

Introduction

Shazia Choudhry and Jonathan Herring

Introduction

It has become almost a cliché to say that family law is in a state of turbulence. The long-established cornerstones of family law: marriage, parenthood, childhood and even family itself are crumbling before our eyes, or at least becoming complex and contested concepts. Family lawyers are asking questions which our forebears would never have foreseen: what is a parent? Can a child have three or more parents? What is the position if a woman carries a baby using an egg from her daughter? Should we allow a group of four people to marry?

Some of these changes are a result of technological developments which have meant that children can be created in family forms that are far more diverse than in the past. However, the greatest impact has been dramatic changes in social attitudes and social conditions. The most significant has been the changing position of women. The traditional role of wife and mother which was so central to women's lives in the past and their position in family law is now adopted by fewer women. The 'ideal of motherhood' still hangs over family law and can still be found in the many aspects of it, but it grates with the reality of family life for many women. That said, family law has still struggled in many countries to respond to the changing norms of family life for women and in particular to develop legal responses which are not based on an assumption of traditional married life. That challenge is made more complex by the variety of family forms, meaning that a single model of family law becomes difficult.

With these challenges come many possibilities. Family lawyers are now required to think more deeply and richly about what it means to be a family; what is at the heart of parenthood; and what family law is trying to do. Rather than relying on external formalities (e.g. marriage; birth certificates) as a proxy for the deeper values being promoted, the law must seek to explore what those values are.

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In this book we encouraged leading family lawyers from a range of jurisdictions to explore what issues they thought were the major ones facing family law today. We gave some broad indications of the kind of issues we thought might be raised, but left it to each author to identify what they thought were the key ones in their jurisdictions. In this introduction we seek to bring out some of the common themes.

Gender

All the chapters in this collection make references to gender. This is not surprising. Traditionally in many societies families were seen as the world of women. Family life was seen as structured around clearly defined gendered roles: the husband as breadwinner, the wife as homemaker; the father as disciplinarian and decision maker; the mother as carer. One of the most significant changes in the twentieth century was the dismantling of these roles, or at least partial dismantling. While the concepts of equal sharing of childcare and equal access to the labour market are promoted in most, if not all societies, they are the subject of idealised rhetoric, rather than reality. There has certainly been significant changes in the employed work lives of the average men and women. The division of household and family labour has been harder to shift. This means that while most family law systems now seek to promote equality between men and women, what equality means is still hotly debated.

It might be thought that it would be rare to find family laws which overtly discriminate against women nowadays. However, as Farrah Ahmed notes in Indian law (Chapter 9), through its use of personal law, depending on the religious category into which one is deemed to fall, some rules overtly discriminate on the grounds of sex. This might be justified on the basis that if an individual chooses to follow a religion that sets up different roles for men and women, then this choice should be respected. However, even accepting that premise, which we would not, Ahmed explains how often Indian law assigns a religion to an individual which does not reflect their self-identified religion. The differences in treatment under Indian law can be significant. She notes:

By giving women weaker rights to inheritance and weak powers of marriage, divorce, adoption, and guardianship, most personal laws leave them with fewer

options and less power over their own lives. Without such rights, women are denied valuable options, including the many options closed by a lack of money.¹

But such overt distinctions between men and women are now rare in family law. In Chapter 5, Nicolás Espejo and Fabiola Lathrop, looking at family law in South America, see the equalising of the rights of mother and fathers in family law as an important development, promoting ‘a more egalitarian distribution of child rearing in family life’.² Certainly few would decry the fact that under most family law jurisdictions mothers and fathers have equal responsibilities to care for their children. However, as already indicated the term equality is problematic. Feminist scholars have done much to highlight the way that equal treatment of those unequally positioned does not promote equality. Fehlberg and Samas give a good example using the issue financial orders on divorce (Chapter 4). It might be claimed that an equal division of assets on divorce would promote fairness or equality, but if the relationship has impacted on the parties’ capacity for earning income the equality would be short-lived. There would not then be in the long term a fair sharing of the economic disadvantages generated by the marriage.

A similar issue relates to childcare. In Chapter 3, Heiderhoff explains that it is common for a couple to agree on a 50:50 sharing of childcare following relationship breakdown in Germany, in Chapter 1, Hunter explains that in England in court-resolved disputes there is strong pressure to ensure as much contact with both parents as possible. Yet in both Germany and England we are still well short of an equal sharing of childcare while the relationship is intact. Indeed, in many jurisdictions there is a notable disjunction between the considerable efforts put into enforcing shared care post-separation, with the minimal efforts in ensuring shared care during the relationship. A notable exception is Sweden where, as Leviner (Chapter 6) mentions, parents each get individual paid leave, which they must use or lose. That provides a powerful encouragement for both parties to be involved in childcare.

A more profound challenge to gender difference may be found in the discussion of Nicolás Espejo and Fabiola Lathrop of a series of cases on intersex children. The South American courts have been more progressive than in many other jurisdictions in arguing for the right to registered as intersex and for acknowledging the rights of children with intersex bodies

¹ Page 237. ² Page 132.

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to determine for themselves what surgery, if any, they wish to receive and gender identity to adopt. These decisions demonstrate the breaking down of the binary model of sex being either male or female. As a broader range of sexual identities and sexualities are developed, the male–female divide, that has been so powerful in family law, becomes problematised.³ Of course, even if there is growing acknowledgement that sexual fluidity is a biological truth and gender fluidity becomes more common as a social identity, it remains to be seen how far gender norms and patriarchal forces will operate. Certainly, the traditional feminist analysis of patriarchy will need to become far more sophisticated than a straightforward story of men's power over women's. The current work by black feminist scholars on intersectionality has begun that work.⁴

One area where there can be particular tensions between family law and gender concerns religious understandings of marriage and we turn to that issue next.

Religion

It is, perhaps surprising, how often religion is mentioned in the chapters which follow. One of the major changes in social attitudes and practice in the latter part of the twentieth century, mentioned previously, is attitudes towards religion. In many countries formal religious observance has declined. Yet religion still, undoubtedly, has enormous social and personal significance in many countries.

Religion and family law have a long history in many jurisdictions. In England family law was largely administered by the ecclesiastical (church) courts until the nineteenth century, and in India, as Farrah Ahmed's chapter discusses, Indian law is still largely a set of religious laws (Chapter 9). Even in countries which seek an overtly secular family law, it is difficult to avoid any reference to religious practices or concepts.

The overlap between religion and legal understandings of family relationships partly flows from an overlap between the terminology and

³ J. Herring, 'Making family law less sexy . . . And more careful', in R. Leckey (ed.), *After Legal Equality: Family, Sex, Kinship* (Abingdon, UK: Routledge, 2014), pp. 25–41.

⁴ K. Crenshaw, 'Mapping the margins: Intersectionality, identity politics, and violence against women of color' (1991) 43 *Stanford Law Review* 1241.

concepts. Given the influence of religion on the way people organise and structure their family lives, a legal intervention which sought to ignore religion would be based on a false understanding. Yet, as religious practice, at least in the context of formal religion, become far less prevalent in many countries and as religious values far from underpinning the legal system in some cases are in direct opposition to it, the relationship between law and religion has become more complex. Ahmed explains that in India it is the belief that family law is about personal law that means the law should reflect the religious views of the individual, hence there are separate family laws for Hindus, Buddhists, Sikhs, Jains, Muslims, Parsis, Jews and Christians. This is certainly a challenge to western concepts of law built on the concept of 'one law for all'. However, as we shall see under the heading 'Autonomy' below, that concept is under challenge from other sources apart from religion. What is notable about the Indian approach is that, by contrast with English family law, there is no attempt to impose a single religious vision of what family life should be or at least privileged certain religious forms of family life, but rather an attempt to acknowledge a wide range of alternate religious understandings.

A further difficulty identified by Ahmed is that if an attempt is made to match the legal regulation and religious beliefs of an individual, the question then arises as to which religious rules to apply. As she notes, Indian law tends to identify a person's religion, rather than allow them to self-identify. She explains that this means that Sikhs, Buddhists and Jains can be regarded as Hindu, although they would never describe their religion in that way. This might undermine any claim that the law is simply seeking to allow an individual to select what form of legal regulation if any they wish to apply. However, one can see the difficulty that can arise if an individual is simply permitted to select their religion. An individual's religious beliefs may change over time making it difficult to identify the correct regulation to apply. Further, it will be rare, even for a firm believer, to adopt all of particular religious group's teaching. If we seek to match the regulation to an individual's religious beliefs (by contrast with their membership of a religious group), the task for legal intervention becomes very difficult. If, however, as seems to happen in some cases in India an individual is deemed a member of a religious group and rules to which they do not adhere apply to them, this becomes hard to justify. Even if one's religion is correctly identified, it becomes the state which then determines the regulations that should apply to that religious group. Hence, even

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Indian law which might be seen as an attempt to acknowledge and treasure religious diversity, in some respects ends up undermining respect for individual religious beliefs. Ahmed claims that in Indian law respect for choice is illusory. Indeed, she claims that for women the use of 'personal law' is autonomy reducing, rather than autonomy enhancing.

One solution, proposed by Ahmed, is to have general family law that applies to everyone, but permit specific detailed regulations on secondary matters to be left to individual religious preferences. Hence, in English law, the precise form of a marriage ceremony can be determined by the preferences of certain religious groups, although only a tightly defined group. However, as Ahmed's chapter demonstrates there are considerable difficulties that such a partial accommodation can generate.

Notably critics of attempts to use state law to uphold religious principles in the area of family law include religious groups themselves. In Chapter 10, Abdullahi Ahmed An-Na'im questions the very possibility of having the state enforce Muslim law: 'since it is enacted and enforced by the state, this field of state law does not qualify as being "Islamic" by any clear and verifiable criteria of what it means to be Islamic'.⁵ One might imagine similar points being made from the perspectives of other religions where what is 'in the heart' and spiritual truths are what matters and these are, in their nature, outside the scope of a formal legal assessment.

A second reason for scepticism of state-enforced religious regulation from a religious perspective is that as Abdullahi Ahmed An-Na'im states 'arbitrary selectivity fails to account for the normative and social cohesion of each school in its broader social context'.⁶ If the state were to decide to affect some aspects of religious law (e.g. only in the area of family law), but not other aspects of religious law, this would create all kinds of difficulties.

Another issue raised by the use of opting into religious regulation is whether such a choice can ever be free. Hunter writing on the English position of the use of religious tribunals is concerned that 'there is evidence that women feel pressured into taking this route by their communities and feel they have little choice in the matter'.⁷

The easiest route might be thought to make family law a religion-free zone and leave religious matters entirely to religious bodies and individuals. This is the kind of approach that is promoted in South Africa, as discussed by Louw (Chapter 7), where religious and customary marriages

⁵ Page 254. ⁶ Page 271. ⁷ Page 26.

are not formally recognised by law. Looking at the issue of customary family law and marriage she notes that ‘a distinction is drawn between so-called “official customary law”, as applied by the courts and state bodies, and “living customary law”, represented by the current customary practices of the people whose customary law is in question’.⁸ In other words, if the law decides to ignore customary or religious law, that does not mean individuals will. If they continue to abide by religious regulation and see the state regulation as irrelevant to them, then they will fall outside the law’s scope.

Alternative Dispute Resolution

Many family law systems offer some form of alternative dispute resolution (ADR) as an option to be used instead of court resolution. There are multiple reasons behind this shift. One is certainly cost. Given the increasing numbers of cases of family breakdown leading to disputes in many jurisdictions, the expense involved in providing traditional court-based resolution has meant that cheaper forms of ADR are used. However, there is more behind the move to ADR than this.

One factor is the growing complexities of issues that are raised on family breakdown. Family breakdown problems are not restricted to traditional legal issues concerning division of assets or care of children, but can highlight mental health issues; psychological difficulties; religious concerns; debt counselling; and educational problems. Without seeking to resolve some of these broader issues legal interventions may well be ineffective. A court order determining child arrangements may well only succeed if the parties are able psychologically to resolve the broader issues around it. Traditional courtroom settings are often not appropriate to deal with the complex emotional difficulties that can arise, although increasingly courts are required to deal with these.⁹

A further factor is that ADR is seen as more consistent with the broader push towards autonomy mentioned below. It enables parties to use the values that they live by to resolve their disputes, rather than have

⁸ Page 183.

⁹ J. Eekelaar and M. Maclean, *Family Justice: The Work of Family Judges in Uncertain Times* (Oxford: Hart, 2013).

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generalised values that the law uses. Farrah Ahmed suggests this may be particularly appropriate in the Indian context for couples of religious faith. They may seek to use ADR to ensure that the religious and practical issues around their dispute are resolved. She sees this as preferable to the court-based system in India, which she explains can seek to determine the religion of the individuals, which may not match their self-identification. It would mean that only those who choose to use religious ADR would be subject to its terms, rather than the current system in India where religious personal laws apply to an individual, whether they wish them to or not. It would also have the advantage of the couple seeking to precisely define the nature of their religious belief, if for example, they hold a minority view within a religion they could seek ADR that reflected that. However, as already mentioned, questions are raised over the extent to which individuals embedded in a religious community can choose not to participate in a religious-based ADR if that is promoted by the leadership of the religion.

Ahmed, however, acknowledges the difficulty with ADR is that it can allow discriminatory results. If the views of the couple, be they religious based or not, are discriminatory, is it appropriate that the legal system allows a system of dispute resolution that is sexist? One answer to that, as Ahmed proposes, would be 'to introduce safeguards that would prevent the enforcement of such discriminatory norms'.¹⁰ Abdullahi Ahmed An-Na'im also calls for 'state legislation and regulation should reflect the religious/cultural values and practices of the communities they govern, that must be with due regard to constitutional and human rights requirements of equality and non-discrimination'. The Canadian Supreme Court in *Miglin v. Miglin*,¹¹ looking at a spousal separation agreement assessed whether the agreement was entered into freely and whether it complied with the objectives of Canadian family law. It might be very difficult to know whether or not discriminatory norms were used in an ADR settlement which was in its nature private.

Outside the context of religious ADR, there are, as Hunter notes, real concerns about the very common situation that the parties do not have equal bargaining power. She writes 'the more vulnerable party is likely to find the process traumatic, the chances of settlement are low, and any outcome reached is likely simply to reflect the power imbalance between the parties'.¹²

¹⁰ Page 244. ¹¹ *Miglin v. Miglin* [2003] 1 SCR 303. ¹² Page 42.

Hunter also raises a major practical problem: few couples seem keen to take up ADR. It is, perhaps not surprising, that at the point of relationship breakdown the last thing someone wants is to spend time in a room with their ex-partner.

Marriage

Marriage in some jurisdictions has been at the heart of marriage, but as an institution it is facing challenges in many parts of the globe. These have taken several forms.

First, there are disputes over access to marriage. In particular whether marriage should be restricted to opposite-sex couples or whether it should be available to same-sex couples. Further, there are arguments over whether it should be open to more than one person. Increasingly marriage has been extended to same-sex couples. In many jurisdictions this has been through the intervention of the courts, for example *Obergefell v. Hodges*¹³ in the US and *Minister of Home Affairs v. Fourie (Doctors for Life International and Others, amici curiae); Lesbian and Gay Equality Project and Others v. Minister of Home Affairs (Fourie)*¹⁴ in South Africa. In others including England and Wales this has been through legislation.¹⁵

Second, there are issues around the regulation of couples living together in relationships, but do not formalise these through the concept of marriage. In many jurisdictions there has been a sharp increase in the number of unmarried cohabitants. Traditionally many family law regimes have made minimal recognition for unmarried couples. One justification is that couples have chosen to avoid marriage and its legal regime, and it would be contrary to their autonomous wishes to impose regulation upon them. This argument is certainly open to question. One can query how many of those who do not marry are aware of the legal significance of their status. It may be that they falsely believe the law will protect them even if they are not married, or that they never actively think through the issues and make a choice. Certainly, the idea that many cohabitants pour over a family law textbook and having considered the alternative legal regimes opt for cohabitations seems absurd. Further, it seems wrong to assume that even

¹³ *Obergefell v. Hodges*, 135 SCt 2584 ¹⁴ 2006 (1) SA 524 (CC).

¹⁵ Marriage (Same Sex Couples) Act 2013.

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if a couple have rejected marriage, they therefore do not want any form of legal regime at all. It is not surprising that some jurisdictions have sought ways of providing some kind of legal protections, even if short of marriage. Another justification is that it would undermine marriage if couples who were not married were given the advantages of marriage. Hunter provides a powerful response to such an argument: 'the legitimate aim of promoting marriage is clearly not being achieved by leaving cohabitants – and just as importantly, the children of cohabitants – less well provided for following the breakdown of their relationship'.¹⁶

Third, there is the challenge of whether marriage is in its nature a patriarchal or outdated institution, or whether it can adapt to modern life and values. Whichever side you take on that question there is still the question of whether the law should provide alternatives to marriage for those who do take the view that it is inherently patriarchal or undesirable. In England and Wales, as Rosemary Hunter discusses, the status of civil partnership was originally created for same-sex couples who sought the legal privileges of marriages, but were denied access to matrimony itself. Now that in England and Wales same-sex couple can marry, civil partnership has become, at least for some, an alternative status to marriage that does not carry the religious and gendered overtones that it used to. It is not currently open to opposite-sex couples, although as Hunter states that may happen in the future. It is an interesting debate because civil partnership and marriage carry for practical purposes the same set of legal rights and obligations. The difference lies primarily in the name and whether it is seen to symbolise.

Anne Louw notes that under the South African law at the solemnisation of a civil union the authorised officer must ask the parties whether they wish to call their union a marriage or civil partnership. This can be taken to make clear that for the state there is no difference between the two.

Fourth, there is the rise in divorce rates. Many jurisdictions have seen an increase in divorce rates. This creates difficulties for marriage. Perhaps the primary claim for privileging marriage over other forms of relationships is the argument it promotes stability in relationships. Increasingly marriage seems better promoted in legal terms as offering an effective framework for resolving disputes when the relationship breaks down, than as providing a scaffolding for a lifelong relationship.

¹⁶ Page 32.