Introduction to the *Research Handbook on Family Justice Systems*

*Mavis Maclean and Rachel Treloar*

What does this volume aim to provide? It may well not immediately be clear, as none of the three terms included in the title – ‘family’, ‘justice’ or ‘system’ – enjoys a clear or internationally agreed definition. But taken together, we can perhaps assume that the first two words refer to a set of components with the common purpose of achieving fairness for groups of people who live or have lived together. The phrase is concerned not only with the rules referred to as ‘family law’, but also with the institutions comprising the operating system – particularly the family courts and the legal profession; and also that this system works mainly with groups of people who wish to change their situation and either begin or cease to live together. The family justice system is an important and evolving element in the organisation of a society, with which sociologists – in this case, sociologists of law, as well as lawyers and family sociologists – are concerned.

The term ‘family justice systems’, though already in existence, was not widely used in the UK until the publication in 2011 of the Family Justice Review chaired by Sir David Norgrove. He began his Interim Report\(^1\) by differentiating between the legal framework and the justice system, which he described as being under great strain – due partly to rising caseloads, but also to a failure to work coherently as a result of lack of trust, with few means of sharing mutual learning and feedback, and a lack of sufficient IT and management information to understand performance or what things cost. ‘The system in short is not a system.’ In the decade which followed, socio-legal researchers have tried to develop analysis of the aims, the structure and the impact of what are termed ‘family justice systems’. We seek in this volume to bring together key contributions in this field from a wide range of jurisdictions to look more closely at the key functions of a family justice system, which were described by Norgrove as giving paramount consideration to the welfare of any child involved in a court hearing; making safeguarding central in public law cases where the state is involved and in private law cases taking place within a family; upholding the rights of the child; and ensuring that resolution by a court is enabled and encouraged where appropriate.

The chapters which follow address a series of questions about how family courts operate in practice.

Do they offer dispute resolution – whether through adjudication, negotiation to settlement or something more, perhaps problem solving? Where do the boundaries lie with other administrative or welfare bodies or the state? How has the traditional role of the court been developing and working with methods of alternative dispute resolution (ADR)? Where does the responsibility of the state to intervene in family matters begin and end? How does a family justice system work alongside other forms of regulation and belief about family life?

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PART I. FAMILY COURTS: ROLES AND BOUNDARIES

We begin in Part I with information about family courts as the key components of justice systems across a range of jurisdictions, showing how they perceive their roles and where they see the boundaries of their responsibilities.

In the opening chapter, Rae Kaspiew draws on many years of empirical work with the Australian Institute for Family Studies to offer an overview of developments in the family justice system in Australia, which has remained court centred, with a direction of travel for reform to move away from the division between central federal regulation and local state or territory-based systems. However, the focus of activity has clearly become less court centred, beginning with the setting up of the administrative child support system (since emulated in the UK), and with the growing interest in ADR pathways based in the community, while retaining court responsibility for child protection. Property arrangements too remain court centred; but family matters are now also recognised as having a community aspect in their impact on social security and welfare provision. The majority of families in difficulty are now encouraged to seek private forms of resolution, but those with complex issues such as domestic violence or mental health remain in need of the help of the courts. The emerging concerns with this move to private problem management lie in the need for better screening and information collection in these troubled cases; and for further ‘upskilling’ of the legal profession and the judiciary in handling these difficult cases. The recent reforms which followed the Australian Law Reform Commission Review of 2020 have increased funding for the courts and increased judicial capacity by 10 per cent and judicial registrars by 30 per cent. The new requirement to seek ADR before coming to court and self-management as the norm is moving forward; but there remains a need for help with the power imbalance in mediation, greater awareness of domestic violence and more attention to the voice of the child.

Chapter 2 from De Boer and Kronborg in Denmark describes a very different approach in the major role given to administrative institutions in family matters: the Agency for Family Law manages the majority of cases under a triage system, with only those involving violence moving swiftly on to the new family court. Chapter 3 by Hannah Thackeray and Julie Macfarlane in Canada then describes how the role of lawyers in court has changed as the reduction in publicly funded legal aid has increased the number of self-representing litigants, and explains how difficult this can be for them – even though the change is partly driven by a lack of satisfaction with the value for money provided by the legal profession, as well as the increased availability of legal information online. We move next to an account from Kurczewski and Fuszara in Chapter 4 of another way in which the courts are being marginalised – this time in Poland, where family courts did not develop until 1960 as privacy has always and remains a strong concern in family matters.

Finally, in Chapter 5 by Taylor and Freeman, we turn to the impact of geographical boundaries on justice systems, looking at cross-national child arrangements, where the Hague Convention deals with the more ‘black-letter’ aspects of the legal framework of the jurisdictions concerned, rather than turning first to a call for further welfare reports or individual
facts. Under the Convention, there is pressure for the speedy return of children where legally indicated – perhaps best described as a more technical approach to justice, rather than the sometimes ‘softer’ arguments about the welfare of the child that characterise decision making within a number of jurisdictions, including England and Wales.

PART II. NEW WAYS OF WORKING

Next, we turn to discussion of the development of alternative ways of working within a family justice system but outside the courts, in response to the increased pressure on family courts and family judges in many jurisdictions following higher rates of family stress related to separation and divorce. This has been associated with a greater need for complex decision making in financial arrangements, not only when dividing large assets but also when trying to stretch one income to support two families. Furthermore, there is now heightened awareness of safeguarding issues in relation to domestic abuse including coercive control and – above all – increased concern for the welfare and best interests of children following parental separation. The growing interest of fathers in having more time with their children, the complex ways of organising shared care and the emergence of the concept of parental alienation in child contact matters have been accompanied not only by increasing resort to court, but also by a growing need for the contribution of child experts. The family court may now be seeking and channeling expert advice in coming to a decision rather than adjudicating following presentation of arguments by legal representatives. It may be trying to ensure not only that justice is done, but also that the child’s welfare is given paramount consideration (as in the Children Act 1989 of England and Wales). The response within family justice systems has been to seek alternative means of dispute resolution and even, in some jurisdictions, to move away from dealing with disputes and towards preventive work, to try to help to solve problems which could become disputes; and for this to take place outside the court.

The first chapter in Part II, Chapter 6, looks at attempts to respond to pressure on judicial time in France by taking a step back from expecting divorce-related disputes to be adjudicated and instead to providing more support for negotiation to settlement by lawyers, within the court setting. Benoit Bastard reports that the first attempts to deal with the problem through mediation were found to be unhelpful, increasing the time taken per case and not achieving a higher rate of settlement; but when the court steps back and the lawyers are encouraged to discuss matters face to face, the situation may be seen to improve.

However, mediation remains the most often discussed alternative to dispute resolution by adjudication, and in Chapter 7 Julieta Marotta outlines the statutory incorporation of mediation in the family justice system of Argentina through the Mediation and Conciliation Law (Law 26589) of 2010. Starting from dissatisfaction with the existing adversarial approach to family issues, which often have complex origins that are not easy to formulate in judicial process, this law instead allows parties to reflect on their position and explore paths to cooperation. The chapter reports on a study which examined the roles of justice providers, mediators and victims in domestic violence cases – an area where mediation has been approached with caution in many other jurisdictions. In Argentina, however, it has been adopted as a mandatory procedure before any legal procedure may be initiated in court. Marotta explains that the traditional approach of the family courts being seen as to provide a just and correct solution was
no longer effective, and that solutions needed to be developed between the courts and parties taking the characteristics of the family into consideration.

Another aspect of judicial function – the changing role of the judiciary after an arrangement has been agreed – is explored in Chapter 8 by Masha Antokolskaia and her colleagues from the Netherlands. They examine the ways in which, after an agreement has been reached concerning arrangements for children of separated parents, the agreement can be supported and compliance achieved. They begin with the compulsory parenting plan and the innovative use of what is termed ‘forensic mediation’, which is voluntary for parents but where investigation using the techniques of mediation produces information which gives the parents a chance to agree – and the court the information that will facilitate effective judicial decision making.

This part closes with an explanation in Chapter 9 of the legal framework in an area of law that is sometimes neglected by family law scholars. Kayo Murayama sets out the position of the elderly in need of care – an area of legal regulation which requires increasing attention in an ageing society (in this case Japan, described as a ‘super ageing society’); and outlines the rights of persons requiring care, but also the rights of caregivers.

PART III. PUBLIC AND PRIVATE FAMILY JUSTICE

Part III of this volume considers issues arising from the division of the work of a family justice system into matters initiated by the state (‘public law’) and those which arise from individual disputes where the state does not have a direct interest (‘private law’); and how the limiting of state intervention through the family justice system has been failing women and children.

Part III begins in Chapter 10 with a discussion of how to manage cases on the border of public and private law where a private relationship between two adults enters the area of public responsibility when allegations of domestic abuse are made, and where arrangements are under consideration for the children of these adults after parental separation. Mandy Burton and Rosemary Hunter draw on the work of the Harm Panel in England published in 2020, which emphasised the need in many jurisdictions for stronger safeguarding measures in court during these hearings and for greater awareness throughout family justice systems of the level of risk to children. They argue that further specialisation of the courts in this jurisdiction dealing with these matters is desirable, but may not be effective without a greater emphasis on the need for investigation and the acceptance by the court of greater responsibility for ensuring safe outcomes. Chapter 11 from Stephanie Holt and co-authors picks up the issue of the importance of hearing from the child in such matters, as has been reflected in the core ethos of the United Nations Convention on the Rights of the Child since 1989. They record the difficulties in moving in this direction in Ireland, where the emphasis on Catholic marriage continues to support the imprescriptible and inalienable rights of parents as incorporated in the Irish Constitution of 1937.

We move on from physical to financial abuse post separation in Chapter 12, where Ayesha Scott describes the money taboo in New Zealand. Here commonly held views on money management within marriage make it difficult for the existing gender disparities in earning and the division of unpaid household labour to be brought into the open by the family justice system. Scott stresses that this failure to address issues of disclosure and discovery is preventing adequate settlement and contributing to ongoing financial insecurity and hardship for mothers.
Moving on from longstanding concerns about the need to give the child a voice and hear about the financial position of women, Part III ends with a discussion of new and changing ways of defining ‘parenthood’, moving beyond tradition and biology. Pamela Laufer Ukeles describes in Chapter 13 how in Israel and beyond we are seeing the decline of an exclusive binary biological definition of ‘family’ and the rise of what she terms ‘multiple parenthood’, with surrogate mothers, gamete donors, acceptance of same-sex parenting and adoption and the rise of new family forms. She asks why, in a world ‘where so many children live without sufficient parenting, do we not embrace multiple parenthood?’ In Israel, illegitimacy carries a religious stigma and prevents marriage. Laufer Ukeles suggests disaggregating parental rights into their parts in order to consider how best to promote the interests of children.

PART IV. THE IMPACT OF BELIEF SYSTEMS ON FAMILY JUSTICE

Part IV moves into a broader consideration of the impact of belief systems on family justice, giving rise to conflicting aims and processes.

Verda Irtis opens this part with her account in Chapter 14 of how the family justice system in Turkey is shaped by the interlocking of ‘traditional’ and ‘modern’ elements, and how this has ultimately led to ‘justice for society’ instead of ‘justice for the individual’. In Turkey, ‘the family’ still means marriage; the influence of families on the formation of a couple remains important and arranged marriages are still practised. The family constitutes a privileged political space because of its structure, roles and status; and the happiness of the family group takes precedence over the happiness of the individual for the good of society as a whole. Family law is closely linked to religious values and Turkey’s Family and Religious Guidance Offices were established in 2002. The individual is not really considered for themselves in this authoritarian statist tradition, which remains slow to accept individualisation as a necessity for development.

Federica Sona takes up the question of the relationship between religious and state law in Chapter 15, where she examines how Sharīʿah-consistent marriage dissolution is regarded in Italy. Italian or foreign Muslims settled in Italy have a number of choices if they wish to end a marriage; these depend mainly on the nature of the marriage, which may have been civil, religious or religious with civil effects. If a marriage is not disclosed to the state authorities, it can be regarded simply as cohabitation. But Muslim partners can also marry in a European country with less demanding immigration controls and then register the marriage in Italy, and later choose to begin divorce. The judiciary is being asked to respond to fluid matters in question – for example, a ṭalāq is not acknowledged as valid in Italy, but a ṭalāq formalised by a foreign Sharīʿah tribunal is. Case-by-case examination may remain the best way to achieve a fair outcome, but this is lengthy, costly, and may not be feasible for overwhelmed judicial bodies.

In Chapter 16, Sonya Cotton takes us to the conflict of laws between customary law and constitutional protection for polygamous wives in the Southern African Development Community. African states have taken different approaches in trying to reconcile fundamental human rights and the right to follow cultural practice. These range from exempting customary law from any bill of rights (eg, Zambia), through a more ambiguous approach suggesting that a woman must not be compelled to undergo a custom to which she is conscience opposed (eg, Eswatini), to a robust approach to the application of human rights to customary practice which
respects cohesion and family values (e.g., Zimbabwe). There is scope for state-sanctioned
discrimination; but the African Union’s Agenda 2063 suggests a vision for the continent of
dialogue between various legal constituents and a core standard of legal rights for those in
customary unions similar to those in civil marriages.

Chapter 17 explores another cultural minority set of issues, as Moeata Keil and Vivienne
Elizabeth describe how Pacific parenting practices in New Zealand come to the attention of
the state family justice system when parents separate. Fathers seek shared care on the basis
of their need to comply with an ethic of paternal care drawn from traditional family values
but linking this to an ethic of justice; while mothers express the gendered norms of practice
which render them responsible for the wellbeing of the whole post-separation family. But this
ethic has had the effect of constraining the mothers’ demands, while empowering the fathers
to make their claims.

To close Part IV, we turn to David Shilei and colleagues in Chapter 18, who describe
a new system in Chinese family justice which develops the investigative function referred
to by Burton above. In 2016, a reform programme was initiated in the family justice system
which refers to two categories of investigation of the circumstances in a family matter: one
carried out by the judge and one carried by family investigators who report to the judge. The
reform policy refers to the special nature of family cases, in that they are ethics related and
complex, involving personal relationships and property and the protection of children, as well
as morality, social ethics and other factors. It is important in these cases to distinguish right
from wrong, eliminate antagonism and promote a peaceful resolution; and there is also a need
to maintain the high qualification level of judges. The register of special investigators that has
been established as a result of the reform is not restricted; inclusion depends on recommenda-
tion, with variations in who is accepted and how they are used. But the service is developing
slowly – and with more cases being heard by fewer judges, change is needed.

PART V. ISSUES EMERGING

Chapters 17 and 18 lead us directly into our final Part V, where the chapters do not present
conclusions, but rather raise questions about how family justice systems might offer more
through new ways of working and the need to respond to a changing society. What questions
are emerging? And what is seen as the way ahead?

Part V opens with Richard Ingleby and Belinda Fehlberg’s important questions in Chapter
19 about some of the implications for child protection of a jurisdiction which had divided the
functions of family justice between federal and state authorities according to the Australian
Constitution of 1900. The federal jurisdiction centred on marriage but litigants at state level
applying for family violence intervention orders and families subject to child protection pro-
ceedings remained urgently in need of protection. Matters relating to child protection were
largely a state responsibility and were seriously under-resourced.

Chapter 20 from Michelle Cottier and co-authors in Switzerland looks at the unexpected
consequences of the successful development of ADR which effectively results in private
ordering. They go on to reveal that though a dispute may be resolved, the outcome may not
comply with national legal norms – for example, concerning gender equality when financial
arrangements are made after divorce.
In Chapter 21, June Carbone draws to our attention another aspect of the change in social norms and notes the increasing gap between behaviour and the territory covered by family regulation. She describes how family law is only equipped to deal with those who marry or adopt children, and asks us to consider how family law interacts with groups who order informal relationships without marriage, adoption or contract. Marriage and adoption once served to formalise family relationships; but 40 per cent of American births now take place outside marriage, and even larger numbers of couples cohabit, have children, separate and cohabit again. The family justice system is excluded.

Chapter 22 by Rosanna Hertz focuses on the question of anonymity for donors of gametes in the US, where there is not yet a policy surrounding donor anonymity, and raises the question of the rights of children to know their parentage.

PART VI. PROGRESS?

After describing so many difficulties in the development of family justice systems, we are pleased to close with three chapters which offer recent examples of positive responses to social change.

In Chapter 23, Thomas Meysen describes the role of the court in problem solving, not only conflict resolution. Amicable solutions have become the norm in German family court proceedings after separation and divorce. The court is easy to approach and supports access to counselling (rarely mediation). When agreement is reached, the court then usually ratifies the arrangements and can provide enforceability.

In Chapter 24, Oliver Gilman describes the way in which government lawyers in the United Kingdom facilitated the legal recognition of same-sex relationships over the period from 2003, when the Civil Partnership Act was passed, to 2013, when the Marriage (Same Sex Couples) (MSSC) Act was passed. Recognising same-sex relationships was a complex undertaking, dealing with the fears of the established church about undermining the sanctity of marriage. But the creation of the civil partnership provided legal recognition of non-traditional same-sex relationships, and also reassurance for the protection afforded to the beliefs of religious bodies in the MSSC Act which followed.

Finally, in Chapter 25 Rob George shows how not only the legislation, but also the work of a family justice system needs to respond to changing circumstances. He delivers a positive account of the value of the family justice system – and specifically of the family courts – in England, appreciating the ways in which it has been able to adapt to meet changing needs demonstrated through the use of technology to provide remote hearings during the recent COVID-19 crisis.

This final part confirms our view as sociologists of family law, addressed in different ways throughout the volume, that a family justice system is a living entity, working with and for a wide range of beliefs and practices, comprising far more than a set of rules and regulations, which can respond to a changing society while also contributing to that change.