are established or evolve in the context of their parents' capacity to resolve their own emotions and deal with each other's responses to the separation. Such evidence cannot and should not be ignored by policy makers. A heavy-handed legal response such as the one being proposed, is unlikely to serve the best interests of parents trying to emotionally resolve the separation and, by implication, such a response is also unlikely to serve children well.

Empirical evidence consistently demonstrates a significant variation among separated parents in the way that spousal detachment and emotional resolution occurs and in the emotional and social contexts in which arrangements for children evolve. Policy makers must take this variation seriously before implementing a one size fits all legal presumption of equal time. It would be unfortunate if the worthwhile principle of shared parenting metamorphosed into no more than a legal strategy to override diverse parental inclinations and their correlations with children's best interests.

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References


2. Hugh Melsaas, 'California Joint Custody Retrospective' in Jay Folberg (ed) Joint Custody and Shared Parenting (1991) 262-74. The joint custody model advocating 50:50 shared residence between parents has been discredited and rejected in overseas jurisdictions such as California. In the case of California, joint custody was frequently imposed on litigating couples and seen as a solution to high levels of inter-parental conflict. The expectation was that parents would be forced to resolve their differences by both putting the children's needs first. This is in fact contradictory to findings such as those of Amato which suggest that the higher the level of conflicts, the more likely it is that the effects of frequent contact with both parents on a child's wellbeing will be negated. Paul R. Amato, 'Contact With Non-Custodial Fathers and Children's Wellbeing', (1993) 36 Family Matters 32.

3. See Kaiz Funder, Remaking Families: Adaptation of Parents and Children to Divorce, (Australian Institute of Family Studies, Melbourne, 1996). This study found that the majority of parents and children ultimately adjust to divorce quite well and in such a variety of ways that there is 'no one golden rule' for post-divorce adjustment nor any one optimal family structure.

4. Rhoodes, Graycar and Harrison claim that there is a disproportionate number of submissions made to parliamentary inquiries into family law matters by disaffected fathers. Helen Rhoodes, Reg Graycar, and Margaret Harrison, The Family Law Reform Act 1995: The First Three Years (University of Sydney and the Family Court of Australia, 2000).

From the chaos and lawlessness of that period China has in the space of a quarter of a century re-established a functioning although imperfect legal system. The breadth of these reforms is remarkable and includes re-establishing a judiciary, a legal profession, and what is now the world's largest legal aid scheme. Equally importantly, the reforms are designed to restore the Chinese people's faith in the legal system. China has also passed volumes of legislation to promote use of the legal rules by business and citizens. The re-construction of the legal system is creating a major headache for the reformers. Have the Chinese fallen in love with litigation? It appears that they have and to a degree that will seriously stretch the legal system.

China's legal reforms have complicated origins. In brief, they lie in a combination of huge pressures to reconstruct a legal system. Since the Cultural Revolution, the Chinese have demanded legal certainty in dispute resolution and that this be provided by the courts. Demands for greater attention to legal protection of human rights, and pressure to establish a court system to process economic and trade disputes have been made. International agencies, including the United Nations, have also pressed for legal reforms. The United Nations Development Program has pressed for human rights reforms. Meanwhile, the WTO and the USA have pushed for China to reduce trade barriers and embrace the global trading system. Economic reforms require a legal system that includes lawyers and judges of reasonable quality and courts that apply the relevant rules without political interference. But it is no easy task to balance all these goals in reestablishing a legal system. Perverse consequences may be emerging.

What were the main weaknesses of China's legal system at the end of the Cultural Revolution? By the 1970s, the Chinese legal system was a disaster. The courts had stopped working and laws were largely irrelevant in Chinese society. Law schools and universities had long ceased functioning because they were prime targets of the Red Guards and the Cultural Revolution. Consequently, by the end of the 1970s there were fewer than 3000 lawyers in China and they were all state employees. Private legal practice was illegal.

What has been done to reestablish the system? First, judges and courts are functioning again. In 2002, for example, 210,000 judges were on the bench. But this result is not as positive as it might appear. Many observers inside and outside China have serious doubts about the quality of the judiciary. It is estimated that approximately 30% of judges have no legal training. Many have not been to university, and some have not finished high school. Furthermore, many were appointed to these positions after leaving the People's Liberation Army. Needless to say, loyal state employees leaving the army might be a convenient source for a government trying to rapidly establish a functioning court system. But the quality of their judicial work is by no means assured. While the ex-army officers might have a good understanding of discipline and application of rules in a military setting, this does not equip them to process legal disputes under law. The government has taken steps to improve the quality of judicial decision-making, including establishing the National Judges College to educate the middle and senior members of the judiciary. Existing judges are now encouraged to undertake ongoing training. It will, however, take time for such changes to have an impact.

Second, the legal profession has reemerged, including a private profession. In the late 1970s, the law schools and
universities began to reopen and since then have expanded rapidly. Currently there are about 1000 universities and over 300 law schools in China. In addition, there are many night courses, similar to TAFE, offered in law. By the end of 2000 there were over 110,000 lawyers in China. The majority work in private practice due to the legislation passed in the mid-1990s that was designed to stimulate the legal profession and serve the economic and trade boom. Nevertheless, the profession remains tiny given that the population of China is over thirteen hundred million people.

The small size of the legal profession is unfortunately likely to restrict another important legal reform. In the 1990s, the government established what is now the world's largest legal aid scheme. In 2002, there were over 2300 legal aid offices across China employing over 8000 legal and other staff. The scheme assisted 180,000 people in court cases including 58,000 criminal, 85,000 civil and family, and 3000 administrative cases. The scheme also provided advice to more than 1,300,000 people. This is a big improvement on the situation in the early 1990s when people had to fend for themselves when dealing with legal problems. But it is a drop in the ocean compared to the size of the population and the volume of cases going through the courts. The scheme faces a number of challenges including the low level of funding, and the patchy quality of staff. One international aid agency worker, for example, described legal aid workers on the ground in China as 'enthusiastic amateurs'.

The biggest problem facing the emerging legal system is, in fact, none of these issues. The main problem seems to be the success with which China has restored faith in the legal system. Recent evidence suggests that the Chinese have fallen in love with litigation. They have lost faith in the compromise of mediation and are, instead, flocking to the courts to process all sorts of disputes. Historically many disputes were resolved through mediation. Over the past 20 years, the ratio of mediated cases to first instance court cases has shifted in favour of litigation.

### The changing case loads of Chinese mediation and courts*

<table>
<thead>
<tr>
<th>Year</th>
<th>Mediated cases</th>
<th>Court cases (first instance)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1981</td>
<td>13,456,419</td>
<td>673,926</td>
</tr>
<tr>
<td>1986</td>
<td>8,479,024</td>
<td>989,409</td>
</tr>
<tr>
<td>1993</td>
<td>7,131,444</td>
<td>2,089,257</td>
</tr>
<tr>
<td>1995</td>
<td>6,912,203</td>
<td>2,718,533</td>
</tr>
<tr>
<td>2001</td>
<td>6,030,056</td>
<td>3,459,025</td>
</tr>
<tr>
<td>2002</td>
<td>6,000,000 approx</td>
<td>6,000,000 approx</td>
</tr>
</tbody>
</table>


Twenty years ago the ratio of mediated cases to court cases was approximately 10:1. It is now 1:1. A steady decline in the number of mediated cases since 1981 has been accompanied by a rapid growth in the number of first instance court cases. The reasons for the steady decline in mediation is not immediately clear. It might be that litigation is seen as the new faf for many disputes, that mediation was tainted because it was often controlled by the Communist Party, or it might be that people prefer to test their options to resolve disputes and the current ratio reflects a more 'natural' balance between the two forms of dispute resolution.

Whatever the reasons, the rate of growth in court cases puts immense pressure on the small, fragile and under-resourced legal system. It seems that the love of litigation is placing an impossible burden on the courts, legal profession and legal aid scheme. Perversely, successfully restoring faith in the legal system over the past 25 years is creating an impossible load for that system.

*Rix article continued from p.241*

13. Ibid.
15. Williams, above n 14.
18. Anderson and Renouf, above n 17, 13.
21. Community law matters include consumer protection, victims of crime, compensation for injury, court support, credit and debt, and aspects of the employment relationship.
22. Criminal injuries compensation law, which is practised by some commercial law firms in jurisdictions such as South Australia, may be a partial exception to this generalisation. The fees received by these firms from the government for practising in this area of the law do not cover costs.