in the form of a two fold assessment in which comparisons between the circumstances of the natural and adoptive family prevail throughout the decision process. The reasonableness of the parent is assessed by reference to his views on the welfare of the child and thereto it is suggested that the court must make allowance for the concept of anonymity whenever this step has been taken. As said earlier, there is an element of artificiality in seeking to decide whether a natural parent is withholding his consent unreasonably, if he does not have any knowledge of the circumstances of the placement and it is submitted that the court must take into account these missing factors and seek to determine how a reasonable parent would act in the knowledge of all the circumstances.[197] However, in this context the decision becomes more artificial than ever since the court would have to make a number of hypothetical estimations. Indeed such decisions will involve a great deal of balancing claims, mixed with considerations of future probabilities as to the welfare of the child - a task not always easy to perform andnot without risks. For instance, there is the precedent where the decision to remove the child either from the parents or from the adopters has been taken on the assumption that a very young child is not likely to suffer, provided that the person

taking over its care is capable of bringing him up and anxious to do so. As for a child of tender age the court has shown reliance on the child's ability to adjust and regarded the effects of parting with the parent or adopter as "mercifully transient", unless the contrary was strongly supported.[198] Nevertheless, a problem for the court is how to isolate transient facts from the evidence presented and assess this in the context of the child's needs, to predict the future conduct of either parent in relation to the child and to try to form an idea of what the future of the child would be if the order is granted or refused.[199] One avenue might be provided by the use of socio-medical evidence but judicial opinion in the past has been rather reluctant to attribute real weight to such evidence.[200] A recommendation of the Houghton Committee for Scotland was that courts should be able to appoint expert assessors to assist in the evidential matters[201] and that this might realise the above alternative. However, the entire responsibility remains with the court and the judges have to make up their minds on account not only of the past experience of the child but also of future plans presented by the parents.

In relation to the latter, it must be noticed that frequently parents appear with certain plans for bettering their personal circumstances which intensified the dilemma as to whether to award the order or not.[202] And if this is looked at on the basis that, in a considerable number of cases, the child is already emotionally or otherwise detached from the natural parents, the decision is not as simple as one would think.

In view of the complexity of the decision it is possible to

predict the following dangers and make the necessary suggestions in relation to the assessment of the unreasonableness of the parent. In the first place, if the decision on the unreasonableness of the parent will continue to be of the nature of a comparative assessment of the advantages for the child if adopted or not, there is the danger of partiality. Second, under this method the tests applicable for assessing whether the natural relationship causes undue damage to the welfare of the child have a different significance than if the child was not to be adopted at all. Therefore, there may be some doubt as to the maturity of such decision. Third, in the context of this comparison the decision is characterised with individuality which in turn brings a relativity to the scope of the ground.

On the basis of those dangers there is a need to divide the decision into two distinct stages and decide whether the parents should be deprived of the child exclusively on circumstnaces relating to the natural family per se. As regards the role of the welfare of the child for that assessment, this has been discussed earlier in the relevant chapter. Given that the finding of this assessment is that the relationship with the parents causes harm to the welfare of the child and that there is no hope of any other remedy it may be possible to consider the alternative of adoption if the welfare of the child so indicates. The need to have evidence about the future of the child in adoption no longer has the same significance as before, since success is more or less sufficiently guaranteed by the standarized comprehensive adoption service. As to the natural parents this exclusive consideration will increase their understanding of the decision and eliminate the feelings of inferiority, friction and grief which are usually felt after a decision in favour of the adopters. This expectation

is based on the fact that success or failure in keeping the child is the result of the application of social standards of which they may have a sufficient knowledge.

b. In Greek law, considerations concerning the unreasonableness of a parent in withholding his agreement to the adoption of his child are a matter of dispute. They appear as an element in dispensing with parental agreement under article 11(c), but this condition arises only on failure as a parent which has resulted in the child being put into care. No definitie answer, however, has been given so far in the case where the parent of a child, who is not under institutional care, withholds his agreement even though he has failed to care properly for the child. Nor is it clearly specified whether such conduct by the parent constitutes an abuse of right according to the sense of article 281 of the Greek Civil Code.[203]

If one tries to derive some knowledge on the matter from the precedents or from opinions of scholars, one finds the former cover only the case of conditions which on present standards almost certainly would have given rise to care proceedings in relation to the child[204] and that, in the latter, opinions appear to be divided, some of them accepting and some rejecting the application of article 281 in dispensing with parental agreement. Thus, Spyridakis is of the opinion that "the court is not fettered" if the parent, guardian or tutor abusively denies consent.[205] This view, however, contrasts the opinion of Balis who argues that under no circumstances may the court dispense with any of the conditions required for a valid order.[206] Tousis, nevertheless inclines to the same opinion that abusive refusal by the parent to agree does not allow the court to dispense with his agreement.[207]

G. Michaelidis-Nouaros, in a more detailed study on "The Meaning of Functional Rights and their Abuse",[208] points out that every right recognized by Greek Private law is subject to the control of article 281 of the Greek Civil Code. This general wording of this article indicates that "droit discretionnaires" are not recognised in Greek law.[209] On the other hand in Greek precedents a distinction is made between "concrete rights" and natural freedoms (droit indefinis) the power of the courts being exercised only in relation to the former.[210] The consent of the parent, therefore, because it is a natural freedom according to the precedents escapes the control of the court.[211] Natural freedoms, however, as Michaelidis Nouaros argues, are not beyond any control but are submitted to the restrictions of article 919 of the Greek Civil Code (Intentional cause of damage in a manner contravening the upright morality rendering the person liable to pay compensation.) Thus whenever a person exercises his natural freedom in a manner causing intentional damage to a third person and contravening his moral obligations this act is prohibited as abusive.[212]

However, considering the matter in the light of the developments introduced by the legislative decree 610/1970 consent cannot be regarded as a genuine natural freedom. The L.D. sees adoption from a different perspective than the civil code. The purpose of adoption became a social one so that the prerogative of the parent to withhold consent underwent a substantial transformation. Under the civil code, the fitness of the parent in exercising parental rights and duties was immaterial to his right to provide or withhold agreement. This was so, primarily because adoption had the mere purpose of placing the child as the child of the applicant. Also the protection offered to the child was minimal since the court had only to be satisfied that the order would result to some benefit for the child and that

the legal conditions had been met.[213] In this context the decision of the parent to provide or withhold agreement prevails over all other considerations since the order lacks any social function of pervasive importance. Therefore this decision whether the child should remain his own or be given to someone else could not be otherwise than beyond any control.

The L.D., however, had introduced welfare tests in relation to the placement so that adoption should take place or be ordered by the court whenever the interests of the child require so. This, as has been argued earlier, is interlocked with the interests of the natural and adoptive parents. What remains therefore to be seen is whether it left unaffected the natural freedom of the parent to withhold agreement to adoption.

In the first place the characterization of parental agreement as a natural freedom even in relation to the previous law is unsatisfacory taking into account that its consequences have a direct bearing on a third person, the child, whose parent has the obligation to protect and promote his interests. Therefore, although it is justifiable for a contracting party to reject an offer and nobody can force him to enter into a contract, this is not similarly justifiable when his decision affects the interests of the child and has a social dimension.

Secondly, his agreement is not binding for the court. The court following the inquisitorial procedure has the discretion to award or to refuse to grant degree according to the conditions of article 2(1) of the L.D. Thus implicit control qualifying the functioning of parental agreement cannot be denied. To take the example of a parent who responds to his duties both materially and emotionally - it

is unlikely for the court to give effect to his agreement under such circumstances by awarding an order to the applicants, which indicates that parental agreement is subject to the provisions of the law and to a qualifying control by the court.

Thirdly, according to the law, parental agreement is needed where there is some contact between parent and child or the animus of the parent-child relationship is extant. Thus, the court may dispense with parental agreement if the child is abandoned or of unknown parentage (11(a)), or because of the mental condition of the parent or some other reason why he cannot provide agreement (11(b)) and the interests of the child dictate that it be adopted. Also the court may dispense with parental agreement if the parent abusively withholds his agreement while the child is committed to the care of a social institution. The court decides after considering the welfare of the child.

Comparing the aims of adoption, the characteristics of parental agreement and the grounds under which the court may dispense with it, one comes to the conclusion that parental agreement is not an uncontrolled natural freedom related to the person of the parent but a right deriving from a specific bond with the child. This bond can be identified in the parental relationship - a concept wider than that of parental authority referring to the existence of a family relationship recognised by law. As such, therefore, the right is interlocked with the family relationship - the latter overlapping the former. In consequence by accepting that rights and duties deriving from the parent-child relationship are subject to the control of article 281 the right of the parent to provide or withhold agreement, as being of the same nature, has to be identified within the same category. Furthermore,

the strength of the right is limited within the boundaries of the welfare of the child so that if the latter is at risk the parent may be controlled in his decision to give or withhold agreement.

In support of this opinion one can recall the following

a) the right to give agreement is recognised to persons who, apart from being the parents of the child, are in a family relationship with the child (the mother, her husband, the father of a voluntarily acknowledged child or one that is so assimilated). It is not recognised to a father for whom paternity has been judicially established since that father is not in any proper family relationship with the child.

b) In consequence to the former the right of the parent is not a freedom recognised to the person of the parent as a result of the biological relationship, but in relation to a family relationship, legally regulated and of great social concern.

c) The preservation or not of that relationship is largely affected by the performance of the parent in his parental rights and duties. State intervention within the parent-child relationship justifies dispensing with parental agreement if the parent fails in his duties.

d) The parent does not correspond to his role in article 11(a) and (b) of the L.D. while in 11(c) he fails to live up to his duties. Therefore the parental relationship is considered not to be preserved for the interests of the child if the parent by his conduct threatens the welfare of the child.

e) With the adoption order there is created a legal link in the interest of the child. The creation or not of that relationship depends on whether the parent exercises reasonably or unreasonably his right of agreement. Moreover, the order does not affect

the blood relationship especially in Greek law where rights and duties in relation to the natural family remain almost unaffected.

Having reached, therefore, the point that parental agreement is a functional right within the broad category of the rights and duties recognised in the parent-child relationship it is necessary to see whether submitting it to the control of article 281 strikes against the purpose of article 11, especially its part (c) of the L.D.

As Michaelidis Nouaros points out in relation to article 11(c) "the legislature considered that it would be cruel and inhumane to tear away a child who lives with its parents as a family unit, and to give that child up for adoption against its parents' wishes; that is why the right of the court to substitute by its decree the consent of the parents in the case of wilful refusal is only recognised by the law when the child is no longer being brought up in the home of its parents, but has been received by charity or foundation of social assistance".[214] Obviously such restrictive application leaves a vacuum in the law which needs to be filled by applying the tests of article 281. There are sound reasons for proposing this formula. Not every child who lives with its parents constitutes a legally acceptable unit and not every parent who withholds agreement does so because of genuine feeling for the child. Such situations have been revealed earlier[215] and, though some of them may be dealt with on the grounds of part (a) of article 11, in certain other cases the court is left without power unless the child is submitted to institutional care. Such cases may arise in the instance of a particular placement, for instance because the child is submitted to the care of a third person by virtue of article 1524 of the Greek Civil Code or in the instance of intervention in the relationship

according to the condition of article 1524, provided the parent-child relationship is irretrievably damaged and the only possible alternative for his welfare is adoption. On the other hand to require the child first to undergo the experience of institutional care can hardly be accepted to be the true intention of the legislature since it exposes to undue risk the interests of the child. It should be accepted, therefore, that article 11 of the L.D. introduces special law intending to ease the position of the courts in specific circumstances where parental failure is clearly apparent and does not otherwise affect the regulations applicable to parental agreement requested under article 1577 of the Greek Civil Code[216] in relation to article 2(1) of the L.D.

Accepting therefore that the right to agreement is a functional right, what principles should apply in defining its abuse? Adopting by analogy those referred to by Michaelidis Nouaros in relation to the abuse of functional rights the following should be recommended: The right in itself like the others included in the parent child relationship must be considered as of "altruistic" nature[217] created not for the sake of any personal satisfaction of the bearer but, as a principle of social deontology, to serve purposes useful to the society and according to the intentions of the legislature (the overall function of the parent-child relationship). As with every functional right of such broad nature, the bearer must have discretionary authority in exercising his rights, as for example with patria potestas, provided that he exercises the right in a manner in accord with the general and useful purposes.

Besides the discretion of the parent, however, stands his obligation to exercise the right. Thus, under circumstances where he would be

expected to agree to the adoption, his refusal could be considered as omission of duty and constitute "negative abuse of right". This omission, in order to be abusive, need not necessarily arise from fraud or negligence. Even in the absence of any offending conduct, or where his acting is not legally blameworthy, his refusal could be considered "objective abuse" if his conduct contravenes the purpose of the law. In such cases the same remedies would apply as if culpable conduct existed.[219] However, it can be argued that alike parental rights consent to adoption is not susceptible to detailed control, the latter being permissible only in the event of serious misconduct which affects or exposes to danger the health or morality of the child.[220] But, insofar as abuse of authority is prohibited, the acting of the parent is also open to control in determining this point, even though there is not serious misconduct. Thus, irrespective of the legality of the parental conduct it is permitted for the court to examine whether the performance of the parent of his duty deviates from the purpose upon which parental authority is founded. Any decision, however, must be taken on account of all the circumstances of the case unless one act sufficiently signifies incompetency to perform in parental duties.

However, because in the application of this ground there appears the same dangers as in Scots law when parental agreement is dispensed with as unreasonably withheld, the method suggested there for assessing the circumstances should apply also for the present case.

# C H A P T E R  S E V E N

## ADOPTION PROCEDURE AND RELATED ASPECTS

### INTRODUCTION

The reduction of the amount of legal prescription concerning the qualifications for and conditions of adoption inevitably indicates the development of a more rigorous and sophisticated process for the adoption procedure to handle the manifold problems involved, starting with the initiative of placing the child for adoption and terminating with the after care needed for the order. A great deal of attention, therefore, is expected to concentrate on the extra-judicial procedures, in terms of administrative flexibility and of the monopoly of adoption agencies in making placements. But, the role of the courts, however, is by no means diminished. The court is legally required to be satisfied that adoption will be for the welfare of the child and to safeguard the rights and interests of all other parties involved. Thus the court may look fully at the merits of the application and check on the activities of the adoption agency. Its duty presumably will be to satisfy itself that the legal requirements have been complied with and that the adoption agencies were justified in formulating their recommendations.[1]

The motivating factor for paying considerable attention to the administrative part of the decision making process, according to Fisher lies in the fact that crucial decisions are taken in it so that much may depend upon the imagination shown at that stage. Thus, as he explains, the most significant decision is the decision as to the original placement and once the placement matures into an acceptable relationship between adoptive parents and child, it will become more

difficult as the time passes to justify interfering with that relationship. The courts from their side have become increasingly sympathetic to such an argument, both in a contested application and where it is left entirely up to the court to decide whether an adoption order is for the welfare of the child. And, as he states, that few applications are refused reinforces the significance of the original placement decision.[2]

In the following pages the law relating to the administrative part of the order will be examined in relation to each country, along with the role of the judicial authority in the adoption process. Thus, in the first place there will be examined the provisions for the adoption service in each country; second, relinquishment procedure; third, the procedure leading to the adoption order; fourth, the judicial process, fifth, the orders available to the court, and finally, the status conferred by the order.

## A. EXTRA-JUDICIAL ASPECTS OF THE ORDER

### I. The Adoption Service

#### a. In Scotland

Part One of the Adoption (Scotland) Act 1978 seeks to fulfil the need for a service comprehensive in scope and available throughout the country. Thus section 1 to achieve this objective requires every local authority to establish and maintain a service, or to ensure the existence of one in their area. This service should be comprised of child care services for the already adopted child, adoption placement service and assessment facilities, social work service to natural parents and after care for natural and adoptive parents. Also it is a duty of the local authority to secure the requisite facilities for the fulfilment of the above purposes or to ensure that those are provided by approved adoption agencies.[3]

Nevertheless, it is required that this service should be provided in conjunction with the authority's other social service, in order to achieve coordination and efficiency within the area.[4]

The described service does not go as far as the Houghton Committee recommendations, which suggested, after receiving evidence of insufficiency or even lack of adoption service in certain areas,[5] that the local authorities themselves should provide such a service as part of their general child care and family case work provision.[6] However, it meets the recommendation that there should be a statutory duty on them to ensure, in cooperation with voluntary societies, that a comprehensive adoption service is available throughout their area.[7]

This service is entrusted with the decision as to the placement, which involves, in a preliminary form, all the aspects of the process. Thus, it comprises assessment of the needs of the child, choice of the most suitable applicants, securing of parental agreement and more important, assessment as to whether it is necessary to proceed for a placement in view of the background of the whole range of alternatives which may be open in a given set of circumstances. And it is not difficult to foresee that, with this complexity, to secure placement decisions of higher quality the decision must be taken by duly qualified persons. Not surprisingly, therefore, the Act imposes strict control over adoption agencies while nevertheless conferring upon them the administrative monopoly for arranging adoption placements.

Under the 1958 Act a voluntary adoption society had to register with the local authority. Control was not rigorous and the criteria simply envisaged the need of ensuring that the staff of the society was competent and numerically adequate, and that there was a committee responsible for the members, and controlling the activities of the

society.[8] These conditions were regarded by the Houghton Committee as too narrow and, instead, they recommended centralization and a tightening up of the registration system.9 In the view of the Committee "there should be a phasing out of those voluntary adoption societies which are unable or unwilling to provide a comprehensive service."[10] since the concentration of administrative power in the adoption service would involve considerable risk if not provided with professional, economic and financial resources securing high quality and standards in the service.[11] Hence, instead of the concept of registration the Act implements the concept of approval under criteria of different character and administrative control over the adoption agencies, aside from the judicial control which the court may exercise over them as statutory bodies.[12] The following matters, it is suggested by the Committee, should require to be substantiated as a condition of registration

a) that the agency's programme would make an "effective contribution towards a comprehensive service";
b) that the resources of the agency are adequate in relation to its programme; and
c) that the organization of the agency is "appropriate for the effective carrying out of the programme".[13]

Those have been given effect in section 3(3)-(5) of the 1978 Act. Nevertheless, it is submitted that because those criteria require not merely a factual investigation but also a functional analysis the Secretary of State should be selected as the appropriate registering authority,[14] principally as this choice would most effectively achieve high standards throughout the country and a "partnership between local authorities and voluntary societies in planning a comprehensive adoption service."[15] On that basis the expectations are that the quality of adoption services and their availability should thereby be improved and that, particularly by the integration of adoption

services and other child welfare services, the problem of "children who wait" may be resolved.[16]

The facilitating of a sophisticated adoption service naturally presumes the aim of channelling placements through this service. Thus, the Committee had suggested in their working paper that the law should prohibit placements with adopters not related to the child and which had not been arranged through adoption agencies.[17] In a similar fashion they adhere to this suggestion in the report since different opinions presented to them did not guarantee otherwise the quality of independent placements.[18] Thus they state that "Adoption is a matter of such vital importance to the child (who is usually too young to have any say in the matter) that society has a duty to ensure that the most satisfactory placements are made. Society manifestly does not do so while it is open to anybody to place the child for adoption".[19] And as Fisher comments on this statement "This perfectly illustrates the use of the welfare of the child as the supreme justification for changing legal policy".[20]

On this basis section 11 of the Act gives adoption agencies (i.e. local authorities and approved adoption societies) a monopoly in placing children for adoption except in cases where the proposed adopter is a relative of the child. In addition, the section makes it an offence for a person other than an adoption agency, i.e. doctors, midwives, ministers, or even lawyers, to place a child with a person not a relative or for a person not a relative to receive a child otherwise than through an adoption agency.[21]

Given the aims of those recommendations and their statutory enactment the following conclusion would certainly seem justified. The

contribution of the Act towards the concept of an administration-orientated process is remarkable not only for the expanded agency discretion at the point of placement and the extension of administrative control over the agencies themselves, but also for the provision of a comprehensive service capable of regulating any aspect of the procedure, and of assisting the court in reaching the best possible decision.

b. In Greece

In Greece, on the other hand, an adoption service in the form of a specialized body able to offer a comprehensive service does not exist. Problems that may appear at the time of placement or after the order are dealt with by the departments of social work of the Ministry of Social Services, or, if the child is in the care of an institution, by the department of social work of the institution. Consequently the original placement is left unregulated nor does there exist restriction on independent placements. An exception to be noted is when the child is in the care of an institution in which case the institution may make the necessary arrangements and assess the suitability of the applicants at an early stage. Even so, however, the services offered to both natural and adoptive parents are restricted and very rarely can those institutions maintain a close contact with them.[22]

Provision is made on the other hand to regulate certain stages of the procedure by especially appointed bodies or by the departments of social service. Namely, once the placement is advanced and an application is intended to be made to the court, the applicant has to submit a prior application to one of the bodies appointed to "collaborate in adoptions" along with a report on his family and financial position. Collaborating bodies, as specified by article 1(1) of the Royal Decree 795/70, are the Central Committee and the district departments of the Regional Social Services, as well as those in the province of the region of Attiki; also in respect to children received into their

care are authorised the P.I.K.P.A.; the National Organization of care; the infant centre "Mitera" with their district offices; and the public infants asylums of Athens, Salonica and Patra. The same authorities are entitled to collaborate in adoptions by foreigners, with the exception that in the case of a regional social service the right belongs only to the Central Office and not to the departments,[23] as well as to the Athens international social service.[24]

On receiving the application the service has to appoint a social worker, who will have to maintain contact with the applicants and investigate and report on their circumstances to the department of the social service or the central office (as the case may be)[25] which decides whether or not to supply the applicant with the required certificate that investigation has been completed. The report of the social workers along with the report on the findings of the committee of the agency, on the other hand, remain confidential and are sent directly to the City court, where the application is pending.[26] Since, however, the certificate supplied to the prospective adopter is a qualifying document for the application,[27] it implies that no adoption can be performed in Greece unless it is supervised and approved by an adoption agency, prior to the hearings. Nevertheless, as far as there is no provision for the recognition of private agencies, collaboration in the placement is with public services or publicly controlled institutions and herewith one can see a strong reason for classifying adoption among the measures operating within the scope of wider social policy.[28]

The above mentioned bodies have also the duty to supervise the placement after an order is made and submit an annual report to the Ministry of Justice and to the Ministry of Social Services about the placements made under their supervision and reports on the aftercare

of those placements.[29]

In conclusion it can be said that the obvious drawback in the adoption service in Greece is that the adoption placement is unregulated. The involvement of the agency starts only from the moment of the application for the intended adoption so that there is no selectivity in the choice of parent. The agency, therefore, instead of having the responsibility of attracting the most suitable applicants in respect of the child has the passive role of supervising and approving or disa-proving placements in progress.

c. Prevention of trafficking of children in Scotland and Greece and the penal provisions of the Legislative Decree 610/1970.

In section 51(1) (2) of the 1978 Act and in Article 15 of the L.D. provision is made to prevent the child from being the subject of an illegal transaction. Thus, it is provided that it is an offence to give or receive any payment or reward for or in consideration of the adoption of a child made either by the prospective applicants, parents, guardians or caring persons.[30] In Greek law, where the adoptive parent has not the right to consent to adoption, there is a specific prohibition on making arrangements for the further adoption by another person of his already adopted child.[31] In both systems it is also considered an offence to act as an intermediary in arranging adoptions, especially when it is done in view of a payment or reward. Similarly, it is an offence for theparent or guardian to make any agreement with prospective adopter, after receiving payment promising his consent to the child's adoption, or to transfer the care and possession of the child with a view to adoption.[32] Persons that contravene these restrictions are liable in Scotland on a summary

conviction to imprisonment for a period not exceeding 3 months or to a fine not exceeding £400, or both,[33] while in Greece they may be punished by imprisonment not exceeding two years and a fine up to 100,000 Drachmas (about £1,000). The Greek L.D. also provides for more severe punishment (imprisonment not exceeding 3 years and a fine up to 200,000 dr.) if the acts described above are done habitually or for profit.[34]

It is also considered an offence for either parents or prospective adopters to advertise their desire for adoption, or for anyone to advertise willingness to make adoption arrangements.[35] Adoption agencies are exempted from these restrictions.[36] Persons who contravene the section may be fined up to £400.[37] In Greece a similar restriction exists in the Press Law.

The purpose of these restrictionsis to avoid any possibility of the children being bought or sold, or of being put in the way of adoption in the prospect of an illegal profit to their parents, guardians or third parties.[38] Behind them, however, there lies the deeply rooted opinion that the interests of the child are better served in the natural family, and the provisions are intended to deter parents from giving their children away, unless the welfare of the child so requires. Particular emphasis is given to the restriction on the parent to promise consent or to transfer the possession of the child when it refers to the natural mother. It is well known that the latter is vulnerable in many respects. In particular, the birth of the child may have created problems, many of which have a financial aspect (lapse or loss of employment, change of residence to avoid stigmatisation, etc). Accordingly, the stimulus of financial assistance could work effectively to overcome any hesitation in relation to the adoption.[39]

In the Greek L.D. special protection is also provided for adoptees under 18, regarding their treatment by the adoptive parents, and the right of the natural parents to have access to the child. First it punishes with imprisonment not exceeding six months and/or a fine of up to 100,000dr., the parent who uses the child in immoral tasks or ones dangerous to his physical or moral health.[40] Second, the court has the discretion within the realm of a wider power, at the adoption hearing or after, upon the petition of the adoptive parent or the Public Attorney, to take away the right of access from the natural parents, if it is of the opinion that contact with them is harmful to the child.[41] Furthermore it is within its power to take any necessary measures designed to safeguard the physical and emotional health of the adoptee.[42] Similar measures can be taken against the adoptive parent if he contravenes article 15(1) of the L.D. or has forfeited parental rights, and the court may even revoke the order, if it is in the interest of the child.[43]

In the Scots law, on the other hand, natural parents have no right of access to their children after adoption, but because the court is empowered to include in its decision any terms and conditions that it thinks fit,[44] reasonable access may be ordered on their behalf.[45] Also conditions can be imposed on the adopters if the court thinks necessary to order them to further safeguard the child.[46]

## II . FREEING THE CHILD FOR ADOPTION

Both laws provide a procedure for relinquishment of parental rights and duties, whereby agreement to adoption can be made final before the adoption application is heard. There is a concurrent investment of parental rights in the adoption agency. The purpose is to allow

a reduction of the time needed for obtaining valid consent and to secure the progress of the placement.[47]

The legal reason that demanded the enactment of this procedure is that parental rights and duties, even after giving formal consent, remain in the person of the parent until the issuing of the adoption order, because the nature of the rights make it impossible to leave them in limbo. The parent could thus withdraw his agreement at any time up to the making of an adoption order. Moreover, the parent, when formally providing agreement, agrees to a particular placement, so that if it falls through, the agency cannot proceed with confidence to a new placement. The effects of this on adoption proceedings were considerable delays between first and second placement as well as many withdrawals of agreement, due to vacillation on the part of the natural parent. Accordingly, many children with prolonged institutional life suffered considerable harm being switched from placement to placement for those reasons. The agencies too, experiencing frustration from the disruption of their arrangements, became reluctant to place children if uncertain about parental agreement, and looked to a formula that could remove this insecurity.

Also, this interval causes a number of problems for both natural parents and prospective adopters. Natural parents find the period leading up to the adoption hearings an anxious one, as they are aware that they have not yet made an irrevocable decision and consequently temporise on whether to retain the child or not. The interval is particularly difficult for single mothers who commonly ask for the final arrangements to be brought forward. Similarly prospective adopters experience great strain throughout the period leading up to the order, as they live with the fear that the natural parent may withdraw his agreement before the date of the hearings.[48]

Accordingly, the Houghton Committee in Scotland and the Committee appointed by the Ministry of Justice in Greece, respectively, proposed separate procedures, to be held prior to the adoption hearings, at which the natural parent would relinquish his/her rights irrevocably in favour of an adoption agency.

a. Section 18 of the Adoption (Scotland) Act 1978 introduced to this effect, makes provision for the transfer of parental rights on the request of the parent and the agency, or the agency alone, if there is reason for dispensing with parental agreement. The latter possibility is designed to deal with children who have been in children's homes since early infancy and would be placed for adoption if the parent was not refusing agreement. Under the previous law this could only be achieved by placing the child and then asking the court to dispense with agreement on one of the statutory grounds. A frequent consequence was either the mother attempting to remove the child or the court refusing to dispense with agreement.[49]

The application must be forwarded to a court of competent jurisdiction, which must satisfy itself that each parent or guardian agrees fully and unconditionally to the child being adopted. If not, the court must decide whether his agreement can be dispensed with on one of the grounds of section 16(2).[50] At least one parent will have to consent to the application, unless the agency wants the court to dispense with both parents' agreement. In this case they must have the child under their care,[51] and placed with adoptive parents, or satisfy the court that the child will be the subject of a placement in the near future.[52] Provided there is the consent of one parent, the application is validly submitted, but, before making the freeing order the court must be satisfied that the other parent agrees to adoption

or that his agreement should be dispensed with. This is also subject to the condition that the child has been placed for adoption, because it will be unjust to deprive the unwilling parent of all rights unless adoption were virtually certain. But, nonetheless, as the purpose of the provision is to enable the child to be free for adoption before being placed, it is permissible for the court to consider the application if the placement is probable.[53] It should be noted here, however, that the chance of considering the placement as probable is greater if the consent of the other parent is given. The other parent is left alone to meet the child's needs in the short run in order to convince the court that by retaining the child this will serve his welfare according to section 6.

The section does not specify any time that should expire between the issue of a freeing order and the adoption order, but makes provision as in section 16, for effective consent to be provided once the child is no less than six weeks old.[54] This does not debar from submitting an application earlier but no formal agreement can be secured at that stage.[55] As to the point of for how long the agency may retain the rights if the child has not been placed for adoption, section 20 permits the parent who had agreed to the adoption to apply for the resumption of rights under certain circumstances (infra).

The agency which, either alone or in cooperation with the natural parent, can initiate proceedings in the majority of the cases will be the local authority applying in respect of a child who remains in a children's home. Nevertheless, it equally extends to cover cases where a voluntary organisation, which is an approved adoption society, is willing to apply to secure agreement for the adoption of a child boarded in their premises.[56]

The additional consent of the minor child is also preserved and no order can be made without the agreement of the child, if aged over sixteen. However, if the court is satisfied that the minor is incapable of giving formal agreement it may dispense with this.[57]

The parent or guardian who consented to the application must be asked whether he wants further involvement in the child's future.[58] Given a negative answer the order brings to an end the parent-child relationship. On the other hand, when a declaration in favour of involvement is submitted, sections 19 and 20 apply.[59] These entitle the parent to receive a report from the agency on the progress made towards the adoption of the child[60] and even to apply to resume parental rights and duties.[61] However, it is open to the parent to submit a declaration of non-involvement at any time after the freeing order.[62] The agency must serve a report to the parent who expressed the wish to be informed immediately after the adoption order or within the 14 days subsequent to the expiration of a years time from the date that the freeing order was made, whether an adoption order has been made or, if not, whether the child has his home with a person with whom he is placed for adoption. Provided that the child is not adopted within the first 12 months the agency has a duty to inform the former parents of any subsequent order that will occur as well as to serve notice on them whenever the child is placed for adoption or ceases to have his home with the person with whom it was placed for adoption.[63]

Furthermore, a parent who did not make a declaration of non-involvement and whose consent has not been dispensed with is entitled to apply for revocation of the freeing order, if he wants to resume parental rights, stating the reasons why revocation would serve the interests

of the child.[64] The application can be submitted at any time after the first 12 months unless in the meantime the child is adopted or placed with prospective adopters.[65] The law, to secure that the parent will be considered, prevents the placement of the child while his application is pending.[66] If the freeing order is revoked, parental rights and duties will revest in the former parent or guardian, even though these have been assumed by the local authority or voluntary organization prior to the order vesting them in the adoption agency. The reversing order by-passes them and reinvests rights in the individual or individuals from whom they have been taken in the first place.[67] The purpose of this provision is to ensure that no parent can bring a reversal of the order returning the child to an institutionalised life from which he could get it back whenever convenient for him. The parent, when he applies, has to make sure that he offers the kind of home and care for the child that will be looked at with favour by the court.[68] The revocation order also revives any duty relating to payments towards the child's aliment that existed prior to the order.[69] In general however, any right or duty insofar as it is related to any period before the date of revocation, remain unaffected by the changes in the child's status.

When an application by a former parent is dismissed on the ground that it is contrary to the welfare of the child, as specified in section 6, the applicant is normally not qualified to make a new application,[70] and the agency has no longer a duty to serve notice on him.[71] The court which dismissed the application has, nevertheless the right to give leave to the former parent or guardian to submit a further application if the child has not been adopted or ceased to live with the persons with whom he has been placed for adoption. This is subject to the condition that the court has been convinced that,

due to change in the circumstances or for any other reason, allowing the application serves the welfare of the child.[72] One of the anticipated dangers is that the child may not be adopted. Though this is only theoretical with the present availability of adopters, the law in the last resort has to involve reconsideration of the natural parents in order to prevent any damage that may be caused if the child remains in the institution and in a long lasting legal limbo.[73] However, to restore rights to the natural parent has been seen as achievable by the Committee, either by giving the court an unrestricted discretion, or a discretion subject to the proviso that restoration will be for the welfare of the child, or by prescribing detailed circumstances of restoration.[74] The second alternative thus is adopted when the parent applies to resume the rights in the first instance[75], whereas if the parent submits an application and a previous one has been rejected it is necessary in addition for the court to state explicitly the changes in the circumstances or other substantial reason that is in favour of the restoration. The latter, however, is of particular significance - if applied analogically - in assessing the circumstances and the conduct of the parent in agreeing to adoption becuase it is one of the few where the law presumes tests, of the nature and gravity required for awarding an adoption order, in respect of the natural parents.

Also as discussed earlier, in accordance with the policy of the Houghton Committee of involving putative fathers, provision is made in section 18(7) that no order may be made freeing the child for adoption, unless the court satisfies itself that any person claiming to be the father of an illegitimate child and who does not have custody either has no intention of applying for custody or if he does, his application would be unlikely to succeed.[76] On the recommended

basis of relinquishment proceedings this right of the father is unchallengeable, since his rights and duties will be terminated by the relinquishment order in the same way as those of the mother.[77] However, as said in the part dealing with parental agreement, neither the mother nor the court nor any other person, according to the meaning of this subsection, need positively seek the father to enable him to protect his rights if he does not draw any attention to them.

As regards the attention to be paid to the interests of the mother's husband, in the relinquishment procedure, when he is not the father of the child or when he disputes that fact, the matter has been discussed at length in the section dealing with parental agreement.

In relation to the above discussion it should be mentioned that the Act, by introducing this new concept in adoption law, secures a system where the particular placement and the natural parent-child relationship can be confronted by the court as two distinct questions. This eliminates the problems observed in dealing with consent in view of a specific placement.

As Fisher points out this "division of the role of the courts into two parts should direct the court's attention to the issues before the court and at the same time define more precisely the functions of the court compared with those of the other persons involved in the adoption process. One consequence may be that the court will rely on the supporting investigative processes where appropriate more than they tend to do at the moment ...".[78] And indeed one may foresee within this process the opening of the way towards a more detailed investigation and the formulation of objective standards on the suitability of the natural parents. Besides, the concept of relinquishment procedure

comprehends any problem that is likely to appear in the circumstances. The period of twelve months is sufficient for arranging the placement. Moreover, it is appropriate to suspend the right of the parent to apply for the same period since during it no substantial change can be expected in the circumstances of the parent. Also, proper attention is paid to considering early the putative father and this should be exploited to an extensive degree. Finally, care is taken to revest the rights in a parent, who consented in the first place, if he offers a secure home for the child and in extreme cases even inadequate circumstances may be accepted when the further institutionalisation of the child seems more risky.

b. In Greek law, article 12(2) of the Legislative Decree 610/70 provides that agreement to the adoption of the child may be given in blank, so that the child can be placed with prospective parents of the choice of the agency and can be adopted without further involvement of the natural parents.

The measure applies to adoptions handled by the child welfare authorities or by a recognised adoption agency for children "received by them for social assistance".[79] The article does not specify whether the child has to be boarded at the premises of the institution or has a more extensive meaning to cover the cases where the child has been entrusted to foster parents while the authority retains the legal custody of the child and supervises the placement. In the preparatory works it was suggested that emphasis should be placed on children abandoned on the premises or collected from the streets as a result of the parents' failure to meet their needs and awaiting adoption boarded in the institution.[80] Nonetheless, however, insofar as the letter of the law does not restrict application, the

terms should be given the wider meaning to cover the case of a child committed to the care of a local authority due to parental failure to control him, especially when there are indications through a foster placement that the child is behaving well under the care of other people. The only drawback to this approach is that the court cannot dispense with parental agreement at that stage and, unless the parent cooperates, the measure cannot be applied. This is a problem because agreement secured in advance solves the problem of uncertainty in the placement. However, it is understandable in terms of the general approach preserved throughout the Legislative Decree in favour of the natural relationship. The legislator was reluctant to provide in advance intervention in the natural relationship without positive evidence that the relation is being left behind for the permanent interest of the child.

Moreover, proceedings can be initiated only by the welfare authority in charge of the child. Neither the parent himself nor an adoption agency which acts as a welfare investigator under article 9(1) of the L.D. can submit an application. The application must be submitted to a court of competent jurisdiction and a special session must be arranged where the parent will provide his general and unconditional agreement to the adoption of the child by persons of the choice of the agency.[81] This agreement is irrevocable and no right is preserved on behalf of the natural parent for further involvement.[82] A general requirement applying to any adoption order concerning a child for whom agreement has been secured in advance is the dual anonymity. Neither the adopters' nor the adoptee's identity should be revealed at any stage in the proceedings. To achieve this article 12(3) of the L.D. suggests the use of a pseudonym, while the real names of the litigants are kept in a secret register preserved to that effect in each City Court.[83]

The justifiable inference from the above procedure, is that it has a restricted scope and mainly aims for the benefit of the parents. As such, then, it fails in many respects in relation to its counterpart in the Adoption (Scotland) Act 1978. No provision is made to meet subsequent change of circumstances by appointing in the last resort the natural parents to the care of the child nor is it at all prepared to meet, otherwise than by acknowledgement, a claim by the natural father. Also the procedure becomes operative only when the parents wish to cooperate and the child is in the care of an institution. The latter prerequisite leaves open to the risks of forced third party placements a child whose mother is anxious to give it for adoption. Finally, the procedure has the major defect of being irrevocable. The child may not be adopted, in which case there is no provision to end the institutional life of the child by reconsidering the natural parents.[84]

III. Procedure leading to the making of an adoption order

a. The child living with the adopter before the order is made

The length of time that the child has been in the care and supervision of the adopter(s) is listed among the matters subject to enquiry prior to the granting of an adoption. The condition aims to satisfy the court that sufficient opportunities were granted to see the child with the applicant or applicants, and that their home environment has been closely investigated by the adoption agency or by the local authority within whose area they have their home. That concern has been given a legal effect in Scotland, while in Greece only in the practice of some adoption agencies may there be given an opportunity for mutual adjustment between adopters and adoptee.[85]

Section 13 of the Act sets the minimum period during which the child

must have his home with the applicants. Namely if the child has been placed by an adoption agency he must have lived with the prospective adopter(s) for the 13 weeks preceding the hearing, save that the first six weeks of the infant's life does not count. The same period is necessary if the prospective adopter is the parent, step-parent or a relative of the child.[86] But, where the applicants are not relatives of the child and the child has not been placed for adoption by an adoption agency, the child must be at least 12 months old and have lived with the applicants or one of them for at least 12 months preceding the making of the order.[87] This arrangement would apply to relatively rare instances due to the prohibition of independent placements. It would apply when the foster parents want to adopt a child fostered by them. Their application, however, is yet subject to section 53(1) of the Children Act 1975.[88] Thus, the court may consider whether an award of custody would be more appropriate and, if so, should direct the application to be treated as one of custody.

The statute requires the child to "have his home with the adopter" which is different from the wording of the 1958 Act, requiring "continuous care and possession" of the child for the three months preceding the hearing. The Houghton Committee doubted whether any change in the law was necessary[89] but this was in fact required because short interruptions in this period could lead to the refusal of the order. The new wording is intended to make it easier for the courts to reach reasonable decisions in difficult borderline situations.[90] In fact the wording of 1958 Act could not cope with the "longumanus" care and possession but applied only to situations where the child adhered to the applicant continuously for the preceding three months. On the other hand, the present wording, though not entirely clear, could hardly have been intended to make the test more restrictive than under

the old law. A more relaxed formula seems to be intended and temporary absence is excused where the absence refers to a reasonable part of the probationary period, when the child is due to be returned to the applicant's home, and when he shows the appropriate concern expected from a person caring for a child while the child is away, (contact, visits in hospital, visits to the boarding school of the child, etc.).[91] A provision is made for the case of prospective married applicants of whom one is away from home. In this case it is sufficient if the child has his home with one of the adopters provided that the adoption society or local authority has had sufficient opportunity to see the child in the home environment and in the presence of the spouse who is away.[92]

The 19 weeks time of the caring period is provided for the father and mother of the child, as well as for the relatives who intend to adopt it.[93] The natural father is not a parent but he is also included by virtue of section 65(1) which regards him as a relative.[94] The same applies to a step-parent. It is difficult, however, to determine whether the husband of the natural mother is a step-parent and whether he will continue to be referred to as such after the dissolution of the marriage. For certain purposes of the Act (i.e. parental agreement), the mother is regarded as parent but it is not clear whether this should extend to this purpose because a natural mother is not a mother in a proper civil sense. The definition of a step-parent is otherwise certain enough and refers to the person that the parent remarries, whether the previous marriage has been dissolved by death or by divorce.[95] However, in the context of the present law, the natural mother is treated as the person exercising parental rights over the child and the idea is that a fairly wide meaning should be given to the term step-parent and that it should cover the man who

has married the mother of an illegitimate child and who, now a widower, applies to adopt the child. Such a person is likely to have as close a relationship with the child as certain relatives.[96] However, such an adoption is against the policy established by the Houghton Committee and is discouraged if a custody order could serve better the welfare of the child.[97]

The Greek law has not specifically provided a probationary period to precede any adoption placement. The matter has attracted some attention but little real interest was shown.[98] The Committee proposed a probationary period of 4 to 6 months[99] which was rejected by the Ministry of Justice on the grounds that neither were they manned by enough personnel to do the job nor did they expect that Greek prospective adopters would willingly cooperate with social workers.[100] The explanation, however, fails to convince if one takes into account that the number of adoption orders in Greece are approximately 1,600 per annum of which a great deal concern placements with relatives where supervision is more relaxed- also that probationary supervision usually operates by visits of regular intervals which could be easily performed by the personnel of the regional social services and the independent foundations.

Another explanation given for the lack of probationary period is that in practice most adoptions involve institutionalized children and the various institutions have established a procedure for adjustment.[101] Usually the adopting parent visits the child in the institution three or four times a week under the supervision of the social worker, who provides him with the necessary advice. Such procedure, for example, is followed by the infant centre "Mitera" for adoptions concerning one of the centre's infants,[102] but as Spinellis observes, neither the

length of time nor the place guarantees the creation of a parent-child relation nor can a proper estimate be made by the agency as to the future of the placement if an order were granted.[103]

In the present law, nevertheless, such a requirement can by implication be founded if one takes into account the conditions of article 9(1) of the L.D. 610/1970 and the purpose of the social investigation. The article requires investigation of the capability of the applicant to rear the child properly and on the possibility of the child adjusting to the family of the applicant. Such matters are to be investigated by a recognised social service and to be included in its report. The report is an essential prerequisite of the application. Therefore, it must be based on objective evidence and not be coloured by personal opinions. For the collection of any information regarding the above matters it is essential to have a testing period in which opinions can be formulated objectively.

b. Investigation and report by the local authority or agency:

In Scotland, in cases where placement was not made by an adoption agency, the applicants are required to give the local authority within whose area they have their home at least 3 months notice of their intention to apply for an adoption order.[104] It is a duty of the local authority after receiving the notice to investigate the matter and submit a report to the court.[105] Particularly it must investigate the suitability of the applicants and any other matter relevant to section 6 together with the reasons why the placement is not made by an adoption agency.[106] The same duty is imposed on the adoption agency for placements made by them.[107] Accordingly, the agency has the duty to submit to the court a report on the suitability of the applicants and any other material matters relevant to the operation of section 6 and shall assist the court in any manner the court may direct.[108]

This duty is first imposed on the agency or local authority by the 1978 Act. Prior to this they did report directly to the court but investigation was done by the curator ad litem.[109] The Houghton Committee, in order to bring the courts close to the preliminary but also essential procedure, felt that the court ought to have a first hand account of the judgments and assessments made by the adoption agency, and that the agency should be responsible for completing the report for the court on the suitability of the applicants.[110] A further advantage would be to save time in the procedure because under the 1958 Act in addition to the social worker acting on behalf of the agency it was always necessary to appoint another one to act as curator ad litem. Under the 1978 Act the appointment of the latter became optional for specific cases which eliminates the need for duplicate inquiries and reports as in the 1958 Act.[111]

In Greece, whereas early involvement of the agency is not provided for, it is obligatory that an inquiry by a social worker is made as to the suitability of the applicant, in order to assist the court in reaching its decision.[112] Such investigation must take place before any proceedings. According to article 9(1) of the L.D. the petition for adoption is inadmissible unless it is accompanied by a certificate issued by an authorised social service certifying that a thorough social investigation by a trained social worker has been conducted on the following matters:

a) the personality of the applicant;

b) his health, morality, the family circumstances and financial situation;

c) the motives of the prospective parent and his qualification to rear the child adequately.

Moreover, the investigation must cover the likelihood of the child

adjusting to the family of the applicant and any other matters from which one might establish whether the adoption would be to the benefit of the child. To perform these duties, the social worker is facilitated by the right to apply to the various authorities to issue the various certificates necessary for the adoption proceedings.[113]

Applications submitted without a certificate that investigation was carried out are according to the letter of article 9(1) inadmissible. This wording caused a series of articles and contradictory decisions prior to the issue of the Royal Decree authorising agencies.[114] Today, however, the tenour is quite clear and it remains to be seen whether the court can accept an application if investigation has not been carried out or when the one carried out is incomplete.

In the introductory report of the L.D. 4532/1966 the vague explanation was given as "inadmissible" to have the purpose of preventing the court from entering discussion on the merits without any investigation having been carried out.[115] In such a case, the court would need either to order an investigation itself or, if such had been carried out but was in its opinion incomplete or inadequate, to demand further investigation. As Kroustalakis points out, such application neither explicitly nor implicitly qualifies in the substantive law and nevertheless, according to the meaning of the term "inadmissible" in the civil procedure and established practice the application must be rejected.[116] On the other hand, Beis has advanced the opinion that "inadmissible" in article 9(1) is not the inadmissibility of procedural formality but refers to the substantive law[117] which opinion seems to be supported by the Introductory Report of the L.D. 610/1970.[118] Consequently, the meaning of inadmissible in article 9(1) is to protect the interests of the adoptee through a preventive control and,

as such, though it operates as a procedural formality, refers to the relation between adopter and adoptee. The matter therefore is whether the cause of the law would be better served by rejecting the application or, if it is retained, by ordering an investigation. As Beis explains the defect of the application debars the court from entering the discussion on the merits, while, at the same time, it is a defect visible and remedial in the short term. Thus, though in principle it implies rejection of the application in order to provide protection of the procedural act of the party, the short term remediability of the inadmissibility must not debar the defective application.[119] However, to this compromise opinion, which in terms of child's welfare is adequate insofar as the court does not enter discussion on the merits, one should add that the majority of cases of adoption in Greece concern either children with a disturbed family background or that of institutionalised life.[120] Consequently, there is no merit in delaying matters on grounds of legal formalities, as far as there is a possibility for the social service to give the required report instead of waiting till the child becomes the subject of a new application.

Spinellis, also, has advanced the thesis that when the application concerns a child already adopted into the family, investigation is not in fact necessary.[121] The decision 765/1969 of the City Court of Athens[122] requiring investigation for the petitioner who was the wife of a man who had already adopted the child in question six years ago, gave rise to the assumption that it was. In fact, in the particular case, the court had not been overprotective because, apart from the fact that the first order had been granted in a period where investigation was not made much use of, the relationship of a parent is quite different from that of the step-parent. For the purpose of

the present law the assumptions can by no means be made on the particulars of article 9(1) that such parental rights can be vested directly in a spouse without contravening the protective aims of the article. For if any investigation had been carried out in respect of the family, this would have concerned the spouse as a step parent and not as a parent in whom rights should be vested. Besides, as the rationale of the decision suggests, the adoption is a different adoption, despite the fact that the child would be deemed as a child born to the adopters in lawful wedlock.[123]

c. Restrictions on removing the child whose adoption is pending:
Section 27 of the Adoption (Scotland) Act 1978 provides that no parent or guardian of the child is entitled to remove the child from the custody of the person with whom the child has his home against that person's will except with the leave of the court. The prohibition stands while the application is pending and the parents or guardians of the child have agreed to the making of an adoption order (whether or not they know the identity of the applicant);[124] as well as when an application for an order freeing the child for adoption is pending and the child is in the care of the adoption agency which applied without the consent of the parent or guardian.[125] A person who contravenes either of these provisions is liable on conviction to three months imprisonment or a fine not exceeding £400 or both.[126]

Provision is also made in section 28 for restriction on the removal of the child where the applicant has provided a home for the child for five years or more. No one can remove this child against the will of the person caring for it given that an adoption application by him is pending, except with the leave of the court or by authority confirmed by any enactment, or on the arrest of the child. The same restriction exists when the person has notified the local authority of his

intention to apply for an order in respect of the child cared for by him. Thus, foster parents are protected from having their child removed by the natural parents, by the local authority or by anyone, from the time that they give notice to the local authority of their intention to adopt up until the time of the hearing. However, if they give notice to the local authority and they do not apply within 3 months the protection ceases. They must go through the same procedure again but within 28 days.[127]

The above provision also applies where the child was in the care of the local authority at the time when he first began to have his home with the applicants and remains in the care of the local authority, at the time of application.[128] The authority cannot remove the child without the consent of the applicant or of the prospective adopter except in accordance with section 30 or 31 or with leave of a court. Subsection 3 does not apply however, where the removal of the child has been authorised in terms of part III of the Social Work (Scotland) Act 1968, by a justice of the peace or a Children's Hearing.

Section 28 is aimed partly at safeguarding the interests of foster parents who decide to adopt, but mainly at those of the children who would in most cases suffer if they were removed precipitantly from the foster parents with whom they have had their home. It neither confers additional rights on the foster parents nor introduces preferential treatment at hearings where the application is dealt with exclusively on its merits. As such, according to J. Terry, it does not represent a serious infringement of natural parents' rights, although the section has been opposed on this ground.[129]

If a child is taken away in breach of sections 27 or 28, an authorised

court is empowered by virtue of section 29, on the application of the foster parent, to order that the child should be returned to him.[130] Similarly, if the person has reasonable grounds for believing that another person intends to remove the foster child from his custody, he may apply to the court for an interdict preventing the other person from removing the child.[131]

When the child has been placed for adoption by an adoption society or local authority and an application is pending for adoption by the caring person in respect of the child, the person may give a written notice to the society or authority of his intention not to retain the care and possession of the child.[132] Similarly, the society or authority may cause a notice to the caring person of their intention not to allow the child to remain in his care and possession. But if he has already made an application , the permission of the court is needed.[133] By virtue of subsection (3) within 7 days after notification either by the applicant or the adoption society of refusal or withdrawal of the application, the person has has care of the child must return the child to the society or authority. The court may, if it thinks fit, any time before the period expires[134] order an extension of care not exceeding 6 weeks.[135] Persons who contravene the provisions of section 30 are guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding £400 or both, and the court may order return of the child to his parent or guardian.[136]

Moreover, section 31, in respect of a child under the care of a local authority, who has been placed without a view to adoption, provides that if the caring person gives notice in pursuance of section 22(1) to the authority of his intention to apply for an adoption order

in respect to that child, section 30[9]1) shall apply, with the exception that where the application is refused or withdrawn, the child need not be returned to the local authority in whose care he is unless that authority so requires.[137] The subsection (2) also suspends the right of the local authority to claim the child back other than in pursuance of section 30 after the notice is given and until the application for an adoption order has been made and disposed of. Sub-section (3) also provides that while the child is assumed in the care and possession of the person by whom the notice is given, persons liable under section 78 of the Social Work (Scotland) Act 1968 to make contributions in respect of the child shall cease of their obligations unless 12 weeks have elapsed since the giving of the notice without application being made or the application has been refused by the court or withdrawn. The notice automatically stops any obligation but if the application is refused, withdrawn or not submitted within 12 weeks the obligation automatically revives.

d. Protected children:

The purpose of the notice to the local authority is to ensure the proper supervision of children,[138] and from then on the child becomes a protected child, while he has his home with that person. The child is not protected, however, by reason of such notice while he is in care of any person or any school, home or institution as mentioned in section 2(3) of the Children Act 1958,[139] while resident in an establishment provided for persons suffering from mental disorder,[140] or he is liable to be detained or subject to guardianship under section 23 of the Mental Health (Scotland) Act 1960.[141]

The child ceases to be deemed as protected on lapse or withdrawal of the application,[142] or if it is granted or otherwise determined.[143]

Similarly, protection ceases if the child has been the subject of a custody or guardianship order or attained the age of 18 years.[144]

The point of the protection is to secure the well-being of the prospective adoptee. The local authority, from the time that the notice is received, must maintain visits by its officers who "must satisfy themselves as to the well-being of the children" and provide any appropriate advice as to the care and maintenance of the child.[145]

A sheriff, and in an emergency a justice of the peace, may order the child's removal to a place of safety if the child is kept or if it is to be received by an unfit person or in premises and an environment detrimental to the child. The Act imposes a duty to place the child in safety until other arrangements can be made or until it is given back to a parent, relative or guardian.[146] However, in any case where practicable they must inform the parent or guardian.[147]

e. Notice of the hearing:

Provision is made in both jurisdictions to serve notice to any parent or guardian whose rights would be in any way affected by the adoption order. Thus in Scotland the 1978 Act makes provision for the introduction, by Act of Sederunt, of a duty in an application for adoption, or in an application for an order freeing the child for adoption, to inform every person who can be found and whose agreement or consent to the making of the order is required to be given or dispensed with, of the date and place of the hearing.[148] The purpose of the notification is to inform him where he may be heard on the application of the fact that he need not attend the hearing unless he wishes, or if the court orders so.

Under the present law there is a duty imposed upon the petitioner to inform the following persons

a) any person or body having parental rights or the custody and care of the child;

b) any person who by virtue of an order or agreement is liable to contribute to the maintenance of the child;

c) the local authority specified in his application;

d) the local authority or agency who took part in the arrangements;

e) any other person or body that the court requires.[149]

In Greek law, a similar duty is imposed on the applicant[150] to notify by legal document any person who, in his opinion, has a legitimate interest in having notice of the matter. The notified person has the right to intervene in the hearing.[151] Notification has an important role in relation to the force of the final judgement because the decision is not otherwise enforceable against him if he is related to either the petitioner or the child, as a parent or child or having patria potestas.[152] Against third parties not involved in the hearing the decision proves the adoption but it is not binding as regards its validity. Such third parties, if they have a legitimate interest, may complain against its validity.[153] In the decision of A.P. 228/1964.[154] however, it was provided that such legitimate interest belongs to all persons having a personal, family or succession right offended by adoption. This defines the range of persons that must be notified, as follows : parents,[155] guardians[156] of the child, children of the applicant,[157] the spouse of the applicant,[158] an agency assuming parental rights over the child,[159] persons having actual custody,[160] and the illegitimate father who voluntarily or full judicially admitted paternity.[161]

## C THE ROLE OF THE COURT

Mere agreement between the parties concerned is not sufficient to give legal force to any placement unless approved in both legal systems by a judicial authority. The role of the courts in the present law is to make an order, on an application by the prospective adopters and following on a report by the local authority or social service, if it thinks that all legal requirements have been met and that the order will operate to the child's benefit. In this prospect the function of the court is not confined to the mere control of formalities but rather tends to the wider objective of the protection of the welfare of the prospective adoptee.

The involvement of the judicial authority may appear as a tiresome formality in Scots law when most of the important decisions and safeguards - as described above - operate long before the hearing, but the law is always likely, as Hoggett points out, to require a formal order to make such a drastic change in status, affecting not only the parties but their families and indeed anyone who comes into contact with them.[162] In Greek law on the other hand, where pre-court procedure is less extensive, the onus of any decision is exclusively with the court.

### I. Competent Courts

Courts authorised to receive applications for adoption in Scotland are, according to section 56 of the Adoption (Scotland) Act, 1978 the Court of Session and the Sheriff court of the sheriffdom where the child resides. Both have jurisdiction for applications concerning children residing in Scotland, whereas for a child who lives abroad or if the application concerns a Convention Adoption Order the application must be submitted to the Court of Session.[163] However, if the petitioner

applies for a return of a child taken away in breach of section 27 or 28, the authorised court is the one in which an application for adoption is pending[164] and in any other case the Court of Session or the Sheriff court in the residence of the applicant.165

The Houghton Committee in its recommendation suggested the retention of the concurrent jurisdiction of the two courts with the exception that adoption proceedings should be transferred from the Inner to the Outer House of the Court of Session.[166] This proposal had the approval of lawyers and social workers since there was no reason to reserve adoption for the Inner House as far as divorce, custody and separation actions were dealt with in the Outer House. Further since appeal jurisdiction in adoption matters anyway lies with the Inner House, it seems inappropriate that jurisdiction of first instance - no matter how frequent the cases - should also lie there.[167]

Another recommendation concerning the courts related to the appointment of expert assessors to assist in weighing up evidence, especially with medical questions.[168] Legal opinion in Scotland was against the suggestion as diminishing the role of the courts. On the other hand, social work practioners were generally in favour of the proposal, which reflected existing discussion between them and the courts regarding the evaluation of medical and other special evidence.[169] The committee anticipated that such assessors would be carefully selected after consulting professional bodies and would be publicly funded, to offer an unrestricted type of expertise to assist the courts with any type of problem, which rather points to a change in the balance of functions between judicial and non-judicial bodies than restricting the power of the court.[170]

As regards the hearings, previously applications for adoption were usually heard in private, although this constituted an exception under the 1958 Act.[171] Under the present Act, the rule is that hearings though discretionary, whenever held, shall be heard and determined in private unless the court otherwise directs.[172] The section ensures that proceedings should be in private, both in the case of applications for adoption and of applications to free a child for adoption as well as in hearings concerning the return of a child taken away in breach of sections 27 or 28 of the Act.

Presence of the petitioner and the child according to the letter of section 10 of the Act of Sederunt 1959 appears not to be compulsory. However, the court may refuse to pronounce an order if they are not in personal attendance.[173] On some occasions it may be necessary for the court to interview the petitioner and the child or either of them privately and in such cases their absence may cause unreasonable delay. It is also at the discretion of the court to direct persons or bodies notified, to attend and be privately interviewed.[174]

In Greece the adoption hearings are subject to the non-contentious jurisdiction of the City Court[175] and an application may be submitted to the court of the area where either the applicant or the child resides.[176]

The courts have the discretion to appoint one or more professional experts, if they are of the opinion that special knowledge for a particular question is required.[177] Moreover, it is obligatory for them to appoint expert assessors on the request of either of the litigants provided that it is sufficiently argued in the petition that special knowledge is required.[178]

Hearings in relation to adoption are heard in public as are any proceedings before the Magistrates' Court. However, if the court foresees any danger arising from the public nature of the proceedings it is empowered to take any appropriate steps, i.e. to order the application to be heard in camera, to safeguard the interests of the child and the parties involved.[179]

As regards the presence of the litigants, this is obligatory in any adoption hearings to enable the court to formulate a personal opinion on the merits of the case.[180] This arrangement is the result of the lack of comprehensive service in Greece which shifts the entire responsibility of assessment to the courts. Thus, although article 1578 of the Greek civil code is still applicable, the Legislative Decree widens judicial flexibility so as to empower the court to be involved in any question arising out of the hearings.[181] Consequently, the presence of the petitioner required by article 1576 of the Greek civil code has been reinstated in the same manner and in the present law. This article provides that the "adoption is performed by a judicial decision, the adopter being present and consenting". According to the letter of the law, therefore, the applicant cannot be represented by his attorney[182] nor by any person having power of attorney. Also this implies that the application itself does not presume consent and that he has to consent formally before the court. However, since the nature of this consent is to express his wish to acquire parental rights and to serve the welfare of the child it may be given before an authorised court or a rapporteur judge if necessary in a separate hearing.[183] The presence of the adoptive child is not necessary unless he is a minor aged over 16 when by virtue of article 1577 of the Greek civil code he must be present and give his agreement to adoption.

II. Curator ad Litem and Reporting Officer and their role in the investigation by the court.

In Scotland the office of the curator ad litem arose from a need for impartial justice. The interests of the child, during the hearings becomes of "none's interest" since the parents may be determined to interpret his interest according to their own views. At the same time the court could not be the defender of the child's interests without ceasing to be impartial. The problem was thus resolved in the 1958 Act by appointing a third person to act as a curator ad litem with the duty to investigate and report on all circumstances relevant to the application and safeguard the interests of the child before the court.[184]

The 1978 Act, however, following the recommendations of the Houghton Committee, partly abandoned earlier practice, providing for the separate appointment of a curator ad litem and a reporting officer. This innovation resulted in a significant change in the office of the former since a considerable number of administrative aspects of the procedure were transferred to the latter. Thus, under the 1978 Act the curator ad litem retains his main duties as regards the protection of the interests of the adoptive child and he is bound to exercise them in a manner prescribed by rules of procedure.[185] However, the Committee envisaged the appointment as no longer mandatory. The court should have the discretion to appoint a person to the office in instances where further investigation is needed.[186] The Act gives effect to this recommendation by providing that rules shall provide for the appointment of a curator ad litem in such cases as the rules may prescribe in adoption hearings as well as in applications to free the child for adoption.[187] The enactment to follow this section must specify the cases where the court exercising discretionary power may appoint him and the

necessary qualifications for the appointment.[188] This has been seen as imposing an additional obligation on the court to consider whether the circumstances of the case warrant such an appointment, which may make the decision to have a report from the curator more meaningful and effective. And in relation to this it is pointed out that the decision will cease to be a purely formal one since "the attention of the court will have to be directed towards a consideration of at least some basic issues" and may be forced "to consider in greater depth the social and sociological implications of its functions.[189]

A corollary of the shift of attention from legal to sociological questions in the process was the recommendation that preference must be given to social workers, "because lawyers are able to satisfy themselves as to the legal aspects of the case, but are not generally equipped to make social assessments".[190] The lawyers, however, should continue to play an important role in the procedure, even although it may be susceptible of subtle changes, for the procedure remains with the courts and a number of legal questions in respect of rights and duties has to be answered.

The new concept in adoption law however, is found in the role of the Reporting Officer. The office in many respects resembles the office of the Reporter in the Social Work (Scotland) Act 1968 and his duties are described to include supervision and report on matters mainly concerning the dissolution of the natural relationship. In the Act it is provided that rules should prescribe his duties,[191] but as the Houghton Committee envisaged the office of the court would have the obligation to appoint a social worker,[192] in the relinquishment procedure as well as in applications for a specific

adoption, with the duty to report whether the parent had in fact freely come to his decision after a consideration of the alternatives and implications.[193] The appointment should be made after the court had received a report by the agency or the local authority on what steps have been taken to help the parent to reach his decision. The duty of the officer then is to interview the mother and the agency to ascertain whether agreement is freely provided, and to witness the signing of the consenting document. Moreover, the Reporting officer must inform the parent of the date and time of the hearing and inquire whether he wishes to attend. If the parent is unwilling to be present at the hearing, the officer has to forward a notice to the court accordingly, signed by the parent. The notice, however, does not have formal effect on his right to be present and he may attend the hearings if he subsequently changes his mind.[194] The need for facilitating this procedure arose from the fact that many parents,.e.g. unmarried mothers, feel it particularly depressing to follow the proceedings step by step. Thus, due to the lack of a separate procedure many parents hesitated to appear in court and give agreement, which cancelled a number of placements.[195] The officer, after completing the enquiries, should submit a report to the court and be present at the hearings. His presence is compulsory in the experimental period with the view that at a later stage it might be left to the discretion of the court.[196]

The curator ad litem and the Reporting officer require to be appointed independently of the adoption agency which placed the child or made the application in section 18.[197] They may be the same person if the court thinks it appropriate, appointed from the staff of the panel of persons available to the court.[198] In any

case, a Reporting officer may be appointed before the application is made, provided that the court received the necessary notice, but not before the statutory six week period has elapsed from the child's birth.[199]

In Greece on the request of either party an exclusively defending role is recognised for the public attorney to protect the interests of the child but his involvement is not mandatory. However, by virtue of article 1603(2) of the Greek civil code the public attorney on such request may appoint a temporary guardian to represent the interests of the child in an instant action if they are in conflict with those of the parent or guardian. The duties of the appointed guardian are specified in the appointing deed.[200] Moreover, it is left to the discretion of the court to secure consent in a separate session or by appointing a judge rapporteur with the duty of witnessing parental agreement and the conditions under which agreement is provided.[201]

III. Concluding remarks on the role of the Court

Obviously fears, whenever expressed, concerning a diminishing of the role of the court by reason of the extensive involvement of the adoption agency and social workers seem to have no proper foundation. In both countries, the court remains the master of the entire process since adoption is performed by a court order and the role of the administrative bodies remains more or less that of assistants of the court.[202] The courts look fully at the merits of the case and then come to an independent decision or endorse the views of the administrative bodies involved. An argument, however, that can be sustained in respect of the discretion of the court is that it cannot function properly in

this power because the degree of judicial awareness that can be achieved over details of the various stages of the process is inadequate. As Louis Blom-Cooper foresaw there is insufficient judicial control over the various stages of the adoption process which keeps the court unaware of many important details.[203] Maybe this defect is partly compensated for by the fact that the placement is carefully regulated and supported by a complicated administrative system. This is true to a great extent for Scotland but not for Greece where critical stages are left out with the involvement of the agency. Thus as Blom- Cooper points out, if the courts were to perform any real function in ensuring the protection of the child and of guaranteeing parental rights, the moment immediately prior to placement is the point at which judicial power should be exercised.[204] In fact, this could be of great assistance in ensuring that valid agreement is given or dispensed with prior to placement and in declaring it given, so that the placement will not depend on the parents. It could be more important in ensuring close observation of the various stages of the placement. Similar views are shared by Sir Roger Ormrod, who observes that the courts are wholly dependent on what they are told by the parents or the social worker. They are incapable of carrying out any action except in the last resort to make orders and enforce them. Such modifications, if practicable, would relieve the courts of their overtly authoritarian character in their role as sole deciders on adoptions, providing them with a more dynamic involvement, and, on the other hand, resolve many problems of uncertainty in the proceedings.[205] Maybe such suggestions will alter radically the role of the court and may confuse administrative with judicial processes but there is sufficient reason for considering more active involvement of the court if the final word is to be left with them.

D. THE ORDER

If the court is satisfied that the legal requirements are met with and that the adoption will be for the welfare of the child it may award an order in favour of the applicant. Nevertheless the court may refuse the application, or in Scotland make an interim order or award custody to the applicants depending on the circumstances. The legal nature of this order has been a matter of some dispute in the past. The theories advanced varied in regarding adoption as a contract ratified by the court,[206] as an order of mixed nature in which the contractual and judicial elements co-exist,[207] or as an act with pure judicial character.[208]

I. The nature of the order and its legal consequences

In the Scots law, the decisive role of the court was recognised from the very beginning and in the present Act, by virtue of section 12(1), adoption is created via an order made by an authorised court on the application of the adopters, producing a prospective vesting of parental rights and duties in them.[209] On the other hand, in Greece the matter is still the subject of dispute, despite the fact that article 1576 of the Greek civil code states that "the adoption is performed with a court decision ...". The prevailing theory was on behalf of the mixed nature accepting that adoption is a contract in which, however, the judicial order prevails, belonging to the "broader category of family law contracts " like marriage.[210] A recent issue of court decisions on the other hand abandoned this theory and advanced the approach recognised in Scotland. The decision 228/1964 of Arios Pagos[211] provided that the decision of the court has the creative character of a new relation, and the decisions 1545/1972 of the Appeal Court of Athens,[212] and 695/1970 of Arios Pagos[213] accepts that in adoption orders the judicial character predominates.[214] These decisions reinstate

the actual spirit of the articles 1576 to 1978 of the civil code requiring the judicial authority to handle the entire process and determine with its power the very validity of actions of the parties involved. This is clearly implied by article 1578 as reformed by article 2(1) of the L.D. 610/1970, which states that the court authorises the adoption after seeing that the legal requirements are met and after examining whether the order will be for the interests of the child.[215]

The recognition of the order as judicial act has the consequences that when it becomes final it can be reduced only on restricted grounds with reference to parental agreement and the eligibility of the applicant.

In the first place it became obvious in the discussion about parental agreement that this agreement is not consent in its contractual sense giving approval to the adoption of the child, but an agreement provided by a person who exercises parental rights or being a parent, forwarded to the court and indicating whether he wishes to retain or discharge his rights and duties. This, however, is not binding for the court which may dispense with consent, or refuse to award an order despite the fact that agreement is supplied. Therefore, adoption cannot be reduced on the ground of essential error, misrepresentation, fraud, ignorance or mistake on an applicant's identity, or because he gives his agreement on the belief that the applicant had certain qualifications.[216]

Secondly, as regards the statutory prerequisites for adoption, the position is not entirely clear because if the decision of the court can remedy non-compliance with the conditions, this strikes at the very validity of the law. Furthermore, it is not considered as satisfactory to try to solve the problem by reference to the welfare of the child. The application of this test would make any order conditional and it could be set aside when the child's interest requires so.[217]

Therefore minor irregularities concerning the place of residence or that the child had his home with the applicants for a shorter period than that required can hardly have been intended to carry the sanction of nullity. On the other hand adoption of an adult or married person should be liable to reduction. Also adoption awarded to minors concerning their illegitimate children.[218]

As regards Greece, the distinction is drawn between subjective prerequisites and constructive conditions of adoption. Non compliance with constructive conditions like the contractual capacity of the adopter[219] the eligible age, childlessness, age difference between adopter and adoptee[220] renders the adoption voidable. Therefore, parties not notified to attend the hearings having a lawful interest of a family nature, can submit a petition to that effect. On the other hand, subjective prerequisites as the impediment of the ward, lack of the consent of the spouse, according to the prevailing opinion provide relative voidability.[221] Thus, the parent, the spouse or the ward may submit a petition requiring annulment of the order if they have not been notified of or attended hearings. The purpose of these provisions is to safeguard the interests of the above persons and, therefore, they have an exclusive right to bring the petition.[222]

II. Where an adoption order is refused

In the case that the court had refused to award an order, the child has to be returned to the adoption agency in Scotland within the prescribed limits of seven days[223] and to the caring institution in Greece as soon as it is practicable. When in Scotland an agency is not involved, if the application concerns a child under 16, by virtue of section 26, the court may, on refusing to make an adoption order, make a supervision order to the local authority or[223a] a care order where exceptional

circumstances make this desirable for the child not to be entrusted to the parents or to any other individual.[224] For both cases a special provision is made empowering the court to order alimentary payments by the parent to the local authority in respect of the child of an amount that the court thinks reasonable.[225]

III. Interim order

When the child is free for adoption and the order still stands, or when the court is satisfied that the parent agrees to the child's adoption or there are grounds for dispensing with his agreement, and the applicant had duly notified the local authority of his intention to adopt the child the court may defer making a full adoption order and "make an order vesting the custody of the child in the applicants for a probationary period not exceeding two years upon such terms for the aliment of the child and otherwise as the court thinks fit".[226] Such an order can be extended, if it is for less than 2 years, by a further order but the duration of both should not exceed 2 years in all.[227]

The purpose of the interim order is to enable the adopter to act for a probationary period sufficient to enable the court to make up its mind on the rightness of the placement.[228]

The order has been used, as well, in cases where it appears to the court to be uncertain whether an order is appropriate in the interests of the child or in whether he should be returned to his parents. The measure is open to criticism in that it leaves considerable doubt as to the child's future while at the same time the child becomes accustomed to a family and a way of life. The Houghton Committee was very reluctant in suggesting the use of the measure and expressed the hope that their recommendations on improving the agency standards, the banning of independent placements with non relatives and the alternative of

guardianship for step-parents and relatives, would greatly reduce the need for interim orders.[229] However, because the order is a forerunner of an adoption order such an order can only be made by the court having jurisdiction for the adoption provided that they are satisfied as to the conditions concerning the eligibility of the applicant.[230] The intention of the legislator appears that the provision should by no means be used to secure care and possession by the applicant when fulfillment of certain conditions is a problem of time.

The court may impose a variety of terms or conditions. They may give a right to access to the biological parent or sustain his obligation to aliment.[231]

By virtue of Section 30(4) where the period specified in an interim order expires without an adoption order having been made in respect of the child the application must be treated as refused at the expiration of the period and the child must be returned within seven days to the agency or authority.[232] An extension of this period is possible not exceeding six weeks[233] but the courts must refuse an extension if the order was not made because of failure to meet the welfare requirements.

As an alternative suggested instead of the interim order is the adjournment of the proceedings[234] However, it was felt that over this course the interim order presents advantages in the sense that the agency or the authority will remain in contact with the adoptive home during the period of the order which will enable them to form an opinion on the matters that have diverted the application into an interim order as well as to make further investigations on the welfare of the child.[235] Particular attention then must be paid to the terms and conditions imposed by the court if those are imposed as a test or to obtain further

information on the suitability of the applicant. Nevertheless, it was found that such an order would prevent unsuitable natural parents from removing the child during the currency of the order.[236]

IV. Revocation of an adoption order

An order in Scotland is generally irrevocable and the Act does not specify any grounds for that purpose. The only exception appears in section 46 where the revocation of the order is permitted on legitimation of the child. Thus the court which made an adoption order may revoke that order on the request of any of the parties concerned, in the instant of a marriage of the parents of an illegitimate child if that child is the subject of an adoption order by the one parent alone.[237] The same is provided in respect of a child who is adopted by his father or mother alone under a regulated adoption order[238] if that child has been legitimated by the subsequent marriage of his parents. Jurisdiction in this case is recognised to the Court of Session.[239]

In Greece on the other hand the adoption order may be terminated by a court decision on a variety of grounds. Namely on the request of the adopter, the adoptive child, his natural parent, and the public attorney, the court may revoke the order if there is any reason justifying disinheritance, danger to the child's welfare, or ingratitude towards the adopter.[240] Besides it is recognised as an ipso jure dissolution of adoption if a marriage has been celebrated between adopter and adoptee in violation of the relevant impediment.[241]

Specifically the grounds for the revocation of the order as provided in the civil code permit the dissolution of the order for an offence committed against the adopter or the adoptee by the other party if the act itself justifies disinheritance. Or it may be requested by the

adoptive parent if an act is committed showing ingratitutde of the adoptee towards the adopter.[242] Disinheritance is a conception of succession law and should be understood here in the narrow sense of the term which means the exclusion of the person who would otherwise be entitled to his legal share of the estate of the testator. The aforesaid right is based on the nearest blood relationship and the moral family which unite the heir with the testator.[243] Since the latter constitutes the foundations of adoption the court is allowed to revoke the order if the family ties "suffer an irreparable blow as a consequence of a grave offence" committed by either party, because further coexistence between those persons has become intolerable.[244] The grounds on which either the adopter or the adoptee can demand through his action the dissolution of the adoption by reason that disinheritance is justified are the following

a) if either of them makes an attempt against the life of the other, his spouse or the descendants,

b) if either of them is found guilty of felony or a grave misdemeanor by intention towards the other or to the others spouse;

c) if either violates maliciously his legal obligation to maintain the other;

d) if the adoptee leads a dishonest or immoral life contrary to the desires of the adopter or

e) causes physical injury to the adopter and his wife.[245]

The two latter grounds are settled only in favour of the adopter and emerge from the fact that the parent whether natural or adoptive is in a more "advantageous social position than the child, enjoying greater respect and esteem from society, and his deeds are regarded to be characterized mainly by freedom of action and common sense." [246] However, irrespective of whether such allowances could be permitted in a natural relationship, in adoption where the relationship is more

critical this freedom of the parent may prove to be risky for the child.

The ground of ingratitude, first introduced in article 1587 of the Greek civil code by article 20 of the L.D.4532/1966[247] further deteriorates this unbalanced situation by creating one more privilege in favour of the adopter. According to this ground the adopter can demand the dissolution of adoption if there exists a grave fault of the adoptee, which according to the provisions of article 505 of the Greek civil code constitutes a reason of ingratitude.[248] The gravity of the fault is left to the free discretion of the judge and it is his prerogative to decide in each case whether there is ingratitude in the legal sense after taking into consideration the life standards and the moral concepts involved in the case.[249] However, the essential element incorporated in the ground is a serious fault by legal appreciation,[250] which is to say a "fraudulent action or omission, or in some circumstances, of negligence" presuming culpability of the adoptee,[251] and the act being considered as "ingratitude by moral and social appreciation.[252] There may be cited as examples attempts against the life of the adopter, physical ill-treatment, wounding, iniquitous attack, fraud, theft, grave slander, false accusation, unjustified desertion of the adopter for a long time during illness or imprisonment and the like.[253]

As Daes points out the introduction of this ground is completely inconsistent with the aim of reforming the law towards the interests of the adoptee since it reduced,without sufficient justification, the protection originally afforded to the child by the civil code. Thus it was severely criticized by Greek authors and in the discussions in Parliament.[254]

An effort is made to manipulate the powers afforded to the adopter in the civil code with the enactment of the provisions in article 13(3) and (4) of the L.D. Thus it is prohibited for the adopter to bring an action in respect to a child who has not yet completed his 16th year of age, if that child is liable for an act constituting a ground for disinheritance or ingratitude.[255] This provision is in line with the criminal responsibility recognised for minors in the Greek Penal Code which starts from the age of sixteen.[256]

Additionally in article 13(4) a right is granted to the district attorney to request the dissolution of the adoption

a) if the adoptive parent transgresses his duties in a manner covered by the conditions of article 1524; or

b) if the adoptive parent uses the adopted child in immoral tasks or ones dangerous to his physical or mental health, or is involved in arranging the further adoption of the child;[257] or

c) if the adoptive parent has forfeited his parental authority according to article 1525 ofthe Greek civil code. The same step can be taken by the curator ad litem.[258]

As one can see from the above grounds the attention of the Greek legislator is focussed on a restraining control over adoption to remedy problems that may arise from the inadequacy of the adoption service. The correctness of this observation becomes quite clear not only by comparing the grounds for dissolution of adoption in each country but also by the manner that each handles the possibility of having such situations in the relationship. Scots law moves with confidence in the relationship and permits the further adoption of the child if needed, and so far there is no precedent indicating a further placement of the child for any of the aforementioned reasons. On the other hand,

of course, one must acknowledge the advantages of the dissolution of the order over the assumption of parental rights by the local authority especially if the relationship turns out to be an immoral one. But under the present circumstances of the adoption service in Greece, this alternative is characterised more as a punitive resolution aiming at a preventative control by the parents. Irrespective of the effectiveness of this control, however, the experience of the child in the meantime may be rather harsh so that it is mandatory to shift the attention towards the stage of placement.

## E. THE STATUS CONFERRED BY ADOPTION ORDER

The order in both systems brings forward a significant change in the child's status. Scots law goes as far as to proclaim the child as the child of the adopter born to him in lawful wedlock,[259] whereas in Greek law the change brought about with the order declares the child as the legitimate descendent of the adopter without bringing a complete severance of the relationship with the natural parents.[260]

At the outset, it should be pointed out that the status recognised by the order is a new one in the sense that it neither transfers nor improves the already existing status.[261] This is explicitly provided in section 12(3) of the 1978 Act which envisages that the adoption order extinguishes any parental right or duty relating to the child which has been vested in a person whether parent or tutor, curator or other guardian as well as any duty owed to or by the child in respect of aliment or other payment arising out of parental rights and duties, without their extinction implying that they must re-vest in their previous form in the person of the adopter. The child from the date of adoption acquires the new legitimate status in his relationship to the adopter as if it were born to him from that date.[262]

Similarly in Greece the status conferred is absolutely new, and irrelevant to rights and duties existing prior to the order with other persons.[263]

a. Family Integration

In both laws examined the general principle has been laid down of equalising the rights of the person adopted with those of a person born to the adopter in lawful wedlock and the integrating of the child within the adoptive family. This is formulated in an almost identical form. Scots law refers to vesting all parental rights and duties in relation to the child, as if the child was for the adopter or adopters a lawful issue ,[264] and in Greek law the words used are "deemed as the legitimate descendant of the applicant from the date of adoption".[265] Where adoption is granted to a married couple in Scotland, the child is deemed as born to the adopters' marriage from the date of adoption.[266] In Greece it stands from that date as their common legitimate child, which applies also in the case where the spouse adopts the legitimate child of the other spouse.[267] However, though both jurisdictions emphasise that the adopted child is in all respects considered as equal to the adopter's own children and that no distinction whatsoever is made between the two categories, some reservations in respect to the effects of the order still apply. Scots law thus makes certain exceptions as regards the acquisition of titles, premiums of insurance policies, acquisition of nationality.[268] Greece on the other hand confers a status, comparable to, but not identical with that of a legitimate person. The relationship is confined to the applicant and the child and extends to the legitimate descendants of the adoptee born after adoption.[269] but no other relationship is acquired by either party. Also reciprocity for certain rights is retained.[270] The integration of the adopted child may thus be complete in Scotland but not in Greece. Moreover, in

Greece as far as the biological family is concerned, the links between the child and his natural parents are not broken because of adoption.[271] Except where the law provides otherwise, the adoptee and his natural parents have the obligation to give support and care to each other and the parents retain the right to custody in certain cases.[272] It follows that Scots law embodies the general principle of legitimating adoption where all parental rights and duties are vested in the adopter and extinguishes from the time of the making of the order, any right or duty included in the previous parental rights. On the contrary, Greek law goes as far as to provide for a legitimate child but retains duties and rights of the natural family as either simultaneously or alternatively operative.

b. Recognition of family relationship and kinship.

Generally a family relationship between the adopted person and the adopter is recognised in both systems. In Scotland, this extends to the relatives of the adopter, with the exception of that in respect to impediments of marriage. Only the child and the parent are deemed within the forbidden degrees.[273]

In Greece on the other hand this extends to the descendants of the adopter,[274] legitimate or illegitimate. Apparently the relationship extends in both systems to the descendants of the adoptive child. Kinship, on the other hand, is generally recognised in Scotland between adoptee and relatives of the adopter as indeed are all rights and duties based on such relationship.[275] In Greece, on the other hand, adoption does not result in equating kinship with that of persons born to the adopter in wedlock. It fulfills that objective insofar as the mutual relationship established between the adopters and the adoptive child is concerned.[276] However, kinship is extended to the descendants

of the adoptee born to him after the date of adoption.[277]

## DISCUSSION AND CONCLUSION

The findings of sociological studies, either reflecting public opinion or assessing situations in the parent child relationship, manifest a number of contradictions and inadequacies in the current legal policy of the two countries. Although they do not clearly illustrate how far the law is responsible for the present situation they place a heavy onus upon the law because of the claims made on its behalf to reflect social realities and to adopt the right approach to social needs.

Thus, as illustrated in the first chapter, the laws reflect the traditional conception of the status of legitimacy which is based upon moral, social and pragmatic assumptions undermined by present social realities. There became apparent throughout the study of the laws on anxiety to absorb as many children as possible within the marital family and to protect the status so attributed to them. A variety of motives are hidden behind this idea, of which at least one is directly concerned with the welfare of the child: the view that the stable legal family affords the best protection to the interests of the child. Indeed no one can deny that fact since from the nature of the marital relationship the paternity of the child can be presumed with a high degree of certainty, and consequently both parents can be required to undertake their duties immediately. In addition, because marriage is presumed to last for life it is regarded as the best prospect for a continuous care of the child. Throughout history this combination has received overwhelming support and undoubtedly it must continue to do so, particularly since recent evidence shows that marriage has undergone a democratizing process so that, at least as long as it exists on healthy bases, it supports both the certainty of paternity and cooperation of the parents in bringing up their children. In this respect it may be appropriate to hold both children conceived and children born in wedlock as children of the mother's husband without this

being an arbitrary resolution. However, for children born but not conceived in wedlock, the present state of factors leading to the construction of a man-woman relationship makes the approach of neither law entirely satisfactory, given that adequate attention needs to be paid to the interests of the child. Thus, the approach of Scots law in requiring acknowledgement in order to hold the child as of the husband lacks the public concern expected for the child. On the other hand, Greek law which, under circumstances presuming acknowledgement of the child, holds the presumption irresistible exposes the marital relationship to undue danger. The right approach probably lies partly with Greek law in holding the child as that of the husband unless formally disclaimed within a short period and partly with Scots law in holding the presumption rebuttable after this period or of the child has been falsely acknowledged. Since recent statistics show that most of first births in wedlock have been pre-marital pregnancies the approach suggested, apart from offering a better protection to the child, is probably the most suitable for the present conditions. On the other hand since the existence of a pregnancy has not as a rule decisively deterred another man from marrying the mother, it may be appropriate to make it relatively easy for the husband to declare the child not his. Some attention, however, must be given to the conduct of the husband during the pregnancy and delivery. It must be a matter of fact and degree whether his conduct is an express acknowledgement of the child as distinct from assistance offered to his wife on the basis of his conjugal duties.

Apart from the indisputable benefit of the marital family for the rights of the child, dogmatic legal thinking has envisaged that family as inter-locking with other important but frequently absurd assumptions of social deontology. Thus it has been agreed that support for the marital family is necessary to uphold moral standards as well as because that family pro-

vides the cement of society. Original Christian sources, which had much influence in the formulation of our present moral values, do not clearly show ethical concern for the spiritual family, although they are found to do so in respect to the well-being of the parent-child relationship. Nevertheless such concern emerged in later Christian writing when religion was subordinated to the demands of organized societies. Today this morality faces a strong challenge by different ethical codes of public opinion which, without attacking religion as such, criticize most of its concepts of social deontology. In fact what Christian morality was supposed to support in the monogamous marriage was the elevation to a spiritual level of fundamental assumptions as to how society could secure the renewal of its membership and the upholding of the status quo in the reproduction of children. Those assumptions, however, reflect social realities and as such they must receive consideration on their social merits.

The dependency of children on their parents and the complexity of their needs undoubtedly are the factors that should determine future legal policy. However, the assumption that these factors can only be accomodated within marriage is found to be artificial and in addition hardly consonant with the present state of family relations. Instances have been noted where the status of the child may come while the parents are separated or at a time when the child has ceased to be dependent on them. Nevertheless, it reflects a legal stereotype perceiving a uniform construction of man-woman relationship whereas this is in a dynamic movement. Changes in the status of women, education and the involvement of both sexes in work make the relationships more sophisticated and more demanding. In consequence marital relationships have been more personalized and operate to higher standards which in turn reduce tolerance as well as the influence that the interests of the child may have in keeping the parents together.

On the other hand there has been revealed an ongoing disuse of formal marriage. Cohabitation in many instances has been the permanent choice of all generations and in many instances it has involved the production of children. Those children, although they have not experienced single parenthood, have been refused legal protection. This state of flux in the relationships of the sexes, rightly observed to bring a considerable fluidity to the composition of families today, renders marriage rather insecure as a basis for the entire policy concerning the child's status. This may be particularly so since the changes in the relations between the sexes have had considerable effects on the durability of the marital relationship. Continuous increase in the incidence of divorce and separation shows that the fundamental reason for institutionalizing children within the marital family, permanent parental protection, cannot be argued the same as before. Therefore, the present state of the marital family, though in its democratic conception it may hold good on the issue of paternity, nevertheless cannot justify a policy which regards it as the exclusive institution for bringing up children. To support such an absolute policy presupposes a minimum deviation from the pattern, whereas in present circumstances it is rather high. Arguably therefore the presumption of conception in wedlock may be preserved to create parenthood, but the securing of the interests of the child born in wedlock cannot be used as a starting point for discrimination against children born outside wedlock. Acknowledgement of the additional advantages to the child if his parents are married may be met by an exhortative policy, since it seems to be rather incidental and remote to the contemplation of society at large. This observation must influence also the rebuttal of the presumption of paternity, which must be liberated from policy considerations for the additional reason that the present state of conjugal relations has increased the likelihood of extra marital intercourse. The tendency noticed in the laws to maintain the presumption or to rebut it upon facts must become the rule.

However, the present image of the legal family might not be sufficient reason to overturn an entire policy if other conditions did not conduce to the same conclusion. Better treatment for children born outside wedlock has been subordinated to historical factors concerning the wider interests of society. Those factors have to be tested against the demand for recognition of the child's right before reaching any conclusion.

The ancient pagans, as said, disfavoured certain classes of children to protect citizenship and this was transformed to pure family levels in the Imperial period when the organization of the Roman state took the form of a collection of families. A person who could not trace descent from a pater familias was regarded as stateless. The decay in family bonds along with the rise of legislation recognising the independent existence of the individual shifted the emphasis in the protection of familial property rights. This tendency is clearly reflected in the legislation of Byzantine emperors in a varying degree. In medieval Europe discrimination revived in the form of denial of basic civil rights along with isolation of the child from any family lineage. The common law attitude to an illegitimate child was to regard him as a filius nullius in order to protect the interests of the landed classes and upon that basis was developed the entire approach of Scots law on illegitimacy. Civilian systems on the other hand, varied in their approach - some restricting the relationship with the parents to basic rights with others and among them Greek law adopting the late Roman law approach, where because of the degree of certitude of maternity, the relationship with the mother was a complete one while that with the father varied according to its degree of certainty. The formulation of the law, however, is marked by the inherent tendency of organized societies to regard temporary liaisons as a threat to the marital family and therefore as undermining society's very existence. This attitude has varied in accord with the influence of religion, ideology

and the particular social needs of the time. By the time of Constantine when the political and religious authority was invested in the Emperor both authorities were used interchangeably to exercise control over the family. Once the church, however, secured its position, it started exercising independent control over family matters which ended with the clash of the "stasis of Nica" which enabled Justinian to reform the law of illegitimacy and give considerable recognition to children born in concubinage. His reform, however, still reflected religious beliefs as did the legislation of subsequent emperors. In Medieval Europe where the church regained control over pol itical matters the attitudes to illegitimate children became particularly severe to end in a clash with the political forces of the time. Feudal attitudes which influenced legislation from then on were particularly concerned with the conservation of properties. Nevertheless it seems that the rulers were well aware of the dangers in their position if the lower classes suffered excessive oppression. Thus the ethical concern they showed about illegitimacy - in which they had cooperation of the church - was rooted in the fact that marriages were a matter of property and this property was likely to escape the control of the family with illegitimacy. The lack of pure ethical concern manifests itself in the fact that bastards of noble origin were not despised. The implementation of welfare policy with the Poor law to alleviate the mixery of the lowest classes, which were a continuous threat for the landed classes, found difficulties in achieving its purposes because of widespread illegitimacy. The system was based in the concept of less eligibility and thus mothers with children born out of wedlock absorbed most of the funds disposed. This resulted in a tightening up of attitudes towards illegitimacy, a policy that partly changed with the emergence of individualism by the end of the last and beginning of this century. Political theories evolved at that time, concerned with the welfare of the individual in the social context, followed the well-known

path in assuming that that interest can be best served in the context of the marital family. Aiming basically at improving social standards with limited resources, since the wealth was still controlled by certain sectors of the population, the options were limited. The inevitable choice therefore was for this policy to be centred around family and deterrence, ignoring the variety of factors involved in extra marital conceptions. However, the policy could not be carried out by denying any sort of relationship with the parents without this turning against the fundamental purpose of improving social life. This approach is clearly reflected in recent legislation which, on the one hand, excludes the child from family lineage and the benefits attributed to this structure and, on the other hand, recognises a certain set of rights and duties which fulfils the child's basic requirements and maintains the human face of society. To complement this policy the state has implemented entitlement to special welfare legislation where the basic needs of the child cannot be fulfilled by his parents. The price paid for this policy has been shown to be particularly high since the basic legal protection has proved to be inadequate to the circumstances.

This policy, as formulated by tradition and ideology, has been set side by side with and analysed in the light of present social conditions and has been focused to present basic misconceptions. Marriage has been observed to be a well settled institution though in the character of a personalized relationship and operating at this level. Its value for the reproduction and bringing up children has been widely acknowledged but as of only incidental importance in terms of the parent-child relationship as such. Parental roles tend to be regarded not as stemming from the ties between the parents but as based in a duty of a personal character - a fact confirmed by the attitudes of the parents when divorced.

On the other hand, it was found that the reproduction of children

continued, both inside and outside marriage, at a rate fluctuating in its own right, irrespective of the implementation of legislation trying to control the incidents. In periods of social stability it was observed that illegitimacy followed closely trends of general fertility with minor deviations due to changes in the policy towards abortion and contraception and a steady decline in marital fertility. Attempts to uncover the causes of extra-marital conceptions have not been particularly successful. Nevertheless there have been noticed some contributory factors going beyond the control of the law - such as the present state of marital relations and the continuous invasion by adolescents of areas of social life which until now were reserved for adults. In relation to adolescents the double standards applying to sex and the negatives stressed in parental attitudes were arguably observed to make an "ideal" combination of contributory factors, rendering the entire policy self-contradictory. This is particularly so if it is taken into account that pre-marital acquaintance is an indispensable feature of marriage today. However, what the discussion on aspects of illegitimacy has mainly revealed is that mostly illegitimate pregnancies are incidental to a variety of conditions of deep-seated social origin. Social opinion has started, though slowly, to acknowledge this and to an extent shows considerable sympathy for the mother and the child. The discussion has also revealed that the deterrence policy is not only ineffective but also unnecessary in the context of preventing extra marital conceptions or supporting the institution of marriage. Additionally in respect of the labelling of the mother and her child as deviant it has been pointed out that a culpable deviation from the prevailing norms can be established in no more than a few instances. Most important, however, is the fact that the child is the person least responsible for the acts of his parents and he mostly suffers the consequences. This conception of the child's position is incompatible with the independent recognition of his membership of society and the protection it should be afforded by the law in having its relationship with the parents recognized.

Reaching, therefore, to the point of finding that illegitimate children are the victims of an unjustifiable and often illogical policy for which the law bears a responsibility for its negative sanctions, it has been considered appropriate to follow the example of many other countries and to change its task to one protective to the illegitimate child. The support from legal quarters for expressing through the law public concern for the natural relationship has been mixed, some thinkers still vacillating among the alternatives of legitimation or adoption, others expressing concern as to whether reform should be carried out to the extent of sweeping all the differences away and only a few giving their overwhelming support to such an approach. Sociological writings, on the other hand, being more concerned with the problems of the individual, gives its support to such a contribution by the law. Their findings further forecast the possibility of the natural relationship operating as that with divorced parents. Given that there has been substantial reform in respect to specific rights of the illegitimate child, much of the ground work for abolition of the distinction has already been accomplished. Accordingly the effects of its abolition on the substantive rights of the child will be minimal. The major difference, though, is that these so far have had an individual enforcement whereas with abolition of the distinction they will come into operation by power of status. Finally a certain benefit can be claimed for social order since the linking of the child with his natural parents will eliminate disorganization and remove part of the burden for its welfare from the social services, accordingly improving their efficiency.

Given this conclusion, the choice lies between assimilating the rights of children born out of wedlock to those born in wedlock and abolishing the status of illegitimacy by incorporating the concept of parenthood entailing the same rights and duties as with children born in wedlock. The second

approach being considered more secure and less discrimatory, has been followed in chapter three.

The first difficulty that one faces in incorporating the concept of parenthood into unmarried relationships is to overcome the arguments for exercising preventive control in cases where there are no signs of the relationship being functional in any respect. The dilemma faced is whether the concept of parenthood should be connected only to the fact of procreation or whether it must be submitted to welfare control, since after birth we have evidence of parental conduct. Such an approach, apart from its disadvantages as discriminatory, in principle could not be given effect without duplicating the law by incorporating aspects of adoption.

The second difficulty was concerned with the possibility of constructing a presumption of conception which was rejected due to the variety of circumstances in pre-marital conceptions and because such parents do not make a case in the law as married parents do to generate the law on time. Thus it is suggested that formal recognition should apply in all cases under a procedure confined to revealing the biological relation in the most convincing way. This gives the option of providing the same protection for children born in and out of wedlock.

In the choice of the methods and their construction a number of adverse factors had to be taken into account without these running counter to the importance of the fact of paternity. It was considered appropriate to encourage the father to acknowledge the child. Voluntary acknowledgement has therefore, been constituted in a particularly flexible form, mainly by a declaration to a registrar in Scotland and to a notary in Greece, amounting to proof against the father and effective in rem if otherwise confirmed. The burden of contesting this paternity has been transferred

to the persons having an interest in doing so to avoid complications and in the belief that a man will not normally acknowledge a child unless he believes himself to be the father. For the cases where the parent fails to acknowledge the child or paternity is a contested matter the method adopted is that of judicial recognition of paternity. Due to the importance of the issue attention has to be given to adopting a neutral judgemental system of declaratory nature, concentrated upon the proof of biological fact. Thus it is suggested that the issue be treated as the main question in the proceedings with which ancillary claims may be connected without the impact of those claims having any influence upon the decision of the court. Further, in order to prevent evidence from becoming obsolete and to implement adequately public concern for the establishment of paternity, it is considered that the action should be compulsory and be raised within a short period after the birth. This approach faces severe criticism as a major invasion of the privacy of the individual, although not altogether convincingly when balanced against the obvious advantages to the child and to social order of having his lineage established. In line with these views a number of matters are considered to require implementation in the law. Thus, it is regarded as appropriate for the finding of the court to be recognised as of declaratory nature and proof in rem, and for jurisdiction to be transferred to the Sheriff court in Scotland due to its lengthy experience with issues of legitimacy. The petition may be validly submitted to the court of the petitioner's residence if the residence of the father is unknown. The court should have the obligation to take care ex officio for the continuation of the proceedings, following an inquisitorial procedure and may hold hearings in camera if there are reasons for doing so. As regards the litigants, the right of the mother to raise the action is preserved along with an unqualified right of the child to apply. Other collaterals or third parties may do so if they have custody of the child. A special right is also supplied to the office of public prosecutor to avoid the risk of

dependency on variables connected with the persons involved. The action should be directed against the putative father and on his death against his relatives. Care is taken for the right to raise the action not to run counter to the right of the father to acknowledge the child by obliging the mother to serve notice to him before raising the action. In addition, in line with the need to protect the evidence from becoming obsolete and to avoid any possibility for the child remaining fatherless for long, it is suggested that the mother's right should prescribe after 3 month, thus reviving to the office of public prosecutor. This period appears also in relation to the right of the mother to give formal agreement to the child's adoption, being regarded as a period which should elapse before crucial decisions are taken about its future. The question of proof of paternity has been treated with much scepticism because of the difficulties in proving paternity, especially when both father and mother are unwilling to cooperate, and because of its importance for the order. Though maternity may be attested by the act of delivery, which is a fact of indisputable certainty, with paternity the matter is far more complicated. Proof beyond doubt cannot be achieved while simple proof is found to accord only a relative credibility to the order. In addition it is necessary to overcome inherent suspicion without reducing the possibility of paternity being established. In this respect consideration was given to the system adopted in Norwegian legislation as presenting the highest certitude amongst its rivals as well as because it vests the finding with advantages which forecast its social acceptability to a similar level with conception in wedlock. Thus there is employed the concept of affirmative and negative attestation of paternity aiming to prove not only that the person held to be the father may be so, but that no other person could have possibly fathered the child. In this respect the wide use of blood tests is suggested because of their infallibility in excluding paternity and the affirmative proof they may supply if the

blood exhibits rare characteristics. Because the quality of this evidence cannot be controlled by the court and further involves certain dangers it is suggested that tests be carried out under a security system preventing impersonation and to high laboratory standards. If they contradict customary evidence, blood tests should prevail as less involving such variables as human error and perjury. Also in accord with their importance for the question of paternity it is recommended that it be compulsory for any person to give a blood sample if requested. However, because blood test evidence involves mainly a laboratory process with which many people are not familiar and, therefore, lacks for them the conviction offered by customary evidence, it is thought to be essential for the finding to be supported by customary evidence.

In accord with the approach that there should be no distinction between legitimate and illegitimate children and the consideration given to the issue of paternity the concept of legitimation has no reason to exist in either system. The unrestricted right of the father to acknowledge the child as well as the availability of judicial proceedings to settle the matter makes it unnecessary.

Adoption, being an artificial method for creating a parent-child relationship, has been treated as such. Its unique characteristic of creating a legal relationship between a strange child and an adult makes adoption the best alternative to a dysfunctional or non-existent family. To this end Scotland provides a highly advanced system aiming at the complete integration of the child in the new family, whereas Greece, still under the influence of its experience of adoption law, compromises between traditional and modern approaches.

The history of adoption law shows us that the institution has had a

strong interaction with familial needs. Its development, nevertheless, has been in accordance to parental rights and the social position of the child. Thus in days of absolute parental authority and when the social position of the child was designated by his family membership, there is observed a complete integration of the adoptee in the adopting family. The rise of legislation concerned with the individual citizen along with the gradual decay of familial ideals effected substantial transformations in the character and aims of the institution. Thus the need of the childless to find a child to secure the continuation of the spiritual and social ideals of his family gave way to a concern with the practical needs of daily life. Certain forms of adoption emerged in this context, mainly concerned with transferral of properties. This is clearly reflected in Roman Byzantine legislation where the family relationship accorded to adoption tended to be limited to the persons immediately concerned, with or without any effects on the rights of the child with his natural family. More importantly, however, the ends of the individual adopter were strengthened in this process, which as a consequence reduced public concern for the institution. This conception of adoption, implemented in the civilian legislation of the nineteenth and early twentieth centuries, put the institution in a position remote to the public interest, so that many even argued for its abolition.

The revival of interest in adoption is marked by the increasing intervention of the state in the parent-child relationship and the arising of an independent recognition of the child's interest, and a regard for his welfare. As strong concern emerged for children who had become parentless because of the vicissitudes of this century, or because of their defective family status, adoption was selected as the appropriate solution for this problem. In addition, as public opinion started becoming less tolerant towards the maladjustment of children within the natural family, the scope of adoption was extended to cover such children. With

this modern view of adoption, there appeared a number of problems and misconceptions, especially in respect of the latter function, clearly illustrated in the experience of Scots law and likely to be repeated in Greek law which has recently incorporated this function in a half-hearted fashion.

In respect to the child's welfare recent Scots law has shifted the emphasis from regarding it as paramount and placed it instead as of the first consideration. This approach, which it was found could be accommodated by the relevant Greek provision, is an important innovation if the concomitant changes in the scope of adoption are taken into account. In this context the welfare of the child, without losing its primary importance, runs parallel with the general social interest which requires that adoption will not cause disorganization to the lives of other individuals. Thus the interests of the child have to be balanced against the interests of the natural parents, while the adopter must be appropriately qualified so that the introduction of the child into his family will not effect damage. The change, if seen in conjunction with the reinforcement of the importance of the natural relationship, coheres with the following principles : a natural relationship will be terminated when and only when this is clearly necessary; better prospects in the adoptive family will not influence the decision on the termination of the natural relationship; the adopter should qualify only if he measures up to acceptable standards of parenthood and has the additional qualities required for an artificial relationship; no other interests will have any significance in any decision unless they coincide with the interests of the child; because by definition the adoption assumes that the interests of the child will be served in a family context the law must facilitate both its adjustment to and integration within the new family.

Many of these principles are embodied in Greek law, though frequently in an unsatisfactory form, while others are ignored altogether. First as regards the qualifications and conditions, the major difference is that Greek law still focusses on single applications and thus fails in terms of the essential prerequisite of a complete family unit. The fact that the spouse has consented to the placement of the child in the family does not provide sufficient guarantees for his welfare since the relationship with the non-adopting spouse is far from enjoying express recognition in Greek law. The relatively high age limit is another striking feature since it inhibits the option of considering young and suitable couples. This feature was argued to be connected to a number of other features of the law, worthy of further attention. Thus, apart from the restrictions of single applications, the lack of an advanced adoption service and the condition of childlessness have a certain influence in the choice of the limit. As regards childlessness, it clearly manifests a traditional conception of the child's interests - as its exceptions further confirm - incompatible with the modern aims of adoption and thus worthy of repeal. In complete contrast to the Scots tendency to discourage adoptions by natural parents and step-parents, Greek law affirmatively promotes these adoptions and, further, waives the age limit in such applications. This aspect of adoption, in aiming to compensate defects of status, will be eclipsed with the recognition of an equitable status for children born in and out of wedlock. Further, such adoptions have the important defect that they conceal from the child its true origins and affect the relationship with the other parent. They must, therefore, be avoided except where the interests of the child manifestly require this solution in the circumstances of the specific case. Parental agreement is the area where both laws appear to have certain limitations with regard to children born out of wedlock, arising from the fact that neither law secures adequately

the prior rights of the child in relation to his natural parents. Thus neither law recognises a right to the natural parent to agree to his child's adoption, with the exception in Greek law in respect of a father who has or is deemed to have voluntarily acknowledged the child. The effort made in Scots law on the other hand to improve his position, by according to him the right to be informed and even to apply for custody of his child, operates within the limits of the filius nullius concept and thus fails to impose any express obligation to seek out the father. However, in conformity with the general principle embodied in this study - that an adoption placement will not run counter to the rights of the child arising from his natural parentage - it has been suggested that, despite the objections expressed, no adoption placement should be attempted in respect of a natural child unless all the possibilities for establishing the relationship with the father have been exhausted. This has been preferred over other considerations in that it opens the way to considering all the dimensions to the child's rights, which so far have been dependent upon the mother. Also it has been suggested that the right of agreement should be given to the father, subject to the power of the court to dispense with it. With regard to the agreement of the mother's husband against whom the presumption operates it is suggested that the court should not refrain from carrying out a full inquiry into the matter if, from evidence presented, it appears that he might not be the father. The variety of dangers involved in this case mean that the matter has to be treated with extreme caution.

The difficulties of balancing the interests of the child with that of the natural parents, as well as the need to secure that the relationship is not dissolved in haste, have been sufficiently revealed in the course of dealing with the grounds for dispensing with agreement.

Although the court may refuse an order whether or not the parent agrees to it, it was felt essential to put more emphasis on the necessity of distinguishing and even separating the decision on the adoptability of the child from that concerning the particular placement. Since influence on the decision of the court by the nature of the intended placement cannot be precluded, such a separation is preferable. A limitation on this is that the involvement of the court starts late in the whole process and it frequently is faced with de facto situations which it is under pressure to preserve. For the grounds themselves, while Scots law provides a wide range of grounds permitting dispensation with parental agreement if the relationship is not conducive to the child's welfare, the grounds in Greek law are rather limited and are argued to expose the interests of the child to undue risk. Particularly noticeable is the lack of any ground permitting the court to dispense with agreement when the child is still in the custody of either of his natural parents. A variety of instances have been indicated where this may be necessary - without first committing the child to institutional care.

Probably most of the limitations observed in Greek law arise from the lack of an advanced adoption service capable of responding to any matter concerning the placement. Today, because most of the decisions are taken outside the court, a comprehensive service is an essential feature of any adoption process. The importance of the initial placement and the complex assessments that have to be made either in respect to the natural family or in respect to the suitability of the adopters require a service with specialised personnel, especially employed for this purpose, along with the necessary facilities for caring for the child throughout the process where necessary. Relevant to this is the lack of any provision for the child to live with the applicant prior to the

order. These omissions operate against the extensive investigation otherwise required as to whether the circumstances of the placement are conducive to the child's welfare and most probably attribute to the report only a relative validity. The relinquishment procedure also needs to be reformed so as to permit the court to dispense with agreement and to be operated in cases where the child does not undergo institutional care.

Two more aspects in which the two laws appear to present major differences concern the dissolution of the order and the status conferred. Scots law permits the revocation of the order only if the child has been adopted by one of his parents who has subsequently married the other partner, a regulation that still may find application under an equal status for children born in and out of wedlock. Dissolution is permitted on a variety of grounds in Greek law of which a few are concerned with the child while the others clearly point to the interests of the adopter. Particularly, the grounds of ingratitude and disinheritance are a reflection of the old conception of adoption and are inappropriate for legislation with pure social aims. On the other hand, the grounds in favour of the child, although they introduce a form of control over the placement, are felt to be inappropriate to the time and to reflect the lack of suitable assessment procedure in the first place. It would be better, therefore, if the emphasis were transferred to the initial placement.

F inally, as regards the status recognised to the relationship, while Scots law places the child in a complete family relationship with the adopter and extinguishes any right and duty related to the natural parents, Greek law recognises a relationship between the applicant and the child and leaves the natural relationship almost unaffected. This feature

is probably the most significant difference between the two laws and undoubtedly the major limitation of the Greek system, calling urgently for reform. The importance of adoption lies significantly with this factor since an order which does not achieve complete integration within the adoptive family and fails to cut off the child from the background which puts it in this position is unlikely to have any substantial success. Further, in this half-way process are included risks of erosion for the institution, apart from the major risks of the child being confused over his parentage or suffering emotional disturbance with the involvement of the natural parents.

The comparative analysis of the two laws once again confirms the possibility of complementing a legal system by testing it against another. On the positive side, it may provide formulas giving satisfactory solutions and on the negative it may reveal possible dangers experienced in a certain practice. Even in this critical area of the law where cultural factors have such importance, solutions can still be exchanged as long as care is taken concerning their adjustability in the particular social context. Irrespective of this experience, however, the important lesson of this comparison is that instead of putting the family law into a 'strait-jacket' it is necessary to provide the means of updating legislative policy since familial relations neither present rigidity nor respond to a stagnant conception of a certain social order. If it is permitted to adopt the phrase used in the Report of the Quebec Civil Code to describe its aims "it had to be a body of law that was alive and contemporary, and which would be responsive to the concerns, attentive to the needs and in harmony with the requirements of a changing society in search of a new equilibrium".

FOOTNOTES

PART TWO : INTRODUCTORY CONSIDERATIONS

1. Michaelidis Nouaros, "The Law of Adoption and the Reform Needed" (1962), NoV, 10, 1025, p.1025, 1027; idem, Family Law (Univ. Textbook), pp 309-10; Krause, Creation of Relationships of Kinship, p.12, 73; Louis Blom-Cooper "Parental Rights in Adoption Cases" in Child Adoption (London: ABAFA, 1976) p 189; for the Poor Law see Eekelaar, Family Law and Social Policy, pp 67-8.

2. Gloag and Henderson, Introduction to the Law of Scotland, p.691; Walker, Principles of Scottish Private Law, p 330; Krause "The Creation of Relationships of Kinship", op. cit. p.12.

3. Home Office and Scottish Education Department, Report of the Departmental Committee on the Adoption of Children presented to Parliament in October 1972, (under the Chairmanship of Sir William Houghton) (London: HMSO) Cmnd. 5107, pars. 15, 16, p.4.

4. Cmnd 5107 par 14, p 4.

5. Working Paper on Adoption of Children (London : HMSO 1970) pars. 54, p.19, 81 - 99, pp 22-32; Cmnd 5107, Chapter 5, pp 27-31.

6. See Samuels, A., "Report of Committee" (1970), 33, M.L.R., 684-5; M. Justice Scarman, in The Human Rights of those born out of Wedlock, p.2, 5.

7. Fisher, "The 1972 Adoption Report - The Emerging Pattern" (1973) 18 Juridical Review, 180, p.183.

8. Cmnd. 5107, par 28, p.8.

9. Fisher, "The 1972 Adoption Report", op. cit. p.182-3.

10. Perhaps it is the only area where parenthood "by licence" is the rule because of the precarious and difficult objectives that adoption intends to fulfil. Control for natural parenthood on the other hand seldom is explicitly preventive and whenever it appears in the law, it appears in the form of minimum requirement, (age of marriage, capacity, health certificate in Greece but with advisory purposes).

11. Much attention is paid to the original placement in order to be both final and successful. The uprooting of the child even from a temporary foster placement to be placed with the adoptive family may be painful and difficult (see for example Bell, V. "Special considerations in the adoption of an older child", p.73-86 and Muhlberger, Esther Veach "Helping older children to participate in adoptive placement", p.87-97 in Tod, R. (ed) Social Work in Adoption : Collected papers (London: Longman, 1971), so that much weight is now given to the original placement (Cmnd 5107 par 70, p 20, par 88 p 24.

12. Such a project has been undertaken in 1976 by Barnardo's in cooperation with Strathclyde Social Work Department to find families for hard-to-place childrne in the West of Scotland. In contrast to the existing practice the "New Family Project" follows the reverse process from that in ordinary placements. Instead of trying to select the proper child to fit to a specific family they look for families to fit children referred to them.

Criteria are not rigid in terms of status, family obligations, age, attention being given to the merits of the application. Experts' advice is intensively used in committee assessment, in counselling and supervision of the placement. The results so far are promising. The children's reaction was positive in many respects. The project also showed that adoptive parents are not rigid in their criteria. Contrary to earlier assumptions they prove to be with genuine intention ready to offer their home and care to older and somehow problematic children. For discussion on the project see Lindsay Smith, Carol "The New Families Project" in Triseliotis, J. (ed) New Developments in Foster Care and Adoption, (London: Routledge & Kegan Paul, 1980), pp 196-211; see also Cmnd 4107 par. 24, 25, 27, pp 7-8.

13. Sect. 65(1) and 12(5) of the Adoption (Scotland) Act 1978; Art. 1 of the L.D. 610/1970.

14. W.P. on Adoption. par 10, p.3. and par. 16, p.5; Cmnd 5107, par 15, p.4.

15. W.P. on Adoption, par 14, pp 4-5; Cmnd 5107, pars. 21, 22-29, pp 6-8.

CHAPTER FOUR

1. Zepos, J., "Adoption in Ancient Greek Law" (1939), Themis 50: 26-35 (1939); Spinellis, D.C. and Shachor-Landau, C. "Reflections on the Law of Adoption in Greece and Israel in the Light of the European Convention", (1972) 25 Revue Hellenique de Droit International, 142, i.e. p 142-3. Greek mythology often alludes to cases of adoption. For instance the famous Oedipus, son of Jocasta, was brought up by the childless King Polyvios and Queen Merope of Corinth (Sophocles, Oedipus Rex) and Ion, the son of Apollo and Creoussa was an illegitimate child shared by Hermes and given to Pythia in Delphi who brought him up. (Euripedes, Ion).

2. Colquhoun, P. A Summary of the Roman Civil Law, Vol. 3, (London, 1849), Vol 1, pp 547-8.

3. Isaeus, On the Estate of Menecles, 24,: he invokes "barbaric" law to prove the rightness of Greek Law, which implies strong links and interaction with the neighbouring systems. The same author refers also to adoption law, On the Estate of Apollodoros, 30, 31; see G. Michaelidis-Nouaros, "Adoption Law Reform", op. cit. p. 1026 and note 4.

4. For instance the code of the Hammurabi , art. 160 et seq, some four thousand years ago includes provisions protecting the adoptee from abuses by the adopter. Nouaros,("Adoption Law Reform", p 1026) mentions the existence of adoption provisions in Hindu Law, while Friedmann (Law in a Changing Society, p. 254) points out that apart from Greek law, adoption formed part of Babylonian and Egyptian legislation.

5. Colquhoun, Roman Civil Law, p. 548 where he mentions the adoption of Moses by the daughter of Pharaoh.

6. Demosthenes, Pros Makartaton, 12 and 75.

7. Aristotle, Politics, 11, 9.7, p 1274 b.

8. Herodotus, VI, 57, 15.

9. Isocrates, Aeginiticos, 49.

10. Nomos Gortymos, X, 35 and XI 5 et seq.

11. Spinellis-Landau "The law of Adoption in Greece and Israel", op. cit. p 143-4 and notes 8-12.

12. ibid. p.144

13. Michaelidis Nouaros "Adoption Law Reform", op. cit. p.1026; Colquhoun, Roman Civil Law, p.546; D. Walter Jones, The Law and Legal Theory of the Greeks, (Oxford 1956), p.180.

14. According to Nouaros ("Adoption Law Reform", op.cit. p.1026) any tie with the natural family was extinguished with a simultaneous vesting of rights and duties between adopter and adoptee. The child acquired full inheritance rights which, alike in respect to natural children, the father could not prejudice with further adoptions. (Colquhoun, Roman Civil Law, p. 546). According to Walter Jones (The Law and Legal Theory of Greeks) however, this was not strictly speaking the rule due to the weight given to the continuation of the agnatic line. It seems therefore that a father with female issue could adopt a male child and where he had done so by will and the adopted

son had not, as was usually the intention, married the daughter, "there could be no question of an heiress, for the whole principle of the system vested on the absence of a son whether adopted or not, the adoption serving the purpose of providing an heir, though a son adopted by Will was required to satisfy the court that the Will was valid." Moreover, "while a daughter adopted inter vivos was in the same position as a daughter born into the family, a daughter adopted by Will and at the same time given the estate, or one bequeathed with the estate, was not strictly an heiress within the rule as to marriage to the nearest agnate". p.180.

15. Walter Jones, The Law and Legal Theory of the Greeks, p.197.

16. According to Colquhoun, Roman Civil Law, pp 546-7 a mother could dispose of her son for adoption after her husband's death given the consent of the son. Adoption could be performed with a valid testament provided that the adopter had named the adoptee in the disposition of his property and if for any reason the Will was invalidated this affected the adoption as well. Nevertheless the adoptee could leave the adopter by providing a male issue to represent him and in the case he was resubmitted to the power of his natural father. The child was registered in the agnate registry where the Athenians used to register their children and as Isaeus states, from a certain period and onwards, in the paternal demo s which attributed full rights of citizenship as a member of his adopting demos.

17. ibid p.546.

18. Michaelidis Nouaros, "Adoption Law Reform", op. cit. pp 1026, 1032-3 and note 39.

19. ibid. p. 1026, Colquhoun, Roman Civil Law, p.545; Katopodis, G., Family Law : According to the Lectures of Professor C. Demertzis, (Athens, 1935), p.265; On the other hand according to Magnabeiva Unger, R. Law in Modern Society : Towards a Criticism of Social Theory, (Free Press, New York, 1976), the patriarchical tendencies connected with religious beliefs, though reflected in the Greek adoption system, did not really become the purpose of adoption: pp 120-6. "The agnatic tribal organization typical of societies dependent upon large-scale agriculture was unknown in Greece. Ancestor worship, traditionally associated with sedentary food-raising peoples and a powerful support or extended family links, played a minor role", p.122.

20. Colquhoun, Roman Civil Law, p.545.

21. These mainly were financial interests, political aspirations, increase of the labour force of the family and to avoid penalties imposed on divorce. Katopodis, Family Law, p.266; Hoggett, Brenda, Parents and Children, (London: Sweet and Maxwell, 1978), p.225; Colquhoun, Roman Civil Law, p.546, 548-549.

22. Thus, adrogation could take place either on 24th of March or on 24th of May each year when the Comitia Calata assembled. Moreover, because impubes and women could not take part in those assemblies they were excluded from adrogation.

23. Thomas, J.A.C., Textbook of Roman Law, (North Holland, 1976), p.437; Colquhoun, Roman Civil Law, p.549.

24. Michaelidis Nouaros, "Adoption Law Reform", p.1026.

25. Thomas, Roman Law, p.439; Colquhoun, Roman Civil Law, p.551.

26. Colquhoun, Roman Civil Law, p.552; who supports the view on a testimony of Cicero.

27. Roman Law, p. 439.

28. The first was performed by a triple sale in the presence of natural and adoptive parents and five citizens above the age of puberty; the second could be done by testament and conferred only the name (see Studies in Roman Law, 7th edition (Edinburgh-London, M.DCCCSCVIII), p.134) but no potestas or other rights were enforced. The status would come into operation after the death of the adopter, though testaments were publicly performed. The third, which was a posterior mode, used to be performed before a magistrate where the adopter formally declared the child as his own and the natural parent did not defend his rights. For details on the methods see Thomas, Roman Law, pp 439-40; Colquhoun, Roman Civil Law, pp 553-554. Michaelidis Nouaros, Family Law (Univ. Textbook), p.310.

29. Thomas, Roman Law, p.441. It seems that the adoption of whole family units was permitted as well as the adoption of someone in the rank of grandchild, given the consent of the natural son. Studies in Roman Law, pp 133-4.

30. Studies in Roman Law, p.134.

31. Colquhoun Roman Civil Law, p. 550; Michaelidis Nouaros, "Adoption Law Reform", op cit. p.1028; idem, "About the voidness of Adoption especially because the adopter lacks the formal age" (1954), E.E.N., 21:481 pp 481-2.

32. Studies in Roman Law, p. 133; Thomas, Roman Law, p.440.

33. Colquhoun, Roman Civil Law, p.553; according to him this is observed to be a settled practice by the time of Antoninus the Pius. Thomas, (Roman Law, p. 438), however, places its legal enactment on the days of Diocletian by the end of 3rd century.

34. Katopodis, Family Law, p.267; Colquhoun, Roman Civil Law, p.553; Michaelidis Nouaros, "Adoption Law Reform", op. cit. 1026.

35. Michaelidis Nouaros "Adoption Law Reform", op. cit. p.1026 and notes (10), (11).

36. ibid. The Christian emperors have shown a great concern about the wellbeing of the adopted children since both parties started entering relationships according to calculated financial advantages, which resulted in a number of abuses by both adopters and adoptees. see also Leslie, The Family in Social Context, p.163.

37. Thomas, Roman Law, p.438.

38. Studies in Roman Law, p.133.

39. Gia Epitome, 1, 5, 2.

40. Katopodis, Family Law, p.265.

41. Instit. 1, 11, 10; Studies in Roman Law, p.133.

42. L. 7C (5, 2, 7); Novel 74, Chapter 3 and 89 Chapter 11,2.

43. Studies in Roman Law, p.133. Tousis, Family Law, Vol B, p.211, note (3).

44. Katopodis, Family Law, p. 264; Studies in Roman Law, p.133.

45. Studies in Roman Law, p.134; Michaelidis Nouaros, "Adoption Law Reform", op. cit. p.1027.

46. Thomas, Roman Law, p. 441.

47. ibid.:; also Katopodis, Family Law, p.265; Michaelidis Nouaros, "Adoption Law Reform", op. cit. p.1027, 1632-3.

48. Michaelidis Nouaros, "Adoption Law Reform", op. cit. p.1027; Kostaros, G. "The Adoption of Illegitimate Children" (1959), E.E.N. 26 : 911; Tousis, Family Law, Vol B, p. 219, to find further references related to the administration of the law of adoption by the Ecumenical Archbishop of Constantinoupolis.

49. Tousis, Family Law, Vol B, p. 207. Michaelidis Nouaros, "Adoption Law Reform", p. 1034 and authors cited in note (43)

50. ibid. and notes (44), (45). Pratchicas, Chr. Greek Family Law, p. 447; The contract frequently concerned children cared for by social institutions and largely resembles what is known today as fostering.

51. Katopodis, Family Law, p. 266; Michaelidis Nouaros, "Adoption Law Reform" op cit. p.1027-8.

52. c.f. art 1579 and 1583 of the Greek Civil Code.

53. art. 1579 (2) and 1583 of the Greek Civil Code.

54. art. 1568 of the Greek Civil Code.

55. art. ibid.

56. art. 1570 (1) of the Greek Civil Code.

57. art. 1570 (2) of the Greek Civil Code.

58. art. 1569 of the Greek Civil Code.

59. art. 1574 of the Greek Civil Code.

60. Fraser, Parent and Child, p. 188; Clive, E. "The Guardianship Act 1973", 1973 S.L.T., 225, p.228: There can be no contractual renunciation or assignation of parental rights, and thus no common law adoption. The only exception is forisfamiliation but in this case the child ex hypothesi is capable of an independent life. It was permitted on the other hand for the parent to arrange fostering by means of a contract : Briggs v. Mitchell, 1911 S.C. 765 and this was of fairly common usage. see Marshall, E. General Principles of Scots Law, (Edinburgh 1978) p 518; Gloag and Henderson, Introduction to the Law of Scotland, p.691; Walker, Principles of Scottish Private Law, p.330; for the rise of de facto adoptions see Eekelaar, Family Law and Social Policy, pp 68-71.

61. Kerrigan v. Hall (1901) 4F. 10; Fraser, Parent and Child, p. 168 and note 6.

62. Fisher, D.E. "The 1972 Adoption Report", op cit. pp 180-1.

63. Stone, M.O. "Reports of Committees - The Home Office and Scottish Home Department: Report on the Departmental Committee on the Adoption of

children, presented to Parliament, September, 1954. Cmnd. 9248, HMSO, 35, net" (1955) 18 M.L.R. 274-280, p.275. Idem. "Recent Developments in the Law of Adoption in the United Kingdom" in Bates, F. (ed.) The Child and the Law, Vol. 2 (New York : Oceana Publications, 1976), Vol 1, 245-270, p.245.

64. First under the Chairmanship of Sir Alfred Hopkinson which prepared Cmnd. 1524 and secondly, under the Chairmanship of Tomlin, J. which submitted Cmnds. 2401 and 2469 along with a draft of the law. Finally, the Adoption of Children (Scotland) Act 1930 was enacted which came into operation on January 1, 1931.

65. Stone, "Reports of Committees", op. cit. p. 275-276.

66. Stone, "Recent Developments in the Law of Adoption", op. cit. pp 245-6; sect. 45, Adoption of Children (Scotland) Act, 1930; Cmnd 9248 and note 63; The concept of first and paramount consideration most probably was borrowed as an idea from the law of custody.

67. Sect. 7 of the Act. No statutory enactment altered this principle though minor alterations were introduced with subsequent Acts on other aspects of adoption.

68. As amended by Act of Sederunt of 31 May 1977 to regulate proceedings on adoption.

69. To provide for the effect of foreign orders and facilitate proof of adoption orders in different parts of the U.K. and for connected matters.

70. Deals with the same matters as the 1964 Act.

71. See Cmnd. 5107 as cited supra note 3 in introduction.

72. Fisher, "The 1972 Adoption Report", op. cit. p. 181 who refers to the Social Work (Scotland) Act 1968, the Family Law Reform Act 1969 and the Children and Young Persons Act 1969.

73. No. V. 13: 1235-8 (1965).

74. p. 1235 also idem. in No. V. 5 : 161, 346 et sub. (1957)

75. Daes, Erica-Irene A., "Some points of Greek and Foreign Law on Dissolution of Adoption : (A Comparative Study)" 21 Rev. Hellenique de Droit. International 49 - 91 (1968) p. 50.

76. "Adoption Law Reform", op. cit. p. 1028.

77. ibid. p. 1034.

78. "The Reform Under Consideration for the Law of Adoption", (1965), No. V. 13 : 1235 pp 1235-6.

79. Michaelidis Nouaros, "Adoption Law Reform", pp 1027-8.

80. "Introductory Report on the Draft of the Legislative Decree: On Adoption of Minors of Age below 18", (L.D. 4532/1966) (1966) Kodix Nomikon Vimatos 14 : 769. Rousopoulou, "The Reform under Consideration", op. cit.; Kostaras, "About the Reform needed to be introduced in Family Law", op. cit. p.315; Gazis, "The Necessary Reform in the Family Law", op. cit. p. 1029; Daes, "Dissolution of Adoption", op. cit. p.50.

81. Michaelidis Nouaros "Adoption Law Reform", op. cit. 1025; Daes, "Dissolution of Adoption", op. cit. p. 50.

82. W.P. on Adoption of Children, pars. 8, 9-10, 11, 16, pp 3-5; Introductory Report of the LD.. 4532/1966 in E.E.N. p.203. and K. No. V. p 769; For further discussion see Freud, Anna "The Rights of the Child" in A.B.A.F.A., Child Adoption, (London 1975), i.e. pp 228-229.

83. Goldstein, Joseph; Freud, Anna and Solnit, Albert J. Beyond the Best Interests of the Child, (New York : The Free Press, 1973), p.7; The functioning of the adoptive family in the social context has been discussed also by Jaffee, B. and Fanshel, D. (How they fared in Adoption : a follow up study, (New York: Columbia University Press, 1970), who point out that adoption aims to compete with the functions of the conventional family model in respect to the needs of the adults and children. Particular attention is then given to the need for the children to have broadly similar developmental processes as in conventional families.

84. 1971 S.C.(H.L.) 129.

85. Per Lord Simon of Glaisdale, p. 145.

86. W.P. on Adoption, par. 11, p.4 and proposition 2, p.6.

87. The publication of the W.P. on Adoption, and the issue of the decisions, Re W (an infant) [1971] 2 All. E.R.49 and A & B (pets) supra brought the second and most probably the final stage of a prolonged conflict accompanied by a number of contradictory decisions between the right of the parents to withhold consent and the paramouncy of the child's welfare. The conflict started as soon as the transitional period was over when the implications of the irrevocability of the order started to become apparent. This produced a degree of awareness and concern about the rights of the parents further exacerbated by the silence of the 1958 Act on the matter. This resulted in decisions vacillating between the natural (or objective) and the special (or subjective) construction of the term. See for discussion and cases Brown, F. "Parental Consent to Adoption" (1972) 17 Juridical Review, 170. Bevan, Hugh K. and Parry, Martin L., Children Act 1975, (London : Butterworths, 1978), pp 22-32; also infra chapter 6. A degree of responsibility still has to be reflected in the parental decision which apart from culpability "can be everything which can objectively be adjudged to be unreasonable. It is not confined to culpability or callous indifference. It can include, where carried to excess, sentimentality, romanticism, bigotry, wild prejudice, caprice, fatuousness or excessive lack of common sense". Per Lord Hailsham, L.C. in Re W (an infant) (1971) A.C. (H.L.). 682, at p 699-700.

88. A & B, (pets) 1971 S.C. (H.L.) 129, p.145.

89. Cmnd 5107 pars. 210-211, pp 60-1.

90. The Committee seems to have taken this view despite suggestions made to them to leave the law as it had been settled by the courts (see criticisms by Wilkinson, A.B., "Children Act 1975", 1977 S.L.T., pp 221-225 and 237-241, at p. 224) an understandable view taking into account the prolonged vacillation of the courts in the matter. Thus though nothing is stated explicitly in the report it becomes apparent that the hidden intention is to reinforce and make endurable the law as settled by the House of Lords. See also A and B (petrs) 1976 S.C. 27 per the Lord President at p.31.

91. Cmnd 5107 par 217. p.62.

92. Wilkinson,"Children Act 1975", op. cit. p.224.

93. Bevan and Parry, Children Act 1975, (London : Butterworths, 1978).

94. ibid. p. 23.

95. H.L. Official Report, 1975, Vol 357, no. 54. Cols. 1057-1058 (Report Stage : Lord Wigoder), as cited by Bevan and Parry, ibid, p.24.

96. Cmnd. 5107, par. 212, p.61.

97. ibid. par 216, p.62.

98. Wilkinson, "Children Act 1975", op. cit. pp. 222-4.

99. ibid. p. 223.

100. ibid. p.223.

100a. See A.B. and C.B. v. X's Curator, 1962 S.C. 124, per Lord Sorn at p.139; Re W [1970] 2Q.B. 589, per Russell, L.J. at p.593.

101. City Court of Patra 1424/1966 Hell. Dikaiosyni, 8 : 95, "... the welfare of the child is the decisive criterion for the court to dispense with parental consent and declare the child adopted..." p. 96; City Court of Athens, 478/1969 E.E.N. 36, 361; Appeal Court of Athens, 937/1971, No. V., 19 1273.

102. cf. Cmnd. 5107 par. 212 p. 61; articles 2(4) and 11(c) of the L.D. 610/1970 : consent abusively withheld in respect to a child cared for by a social institution. The court in assigning the meaning of the term "abusively" has to take into consideration the risk involved for the child if it remained under the control of the parents and whether it can have a normal life with the adopters; see "Introductory Report of the L.D. 4532/1966" op. cit. p. 769, 771, 772.

103. Article 9(1) of the L.D. 610/1970. The article provides that the order is unacceptable if investigation has not been carried out. The term "unacceptable" concerns the conditions of substantive law so that the court has to refrain from issuing an order unless the position of the natural parents has been investigated : "Introductory Report of the L.D. 4532/1966", op. cit. 205; also Beis, C., "The Unacceptability of an Application for Adoption According to Article 9(1) of the L.D. 4532/1966," (1966), No. V. 14 : 1192; contra Kroustalakis, E." Some problems arising from the application of the L.D. 4532/1966: About the Adoption of Minors below the age of 18"(1966) No.V. 14 : 988. For the objectives of social investigation, see Dervenagas, A, "The Relationship of Article 1577 paragraph C of the C.C. and Article 11 of the L.D. 610/1970 : On adoption of minors below the age of 18" (1973), Armenopoulos 27 : 730, p 731.

104. See comments of Kamenopoulos, F. on the decision : City Court of Athens 1141/1969 in E.E.N. 36 : 562 (1969)

105. Article 13(2) of the L.D. 610/1970.
The decision is submitted to the tests of the child's welfare : G. Michaelidis Nouaros "The Adoption Law in Greece" in The Unprotected Infant : Reports and Conclusions of a Seminar, Health Institute of the Child Queen Anne-Marie (in cooperation with the 'Center of Infants, Mitera'), (Athens, 1968) p.75. Arguably therefore the court must take into consideration, apart from positive damage to the physical or emotional health caused by the contact with the natural parents, possible or suspected damage which is likely to arise from further contact. For the need of such factors

to be taken into consideration see Spinellis, "Law of Adoption in Greece and Israel", op. cit. p.166, 177 and note 108. Contra Kamenopoulos on the City Court of Athens 1141/1969, p 563 who argues for the need to enforce the visitation rights of the natural parents since they have an interest in the education of the child. Therefore unless there is an outstanding danger, the court cannot remove the rights of the natural parents.

106. City Court of Athens 1141/1969 E.E.N. 36: 562, and comments by Kamenopoulos, supra.

107. Article 11(a), (b) of the L.D. 610/1970.

108. Article 11(c) of the L.D. 610/1970.

109. "Introductory Report of the L.D. 4532/1966", p.206.

110. City Court of Patra 1424/1966, Hell. Dikaiosyni, 8:95, supra note 101.

111. City Court of Athens, 478/1969, E.E.N. 36:361.

112. Elements and guidance in making this division have been taken from D.H.S.S. ' S.W. S.G.Sc. A Guide to Adoption Practice, prepared by the Advisory Council on Child Care, (London : HMSO, 1970). Chapter III p.25-38, and from the classification offered by Clive and Wilson, Husband and Wife, pp 583-590 in relation to the welfare in custody.

113. ibid, p.583; see also A and B (petrs) 1976 S.C. 27 per Lord President at p.32; Stone, Recent developments in the Law of adoption", op. cit. p.249 defines the degree as "active promotion as well as passive safeguarding of the child's welfare".

114. Mr. and Mrs. A. (petrs) 1971 S.C. (H.L.) 29, per Lord Reid at p.142 "In unusual cases medical evidence may be helpful, but I should be sorry to see any general tendency to call medical evidence in these cases."

115. Sect. 6 of the 1978 Act and Section 6 (e), (p) of the Adoption of Children (Sederunt) Act 1959.

116. Spinellis, "Law of Adoption in Greece and Israel", op. cit. pp 187-8.

117. Section 6 (M) of the 1959 Act of Sederunt.

118. Sect. 6 (b), (d), of the 1959 Act of Sederunt.

119. Sapre, P. "Awarding custody of children", 9 Univ. Chic. L. Rev. 672, 676-685; For judicial opinion on the matter see Chapter 7 under "Acting Unreasonably".

120. For discussion see Ormrod, Sir Roger, "The Role of the Courts in Relation to Children" in A.B.A.F.A., Child Adoption (London, 1975) pp 204-5.

121. Deide, R.C., "Two Pairs of Parents : Repulsion or Harmony" in A.C.T.A. World Conference on Adoption and Foster Placement, (Milan, 1971), p188 et subq.

122. As Eekelaar ascertains (Family Security and Family Breakdown, p.179) though most of placements depend upon them there is no direct evidence to confirm how far adoption can increase the happiness of an otherwise childless marriage, (but) that it often does so is certain. However, adoption should not be used to "bolster" failing marriages. Its stability

is a factor that according to the law must stand in the judicial assessment : see Hoggett, Parents and Children, p.227 and note in "By the Way",1975 Family Law, 5, p.137.

The problem goes back to when the Hurst Committee was reporting in the fifties where they referred to "the deplorable cases in which a doctor acts as third party for the benefit of a patient whose neurotic condition he seeks to remedy or whose marriage he hopes to stabilize by this means", Cmnd 9248, par. 43, p.11. The Houghton Committee, without disregarding altogether the need to help with childlessness, in accord with the principle that adoption will be a child centred process suggests that though some help must be given to them, to come to terms with their disappointment, this must be ancillary to the central aim which is to find a home for the child: Cmnd 5107, par 36, p.11. For general discussion on the interests of the adopters : R.G. Deide, "Two pairs of Parents" op. cit and Nakhooba, Zulie, "Adoption and Modern Society : A Challenge" in A.C.T.A. World Conference on Adoption and Foster Placement, (Milan, 1971) i.e. p.32, ff, 45 ff.

CHAPTER FIVE

1. Section 65 of the Adoption (Scotland) Act 1978; Article 1 of the L.D. 610/1970.

2. M. (petr.) 1954 S.C. 227; Article 127 of the Greek Civil Code.

3. S. 12(5) of the 1978 Act ; Article 1 of the L.D. 610/1970.

4. S. 13(1), (2) of the 1978 Act.

5. Art. 10 of the L.D. 610/1970.

6. Sect. 6(0) Adoption of Children (Sederunt), Act 1959.

7. Art. 7(1) of the L.D. 610/1970.

8. The child can be re-adopted if the existing valid order has been cancelled by a court decree, or with the death of the parent. (Vallindas, Family Law, p.213, Spyridakis, Civil Code, 1572 note (1),) given the consent of the natural parents: City Court of Athens, 765/1969, No. V, 17: 991.

9. S. 12 (7) of the 1978 Act.

10. S. 1(1) of the Adoption Act 1958.

11. S. 15 (2) (a) of the 1978 Act.

12. S. 14 (2) (a)

13. Art. 14 of the L.D. 610/1970.

14. S. 2(1) (a) Adoption of Children (Scotland) Act, 1930.

15. S. 2(1) (b) of the 1930 Act. The decision was left to the discretion of the court.

16. For discussion see Trotter, On Children Acts, p.225 and note 2.

17. S. 2 of the 1958 Act; HMSO, Working Paper on Adoption, par. 25, p.20.

18. A compromise solution was proposed so as to permit a childless couple to adopt after ten years of infertile marriage or when according to the opinion of the court special reasons concerning the interest of the adoptee require the issuing of an order. Michaelidis Nouaros, "Adoption Law Reform", op. cit, p.1029.

19. Art. 2 of the L.D. 4532/1966; G. Michaelidis Nouaros "Some Observations on the Reform of Adoption Law in Greece" in Bates, F. (ed) The Child and the Law, 2 vol. (New York : Oceana Publications 1976), Vol 1, 271-282, p.271.

20. S. 3(b) of the Adoption (Scotland) Act 1930; S.1 of the Adoption Act 1958; Trotter, On Children's Acts, p.238; Brown, "Parental Consent to Adoption", op. cit. p.171.

21. Cmnd 9248 par. 38, p.9; Working Paper on Adoption, pars. 24, 25, 26, p.8.; Cmnd 5107 par. 73, p.20.

22. Cmnd. 5107 par. 20, p.5.

23. For detailed discussion Working Paper on Adoption, part IV and infra same chapter under VIII.

24. Initially it was suggested that any adult should be eligible to adopt (Working Paper on Adoption, par 61, p.21), subject to satisfaction of the conditions. From 1.1.1970 it became the 18th year of age which gave rise to concern among the experts because of the instability and fluidity in the lives of persons around that age. Finally the age of 21 was accepted. (Cmnd 5107 par. 77, p.21) probably as the golden medium between the too low, in terms of experience for parenthood, age of majority and the too high limit of the 1958 Act.

25. Cmnd. 5107 pars. 76, 77, p.21; Bromley, P.M., Family Law, 5th ed. (London: Butterworths, 1976), p.359.

26. Michaelidis Nouaros, "Adoption Law Reform", op. cit. pp 1028-29; Idem "About the Voidness of Adoption", op. cit. p.481-2; Rousopoulou, "The Reform under consideration", op. cit. pp 1236-7; Tousis, Family Law, Vol B, p.209; Appeal Court of Athens, 1203/1973, No.V, 21: 1113.

27. Rousopoulou, Agni, "Greek and Interstate Adoptions", (1959), No.V. 7:1228-1234; Michaelidis Nouaros "Adoption Law Reform", op. cit. 1029, City Court of Athens 20117/1963. Hell. Dikacosyni 4: 1159.

28. Sections 14(1) "... an adoption order may be made on the applications of a married couple where either has attained the age of 21 years ..." and Sect. 15(1) "... on the application of one person where he has attained the age of 21 years ...". In relation to Greece article 2(2) authorises the courts to allow an adoption if the applicant "has full legal capacity (and) has attained the age of thirty ...". Legal capacity alone, which concurs with the age of majority (21st year of age), suffices for an application submitted under article 3 of the L.D., Appeal Court of Athens, 1563/1972, No. V. 20 : 1328.

29. It is unlikely for children qualifying for adoption under the present law to be placed for adoption with an elderly person due to the high concern expressed for the relationship to be normal. Their experience, however, may be of great help in difficult placements (children of different ethnic origin, handicapped or with special problems) since they can show a high degree of understanding. Therefore, they may be considered where higher skill is required : D.H.S.S. ' S.W.S.G.Sc. A Guide to Adoption Practice, par.III, 14, p.28.

30. Art. 1558, 1559, 1567 of the Greek Civil Code; Art. 1530 of the Greek Civil Code for the natural child-mother relationship; the adopted child article 1579 "is deemed legitimate for the applicant ..."; by accepting that the adopted child should be included in the exception does not contravene the rule adopted in jurisprudence that adoptions by spouses constitute two independent orders (for the rule see Spyridakis, Civil Code, Vol. 4. 1572, note (2); Vallindas, Family Law, p.213. voidness in relation to the one party does not render the order void for the other) so that the conditions have to be looked upon separately for each of them; see Appeal Court of Athens 1563/1972 No. V. 20: 1328 where the court permitted adoption by a person less than 30 years of age having legitimate issue.

31. See infra appendix on custody. It is disputed whether a father for whom paternity has been "completely judicially" established would be awarded custody by the court despite his legal entitlement.

32. Report of the Committee on the Age of Majority (Latey Report) Cmnd 3342, (London: HMSO, 1967), p.42-3.

33. M. Rood de Boer, "Coming of Legal Age: The Legal Position and Reform in the Netherlands", in Bates, F., The Child and the Law, (New York: Oceana Publication, 1976), pp 37-45, i.e. pp 37-9.

34. Cmnd 5107, par 76, p.21; see D.H.S.S. & S.W.S.G.Sc., A Guide to Adoption Practice, par III, 13, p.27-8.

35. ibid., par 77, p.21. The adopted limit is in line with the recommendation made by the Advisory Council on child care that the child be brought up by parents within the age range usual for natural parents of a child of that age. D.H.S.S. & S.W.S.G.Sc., A Guide to Adoption Practice, par III 14, p.28. The lowering in the age of first marriage along with the fact that most children are adopted from infancy means that many children will be adopted under the most normal conditions. The Council also express concern for the relationship of the couple to be normal as regards the age difference. A gap in their age should not be a bar to consideration but when the one partner is acting towards the other in the role of a parent towards a child, it may be difficult for the adoptee to be loved and accepted and not viewed as a rival, par III, 15, p.28.

36. Tousis, Family Law, Vol. A, p49 who reveals the disproportion of the responsibilities that a minor undertakes with marriage and parenthood; and Panagiotakos, Manual on the Marriage Impediments, pp 28-9 who stresses the biological inadequacy of the minor to undertake parental duties satisfactorily. In relation to adoption attention is paid to settling an age which by itself presumes fitness and normality in the relationship without contradicting the condition of childlessness.

37. The preference for marriage and rejection of cohabitation or single applications arises from the participation of the community, as well as from the artificial nature of adoption which require additional safeguards. The difference between bringing up an adopted child and a natural child, as well as the fact that adoptees come normally from disturbed backgrounds necessitates a complete stable family capable of producing a happy environment for the child. This is not to say, of course, that a stable cohabitation or a single applicant cannot produce the same results, but because the policy of adoption concerns children with evidently disturbed backgrounds, whereas in natural parenthood this need not be the case, the solution to be adopted here must be different and precautionary. This approach has been adopted in the draft of the Quebec Civil Code notwithstanding that it is permitted for consorts not living together to adopt a child if special circumstances justify such an adoption. (Article 293 of Quebec Civil Code). Thus, if they have raised the child before their separation or divorce they may adopt the chid, but not unmarried cohabitees. Moreover, posthumous adoptions are permitted if one of the applicants died after the motion or it has been clearly established that the deceased consort intended to adopt (art. 294, 295, of the Quebec Civil Code). See Report on the Quebec Civil Code, Vol. II, 2, pp 192-3; for further discussion on the preference for marriage see D.H.S.S. & S.W.S.G.Sc., A Guide to Adoption Practice, pars. III, 11-12, pp 26-7; Cassanmagnago, Laria Luisa, "Social Trends in Adoption and Foster Care", in A.C.T.A., World Conference on Adoption and Foster Placement (Milan, 1971), i.e. pp 13-17.

38. Bevan & Parry, Children Act, 1975, p.40; also infra under V.

39. see supra Chapter 4 on aspects of the welfare; Agni Rousopoulou, "Again

the Secrecy of Adoption" (1971) Neon Dikaion 27: 1970.

40. "Introductory Report of the L.D. 4532/1966", op. cit. 203; and "Introductory Report of the L.D. 610/1970" (1970), Kodix No.V. 18: 865.

41. Although, consent of the spouse of the applicant presupposes that both partners in a marriage are actively in favour of adoption in many instances the spouse agrees simply in order to please the other. However, because Greek law does not recognise the rule "child accepted into the family" the legal links with the consenting spouse are very loose which may turn against the interests of the child. A deep investigation into the matter may be of great help and under certain circumstances it may be appropriate to treat the application as one of a single person.

42. Cmnd. 5107, par. 101. p.28.

43. For instance de facto fostering when the welfare of the child requires the situation not to be disturbed. It depends on the age and understanding of the child, however, whether that relationship can be transformed to one of parent and child.

44. Sect. 15 (1)(b) of the 1978 Act.

45. Re F. (R) (an Infant) [1970] 1 Q.B. 385, Inability to find the other must exist at the date of hearings, Mr. and Mrs. O (Petrs), 1950 S.L.T., 64.

46. Either kind of separation produce fiscal effects. See Clive & Wilson, Husband and Wife, p.436. See also Bevan and Parry, Children Act, p.41.

47. Clive and Wilson, Husband and Wife, p.436. Ettenfield v. Ettenfield [1940] P.96.

48. Hopes v. Hopes [1949], p.227; Mouncer v. Mouncer [1972] 1 All. E.R. 289. As cited by Freeman, Children Act 1975, c72/11 note in Subs. (1).

49. Freeman, supra.

50. See Clark, Hall and Morrison, Children and Young Persons, (London: Butterworths, 1967) p.523; whether this has been sufficiently indicated c.f. Clive and Wilson, Husband and Wife, p.437, 410.

51. Bevan and Parry, Children Act 1975, p.41.

52. ibid. p.41.

53. see Freeman, Children Act 1975, c72/11. note in sub.s.(1).

54. Bevan and Parry, Children Act, 1975, p.41.

55. The consent of the spouse is a substantial prerequisite of adoption Appeal Court of Athens 991/1967, No. V. 15: 585. Therefore whether such reason exists or not is subject to the judgement of the court of adoption. See also Tousis, Family Law, Vol. B., p.218.

56. Vo. V. 12 : 919.

57. Applying by analogy the ground of de facto separations. A certain degree of permanence in the reasons must be present. Vallindas, Family Law, p.213.

58. Michaelidis Nouaros, "Some Observations on the reform of adoption", in The Child and the Law, p.274.

59. See Michaelidis Nouaros, Family Law (Univ. Textbook), p.322; Idem, "About the voidness of adoption", op. cit. p. 485, 486.

60. Bromley, Family Law, p.359; Saario, V.V. A Study of Discrimination Against Persons born out of Wedlock, (New York : United Nations, 1967), p.153.

61. See supra note 41. City Court of Veroia 524/1953 E.E.N. 21, 527, See Vallindas, Family Law, p.214, held consent as an objective prerequisite that must exist at the first hearing; Atsalakis, St., Erm.Ak.1476 (11). This approach, although offered for adoptions performed under the Civil Code provisions, for the reasons stated is more appropriate for adoptions for minors.

62. For the obligation of the spouse to accept the child into the family and for his limited obligation to provide aliment arising from moral duty. See Atsalakis, Erm.Ak. 1476(11),(13), G. Michaelidis Nouaros, Family Law, (Athens, 1953) par 94 note (3), contra Balis, Family Law, par 55(4), p.120.

63. See for example Prachican, Chr. Family Law, (Athens, 1953), par 148, p.445, ff; Balis in Themis 65: 18 (Opinion); Roilos (-Koumantos), Family Law, 1568-1588 Prolegomena C.; Michaelidis Nouaros, "About the Voidness of Adoption", op. cit. pp 482-4.

64. Roilos (-Koumantos) Family Law, 1573 (10); Appeal Court of Patra 128/1947, E.E.N. 14, 481; Tousis, Family Law, Vol. B. p226, note (15).

65. See supra note 61.

66. Michaelidis Nouaros, Family Law (Univ. Textbook), p.322. Appeal Court of Athens 991/1967, No.V. 15:585.; Appeal Court of Athens 1545/1972 Dikaiosyni (1973), 314.

67. Tousis, Family Law, Vol. B, p.218; Vallindas, Family Law, p.214; This receives support in a number of decisions holding that a third party claiming a personal family or succession right (AP 228/1964, No.V. 12 682) may apply for the revocation of the order because the applicant does not meet any of the conditions of articles 1568-1577 of the Greek Civil Code - amidst them consent of the spouse: AP 695/1970, No.V. 19: 175, AP 253/1973, No.V. 21 : 1087.

68. Tousis, Family Law, Vol. B. p.218 and note (28). The court, therefore, before any discussion on the merits has to examine whether consent is provided and if not whether it should be dispensed with.

69. Art. 6 (2) of the LD. 610/1970.

70. Tousis, Family Law, Vol. B, p.218.

71. Spyridakis, Civil Code, Vol. 4, 1573, (1).

72. Cmnd. 9248, par. 33, p.9.

73. Cmnd. 5107, par. 73, p.20.

74. Vas. 33, 1, 12; Hell. Nomosch. 1874, art. 362.

75. Art. 1568 of the Greek Civil Code; article 2 of the L.D. 4532/1966.

76. Balis, Family Law, pp 362-3 in 3; Vallindas, Family Law, p.210; Spyridakis, Civil Code, Vol. 4, 1568 (1).

77. Art. 1581 of the Greek Civil Code; Tousis, Family Law, Vol. B, p.210, 230; Vallindas, Family Law, pp 211-212, 220.

78. Article 1570 of the Greek Civil Code : Unless adopted with the same court order, Article 5 of the L.D. 4532/1966 subject to the exception that further adoption was permitted if the already adopted child suffered from an incurable disease. Michaelidis Nouaros, Family Law (Univ. Textbook), p.326. This provision is a corollary enacted for the same reasons that prevented adoptions by applicants with issue of their own. Thus it aims to prevent conflict between a first and a second adoptee and protect the interests of the already adopted. The first argument freed opposition even in the pre-code law by K. Rallis who argued "the fear of possible friction and conflicts is almost non-existent, taking into consideration that the adopted children are normally of very young age; therefore it is the responsibility of the adopter to prevent the creation of such instincts of competitiveness between them by offering the appropriate education". (About the Institution of Adoption, (1891), p.40, as cited by Michaelidis Nouaros, "Adoption Law Reform", op. cit. p.1030.) As regards the protection of the interests of the adoptee, i.e. succession rights it has been argued that since adoption is basically a contract its content cannot be altered unilaterally but only with the consent of the other party (Roilos (-Koumantos), Family Law, 1569 (4). Michaelidis Nouaros has opposed this approach arguing that from a legal point of view adoption is as much a judicial act as a contract whose results are pre-defined in the law; besides from a moral point of view, as the first child cannot prohibit the parents from giving birth to other children, in the same manner the existence of the first adoptee cannot prevent further adoptions. "Adoption Law Reform", op. cit. p.1030. A justification for the prohibition is given by Rousopoulou who envisages the restriction as necessary since with rapid industrialization and the demand for cheap labour after the Second World War abuses of adoption were mostly expected given the poor legislation on child protection and the indisputable parental authority at that time. "The Reform under Consideration" op. cit. 1235. The paradoxical point, however, about article 1569 is that adoption is permitted without any restriction of more than one child, which, at least in terms of child welfare, is a major defect because a parent who wished to adopt more than one child had to undertake the extensive responsibilities of bringing up several children simultaneously instead of proceeding to a second and subsequent adoption : Michaelidis Nouaros Family Law (Univ. Textbook) pp 313-4.

Idem "Adoption Law Reform", op. cit. p.1030 and notes (22),(25): The Committee appointed by the Ministry of Justice in 1959 proposed modification of the law so as to permit second adoption after 3 - 5 years provided that the applicant satisfies the welfare requirements. Finally, article 5 of the L.D. 610/1970, allowed the adoption of several children under the same order or subsequently; Magistrates' Court of Evros, 159/1970, Dikaiosyni (1971): 137.

79. Vallindas, Family Law, p.210; Tousis, Family Law, Vol. B, p.209, note (1)

80. Article 1583 of the Greek Civil Code; Vallindas, Family Law, 221-2.

81. Michaelidis Nouaros, Family Law (Univ. Textbook), p.312; Tousis, Family Law, Vol. B, p.210.

82. Tousis, Family Law, Vol. B. p.209, note (1)

83. E.E.N. 14.226.

84. In favour of childlessness: Tousis, Family Law, Vol. B, p.209, Michaelidis Nouaros, "Adoption Law Reform", op. cit. p.1030; See contra Enrico Forni, "Adoption in Modern Society : A challenge", i.e. p.116-7, Angelo Vaccano "Family of Blood and Adoptive Family" and Giacomo Rerico, intervention p.93 in A.C.T.A. World Conference on Child Adoption and Foster Care (Milan 1971); The Advisory Council on Child Care. (D.H.S.S. & S.W.S.G.Sc., A Guide to Adoption Practice), has been particularly cautious about the suitability of childless couples for adoption. As it argues "cause of infertility, relationships within the marriage, attitude to infertility and the age of the applicants, as well as the actual duration of marriage are all inter-linked and interwoven in any relevant assessment. The adopters themselves should have come to terms with their infertility or their inability to have further children on their own". Furthermore referring to the research of Michaels, R. and Brenner, R.F. (A Follow-up Study of Adoptive Families (New York, 1951), and Humphrey, M. (The Hostage Seekers (Longmans 1969) it points out that "... for successful adoptive parenthood, couples who have been told that there is no known reason for their failure to conceive need a longer time to come to terms with this before applying as adopters than do those whose infertility is known to be organic". par. III, 13, pp27-8. For further review on the research see Lambert and Streather, Children in Changing Families, pp. 36-45. The condition has been bitterly criticized by Risotaxis (Health and Welfare Services, p.128), as causing undue humiliation by entering a strictly personal matter with the possibility of affecting adversely the conjugal relationship. It almost makes the act of adoption a sort of stigma, an official end to the hopes of a childless couple, and there appears to be no valid reason for it since the couple who have taken the serious step of adoption will not stop caring for the adopted child if they have a child of their own. In addition, she regards the lack of selfish motives for couples, with children, who want to adopt as a valid reason for repealing the condition altogether.

85. See Tousis, Family Law, Vol. B. p.209 and authors cited in note (1). Against the importance of the succession rights, Rousopoulou "The Reform under Consideraton", op. cit. p.1235, idem "Again the Secrecy of Adoption", op. cit. p. 171 also Luciano, Leonor Ines, "Adoption in the Far East" in A.C.T.A. World Conference on Adoption and Foster Placement (Milan, 1971), i.e. p 262, 266.

86. Article 12(2) of the European Convention which came into force on April 26, 1968 provides that "a person who has, or is able to have, a child born in lawful wedlock, shall not on that account be prohibited by law from adopting a child".

87. G. Michaelidis Nouaros. "The law on Adoption in Greece", in The Unprotected Infant, pp 69-70, p.74.

88. Spinellis, "Law of Adoption in Greece and Israel", op. cit. p.184.

89. Rousopoulou "The Reform Under Consideration", op. cit. p.1237; Spinellis, S. "Law of Adoption in Greece and Israel", op. cit. p. 184 and note 123; Michaelidis Nouaros, "Some Observations on the Reform of Adoption Law in Greece" in Bates, The child and the law p 273.

90. Appeal Court of Aegeon 84/1972, No. V. 21 : 1364.

91. See "Introductory Report of the L.D. 610/1970", op. cit. p.866;

Michaelidis Nouaros, "Adoption Law Reform", op. cit. p.1031.

92. "Some observations on the Reform of Adoption" in Bates, The Child and the Law, p. 274. See, however, infra under VIII.

93. Patton-Kittson, Jean M., "The American Orphan and the Temptations of Adoption : A Manifesto" in A.C.T.A World Conference on Adoption and Foster Care (Milan, 1971).

94. Michaelidis Nouaros "Adoption Law Reform", op. cit. p.103. note (28)

95. ibid. p. 1031. Idem "Some observations on the Reform of Adoption" in Bates, The Child and the Law, p.274, ff.

96. Rousopoulou "The reform under consideration", op. cit. p 1237; For an analysis of the difficulties in handling the problems of handicapped children see Pringle, Mia Kellmer, The Needs of Children, (London, Hutchinson, 1975), pp 117-123; for the assessment that must be made, Knight, Iris "Adoption and Handicap" in A.B.A.F.A. Child Adoption, pp 138-147.

96a. The decision of Appeal Court of Aegean 84/1972. No. V. 21 1364 is in line with this approach in holding the interests of the natural child to be of overriding importance in deciding whether it should be permitted for the parents to adopt. The natural child in this case suffered from a disease to a degree where it was presumed as "non-existent" for his parents.

97. "Placement in Families with Handicapped Children", in A.B.A.F.A. Child Adoption , p.149-151; see and supra note 29.

98. Cmnd. 5107 Appendix B, table 2 p.123 and table 3, p.125.

99. "Introductory Report of the LD. 610/1970", p.866.

100. Article 12(3) of the L.D.

101. c.f. the status described in Chapter 3 and that of adoption as described in Chapter 7(E)

102. Sects. 15 of the Adoption Act 1958.

103. Cmnd. 5107 pars. 98, 99, p.27.

104. ibid. par. 98, p.27.

105. See ibid. par. 101, p.28 and par. 98, p.27.

106. Sect. 15 (3), (a) (b)

107. Bevan and Parry, Children Act 1975, pp 53-4.

108. ibid. p. 54; Cmnd 5107, par. 102, p.28.

109. Cmnd. 5107, par. 101. p.28.

110. ibid. par. 101, 102, pp 27-8.

111. see Scottish Law Statutes (1978). c.28/16 note in Subsection (3); Bevan and Parry, Children Act 1975, p.55.

112. Kostaras, "The Adoption of Illegitimate Children", op. cit. p.911. The prohibition was supported by the Pandectists with the revival of the Roman Law in Europe because it was considered that allowing the adoption of natural children would bring confusion between artificial and blood relations. The inward concern, however, was that, if adoption was permitted, concubinage and marriage would have the same consequences, to the damage of the latter.

113. Michaelidis Nouaros "Adoption Law Reform", op. cit. p.1029, argues that the drafters of the civil code brought in a wider form the Justinian prohibition of adoption of illegitimate children. The first rule ever recorded is that of Justinus (L.7. C (4,27)) later confirmed by Justinian (Novel 89, ch. 7, 11, par 2): Katopodis Family Law, p 266, prohibiting the adoption of children born in concubinage. When concubinage ceased to be recognised as a family law institution there was nothing to debar the adoption of illegitimate children. The courts, however, preserved the rule, making the distinction between affiliated and non-affiliated children (Appeal Court of Athens 1598/1893, Themis 4, 569). Thus an adulterine could be validly adopted by his natural father insofar as paternity had not been established. City Court of Athens, 1619/1918, Themis 29:270; City Court of Volos 1247/1936, Dikaiosyni 9 : 729.

114. According to Kostaras "Adoption of Illegitimate Children", op. cit. p. 912, the article has been borrowed from the Italian Civil Code of 1865, article 205 providing a general prohibition of the adoption of illegitimate children. Similar provision is to be found in the Samian Code art. 296, and abroad in the Rumanian Civil Code 1864, the Spanish Civil Code of 1888 and the Belgian Civil Code of 1898 reflecting the spirit of the period against illegitimacy.

115. ibid. p.192. The drafters of the Civil Code took the original form of the article 203 despite the fact that, as modified in 1938, it distinguishes between affiliated and non-affiliated children (article 293); see also Tousis, Family Law, Vol B, p.214, note 15.

116. The decision of the City Court of Piraeus, 1855/1948. Themis 59:925, held that even when the applicant admits paternity before a court of law hearing on adoption the court must not refrain from issuing an order if paternity has not otherwise been established; Balis, Family Law par. 172.2, p.357, and Vallindas (Family Law, p. 211) incline to the opinion that in such cases the court has to consider the moral aspect involved and refuse to grant decree. See also Michaelidis Nouaros, Family Law (Univ. Textbook), p. 313; Contra Kostaras, "The Adoption of Illegitimate Children, op. cit. p.912, who holds the position existing in the pre-code law. Thus if there is no legal link with the father he can validly apply for the adoption of the child.

117. "Introductory Report of the L.D. 610/1970", op. cit. p.866.

118. Article 1530 of the Greek Civil Code. For the need to give wider assurance in illegitimate relations see Rousopoulou. "The Reform Under Consideration", op. cit. p. 1237; Michaelidis, Nouaros, "Adoption Law Reform", op. cit.p1029-30.

119. Article 1584 of the Greek Civil Code.

120. Article 82(2) of the Bill.

121. "Introductory Report of the L.D. 4532/1966", p. 205.

122. "Some observations on the reform of adoption" in Bates, The Child and the Law, p. 273.

123. Koussidou, T.J. "Foster Care in Greece: Existing Programs and Problems" in A.C.T.A., World Conference on Adoption and Foster Placements (Milan, 1971).

124. ibid. p. 476. Only 6 of the children were placed with foster parents with a view to adoption.

125. Risatakis, Health and Welfare Services, p. 126, 127.

126. in Michalacopoulou, N. "The Children of Bad Luck", op. cit.

127. pp 44-5; For the ineffectiveness of Greek social services to meet the need for proper family surroundings for children see Risataki, Health and Welfare Services, pp 126-7.

128. p. 46.

129. Article 1584 of the Greek Civil Code; Appeal Court of Athens 2447/1968, Armen, 23 : 346.

130. Vallindas, Family Law, p. 222.

131. cf. articles 1579, 1813, 1825 of the Greek Civil Code and 1539.

132. Article 54 to reform article 1501 of the Greek Civil Code.

133. Article 86 to reform article 1537 of the Greek Civil Code.

134. Article 93 to reform article 1555 of the Greek Civil Code.

135. see articles 1545 to 1549 of the Greek Civil Code and articles 89, 90, 91, 92 of the Bill.

136. Section 12 (1) (3) of the 1978 Act; Cmnd 5701 par. 110 p. 30.

137. Art. 1580 (2) of the Greek Civil Code; the father's rights are that of illegitimacy; Vallindas, Family Law, pp 219-220.

138. See Grey, Eleanor, A Survey of Adoption in Great Britain (London HMSO, 1971) p.94; in Greece a rise of such adoptions must be expected after the approval and support given to them with the L.D. 610£1970; articles 1(3) and 3. see the Introductory Report, pp 865-6.

139. See for example Z v. Z 1954 S.L.T. (Sh. Ct) 47, A. and B. v. C. 1978 S.L.T. (Sh Ct.) 55; E and B 1936 S.C. 256; I and I (Petrs) 1947 S.C. 485.

140. Cmnd. 5107, par. 105, p.29.

141. ibid. par. 106, p. 29, and pars. 109-110, p.30.

142. ibid. par. 107, p. 29.

143. ibid. par 109, p. 30 and recommendation no 20, p. 31.

144. supra under III, b.

145. Article 5(2) of the L.D. 610/1970.

146. The child on divorce will be considered as natural for the one parent and adoptive for the other. The adoptive parent's spouse can adopt the child but not the spouse of the natural parent; see for Scots Law supra Under I.

147. Cmnd. 5701 par. 111, 112, p.30 ; see Mrs. D. (Petr) 1951 S.L.T. (Sh.Ct.), 19; B and B. 1965 S.C. 44.

148. Working Paper on Adoption, par. 31; Cmnd 5701, par 113, 114, pp30-1.

CHAPTER SIX

1. Article 1577(2) reads now in conjunction with article 11(a) (b) of the L.D. 610/1970.

2. Although the L.D. repeats the grounds of the Civil Code it innovates by imposing a duty on the court not only to receive evidence as to whether consent is unattainable but also to investigate whether dispensing with parental agreement will be conducive to the child's welfare. Thus assessment will not be restricted to whether the evidence received proves unattainability of consent but should extend to whether the natural relation should be severed.

3. Article 11(b) of the L.D. 610/1970; after hearing the nearest relatives.

4. Article 1577(c) of the Greek Civil Code; after hearing the opinion of the Justice of Peace acting as the family council if the child is illegitimate, article 1665(2) of the Greek Civil Code; if legitimate, this is composed of the nearest relatives and the Justice of Peace as president: article 1612 of the Greek Civil Code.

5. Cmnd. 5107 pars. 188, 190, pp 54-5.

6. D.H.S.S. & S.W.S.G.Sc. A Guide to Adoption Practice, par II 27-35, pp 19-22, i.e. par II, 31.

7. Spinellis, "The Law of Adoption in Greece and Israel", op. cit. p.174-5. See also for the importance attached to this aspect by courts infra in dispensing with parental agreement.

8. H. and H. (petrs.) 1944 S.C. 347.

9. Section 16(1) (b) (I) of the 1978 Act.

10. ibid. it can be any information that will increase the parent's understanding and help him in reaching a mature decision. The information has to be general and to satisfy the existing parental anxiety about the future of the child. But, although there is nothing to stop the parent from saying that "I will agree provided that I know who the people are and I can visit the surroundings where my child is to brought up", such a request is unjustifiable and challenges the entire welfare network surrounding the adoption : see B and B (pets) 1946 S.L.T. (Sh Ct), 36.

11. Cmnd. 5107, pars. 228, 229, 230, p.65.

12. The protection provided for parental rights in Section 10 (b) of the Guardianship Act 1973 is absolute. The right to consent cannot be limited nor otherwise renounced.

13. Section 6 of the Adoption Act, 1958, to read in conjunction with Section 1 and 4 of the Adoption of Children (Sederunt) Act 1959.

14. Sect. 55(1) of the 1978 Act.

15. Sect. 16(4) of the 1978 Act; also supra.

16. Still in force by reference; article 8 of the L.D. 610/1970.

17. Art. 12 of the L.D. (part (1) gives the discretionary power to the

court on the request of either party or when it thinks appropriate to remit the consenting procedure to a rapporteur; part (3). The names of the parties must be kept secret and part (4) recognises maintenance of the requested confidentiality as an official duty (invoking certain penalties) of the judge and the officials involved.

18. Tousis, Family Law, Vol B., p.220 and note (3); A.P. 657/1974, No. V. 23: 272: Consent of the parent is given by reason of the blood relationship and the emotional link involved, and not as that of a person exercising parental rights. This is a major controversy in Greek law since what is least affected by adoption is the blood relationship, art. 1583 of the Greek Civil Code.

19. Articles 1575, 1576 of the Greek Civil Code; A.P. 695/1970, No. V, 19:175; A.P. 650/1969, No. V. 18 : 535, A.P. 253/1973 No.V. 21:1087.

20. A contrario from article 11 of the L.D.

21. Article 10(1) of the L.D.

22. Article 1575 of the Greek Civil Code; Michaelidis Nouaros, Family Law (University Textbook), p.315; Bâlis, Family Law, par. 174 (6).

23. Article 14 of the L.D.; Risatakis, Health and Welfare Services, p. 128.

24. See supra note 12; Section 16(1)(b).

25. c.f. sub.sect. (3)(a) and (7) of Section 12 of the Act.

26. Mr. and Mrs. O. (petrs) 1950 S.L.T. (ShCt) 64; X v Y 1967 S.L.T. (ShCt) 87; A.B. (petrs) 1975 S.L.T. (ShCt) 49.

27. A.B. and C.B. (petrs) (Appellants) 1963 S.C. 124.

28. A.B. and C.B. supra, per Lord President, p. 137. See also Terry, J. A Guide to the Children Act 1975, (London : Sweet and Maxwell, 1976), p.33.

29. Section 63(1) of the 1978 Act but he is deemed a relative of the child.

30. A. v. B. 1955 S.C. 378; Cmnd 5107, par 192, p. 36; according to Wilkinson, "Children Act 1975", op. cit. pp 237-8, the agreement of the putative father may be needed when the mother alone seeks to adopt since the expression "natural parent" in Section 13(3) comprehends the putative father as opposed to the term parent alone which by ordinary rules of construction does not.

31. Section 63(1) of the Act 1978; the change in respect to the father having custody was first introduced by the present Act.

32. Under Section 2 of the Act.

33. Under Section 9 of the Act.

34. Sect. 18(7) of the 1978 Act; Cmnd 5107 par 193-194 pp 56-7 and recommendation no 47, see the Adoption of Children (Sederunt) Act 1959 sect.8(c).

35. Normally this will be expected to be done by the agency, Cmnd 5107 par. 195 p.52, and recommendation no. 48.

36. Cmnd. 5107, p. 196, p. 57; But the court needs to be satisfied that he does not wish to be involved or that the agency has taken all reasonable steps to trace the father.

37. Tousis, Family Law, Vol. B. p 220, 222; Spyridakis, Civil Code, Vol. 4. art. 1577 note 3; A.P. 724/1976, E.E.N., 43 : 878.

38. City Court of Thessaloniki, 1326/1950. Armenopoulos, 4 : 400.

39. Appeal Court of Patras, 198/1963, No. V. 12 : 215 (both parents with limited capacity; in the same decision it was held to be irrelevant that the father exercises patria potestas-consent of both parents is validly needed).

40. See supra note 39; the Appeal Court of Athens 1543/1972, Arm. 26: 855, held that the widowed mother who failed to call for the appointment of a guardian for her child after marrying (1595 of the Greek Civil Code), though de jure deprived from guardianship rights, validly consents to the child's adoption as the only living parent.

41. Article 12(c) of the L.D. see infra in Section BII.

42. Article 281 of the Greek Civil Code, see infra in Section B IV.

43. City Court of Athens, 765/1969 No. V. 17 : 990.

44. A.P. 657/1974, No. V. 23: 272 even when she is a minor having the limited capacity of article 129 of the Greek Civil Code her personal agreement is needed.

45. Appeal Court of Athens 2905/1972, No. V. 21: 67.

46. Appeal Court of Athens, 1543/1972. Arm. 26 : 855.

47. Article 1577 (3). He is not a parent within the meaning of part (2) of the same article, see supra note 45.

48. The right of the father to acknowledge the child is unlimited and gives him a decisive power to veto adoption whenever he wishes to assume the care of the child. Where the mother does not intend to continue, or she has turned out to be unfit for, having care, the father has a lawful interest needing protection and therefore the court must exercise its power under article 753 of the Code of Civil Procedure. If the father acknowledges the child the future of the order will be determined by applying the tests of article 2(1) of the L.D.

49. Cmnd 5107 par. 195 p.57; For criticisms see Turner, Improving the Lot of Children, p. 39; Samuels A. "Reports of Committees" (1970), 33 M.L.R. 684, p. 685.

50. Cmnd 5107, par. 196, p. 57.

51. W. P. no 74, p.85.; also see Burges, Linda C, "The Unmarried Father in Adoption Planning" in Tod, R. Social Work in Adoption: collected papers (London : Longman, 1971) (1980), pp 21-2.

52. "Reports of Committees" (1980) 43 M.L.R. 299, at pp. 301-4.

53.ibid. p. 303.

54. ibid, p. 303.

55. Skalts, "Legal Situation of Children Born Outside Marriage", in The Human Rights of those Born out of Wedlock pp 6-20; See also article 299 of the draft of the Quebec Civil Code.

56. ibid. p. 9-10, 20; A full account of the practice of an adoption agency in the United States to invite the father to cooperate in planning for adoption and its beneficial results, see Burgess "The Unmarried Father in Adoption Planning", op. cit. pp 23-29.

57. Clive, "Aspects of Illegitimacy", op. cit. p. 235.

58. Turner, Improving the Lot of Children born outside Marriage, p. 48, in 4 (iii) (a).

59. ibid. pp 30-32, 48 in 4 (iii) (b).

60. ibid. p. 32; Clive, "Aspects of Illegitimacy", p. 237.

61. W.P. 74, par. 65, p. 86.

62. ibid. par. 6.6, p. 86.

63. See for instance: Hayes, "Reports of Committees" in 43 M.L.R., p. 304.

64. W.P. no 74, p. 6.6, p.86; for the similar process in the Draft of the Quebec Civil Code see articles 298, 299, 307, 310.

65. Article 1471 of the Greek Civil Code.

66. See supra Chapter 1 in C.I.

67. See articles 41, 42, 43, 44 of the Bill prepared by Gazi Committee.

68. Cmnd. 5107 par 200, p.58.

69. ibid. par 201, p. 58.

70. ibid. par. 199-203, pp 58-9.

71. See Fisher "Adoption and the Courts", op. cit. p. 148.

72. Cmnd 5107, par 201, p. 58.

73. ibid. par 202, p. 58.

74. ibid. par 202, p. 58.

75. ibid. par 203, recommend 50, p. 59.

76. See ibid, par 199, p. 58; For review of Scottish authorities on the matter see : Burman v. Burman, 1929 S.C. 362 per Lord Murray, p. 364; The husband may not be involved if the evidence presented amounts to absolute proof; relevant also A and A (petrs), 1949 S.L.T. (Sh.Ct.) 77.

77. Cmnd. 5107, par 202, p.58.

78. See Wilkinson v. Bain (1880) 8 R 72 per Lord Young at p.73 for considerations relevant to the point raised here; also Fisher, "Adoption and the Courts",

op. cit. p. 148; for opinions on the risks of collusion involved in declarators of Bastardy, see : Dickson, Evidence (3rd ed) par 284; Walker and Walker, The Law of Evidence in Scotland, p. 168; Burman v. Burman, supra per Lord Murray, p. 368-9.

79. Cmnd. 5107, par 202, p. 58.

80. See Imre v. Mitchell, 1958 S.C. 439.

81. 1949 S.L.T. (ShCt) 77.

82. 1953 S.L.T. (Notes) 10.

83. per Lord Patrick, p. 11.

84. 1958 S.C. 439.

85. Relevant also is Wilkinson v. Bain (1880) 8 R 72.

86. See per Lord Ordinary p. 441, i.e. pp 455-6.

87. See per the Lord President at p. 463; per Lord Sorn at p. 473; per Lord Carmont, pp 469-70.

88. Per the Lord President, pp 462-3.

89. Per Lord Sorn, p. 475.

90. Cmnd 5701, pars. 200 and 202, p. 58.

91. Per the Lord President, pp 463-4; for the value of such declarations as evidence see Burman v. Burman, 1929 S.C. 362.

92. Cmnd. 5701 par 202, p. 58.

93. In line with the suggestion made earlier that once the action of paternity is raised it must be irrevocable and the court will have ex-officio the duty to continue the proceedings, it seems appropriate where the mother has led evidence against her husband for the court to order proof to be taken on the matter. Apart from the reasons explained in the text an additional one is that mother balancing the consequences will have second thoughts before raising the matter.

94. Sect. 65(1) under (a) of the 1978 Act; see also infra the relevant appendix.

95. Section 65(1) under (b) of the 1978 Act

96. Art. 1589 of the Greek Civil Code; See and relevant appendix infra.

97. Arts. 1603, 1662 of the Greek Civil Code; City Court of Thessaloniki, 142/1973, Armen. 27 : 603.

98. Article 1599 of the Greek Civil Code.

99. Article 1601 of the Greek Civil Code.

100. The duties of the guardian do not extend beyond representation and administration of his property (Article 1631 of the Greek Civil Code) to rights affecting the status of the child if the parents of the child are alive (1577(3)) save the exceptions of article 11(1) of the LD. City Court of

Thessaloniki 142/1973, Armen. 27:603. Thus consent of the guardian is needed for parentless children who are not deemed of unknown parentage or foundlings.

101. Although care proceedings and adoption present a basic difference - the latter being irrevocable - as social measures of preventive character they share a lot in common. Thus the tests applied in judging the performance of the parent in his duties as a basis for dispensing with consent in adoption must be in line with the tests applied in care proceedings subject to the irrevocability of the adoption order. In this respect valuable information has been taken for the following part from the works of Clive E. "Getting Children out of dangerous homes" 1976 S.L.T., 201-8; idem, "Refusing to return children to dangerous homes", 1976 S.L.T. 265-271; Graham Hall, J., "Protecting children from their parents - grounds for state intervention", 1980 10 Family Law, 201-3. . MacEwan, J.N.S., "Powers and duties of Local Authorities with regard to Children", 1971 S.L.T., 89-92. Freeman, M.D.A. "Removing babies at birth : a questionable practice", 1980 Family Law, 313-4; and Middleton, D.N., "Child Abuse, Child Neglect and the Law's Remedies"(1980), 48, S.C.O.L.A.G. 128-130.

102. Article 11 (a)(b) of the L.D.

103. Article 11(c) of the L.D.

104. Article 281 of the Greek Civil Code; Spyridakis, Civil Code, Vol. 4, 1577 (4); Michaelidis Nouaros "Functional rights and their abuse", in Honorary Volume in Memory of Professor Maridakis, (Athens University, 1967), Supplement p.1-61 at p.45 in relation to children in institutions.

105. Mitchell v. Wright (1905) 7F. 568, per Lord Dunedin, p. 574.

106. c.f. Children and Young Persons (Scotland) Act, 1937, S.12, as cited in S.L.S. (1978), c. 28/16, subs. (2)(a).

107. Bevan and Parry, Children Act 1975, p. 39; English Courts held that the conduct must be such as to give rise to criminal liability : Watson v. Nikolaisen [1955] 2QB 286, but it is suggested that there is little justification for incorporating this additional requirement into the law of adoption especially since Parliament had not expressed such intention. S.L.S. (1978), C28/16, subs. (2)(d).

108. Re C.S.E.[ 1960 ]1 W.L.R. 304; Re M [1965], 109 Sol.J.574. The ground most probably will apply against the putative father for whom paternity has not been established though his conduct may be taken into consideration if he has been informed of the pregnancy.

109. The Draft of the Quebec Civil Code article 307 (3) confronts the problem of de facto abandonment by imposing time limits. Thus there "may be declared eligible for adoption: (3) a child whose care, maintenance or education has not in fact been assumed by either his father or his mother for more than six months;" see and Report on the Quebec Civil Code, Vol.II, part 1, p. 197.

110. Bevan, H.H. The Law Relating to Children (London, Butterworths, 1973), p.349.

111. Bevan and Parry, Children Act 1975, p. 38.

112. Cmnd 9248, par 120 and Cmnd 5701, pars. 205, 219, p.59, 62.

113. Re P (infants) [1962], All E.R. 789.

114. See cases below; Also MacEwan, J.N.S. "Powers and Duties of Local Authorities with Regard to Children", op. cit. i.e. p.p. 90-91.

115. Children Act 1975, p. 38; The number of children that could be subjected to this resolution by reason of abuse or neglect in Scotland may be as high as 1100, see Middleton "Child Abuse, Child Neglect and the Law's Remedies, "op. cit. p.128.

116. Re P (infants), op. cit.

117. [1965,] 109 Sol. J. 574.

118. [1960] 1 W.L.R. 304.

119. The point is of the most contradictory since failure to visit obviously counts against the parent. At the same time it is necessary to prevent emotional disturbance while the child is adjusting with the applicants. For the natural parents not to visit on such good grounds will strengthen the position of the adopters.

120. 1973, All. E.R. 1001.

121. The term first appeared in Re B (an infant) [1968], Ch. 204, per Goff, J. p.214, referring to the father of a little girl of about six as having washed his hands of her" so that his behaviour was "symptomatic of complete neglect".

122. per Hollings J. at p. 1007 distinguishes the meaning of persistent as to be a question of fact and degree rather than presuming any amount of permanency.

123. Per Sir G. Baker P. at p. 1005.

124. The Times, November 25, 1974.

125. [1973] All E.R. 1001, p. 1006.

126. See supra in Re M and Re C.S.E. and notes 108 and 119.

127. X v Y 1967 S.L.T. (Sh.Ct) 87; The ground has been put under consideration in H and H (petrs) 1976 S.L.T. 8, adoption by parent and step-parent.

128. A v. B 1955 S.C. 378, at p. 379 and 1955 S.L.T. 436. Proof held even in camera might not have preserved the anonymity of the adopting parents which it is one of the prime objects of the Adoption Act to preserve, since at a proof the parties are entitled to be present and among the parties the adopting parents are included.

129. X v Y supra p. 88: "In a case like the present where the petitioners are to remain anonymous, there is a certain artificiality in seeking to determine whether the natural mother is acting reasonably or unreasonably in withholding her consent. She can never see to assess for herself, the prospects, favourable or unfavourable, which the adoption offers to her child, and must reach her decision on such information as can legitimately be imparted to her."; B and B (petrs) 1946 S.L.T. (Sh.Ct.) 36 and supra note 10.

130. H.L. deb. Vol. 356 (1975) cols. 818-824 as cited in S.L.S. (1978) c. 28/16 sub 2(3); See too Freemen "Removing Babies at Birth", op. cit. i.e. pp 133-4; Graham Hall, "Protecting Children from their Parents", op. cit. i.e. pp202-3.

131. See Bevan and Parry, Children Act 1975, p. 39. They argue, however, that

the conduct of the parent must be of a kind and degree that would render the parent or guardian criminally liable. This in fact is a situation implying positive misconduct or gross negligence of the child's interests which must be carried out for such a period and to such a degree to satisfy the condition of persistence. This situation, however, resembles more to serious ill-treatment. See Graham Hall, "Protecting Children from their Parents", op. cit. p. 201.

132. Cmnd. 5107, par 219, p. 62, par 220 (recom. no 52), p 63. For being of punitive character and therefore requiring careful application, see Terry, A Guide to the Children Act, 1975, p. 41.

133. Commitment of the child to care will vary between local authorities due to their different organisation and facilities. It may be possible for a child to remain with his family and be rehabilitated there because the local authority can offer daily close supervision. Terry, A Guide to Children Act 1975, par 68.

134. Bevan and Parry, Children Act, 1975, p. 39.

135. ibid. pp 39-40.

136. Michaelidis Nouaros, "Some observations on the reform of adoption" in Bates The Child and the Law, pp 276-7, article 11 (c) of the L.D. in conjunction with article 1524 of the Greek Civil Code.

137. City Court of Athens, 9617/1946, Themis 58 : 198, City Court of Athens, 2183/1946, Themis 59 : 155.

138. City Court of Thessaloniki, 142/1973, Armen, 27 : 603; Appeal Court of Athens, 4081/1955; E.E.N. 23: 915. Complete judicial recognition is not included : Vallindas, Family Law, p. 217.

139. Magistrates' Court of Patra 1424/1966, Hel. Dik. 8 (1967) : 95-6. c.f. Appeal Court of Patra 127/1955, Armen. (1956): 318, Appeal Court of Athens, 4081/1955, E.E.N. 23: 915 and A.P. 237/1957, E.E.N. 24: 800;

140. Art. 306 of Penal Code

141. Fraud in the first instance and negligence in the second: Vavaretos, G., Penal Code (with commentaries), 5th ed. by Karra A. (Athens : Sakkoula, 1974) p. 944.

142. "Introductory Report of the L.D. 4532/1966", op. cit. p.206.

143. Michaelidis Nouaros, "Adoption Law Reform", op. cit. p. 1031.

144. Appeal Court of Thessaloniki, 60/1954; Magistrates Court of Thessaloniki, 375/1954; A.P. 415/1966. See Vavaretos, Penal Code, p.943,945.

145. A.P. 16/1967; A.P. 271/1964; Vavaretos, Penal Code, p. 943.

146. Vavaretos, Penal Code, p. 940, 941, 943.

147. Though the article refers to the person exercising patria potestas it is submitted that it also covers the case of a mother substituting for the father (art. 1500(a) of the Greek Civil Code) or to the parent having the guardianship and custody of the child. Tousis, Family Law, Vol. B. p. 133; Spyridakis, Civil Code, Vol. 4, 1525 note 1; Articles 1590, 1592 of the Greek Civil Code.

148. Tousis, Family Law, vol. B, p. 132; Spyridakis, Civil Code, Vol. 4, 1525, note (3); 1628.

149. Tousis, Family Law, Vol B, p. 133; the parent retains the right of access and to claim aliment of the child : Spyridakis, Civil Code, Vol. 4, 1525, note (e).

150. Art. 306 (1) of the Penal Code.

151. Article 312 (1) of the Penal Code; by applying the common socio-moral and educational criteria : Magistrates Court of Kalamata 323/1969 in Vavaretos, Penal Code, p.966.

152. Article 312(2) of the Penal Code; See Vavaretos, Penal Code, p. 967: it is not malicious if it is due to the inability or indifference of the parent, but it may affect custody see Tousis, Family Law, Vol. B, p. 417 and note 8.

153. The cause of bodily injury or damage to the health is incorporated in both paragraphs of the article and constitutes grounds for depriving the father of patria potestas, article 1525 of the Greek Civil Code; for the mother see supra note 147. In consequence paternal authority over the child stops (Article 1526(1) of the Greek Civil Code) and the child is submitted to the guardianship of the mother, article 1590 of the Greek Civil Code.

154. Vavaretos, Penal Code, p. 967; Relevant also is article 360 of the Penal Code: Negligence of the supervision of a minor by persons having de jure or de facto the care of the child, p. 1122-3.

155. The parent who forfeited parental authority still has the right to consent : Appeal Court of Patra 198/1963, No. V. 12 : 215; Different is the draft of the Quebec Civil Code article 307 (5) where the child is ipso jure eligible for adoption if the parent has been deprived of parental authority, according to art. 359.

156. c.f. the measures applicable in the intances of art. 1524 and 1525, 1526 of the Greek Civil Code.

157. Appeal Court of Athens, 871/1970, Armen, 24 : 886. City Court of Halkidikis (Mon) 273/1971, Armen 26 : 350, Vallindas, Family Law, p. 177.

158. see supra in 157 also City Court of Thira (Mon.) 34/1971. Arch. Nom. 22, 316; in general in any abuse of rights deriving from parental authority : Vallindas, Family Law, p. 177; Spyridakis, Civil Code, Vol.4. 1524, note (1).

159. See Tousis, Family Law, vol. B. p. 129, and note (1); relevant too the Appeal Court of Athens 1806/1949 Themis 61 : 418.

160. Art. 1 of the Law of Assistance to Unprotected Children 4051/1960 and article 1 of the Royal Decree 669/1961; "Introductory Report of the L.D. 4532, 1966", op. cit. p.206 for the limited application of the ground.

161. E.E.N. 36 : 361.

162. E.E.N. 33 : 206 and Michaelidis Nouaros "Adoption Law Reform", op. cit. p. 1031 and note 30.

163. For the circumstances of the case see Chapter 4 in the section dealing with welfare in Greek law.

164. Vallindas, Family Law, p. 277 for the incapacitated minor because of his inability to consent art. 1577(3); the reasons, however, are the grounds for the dissolution of adoptions in Greek law (infra Ch. 7); because of the high probability of those children showing ingratitude towards the adopter, children with criminal parents are not considered adoptable. Spinellis, "The Law of Adoption In Greece and Israel", op. cit. pp 173, most probably because the links with the natural family are retained after adoption.

165. E.E.N. 36 : 361; see also comments by Kamenopoulos on the City Court of Athens 1141/1969, E.E.N. 36 : 562.

166. See article 1(1) (b) of the Royal Decree 795/1970. The services mentioned in sub.(a) of the same article have the discretion to deal with the child by placing it with foster parents or to call for the appointment of a guardian, or to commit the child to an institution of social assistance as long as the child has not broken the law. See "Introductory Report of the Compulsory Law, 2724/1940", and article 1 of the same law, in The Government Gazette, no. 449 (December 27, 1940), pp 3227,3228, 3230; Introductory Report of the LD. 4532, p 203, 206, and supra in note 160.

167. See "Introductory Report of Compulsory Law 2724/1940" op. cit. p. 3227 and art. 1 of the law; Article 122(c) (d) of Penal Code; see for the size of the problem in numbers N.S.O.Gr. Statistics of Justice 1978, table 7(2) for the family background; table 8(1) for the reasons of commitment: first in the list is theft, second antisocial behaviour, third vagrancy and table 9(1) for the reasons of commitment in relation to the family background. It is a shared belief between commentators on criminality amonst adolescents that most of it is due to bad family conditions and that the children spend many years in rehabilitative institutions because there is no appropriate family situation to receive them back. see Gardikas, K. Criminology, (Athens, 1959).

168. Sect. 16(2) (a) of the 1978 Act.

169. Mr. and Mrs. O. (petrs) 1950 S.L.T., 64; Re F (R) [1970] 1 QB. 385.

170. Re R [1966], 2 All. E.R. 613.

171. J. and J. v C's tutor 1948, S.C. 636, per Lord President p.642. The court exercises under the relevant statutes and Acts of Sederunt "the widest discretionary powers as to the investigation and verification at its own hand of all relevant facts"; Re F (R) [1970] 1 Q.B. 385: if this is not done leave to appeal out of time may be given if in all the circumstances it is right to do so.

172. Freeman, Children Act 1975, c72/12 sub (2); S.L.S. (1978) c.28/16 sub (2)(a); Bevan, The Law Relating to Children, p. 342; Re R [1966] 2 All. E.R. 613.

173. Article 1577 of the Greek Civil Code and 11(b) of the L.D. 610/1970; Vallindas, Family Law, pp 216;7; the assessment of the facts is subject to the discretionary power of the court: Appeal Court of Athens, 1545/1972; Dikaiosyni (1973), 314.

174. City Court of Athens, 751/1971, No. V. 19 : 766, "Introductory Report of the L.D. 610/1970", op. cit. p. 866; to assess whether the care of the child can be met within the extended family: c.f. with 11(c) of the L.D. where such inquiry is not needed.

175. City Court of Thessaloniki 142/1973, Armen, 27 : 603. Appeal Court of Athens, 4081/1955, E.E.N. 23 : 915; City Court of Verria 32/1947, Themis, 60 : 39.

176. cf. Appeal Court of Athens, 1545/1972. Dikaiosyni (1973) 314, A.P. 650/1969 No. V 18(1970): 535; if the parent goes abroad or undergoes hospital treatment he may consent formally with a notarial deed or before a rapporteur judge : "Introductory report of the L.D. 610/1970", op. cit. p. 866; article 10(2) of the L.D.; relevant and the City Court of Thira 434/1966, Hell. Dik. 8 : 91.

177. See Chapter four supra, S.L.S. (1978) c. 28/16 note in sub (2)(b); Wilkinson "Children Act 1975", op. cit. p.222-225. Bevan and Parry Children Act 1975, Chapter 3 and pp 37-8.

178. A and A (petrs) 1971 S.C. 129, per Lord Reid at p. 141.

179. Re D, [1977] 1 All. E.R. 145, per Lord Simon of Glaisdale at p.161.

180. Re W (an Infant)[ 1971] 2 All. E.R. 49 at p.64.

181. See : Brown, "Parental Consent to Adoption", op. cit. p. 172, ff. and authorities cited there; also the comments of Bates, F. "Consent in Adoption Cases and the Nature of the Relationship of Parent and Child", 1977, S.L.T., p 4-6.

182. Re K (an infant) [1953] 1 Q.B.117 per Jenkins, L.J. p. 129.

183. See Bevan, The Law Relating to Children, p. 343 and authorities cited there.

184. S.C. 124.

185. The court held with approval the opinion delivered by Lord Denning M.R. in Re L [1962] 106, Sol. J. at p.611: "I must say that in considering whether she (i.e. the parent) is reasonable or unreasonable we must take into account the welfare of the child. A reasonable mother surely gives great weight to what is better for the child. Her anguish of mind is quite understandable: but still it may be unreasonable for her to withhold consent. We must look and see whether it is reasonable or unreasonable according to what a reasonable woman in her place would do in all the circumstances of the case", per the Lord President (Clyde) p. 135. See also A.B. v. C.D. 1970 S.C. 268, per the Lord President (Clyde), p 269.

186. A.C. 682.

187. Re W (an Infant), [1970] 2 Q.B. 589.

188. at p. 608.

189. A.B. and C.B. v. X's Curator 1963 S.C. 124.

190. Court of Session 11.12.1970. reported 1971, S.C. (H.L.) 129.

191. per Lord Migdale, p. 138.

192. supra note 165.

193. A v. B and C 1971 S.C. (H.L.) 129 per Lord Simon of Glaisdale, p. 145.

194. Per Lord Simon of Glaisdale, p. 145.

195. p. 141.

196. Cmnd 5107, p. 223, p. 63.

197. A. v B. and C. 1971, S.C.(HL.)129 per Lord Simon of Glaisdale, p. 146. A.B. (petr.) 1975 S.L.T. (Sh.Ct.) 49, X v Y 1967 S.L.T. (Sh.Ct) 87; Brown, "Parental consent to adoption", op. cit. pp 181-4.

198. Bevan, The Law Relating to Children, pp 345-6, and authorities cited there; relevant too AB v C D 1970 S.C. 268; A v B and C 1971, S.C. (H.L.) 129 per Lord Guest, p.143.

199. A. v B. and C. 1971, S.C.(H.L.) 129, per Lord Reid p.142; per Lord Simon of Glaisdale, p. 147-8; Re C (an Infant) [1964], 3 All. E.R. 495, per Diplock, L.J.

200. A v B and C supra per Lord Reid, p. 142; Bates, Consent in Adoption Cases, p. 6.

201. Cmnd 5107 pars 287-290 pp 80-81.

202. See for example A v B and C supra; see also A.B. (petr) 1975 S.L.T. (Sh Ct.) 49.

203. It is argued that the power of the court does not extend to children living with their parents : see for example "Introductory Report of the L.D. 4532/1966" op. cit. p. 772. Michaelidis Nouaros, "The Meaning of Functional Rights and Their Abuse", op. cit. p. 45. On the other hand the application of article 281 though considered in the light of civil coee provisions may be held applicable under the L.D. Article 8 of the L.D. holds by reference article 1577 to apply to adoptions of minors with the exceptions of article 11.

204. A.P. 126/1926, Themis, 37 : 529.

205. Spyridakis, Civil Code, Vol. 4, 1577, note (4).

206. Balis, Family Law, par 176.5, p.361.

207. Tousis, Family Law, Vol. B, p.223.

208. op. cit.

209. ibid. p. 5-7.

210. A.P. 136/1948, E.E.N. 15 : 474. A.P. 83/1954, E.E.N. 21 : 656. ibid p.7 and note 13.

211. ibid. pp 7-8 and authors referred in note 12.

212. ibid p.8.

213. article 1578 of the Greek Civil Code.

214. "Some Observations on the Reform of Adoption" in Bates (ed) The Child and the Law, p. 277.

215. See supra same chapter in B II b.

216. Article 8 of the L.D. 610/1970; contra Michaelidis Nouaros, "The functional rights and their abuse", op. cit. p. 45 who sees the power of the court as a special sanction imposed in the instance of article 11(L) of the L.D.

217. For an analysis of rights of "altruistic" nature see ibid pp 9-12, 16, 17, 18, 25-27, 31.

218. ibid. pp 32-5, 37.

219. ibid. p. 36 and author's in note (11) and pp 41-2 and authors in note (22) - (26).

220. ibid. p. 37, 38, 39.

221. ibid. pp 39-41 and authors in notes (19) - (21).

CHAPTER SEVEN

1. See for general discussion, Fisher, "Adoption and the Courts", op. cit. p. 145, ff; idem, "The 1972 Adoption Report", op. cit. pp 189-192; Louis Blom-Cooper, "Parental Rights in Adoption Cases", op. cit. pp 192-194; Ormrod, Sir Roger, "The Role of the Courts in Relation to Children" in A.B.A.F.A. Child Adoption, pp 196-207.

2. Fisher, The 1972 Adoption Report, op. cit. pp 183-4; see A v B and C 1971 S.C (HL.) 129, per Lord Reid, p. 141.

3. For an analysis of the reasons behind the need for case work in adoption and how it should function, see D.H.S.S. & S.W.S.G.Sc., A Guide to Adoption Practice, par I. 17 - I.19 pp 5-6; Cmnd 5107, par 35-38, pp 10-11.

4. Section 1(3) of the 1978 Act; other social services as specified in sub-section 2 of the same section and the general family welfare services controlled by the local authority (see infra); Cmnd 5107 par 42, p.12.

5. Cmnd. 5107 par 32-34, p. 10.

6. ibid. par 44, recommendation 2, p.12.

7. ibid. recommendation 3, p.13.

8. Sect. 30 of the Adoption Act 1958.

9. Cmnd. 5107 pars 50 and 51-61 pp 14-17.

10. ibid. par 43, p. 12.

11. ibid. par 15, p. 13.

12. It was accepted that the quality of service is something that cannot be ensured if control is left to the local authority which usually strives to manage its finances or to judicial control. Thus the Committee recommended administrative control over them. See ibid, pars 49, 51, 55, pp 14-16.

13. ibid. par 58, (a)(b)(c).

14. The choice does not seem to have been an easy one for the Committee to whom various compromises and arguments were presented (pars 52, 53, p.15) mainly favouring a central government registration but envisaging a considerable involvement of the local authority. Moreover because of the functional analysis needed for the criteria of registration the Sheriff Court was regarded as an unsuitable forum to determine registration appeals (see par 60, pp 16-7). In fact the Committee thought special machinery for appeals to be unnecessary.

15. ibid. pars 54, 56, p 15, 16.

16. Wilkinson "Children Act 1975", op. cit. p. 237.

17. W.P. On Adoption, p.23.

18. Cmnd 5107, par 85, 88. p 23, 24. As the Committee explains, a court hearing is the final safeguard and safeguards are needed much earlier. Moreover, the court may find it difficult to refuse an order if there is

no agency to which to return the child.

19. ibid. par 88.

20. Fisher, "The 1972 Adoption Report", op. cit. p. 186.

21. See also : infra prevention of trafficking.

22. Infra on the investigation by the social agency.

23. Article 1(2)(a) of the R.D. 795/1970.

24. Article 1(2)(c)

25. Article 1 (3).

26. Article 1 (4).

27. Article 9 (1) of the L.D. 610/1970.

28. Rousopoulou, "The Reform under Consideration", op. cit. p. 1237. "Introductory Report of the L.D. 4532/1966", op. cit. p. 205.

29. Article 4(2) of the R.D. 795/1970.

30. Sect. 51(1) (a) of the 1978 Act, Article 15 )2)(b) of the L.D. 610/1970; For a detailed discussion on the prohibitions see Bevan and Parry, Children Act 1975, pp 64-67, 200-1; Hoggett, Parents and Children, pp 229-230, "Introductory Report of the L.D. 4593/1966" op cit. p.207.

31. Article 15 (2) (a) of the L.D.

32. Sect. 51(1)(b), (c) of the 1978 Act and Art 15(2)(b) of the L.D.

33. Sect. 51(3) of the 1978 Act.

34. Art. 15 (3) of the L.D.

35. Sect. 52 (1)

36. Sect. 52 (1) (L)

37. Sect. 52 (2)

38. Hoggett, Parents and Children, p.255; "Introductory Report of the L.D. 4532/1966", op. cit. p. 207.

39. Such danger of course exists also among married couples. The most striking case that one can come across is that reported in a Greek newspaper recently (Ta Nea, 5th January 1981) referring to a couple who of the sixteen children they had produced since they had been married in 1964, they had placed thirteen for adoption with profit and who were going to so place their recently delivered infant, despite a conviction for trafficking in 1979.

40. Article 15 (1) of the L.D.; unless he is found liable of an act invoking more severe punishment.

41. Article 13(2) of the L.D., City Court of Athens, 1141/1969 E.E.N. 36:562 and comments by Kamenopoulos, pp 362-3.

42. Article 13(2) of the L.D.

43. Article 13(4) of the L.D.

44. Sect. 12(6) of the 1978 Act.

45. English courts had used this provision in this context : Re J. (1973) Fam. 106; Re S (1975) Fam. 1.

46. In G.D. (petrs) (1950) S.L.T. (Sh.Ct.) 34 adoption was granted only when the natural father undertook the obligation to pay a weekly sum into a fund for the child's benefit. See S.L.S. (1978), c28/12 note in sub.6.

47. Fisher, "Adoption and the Court", op cit, pp 145-8. Wilkinson, "Children Act 1975, op. cit. p. 225. Cmnd 5107 pars 173-186, 188-191, pp 50-56, 221-225, pp 63-4. Hoggett, Parents and Children, pp 245-6. "Introductory Report of the L.D." 610/1970, op. cit. pp. 866-7. Michaelidis Nouaros, "Some Observations on the Reform of Adoption" in Bates, The Child and the Law, pp 277-8.

48. Fisher, "Adoption and the Courts", op. cit. p. 145; Cmnd 5107, pars 168, 169, 171, 172, pp 49-50. "Introductory Report of the L.D. 610/1970" op. cit. p. 867.

49. Sect. 18(2) of the 1978 Act, Cmnd 5107 par 168., pp 45-50, pars 221-224, pp 63-4.

50. Sect. 18(1)(a)(b)

51. Cf. Sect. 18 (2)(a) and (b).

52. Sect. 18(3). In the view of the committee"an agency would be unlikely to support an application for relinquishment unless it was reasonably confident that it could find an adoptive home for the child. Otherwise the agency should defer making application for relinquishment until a placement had been made or was guaranteed." Cmnd. 5107, par 184, p.53.

53. Cf. S.L.S. (1978), c 28/18 notes in subsection (2); see also Hoggett, Parents and Children, p. 245. Of course the possibility of the child not being adopted in this instance has to be eliminated. A thorough investigation of the reasons that led the one parent to agree while the other still objects to adoption may be appropriate along with investigation of whether the decision of the consenting parent is mature and what other alternatives may be considered in the circumstances.

54. Sect. 18(4) of the 1978 Act.

55. Cmnd. 5107 par 182, p.52. The child may be placed with the adopters straight from the hospital but the procedure cannot be completed before the specified period. Of course the court must take care the placement does not prejudice the rights of the putative father, i.e. if he was ignorant of the child's existence.

56. Under Sect 15 of the Social Work (Scotland) Act 1968. The voluntary adoption agency applying for such an order must be a highly equipped one capable of taking the responsibility of boarding out the child for a considerable period. See also Fisher, "Adoption and the courts", op. cit. p. 146; Hoggett, Parents and Children, p. 246.

57. Sect. 18(8) of the 1978 Act.

58. Sect. 18(6); The view originally held by the committee was that, given the nature of the relinquishment, it would be inappropriate to go back to the mother and explain that the adoption had not taken place. With the danger of no placement or order taking place the Committee had to consider various alternatives and even to leave it open under certain circumstances for the parent to resume his rights.

59. Sect. 19(1)

60. Sect. 19(2) (a) (b). See text.

61. Sect. 20 (infra)

62. Sect. 19 (4)

63. Sect. 19 (3)

64. Sect. 18 (6), 19 (1) and 20 (1),(4); It is implicit in hearing different proceedings that the first application may be granted and the second refused, since it is justifiable for the court to terminate the rights of the natural parent, i.e.. if it is so requested and at the same time it may be contrary to the welfare of the child to entrust it to any of the actual applicants. There are strong grounds therefore in support of the condition of Sect. 18 (3) and for allowing the parent to resume rights since experiments with placements may be damaging to the child's welfare.

65. Sect. 20 (1) (a) (b).

66. Sect. 20 (2)

67. Sect. 20 (3) (a) (b)

68. Freeman, The Children Act 1975, 75/16 note in Subs. (1), but see also note in Subs. (4).

69. Sect. 20 (3) (c).

70. Sect. 20 (4) (a).

71. Sect. 20 (4), (b).

72. Sect. 20 (5); Freeman, Children Act 1975, c.72/17 note in subs.(5): This subsection was moved at the Report Stage in the House of Commons, (Vol. 898. cols. 1458, 1459). It was felt that otherwise, s 20(4) would act as a severe deterrent to parents applying for their rights to be restored. Parents whose child had been freed for adoption but not placed would have been in a worse position than parents with a child subject to a custodianship order, care order or s.2 resolution.

73. Fisher "Adoption and the Courts", op. cit. p. 147.

74. Cmnd. 5107, par 184, p.53.

75. Section 20(4) reads: "if the application is dismissed on the ground that to allow it would contravene the principle embodied in Section 6".

76. Sect. 18 (7) (b)

77. Sect. 18 (5).

78. Fisher "Adoption and the Courts", op. cit. p. 148.

79. Michaelidis Nouaros, "Some observations on the Reform of Adoption" in Bates The Child and the Law, p. 277; see also "Introductory Report of the L.D. 610/1970," op. cit. p.867.

80. See comment in the Introductory Report (supra).

81. Art. 12(2) of the L.D.; Michaelidis Nouaros, "Some observations on the reform of adoption" in Bates, op. cit., p.278.

82. ibid; article 12 (2) (b) of the L.D.

83. Article 12(2) (c) of the L.D.

84. For the conditions and consequences of long institutional life in Greece and fostering see Koussidou, "Foster Care in Greece" in A.C.T.A., World Conference on Adoption and Foster Placement, pp 475-7.

85. See Spinellis, "The law of adoption in Greece and Israel", op. cit. p. 163, 189. Maganiotou, V. "Aspects sociaux et juridiques de l' adoption en Grece" in A.C.T.A. World Conference on Adoption and Foster Placement, (Milan, 1971) p.283-5. Rousopoulou, "Greek and Interstate Adoptions", op. cit. p. 1233.

86. Sect. 13 (1)

87. Sect. 13 (2)

88. Cmnd. 5107 parp 91, p. 25.

89. ibid. par 241-242, p.68.

90. cf. S.L.S. (1978), c.28/13 in general note.

91. Cmnd 5107 paras 242-243, p. 6 V; for further comments see S.L.S. (1978) c28/13 note in subs. 1 and authorities cited there.

92. Sect. 13(3) (a) (b)

93. As defined in section 65(1)

94. A v B 1955 S.C. 378.

95. I.R.C. v. Russell 1955 S.C. 237 per Lord Sorn at p. 241.

96. See (1978), S.L.S. c. 28/13 note in subs. (1)

97. c.f. Section 15(1)(a) and 65(1) : "where the child is illegitimate ... any person who would be a relative within the meaning of this definition if the child were the legitimate child of his mother and father".

98. See supra in note 85.

99. The Commitee appointed by the Ministry of Justice to Reform Adoption Law, minutes six and seven of June 19 and 26, 1959; see Michaelidis Nouaros, "Adoption Law Reform", op. cit. p. 1033-4, note (41).

100. ibid. p. 1034.

101. Spinellis, "Law of Adoption in Greece and Israel", op. cit. p.163.

102. Maganiotou, "Aspects sociaux et juridiques", op. cit. p. 283-5.

103. supra note 101.

104. Section 22 (1) of the 1978 Act; Cmnd 5107 par 2, p. 68.

105. Sect. 22(2).

106. Sect. 22 (3) (a) (b); for the importance of the report see Cmnd 5107 par 237 p.68

107. Sect. 23.

108. This is not required as a second report along with that of the local authority but as the only and independent report to be submitted to the court by the agency responsible for the placement. Therefore due concern is expressed by the committee that its ability in performing such duties should be a criterion for registration Cmnd 5107, pars 237-8, p.67.

109. ibid. pars. 234-5 pp 66-7.

110. ibid. par 244, pp 68-9.

111. ibid. par 236. p.67; Terry, A Guide to Children Act, 1975, p.51.

112. Michaelidis Nouaros, "Some observations on the Reform of Adoption", op. cit. p. 275; Spinellis "The Law of Adoption in Greece and Israel", op. cit. p. 166.

113. Art. 9 (2) of the L.D.

114. City Court of Patra, 1424/1966, Hell. Dik. (1967): 95. City Court of Thira 434/1966, Hell. Dik. (1967): 92. City Court of Athens 765/1969, No. V. 19 : 990; Koroustalakis, "Some problems of the L.D. 4532/1966" op. cit.; Beis, "The unacceptability of an application of adoption", op. cit. See also Spinellis, "The law of adoption in Greece and Israel", op. cit. pp 177-8.

115. p. 205.

116. "Some Problems of the L.D. 4532/1966", op. cit. p. 989.

117. "The Unacceptability of an Application of Adoption", op. cit. p. 1193.

118. "Introductory Report of the L.D. 610/1970", op. cit. p.856, et seq.

119. "The Unacceptability of an Application of Adoption", op. cit. p. 1194.

120. Spinellis, "The Law of Adoption in Greece and Israel", p. 163.

121. ibid. p. 178.

122. No. V. 17 : 990.

123. ibid. p. 991.

124. Sect. 21 (1) of the 1978 Act

125. Sect. 21(2).

126. Sect. 21(3), (5).

127. Sect. 28 (6).

128. Sect. 28 (3).

129. A Guide to the Children Act, par 79, p. 49.

130. Sect. 29 (1)

131. Sect. 29 (2)

132. Sect. 30 (1) (a)

133. Sect. 30 (1) (b), (2)

134. The period of 7 days according to subs. (3).

135. Sect. 30 (6).

136. Sect. 30 (7).

137. Sect. 31 (1)

138. Under Section 22 (1); Bromley, Family Law, p. 137.

139. Sect. 32 (3) (a).

140. Under Section 59 of the Social Work (Scotland) Act 1968; sect. 32 (3) (b).

141. Sect. 32 (3) (c).

142. Sect. 32 (4) (a)

143. Sect. 32 (4) (b).

144. Sect. 32 (4) (c), (d), (e)

145. Sect. 33,

146. Sect. 34 (1)

147. Sect. 34 (4).

148. Sect. 59 (1).

149. Sect. 8, Adoption of Children (Sederunt) Act 1959.

150. Article 591 and 91 (1) of the C. of Civil Proc.

151. Article 92 of the C.C. Proc.

152. Article 618 of the C.C.Proc.

153. Spyridakis, Civil Code, Vol 4, 1578, note (3); A.P. 742/1970, No. V. 19 : 3 22; A.P. 253/1973, No.V. 21 : 1087,

154. No. V. 12 : 682.

155. Michaelidis Nouaros, "About the Voidness of Adoption", op. cit. p. 486 (a).

156. Balis, Family Law, 175.4: if his consent is required.

157. Michaelidis Nouaros "About the Voidness of Adoption", p. 486 (c).

158. City Court of Veria, 524/1953, No. V. 2 : 190.

159. Art. 12 (a) of the L.D.

160. As in case of art. 11(a) of the L.D.

161. Appeal Court of Athens 2905/1972, No. V. 21 : 67; for the putative father who has no right to consent, see supra.

162. Hoggett, Parents and Children, p 225-6; for the involvement of the court as the ultimate and final safeguard see Cmnd. 5107 par 88 p 24 and 232, p.66; See also Fisher, "Adoption and the courts", op. cit. p. 145.

163. Sect. 56(3), (4) of the 1978 Act.

164. Sect. 56(5) (a).

165. Sect. 56 (5) (b)

166. Cmnd 5107, par. 285, p.80.

167. ibid. pars. 285, 286, p.80.

168. ibid. par 287, p.80.

169. ibid. par. 288, p.80; the Committee also opposed, against the fear of a possible diminishing of the role of the court, the fact that there are statutory precedents in the country, some of them of long standing, for enabling the courts of Scotland to appoint expert assessors, Nautical Assessors (Scotland) Act 1894, Coal-Mining (Subsidence) Act 1957, par 289, p.80.

170. ibid. para. 290, p.81; Fisher, "The 1972 Adoption Report", op. cit. p.191 and note 95; idem "Adoption and the Courts", op. cit. p. 145.

171. Sect. 9 (2) of the 1958 Act.

172. Sect. 57 of the 1978 Act, Cmnd 5107, par 270, p.76. any proceedings of part II of the Act, hearings on a Convention Adoption order and of section 29 (see text).

173. Sect. 10 of Sederunt Act 1959.

174. Cmnd 5107 par 267, 268, 291; Fisher, "The 1972 Adoption Report", op. cit. p. 919; In England where evidence is taken on affidavit, presence normally is not required but in Scotland, where hearings are in the discretion of the court, the court may order the parties to be present. For a Hearing to be held in Scotland is very much the exception. This appears to have carried some weight in the Committee's deliberations and it is recommended that throughout Britain hearings should be discretionary. Recom. 67, par 275, p.77.

175. Article 121 of the Introductory Law of the Civil Code : Polymeles Protodikion, and art. 740 (1)(a) of the C.Civ.Proc.

176. Article 800 (1) of the C.Civ.Proc.

177. Article 369 (1) of the C.Civ. Proc.

178. Article 369 (2) of the C. Civ. Proc.

179. Article 12 (1) of the L.D.; Spinellis, "The Law of Adoption in Greece and Israel", op. cit. p. 183.

180. Article 1576 of the Greek Civil Code.

181. Article 1578 provides that the court authorises the adoption after seeing that the legal requirements are met and after looking at the morals and the financial situation of the adopter. With the general wording of article 2(1) of the L.D. and the wide scope of investigation suggested by article 9(1) the courts are in a better position since they can deal with any aspect of the proceedings to protect the interests of the child.

182. Spyridakis, Civil Code, Vol. 4, 1576, note 2.

183. Art. 800 (2) of the Code of Civ. Proc.; May be given privately article 12(1) of the L.D.; For the nature of the condition see Vallindas, Family Law, p. 215; Balis, Family Law, par 175 (2); A.P. 228/1964, No.V. 12: 682.

184. Sect. 11(4) of the Adoption Act 1958; D.H.S.S. & S.W.S.G.Sc. A Guide to Adoption Practice, pars. X2 - X5, pp 104-105.

185. Cmnd 5107, para, 249, p.70.

186. Cmnd 5107 para 259, recom. 61, p.72 and pars 249-251 p.70.

187. Sect. 58(1) (a) of the 1978 Act.

188. cf. Sect 58(1) and recomm61 supra

189. Fisher "The 1972 Adoption Report", op. cit. p. 190.

190. Cmnd 5107 para 254, p.71, para 257, recom. 62, p. 72; As Fisher observes this is more of a break with tradition than in Scotland, where lawyers are often appointed curators ad litem, than in England and Wales, and it is symptomatic of the tendency the role of purely legal expertise in children's matters generally. "The 1972 Adoption Report", op. cit. p. 190.

191. Sect. 58(1) (b) of the 1978 Act.

192. Cmnd. 5107, para 257, recom. 62, p.72; par 244, pp 68, 69.

193. ibid. paras 176, 177, 187, p50, 54.

194. ibid. paras 178, p.52.

195. ibid. para 174, 175, p.51 and para 191, recom. 39, p.55; See also Fisher "Adoption and the Courts", op. cit. p. 145.

196. ibid. para 180, p.52.

197. Sect. 58)2) (a) (b) (c) of the 1978 Act.

198. Sect. 58 (2)

199. Sect. 58 (3).

200. c.f. A.P. 122/1956, E.E.N. 23 : 621; Appeal Court of Thessaloniki, 521/1972, Arm. 26 : 652; A.P. 559/1962, E.E.N. 30 : 127; see also Tzouganatou

Gasparinatou, The Judicial Recognition of Paternity, pp 222-3; Tousis, Family Law, Vol. B, p. 272-4.

201. Article 800 (2) Cod. of Civ. Proc.; article 12 (1) of the L.D.

202. Cmnd 5107 par 88, p.24, 288 et seq., p.80; Fisher, "Adoption and the Courts", op. cit. p. 145. idem "The 1972 Adoption Report", op. cit. pp 191-2, Ormrod, Sir Roger "The Role of the Courts in Relation to Children" (1973) in A.B.A.F.A., Child Adoption; Tousis, Family Law, Vol. B., pp 218-9, 223-4, 226-8.

203. Louis Blom-Cooper, "Parental rights in adoption cases", in A.B.A.F.A. Child Adoption p 192. See however for examples of the attempts made by the 1978 Act to bring the courts close to the preliminary procedure, Sections 58, 59.

204. ibid, p. 193.

205. Ormrod, "The Role of the Courts in Relation to Children", op. cit. pp 196-207.

206. The theory probably traces its origins to the contractual nature of adrogation. It was adopted in German law and in Greece for the pre-code law, see for example Prachican, Family Law, para 158, par. 7, p.445 et seq. In Scotland this opinion has never been accepted, J and J v. C's Tutor 1948 S.C. 636; The theory presents the following inadequacies in relation to adoption of minors, a) a minor cannot validly consent; b) the consent of the parent or guardian is not of contractual nature because parental rights and duties cannot be renounced by a declaration by the parent; c) the adoption order is creative of a new status not in any way related to the previous one.

207. Michaelidis Nouaros, "On the Voidness of Adoption" op. cit. p. 483, et seq., see also authorities, cited there; but see idem, Family Law (Univ. Textbook) p. 317.

208. Vallindas, Family Law, pp 214-215; Tousis, Family Law, Vol. B. p.226-8.

209. See somments in S.L.S. (1978), c28/12 notes in subsection (1); Gloag and Henderson, Introduction to the Law of Scotland, p.691.

210. Roilos (-Koumantos), Family Law, Vol C, prolegommena in Art. 1568-1588; Michaelidis Nouaros "On the Voidness of Adoption", op. cit. p. 484; idem, Family Law (Univ. Textbook), p.317.

211. No. V. 12 : 682.

212. Dikaiosyni (1973) : 314.

213. No. V. 19 : 175.

214. Dikaiosyni (1973) : 314. "Thus in adoption predominates the public character of the order which creates a new family relationship", the role of the court is not restricted to verifying the intentions of the parties but performs an ex officio investigation as to whether the conditions have been met and, in the absence of any of them, may refuse the order. It is not allowed to petition against the order by reason of duress, fraud, or error, in other words for defects of the will of the parties because those are covered by the decision of the court which is not susceptible to attacks upon such grounds, p.314-5. Relevant also is A.P. 650/1969 No. V. 18 : 535.

215. City Court of Athens, 478/1969, E.E.N. 36 : 361; Spinellis, "The Law of Adoption in Greece and Israel", p. 162.

216. See sect. 16(1) (b) (i) of the 1978 Act. J and J v. C's Tutor, 1948 S.C. 636; S.L.S. (1978), c 28/12 note in subs (1); Walker, Principles of Scottish Private Law, p.332; A.P. 650/1969, No. V. 18 : 535; A.P. 695/1970, No.V. 19 : 175. Vallindas, Family Law, p.216-7.

217. S.L.S. (1978), 28/12 note in sub. (1).

218. ibid. referring to the dicta in J and J v. C's Curator (supra) and Re F [1977] 2 All. E.R. 777, at 783.

219. A.P. 650/1969 No.V. 18 : 536.

220. Michaelidis Nouaros, Family Law (Univ.Textbook), p.322, idem "On the Voidness of Adoption", op. cit. p. 485.

221. Article 1571, 1573.

222. Michaelidis Nouaros, Family Law (Univ. Textbook), p. 322-3; Appeal Court of Athens, 919/1967 15 : 545 and comments at p 585, Art. 17 of the L.D. introduces a statutory limitation for such petitions. Thus the right expires within one year from the entitled being informed of the adoption or within three years from the date that the order became final.

223. Sect. 35(3) of the Adoption Act 1958 with the possibility of it being extended up to six weeks, sub (5A).

223a. Sect 26 (1) (a) of the 1978 Act, for the case that the circumstances make it desirable that the child should be under the supervision of a specific individual.

224. Sec. 26(1) (b).

225. Sect. 26 (2).

226. Sect. 25 (1).

227. Sect. 25 (2).

228. Bromley, Family Law, p. 372, Cmnd 5107, par 309, p.87.

229. Cmnd. 5107, par 310, pp 87-88.

230. Bromley, Family Law, p. 372.

231. S. v. Huddersfield B.C. [1974] 3 All. E.R. 296.

232. See section 30 (3); for the person to receive the child Subs. (5).

233. Sect. 30 (6).

234. Cmnd. 5107 par. 309, p.87; W.P. on Adoption par. 239, p.87.

235. Cmnd 5107 par 310 pp 87-8; W.P. on Adoption par 240, p.88, see and par 238, p.87.

236. Cmnd 5107, par 310, supra

237. Sect. 46(1) of the 1978 Act.

238. It refers to an overseas adoption order regulated by the Hague Convention sect. 65(1), (2).

239. Sect. 46 (2).

240. Article 1587 of the Greek Civil Code as reformed by article 18 of the L.D.; Article 13(4) of the L.D.

241. Article 1588 of the Greek Civil Code.

242. Daes, "Remarks on the Dissolution of Adoption", op. cit. p. 53-4, the ground of ingratitude as specified in article 505 of the Greek Civil Code was first imposed by article 20 of the L.D. 4532/1966 and has been reinstated by article 18 of the L.D. 610/1970.

243. ibid. p.54; Balis, Succession Law (Athens, 1959), article p.40.

244. ibid. p.54; A.P. 25/1966, No. V. 14 : 713; A.P. 229/1970, No.V. 18, 957.

245. cf. Article 1840 of the Greek Civil Code and 1841; for a detailed analysis of the grounds see Daes, supra pp 55-59; Tousis, Family Law, Vol B, pp 236-240.

246. Daes, "Remarks on the Dissolution of Adoption", op. cit. p. 57-8.

247. Presently article 18 of the L.D. 610/1970 see supra note 242; Relevant A.P. 1009/1976, No. V 25:370, Appeal Court of Patra 5/1974, E.E.N. 41: 116.

248. Article 505 refers to revocation of donation inter vivos; the article applies by analogy to adoption. The general clause of ingratitude has been first adopted in the civil code instead of the specific mention of the pre-code law. (see Fraggistas, Erm. Ak. general note in article 505), which reflects the tendency of the legislatures to increase judicial discretion and secure flexibility of the law.

249. Fraggistas, Erm. Ak. 505, (12): by being a mental state which may be ascertained though the expressions and attitude of the adoptee (505 (2)) ingratitude cannot be punished unless the adoptee moves from the passive state to an active one committing a serious offence against the adopter, 505(3); Daes, "Remarks on the Dissolution of Adoption", op. cit. p. 60.

250. Zepos, P., Law of Obligations, (Athens 1965), Vol B., p.33. see also supra note 249.

251. Fraggistas, Erm. Ak. 505, part II, 1, 2, 3. pars 3 - 6.

252. Zepos, Law of Obligations, p.34, (note 4); Appeal Court of Thessaloniki, 371/1954, E.E.N. 21 : 1050.

253. Zepos, Law of Obligations, p.33; Fraggistas Erm. Ak. part II; Tousis, Family Law, vol. B, p. 238-9.

254. Daes "Remarks on the Dissolution of Adoption", p.59 and note 23.

255. Appeal Court of Athens, 3/1971 Dikaiosyni (1971), 133.

256. Article 121 (1) of Penal Code.

257. See supra prevention of trafficking and penal provisions; also chapter 6 on dispensing with parental consent under article 11(c) of the L.D.

258. Article 13(4) of the L.D. and article 1603(2) of the Greek Civil Code. Either the district attorney or the curator ad litem may petition the court to take the appropriate measures according to article 1524 and among them to request the dissolution of adoption if this is in the interest of the child; the tests of article 2(1) of the L.D. apply in this case.

259. Sect. 12(1) and 39 of the Act 1978. See also "Issue and Adopted Children" in Workshop, 25 Journal of the Law Soc. of Scotland, pp 165-168, 172-3; "Adopted Grandchildren Workshop," 26 Journal of the Law Soc. of Scotland, pp 182, 4, (by E. Clive).

260. cf. 1579 (1) and 1583 of the Greek Civil Code.

261. See supra under D.I.; see also S.L.S. (1978), c28/12, note in subs.(1); Fisher, "The 1972 Adoption Report", op. cit. p. 197.

262. Sect. 39(1).

263. c.f. article 1579, 1580, and 1583-6 of the Greek Civil Code.

264. Sect. 12(1) and 39(1) of the 1978 Act; Sect. 24 of the Succession (Scotland) Act, 1964.

265. Article 1579 (1) of the Greek Civil Code.

266. Sect. 39(1)(a): "(Whether or not he was in fact born after the marriage was constituted.)"

267. Article 1580 (1) (2) of the Greek Civil Code.

268. See sects. 41(2), (3), (4), 42, 44 of the 1978 Act and Sect. 37 (1)(a) of the Succession (Scotland) Act 1964.

269. Article 1581 of the Greek Civil Code; A.P. 43/1957, Neon Dikaion. 13: 351; A.P. 720/1970, No.V. 19: 305; Appeal Court of Athens, 2447/1968, Arm. 23:346.

270. See for example Article 1579 (2) of the Greek Civil Code; also it is argued that the adoptive parents claim to aliment is postponed to that of the natural parent (see infra appendix No. 5).

271. Article 1583 of the Greek Civil Code.

272. Article 1585(2).

273. Sect. 41(1) of the 1978 Act; Cmnd 5107 pars 329-333, pp 93-4.

274. Article 1360 of the Greek Civil Code.

275. See references supra in note 259.

276. Article 1579 and 1581, par 2 of the Greek Civil Code; Tousis, Family Law, Vol. B. p.230, note 2(2).

277. Article 1581 (2).

SURNAME

The right to a name is recognised to be fundamental for the child. Principle 3 of the Declaration of the Rights of the Child provides "The child shall be entitled from his birth to a name ... ". Article 22 bis, paragraph 2 of the draft Covenant on Civil and Political Rights provides : "Every child ... shall have a name."[1] In the absence of express definition this should be taken to include both first name and surname with emphasis on the latter since this is what distinguishes the individual in the community.

Explanations for the legal nature of the name are manifold, being, apart from identification, an outward sign of filiation distinguishing a person from others and placing him in a certain lineage, an attribute of legal personality or as having to do with inheritance and acquisition of familial properties. However, whatever one says of its legal nature, as a matter of law and custom the attribution of a surname has always been connected to the names of the parents as a consequence of their legal relationship, usually on account of special rules limiting selection. Strictly speaking the question of surname is not exclusively one of status but more or less one of filiation, though status in itself seems to have particular importance for the matter. The attribution of surname is closely linked to the fact of birth, disclosing the identity of the parents and, as such, for children born out of wedlock has significant importance for countries like Scotland and Greece which maintain discrimination.[2] Attitudes towards the name between the two countries vary depending on whether the child is born in wedlock, legitimated, adopted, or is born out of wedlock and has been affiliated or not.

A child born in wedlock in Scotland normally is given the surname of the parents or of the father[3] while in Greece as a rule it is given the

parents surname corresponding to that of the father.[4] On legitimation in Scotland the child has the right for the father's name to be entered in the register and probably has a right to use his surname.[5] In Greece whether the legitimation is per subsequens matrimonium[6] or judicial[7] the child concerned is entitled to bear the father's surname as in legitimacy.[8] On adoption, because the child stands as legitimate to the adopter, this entails for him a right to bear his name. Thus in Scotland the surname of the child may be changed and the change would be entered in the register.[9] Such change must be specified in the adoption order by stating the surname of the child requested in the application, and, if not the original child's name and the applicant(s) surname.[10] In Greece if the child is adopted by two spouses or the husband alone it bears the surname of the husband[11] whereas if adopted by the wife or a widowed woman alone, according to the prevailing opinion it bears her maiden name.[12] The child nevertheless may retain his surname besides that of the adopter.[13] The possibility of changing the first name of the child on adoption should be mentioned as well.[14] The surname given to the child through adoption in Greece prevail other surnames that may be given to the child by changes in his legal status while the order stands. Thus if the child is acknowledged or legitimated and remains the subject of an adoption order his surname will remain unaltered.[15]

On illegitimacy neither country allows free usage of the father's surname on the basis of the biological relationship. In Scotland the mother has the right to decide on the child's surname which normally will be hers[16] or if paternity has been registered or admitted may be that of the father. It is not entirely clear if the father can veto usage of his surname as indication of paternity though for certain he cannot object to registration of his name if he is found to be the father.[18] In Greece, prior to recognition or in "incomplete" judicial affiliation

the child by power of law bears the maiden name of the mother irrespective of whether it was attributed to her through legitimacy, adoption or acknowledgement.[19] Her husband may give his surname to the child with a notarial deed[20] provided this has consent of the mother and the child.[21] This surname cannot change if the mother comes to a new marriage but perishes by the acknowledgement of legitimation of the child.[22] On voluntary or complete judicial acknowledgement the child's surname changes to that used by the father[23] at the time of acknowledgement and follows subsequent changes.[24] Special provision is also made in both countries for a surname to be given to a foundling by the administrative authority.[25]

The way that the surname is attributed to the child has been frequently criticised in countries like Greece where it is subject to legal regulation. Nevertheless, in view of the equality of children, certain problems arise in relation to the surname of a child born out of wedlock. In general, the suggested approaches to the problem can be classified in the following headings:

1. The child receives the name of the father;
2. The child receives the name of the mother;
3. The child receives a name consisting of the parents' names;
4. The parents choose which of their names or what name or combination of their names the child will have.

In Scotland since the attribution of the surname is a matter of usage probably some protection will be needed for the father of the child born out of wedlock to have a greater legal control over the change of the surname.[26] At present neither of the parents can affect the child's surname without the consent of the other.[27] In disputes, a compromise might be for the child to receive at least two surnames of the

choice of the parents[28] which may serve the practical purposes of identification with the increasing use of computers in registration.[29]

If the surname is going to be regulated the following considerations should apply for both countries. The surname of the father though of long tradition in both countries, cannot be considered as the only possible solution without this running counter to the principle of equality.[30] Attribution of the mother's surname to a child should be retained for the child born out of wedlock until the establishment of paternity.[31] The usage of her surname however for children born inside and outside wedlock, although the best and most trouble free solution[32] cannot be considered at the moment as the conditions are not mature enough to disrupt an age-old tradition. Turning now to the third and fourth approaches it has to be considered whether the child should have one or two surnames and whether the choice of name should be left to the discretion of the parents.

Two surnames, apart from lacking in simplicity, present difficulties in the order of attribution and in addition passes the problem of choice to the next generation.[33] Therefore, it is preferable for there to be only one. As regards the matter of choice, this has been considered recently in the proposals of the Gazi Committee. They envisage a decision being taken and notified prior to marriage or adoption in respect of each possible child of the family and, in the absence of such a decision, the child receiving the surname of the father.[34] This resolution, though not faultless in terms of constitutional law, is practically simple for children of the marriage.[35] Of course, for children conceived outside wedlock such agreement in many cases would be difficult to achieve. The Gazi Committee in this case proposes for the child to receive the father's surname or to add it to his surname.

given a notarial declaration by the mother, the child's guardian or by the child himself in his majority.[36] Another proposal suggests giving a right to the father to apply to the court for an order that the child take his surname. The court should have the general discretion to decide.[37] For the same case the law in Germany envisages the child's surname changeable subject to the consent of the father who has acknowledged the child. If he refuses the mother has the discretion to petition the court.[38] Between the three approaches the choice lies with the relevance that surnames must have the biological relationship. Birth out of wedlock should not be considered as a shame. Besides there is the need for identification and acceptance of a biological relationship. On the other hand, it may be argued that the child's surname should not be such as to attribute to him the ill-fame of either of his parents. The choice seems to be particularly difficult taking into consideration that in quite a few instances the contact and attitudes of the parents to each other would be far from appropriate.

The common features of the three approaches is the weight that they attribute to the position of the father in relation to the child's surname and the minimum protection of the mother against having the identity of her paramour revealed through the child's surname. Starting from this point the fundamental recommendation is for the surname of the child to be changeable and be attributed to him by a declaration signed by both parents simultaneously or subsequent to the act of acknowledgement. If such declaration is not provided the child will receive the father's surname. The mother will have the right to petition to the court against such change or to ask for her surname to be retained besides that of the father.

NATIONALITY AND CITIZENSHIP

The international instruments protecting the Nationality of the child as stated by Saario[1] are as follows:

1. Article 15 of the Universal Declaration of Human Rights proclaims that :

   (a) "Everyone has a right to a nationality"

   (b) "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality".

2. The Declaration of the Rights of the Child adopted on 20 November 1959 by the General Assembly of the United Nations in principle 3 provides that : "The child shall be entitled from his birth ... to a nationality".

3. The Convention on the Reduction of Statelessness adopted by the Conference on Statelessness held in New York on 28 August 1961 under the auspices of the United Nations provides inter alia: "Article 1. A contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless ...". Article 4. A contracting State shall grant its nationality to a person, not born in the territory of a contracting State, who would otherwise be stateless, if the nationality of his parents at the time of the person's birth was that of that State ...".

The child of a marriage may acquire U.K. citizenship[2] by birth in the U.K. or a Colony since 1948 (lex soli)[3] by descent from a father who is a U.K. citizen at the date of the child's birth (lex sanguinis)[4] or by registration if the parent acquires U.K. citizenship.[5] In Greece the rule applicable is that of lex sanguinis so that the child normally acquires citizenship through descent from a Greek father. Nevertheless, acquisition of citizenship is possible by registration.[6]

Aside from citizenship through legitimate descent the child acquires citizenship by adoption. In Scotland, if the adopter, or in the case of a joint adoption, the male applicant is a citizen of the U.K. and colonies and the child is not, the latter acquires U.K. citizenship from the date of the adoption order.[7] Also in Greece if a Greek citizen adopts a minor of foreign origin the child becomes a Greek citizen from the date of the adoption order.[8]

A child in general under British law cannot trace citizenship by claiming descent from a mother who is a United Kingdom citizen. Frequently this may result in the child being stateless if born outside United Kingdom territory or colonies and unable to claim citizenship from the state of his father's origin. The probability of this is quite high given that most countries accord nationality only by the lex sanguinis.

However, although descent from a mother does not invoke citizenship for legitimate or illegitimate children, it bears harder on the second if the country of the child's birth or of the acknowledging parent refuses to grant its own citizenship or nationality on the basis of birth or acknowledgement. The English Law Commission refers to two remedies for children born to a mother who is a U.K. citizen and who wants to attribute her citizenship to her child. First by registration under Section 7(2) of the 1948 Act which permits the Home Secretary, at his discretion, to register any minor as a U.K. citizen "in special circumstances". Statelessness by illegitimacy has been treated as a factor in assessing the presence of "special circumstances". However, it is the practice of the Home Secretary to use this power when the mother is a U.K. citizen by birth (or adoption) and it is seldom exercised if she is a U.K. citizen by descent, or by registration or naturalization

unless it is evident that the child's future lies in the U.K. Second, in compliance with obligations under the United Nations Convention on the Reduction of Statelessness, the child born to a mother who is a U.K. citizen may also acquire citizenship by registration. To that effect Section 1 of the British Nationality (No.2) Act 1964 provides that application for registration as a U.K. citizen may be made by or on behalf of any such child who is and always has been stateless,[9] if born to a mother who was a U.K. citizen at the time of his birth.[10] As the English Law Commission observes registrations under this section are not common but unlike the previous case they are not dependent on the exercise of the Home Secretary's discretion and application is not restricted to the age of minority.[11]

In Greece, the natural child acquires citizenship either by his mother or by his father irrespective of the place of birth and acquisition of a nationality different from that parent. A natural child tracing descent from a mother of Greek nationality or one who has been voluntarily or "completely" judicially acknowledged by a father of Greek nationality automatically becomes a Greek national from the date of birth or from the date of acknowledgement.[12] Special provisions govern the resignation of Greek nationality by a natural child tracing descent from a Greek mother if that child acquires citizenship of another state by an act of acknowledgement.[13]

The solutions suggested in order to eliminate discrimination in this area largely accord to the existing law in Greece. The idea that E. Clive[14] puts forward is to enable the child to claim citizenship from either parent, as the New Zealand Citizenship Act of 1977 does presently. The same resolution is put into consideration by the English Law Commission in their Working Paper. Particularly for a

child born to a mother who is a U.K. citizen they see a strong argument ensuing for allowing that child to acquire British citizenship irrespective of any other nationality that he may acquire by reason of birth or acknowledgement.[15]

However, it would be against any principle of equality if such reform were carried out only in relation to the mother. Therefore, the Commission puts forward the need for recognition of citizenship if descent is established from a father who is a U.K. national, to avoid sexual discrimination.

Above all, however, what needs substantial consideration is the present distinction in the transmission of citizenship for children born within and outside wedlock. Such a distinction needs to be removed, although it is not entirely clear if this should be carried out to the extent of abolishing the dependent nationality of the child, born in wedlock, on his father. Such a development would increase the number of binationals and the problems of jurisdiction in family matters. On the other hand not to do so would create a discrimination against the wife and the child itself. Probably a fair solution would be to give weight to the jurisdiction of the domicile since it is the active aspect of inter-state relations in family matters and oblige the child to choose between his nationalities when attaining the age of majority.

DOMICILE (RESIDENCE) AND RELATED MATTERS

Undoubtedly the most problematic area is that of private international law, especially when domicile and nationality do not coincide. The perspectives vary, with Scotland giving considerable weight to jurisdiction based upon derivative domicile and with Greece hardly acknowledging the concept - being mainly concerned with the law of nationality. There is a fundamental difference between the two approaches since jurisdiction based upon domicile implies invocation of legal rules which have a daily application upon the life of the individual and the protection of a set of rules with which the individual himself chooses to live. The approach of nationality, on the other hand, though free from the fluidity of changes of domicile, and therefore more coherent and certain, nevertheless presents the problem of applying to the individual a set of rules with which he may have little connection.

By definition, a domicile is the place where the person has his legal home, by being primarily established there and to which whenever absent, he intends to return or, in the case of a minor, is assumed to belong. Domicile, therefore, may be distinguished in relation to persons who are sui juris and who can choose their own domicile and to persons who are alieni juris, this being determined by law and therefore imposed upon persons who are subject to the authority of a parent or guardian. We are concerned here only with the second case and for as long as the child is subject to parental control.

With the introduction of the Domicile and Matrimonial Proceedings Act 1973 a married woman is able to acquire a domicile independent of that of her husband.[1] In relation to a child incapable of having an independent domicile[2] the traditional rule is retained so that the child born in wedlock acquires that of his father.[3] Exceptionally for that child, if his parents are living apart,[4] clause 4(2) provides that the child's

domicile will be that of his mother if

(a) he then has his home with her and has no home with his father; or

(b) he has at any time had her domicile by virtue of paragraph (a) above and has not since had a home with his father.

The section has been criticised as discriminatory to the extent that it "preserves the pre-eminence of the father's domicile".[5] This criticism stands so far as domicile acquired from the mother comes upon facts related to the child's life and not to the fact of birth. However, this pre-eminence relates only to the acquisition of domicile, since the mother's once acquired, continues to determine the child's status after the mother's death unless the child acquires a home with his father.[6] Perhaps the provisions for domicile of legitimate children apply to adopted ones in accord with the principle embodied in sections 12(3) and 39(1) of the Adoption (Scotland) Act 1978. However, independent domicile is rarely a problem in adoption,[7] though later it may occur and in such cases the provisions of the Domicile and Matrimonial Proceedings Act 1973 apply. The Domicile and Matrimonial Proceedings Act 1973, despite the improvements that it made in relation to the domicile of a married woman and her legitimate child, left unaltered the rules applying to illegitimate children. Sub-section (4) of Section 4 provides that "Nothing in this section prejudices any existing rule of law as to the cases in which a child's domicile is regarded as being by dependence that of his mother." In this respect, of course, apart from preserving the distinction between legitimate and illegitimate children, in addition it omits to establish fair treatment for the parents of a child born out of wedlock on the basis of who has actual custody of the child.

In Greece the present law incorporates the principle of "legal residence" which, like domicile, presumes actual establishment of a person in an area and intention to stay there.[8] In relation then to persons who are alieni juris, aritcle 56 of the code adheres to the traditional principle

so that the non-emancipated minor has a residence, that of his father or guardian".[9] This residence continues after emancipation or majority unless the child acquires a new one.[10] As the result of an adoption order the child also acquires the residence[11] of the adopter and in the case of a joint adoption, that of the male applicant.[12] The illegitimate child on the other hand takes the residence of his mother "even when it has been acknowledged by the father".[13] Due to the fact that the wording of the article does not make any distinction between voluntary and judicial acknowledgement, it is submitted that the child retains the residence of the mother irrespective of the kind of acknowledgement and irrespective of whether she has the care of him and/or is his "dative guardian".[14] An interesting provision affecting the actual but not the legal residence of the illegitimate child is provided by article 1538 of the Greek Civil Code. According to this the child who is voluntarily or completely judicially acknowledged may "cohabit" in the house of the acknowledged father. This right of the child has the same nature as that of a legitimate child, subject to the restriction that if at the time of the voluntary (or judicial) acknowledgement the father was married, the child may cohabit in the matrimonial home only if the wife of the husband consents[15] ad hoc.[16] The expediency of the right to cohabit has been criticized as to its very existence, probably because no woman will accept such a child in the house.[17] However, latter proponents of the rule comment in favour of the provision as it stands because without putting the interests of the parties to any risk it opens the way to the paternal household.[18] A similar right is probably recognised in Scotland for the natural child though such an offer by the father can no longer be made to meet a claim to aliment. Normally, the child will live in the paternal household as a result of a custody or care order, or as a result of an agreement between the parents.

Various alternative solutions have been suggested to the problem of the dependent domicile/ legal residence of children. Clive[19] referring to the Domicile and Matrimonial Proceedings Bill and then Act 1973 envisages as a reasonably practical and less discriminatory solution, letting the domicile of a pupil child follow that of the mother in all cases with an exception, the converse of that of the Act, when the parents are living apart and the child has or has had his home with the father. In his article on aspects of illegitimacy he generalizes the concept so that domicile would follow the residence of the child and be that of theparent with whom the child has, or last had, his home until old enough to acquire an independent domicile.[20] A similar concept is adopted by the Gazi Committee for Greece. "The minor subjected to 'parental care' has his residence as that of his parents or of the parent who alone exercises parental care (over the child). If both parents exercise parental care and they do not have the same residence, the minor has his residence as that of the parent with whom he lives. Minors subject to tutorship or incapacitated persons have as their residence that of their tutor".[21] The Report on the Quebec Civil Code probably provides the median solution in relation to the above propositions. Article 63 of the Draft provides as follows :

"A minor is domiciled with his parents or with his tutor."

"A minor whose custody has been the subject of a judicial decision is domiciled with the person who has custody of him".

"When no judicial decision has been tendered with respect to custody, and the minor's parents have no common domicile, the minor is domiciled with the person with whom he habitually resides".

According to article 353 of the Draft, parental authority is exercised ex officio by both parents so that domicile derivative of tutorship may occur only rarely. However, if a tutor is appointed, since he will have custody, it is thought to be correct for it to be from him that the

child derives his domicile.[22] The second paragraph regulates the domicile of the child if the parents live apart as a result of divorce or separation a mensa et thoro and the child becomes the object of a court decision.[23] The third paragraph regulates the child's residence on de facto separation or acquisition of separate domicile by the parents on account of his habitual residence with either parent.[24] A similar formula is currently practised in Germany with the exception that the non-marital child has the residence of the mother, as she will exercise the parental authority by power of law. Occasionally there may be a change to that of the father if he is substituted for the mother in parental authority.[25]

On the basis of the above discussion the following major approaches may be distinguished:

(a) Domicile emerging from the act of birth and

(b) regulated and changeable domicile. However, before making any choice between the two, it may be necessary to see what implications domicile and legal residence may have for the child. For Scotland, domicile has significance in choice of law, where the lex patriae governs. Thus section 1(1)(a) of the Legitimation (Scotland) Act 1968 attributes legitimacy to the spouses common child if the father at the date of marriage was domiciled in Scotland. Also domicile empowers the person to apply for a national adoption order.[26] In addition, the status of the child[27] and custody matters[28] will be considered according to the domicile of the parents.

For Greece, on the other hand, legal residence has less important implications. Legitimacy is regulated by the law of the husband's nationality[29] and the relations between parent and child by the law of their common nationality and, if different, by the law of the father's

nationality at the child's birth. On the father's death the relations are regulated by the law of the last common nationality of the mother and the child and if different, by the law of the mother's nationality at father's death.[30] With regard to the illegitimate child and his mother the relations are regulated by the law of their common nationality and, if different, by the law of the mother's nationality at the child's birth.[31] Similarly, the relations with the natural father are regulated by the law of the father's nationality at the child's birth[32] but relations concerning the parents by the law of mother's nationality at the child's birth.[33] Also legitimation is governed by the law of the father's nationality.[34] For the care of the child also domicile is immaterial, everything being governed by the law of nationality.[35] Domicile and in its absence, temporary residence, has significance only for a stateless child[36] and probably in the case of binational persons if neither of the nationalities is Greek[37] since it indicates the jurisdiction with which the child is more connected and therefore the applicable law.

Due to the fundamental differences in the two systems it may be appropriate for each of them to be given a different treatment.

For Scots law questions related to the establishment of the parent-child relationship may be answered on account of the parent's domicile. Thus a child born to parents either of whom or both are domiciled in Scotland may enjoy the right to a complete relationship with both parents. This is to say that a Scotsman who fathered a child born in a foreign country where the mother is a foreigner as well would have the right to recognise his child and from that recognition would create rights related to Scotland. The same must apply in the case that the mother is domiciled in Scotland. Also a complete relationship should be presumed to exist in relation to a parent not domiciled in Scotland who acknowledged the child according to Scots Law or according to his national law, if that law recognises such

a relationship for persons born out of wedlock. A similar principle must apply if the parents, at least one of whom is domiciled in Scotland entered into a valid marriage.

For Greek law, questions concerning the creation of the parent-child relationship are included among the matters considered by the Gazi Committee. The Committee leaves unaltered the provisions of articles 19-21 of the Code on illegitimacy and for legitimacy and legitimation makes the following recommendations. Legitimacy and legitimation with marriage are governed by the law governing the conjugal relationship. For a child born after the dissolution of marriage his legitimacy lies with the law governing the conjugal relationship at the time of its dissolution. The law governing the conjugal relationship governs rights and duties between parents and child. On the death of either parent the law of the nationality of the surviving spouse is applicable, but if the law governing the relation until then was that of the habitual residence of the couple, and the surviving spouse and the child continue to reside there, this law should continue to apply.[38] On termination of the marital relationship or judicial separation, the law applicable is that which should be applied if "marital cohabitation" was still existing.

For a non-marital child the only recommendation made concerns the legitimation of the child by a decree of an authority whether judicial or administrative. Thus article 6(3) of the Bill to reform article 22 of the Greek Civil Code provides that such legitimation would be governed by the law of the father's nationality. There is an unjustifiable conservatism in this provision as well as in the preservation of the Civil Code provisions in respect of the acknowledgement of a non-marital child. Moreover, it contrasts with the stipulations of article 5 of the Bill (to reform article 18 of the Greek Civil Code) which recognises as

applicable the law governing the marital relationship, which may be different to that of nationality. It may appear necessary, therefore, to provide for such an act to be governed either by the law of the child's domicile at birth or his nationality, if recognising such relationships, because the establishment of the relationship concerns the child's interest most.

Turning now to the administration of the relationship which refers to matters such as the custody of the child, access, the aliment due, and other aspects concerning the daily life of the child, the choice must be between the law applied to the acquisition of the relationship and that of the child's residence. The second presents the decisive advantage in that it invokes upon the child the set of rules with whom the child's life is more connected. Therefore, it is preferred to the first.

In respect of the above observations, the formula to be adopted for the child's domicile in Scotland and for his legal residence in Greece must be as follows:

(a) For a child of the marriage the family's domicile would determine that of the child and the applicable law. If the child is subject to tutorship he acquires the domicile of his tutor subject to the exception that if the order is defined to be of a short period, or the circumstances indicate so, the change in the child's residence must be treated as a temporary one which leaves unaffected the child's domicile and the applicable law. The proposition to retain as the domicile of origin that of the mother, despite its solid advantages in the context of certainty of maternity, of applying the same rule to legitimate and illegitimate children, of her usually retaining custody after the dissolution of marriage,[39] has the disadvantage of introducing sexual inequality and also, in a number of instances, it

may be different to that of the rest of the family. For instance, the family as a whole may reside in country X and the mother or the father due to his work acquires a different domicile in country Z. It is not necessary to change the law governing the family relationship as long as the family exists as a unit by reason that the child habitually resides with the parent in country Z.

(b) A child who is a subject of custody order, whether born in wedlock or out of wedlock must acquire the domicile of the parent who has custody of him.

(c) A child who is not the subject of a custody order, whether born in wedlock or out of wedlock must have, as domicile, the common domicile of his parents. If the parents do not have a common domicile the child will acquire the domicile of the parent which can be presumed as his habitual residence on account of express indications showing a stronger connection with the domicile of that parent.

## GUARDIANSHIP AND CUSTODY*

This area of the law has been marked by substantial changes affecting both children of the marriage and adopted children with the recent tendency to equalize the rights of the parents over their children. Nevertheless, in relation to illegitimate children, it has been the stopping point of the illegitimate child's march towards a broader legal relationship with his father. As a rule such rights are retained for the mother, she being considered the appropriate person to care for the child. But where she turns out to be unfit, the care of the child is not handed by power of law to the natural father. Normally control and care over the child are instead entrusted to a third party. It may be helpful, therefore to give a brief description of the law that now governs legitimacy and adoption on guardianship, custody and related matters in each country and then to consider the possible alternatives that may be suggested in relation to illegitimate children.

### A. LEGITIMACY AND LEGITIMATION

#### I. Legal provisions

Apart from Common law, the main Scottish statutory provisions relating to guardianship and custody are now in the Conjugal Rights (Scotland) Amendment Act 1861, the Guardianship of Infants Acts 1886 and 1925 as amended by the Guardianship Act 1973. Also relevant are the Matrimonial Proceedings (Children) Act 1939, the Custody of Children (Scotland) Act 1939, and the Children's Act 1975.

In Greece the relevant provisions are incorporated in the Civil Code.

* Here guardianship and custody are examined in relation to the parents. The rights of relative or other third parties to claim custody is seen only incidentally in its relation to the rights of the parents.

Articles 1500 to 1529 of title eleven deal with patria potestas for children subject to paternal authority, and articles 1589 to 1665 to title fourteen and articles 1666 to 1685 of title fifteen with the guardianship of children. The former deals with the tutorship of children who are not subject to patria potestas while the latter deals with the curatory of emancipated children.[1]

## II. Parental rights over the child

The concepts of guardianship and custody constitute the parental rights and powers over the child which are distinguishable as two basic kinds;

(a) parental rights aiming at directing and guiding the persons of children under majority and,

(b) the right of administration of the child's legal affairs and his property.

Acts of the parent falling within the former category are usually termed those concerning legal custody of the child while acts falling within the latter are regarded as acts of his office as guardian. If the parents are cohabiting and parental powers have not become the subject of a judicial order, the parent is both the guardian and custodian of his child under age. In Scotland, guardianship may then be either tutory in respect of a pupil child or curatory in respect of a minor child. In Greece the same child which is subject to parental authority is subject to the patria potestas of the father or the guardianship of the mother. An emancipated minor on the other hand is subject to the curatory of the father and under certain circumstances also of the mother.[2] Nevertheless guardianship, exercised by the parent, affects custody unless the latter has been regulated by a court order. Parental authority, however, in either country has a different confrontation, with Greece adhering to the concept of patria potestas which gives pre-eminent rights to the father and with Scotland giving

equal rights to both parents. The bill drafted by the Gazi Committee to reform the civil code aims to attribute equal rights to Greek parents and therefore it will be discussed along with the provisions of Scots law.

## III. Patria Potestas

The concept in its present form is the remnant of the absolute power of the father under the Roman Law family system to administer and direct his family affairs. It used to be a recognised right of the father under the common law in Scotland[3] and it is still an authority exercised by the father of a legitimate child in Greece.[4] It includes a pre-eminent right of the father to custody of his child under age and the authority to regulate the child's upbringing and discipline.[5] In this respect it includes the legal cutody of the child in the sense that the father has the power to regulate the day to day life of the child, its residence and its upbringing.[6]

In this authority the father may be substituted by the mother if he is temporarily unable to perform his duties[7] and it may be diminished or lost in the following instances:

(a) When the parent disregards or transgresses his rights deriving from patria potestas in respect of the day to day care of the child or maladministers the child's property. Upon the request of the mother or the nearest relative, or the public prosecutor, the court may take any appropriate measure to restrict the power of the father, i.e. to appoint a third party to represent the child or to entrust to him its day to day care, or to appoint a tutor to administer the child's property.[8]

(b) The father forfeits patria potestas if he has been convicted with at least one months imprisonment for a crime against the life,

health or morals of the child.[9] However, the same will occur on the father's death, or presumed death, or the emancipation or majority of the child.[10] The mother substitutes for the father if he is unable to perform his duties, although if she is unable to fulfill this role the child is submitted to the authority of a guardian.[11] Also if patria potestas is terminated while the child is still subject to parental authority, it is submitted to guardianship, though in this case the mother has the ex officio right to act as guardian of the child.[12] A guardian nevertheless may be appointed in the will of the father who exercised patria potestas until his death if there is no mother or the mother cannot act as the guardian of the child.[12a] The mother may also appoint a guardian in her will if she either exercised parental rights as the guardian of the child or substituted the father in patria potestas until her death.[12b] Appointment made by either parent is cancelled if the father regains patria potestas or the mother the legal custody of the child.[13]

## IV Custody

Within parental rights and duties is included the custody of the child. As regards Scots Law Section 10(1) of the Guardianship Act 1973 affects custody in the sense that it places the parents as joint guardians of the child and gives them equal rights to custody. In Greece under patria potestas the father retains a pre-eminent right to custody. However, custody is concerned with control of the physical person of the child[14] and must be distinguished from tutorship or curatorship of the parent or guardian which, in both systems, is more concerned with the legal representation of the person of the child. Both concepts are included in the broad category of parental duties, but

may be distinguished and exercised by different persons. As a rule, however, custody does not affect tutorship or curatorship which may still be exercised by a parent not having the custody of his child.[15]

As pointed out, custody is concerned with the day to day life of the child.[16] As such, therefore, it regulates the residence[17] of the child in the sense that the parent who has custody may have the child living with him[18] or if entrusted to someone else reclaim it at any time.[19] It also imposes on the parent the obligation and discretionary power to guide and direct the child's upbringing with regard to its physical and moral welfare,[20] its education[21] and the application of appropriate rehabilitative measures.[22] A parent without custody is normally entitled to access to his child as ordered by the court.[23] In exceptional circumstances this may be removed.

V. Parents under equal rights

In Scotland the Guardianship Act 1973 repealed the common law right of the father to have patria potestas of his child and placed both parents jointly and severally as guardians of the child. The mother until then had no guardianship rights during the father's lifetime. On the father's death, she became the tutor of her pupil child, but not curator of her minor child which can contract alone. In the absence of court proceedings the father of a legitimate child also had a pre-eminent right to custody although this right has been considerably restricted by section 1 of the Guardianship of Infants Act 1925, putting the welfare of the child as the first and paramount consideration. Certain statutory provisions incorporated in the Guardianship of Infants Acts 1886 and 1925 improved the position of the mother, but substantial changes came only with the enactment of the Guardianship Act 1973.

The clause adopted in section 10(1) of the 1973 Act provides that "In relation to a pupil or minor, and to the administration of any property belonging to, or held in trust for, a pupil or minor, or the application of income of any such property, a mother shall have the same rights and authority as the law allows to a father (and shall accordingly hold the office of tutor to a pupil, or as the case may be, curator to a minor) and the rights and authority of a mother and father shall be equal and be exercisable by either without the other." According to subsection (2) of the same section a prenuptial agreement to give up any of those rights is unenforceable.[24] However, an antenuptial agreement may hold for a child of theirs regulating the administration of their rights and powers in a separation, but it is subject to the discretion of the court which may decide not to give effect to it if it sees that it will not be for the benefit of the child. Disagreements between the parents may be referred to the court as long as these concern the child's welfare and it may make such an order regarding the matter as it thinks proper.[24a] The power of the court in this case does not extend to making any order regarding the custody of the child or the right of access to him by either parent.[24b] Orders made by the court modifying parental rights may be varied or discharged on the application of either parent, or guardian[25] or a person having the custody of the child.[25a] The Act, however, did not change the position of the minor mother to represent her child. She is still subject to the curatorship of her husband and her rights are suspended until she attains majority.[26]

The Gazi Committee, on the other hand, propose to repeal the patria potestas provisions of the Greek Civil Code and replace them with the concept of "parental care" (goniki merimna). Thus the clause adopted in article 53 of the Bill[27] reads as follows :

"The care of the non-emancipated child under the age of majority is the duty and right of the father and the mother, exercisable jointly by them (goniki merimna). On parental disagreement, and as long as the interest of the child calls for a decision to be taken, the court decides."

"If the parent is unable to exercise parental care, either because of factual reasons or because he is incapacitated or has a limited capacity to transact, the parental care is exercised by the other parent. The parent who is not of full age has the care of the person of the child (custody)."

Article 54[28] defines the context of parental care as including "the care of the person (custody), the administration of property and the representation of the child". Article 58[29] defines the care of the person of the child to include "the upbringing, supervision and education" of the child, "regulation of its residence and the application, if appropriate, of the necessary rehabilitative measures". Nevertheless Article 55 [30] regulates the representation of the child "to be jointly by both parents whether judicially or extra-judicially in respect to any matter or transaction concerning the person or the property of the child". Either of the parents represent the child alone in "ordinary actions" or in actions of "ordinary administration" or "urgent" as well as "in receiving a declaration of will directed to the child".

Although the general rule adopted with the clause in statute 10(1) of the Guardianship Act 1973 that the mother and father have equal rights is acceptable, it is submitted that it may be proper to provide that this rule could be varied by the court either on an independent application or in a consistorial action and that if the parties were

living apart, in the absence of a specific court order, guardianship might be given to the parent entitled to custody, or if both were entitled to custody, to the one with whom the child had, or last had, his home.[31] Furthermore, it has been suggested that guardianship acquired under these rules by a parent or parents would continue, in the absence of a court order altering the position, even if the child were placed with a third party. Once lost however by a parent under those rules it would not revive automatically on the death of the other parent. Guardianship would be subject to the power of the court on the request of the parent or a third party and may be exercisable on behalf of either of them.[32]

What gave rise to these recommendations was the fact that the Act refrains from regulating tutorship or curatorship which may produce some unsatisfactory situations if custody becomes the subject of a court order.[32a] Normally the parent who lost custody retains tutorship or curatorship unless he is declared unfit under Section 7 of the Guardianship of Infants Act 1886, in which case, upon the death of the other parent, the survivor is not entitled to a right to the child's custody or guardianship. Similar unsatisfactory situations arise today in Greece from the rules of patria potestas if custody has been awarded to the mother in so far as the father's rights to represent the child and administer his property have not been removed by the court according to Articles 1524 and 1525. The Bill prepared by the Gazi Committee distinguishes between cohabiting and non-cohabiting parents and suggests regulation of tutorship or curatorship in circumstances when the custody of the child becomes the subject of a court order. However, Article 55, if read in conjunction with Article 57(2) and 56(4) and as implied a contrario from the exception in Article 55(2), enunciates joint administration by the parents in an

informal separation unless it concerns an act for which the parent is entitled to represent the child alone.[33] Protection of the child is provided with the general rules of article 1524 and 1525 of the Greek civil code as reformed by articles 76 and 77 of the Bill.[34] However, according to paragraph (2) of article 55, in case the parents cease to cohabit, in the absence of court proceedings regulating the child's custody, the parent with whom the child resides is entitled to represent it in an action for aliment against the other parent.

It is not entirely clear if, when the question of guardianship arises on de facto responsibility, this must produce pre-eminent legal rights in favour of the parent who is de facto custodian against the other parent. For certain, if such a situation lasts for a long time, it will produce a gradual decrease in the significance of the other parent's rights. If at the very end, when parental rights become the subject of a court order the de facto care by one parent has created a desirable and happy situation, this ultimately may lead the court to confine parental rights exclusively to that parent. However, if the de facto care of the parent results in exclusive rights being accorded to him by law the following disadvantages can be observed :

(a) There may be some uncertainty and confusion over the administration of the child's affairs since it is difficult in such a transitional period to set rigid criteria about the right of a parent to guardianship. Therefore, changes in the de facto care of the child, either short or long term, which are common between separated parents will result in uncertainty about the right of the parent and the validity of his action.

(b) The period for one of the parents will be transitional in terms of its competence to care for the child. One of them may have

left the household and be seeking accomodation to resettle himself. Therefore, he is in an inferior position to care for the child and normally, if he is a concerned parent, he will refrain from involving the child in such troubles unless there are special reasons. By proceeding then to accord legitimate exclusive parental rights to the other parent under such circumstances may cause undue alienation of the first parent and damage to the child's welfare.

(c) The conditions are premature in assessing how the child's welfare can be benefitted by either parent. Both, though separated, may continue to play an important role in his life. On the other hand, giving exclusive rights to one of them lessens the contact of the child with the other and may result in a substantial alienation between the parent and the child. Additionally, such a solution biases the rights of the parent without care, in the sense that it prepares the ground for the custodian parent to play an important role in the child's life, creating a situation which may be regarded by the court as custody proper and not to be disturbed. It does not appear that leaving the matter unregulated, at least for this period, will result in any disadvantage to the child's welfare since normally it will follow the parent who offers the best facilities and is more concerned. There is the danger, of course, that parental cooperation in de facto unregulated custody reaches deadlock with damaging consequences to the interests of the child. But, on the other hand, legitimation of de facto care may be abused by the parent who pressures the other for concessions in divorce matters.

(d) From the above considerations it can be argued that some speculation for the time being will benefit the welfare of the

child. The parents will reorganise their lives, and if they cannot reach an agreement on the custody of the child, the court will have the option to choose the one who is the best prospect for the child. Besides, if this time is treated as a trial period, the parents may find a solution which suits them better - one of them undertaking the administration of the child's affairs and the other the day to day care; or one exclusively having both. A similar arrangement may be considered by the court if it thinks that the welfare of the child will be better served if one parent has the administration and the other the care.

## VI Parental rights in court proceedings

Custody and guardianship ultimately may need special regulation in prolonged de facto separation or in judicial separation, divorce or nullity of marriage. The alternatives to be considered in such cases are either to treat administration of the child's property, its legal representation and care of its person as interlocking matters which cannot therefore be divided between the parents or to treat them as divisible on account of the welfare of the child.

The basis of the jurisdiction of the Scottish court on custody is provided in Section 9 of the Conjugal Rights (Scotland) Amendment Act 1861. Thus in an action for separation a mensa et thoro or for a divorce or for 'nullity and adherence' the court may from time to time made such interim orders and may in the final decree , and in certain cases on dismissal or absolvitor "make such provision as it shall deem just and proper, with respect to the custody, maintenance, and education of any pupil children of the marriage to which such action relates".[35] The power of the court has been extended to children

below 16[36] and to children not of the marriage - one who is either the illegitimate child of the spouse or the child of one of the spouses, whether legitimate or illegitimate, accepted into the family.[37] The Matrimonial Proceedings (Children) Act 1958 provides that in such actions the court must not grant decree (i.e. must not make the order sought by the pursuer) unless and until it is satisfied that arrangements have been made which are satisfactory or are at least the best which can be devised under the circumstances, or that it is impracticable for the spouses[38] in the litigation to make such arrangements. The Guardianship of Infants Act of 1886 further gives the court power in pronouncing a decree of separation or divorce to declare the parent "unfit to have custody" of the children of marriage if such a decree is made by reason of his misconduct.[39]

The court also has statutory jurisdiction on the application of either parent to deal with questions of custody and access arising independently of actions of divorce, nullity of marriage or separation in respect of a child under 16.[40] Also one of the parents may be awarded custody of and aliment for the child even when he or she lives with the other parent but the aliment order is not enforceable during such cohabitation.[40a]

The Guardianship of Infants Act 1925, which also applies in court proceedings on custody, enshrines the guiding principle which is now applied in all custody disputes. In section 1 it is provided that "Where in any proceedings before any court ... the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, ... is the question, the court in deciding the question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at

common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father."[41] The Guardianship Act 1973, on the other hand, by altering the background against which the court exercises its powers, provides the option for different solutions since both parents have equal rights to custody and guardianship.

However, such power is recognised so far only in relation to the power of the court to grant a custody order which may entrust the child to either parent and recall or vary the order either ex proprio motu or on the request of a person concerned.[42] Tutorship or curatorship on the other hand remained unaffected unless the parent is declared "unfit" to have custody.[43] As a rule custody matters are resolved on account of the welfare of the child which is of paramount consideration. Accordingly though custody is commonly granted to the innocent party, it may be granted to a parent found guilty for desertion or adultery if he or she can better serve the welfare of the child. If the child is in its formative years it is a relevant factor but not conclusive. Thus a pupil child may not be entrusted to his mother unless his welfare is equally well secured with her as with the father.

In relation to Greece, Article 735 of the Code of Civil Procedure empowers the court if the spouses "cease cohabitation"[44] to order any temporary measure that it thinks to be appropriate in the circumstances with respect to the "personal relations between the parents and children", i.e. to regulate the custody of the children and access by their parents. However, such arrangement is mainly a security measure whilst custody in its very nature is regulated by the civil code after a petition for divorce or annulment of marriage is brought before the court

of competent jurisdiction. Thus, according to article 1506 of the Greek Civil Code, "During the judicial proceedings on divorce or annulment of marriage the court may appoint the parent to whom provisional custody of the child belongs".[45] In the absence of such proceedings it is argued that the court cannot enter their questions of custody irrespective of whether the parents still cohabit or cease to do so. The factors then that may be considered for the custody of the child is that the security measures of article 735 of the Code of Civil Procedure differ to those relative to divorce or separation and largely favour the father. Under patria potestas he has a superior right which must be taken into consideration by the court. Thus it is suggested that the father's right to custody may be taken away if constituting an abuse of right (for instance because the father removed a child of tender years of age from the mother who can satisfactorily care for it)[46] or in accordance with the provisions of Article 1524.[47] These recommendations are of ambivalent value because unless the father is considered unfit to care for the child, the court reluctantly will remove his right even though the mother can better serve the child's welfare. To remedy this inconsistency it is submitted that Article 1506 should apply by analogy for any form of separation, in order to achieve uniformity in legal reasoning.[48] In this respect the decision concerning the child's custody must be decided by the court but its power is limited since it has the option to choose only between the parents.[49]

When a divorce order[50] (or an order anulling the marriage)[51] is pronounced and both parents are alive, according to Article 1503 "the custody of the child belongs to the parent who had petitioned for the divorce if he is the innocent party. If the decree was pronounced on equal responsibility of the spouses the custody of the daughter and the son who is below his tenth year of age belongs to the mother, while

the custody of a son above the age of ten belongs to the father. The court may order otherwise if the interests of the child so require and may award custody to a third party. The decision may be altered in the light of posterior events."

The Bill prepared by the Gazi Committee radically alters the situation, first by proposing in Article 57 application of the regulations for divorce to separation in general and to annulment of marriage and, second, by proposing a major change in the provisions for custody in divorce. Article 56 of the Bill provides that "If a divorce order has been issued, while both parents are alive, parental care is regulated by the court according to most advantageous way to the child. The exercise of parental care may be commissioned to one of the parents, unless the interest of the child requires otherwise, especially as the custody of the child may be commissioned to one of the parents and the administration of his property to the other. The parent who is deprived of part or the whole of parental care has the right to be kept informed by the parent exercising parental care, and he may petition the court to cancel its decision only if the way that he fulfils his duties constitutes an abuse of right." The article places the welfare of the child of paramount consideration and treats the parents on equal bases. However, the important innovation which may be considered in relation to Scots law, is that the Bill submits tutorship and curatorship to welfare tests. Thus, the court may regulate them according to the best interests of the child. By placing them within the wide jurisdiction of the court in custody, the court will take care that the decision concerning the legal representation of the child will be taken by the parent or a third person who can act quickly and is concerned for the child's interest. Besides care will be taken that such decisions will be less affected by the disputes of the parents.

B. ADOPTED CHILDREN

According to the clear spirit of section 12(1) of the Adoption (Scotland) Act 1978, with the adoption order all parental rights relating to a child will rest with the adopters. Duties and liabilities of the natural parents or guardians in relation to custody and guardianship are extinguished and they vest with the adopters. Specifically section 12(3) provides that the adoption order will operate to extinguish - "(a) any parental right or duty relating to the child which immediately before the making of the order was vested in a person (not being one of the adopters) who was

(i) a parent of the child, or

(ii) a tutor, curator or other guardian of the child appointed by a deed or by the order of the court".

The status conferred on the child is that of legitimacy and therefore his custody and guardianship from then on is governed by the law applicable to legitimate children. However, a limitation to this rule is provided by section 12(4) (b) which states that "Nothing in subsection (3) (b) shall of itself terminate the appointment or function of any judicial factor loco tutoris or curator bonis appointed to administer the whole or any part of the child's estate".

In Greece, in accordance with Articles 1579 and 1580 of the Greek Civil Code the adopted child is deemed as the legitimate child of the adopter(s) even when a spouse adopts the natural child of the other spouse.[51a] Thus, article 1584 of the Greek Civil Code provides that with the adoption order the patria potestas of the natural father or the curatorship or guardianship, to which the child was subjected are replaced by the patria potestas of the adoptive parent and, n adoption by a woman, by her guardianship.[52] The article is among those due to be reformed by the Bill of the Gazi Committee which suggests the following arrangement :

'From the date of the adoption order the parental care of the natural parents the guardianship or curatorship of the child are replaced by the parental care of the adoptive parent(s). If the spouse adopts the child of the other spouse, the spouses have jointly parental care or curatorship of the child.[53] Custody and guardianship vested in a person by an adoption order are regulated by the rules applicable to legitimate children.[53a] The same rules will apply on divorce of the adoptive parents.[54] However, there is a major deviation in this rule in relation to the custody of the adoptive child. Namely while patria potestas, or guardianship (and after the reform parental care) do not revive in the person of the natural parent if the adopter(s) forfeit his (their) rights, the natural parents have the right to custody of the minor child.[55] In such cases the court has to appoint a tutor or curator of the child.[56] This provision is rather unfortunate taking into account the previous role of the natural parent as custodian of the child. Therefore, it would be preferable in such instances for the custody of the child to be subject to the discretion of the court, treating the natural parent as a third party claiming custody with a prior right among equally qualifying custodians.[57]

C. ILLEGITIMACY

In Scotland because the natural child is deemed filius nullius neither of the parents has any proper civil rights over the child. Neither does the father have patria potestas nor any right to administer the child's affairs,[58] nor does the mother.[59] Judicially the child is normally represented by a tutor ad litem appointed ad hoc.

Under the common law the father has no right to custody,[60] the mother being primarily the person entitled to have custody of her natural child.[61] The father might, when the child reached seven, have offered to take it

into his home to aliment it in natura and if this was refused, the mother lost her right to claim contribution from the father.[62] Statute has repealed this right of the father.[63] With the Illegitimate Children (Scotland) Act 1930 a substantial modification was introduced in respect of the mother's common law right to custody so that priority had to be given to the welfare of the child.[64] Specifically section 2 provides that the court may, on the application by the father or mother in any action of aliment "make such an order as it may think fit regarding the custody of the child" and probably the right of access thereto,[65] "having regard to the welfare of the child and to the conduct of the parents and to the wishes as well of the mother as of the father and may on the application of either parent recall or vary such an order."[66] Also by reference to the same welfare tests is exercised the court's power on divorce to regulate custody of an illegitimate child of the parties of the marriage or that of one party who has been accepted as one of the family.[66a]

In a similar fashion in Greece acknowledgement is immaterial to the legal representation of the natural child by his father. Any kind of recognition by the father does not confer on him right to patria potestas and the child is always subject to "dative guardianship".[67] The guardian is appointed by the court on the request of the nearest relatives or of a person having a lawful interest, or the public prosecutor "after having the opinion of the justice of peace".[68] In the office, the mother[69] or the acknowledged father[70], may be appointed.

According to Article 1663 the custody belongs to the mother who is entitled to take any decision concerning its day to day care. The court may order otherwise[71] taking into consideration the interests of the child.[72] The right of the mother is not in any way affected by the recognition of the child by his father since acknowledgement per se does not confer on him any rights to custody.[73] Either parent, not having custody of the

child is entitled to reasonable access as arranged by the court.[74]

The Gazi Committee in its Bill proposes a substantial change to the rights of the mother, while for the father it is thought appropriate to increase his rights in voluntary acknowledgement and reduce those recognised in the Civil Code for complete judicial acknowledgement. Specifically article 82(2) of the Bill gives the mother the right to "parental care" of her child,[75] and in this respect she has the right to custody and legal administration of the child's affairs. For the father who voluntarily acknowledged paternity, the Committee sees it as appropriate for him to have "parental care" but to exercise his rights only if the mother forfeited her rights, is unable to exercise them, or if "parental care" by the mother has stopped for any reason.[76] A further restriction imposed by the Bill deprives the father of any entitlement to the income of the child's property.[77] None of the rights deriving from "parental care" is recognised on behalf of a father for whom paternity has been fully judicially established.[78] In respect to access, the Committee considers it appropriate for the father who voluntarily acknowledged the child to have rights to personal contact with the child but not for the father for whom paternity has been the matter of a judicial dispute.[79]

In the light of these recommendations the following changes can be observed in the law of custody and guardianship for voluntarily acknowledged children taking into consideration the wider scheme of reform suggested by the Gazi Committee.

In the first place the right of the mother to custody is strengthened by giving her rights to represent her child as if it was born to her in lawful wedlock. The father has the same rights in an auxiliary form and may petition as a parent to the court for the mother to be deprived partly or as a whole of parental care. He automatically substitutes for her

in office or acquires cutody or represents the child either by reason of the mother's inability[80] or because the court decided so.[81] The court, nevertheless may appoint a third person if he is unfit.[82]

Secondly, as the Committee proposes, the rules applicable to children born in wedlock should govern custody and guardianship of natural children[83] with the exception that the council of relatives is formed by the justice of peace and two persons from the maternal line.[84] Thus either parent may appoint a guardian in his or her will or with a notarial deed provided that he or she had parental care until then. For a child for whom paternity has been judicially established, the right belongs only to the mother. However, no appointment can be made if there is a parent alive qualifying for parental care.[85] Also a parent having only custody of the child may appoint in his will, or with a notarial deed or a declaration before a justice of peace the person who may have custody after his death.[86] With failure of the parent to appoint a guardian, or the one appointed having to be excepted[87] or having resigned from office[88] the court, on the petition of the child's relatives (maternal) or of any person with a lawful interest, or the public prosecutor, may appoint a guardian for the child after hearing the council of relatives.[89] In urgent cases the court may appoint a temporary guardian.[90] The guardian appointed will have custody of the child[91] unless the parent had appointed a different person or the court has ordered otherwise, after hearing the council of relatives.[92] The guardian not having custody, as well as any relative of blood of the child up to the fourth degree, has the duty to watch over the upbringing of the child and to refer to the court or the council of relatives.[93]

Broadly speaking, in consequence to the proposal for abolishing the status of illegitimacy the father and mother should have prima facie

equal parental rights. Neither of the two jurisdictions have clearly attempted to take this step, though the proposals of the Gazi Committee in respect to the voluntary acknowledgement adequately approach this aim. In general, however, the proposals of the Committee present the following disadvantages. They give a superior right to the mother while parental care must be governed by the welfare of the child. Besides, by giving to the father an auxiliary right it fails to facilitate the cooperation of the parents in parental rights, i.e. in cohabitation or in instances where they can reach an agreement. Also this proposition is by itself discriminatory and prejudicial to the attitudes of the natural parents. The latter point, however, becomes more serious in relation to the suggestion of the Committee of complete exclusion of the father from any parental rights if paternity has been judicially established. As argued elsewhere in this study a dispute between the parents should not be anticipated as determining his future attitude towards the child. Doubts on paternity are expected and it is a duty of the law to facilitate their removal.

Accordingly the following changes may be considered for equalizing the position of children born out of wedlock to those born in wedlock in respect of custody and guardianship by parents of their children as if they were born to them in lawful wedlock. The clause embodied in section 10(1) of the Guardianship Act 1973 should be extended to apply to children born out of wedlock.[94] The same recommendation should be made in respect of the formula adopted in article 53 of the Greek Bill so as to apply to both classes of children. In consequence to this recommendation both parents would be prima facie jointly custodians and legal administrators of the child's affairs.[95] A parent who is not deprived of his parental rights would have the power to appoint a guardian for the child after his death who would have the obligation to cooperate with the surviving

parent. The guardian must have the power to contest the parental rights of the surviving parent and petition for their modification or regulation. The same right should be had by the parent against the appointed guardian.[96]

Differences between parents themselves or between parent and guardian must be referred to the court which should resolve the matter as presently is the law for married and not judicially separated parents. The degree and gravity of the disagreement between the parents must signify whether the court should proceed to a permanent decision on the aspect referred to it. Any decision should be taken on the basis of the child's welfare, i.e. from a point of view of whether the parent by his disagreement exposes the interests of the child to risk.

If the parents or guardians cannot reach agreement on the child's affairs or live apart or as a matter of fact cannot cooperate, the child's welfare may require,in a number of instances, the court to deprive the parent or guardian of guardianship rights. Presently such power is recognised to the Court of Session under common law by reason of positive misconduct of the parent in his parental duties. Similarly, the Magistrate's Court in Greece has the power to modify patria potestas (and with the Bill "parental care") on grounds of parental misconduct. Of course, to remove his right from the parent in the present case would be potentially a far reaching power because it might be necessary to do so without providing specifically pre-defined grounds and without testing behaviour of the parent in relation to them. However, such power ought to be exercised only if it were clearly in the child's interests.[97]

The courts presently have a wide power in relation to custody and the same discretion probably must be conferred on them in relation to

guardianship. This is to say that courts must have the power to decide for any aspect of parental rights. In relation to this suggestion the following alternatives may be considered : either to give weight to custody and even link administration of the child's affairs with custody[98] or to treat them as equal and divisible matters[99]. Though in practice, the first will normally occur,nevertheless, at least as a matter of policy, the second approach has to be adopted because it provides more options for active involvement of both parents and less risks of alienation.

With custody the court now will have the reverse of the task that they used to have for children born out of wedlock. They will be asked to remove or modify the right of either parent to have the day to day care of the child. The equality adopted in section 2 of the Illegitimate Children (Scotland) Act 1930 is a principle that must be preserved, though words like "having regard to ... the conduct and wishes" of the parents must not be regarded as determining the welfare of the child but as matters to be assessed only in considering what is important for the child. When a parent has to apply to the court for a custody order - which may be inevitable in a considerable number of cases-a fair solution may be to treat the parents as divorced. The law of divorce embodies solutions which appropriately satisfy the present needs. When the custody of the child has become the subject of a court order the situation must not be upset by the appointment of a guardian. The parent or guardian may contest the order, however, in changing circumstances, but the final decision should lie with the court which must decide on account of the child's welfare.

Access rights must be recognised to every parent or guardian where he is not granted custody as is the present law for legitimate children and

save for some exceptions, for illegitimate ones in Greek law. The parent or guardian should have a prima facie right to access unless the court decides to remove it.[100]

## ALIMENT IN PRIVATE AND PUBLIC LAW

In general, the obligation of aliment refers to the duty of a person to furnish to another, for his support, the means for living. This duty lies primarily with the family though the state, particularly this century, has assumed the obligation to supplement this support if inadequate and in a number of instances even to substitute for the family in its duties. The latter, termed as a public law obligation to aliment, appears in the fields of public assistance and social welfare in the form of benefits payable to the child of a family with an income below a certain level or in the form of subsidies to the earnings of the head of a household with children. Apart from those obligations which emerge in their own right a duty to provide aliment may be freely created, for example, by accepting a child of the family or by means of contracts, gifts or bequests.

### A. Private law obligation to aliment

Among the duties imposed upon the parents towards their offspring, probably the most fundamental, after care and protection, is the duty to maintain them until they become self-sustaining. In general this means supporting the child until it reaches a certain age, and uncer certain circumstances continuing to do so for a longer period of time. This mainly depends upon the situation of the parents and the aptitude of the child, e.g. if the child, because of its physical health or because it is still attending education or for other reasons is unable to support itself.

The obligation of the parents to aliment his child is a fundamental aspect of the legal provisions delegating the institutionalizing of children to within the family. In consequence it is one of the areas where the law discriminates against children born out of wedlock. The legal discrimination comes harder because of problems inherent in those situations

and the likely existence of responsibilities by the parents towards other alimentary creditors (children of marriage, wife, parents, etc). The legal family is in itself a financially independent unit where there is a de facto accumulation of wealth from which the child is maintained. The parents take their obligations for granted and the fulfilment of the child's needs to an extent comes as a natural consequence of this family structure. Without exaggeration if someone tries to break this financial dependency his behaviour will be considered by a majority of the parents to be offensive. Of course when the family breaks up normally the non-custodian parent to an extent withdraws from his duties, and it may become necessary to enforce his obligations. In illegitimacy there are some additional disadvantages apart from those already implied. Frequently disputes between the parents end with one or other of them refusing to pay his contribution. Also the lack of immediate contact, usually arising from living at a distance, is a factor contributing to irregularities in aliment as well as the fact that illegitimacy is usually associated with poverty and thus it is most likely that the immediate family of the parents will absorb most of the funds.

The number of problems involved has given rise to considerable criticism of the system, carried to the extent even of suggestions for the abolition of the private law obligation. The Scottish Law Commission,[1] which dealt with the matter recently, argues against such substantial change by reason that the arguments for its abolition point rather to pathological situations (divorce, separation, illegitimacy) the quantum of which is not of the degree to suggest the state stepping in and substituting for the parent in his duty; and that if the system were altered radically the cost to the tax payers would be substantial. Even the Finer Committee[2] which sharply criticized the system of private law anticipates its preservation and suggests changes in the methods according to which the duty should be fulfilled. In brief, the Committee proposes a system

whereby a relative, and not only the state, is liable to provide aliment, whether it is provided directly, or indirectly through reimbursement of an administrative authority. In this respect the obligation primarily remains with the relatives and what really changes is the method for providing support involving a shift from private law to public law techniques. Both works mentioned, along with others dealing with their recommendations, offer the most important and innovative considerations of the methods seeking to satisfy private law alimentary claims. No doubt the application of their recommendations would bring a new era in the matter. However, such a rich topic cannot appropriately be examined in the limited lines of an appendix. Thus it will be confined to reviewing briefly the appearance of an alimentary right in the person of the parent under the present status distinctions and what changes may be considered if such distinctions were to be removed.

a. In both countries for a legitimate relationship there is recognised a reciprocal alimentary claim between ascendants and descendants.[3] The nearest relatives are liable before the more remoter ones and the duty primarily lies with the descendants of the claimant.[4] As regards the ascendants, however, concerning children, the duty is imposed upon the parents,[5] the father being the one primarily responsible.[6] Failing the father, the responsibility falls upon the mother and other ascendants. However, the hierarchy differs in the sense that in Scots law the next liable are, first, the paternal grandfather, then the paternal grandmother until the range is exhausted, when the obligation starts for the maternal line in the same order.[7] In Greece though the paternal line has the first responsibility nevertheless equally close relatives must share the liability in proportions assessed according to their respective means.[8] Also, unlike Scots law, brothers and sisters under special circumstances are bound to aliment each other.[9] Under Scots law an adopted child is

placed as the legitimate descendant of the adopting parent.[10] Thus the order extinguishes any alimentary obligation owed to or by the child in respect of his natural relatives and creates a reciprocal obligation between the adopter and adoptee.[11] This affects any duty to pay or provide aliment, as well as any payment incidental to parental rights and duties in respect of any period occurring after the order.[12] The order, however, does not extinguish any duty arising under a deed or agreement which constitutes a trust or which expressly provides that it is not to be extinguished by an adoption order.[13] Under Greek law a reciprocal alimentary claim is created between the adopter and adoptee[14] but if the adopter fails in his duty he is substituted for by the natural parents and other relatives.[15]

b. Under the present law in Scotland parents are jointly and severally bound to support their illegitimate child according to their means and position and the whole circumstances of the case but a child is not reciprocally bound to support his parents.[16] Moreover, the grandparents have no such duty towards his child's illegitimate child and vice versa.[17] Under Greek law the mother and maternal relatives have a reciprocal duty towards the child similar to that owed to a legitimate child.[18] A similar reciprocal duty is recognised in respect of the father who has voluntarily acknowledged the child (or one who is so assimilated)[19] without this extending to further ascendants or descendants on either side.[20] The mother's duty, however, follows that of the father who is primarily responsible for maintaining the child.[21] In respect to a child whose paternity has been judicially recognised (simply) the duty owed by the father consists of a limited aliment according to the social position of the mother and the means of the father, which may vary before duties of the obligant towards his wife and legitimate child.[22]

c. The content, extent and duration of maintenance is also an area where discrimination appears to exist. While the parent is bound to aliment his legitimate child until it becomes legally and in fact capable of maintaining itself,[24] statute restricts the limit to 16 years of age in illegitimacy[25] unless the child undergoes full time education, and if need be throughout his life.[26] In Greece also the claim depends on whether the claimant can support himself[27] though the unmarried minor even with property is entitled to aliment if his income is not sufficient to maintain him.[28] For the illegitimate child the duty lasts until he attains the age of majority[29] unless because of a physical or mental handicap he cannot support himself.[30]

As a general rule, no obligation to aliment arises unless the alimentary creditor is in need: a person who can support himself at the appropriate level has no right to aliment from relatives. No major differences appear to exist as regards the extent and the content of the duty owed to a legitimate and illegitimate child between the two countries though both discriminate against the latter. A parent in Scots law has the duty to preserve his child from "want" which is a relative term to be interpreted in accordance with the social position of the parties.[31] In Greece the parents have the duty to provide aliment according to the social position of the child (Proportional Aliment).[32] In both countries the claim includes living expenses as well as expenses for upbringing and education, and may be readjusted in changes of circumstances. In Greece, however, the aliment may be reduced to the strictly necessary if the claimant has committed an offence against the obligant justifying disinheritance.[33]

With respect to the duty owed by the parents to an illegitimate child in Scotland as Walker points out "the amount which may be awarded as aliment depends on the means of the parties, the minimum being the amount of

support beyond want which must be accorded to an illegitimate child".[34] In Greek law a child for whom paternity has been judicially established, if unmarried,[35] is awarded aliment proportional to the social position of the mother and the means of the father,[36] including that necessary to live and the expenses of his upbringing and analogous to his social position education.[37] It may be varied in change of circumstances[38] and be reduced to the strictly necessary if the child has committed an offence justifying disinheritance.[39]

B. Public law obligation to aliment

As said earlier various sums are payable by each country, either to complement or even substitute for the private law obligation to aliment. A number of arguments have been adduced for such in respect of children and the family in general, giving due attention to the employment factor, the social welfare and the participation of society in the upbringing of children. It has been considered that family benefits, where children are concerned, guarantee a reasonable subsistance income for all children - an object that cannot be secured by wages, as these do not take into account the family size to the extent that the public law does in terms of the qualifications of the worker. Probable dangers arising by permitting benefits to be equal to or to exceed earnings from work where the claimant is unemployed or disabled, have to be borne since allowances for children have to remain alike during earning and non-earning periods. The provision of child benefits is conducive to a higher birth rate. Because they are mainly financed by general taxation, the child's support becomes a community matter and thus increases social awareness and concern for his welfare.

a. Scotland

Non-Contributory benefits in respect of the child.

i. Child Benefits : This is payable to the person responsible for the child (the custodian or the person liable for the child's support at a rate exceeding the weekly rate of the benefit) for any child under 16 or under 19 undergoing education, at a fixed weekly rate. It is payable to the person with whom the child lives and in a two-parent family to the mother. That person has priority over the alimentary obligant. From the benefit are excluded children under the care of local authority, or when the claimant (or the spouse) is exempt from U.K. income tax or, he (or one of the child's parents) has not lived in U.K. more than 26 weeks in the 52 weeks preceding the claim. The claim is neither assignable nor taxable and cannot be used as security. An increase may be claimed in the special circumstances of single parent families (divorced, separated or single people).

ii. Family Income Supplement payable to the head of a family with a low income employed in full-time work, if the family has at least one dependent child. All children under 16 or over 16 undergoing secondary education may be included in the family provided that they live with the claimant. The supplements are one half of the amount of which the family's gross weekly income falls below the relevant prescribed amount. It applies equally to one or two parent families and increases according to the number of children.

iii. Supplementary Benefit: This is a non-contributory benefit payable to anyone over the age of 16 who is not in full-time employment and whose resources fall short of satisfying his needs. It frequently comes as a supplement to other state benefits but provision is made to avoid duplication with them. The benefit is payable in cash or (rarely) in kind to a single person or the head of a household in respect of his dependants. Special provisions apply to persons who refuse or neglect

to maintain themselves or their dependants and, when the benefit is paid to meet requirements for a spouse or child which some person is liable to discharge, the Commission may recover the cost of benefit from the person liable. The Commission also has the same right as a mother to bring an action for affiliation and aliment for a child born out of wedlock.

iv. National Insurance Benefits (Contributory) and other Benefits :

A number of other benefits, mostly related to the contributions of the parent during his work, are related to the child. These are the Widow's Benefit, the child's special allowance, Sickness Benefit, Unemployment Benefit, tax allowances and credits, rent rebates and allowances, rate rebates, educational maintenance allowances and benefits and allowances in respect to health or general welfare of children in families with low income.[40]

b. Greece

Because in Greece tasks of social security are divided between the state and a number of subsidiary foundations of certain professions, no details of the provisions concerning the benefits of its organization in respect of children will be offered. In general, however, the employer has the obligation to contribute in the salary of the employee such sums in respect of his children and make such contributions in respect of their health insurance as prescribed by law. From a special account (Distributive Account for Family Allowances of Employees, Legislative Decree 3868/1968) there is provided an allowance in respect of children of employees in cases that the employer does not have such responsibility. This varies according to the number of children and the number of days for which the claimant was engaged in work for the previous year. It is payable in respect of legitimate, legitimated, adopted, acknowledged and step children of a male claimant and the illegitimate

children of the female claimant.

Reference should also be made to the allowances aiming to protect families with four and more children and allowances payable to the third and subsequent child of the family as provided by the Legislative Decree 1153/1972 (The Government Gazette 76/25.5.72 Part A). The first is an annual sum payable to families with four children below the age of sixteen residing in Greece and living with at least one of their parents. The status of the children is irrelevant though adopted and step children do not qualify. The second consists of a monthly sum payable to the third and subsequent child of the family of the claimant whether legitimate, legitimated or acknowledged. The allowances are paid to the mother or, where she has lost the care of the children, to the father or guardian. Those are not means-tested benefits.[41]

C. Mother's Inlying Expenses

Under Scots law a court upon the claim of the mother may award in an action of affiliation and aliment any sum in the name of mother's inlying expenses having regard to the means and the position of the pursuer and the defender, and the whole circumstances of the case.[42] If the action is raised prior to the child's birth and is undefended or paternity is admitted the court may order a certain sum to be paid in advance which may be accorded to the actual expenses of the mother with a further order after confinement.[43] The action, however, cannot be raised more than three months prior to the specified date of delivery.[44]

If the mother has been working she is entitled to a maternity grant (upon her own contributions) to help with the general expenses of confinement. Also if she has paid sufficient contributions as an employed or self-employed person she is entitled to maternity allowance for 18 weeks

starting 11 weeks before the week the baby is expected provided that she stays out of work and this may be varied if she has an adult dependant or dependant child.[45] In the case of Freer v Taggart[46] it was held that the court in assessing inlying expenses should not take into account the mother's maternity grant but that the defender's earning capacity should be, as well as his past and present income.[47]

In Greek law the mother's similar claim against the father includes the expenses incidental to delivery an alimentary claim for 6 months starting 2 months prior to delivery,[48] and the moral duty imposed by article 359 of Penal Code to support and assist her during the pregnancy (Abandonmen of a pregnant woman).[49] The Gazi Committee made some substantial modifications to the civil law claim of the mother as described below.

In the first place the Committee preserves the duration of the alimentary claim with the possibility of it being extended up to one year under special circumstances.[50] Second, unlike the civil code where aliment was due irrespective of the means and the position of the mother,[51] in the Bill it is subject to the condition that "she cannot support herself".[52] In calculating the aliment the father's earning capacity is relevant[53]. His obligation, however, does not extinguish if the claim by the mother endangers his own maintenance.[54] In the claim there may be taken into account all living expenses: food, clothing, rent, heating, medical expenses,[55] as long as these are not included on the expenses incidental to delivery. The latter includes all actual expenses plus any additional expense incurred thereafter (for example medical treatment) related to the delivery.[56] The Gazi Committee preserved the claim of the mother in an auxiliary form so that she may claim all or part of the expenses not covered otherwise.[56a] The claim of the mother is subject to the establishment of paternity,[57] it may be connected as an

ancillary claim in an action for recognition of paternity[58] and prescribes in three years after confinement.[59] Further claims for damages are not precluded.

Also the mother who is employed in remunerative work and pays contributions is entitled to a maternity allowance and a maternity grant. These, as provided by the main social security organization in Greece the I.K.A. (Foundation of Social Security), include a lump sum for delivery expenses and a daily allowance payable for 42 days prior to and after delivery, subject to increases if she has dependnats.[60]

D. Basic changes to be considered

Although there is the tendency in public law to restrict the parties in the alimentary relationship, such may not be justified in respect to private law obligation without further deterioration of the links of the extended family. However, the Scottish Law Commission recommends that the obligation between grandparents and grandchildren should be repealed,[61] though it would be better for it to be retained as a further security. Between parent and children they recommend the duty to be the same for legitimate and illegitimate children[62] and the adoptive child to stand exclusively in the position of parent and legitimate child.[63] They also recommend the recognition of an alimentary claim for the mother of a natural child.[64] An ambivalent proposition made in respect to the right of the illegitimate child reads that the mere fact that a man has had sexual intercourse with the mother at the probable time of conception should not render him liable to aliment the child.[65] This needs to be extended as to make the right enforceable upon the establishing of paternity. If the right will be equal between all classes of children, a tendency expressed in public law benefits, and the remedy may be assimilated with remedies available to the child of divorced or separated parents.[66] This proposition is adopted by the Gazi Committee in

Greece which recommends that either parent is liable to aliment his/her child according to his means and position.[67] The measure of aliment should be the same for both classes of children and must be payable until the age of majority or beyond if this is expedient. Among other points that might be made, one of the most important is to emphasize that the remaining distinctions in public law should be removed altogether.

SUCCESSION

The area where discrimination has been particularly harsh for the child born out of wedlock is in succession. Though legitimate children were always entitled to the parent's estate and adopted children up to a certain extent, illegitimate children in general have suffered various restrictions in their succession rights.

As regards the adoptee under previous Scots Law while the child was treated for all purposes (custody, maintenance, guardianship) as though he was the child of the adopter born in lawful wedlock, such a child did not obtain any rights of succession from his adoptive parents nor did he lose any such rights by his natural parents. Also the adopter could not claim succession rights if he survived the child.[1] The arrangement was considered a major defect in the previous law of succession[2] and its remedy was one of the objectives of the MacKintosh Committee.[3] The Succession (Scotland) Act 1964, which is based upon the recommendations of the committee, treats the adoptee as the child of the adopter and not as the child of any other person for purposes relating to testate or intestate succession and the disposal of property by virtue of any inter vivos deed.[4] As Meston[5] explains "succession of a deceased person is to be construed as including the distribution of any property in consequence of his death and any claim to prior rights or legal rights out of his estate. In other words, an adopted child clearly has the right to legitim out of the estates of his adoptive parent or parents as well as his right to share in the free intestate estate and any other property being distributed on the adopter's death, as a lawful child of the adopter."[6]

As to the collateral succession, section 24(1) of the Succession (Scotland) Act which deals with computation of relationship provides that "an

adopted person shall be deemed to be related to any other person being the child or the adopted child of the adopter or (in the case of a joint adoption) of eitherof the adopters

(a) where he or she was adopted by two spouses jointly and that other person is the child or adopted child of both of them, as a brother or sister of whole blood;

(b) in any other case as a brother or sister of the half-blood."

The section creates a relationship of full blood between children who relate to both parents by blood and the jointly adopted child. Between the child of a previous marriage or previously adopted by one of the applicants and the jointly adopted child it creates the relationship of half blood. This provision has been criticised because of its inadequacy to create full blood relationships in some instances where children born out of wedlock are involved. Meston[7] refers to the rare case where a mother gives birth to twins and subsequently adopts them herself in order to get a clear birth certificate. These children remain half blood collaterals for the purpose of succession and in fact one may "wonder whether" the general policy of the adoption provisions is carried out in this case".

The Act also replaces the right of the natural parents to succeed to the child's estate with that of the adopted parent[8] and entitles children to represent their adoptive parents in successions in which the adopting parents would have been entitled to share by survival.[9]

In Greek law, by virtue of article 1579 of the Greek Civil Code the adopted child inherits from his adoptive parent, whereas the adopting parent has no right. Moreover the adopted child retains his rights of inheritance from his natural parents and natural parents can also inherit

from an already adopted child.[10] A blood relation, though, does not exist between the adoptee and relatives of the adopter,[11] and the child cannot represent the line of his adoptive parent in distribution of property of a deceased blood relative of the parental line or his wife.[12]

The nature of the right of the child to succeed to the adoptive parents' property includes full succession rights on intestacy and to the compulsory portion on testate succession. The parent, unless the child has so disposed of its property, cannot inherit from the child. This, however, is permitted as far as he preserves the compulsory portion of natural parents.[13] The reason for excluding reciprocity in succession according to Nouaros[14] is that, in principle, adoption must not procure material benefit to the adopter.

However, there are some problems to be considered in relation to the reciprocity retained by the succession law between the child and his natural family and the extent to which the child is deemed as the child of the adopter, for the purposes of succession law. In the first place this reciprocity cannot operate in a number of instances because of the confidential nature of adoption.[15] But even when this problem is overcome most probably the child will inherit nothing, taking into account the usual background of the natural family. On the contrary retaining the relationship unaffected encourages speculative placements probably not so much in terms of the succession rights of the natural parents as to their right to claim aliment. In general, however, such beneficial treatment of the natural parents is hardly justified - taking into account that in a considerable number of cases the child has been placed for adoption due to their failure to meet his needs. On the other hand placing the child in a complete relationship only with the adopter and recognising one sided succession rights again involves risk for the child and results in an injustice against the adopter. Normally a child

will not possess property but even if he does, it will be in a trust, or subject to some other arrangement and therefore, will remain unaffected by the order.[16] Even if there are such risks, there is the alternative of fostering or of a custody order to consider. Usually, if an adopted child has property, he must have acquired it while living with the adoptive family and this is a sound reason for keeping this property within this family. However, it does not seem that the adoptive parents will be benefitted by reciprocity because the property of the child will usually be a small donation which has been made to him. Also as a matter of fact, normally the child will survive the adoptive parents.

The alternative of retaining the rights with the natural family has been put forward by the MacKintosh Committee which, considering the issues involved, concluded that "it is not desirable from any point of view that a child should be regarded for succession or for any other purpose as being a child of two different families at one and the same time ... if the policy of adoption is to be successful, everything should be done to put the child in the position of a lawful child of the adopter and to cut all connection with the natural family". The same suggestion was made by various bodies concerned with the social aspects of adoption which found it to be essential for the child to be treated exclusively as the legitimate child of the adoptive family.[17] Similar suggestions have been frequently made in Greece and it may be essential to change the law for a complete integration of the child with the adoptive family.[17a] However, taking this step would only be a half-way solution and damaging to the child if the rights with the adoptive family were restricted between adopters and adoptee while at the same time it lost all rights deriving from the relationship with collaterals in the natural family. There may be some objections to allowing an adoptive child to inherit from a relative since the relative may know nothing about the adoption, or has been

hardly involved. However, because the preservation of rights with the natural family is objectionable, to limit the rights of the child between adopter and adoptee will be unfair since rights with natural collaterals have been extinguished and because there is the need for complete integration of the child within the adoptive family. It may therefore be appropriate to supply the child with the right to represent his adoptive parents in succession from further ascendents or collaterals as if he was their child born in wedlock.

For illegitimate children on the other hand provisions on their succession rights has been more striking. In Scotland, the harsh treatment of illegitimate children was nowhere more apparent that in the common law rules relating to succession. However, the common law rules were dealt with elsewhere in this study and here attention is given to the statutory changes introduced by the Succession(Scotland) Act 1964 and the reform needed.

In Section 2(1)(a) of the Act it is provided that "where an intestate is survived by children, they shall have right to the whole of the intestate estate". This in fact regulates the whole succession of legitimate descendants when read in conjunction with the scheme of representation contained in Section 5(1) and the distribution contained in Section 6. Although Section 4 of the Act, was initially directed to give the natural child a right of succession to his mother's free estate when the mother died intestate and without lawful issue,[18] after the Law Reform (Misc.Prov.) (Scotland) Act 1968 the child is placed in a position to share in the intestate free estate of both parents, on a basis of equality with legitimate children.[19] Section 10A also gives the right to the illegitimate child to legitim in the estate of both parents.[20]

The substantial difference that still exists between children born in wedlock and those born out of wedlock is that the latter cannot represent a predeceasing parent in a succession opening after the parent's death.[20a] His right to legitim is restricted to his immediate ascendant and therefore he cannot claim legitim from, or otherwise succeed on intestacy to, his grandparents' estate. His claim would depend wholly on representation under Section 11 but this right is conferred exclusively to a "lawful issue" of the parent.[21] But in the construction of deeds reference to persons of a particular degree of relationship are to be presumed to include those whose relationship is illegitimate. Thus, reference to children shall be taken to include illegitimate children unless an express contrary intention is shown. With collateral succession, the situation remained unchanged - namely the illegitimate relationship is not a relationship for succession purposes.[22] Rights exist between the parents and the child only, subject to representation of the child in the parent's estate by its "lawful issue".[23]

In Greek law testamentary and succession laws are complex and appear to have some fundamental differences from the common law rules. At the outset there is no free testation as long as the deceased is survived by descendants, parents or spouse. Provided that those relatives could inherit the estate of the deceased if he died intestate,[24] they are entitled to a compulsory portion. A will, however, excluding either of the above relatives cannot be invalidated for that reason but the relative excluded has the right to claim from the legatees half of what he would have received on intestacy.[25]

Article 1813 of the Greek Civil Code defines the "first order" of relatives, which excludes further ascendants or relatives. The rule embodied there provides that "as heirs in intestate succession" there

should be called in the "first order" the descendants of the deceased. The nearest of them excludes the more remote in the same stirpe. - In the position of a predeceased descendant at the date of the inheritance's inducement are called his descendants who through him are connected with relationship to the deceased (succession per stirpes) - The children succeed in equal shares. Article 1814 defined the "second order" which includes parents of the deceased, brothers and sisters and their descendants. The right of the spouse as defined in article 1820 is a quarter of the free estate if she succeed with relatives in the first order and half if she succeeds with relatives in the second, third and fourth order.[25a] She is called alone in the whole estate in the fifth order.[26] In relation to illegitimate children, article 1539 prescribes the right of the voluntarily acknowledged and the so assimilated[27] child if the child succeeds along with lawful descendants, or parents or the spouse, of the father. As regards the claim against the mother, in accord with the spirit embodied in article 1530 of the Greek Civil Code the child is one of her heirs in the "first order".[28] A child, however, which is judicially recognised does not have succession rights against his father.

On account of the above provisions, the following observations can be made in relation to the rights of the natural child against his parents' estate :

(a) The illegitimate child is entitled to the same share in his mother's estate as if he had been legitimate.[29]

(b) If legitimated per subsequens matrimonium or judicially he has equal rights in succession with children born in wedlock.[30]

(c) The child in favour of whom the results of voluntary acknowledgement operate, is entitled to the compulsory portion in testate succession and to a portion in intestacy.[31]

(d) This portion is half of that of a lawful child if the deceased is

survived by either a lawful descendant, or a parent, or his spouse who is entitled[32] to claim from the inheritance.[33]

(e) With further ascendants or collaterals, the child is entitled to the whole of the father's estate as if it was a lawful descendant.

(f) Since the child cannot claim relationship through his father[34] he cannot represent his predeceased father in a claim against the estate of the paternal grandparents.[34a] Nor can the lawful descendants of a predeceased natural child establish a claim against the estate of the acknowledged grandfather, - the right has been simply restricted between father and child.[35]

(g) With respect to collateral succession natural children tracing descent from the same mother are deemed relatives of the half blood[36] and receive half of the portion of that of the full blood.[37] The same applies to a judicially legitimated child in respect of his collaterals of the father's marriage.[38] No relationship, however, is recognised between children acknowledged by the same father and therefore such children cannot claim from their sibling's estate.

(h) While the mother is entitled to the child's estate as a lawful ascendant, the acknowledged father is not.[39]

(i) General expressions in a will referring to the intestate or legal heirs of the deceased unless a contrary intention is indicated should be construed as to include the acknowledged child as long as its right to the estate is legally recognised.[40]

With equality among both classes of children differences that may appear between children born in wedlock and children born out of wedlock have to be removed altogether. Fears have been expressed that this may cause serious problems in intestate succession or even in testamentary succession where the testator omitted to name his legatees, i.e. with fraudulent claims against rich men. Clive,[41] however, in relation to the operation of succession law in Scotland from 1968 points

out that the attribution of succession rights to natural children has not given rise to great difficulty, while Samuels[42] in respect to the relevant English law argues that such fears are misplaced within the present social conditions. Even so, however, such fears may be totally unjustified if the procedure earlier suggested on ascertainment of paternity is applied. The principles adopted there are early establishment of paternity and under such safeguards that leave little doubt about the paternity. Rarely, therefore, would a claim be initiated against a non ascertained father and if so such a claim would have tobe supported with substantial evidence since the primary concern of the action is to place the child in a family position with the relatives of the deceased. There is another way, however, to look at the problem. So far with the strong proof required to rebut the presumption of legitimacy a number of children have been passed off as children of the marriage and claimed succession from the husband's estate. Nobody ever argued for the rights of legitimate children to be susceptible to attestation as the incidents of adultery increase. If the establishment of paternity is supported with evidence showing a high degree of probability obviously fraudulent claims will not be proportionately higher than that of the children passed off as children of marriage. And, even if some cases appear, it is not proper to discriminate against children born out of wedlock as a whole by reason of a few fraudulent claims.

On account of the present position of the law the following changes may be considered in succession law. In the first place in intestacy any person born outside wedlock, for whom paternity has been established or can be established, should be entitled to succeed from either parent or to represent him in claiming inheritance against the estate of parental relatives as presently is the law for children born in wedlock.[43] An equal right should be recognised to the parents and parental relatives.[44] Intentions to exclude such children, i.e. if appearing after the father's

death, should be expressed through a will.[45] In the case where a child appears after the distribution of property the appropriate solution would be to hold the heirs as debtors in proportion to their shares for satisfying the claim of such a child. Also, it may be appropriate to impose time limits for a child for which paternity is not established for claiming from the father's estate.[46]

Secondly, as regards the construction of wills or other instruments the word "child" should be anticipated to refer to both children born in wedlock and children born out of wedlock unless a contrary intention is explicit. Such intention however, should not be presumed if reference is made to the legitimate child or lawful child. Also the word "heir" or nicer expressions like "grandchildren" should be construed as to refer also to a person born out of wedlock or tracing relationships through birth out of wedlock.

## FOOTNOTES TO APPENDICES

### Appendix 1

1. As cited by Saario A Study of Discrimination p.83

2. For discussion on the international trends towards surname see ibid pp. 83-89; Krause "The Creation of Relationships" op.cit. pp. 70-72. For the function of the surname see Saario, ibid. and Papantoniou, N. "The Updating of Family Law", op. cit.

3. Walker, Principles of Scottish Private Law", p.305. "Registration of Births, etc : a modern code" 1965 S.L.T. 197. Clive, Aspects of Illegitimacy, op. cit. 234. The attribution of name is more a matter of usage than of law. Therefore any name can be given to the child.

4. Art. 1493, Gr.C.C. "The child receives the surname of the father." The provision is one concerning public order. Therefore the right of the child to bear his father's surname is protected and the child cannot resign from his right, subject to the provisions allowing the change of surname on specific circumstances. Tousis (1979), Family Law, Vol. 2, p.82. Change in the surname of the father does not automatically bring a change to the child's surname (Roilos (-Koumantos) (1865/1966), 1493, 9 p.170) though later it was submitted that such a change must be followed by change to the child's surname when in minority (S. Gasparinatou "Change and Attribution of Surname" (1962) No.V. 17 : 761 ff.

5. Hunter, Scottish Woman's Place, p.58. The child does not get the name automatically and a motion is needed.

6. Tousis, Family Law, Vol. 2, p.196 and note (2). According to article 1557 the parents have to declare the child concerned as born to them with a declaration to the registrar of the place of marriage. Omission to declare does not affect the child since it may bring a petition to be recognised as a child of the marriage and to have his name changed. See Roilos (-Koumantos) Family Law 1557 (4) p.4L5.

7. Tousis, ibid, p.203.

8. Article 1559 recognises the child legitimated with the marriage of the parents "as lawful in any respect in relation to both parents" and article 1567 recognises the judicially legitimated as lawful in any respect in relation to the father.

9. Adoption Act 1958, ss. 22-24.

10. ibid. s. 23(1), (2). It is submitted that a widow who intends to adopt her illegitimate child and give him the surname of her late husband cannot do so without the consent of the husband's relatives. See Mrs. C. Cn or Cl 1951 S.L.T. (Sh.Ct.) 83.

11. Art. 1582 of the Gr.C.C.; Tousis (1979) Vol. 2, p.80-81.

12. Roilos (-Koumantos) (1965/1966) :"Family Law", 1582 (17); City Court of Kalam 474/1973, Arm. 27 : 604. The wife, however, would continue to use her husband's name in such a case and it may be considered more appropriate to give the child this surname. This can be established on the wording of article 1582 which has been construed to refer to the name that the applicant uses at the time of the order, as well as because the

husband consents to the adoption by his wife and therefore as an element of the consent there may be anticipated his agreement to the usage of his surname (Vallindas, Family Law, p. 221).

13. 1582(2); Spyridakis, Civil Code, Vol 4, 1582, note (2).

14. Adoption Act 1958, s. 23(1), (2). Article 1(1) of the Presidential Decree 11/1975.

15. Tzouganatou Gasparinatou, The Judicial Recognition of Paternity referring to Egger, (1943, par. 326, 6 p.275), p.276 note (1).

16. Walker, Principles of Scottish Private Law, p.320. For the common law rule where the illegitimate child establishes a surname "by reputation" and not by "inheritance" see Turner, Improving the Lot of Children Born out of Wedlock, p.36 and authorities cited.

17. c.f. Hunter, Scottish Woman's Place, p.58 and s.s. 18, 19 of the Registration of Births, Deaths and Marriages (Sc.) Act 1965.

18. The arguments are strong taking into consideration that great concern has been expressed for the damage that this may cause to the reputation of the father. (McDonald v. Ross 1929 S.C. 240, and authorities cited there), i.e. when he is married (see Armholm "Parents and Children" op. cit. p.16.

19. Art. 1531 (1) of the Gr. C.C.; A.P. 674/1963, E.E.N. 31 : 204; Tousis, Family Law, Vol.B., p.141.

20. 1531 (2) Gr. C.C.

21. 1531 (2) Gr.C.C. On mother's death the consent of the child suffices. Consent must be free of terms and conditions. See Tousis, Family Law, Vol.B. p.142.

22. ibid.

23. Art. 1537(1) and 1555(1) of the Gr.C.C.; G. Michaelidis Nouaros (1972) par. 202, p.286. Tousis, Family Law, Vol.B. pp 80-81 and 154; Roilos (-Koumantos), Family Law, 1537, 7; Tzouganatou Gasparinatou, The Judicial Recognition of Paternity, p.275.

24. Tousis, Family Law, Vol.B. p.81, 154; Tzouganatou Gasparinatou, The Judicial Recognition of Paternity, pp 275-6.

25. "Registration of Births, etc" op. cit. pp 198, 199, 200. For Greece see art. 35 of the Compulsory Law 1179/1938 for Regional Governors as reformed by article 1 of the Decree 2573/1953 and the Decision no. 71039 of 28.9/2.10.1953 of the Minister of Interior, the Governor of the Region sanctions the attribution of a surname to those children.

26. See S.P. no. 74, par 6.13, p.20; Turner, Improving the Lot of Children Born out of Wedlock, par 6 (b) (c), p.49.

27. The right to change the child's surname before majority probably lay primarily with the father as the natural guardian of the child (Walker, Principles of Scottish Private Law, p.305). However, this may no longer be the case since with equality the consent of the other spouse may be essential. See W.P. no. 74 p.6.11 and English authorities cited there; also Walker, p.305 and reference in note (5).

28. See infra

29. See Report on Quebec Civil Code, Vol. 2 part I, p.30.

30. Papantoniou, N. "The Updating of Family Law", op. cit.; Report on the Quebec Civil Code Vol. II, part 1, p.30.

31. Such a formula, already existing in Greece, has been adopted in the report of the Quebec Civil Code, c.f. art 1531(1) of the Gr.C.C. and art. 33(2) of the Draft of the Qu.C.C. The English Law Commission on account of the common law rule suggests the choice in such a case to remain with the mother which may be the solution if the right in Scotland remains unregulated. W.P. no.74 p.6.13; See also Turner, Improving the Lot of Children Born out of Wedlock par 6(a), p.48-49.

32. The Report on the Quebec Civil Code (Vol.2, part 1, p.30) suggests that although it may be discriminatory as retaining the father's surname, it would have the advantage of placing all children on an equal footing regardless of the circumstances surrounding their birth and whether or not their parental filliation has been established. Besides such a solution would accord to the change of principle desirable in the parent child relationship as demonstrating "primacy of the biological tie over the legal tie". There are other reasons to be considered, however, as the elimination in the changes of the child's surname due to change on his status, certainty about one's identity and so forth.

33. Papantoniou, N. "Updating the Family Law", op. cit.; Report on the Quebec Civil Code, Vol. 2, part I, p.30.

34. Art. 49 of the Bill to reform article 1497 of the Gr. C.C.

35. Papantoniou, N. "Updating the Family Law", op. cit. The children may be with different surnames and nevertheless the protection of the wife's right is by no means absolute.

36. Article 86 of the Bill to reform article 1537 of the Gr.C.C.

37. Turner, Improving the Lot of Children Born out of Wedlock, par.6.(b) p.49

38. ibid. p.37, 49 6(c).

Appendix 2

1. Saario, A Study of Discrimination, p.132.

2. The matter is somehow complicated as regards Britain since the British Nationality Act 1948 distinguishes between "British Subjects" and "Citizens of the U.K. and Colonies". The former refers to the Commonwealth citizens where the latter to residents of the United Kingdom (British Nationality Act 1948, ss. 1, 2; S.P. no. 74, par 7.1 and notes (1),(2),(3) at p.91). Attention will be diverted to the United Kingdom Citizenship since it is the one controlled by British parliament and nevertheless corresponds to nationality in its ordinary sense.

3. Sect. 4 of the British Nationality Act 1948.

4. Sect. 5 of the 1948 Act.

5. Sect. 6(2), sect. 10 (Nationalization) of the 1948 Act - see also infra.

6. Article 1 of the Code of Greek Nationality as cited in Tousis, Family Law Vol. B p.83.

7. Sect. 40 (1) of the 1978 Act.

8. Art. 19(1) of the L.D. 610/1970. When the child acquires foreign nationality by reason of adoption it may petition to the Ministry of Interior to abandon the Greek nationality. The Ministry decides after consulting the Nationality Council taking into account all the circumstances of the case: Spinellis, "The Law of Adoption in Greece and Israel", op. cit. p.171.

9. As cited in W.P. no.74, par. 7.5 p.93.

10. Sect. 1(1) (2) and (3) of the 1964 Act; as cited, ibid. note 13, p.93.

11. ibid. par. 7.5 p.93.

12. Art. 3 of the Code of Greek Nationality: "A person voluntarily acknowledged by his father or for whom paternity has been completely judicially established before attaining the 21st year of age becomes a Greek National from the date of acknowledgement". See in General Metermacher-Gerousis, in E.E.N. 28 : 161; Appeal Court of Athens, 2272/1947 Themis 49 : 259; Michaelidis Nouaros, Family Law (Univ. Textbook), par. 202, p. 286. Tzouganatou Gasparinatou, The Judicial Recognition of Paternity, p.276.

13. Tousis, Family Law, vol. B. p.154; acquires the nationality of the acknowledged father.

14. Clive "Aspects of Illegitimacy", p.235.

15. W.P. note 74 par. 7.7, p.94; see, however, in relation to the following recommendations, pars. 7.6-7.12, pp 94-96.

Appendix 3

1. Section 1 (1), (3) of the Act.

2. Section 4(5) of the Act, for the application of the section to Scotland Sect. 4(6).

3. A contrario from section 4 sub (1) (2).

4. As defined in sect. 4(1), whether indicating actual separation or by power of her right recognised in section 1(1) (2) of the Act.

5. E. Clive, "Domicile and Guardianship of Children" in 1973, S.L.T. 84 p.85.

6. Sect. 4 (3) of the Act.

7. c.f. sections 13 and 15(1) of the Adoption (Scotland) Act 1978. See also comments in Scottish Law :Current Statutes 1978 (Edinburgh, Green & Son), 628/13 in relation to subsection 1.

8. Article 51 of the Gr.C.C.

9. Art. 56(1) of the Gr.C.C. The word minor is used to contrast with emancipation though the wording of the article would be more compatible with the term person "under-age" which covers infancy pupillarity and minority.

10. Article 52 of the Gr.C.C.

11. Tousis, Family Law, Vol.B. p.229 and note (1) in par. 217.

12. c.f. articles 1579, 1580 and 1584 of the Gr.C.C.

13. Article 56(3) of the Gr.C.C.,

14. See Tzouganatou Gasparinatou The Judicial Recognition of Paternity, p.278 and n(1) and authors cited there.

15. Consent may be explicit or implicit.

16. Ibid. p.277; also article 1538(2). The right to cohabit under the L.D. 14/17 July 1926 did not provide for such a safeguard.

17. Pratsikas, Family Law, op. cit. 157, p.432.

18. Roilos (-Koumantos), Family Law, op. cit. 1538 (3) p.334; Tzouganatou Gasparinatou The Judicial Recognition of Paternity, p.277.

19. "Domicile and Guardianship of Children" op. cit. p.86.

20. Clive, "Aspects of Illegitimacy", op. cit. p.235; see also W.P. no.74, p.98.

21. Article 9 of the Bill to reform article 56 of the Gr.C.C. To assess the articles one has to see it in the context of the innovations of articles 53 of the Bill (to reform Art. 1500 of the Gr.C.C.) which confers the right to exercise parental care to both parents and article 82 (to reform Art. 1530) and 83(1) (to reform article 1537) the first attributing "parental care" to the mother of a natural child and the second attributing it to the father "if the mother ceases to exercise or has forfeited her right, or is unable to exercise it".

22. Report on Quebec Civil Code, op.cit. Vol. 2, part 1, p.37.

23. Ibid. p.37.

24. Ibid. p.37-8. Probably the term habitual residence is used to qualify the degree of time and expressions that may signify change or acquisition of domicile with either parent. Though particular qualities are not illustrated in the report, probably the enrolment of the child in a school in the area of the parent accompanied with residence with that parent or other express indications from acts related to the daily life of the child and implying permanent living with him may sustain "habitual residence" for the child.

25. See for discussion also references to the German law in Turner, Improving the Lot of Children Born out of Wedlock, p.35-6, 48, 5(b). The concepts adopted in that law are like the proposals of Gazi Committee, see supra in the text.

26. Section 14(2) (a) and 15(2) (a) of the Adoption (Scotland) Act 1978. See also supra on the chapter dealing with qualifications and conditions.

27. Walton, F.P. Husband and Wife According to the Law of Scotland, 3rd ed. (Edinburgh : Green & Son, 1951), chapter XIV.

28. Clive, "Domicile and Guardianship of Children", op. cit. p.86.

29. Art. 17 of the Gr.C.C.

30. Art. 18 of the Gr.C.C.

31. Art. 19 of the Gr.C.C.

32. Art. 20 of the Gr.C.C.

33. Art. 21 of the Gr.C.C.

34. Art. 22 of the Gr.C.C.

35. Art. 24 of the Gr.C.C.

36. Art. 30 of the Gr.C.C.

37. Greek nationality prevails other in the case of binationals. Art. 31(1) of the Gr.C.C.

38. Art. 31(2) provides as applicable law that of the state with which the person is more connected.

39. Clive, "Domicile and Guardianship of Children". op. cit. p.86.

Appendix 4

1. Minor children have a certain power to transact but depending on their age and the nature of transaction the consent of curator or guardian may be needed.

2. Art. 1670 of the Gr.C.C.

3. Harvey v. H. (1860) 22 D.1198.

4. Art. 1500 of the Gr.C.C.

5. Art. 1501 of the Gr.C.C.

6. Art. 1502 of the Gr.C.C.

7. Art. 1500 of the Gr.C.C.

8. Art. 1524 of the Gr.C.C.

9. Art. 1525 of the Gr.C.C.; this terminates patria potestas for the specific child. Art. 1526 (1) of the Gr.C.C.

10. Art. 1526 (3) of the Gr.C.C.

11. Art. 1589(2) of the Gr.C.C.

12. Art. 1590 in conjunction to 1589(1) of the Gr.C.C.

12a. Art. 1599 (1) of the Gr.C.C.

12b. Art. 1599 (2) of the Gr.C.C.

13. Art. 1599 (3) of the Gr.C.C.

14. Walker, Principles of Scottish Private Law, p.307; Art. 1502 of the Gr. C.C.

15. Clive and Wilson, Husband and Wife, pp 565-6; c.f. Articles 1501 and 1502, of the Gr.C.C.

16. Subject to any order that the court may make: Conjugal Rights (Scotland) Amendment Act 1861, sect.9; Art. 1524 of the Gr.C.C.

17. Clive and Wilson, Husband and Wife, p.565, Art. 1502 of the Gr.C.C.

18. ibid. p.565 and cases in note (3); Tousis, Family Law, Vol. B, p.106.

19. The right is contestable in Scotland and when court proceedings follow the court will decide having regard to the welfare of the child (first and paramount consideration); Clive and Wilson, Husband and Wife, p.565, 582; Guardianship of Infants Act 1925, sect. 1. In Greece the right of the parent seems irresistible: Tousis, Family Law, Vol. B., p.106 notes (21) (22), but also p.97 note (206).

20. Clive and Wilson, Husband and Wife, p.566, 583-590.

21. Clive and Wilson, Husband and Wife, p.566. The right before to the tutor, now to the custodian; Art. 1502 (1).

22. Art. 1502 (1), Gr.C.C.; Tousis, Family Law, Vol.B, p.107; c.f. Clive and Wilson, Husband and Wife, p.584.

23. Clive and Wilson, Husband and Wife, pp 567-8, 577, 590; Article 1504 of the Gr. C.C.

24. For critisism of the term and its incompetency in Scots law see Clive, E. "The Guardianship Act 1973" 1973, S.L.T. 225, p.228-9. However, though it can not be clearly supported the agreement between the parents is not to a renunciation of parental rights but suspension of their enforcement under a contractual agreement which must be governed by the rules of cancellation of contracts. Contracts are not uncommon in family law and as a rule (as also in the present case) are subject to the discretion of the court to enforce or not, if contravening morality or public order or the child's interests. Of course that the concept approximates more to English law is indisputable but that it is without support in Scots law is an unacceptable view.

24a. Sect. 10(3) of the 1973 Act.

24b. Sect. 10(4) of the Guardianship Act 1973.

25. As defined in Section 10(5).

25a. Section 10(5).

26. Clive, "The Guardianship Act 1973", op. cit. p.225.

27. To reform article 1500 of the Gr.C.C.

28. To reform article 1501

29. To reform article 1505

30. To reform article 1502.

31. Clive, E. "Domicile and Guardianship of Children", 1973, S.L.T., 84, p.86.

32. ibid. p.86, see also infra in Greek law.

32a. Clive "The Guardianship Act 1973", op. cit. pp. 227-8.

33. See distinction made supra.

34. As with patria potestas at present.

35. Clive and Wilson, Husband and Wife, p.568.

36. Sect. 1, Custody of Children (Scotland) Act 1939.

37. Sect. 7, Matrimonial Proceedings (Children) Act 1958.

38. Clive and Wilson, Husband and Wife, p.574; applies only to spouses.

39. Sect. 7.

40. Sect. 5 of the Guardianship of Infants Act, 1886.

40a. Gloag and Henderson, Introduction to the Law of Scotland, p.688.

41. For the extent of its application see Clive and Wilson, Husband and Wife, p.572.

42. Sect. 14(3) Matrimonial Proceedings (Children) Act, 1958

43. See supra; also Walker, Principles of Scottish Private Law, p.309.

44. Art. 1394 of the Gr.C.C.

45. As reformed by art. 57(3) of the Introd. Law of the Code of Civil Proc.

46. Kafkas, C.A. "Custody of Children of non-cohabiting Parents", (1950) Themis 62 : 49, pp 49-50.

47. Ibid. p.50; Tousis, Family Law, vol A p.416 note (7)

48. Spyridakis, Civil Code, Vol.4. 1504 (4) and 1506 (2) and cases cited there

49. Tousis, Family Law, Vol. A. p.416 note 7, unless the conditions of article 1524 concur.

50. Decree to be irrevocable : A.P. 1056/1972, No.V. 21 : 620.

51. Art. 1505 of the Gr.C.C.

51a. Art. 1580 (2) save the exceptions 1579(b), 1581(b) and 1582(b) of the Gr.C.C.

52. There is disagreement as to whether the emancipated child will be submitted to her curatory.

53. Art. 97 of the Bill.

53a. Spyridakis, Civil Code, 1580 (2).

54. Ibid. 1580 (1)

55. Article 98 of the Bill in conjunction to article 1584 of the Gr.C.C.

56. Tousis, Family Law, Vol. B. p.235.

57. c.f. for example the position of the natural parent after relinquishment in Scotland.

58. Corrie v. Adair (1860) 22 D.897.

59. Jones v. Somerrell's Tr. 1907 S.C. 545 as cited by Walker, Principles of Scottish Private Law, p.326, note 6.

60. Corrie v. Adair, supra

61. Brand v. Shaws (1888) 15 R. 449; see also in chapter 3 on the historical development of the law.

62. Corrie v. Adair supra; MacDonald v. Denoon,1929 S.C. 1972.

63. Sect. 2(2) of the Illegitimate Children (Scotland) Act 1930.

64. Sect. 2(1) of the 1930 Act; Brand v. Shaws (1888) 15 R. 449.

65. Walker, Principles of Scottish Private Law, p.325.

66. See sect. 2(1) of the 1930 Act.

66a. Supra; Also Matrimonial Proceedings (Children) Act 1958, Sect 7(1) (a) (b).

67. Arts. 1662, 1602-1603 of the Gr.C.C.

68. Acting as Council of Relatives arts. 1603, 1665 of the Gr.C.C.

69. Art. 1662 (b) of the Gr.C.C.

70. Art. 1662 (c) of the Gr.C.C.

71. Art. 1663 (b) of the Gr.C.C.

72. City Court of Thessaloniki (Mon.) 193/1973, Arm. 27 : 179.

73. City Court of Chalkida (Mon) 100/1973, No.V. 21 : 831.

74. Tousis, Family Law, vol. B. p.329 and note (3).

75. To reform article 1530 see also Chapter five adoption by a single natural parent.

76. Article 86 of the Bill.

77. Article 86(3) of the Bill.

78. Article 93(2) of the Bill to reform Article 1555.

79. Article 93(2). The father had the right under the Civil Code.

80. Art. 53(2) of the Bill.

81. Article 1524 of the Gr. C.C.

82. Article 76(2) of the Bill.

83. Article 115(a) of the Bill.

84. Article 115(b) of the Bill.

85. c.f. Arts 78 and 86, 99(2) and 101(2) of the Bill.

86. Art. 112 of the Bill.

87. Art. 109 and 110 of the Bill

88. Art. 104 (2) of the Bill.

89. Art. 105 (a)

90. Art. 105 (b)

91. Art. 111 of the Bill.

92. Art. 112 in conjunction to art. 111 of the Bill.

93. Art. 113(2) of the Bill.

94. Clive, "Domicile and Guardianship of Children", op. cit., p.86.

95. Ibid. p.86; Idem "Aspects of Illegitimacy" op. cit. p. 234.; W.P. no. 74, pars. 321(vi) p.32 and 4.8, 4.9, 4.10 pp 38-39; Report on the Quebec Civil Code, Title four, i.e. art. 350-354, 357.

96. Clive "Domicile and Guardianship of Children", p.86.

97. W.P. no. 74 par. 4.17 p.42.

98. Clive, "Aspects of Illegitimacy", op. cit. p. 234.

99 See for example the proposals of Gazi Committee on divorce supra.

100. See Turner, Improving the Lot of Children Born out of Wedlock, p.48 (ii)a in relation to the law of New Zealand.

Appendix 5

1. Memorandum no. 22, op. cit.

2. Cmnd. 5629

3. Memorandum no. 22, p.10, 16 and cases in note 13; "Smith v. Smith's Trs. (1882) 19, S.L.R. 552; Article 1476 of the Gr.C.C.

4. Memorandum no. 22, p.38. MacKenzie's Tutrix v. MacKenzie 1928, S.L.T. 649. Article 1479 of the Gr.C.C.; see Atsalakis, Erm. Ak. 1479, 3-6.

5. Dickinson v. Dickinson, 1952, S.C. 27.

6. Walker, Principles of Scottish Private Law, p.314; Article 1480 of the Gr.C.C. unless the mother exercising patria potestas has the ususfruct of the child's property; Atsalakis, Erm. Ak. 1480 III 5-12.

7. Memorandum no. 22, p.38; Walker, Principles of Scottish Private Law, p.315.

8. Art. 1480, Atsalakis, Erm.Ak. 1480 II, 2-4; Also recommended for Scots law by the Scottish Law Commission, see Memorandum 22, p.44.

9. c.f. Art. 1492 of the Gr.C.C. and Greenhorn v. Addie, (1855), 170, 860.

10. Sect. 39 of the 1978 Act.

11. Sect. 12 (3) (a) (1).

12. Sect. 12 (3) (b) (1)

13. Sect. 12 (4) (a)

14. Spyridakis, Civil Code, Vol.4, 1574 (4): the claim of the adopter does not precede that of the natural parents. Michaelidis Nouaros, Family Law (Univ. Textbook) p.319. 1476 et seq. of the Gr.C.C. apply also in this case : Atsalakis, Erm Ak. 1476.2

15. Art. 1586 of the Gr.C.C. It is disputed however, if the duty owed by a natural father under article 1545 of the Gr.C.C. is a duty which should be extinguished with adoption. The artument points to the lack of any familial link between them. See however discussion: Beis, C. "The Legal Nature of the Duty of the Natural Father for Aliment and its Priority over the Similar duty of the natural Mother and the Adopter" (1962) No.V. 10:56.

16. Section 1(2) of the Illegitimate Children (Scotland) Act 1930. Clarke v. Carfin Coal Co. (1891) 18 R. (H.L.) 63; Memorandum no 22, p.12 but see cases in note 23, p.12.

17. Nicoll v. Magistrates, Haritors and Kirk Session of Dundee (1832) 10 S.670 as cited in Memorandum no.22 p.17 note 45; also see in the same cases in note 46.

18. Atsalakis, Erm.Ak. 1476, 7(b), Beis, "The Legal Nature of the duty of the Natural Father" op. cit. 56 et seq.

19. Atsalakis, Erm. Ak. 1476, 7,(3) (st)., Tzouganatou Gasparinatou, The Judicial Recognition of Paternity, pp 284-5 and authors in note (1) p.284.

20. Ibid, p.286. and authors and cases in note (2).

21. Ibid. pp 296-7.

22. Art. 1545 of the Gr.C.C. Due consideration must also be given to the duty of the father towards a voluntary acknowledged child or other duties towards judicially recognised children; Balis, Family Law, par 165

24. Gloag and Henderson, Introduction to the Law of Scotland, p.684; Walker, Principles of Scottish Private Law, p.315.

25. S. 4. of Illegitimate Children (Scotland) Act 1930.

26. Walker, Principles of Scottish Private Law, p.323; for two years or more but not beyond the 21st year according to a statute but beyond this age under common law.

27. Art. 1477 (1) of the Gr.C.C.

28. Art. 1477 (2) of the Gr.C.C.

29. Art. 1546 (2) of the Gr.C.C.

30. Art. 1546 (b) of the Gr.C.C.

31. Cloag and Henderson, Introduction to the Law of Scotland, p.684.

32. Art. 1484 (1) of the Gr.C.C.

33. Art. 1486 of the Gr.C.C.

34. Walker, Principles of Scottish Private Law, p.324.

35. Art. 1554 of the Gr.C.C.

36. Art. 1545 (1) of the Gr.C.C.

37. Art. 1547 of the Gr.C.C.

38. Art. 1548 of the Gr.C.C.

39. Art. 1549 of the Gr.C.C.

40. For a detailed analysis on the benefits of the child in Britain see Guide to the Social Services 1979, op. cit. Lister, R. (ed). National Welfare Benefits Handbook, 8th ed. (London : Child Poverty Action Group, 1978); Moon Gay "The Rights of Cohabitees", op. cit. 3. Money pp 39-41; Cunningham, D., "Taxation - Children's aliment" (1980) 25, Journal of the Law Society of Scotland, 17; Tunnard, J. "Benefits for Parents with Children in Care" (1980), Legal Action Group Bulletin 138.

41. See for discussion on the Greek system, Leontaris, The Law of Insured, op. cit.; also Agallopoulos, Gr.N. Social Insurances, (Athens, 1955); Picoulas, M. 'Family Allowances and Population Increase" (1968) 18 Bulletin of the Foundation of Social Insurance 585; Risataki, Health and Welfare Services;

42. Section 1(2) of the Illegitimate Children (Scotland) Act 1930; Fraser v. Campbell, 1927, S.C. 589; Mottram v. Butchart, 1938, S.C.89.

43. Section 3(1)

44. Section 3(a); see also chapter three on judicial recognition of paternity.

45. The Family Welfare Association, Guide to the Social Services, 1979 67 cf. (London : MacDonald and Evans, 1979), p.89; Cmnd 5629 Vol. B. page 308.

46. 1975 S.L.T. (Sh.Ct.) 13.

47. For comments see Mathie,"Anomalies in Aliment" op. cit. pp 63-4.

48. Art. 1551 of the Gr.C.C.; A.P. 533/1976 No.V. 24 : 1064. Appeal Court

of Athens, 4773/1976, No.V. 25 : 75.

49. According to the article 359 of the Greek Penal Code (G.P.C.) "the man who abandons in penury or else unassisted a woman who has conceived by him and who because of her pregnancy or delivery, is unable to care for herself, is punishable with imprisonment not exceeding one year. Prosecution admits only by complaint." This imposes an obligation on the putative father to support and assist the mother in respect of her inlying expenses and of any problems arising from pregnancy and birth. Financial assistance need only be given in certain circumstances, namely if the woman is at that time unable to meet her ordinary living expenses and/or any additional expense arising out of the pregnancy/birth - that is if she is in a situation of "penury". The term is narrower than that of "want" or article 358 of G.P.C. which refers to a judicially recognised aliment, where the life style of the person to whom the aliment is due and the funds of the person owing aliment must be taken into account. Even where the necessary financial assistance has been given, the putative father may still be open to liability for moral abandonment if he fails to show appropriate concern.

50. Art. 92(2) of the Bill.

51. See Vallindas, Family Law, pp 196-7; Tousis, Family Law, Vol. B. p.181; It has been considered as a special legal claim founded upon the clause of leniency : Roilos (-Koumantos) Family Law, 1551 (4) p.380.

52. Ar. 92(2) of the Bill. This insertion though tightens up the condition bringing it closer to the nature of a quasi familial alimentary claim; see also Sourla, C. Illegitimate Children according to the Draft of the Legislative Committee and the Existing Law (Athens, 1932), p.170.

53. Tousis, Family Law, Vol. B. p.182; Appeal Court of Nauplion 58/1969, Armenopoulos 23: 766; City Court of Trikala (Mon.) 2/1967, Arch. Nomal 20: 64.

54. A.P. 533/1976, No.V. 24:1064.

55. Pratchican, Family Law, par 152, p.418.

56. Tousis, Family Law, Vol. B. pp 180-1; Appeal Court of Crete, 17/1965, No.V. 13:190.

56a. Art. 92(1) of the Bill; probably implies claims of social security.

57. Whether voluntarily or by court decree: Roilos (-Koumantos), Family Law 1551, 7 (10b) p.381.

58. Ibid. 1551, 7 and 10(b), p.381, 383 and authorities cited there. It may be constituted independently. City Court of Athens (Mon) 9428/1973, No.V. 22 : 833.

59. Art. 1551(2) of the Gr.C.C. and 92 of the Bill: similar to the Bill's provisions are those for the mother's separate action in German law, see Turner, Improving the Lot of Children Born out of Wedlock, p.13.

60. Leontari, Miltiades C. The Law of Insured (Athens: Pamisos, 1974) pp 162-3; "Greece: Social Security System" (1975) 26 Foreign Tax Law, Bi-weekly Bulletin 1, p.4.

61. Memorandum no 22 par. 2.36.

62. c.f. ibid par 2.16 and 2.18.

63. ibid. par 2.17

64. ibid. par 2.24

65. ibid. par 2.51.

66. Turner, Improving the Lot of Children Born out of Wedlock p.46, 2(a)

67. Article 46(b) of the Bill to reform article 1480(b) of the Gr. C. C. and article 89(a) to reform article 1545(a); To this concurs and Clive see "Aspects of Illegitimacy", op. cit. p.234.

Appendix 6

1. Scottish Home Department, Law of Succession in Scotland : Report of the Committee of Inquiry, under the Chairmanship of the Hon. Lord Mackintosh (Edinburgh: H.M.S.O., 1951) Cmnd 8144, par 23, p.22.

2. Cmnd. 8144, par 24, pp 22-3.

3. Ibid. pp 22-3; Meston, M. The Succession (Scotland) Act 1964 2nd ed. (Edinburgh : Green, 1969), p.55.

4. Sect. 23 of the Succession (Scotland) Act 1964.

5. Meston, The Succession Scotland) Act 1964.

6. ibid. p.56.

7. ibid. p.60.

8. Sect. 23(1) of the 1964 Act.

9. Sect. 2(1), 23(1), 5(1); Also Meston, The Succession (Scotland) Act 1964 p.67.

10. Art. 1583 of the Gr.C.C.; Vallindas, Family Law, p.219, 221; Spinellis, "The Law of Adoption in Greece and Israel", op. cit. p.168.

11. Balis, Family Law, p.363.

12. Vallindas, Family Law, p.220.

13. Ibid. p.219.

14. Michaelidis Nouaros, Family Law (Univ. Textbook), p.319.

15. Rousopoulou, "Again the Confidentiality of Adoption", op. cit. p.171.

16. See ibid. pp 170-1; it is common knowledge that properties rarely come to a child and when it happens the donor usually arranges its administration.

17. Cmnd. 8144 par. 24, p.23.

17a. The Committee refers to the National Vigilance Association, The Scottish Committee of the National Council of Women, The Scottish Council for the Unmarried Mother and her Child and the Muir Society, ibid, p.23.

18. Meston, The Succession (Scotland) Act 1964, pp 86-7.

19. Section 4 as reformed by sect. 1 of the Law Reform (Misc. Prov.) (Scotland) Act 1968.

20. Section 10A as reformed by Sect. 2 of the 1968 Act. The clause was met with objections from the House of Lords, see Meston "The Law Reform (Miscellaneous Provisions) (Scotland) Act 1968", op. cit. p.213.

20a. Sect. 5(1) of the 1964 Act; Meston, The Succession (Scotland) Act 1964, p.57.

21. ibid. p.67.
For the meaning of the term see "Issue and Adopted Children" (1980) 25, Journal of the Law Society of Scotland, p.172-3, 165-168; also Clive, E. "Adopted Grandchildren: mite not right" (1981) 26 Journal of the Law Society of Scotland 183-4.

22. Sect. 4(4) of the Succession (Scotland) Act 2364.

23. Sect. 11 of the 1964 Act.

24. Unless there are grounds for disinheritance; see supra on dissolution of Adoption and art. 1840-1841 of the Gr.C.C.

25. Art. 1825 of the Gr.C.C.

25a. Art. 1820 of the Gr.C.C.

26. Art. 1821 of the Gr.C.C.

27. Art. 1555, 1832(2) of the Gr.C.C.

28. Tousis, Family Law, Vol. B. p. 140 and note (5).

29. Arts. 1530, 1813 of the Gr.C.C.

30. Arts. 1530, 1860, 1869 of the Gr.C.C.

31. Tousis, Family Law, Vol. B. pp 155-156.

32. Unless disinherited, see article 1840, 1841 of the Gr.C.C.

33. Either of them.

34. Art. 1463(2) of the Gr.C.C.

34a. Tzouganatou Gasparinatou, The Judicial Recognition of Paternity, p.319.

35. Roilos (-Koumantos), Family Law, p.334.

36. Tzouganatou Gasparinatou, The Judicial Recognition of Paternity, p.319 and note (1).

37. Art. 1815 of the Gr.C.C.

38. Tousis, Family Law, Vol. B. pp 203-4.

39. Tzouganatou Gasparinatou, The Judicial Recognition of Paternity, p.318.

40. Art. 1790 of the Gr.C.C.

41. Clive, "Aspects of Illegitimacy", op. cit. p.235.

42. Samuels "Abolish Illegitimacy", p.134.

43. Clive, "Aspects of Illegitimacy", op. cit. pp 235-6; Report on the Quebec Civil Code, art. 25; W.P. No.74, par 5.6; Turner, Improving the Lot of Children Born out of Wedlock, p.49.

44. Report on the Quebec Civil Code, art. 47.

45. W.P. no. 74, pars. 5.8, 5.9 pp. 75-76.

46. ibid. par. 519, 5.10, pp 76-77.