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Imperatives and challenges in child and family law

Commonalities and disparities

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1.1 The goal of this volume is to explore the development of child and family law in a number of countries around the world – Australia, Canada, China, India, Israel, Malaysia, the Netherlands, New Zealand, Norway, Russia, Scotland, South Africa and the United States[1] – in the attempt to identify the imperatives and challenges that have driven it to its current position and those that are likely to determine its future direction. Each chapter is contributed by a leading child and family law scholar with expertise in the country under examination. In order to aid comparison, each contributor has adopted a common chapter structure.

1.2 Implicit in such a work is the rejection of any notion that child and family law is unsuited to comparative analysis. That notion has its roots in the very close connection between this area of the law and the moral, social, cultural, political and religious beliefs of the society in which it operates. Because of the particularly strong impact of these factors on child and family law, in contrast to, say, commercial law, a 'cultural constraints argument' is sometimes made, suggesting that child and family law in one society cannot be compared meaningfully with that in another.[2] Yet the problems of family life arise out of the nature of human relationships,

My thanks go to Craig Callery for his invaluable research assistance with this chapter.

[1] Sadly, personal circumstances prevented completion of the chapter on England and Wales. On occasion, developments there will be referred to in this chapter.

[2] W. Müller-Freienfels, 'The Unification of Family Law' (1968) 16 *American Journal of Comparative Law* 175, 175 ('family law tends to become introverted because historical, racial, social and religious considerations differ according to country and produce different family law systems'); D. Bradley, 'A Note on Comparative Family Law: Problems, Perspectives, Issues and Politics' (2005) 6 *Oxford University Comparative Law Forum* 4 (asserting that 'family law is political discourse' and pointing to 'variations in social and economic policy', reflecting 'differences in political culture and processes').

not out of nationality, domicile or place of residence.[3] Comparing how different legal systems address the creation, functioning, dissolution and ongoing interactions of families may tell us much about the nature of the societies in which they operate, their similarities and their differences.[4] In turn, this presents an opportunity to do more with the information, as it may well be that a solution found to a particular family law problem in one society offers an approach that could be adopted, to good effect, in another.

1.3 The suggestion that child and family law is unsuited to comparative analysis arises out of conflating comparativism and the very different objective of harmonisation. Comparativism is a benign process. It simply involves looking at how legal systems other than one's own address the issues at hand and considering whether any of the approaches taken might work better, in their original form or with adaptations, in one's own jurisdiction than what is currently available. Not only does it allow law reformers, lawyers and courts to learn from experiences elsewhere, it provides an opportunity to be critically selective, bearing in mind, of course, the need for internal consistency within a given legal system.[5] In short, comparativism asks no more than that one keeps an open mind

[3] H. D. Krause, 'Comparative Family Law – Past Traditions Battle Future Trends and Vice Versa', in M. Reiman and R. Zimmerman (eds.) *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006), p. 1101 ('For all their very real differences, nations around the world find themselves facing fundamentally similar dilemmas in defining and regulating the modern family. Accordingly, it makes sense to take stock of what has been tried and what has – or has not – worked elsewhere. Comparative family law's days as an unlikely pioneer are over'). For an economic perspective, see F. Nicola, 'Family Law Exceptionalism in Comparative Law' (2010) 58 *American Journal of Comparative Law* 777 at 810 ('To make sense of the market/family dichotomy, rather than overcoming, subverting or reproducing it, scholarly projects should show the interdependence between the law of the family and the market … scholars have highlighted that family law reforms should not be about only moral values and universal right, but just like reforms of the market, about their economic and distributive consequences as well').

[4] There is no shortage of advice on comparative methodology and pitfalls to be avoided. For a useful summary, see P. de Cruz, *Family Law, Sex and Society* (London: Routledge, 2010), pp. 33–7. See also K. Boele-Woelki, 'What Comparative Family Law Should Entail' (2008) 4(2) *Utrecht Law Review* 1.

[5] For competing views on whether family law is structured and how, see J. Dewar, 'The Normal Chaos of Family Law' (1998) 61 *Modern Law Review* 467 and the reply, M. Hennaghan, 'The Normal Order of Family Law' (2008) 28(1) *Oxford Journal of Legal Studies* 165, a review article of J. Eekelaar, *Family Law and Personal Life* (Oxford University Press, 2006).

and is willing to consider other ways of doing things.[6] Unsurprisingly, it has long been employed in reform of child and family law, undoubtedly aided by the many excellent scholarly works on the subject.[7]

1.4 Harmonisation of substantive law is not a benign process since its primary goal is standardisation. Inherent in achieving this end is compromise: of negotiating; of finding the middle ground; and of accepting less-favoured outcomes on some issues in return for more-favoured outcomes on others. That it can be done in respect of aspects of child and family law is demonstrated by the Nordic countries.[8] Whether that experience can be carried through on a larger scale is questionable. It was never the purpose of this book to engage in the debate over whether global harmonisation of substantive child and family law is a worthwhile exercise.[9] Nor is this the place to address the very local question of harmonisation within the European Union, discussed so extensively elsewhere.[10] Suffice it

[6] In the past, of course, legal transplants occurred, not only by choice in the host legal system, but as a result of colonisation, sometimes leading to the temporary or permanent obliteration of the indigenous legal system. See paras. 1.31–1.33 below for discussion of the increased recognition of customary law.

[7] See, in particular, A. Chloros, M. Rheinstein and M. A. Glendon (eds.), *International Encyclopedia of Comparative Law*, Volume IV, *Persons and Family* (Tübinger: Mohr Siebeck, 2004). See also, M. A. Glendon, *The Transformation of Family Law: State, Law and Family in the United States and Western Europe* (University of Chicago Press, 1989); S. N. Katz, J. Eekelaar and M. Maclean (eds.), *Cross Currents: Family Law and Policy in the United States and England* (Oxford University Press, 2000); de Cruz, *Family Law, Sex and Society*.

[8] As Sverdrup notes, at para. 10.12 below, that process started at the beginning of the twentieth century with no-fault divorce. See also P. Lødrup, 'The Reharmonisation of Nordic Family Law', in K. Boele-Woelki and T. Sverdrup (eds.), *European Challenges in Contemporary Family Law* (Antwerp: Intersentia, 2008), p. 20. For a comparison between EU and Nordic efforts at harmonisation from a gendered perspective, see A. Pylkkanen, 'Liberal Family Law in the Making: Nordic and European Harmonisation' (2007) 15(3) *Feminist Legal Studies* 289.

[9] In *Model Family Code from a Global Perspective* (Antwerp: Intersentia, 2006), Preface, p. v, Ingeborg Schwenzer (in collaboration with M. Dimsey) sets herself the somewhat ambitious goal of seeking to 'remove all discrepancies persisting in national family laws due to different historical levels of – somewhat patchwork – development, and to create a wholly autonomous and consistent system of family law based on modern solutions'.

[10] See M. Antokolskaia, 'Harmonisation of Substantive Family Law in Europe: Myths and Reality' (2010) 22(4) *Child and Family Law Quarterly* 397; D. Bradley, 'A Family Law for Europe? Sovereignty, Political Economy and Legitmation' 4(1) *Global Jurist Frontiers*, available at: www.bepress.com/gj/frontiers/vol4/iss1/art3/; M. R. Marella, 'The Non-subversive Function of European Private Law: The Case of Harmonization of Family Law' (2006) 12(1) *European Law Journal* 78. Some thirty volumes, many of them collections of essays, have been published to date by Intersentia, in collaboration with the Commission on European Family Law, in its *European Family Law* series. See

to note that when he described 'a hopeless quest', involving the work 'more of a Sisyphus than a Hercules',[11] Otto Kahn-Freud was referring to harmonisation of family law, rather than comparative analysis of it.

1.5 What emerges from the various jurisdictions considered in this volume is often subtle and nuanced but, then, the diversity of family relationships with which any legal system must deal is rich and varied. A number of common themes emerge from most or all of the country-specific contributions, with systems converging and diverging on particular issues. Aspects of these themes – organised under the broad headings of equality, increased respect for children's rights, protection, diversity in adult relationships and the impact of developments in assisted reproductive technology – are discussed below to give a flavour of the rich pickings to be found in the chapters that follow. It goes without saying, but will be said, nonetheless, that this introduction simply offers a taste of what follows and each of these chapters will reward reading in its entirety.

1.6 Given the hazardous nature of speculating about the future, the contributors are to be commended for their courage in gambling on what some academics see as the greatest of all risks – the risk of being wrong. What, then, do the contributors see as driving child and family law forward in their respective countries? Often the answers are issue-specific, but a fairly constant theme is that many of them believe that the same imperatives that have driven child and family law to date will be the operative drivers of its future development: that there will be a process of linear development.

1.7 That suggests that existing divergence between jurisdictions may be magnified. In this, there is something of an assertion that 'Western' ways of doing things are not the only, nor the best, approach. As the Constitutional Court in South Africa pointed out, in the context of the rights of non-marital fathers, a 'nuanced and balanced consideration of a society in which the factual demographic picture and parental relationships are

particularly, K. Boele Woelki (ed.), *Perspectives on the Unification and Harmonisation of Family Law in Europe* (Antwerp: Intersentia, 2003); M. Antokolskaia, *Harmonisation of Family Law in Europe: A Historical Perspective: A Tale of Two Millennia* (Antwerp: Intersentia, 2006); K. Boele-Woelki and T. Sverdrup (eds.), *European Challenges in Contemporary Family Law* (Antwerp: Intersentia, 2008).

[11] O. Kahn-Freud, 'Common Law and Civil Law – Imaginary and Real Obstacles to Assimilation', in M. Cappelletti (ed.), *New Perspectives for a Common Law of Europe* (Leyden: European University Institute, 1978), pp. 141 and 142.

often quite different from those upon which "first-world" western societies are premised'[12] was required in assessing the matter there. Similarly, the Malhotras point out that 'India has its own deeply embedded moral and cultural values and emulation of Western principles in matrimonial matters should be approached with the greatest caution'.[13] Given international mobility and communication, an appreciation of racial, ethnic, religious and cultural diversity will become increasingly relevant to the 'first-world' nations, something understood by Atkin, speaking of New Zealand, when he notes 'The Western model can no longer be taken for granted … Flexibility rather than black and white rules may well have its merits in enabling diversity to be appropriately embraced'.[14]

1.8 Before we turn to the imperatives and challenges, it may be helpful to set the scene by giving the reader a brief overview of the law-making process and operation of the legal systems under discussion and by placing child and family law in its international context.

A The legal systems and the context

The domestic context

Law-making

1.9 While government itself may initiate law reform, proposals for innovation in child and family law often come from, or via, a standing law reform commission or a committee appointed to examine a specific topic.[15] Of course, the fact that the issue is being examined at all will often be the result

[12] *Fraser* v. *Children's Court, Pretoria North* 1997 (2) SA 261 (CC) para. 29, discussed by Heaton, at para. 13.27 below.

[13] Para. 5.58 below. [14] Para. 9.3 below.

[15] New Zealand, Scotland and South Africa have standing law reform commissions, although their existence does not preclude the use of ad hoc committees. While Australia has a law reform commission, another body, the Family Law Council, is the driving force in family law reform. Some provincial law reform commissions remain in Canada, but others and the federal equivalent were disbanded and reliance is placed on specially appointed committees. In India the law commission is established for a fixed period of time, with the current commission serving for the period 2009–2012. In the United States the Commissioners on Uniform State Laws and the American Law Institute produce draft laws available for adoption, in whole or in part, by individual states. In Israel, the Netherlands, Norway and Russia use is made of committees appointed to deal with specific issues. The China Association of Marriage and Family Studies is the key agency in terms of reform of statute there.

of lobbying efforts by groups and individuals with an interest in the outcome. Those who are sufficiently motivated have another avenue in those parts of the United States where citizen-initiated legislation is built into their states' legal systems through the 'ballot initiative' process.[16] A rather more anodyne approach is found in Scotland through the possibility of lodging a petition in support of a desired reform with a committee of the Scottish parliament.[17]

1.10 The court structure is, of course, jurisdiction-specific. Where the applicable family law is governed by an individual's religion, most or all disputes will be addressed before the appropriate religious court, although the civil courts may also have a role.[18] While many of the secular jurisdictions have dedicated family courts, others do not, with family-related litigation being dealt with in the ordinary courts, whether adversarial or inquisitorial in nature. Increasingly, various forms of alternative dispute resolution are employed in child and family law cases.[19]

1.11 There is wide variation in the interaction between the courts and the legislature in developing child and family law in the various jurisdictions. At one end of the spectrum is India, where the Supreme Court has constitutional authority to declare law,[20] something the Malhotras note is particularly valuable in light of delays in the legislative process.[21] At the other end is the United States, where Melli points to accusations of 'judicial activism' being levelled at courts by critics of their decisions, particularly those supporting same-sex marriage and reproductive rights.[22] In South Africa[23] judicial reform is viewed more favourably, by Heaton, as a by-product of a constitution containing a bill of rights, while in Israel Schuz and Blecher-Prigat describe the judiciary as fulfilling a crucial role in bridging the gap between religious law and modern secular philosophy.[24] Vlaardingerbroek is equally positive about the role of the courts

[16] A typical model requires that the requisite number of voter signatures in support of a proposition be collected. The proposition is then put on the ballot at the next election. If the majority of those voting approve the proposition, the legislature is bound to introduce legislation implementing the proposition. See further, W. E. Adams, Jr, 'Is it Animus or a Difference of Opinion? The Problem Caused by the Invidious Intent of the Anti-Gay Ballot Measures' (1998) 34 *Willamette Law Review* 449.

[17] Whether the proposal goes forward is at the discretion of the committee and, even then, the Scottish parliament is not obliged to act upon it. See para. 12.10 below.

[18] See para. 1.27 below. [19] Para. 1.17 below.

[20] Art. 141 of the Constitution of India provides: 'The law declared by the Supreme Court shall be binding on all courts within the territory of India.'

[21] Para. 5.80 below. [22] Para. 14.2 below. [23] Para. 13.9 below.

[24] Para. 6.74 below.

in the Netherlands, noting that 'legislators can barely keep up with modern social changes, leaving much to the judiciary'.[25] A less rosy picture is painted by Bates when he observes that tensions exist between policy-makers, legislators and the courts and notes 'a tendency for courts, particularly the Family Court of Australia, to undermine particular legislative goals'.[26] Even where courts might claim that they are simply applying the law, as enacted by the legislature, there is no denying the contribution that the former can make to development of the law. Rogerson demonstrates this process at work in Canada, where a series of lower court decisions led, ultimately, to the introduction of same-sex marriage.[27]

Access to legal advice

1.12 In almost all of the jurisdictions discussed, there is some provision for legal aid to enable those who cannot afford to pay for legal advice and representation to receive at least some legal services at state expense. However, there is an almost universal lament over the inadequacy of provision and the fear that matters are only likely to get worse. Norway stands out as the lone exception, with Sverdrup noting that less-stringent financial thresholds for access to legal aid have been proposed there.[28]

1.13 The problem of access to legal advice is exacerbated by another common concern – the complexity of the law itself. As Sutherland observes, in Scotland the absence of a single child and family code, combined with the proliferation of statutory provisions and court decisions, 'renders aspects of the law almost impenetrable to all but the most determined lay person'.[29] Discussing financial provision on divorce in Australia, Bates observes that 'The system resembles a patchwork quilt, with a rather confused chameleon lost on it'.[30]

Dispute resolution

1.14 Legal systems are, inevitably, a product of the culture and politics in which they are situated and nowhere is that illustrated better than in the approach to dispute resolution. All of the legal systems discussed in this volume envisage some role for the courts in family proceedings, but the precise scope and timing of that role varies, with courts being seen increasingly as the destination of last resort.

[25] Para. 8.1 below.
[26] Para. 2.1 below.
[27] Para. 3.48 below.
[28] Para. 10.14 below.
[29] Para. 12.8 below.
[30] Para. 2.53 below.

1.15 Occasionally, in the divorce context, there must be an attempt to repair the relationship before recourse to the courts is competent. In Malaysia, for example, Awal notes that divorce must be preceded by conciliation, designed not simply to resolve outstanding disputes on issues like property, but to effect reconciliation between the parties.[31] Similarly in India, attempting reconciliation is an inherent part of the divorce process.[32] In most of the other jurisdictions there is no legal requirement that a couple seeks to repair a damaged relationship before moving to terminate it.[33]

1.16 A particularly clear reminder of the importance of a legal system's cultural roots comes from China, where Palmer observes that 'Confucian values of compromise, reconciliation and community interests predominated in traditional China's approach to dispute resolution',[34] explaining the long-standing use of community and judicial mediation. In addition, in countries with a Western legal system, if such a generalisation may be permitted, the indigenous population may have continued to employ its traditional methods of dispute resolution.[35] In New Zealand the Maori model of family group conferencing is now being embraced by the mainstream dispute resolution process.[36]

1.17 Alternative dispute resolution (ADR) is now employed in all the jurisdictions in our enquiry, either as a means of diverting the dispute from the court system or, where the dispute has reached the court, resolving it without resort to the traditional adversarial or other court process. The forms of ADR available vary with the country, of course, but they include counselling, out-of-court mediation,[37] judicial mediation,[38] collaborative law[39] and comprehensive support

[31] Paras. 7.13ff. below. [32] Para. 5.17 below.
[33] So, for example, in Russia, while a case can be continued for reconciliation to be attempted, Khasova describes the process as often being 'just a formality and only delays the final decision': para. 11.38 below.
[34] Para. 4.7 below. [35] As occurred in South Africa; see para. 13.11 below.
[36] See para. 1.31 below.
[37] See the Netherlands (para. 8.9), Norway (para. 10.13), Scotland (para. 12.11) and the United States (para. 14.15).
[38] See New Zealand, where Atkin describes the process as 'not genuine mediation but more like a settlement or pre-trial conference': para. 9.20 below.
[39] Scotland (para. 12.11) and the United States (para. 14.16). Assistance is also provided in a number of state courts in the United States to help *pro se* litigants negotiate their way through the legal process (para. 14.17), something that may be particularly important since the recent US Supreme Court decision in *Turner* v. *Rogers*, 131 S.Ct. 2507 (2011),

services,[40] often wholly or party funded by the state. The growing popularity of ADR is motivated by a belief that it offers a kinder, more constructive way to address family conflict, avoiding the delay and acrimony often associated with litigation, something that becomes particularly important when the adult parties will continue to be involved with each other as parents. There is also the attraction of saving on the costs associated with protracted legal disputes.[41] Indeed, it is the fact that 'litigation in Russia is cheaper and faster than in the West', combined with the fact that mediation is not embedded in the culture, that leads Khasova to conclude that it may take some time there to raise public and lawyer awareness of the benefits of mediation.[42]

The international context

1.18 It is easier to move around the world than it used to be and the cost of international travel makes it an option for many who would not have been able to afford it in the past. In addition, international communication has become much more accessible. Individuals and families take advantage of these developments to relocate to another country, temporarily or permanently, while others use the opportunities presented for a particular purpose, like obtaining medical treatment not available in their home country or adopting a child from abroad. This mobility has presented challenges to child and family law, or at least challenges on a scale unknown hitherto. The international community has sought to address some of them through international instruments. However, problems remain and the contributors to this volume address issues faced in their legal systems as a result of increased international mobility.

holding that there was no right to counsel in civil cases even where resulting contempt proceedings could result in imprisonment.

[40] See Australia (para. 2.8), Canada (para. 3.11) and Israel (para. 6.8).

[41] Another way to reduce the cost associated with relationship breakdown is to use an administrative process for the divorce itself, leaving outstanding disputes over the care of children and property to be addressed by alternative dispute resolution mechanisms or the courts. What is actually or effectively administrative divorce is available, at least for certain kinds of cases, in Norway (paras. 10.16 and 10.66), Russia (para. 11.61) and Scotland (para. 12.53) and is being considered in a number of other countries, including the Netherlands (para. 8.64).

[42] Paras. 11.19–11.20 below.

International instruments

1.19 International instruments in the field of child and family law serve a variety of purposes. They may seek to promote common standards around the world, with the goal of ensuring equal respect for the human rights of all. The Universal Declaration of Human Rights[43] is a good example of an attempt to get broad, general consensus, in principle, while the International Covenant on Civil and Political Rights (ICCPR)[44] seeks to establish more specific and enforceable human rights standards, something elaborated upon in respect of specific groups in the United Nations Convention on the Elimination of Discrimination Against Women[45] and the United Nations Convention on the Rights of the Child.[46] It is worth noting, however, that these instruments do not seek harmonisation of the law itself. While the conventions require compliance with their principles and rules, they largely leave it to states parties to implement and enforce these standards.

1.20 Another function of international instruments is to establish a system for international cooperation on specific issues where the international dimension has given rise to problems in the past. Thus, for example, the Hague Convention on Civil Aspects of Child Abduction[47] established a system for international cooperation, designed to ensure the prompt return of an abducted child to his or her home jurisdiction, removing the incentive for an aggrieved parent to remove the child in the first place. The effectiveness of the system, combined with recent instances of parental child abduction, prompted Russia to ratify the convention in June 2011.[48] Similarly, the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption[49] sought to address a number of concerns that had arisen over inter-country

[43] UN Doc. A/RES/217/111.
[44] 999 UNTS 171, ratified by all of the countries examined here except China and Malaysia.
[45] 1249 UNTS 13, ratified by all of the countries examined here except the United States.
[46] 1577 UNTS 3; (1989) 28 ILM 1448, ratified by all of the countries examined here except the United States.
[47] 25 October 1980, HCCH 28. All the countries examined except China, India and Malaysia are parties to it and legislation before the Indian parliament would pave the way for ratification: paras. 5.36–5.37 below.
[48] Para. 11.40 below.
[49] 29 May 1993, HCCH No. 33. The earlier attempt to regulate international adoption, the Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption, 15 November 1965, HCCH 13, was not a success since only Austria, Switzerland and the United Kingdom ratified it.