



# Appendix 7

## **The Duty Of Maintenance in family law within the Human rights perspective – Dr Peter Fenech**

Good morning colleagues, throughout this brief presentation I shall be running through the Duty of Maintenance in family Law within Human Rights perspective.

We will run through Human Rights and their modern perspective, the European Convention on Human rights at the Charter of the European Union , taking a look at how we arrived where we are today.

We will then take a look at the ECHR notably article 8, Family and Children, passing on to the basic concept of Maintenance as a right.

A few observations on case law and its obligation together with cross border implementation and the difficulties which arise.

In conclusion I will take a look at the need to further recognise this right on the one side and its obligation on the other, together with the need for a fast track to its implementation.

There is no doubt that Human Rights as we refer to them today are the result of a far reaching evolution of society and Governments in what we commonly refer to as the Western World.

We may briefly summarise this evolution into milestones, first amongst which, Custom.

Which is the oldest source of International Law. Custom is indispensable to understanding human rights law. Defined as the consistent practice, followed by a number of groups in societies which eventually formed into states. Naturally it is not as straight forward since the implementation of a customary rule may go against the interests of a third party grouping or state.

Another milestone in the development and recognition of Human Rights philosophy as known to us today was the development of TREATIES, or similar agreements amongst which pacts, protocols, covenants, conventions, charters, exchange of notes, concordats etc. however treaties are most common and through which most progress was achieved.

These had a hands' on effect in the development since these gave rise to the creation of international institutions whereby states bound themselves to observe certain modes of conduct and to which they owed duties.

We have here a form of stability being created, together with the possibility of a systematic development of new principles responding to the changing needs of an international community. A forum for the institutionalisation of newly developing ideals.

That human beings are entitled to fundamental rights and freedoms is something we have all heard about. Something inherent in the roots of human thinking.

But what are these rights and fundamental freedoms. Does Maintenance classify as one of them ? And Maintenance to whom, to all dependents, solely to children and till what age, solely till they come of age – and when do they come of age ?

Rights have throughout the years evolved over out of a number the above international commitments.

Politically the last decades of the eighteenth century were crucial for the affirmation of rights; the *American Bill of Rights* {1776} and the French National Assembly's *Declaration of the Rights of Man and Citizen*. However it was not until the 1920 that a European state, Austria, established a Constitutional Court that could invalidate the act of the legislature. By the 1950`s human rights had become fairly established on the international agenda and Constitutional Courts were being introduced all over Europe, but the necessary political importance is a recent achievement. Prior to the recent developments it was more discussion than practice.

If we stop to sum up the position here I would say therefore that the revolutionary thinking was a natural conclusion to the struggles against political absolutism, against the concept that any judiciary could not interfere on political will. But once again we do not find references to maintenance and its duty or obligations.

When we talk about Human Rights, which is one can say an evolution of the term Natural Rights we are taking about rights which are inalienable to man according to philosophers which set the then revolutionary thinking going in

this sphere. We are talking about rights which man did not surrender to Governments, but which he surrendered the enforceability of such rights to government.

So what's all this fuss about maintenance in a Human Rights perspective and if its so important why was it not highlighted and brought to the fore?

The answer lies in the aftermath of the Second World War. After a war which was brought about by dictatorship and abuse of power, the civil and political will which led to war led to a realization that they had to work together . Only respect for each other would yield a long lasting peace translated into democracy, it was evident that the transgression of rights took place throughout dictatorships which eventually lead to war and to the destruction of millions of peoples and their ideas. People became more conscious that there was the need to limit the sovereignty and make clearer and more importantly enforceable their rights. Taking some out of the inherent sphere and ensuring a commitment by states to observe same. It was only at this stage that we could start to look at the individual as the centre of our perspectives, and was maintenance at the forefront ? Was it a cause for concern at that point in time ?

Therefore in reality every state which recognised the authority of an international body of Human Rights and committed itself to observe the principles laid down by that international body was in effect voluntarily limiting its sovereignty.

So when we speak about Human Rights we should now have a clearer idea of what we are talking about, those inherent and inalienable rights born with us which no one can take away but can take away their enjoyment.

Today we are emphasizing Maintenance within this dimension of rights. Taking a look at the body of rights which come immediately to mind when we speak about rights, the European Convention for Fundamental Freedoms and Human Rights we note that this Convention drafted way back in 1950 and amended with 14 protocols to date, does not directly mention maintenance.

In the fist section of the convention, which lays down the main rights and freedoms, sections 2 to 18, we come across what we could term as those political rights which where the main bone of contention in the fifties and

whose importance due to their recognition today in most European states, has diminished.

The right to life, prohibition of torture and slavery, right to one's liberty and security, the right to a fair trial, the prohibition of retrospective punishment, the right to respect of family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, right to marry and found a family, right to an effective remedy, prohibition of discrimination.

The protocols to the Convention, speak about, the right to property, education, free elections, civil imprisonment, freedom of movement and expulsion, the death penalty, discrimination but we do not find maintenance.

I believe that there is a very pertinent explanation to its omission, the political scenario at the time of formulation of the Convention of Human Rights and also the development of society at that stage.

Europe had witnessed the wars we all know about and had primarily witnessed the abuse

Of Fundamental Human Rights. The first aim was to secure the basic rights, which we commonly identify as civil and political rights. As we shall discuss further on this was the direction taken by legislators since it was the common ground that most countries were amenable to reaching consensus over.

The issue of maintenance is an issue which arose as a result of our contemporary society hence it was not addressed throughout the drafting of the convention. This does not go as far as to eliminate it from falling within the interpretation of the convention – which has, on numerous occasions been interpreted widely covering modern situations.

The relevant article for our discussion would therefore be article 8 of the convention, which lays down the right to respect for private and family life, home and correspondence.

Before proceeding to discuss this article it is relevant at this stage to take a look at the European Union's Charter of Fundamental Rights.

Basically there are 6 substantive Chapters dealing with Dignity, Freedoms, Equality, Solidarity, Citizens Rights, Justice.

**Under Chapter 2 FREEDOMS we find a reference to family life, article 7 Respect for private and family life, Everyone has the right to respect for his or her private and family life, home and communications. We also find a reference to the child under article 24.**

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

And also under Article 32 Prohibition of child labour and protection of young people at work, Article 33 Family and professional life

1. The family shall enjoy legal, economic and social protection.
2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

So under the European Union's Charter of Fundamental Rights we have more principles laid down however once again no mention of Maintenance.

Reverting back to Article 8 of the European Convention of Human Rights we find that the article lays down that :

Everyone has the right to respect for his private and family life, his home and his correspondence. Sub article 2 of this article is not relevant for this morning's discussion.

It is important to consider the meaning of Family life under this article. The term Family has been given a broad interpretation and includes as well as married couples, their offspring, adopted children, children from previous marriages and other relatives who are in cohabitation.

We find numerous case law on this article concerning children, from custody to access, to care orders, to education, religious beliefs their well being and safety, however on maintenance we do not trace case Law.

This begs the question why ? With the Freedom of movement in Europe is it rather surprising not to find this issue as a primary concern, hence the subject of case law. The matter is not whether Maintenance forms the basis of a fundamental human right, I trust that we can all agree to this, in a wider interpretation of Article 8, the reason is that the issue of maintenance is properly provided for in individual states and therefore not the subject of issues which arrive so far.

We should all agree that the basic right to have one maintain his child is not only a civil legally enforceable obligation but also one child's fundamental right.

A right to ensure that the child is given the best possible upbringing in the circumstances within which his family trudges along. This is also a right with which one is born with, however it was never the centre of legal attraction, since as discussed previously, the forefathers laid emphasis on Civil rights just after world war 2 and thereafter laid emphasis on social, economic and cultural rights.

The arguments against the payment of maintenance are usually shrouded in a plethora of excuses however never in the form of one's right not to upkeep his/her offspring. There is always the recognition of the obligation and the desire to contribute to the upkeep and this ensures that whatever the reason for the non payment of maintenance the issue stops locally.

As we have heard earlier on the obligation of maintenance is provided for civilly and in our country also criminally sanctioned, the issue arises however when a parent moves to another country.

Here once again there is cause for concern. However the fact that it is to be considered as a right fundamental to children does not change anything. The right remains a right wherever the individual resides, its enforcement raises difficulties.

The issue does merit consideration since we do have elements of cross border implementation which are on the increase and hence concern for the

manner in which one recognises such decrees and the manner in which one enforces such decrees. But once again they are not questions of fundamental human rights but more of reciprocal recognition of foreign judgements.

Recognition of the difficulties which arise when trying to implement such maintenance obligation, is a must in these circumstances and one does advocate that the major European institutions work together to enhance these procedures which ultimately ensure that the child's right for maintenance is enforced.

The question is how and who is to take such initiative – What is the fast track procedure that we should implement as Europeans which would ensure that one upholds his/her civil obligations to maintain their offspring. Delay in resolving this fast track is tantamount to a violation of enjoyment of one fundamental right to be maintained.

What is the Council of Europe, now soon encompassing also the European Union following the Lisbon Treaty, going to do about it ?

We will have to wait and see.