Introduction

THE SCOPE AND PURPOSE OF THE BOOK: DEFINITIONS AND BOUNDARIES

BY FAMILY JUSTICE we mean not only Family Law, the legal framework within which personal obligations over the life course are managed and regulated, but also the justice system which delivers legal knowledge, advice and support at times of change of status or family stress, together with the mechanisms for dispute resolution, and adjudication where agreement cannot be reached.

The past few years have seen unparalleled turbulence in the way family justice systems function across a number of jurisdictions. These changes are stimulated by economic constraints in many countries, for example England and Wales and Spain have seen a drastic reduction in public funding for private family law cases, and in France judges are under pressure to accelerate their activity rate to control costs. In other settings change seems to have been driven by political pressures, for example British Columbia's new Family Law Act 2013 and the procedural changes in New Zealand sit firmly within a neoliberal political landscape, while the Bulgarian justice system is under pressure to conform to the requirements for accession to the EU, and in Poland increased public questioning of all institutions in the period after transition has been associated with a decrease in confidence in the courts and judiciary. The climate is calmer in Scotland, where court use is traditionally low and clear legislation seems to make private contracting in the shadow of the law work well. And in Australia a great deal of thought, accompanied by resources, has resulted in a considered though not always unquestioned shift towards Alternative Dispute Resolution. But whether the policy context is turbulent or calm, well-resourced or struggling, we are seeing an increase in private ordering and the marketisation and fragmentation of legal services, together with an overarching reduction in the role of law and the delivery of traditional legal services.

We therefore came together as a multidisciplinary group including judges, lawyers, mediators, researchers and policy-makers, from civil and common law countries in Europe and beyond, including England and Wales, Scotland, France, Poland, Spain, Bulgaria, Canada, and Australia and New Zealand to share our experiences and knowledge of the changing delivery of family justice, and to discuss possible outcomes and concerns. We shared anxiety about the impact of these changes on access to justice, and on the achievement of a fair and informed resolution of family difficulties for those without

the resources to enable them to turn to the newly developing family legal services market, or the computer literacy to choose and use the newly developing web-based services. At the same time, we were aware of the economic and political pressures for change, and of the inventiveness of the response to these pressures being displayed by the legal professions and others in developing new ways of working: cutting costs by working from home with sophisticated IT, making effective use of the internet, and developing new professional relationships with ADR practitioners, including mediators, arbitrators and others. We found ourselves both starting and ending with comments on the part played by the law within the justice system, and reached the inescapable conclusion that justice without law is hard to find. For example, in England and Wales we noted with sympathy the principles which guided the Review of Family Justice in England and Wales which reported in 2011, chaired by David Norgrove,[1] which included paramountcy for the interests of the child in any decision affecting them; protection for the vulnerable and the avoidance of intervention by the state except where it is of clear benefit; and the right of adults to information and support to enable them to take responsibility for the consequences of separation and to make their own decisions, wherever possible outside the courts. Conflict should be minimised, process should be clear and simple, and administrative or non-adversarial in nature, and mediation should be preferred to legal process.

But while applauding the focus on the interests of children and the vulnerable, we also noted an apparent more widespread change in views of the role of law, including the idea that law is not important to all, but only to a subgroup of 'the vulnerable', although perhaps, as John Eekelaar suggests in our final chapter, anyone who needs to have recourse to the law with respect to his personal affairs might be properly regarded as vulnerable.

Systems and terminology vary across the countries discussed here, but we have aimed to include within our discussion of the family justice delivery system all those institutions whose primary purpose is to define, protect and enforce the legal rights family members have as family members, and to resolve conflicts family members have concerning those rights. These are the court system (judiciary, court-based staff and court-based agencies), lawyers and mediators, and experts. But we have excluded the counselling, medical and psychotherapeutic services which support the justice system.

STRUCTURE AND ANALYTICAL FRAMEWORK

Structure

The volume is presented in four parts: the first is concerned with the role of substantive law in the delivery of family justice. We look at the way in

[1] *Family Justice Review, Final Report* (London, Ministry of Justice, 2011).

which the role of law in the justice system has been changing, and been reformed either as a result of traditional governmental 'top-down' decree, or more gradually by osmosis or the absorption of developing social norms, or even by direct consumer action where those using the law take matters into their own hands. The second part looks at change in the heart of the justice system, the work of courts and judges, and the way in which political and economic pressures are affecting both the role of the judiciary and the way in which they are regarded in society. The third part looks at the impact of austerity on access to family justice, and at the changing pathways for users through the system, often involving less recourse to courts and lawyers and increased use of private ordering processes including mediation. The fourth and final part discusses newly developing aspects of the family justice system, including new ways of using courts, redefining the role of lawyers, and finding web-based alternatives to traditional legal services. The final chapter takes us back to the central but no longer unquestioned role of law in the delivery of justice.

Analytical Framework

This group of researchers has interests which differ; some are more concerned with the content of the law; others with how cases are treated in different situations; others with how courts function. But we share a common starting point: the state has withdrawn from the private sphere when dealing with couples, but control has been maintained or even reinforced when dealing with children and parenting. This evolution is not happening in the same way with the same rhythm everywhere, but is influenced by many background factors including the economic situation, social organisation, gender roles, culture and religion. And the change is not completely homogeneous, even in some instances moving in different directions. Our aim has been to try and ask a range of questions to show where each country is situated on the pathway of change, to investigate, first, how society tries to ensure people do what is expected from them, and do it properly when they have responsibility for action, and secondly, how society manages such cases efficiently when the responsibility is a private matter, always keeping in mind how gender or economic inequalities are managed, given that they are key determinants of access to the justice system. We know that the same problems are dealt with in different ways in our different countries. In particular, we start from the following questions, 'What is public, what is private? What is subject to judicial action, what is not? Where do we need a judge and where do we not'? For the French, the idea that 'private ordering' could be the norm, without any need for state intervention in family matters, is difficult to understand. There has been resistance recently to proposals for administrative divorce as the judges are currently always active in the process in France, whereas in England the procedure for undefended divorce has been

essentially administrative with minimal judicial involvement since 1976. We are also aware that the scope of court activities varies widely across the jurisdictions represented here. As a consequence, we need to consider the question of the professions and professionalism in a comparative way. 'Who is doing what? Who is in charge of solving conflicts: lawyers, mediators or computers'? There is competition between the professions, each trying to demonstrate its own competence and the superiority of its techniques, while governments focus on cost-effectiveness.

The issue of scope leads directly to questions about the management of family cases. In France, for example, where family judges see all cases, sometimes without any preview of the case by a lawyer or other professional, the management of cases is a serious problem, with judges deciding up to a hundred cases each month. In countries where court use is lower and more decision-making takes place outside them, the courts may see only the more contentious cases, which will be fewer in number but take longer. Management issues then tend to centre around deciding which cases should be in court and which dealt with by Alternative Dispute Resolution.

The common unifying factor however remains, that justice systems are poor and this lack of resources impacts on access to justice, contributes to delay, and in the current economic crisis gives an air of precariousness to each system. But whether cases are dealt with in or out-of-court, the same questions arise about the treatment of family problems: how do we find a way to fit private ordering within some degree of control? How do we provide solutions for families that fit with both their values and with general societal norms? Do we keep matters within the private domain but with some issues reserved for public control, and if so which? We know that there is a gap between how people live and how they are expected to behave in court. They cannot expect recognition of who they are and what they feel when they enter the family justice system, and many aspects of their stories have to be abandoned.[2] The conflict between individuals develops long before the conflict becomes a judicial one, and rarely ends with the judicial decision.[3]

At the same time, our view of law is predominantly proactive. We expect law to mould behaviour. Through the justice system we seek settlement, and the making of arrangements for the future. But there is a paradox here with respect to collaborative law and mediation in that we seem to be asking people to make agreements and to reach a shared view about the future for their children when they are at their most conflicted. This leads to questions about whether people are able to respond to these expectations, and what

[2] Renchon, J-L, 'Droit et pauvreté affective' (1983) 10 *Revue interdisciplinaire d'études juridiques* 17.

[3] Noreau, P, 'La superposition des conflits: limites de l'institution judiciaire comme espace de résolution' (1998) 40 *Droit et société* 585.

should happen if they cannot. Do we help them? Educate them? Or punish them? At the present time we do not seem to have a clear answer.

Finally there is the question of inequality among those coming to the justice system. In family justice, the private conflict reflects and expresses the broader tensions in society. Divorce or separation is the moment when the specialisation of parenting roles or the difference in resources available to the parties is made visible. The gap between aspiration and reality is revealed. The impact of any justice system is limited. In fact when justice is privatised and relies on private ordering, little can be expected except the reproduction of societal inequalities by the justice system and indeed by the parties themselves.[4]

These questions arise from our combined researches into the changing delivery of family justice. The individual chapters which will be described in more detail below arise from, though they cannot answer, the questions just raised. Hopefully, in the best tradition of the Oñati Workshops which offer such a rich environment for reflection and debate, they may add to and develop that list of questions, and thus develop the next generation of empirical studies.

ORGANISATION OF CHAPTERS

Part I: Law and Delivering Family Justice

Part I examines the role of law in the changing delivery of family justice. Taking substantive law as the starting point for the family justice system, we begin the volume by looking at where changes to the law may come from, and whether the origins of change affect the delivery of justice.[5] Rachel Treloar looks at top-down reform with a political agenda in her description of the introduction of the Family Law Act in British Columbia, Canada, which came into effect in 2013. The background of the economic, political and social context, with increasing economic disparity within the population and precarious employment, reveals a neoliberal approach to politically inspired governmental lawmaking, seeking to emphasise parental responsibility and choice while de-emphasising any active role for the state, including adjudication through the courts. And while asking families in conflict to take more responsibility, the Act also included significant cutbacks to public funding for legal aid and the broad range of services that support families. Treloar quotes research on the impact of leaving family disputes unresolved

[4] Le Collectif Onze, *Au tribunal des couples: enquêtes sur des affaires familiales* (Paris, Odile Jacob, 2013).

[5] For further discussion, see Maclean, M, with Kurczewski, J, *Making Family Law* (Oxford, Hart Publishing, 2011).

which argues that perpetuating social problems in this way ultimately adds to overall social costs.[6] The Act gives interesting new and precise rules on relocation, defines domestic violence and replaces the terms custody and access with an expanded definition of guardianship, paving the way for independent decision-making. While these rules may work well for many families, for those with a serious dispute the restriction of legal aid means that parties without resources will either self-represent at great personal cost, or concede. Confidence in the family law system is at risk. So at the beginning of the volume we are alerted, however highly we value the law, to the problems associated with the content of the law in this case as a result of top-down law reform. The second chapter in Part I from Bill Atkin in New Zealand, looks at how court process can reflect the role of the state to achieve the same kind of outcome, moving towards 'user pays', 'privatisation' and 'secret justice'. The third chapter also comes from Canada, but has a more positive account of legal reform as taking on board the common practice of people undergoing in this case divorce or separation and making financial arrangements. Carol Rogerson was one of the team of lawyers involved in deciding whether the system for deciding property and maintenance at the end of a relationship should remain largely discretionary or whether there should be a move towards a rule-based system. As in other jurisdictions, including England and Wales, there had been interest in developing rules, but lack of agreement about which rules to adopt. Professor Rogerson and colleagues carried out research to discover social norms, by looking at what arrangements separating couples in a variety of circumstances had adopted and been able to live with. They analysed actual arrangements made according to age, length of marriage, number and age of children, wealth and income. They created tables showing the range of outcomes chosen for each set of circumstances. These were made available on the internet, so that couples could see where they stand, and choose an option within the range adopted by others in similar circumstances. No law was 'made' but the guidelines were popular with separating couples and with the judiciary and are now so widely used that there is some concern that this information has become used prescriptively as if it were a formal legal requirement. But the gradual progress from actual behaviour, to information, to acceptance of de facto rules worked well. Becky Batagol describes an earlier stage in the move towards change in Australia, where the government is attempting to support traditional forms of marriage through a required text of the civil marriage service, which refers to marriage as the union between one man and one woman. But Australians who support same-sex marriage are taking

[6] Currie, A, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences if Justiciable Problems Experienced by Canadians* (Department of Justice, 2009) www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_la1-rr07_aj1/rr07_la1.pdf.

matters into their own hands by following their formal vows with an immediate statement of their disagreement with the formulation. It remains to be seen whether law reform will follow in response to this form of direct action. Part 1 therefore asks us to think carefully about what we mean by law, and where it may be coming from.

Part II: Judges and Courts Delivering Family Justice

The next part turns to the traditional heart of any family justice system, the judges and their courts. The first chapter in this part from Biland and colleagues presents empirical data on the working of family courts in France and in Québec, both with high divorce rates, but with very different kinds of hearings, partly as a result of the difference between civil and common law traditions, but also of the expectations about levels of state control. In France, the government has responded to austerity by concentrating on internal reforms to the courts, where lawyers are heavily involved and the career judges, often young women, who deal with every case, are under pressure to meet targets for cases dealt with each month. All family matters remain in court, including the calculation of child maintenance, and mediation is used by only a minority. In Québec, the encouragement of private ordering and no-fault divorce has led to less investigation by the court, resulting in more privacy for the parties and more agreements being made out-of-court. Mediation is used in less than half of the cases, but other services by various kinds of 'sub judge' are also offered to the parties to reduce the need for time in court. Judges now concentrate on the most highly conflicted cases. Legal aid helps the poor, the rich can buy what they need, and it is the middle income cases which are most likely to avoid court hearings because of the cost. The authors refer to the different ways of managing cases in the two jurisdictions, but interestingly point to the possibility for parties in private ordering, in both areas, of maintaining increased privacy by doing so. The remaining chapters in this part reveal an interesting set of political influences operating in the heart of the justice system. In Bulgaria, the judges in family courts are being pressured into taking more and more cases to comply with the requirements for the way courts work set by the EU on agreeing to accession. While in Poland, drawing on national survey data over time, it appears that, while under communism the courts and judges were held in high regard as places of independent thought and judgment, following transition this regard has lessened along with the increased questioning of all institutions now that this is possible. The emphasis on inquisitorial judicial activity is under discussion. So again, as in Part I, we are encouraged to question our assumptions, in this case about the role of the state through the mechanism of judges and their courts, as well as the substantive law.

Part III: Current Context of Practice and Policy—(I) Bypassing Courts and (II) Reducing Public Funding

Part III considers directly the impact of economic pressures, often in a neo-liberal policy landscape, on the delivery of family justice. A common factor across a number of the jurisdictions represented in this volume has been the attempt to reduce the role of law and the courts in the family justice system by cutting public funding for legal help and encouraging other forms of dispute management which increase individual responsibility and reduce public expenditure. This part begins with a description of the existing pathways to justice, including private ordering, taken by parties seeking divorce or separation, and then of how these are being affected by resource issues; it concludes with comment on governmental decision-making, the aims, the process and the possible outcomes.

The first chapter reports on the major study *Paths to Justice* carried out in England and Wales 2011–14, led by Rosemary Hunter and colleagues, which presents survey results on awareness of and use and satisfaction with three main paths to divorce settlement, all of which seek to avoid contest in court: lawyer-led negotiation, collaborative law and mediation. It is combined with interview data from professionals and clients, and recordings of examples of each process. The authors conclude that some cases need to go to court, and that private ordering or Alternative Dispute Resolution in the form of mediation as currently offered as a stand-alone service is unlikely to meet the current needs of the divorcing population as a whole, despite government's preference for this route. Angela Melville and colleagues then describe an earlier experiment in moving from lawyer-based intervention to multi-agency support in England, which has not been continued partly because the lawyers were better at receiving referrals than making them. Another form of private ordering through the use of contracts is described by Jane Mair and Fran Wasoff and their colleague in Scotland, Kirsteen Mackay, where the legal framework for property division on divorce or separation is relatively clear, court use is traditionally low and parties are accustomed to seeing a lawyer together to prepare a legally binding contract known as a Minute of Agreement which is then registered in the Books of Council and Session. The cost is low (a few hundred pounds sterling), and satisfaction and use are high (most divorces with property use this method and the agreements are rarely challenged). The contract is legally binding, but courts are bypassed. The system is widely thought to work well, with the caveat that the bargaining takes place in the shadow of the law, and requires a fresh supply of court decisions to keep the bargaining process up to date.

Part III(II) then focuses more directly on the impact of austerity on the delivery of family justice. Teresa Picontó-Novales describes the recent changes to Spanish law which have increased court fees, require payment in advance and have cut the provision of other non-lawyer services within the courts

such as social workers. This has given rise to serious concern about access to justice for women and children. We are fortunate to have further comment on this issue from the judicial perspective by Encarna Roca Trías of the Constitutional Court of Spain. The range of court fees in other jurisdictions, and whether they are set for economic or political reasons, requires further research, for example the constitutional challenges to rising court fees in British Columbia compared with the absence of court fees in family courts in Ontario. Liz Trinder provides an account of how litigants in person affect and are affected by the court process in Canada, Australia and England and Wales. Numbers may increase in other jurisdictions experiencing reduction in public funding for legal help. Data from the study by Trinder and colleagues for the Ministry of Justice study in England and Wales published as we go to press throws new light on their need for support, and indicates how judges might be given specific training for dealing with cases where one or both parties are without legal representation.

Detailed concerns expressed in an ongoing study of a small qualitative sample of those directly involved in the delivery of family legal aid (lawyers, mediators, judges and court staff) about the impact of the Legal Aid Sentencing and Punishment of Offenders Act 2012 on access to justice in family matters are then set out by Hilary Sommerlad in chapter fourteen. A barrister suggested that absence of legal representatives could increase the length of a hearing from half an hour to all day; a solicitor referred to 'a whole industry of unregulated paralegals who charge for services with no insurance, no liability: DIY divorce and other IT platforms'; a judge raised the problem 'about provisions for disadvantaged parties … usually battered women'. Another barrister was concerned about the wider impact on society, saying: 'It's making access to justice unavailable for the ordinary man in the street … we're becoming a nation of two halves'. The final chapter in this part by Peter Harris draws on his experience as a British civil servant in observing opposition to various government policy moves, and advocates taking care not to undermine the position of those in government charged with responsibility for the justice system, and to be aware of the possibilities of exploiting changes in the machinery of government for delivering publicly funded legal services in order to maintain or expand them. This pragmatic approach may be of some interest in the context of Sommerlad's contention that the disintegration of the family justice system may, in effect, be the aim of governments who wish to withdraw from intervention in the private family affairs of citizens.

Part IV: Innovation in Delivering Family Justice

The final part of the volume looks to the future, identifying new forms of delivery developing to reduce state costs and the issues arising from this, before closing with a return to our initial concern with the place of law

in delivering family justice. It begins with Benoit Bastard and colleagues' account of the French response to economic pressure which does not try to remove family matters from the oversight of the judiciary, nor limit the involvement of lawyers, but instead aims to reduce the time spent on each matter by accelerating the court process, seeking quick answers not lengthy consideration. Rather than privatising family responsibilities, the state aims to keep control over the family's situation, but limits costs by using the techniques of public management, pushing parties to compromise, pressing lawyers not to speak, not to postpone. Bastard contrasts this with the Belgian approach where family matters are divided into their different components, to be dealt with in different courts, for example post-divorce parenting comes to the juvenile court, division of patrimony to the notary and so on. The delays which may arise from this segmentation are best avoided by private negotiation, leading back to the promotion of mediation. In England and Wales, Lisa Webley alerts us to the question of what exactly is meant by the term 'lawyer' in a jurisdiction where most legal activities are not reserved to lawyers who have been admitted to the profession of barrister or solicitor. Family arbitration, negotiation or advising a client on family law, assisting in drafting a consent order which a court may be asked to ratify, even when a fee is charged, may be done by anyone. A market is developing in unregulated legal services, which in some ways could be beneficial in increasing access to justice and encouraging working partnerships between lawyers, social workers or mediators. But the potential problems of lack of professional indemnity and quality control are worrying. Mavis Maclean looks at new sources of legal information and advice, describing the development of web-based services offering advice which may or may not be free and may or may not be advice and sit outside any recognised regulatory framework, and at the possibility of finding legal help within family mediation, especially where the mediators are qualified as lawyers also. Some of these services are high quality, and both web-based and mediation services have established relationships with firms of lawyers. The web can work well for divorcing couples without property, children or dispute, and mediation for those who are able to cope with it. But where there is conflict, vulnerable parties may be at risk of failing to reach a fair and informed settlement without legal backup.

To conclude this informative and provocative series of debates, our final chapter from John Eekelaar takes us full circle to the fundamental question 'Can there be family justice without law?' Governmental hostility to legal process in family courts and lawyers in a number of jurisdictions seems to sit with reluctance to intervene in private life, combined with a clear view of the way people should be required to behave: an uncomfortable combination, especially when exacerbated by economic constraints. Substantive law is more popular with government when it is seen as a way of delivering a message, for example about the desirability of opposite sex marriage or cooperative parenting after separation. Interestingly, there are some signs of

the emergence of a more positive approach to law and legal process exemplified by the Law Commission of Ontario Report 2013,[7] which argues for treating family problems in a holistic manner, drawing on law and lawyers, and also in the introduction of lawyers into the Australian Family Relationship Centres and the New Zealand government's recent drawing back from excluding family lawyers from certain courts.

Are family disputes best dealt with by law? Should individuals reach their own solutions, if necessary with the help of dispute resolution services? Are legal services just another service which the market will provide in varying ways in varying circumstances according to demand?

Eekelaar argues for the place of law, the rule of law and the need for law in providing a framework within which to organise the complexities of family life and to provide a safe place in which if all other attempts fail to secure guidance when conflict arises. Law is far more than dispute resolution. Private ordering outside law is an invitation to perpetuate in individual cases the inequalities of the wider society. The outcome of a dispute needs to be not only acceptable to the parties, but to be perceived as such by what Adam Smith (and later Amartya Sen) called 'an impartial spectator', in this context, the family justice system which includes legal norms, courts and lawyers advising and representing parties, and mediators resolving disputes. Eekelaar closes the volume with the following words: 'Family justice is concerned with more than simply bargaining, fairly or otherwise. It is concerned with upholding some elemental features of personal relationship. It cannot do this without the law, and effective means of upholding it'.

[7] Law Commission of Ontario, *Increasing Access to Family Justice through Comprehensive Entry Points and Inclusivity*, available at: www.lco-cdo.org/en/family-law-reform-final-report.