

## Conclusion

The recent cases reviewed above show that the law relating to summary judgment in Hong Kong is in transition. A very clear message is being sent by the Court of Appeal that the misuse and abuse in Hong Kong of summary judgment procedure must end and that the type of inquiry into the evidence which was conducted in *Murjani* is not appropriate. The test approved by the Court of Appeal to decide whether a defendant has raised a triable issue is: 'Is what the defendant says credible?' The Court of Appeal has given, along with this new test, the admonition that it is not to be applied in a way which results in a *Murjani* style of inquiry into the evidence.

Can we conclude that *Murjani* and *Bank of India* would be decided differently if the Court of Appeal were deciding them today? There are some sound reasons for suggesting that the outcomes would be different. Mr Justice Godfrey was not on the Court of Appeal when *Murjani* and *Bank of India* were decided. Among members of the judiciary he is the most outspoken critic of the misuse in Hong Kong of summary judgment procedure, and his disapproval of *Murjani* is not equivocal. Other members of the Court of Appeal appear to share his views.

We must balance against these considerations, however, the fact that it is difficult for a defendant to raise a triable issue by relying on a collateral oral agreement. Such agreements must be strictly proved.<sup>37</sup> This was the situation in *Murjani* and *Bank of India*, and on this basis we can distinguish these cases from *Ng Shou-chun* and *John MacLean*. The emerging trend in Order 14 cases in Hong Kong is strong, however, and it is highly questionable whether this distinction would withstand the trend.

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## The Parentage of Children Born As a Result of Natural and Assisted Reproduction

### Introduction

Hong Kong law, like English law, distinguishes between a legitimate and an illegitimate child. Illegitimacy carries the stigma of the parents' illicit union, and an illegitimate child is treated differently from that of a legitimate child.

<sup>37</sup> See, eg, *Banque de Paris* (note 13 above); *Bank of India* (note 11 above); *Universal Dockyard v Trinity General Insurance* [1989] 2 HKLR 160, 164.

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The Parent and Child Ordinance (PCO),<sup>1</sup> enacted on 13 March 1993,<sup>2</sup> implements the recommendations of the Law Reform Commission (LRC) on Illegitimacy<sup>3</sup> by removing the legal discrimination based on illegitimacy. The whole spectrum of discrimination, and analysis on how it has been affected by the PCO, will be considered on another occasion. This paper deals only with parentage and ancillary matters, such as the presumption as to legitimacy, paternity, declaration of parentage, and registration of birth. In this context, the inadequacies of the common law, and the disparities of the legal treatment of legitimate and illegitimate children, are first explained, followed by an examination of the reforms made by the PCO.

Parentage of children born as a result of artificial conception raises difficulties of a different dimension, presenting social, ethical, and legal issues which force family and individual values into sharper focus. The following issues will be explored: Is a child born as a result of donor insemination legitimate? Who should be the father of the child? How should the child be registered? Similar issues arise in a case of ovum donation, or surrogacy. The paper goes on to examine how the PCO resolves these issues, and how these solutions differ from those dealing with children born by natural means. I end with an examination of some of the ramifications of the provisions relating to children born as a result of artificial reproduction.

As the Law Reform Commission (LRC) acknowledged, the term illegitimacy is a derogatory label. The author does not wish to perpetuate it. Countries<sup>4</sup> which have removed almost all the major discrimination against illegitimate children have opted to use terms such as 'unmarried fathers' or 'children born out of wedlock' and to avoid the use of deprecatory notions attaching to illegitimacy.<sup>5</sup> The PCO retains the use of the term legitimacy. To avoid confusion, this paper uses the same terminology as that of the PCO. In addition, parentage will be discussed with reference to unmarried fathers/mothers.

### Parentage: children naturally conceived

At common law, a child is legitimate if his parents were married at the time of his conception or at the time of his birth.<sup>6</sup> This means that legitimacy depends not only on marriage, but also on parentage (that is, paternity and maternity).

<sup>1</sup> No 17 of 1993.

<sup>2</sup> Part of the ordinance came into force on 19 March 1993 (amendments to the Guardianship of Minors Ordinance) and others came into force on 19 June 1993; see LN 86 of 1993.

<sup>3</sup> The Law Reform Commission of Hong Kong, *Report on Illegitimacy*, Topic 28, December 1991 (hereinafter cited as the LRC).

<sup>4</sup> See, eg, Family Law Reform Act 1987, Law Reform (Parent and Child) (Scotland) Act 1986.

<sup>5</sup> See LRC, p 2.

<sup>6</sup> Bromley and Lowe, *Bromley's Family Law* (London: Butterworths, 1987), p 234.

Parentage is a question of fact. Whereas maternity is rarely<sup>7</sup> in dispute,<sup>8</sup> paternity — because of the transient nature of siring an offspring — can be a matter of contention.

*Presumption of legitimacy and paternity*

At common law, a woman who carries a child for nine months and gives birth is the mother. Gestation and labouring furnish evidence of maternity, and this could perhaps be the reason why the common law has no presumption of maternity. In order to assist in the resolution of disputes of paternity, the common law recognises the presumption of legitimacy. The presumption deems a child to be legitimate if his/her mother was married, either at the time of the child's conception, or at the time of the child's birth.<sup>9</sup> This presumption stipulates that the child's father is the mother's husband, if either of the conditions is satisfied. Putting aside the question of maternity, the presumption of legitimacy can therefore be reduced to a presumption of paternity. In view of the harshness of the common law towards an illegitimate child,<sup>10</sup> this presumption gives children the benefit of the doubt, and shifts the burden of proving otherwise to the party who challenges the child's legitimacy. The standard of proof is beyond reasonable doubt. Thus, it was held that the presumption was not rebutted by the fact that the husband was using condoms, or that the wife was committing adultery.<sup>11</sup> In one case, the wife gave birth to a child with Chinese features, although both the wife and her husband were Europeans. At the time of the child's conception, the wife was living with her husband and having an affair with a Chinese man. It was held that the relationship was insufficient to rebut the presumption.<sup>12</sup> The court said that 'there is no accounting for the vagaries of nature.'<sup>13</sup>

*No declaration of parentage*

Given that the law draws a distinction between legitimate and illegitimate children, establishing paternity (and maternity) becomes an important preliminary step in resolving questions of financial provision, custody, inheritance, and citizenship.<sup>14</sup> Yet, prior to the enactment of the PCO, Hong Kong courts had no jurisdiction to make a bare declaration of paternity (under the court's inherent jurisdiction)<sup>15</sup> where no other relief was sought.<sup>16</sup> However, if

<sup>7</sup> This was true until the advent of artificial reproduction. See below.

<sup>8</sup> See the maxim 'mater semper certa est, pater incertus est' (one's mother is certain but one's father is not). For instance maternity was disputed when a hospital mis-allotted a child to its mother, *R v Jenkins, ex parte Morrison* [1949] VLR 277; see also below on assisted conception.

<sup>9</sup> *Knowles v Knowles* [1962] P 161; *Preston-Jones v Preston-Jones* [1951] AC 391.

<sup>10</sup> See the LRC.

<sup>11</sup> See *Watson v Watson* [1954] P 48; *Francis v Francis* [1960] P 17.

<sup>12</sup> See also *Ah Chuck v Needham* [1931] NZLR 559.

<sup>13</sup> *Ibid*, p 564.

<sup>14</sup> See the LRC.

<sup>15</sup> Ord 15, r 16, Supreme Court Rules.

<sup>16</sup> *Re JS (a minor)* [1981] Fam 22.

the question of legitimacy of a person was called into question, a declaration of legitimacy (or legitimation) which involved a declaration of paternity could be made under s 49 of the Matrimonial Causes Ordinance (MCO).<sup>17</sup> As has been seen above, a declaration of legitimacy was only an indirect route to establishing paternity. DNA fingerprinting provides a more rigorous scientific proof of parentage.<sup>18</sup>

*The difference between legitimate and illegitimate children*

At common law, paternity of an illegitimate child is not covered by any presumption of law, and it is to be proved independently. Prior to the enactment of the PCO, the court had no jurisdiction to make a declaration of paternity for an illegitimate child, except in conjunction with an application for maintenance under the Affiliation Proceedings Ordinance (APO) which resembled criminal proceedings. Under the APO, the court might 'adjudge the defendant to be the putative father of the child.'<sup>19</sup>

*LRC's recommendations on presumption as to paternity and declaration of parentage*

The LRC sought to remedy the lack of any presumption of paternity in respect of an illegitimate child and the disparate, unscientific, and circuitous means by which a child could establish his status/parentage.

On the presumption of paternity, the LRC considered other ways, apart from marriage, in which a presumption could arise. They rejected cohabitation as a basis upon which a presumption of paternity could arise.<sup>20</sup> They considered the alternative of entry of a man's name in a child's birth certificate<sup>21</sup> as the basis for such a presumption. They concluded that whether or not such registration should lead to a presumption of paternity was linked to the question of when a father had the right to have himself so registered. The LRC was reluctant to accept registration as the basis of such presumption without the necessity of

<sup>17</sup> Section 49(1) allowed an application to be made to the court for a declaration of legitimacy where 'any person who is a Commonwealth citizen, or whose right to be deemed a Commonwealth citizen depends wholly or in part on his legitimacy or on the validity of any marriage, may, if he is domiciled in Hong Kong or claims any real or personal estate situate in Hong Kong.' Section 49(2) provided for a declaration of legitimation, and stated that 'any person claiming that he or his parent or any remoter ancestor became or has become a legitimated person may apply by petition to the court ... for a decree declaring that he or his parent or remoter ancestor, as the case may be, became or has become a legitimated person.' Petitions for declarations of legitimacy might be brought in the District Court or Supreme Court, whereas those for declarations of legitimation were to be brought in the District Court. For declaration of legitimacy, the applicant had to be a Commonwealth citizen and have either domicile in Hong Kong or a claim to property situated in Hong Kong. The Attorney General had to be a made a party in every case to an application made under s 49. The decree was binding on the Crown and all other persons.

<sup>18</sup> See below.

<sup>19</sup> s 5.

<sup>20</sup> LRC, para 5.44.

<sup>21</sup> On the laws on birth registration, see below.

producing any evidence of paternity. They therefore recommended that an unmarried father should have an automatic right to have himself entered on the register as the child's father with the mother's consent, or on the production of a finding of paternity by a court.<sup>22</sup> The LRC recommended that the law should provide a new, direct, and unifying procedure whereby a person (whether born within or without wedlock) could obtain a declaration of paternity, and the court should be given the jurisdiction to make such a declaration.<sup>23</sup>

*PCO Part III and IV on presumptions on paternity and legitimacy, declaration of parentage*

Part III of the PCO, implementing these recommendations, lays down certain presumptions relating to paternity and legitimacy. Section 5(1) states:

a man shall be presumed to be the father of a child — (a) if he was married to the mother of the child at any time and if there arises by virtue of that marriage a presumption of law that the child is the legitimate child of that man; or (b) where no man is presumed to be the father under paragraph (a), and subject to section 10(3), if he has been registered as the father of the child by an entry made after the commencement of this section in any register of births kept by the Registrar of Births and Deaths under any Ordinance.

There are two presumptions of paternity here. First, the common law presumption of legitimacy, based on marriage, which is also a presumption of paternity, is now incorporated into s 5(1)(a). This presumption can arise in three situations:

- (1) where the parties were married at both the date of the conception and birth of the child, or
- (2) where the parties were married at the date of the conception but not at the date of the birth of the child, for example after the conception of the child, the father died or the parties divorced, or
- (3) where the parties were not married at the date of the conception of the child but were married at the date of the birth.

Second, the presumption of paternity arises through an entry in the child's birth certificate. This is a new presumption. Both of these two presumptions of paternity can now be rebutted on the balance of probabilities.<sup>24</sup>

<sup>22</sup> LRC, para 5.45–5.46. For the law on registration of birth, see below.

<sup>23</sup> LRC, para 5.48.

<sup>24</sup> s 5(2).

Part IV of the PCO, inter alia, sets out the procedures for establishing parentage and legitimacy. Section 6(1) states that 'Any person may apply to the court for a declaration that — (a) a person named in the application is or was in law his parent; (b) he is the legitimate child of his parents ...' The jurisdiction of the court to make such a declaration is limited by s 6(2).<sup>25</sup> Further, the standard of proof is apparently more onerous than that of the balance of probabilities.<sup>26</sup> The court will only make a declaration if it is satisfied with the truth of the proposition, and that to do so would not be contrary to public policy.<sup>27</sup> The court shall notify the Registrar of Births and Deaths where a declaration is made under sub-s (1)(a) or (b).<sup>28</sup> A declaration made under this section shall be binding on the Crown and all other persons.<sup>29</sup> There are, however, some limits to the power of the court.<sup>30</sup>

To safeguard against potential abuse of the power of the court to make declarations of parentage, provisions have been incorporated in s 7 for the intervention of the Attorney General, for instance, where the application is not opposed by anyone.<sup>31</sup> Section 8 provides that any declaration under s 6 and any application for such a declaration shall be in the form prescribed by rules under the PCO. The Law Reform Commission Consultation Paper (LRCCP)<sup>32</sup> intended that s 6(1)(c) would replace s 49 MCO, but the schedule to the PCO did not repeal s 49 of MCO, and it is unclear how the two sections co-exist side by side.

The procedure for the declarations of parentage is now supplemented by a new provision which allows the court to direct that DNA fingerprinting — a scientific test — be used where the parentage of any person falls to be determined. A DNA test decodes the chemical 'signals' in human blood into a series of bands of bar bands (similar to commercial bar codes) and thus enables parentage to be determined with little doubt. It has been said that the accuracy of the test is such that the chance of two persons having all the remaining bands are some 30,000 million to one.<sup>33</sup>

<sup>25</sup> Which requires that the applicant is either domiciled in, habitually resident for one year in, or has substantial connection with Hong Kong.

<sup>26</sup> Section 6(3) talks about proof 'to the satisfaction of the court.'

<sup>27</sup> s 6(3).

<sup>28</sup> s 6(4).

<sup>29</sup> s 6(5); see *The Amphill Peerage Case* [1977] AC 547.

<sup>30</sup> (1) The court, on the dismissal of an application for a declaration under this section, shall not have power to make any declaration for which application has not been made. (2) A declaration which may be applied for under the section may not be made otherwise than under the section. (3) The court cannot make a declaration that a person is or was illegitimate.

<sup>31</sup> It seems that a man could be declared to be a father of a child without his knowledge.

<sup>32</sup> Which is the precursor to the LRC; see The Law Reform Commission of Hong Kong, *Consultation Paper on Illegitimacy* (1989).

<sup>33</sup> Except for identical twins who share the same DNA bands. See Antony Dickey, *Family Law* (Sydney: Law Book Company, 2nd ed 1990), p 272.

*Registration of birth*

As has been seen, birth registration raises an inference that the person whose name is so entered is the father/mother in relation to the person registered. Prior to the enactment of the PCO, the law governing registration of births in Hong Kong closely followed the English law, and it depended on whether a child was legitimate or illegitimate. Thus, the Births and Deaths Registration Ordinance (BDRO) stated that married parents were under an obligation to register the birth of their child within 42 days.<sup>34</sup> In relation to an illegitimate child, the obligation to register a child was on the mother.<sup>35</sup> An unmarried father could not have his name entered on the register unless at the joint request of himself and the mother. Where there was such a joint request, they both signed the register together.<sup>36</sup>

Birth registration raises not only a question of integrity of public records, but also complex issues concerning the rights of a father to have his name so entered, the rights of a child to have his paternity recorded, and the rights of a mother to veto, if any, such registration.

Prior to the enactment of the PCO, the law on the registration of an illegitimate child meant that, in the absence of a joint request by the mother and the father, the entry in a child's birth certificate was to be left blank. Even when the mother requested the entry of the father's name, and (i) there was a statutory declaration made by a man acknowledging himself to be the father, or (ii) there was a copy of an affiliation order, the entry was left blank. The child's entry in the column of 'father' was also left blank where the father requested the entry, and where (i) he had been adjudicated to be the 'putative father,' or (ii) he had made a statutory declaration acknowledging himself to be the father of the child, or (iii) he had been awarded custody or access of the child, or he had been made liable for the child's maintenance.

The differences between the ways in which legitimate and illegitimate children were registered reflected partly the fact that many illegitimate children's fathers were unidentifiable. However, even where they were identifiable, the law discriminated against them. As birth registration was *prima facie* evidence of paternity,<sup>37</sup> any restriction on a father's right to enter his name on his child's birth certificate operated to the disadvantage of both the unmarried father and his child. First, it was unfair to the father whose paternity could not be recorded. Second, it was unfair to the child since leaving paternity unrecorded might make paternity difficult to prove subsequently.

<sup>34</sup> Either husband or wife can register their child: see s 7, Births and Deaths Registration Ordinance.

<sup>35</sup> s 12.

<sup>36</sup> *Ibid.*

<sup>37</sup> See s 24(2) of the BDRO and *Jackson v Jackson* [1964] P 25.

*LRC's recommendations on birth registration*

The solution recommended by the LRC was to permit registration where paternity had been established by court order. This approach had a potential drawback in that some mothers might be deterred from taking maintenance proceedings. This, however, had to be weighed against other considerations:

First, if a man is obliged to accept the financial obligations of paternity it is, we feel, reasonable that he should be entitled if he wishes to have the fact of his fatherhood recorded. Secondly, registration of paternity could well benefit the child, not only, for example, *in a possible future inheritance claim, but more generally to satisfy the desire to discover his biological parentage*<sup>38</sup> ... Thirdly, there is some advantage in having court orders and birth register entries so far as possible consistent with one another rather than, as now, allowing one parent but not allowing the other to have the findings on a public document such as a court order reflected on another public document such as the births register.<sup>39</sup>

*PCO on birth registration*

The PCO accepts the LCR's recommendations, and amends s 12 BDRO. The new s 12 allows an unmarried father's name to be entered where: (1) he makes a statutory declaration as to his paternity, together with a declaration by the mother that the man is the child's father; or (2) he has a declaration of paternity from the court, or has some of the parental rights, or is liable to make financial provision for the child under a court order (the relevant order). The new s 12 also enables an unmarried mother to register the name of the father on her child's birth certificate in the following circumstances: (1) on production of a statutory declaration made by a person acknowledging himself to be the father, together with an acknowledgement on the part of the mother that the person is the father; or (2) on production of a certified copy of a relevant order. However, an unmarried mother cannot on her own assertion enter the name of a man on the child's birth certificate as the father of the child.

*PCO on birth registration and declaraton of parentage*

In a not dissimilar vein, the possibility of a declaration of paternity raises the question as to how such a declaration should be reflected on birth registration. Should a declaration of paternity under s 6 PCO, and a finding of paternity in custody and maintenance proceedings, be automatically reflected on the register? The LRC felt that the overriding consideration is *accuracy of a register of public record*; that the Register of Births should be a *full and accurate reflection*

<sup>38</sup> Emphasis supplied.

<sup>39</sup> Law Commission, *Report on Illegitimacy*, No 118 (London: HMSO, London, 1982), paras 1060-1.



of the facts as they are known.<sup>40</sup> However, having stated this overriding consideration, they felt obliged to follow the English approach,<sup>41</sup> whereby only a declaration of paternity is automatically reflected in the birth register. Section 12B of the PCO amends the BDRO, and provides that declarations of paternity automatically be reflected on the register.

So far, we see that the law is concerned with a person's (legitimate or illegitimate) biological parentage. To the extent that the common law did not have an adequate means of establishing parentage, the PCO provides for a scientific means and a direct procedure for ascertaining parentage. Without compromising the accuracy of the public record, the PCO tries to fill the blank columns under 'father' in the case of illegitimate children. It enables an unmarried father, who within the framework of the BDRO acknowledges his relationship with his child, or performs some of the parental responsibilities, to register as father. In this context, a father's right to enter his paternity, and a child's right to know his genealogical heritage, are perceived to be important.

In any system of recording, accuracy of information recorded is important. A variety of measures are used to ensure accuracy of information placed on the birth register. For instance, information is usually obtained from those most likely to know its accuracy. Informants are under a legal obligation to give true information, and the registrar has the power to take steps to verify the information. Complete accuracy of the register, however, is not an attainable goal, for example where paternity is not revealed or is unknown (either because the mother deliberately concealed the fact or because as a matter of fact it is unknown). This problem is beyond the province of the law and the practice of registration (unless a system of compulsory paternity testing is introduced). Statutory power cannot extend to the exhaustive verification of the identity of all persons. This, however, does not and should not mean that one should abandon every effort to ensure that entry in the birth register contains information as accurate as may be obtainable. The PCO, amending the BDRO, has struck a proper balance between the rights of unmarried parents, providing a proper mechanism whereby children can have their parentage recorded.

### **Parentage: children born as a result of artificial conception**

Like children born as a result of natural reproduction, children resulting from artificial conception raise questions of legitimacy, parentage status, and registration of birth. These issues question our fundamental assumptions about family privacy, interests of the infertile, gamete donors, children's position in society, medical confidentiality, and the integrity of public records. Like

<sup>40</sup> LRC, para 5.55 (emphasis supplied).

<sup>41</sup> See ss 10, 10A, and 14A of the Births and Deaths Registration Act 1953, as amended by the Family Law Reform Act 1987.

legislation in many other countries,<sup>42</sup> Part V of the PCO, which follows closely ss 27–30 of the UK Human Fertilisation and Embrology Act (HFEA) 1990, deals with the ramifications of modern reproductive technologies.

The history of artificial reproduction dates back to 1981 when the Hong Kong Family Planning Association introduced artificial insemination using semen donor (AID) as part of its service. In 1986 the first baby in Hong Kong was born as a result of in vitro fertilisation (IVF or more commonly called test-tube baby which means fertilisation extra-corporeal). It is now estimated that more than 130 and 70 children have been born with the help of AID and IVF respectively.<sup>43</sup> In the light of these developments, the government in November 1987 appointed a Committee on Scientifically Assisted Human Reproduction (CSAHR) to consider the social, moral, ethical, and legal issues arising from assisted reproduction. CSAHR's final report (SAHRFR), together with its recommendations, was released in March 1993.<sup>44</sup> As has been seen in the first part of this paper, the PCO deals with the status of legitimacy and the question of paternity and birth registration. Part VI of the PCO deals with 'determination of parent where birth or pregnancy results from medical treatment.' The implications of Part VI go beyond parentage into topics beyond the ambit of this discussion. The rest of this article will examine how, in relation to the different artificial reproductive techniques such as donor insemination, ovum donation, and surrogacy, exceptions to parentage and registration of birth are created, and how this may affect a child's right to know his biological parentage.

#### *Legitimacy, parenthood and registration of birth: difficulties*

Artificial insemination using semen of one's husband does not cause any legal difficulties since the only difference between a child born as a result of insemination using a husband's semen and any other children born in wedlock is that one is born by artificial means of conception, and the other is born through natural intercourse. In the context of legitimacy, parenthood, and registration of birth, artificial insemination using semen from an anonymous donor raises a number of moral, ethical, social, as well as legal issues.<sup>45</sup>

The common law rules, originating in the days when conception could only occur through natural sexual activity, confront a different set of problems in the

<sup>42</sup> Countries with statutes governing artificial reproduction, surrogacy, and status of children — for Australian examples see the Artificial Conception Ordinance 1985 (ACT); Artificial Conception Act 1985 (WA); Artificial Conception Act 1984 as amended by Children (Equality of Status) Amendment Act 1984 (NSW).

<sup>43</sup> See South China Morning Post, 17 December 1991 and 5 May 1992.

<sup>44</sup> *Consultation Paper on Final Report of the Committee on Scientifically Assisted Human Reproduction* (March 1993).

<sup>45</sup> The complex issues arising out of the use of artificial conception are beyond the scope of this paper; for an overview, see Athena Liu, *Artificial Reproduction and Reproductive Rights* (Aldershot: Dartmouth Publishing Company, 1991).

context of artificial conception. For instance, the common law rules assumed that for a child to be legitimate, the sperm and ovum which provided the genetic make-up of the child came from the parties to the marriage. In donor insemination, a wife conceived with donated semen. The child born to the wife was illegitimate, despite consent on the part of the husband. Similarly, in the case of donated ovum, a wife might give birth to a child who had the genetic make-up of an ovum donor (a woman who donated the ovum) and the sperm of her husband (or a semen donor). A child born in either of these situations was illegitimate because he/she was not a child of the parties to the marriage. Further, in the case of full or partial surrogacy,<sup>46</sup> no clear answer could be found in the common law rules as to whether the child was legitimate, and indeed, who was the mother of the child.

Apart from the question of legitimacy, in the case of donor insemination, donated ovum, and surrogacy, who was the father and who was the mother? For instance, if a married woman received donor insemination with the consent of her husband, the legal position prior to the enactment of the PCO was that the child would be illegitimate. In theory, the semen donor might be liable as the child's father to maintain the child, and might apply for access and custody. As a corollary, the husband would have no parental rights or duties regarding the child. The social reality, however, was different; donors would be given an undertaking by doctors that their identity would be kept secret and neither the child nor the couple would be able to trace the donor, or vice versa. Hence, they would not be able to enforce any liability of the donor to maintain. The donor would know nothing about the child, and he would not, therefore, be in a position to seek access or custody. For the same reason, it was unlikely that any intestate succession rights existing between the donor and the child would have effect. Even if the marriage between the couple broke up, the husband would have treated the child as a 'child of the family,'<sup>47</sup> and would thus effectively be under the same financial obligations to the child as if he or she were the husband's legitimate child.

Although donors' fear that they might be held liable for the maintenance of their children was unlikely to materialise,<sup>48</sup> it was thought undesirable, from both the donors' and the husbands' points of view that this discrepancy between the law and social reality should exist, if donor insemination was to be accepted as a possible means of alleviating the infertility of the married. More importantly, the discrepancy between the law and social reality created difficulty with birth registration.

<sup>46</sup> In the case of full surrogacy, the essence of the agreement between the commissioning husband and wife and the surrogate is that the latter will carry the embryo which has been fertilised in vitro using the wife's ovum and the husband's semen to term, and after parturition, the surrogate will hand the child over to the couple. A variation from this is partial surrogacy where the surrogate will be artificially inseminated using semen from the commissioning husband of the infertile couple.

<sup>47</sup> s 2, Matrimonial Proceedings and Property Ordinance.

<sup>48</sup> *Re F (Minor: Paternity Tests)* [1993] 1 FLR 225.

As has been alluded to above, the BDRO required that the name of the father and mother of a child be recorded in the birth register. Although 'father' and 'mother' were not defined, the law and practice of registration were developed in days when only natural reproduction was possible; the assumption was that only biological parentage was envisaged. As donor insemination would only be administered to a couple if there were a clear medical indication that the husband could not father a child, the child who was born as a result of donor insemination was most likely to be the child of the anonymous semen donor. Yet, most donor insemination couples regard children born as a result of donor insemination 'their' children. This, coupled with the facts that donor insemination was, and still is, invariably kept secret, and that couples would not want the fact of donor insemination to prejudice the status of the child, created an irresistible temptation to couples to register the husband as the father of the child, even though they knew that the donor was most probably the father of the child. In declaring that the husband was the child's father, the couple committed an offence of wilfully giving false information concerning the birth of the child.<sup>49</sup> Further, a donor insemination child would never know the circumstances of his/her conception, unless he found out accidentally, or it was revealed to the child by his parents.

*Recommendations of the CSAHR on AID and PCO*

The SAHRFR recommended, inter alia, that donor insemination, used by a married couple, was permissible.<sup>50</sup> It recognised the difficulty faced by married couples who used donor insemination. They concluded that a child born to a married woman as a result of the technique was to be treated as the child of the woman and her husband, unless it could be shown that the husband did not consent to the wife's treatment.<sup>51</sup> It further recommended that a donor's identity should be kept confidential, and that an AID child, on reaching the age of majority, should be given the right to verify that he was born following the performance of AID on his mother.<sup>52</sup>

Section 10(1)(2) of the PCO legitimises the relationship between a husband and his donor insemination child, and it now stipulates that the husband is to be treated as the father unless he can show that he did not consent to the wife's treatment. Although the SAHRFR was silent on whether single women using donor insemination was acceptable, the PCO provides that where an unmarried woman and her male partner obtained treatment together, the male partner was to be treated as the father of the child.<sup>53</sup> Despite what the SAHRFR

<sup>49</sup> s 35, Crimes Ordinance.

<sup>50</sup> Recommendation 6.

<sup>51</sup> Ibid.

<sup>52</sup> Recommendations 10 and 12.

<sup>53</sup> s 10(3).

recommended, there is no provision in the PCO giving the child a right to confirm the performance of AID on his mother.

*Recommendations of the CSAHR on surrogacy and the PCO*

On surrogacy, the SAHRFR recommended that surrogacy should only be acceptable if both the commissioning husband and wife are the genitors of the surrogate-born child.<sup>54</sup> It did not make any recommendation as to who was to be treated as the mother in this situation. It took the view that the commissioning husband and wife should regularise their position with the surrogate-born child by adoption. The SAHRFA further recommended that a woman who had never been married or had never had a child of her own should not be permitted to act as a surrogate.<sup>55</sup> On the question of confidentiality, the SAHRFR took the view that since 'the surrogate mother knows the identities of the child and his genetic parents, she is in a position to disclose her relationship to the child or to others.'<sup>56</sup>

The provisions in the PCO deal only with parentage. Section 9(1) takes the initiative of providing that a woman who carries or has carried a child, as a result of the placing in her of an embryo or of sperm and egg, through assisted reproductive methods is to be regarded as the mother.<sup>57</sup> Further, s 12 stipulates that where a married couple employ the service of a surrogate mother, and where at least one of them is the progenitor of the resulting child, they may apply to the court for a parental order the effect of which is that the child would be treated in law as the child of the parties to the marriage. Section 12 further provides that where a parental order is made, the registrar of the court shall notify the Registrar of Births and Deaths, in such manner as may be prescribed, of the making of that order. As both s 9 and s 12 are transplanted from the UK Human Fertilisation and Embryology Act 1990, UK experience will be relevant.<sup>58</sup>

*Defining parenthood — ramifications*

In defining parenthood in the context of artificial reproduction, the PCO helps to solve the problem of legitimacy and registration of birth. In the example of donor insemination, it allows the husband to be treated as the father, and thus the child is not illegitimate. The husband can also register his name in the child's birth certificate without committing perjury. Now that the husband,

<sup>54</sup> Recommendation 14.

<sup>55</sup> Recommendation 17.

<sup>56</sup> Para 3.13.

<sup>57</sup> s 9.

<sup>58</sup> Recently, draft Parental Orders (Human Fertilisation and Embryology) Regulations 1994 have been issued. Subject to Parliament's approval, the regulations will come into force on 1 November 1994. These regulations envisage that a parental order is a short form of adoption. Provided that certain conditions are satisfied, the child who is the subject of a parental order will be the child of the commissioning couple as if he/she was born in wedlock.

and not the donor, is to be treated as the father, all the rights and duties of being the husband's child follow. Section 10(1)(2) of the PCO represents society's acceptance that the husband (the social father), rather than the donor (the biological/genetic father), is the father of the child. This is an exception to the general rule that the genetic father is the father in law, and for the purposes of birth registration. Such an approach, however, is not without its own difficulties. First, it is tantamount to statutory authorisation of falsification of birth registration. Second, in light of the statutory presumption that the husband is the father, and the absence of any system of recording the circumstances of a child's conception/birth and identity of the donor, the child will never know the identity of his or her genetic father.<sup>59</sup> The difficulty was summarised by Derek Morgan and Robert Lee:

[t]he decision of what to tell the children born of assisted conception has long stood as one of the most problematic aspects of technological creation. The balance between preserving the identity of the donor and fracturing the identity of the resulting children has produced one of the deepest philosophical and pragmatic tensions. With artificial insemination and gamete donation there arises not just the possibility of anonymity for the donor, but of secrecy surrounding the circumstances of the person's conception.<sup>60</sup>

More importantly, should the law set a precedent which destroys the claim that birth certificates and birth registers show real genetic relationships, and that birth records could be taken at face value?<sup>61</sup> It is one thing for an individual to give false information to risk prosecution, but quite another for a government to create a legal fiction which has wide ramifications without thorough consultation or debate. The CSAHR published their reports, but none of them elicit views on the potential difficulties regarding birth registration. Does a person have the right to have his or her genetic parentage accurately recorded, or is this right subsumed under that of the desires of genetic/social parents to keep the information secret? The consent of all the people involved in artificial conception may be obtained, but one cannot obtain the consent of the person ultimately the most concerned: that is, the resultant child. The desire for confidentiality and privacy by the parents is a natural one, but that says little about deceiving the child. Apart from the child's right to know, knowledge of one's blood descent can be important not only from the point of view of

<sup>59</sup> See John Dewar, 'Father in Law? The Case of AID' in Robert Lee and Derek Morgan (eds), *Birthrights: Law and Ethic at Beginnings of Life* (London: Routledge, 1989), p 115. Compare Michael Freeman, 'The Unscrambling of Egg Donation' in Sheila McLean (ed), *Law Reform and Human Reproduction* (Aldershot: Dartmouth Publishing Company, 1992).

<sup>60</sup> Derek Morgan and Robert Lee, *Blackstone's Guide to the Human Fertilisation and Embryology Act 1990* (London: Blackstone Press Limited, 1991), p 165.

genealogy but also for medical reasons when possible inherited diseases and medical treatment require knowledge of antecedents.

Part V of the PCO, by defining parenthood, provides most children born as a result of assisted reproduction with parents. This is to be commended. However, some important questions remained unanswered. For instance, in the case of donor insemination, a donor now remains anonymous and it is unclear what overriding interests justify such an approach. *Hansard* debates were silent on this, although the CSAHR talked about protecting 'the interests of the donor.' On the other hand, the CSAHR is unwilling to offer the same protection to a surrogate mother. Section 12 of the PCO envisages some form of adoption. Would there be a new register called the Parental Order Register, which is similar to the Adopted Children Register? Assuming that a surrogate is married, depending on the assisted reproductive technique used, the law as it stands on parentage, birth registration, and subsequent re-registration after a parental order (assuming that the surrogate is married) is as follows:

(1) in a case of full surrogacy (that is, where a commissioning couple's gametes were fertilised in vitro to create an embryo which is then carried by the surrogate), the surrogate is the mother, and her husband is presumed to be the father by virtue of s 10(2) PCO, and they would be initially registered as the child's parents. Neither however is the child's progenitor. Such registration will be changed if the commissioning couple obtain a parental order;

(2) where the surrogate is artificially inseminated using the commissioning husband's semen, the surrogate and her husband will be registered as the parents. This again will be changed if there is a parental order; and

(3) where surrogacy is achieved by using a donated embryo, the surrogate and her husband will be registered as parents, and such registration will be changed after a parental order.

## Conclusion

Some of the problems alluded to above no doubt have surfaced for those who use the services of a surrogate mother. Legislation in the area of artificial reproductive techniques is piecemeal and unco-ordinated. Dr Leong Che-hung, who was also the chairman of the Committee on Scientifically Assisted Human Reproduction, said during the second reading of the Parent and Child Bill that:

<sup>61</sup> See above.

[the committee] was entrusted to study and make recommendations on ethical, moral, social and legal aspects of these procedures ... a final report was presented to the Secretary for Health and Welfare in May 1992 ... But up to now, nothing is forthcoming from this report. The Bill before us today is therefore in my mind 'putting the cart before the horse.'<sup>62</sup>

On this point, Mrs Miriam Lau who chaired the ad hoc group which studied the Parent and Child Bill (PCB) stated that support of members of the ad hoc group to the PCB 'does not necessarily mean that they have endorsed the practice, morality and ethics of such treatment services.' On behalf of the government, the Attorney General replied:

this Bill is not concerned with whether or not surrogacy and scientifically assisted birth is desirable, nor with considering the controls, if any, which should be applied. This Bill deals only with making provision to identify the legal parents where such births take place, and to provide a legal mechanism for parties to a surrogacy to apply to the court for an order as to the child's parentage which reflects the reality of the surrogacy arrangement.

The aim of ss 9 and 12 is to reflect the reality of a surrogacy arrangement. Section 10 reflects the reality of donor insemination. The PCO, on the one hand, clarifies the parentage of children born naturally, emphasising a person's right to have a declaration of parentage which refers to biological parents. On the other hand, it creates exceptions to the parentage of children born as a result of artificial reproductive techniques. The ramifications of these exceptions have yet to be considered. The SAHRFR, specifically constituted to advise the government on these matters, was not particularly helpful in its recommendations. As the government intends to legislate on the SAHRFR's recommendations, it remains to be seen how Part V of the PCO will operate in tandem with future legislation, if any, on assisted human reproductive technologies.

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<sup>62</sup> See *LegCo Proceedings*, 10 March 1993, p 2415.

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