Introduction

MAVIS MACLEAN

The members of the Family Group of the Research Committee on the Sociology of Law have been thinking hard about the place of family law in society for many years now, starting from concerns about the relationship between law, family and the state, then looking at specific issues, including parenting after separation and divorce. More recently we have looked at the broader problems of delivering access to family justice in times of austerity, complicated by the need for a justice system to be able to help individuals and families with a diverse range of values and expectations. Our last volume, *Digital Family Justice*, looked at the rather varied contribution being made by the use of technology to developing cost-effective digital justice.[1] This volume has arisen in the context of continuing widespread concern about increasing demand for access to family courts, and the public and private costs which follow, and tries to raise and address the questions which might help us to find a way through this barrier to achieving access to justice. If we wish to move on from focusing on policy questions which only look at how to cut costs, we will need to step back and think first about what it is that we want from a family justice system? And only then consider how such a service could be provided in a cost-effective way.

This introduction sets out the work of the 2020 IISL Workshop convened by a group of family lawyers, mainly members of the RCSL Legal Professions Working Group, who set out to take the first step of asking: What is a family justice system for? What is it asked or expected to achieve? And how might this work be evaluated across a number of jurisdictions in Europe, and also in Australia and Canada? In *Digital Family Justice* published in the IISL Hart Series in 2019, we began by tracing concerns about the attempts to promote Alternative Dispute Resolution (ADR), which had developed in order to enable those with family disputes to reach a settlement without using traditional court-based decision-making, but instead working with a skilled and impartial mediator. Sadly these attempts, although supported by a number of governments in the hope of reducing conflict and increasing acceptance of personal responsibility, as well as reducing demand for costly court process, have failed to gain widespread support. This may be because mediation requires the parties

[1] Maclean and Dijksterhuis (2019); see also Maclean and Kurczewski (1994); Maclean (2005).

to do the work of rethinking and compromising, without a 'champion' to give a party confidence by supporting their individual position. There has also been concern about ADR as a move towards 'private ordering' whereby parties can reach a decision which they and society as a whole may accept, but which may not necessarily be supported by a legal framework, for example concerning gender equality in financial arrangements after divorce. Then followed attempts to modernise family justice by moving from ADR to developing Online Dispute Resolution (ODR) – making greater use of technology to provide legal information and advice as well as administrative support, in order to reduce pressure on court time. Here too the degree of success was limited, as information without advice and support in taking the next step to resolve a matter was not enough in most cases. After the onset of the Covid-19 pandemic in early 2020 remote court hearings became increasingly important for family matters, as many courts closed except for hearings online.

But these earlier discussions on the alternatives to court, both ADR and ODR, have helped us to understand that dispute resolution is only part of what is needed by those who approach a family justice system. If we start by looking at the people who are seeking the help of the courts, we can see that they are experiencing a major life change, such as divorce, with particular difficulties if they are parents, and they are likely to be confronted by challenging decisions about how to manage their financial arrangements as well as the care of their children. If problems arise these may be resolved privately, perhaps with the help of family and friends, or they may develop into disputes which reach high levels of conflict requiring external intervention. In what follows we wish to explore at what stage, and in what way, a family justice system becomes involved in these private matters, as well as in the public duty to protect children.

A number of questions have arisen: Does a family justice system have functions other than decision-making in dispute resolution, whether traditional, alternative or digital in form? Might a family justice system help to prevent or minimise conflict as well as resolve dispute when it arises? How might a family justice system develop such functions in a period of austerity, medical emergency and limited public funding? Could these kinds of interventions by a family justice system be offered through direct provision, with referral to other services, or by acting as a hub for information enabling increased self-help? What is the level of responsibility to be accepted by a family justice system to provide help and support directly or indirectly? Above all, we ask whether a justice system can embrace a welfare function? If so, where does the boundary lie between justice and welfare and where can the necessary resources and experts be found? Does public responsibility extend beyond protecting the vulnerable, often meaning women, children and those who lack legal capacity, to include public involvement in private quarrels? Or might a family justice system withdraw from the private sphere, perhaps using legislative reform to promote private autonomy by clearly imposing defined financial obligations after divorce, or by requiring structured

individual responsibility for decision making through mediation rather than adjudication? Should we add to our consideration of what we may call the Welfare Justice Axis a second complex relationship evidenced by the emerging debates about the relationship between autonomy and economy? Might a more proactive family justice system, accessible early in the development of a problem into a dispute, be costly at the point of use but cost-effective over time by saving public money at a later stage when more substantial intervention by other services such as health or education could otherwise be required? In addition, we see an ongoing tension between the dominant trend towards privatisation, whether sought for its own sake or because it is thought to save resources, and the need to maintain control in cases of domestic violence and child abuse. From country to country different configurations are emerging.

From our earlier work on access to family justice[2] we have already learned a great deal about different ways of responding to family matters where the law offers a framework for resolution. We saw how ADR, even though not used as widely as policy makers had hoped in many jurisdictions, can help to broaden the focus of justice to think more about problems as well as disputes, how the child-centred approach in Scandinavia enables parenting issues to be dealt with by expert welfare services rather than courts, and how financial advice services have been developing online to help families make the best use of their available resources. At the Workshop, held at a time of crisis during a pandemic, we could see an urgent need to ask more clearly the underlying question: what is the role of a family justice system? But even the well-evidenced and clearly argued research papers presented at the Workshop cannot, of course, provide a single answer. It is indeed rarely the sole purpose of research to provide answers, but as can be seen from our previous work, what we can do is to generate the next set of difficult but essential questions. Here we ask what a family justice system can offer, and how to set about the work needed, bearing in mind that family justice is very different from other parts of the justice system. Family justice looks to the future, not the past. In criminal justice the important question is what an individual did or did not do on a particular day. In family justice the focus in children cases is on the best interests of the child, ie what a number of individuals are likely to do in the future. This is a far wider and less clearly defined remit, which requires reaching out and asking for a range of information and nuanced advice in coming to a decision, rather than being limited to a precise view of a specific act. At the same time, in matters of family finance there may be wider societal issues about whether the justice system should be promoting a particular form of financial relationship between spouses, during or after a marriage, whether to rely on existing norms, or whether to strive to move forward towards greater gender and age related equalities.

[2] See Maclean, Eekelaar and Bastard (2015); Maclean and Eekelaar (2016).

I. STRUCTURE OF THE VOLUME

In Part 1 the contributors look at the boundaries of a family justice system in different jurisdictions, and the place of public and private values in a legal framework. Part 2 looks at those who take part in a family justice system, whose who work there and those who use a family justice system. Part 3 looks at different ways of working within a family justice system and raises the question of whether the move towards privatisation derives from the intrinsic value of individual autonomy, and acceptance of responsibility in family matters, or whether it is more often a response to the increasing burden on the state of providing a welfare-minded proactive family justice system. Finally, in Part 4 we hear of some of the major changes of direction for the family justice systems in Australia, Argentina and Germany. Our concluding chapter incorporates the wise words of Justice Encarna Roca Trias, Deputy President of the Constitutional Court of Spain, and a distinguished family law scholar, who emphasises the permanence of the fundamental role of the judiciary, and the immense importance of the need to guarantee the human rights of those who are experiencing a family law conflict.

A. Part 1 Boundaries – Defining the Function and Purpose of a Family Justice System: Justice and Welfare?

We begin with Rachel Treloar's account (chapter one) of the impact of recent attempts in Canada to develop new ways of working with post separation parenting disputes, by providing additional services outside the court. Treloar draws on her own work in British Columbia with highly conflicted separated parents, and describes the new potentially helpful ways of making court more accessible and friendly with new information and early resolution services. But sadly this approach has left those who still need the help of the court with few places to turn to. The range of services include parenting education, mediation and collaborative law, as well as arbitration, parenting coordination, expert assessment and children's lawyer. But the parents must use their own resources to access these services, and if they fail to resolve their problems the court has become the place of last resort, with the remaining state funding being used for ADR and online information, neither of which are enough to help parents with complex or high-conflict problems. Treloar suggests that it would be more prudent to ensure that all families receive sufficient help to navigate difficult family cases, especially given the high financial health and social costs of litigation. The dominant approach is to 'nudge' parents towards out-of-court resolution, and under the forthcoming federal Divorce Act, parents will have a *duty* to attempt to do this. But reforms which emphasise individual problem solving and remove family disputes from formal justice change the very meaning of justice, Autonomy and Economy may prove a dangerous alliance.

In chapter two we hear of a very different way to try to maintain a minimal role for the family courts in the Danish system by relying on a larger administrative component provided by the state. Annette Kronborg and Christina Jeppesen de Boer describe how a Family Court has recently been added to the system based on the Family Law House with a new mandatory triage process which identifies 'green' cases needing information, 'yellow' cases which also need help including counselling or mediation, and the urgent 'red' cases which need immediate referral to court. The triage follows on from self-referral, and is completed online. The aim is a holistic, unified and focused system with a child-centred approach. To the outsider it appears an attractive model, providing welfare with justice and autonomy with economy. But sadly in practice there are still some practical problems with communication and cooperation between the existing agencies that have been brought together in this attempt to provide a holistic service, and there is continuing tension between the aims of promoting the welfare of the child and respecting the rights of the adults.

The second two chapters in Part 2 look at the gap between the principles underlying public law and the private values expressed in seeking the management of family disputes.

In chapter three Bregje Dijksterhuis and Alexander Flos from the Netherlands ask how far family justice systems should reflect social norms and behaviour in making financial arrangements after divorce. They draw on their research into conflicted financial arrangements to describe the role of the notary in providing information and advice to couples on making fair and informed prenuptial agreements to avoid conflict on divorce. But the legal framework is changing in a way that accepts and reflects current social norms relating to the economic position of men and women during marriage and afterwards, but does not support gender equality, leaving a third of divorced mothers reliant on state benefit. For example, in 2020 the legal duration of spousal support was reduced, and since 2018 the law has moved from supporting universal community of property to limited community of property. So even here a system which as part of the regulated attempt to avoid conflict may have reduced resort to the courts, has nevertheless failed to guarantee a just outcome in the opinion of those who support gender equality.

In the following chapter (chapter four) Michelle Cottier, Bindu Sahdeva and Gaelle Aeby look at a parallel dilemma in Switzerland where there is a constitutional mandate to implement gender equality and private post-divorce arrangements are common. But social norms are not in alignment with the constitutional position. The divergence here is even more pronounced than in the Netherlands, as the aim of the Swiss justice system is not to follow social norms but to proactively implement gender equality. In accordance with the ideal of basing divorce on mutual agreement, 90 per cent of all divorces in Switzerland are based on a settlement made by the spouses themselves, and the role of the justice system is reduced to providing a framework for the spouses' settlements and judicial sanction of their agreements.

B. Part 2 Participants – Who Uses and Who Works in the Family Justice System?

Here we turn to patterns of court use, and begin to ask whether what we see reflects the impact of Autonomy and or Economy? In chapter five Benoit Bastard looks at the changing role of the judiciary and the family courts in France, drawing on his research into the continuing impact of the recent reforms in France which placed divorce by mutual consent in the hands of lawyers, without recourse to court hearings and judicial decision-making in most cases. The judges have not indicated that they have suffered in any way from this change, as they had been overloaded with work; however the cases they no longer deal with are the more consensual cases which had taken little of their time. The pace of reform continues, while the main part of the work of the courts concerns parenting disputes. In 2021 there was no change in these cases, and there will be no change to the rules which support the best interests of the child, but the procedure will be simplified by reducing the time before a consensual divorce can be granted to six months, and the first stage in the process which attempts conciliation will no longer take place. The judges remain concerned about the increasing debate on domestic violence, but for the legislator divorce is increasingly seen as the personal business of the spouses, and the courts are to disengage themselves further. Nevertheless, pressure on the French justice system continues to be at crisis level and reforms continue to flow, while the family judges continue to manage family situations which seem to them more than ever to be seriously dysfunctional and conflicted. The mediators, who were social workers by origin, are less visible. In this context the process of 'privatisation' has continued without the debates and difficulties which might have been expected. In addition, the restrictions associated with the Covid-19 crisis have accentuated and confirmed the long-term tendency to reduce the oral nature of debates.

In chapter six Malgorzata Fuszara and Jacek Kurczewski describe a very different set of issues in Poland about which family issues are brought before the courts, where the divorce rate is low as befits a strongly Catholic society. Here survey research by the authors looks at the nature of public readiness to turn to the courts to settle family disputes. The long standing tradition of reluctance to do so springs from the high value given to protecting the privacy of family life, and reluctance to turn to the state courts during the communist period for help except in extreme circumstances such as risk to personal safety. The financial cost to the individual of going to court is not a major factor in keeping people away, as court fees are not high and there is no requirement to use a lawyer. Multivariate logistic analysis of their survey data indicates that of gender, age, employment, education, and standard of living and urbanisation, it is education which emerges as the dominant factor associated with privacy, with higher levels of education being associated with a greater willingness to approach the court. But, overall, private forms of dispute resolution are preferred.

In chapter seven Teresa Picontó and Elena Lauroba start from the opposite perspective, and look at how frequently cases proceed from ADR towards the court system in Spain, taking into account the impact of the Covid-19 crisis. Mediation, even though encouraged by the government in Spain, is not widely used, and is not permitted in cases where there is domestic abuse or where the safety of children is at risk. The authors describe how any case of abuse will not go to the family court, but to a specialist gender violence court. But the new role of parenting coordinator is attracting a great deal of attention, with a lively debate about whether this is role is basically a social work task (welfare) or whether there is a more juridical function (justice). Meanwhile the impact of the Covid-19 crisis has had a profound effect on the work of the family justice system, causing delay in resolution while family conflict increases.

C. Part 3 Innovative Practice

After entering the court, what new procedures are developing with the involvement of different professionals and lay advisers in legally assisted decision making? How is efficient use of resources supporting the aim of Autonomy?

In chapter eight, which opens this Part, Masha Antokolskaia and her colleagues look at the new ways of supporting parents in developing their own arrangement within the shelter of the court, described as a 'non-adversarial divorce procedure' in the Netherlands. An obligation to submit a parenting plan had been placed on separating parents in the Netherlands, but a subsequent evaluation found that little help had been made available with addressing this task. This chapter describes new pilot schemes in two Dutch family courts, experimenting with non-adversarial procedures somewhat resembling Australian family dispute resolution, whereby parents receive support in preparing workable arrangements for the children. To avoid escalation of conflict, the parents first have a non-adversarial hearing where they are represented by an impartial family representative – a lawyer-mediator or mediator – who represents the whole family, including the children. If they can reach agreement at that stage the family representative will apply for a consent order, If not, the matter proceeds to the new style of interventionist family judge, the *regierechter*, who can make an immediate decision or allow the parties to start an adversarial procedure with two lawyers.

But are there other ways of enabling access to justice while controlling costs? In chapter nine Jane Krishnadas asks who needs what, where and when? She then describes the project which she started in Keele University in England in which she developed the concept of the Community Legal Companion. CLOCK (the Community Legal Outreach Collaboration Keele) was designed by applying a transformative methodology to identify resources and navigate legal needs through the family justice system. CLOCK is a community law based project

whereby law students with training from local solicitors and court staff in a growing number of universities are able to support parties in a number of ways: trying to access the limited legal aid that is still potentially available where there is evidence of domestic abuse; helping at court counter services which are now short of staff; and also trying to direct parties to sources of help in the community. Jane Krishnadas developed this work from her experience with women's groups in India, and the UK, challenging the colonial public and private sector divide, and developing a collaborative, intersectional, relational and transformative mechanism for access to family justice, The approach has been of great value in responding to the increased exposure of children to harm during the Covid-19 pandemic crisis, and particularly at the intersection of private and public law.

D. Part 4 Major Policy Change

The final Part prepares us for thinking about future developments by looking closely at examples of recent major policy changes and their user impact, including the aims and aspirations, and also the outcomes, both positive and negative. The Part begins with an account in chapter ten of a new approach to family justice, 'Developing Holistic and Inclusive Family Justice in Argentina'. Julietta Marotta uses this phrase from Patrick MacDonald (see MacDonald, 2010) to describe the deeply considered Argentinian plan to move to full access to holistic and inclusive family justice, incorporating an appropriate legal framework with more accessible courts and trained judges, plus multidisciplinary assistance and empowerment of the parties involved in the conflict. In the case of domestic violence, the legal framework itself was transformed by Law 26485 in 2015 on the Right of Women to live Free of Violence, and a framework for implementation was provided through a network of legal aid offices created over the last 10 years, particularly the two centers created to assist victims of domestic violence. The legal aid provision enables a women to have interdisciplinary support from a lawyer, a psychologist and a social worker. Of course there are problems in practice of coordination, motivation and resources. But the policy and planning is exciting, and marks a major step forward along the welfare and justice axis.

In chapter eleven Verda Irtis raises questions about the family justice system in Turkey arising from the tensions between the traditional influence of the religious advisers to the family courts appointed since 2012, and the new developments of mediation, and the use of technology which have become increasingly important since the Covid-19 pandemic. The justice system is in danger of becoming increasingly fragmented and losing its cohesion. And in chapter twelve Belinda Fehlberg and Richard Ingleby note the gap between the vision set out for Australian family justice at the time of the establishment of the Family Court of Australia in 1975, with specialist judges and court staff including welfare officers and counsellors as well as legal advisers, and the situation

by the time of the recommendations of the Australian Law Commission Inquiry in 2019 for addressing the division of responsibility between federal and state authorities began to be put into effect, together with a new requirement to use ADR before making an application to the court. In this context they raise the question of how a legal system can best deal with malfunctions by its judicial officers. Richard Ingleby argues that 'there needs to be more extended and precise discussion of what the aim of a court should be as a prerequisite for particular changes' (Ingleby, 2020: 181). The contributors to this volume strongly agree!

But a positive note is provided by a description of a radical and highly successful reconsideration of what a family court is for, from Germany. Thomas Meysen (chapter thirteen) describes the approach to family justice set out in the German legislation of 2009. The Act for Proceedings in Family Matters served to emphasise the importance of basic personal conflicts, but also to strengthen support and prevent conflict (Bundestags Drucksache 16/6308, p 64). The courts are required to serve a secondary non-justiciable role, not addressing the solution or decision, but rather the reasons which hinder parents from coming up with the solutions themselves. There must be a first hearing within a month, in order to prevent further escalation of a conflict, and there is an acknowledged need to restore the ability for self-determination, but with process not decision as the primary orientation. Agreement is the goal, and counselling (or mediation if desired) is the pathway. On first appearance in court the message to parents is to try counselling first, before coming back to court! The best interests of the child would normally include contact with both parents. Counselling is provided by the Youth Welfare Offices, free, with direct access to parents. And a study to appraise the system (see Ekert and Heiderhoff, 2018) found a high percentage (60–70 per cent) of the professionals think the proceedings are practicable, and that more agreements are reached, though they are less confident about prevention of conflict or success in high-conflict cases. The association of welfare with justice is strong and clear, while autonomy is supported but free from the economic pressures on the public or private purse as Germany draws on the pre-existing network of Youth Welfare Officers, and the right to use these without charge is statutory. The approach is attractive in its direct commitment to social support to enable parents to understand their conflict, and hopefully move towards resolving it. It offers high normativity, clear orientation for parents and professionals, with early intervention by welfare services providing what has been called 'fenced in voluntariness' (see Loschky, 2011), ie guided autonomy without direct cost to individual parties. It would of course be useful to have the views of parties, and more information about the working of the welfare services.

We also note the views of Barbara Willenbacher on the need to balance prevention, management, settlement and adjudication on the one hand, with enforcement, sanctioning and defending on the other. At the Workshop Professor Willenbacher gave a more detailed account of how the majority of all actions at the Family Court are regulated bureaucratically, following and enforcing rules for

divorce, pension splitting, levels of child support and so on, while the mediating / counselling roles of the Family Court are mainly concerned with parenting arrangements. A sanctioning role emerges when a child is taken into care, and single mothers and migrant families are over-represented in this group, a matter often neglected in public discussion by partisans of mediation and consent. Furthermore she feels that the Family Court has a repressive controlling function with respect to domestic violence, mainly through the use of restraining orders. In the German family justice system parental autonomy is limited in the joint legal custody presumption, and child support rates are set by regulation, but compliance by low income fathers is low, and in contact cases the negative impact of domestic violence is not well acknowledged. Recent government-funded research has reported the statements of fathers about their relationship with the mothers, but not the statements of the mothers. The German system, like all family justice systems, is far from perfect. But the availability of the counselling services makes a major difference to our axes of concern by enabling justice to sit alongside welfare and for a degree of autonomy to flourish for its own sake without economic incentive.

The volume ends (chapter fourteen) with brief observations from the editors, who are most grateful to Justice Encarna Roca Trias, Deputy President of the Constitutional Court of Spain for her contribution to the Workshop. She emphasised the enduring and permanent role of the judges in family conflict, and also the long standing and ongoing need to guarantee the human rights of people in involved in family conflict.

II. QUESTIONS FOR THE FUTURE

An international collection of sociolegal research reports could simply describe the different ways of carrying out the necessary functions of the justice systems in the countries studied. We have been encouraged by the research presented at our Workshop to go further, and to try to develop some old and identify some new questions about what a family justice system is for.

Is the purpose of a justice system concern to promote societal values? To protect the vulnerable? To enhance the life chances of children and young people? To control unacceptable behaviours? Maintain the rule of law? Provide access to justice? Or all of these and more … while making sure the quality of judicial decision making in family matters is good enough.

Our key original question was about how justice in family matters sits alongside welfare considerations, and if so which element along this axis dominates in the case of conflict between the two? For example, how does a legislative provision such as the Children Act 1989 (England and Wales) ensure adherence to the principle of welfare paramountcy in any decision in a matter concerning a child when the judge has no expertise in child development? Welfare advice must play a part. But who will give it? Who will pay for it? What authority will it have?

A second important question has emerged, about how far the current emphasis on autonomy in decision making supports the value of respect for the rights of the individual, and how far it is used to justify reducing the cost of a justice system by keeping people out of court. How do autonomy and economy fit together? And how do our two axes of welfare/justice and autonomy/economy intersect a time when family problems appear to be more turbulent and difficult to manage, and resources are increasingly limited? The kinds of issues arising between conflicted separated parents seem to be revealing extreme behaviours, including domestic abuse and violence, which are less manageable through out-of-court ADR, and there appears to be an overlap between the rights of adults in private disputes and the public responsibility for child protection. Where will our thinking go next? The growing interest in universal holistic provision and concern for the experience of those who need a family justice system, together with better understanding of the assumptions of those who provide it, may help us to move in a positive direction. The Covid experience has stimulated radical thinking and stimulated changes in practice. Perhaps the need to think about what might be 'good enough justice' during this time of crisis when courts have been closing may encourage us to consider radical and effective solutions. But only when we have identified our goals for a family justice system can we begin to evaluate its effectiveness.

REFERENCES

Ekert, S and Heiderhoff, B (2018) *Die evaluaering der FGR Reform Abschlussbericht zum Forscungvorhaben* (Berlin, Ministry of Justice).

Ingleby, R (2020) 'Case Management: Never mind the quality feel the width', *Aus Law Journal* 94, 179.

Loschky, A (2011) 'Die Beratung mit angeordneter Teilnahme' in K Menne and M Weber (eds), *Professionelle Kooperation zum whole des Kindes. Hinwirken auf elterliches Einvernehmen im familiengerichtlichen Verfahren (FamFG)* (Weinheim, Basel, Beltz Juventa), s 137–150.

Maclean, M (ed) (2005) *Family Law and Family Values* (Oxford, Hart Publishing).

Maclean, M and Dijksterhuis, B (eds) (2019) *Digital Family Justice* (Oxford, Hart Bloomsbury).

Maclean, M and Eekelaar, J (eds) (2016) *Managing Family Justice in Diverse Societies* (Oxford, Hart Bloomsbury).

Maclean, M, Eekelaar, J and Bastard, B (eds) (2015) *Delivering Family Justice in the 21st Century* (Oxford, Hart Bloomsbury).

Maclean, M and Kurczewski, K (eds) (1994) *Families Politics and the Law* (Oxford, Oxford University Press).

Macdonald, RA (2010) 'Access to civil justice' in *The Oxford Handbook of Empirical Legal Research* (Oxford University Press) 492–521.