RIGHTS OF MENTALLY RETARDED PERSONS IN DOMESTIC RELATIONS*

In the field of mental retardation, traditional and set beliefs of the general public and its casual and indifferent attitude are very difficult to erase. When even legislative provisions reflect prejudice and misgivings, it is not surprising that attempts to alleviate the plight of retardates are often thwarted and hampered. It is enlightening, however, that in recent years legislative innovations in some jurisdictions have begun to confirm national commitments to rights of the mentally retarded.[1]

Basic to these new developments is the principle of normalisation which stemmed from the Scandinavian countries. Normalisation in the context of mental retardation represents

> "a conscious effort in all that is being done and planned for and with the mentally retarded and their families to come as close as normal living situations as is feasible, considering the degree of intellectual, physical and social capacity of the retarded persons involved."[2]

Minimum deviations from the norm when treating mentally retarded persons are, therefore, central to this principle, although it does not indicate a fixed standard or criterion of achievement, or a point at which a particular retarded person can be considered to have attained his maximum potential. The normalisation principle thus takes note of the diverse nature of mental retardation. Mental retardates have often been

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[1] For example, the *Education of All Handicapped Children Act 1975* proclaimed in the United States. See D.W. Keim, 'The Education of All Handicapped Children Act 1975' (1976) 10 *University of Michigan Journal of Law Reform* 110.

[2] G. Dybwad, 'Basic Legal Aspects and Provision for Medical, Educational, Social and Vocational Help to the Mentally Retarded' [1972] *Australian Journal of Mental Retardation* 97, 104. See also C. Judge, *Retarded Australians*, Melbourne University Press: Melbourne (1975), 44 and R.H. Woody, *Legal Aspects of Mental Retardation: A Search of Reliability*, Charles Thomas: Illinois (1974) 106–110.

classified as profoundly retarded, severely retarded, moderately retarded or mildly retarded. According to the Standard Binet scale, a mildly retarded person will have an intelligent quotient (IQ) of between 52 and 67, while a moderately retarded person will have one between 36 and 51, a severely retarded person will have one between 20 and 35 and a profoundly retarded person will have one below 20. There is yet another category for persons with an IQ of between 68 and 83 who are considered to be on the borderline. Although there are many categories of retardates, anyone with an IQ level of below 80 is often considered retarded and, because of this mislabelling, the misconception that all retardates belong to the lower end of the scale is engendered. The general community and legislators are thenceforth inclined to group all retardates into a homogeneous entity, declare them incompetent and thereby deprive them of rights.

Normalisation, which recognises the various categories of retardates, appears to have been readily accepted by many jurisdictions, notably the United States. There, the first of a number of *Civil Rights Act* passed in 1964 by Congress states:

> "Every retarded person, no matter how handicapped he is, is first of all in possession of human, legal and social rights. As much as possible, retarded persons, whether institutionalised or not, should be treated like other ordinary persons of their age are treated in the community. Every effort should be made to "normalize" the retarded person, to emphasise his similarity to normal persons and to diminish his deviant aspects."[3]

In Canada the British Columbia Royal Commission Report[4] has listed out "Children's Rights" instead of "Rights of Mentally Retarded Children". The *Declaration of the Rights of the Mentally Retarded* adopted by the United Nations General Assembly on the 20th December 1971, appears to be consistent with the *Declaration of the Rights of the Child* which was earlier adopted in 1959, in recognising the principle of normalisation. Principle 5 of the 1959 Declaration says:

[3] *Civil Rights Act 1964*, 42 U.S.C. cl. 2000 a–e.

[4] Fifth Report, Part IV, *Special Needs of Special Children*, Vancouver, March 1975.

> "The child who is physically, mentally or socially handicapped shall be given the special treatment, education and care required by his particular condition."

while the 1971 Declaration in Article 1 says:

> "The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings".

In 1975, the United Nations General Assembly proclaimed its *Declaration on the Rights of Disabled Persons.*[5] Article 6 reads:

> "Disabled persons have the right to medical, psychological and functional treatment, including prosthetic and orthotic appliances, to medical and social rehabilitation, aid, counselling, placement services and other services which will enable them to develop their capabilities and skills to the maximum and will hasten the process of their social integration or reintegration."

It must be noted that these are mere statements of policy objectives; what is required are legal and administrative machinery to treat all persons alike and provision for specific means to achieve and implement this are, perhaps, more fundamental. Besides normalisation, another process which ought to be undertaken is the mainstreaming or integration of mental retardates with the community at large. Both should be undertaken simultaneously as they possess common bases, namely, sound psychology and public policy. They highlight and maximise individual abilities while saving State funds, as when individual retardates become self-sufficient the need for special facilities and funds gradually decreases. We propose to discuss one important area wherein normalisation or integration efforts in Malaysia should be improved and that is domestic relations. Emphasis will be given to three individual sub-areas of domestic relations: marriage, procreation and raising children.

[5] A "disabled person" has been defined by Article 1 to mean "any person unable to ensure by himself or herself wholly or partly the necessities of a normal individual and/or social life, as a result of a deficiency, either congenital or not, in his or her physical or mental capabilities."

Domestic Relations

Mentally retarded persons have been thought incapable of coping with domestic relationships and to lessen domestic disruptions, laws have been passed forbidding them from marrying, procreating and raising their own children. Prohibitions first appeared in the common law followed by statutes of many jurisdictions using an array of nomenclature, such as idiots, imbeciles, persons of unsound mind,[6] the feebleminded and mental deficients, to describe these persons.[7] The right to marry, procreate and raise children are basic human rights, vital features for the normalisation or integration of the mentally retarded. There may be individuals who are totally incapable of being mothers, fathers, wives or husbands but many individuals who do not meet preconceived norms of intellectual and sexual functioning are capable of such relationships. Laws generally group them as "incompetents" and deny them rights which may be useful for their integration in the community.

(a) *Marriage*

The laws concerned with marriage of retarded persons have generally subscribed to two main objectives, namely, to prevent the creation of a marital contract when one of the partners is incapable of understanding the nature of the relationship, and to prevent reproduction by persons whose issues may become public charges.[8]

Under the common law the marriage relationship is viewed as a contract. This necessitates understanding and capacity to enter into the contract in order to validate it. A marriage is hence void *ab initio* if either party at the time of the marriage is suffering from insanity to such an extent as to be incapable of

[6] See *Divorce Ordinance, 1952*, section 15(1)(g); and the *Mental Disorders Ordinance*, 1952 (No. 31), section 2.

[7] P.Wald, 'Basic Personal and Civil Rights' in M. Kindred, J. Cohen, D. Penrod and T. Shaffer (eds.), *The Mentally Retarded Citizen and the Law*, The Free Press: New York (1976), 3, 7; and L.G. Jacobs, 'The Right of the Mentally Disabled to Marry: a Statutory Evaluation' [1976–1977] *Journal of Family Law* 463.

[8] S.J. Brakel and R.S. Rock (eds.), *The Mentally Disabled and The Law*, University of Chicago Press: Chicago (1971), 226.

understanding the nature of the ceremony or to have insane delusions on the subject;[9] similarly, if a party to a marriage is mentally retarded to such an extent as to be incapable of understanding the nature of the marriage ceremony. Unlike in a normal contract where it is perfectly enforceable if entered during a period of lucid interval, a marriage contracted during such an interval is nonetheless considered void *ab initio.*[10]

Statutes appear to have incorporated this line of reasoning and paternalistic approach. In Malaysia although the *Civil Marriage Ordinance, 1952* and the *Christian Marriage Ordinance,1956* do not expressly provide that consent of both parties to a marriage are necessary to validate the marriage, it appears that consent is necessary because if the parties fail to attest the entry in the marriage register, the marriage may be void.[11] The *Law Reform (Marriage and Divorce) Act, 1976,*[12] on the other hand, explicitly provides that consent of both parties must be obtained.[13] The *Divorce Ordinance, 1952*[14] annulls a marriage contracted when either party was of unsound mind at the time of marriage. Whereas in a petition for divorce, a petitioner has to prove that the respondent is incurably of unsound mind and has been continuously under care and treatment[15] for a period of at least five years immediately preceding the presentation of the petition,[16] he or she need only prove that the other party to the marriage was at the time of the marriage of unsound mind before he or she can obtain a decree of nullity of marriage. Thus, although "unsound mind" is not defined anywhere in the Ordinance, it logically follows that un-

[9] United Kingdom, *Report of the Royal Commission on the Law Relating to Mental Illness and Mental Deficiency* 1954–1957 (1957), H.M.S.O. Cmnd. 169, para. 855.

[10] *Id.*, para. 854.

[11] *Christian Marriage Ordinance,* s. 19(3); *Civil Marriage Ordinance,* s. 26(1) and (2).

[12] Act 164. This statute has yet to be enforced.

[13] S. 22(6).

[14] No. 74 of 1952.

[15] S. 7(4) explains what is meant when a person of unsound mind is deemed to be under care and treatment.

[16] S. 71(1) and (2)(f).

soundness of mind in the context of nullity of marriage includes mental retardation or mental incapacity.[17] After all, the purpose of annulling marriages contracted by parties suffering from unsoundness of mind is to prevent a contract entered into by parties who do not understand the nature of the contract. In Australia the *Family Law Act 1975* provides that consent to marriage of either of the parties is not real consent if that party is "mentally incapable of understanding the nature and effect of the marriage ceremony".[18] Thus, both at common law and in statutes possession of sufficient mental capacity to consent is a prerequisite for a valid marriage. Such prohibitions may be too widely phrased as they not only include the severely retarded but also the mildly retarded persons. This accentuates the legal dubiousness of legislative interference in this area.

It certainly is doubtful whether potential inadequacies as parents should be a legitimate criterion for denying rights to marry because there are means to intervene on behalf of the child of the marriage if the need arises. In Australia the various State welfare statutes have provisions for care and protection of children.[19] Likewise, in Malaysia the *Juvenile Courts Act, 1947*[20] and the *Children and Young Persons Act, 1947*[21] do provide for children who need care and protection not only against the community but also against their own parents. The children can be sent to an approved school or to any place or home for the purpose by the Minister of Social Welfare, or be committed, for a specified period, to the care of any fit person, whether a relative or not, who is willing to undertake the care of him.[22]

[17] *Supra*., n. 14.

[18] S. 51.

[19] Vic.: *Social Welfare Act 1970*; N.S.W.: *Child Welfare Act, 1939*; S.A.: *Community Welfare Act, 1972–1975*.

[20] Act 90, as amended by Act A297/75, Pt. VII.

[21] Act 232.

[22] *Juvenile Courts Act, 1947,s, s. 36(1).*

Parents who wilfully neglect their children may be prosecuted under the *Children and Young Persons Act.*[23] Even if a marriage is unsuccessful because of the mental disability of one or both of the parties, the laws of divorce or annulment permitting termination of the relationship should suffice to alleviate personal hardships and protect the personal and property rights of the parties and children.[24] Besides, the *Law Reform (Marriage and Divorce) Act, 1976* provides divorce based on the no-fault concept. In Australia marriages can also be dissolved through the no-fault concept now available under the *Family Law Act.*[25] Indeed, the extensive use of the divorce laws by "normal" persons may be viewed as a further argument against legislation which singles out mentally retarded persons as incapable of or unfit for marriage.

There therefore seem no plausible explanation for preventing a retarded person from entering into a marriage except, perhaps, society's projection of its own fears and anxieties on a symbolic group — the fears of lack of impulse control and the fears of helplessness, dependency, and vulnerability.[26] But, just as it is difficult to make accurate predictions about how normal people will function in a domestic liaison, it is also difficult to predict who among those who function at a lower intellectual and social level present such an intolerable risk to themselves or their spouses that they should be forbidden to marry. After all, in the United States, at least,

> "one in every four marriages between normal persons end in divorce, and an unknown number of the rest generate misery, murder, mayhem, mental breakdown, and child abuse. On what basis then can retarded persons be told that they cannot marry?"[27]

The ability to relate to another person in marriage or to make use of that relationship is certainly not necessarily linked

[23] S.3.

[24] *Supra.*

[25] Under section 48, only a twelve-month period after marriage has to elapse first.

[26] P. Roos, Reaction Comment to 'Basic Personal and Civil Rights' in Kindred, *et. al., op. cit.*, 27; approved in Wald, 8.

[27] Wald, *op. cit.*; Jacobs, 483.

to the level of intelligence.[28] Marriage, on the other hand, can be the most desirable attainment of growing up to a retarded person. Undeniably, some retarded persons are unable to marry without endangering the welfare of a spouse, possibly offspring, and themselves. However, such persons should not by statute be systematically classified with other mildly retarded persons who lead moderately successful, self-sufficient lives and who wish to express their sexuality through marriage or with persons who do understand the rights and responsibilities of marriage. Marriage-counselling should be offered to those who may be diffident about marrying. If marriage of retarded persons as a group is to be limited in any manner, statutory terms must be precise and the limitations must reflect a legitimate public policy because marriage is "one of the basic civil rights of man, fundamental to our very existence and survival".[29]

(b) *Procreation*

The right to procreate is as basic and fundamental as the right to marry.[30] It necessarily means a person's right not to consent to a sterilisation operation or a right not be sterilised. After all, sterilisation

> "involves the deprivation of a basic human right, namely, the right of a woman to reproduce and if performed on a man or woman for non-therapeutic reasons and without his or her consent, it constitutes a violation of such rights."[31]

Irrespective of this right, legislation in the United States still incorporate eugenic sterilisation clauses in their provisions. The Supreme Court in *Buck* v. *Bell*[32] had in 1927 given judicial

[28] Judge, 120.

[29] Per Warren, C.J., in *Loving* v. *Virginia* (1967) 388 U.S. 1, 12.

[30] In *Skinner* v. *Oklahoma* (1942) 316 U.S. 535, the United States Supreme Court held an Oklahoma statute which provided for the sterilisation of habitual criminals unconstitutional because it had violated the equal protection clause in the Fourteenth Amendment.

[31] *In re D(a Minor)* [1976]1 W.L.R. 279, 286; per Heilbron, J.

[32] (1927) 274 U.S. 200.

approval to sterilisation when it declared that the State may sterilise an eighteen-year old institutionalised retarded mother whose mother and illegitimate daughter had also been retarded. Apparently, "three generations of imbeciles are enough". In *Re Cavitt,*[33] the Supreme Court of Nebraska upheld the constitutionality of the State's legislation on compulsory sterilisation for the institutionalised mental defectives. In a recent New Jersey case,[34] a couple who had applied for a court order to have their mentally retarded daughter sterilised succeeded in obtaining judicial permission. The judge was, however, cautious when he delivered judgement and made it clear that the decision applied only to that particular case; similar cases would have to be judged individually.[35] Critics of such holdings have mainly addressed themselves to the proposition that the right to parenthood is a fundamental liberty and the right of procreation far outweighs the contribution of compulsory sterilisation to public welfare.

In England the widowed mother of an eleven-year old girl suffering from Down's syndrome, had wanted the girl to be sterilised because the mother was worried that her daughter might have a baby which the daughter might be incapable of caring for and which might also be abnormal. The consultant pediatrician who had been caring for the girl was also of the opinion that the operation should be conducted. This was challenged by the plaintiff, an educational psychologist, in the case *Re D (a Minor)*[36] and the Court held that the sterilisation operation was "neither medically indicated nor necessary, and that it would not be in D's best interest for it to be performed."

In Victoria legislative provision allows all types of surgery, except the leucotomy, to be done on a retarded inmate of an institution.[37] This includes the sterilisation operation. The

[33] (1970) 396 U.S. 996.

[34] See 'Somebody, help get our child sterilised' *The Malay Mail,* 10 February, 1979 and 'Parents get nod to sterilise daughter' *The Malay Mail,* 13 July 1979.

[35] *The Malay Mail,* 13 July 1979.

[36] [1976] W.L.R. 279.

[37] *Mental Health Act, 1959,* s. 102.

prime objection here is that not only a fundamental right of the person is deprived but also that it could be deprived without his consent.

The original rationale for sterilisation laws was eugenic; "to save civilisation from the imminent danger of being overrun by defective stocks who were already eating it away like internal parasites".[38] This is largely due to the general agreement at present that mental retardation cannot be cured.[39] It would appear that any solution to the problem of mental retardation must lie in preventing the very occurrence of the condition.[40]

Whilst there are adequate evidence to show that mentally retarded persons have more subnormal children than do persons of normal intelligence, there are also evidence which show that, in addition to the heredity factor, there are other causes for mental retardation including birth injuries, thyroid deficiency, infections, lead paint and poor education.[41] Admittedly, there is some relationship between heredity and mental retardation, but it has been estimated in the United States that about 89 percent of inheritable deficiency is passed on by individuals not themselves deficient or retarded.[42] Hence there is at present no scientific basis for any plan to completely eliminate the problem of mental deficiency.[43]

In *Re Cavitt*,[44] the Nebraska Supreme Court upheld the constitutionality of a statute for the sterilisation of mentally defective persons as a prerequisite for parole or release from a State institution. Besides showing the dubiousness of "voluntary" sterilisation, it also reflects a shift away from eugenic grounds as the rationale for sterilisation. The court was prompted by the fact that the woman in question and her eight

[38] E.Z. Ferster, 'Eliminating the unfit – is sterilisation the answer? (1966) 27 *Ohio State Law Journal* 591, quoted in Woody, 68.

[39] Haggerty, *et. al.* 65.

[40] Ferster, *op. cit.*

[41] Judge, 77; Wald, 68.

[42] A. Deutsch, *The Mentally Ill in America* (1949), quoted in Brakel and Rock, 212.

[43] *Ibid.*

[44] (1968) 182 Neb. 712.

children were provided for largely by public aid. Eugenic reasons were not considered and there was no evidence that the children were mentally retarded. Sterilisation therefore, has found a new rationale, that is, it lessens the potential burden on public funds.

Although still conducted, there does seem to be a decrease in the number of sterilisation operations in the United States.[45] Commentators are of the opinion that this could be due to increasing opposition to sterilisation primarily on the ground that scientific knowledge of heredity factors in mental retardation is not sufficient to warrant its widespread use, certainly not on an involuntary basis.[46] Price and Burt[47] are of the opinion that compulsory sterilisation statutes have largely fallen into disuse because there has been a search for a way to achieve a wanted result "more covertly, more legitimately, or under a less sordid banner". There is a likelihood that "voluntary" or consensual sterilisation will become more frequent. This is currently evident especially because of the sterilisation prerequisite before any retarded person leaves an institution.[48] It is possible that contraceptive counselling has improved, including involuntary contraception, and, finally, a child born of mentally retarded parents could be placed under care of a State institution under the "care and protection" provisions.

The current trend in imposing a prerequisite before any retarded person leaves an institution to have a sterilisation operation has been stated. One questions the validity of a consent given in these circumstances. It is ironic that when incapacity to consent is often the reason behind prohibitions to enter into marriage relationships and other purposes, it is recognised when it involves the sterilisation operation. Anyhow, every statute authorising voluntary sterilisation especially those applicable to the mentally retarded should afford every reason-

[45] Woody, 68; M.E. Price and R.A. Burt, 'Nonconsensual Medical Procedures and the Right to Privacy' in Kindred, *et. al.* 100.

[46] See Ferster, 68–69.

[47] *Op. cit.*

[48] *Re Cavitt* (1968) 182 Neb. 712.

able substantive and procedural protection to ensure that the sterilisation is truly voluntary. There needs to be an inquiry into the possibility of coercion by way of outside influences, personal circumstances, present emotional state and mental condition; in other words, to find out if the operation is truly desired and truly voluntary.

In Malaysia the *Mental Disorders Ordinance, 1952*[49] governs the admission of mentally retarded persons into institutions. It, however, does not indicate if eugenic sterilisation operations are carried out in those institutions and, if they are, whether consent of the "patient" is required or whether the operation is a condition for release. The general position in Malaysia is that an operation to sterilise a person can be lawfully performed only in those circumstances in which the operator honestly believes upon reasonable grounds that an operation is necessary to preserve the life of, or to avert serious injury to the physical or mental health of the patient.[50] A doctor should therefore ensure that such danger to life or health described above do exist, obtain in all cases a second opinion where possible, make quite plain to the patient the nature of the results of the operation, and ensure that the patient's consent in writing is freely and fully given without influence by others.[51] Eugenic sterilisation operations are obviously excluded. Further, it is believed that a person who conducts a sterilisation operation for eugenic purposes may be prosecuted under the criminal law because such an operation is not therapeutic or for the benefit of the patient.[52]

(c) Raising Children

The right of a parent to keep and raise his or her child is as basic as the right to have the child. The Supreme Court in the United States has recognised this right in the case of unmarried

[49] No. 31 of 1952.
[50] Ministry of Health circular, Ref. No. MH Cont. 401/7, 25 July 1959, quoted in Ahmad Ibrahim, *Law and Population in Malaysia*, Law and Population Monograph Series No. 45 (1977), 27–28.
[51] *Ibid.*
[52] See *Penal Code*, F.M.S. Cap. 45, s. 320 and s. 92.

fathers,[53] but, what about rights of the mentally retarded parent to keep his or her child?

Mentally retarded persons are generally assumed to be incapable of caring for their children and this is the basis of statutes which allow children of retarded parents to be adopted or taken away from them without the parent's consent.[54] They are presumed to be incapable of proper and effective consent anyway. In the United States forty states have dispensed with the requirement of a parent's consent to adoption if the parent is "incompetent" while a few others require an additional finding that it is for the child's best interests to be taken away from that parent.[55] Where parental consent has been dispensed with in the cases where the conduct of the parents have been deleterious to the welfare of the child – abandonment, neglect or cruelty – the statutes appear justified but where the sole reason is the parent's mental condition, dispensation of his or her consent is questionable.

In Victoria the right of a retarded person to raise his own child is restricted in some ways too. When a child is below seventeen years of age, he may be made the subject of a care and protection order due to alleged incapacity of his custodian by reason of health.[56] This is, in a way and in proper cases, a commendable measure and it has been earlier argued in this paper that the right of the retarded person to marry and procreate should not necessarily be restricted because of their potential incapacity to care for their child.[57] Nevertheless, this provision should only be applicable when the parents have been proved on the facts of the individual case incapable of providing care for the child or that the child's best interests would not be served by letting him stay with his parents. The Children's

[53] *Stanley v. Illinois* (1972) 405 U.S. 645.
[54] *Infra.*
[55] H.H. Clark, (Jr.) *The Law of Domestic Relations in the United States*, West Publishing Co. Minnesota (1968), 638.
[56] *Social Welfare Act, 1970*, s. 31(h). It is interesting to note that in 1972, 3 percent of all parents involved in care and protection cases in Victoria were mentally retarded parents: P. Leaper, *A Study of Children's Court Cases for 1972: Children Brought Before the Court on Care and Protection Applications* (1974), 59–60.
[57] *Supra.*

Court would then deal with the application as in any normal case of child neglect, that is, if the case is made out the court would adjourn, place the child on probation, make a supervision order or admit the child as a ward of the State.[58] As State wards, these children could be placed in institutions, foster care, home release or placed for adoption.[59] Direct application to the Social Welfare Department could also be made where a similar procedure as above would follow.[60]

A child may be put up for adoption irrespective of his retarded parent's non-consent in some cases. The Victorian *Adoption of Children Act 1964* permits a court to dispense with consent of a parent where the court is satisfied that the parent is "in such a physical or mental condition as not to be capable of properly considering the question whether he should give his consent."[61] Unarguably, a parent may be unable to give an effective consent due to mental retardation but, nevertheless, be quite capable of caring for his or her child. Parental consent has been dispensed with also in cases of abandonment, neglect and cruelty because the conduct of the parents has been deleterious to the welfare of the child. The same reason would have been justified if applied to children of retarded parents. But, unfortunately, the prime consideration in depriving a retarded parent's right to raise his or her children through adoption is their incapacity to take care of the children. A general finding of "incompetence" based on intellectual deficiencies is inadequate as a criterion for taking away parental rights because there are no data to support such a general finding that retarded parents are bad parents. Proof of incapacity has to be provided in individual cases but this might prove ineffective if courts maintain an insistence to follow presumptions only.[62]

[58] *Children's Court Act 1973*, s. 27.
[59] *Social Welfare Act 1970*, s. 40.
[60] *Op. cit.*, s. 35(1).
[61] S. 29(1)(b).
[62] In *Stanley v. Illinois*, White J. said: "Procedure by presumption is always cheaper and easier than individualised determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand": 31 L. Ed. 2nd. 551, 562.

In *Re MacDonald,*[63] for instance, the United State Supreme Court held that a "person with low IQ did not have the same capacity to love and show affection as a person with normal intelligence" and ordered the children involved to be taken away from the parents.

In Malaysia a similar statutory provision as the one in Victoria exists. The *Adoption Ordinance, 1952*[64] requires consent of every parent or guardian of a child in respect of whom an adoption application is being made but where the parent or guardian has abandoned, neglected or persistently ill-treated the child and where the person whose consent is required is "incapable of giving his consent" such a consent can be dispensed with by the court.[65] It appears that neglect by retarded parents must be proven in the same way as neglect by any other parents. It should not be presumed only from mental retardation or from incapacity to consent because the mentally retarded parent may not produce any more problems than any other parent. Indeed, the achievements of a number of retarded couples should prove that intellectually normal couples are not the only ones capable of caring for children.

The position of a retarded person seeking to adopt a normal child is governed by the *Adoption Ordinance* as well. Section 3(1) reads:

> "Upon an application made in the prescribed manner by any person desirous of being authorised to adopt a child, the Court may, subject to the provisions of this Ordinance, make an adoption order, authorising the applicant to adopt that child."

Among the prerequisites for adoption are those mentioned in section 4(4), namely, a child has to be continuously in the care and possession of the applicant for at least three consecutive months immediately preceding the date of the order, and the applicant has to at least three months before the date of the order by a written notification inform an officer of the

[63] (1972) 201 N.W. 2d. 447.

[64] No. 41 of 1952.

[65] S. 5(1)(c), (2).

Social Welfare Department of the State in which he is for the time being resident of his intention to apply for an adoption order in respect of the child.[66] Although section 3(1) subjects an adoption order to the provisions of the Ordinance, nowhere is it stated that the applicant must be of sound mind or a mentally normal person. Even if mentally abnormal persons are implicitly excluded, the prerequisites in section 4(4), if met, should be adequate proof of a retarded person's capabilities of caring for children. Each application should be considered individually and no general rule should exclude those who are capable.

In Victoria the position of a retarded person seeking to adopt a normal child is governed by the *Adoption of Children Regulations 1965*. Among the considerations prior to approval to the adoption is suitability of applicants having regard to their state of health, educational background and physical characteristics.[67] This provision is, as yet, unexplored but the argument remains that just as a retarded person has rights to raise his or her own child, presumably a normal child, similar rights ought to accrue when he wishes to adopt someone else's normal child. After all, the right to raise children does not confine itself only to raising one's own children. Another point to consider here is contraception. If it is believed that mentally retarded couples are incapable of coping with a child, the various methods of contraception should be carefully explained to them, exposing the merits and demerits of each and advising as to the most suitable method for a particular couple. This task will preferably fall on the shoulders of the individual couple's families. The ultimate choice of contraceptive method should be left to the couple.

Conclusion

The rights of the mentally retarded in three sub-areas of domestic relations have been discussed. The foremost problem which remains is that of enforcement and implementation.

[66] See also s. 4(1)(2) and (3).

[67] Regulation 51.

Undoubtedly, legislative backing is needed to ensure that these rights are safeguarded. In the absence of legislation, the courts and other administrative bodies could function but, being administrative in nature, their scope is very limited. Be that as it may, the courts remain the sole outlet whereby aggrieved retardates and their representatives could seek remedies. Particular circumstances of the individual's case would certainly be very much the concern of the courts, if not the legislature, and individualised attention could be devoted on a more practical level. A combination of legislative force and judicial framework would certainly perform better by pulling the strengths of each set-up and giving effective meaning to the rights of the retarded person. But would this be the end of the matter?

There is yet another phase which is more difficult to overcome but not impossible, and that is the prejudice and discrimination in the minds of the general population when they regard the mentally retarded. The public needs to be educated and informed to acquire a more tolerant and enlightened attitude towards the retarded because only with these different attitudes would prejudice and discrimination be dispelled. Indeed,

> "dislodging firmly rooted, traditional beliefs fed and watered by emotion and fattened by popular acceptance is not an easy task. Nor is it quickly achieved. Yet, it must be done."[68]

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[68] E. Hart, *How Retarded Children Can Be Helped*, Public Affairs Pamphlet, No. 188, Public Affairs Committee, New York (1976).

PENGECUALIAN KEPADA KEPERLUAN BALASAN: SATU KAJIAN SEKSYEN 26 AKTA KONTRAK 1950

Adalah satu kaedah asas kepada Common Law bahawa suatu perjanjian yang boleh dikuatkuasa memerlukan unsur balasan.[1] Pihak menuntut mestilah telah mendapat janji pihak kena-tuntut sebagai balas janjinya sendiri. Seksyen 26 kepada Akta Kontrak Malaysia 1950 (disemak 1974) menyatakan bahawa satu perjanjian tanpa balasan[2] adalah terbatal melainkan salah satu dari pengecualian yang terdapat di dalamnya telah dipakai. Seksyen 26 berbunyi seperti berikut:

> Sesuatu perjanjian yang dibuat tanpa balasan adalah terbatal, kecuali –
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> (a) Ia dinyatakan secara bertulis dan didaftarkan menurut undang-undang (jika ada) yang pada masa itu berkuatkuasa untuk pendaftaran dokumen sedemikian, dan dibuat berdasar atas kasih-sayang semulajadi antara pihak-pihak yang ada hubungan karib antara satu sama lain; atau kecuali
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> (b) Ia sesuatu janji untuk memampaskan, keseluruhan atau sebahagiannya, kepada seseorang yang telah

[1] Pengecualian yang diiktirafkan dengan jelas kepada keperluan balasan di dalam Undang-Undang Inggeris ialah satu janji yang terkandung di dalam suatu dokumen yang "ditandatangani, dimeterikan dan diserahantar" atau apa yang dipanggil kontrak yang dimeterikan. Ada terdapat beberapa keadaan di dalam undang-undang Inggeris yang diiktirafkan sebagai kontrak yang boleh dikuatkuasakan walaupun balasannya adalah tidak jelas, misalnya surat kredit bank jenis "irrevocable credit." Untuk perbincangan lanjut mengenainya dan perkara-perkara yang berkaitan, lihat Treitel, *The Law of Contract* (Edisi ke–5), m.s. 96–106.

[2] Balasan adalah ditakrifkan oleh S. 2(d) seperti berikut: "menurut kehendak pembuat-janji apabila penerima janji atau siapa sahaja yang telah membuat atau telah menahan diri dari membuat sesuatu, atau membuat atau menahan diri dari membuat sesuatu, maka perbuatan atau penahanan diri atau janji itu adalah disebut balasan untuk janji itu." Bukanlah tujuan rencana ini untuk membincangkan aspek-aspek takrifan ini. Untuk mendapatkan perbincangan yang lanjut mengenai Doktrin Balasan secara keseluruhannya lihat Visu Sinnadurai, Doctrine of Consideration under the Malaysian Contracts Ordinance (1972) 3 Lawasia 483. Lihat juga V.G. Ramachandran The Law of Contract in India (Vol. I), m.s. 176–209.