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EDITORIAL

State ordered separation: terminating parental authority in whose interests?

When States terminate parental authority, there are a number of competing interests at stake, some of which are not easily reconcilable and can be of particular importance in the adoption process.

Prima facie, when children are separated from their parents due to conflict, natural disaster, migration etc, it is widely accepted and even promoted that the State should be actively involved in reuniting families. Yet when the State, by way of its social welfare administration is at the genesis of the child's separation from his family, the justification of its involvement can be less obvious.

Article 16(3) Universal Declaration of Human Rights 1948 (UDHR) states that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State'. Despite this privileged position, the family environment may be dysfunctional and even detrimental to the child, a situation which is foreseen in article 9(1) Convention of the Rights of the Child (UNCRC) where children may be separated from their parents in their best interests. The UNCRC identifies cases such as 'one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence' as being situations where it may be necessary for the child to be separated.

Approaches to State ordered separation

The international standards dealing with State ordered separation (mentioned above) are often reflected in the legal framework of individual countries, although not in the same manner and sometime inadequately. The issue involves one of the most fundamental components of a society (the family) where States responses are deeply influenced by their social conceptions of the family. For some countries, biological ties should be severed as soon as possible to give the child a better chance to build a "new" life. For others, filiation is the foundation of society and its severance should only be in exceptional cases.

In some countries, the legal provisions allow for the separation of the child from his parents and identify the court as having the sovereign decision making authority to permanently sever ties. Yet one sole judge may not dare to make such a weighty decision, sometimes to the detriment of the child. To avoid such a situation, it is necessary to ensure that the judicial decision is based on a previous assessment undertaken by social workers assisting the court and partially sharing the burden to determine when it is necessary to sever ties based on objective criteria.

In practice, there are many situations where the judiciary is reluctant to permanently sever ties. As a result, the child can be placed under the protection of the State, usually by way of foster or institutional care with the ideal hope of being reintegrated back with their families of origin. Meanwhile, the reality in many countries is that thousands of children are left under the protection of the State without having permanency plans and perhaps are adoptable, had the filiation tie with their biological families been severed (see Monthly Review 3-4/2009).

In an effort to avoid this situation of limbo and indecision, countries such as Australia (see page 5), Quebec (see monthly review 6/2009), Denmark, United Kingdom and USA have introduced laws that place time limits for when the court must make a decision to sever ties. The laws in these countries require that efforts must be made to reintegrate the child back with

his family of origin and after a certain time limit (usually between 6 months and 2 years), the court will make a decision as to whether it is in the best interests of the child to make a definitive order cutting the filiation tie of the child with his biological family. Thus, time becomes an essential element in the decision, providing a solution to the binary dilemma.

Debates about the need to permanently sever ties

The criterion by which the court bases its decision to permanently sever ties in practice is diverse and can be a source of great debate among various stakeholders. At the root of such debates is the fundamental question about the role of the State in private family matters.

In an effort to identify the boundaries of State interference, strict laws exist to protect the private sphere from unnecessary interference (article 12, UDHR and article 8 European Convention of Human Rights etc). Such laws are an absolute necessity given that some State actions can have disastrous effects. For example, the European Court of Human Rights (ECHR) in the case of *Wallová and Walla v. Czech Republic* there was an over and serious interference by the Government. In this case, the children were removed from their family and placed in an institution due to the parent's lack of resources, accommodation and employment stability. The ECHR pointed out that the State had failed its obligations to support the family as it was not obvious from the facts of the case that the child protection authorities had genuinely made important efforts to support the parents in remedying their difficulties, and in trying to get their children back as soon as possible. Clearly the State has obligations in preventing the need for separation (see Part IV Guidelines on the Alternative Care of Children), prior to making momentous decisions to permanently terminate parental authority.

Difficulties with the State permanently severing ties

In the realm of unnecessary State interference, practical difficulties have surfaced including the creation of legal orphans. Ideally the aim of provisions terminating parental authority would be to facilitate the creation of a new filiation tie with an adoptive family. However in practice, some courts are terminating parenting authority without having identified a permanent family solution for the child in question, placing him in another type of limbo of being a 'legal orphan'.

Moreover, it is essential to identify what the termination of parental authority means to the child given there are situations, especially in the case of older children, where they do not agree with the filiation tie being terminated. In such situations, questions should be raised about whose interests are being met with the termination of parental responsibility. In the limited cases where despite the child's opposition, termination is in their best interests, it is important that options such as open adoption and post adoption contact agreements are investigated.

Balancing competing interests

The State has a huge interest in ensuring that children do not remain in foster or institutional care for endless periods of time until they reach the age of majority and move out of care. Studies have shown that children who find themselves in this situation are at high risk of homelessness, unemployment, early pregnancy and criminal involvement. At the same time, families as the fundamental unit of society have an interest in caring for their own children and should be supported in undertaking this role. Yet the interest that must be given the greatest weight is that of the child. Given the enormous implications when terminating parental authority, especially for the child, the ISS/IRC stresses the importance of having the best interests of the child as the primary goal. It is imperative that the child's views are considered when making any such decision and if appropriate, ways should be investigated to ensure that children can maintain contact with their birth families.

This debate must be kept in mind when discussing intercountry adoption issues. When children are declared adoptable as a result of the termination of parental rights, international standards dictate that the question should be raised as to whether this decision was necessary or not, and for whose interest it was taken.

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