Chapter 1 supplementary materials

This section of the online resources contains additional introductory material which we hope you will find useful as you begin your study of family law. The material is designed to supplement and, in some instances, expand upon the discussion contained in chapter 1.

Please read the *Guide to the book and the Online Resources* before reading these materials.

The following topics are covered here:

- Sources of family law and policy
  - statute law
  - case law
  - international and European law
  - non-legal resources for family lawyers and policy makers

- The Human Rights Act 1998 and family law: core principles
  - statutory interpretation: seeking compatibility with the ECHR
  - the duty of public authorities to act compatibly with the ECHR
  - horizontal effect: the application of the ECHR in private law cases
  - remedies for victims
  - Strasbourg case law and the margin of appreciation
  - the discretionary area of judgment

- The family justice system
  - the family court system
  - the demise of legal aid in family law
  - family justice outside the courts: mediation

- Themes and issues in contemporary family law and policy: extended extracts to supplement section 1.2 of the book
  - a rights-based approach to the family
  - rules versus discretion
  - women's and men's perspectives on family law
  - gender issues
  - sexual orientation
  - cultural diversity
  - state intervention versus private ordering

SOURCES OF FAMILY LAW AND POLICY

In the *Guide*, we outlined the various types of 'material' that you will find in the book. Here, we discuss in more depth the sources of family law and the distinctive issues to which they give rise for us as students of family law.

1. STATUTE LAW

It has been said that 'to teach family law in terms of "case law" [to the neglect of statute law] is to act like a professor of medicine who teaches pathology in terms of the rarest diseases to students knowing nothing about anatomy or physiology'.[1] Much family law is located in primary legislation. In some areas, secondary legislation is also important, providing the detailed substantive and procedural rules for the determination of particular disputes.

The legislature uses two principal modes of law-making in relation to the family: (i) the imposition of rules; and (ii) the creation of judicial (or executive) discretion, which (as we explore below) may be understood by the judges to call for more or less structured decision-making, depending on the nature of the issue.[2] Some legislation creates prescriptive and exhaustive rules to govern particular disputes. Here, the courts' function is confined to determining the meaning of the statutory language and applying it to the facts of the case (not a straightforward or value-neutral task). Other legislation, such as that applying throughout much of child law, confers wide powers on the family courts: the statute may set down broad principles and indicate relevant factors for the courts to consider, but it may give no clear indication of the 'right' outcome for any particular case. Here, the courts' role is very different. Interpretation of the legislation is less difficult and less important to the determination of individual cases. Instead the emphasis is on the courts' own assessment of the circumstances of the cases before them, and their judgment of what will be a 'fair' outcome, or one which best promotes the welfare of the relevant child. The nature of the courts' function here has particular implications for how we approach case law relating to this type of legislation.

2. CASE LAW

Some 'family law', particularly that relating to family property, consists of general common law and equitable principles. For example, those who have not formalized their relationships by marriage or civil partnership are not subject to the specialist statutory remedies applicable on divorce/dissolution to spouses and civil partners. The general law of contract, trust, and property therefore applies to determine such individuals' financial and property disputes on relationship breakdown.

That general case law aside, of particular importance for family lawyers are the cases in which the family court interprets and applies its specialist statutory powers. The peculiarly discretionary nature of so much of English family law has significant implications for how appellate judges determine cases brought before them, not least: on what grounds can an appeal court overturn the decision of the original judge? This in turn

[1] O. Kahn-Freund, from a lecture at Yale, cited by Müller-Freienfels (2003), 42.
[2] See generally 1.2.2.

has implications for the way in which both judges and students of the subject handle case law as a source of law, and reflects the nature of the judicial function in these cases.

Lord Hoffmann considered these questions in a case concerning, the property and financial remedies (such as periodical payments and transfers of the matrimonial home) available on divorce under the Matrimonial Causes Act 1973, previously known as 'ancillary relief'. As we explore in chapter 6 of the book, the Act grants the court a broad discretion to make whatever orders it thinks fair in all the circumstances, given a 'checklist' of factors set out in s 25.

Piglowska v Piglowski [1999] 1 WLR 1360 (HL), 1372–3

LORD HOFFMANN:

In *G v G (Minors: Custody Appeal)*. . ., this House. . .approved the following statement of principle . . . which concerned an order for maintenance for a divorced wife:

> "It is, of course, not enough for the wife to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere."

This passage has been cited and approved many times but some of its implications need to be explained. First, the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. . . .

The second point follows from the first. The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. . . . An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself. . . .

Thirdly, the exercise of the discretion [under the Matrimonial Causes Act] requires the court to weigh up a large number of different considerations. The Act does not, as I have said, lay down any hierarchy [for the items in the statutory checklist]. It is one of the functions of the Court of Appeal, in appropriate cases, to lay down general guidelines on the relative weights to be given to various factors in different circumstances. *M v B (Ancillary Proceedings: Lump Sum)*. . ., emphasising the importance of providing the father of small children in the care of his divorced wife with accommodation in which he can receive them, is a good example of such a case. These guidelines, not expressly stated by Parliament, are derived by the courts from values about family life which it considers would be widely accepted in the community. But there are many cases which involve value judgments on which there are no such generally held views. The present case is a good example. Which should be given priority? The wife's desire to continue to live in the matrimonial home where she can conveniently carry on her business and accommodate her sons, or the husband's desire to return to England and establish himself here securely with his new family? In answering that question, what weight should be given to the history of the marriage and the respective contributions of the parties to the family assets? These are value judgments on which reasonable people may differ. Since judges are also people, this means that some degree of diversity in their application of values is inevitable and, within limits, an acceptable price to pay for the flexibility of the discretion conferred by the Act. . .The appellate court must be willing to permit a degree of pluralism in these matters.

Given the discretionary nature of family law, neither first instance nor appellate decisions can be mechanically 'applied' as precedents determining future cases. Much may turn on the particular circumstances of the individual family. The principal purpose of the discretion is to permit the courts to reach decisions sensitive to the unique features of each family. But that does not mean that the case law is an ad hoc series of unconnected decisions. Judges, like any decision-makers operating a wide discretion, give their discretion some structure by developing particular patterns, rules of thumb, and general principles. Indeed, the law *must* contain some guiding principles in order to ensure consistent decision-making and a legal backdrop against which parties can negotiate without having to resort to litigation.[3] There are limits to the extent to which the judge can legitimately 'firm up' their statutory discretion in this way, and the approaches of individual judges differ. But we can glean from the case law some sense of the overall shape of the judges' discretion. How do they tend to decide this kind of dispute? What factor tends to be given greater weight? In the absence of more specific guidance from the legislature, what do the courts tend to regard as a 'fair' outcome or in the child's 'best interests' in this sort of case? Gaining a sense of the answers to these sorts of questions then gives us a basis on which to begin to evaluate the law.

However, not all decisions in family law involve a broad exercise of discretion. Some disputes will turn on the correct interpretation of the law; others will require what has been termed a 'value judgment' or 'evaluative' exercise. The appellate courts will approach these types of appeal differently. The correct approach to, and complexities of, exercising the appellate jurisdiction in family cases has been the subject of detailed consideration by the Supreme Court in *Re B (Care Proceedings: Appeal)*.[4] *Re B* involved the making of a care order with a view to placing the child for adoption in a case where the child had not yet suffered any harm at the hands of the parents. Moreover, the alleged risk of future harm was not of a physical nature but of an emotional/developmental nature being caused by the mother's complicated mental health problems and the inability of the parents to deal honestly and constructively with professionals. The specific point on the exercise of the appellate jurisdiction which the Supreme Court was called upon to answer was whether, when there is a challenge to the proportionality of making a care order, the appellate court is required, pursuant to section 6 of the Human Rights Act 1998, to undertake *de novo* its own analysis of proportionality or whether it is restricted to its normal role of secondary review. The Supreme Court held by a majority (Lord Wilson, Lord Neuberger and Lord Clarke in the majority; Lady Hale and Lord Kerr in the minority) that the obligations placed on public authorities, including courts, under section 6 did not require the appellate court to carry out its own fresh examination of the proportionality of making the care order, provided the question had been properly addressed during the proceedings. However, in determining by what criterion or standards the process of secondary review should be carried out, the judgments ranged

[3] *White v White* [2001] 1 AC 596, 600.
[4] [2013] UKSC 33. See also *Re B-S (Adoption: Application of s 47(5))* [2013] EWCA Civ 1146, [72]; *Re TC and JC (Children: Relocation)* [2013] EWHC 292, [15]-[18] and *Re S and V (Leave to Remove)* [2018] EWFC 26, [5] (both decisions of Mostyn J) are amongst a select few private law decisions to consider the judge's task to be one of evaluation rather than the exercise of discretion.

widely over the correct approach to the exercise of the appellate jurisdiction in different types of decisions in family cases. Although dissenting on the question of proportionality, Lade Hale gave perhaps the clearest account of how the appellate jurisdiction should be approached, on which the Supreme Court were generally in agreement:

Re B (Care Order: Proportionality: Criterion for Review) [2013] UKSC 33

LADY HALE:

199. The judgments involved in care proceedings are of (at least) three different types. First are the decisions on the facts: for example, who did what to whom and in what circumstances. Second is the decision as to whether the threshold is crossed.... In *In re MA (Care: Threshold)* [2010] 1 FLR 431, at para 56, Ward LJ was inclined to think that this was a value judgment rather than a finding of fact; and in the Court of Appeal in this case Black LJ was also inclined to categorise it "as a value judgment rather than as a finding of fact or an exercise of discretion" (para 9). I agree and so, I think, do we all. It is certainly not a discretion and it will entail prior findings of fact but in the end it is a judgment as to whether those facts meet the criteria laid down in the statute. Third is the decision what order, if any, should be made. That is, on the face of it, a discretion. But it is a discretion in which the requirements, not only of the Children Act 1989, but also of proportionality under the Human Rights Act 1998, must be observed. What is the role of the appellate court in relation to each of these three decisions?

200. As to the first, the position is clear. The Court of Appeal has jurisdiction to hear appeals on questions of fact as well as law. It can and sometimes does test the judge's factual findings against the contemporaneous documentation and inherent probabilities. But where findings depend upon the reliability and credibility of the witnesses it will generally defer to the trial judge who has had the great advantage of seeing and hearing the witnesses give their evidence. The question is whether the findings were made open to him on the evidence. In child cases, as Lord Wilson points out, there is the additional very important factor that the court's role is as much to make predictions about the future as it is to make findings about the past.

201. As to the second, in *Piglowska v Piglowski...* Lord Hoffmann cautioned the same appellate restraint in relation to the trial judge's *evaluation* of the facts as to his factual findings themselves....

202. In fact, the "generous ambit" or "plainly wrong" tests were developed, not in the context of value judgments such as this but in the context of a true discretion....

203. In relation to evaluating whether the threshold has been crossed, we are all agreed that the proper appellate test is whether the trial judge was "wrong" to reach the conclusion that he did. This is the test laid down in CPR 52.11(3) and there is no reason why it should not apply in this context. "Plainly" adds nothing helpful, unless it is simply to explain that the appellate court must be in one of the three states of mind described by Lord Neuberger at paragraph 93 considering the trial judge's decision (v) on balance wrong, (vi) wrong or (vii) insupportable [see below for relevant extract from Lord Neuberger's judgment].

On the question of the correct test to be applied to the third type of decision: what if any order should be made, the Supreme Court were again in agreement that the proportionality requirement rendered this different from a pure exercise of discretion (such as discussed in *Piglowska*).[5] However, it was here that the majority and minority differed in their approach. Whilst the minority argued that the human rights obligations

[5] See for example Lord Wilson's judgment at [45].

on the courts required the appellate court to consider the matter afresh, the majority held that the test was again simply whether the judge had been "wrong". The majority's approach is set down clearly by Lord Neuberger:

LORD NEUBERGER P:

85. ...[T]he fact that a Convention right is involved does not require an appellate domestic court to consider again the issue of proportionality for itself. What it requires is that a court considers the question of proportionality and that, if there is an appeal, any appeal process involves a proper consideration of the question of proportionality. In other words, the court system as a whole must fairly determine for itself whether the requirement of proportionality is met, but that does not mean that each court up the appeal chain does so...

91. That conclusion leaves open the standard by which an appellate court should apply when determining whether the trial judge was entitled to reach his conclusion on proportionality, once the appellate court is satisfied that the conclusion was based on justifiable primary facts and assessments. In my view, an appellate court should not interfere with the trial judge's conclusion on proportionality in such a case, unless it decides that that conclusion was wrong.

The difficulty is that whilst the majority of the Supreme Court is in agreement that the correct criterion to be applied to questions of proportionality is whether the decision is "wrong", we still need to know how the appellate court is to determine the "wrongness" or otherwise of the decision. In answering this question we can probably say with a degree of certainty what the test is not: it is not the test applied to primary findings of fact (was such a finding open to the judge on the evidence) or to the broad exercise of discretion (the generous ambit test). Nor would it seem correct that the decision is to be declared "wrong" if the appellate court would simply have come to a different conclusion from that reached by the first instance judge – that would be to undertake the *de novo* analysis rejected by the majority. Lord Neuberger attempts to provide some clarity holding that the appeal should only be allowed if the trial judge made a significant error of principle or reached a conclusion he should not have reached.[6] He went on to add:

LORD NEUBERGER P:

93. There is a danger in over-analysis, but I would add this. An appellate judge may conclude that the trial judge's conclusion on proportionality was (i) the only possible view, (ii) a view which she considers was right, (iii) a view on which she has doubts, but on balance considers was right, (iv) a view which she cannot say was right or wrong, (v) a view on which she has doubts, but on balance considers was wrong, (vi) a view which she considers was wrong; or (vii) a view which is unsupportable.

Thus, the difference between the majority and the minority is that whilst Lady Hale and Lord Kerr would allow the appeal in case (iv) where they have undertaken their own analysis of proportionality and reached a view different from that of the trial judge, the majority would not allow the appeal because whilst they may have reached a different conclusion from the trial judge they are not able to say in a 'grey area case' such as this that he/she was "wrong". The majority would thus dismiss the appeal unless the decision

[6] [88], per Lord Neuberger.

fell within categories (v) – (vii). In a case within (iv) the majority would defer to the judgment of the trial judge.

3. INTERNATIONAL AND EUROPEAN LAW

Both international and European law-makers have had strong influences on the shape of English family law in two areas: human rights and cross-border family disputes (private international law). Harmonization of substantive rules of domestic family law across the EU is also being mooted.

Although binding in international law, treaties signed and ratified by the UK government and other inter-governmental agreements are not directly enforceable in the domestic courts unless incorporated by legislation. One notable example where this has been done is the European Convention on Human Rights, given effect by the Human Rights Act 1998 (HRA 1998). Even if international law has not been incorporated, it is not irrelevant to our understanding of domestic family law and is certainly relevant to our evaluation of it. Ratified treaties not incorporated into domestic law can be relied on indirectly as an additional tool of statutory interpretation of domestic legislation: where the statutory wording is ambiguous or uncertain, the courts will assume that Parliament would not have intended to legislate contrary to the UK's international obligations.[7] The UK is also a signatory to a number of international Conventions aimed at ensuring co-operation between states, primarily within the ambit of the Hague Conference on Private International Law.

The European Union has also become increasingly active in the family area, principally in relation to the handling of cross-border family disputes. From limited provision in the form of international Conventions aimed at ensuring co-operation between states, the EU has now assumed limited competence in the family law field, introducing a range of binding measures.[8] The legal position in relation to these elements of EU law remains unchanged by the 2016 Referendum result at time of writing. How things will change when – or perhaps if – the United Kingdom leaves the EU will depend on the terms of any withdrawal agreement which is reached. It is consequently difficult to specify in advance the extent to which provisions of EU law will continue to have effect after Brexit.

International human rights conventions

The United Nations human rights treaties are an important source of international family law. The United Nations Convention on the Rights of the Child (1989) was the first multilateral treaty to establish binding international standards on children's rights: civil, political, social, economic, and cultural. The Convention contains normative standards on many issues addressed in the book: birth registration, parental responsibility, contact, the right to be heard in legal proceedings, economic support, protection from all forms of abuse, and adoption. We discuss it specifically at 8.5.5.

[7] *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696.
[8] McGlynn (2006), ch 6.

The Convention was ratified by the UK Government in 1991 but has not been incorporated into domestic law.[9] Nevertheless, as the most widely ratified human rights treaty establishing near-universal consensus on a broad range of children's rights,[10] it should constitute an important interpretative tool and source of guidance for domestic family courts. Indeed, it is increasingly referred to in domestic judgments.[11] The European Court of Human Rights has also drawn on the UNCRC when interpreting states' obligations under Article 8 of the ECHR which has again, in turn, impacted upon its use in the domestic courts.[12] In, *ZH (Tanzania) v Secretary of State for the Home Department*,[13] an important decision of the Supreme Court, Lady Hale noted these developments in Strasbourg and in particular the decision of the European Court of Human Rights in *Neulinger v Switzerland*.[14] In *Neulinger* the European Court held that, "the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law." Those principles include most importantly the rights of the child as enshrined within the UN Convention on the Rights of the Child. Lady Hale went on to explain the significance of this decision for the domestic courts:

***ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4**

LADY HALE:

23. For our purposes the most relevant national and international obligation of the United Kingdom is contained in Article 3 (1) of the UNCRC:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law...

25. Further, it is clear from the recent jurisprudence that the Strasbourg Court will expect national authorities to apply article 3 (1) of UNCRC and treat the best interests of a child as a "primary consideration." Of course, despite the looseness with which these terms are sometimes used, "a primary consideration" is not the same as "the primary consideration", still less as the "paramount consideration"

Lady Hale then goes on to explain the importance of these developments when the Convention rights of family members, particularly under Article 8, are engaged in a decision:

[9] In *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, Lord Kerr suggested that the UNCRC should be seen as being directly effective in UK law despite not having been incorporated by legislation, but the other Justices did not agree.
[10] Only the United States is yet to ratify.
[11] E.g. *Smith v Secretary of State for Work and Pensions* [2006] UKHL 35, [77]–[78]; *R (T) v Chief Constable of Manchester Police* [2014] UKSC 35; *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16.
[12] E.g. *Maire v Portugal* (App No 48206/99) (2003).
[13] [2011] UKSC 4.
[14] (App No 41615/07) (2010).

33. We now have a much greater understanding of the importance of these issues in assessing the overall well-being of the child. In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created.

As Lord Wilson succinctly put it in the subsequent case of *HH; PH v Deputy Prosecutor of the Italian Republic, Genoa*, the rights of children under Article 8 must thus now be examined through the prism of the UNCRC.[15] That approach was reinforced by the Supreme Court in *R (SG) v Secretary of State for Work and Pensions*, in which the court was concerned with the question of whether benefits cuts introduced by the government were unlawfully discriminatory or not.[16]

The Council of Europe has been a major source of international standards regarding the family. The Council is an intergovernmental organization (quite separate from the EU) consisting of 46 European countries, set up to 'defend human rights, parliamentary democracy, and the rule of law; develop continent-wide agreements to standardize member countries' social and legal practices; and promote awareness of a European identity based on shared values and cutting across different cultures'.[17] International treaties of the Council are based on a human rights mandate and so are intended to harmonize the substantive content of domestic family law by implementing core minimum standards. The most well-known and significant of these treaties is the European Convention on Human Rights (ECHR).

'Family rights' have also been included in the EU Charter of Fundamental Rights: the right to respect for private and family life; the right to marry and found a family; the rights of the child; and the right of the family to legal, economic, and social protection.[18] Following the Lisbon Treaty the EU Charter is now legally binding on EU institutions and member states implementing EU instruments.[19]

Private international law, cross-border disputes, and the family

Private international law is an extensive and highly complex area, forming the subject matter of textbooks and courses in its own right. For that reason we do not deal with this area of law in this book. However, it is important for the domestic family lawyer to have a basic awareness of the larger international context in which family law disputes now increasingly arise and how such disputes are resolved.

As a result of immigration and the ease with which individuals can travel, live, and work abroad, a growing number of family relationships are being formed across international borders. Members of one family can have connections with several countries. If such a relationship breaks down, cross-border disputes are common. For

[15] [2012] UKSC 25, [155]
[16] [2015] UKSC 15. We discuss *R (SG)* in more detail in the ORC supplementary material for chapter 8.
[17] See Council of Europe website.
[18] 2000/C 364/01, Articles 7, 9, 24, and 33.
[19] The EU was, at one time, proposing itself to accede to the ECHR, but CJEU *Opinion 2/13* held the accession agreement to be incompatible with EU law, making future accession difficult if not impossible.

example, one parent may have returned to his or her country of origin with the child without the other parent's agreement and be refusing to allow that parent any contact with the child. In disputes of this nature, there may be questions about which of those countries is the proper 'forum' for any resulting legal proceedings, and about which country's substantive law should be applied to resolve the conflict. There may be particular tactical advantages and disadvantages for each party depending on which forum the dispute is heard in and/or which substantive law is applied to the subject matter of the dispute. It is the role of private international law—the law relating to such 'conflicts of laws'—to provide answers to these sorts of questions.

Several international conventions drafted under the auspices of the Hague Conference on Private International Law have been incorporated into English law by legislation.[20] The various conventions are not intended to harmonize states parties' substantive family law, although they establish certain minimum standards for dealing with cases with an international element. Instead, the Hague Conventions seek to address the *procedural difficulties* arising from cross-border family disputes: producing a body of rules resolving conflicts of jurisdiction and applicable law, providing for the recognition and enforcement of court orders across borders, and promoting judicial and administrative cooperation in certain family law matters. The Hague Conference has also addressed the international dimensions of adoption and child abduction (where one parent removes the child from one jurisdiction without the other's consent).

The EU is responsible for a growing body of private international law, in furtherance of its common market objectives, insofar as they depend on the free movement of persons and sex equality.[21] Without clear rules to determine cross-border family disputes, individuals' ability to exercise their common market freedoms may be inhibited. An increasing number of EU measures now provide rules allocating jurisdiction amongst Member States and requiring States to recognize and enforce each others' judgments in a number of areas of inter-country family dispute, including parental responsibility, child abduction, maintenance, divorce, and (most recently) matrimonial property and succession. The more recent Regulations include 'applicable law' rules, with the result that all States apply the same law to a given dispute, wherever it is heard. The UK, along with Ireland and Denmark, has thus far not participated in the applicable law Regulations, so the courts of England and Wales generally apply English law to family disputes which come before them, however much the parties and their dispute might be connected to another jurisdiction. The longer-term may see the development of rules regarding paternity and the recognition of civil status (marriage and civil partnership).[22] Again, the position of these EU law provisions following Brexit remains unknown at time of writing, as it will depend on terms of any agreement reached between the UK and the EU.

[20] These include: the 1980 Convention on the Civil Aspects of International Child Abduction; the 1993 Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption; the 1996 Convention on Jurisdiction, etc; and the 2007 Convention on International Recovery of Child Support and Other Forms of Family Maintenance.
[21] Caracciolo di Torella and Masselot (2004), 36.
[22] Pintens (2003), 24; McGlynn (2006), ch 6.

4. NON-LEGAL RESOURCES FOR FAMILY LAWYERS AND POLICY-MAKERS

In order to acquire a rounded appreciation of the law's development and impact, it is useful to examine some non-legal resources. They can cast light on how and why the law came to be in its current form, how the law actually applies to families in practice, whether those outcomes correspond with the law-makers' intentions, and how the law might be reformed in order better to pursue the desired policy.

Governmental and parliamentary materials and the wider policy environment

Many laws and policies affecting the family originate in government consultation and other papers. Some outline general policy goals to be pursued without any need for a change in the law; others pave the way to new legislation. Bills reforming family law frequently attract considerable and often heated parliamentary debate. Examination of these debates, recorded in Hansard, can offer valuable insights not only into the intentions of the legislature—or of individual parliamentarians—but also about the range of opinions circulating in the public arena regarding the family.

Useful perspectives on family law and policy can also be obtained from examining the views of representative/professional organizations and interest groups, many of whom publish policy and research papers, professional codes of practice, and reform proposals. Some of these groups, such as Resolution, the Law Society, the Family Law Bar Association, and the various mediators' organizations represent professionals working in family law and their view of their clients' needs. Several groups represent the interests of individuals affected by family law, such as children, lone parents, fathers, the lesbian, gay, and bisexual communities, transgendered people, and victims of domestic abuse. Other groups seek to promote and support family life generally and (often) marriage specifically.

Marriage and family life are central to many religions, and many religious organizations are actively involved in the development of policy on family law issues. There is a considerable diversity of opinion between Christian groups, some theologically and socially conservative, others more liberal, even radical. Other major faith groups represented in British society also participate in debates on proposed changes to family law and policy. The presence of representatives of the Church of England—the 'Lords Spiritual': 26 senior bishops, including the Archbishop of Canterbury—in the House of Lords' legislative chamber gives the established Church direct influence over family law's development. We shall also see that the Church of England retains a privileged position in the creation of marriages recognized by English law, reflecting the fact that matters relating to marriage and family were once the exclusive preserve of the established Church, its ecclesiastical courts, and canon law.

The work of the Law Commission

Much current family law originates in the Law Commission, an independent statutory body created to review the law and recommend reform.[23] The Commission devoted

[23] Law Commissions Act 1965.

considerable attention to family law during the first three decades of its existence,[24] and it has been said that 'family law reform has historically been [its] most successful area'.[25] Not all of its recommendations in relation to family law been implemented: for reform of divorce law, to provide remedies for cohabitants suffering domestic abuse, and to create a statutory scheme for resolving property disputes between former cohabitants encountered particular difficulties, owing to the highly charged moral and social debates surrounding these reforms.[26] However, the Commission's recommendations for reform of family law have very often resulted in legislation. Its publications offer a good starting point for analysing much of the law discussed in this book, providing a wealth of useful material: an account of the then state of the law and its perceived defects; social surveys; and reform options, with their various merits and demerits.

Evidence-based family policy and law reform: official data and socio-legal research

In evaluating the operation of the current law and developing family policy and reform proposals, it is important to know as much as possible about the individuals and families subject to that law and how that law impacts on them. Government regularly publishes statistical data on issues such as household composition, marriage and divorce rates, and labour market participation rates of women and men. The outputs of social scientists conducting empirical or socio-legal research are also an illuminating resource for family lawyers and policy makers:

J. Baldwin and G. Davis, 'Empirical Research in Law', in P. Cane and M. Tushnet (eds), *Oxford Handbook of Legal Studies* (Oxford: OUP, 2003), 880–1

Empirical research may be defined by reference to what it is not, as well as to what it is. It is not purely theoretical or doctrinal; it does not rest on an analysis of statute and decided cases; and it does not rely on secondary sources. What empiricists do, in one way or another, is to study the operations and the effects of the law. . .The focus of attention may be upon professional actors or it may be upon consumers; it may be upon the practice of law or upon measures of outcome; it may be upon legal processes which are in any event highly visible, even iconic, or it may be upon aspects of the law which normally remain subterranean; and finally it may involve collecting data on large numbers of cases, each subject to a predetermined scheme of categorization and reporting, or it may involve the painstaking examination of a relatively few interactions. All we can say, therefore, is that empirical research in law involves the study, through direct methods rather than secondary sources, of the institutions, rules, procedures, and personnel of the law, with a view to understanding how they operate and what effects they have. . .

. . .[I]t is principally through empirical study of the *practice* of law. . .and in studying the way legal processes and decisions impact on the citizen, that the disciplines of sociology and, to a lesser degree, philosophy, psychology, and economics have entered into and enriched the study of law. This multidisciplinary research has, in turn, influenced many aspects of legal practice albeit the insights gained may be conveyed imperfectly and in such a manner as barely to do justice to the originating ideas. Even the rules and procedures of the law, which can seem arcane and specialist, reflect this influence.

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[24] Cretney (1998), ch 1.
[25] Hale (1995), 232.
[26] See the concerns of Cretney (1998), 26–32.

Whilst 'black letter' legal scholars engage in painstaking analysis of decisions taken in the courts especially at appellate level, other social science disciplines have contributed to a widespread recognition that the study of what the law *does* can be as stimulating and intellectually challenging as what the law *says*, and. . .that traditional legal scholarship should not be regarded as a separate world but is itself enriched through a fuller understanding of law in its social context.

G. Davis, 'A Research Perspective', in J. Westcott (ed), *Family Mediation: Past, Present and Future* (Bristol: Jordan, 2004), 59

. . .[R]esearch has a debunking tendency. If it is any good it will offer an alternative account to that advanced by practitioners and policy-makers.. . .[R]esearch of this type does not take place in a vacuum: there are always other stories, and nowhere is this more apparent than in the sphere of law. A dominant theme of socio-legal research is the gap between the story advanced by the law—'law on the books'—and the way law works in practice: it is the gap between what *is* and what *is meant* to be. Secondly, socio-legal research typically gives prominence to the voice of the consumer of legal services: of course, everyone claims to speak for consumers, but other than through research the consumer's voice seldom emerges directly. . .Thirdly, research will often focus upon the subterranean, that is to say, on low level and preliminary processes rather than on the major level set-pieces, such as trials. Studies of family mediation fit perfectly within this tradition. And, finally, research is often concerned (too often, in my opinion) with monitoring innovation.

This sort of work is often sponsored by government through pilot projects and follow-up surveys, seeking to predict the impact of proposed legal developments and to measure their success in meeting specified policy objectives. But as Davis' discomfort with monitoring innovation suggests, the relationship between empirical researchers and policy-makers is not always easy.[27]

Comparative sources

The experience of other jurisdictions is also instructive. The contrast with the laws of other countries, and the work of their own law reform commissions, can indirectly offer a critique of English law and inspiration for the law reformer. However, comparative sources must be handled carefully. Ruth Deech has remarked that 'the different measures adopted in each individual country [may reflect] its own national characteristics and attitudes and [have] developed in the context of its own social and economic history. In other words, it is interesting to look at what other countries do but useless to draw straight conclusions from their practices to be applied here'.[28] There is always a danger of falling into the trap of thinking that the 'grass is greener on the other side'. Nevertheless, subject to those caveats, comparative sources can greatly enrich our study of family law and policy.

[27] See also the debate between Deech (1990), Eekelaar and Maclean (1990), and Baldwin and Davis (2003), 888–9, 895–9.
[28] Deech (1990), 240.

THE HUMAN RIGHTS ACT 1998 AND FAMILY LAW: CORE PRINCIPLES

The discussion here supplements the material covered at section 1.2.1 of the book

The ECHR is an international treaty imposing human rights obligations on the state signatories, all members of the Council of Europe. As international law, signed and ratified by government without implementing legislation, it would not ordinarily be directly enforceable in the domestic courts. However, unusually in international law, the ECHR created an international court—the European Court of Human Rights, in Strasbourg—to which private individuals may apply to enforce their rights. Until the Human Rights Act 1998 (HRA 1998) came into force in England and Wales in October 2000, individuals who claimed that their Convention rights had been violated by the UK therefore had to apply to Strasbourg. Since they could do so only after exhausting all domestic remedies, rights-enforcement was a costly and time-consuming process. But there were notable successes which shaped several aspects of current English family law.

The HRA 1998 gave effect to the ECHR in domestic law. The most important practical effect of the HRA 1998 is that individuals are now able to assert their rights directly and immediately before domestic courts and tribunals, enabling the domestic courts to consider (and possibly develop[29]) ECHR jurisprudence. Its impact on different areas of family law has thus far varied considerably, but rights-based arguments are increasingly important and have diverse and potentially far-reaching implications for domestic family law. As we noted in chapter 1 of the book, despite continuing opposition and scepticism, adoption of a more rights-based approach to the family is unavoidable. It has implications for statutory interpretation, the development of case law, and the exercise of judicial discretion. Consequently, sound knowledge of the HRA, the ECHR, and the Strasbourg jurisprudence is now essential for any family lawyer in this jurisdiction. We examine those Articles of the ECHR which are most important for family law in chapter 1, and the application of the ECHR to specific issues is explored in detail in later chapters. Most readers should be familiar with the operation of the HRA 1998, but for those who are not, the following sections introduce the core concepts and principles underpinning the operation of that Act.

1. STATUTORY INTERPRETATION: SEEKING COMPATIBILITY WITH THE ECHR

Human Rights Act 1998, s 3

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights. . . .

This obligation applies to all statutory material in family law, whenever enacted. The interpretation of legislation pre-dating the HRA—such as the Children Act 1989—may be revised in light of the requirements of the ECHR.

[29] Cf *M v Secretary of State for Work and Pensions* [2006] UKHL 11, [24]–[30], and n 41 below.

Where it is impossible to read legislation compatibly with the Convention, the Supreme Court, Court of Appeal, and High Court may issue declarations of incompatibility under s 4. These declarations do not affect the validity, continuing operation, and enforcement of the legislation in question,[30] but draw Parliament's attention to the incompatibility and allow use of a fast-track parliamentary procedure to amend the offending provisions.[31]

2. THE DUTY OF PUBLIC AUTHORITIES TO ACT COMPATIBLY WITH THE ECHR

Human Rights Act 1998, s 6

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
(2) Subsection (1) does not apply if—
(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions. . . .

The interplay between this section and ss 3 and 4 means that wherever it is argued that a public authority has acted incompatibly with Convention rights (for example, in relation to a local authority taking a child into care), several questions must be examined. First, has the right been violated at all? If so, and if the public authority was purporting to act under the authority of legislation, can that legislation be read under s 3 in a way which is compatible with Convention rights? If the legislation, so read under s 3, does not authorize the public authority's action, then that authority will have acted unlawfully under s 6. If the legislation cannot be read compatibly, then the authority's action will have been lawful, and the applicant's only 'remedy' is a declaration of incompatibility.

3. 'HORIZONTAL EFFECT': THE APPLICATION OF THE ECHR IN PRIVATE LAW CASES

Because courts are included in s 6's definition of 'public authority', this creates what is often referred to as the Convention's 'horizontal effect'. This means that the Convention may be relied on not only in disputes between private individuals and organs of the state (for example, child protection cases), but also by parties to purely private disputes (for example, relating to children's residence or contact with non-resident parents). In such cases, in so far as it is possible to do so within the terms of any applicable primary legislation as interpreted under s 3, any decision of the court must be compatible with the parties' Convention rights; otherwise, it will fall foul of s 6(1). The Court of Appeal accepted the existence of this 'horizontal effect' of the Convention in private family law disputes soon after the HRA came into force.[32]

[30] HRA 1998, s 4(6).
[31] Ibid., s 10.
[32] *Payne v Payne* [2001] EWCA Civ 166, [34]; contrast problematic comments by Ryder LJ in *Re Y (Removal from Jurisdiction: Failure to Consider Family Segmentation)* [2014] EWCA Civ 1287.

However, although the implications of horizontal effect are clear where the dispute in question is governed by legislation, the position is less clear in relation to non-statute law. Although the courts are acting just as much as public authorities when they interpret and apply the common law or equity as they do when exercising a statutory jurisdiction, it is generally considered that the courts' obligation to develop the common law compatibly with Convention rights is limited. Whilst they might be expected to *develop existing* aspects of the common law compatibly with human rights principles, *creating* brand new causes of action to fill gaps in the current menu of remedies is probably beyond their competence. To give a straightforward example, imagine an acrimonious divorce, where one party complains that the other has been spying on him and his new partner in order to gain ammunition for the litigation. That complainant cannot frame his claim against the 'spying' party simply in terms of a violation of his right to respect for private life under Article 8. Instead, the claim must be framed within an existing cause of action recognized at common law or equity, or created by statute. The human rights argument must be confined to seeking the incremental development of that cause of action,[33] and the courts may conclude that the development sought goes beyond legitimate judicial activism and requires legislative change.

4. REMEDIES FOR VICTIMS

Individuals who claim that a public authority has breached their Convention rights may challenge that authority's act or decision by one of several routes: judicial review; free-standing proceedings under s 7 of the HRA; in the case of an offending judicial decision, by appeal; or, if all domestic remedies have been exhausted, by an action before the European Court. Where proceedings between the relevant public authority and the individual are ongoing, it is possible and preferable for human rights complaints to be raised in the course of those proceedings. This avoids a proliferation of costly and time-consuming 'satellite' litigation around the original case, and enables one court to take a holistic view of the issues and dispose of the case accordingly.[34] Section 8 provides the courts with a wide range of remedies for successful human rights challenges, including injunctive relief and, in certain courts, the award of damages.

5. STRASBOURG CASE LAW AND THE MARGIN OF APPRECIATION

In reviewing the decisions of national authorities, the European Court shows a degree of deference towards those authorities' conduct of the relevant balancing exercises, for example, under Article 8(2). This deference—the 'margin of appreciation'—means that the ECHR essentially provides only a *minimum* level of rights protection to be respected by the many socially and culturally diverse European states to which it applies. The width of that margin varies according to the nature of the issues and seriousness of the interests at stake. For example, considerable latitude is permitted in relation to controversial social issues where there is very little consensus amongst European states.[35] By contrast,

[33] *Campbell v MGN* [2004] UKHL 22.
[34] In the context of child protection: *Re L (Care Proceedings: Human Rights Claims)* [2003] EWHC 665.
[35] *Rees v UK* (App No 9532/81) (1986), [37].

decisions regarding the reunification of families from which children have been removed on child protection grounds are subjected to much closer scrutiny.[36]

When required to determine any question with respect to a Convention right, the domestic courts must, under s 2, take into account Strasbourg jurisprudence.[37] Section 2 does not purport to make Strasbourg case law directly binding on the domestic court and the UK Supreme Court has held that it is not bound to follow every Strasbourg decision: that would impair its ability to engage in 'constructive dialogue' with the Strasbourg Court and so to contribute to the development of Convention jurisprudence.[38] However, it held that where there is a 'clear and consistent line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspects of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line'.[39] Moreover, the House of Lords has (perhaps surprisingly) declined to interpret the scope of Convention rights more generously than the European Court requires, on the basis that, save where the issues falls within the margin of appreciation,[40] the meaning of the Convention should be uniform in all countries.[41] However, even if the domestic *courts* generally do not adopt a more generous interpretation of Convention rights than the Strasbourg court itself currently permits, there is nothing to stop individual *states* from taking a more 'generous' approach to protection of a right, by legislative or administrative action, provided that in doing so they do not interfere with some other right any further than is permitted by the Convention. Where domestic courts are faced with problems that have never been considered in Strasbourg, they inevitably have to find their own path through the human rights arguments. And in all cases, the task of evaluating the competing interests in cases involving qualified rights, such as Article 8, inevitably falls to the domestic courts.[42]

6. THE DISCRETIONARY AREA OF JUDGMENT

The margin of appreciation is a principle of international law and so does not apply to domestic courts performing their duty to apply the Convention and its case law under the HRA.[43] The domestic courts must identify the minimum standards declared and applied by the Strasbourg Court and enforce them. However, that is not to say that the domestic courts do not sometimes defer to the judgment of the public authority whose decision is being impugned, and/or to the judgment of the legislature that enacted the provisions whose compatibility with Convention rights is being questioned. When the courts are

[36] *Kutzner v Germany* (App No 46544/99) (2002), [66]–[67].
[37] Since the abolition of the Commission, initial decisions regarding cases' admissibility and merits are made by one of several chambers of the Court; appeal may be made from there to the Grand Chamber.
[38] *Manchester City Council v Pinnock* [2010] UKSC 45, [48], per Lord Neuberger.
[39] Ibid.
[40] *In re P* [2008] UKHL 38.
[41] E.g. *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [20]; *N v Secretary of State for the Home Department* [2005] UKHL 31, [25], applied in *Wilkinson v Kitzinger* [2006] EWHC 2022. Cf the view that the HRA 1998 created entirely new domestic human rights: *Re McKerr* [2004] UKHL 12, [66].
[42] *R (S) v Chief Constable of South Yorkshire Police* [2004] UKHL 39, [27].
[43] See, eg, *In the Matter of an Application by Siobhan McLaughlin for Judicial Review (Northern Ireland)* [2018] UKSC 48, [34].

required to decide whether a given right has been violated, the domestic concept known as the 'discretionary area of judgment' may sometimes restrain them from interfering too quickly with the view taken by the executive agency (for example, the local authority taking child protection decisions) or Parliament. The degree of room for manoeuvre that the courts give to the executive or legislature varies according to the nature of the issue and the perceived limits of judicial competence; for example, the discretionary area of judgment may be expected to be wider where national housing policy is at stake, and narrower (even in the field of housing policy) where claims of gender or sexual orientation discrimination are being made.[44]

[44] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [19]–[23]

THE FAMILY JUSTICE SYSTEM

The discussion here also links to the state intervention versus private ordering theme addressed at section 1.2.7 of the book and below

Study of family law used to focus exclusively on the family court system, but it is now preferable to talk more broadly about the 'family justice system', which has over time acquired a distinctive character within the wider legal system. Although the family courts remain a key part of that system, various forms of non-court dispute resolution (formerly known as alternative dispute resolution or 'ADR') operating outside the formal court structure play an increasingly important role – so much so that, adopting a recommendation of the recent Family Justice Review,[45] the government now talks in terms of 'dispute resolution services' ('DRS'), of which the courts and lawyers are just one part.[46] This 'rebranding' is intended to minimize any deterrent to the use of non-court based solutions. The move to non-court/non-lawyer based DRS has been prompted by concerns that adversarial litigation is often accompanied by hostility (and that the involvement of solicitors tends to encourage a resort to litigation), which is particularly damaging in the context of family relationships.

However, political debate of these issues has tended to be conducted on the basis of a caricature of family justice which many family lawyers would not recognize, and which does not fit with the research evidence available:[47] it is already the case that most people settle their disputes without going anywhere near the doors of a court, and family solicitors, operating under the Code of Practice and Protocols of professional organizations such as the Law Society and Resolution, have for some time approached their work on the basis that non-hostile, out of court settlement is to be preferred and actively encouraged. The family law solicitor is no longer expected to act solely as legal adviser and advocate, but also arbitrator, negotiator, mediator, and information-provider. Those cases that do reach court tend to be those that are most heavily conflicted, often involving domestic abuse, mental health or substance abuse issues, serious child welfare issues, or deeply entrenched conflict of a sort which is not likely to be susceptible to out of court resolution. While most families may be able to resolve their problems for themselves more or less amicably, often with the aid of a solicitor or (less commonly) a mediator, sometimes, a judge's decision is the only real option.

The family justice system is currently in a state of flux. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO', which is discussed below) came into force in April 2013, largely removing legal aid – means-tested public funding for legal advice and legal representation in court – from all private family law cases, save where there is evidence of domestic abuse or risk to a child. Funding for mediation remains available to those who pass the means-test, but early anecdotal evidence suggests that the number of mediation cases has dramatically fallen since April 2013, and it was widely anticipated that the removal of legal aid would result in a large increase in the numbers of self-represented parties (or 'litigants in person') trying to navigate the system

[45] Norgrove (2011b).
[46] MOJ and DfE (2012).
[47] Eekelaar, Maclean, and Beinart (2000); Maclean and Eekelaar (2009).

without a lawyer (of which there were already substantial numbers pre-LASPO).[48] While it remains too early to draw final conclusions about the effects of the LASPO changes on the number of litigants in person, it may be noted that the number of family court cases in which neither party had a lawyer nearly tripled, from 13 per cent in 2012 to 35 per cent in 2017.[49] As we discuss from page 23 of the main text, LASPO is part of the background leading to a family justice system under enormous strain.

1. THE FAMILY COURT

The courts with jurisdiction to hear family matters, and a new Family Court

As we discuss in the main text, it can be difficult to pin down a set of legal rules that can be labeled 'family law'. Similarly, until recently it was difficult to identify a 'family court'. However, while there was previously a patchwork system with many types of court hearing family cases, the Crime and Courts Act 2013 brought together the judicial and other personnel who operate family justice under the umbrella of 'the Family Court'.[50] The principal reason for having a single Family Court is administrative streamlining. Whereas applicants previously had to work out where to file an application depending on the type of case they were bringing, all matters now go to the same place, and it is easier to allocate cases to a judge with suitable expertise and seniority for the issues raised.

The previous distribution of jurisdiction across different courts was the product of a gradual evolution from the three quite distinct jurisdictions that historically existed in relation to family matters.[51] Each jurisdiction operated under its own rules and applied separate branches of substantive law, so that people would have to apply to different forums for different types of relief.[52] The ecclesiastical courts had jurisdiction over a relatively narrow range of issues relating specifically to marriage law. When the law of judicial divorce was introduced in the mid-nineteenth century, their jurisdiction over these matters was abolished and transferred to a new secular court, which eventually became today's Family Division of the High Court. The magistrates' court exercised a family jurisdiction originating in the power to make separation orders in favour of wives on conviction of their husbands in criminal proceedings for aggravated assault.[53] This jurisdiction in practice operated as the 'poor man's' divorce court, though the magistrates had no power to grant decrees of divorce. The Poor Law system, administered by local government and in the magistrates' court, provided state support for the poor and vulnerable, and enforced family members' obligations to support each other. It was

[48] For an important study on litigants in person in the family court, see Trinder et al (2014).
[49] MOJ (2018a).
tudy on litigants in person in the family court, see Trinder et al (2014).
[51] Judges sit as part of the Family Court, the High Court itself retains jurisdiction in a small number of complex matters, principally involving international issues and the invocation of the High Court's inherent jurisdiction, which we discuss in the main text at 8.7 and in the supplementary material to chapter 8.
[51] See Cretney (2003*a*), ch 21; DHSS (1974), ch 4.
[52] DHSS (1974), para 4.9; see also the proliferation of different jurisdictions operating in relation to domestic violence in the 1970s, discussed in chapter 4 of the main text.
[53] Matrimonial Causes Act 1878.

replaced in 1948 on the introduction of the modern welfare state. The magistrates' court still has jurisdiction over 'liable relative' proceedings.[54]

These original jurisdictions morphed during the latter half of the twentieth century, and the Family Division of the High Court, served by a specialist cadre of family judges, was created in 1970.[55] The Family Division had jurisdiction over a wide range of family matters,[56] but in practice that jurisdiction became shared with the county courts, except for proceedings under the inherent jurisdiction for the protection of minors and some international matters, which remained the preserve of the High Court.[57] In practice, the bulk of family work was done in the county courts, the High Court being reserved for particularly important and complex disputes. The jurisdictions of the High Court, county courts and magistrates' courts (which became known as the 'family proceedings courts') were streamlined in the late 1980s and 1990s. The Children Act 1989 (CA 1989) created a unified code of public and private law relating to children, and all three levels of court therefore share jurisdiction over these and most other matters relating to children.[58] The Family Law Act 1996, Part IV (FLA 1996) created a single set of remedies for domestic abuse, again available from all three levels of court. In most areas of family law, an applicant could therefore seek the same remedies, under the same substantive law, from the Family Division of the High Court, the county court, or the family proceedings court. The CA 1989 also introduced the concept of 'family proceedings', an umbrella term covering a wide range of family matters.[59] A court exercising jurisdiction in relation to one type of 'family proceeding' gained the power to make *any* type of 'family proceedings' order falling within its jurisdiction. This gave the courts the flexibility to deal with the full range of issues affecting the family before them in the most appropriate manner, though with more administrative difficulty than should occur with the single Family Court. Fortunately, these complications have been swept away by the 2013 Act, but it is helpful to understand the history in order to see the context of the pre-2013 cases.

Officers of the family courts – Cafcass

Many of the people working within the family court system are the same as in any other domestic court: solicitors, barristers, judges, clerks. However, one other organization works almost exclusively within the family courts: the Children and Family Court Advisory and Support Service (Cafcass). Cafcass is the main body responsible for representing the rights and interests of children in family proceedings. It was established in 2001 with the aim of consolidating the services previously provided by the Family Court Welfare Service, the Guardian ad Litem Services, and the Children's Division of the Official Solicitor.[60] Cafcass's duties and responsibilities are set out in legislation. Its principal functions are as follows:

Criminal Justice and Court Services Act 2000, s 12

[54] See section 3.8.2 of the main text.
[55] Administration of Justice Act 1970.
[56] Supreme Court Act 1981, Sch 1.
[57] Matrimonial and Family Proceedings Act 1984, ss 33-4, 38.
[58] Including declarations of parentage under the FLA 1986 and parental orders under the HFEA 2008.
[59] CA 1989, s 8(3)-(4).
[60] Information taken from CAFCASS website: *www.cafcass.gov.uk/about_cafcass.aspx*

(1) In respect of family proceedings in which the welfare of children is or may be in question, it is a function of the service to –
(a) safeguard and promote the welfare of the children,
(b) give advice to any court about any application made to it in such proceedings,
(c) make provision for the children to be represented in such proceedings,
(d) provide information, advice and other support for the children and their families.

However, despite Cafcass's work in representing children in family proceedings, there are concerns that more needs to be done to listen to children embroiled in family disputes. This issue is discussed in more detail at 11.3.3 of the main text.

Transparency, privacy, and the family courts

Overview

It is a fundamental principle of the English legal system that justice must not only be done but be seen to be done. To guard against potential abuse of judicial powers, legal proceedings in England and Wales are conducted in public and, subject to the laws of contempt, in the full glare of the media. Family proceedings constitute a significant exception to this principle of open justice. Most family proceedings are heard in private, for good reason:

DCA (2006*a*). ***Confidence and confidentiality. Improving Transparency and Privacy in Family Courts.*** CP 11/06. Cm 6886, 9-10

[T]he family courts often deal with cases in which the evidence and the vulnerability of those involved, particularly children, make this appropriate... Without proper protection for those involved in cases which go to family courts, parties to proceedings and all those involved would not have the benefit of privacy over sensitive issues, at times when they are often highly vulnerable. Privacy is vital, not only for the proper resolution of cases but is a protection for those involved in them rightly feel they deserve.

However, the closed nature of family proceedings and the associated reporting restrictions have been subjected to increasingly strong criticism.[61] The 1997-2010 Labour Government was clearly concerned about the issue:

DCA (2006*a*). ***Confidence and confidentiality. Improving Transparency and Privacy in Family Courts.*** CP 11/06. Cm 6886, 62-3

4. We want to ensure public confidence in the family courts. Important court decisions are made every day directly affecting the lives of children and families. For children particularly, decisions to remove them from their families impact not only on their childhood, but can continue to have repercussions into adulthood. People are concerned that those decisions are made on a sound basis.

5. Recent high profile cases have given rise to concerns about the possibility of miscarriages of justice in the family justice system, particularly in relation to care cases. There are also concerns

Comment [A1]: Should be "impact"??

[61] See, for example, *Re B (A child disclosure)* [2004] EWHC 411; DCA (2006*a*), 21-5.

about private law children cases, and allegations on the one hand of bias in the system against non-resident parents and, on the other, that contact may be taking place when it is not safe. The current access and reporting restrictions makes it difficult to see what is really happening and this is contributing to a lack of confidence in the family justice system…

7. To improve public awareness and ensure confidence in the family justice system, the family courts need to operate more openly. Public scrutiny is an important part of this and will contribute to an increased public awareness of how the family courts operate. Recent high profile cases… have added to concern about the way family courts work and how decisions are reached, particularly when those decisions have such a profound impact on people's lives.

To strike a better balance between the need for confidentiality on the one hand and improving public confidence in the family justice system on the other, the Labour Government began a process of reform in 2006. Due to strong opposition from children and family welfare groups to the proposals contained within the government's first consultation paper,[62] the final changes were not as extensive as originally intended.[63] The Family Procedure Rules were amended to permit media representatives to attend family proceedings as the 'eyes and ears' of the public.[64] Further changes dealing with the lifting of reporting restrictions contained within Part 2 of the Children, Schools and Families Act 2010 were not, however, implemented and, much to the apparent dissatisfaction of some senior members of the family judiciary, were repealed by the Crime and Courts Act 2013.[65] This has left the judiciary to take matters forward which the previous President of the Family Division (2013-2018), Sir Justice Munby P, has done.[66]

In April 2013, Munby P issued a statement in which he identified transparency as one of the three strands in the reforms of the family justice system and made a commitment to improving access to and reporting of family proceedings.[67] In January 2014, he issued Practice Guidance intended to increase the number of family judgments available for publication. The Guidance provides for two categories of judgments: (i) those that the court *must* ordinarily allow to be published unless there are compelling reasons why it should not; and (ii) those that *may* be published.[68] Cases falling within the first category include judgments relating to:

- cases where serious allegations (e.g. in relation to significant physical, emotional or sexual harm) have been determined;
- cases where the court made or refused a final care order;
- cases where the court made or refused an order placing a child for adoption;

[62] DCA (2006a), 9-10.
[63] A second consultation paper was published in June 2007 in which the Labour Government took a very different approach: MOJ (2007).
[64] FPR (2010), r 27.11
[65] S 17. See comments of Mostyn J in *W v M (TOLATA Proceedings: Anonymity)* (FD) [2012] EWHC 1679, [46]-[47].
[66] See, for example, D. Barrett (2013). *Judge calls for more transparency in family courts*, Telegraph, 5th September 2013, available at: http://www.telegraph.co.uk/news/uknews/law-and-order/10289280/Judge-calls-for-more-transparency-in-family-courts.html
[67] The Rt Hon Sir James Munby, President of the Family Division, *View from the President's Chambers: The Process of Reform* [2013] Fam Law 548.
[68] *Transparency in the Family Courts: Publication of Judgments*, Practice Guidance issued on 16 January 2014, [15]. Available at: http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/transparency-in-the-family-courts-jan2014.pdf

- cases involving the deprivation of liberty;
- cases involving ordering or withholding serious medical treatment; and
- applications relating to restraints on the publication of information relating to family proceedings.[69]

All other cases heard in the family courts will fall within category 2 and the judgment may be published whenever a party or accredited member of the media applies for an order permitting publication.[70] In determining whether to grant the application the judge must consider the competing rights under the European Convention (Articles 6, 8 and 10).[71] A judgment should also be published (regardless of whether an application has been made) in any case where the court considers publication to be in the public interest.[72] The Guidance further provides that anonymity should not be extended beyond protecting the privacy of the families unless there is good reason and that public authorities and expert witnesses, in particular, should be named unless there are compelling reasons to confer anonymity.[73] The 'success' of this policy – both in terms of its effective implementation, and in terms of the desirability of the outcomes that it set out – is open to debate. It is certainly true that far more judgments are now made available online than was previously the case, but the number of judgments made public in this way seems unlikely to be as wide-ranging as Munby P intended. Campaigns continue to increase transparency and open up 'the secret family courts', as campaigners generally term them.[74]

2. THE DEMISE OF LEGAL AID IN FAMILY LAW

The provision of public funding to those who are unable to afford the costs of private legal advice and representation is essential to secure access to justice, whether obtained via lawyer-led negotiation and settlement of a dispute or, far less commonly, by resort to contested litigation and adjudication of the issues. Matrimonial matters have fallen within the scope of the legal aid scheme since its inception as part of the post-war welfare state. However, in the era of cuts following the global recession, the Coalition Government made radical proposals for the 'reform' of legal aid, the most important aspect of which for our purposes is the removal of entire areas of private law family disputes from the scope of public funding for legal advice and legal representation, in particular, those concerning contact and residence of children, financial relief following relationship breakdown or death, and financial provision for children. Despite opposition from the vast majority of the 5000 respondents to the Government's consultation paper on legal aid reform, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (known as

[69] Ibid, Schedule 1.
[70] Ibid, [18].
[71] Ibid, [18].
[72] Ibid, [16].
[73] Ibid, [20].
[74] See, eg, <www.transparencyproject.org>.

'LASPO') implemented those proposals largely unchanged.[75] The Act came into force in April 2013.

Instead of providing legal aid for legal advice and lawyer-led negotiation, there is significant pressure for private family disputes to be resolved with the assistance of publicly-funded mediation (discussed below), with only minimal legal advice to prepare individuals for those sessions and to draft a consent order to implement any agreement reached.[76] Strangely, lawyers are now paid where they help settle a case through mediation, but not where they settle it themselves. One key exception to the removal of legal aid for legal advice and representation is that funding for all types of dispute is still provided in cases involving 'domestic abuse', evidenced by a specific set of 'gateway' criteria set out in secondary legislation.[77] Funding for legal advice and representation are also available where a child who is the subject of the proceedings is at risk of 'harm'.[78] More generally, funding is (in theory) available on an 'exceptional case funding' (ECF) basis where necessary to protect the applicant's rights under Article 6 of the ECHR, into which the European Court of Human Rights has implied a right to legal aid in certain circumstances where the applicant cannot 'properly and satisfactorily' represent herself.[79] Very few cases were initially granted ECF;[80] however, following successful judicial review of the government's previous guidance,[81] numbers have increased (though the total is still a tiny drop in the ocean of family litigation).[82]

LASPO has been widely condemned by the family law practitioner and academic community, the advice sector, domestic abuse groups and others, who are seriously concerned that very many family members, in particular the children commonly the subject of these disputes, will now be denied access to justice.[83] The proposals underpinning LASPO were based on the false premise that resort to lawyers inevitably means resort to court, overlooking both the substantial body of evidence (some of which we discuss below) that family law practitioners are very largely committed to resolving their clients' disputes out of court, and the important work done by solicitors to manage their clients' expectations in order to avoid pointless litigation and to reach a sensible private settlement.[84] Moreover, mediation only works effectively where both parties cooperate in the process. Where mediation fails, the only option for many individuals who cannot afford a lawyer to assert their (or their children's) legal rights will be to act as a self-represented party or litigant in person, i.e. to represent themselves before the court without the help of a lawyer. Research shows that litigants in person in the family courts,

[75] MOJ (2011).
[76] LASPO, Sch 1, para 14.
[77] Ibid, para 11-12; SI 2012/3098, r. 33.
[78] Ibid, para 13; SI 2012/3098, r. 34.
[79] Ibid, s 10; *Airey v Ireland* (App No 6289/73) (1979–80) 2 EHRR 305; see generally Miles (2011a, 2011b).
[80] In 2013-14, only nine family cases were given ECF: MOJ (2017a), 1.
[81] *R (Gudanaviciene) v Director of Legal Aid Casework* [2014] EWCA Civ 1622.
[82] In 2015-16, 156 family cases were granted ECF; in the first half of the 2016-17 year (when the latest data finish), 56 cases had been granted funding: MOJ (2017a), 1.
[83] See for example the responses of the Association of Lawyers for Children (2011), the Family Law Bar Association (2011), Resolution (2011), and the Law Society (2011).
[84] E.g. Eekelaar, Maclean, and Beinart (2000). For critique of the Government's policy, see Eekelaar (2011).

unfamiliar with court processes and the law, cause delays;[85] litigants in person tend to be poorly prepared, and extra care has to be taken by the judge and any lawyer involved in the case to ensure that his or her interests are as well protected in the proceedings as possible, which inevitably slows things down. However, it is likely that many will *not* feel able to represent themselves, so that – unless 'exceptional funding' is granted on the basis of Article 6 ECHR – mediation in such cases will take place without the 'threat' of court proceedings hanging in the background. This will in turn mean that the party on the wrong side of the dispute (i.e. the one who, were the matter litigated, would 'lose') may have little incentive to acknowledge his or her legal responsibilities by reaching an appropriate settlement. Should mediation fail to reach a satisfactory settlement in such cases, justice will simply be denied with no realistic prospect of resort to court. Although the Government has widened the criteria for evidencing 'domestic abuse' from those originally proposed as the passport necessary to secure public funding in family cases,[86] there remain concerns that some victims (and their children) most in need of legal protection may be left in very dangerous situations. And even if the victim obtains legal aid, the (alleged) perpetrator will not – so unless the latter can afford to pay for legal representation, we face the deeply unpleasant prospect of some victims being cross-examined by their perpetrators in court, or vice versa. This is not something that would be possible in the criminal courts, but judicial efforts – led by Sir James Munby P – to secure public funding for lawyers from other sources where there is a risk of Convention rights being breached have been overturned by the Court of Appeal as beyond judicial competence.[87] As we note in the main text, judges have expressed strong criticisms of the current position,[88]

The Ministry of Justice conducted a post-implementation review of LASPO in 2019.[89] While the review highlighted some issues which had concerned professionals, the proposed changes were modest (for example, reviewing the threshold for means testing, and expanding non-means tested availability to proceedings where a parent seeks to oppose an adoption order being made). It remains to be seen what, if any, substantive changes are brought about, either as a result of the review or otherwise.

3. FAMILY JUSTICE OUTSIDE THE COURTS

In chapter 1 of the main text, section 1.2.7, we discussed the use of mediation. Later in these pages, you will find extracts from academic commentators on the general issue of the role of law and lawyers in dealing with family disputes to supplement the discussion at 1.2.7. Here we pick up on key research findings relevant to that discussion, and report on the latest policy developments relating to family justice as it operates outside the courts, particularly in light of the legal aid reforms in LASPO.

[85] Trinder et al (2014); see also Moorhead (2005), and the literature review by Williams (2011).
[86] For criticism of the original proposals, see Hunter (2011), and see now SI 2012/3098, rr. 33-34.
[87] E.g. *Q v Q et al (Private law: public funding)* [2014] EWFC 31, disapproved by the CA in *Re K and H (Children)* [2015] EWCA Civ 543.
[88] See, eg, Hayden J in *PS v BP* [2018] EWHC 1987.
[89] MOJ (2019).

As we noted in the main text, interest in mediation further peaked in the 1990s during the debates on the reform of divorce law. The following extract records the benefits which government thought would accrue from mediation in those cases:

Lord Chancellor's Department, *Looking to the Future—Mediation and the Ground for Divorce*, Cm 2424 (London: HMSO, 1993)

7.4 The mediation process is much better adapted to identifying those marriages which are capable of being saved than is the adversarial legal process. . .
7.5 Mediation also enables spouses to accept responsibility for the breakdown, to acknowledge responsibility for the ending of the marriage, to address face to face the questions of fault and blame and to deal with feelings of hurt and anger. Where the conduct of one spouse or another is in issue and is providing an impediment to an amicable settlement of the arrangements, mediation offers an opportunity to address what went wrong with the marriage.. . .
7.7 The overall objectives are to help separating couples reach their own agreements about the future, to improve communications between them, and to help them co-operate in bringing up their children. The couple are specifically encouraged to focus upon their children's needs rather than their own. Unlike current legal processes, mediation is capable of taking the different attitudes and different timescales of the spouses into account. It empowers them to plan the future for themselves at a pace which suits both of them, and as part of that exercise to examine the past.. . .
7.20 The advantages of mediation claimed by its proponents and identified in research studies here and abroad are that:

- it encourages couples themselves to resolve disputed issues and helps them develop their skills in negotiating their conflicts;
- it can involve other interested parties (children, parents, etc);
- it focuses on the future not the past;
- it avoids the polarisation of the adversarial process, which can freeze parties into opposing solutions to problems;
- it tends to reduce . . . emotional suffering for the parties and their families;
- it tends to result in longer-lasting arrangements for the parties and their children, with better prospects of renegotiating such arrangements when circumstances change;
- it tends to reduce the costs to the parties (and, where they are legally aided, to the Legal Aid Fund) because of reduced involvement of lawyers and the courts; and
- it is often more cost-effective as a result of enabling the parties to reach their own agreement rather than negotiating at arm's length through lawyers. It is cheaper than litigating.

In contrast to mediation, litigation and lawyers were presented in a negative light:

7.3 The present system of divorce law is based on the adversarial model for litigating disputes through the civil courts. All too often it encourages divorcing spouses to take up opposing stances in relation to some or all of the issues that have to be resolved—even though it does not require them to appear in court. Only a very small proportion of divorce petitions are actually defended. Nevertheless, in a large number of cases the separating couple and their lawyers act, at least initially, as if the divorce petition will be defended. This can undoubtedly add to the stress and pain of the divorce for all those involved. It can also affect the cost of the divorce to the couple concerned, and, where one or both are legally aided, to the State.

As the recent debates around LASPO attest, government still adheres to this stereotypical view of both mediation and legal practice, despite the absence of research to support its view and despite the substantial body of research that shows its view of legal practice to

be false.[90] Eekelaar, Maclean and Beinart describe various government assumptions about family lawyering: that the arms' length style of lawyer-led negotiation increases rather than reduces bitterness and hostility, makes communication harder, and causes misunderstanding; that lawyers drive in partisan, point-scoring fashion for the 'best deal' possible for the client, whatever the impact on the other side; that they upset agreements that parties have already reached for themselves.[91] Although their work went unmentioned in the Government's legal aid consultation paper, these leading researchers long ago debunked the negative myths about lawyers' practice, based on their observation of solicitors' work:

J. Eekelaar, M. Maclean, and S. Beinart*, Family Lawyers: The Divorce Work of Solicitors* (Oxford: Hart, 2000), 183–7

We found only two cases where some element of "scoring points" may have been present.. . .[In one case, the tit-for-tat was client driven and the lawyers sought to discourage it; in the other, one solicitor seemed not to be complying with the code of practice of Resolution, the specialist family law solicitors' association.]

We did not find an example of misunderstanding resulting from a "translation" problem, though we did note the extent to which lawyers repeat explanations and advice to clients in an effort to avoid misunderstanding.. . .[T]he lawyer's role is not confined to merely giving legal advice. It extends to providing reassurance and practical support for many clients during a particularly stressful period. It often extends to dealing with third parties. With respect to communication and increasing tension, we had no evidence about how far the experience of using lawyers aided or hindered clients from communicating with one another. But lawyers standardly encouraged clients to discuss matters between themselves, especially those concerning children and household contents, although they did tend to warn some clients against entering into agreements with the other party over finances unless they checked with the solicitor. There were moreover a number of cases where the parties were only able to communicate *through* the solicitor, so in those circumstances the lawyer was the only channel of communication which worked. It is also impossible to measure the tension which may or may not have been generated by the use of lawyers. Our evidence does, however, show the lawyers consciously taking many measures to try to *reduce* tension. The most notable was the reluctance to mix disputes about children with financial matters, or to take formal steps which would raise the temperature. . .In view of the often highly emotional state which many of the clients were experiencing when they came to see the lawyer, it is difficult to see how the lawyers could have worked with the client at all unless they succeeded in reducing the level of distress. The extent to which negotiation through lawyers results in settlement … is perhaps a testament to their success.

The government's complaint about lawyers working to achieve the best deal possible for their client needs careful unpacking and examination. As the researchers observe, clearly any form of dispute resolution, whether achieved by adjudication, lawyer-led negotiation or mediation, is bound to result in better outcomes for one party or the other on one issue or another, or indeed for another family member whose interests are involved, not least the child.[92] So that cannot be the concern.

[90] In its 2019 review of LASPO, the government went only so far as to say that 'we have heard strong arguments that early intervention through legal support can help people resolve their problems without having to resort to legal advice and court': MOJ (2019), [26].
[91] Eekelaar et al (2000), 183.
[92] Ibid, 184.

The question is rather whether lawyers push for the maximally optimal outcome for their client, regardless of any other matter. This is clearly not the case, on our evidence. The lawyers sought to achieve the best deal for their clients *within the normative standards of the law*. Hence lawyers discouraged clients from pursuing unreasonable claims, either because they would risk running excessive costs, or were beyond what they were entitled to, and were therefore unlikely to be acceptable to the other side or to succeed in litigation

What, then, about concerns that lawyers interfere by seeking to unravel agreements that parties had reached for themselves? Is this an unjustifiable interference with party autonomy that unnecessarily creates conflict where none existed? Or necessary to ensure that justice is done in accordance with parties' legal entitlements?

We have seen that our lawyers have advised clients not to proceed with *informal* arrangements made without advice … But it depended on how reasonable the lawyer believed the agreement to be …, and in any case, the lawyers were careful to make it clear that the ultimate decision was that of the client.

Yet cases where decisions which one party had thought had resolved the matter were abandoned as a result of legal advice, did appear to leave the other party with a deep grievance, sometimes making subsequent settlement more difficult. The lesson we draw from this is that informal agreements made without legal advice can be dangerous, for they might promise what they cannot deliver. But the matter raises a wider question altogether. How far are parties entitled to pursue their legal rights, even at the risk of appearing disruptive? The pejorative connotation which the expression *adversarial* has attracted conjures the image of the troublesome, selfish, individual, unwilling to settle for what the existing dispensation delivers. Yet it can sometimes be only by challenging that dispensation that justice is promoted. ….We … feel it is important to reaffirm the importance of the principle that proper respect for individual rights requires recognising that people should have the opportunity to pursue them.

However, we also recognise that no rights are unrestricted, and even that not every claim to a right can, or should be pursued *in all circumstances and at all costs.* But this is to say little more than that other people's rights must be respected, too. The tensions between these rights lies deep within family law itself …

Since these tensions exist within the law, it is not surprising that they are reflected in legal practice. Lawyers can both pursue the interests of their clients *and* observe the wider interests at stake. The picture of family lawyers' work … which emerges from our observational data is one of informed guidance, support, and expert facilitation through the divorce transition process within the legal frame.

It has also been argued that legal practice in fact shares many of the virtues claimed for mediation:

J. Eekelaar, 'Family Justice: Ideal or Illusion? Family Law and Communitarian Values', (1995) 48 *Current Legal Problems Part II*, 191, 206–9

It is very difficult to substantiate many of the instrumental claims made for mediation, partly because of the variety of forms it takes and the almost inevitable self-selectivity of the samples. But another reason is that most of the characteristics claimed for mediation *may also* be claimed for the legal process. For example, the point that mediation focuses on the future, not the past, can be matched by the legal process, which, when dealing with the consequences of divorce,

rarely engages in examination of past conduct and looks almost entirely to future needs. The idea that mediation enhances negotiation skills can be matched by Ingleby's observation that a person's capacity as a negotiator is related to knowledge of legal entitlement and access to power structures (for example, to obtain information: mediation relies on voluntary disclosure). . .[T]here seems little merit in the added claim for mediation that it 'encourages' the parties to develop their negotiating skills. Apart from conflicting somewhat with the 'communal' ethic, why should it be thought beneficial to see these events as a learning opportunity for those too distressed or distracted to wish to use it as such?

The major claim that mediation avoids litigation can be matched by the evidence. . .that the legal process is overwhelmingly also geared towards the same objective, and successfully achieves it. . .[93]

The claim that mediation 'reduces emotional suffering for the parties and their families' seems to be supported by many studies which show high consumer satisfaction by parties using mediation. However, this is usually in contexts where mediation *supplements* legal services, so it is impossible to know whether the same satisfaction would be felt if mediation stood alone. Furthermore, the studies seldom compare mediation clients with those who reached a resolution using only lawyers. …

As for the claim that mediated settlements last longer than those reached without mediation, there is American evidence suggesting that, while mediated agreements hold better than litigated outcomes in the short-term, the non-compliance rates equalize after a period of 4–5 years or even earlier. That evidence also only compares mediated outcomes with cases with court-imposed outcomes, which ignores all the cases settled within the legal context without litigation or mediation.

The evidence about costs is equally uncertain. . . .

Nor is mediation necessarily the panacea that some consider it to be:[94]

Lord Chancellor's Department, *Looking to the Future—Mediation and the Ground for Divorce,* Cm 2424 (London: HMSO, 1993)

7.21 The disadvantages identified by those who are more sceptical about mediation appear to be that:

- if done badly, mediation can become a coercive process with both parties feeling obliged to reach agreement to please the mediator rather than genuinely agree on solutions;
- it can disadvantage a weak or inarticulate party, who may be relatively easily led to settlement because of fear of the other party;
- it cannot prevent parties approaching lawyers subsequently although not necessarily at the State's expense—which may increase the total costs of the separation and divorce to the parties; and
- there is a lack of empirical evidence in England and Wales about mediation's effectiveness and long-term outcomes.

Nearly twenty years after the 1993 paper extracted above, respected socio-legal researcher Dame Hazel Genn described the claims made for the mediation movement as still being 'empirically unverified'.[95]

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[93] Though avoiding litigation for the sake of it through 'horse-trading' between the lawyers may not always be the best outcome for the parties: Davis (1988), ch 14.
[94] Genn (2010).

Notwithstanding all this, Government's enthusiasm for mediation and what it calls 'family-based arrangements'[96] seems unabated. Notably, from April 2011, all applicants for private law orders in the family courts, whether they are legally aided or privately funded, were (subject to specified exceptions) expected to attend a Mediation Information and Assessment Meeting ('MIAM') before issuing proceedings in order to consider with a mediator whether the dispute can be resolved through mediation.[97] These requirements were extended in 2014, such that it became a *requirement* to attend a MIAM before filing an application, with the court gaining power to adjourn proceedings indefinitely if the parties have not complied without good reason.[98] Exceptions apply where, for example, the mediator is satisfied that the case is not suitable for mediation, whether because the other party to the dispute is not willing to mediate, or for some other reason; and in cases where domestic abuse has resulted in police investigation or an application for protective civil orders (eg under the FLA 1996) in the last year.[99] Even once proceedings are started, the court is required to consider 'at every stage in proceedings' whether alternative dispute resolution is appropriate, and has the power to adjourn proceedings for mediation to be attempted.[100]

Meanwhile, the Norgrove Family Justice Review team was subject from its inception to the 'guiding principle' that 'mediation should be used as far as possible to support individuals themselves to reach agreement about arrangements, *rather than having an arrangement imposed by the courts*' (emphasis added). However, it was heartening that Norgrove's interim report recognized the important role played by family lawyers in private law cases, both in reaching out of court settlements and ensuring, in that minority of cases that do go to court, that court proceedings are concluded expeditiously.[101] As we note on page 25 of the main text, MIAM attendance and mediation starts have both dropped dramatically following LASPO, and show no signs of returning to their previous levels. As Rosemary Hunter has said, it is questionable whether the system should continue to encourage people to attend mediation rather than thinking creatively about alternatives which 'meet the demand for post-separation assistance that actually exists'.[102]

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[95] Genn (2012), 12.
[96] See 6.7.2 of the main text for discussion of recent similar proposals for 'encouraging' private resolution of child support disputes by charging parents with care a substantial upfront fee for applying to the CSA.
[97] See Practice Direction 3A: Pre-Application Protocol for Mediation Information and Assessment (2011), supplementing FPR 2010 Part 3.
[98] Children and Families Act 2014, s 10; Practice Direction 3A: Family Mediation Information and Assessment Meetings (2014), supplementing FPR 2010 Part 3.
[99] The full list of exceptions are set out in paragraphs 17-20 of the 2014 Practice Direction.
[100] FPR 2010, Part 3.
[101] Norgrove (2011), para 5.17.
[102] Hunter (2017), 200.

The numbering of the headings in the remaining sections corresponds with the numbering of sections in chapter 1 of the book.

1.2 THEMES AND ISSUES IN CONTEMPORARY FAMILY LAW – EXTENDED EXTRACTS

1.2.1 A RIGHTS-BASED APPROACH TO THE FAMILY?

Welfare versus rights

Stephen Parker's seminal piece on rights-based and welfare-based approaches to family law contains an excellent account of this debate:

S. Parker (1992). 'Rights and Utility in Anglo-Australian Family Law'. *Modern Law Review,* 55: 311, 319-25

The experimental thesis which I put forward is that classical family law in England and Australia – that rule system drawn from ecclesiastical principles, with its clear view of the legal nature of marriage and its aftermath – was basically justified in terms of rights and duties rather than utility. Husbands had rights to their wives' services and fidelity. Wives had concomitant rights to lifelong support. Fathers (and latterly mothers) of legitimate children had rights over them. Rights could be forfeited through misconduct (i.e. breach of duty), although forfeiture was subject to secondary rules concerning the other party's own connivance, conducement or condonement.

The adversarial system of adjudication was capable of handling litigation in rights-based family law because it was dealing with the same kinds of entities as it did in disputes over torts, contracts and crimes. It purported to find facts and then apply those facts to pre-given rules, without obvious reference to the consequences for the particular individuals. The existence of judicial discretion was not admitted, or at least not publicly…

By the early twentieth century, however, doubts had taken hold about the underlying basis of family law and its administration… [T]he underlying rights ethic of family law was gradually de-centred by a utility ethic. Instead of being predominantly a rights system (tempered by a weather eye on its consequences), family law became an interest-balancing utility system (with an uneasy feeling about the demise of rights).

To put it differently, family law became more centrally concerned with consequences. One example is the welfare principle, whereby the welfare of the minor is the first and paramount consideration. Although given little force initially upon its establishment in 1925, it came to displace father-right (and, in theory, has now displaced parent-right). Another example is the way in which various legal theories were developed to give courts some power to redistribute proprietary and occupation interests on divorce even if, formally, the legislative basis for such a power was dubious.

Many of these judicial developments were then codified and extended by statute. So, the goal of custody proceedings became, in theory, that of finding the most practical way of advancing the child's interests. The goal of spousal maintenance has become the provision of sums adequate for self-support needs. The goal of property alternation has become (problematically) the division of assets that best enables the parties to adjust to the new situation.

Family law, then, became predominantly about weighing interests in some kind of balance, rather than adjudicating over rights. It was no longer a formal system like a pack of cards where high numbers beat low numbers and some cards were trumps. The most obvious way of accomplishing this balancing act, without destroying the flexibility that the system was designed to achieve, was by conferring overt and broad judicial discretion, to be exercised in light of certain goals and standards. As far as I know, Anglo-Australian family law in recent times has conferred the most thorough-going judicial discretion of any western legal system...

By the late 1980s, it seems, a kind of normative anarchy reigned within family law, with some measures tugging in the direction of rights and others in the direction of utility.

Material on the operation of the HRA 1998 in family law may be found above.

1.2.2 RULES VERSUS DISCRETION

The concepts of 'discretion' and 'rules' are examined in detail by John Dewar.

J. Dewar (1997). 'Reducing Discretion in Family Law'. *Australian Journal of Family Law*, 11: 309, 311-314

Discretion and rules are sometimes portrayed as opposites locked into some zero sum relationship: the more discretion, the fewer rules, and vice versa. Most recent writing on rules and discretion avoids this crudity, partly because of a recognition of the "gap" that is likely to develop between norm and practice (rules may be applied in a discretionary way, choice may be constrained through rules of thumb or interpretive practice); but also because it is recognised that there are many more law-making techniques available than just rules and discretions, and that it is better to visualise a continuum or spectrum, with hard and fast rules at one end and unconstrained discretion at the other, with many intermediate points along the way.

Cass Sunstein has suggested … that rules can be understood as "approaches to law that try to make most or nearly all legal judgments under the governing legal provision in advance of actual cases" and as exemplifying an approach to law-making under which a "wide range of judgments about particular cases will occur before the point of application". This contrasts with "untrammelled discretion" which he characterises as "the capacity to exercise official power as one chooses, by reference to such considerations as one wants to consider, weighted as one wants to weight them". Other devices, which lie somewhere between these two poles in terms of the extent to which they seek to constrain outcomes in advance, include presumptions, checklists of factors, general standards, guidelines, principles and analogies. Examples of each of these devices are readily found in family law: indeed, we might say that family law offers a particularly rich array of these different sources of law. …

But why would the legislator choose to confer discretion on judges rather than prescribe rules, particularly in family law?

In this context I find Schneider's classification of deliberately conferred discretions useful. He distinguishes three types: rule-failure discretions, rule-building discretions and rule-compromise discretions.

A rule-failure discretion is conferred where it is thought that the cases to be dealt with by the decision-maker cannot be provided for in advance by rules of any sort; rule-building discretions are conferred where the legislator could develop rules, but thinks that it would be better to leave the development of rules to the decision-makers as they go along; and rule-compromise

discretion is granted where the legislators cannot agree on what the rule should be, and deliberately pass that responsibility to the decision-maker. This classification relates to the common arguments made in support of discretion in family law: that the circumstances of family life are so varied that it would be impossible to lay down rules in advance, and that discretion maximises the chances of doing justice in each case; and that it would in any case be difficult to agree what the rules should be, even if rules were thought desirable.

Of course, it may not be easy, or even possible, to classify discretions as Schneider suggests: some discretions may have been conferred for "rule-failure" reasons, but may actually be used in practice for "rule-building"; and discretions may be conferred for more than one of these reasons. Nevertheless, this gives some clearer idea of why discretions might be conferred, and discretions in family law have been conferred for all three reasons.

The pros and cons of rules on the one hand and discretion on the other are discussed by Schneider.

C. Schneider (1992). 'Discretion and Rules: A Lawyer's View' in K. Hawkins (ed.), *The Uses of Discretion* (Oxford: OUP). 74-7

[One] advantage of rules relates to our basic assumption that like cases should be treated alike. As Professor Mnookin writes, 'Indeterminate standards … pose an obviously greater risk of violating the fundamental precept that like cases should be treated alike'. One way to try to ensure that they are is by employing rules instead of allowing each decision-maker to decide case by case what principles to apply to what fact situations and how to apply them. Rules suppress differences of opinion about what works to serve what purpose, about how to balance factors, and about what justice requires; such differences of opinion could otherwise lead to different results in similar cases. Rules also serve as record-keeping devices, devices that are more efficient and therefore more likely to be used effectively than an elaborate system of precedent. Finally, rules provide an often superior way of co-ordinating the decisions of multiple decision-makers and one decision-maker over time. But will it always be true that a rule will be more conducive than discretion to treating like cases similarly? The answer to this question depends in part on the complexity of the rule. The simpler the rule and the more capacious its categories, the greater the extent to which different cases will be decided under a single principle. Yet the more complex the rule and the more differentiated its categories, the greater the discretion judges are likely to have in applying it.

One important function of the treat-like-cases-alike principle is giving litigants the sense that they have been treated fairly. But will rules or discretion better give litigants that sense? Rules have the advantage of telling litigants clearly that the standard under which their case is to be decided has the authority of legitimacy. Discretionary decisions, in contrast, are more readily open to the objection that they merely reflect the judge's personal and arbitrary preferences, that they arise out of some untoward favoritism for the winner or some prejudice against the loser. But, even if litigants accept the legitimacy of the source of the standard applied, they may still believe the standard to be unjust. And, even if litigants accept the standard's desirability, they may reject the way it is applied. Losers are likely to see differences between cases that look significant to them but that look trivial to others. Because litigants are usually able to see only the strengths of their own case, it is unlikely that any plausible set of rules can prevent this from happening. It is likely, though, that mechanical rules of the kind that prevent the court from looking at the particular facts of a case would prevent an acute sense of injustice, often on the theory that different cases were being treated alike. Litigants seem likely to feel that cases involving important consequences ought to be decided with the fullest possible attention to all the facts and all the equities. Attempts to substitute flat rules for such enquiries seem most unlikely to satisfy the litigants' sense of justice….

> [Further] advantages of rules arise out of the relatively 'public' nature of rules and the relatively 'private' nature of discretion. Generally speaking, rules will in some useful sense be public in both formulation and dissemination. … [A rule] will have been formulated in advance of a decision and will generally be accessible to anyone who knows and cares to look.
>
> By contrast, discretion looks private…. Most basically, while standards for the exercise of discretion may be written and circulated before a decision is made, a discretionary decision is precisely one whose outcomes cannot be described in advance…
>
> This contrast between the public nature of rules and the private nature of discretion helps us see that [an] advantage of rules is that they can serve the 'planning function' better than discretionary decisions. The people and institutions affected by a decision need to know in advance how a case will be decided so that they may plan their lives and work in accordance with the law. But, as Professor Mnookin writes, 'Inherent in the application of a broad … principle is the risk of retroactive application of a norm of which the parties affected will have had no advance notice'. On the whole, rules give better warning than discretionary decisions because they are likelier to provide clear and complete information about what a court or agency will do…
>
> Yet even this apparently clear advantage for rules cannot be stated without enquiring into the particular decisions which the choice between discretion and rules may affect. People will not always need to know what the law is before they act. For example, most husbands and wives are probably not interested in the law governing child-custody disputes on divorce. Most couples do not expect to be divorced, and many of them would find it impractical and perhaps even wrong to shape their marital behavior and their care for their children with an eye to gaining an advantage in divorce litigation. There are, however, undoubtedly some exceptions… And, even if the parties do not need to know custody law in order to plan, that knowledge may still offer them psychological repose. A mother might feel better during her marriage if she knew that the law would ensure her custody of her child even after a divorce. (And, on divorce, her husband might accommodate himself to the disappointment more easily if he had known all along that he had little chance of gaining custody.)
>
> But even if people sometimes do need to know the law in order to plan their behavior before they become involved in a legal dispute, they will surely want to know it after they become involved. Yet even this undoubtedly legitimate interest will not always dictate an answer to the choice between discretion and rules. For example, it is often said that litigants ought to be told as clearly as possible how a court will decide a case so that they can be guided in their settlement negotiations. On the other hand, the less certain the result a court would reach, the greater the practical scope for bargaining. Discretion, in other words, tends to give the parties greater freedom in negotiation...
>
> [One further] attraction of rules also grows out of the contrast between the public quality of rules and the private quality of discretion. This attraction is that rules can serve social purposes that discretionary decisions generally serve less well. Rules are often an announcement about how people should behave, an announcement that attempts to affect behavior. Rules frequently (although not invariably) communicate this information more clearly and emphatically and are more easily recognized as commands than a series of individual decisions from which general principles have to be drawn. On the other hand, this attraction of rules will present itself less forcefully where the law's primary purpose is not to influence behavior. The largest category of such situations is probably where that purpose is to settle disputes, rather than to guide social behavior.

It has been asked whether discretion within family law decision-making undermines the normative function of family law, in turn leading to a greater focus on rules. John Dewar has argued that we have seen over past decades a firming up of the law to limit judicial

choice by the creation of statutory checklists and presumptions,[103] and by the judicial creation of firmer principles to guide the exercise of their discretion.[104] Indeed, some areas of family law – notably child support law – have moved firmly to the rule-end of the spectrum. Why did we adopt discretion in the first place, and why have we moved away from that methodology? When our modern family law statutes were created in the late 1960s and 1970s…

J. Dewar (1997). 'Reducing Discretion in Family Law'. *Australian Journal of Family Law*, 11: 309, 313-316

…[i]t was assumed that the law could do little to affect divorcing behaviour, and that the primary role of the law was to set the terms of divorce … The courts were given very wide discretion to set the terms of a divorce according to general standards requiring the courts to achieve certain loosely defined outcomes in the different circumstances of each case (for example, that arrangements for children were to be decided according to the child's welfare, or that the courts were to use their powers to redistribute property to achieve results that were "just and equitable" in light of factors specified elsewhere in the legislation).[105]

In short, the legislation of a quarter of a century ago could be characterised as having been informed by the spirit of … "technocratic liberalism" that is, a reposing of faith in the ability of experts, when armed with sufficient information, to arrive at optimal solutions for the parties, with "optimal" for these purposes being cast in economic or therapeutic, rather than moral or ethical, terms; and a belief in limits to the state's role in prescribing clear ground rules for what were regarded as private decisions about how private lives should be lived.

It is this model, and the assumptions on which it was based, that have been modified in recent years. In particular, there has been a tendency to reduce or construct the discretionary features of this model, and to specify outcomes in much clearer terms.

Dewar attributes this move from discretion to rules to two broad sets of factors:

J. Dewar (1998a). 'The Normal Chaos of Family Law'. *Modern Law Review,* 61: 467, 473-4

The first is a concern to reduce the costs of family breakdown, both to the legal system and to the welfare state. The need to reduce public expenditure on the legal system (either directly on the court system, or through legal aid) has led to increased interest in 'bright line rules' that encourage parties to resolve their own disputes without going to court; while the need to curb public expenditure on family breakdown led to the enactment of child support legislation, which enables public expenditure to be more accurately controlled and predicted. The second is that there is now greater concern than previously to find some principled basis for family law. This in turn stems from a perception that the 1970s discretionary model has failed to deliver 'just' outcomes for men, women or children. This has led to greater use of arguments for rights or equality, which have in turn pushed family law legislation towards the rule end of the spectrum, in the shape of fixed starting points or firmer guidelines or standards. … However, this trend towards rules, or at least towards legal norms that are closer to the rules end of the spectrum,

[103] E.g. the presumption regarding parental involvement the child's life: see 11.4 of the main text.
[104] E.g. the developing case law on the basis on which financial remedies on divorce are granted: see 7.5 of the main text.
[105] This example is taken from Australian law; the English approach is very similar: see chapter 7 of the main text.

has not been comprehensive: instead, there has been a steady incursion of rules into a discretionary framework, with no overhaul of the fundamental premises of the system.

1.2.3 WOMEN'S AND MEN'S PERSPECTIVES ON FAMILY LAW

Hilaire Barnett's excellent introduction to feminist jurisprudence provides a detailed account of the evolution of feminist thinking and its contemporary diversity. She notes the continuing importance of Simone de Beauvoir's 1949 book, *The Second Sex*, which highlights the idea of women being conceived of as the 'other' sex, with the world starting from a male perspective. De Beauvoir argues that 'man' is the standard against which all are judged. Barnett draws on this work to show that while the law presents itself as being gender-neutral, that claimed neutrality stems from an inherently male perspective. She then goes on to address the ways in which different 'waves' of feminist scholars have thought about the law:

H. Barnett (1998). ***Introduction to Feminist Jurisprudence*****.** (London: Cavendish Publishing), 3-8

First phase feminism which may be dated from mid Victorian times to the present time, although most vociferous from the 1960s through to the mid 1980s, is dedicated to unmasking the features which exclude women from public life. As Ngaire Naffine has written '…the first phase can be characterised by its concern with the male monopoly of law.'… The quest is for equality, whether in employment generally, or in the professions or in politics. First phase feminists work within the existing system in order to remove the inequalities of the system, without necessarily questioning the system itself. This liberally inspired enterprise undertaken by the women's rights' movement accepted law as traditionally portrayed: the rational, objective, fair, gender-neutral arbiter in disputes over rights which applied to undifferentiated but individual and autonomous legal subjects. The objections voiced by feminists in this phase was not to law *per se* but to 'bad law': law which operated to the exclusion or detriment of women.

But first-wave feminism's focus on the letter of the substantive law could not tackle the underlying prejudices which would continue to ensure inferior legal and social treatment of women. Cue second phase feminism, of the 1970s and 1980s:

Here the focus is less on the male monopoly of law and the correlative inequalities of women, but on understanding, 'the deep-seated male orientation which infects all practices.'. First phase feminists had made many remarkable advances for female equality. However, despite these achievements, it remained the case that women were treated differently and discriminated against. If women enjoy the same capacities and talents as men, and all that is required is an analysis, recognition and reversal of the existing inequalities, how is it that women remain, still, despite all the reforms, the 'second' and 'lesser sex'? The answer lies in the masculinity of law and legal systems. For second phase feminists, of differing political persuasions, the root problem with law lies in its pretended impartiality, objectivity and rationality. By assuming gender-neutral language, law masks the extent to which law is permeated by male constructs, male standards. The 'reasonable man' so beloved by the common law, does not include women. If women are to be 'reasonable', within the legal meaning of the term, they must adopt the male standard of reasonableness. …

In turn, third wave feminism questions law's claim to objectivity and rationality by highlighting that its claims to neutrality in fact help to reproduce conditions which subordinate women and other social groups:

> The perception of third phase feminists is that while law is gendered, and deeply so, this does not necessarily mean that law operates consistently, inevitably or uniformly to promote male interests. Rather, law is too complicated a phenomenon to be portrayed in this holistic manner. What needs to be understood, from this perspective, is the manner in which law responds to differing problems, and in its operation reveals its well concealed gender bias. The approach of third phase feminists is one which necessarily rejects the 'grand theories' of second phase feminism: law in the reflection of the society it serves is as complex as that society.

Contemporary theorizing emphasizes the many causes of women's inequality, all of which need to be addressed.

The 'difference' of gender

Does gender make a difference? As Barnett explains, different feminist schools have different views on this issue:

H. Barnett (1998). *Introduction to Feminist Jurisprudence*. (London: Cavendish Publishing), 17-8

> For liberal feminists, gender *per se,* is theoretically unproblematic: what is required is the removal of such formal legal inequalities which bar women from entering public life on the basis of full equality. …. Difference, or cultural, feminist theory, … focuses on the perception that women and men have differing modes of reasoning, and different socially-constructed roles, which are explanatory of women's inferiority and exclusion from the gendered, male, world. By contrast, radical feminism … conceptualises the question of gender in the light of power relationships, and the disparity of power between men and women, supported by law and society. …
>
> Alternatively, in postmodern feminist thought, the gender question is altogether more complex and uncertain… Postmodern feminist thought rejects any form of universalising theory, including theories of gender. Gender thus becomes a site of contestation, not only as to its interpretation, but also as to its significance in legal and social theory. The deconstruction of gender, and the rejection of totalising theories, leads to an understanding both of the indeterminacy and fragility of the very concept of gender, and of the need for feminist jurisprudence to avoid theory which adopts an essentialist view of woman as its focus.

The public/private divide

Barnett explores how the public/private divide has rendered women invisible to the law, legitimizing inequalities and even abuse. She says that the division of labour within families often determines the capacity of individuals to participate in the public world of paid employment or government. Barnett argues that this confines women to the private sphere, with the result that the public world in which the law operates sees men as its subjects and overlooks the different experiences of women. Hence, she notes and as we explore in chapter 4, domestic abuse was only 'discovered' by the law in the 1970s, and even then the reality of domestic abuse has taken a long time for the law to take seriously.

It was only in 1991, for example, that the law recognised that a wife could be raped by her husband.[106] Barnett says that feminism demands that the so-called 'private sphere' not be isolated from society's attention, because that will perpetuate the long-standing refusal to recognise the realities of patriarchy and so continue to leave women vulnerable to abuse, violence and manipulation.

Women as mothers

The close association between the enduring inequalities faced by women, and their child-bearing and child-rearing responsibilities has been the subject of much comment by both radical and liberal feminists:

K. O'Donovan (1985). *Sexual Divisions in Law*. (London: Weidenfeld and Nicolson, 1985), 15-16

According to Rosaldo's analysis cultural value is attached to activities in the public sphere, whereas the domestic sphere is differentiated as concerned with activities organised immediately around one or more mothers and their children. Although advanced and capitalistic societies are extreme in this regard, the dichotomy between domestic and public is found in all societies. Male authority is based partly on an ability to maintain distance from the domestic sphere. Those societies that do not elaborate the opposition of male and female seem to be the most egalitarian. 'When a man is involved in domestic labour, in child care and cooking, he cannot establish an aura of authority and distance. And when public decisions are made in the household, women may have a legitimate public role.'

Although this analysis locates women's subordination in culture, it permits a foundation of that culture in an interpretation of biology. The radical feminist, Shulamith Firestone, offered 'a materialist view of history based on sex itself'. Using Friedrich Engel's original insight that the first division of labour was that between men and women, and that the first expropriation of labour was by men of women's reproduction of the species, Firestone reinterpreted materialism to signify the physical realities of female and male biology. The substance is biology, the superstructure is those political and cultural institutions which ensure that biological differences determine the social order. Firestone acknowledged that these differences did not necessitate the domination of females by males but asserted that reproductive functions did. She identified four elements of biological reproduction which lead to women's subordination: childbirth, dependency of infants, psychological effects on mothers of child-dependency, division of labour between the sexes based on 'natural reproductive difference.' Her revolutionary project was to abolish current methods of biological reproduction through the substitution of artificial methods and the socialisation of child care…

The insistence on the idea that women belong in the private sphere is part of the cultural superstructure which has been built on biological foundations.

Clare McGlynn takes a liberal feminist approach to this issue, emphasizing the importance of eradicating barriers to equality and gender neutrality:

C. McGlynn (2001). 'European Union Family Values: Ideologies of "Family" and "Motherhood" in European Union Law'. *Social Politics* Fall 2001, 325, 326-30

[106] *R v R* [1992] AC 599.

The ideology of the "family" privileged by the European Court is that of the traditional "nuclear" family: that is, a heterosexual married union in which the husband is head of the family and principal breadwinner and the wife is the primary child care provider…

Ideology and Motherhood

Turning, therefore, to consider what constitutes the "dominant ideology of motherhood" it was succinctly summarised in the 1970s by Anne Oakley as the belief that "all women need to be mothers, that all mothers need their children and that all children need their mothers". Thus this ideology broadly constructs a normative model of women and motherhood, the foundation for which is the perceived natural, universal, and unchanging nature of the maternal role, together with the presumed existence of a strong maternal instinct in *all* women. This leads to the assumption that motherhood is the usual and appropriate role for women: the rightful (and actual) ambition of all "normal" women. Unsurprisingly therefore, the mother-child relationship is privileged it being held to be sacrosanct and pivotal to the emotional and physical well-being of the child.

Accordingly, child care is seen to be the primary responsibility of women, and if paid employment is taken up, it must take second place to the woman's responsibilities within the home. This aspect of the dominant ideology stresses the "responsibility of the biological mother for the rearing of her own children, especially during the early years" …

The dominance of the idea of, and importance attached to, the mother-child relationship stems in large measure from psychological and psychoanalytical theories discovered in the immediate aftermath of World War II. Theories of infant to mother "attachment" and mother to child "bonding" were defined as essential biological processes, akin to that of imprinting in animals. In essence, the research purported to show that there is a biologically based requirement for mothers to be physically close to their babies immediately after birth. It was claimed that the attachment of infant to mother is instinctual and is the "primary social bond" that forms the entire basis on which all future social relations are constructed. Researchers concluded that those mothers who had greater contact with their babies in the first few days of their lives than the control group exhibited stronger mother-infant "bonding"…

However, almost immediately after publication, the foundations of this research began to crumble under the weight of criticism. The research conclusions were challenged on the basis that the problems which had been laid at the door of inadequate or no attachment/bond may have been caused by many other factors, not least the experiences which may have led up to a mother-child separation, rather than the separation itself. In addition, the criteria by which the researchers judged "failure to bond" were revealed to be based on spurious grounds. For example, it had been considered that the presence of an active father demonstrated a lack of bonding between mother and child, as was a higher incidence of leaving home shortly after birth.

However, despite the criticisms of both the attachment and bonding theories, they were supported by bodies such as the World Health Organisation and were highly influential in changing many institutional practices. In addition, they attracted, and continue to attract, a broad consensus of support from many disparate groups, from conservative family campaigners to feminists. Some feminists welcomed the theories for the apparent power and control they gave to women, particularly over health professionals involved in childbirth and child care. In addition, these ideas were seen to give value to hitherto marginalised "women's work," namely child care. The ideas also live on in popular culture, policy and political debates, and legal discourse, and are popularised through their repetition in child care and parenting manuals and guides.

These ideas have not been forced on an unwilling public, but nonetheless, the theories and their application have been highly prescriptive of the behaviour of mothers, with consequential effects on fathers and family life. In so doing it is perhaps of little coincidence that the theories replicate a

clearly defined traditional ideology of motherhood and the family. This perhaps explains further why the ideas were taken up so readily: they have a particular resonance in that they fit pre-existing objective, neutral scientific fact, the propagation of these myths became embedded in popular, legal and scientific discourse, and thereby justified in the eyes of the beholders. As a result, there remains one idealised vision of motherhood that is dominant, that of "exclusive, bonded, full-time mothering".

This is a dominant ideology of motherhood which elevates certain biological facts of female reproduction to the status of "universal truths" about women, preserving women's subordination in the gendered division of labour in the home. In effect, this reduces the choices open to women, thereby justifying their inequality. It can therefore be seen that the perceived importance of the maternal instinct, and the privileging of the mother-child relationship, replicates traditional assumptions about the separate spheres of the sexes. Women's primary responsibility is for the home, her identification is with the private sphere; while for men it is the workplace and public life. Thus this dominant ideology of motherhood is closely related to normative notions of the "family": it legitimates the existing sexual division of labor and particular designated roles for fathers.

To repeat, the aim of this argument is not to dispute that these ideas are adhered to by many individuals, nor that these ideas may appear seriously outdated in some member states, but to argue that they are employed in dominant discourses such as EU law, such that they come to represent the norm, legitimating their pursuit and further reproduction through law. Furthermore, it is not my aim to disparage any need for parental "attachment" to their children. Indeed, as Sandra Fredman cogently argues, there remains "insufficient recognition of the value of children and of active parenting" in European society. The crucial point is the need to value *parenting,* not only mothering. My criticism, therefore, is directed at the privileging of the mother-child relationship, exclusive of the role of the father, and the conclusions which are drawn from this supposedly scientific requirement for mother-child contact regarding the organisation of child care and the "family".

Men and the family

Richard Collier has made a significant contribution to improving understanding of the issues surrounding men's, particularly fathers', engagement with family law, following the arrival on the political scene of several fathers' and men's rights groups in recent decades, and their campaigning work on issues such as child support law, the law relating to children's living arrangements following parental separation, and the status of unmarried fathers. This has generated debate about the 'future of fatherhood':

R. Collier (2003). 'In Search of the 'Good Father': Law, Family Practices and the Normative Reconstruction of Parenthood', in J. Dewar and S. Parker (eds), *Family Law Processes, Practices and Pressures* (Oxford: Hart Publishing), 244-66

[I]t has been in relatively recent years that concerns about law, men and the family have moved increasingly centre stage within a context in which a broader political and cultural conversation has emerged about what is frequently referred to as the 'future of fatherhood' debate. Central to this process within Britain has been the idea of the 'new democratic family', a notion which has, in a number of ways, served to *reposition* both motherhood and fatherhood as socially problematic objects of legal intervention.

This debate and associated research has, in particular, led to the construction of the image of the new 'hands-on father' in English law, in which active parenting by men is promoted yet currently inhibited by various factors:

> [Several] studies have for some time highlighted, in particular, how men's interactions with children are frequently constrained, not simply by women's own desires and anxieties around motherhood but also … by the demands of men's paid employment. Increasingly, as a result, there is widely seen to exist a tension facing men within contemporary Western societies between, on the one hand, the still-dominant discourse around fatherhood (which continues to privilege the traditional idea of the 'father as provider', the traditional 'family breadwinner') and, at the same time, what is generally positioned as the more progressive idea of the father as an emotionally involved 'hands-on' parent. In seeking to negotiate the resulting tension, it is no wonder perhaps that, faced with such competing demands, it is now frequently seen to be … a 'hard time to be a father'…
>
> Allied to this work and family life agenda, and more generally, a range of measures have been undertaken which seek to encourage men to take on a more active parental role during subsisting relationships. We have witnessed broad-based initiatives, as well as numerous ministerial statements, aimed at attacking negative cultural stereotypes of fathers as somehow inherently abusive or uninterested in children (especially, it must be said, boys); seen a marked refocusing on the male parent across a range of health and welfare services and experienced the publication of government literature directed to all expectant fathers.
>
> At the risk of simplification, and without under-estimating just how much of this has been a result of subsequent judicial interpretation and case law rather than enshrined in legislation itself, in relation to both post-divorce and separation family economics (the CSA) and understandings of parenthood as a largely gender neutral (ungendered) practice (the CA and FLA), a shift in family policy has taken place in which, alongside a refocusing on parental responsibility, a reconstituted 'father figure' has emerged. This, in essence, is a man who is 'once a parent, always a parent'. The good (post-divorce) father is a man who is (a) to be economically responsible 'for life' for his first family – financially, he is not to move on financially unencumbered into future relationships (the provisions of the CSA); and (b) considered, as part of the good fatherhood ideal the law seeks to promote, to be active in joint parenting, both during marriage and partnership and after divorce or separation (CA and FLA).[107]

However, the emerging image of the 'new father' is not unproblematic. The 'new father' is just one of several contradictory images of fatherhood identified both in the sociological literature and in current debates around family law and policy:

> Smart and Neale, for example, … have argued that the new fatherhood is itself an ideal, undifferentiated social phenomenon. It is made up of what they suggest to be (at least) four distinct elements in the way in which it conceptualises men; as variously, *providers of masculine identity* (seen by the authors as a potentially regressive stance); *enforcers of patriarchal power* (a highly reactionary, backward looking position); *carriers of rights* (involving a self-interested, individualised form of power); and, finally, *sharers of responsibilities* (presented as a collective and, for the authors, progressive stance). …
>
> Within different contexts, we find the idea of the 'feckless' irresponsible father and the 'deadbeat' dad….In addition – although it is of an ambiguous status, all too easily displaced by still-powerful notions of a 'natural father's love' – there exists the increasingly visible discourse of 'dangerous father'. This speaks to a rather different reality, one in which it is 'family men' themselves who constitute a dangerous presence in the lives of women and children, notably in the form of

[107] See also Collier (1995), (2001).

domestic violence and sexual abuse. Each of the above developments suggests that any purported hegemony of the 'good' (heterosexual) family man is itself far from secure and that, at present, cultural representations of fatherhood are diverse.

But it is doubtful in any event how far the new, hands-on fatherhood is actually reflected in people's everyday lives, during relationships as much as following parental separation, with traditional divisions of labour continuing in most families and, despite some of the campaigns of fathers' rights groups, evidence of considerable resistance to change amongst many men. And the whole rhetoric surrounding gender-neutral parenting and the 'new father' has also created concern about its potential impact on the value society places on motherhood, with some suggesting that:

gender neutrality has in many ways led, in practice, to a devaluing and systematic negation of the social importance of mothers and mothering, a position which Fineman describes as 'motherhood descending'.

1.2.4 GENDER IDENTITY

The material here provides a fuller account of the development of current English law concerning gender identity, particularly the legal recognition of transgender individuals' preferred gender.

Until recently, English law's treatment of trans people in relation to marriage was governed entirely by *Corbett v Corbett*, which concerned the validity of a marriage contracted between a man and April Ashley, a transgender woman. At that time, scientific understanding of these cases was less well-developed and gender-reassignment surgery and other techniques less advanced than they are today. The key extract from *Corbett* appears on pages 34-5 of the main text, affirming the common law's insistence on determining gender exclusively by reference to biological factors, specifically to chromosomes, gonads and genitals – where those factors are congruent, that would determine an individual's gender for legal purposes, however they might self-identify. And so April Ashley was regarded in law as a man, preventing her from contracting a valid marriage to her male partner.

Despite the common law position, steps were taken to reduce the embarrassment that trans people might otherwise encounter in their daily lives—notably, by reissuing driving licences, passports, and National Insurance cards in their new names—and gender reassignment procedures were made available on the NHS. However, for legal purposes the *Corbett* line prevailed, denying trans people legal and so societal recognition in their preferred gender. The law was repeatedly challenged before the European Court of Human Rights throughout the 1980s and 1990s with two principal complaints: first, the state's refusal to amend the record of gender on birth certificates and the associated difficulties to which this gave rise; second, the state's refusal to recognize preferred gender for the purposes of marriage. It was argued, for years unsuccessfully, that this violated Articles 8, 12, and 14.[108] However, English law's approach to trans people

[108] *Rees v UK* (App No 9532/81, ECHR) (1986); *Cossey v UK* (App No 10843/84, ECHR) (1993); *Sheffield & Horsham v UK* (App Nos 22985/94, 23390/94, ECHR) (1998); on the issue of recognition for

became increasingly isolated within Europe and beyond, and in 2002 the European Court found the UK position incompatible with the Convention. Two successful challenges were brought, one by Christine Goodwin, who like April Ashley was born a biological male but self-identified as female and had undergone gender confirmation surgery. She had had several discriminatory and humiliating experiences relating to employment, pension entitlements, loan, and other transactions because of her gender status and unalterable birth certificate; and, like April Ashley, she could not marry her male partner as the law still regarded her as male.[109]

The first issue was whether the UK was in breach of a positive obligation under Article 8, failing to respect Christine Goodwin's private life by not recognizing her preferred gender:

Goodwin v UK (App No 28957/95, ECHR) (2002)

> 90. . . . [T]he very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings . . . In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone [as] not quite one gender or the other is no longer sustainable. . . .
>
> 93. . . . [T]he Court finds that the [UK] Government can no longer claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention. Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment, it reaches the conclusion that the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant. There has, accordingly, been a failure to respect her right to private life in breach of Article 8 . . .

In reaching this conclusion, the Court had noted the administrative and other problems that would be encountered in providing a mechanism for the recognition of individuals in their preferred gender, but did not feel that these were insuperable:

> 91. . . . [T]he Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost . . .

The Court then turned to Article 12. In previous cases, the Court had found no breach in the UK's refusal to let trans people marry in their preferred gender. It had accepted that the right to marry protected the traditional concept of marriage between those of the opposite sex, as the basis of the family, and that states were free to adopt biological criteria for determining sex for this purpose. But the Convention is commonly described as a 'living instrument': its interpretation and application can change over time as circumstances change. This time, as with Article 8 above, it held that the UK could no longer shelter behind a wide margin of appreciation on this issue, and—importantly—detached the legal concept of marriage from procreation:

> 98. Reviewing the situation in 2002, the Court observes that Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not

the purpose of acquiring paternity through artificial reproduction, see *X, Y, Z v UK* (App No 21830/93, ECHR) (1997): see 9.2.3.

[109] See also *I v UK* (App No 25680/94, ECHR) (2003).

however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the first limb of this provision.

99. The exercise of the right to marry gives rise to social, personal and legal consequences. It is subject to the national laws of the Contracting States but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired . . .

100. It is true that the first sentence [of Article 12] refers in express terms to the right of a man and woman to marry. The Court is not persuaded that at the date of this case it can still be assumed that these terms must refer to a determination of gender by purely biological criteria [as held by Ormrod J in *Corbett v Corbett* . . .]. There have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality. The Court has found above, under Article 8 . . . , that a test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual. There are other important factors—the acceptance of the condition of gender identity disorder by the medical professions and health authorities within Contracting States, the provision of treatment including surgery to assimilate the individual as closely as possible to the gender in which they perceive that they properly belong and the assumption by the transsexual of the social role of the assigned gender. The Court would also note that Article 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 . . . in removing the reference to men and women . . .

101. The right under Article 8 to respect for private life does not . . . subsume all the issues under Article 12, where conditions imposed by national laws are accorded a specific mention. The Court has therefore considered whether the allocation of sex in national law to that registered at birth is a limitation impairing the very essence of the right to marry in this case. In that regard, it finds that it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex. The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court's view, she may therefore claim that the very essence of her right to marry has been infringed. . . .

[The Court held that no separate issue arose under Article 14.]

Shortly after this decision, the House of Lords was called on to consider the issue in light of the Human Rights Act 1998 (HRA 1998) in *Bellinger v Bellinger*.[110] Another transgender woman, supported by her male partner, sought a declaration that their marriage, contracted over 20 years earlier, was valid. The House of Lords held that the marriage was void under English law and that, while this was incompatible with the ECHR, reform must be left to Parliament.

Parliament responded promptly with the Gender Recognition Act 2004 (GRA 2004), which creates a mechanism whereby transgendered adults can obtain full legal recognition of what the Act refers to as their 'acquired gender' – defined in s 1(2)(a) as the gender in which the person is living – by applying for a gender recognition certificate from the Gender Recognition Panel, composed of legally and medically qualified individuals.[111] Around 5,000 certificates have been issued.[112]

Gender Recognition Act 2004

2 Determination of applications

(1) . . . [T]he Panel must grant the application if satisfied that the applicant–

(a) has or has had gender dysphoria,

[110] [2003] UKHL 21.
[111] GRA 2004, Sch 1.
[112] Government Equalities Office (2018c).

(b) has lived in the acquired gender throughout the period of two years ending with the date on which the application is made,
(c) intends to continue to live in the acquired gender until death, and
(d) complies with the requirements imposed by and under section 3.
. . .
(3) The Panel must reject an application under section 1(1) if not required by subsection (1) . . . to grant it . . . [113]

Applicants are not required to have had or to propose to have any gender reassignment surgery; it may not be clinically appropriate for certain individuals to do so. The application must be accompanied by two reports from appropriately qualified persons, one of whom (either a registered medical practitioner or chartered psychologist) must practise in the field of gender dysphoria. These reports must describe the applicant's diagnosis and any gender-reassignment treatment undertaken or planned. The applicant must also make a statutory declaration that the conditions in s 2(1)(b) and (c) are met, and a declaration regarding his or her marital or civil partnership status.[114] If the applicant is a spouse (and their spouse does not consent to the continuation of the marriage post-gender recognition) or civil partner, that relationship must be annulled prior to grant of full gender recognition, and so an interim gender recognition certificate is issued initially, which provides grounds for nullity proceedings to be taken in relation to that union in the following six months.[115] Once that step has been taken, a full gender recognition certificate can be granted.

The general effects of a full certificate are set out in section 9 of the 2004 Act:

Gender Recognition Act 2004

9 General
(1) Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).
(2) Subsection (1) does not affect things done, or events occurring, before the certificate is issued; but it does operate for the interpretation of enactments passed, and instruments and other documents made, before the certificate is issued (as well those passed or made afterwards) . . .

Other provisions deal with the implications of gender recognition in specific contexts, including amendment of birth certificates, parental status, and welfare benefit and pension entitlement.[116]

We discuss at 2.6.1 and 2.7.4 of the main text the implications of an existing marriage or civil partnership for the gender recognition process. As we also discuss there, an anomaly created by the advent of same-sex marriage – that a married trans person may remain married to his or her existing spouse in the acquired gender (if that spouse consents) but that a trans person in a civil partnership must have that partnership annulled (following the grant of an interim certificate) before full gender recognition can be achieved, as civil partnership remains exclusively available to parties of different legal

[113] Alternative criteria apply to applications for recognition of gender changed outside the UK.
[114] GRA 2004, s 3.
[115] See 2.7.4 of the main text.
[116] Ibid., Schs 3 and 5, s 12.

genders – will be removed by the extension of civil partnership to all couples by the end of 2019.

1.2.5 SEXUAL ORIENTATION

The driving force for reform in this area has been equality. But Craig Lind alerts us to the fact that the concept of equality is not as simple and straightforward as it may at first appear: what do we mean by 'equality', and whose equality with whom are we seeking?

C. Lind (2004). 'Sexuality and Same-Sex Relationships in Law', in B. Brooks-Gordon et al (eds), *Sexuality Repositioned*, (Oxford: Hart Publishing), 116, 118

> [E]quality … does not demand simply that people should be allowed to do precisely what others can do. … In Aristotelian thinking we are required to treat equally situated people in the same way (equally), but are also permitted (and sometime required) to treat differently situated people differently (unequally). … The latter possibility – that unalike people should be treated differently – … allows opponents of any activity being promoted on the basis of equality to claim that the differential treatment at issue is justified by some difference between those claiming the privilege and those who already enjoy it. …

As Lind notes, we see the latter type of argument in debates around same-sex marriage and same-sex couple parenting, where opponents argue that heterosexual relationships confer some particular advantage on children or on family stability generally, or that it is features peculiar to heterosexual relationships, such as the traditional division of labour between husband and wife, that particularly justifies a particular legal intervention, such as special financial remedies on relationship breakdown, which might be regarded as a core aspect of the law of marriage. Lind argues that any argument that different treatment is required calls for very careful scrutiny to ensure that there is a proper justification that is being proportionately pursued. As we shall see, in the English context, Article 14 ECHR has become an essential tool for examining those sorts of claims. But even the attainment of formal equality for same-sex relationships may not be quite what is really wanted. Here again the subtlety of what 'equality' might consist of is apparent:

> At the political level the power of the equality argument … seem[s] destined to succeed in establishing legal parity for same-sex couples in family relationships. … This prognosis is bolstered by the fact that political progress in this respect replicates much early work on women's equality…. People are easily able to think – formalistically – that women's equality is achieved by giving women access to what men can do. … In the context of sexuality and family regulation, allowing same-sex couples access to the privileges enjoyed by different-sex couples seems as easily to achieve their equality.
>
> But … [w]ill admission to marriage and other forms of heterosexual family regulation enhance the 'real' equality of lesbians and gay men?

Whilst important steps have been taken in recent years towards affording same-sex couples equal treatment in family law, concern has been expressed as to the 'normalising effects of formal equality arguments, and their suppression of the diversity of gay and lesbian life:

E. Cameron (2001). 'Foreword' to R. Wintemute and M. Andenæs (eds) *Legal Recognition of Same-Sex Partnerships.* (Oxford: Hart Publishing), v-vi

The implicit premise of these [equality] claims was given clarion expression recently in the Constitutional Court of South Africa. Justice Ackermann stated for a unanimous Court that lesbians and gays in same-sex partnerships 'are as capable as heterosexual spouses of expressing and sharing love in its manifold forms', and 'likewise as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support and assistance in running the common household'. Finally, gays and lesbians:

> 'are capable of constituting a family, whether nuclear or extended, and of establishing, enjoying and benefiting from family life which is not distinguishable in any significant respect from that of heterosexual spouses'. [*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs,* 2000 (2) SA 1 (Constitutional Court) as 32-3 (para.53)]

But on whose terms – and on what basis – is recognition to be gained? Are our relationships to be recognised only if they are in all respects, save for the gender of our partners, indistinguishable from traditional heterosexual marriages? Or are we to assert an entitlement to self-definition and autonomy that will lead to distinctive forms of union? If the latter, just how far should the boundaries of convention be pushed?

The call for full and equal recognition of same-sex partnerships has forced lesbian and gay communities to examine the nature of their demands and to re-evaluate their positions in societies that are often hostile to their demands. This has on occasion resulted in fundamental conflict within such communities themselves, sowing seeds of division amongst political activists, community-based organisations and those who just want to be like everyone else. At the heart of the conflict is the difficult choice often facing lesbian and gay people: 'equality' on society's terms, or continued marginalisation. At the heart of the conflict is the danger of being forced to accept an undignified position of compromise: denial of the reality of lived experiences and the expression of diversity and difference.

Legal formalism and a rights discourse uncritical of existing patterns of systematic discrimination and injustice have formed the backdrop to such divisive developments. A legal culture built on tradition and continuity does not easily revisit old assumptions, prejudices or practices, but more often justified the present by appealing to the past, looking forward without learning from the mistakes of yesterday. It is in such legal cultures that lesbian and gay people seeking legal protection for their families may be forced to appeal to an argument of sameness, to dismiss difference and to deny the richness of diversity.

Recent developments do give cause for hope. The rights discourse is shifting, with formalism giving way to emphasis on the claims of substantive equality. This is not to suggest that formal equality is trivial. That would be wrong, since the attainment of formal equality represents a very real gain for those previously denied it. But it is to recognise a goal beyond that of only formal equivalence. In the words of Justice Albie Sachs, again of the Constitutional Court of South Africa:

> 'What becomes normal in an open society, then, is not an imposed and standardised form of behaviour that refuses to acknowledge difference, but the acceptance of the principle of difference itself, which accepts the variability of human behaviour.' [Ibid. at 68-9 (para. 134)]

1.2.6 CULTURAL DIVERSITY

There is no clear policy in English law determining how cases involving sensitive cultural or religious issues should be dealt with. However, as Sir James Munby P (as he now is) has said, the need for tolerance and restraint is vital:

Singh v Entry Clearance Officer New Delhi [2004] EWCA Civ 1075

MUNBY J:

[67] … We live, or strive to live, in a tolerant society increasingly alive to the need to guard against the tyranny which majority opinion may impose on those who, for whatever reason, comprise a weak or voiceless minority. Equality under the law, human rights and the protection of minorities have to be more than what Brennan J in the High Court of Australia once memorably described as 'the incantations of legal rhetoric'. Although historically this country is part of the Christian west, and although it has an established church which is Christian, we sit as secular judges serving a multi-cultural community of many faiths in which all of us can now take pride. We are sworn to do justice 'to all manner of people'. Religion-whatever the particular believer's faith-is no doubt something to be encouraged but it is not the business of government or of the secular courts, though the courts will, of course, pay every respect and give great weight to a family's religious principles. Article 9 of the [European] Convention, after all, demands no less. So the starting point of the law is a tolerant indulgence to cultural and religious diversity and an essentially agnostic view of religious beliefs. A secular judge must be wary of straying across the well-recognised divide between church and state. It is not for a judge to weigh one religion against another. The court recognises no religious distinctions and generally speaking passes no judgment on religious beliefs or on the tenets, doctrines or rules of any particular section of society. All are entitled to equal respect, whether in times of peace or, as at present, amidst the clash of arms…

[68] Within limits the law-our family law-will tolerate things which society as a whole may find undesirable. Where precisely those limits are to be drawn is often a matter of controversy. There is no 'bright-line' test that the law can set. The infinite variety of the human condition precludes arbitrary definition.

1.2.7 STATE INTERVENTION VERSUS PRIVATE ORDERING

The public interest in family privacy is explained by Andrew Bainham:

A. Bainham (1990). 'The Privatisation of the Public Interest in Children'. *Modern Law Review*, 53: 206, 206-7

The public-private dichotomy is a pervasive theme in legal writing and has been viewed by some as central to an understanding of the role of law in family life. Others have doubted the validity of a rigid demarcation between public and private spheres of activity and in particular the existence of a private, largely unregulated, area of family life. They point out that the so-called private realm is heavily influenced by structures external to it and that its boundaries are drawn up by the State. Thus, it is not naturally preconstituted or beyond legitimate State regulation…

Those who believe in a clear divide between the public and the private view the family as a largely unregulated area beyond the reach of the law… There can be no doubt, at least in theory, that the nature of family privacy imposes significant legal and political constraints on state intervention…

Bainham notes the importance of the European Convention on Human Rights, and especially the right to respect for private and family life in Article 8(1). He also remarks that the CA 1989 has, as one of its core ideas, the principle that the state's role in relation to the family is to be supportive, and that state intervention in family life should occur only when it is necessary, as set out in the so-called 'no-order principle' of s 1(5). He then continues:

> The very susceptibility of the family to legal regulation may lead to a rejection of the public-private dichotomy as a tool of analysis. In a recent article John Eekelaar shows how, historically, the family was left substantially unregulated by law while it adequately performed functions which were thought to be in the public interest. Specifically, the legal protection of children came about initially because of the threat to the social order posed by large numbers of vagrant children in the early nineteenth century. This legal regulation was in effect a response to the failure of the family to operate as a 'sufficient mechanism of control.' He concludes that where the family is properly meeting the public interest the law plays only a small role in the definition or enforcement of societal values. But, since the family is in this sense performing a public service, it is inaccurate to view it as operating entirely outside the public sphere. Familial obligations, on the contrary, 'can be viewed as integral parts of the public law system as a whole'. It may thus be a mistake, according to this mode of analysis, to talk in terms of state intervention in the family as if this were an unproblematic concept. Child-rearing may be seen with equal justification as either a private matter, subject to state involvement only when public norms are transgressed, or as a public matter in the sense that the task of giving effect to the community's standards and expectations for child-rearing is delegated to parents. Each perspective according to Eekelaar, is equally valid and contradicts the existence of a well defined public-private dichotomy. In his view, the concept of 'the public interest' is a more valuable tool in understanding family law and 'the focus should be upon the nature of the conception of the *public interest* current at any given time within a community and not some presupposed classification which has small legal relevance'. His preferred approach entails examination of 'the process of transition from the perception that behaviour, whether within the private or public realm, adequately serves the public interest without the invocation of law to the conviction that the public interest demands a legal response.

However, King and Trowell identify five bases for asking whether law and the legal system are apt for dealing with family problems, particularly those relating to children:

M. King and J. Trowell (1992). *Children's Welfare and the Law: The Limits of Legal Intervention*, (London: Sage), 109-13, 117-9

1. Maintaining social cohesion

Issues concerning child welfare and child protection presented by legal textbooks and the reports of court cases tend to be simplified, sanitized accounts of reality as it is perceived from mental health clinics. Much of the complexity of interwoven emotional relationships is reduced and simplified by the legal process to dimensions that can be made to fit pre-existing legal categories. This process, far from reflecting inadequacies in the legal system that can be remedied by improvements in procedures and the quality of legal representation, is an essential part of the law's social role. Law, according to recent theoretical ideas about the nature of law as a social institution, needs to convey simple, straightforward moral messages to the external world. It does so in part by ignoring or simplifying just those complexities and ambivalences in human relationships that clinical workers thrive upon.

Just as in fairy stories the characters tend to be one-dimensional card-board cut-outs, symbolizing different moral positions … so in legal stories real-life characters tend to be portrayed

as caricatures. Moreover, as in fairy stories, legal stories contain a coded message or moral concealed in the narrative. The law's messages may be concerned with simple moral issues demonstrating, for example, how 'bad' parents lose their children or how 'innocent children' are protected against evil. However, the message is equally likely to celebrate the just nature of law itself. The law, for example, is fair because it protects the weak, rewards virtue and innocence, punishes the guilty, and seeks out where the children's best interests lie. …

2. Promoting the 'public interest'

The degree to which the legal system has a responsibility for maintaining social order and promoting the public interest over and above its responsibility towards the parties to a legal dispute is a matter of much discussion among lawyers. In practice, the public interest as interpreted by the judges tends to prevail over the private interests of litigants, witnesses, etc. This, however, can conflict with the legal principle that children's welfare shall be paramount. … Our position is that where there is a serious risk of harm to the child through use of the legal process, everything possible should be done to minimize that risk…

King and Trowell's third reason relates to **conflict management**: court processes can involve the expression of hostility and acrimony, and – because of the adversarial nature of Anglo-American court proceedings – in fact increase them. They continue:

4. The protection of rights …

Substantive rights: The legal process works relatively well as a protector of substantive rights when it is asked to rule upon issues arising out of a contractual arrangement, such as landlord and tenant or seller and buyer. It may also work well when faced with such quasi-contractual situations as teacher-pupil or trustee-beneficiary. However, it works far less well for those relationships which are based upon a complex interweaving of emotional and economic factors such as one finds in family issues. …. The suspicion remains, however, that the rights rhetoric is covering up vast areas of human experience which the law is ill equipped to tackle….

Procedural rights: … It would be wrong to underestimate the importance of … procedural rights for children in influencing social attitudes towards children and the importance of the law in ensuring that these rights are respected. However, … [t]here is a world of difference between using the formal legal process to ensure that decisions about children are made according to procedures that are fair and just to the child and using that process regularly to determine what course of action would best promote the child's welfare or best interests.

5. Establishing the facts

Many disputes that are brought to the legal system for resolution do not involve arguments about what the law says, but revolve rather around argument over what happened. Much of the legal process, therefore, is concerned with discovering 'the truth' about past events. Were promises made? Was the car going too fast? Were any blows struck? … The legal system, therefore, holds itself out to be not just a resource for determining disputes about the interpretation of laws, but also an institution where 'the truth' can be established. …

However, there is a down side to the Anglo-American preoccupation with establishing 'the facts' in court. … [T]he court's decision may be influenced by a number of different factors, including the inadmissibility of crucial evidence, the performance of witnesses in court and the selective perceptions of judges, magistrates or juries. What the court decides to be 'the facts' may not,

therefore, correspond with 'the truth' as recognized by others whose knowledge of the child and family is not confined by artificial rules or restricted to snapshot exposures …

The anti-legalism which characterizes many of these debates has been challenged by John Eekelaar:

J. Eekelaar (1995). 'Family Justice: Ideal or Illusion? Family Law and Communitarian Values'. *Current Legal Problems*, 48: 191, 198-203

King's conclusion that partnership between law and welfare professionals is doomed to failure seems to follow from the view that legal 'discourse' is impermeable. Placed within the legal process, judgments and concepts of non-legal origin are 'corrupted' by legal discourse. The apparent claim that legal processes are incapable of absorbing ideas from other disciplines has been seriously challenged, and King, in a re-statement of the 'autopoietic' position,[117] has explained that the theory does not deny that the *content* of law may be influenced by external factors. Rather, the theory asserts merely that the discourse of law inexorably reduces issues to categorization in terms of lawful/unlawful.
But just as legal discourse is not confined to courts, neither is all discourse within courts legal discourse:

> The boundaries of law are determined neither by the walls of the courtroom not by the reach of its long arm, but by the application to the external environment of the code, lawful/unlawful.

This, however, is to say no more than that statements of law necessarily adopt the conceptual categorizations of lawful/unlawful, legal/illegal: i.e. are statements of *law*. It is unfortunate that the rhetoric surrounding this unilluminating tautology may have misled some into thinking the theory was claiming more than it was. It is even more regrettable that the theory should be used to attempt to force the complex inter-relationship between the legal process and welfare-related disciplines into a theoretical straitjacket. It is, for example, hard to see how an evaluation by a court of a welfare report, or arguments over evidence whether upbringing by lesbian parents is harmful, are concerned only with past events or are adequately characterized by the lawful/unlawful, legal/illegal dichotomies. Furthermore, the representation of legal discourse by these dichotomies cannot capture the subtle gradations of legal propositions, which include principles and presumptions. Some look very like those which might be made by welfare professionals, such as the dictum by Balcombe LJ that

> It is well established by authority that, other things being equal, it is always to a child's welfare to know and, whenever possible, to have contact with both its parents. [*Re G (a minor)(parental responsibility order)* [1994] 1 FLR 505, 508]

It is true that the final order, entrusting the residence of a child to A or B, or allowing or disallowing contact, could be represented in reductionist form, but to subsume the entire process by which the decision was reached into that form is misleading. Indeed, despite his apparent wish to remove such decisions from the English courts, King has also advocated the French system where they are more directly under the control of a *juge des enfants* … This suggests that his objections to legalism are specific and contingent, and therefore amenable to empirical response, and not dictated by theory.
… I wish to offer two reasons why a legal process *of some kind* may be important in family matters.

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[117] Autopoietic theory describes the process by which one discipline – here law – adopts the knowledge of other disciplines, such as psychology, converting, or corrupting, it into a form 'understood' within the normal terms of that discipline's (law's) discourse; see King and Piper (1995), ch 2.

(a) Law, Coercion, 'Facts' and Procedure

A major reason for law's distinctiveness lies in the fact that use of the legal process carries the implication that, in default of prior resolution, institutional force will be applied against someone, either on behalf of another individual or on behalf of the state. Such coercion or potential coercion, always requires justification. Legalization, therefore, necessarily involves conceptualization of issues in such a way as to introduce normative standards which provide guidance as to the appropriateness of coercive intervention: hence the reductionism. The necessity for such justification extends to the so-called establishment of facts as well as outcomes. King and Trowell state that 'the legal system … holds itself out to be not just a resource for determining disputes about the interpretations of laws, but also an institution where 'the truth' can be established'. But lawyers well understand that courts make findings on the evidence; they do not claim to establish scientific truth. That is not to say that decisions should not be purportedly grounded on versions of 'the truth', and indeed it is a weakness of the anti-legalist thesis that it ignores, or underplays, the importance which people place on this element. But 'truth' is not to be pursued at any price… While endeavouring to maintain just procedures, the law has, rightly, limited its quest for establishing the 'facts' of certain intimate relationships; or it has, rightly, declined to visit extreme consequences on those relationships in the absence of sufficiently precise evidence. [Eekelaar then cites examples of cases where children had been removed from their homes on the basis of unsound medical evidence suggestive of abuse]….

(b) The necessity for rules

I wish, however, to make an even stronger argument for legalism. Apart from being untrammelled by procedural issues, King claims that a framework for decision-making by 'child psychiatrists, child psychologists and social workers' would be governed by 'child welfare knowledge' which, he claims, is a form of 'scientific knowledge' because it has an empirical base. Freeman and James have properly questioned the claim that this knowledge is 'scientific'. But even if it were, scientific knowledge does not in itself create norms for making decisions. Decisions are *necessarily* taken within a framework of rules and conventions.

Even a 'master-rule' that a decision should be 'best' for a child cannot be applied absolutely, for other interests may be at stake. In any event, outside extreme circumstances, it is an illusion to believe that we can calculate or predict outcomes which will be 'best', or even 'good', for people. Essentially, most decisions about children's upbringing are grounded upon conventions about the appropriate ordering of relationships… Unless we are to capitulate entirely to the discretionary power of a class of decision-makers, decisions…must be taken within a socially determined framework, such as that which the law provides. The issue becomes more important when it is necessary to decide what weight should be given to the opinions of state authorities or welfare professionals.

It may of course be argued that such rules and conventions are as likely to operate on welfare professionals as on courts, and indeed I believe they largely do. But when used by welfare professionals they operate silently; if not actually denied, they are not put forward for critical, public, justification. Courts may apply them inconsistently, but they do so in a framework where they may be detected and discussed.

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