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**The Impact of the European Convention on Human Rights on UK Family Law –  
Doctrine, Theory and Gender**

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**Introduction**

My work in the field of the European Convention on Human Rights (ECHR) and domestic family law grew out of concern as to whether the so-called ‘paramountcy principle’ contained in the Children Act 1989 (CA 1989) was compatible with the ECHR as incorporated by the Human Rights Act 1998 (HRA). My first examination of its compatibility took place within the context of the extension of the paramountcy principle from private law children proceedings to public law adoption proceedings by the Adoption and Children Act 2002.<sup>1</sup> This evolved into a larger and more detailed analysis with Professor Helen Fenwick, an expert in the field of human rights, of the compatibility of the principle in both private and public law proceedings under the CA 1989 within the broader context of the merits of adopting a rights-based approach to applications by parents under the act.<sup>2</sup> This also examined in detail what I considered to be a great deal of scepticism about the adoption of a rights based approach and the possible reasons for it within the domestic family law field.

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<sup>1</sup> S. Choudhry, ‘The Adoption and Children Act 2002, the Welfare Principle and the Human Rights Act 1998 A Missed Opportunity’ [2003] 15(2) 119 -138 *Child and Family Law Quarterly*.

<sup>2</sup> S. Choudhry and H. Fenwick, ‘Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act’ [2005] 25 (3), 453-492 *Oxford Journal of Legal Studies*. Although the piece was the product of a number of conversations concerning the application of the ‘parallel analysis’ to cases concerning children, I undertook the majority of the work in drafting the article, to which Professor Fenwick added her expertise regarding the application of the parallel analysis and the proportionality exercise that we recommended be applied. It should also be noted that although the method described by the term ‘parallel analysis’ originated from the Courts, the term itself was coined by H. Rogers and H. Tomlinson in ‘Privacy and Expression: Convention Rights and Interim Injunctions’ [2003] (37) 50 *European Human Rights Law Review*.

After this, I was able to provide a detailed analysis of the merits of adopting a rights based approach to the issue of domestic violence with Professor Jonathan Herring in two further publications.<sup>3</sup> All of these publications therefore form part of the body of work on which the PhD is based.

It also became clear that, given the paucity of the literature in this area, there was a bigger project to be undertaken examining the overall compatibility of domestic family law with the ECHR and the HRA. There was no academic text that had specifically explored the overall compatibility of the domestic family law system with the ECHR at the time of writing.<sup>4</sup> Having collaborated successfully with Professor Herring previously we decided to tackle this large-scale project together in order to reflect our respective strengths in this area by co-authoring *European Human Rights and Family Law*.<sup>5</sup> Although we both worked together on all the chapters I was primarily responsible for Chapters 1,2,4,5 and 9 which dealt with the ECHR, the HRA, marriage, parenthood and parental rights and domestic violence. Taking responsibility for two of the main foundational chapters reflected my detailed knowledge of the academic fields of study of the ECHR and the HRA. This knowledge, in addition to my subject-specialist knowledge of family law, therefore gave me the ability to straddle two significant fields of study effectively and thus constituted my particular and significant contribution to the project as a whole.

However, despite the fact that some conceptual and theoretical perspectives were considered throughout there were deeper theoretical issues arising from the analysis that, for reasons of space, could only be sketched in the book. One aspect that we particularly wanted to consider, emanating from my examination of why there appeared to be a resistance to

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<sup>3</sup> S. Choudhry and J. Herring, 'Domestic Violence and the Human Rights Act 1998: A New Means of Legal Intervention' [2006] Winter, 752-784, *Public Law* and S. Choudhry and J. Herring, 'Righting Domestic Violence' [2006] 2 (20) 1- 25 *International Journal of Law, Policy and the Family*. We both made an equal contribution to the drafting of these articles.

<sup>4</sup> *European Human Rights and Family Law* continues to be the sole academic text, which has done so.

<sup>5</sup> S. Choudhry and J. Herring, *European Human Rights and Family Law*, Hart Publishing (2010).

rights based approaches within the field, was the resistance from a gender-based feminist perspective. As a result, the next natural step was to assess the consequences of using a rights based approach in key areas of family law within the context of gender. Pursuant to this I embarked on a collaborative project with Professor Herring and Julie Wallbank - *Rights, Gender and Family Law*<sup>6</sup> - that was the first and only collection since the HRA to explore the links between gender and rights in a detailed and comprehensive way. I contributed to the collection by co-authoring the first outlining chapter of this collection with Professor Herring and Julie Wallbank and sole authoring the chapter on domestic violence: ‘Mandatory Prosecution and Arrest as a Form of Compliance with Due Diligence Duties in Domestic Violence the Gender Implications.’<sup>7</sup>

### **The Distinct Contribution of *European Human Rights and Family Law and Rights, Gender and the Law to the Literature***

The aim of both of these texts was therefore to make a distinctive contribution to the literature on the impact of the HRA on domestic family law in four related ways.

#### *1. A European Dimension*

The first was to give an explicitly ‘European’ dimension to the discussion by setting out the principles and tools of interpretation developed by the European Court of Human Rights (ECtHR) towards human rights in general and specifically considering substantive areas of domestic family law against the relevant case law of the ECtHR in those areas to assess compatibility, identify areas of potential conflict and how these conflicts could be addressed.

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<sup>6</sup> S. Choudhry, J. Herring and J. Wallbank, *Rights, Gender and Family Law*, Routledge-Cavendish (2009).

<sup>7</sup> Ibid.

However, the task was not simply one of scaling up a domestic analysis to an ECHR level. The ‘European’ nature of intervention demanded sensitivity to constitutional, policy and governance questions that were specific to the Council of Europe and which raised important questions as to the nature and identity of its intervention. The focus was not thus just on the impact of the HRA on English law but rather the overarching and broader European background of the ECHR and the development of the case law of the ECtHR with respect to all Member States of the Council of Europe. Chapter 1 of *European Human Rights and Family Law* therefore contained detailed and original analyses of the often-intertwining roles of the three main doctrines employed by the ECtHR against the specific context of family law, which resulted in a number of key findings.

First, that the ECtHR has been particularly dynamic in its interpretation of the doctrine of positive obligations under the ECHR within the family law context. This is evidenced in particular in relation to the duties imposed upon the State under Article 3 of the ECHR to take measures to ensure that individuals within their jurisdiction were not subjected to such treatment by ensuring that local authorities could be held accountable for their negligence or for breach of their statutory duty in respect of the discharge of their functions concerning the welfare of children.<sup>8</sup> These positive duties have also been developed to include treatment administered by private individuals towards one another evidenced with regard to the need for the State to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual<sup>9</sup> under Article 2 of the ECHR within the context of domestic violence. These findings formed the basis of the doctrinal element of the chapter in *Rights, Gender and Family Law*, which considered how mandatory arrest and prosecution policies could be incorporated into the UK system as a

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<sup>8</sup> *A v UK* [1999] 27 EHRR 31; *E v UK* [2003] 36 EHRR 31 and *Z and Others v UK* [2002] 34 EHRR 611.

<sup>9</sup> *Kontrova v Slovakia* Application No. 7510/04 [2007] ECHR 31 May 2007 and *Opuz v Turkey* Application No 27229/95 [2001] 33 EHRR 913.

means to comply with the positive duties created by the ECHR towards victims of domestic violence. The analysis also noted the considerable development of positive obligations under Article 8 with regard to the protection of family life between a parent and child, transgender rights to privacy and the rights of minorities to a home<sup>10</sup>.

Second, Chapter 1 of *European Human Rights and Family Law* provided the only detailed specific analysis of the factors that affect the operation of the doctrine of margin of appreciation at the ECtHR within the family law context.<sup>11</sup> The analysis found that the general rules concerning the factors that are said to influence the width of the margin, do not necessarily have the same effect in family law. Thus, in general, the more precise the provision the lesser the width of the margin, the more connected the claim is to issues of national sovereignty, such as in immigration, and the more moral or ethical considerations that are involved, the wider the margin. However, within all the other remaining factors the application of the general rules has either been inconsistent, as in the ‘European consensus’ factor in relation to the transsexual cases or, has been applied in completely the opposite way due in large part to the factual context of the case. Thus, in cases involving substantial resource implications, in terms of housing provision for vulnerable groups, a narrower margin was applied; however in cases concerning the serious decision to termination or reduce contact between a parent and child a wider margin has been applied.<sup>12</sup>

Finally, in relation to the doctrine of proportionality the analysis in Chapter 1 of *European Human Rights and Family Law*<sup>13</sup> found that it is highly likely that within the family law context, the most often-used proportionality test will be the least onerous – the ‘fair balance test’. Further, the application of a more onerous standard of review - the ‘sufficiency test’ - is seemingly dependent upon the current policy considerations of the

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<sup>10</sup> *European Human Rights and Family Law*, Hart Publishing (2010) pages 7-10.

<sup>11</sup> *Ibid* at pages 10-26.

<sup>12</sup> Where the margin was narrowed in these cases was on the decision-making procedures that were followed.

<sup>13</sup> *Ibid* at pages 28-34.

Court. Of particular note is the fact that the most onerous standard of review - the ‘least restrictive alternative’ - is yet to be applied by the court within the family law context and this has been the case even when the Commission has considered it to be appropriate.<sup>14</sup> This is of even more significance if we consider that this version of the test, and thus the highest standard of review, also represents the form of proportionality test applied by other international courts. My analysis found that the ECtHR has thus, within the context of family law, *never* applied a test that is as rigorous as that of most of its international counterparts and, furthermore, even when it has applied the stricter ‘sufficiency test’ it will still generally be significantly less rigorous. In sum, my analysis in *European Human Rights Law* found that the three most significant and generally applicable doctrines utilised by the ECtHR in its decision-making are operating in an often-exceptional manner within the context of family law.

2. *Providing a theoretical basis to unify the ECHR and domestic approaches to family law: qualified deontology and the feminist implications of such an approach*

The second contribution was to adopt a rights based perspective that did not preclude a consideration of welfare or gender. Prior to the publication of *European Human Rights and Family Law* there had been little discussion of human rights based approaches to family law within the literature and where such discussions took place they were either focused on

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<sup>14</sup> *Rasmussen v Denmark* Application 8777/79 (1985) 7 EHRR 371 and *Sheffield and Horsham v the United Kingdom* (1998) 27 EHRR 163.

particular and distinct areas<sup>15</sup> or not specific to the approach adopted by the ECHR.<sup>16</sup> Indeed there was more discussion in the literature on the approach of the EU, which has not traditionally had any specific competence within the field of family law.<sup>17</sup> The theoretical approach which informed the book recognised that the domestic family law system reflected a predominantly utilitarian or consequentialist approach,<sup>18</sup> evidenced in particular by the Children Act 1989 and the ‘welfare principle’ contained in Section 1 of that Act. Stephen Parker, in his seminal piece on family law and legal theory,<sup>19</sup> has analysed the movement of family law from a ‘rights-based’ to a ‘utility-based’ approach. Such contrasts between utility and rights-based approaches have often been employed to illustrate the differences between the ECHR and the CA 1989 in terms of their underlying principles,<sup>20</sup> the implication being that the two systems were largely irreconcilable. However, my analysis<sup>21</sup> of the CA 1989 found that since it identifies the welfare of the child as the sole and decisive consideration, it does not

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<sup>15</sup> J. Fortin, “The HRA’s impact on litigation involving children and their families” [1999] 11(3), *Child and Family Law Quarterly* 252; J. Herring, ‘The Human Rights Act and the welfare principle in family law – conflicting or complimentary?’ [1999] 11, *Child and Family Law Quarterly* 223; A. Bainham “Taking Children Abroad: Human Rights, Welfare and the Courts” [2001] *Cambridge Law Journal* 489; S. Harris-Short, ‘*Re B (Adoption: Natural Parent)* Putting the child at the heart of adoption?’ [2002] 114 (3) *Child and Family Law Quarterly* 325; S. Harris-Short, H. Fenwick, D. Bonner ‘Judicial Approaches to the Human Rights Act’ [2003] 52 *International Civil Law Quarterly* 549-586, S. Choudhry, ‘The Adoption and Children Act 2002, the Welfare Principle and the Human Rights Act 1998 – a Missed Opportunity’ [2003] 15(2) *Child and Family Law Quarterly* 119-138.

<sup>16</sup> S. Parker, ‘Rights and Utility in Anglo Australian Family Law’ [1992] 55 *Modern Law Review* 311. See also J. Eekelaar, ‘Families and Children: From Welfarism to Rights’, in C. McCrudden and G. Chambers (eds) *Individual Rights and the Law in Britain* (Oxford: Clarendon, 1994), ch. 10.

<sup>17</sup> C. McGlynn, (2006) *Families and the European Union: law, Politics and Pluralism*. Cambridge: Cambridge University Press; C. McGlynn, ‘Families, Partnerships and Law Reform in the European Union: Balancing Disciplinarity and Liberalisation’ [2006] 69(1) *Modern Law Review* 92-107; C. McGlynn, Rights for Children: the potential impact of the European Union Charter of Fundamental Rights [2002] 8(3) *European Public Law* 387-400; C. McGlynn, ‘European Union Family Values: Ideologies of ‘Family’ and ‘Motherhood’ in European Union Law’ [2001] 8 *Social Politics* 325-350; C. McGlynn, Families and the European Charter of Fundamental Rights: Progressive Change or Entrenching the Status Quo? [2001] 26(6) *European Law Review* 582-598.

<sup>18</sup> For a brief overview of the debates within family law and legal theory see J. Dewar, ‘Family Law and Theory,’ [1996] 16(4) *Oxford Journal of Legal Studies* 725-736.

<sup>19</sup> S. Parker, ‘Rights and Utility in Anglo Australian Family Law’ [1992] 55 *Modern Law Review* 311. See also J. Eekelaar ‘Families and Children: From Welfarism to Rights’, in C. McCrudden and G. Chambers (eds) *Individual Rights and the Law in Britain* (Oxford: Clarendon, 1994), ch. 10.

<sup>20</sup> J. Herring, ‘The Human Rights Act and the Welfare Principle in family law’ [1999] 11(3) *Child and Family Law Quarterly*. 223-235.

<sup>21</sup> S. Choudhry and H. Fenwick, ‘Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act’ 25 [2005] 453-492 *Oxford Journal of Legal Studies*. This analysis formed the basis of the theoretical approach later adopted in the relevant chapters of *European Human Rights and Family Law*.

correspond to classic utilitarianism: it does not seek to arrive at an outcome which, overall, achieves the best result for the family members or others, but only for the child. It therefore arguably amounts to a form of ‘rule utilitarianism’<sup>22</sup> in that an individual’s actions are regulated by reference to a general rule - that the child’s welfare should be paramount - rather than by direct reference to the principle of utility whereby actions that maximise the greatest welfare of the greatest number are preferentially singled out. Thus any decision made on an individual’s application under the CA 1989 will not be justified by reference to the principle of utility: the ‘welfare principle’ has been elevated to the status of a ‘rule’ that determines the outcome of such applications.

At the same time the ECHR’s approach cannot be said to be fully deontological or ‘rights-based’. Although the ECHR is clearly a classically deontological document since it assumes that certain rights and interests are intrinsically valuable and should *prima facie* be protected, its adherence to a strictly deontological approach may be viewed as undermined in respect of the materially qualified articles – Articles 8-11. Mullender’s analysis that these Articles exhibit ‘qualified deontology,’<sup>23</sup> since the qualifications of their second paragraphs allow the rights to be compromised or overridden by sufficiently weighty consequential considerations, is therefore prescient. Thus, by applying Mullender’s analysis to the context of family law I argued that although the ECHR’s theoretical underpinnings differ significantly from those of the CA, the differences in their approaches and values might be less irreconcilable than some theorists have acknowledged.<sup>24</sup>

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<sup>22</sup> For a good introduction to utilitarianism see N.E. Simmonds, *Central Issues in Jurisprudence* 2<sup>nd</sup> ed. (Sweet and Maxwell 2002), ch.1 and J.G. Riddall, *Jurisprudence*, 2<sup>nd</sup> ed. (Butterworths 1999), ch. 13.

<sup>23</sup> See R. Mullender, ‘Theorising the Third Way: Qualified Consequentialism, the Proportionality Principle and the New Social Democracy’ [2000] 27(4) *Journal of Law and Society* 493-516.

<sup>24</sup> S. Choudhry and H. Fenwick, ‘Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act’ [2005] 25 *Oxford Journal of Legal Studies* 453-492. This analysis formed the basis of the theoretical approach later adopted in the relevant chapters of *European Human Rights and Family Law*.

Notwithstanding this analysis it was also important to acknowledge the arguments in the debate over the benefits and disadvantages of rights, however, a core argument of the book was that under our current legal system the HRA nonetheless *requires* the use of rights based approaches. In applying Mullender's concept of qualified deontology to the rights v welfare debate within the field of family law, *European Human Rights and Family Law* thus provided a theoretical basis upon which the two approaches could be unified and provided new insights into the compatibility of the UK family law system with the ECHR. This approach was also significant because it demonstrated that the two approaches were not, as was previously assumed, in conflict with one another. Moreover, in allowing for consequentialist considerations to be taken into account (particularly in relation to the qualified articles) *European Human Rights and Family Law* demonstrated in a number of areas how the ECHR approach could represent a better and improved system of judicial reasoning which could be more effective in producing cases which are more clearly reasoned, with the interests of all parties being given proper weight in a manner that is transparent and open but that ultimately prioritises the welfare of the child.<sup>25</sup>

Building on this, *Rights, Gender and Family Law* was subsequently the first (and to date only) collection since the HRA to explore the links between gender and rights in a detailed and comprehensive way. It was also concerned with the shifting social and legal constructions of gendered power relations and with how the various case studies examined in the book offered important insights into the discursive constitution of masculinity and

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<sup>25</sup> The theoretical contribution to the literature made by the book was noted by Caroline Jones in her review of the book in which she states it is 'theoretically informed and informative...' See Caroline Jones, *Child and Family Law Quarterly*, [2012] 24 (4), 487-488.

femininity in relation to the main themes covered i.e. rights, responsibilities, welfare and care. The contextual analysis adopted was particularly useful for illuminating how rights can have important ontological and practical consequences for the balance of power between women as mothers and men as fathers and for children's welfare. As such, the book offered critical reflections on the increasing significance of the relationships between rights, responsibility and welfare in family law and social policy.

My chapter in the collection examined a hitherto unexplored area: the effectiveness of mandatory arrest and conviction policies as a means of State compliance with the positive obligations created by international human rights instruments. Such policies have been utilised in a number of jurisdictions, most notably in the United States as a means of solving the conundrum of the need to intervene to protect victims of domestic violence and there often conflicting reluctance to co-operate with legal proceedings against the perpetrator. The reasons for this reluctance are well established within the literature in this area and the implications such policies have raised for the autonomy of women have been of particular concern within the feminist literature from both sides of the debate.

My chapter contributed to the literature in two key ways. First, by providing a detailed analysis of how mandatory prosecution and arrest policies could be incorporated into the *UK system* as a means to comply with the duties created by both the HRA and ECHR towards such victims. This was achieved by applying the analytical framework set out in *European Human Rights and Family Law*, regarding the application and development of positive obligations by the ECtHR in relation to Articles 2, 3 and 8 of the ECHR with regard to domestic violence. Second, by providing a detailed consideration of the most recently available empirical evidence of the effectiveness of such approaches from jurisdictions where they are employed and the weighing of arguments for and against their use within the feminist literature. As a result the chapter combined the doctrinal with the theoretical,

ultimately offering an approach, which I argue meets the rigorous demands of both in justifying its use and providing a further opportunity to reduce the patriarchal nature of the state. The chapter ultimately concluded by advocating a compromise between intervention and autonomy from the perspective of the child: the intervention into a woman's autonomous right to participate in the arrest and prosecution of the perpetrator of violence can only be justified where children have or are at risk of experiencing violence either through witnessing it or as a direct victim. This would not only be compatible with Article 8 of the ECHR but also strikes the right balance between respecting the human rights of women, individuals and society as a whole.

### *3. Contributing Family Law Expertise to the UK Human Rights Field*

The third contribution was to consider the impact of HRA scholarship on family law in general and, conversely, to analyse the implications of my findings in the field of family law for the more general legal scholarship on human rights. In the run-up to the implementation of the HRA Sir Stephen Sedley<sup>26</sup> noted that a number of issues remained unresolved. The issues in the list that have most exercised academics within the field of human rights have undoubtedly been the doctrine of 'horizontal effect',<sup>27</sup> the domestic impact of the margin of appreciation doctrine,<sup>28</sup> and who or what constitutes a 'public authority' under section 6 the

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<sup>26</sup> K Starmer, *European Human Rights Law: the Human Rights Act and the European Convention on Human Rights* (London, Legal Action Group, 1999) Introductory chapter. These were: the relation between the supranational and domestic margins of appreciation; the status of commercial speech under Article 10; the relevance of the Convention to environmental protection; the horizontal applicability of rights; the positive obligations of states; the role of the courts as themselves public authorities; improperly obtained evidence; equality as a freestanding right and the impact of Article 8 on immigration and asylum and on child protection.

<sup>27</sup> The obligation upon the State to protect a private individual's Convention rights against infringement by other private individuals. For an overview of the general debate on 'horizontal effect' see G Phillipson, 'The Human Rights Act, the Common Law and "Horizontal Effect": a Bang or a Whimper?' [1999] 62(6) *Modern Law Review* 824; G Phillipson, 'Clarity Postponed: Horizontal Effect After *Campbell* and *Re S*' in H Fenwick, G Phillipson and R Masterman, *Judicial Reasoning under the Human Rights Act* (Cambridge, CUP, 2007) at 143.

<sup>28</sup> The degree of recognition by the European Court of Human Rights of the fact that States are better placed to make the primary judgement as to the needs of the parties involved and the appropriate balance to be struck between them.

HRA.<sup>29</sup> All three of these issues, in addition to the discussion<sup>30</sup> surrounding the exact scope of the interpretative duty contained in s3 (1) of the HRA, continue to be subject to some debate post implementation and, as I considered in Chapter 1 of *European Human Rights Law*, hold particular relevance to family law.

Specifically my analysis found that the applicability of the horizontal effect doctrine to family law has long been recognised by the ECtHR<sup>31</sup> in respect of positive obligations and should thus provide a good opportunity for its application to family law legislation post incorporation of the HRA. In addition, I found that the scope of the margin of appreciation doctrine and the related issue of judicial deference<sup>32</sup> will vary depending on the Convention rights in play<sup>33</sup> and thus will be wider when the Convention is applied to questions concerning domestic social policy, particularly in relation to Article 8 – the right to respect for the home, private and family life. Legislation on these areas is ripe for interpretation under s3 (1). Finally, I found that the issue of the meaning of a public authority under the HRA is of particular relevance to the public law elements of family law in terms of the practice of local authorities to contracting out service for children and adults s to private care homes or charities.<sup>34</sup>

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<sup>29</sup> See generally D Oliver, 'The Frontiers of the State: Public Authorities and Public Functions Under the HRA' [2000] *Public Law* 476; M McDermont, 'The Elusive Nature of the "Public Function": *Poplar Housing and Regeneration Community Association Ltd v Donoghue*' [2003] 66(1) *Modern Law Review* 113; J Morgan 'The Alchemist's Search for the Philosopher's Stone: the Status of Registered Social Landlords under the Human Rights Act' [2003] 66(5) *Modern Law Review* 700 and P Cane, 'Church, state and human rights: are parish councils public authorities?' [2004] 120 *Law Quarterly Review* 41.

<sup>30</sup> A Kavanagh, 'Unlocking the Human Rights Act: The "Radical" Approach to Section 2(1) Revisited' [2005] 3 *European Human Rights Law Review* 259; D Rose and C Weir, 'Interpretation and Incompatibility: Striking the Balance' in J Jowell and J Cooper (eds) *Delivering Rights* (Oxford. Hart Publishing, 2003); D Nichol, 'Statutory Interpretation and Human Rights After Anderson' [2004] *Public Law* 273; A Kavanagh, 'Statutory Interpretation and Human Rights After Anderson: A More Contextual Approach' [2004] *Public Law* 537; C Gearty, 'Revisiting Section 3(1) of the Human Rights Act' [2003] 119 *Law Quarterly Review* 551 and C Gearty, 'Reconciling Parliamentary Democracy and Human Rights' [2002] 118 *Law Quarterly Review* 248.

<sup>31</sup> E.g. *Hokkannen v Finland* 19 EHRR 139.

<sup>32</sup> For a comprehensive discussion, see RA Edwards, 'Judicial Deference under the Human Rights Act' [2002] 65(6) *Modern Law Review* 859.

<sup>33</sup> *Johnsen v Norway* 23 EHRR 33 [64].

<sup>34</sup> *R (On the Application of Heather and Others) v Leonard Cheshire Foundation and Another* [2002] 2 All ER 936.

Given these findings, one would assume therefore that the impact of the HRA upon family law would have been quite significant. However, at the time of writing *European Human Rights and Family Law*, I found in Chapter 2 that there had been just two declarations of incompatibility<sup>35</sup> in cases concerning family law despite evidence of the significant impact that human rights act arguments can have in such cases.<sup>36</sup> Further, our analysis found that many areas of family law had remained largely unaffected by the HRA 1998. These included: the removal of children into care and adoption, the maintenance of the ‘welfare principle’ and the continuance of legislative schemes which maintain differences in treatment between cohabitants and married couples with regard to protection from violence (Family Law Act 1996) and the division of property (Matrimonial Causes Act 1973).

*European Human Rights and Family Law* therefore represented the only academic text of monograph standard to engage in a detailed examination of the impact of the ECHR and HRA of substantive areas of family law. This required a detailed knowledge of both domestic family law and of UK human rights law in general, which as I indicated above, the literature within the UK human rights field demonstrated at the time to be largely absent. A number of articles had been written on seminal HRA cases concerning family law but not by family law academics.<sup>37</sup> This aspect of my contribution to the UK human rights field is

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<sup>35</sup> On restricting the rights of those subject to immigration control to enter into a civil marriage: *R (Baiai) v Home Secretary* [2006] EWHC 1111 and provisions preventing a transsexual from marrying: *Bellinger v Bellinger* [2003] 2 AC 467.

<sup>36</sup> On the existence and scope of the courts inherent jurisdiction to restrain publicity in cases relating to children: *Re S* [2005] 1 AC 593 and the rejection of the Court of Appeals starring of care plans under s3 of the HRA: *Re S (Minors) (Care Order: Implementation of Case Plan)* [2002] AC 291.

<sup>37</sup> A selection of these publications: I Loveland, ‘Making It Up as They Go Along? The Court of Appeal on Same-Sex Spouses and Succession Rights on Tenancies’ [2003] 2 *Public Law* 223 and I Loveland ‘The Impact of the Human Rights Act on Security of Tenure in Public Housing’ [2004] 3 *Public Law* 594; D Feldman, ‘Adoption and Discrimination: What Are Convention Rights?’ [2008] 67(3) *Cambridge Law Journal* 481; J Van Zyl Smit, ‘The New Purposive Interpretation of Statutes: HRA Section 3 after *Ghaidan v Godin-Mendoza*’ [2007] 70(2) *Modern Law Review* 294; A Kavanagh, ‘Unlocking the Human Rights Act: The “Radical” Approach to Section 2(1) Revisited’ [2005] 3 *European Human Rights Law Review* 259; D Rose and C Weir, ‘Interpretation and Incompatibility: Striking the Balance’ in J Jowell and J Cooper (eds) *Delivering Rights* (Oxford, Hart Publishing, 2003); D Nichol, ‘Statutory Interpretation and Human Rights After Anderson’ [2004] *Public Law* 273; A Kavanagh, ‘Statutory Interpretation and Human Rights After Anderson: A More Contextual Approach’ [2004] *Public Law* 537; C Gearty, ‘Revisiting Section 3(1) of the Human Rights Act’ [2003] 119 *Law Quarterly Review* 551 and C Gearty, ‘Reconciling Parliamentary Democracy and Human Rights’ [2002] 118 *Law Quarterly Review*

demonstrated in particular by the initial chapter on the HRA which deals with contested areas of general concern such as the definition of a ‘public authority’ for the purposes of Section 6 of the HRA but within the context of previously unconsidered areas such as the privatisation of children’s services<sup>38</sup> and the applicability to domestic interpretations of deference and proportionality within adoption and assisted conception.<sup>39</sup> Reviews of the book also noted this particular contribution: “It represents an important contribution to the debate on the role of human rights following the HRA 1998 and how rights arguments could change English family law, providing a coherent and persuasive analysis to demonstrate constructive approaches through which this could be achieved.”<sup>40</sup>

*Gender, Rights and Family Law* also highlighted areas of law where rights discourse has *not* been given a high enough level of prominence within the context of family law despite the passage of the HRA, even where it may result in providing greater protection for women in particularly vulnerable situations. My chapter on the use of mandatory prosecutions in domestic violence cases demonstrated the relative failure to harness the full potential of the HRA and the ECHR for the benefit of the victims of domestic violence by considering the compatibility of introducing mandatory arrest and prosecution policies in domestic violence cases with the need to respect the autonomy of women.

#### *Contribution of Original Knowledge to the Field*

I believe the above account sets out how my work has made a significant contribution to the field. In sum, *European Human Rights and Family Law* remains the only academic text to have comprehensively and specifically examined the compatibility of the UK family law

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<sup>38</sup>S. Choudhry and J. Herring, *European Human Rights and Family Law*, Hart Publishing (2010), pages 65-69. See also: S. Choudhry, 'Children in "Care" After YL – The Ineffectiveness of Contract as a Means of Protecting the Vulnerable' *Public Law* [2013], Jul, 519-537

<sup>39</sup> *Ibid* at pages 80-91.

<sup>40</sup> Ruth Lamont, *European Public Law*, [2012] 18 (3), 552–556.

system with the ECHR and the HRA. As such it demonstrates a lasting contribution not only to the field of family law but also to the field of human rights which has been externally recognised: ‘It [the book] is both thoughtful and thought-provoking. It stands as an original and valuable contribution to scholarship in this field.’<sup>41</sup> Its establishment as a key reference point in the field also demonstrates evidence of this; it has been widely cited in both books and articles<sup>42</sup> concerning family law and the ECHR and has been favourably reviewed.

The challenge of meaningfully placing human rights in the context of family life within the current legal framework is an important aspect of the modern dynamics of family law. Herring and Choudhry’s contribution to this debate is an engaging and comprehensive reflection of the legal issues, problems and the potential steps forward.’

Ruth Lamont, *European Public Law*, [2012], 18(3) 552–556.

‘It would be an impossible task to do full justice to each of these chapters in this review. Suffice it to say that there is, almost without exception, detailed critical and insightful coverage across a range of complex issues within family law and consideration of the, at times, subtle nuanced differences of the significance of various aspects of the HRA 1998 for different family members.

Caroline Jones, *Child and Family Law Quarterly*, [2012] 24 (4) 487-488.

The book was also nominated for the Inner Temple Main Book Prize 2011 and, from an entry of over 200 books, was shortlisted by the judging panel in the top ten. The aim of the prize is to encourage and reward the writing of books, which make an outstanding contribution to the understanding of the law.

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<sup>41</sup> Caroline Jones, *Child and Family Law Quarterly*, [2012] 24 (4), 487-488.

<sup>42</sup>Family law texts: J.Herring, (3<sup>rd</sup> edn) *Family Law* (2011) Pearson, Harris- Short and Miles, (2<sup>nd</sup> edn) *Family Law* (2011) Oxford and Diduck and Kaganas, (3<sup>rd</sup> edn) *Family Law, Gender and the State* (2012) Oxford. Articles: Freeman and Margaria, [2012] January, ‘Rights and Obligations in the Contemporary Family: Rethorizing Individualism, Families and the State Who and What Is A Mother? Maternity, Responsibility and Liberty’ *Theoretical Inquiries in Law*; Sloan, ‘The concept of coupledness in succession law’, *Cambridge Law Journal* [2011], 70(3), 623-648; McQuigg, ‘The victim test under the Human Rights Act 1998 and its implications for domestic violence cases’ *European Human Rights Law Review*, [2011], 3, 294-303; Ashcroft, ‘Could human rights supersede bioethics?’ *Human Rights Law Review* [2010], 10(4), 639-660.

Similarly *Rights, Gender and Family Law* has also been recognised as making a significant contribution to the literature concerning the impact of the HRA and the implications for gender relations. The chapter on mandatory prosecution is the only academic publication to date to have considered the issue from the perspective of the UK and within the context of the ECHR and the HRA. As with *European Human Rights and Family Law* the collection has been widely cited and favourably received.

“Not only is the breadth of topics covered impressive, but so too is the variety of authors who have contributed their work. It is perhaps for this reason that this book would be invaluable not only to researchers and scholars with an interest in family law, but also to sociologists, social workers and students who want to explore the relationship between rights, responsibilities and gender in the changing landscape of family life”  
Penny Lewis, *Child and Family Law Quarterly*, [2011], 23(3) 417-422.

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**Declaration - Student Ref: 1390026**

I declare that the submitted material as a whole is not substantially the same as published or unpublished material that I have previously submitted, or are currently submitting, for a degree, diploma, or similar qualification at any university or similar institution;

Part of the work submitted includes work conducted in collaboration with others. Although we, the co authors of *European Human Rights and Family Law*, worked together on all the chapters I declare that I was primarily responsible for Chapters 1, 2, 4, 5 and 9 of European Human Rights and Family Law and that Professor Jonathan Herring was primarily responsible for Chapters 3,6, 7, 8 and 10.

Signed:

Signed:

A handwritten signature in black ink, appearing to read 'Shazia Choudhry', written in a cursive style.

Ms Shazia Choudhry

Professor Jonathan Herring

