

PATERNAL DISCRIMINATION IN GREEK CHILD CUSTODY PROCEEDINGS: FAILING THE CHILD'S BEST INTERESTS

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Abstract

Greek family courts routinely favour mothers in child custody proceedings even in cases where residence with the father would clearly be in the best interests of the child, which is the primary aim of the law. This discrepancy between the law and judicial practice is justified by the courts on alleged bio-social grounds but these have never been elaborated in any way and no theory from the field of neuroscience or developmental psychology has ever been cited as the groundwork for the courts' approach. The ensuing arbitrariness and absence of legal certainty stems from the absence of a dedicated family court system. As a result, generalist judges are fearful of expressing themselves in non-legal areas, such as neuroscience, or otherwise have little awareness of developments in these areas. Because judgments never make any scientific pronouncements litigants cannot challenge the courts on scientific grounds. This gender bias has its roots also in taboo theory. With minor exceptions experts universally agree that attachment theory is gender-neutral and that children, especially infants, form meaningful primary attachments to the person that provides them with a loving and caring environment.

Introduction

It is quite often that one notices discrepancies between the express dictates of a norm and its actual practice by pertinent stakeholders. This is usually the case where private conduct relevant to the norm is deemed acceptable by the State, especially where there is no harm to third parties. The norm itself may be in a state of desuetude, abandonment or transformation and hence private usage, or self-regulation (as is the case with the so-called *lex mercatoria*) is in fact tacitly endorsed at both the national and transnational level.¹ The discrepancy between norm and practice discussed in this article is of a vastly different nature as it concerns the violation of the norm by agents of the State, namely the courts. The central idea is that Greek family courts in their determination of child custody cases resort to an interpretation of the child's best interests² in a manner that in practice discriminates against fathers and thus is detrimental to the very interests of the child which the primary norm sets out to protect.

Article 1510 of the Greek Civil Code (GCC) introduces the broad concept of parental responsibility (γονική μέριμνα) with a view to encompassing all matters pertinent to the care of a child. This includes the child's custody and place of abode, as well as the administration of its property and representation in any case or contract that affects its person and assets. The general rule is that any decision on the exercise of parental responsibility must be in the child's best interests in accordance with Article 1511 GCC. In case of divorce, the courts may sever the various elements of parental responsibility and apportion them to each parent in a manner that serves the child's best interests.³ By way of illustration, if the father is a teacher

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¹ According to Teubner, the ultimate validation of *lex mercatoria* rests on the fact that not all legal orders are created by the nation State and accordingly that private orders of regulation can create law. G Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in G Teubner (ed) *Global Law without a State* (Dartmouth, 1997), p 15.

² Art 1511 Greek Civil Code, in line with Art 3(1) Convention on the Rights of the Child (CRC) 1989.

³ Art 1513(1) GCC.

he may be asked to decide the child's schooling and if the mother is an accountant the courts may designate her as the administrator of the child's estate. Equally, Article 1511(1) foresees the possibility of joint parental responsibility. In practice, however, this is wholly exceptional. The parent to whom physical custody is awarded is also the person that is vested with the power to determine all matters relevant to parental responsibility. The non-resident parent is only granted visitation rights. This is the reason why this article focuses on the narrower concept of custody as opposed to its broader counterpart of parental responsibility. For a variety of reasons family lawyers in Greece are disinclined towards suggesting joint parenting schemes, including joint custody, and the courts themselves are wary of making neat distinctions. As a result, and contrary to developments in other nations,⁴ while the legal tools are available to the parties and the courts they are seldom made use of in practice.

Save for the very specific reasons cited immediately below, Greek family courts are almost exclusively inclined towards awarding physical custody to mothers. The only available empirical study with data from divorce/custody judgments in Athenian courts from 1998-2008 suggests that in 92-94 percent of cases the courts have awarded custody to the mother.⁵ The principal reason for this uncritical stance, in the opinion of this author, is a string of judgments by the Supreme Court of Cassation, which of course acts as precedent upon lower courts, to the effect that mothers enjoy an "undoubted bio-social advantage over fathers" in respect of infants and young children.⁶ The Court of Cassation has never elaborated or dedicated a single sentence on the source or meaning of these bio-social grounds. As a result of the precedent caused by this claim, the jurisprudence whereby physical custody has been awarded to fathers is so sparse that it is not thematically categorised, but is known by actual case name,⁷ although there is no guarantee of precedent. A brief reference to some of these exceptional cases where custody has been awarded to the father is illustrative: the mother was in an adulterous affair and administered sleeping tablets to the child and later slandered the father to the child;⁸ the mother used the children for the purposes of her religion and refused blood transfusion to them;⁹ express desire of the children, aged 12 and 14, to live with their father, in conjunction with the father's overall suitability;¹⁰ the mother moved in, immediately after break-up, with drug addict partner and exposed infant to him as the new father;¹¹ the mother co-habited with the father's cousin who was also the godfather to one of the children;¹² father was found able to spend far more time

⁴ The Swedish model is rightly highlighted in the literature. See A. Singer, Active parenting or Solomon's justice? Alternating residence in Sweden for children with separated parents, (2008) 4 *Utrecht Law Review* 35.

⁵ I Paravantis, D Papadopoulou-Klamari, E Mitsopoulou (eds), Statistical Analysis of the Case Law of the Athens Court of First Instance: Parental Responsibility, *Child Custody and Visitation in case of Divorce* (in Greek, on file with author) (2010).

⁶ The aforementioned empirical study, *ibid*, found that only 10 percent of Greek fathers petition the courts for sole custody, hence there is an impression that the staggering judgments in favour of mothers are the direct result of unwilling custodian fathers. This low number of petitions, as demonstrated in this as well as other sections, is attributed to the widespread knowledge among male litigants of the statistics in favour of mothers and thus the futility of making a petition. This conclusion is further reinforced by the fact that of all relevant petitions (custody, post-divorce maintenance etc), 75-97,6 percent are instituted by mothers. Fathers surpass mothers only as regards visitation petitions (at a rate of 69,7 percent), which may well indicate that they have abandoned all hope of custody in favour of other more realistic options.

⁷ The title of an excellent article on these custody cases is highly indicative of the situation. P Nikolopoulos, The Awarding of Child Custody to the Father (in Greek), (2012) 60 *Nomiko Vima* 1171.

⁸ Supreme Court of Cassation judgment No 834/1996; similarly in Supreme Court of Cassation judgment No 1027/2010. Greek cases are not cited by name but by case number and year of issuance.

⁹ Herakleion Court of First Instance judgment No 245/1986.

¹⁰ Larissa Appeals Court judgment No 3/2011.

¹¹ Athens Court of First Instance judgment No 4033/2012.

¹² Ioannina Court of First Instance judgment No 511/1983.

with the child than the mother, in addition to providing a quality environment;¹³ psychological bond between father and child was especially strong;¹⁴ female child attempted suicide because of poor maternal parenting. The mother owned a night club and was absent every evening whereas the father was a pensioner and was available for the children throughout the day;¹⁵ mother's fixation with sexual partner and abandonment of parental duties towards the children;¹⁶ the mother physically abused the children who subsequently refused to live with her.¹⁷

These cases pretty much constitute the yardstick for awarding physical custody to the father and in each one the father is burdened with the implicit burden of furnishing the relevant evidence. The courts' stance towards mothers is in many cases disturbing as far as children's rights are concerned. In a recent case decided by the Athens First Instance Court, the parties had been in dispute over the custody of their two children (aged 5 and 4 at the time of trial) for a period of almost 4 years. During this time a court-appointed psychiatrist had issued a forty-seven page report in which he praised the father and categorically stated that he was much better suited to exercise custody. In addition, the mother had abandoned the older child for a period of sixteen months and affidavits from two nannies employed by the mother contained evidence that she and her partner mistreated or failed to adequately care for the children when in their custody. Despite the weight of this evidence and the fact that the older child expressed its desire to live with its father (the witness statements suggested that the child was in tears when forced to return to its mother and developed a lisp out of fear for her partner) the court, in the course of a mere twenty-minute hearing, returned with a decision awarding custody of both children to the mother.¹⁸ This is by no means an isolated case and is in fact emblematic of the attitude of Greek courts called upon to decide custody disputes.

The central tenet of this article is that this state of affairs violates the constitutional prohibition against discrimination, the spirit of the relevant part of the Civil Code and of course does not serve the children's best interests. The approach to the problem is not juristic. Rather, an attempt is made to explain why judges favour mothers from an anthropological perspective and to this end the author has undertaken an empirical study involving limited participant observation and a questionnaire. The research consisted of one-hundred male divorcees involved in custody proceedings and ten family lawyers, none of which had any professional connection to the author.¹⁹

The article also sets out to explore whether the justification offered by the Court of Cassation and subsequently by lower courts as to the desirability of maternal custody in respect of infants (children up to the age of five) on alleged bio-social grounds holds any basis in contemporary psychological and neuroscience research. In fact, it is demonstrated that this viewpoint, even if one were to maintain that it was once dominant, is now wholly out of place in contemporary psychology and neuroscience. This bio-social maternal superiority claim is also inconsistent with legal developments (and methodological approaches) in other European jurisdictions, whose courts have in any event gone to some length to explain in what manner neuroscience and psychology are pertinent in the determination and allocation

¹³ Supreme Court of Cassation judgment No 1553/1986; Thrace Appeals Court judgment No 146/2011; Supreme Court of Cassation judgment No 1027/2010; Thessaloniki Appeals Court judgment No 520/2009.

¹⁴ Supreme Court of Cassation judgment No 1910/2005; Athens Appeals Court judgment No 7352/2002, stressing that the male child's special bond with the father will help him achieve a solid male personality.

¹⁵ Athens Appeals Court judgment No 1018/1989.

¹⁶ Supreme Court of Cassation judgment No 1297/1993; Supreme Court of Cassation judgment No 1027/2010.

¹⁷ Supreme Court of Cassation judgment No 104/2011.

¹⁸ Athens First Instance Court judgment No 431/2015.

¹⁹ Although there are no accurate statistics, this author estimates the existence of no more than 150-180 lawyers in Athens that spend at least 90 per cent of their professional time in the area of family law. Hence, the sample represents roughly 8 per cent of the active specialist work force.

of parental responsibility. Although the research for this article concentrates on the practice and attitudes of Greek courts, it is the contention of this author that the problem is not restricted to Greece alone. It persists, in lesser or greater degree, in most industrialised nations as is evident from the range of organisations that have been set up to deal with its various manifestations.²⁰ Moreover, the practice of family law in one nation gives rise to implications before the courts of another in increasing cross-border matrimonial disputes and forum shopping pursuits.²¹ It is hoped that this study will provide some impetus for addressing these outstanding issues that affect the lives of vulnerable children caught in a power struggle of ideologies.

The Protection and Regulation of Custody under Human Rights Law

There is a valid reason for the absence of a discrete discipline of international family law as such, although some scholars and practitioners may argue otherwise.²² The very concept of the family, which in its broadest sense is composed of two independent yet inter-connected relationships, namely the spouses *inter se* and spouses-children (in its narrowest it may consist of single parent families, non-marital families, families without children, two-adult families without children etc), is protected by two overarching freedoms; privacy and the rights of children. The relationship between the spouses and the children, which is the subject matter of this paper, is also constrained by the principle of equality and non-discrimination, but as will be demonstrated this is subsidiary to the operation of the children's "best interests" principle, which is paramount in any determination of matters pertinent to children, such as parental care and custody.²³ The reason for this hierarchy between two seemingly equal human rights norms is their tendency for conflict. If one is to assess the best interests of a child in the course of a custody dispute between two parents, one must "discriminate" in favour of the parent that provides the best possible assurances (e.g. safety, stability, loving environment, education prospects, etc) to the child's wellbeing. This discrimination is considered necessary because the objective in question is the wellbeing of the child, which cannot always be served if equality between the parents is taken as the starting point.²⁴ Hence, the invocation of paternal rights is in a sense misleading because they arise only in connection to the child's best interests, being at all times subordinate to these.

This hierarchy of norms (i.e. best interests versus non-discrimination) is not apparent from a reading of Article 3 CRC which concerns the concept of "best interests". This is because whereas paragraph 1 elevates the concept of "best interests" to a "primary consideration", paragraph 2 suggests that the child's wellbeing should take into account the "rights and duties of his or her parents". The residual operation of non-discrimination in

²⁰ See, for example, the UK's Families Need Fathers (FNF), available at: <<http://www.fnf.org.uk/>>.

²¹ In fact, some of the leading matrimonial jurisdiction cases in England have involved Greek parties, particularly *Marinos v Marinos* [2007] EWHC 2047 (Fam) and *V v V* [2011] EWHC 1190 (Fam).

²² A glance at the contents of some of the few books bearing this title suggests that their subject matter is largely predicated around domestic laws with extraterritorial effect in addition to matters raising human rights – including children's rights – considerations, such as inter-State adoptions and abductions, arranged marriages and others. See, for example, D Hodson (ed.), *International Family Law Practice* (Family Law, 2012).

²³ *Maumousseau and Washington v France*, App No 39388/2005, judgment (6 December 2007), para 62; *Gnahoré v France* (2000) 34 EHRR 38, para 59.

²⁴ The EurCtHR has claimed in unequivocal terms that the award of custody to one parent following divorce or separation constitutes an interference, albeit a legitimate one, to the right to family life of the other under Article 8 ECHR. This interference is justified by the best interests principle enshrined in Article 3 CRC. See *Hoffman v Austria* (1993) 17 EHRR 293, para 29. The "best interests" principle exists also, among others, in Art 24(2) of the EU Charter on Fundamental Rights.

custody proceedings serves to avoid excluding altogether the parent whose lifestyle is not considered mainstream, such as homosexuals²⁵ or members of fringe religious groups,²⁶ albeit only to the degree that said lifestyle is not a threat to the child's wellbeing. The non-discrimination principle has equally been extended to guarantee custody (or joint custody) and communication rights to the father whose child was born out of wedlock.²⁷

That the subject matter of custody and parental care in its wider dimension is important to the operation of the CRC and the best interests of the child principle is beyond doubt. Access to both parents is normally crucial for the healthy development of children. Human rights bodies and entities within the UN system have stressed the need for States to guarantee relations with both parents.²⁸ While said bodies have never actually addressed paternal discrimination this was certainly not because they approved it in principle²⁹ or practice,³⁰ but rather because the most alarming and endemic manifestations of parental discrimination have occurred against mothers in several developing countries where the status of women remains low.³¹

The Place of Culture in Custody Proceedings

In Greek culture, despite the fact that feminism made substantial inroads since the early 1980s, the courts continue to view the family in custody proceedings through a traditional lens. In their assessment of a child's best interests, particularly where differences among the parents are not substantial, they are almost exclusively inclined in practice to offer custody to the mother.³² Culture in this context should not be confused with an assessment of what a particular society views as appropriate parenthood at any given moment.³³ Such an assessment would fall within the realm of anthropology and would no doubt assist the court's reasoning, provided it was consistent with the rule of law. Anthropologists do not presume to know what a particular society thinks but instead seek to extrapolate this from the very

²⁵ *Salgueiro da Silva Mouta v Portugal*, App No 33290/1996, judgment (21 December 1999), para 35, where the EurCtHR found a violation of Articles 8 and 14 by the decision of Portuguese courts not to award parental responsibility to a homosexual parent living with another man.

²⁶ Equally, in the case of a mother who was a Jehova's Witness. See *Hoffman*, above note 17, para 35.

²⁷ *Zaunegger v Germany*, App No 22028/2004, judgment (2 December 2009); *Sporer v Austria*, App No 35637/2003, judgment (3 February 2011). See also BVerfG, 1 BVR 420/09, German Federal Constitutional Court judgment (21 July 2010), awarding joint custody rights to the father of a child born out of wedlock.

²⁸ UN Human Rights Committee (HRCtee) General Comment No 17, para 6.

²⁹ The HRCtee in its General Comment No 19, para 9, emphasised that: "any discriminatory treatment in regard to the grounds and procedures for separation or divorce, child custody, maintenance or alimony, visiting rights or the loss or recovery of parental authority must be prohibited, bearing in mind the paramount interest of the children in this connection".

³⁰ In fact, there are several references in the CtRC jurisprudence recommending that State parties amend their legislation to provide fathers the opportunity to request custody of their children born out of wedlock, where possible as a joint custody with the mother. See CtRC Concluding Observations on Liechtenstein, UN Doc CRC/C/LIE/CO/2 (16 March 2006), para 16.

³¹ UN Committee on the Rights of the Child (CtRC), Concluding Observations on Egypt, UN Doc CRC/C/EGY/CO/3-4 (15 July 2011), para 52(f), noting that States must guarantee equality in divorce and child-rearing responsibilities.

³² See above notes 5 and 6.

³³ Culture is a complex phenomenon and scholars such as Geertz have viewed it as a web of shared meanings expressed through public communication, not in the sense of sharing the same knowledge and skills but in the sense that persons who in fact share a culture share a common world view that is expressed through common symbols and language. See C Geertz, *The Interpretation of Cultures* (Basic Books, 1973).

subjects of their observation.³⁴ The courts, on the other hand, because they are unable to undertake a thorough ethnographic research of parental perceptions, or indeed of shifting social trends pertinent to parenting, adopt uncritical and rather subjective views of acceptable parental models. The Greek courts' perception of the family through a traditional lens presumes that fathers are bread-winners whereas mothers generally stay at home or well less and as a result it makes sense to offer them exclusive custody. Empirical research no doubt disproves this assumption and this male bread-winner model is certainly not true for the majority of the younger generation of families in Europe.³⁵ Another cultural bias is undoubtedly the influence of feminism in European family law and for good reason.³⁶ For at least two decades following the end of WW II women were discriminated in one way or another in their relations with their spouses and the feminist movement succeeded in pushing forward common sense legislation, such as marital rape,³⁷ the possibility of divorce absent mutual consent,³⁸ non-criminalisation of extra-marital affairs, non-discrimination in custody proceedings and even led to the recognition of the so-called battered wife syndrome as a limited defence to the murder of a vicious spouse.³⁹ All these are significant developments for women's equality movement, albeit feminism and women's rights in particular, as is the case with so-called paternal rights, should play no role in custody proceedings as such, given that the paramount consideration remains the child's best interests.

In concert with cultural biases, Greek courts make certain claims that befall the fields of psychology and neuroscience. These claims lack scientific authority as well as an elaboration that links law, in particular parental responsibility, to the theories advanced. Although we shall return to advances made by psychological research in the last two decades, it is instructive at this point to look at the conclusions of Greek courts on this matter. In a judgment by the Cassation Court in 2011 it was held that custody over infants (children below the age of 5) should rest with the mother on account of "well-documented research demonstrating the bio-social advantages of maternal custody over children of that age".⁴⁰ The Court failed to mention any sources for this scientific conclusion and referred instead to its own past judgments on the same matter as precedent. In the hope that the Court may on some other occasion have offered a substantive scientific analysis for its bio-social maternal advantage theory this author traced all relevant cassation judgments back to 1989 on which occasion the bio-social advantage theory was postulated. The reader will not be surprised to learn that no analysis or elaboration was ever attempted in that or subsequent judgments and not a single authority was cited. Yet, despite the absence of any scientific evidence in respect

³⁴ For Bourdieu, in order to assess whether the members of a group share or do not share common values one must distinguish that which is taken for granted by the group and which is beyond discussion (*doxa*), such as faith in God or unquestionable adherence to a political system, from things that are actively discussed among group members and are not therefore axiomatic (opinion). P Bourdieu, *Outline of a Theory of Practice* (Cambridge University Press, 1977), pp 164-70.

³⁵ See R Crompton, *Restructuring Gender Relations and Employment: The Decline of the Male Breadwinner* (Oxford University Press, 1999). While there are of course disparities between southern and northern Europe, principally because of *familism*, the trend is undoubted.

³⁶ See KT Bartlett, Feminism and Family Law (1999) 33 *Family Law Quarterly* 475.

³⁷ *R v R* (1992) 1 AC 599. By 2006 marital rape was prosecutable in 104 nations. See UN S-G Report, In-Depth Study on All Forms of Violence against Women, UN Doc A/61/122/Add.1 (6 July 2006).

³⁸ See, for example, M Blofield, *The Politics of Moral Sin: Abortion and Divorce in Spain, Chile and Argentina*, in D Mares (ed), *Latin American Studies, Social Sciences and Law* (Routledge, 2006), who discusses the complex tug-of-war between these nations' feminist/anti-junta movement against the backdrop of Catholic conservatism in respect of divorce laws.

³⁹ See DL Roth, EM Coles, Battered Woman Syndrome: A Conceptual Analysis of its Status vis a vis DSM-IV Mental Disorders, (1995) 14 *Medicine and Law* 641. The test case in English criminal law was *R v Ahluwalia* (1992) 4 All ER 889.

⁴⁰ Supreme Court of Cassation judgment No 121/2011.

of a claim that constitutes the yardstick for all custody cases, this author is not aware of a single challenge by family lawyers in disputes before the courts.

The issue here is not so much whether the scientific conclusions – as transformed into binding judgments – are correct or not; rather, what is at stake is the methodology for their adoption as well as the aptitude of the judges to appraise the data in such a way as to appropriately and efficiently incorporate them in the legal process in pursuance of their primary objective, which is the child's best interests. In all of the judgments surveyed from 1989 to 2011 none refers to a methodology and there is no mention of a single study, book or journal article that confirms or justifies the pertinent position.⁴¹ A very crude break-down of the bio-social theory involves two strands: a) the biological, which can only encompass children still in the phase of breast-feeding and hence in need of their mothers during such time and; b) the social, which includes social circumstances that are not *a priori* inherent to any particular sex, such as the family's bread-winner or the parent spending less time at work. It is clear that the determination of general social criteria (i.e. all mothers stay at home whereas fathers work) without recourse to context and the particularities of each family are wholly discriminatory.

The situation is further exacerbated by the fact that the lower courts must follow the precedent set by the Court of Cassation.⁴² To their credit, several lower courts have distanced themselves from the psychological postulates of their senior counterpart, albeit these are considered minority decisions.⁴³ German courts, on the other hand, perhaps under advice that no scientific research supports one parent over another in terms of a more appropriate socio-biological custodian, have held in no unclear terms that there exists no biological primacy under German law and jurisprudence.⁴⁴

That judicial perception of pertinent culture is at the heart of judgments encompassing strong arguments with a psychological flavour is undoubted. This is further reinforced by the fact that both international and domestic laws make no mention whatsoever of biological or psychological supremacies and in fact lay their entire emphasis on the child's best interests. In the absence of any direct references to scientific data, therefore, Greek courts are inclined to justify their cultural bias or perception by reference to a discipline that is unfamiliar to lawyers and litigants.⁴⁵ The creation of this cultural bias is constructed along numerous strands, albeit their precise mapping is beyond the scope of this article. Nonetheless, certain indicia are available through statistical data and observation. The first is that the majority of judicial posts in Greece – there are as yet no distinct family courts in Greece as family law is encompassed within the remit of the civil courts, although this is due to change – are now typically occupied by women,⁴⁶ which have in time shifted many of the male-dominated stereotypes of past eras, particularly legal notions requiring judicial discretion, such as a

⁴¹ See, for example, Supreme Court of Cassation judgment No 1027/2010; Supreme Court of Cassation judgment No 1785/2002.

⁴² The silver lining here is of course that in the absence of a concrete scientific justification by the Court of Cassation, lower courts may deny that precedent has been established where they furnish internationally-recognised scientific evidence themselves. Amicus briefs could certainly play a key role in this respect.

⁴³ Athens Appeals Court judgment No 2586/2005, which expressly rejected the argument that mothers alone are best suited for the custody of infants, suggesting that this is true only for a child's first months of life.

⁴⁴ OLG Saarbrücken, judgment (20 January 2011), 6 UF 106/10.

⁴⁵ There are traces here of a limited *confirmation bias*, in the sense of information processing distortion by the judges – as opposed to editors of books and journals to which the term is usually reserved – by means of ignoring or discrediting legal opinions and psychiatric/psychological reports furnished by male litigants in favour of the dominant international research papers. See J Mahoney, Publication Prejudices: An Experimental Study of Confirmatory Bias in the Peer Review System (1977) 1 *Cognitive Therapy and Research* 161.

⁴⁶ The International Judicial Monitor reported that as of early 2013 sixty-four percent of judges in Greece were female. Available at: <<http://www.judicialmonitor.org/current/editorial.html>>.

child's best interest.⁴⁷ Secondly, despite the existence of oral hearings in custody cases these are necessarily short because of backlogs in the system and judges typically make their determinations on the basis of the written evidence supplied by the parties. By the time judges begin to study the written evidence the oral evidence is no longer fresh in their mind – anything from six months to a year – and as a result whatever attachment or familiarity a judge may have developed to the facts of a case these are lost by the time he or she looks at the written evidence. Thirdly, because male litigants share a common feeling of discrimination in custody cases, as further explained to them by their lawyers from the outset,⁴⁸ they generally avoid taking extreme measures throughout the process in order to demonstrate that they are more appropriate custodians. By way of illustration, a man is less likely to give up, or decrease, his working hours in order to show that he can spend more and quality time with the child.⁴⁹ In fact, the father would in all likelihood need to increase his income following marital break-up as he would be forced to move from the family home and pay temporary child support and later post-divorce maintenance. This observation is reinforced by the aforementioned 2010 study which aptly demonstrated that mothers initiate almost 98 percent of divorce-related financial petitions with success rates close to this figure.⁵⁰ Equally, a father may be unable to afford the time or the finances to investigate whether the wife is involved in an abusive relationship that is harmful to the child, which would otherwise confer custody to the father.⁵¹ This male perception of bias in custody disputes has never seriously been studied and hence no anthropological data have been found to justify the conclusion.

Fourthly, Greek judges, both male and female, share in their majority common experiences of traditional matriarchal family settings where the mother was the dominant figure and the father the bread winner. In this context the mother was always portrayed as the *sine qua non* component of the family unit and popular expressions such as “there is only one mother”⁵² are indicative of this particular perception.⁵³

Fifth, as is common with civil law nations, family law is rooted within the civil code. Judges sitting in civil courts in Greece are engaged with all matters falling within the ambit of the civil code. This artificial state of affairs is no longer practical and serves no meaningful purpose. Family law is not at all akin to the law of mortgages and contracts and if anything

⁴⁷ While it may seem contradictory that a largely female bench follows the traditional family stereotype of the breadwinner father, we have already alluded to the fact that despite the significant inroads by feminism since the early 1980s judicial determinations in custody cases are not consistent with cultural developments. This stance reinforces one of the key arguments of this paper, namely bias predicated on taboo. In her study of modern family planning and high abortion rates in urban Greece, H Paxson, *Making Modern Mothers: Ethics and Family Planning in Urban Greece* (California University Press, 2004), at 237, the author noted the “contradictory nature of modern Greek femininity” in its use of IVF despite the high number of abortions. The contradiction arises because whereas motherhood and femininity are associated with the qualities of sacrifice and emotivity, to be a modern person is to be independent, autonomous and rational.

⁴⁸ This is explained by reference to empirical data in the following section.

⁴⁹ Thrace Appeals Court judgment No 146/2011; Thessaloniki Appeals Court judgment No 520/2009.

⁵⁰ See above notes 5 and 6.

⁵¹ Supreme Court of Cassation judgment No 1027/2010; Supreme Court of Cassation judgment No 561/2003.

⁵² There exists no equivalent popular expression about fathers in Greek folklore or religious usage, where the Virgin Mary (the Theotokos) is revered as the ultimate Mother even during Easter, whereas no such veneration is reserved for Joseph. God is not viewed as a father figure because he is part of the indivisible Holy Trinity, which includes the son (Jesus) and the Holy Spirit. Culturally, therefore, Christian Orthodox doctrine and history does not project fatherhood in the same way as the ultimate motherhood of the Theotokos.

⁵³ Writing on Greek immigrant families in the USA, which is an ideal snapshot of a traditional Greek family, Kourvetaris writes that: “the Greek wife and mother was the most dominant figure in the Greek immigrant family. Her presence and influence was felt not only in the family but also in larger ethnic community affairs”. GA Kourvetaris, *The Greek American Family*, in CH Mindel, RW Habenstein, R Wright Jr (eds.), *Ethnic Families in America: Patterns and Variations* (Prentice Hall, 1988), 76.

the child's best interest principle and the respect owed to family life and its privacy are more suited to human rights law. The impact stemming from this lack of specialisation is not felt on the judges' understanding of the relevant law, but rather their understanding of those social or natural sciences upon which the law is, or should be, predicated. This largely explains why no judgment has ever put forward a dominant theory to justify policy and judicial preferences in custody determinations. Even in cases involving serious abuse where one would have thought that the courts would be willing to entertain a dominant theory assisting future cases, judges were content to simply accept expert reports and avoid any incursions into neuroscience or child psychology.⁵⁴ This lack of a dedicated family court structure makes judges hesitant to offer any kind of scientific precedent, despite the fact that many may perhaps be following relevant scientific advances. There are several reasons for this disinclination. Certainly, it is the opinion of this author that many judges sitting in lower courts consider themselves out of place were they to embark upon a non-legal scientific debate, especially if its effect were to deny authority to the bio-social theory of the Court of Cassation. Moreover, given that traditionally and institutionally Greek courts have been reluctant to offer any kind of precedent involving the biological sciences, there is no guarantee that an elaborate judgment would ultimately have any precedential value, which may after be found to contradict the Court of Cassation's bio-social theory. It is instructive that despite the centrality of attachment theory to a child's developmental pathway,⁵⁵ the Greek courts have never once made reference to this theory. As a result, in order to avoid any reputational and related risks, at best, judges seek expert determination only in very complex cases where there are serious concerns about the quality of a particular parent.⁵⁶ However, because the experts are well aware of the minimal impact of a detailed theoretical analysis on the dominant trends in neuroscience, their analyses are quintessentially clinical. There is no single judgment where the courts have cited a past expert report as authority for a later case, thus giving rise to lack of legal certainty, continuity and guidance on the part of all relevant stakeholders. It is thus suggested that a crucial step in the reform of Greek family should be the mandatory participation of qualified social services in each and every petition involving custody and parental responsibility. The determination of a child's best interests cannot possibly be left to a single judge who not only lacks the requisite scientific skills but who moreover has not previously undertaken any investigation as to the parents' personal circumstances.

The following section will discuss some of the empirical findings associated with custody proceedings in Greece. These justify the anthropological conclusions rendered in this section.

The Views of Litigants and Lawyers

The sample consists of one hundred male litigants⁵⁷ interviewed by means of a questionnaire under the assumption that face-to-face contact could act as a deterrent to the admission of

⁵⁴ Case No 4033/2012, above note 11.

⁵⁵ See JE McIntosh, Guest Editor's Introduction to Special Issue on Attachment Theory, Separation and Divorce: Forging Coherent Understandings for Family Law (2011) 49 *Family Court Review* 418, at 418-19.

⁵⁶ Expert determination has been ordered in less than 0.5 per cent of cases. Out of a total 2207 custody petitions surveyed between 1998 and 2008 the courts ordered expert testimony in only 11 cases. See Paravantis et al (2010), above, note 5.

⁵⁷ The sample represents approximately 0.5 per cent of the average annual number of custody judgments before the courts of Athens. Paravantis et al (2010), *id.*, found a total of 1932 custody judgments in 2007 and the assumption is that this number has not significantly altered since. Under the Cohen f^2 formula, an effect size of 0.5 per cent is capable of producing a "medium", as opposed to a small or large, effect.

truth. The interviewees had all undergone custody proceedings in the last three years and the children in question were between the ages of 1 to 8 years old at the time of litigation. The litigants were selected on the basis of their Greek nationality, their residence in Athens, their wide age group (between 35 and 45), their comparatively similar level of education (all at least high school graduates) and employment (with the exception of two all others were in steady employment). The interviews took place between 1 January 2012 and 31 June 2013. In addition, I sought the views of ten family lawyers, some of which were interviewed during the aforementioned periods, whereas others prior to 2012. All interviewees shall remain anonymous. The methodological objective was to attempt something akin to what social scientists would term *participant observation*,⁵⁸ but given the privacy of client-lawyer sessions it was thought that the researcher's physical presence therein would be intrusive and against the litigants' interests since it is natural that some of the litigants may have wished to confess illegal or embarrassing conduct. Thus, participant observation was limited to public courtroom sessions and verbal interaction with the lawyers in the absence of their clients.

Fifty-five of the litigants stated that prior to their first consultation they were confident of securing physical custody of their children on the basis that they had either spent far more time than their wife with them, in addition to earning a better income, the possession of a safe and stable environment or because their wife had entered into an adulterous relationship that was also potentially harmful for the children. The other forty-five litigants were not so confident, because they offered more or less the same guarantees as their wife and as a result were advised by friends that in such circumstances the system favoured the mother. It should be added here that all of the fifty-five in the first group had also spoken to friends, divorced or otherwise, and were equally advised that they possessed little, or no, chance of being awarded custody of their children, but were confident because of their particular circumstances. All of the litigants admitted that they were conscious of the fact that fathers were disadvantaged in the custody process and they took this for granted. When asked how they had come to form this opinion they invariably responded that: "everybody knows this" or that "the courts have a hard time separating mothers from children as there would be an outcry". It would have, of course, been interesting to take a similar sample from a group of mothers to assess whether they shared this popular culture with fathers and whether there are any distinct differences in perceptions between the two groups.

Following the first sessions with their lawyers all of the hundred litigants had reached the same level of thinking regarding their prospects of custody. Even those originally more confident had by the third session accepted that custody was not likely and were in the process of coming up with a settlement that would allow them to see their children as much as possible. They all explained that while their lawyers agreed to undertake custody litigation they were told that in practice custody can only be refused to a mother if there is concrete evidence of prostitution, drug addiction, or if it is demonstrated that she has seriously abused her children, whether physically or mentally. Although, as already explained in the introduction, some lower courts had made further inroads and provided other reasons for conferring custody to the father, the litigants were told that these were exceptional cases and they should not rely on such judgments as solid precedent, particularly if they could not come up with the relevant evidence. As a result of these consultations ninety-five of the litigants admitted they were discouraged and queried whether expensive rounds of litigation were

⁵⁸ Typical participant observation (although this might be misleading given it may vary from non-participatory to complete participation) requires spending significant time living among one's subjects of observation, even in urban settings. There is no winning formula given that there are benefits and disadvantages in partaking in the life of the society observed as there are in being a mere distant observer who stands in the background. For a discussion of anthropological field methods, see K O'Reilly, *Ethnographic Methods* (Routledge, 2nd ed, 2012), particularly pp 86-115 on observation.

worthwhile if only to end up paying legal costs without any prospects of a successful outcome, let alone a hostile ex-wife who as a result of the heated litigation would make contact with the children difficult in the future. Of the hundred litigants, only nine ultimately decided to pursue contentious custody proceedings, all of which were relatively well off financially.⁵⁹ These nine litigants retained only a slight hope of success, but were largely driven by the mother's "poor" conduct – particularly the housing of a new partner in the maternal home with the children – and the children's expressed desire to live with the father.⁶⁰

The lawyers (three male and seven female) stressed that their typical clientele consisted of both male and female parents and that in their experience the majority of marital breakups since 2000 were largely driven by their female clients⁶¹ but they admitted possessing only a limited picture of the marital breakup and divorce phenomenon in Greece and hence their observations were inconclusive.⁶² Their experience with custody proceedings was that it all eventually came down to the particular judge of the day.⁶³ Nonetheless, unless there was concrete evidence that the mother was abusive, a chronic drug-addict or otherwise currently involved in illicit activity that put the welfare of the child at risk (e.g. prostitution, organised crime) it was unlikely that the father would be awarded custody, even if the mother's parenting and time spent with the child was significantly poor as compared with that of the father. It was only the well-off fathers, or those willing to sacrifice otherwise limited financial resources to investigate the mother's lifestyle following separation that pursued further custody litigation, despite the fact that much of this evidence is generally inadmissible in court proceedings. Even so, the lawyers admitted that it is only in exceptional cases that the courts are willing to award custody to fathers in the face of evidence showing delinquent parenthood by the mother. In such cases, fathers can only expect some reprieve where their evidence is assessed by the prosecutor as constituting a prima facie basis for an investigation into the living conditions of the mother with a view to a determination of temporary custody. However, it is evident that the collection of this prima facie evidence in the first place requires painstaking investigatory work that is costly, time-consuming and cumbersome.

These views provide the context of custody proceedings from a bottom-up perspective through the lens of the protagonists, namely fathers and lawyers. It is natural to assume that mothers share the same perspective, which no doubt will be reinforced by the advice received from their respective lawyers. What is unclear from this study is whether this shared view is

⁵⁹ This sample is largely consistent with the percentage of custody petitions lodged exclusively by fathers before the courts of Athens, namely 9.92 per cent. See Paravantis et al (2010), above, note 5.

⁶⁰ As is typical of other jurisdictions, the child's expressed will to reside with a particular parent is taken into consideration by the court but is assessed on the basis of the child's maturity and his best interests under the circumstances. In any event, the emotional bond with a particular parent is an important criterion. See Athens Appeals Court judgment No 7352/2002; Supreme Court of Cassation judgment No 1910/2005.

⁶¹ See H Symeonidou, PG Mitsopoulos, Union Disruption in Greece, (2003) 33 *International Journal of Sociology* 65, who refer to an in-depth sociological study demonstrating that until 2000 divorce rates in Greece were exceptionally low, rising only in the early 1980s when there was a change of law allowing "automatic" divorces in cases of long separation. Since 2000 divorce rates have sharply risen but remain low compared to other EU nations.

⁶² The Hellenic Institute of Psychological and Sexual Health, a private organisation, undertook a survey among 9,726 men and women in Greece, of which 1,945 were divorced, covering the period from 2004-2008. The survey found that at a rate of 70 percent divorces were initiated by the wives who in the vast majority of cases were also mothers. The principal reasons cited were emotional gaps as well as a failure by the husband to meet expectations in the mother's relationship with the child. Available at: <<http://www.askitis.gr/research/telephone>>.

⁶³ All the lawyers admitted that in the course of their practice they had come to identify judges as either father-friendly or father-hostile. In the latter case they claimed that unless the evidence was overwhelmingly compelling their male client had no chance of being awarded custody. In their vast majority, male judges were considered by the lawyers as father-friendly.

tacitly communicated to the judges through the channels of popular culture, or whether it is instead shared by them *a priori*. The hypothesis is that judges are not immune to the symbolism and communicative impact of their surrounding culture. These impediments are further augmented and exacerbated by the particular problems they encounter in the discharge of their office, as these were identified in the previous section. This interplay between norms, ideology, (judicial) power, morality, meaning and interpretation cannot be explained by reference to the two leading theories on legal anthropology, namely *social sanction theory*⁶⁴ and *order and dispute*.⁶⁵ An anthropological theory which this author finds compelling in the context of the present discussion is *taboo theory*, which suggests that particular conduct (viewed alone or through objects and symbols) may be perceived collectively as profane, forbidden or polluted. What is important is whether taboo is created in time by an a-personal culture or through a process of social engineering by a ruling elite. Steiner demonstrated in his 1956 study of Fiji, that those yielding political authority could impose a taboo as part of that very authority. As a result:

The power to restrict was the yardstick by which power was measured: here was the social manifestation of power. Second, the exercise of this veto was in terms of taboo, that is, the actual sphere of any person's office or office's power was delimited by the kinds of taboos he could impose. Taboo thus provided the means of relating a person to his superiors and inferiors.⁶⁶

In the case at hand it is possible that the judges are projecting a combination of their own belief system and shared (but not majority-based) popular culture upon custody determinations by formulating a taboo that is subsequently shared by the relevant actors of the judicial process (i.e. litigants and lawyers). The legitimisation of this taboo is further reinforced by the fact that the "best interests of the child" principle requires judicial discretion. As a result, it is removed from the executive realm and the judges exercise absolute authority over its operation and elaboration. The taboo finds further normative justification and reinforcement by reference to uncritical and uncensored forays into neuroscience and psychology and the absence of a dedicated family law court structure. This explains why there are no similar arbitrary distortions in other fields of family law where the law is unequivocal and not subject to judicial discretion.

The next section will demonstrate that cultural bias in custody proceedings has prevented family law judges in Greece from taking into account advances in psychological and neuroscience research, thus relying on antiquated theories for the determination of physical custody.

The View from Developmental Psychology and Neuroscience and the Dominance of Attachment Theory

For a very long time the dominant theory in the dawn of child psychology was that infants and young children possess an inborn attachment to their mother. The connection between mother and child is self-evident but the "inborn attachment" was also fed by symbolism inherited from religion and implicit kinship conceptions under the guise of biology. Rodney Needham, in a groundbreaking collection of essays in 1971 emphasised that kinship:

⁶⁴ See particularly AR Radcliffe-Brown, Social Sanctions, in *Structure and Function* (Cohen and West, 1952).

⁶⁵ P Caplan (ed), *Understanding Disputes: The Politics of Argument* (Berg, 1995), p 1.

⁶⁶ F Steiner, *Taboo* (Penguin, 1956), p 39.

... has to do with the allocation of rights and their transmission from one generation to the next. These rights are not of any specific kind but are exceedingly various: they include most prominently rights of group membership, succession to office, inheritance of property, locality of residence, type of occupation and a great deal else. They are all, however, transmissible by modes which have nothing to do with sex or genealogical states of transmission or recipient.⁶⁷

As a result the social (or cultural) dimensions of kinship have largely dominated popular perceptions of the family as well as the bonds and relationships between its members. The “biological bond” perceptions, more specifically, were further reinforced by the allocation of family roles, whereby the mother was the sole carer of her children. To a very large degree, in a male-dominated world of past times, fathers must have implicitly viewed this arrangement as rather convenient. A complicating factor upon the advent of modern psychology was the fact that unlike clinical studies with adults, infants and young children could not express themselves in a way that would produce meaningful outcomes and hence empirical studies on children, let alone infants, was limited to observation. Advances in neuroscience played a significant role in this respect because they allowed scientists to track the development of a brain over time.

The aforementioned perceptions-turned bio-psychological theories could not, however, account for the multitude of discrepancies, namely the healthy mental lives of many children not raised by their mothers (e.g. orphans) and vice versa. This missing link was provided by Bowlby’s so-called *attachment* theory and the subsequent understanding by social and natural scientists of the diffuse role of each parent on the psychological development of children.⁶⁸ These theories, which are now dominant, dismissed the suggestion of one parent’s superior role over the other, demonstrating instead that infants develop their sense of safety and stability by attaching themselves to the person or persons that respond promptly and consistently to their cries, smiles and other signals in a process called attachment. Attachment is thus not restricted to the child’s biological parent(s) but may also develop with a nanny or adopted parents.⁶⁹ Whatever the case, psychologists argue that the infant’s secure attachment to its parents provides it with better chances of developing into a happy and well-adjusted adolescent and later adult.⁷⁰ It has aptly been demonstrated that infants form the same quality of attachment to fathers as they do to mothers.⁷¹

Without in any way minimising the role of mothers, the father’s role in a child’s development has been proven crucial not only as regards infants but also later in life.⁷² More importantly, mothers and fathers perform different but complementary functions in the healthy development of their children. This does not, however, mean that the physical absence of one or the other parent is detrimental to the child’s development, given that a

⁶⁷ R Needham (ed.), *Rethinking Kinship and Marriage* (Tavistock, 1971), pp 3-4.

⁶⁸ See the pioneering work of J Bowlby, *Attachment* (Pimlico, revised edition, 1997); J Holmes, *John Bowlby and Attachment Theory* (Routledge, 1993).

⁶⁹ Neuroscience has for some time maintained that affection and love are key to the development of an infant’s brain, particularly the development of social and emotional brain systems. See S Gerhardt, *Why Love Matters: How Affection Shapes a Baby’s Brain* (Routledge, 2004). Once again, Bowlby’s, *A Secure Base* (Routledge, re-issue, 2005) constitutes the groundwork for subsequent advances in neuroscience.

⁷⁰ M De Wolff, M van IJzendoorn, M., Sensitivity and Attachment: A Meta-Analysis on Parental Antecedents of Infant Attachment, (1997) 68 *Child Development* 571.

⁷¹ ME Lamb, C Lewis, ‘The Development and Significance of Father-Child Relationships in Two-Parent Families’, in ME Lamb (ed.), *The Role of the Father in Child Development* (2010), pp 94-153.

⁷² In a recent study by A Sarkadi et al, Fathers’ Involvement and Children’s Developmental Outcomes: A Systematic Review of Longitudinal Studies (2008) 97 *Acta Paediatrica* 153, it was shown that father engagement reduces the frequency of behavioural problems in boys and psychological problems in young women, further enhancing cognitive development, while at the same time decreasing delinquency and economic disadvantage in low-income families.

healthy attachment with a caring and attending mother or father suffices to substitute the qualities of the absent parent. In equal manner, the continuous presence of two unsupportive and un-caring parents to whom the child has not formed a strong enough attachment is by far inferior to the child's attachment to a single parent, be that the mother or the father. Research has shown that whereas mothers project affection and security, fathers are more playful⁷³ and allow infants and young children to explore their surrounding environment and by creating obstacles assist them to solve problems and interact with the world.⁷⁴ Infants enjoy immensely this type of discovery through playful stimulation and it is through this that fathers become special to them and as a result they are able to set and enforce limits and boundaries.⁷⁵

Several empirical studies have demonstrated the beneficial effects of devoted and caring fathers on infants – this age is of some contention given our remarks above. It has been shown, for example, that primary school children score higher on tests of empathy if they had secure attachments to their fathers during infancy. These children displayed humane behaviour towards their peers and actually took concrete steps to make them feel better.⁷⁶ Equally, infants with involved and caring fathers have been shown to score higher in terms of thinking and solving skills,⁷⁷ as well as in forming loving relationships with their other brothers and sisters.⁷⁸

Of course, the construction of legal arguments in respect of post-separation parenting by the courts is not an easy matter. Even where science is unanimous, as is the case with avoiding any stress to the attachment of children up to the age of two,⁷⁹ the courts still have to weigh other considerations, such as the mental and physical behaviour of the primary parent, etc in order to reach a sensible conclusion. However, science can guide family courts because it has already conclusively answered many of the questions posed by the courts in determining the child's best interests. Among these one may cite the fact that the formation of attachment is continuous and is by no means concluded early in life⁸⁰ and that attachment is quintessentially a product of quality care-giving and a loving and warm relationship. As a result, overnight stays with the second attachment figure as well as frequent shifts in the infant's care and location are disorienting and must be avoided especially for infants up to 2 years old.⁸¹ In a recent neuroscience colloquium it was suggested by all the authors that infants do not have gender biases in respect of their formation of attachment.⁸² They are attuned to warm, loving and responsive care-givers. Schore, nonetheless, added a further

⁷³ See the classic work in this field, RD Parke, *Fatherhood* (Harvard University Press, 1986), p 63.

⁷⁴ RD Parke, R Buriel, Socialization in the Family: Ethnic and Ecological Perspectives, in W Damon, RM Lerner, N Eisenberg (eds.), *Handbook of Child Psychology: Social, Emotional, and Personality Development*, vol 3 (Wiley & Sons, 2006), pp 429ff.

⁷⁵ ME Lamb, AM Frodi, CP Hwang, M Frodi, Varying Degrees of Paternal Involvement in Infant Care: Attitudinal and Behavioural Correlates, in ME Lamb, (ed.), *Non-Traditional Families: Parenting and Child Development* (Erlbaum, 1982), pp 117ff.

⁷⁶ HB Biller, *Fathers and Families: Paternal Factors in Child Development* (Auburn, 1993).

⁷⁷ N Radin, The Influence of Fathers upon Sons and Daughters and Implications for School Social Work, (1986) 8 *Social Work in Education* 77; JK Nugent, Cultural and Psychological Influences on the Father's Role in Infant Development, (1991) 53 *Journal of Marriage and the Family* 475.

⁷⁸ B Volling, J Belsky, The Contribution of Mother-Child and Father-Child Relationships to the Quality of Sibling Interaction: A Longitudinal Study, (1992) 63 *Child Development* 1209.

⁷⁹ C George, MB Isaacs, RS Marvin, Incorporating Attachment Assessment into Custody Evaluations: The Case of a 2-Year Old and her Parents, (2011) 49 *Family Court Review* 483.

⁸⁰ E Waters, J McIntosh, Are We Asking the Right Questions about Attachment? (2011) 49 *Family Court Review* 474, who dismiss Bowlby's original theory that attachment formation is wrapped up at an early stage and never develops further.

⁸¹ Above note 71; C George, J Solomon, J McIntosh, Divorce in the Nursery: On Infants and Overnight Care, (2011) 49 *Family Court Review* 521.

⁸² Above note 50, at 424.

dimension in that the female brain is specifically equipped for the largely non-verbal, affiliative, nurtural aspects of attachment formation with an infant.⁸³ Although this conclusion may seem to be in conflict with some of the arguments in this article, this is hardly the case. This author has made no claim that fathers make better parents or that children form primary attachment to them, as opposed to their mothers. But neither Schore nor any other neuroscientist has suggested that mothers make better parents or that their children will definitively form an attachment to them. The argument has been from the outset that the courts must enrich their determination of custody and parental care disputes by reliance on neuroscience and contextual considerations on a case-by-case basis in which all relevant information must be assessed.

The objective of this brief foray into the field of developmental psychology and neuroscience was certainly not attempted in order to discredit mothers or in any way suggest that fathers make better parents. Rather, what is emphasised is the need for family courts in countries such as Greece to dismiss outdated stereotypes about the biological or other superiority of one parent over the other and if such data exists for the purposes of a particular brain function, the courts must point this out and make appropriate contextual judgments. On the whole, the courts must accept in the determination of physical custody that what is of primary importance is the quality of parenting and the attachments formed by the child to one or the other parent.⁸⁴ With this in mind the courts can then effectively choose the mode of custody that best suits the particular child, which may in fact turn out to be joint custody,⁸⁵ subject to the risks associated with infants identified above, although it must be pointed out that joint custody arrangements are usually agreed between the parents rather than enforced by the courts.⁸⁶

Conclusion

Anthropological research is an excellent tool for testing hypotheses about the discrepancy of a norm from its actual practice. The relevant actors, that is, those who influence and are affected by the pertinent practice are best suited to providing valuable insights not only into the existence of the discrepancy but also how and why it is sustained. In the case at hand, it was demonstrated that an imbedded institutional culture exists within the Greek judiciary in relation to cases involving child custody determinations. This judicial culture clearly discriminates in favour of women, with men being generally awarded custody in cases that are overwhelmingly compelling and where any other result would not only be simply unjust but absurd. In trying to explain this judicial stance there are several variables that have not been tested in this paper. Chief among these is whether the prevalence of female judges on the bench in family law-related cases plays a significant role in the form of biases in favour

⁸³ A Schore, J McIntosh, Family Law and the Neuroscience of Attachment: Part I, (2011) 49 *Family Court Review* 501.

⁸⁴ These findings have been endorsed by governmental child-related agencies and form the backbone of relevant decision-making. See US Children's Bureau, The Importance of Fathers in the Healthy Development of Children, available at: <<http://www.childwelfare.gov/pubs/usermanuals/fatherhood>>.

⁸⁵ A study on joint physical custody suggests that adolescents assigned to a joint custody arrangement scored higher in behavioural, emotional, and academic functioning when compared to children who have been placed in sole custody arrangements. CM Buchanan, PL Jahromi, A Psychological Perspective on Shared Custody Arrangements, (2008) 43 *Wake Forest University Law Review* 419.

⁸⁶ Some scholars argue that the change to joint physical custody has shifted the emphasis from having the need for the child to have an attachment to one psychological parent to the need to have an ongoing relationship between both parents. P Parkinson, *Family Law and the Indissolubility of Parenthood* (Cambridge University Press), pp 45-49.

of mothers, particularly where they may identify their own situation to that of a mother seeking custody of her children. This, of course, is a matter of speculation and no conclusion is offered in this paper. What has been (hopefully) explained, however, is that judges are indeed capable of projecting conduct and practices that translate as taboo to those falling under their “authority”. Over time, such taboo, even if inconsistent with a particular norm, become accepted practice, especially in the absence of an active civil society that contests them. In the case at hand, Greece has only recently witnessed the growth of a modest NGO movement that has launched a campaign to argue in favour of the benefits to children accruing from responsible paternal parenting.⁸⁷ This platform is not anti-feminist or aggressive in its argumentation and action, despite the fact that its outreach program is pretty robust. In the opinion of this author, however, it has failed to address the root causes of the issue at hand.

The paper has also highlighted the absence of any theoretical foundations from the perspective of neuroscience and developmental psychology in the reasoning of higher and lower courts. The courts are clearly disinclined from entering into any scientific debate or justifying their position on any identifiable theory. Their uncritical determination that mothers enjoy a distinct primacy in custody cases on alleged bio-social grounds is arbitrary and lacks scientific grounding. Research in this field clearly portrays a very different picture. Fathers and mothers exercise different, yet complementary, roles in the mental development of children and there exists no evidence to suggest that the role of the one is in any way superior to that of the other, save for the observations of Schore as identified in the previous section. What is, at the very least, crucial is the degree of the child’s attachment to one parent, or the potential of attachment in the case of infants, which in turn would justify the awarding of custody to the pertinent parent, in conjunction of course with other considerations that are context-specific and which the courts must evaluate on a case-by-case basis. Although there is no easy way of assessing, among parents of equal value, which is the most appropriate, if the courts were to make their evaluation without any bias from the outset, many of the distortions and injustices to children that have occurred in the Greek context can be avoided. It is thus suggested that in a potential reform of the Greek family law system, priority should be given to the mandatory assistance of social services to the courts in their determination of child custody. It is irresponsible for a single judge to make delicate determinations involving parental environment, children’s needs and suitability without any input from experts that have examined all the parameters first hand.⁸⁸

If the solution to the problem lies principally with unlimited judicial discretion in determining the child’s best interests in each case, then a set of detailed, binding guidelines from the Justice Minister, subject to open debate between key stakeholders, may just be the first key step forward. This should be followed up by a dedicated database that tracks custody arrangements on the basis of sex and the particular reasons upon which a judgment was rendered. Moreover, sound precedent must be set by the Supreme Cassation Court through a test case that definitively puts an end to arbitrary discrimination. Such a judgment must rely on sound psychological and neuroscience reasoning and relevant jurisprudence from other nations so as to leave no doubt to lower courts. To the degree possible, taking into consideration financial constraints, social services should aid the courts in complex and difficult cases. NGOs can play a significant role in this respect by assisting the work of social services and by submitting amicus briefs in contentious cases in order to allow the courts to

⁸⁷ The NGO ΓΟΝ.ΙΣ is arguing in favour of parental equality in respect of custody and communication with the child. Available at: <<http://gonis.gr>>.

⁸⁸ It is evident that current judicial practice has rendered the role of social services in this field largely irrelevant and sidelined. This means that major reforms to social services and social welfare institutions is also required if they are to effectively work alongside the courts.

come to terms with scientific advances. It is also high time for a dedicated family court system to come into operation which will develop these concepts further and put them into concrete action. Without proper family courts little progress can be made.

From a wider family planning and social cohesion policy perspective there are indeed lessons to be learnt. In a recent research, more than 70 percent of Greeks admitted that their greatest hope for overcoming crises was their family.⁸⁹ Given that Greek family life is based on the traditional model, which has cushioned much of the impact of the country's financial crisis, questions must be asked of the rationale underpinning paternal bias. In particular, if there was a popular awareness that judges were even-handed in matters of physical custody as well as in matters of maintenance and ancillary relief, or that the person who was at "fault" for the break-up of the family unit at the clear expense of the children's best interests would pay the necessary consequences, then perhaps family mediation would actually flourish and work and those favoured by judicial discretion would think twice about the impact of their actions. Seventy-two out of the hundred litigants interviewed by this author expressed their discontent at the financial consequences following the determination of custody. In the majority of cases it was complained that mothers threatened to disrupt visitation rights unless they received further financial compensation, even if this was not sanctioned by the court. This state of affairs is possible because there is no precedent of custody being taken from a parent because he or she violated the other's visitation rights. Surely, the law-makers who set out to protect those mothers who devoted themselves to their husbands and families to the detriment of their professional development did not envisage or aim to inflict parental alienation syndrome (PAS) to an entire generation of children.

⁸⁹ In a poll conducted by KAPA Research on behalf of the newspaper *Vima tis Kyriakis*, 72,2 percent of Greeks depends on family when facing a serious problem and needs help. Families balance between the need to remain united and the pressures against their individual members arising from financial and work-related insecurity. Available at: <<http://www.tovima.gr/politics/article/?aid=511181&wordsinarticle=καπα%3bresearch%3bουκογενεια>>.