Family Law and Family Realities

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Family Law and Family Realities: Introduction

Masha Antokolskaia[*]

This book contains a selection of papers presented at the 16th World Conference of the International Society of Family Law (ISFL) that took place from 25 July to 29 July 2017 at the *Vrije Universiteit* of Amsterdam in The Netherlands. The selection has been made on the basis of the merits of the contributions, bearing in mind geographic representation, inclusion of both established and beginning scholars and authors with different views and convictions.

The Conference "Family Law and Family Realities" was dedicated to exploring whether existing national and international family law adequately reflects the rapidly changing realities of modern family life. It is a cliché to say that family realities are changing rapidly in all parts of the world; even since the turn of the millennium substantial changes have taken place in the field of traditional as well as non-traditional family settings. Unmarried cohabitation has increased; new family forms have emerged; same-sex marriage; the high divorce rate, high-conflict divorce and problematic post-divorce parenting have received increased attention; new reproductive techniques, surrogate motherhood and the rights of transgender and intersex persons are high on the agenda; there is growing awareness of domestic abuse and child abuse and many more changes have proven to be an ongoing challenge for contemporary family law. Westernized countries, for instance, are faced with the major demographic challenge of "ageing": due to a decreasing birth rate and longer life expectancy the median age of the population has risen, creating a larger group of elderly people with their own specific demands for empowerment and protection.

In different parts of the world, academic lawyers and practitioners alike are no longer content to regard family law in isolation outside its social context. Concern about the correlation between family law and family realities have triggered a growing interest in empirical research involving both lawyers and social scientists. The aim of this Conference was to bring together experts in family law and social science research who are interested in exploring the correlation between family law "in the books" and family law "in action". This book is one of the results of that endeavour.

The question that the authors of this volume are trying to answer is whether international and national family laws still adequately reflects these changing realities. The international nature of the Conference reflected in the composition of this book enables us to

* Masha Antokolskaia, Professor of private and family law at *Vrije Universiteit* of Amsterdam, The Netherlands, the convener of the 16th ISFL World Conference.

examine the issues in different geographical, political, social, cultural and religious settings (e.g. "western"/"non-western", religious/secular, modern/traditional). This book gives a broad overview of how law relates to actual practices and needs of different types of families (e.g. married and unmarried couples with and without children, different- and same-sex, blended, extended, parallel and polyamorous families) and of various types of family members (e.g. adults, children, elderly persons, persons with disabilities and members of sexual minorities).

Dealing with the issue of whether there still is a match between family law and family realities confronts policy makers with many challenges. What to do if there is no match? Is it a problem if the law is lagging behind? It is clear that not every change in family practices is desirable and should be automatically reflected in the law. After all, the law is also an important policy instrument and is used by society for promoting desirable developments and discouraging or even banning undesirable ones. However, determining what changes are desirable and should be promoted and what changes are undesirable and should be discouraged is a demanding normative quest. As many areas of family law are highly ideologically sensitive, the answer to this question largely depends on the political orientation of the policymakers involved.

Along with the old dilemmas, related to the political sensitivity of family law, the contributions in this book also focus on the new ones. These new dilemmas are of a less controversial and more pragmatic nature and arise when the first normative question has been answered. Once policymakers have decided which changes should be promoted by law and which should be rolled back, the following question arises: "How should this legal change be operationalised?" This follow-up question is of course also not entirely new, but, growing use of a multidisciplinary approach has now made it more explicit and pertinent. Before drafting a law or elaborating a new policy present-day legislatures and policymakers tend to first enquire what works and what does not and what are the preconditions for successful legal intervention. This book provides a variety of examples of how both the normative and the pragmatic dilemmas are currently being dealt with in a whole range of family-law settings in various parts of the world.

The book commences with a Part on several overarching themes that will be coming back throughout the other Parts. This Part I presents fine snapshots of the current ideological and political dilemmas in the family law context. It shows that the ideological and political divide, that has split each and every Westernized society into progressive and conservative camps[1] since the Enlightenment, is still in place. Moreover, in some jurisdictions, such as the USA, the divide has becomes even more pronounced in the last decades. Max Rheinstein's metaphor, that ever since the French Revolution France has been split

1 M. Antokolskaia, *Harmonisation of Family Law in Europe: A Historical Perspective. A Tale of Two Millenia,* Antwerp, Intersentia, 2006.

up into "*les deux Frances*" – one progressive and one conservative[2] – is today equally applicable to the USA. This country is now divided into "two separate countries", populated by two different kinds of families[3]: "the blue families" and " red families",[4] with different political views, levels of economic welfare, family values, and family forms. The divide between those families largely coincides with the divide between the two main political parties: the democrats ("blue") and the republicans ("red").[5] Blue families of the college-educated middle class are characterised by late marriages, higher marital rate, more stable marriages, the first-career-then-children attitude, equal parenting, greater reliance on family planning and contraception and low birth rates. The majority of the red families is represented by working class and poor families and is characterised by declining marriages and high divorce rates. There is a link between growing economic inequality in USA society and growing family inequality.[6]

Another overarching theme taken up in the first Part of this book concerns the great trio from the heritage of the Enlightenment: personal autonomy, self-determination and the right to the pursuit of happiness. This subject is addressed in two different contexts: in the context of the abolition of discrimination and in the context of tensions between the right to the pursuit of happiness and personal autonomy, and responsibility for others.

Using the example of Germany, it has been shown that growing acceptance of sexual and gender diversity has led to an increasing degree of autonomy afforded to homosexual as well as transgender and intersex persons in Westernized parts of the world, which has enabled them to enter into marriages or legally registered partnerships and to adopt children.[7] These changes have had and continue to have significant impact on such fundamental notions of family law as marriage and parenthood.[8]

It has also been shown that even apparently indisputable values can have drawbacks once placed into the context of the responsibility of parents for their children. The pursuit of happiness and romanticized ideas of marital happiness can lead to exalted expectations of happiness in marriage. And if "a person is not 'happy' with a spouse, the person may seek a divorce, a new partner, a new location or a new lifestyle."[9] Adults can exercise their rights to autonomy and pursuit of happiness by choosing for less stable relationship forms, single parenthood, divorce and re-partnering, but the children have to bear the economic,

2 M. Rheinstein, *Marriage Stability, Divorce, and the Law*, Chicago, Chicago University Press, 1972, p. 195.
3 L.D. Wardle, 'Trends, Values, and Changes in Families and Family Law in the USA: Towards Realism, Idealism or Confusion?'.
4 N. Cahn & J. Carbone, *Red Families v. Blue Families. Legal Polarisation and the Creation of Culture*, Oxford, Oxford University Press, 2010.
5 Ibid.
6 L.D. Elrod, 'Changing Families and the Need for Policy to Protect Children'.
7 N. Dethloff, 'Personal Autonomy and Legal Recognition of Sexual and Gender Diversity - The German Perspective'.
8 Ibid.
9 Elrod, op cit, n. 6.

social and emotional consequences of these choices. "Easy come, easy go marriage and casual cohabitation and procreation are on a collision course with the economic and social needs of children."[10]

Last, but not least, an overarching theme addressed in this Part is the relationship between the secular state and religion, in particular Christianity, and the Church in the present-day world. Using the Brazilian example, it is argued that the solution to the existing tension between the secular state and the Catholic Church should be sought in mutual respect and greater tolerance on both sides. It is further suggested that, on the one hand, the state should show more respect for the religious freedom of its subjects, including freedom to choose for traditional family forms and traditional family values. On the other hand, the Church should become more tolerant towards non-traditional family forms and family values. It is emphasised that

> it is not a Christian value to deny the happiness of another because of individual choices, or to exclude a person from protection because he is different or belongs to a non-traditional family form, [as] the essence of Christianity is inclusion, not segregation.[11]

The book is further divided into Parts each covering a rather broad theme.

Part II "Relationship Recognition: Responding to Family Diversity" deals with issues concerning the legal recognition of same-sex unions; the lack of legal regulation of cohabitation outside marriage; the role of certification of marriages in African pluralistic legal systems and the legal position of the members of parallel and polyamorous families.

Part III "New models of Parentage" addresses the legislative responses to both new challenges, such as surrogate motherhood, change of gender identity and further advancement of assisted reproductive technologies; and traditional challenges, such as stepparent families and stepparent adoption.

Part IV "Family Relationships and Financial Obligations" concentrates on the issues of child maintenance, including empirical evaluations of child maintenance schemes across different welfare models; the role of spousal maintenance in Bulgaria; the effect given to marital agreements in Portugal; and the gap between the real financial needs that exist after divorce and the relief provided by Italian law.

Part V "Regulating the Parent-Child Relationship When Parents Live Apart" focuses on various issues of post-divorce parenting such as parental responsibility; parenting

10 H.D. Krause, 'Child Support Reassessed: Limits of Private Responsibility and the Public Interest', *Family Law Quarterly*, Vol. 24, No. 1, Spring, 1990, pp. 1-34 at 16, cited by Elrod.

11 I.N. Paranaguá Carvalho Drumond, 'A Dialogue between Freedom of Religion and the Rights of Families'.

agreements regarding parental responsibility; and problems with contact between children and non-resident parents.

Part VI "Protecting Children's Rights and Interests: New Challenges" covers a whole range of child-related matters, including early interventions aimed at protecting vulnerable children; use of the concept of the best interests of the child; children with atypical gender identity; the negative influence of surname policies on the wellbeing of the children with double nationality in Italy; the protection of children on the internet; practice and legislation in the context of domestic abuse against children in China; child-headed households in the African setting; and guardianship for children in a migration context.

The last Part (VII) "Families and Care for Dependants" addresses the issues related to care for the elderly and persons with disabilities. Special mention has to be made of the chapter by Veerle Vanderhulst: "Taking Care of Rain Man: Interaction between Parental Estate Planning and Disability Benefits", which was awarded the ISFL Early Career Researcher Prize 2017.

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