

Leverhulme International Network: New Families, New Governance

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Speaker Abstracts

Friday 5th September 2014

Session 1

Governance and regulation: making good families or families good?

Ian Butler, University of Bath

'Governance' is difficult to define yet it is a term that is regularly used in the analysis of the state's relationships with its citizens. At one level, it can be understood simply as describing the means employed by the state to deliver those goods and services that it is mandated to provide. However, such a definition may mask the broader political purposes of the state at any given historical moment. In terms of welfare practices and family law, the role of the state may be understood as making 'good families', i.e. helping families to express choices and to achieve their own goals and ambitions. It may also be understood to include making other families 'good' through normative, coercive or exclusionary practices. This paper reviews the extent to which the Seminar Series has engaged with defining governance and what challenges remain. It draws attention in particular to the difficulties of researching governance (both practical and theoretical) and to the challenge of communicating findings in an increasingly fragmented legal and welfare context.

Leanne Smith, University of Cardiff, UK

The role of the internet in transmitting messages about family disputes: problems and possibilities.

Online information and advice relevant to the resolution of family disputes has been available in a variety of forms and from a variety of sources for some time. However, its potential significance has increased due to factors including a proliferation of relevant websites, increasing internet use, the popularity of social media and social networking sites, and measures aimed at delegalising family dispute resolution. In spite of this, we have little evidence about the range and quality of online information which exists and is being accessed. Furthermore, existing research on online information and communication demonstrates that a complex range of factors influence how individuals process and respond to online information sources. This suggests that there is still much to be learned about how people actually use what they are exposed to. As a result of these important deficits in our knowledge, this paper argues that neither the potential nor the limitations of the internet as a tool for the resolution of private family disputes is properly understood at present and this is an obstacle to the future development of effective and accessible resources.

Tess Ridge, University of Bath, UK

How does the state regulate poor families?

The relationships between the state and the family is always shifting and changing, this is complex terrain and families do not always experience regulation by the state in the same way. Although in many areas there is evidence that the state is drawing away from the family which is bringing more private ordering, for low-income families there is evidence of an increase in governance and scrutiny accompanied by the imposition of greater welfare conditionality, interventions and sanctions. The implications of which are felt deep into the heartland of family life.

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Charlotte Patterson, University of Virginia, USA

Legal Recognition of Marriage Among Same-Sex Couples Around the World

“We are living in this era of two Americas, where LGBT people living in certain states ... have much greater access to ... marriage”.
--- Sarah Warbelow, Human Rights Campaign (Caldwell, 2014).

In recent years, the legal contexts in which same-sex couples live have changed dramatically, both in the United States and around the world. Twenty-five years ago, the marriages of same-sex couples were not recognized by law in any country of the world. Today, the marriages of same-sex couples are recognized in 19 states of the United States plus in the District of Columbia, and in 16 other countries; more than 10% of the world’s population lives in marriage equality jurisdictions. These changes have prompted the notion of “Two Americas” – one America in which marriage rights of same-sex couples are recognized, and another in which they are not recognized --- that offer very different environments for lesbian and gay couples. Is this notion valuable, and can it be extended to international as well American contexts? Are there “two worlds” just as there are “two Americas”, and if so what does this mean? Both for the American and for the global context, I suggest that, while the idea can be useful for some purposes, it is also limited in important ways. While it is true that marriage equality in any one jurisdiction transforms life in many ways for lesbian and gay couples who live there, it is also true that options are still curtailed --- for example, by limitations on freedom of movement. Even in marriage equality jurisdictions, same-sex couples’ mobility for employment, leisure, and other activities is inhibited by lack of recognition for their marriages across state and national boundaries. Thus, both in the United States and in the rest of the world, the achievement of true marriage equality anywhere requires marriage equality everywhere.

Session 2

Voices heard and unheard: can we adjust the volume?

Cathy Humphreys, University of Melbourne

Voices heard and unheard has provided a virtual choir of inquiry, with a particular focus on the voice of children and young people. A number of themes have emerged strongly. The foundational role of the Convention on the Rights of the Child in providing an authorizing environment for children’s participation has been pivotal. However, engagement with the rhetoric of children’s rights has not necessarily translated into the reality of children’s views being heard either in the public policy space or in fact in decisions which affect their individual lives. The territory moves from tokenism to action with inter-country comparisons providing ‘news of difference’ about the possibilities and limits created in different jurisdictions. While children’s participation in research and public policy has been canvassed, a particular focus of inquiry has been in relation to children’s participation in the public (child protection arena) and private (family law) spheres of the justice system. Together, the papers in this area suggest that the power of the adult tenors, bases and sopranos may be drowning out the often clear, but softer voices of the child.

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Rachael Field, Queensland University of Technology, Australia

Whose voices are heard in mediation?

Family mediation is increasingly situated in family law systems internationally as the dispute resolution process of first resort for family law matters, and particularly parenting disputes. This is because mediation can be a flexible, cost-effective, time-efficient, more humane, less adversarial way for families to resolve post-separation disputes. Perhaps most importantly, family mediation is a process that can enable party self-determination, empowering each of the parties in dispute, and also in some instances their children, to have a voice and to be heard. There are, however, good reasons to interrogate the efficacy of family mediation in terms of its potential to truly support the hearing of each of the parties' voices in an equitable way that leads to just and fair outcomes. Critically, if one or both parties' capacity to negotiate in the mediation environment is reduced; for example, through a power imbalance (caused by domestic violence, or mental health or education issues), then the hearing of their voice will be compromised. This paper briefly explores the circumstances in which family mediation can be said to allow the parties', and their children's, voices to be heard. It also considers some of the ways in which family mediation can be practised to optimise the hearing of the parties' voices in mediation and to avoid silencing or oppressing participants. These methods are drawn from the Coordinated Family Dispute Resolution model which was piloted for 18 months in 5 locations around Australia in parenting disputes where there was a history of family violence.

Professor Judith Masson, Law School, Bristol University

How do Lawyers enable parents' voice in child protection? ~The Paradox of representation

Lawyers acting for parents have a major role in the child protection process, not only representing parents in court proceedings but also supporting them in the formal pre-proceedings process. In pre-proceedings, the lawyer's role is limited – providing advice and attending the pre-proceedings meeting with children's services. Lawyers said little in these meetings but parents found their presence supportive and empowering, enabling them to have their say. Some parents believed that the lawyer's presence moderated social workers' demands. The position is quite different in court proceedings, where representation frequently serves to distance parents from the legal process rather than to help them engage with it. Much courtroom discussion is in technical terms, between the lawyers and the judge; out of court negotiation takes place between lawyers; documents are formalised, requiring interpretation to clients; and even parents' own statements are often drafted for them. As the parents' mouthpiece the lawyer replaces the parents' voice, facilitating proceedings but limiting parents' involvement and understanding, and justice.

The absence of lawyers also denies litigants voice. The complexity of legal procedures designed for represented clients are unsuited for those without lawyers. Power imbalance can also serve to silence the weaker party.

Masson et al (2013) Partnership by Law? The pre—proceedings process for Families on the edge of care proceedings

<http://www.bristol.ac.uk/law/research/researchpublications/2013/partnershipbylaw.pdf>

Pearce et al (2011) Just following instructions? The representation of parents in care proceedings

<http://www.bristol.ac.uk/law/research/researchpublications/2011/justfollowinginstructions.pdf>

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Marie Connolly, University of Melbourne, Australia
*To be presented by Julie Doughty****Privileging family voices – Democratizing practice or controlling the family?***

Over the past thirty years, in a variety of ways, family engagement practices have developed across child protection systems internationally. Broadly speaking, participatory practices that support meaningful family involvement in matters of child welfare has become an expected aspect of practice, often reinforced in policy and law. Some jurisdictions have introduced family decision-making models into legislation in an attempt to privilege family voices and retain the child's connection with the family of origin. The New Zealand Family Group Conference, now practiced widely across international jurisdictions, is an example of legislative attempts to prioritize and respect service-user rights in child welfare (Connolly & Masson in press). Such redesign of social institutions can be seen as having a democratizing effect which also influences societal norms (Shapiro 1999). Governments can therefore have an important role in democratizing practice in child protection and family law, influencing professional attitudes toward the family, and promoting participatory practice and rights-based ideals. It is clear, nevertheless, that the tension between the care and control functions of state jurisdictions is exacerbated when facilitating participatory practices in child protection. In challenged practice environments, risk-averse systems tend to privilege professional decision-making and create professionally-led processes that seek to control key aspects of family life. In such circumstances a significant degree of commitment to participatory practice is required on the part of the professionals and the agencies supporting their work.

Connolly, M. & Masson, J. (in press). Private and Public voices: Does Family Group conferencing privilege the voice of children and families in child welfare? *The Journal of Social Welfare and Family Law*.

Shapiro, I. (1999). *Democratic Justice*. Yale University Press: US.

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Session 3

Renegotiating relationships: what is the future for family solidarity?

Margaret Brinig, University of Notre Dame

Taken as a whole, the talks about which I'll report indicate that in some ways family solidarity has not changed a great deal. That is because demographics tell us the group of people who are dependent—who rely on others' care—has shifted only in quantity, not so much in kind. Parents remain primarily responsible for young children, and for the most part, this responsibility—legally anyway—tracks biological parenthood. However, the group of people who now can be called parents no longer neatly fits the biological paradigm as more and more children are born to assisted reproductive technologies (ART) or live with stepparents, or occasionally with other relatives. The number of children who depend upon adults for care has been shrinking, while the number of elderly who may at some point become dependent grows. While government has assumed secondary responsibility for supporting children's wellbeing, they have perhaps taken a more standardized approach for those of advanced age, who are expected to have saved personally throughout their working lives and who may have social security benefits. Nonetheless, adult children may be caring for these people as well as for their minor children.

Perhaps the biggest, qualitative, change over the last several centuries, but especially since 1960, has been a rejection of the idea that women are also dependent, needing care from their fathers or husbands. In all the countries represented in the Leverhulme network, most married women, even those with small children, work outside the household at least part time. While some countries (but only to a limited extent the United States) provide economic support for maternity, such time-honored institutions as dower and alimony are now rarely used and may even have been eliminated. And more and more mothers are not married when they have their children. The expectations for fathers have changed as well, though in some countries not as dramatically as for mothers. Today's fathers are expected not only to share in providing for the family's wellbeing and guarding against outside dangers, but also to actively participate in childrearing. Some, but not all, of our countries promote fatherhood from the birth of the child through paid parental leave policies, though, as we've seen, not as many fathers as mothers take advantage of these. A change, at least for married fathers, is that this dual role of fatherhood in the workplace and domestic spheres (held also and increasingly by mothers) is expected to continue even when the adult romantic relationship ends in separation. Our countries struggle with the terms and duties of shared parenting, both in the financial and the childrearing sense. Now for the session-by-session exploration.

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Anne Barlow, University of Exeter, UK

Solidarity and autonomy: mixed messages for the family?

Whereas solidarity was the backbone of both family life and (patriarchal) family law, autonomy (and equality) are arguably becoming the concepts of reform within modern family law. Yet whilst autonomy is an alluring concept and one which is difficult to argue against from an individual perspective, how suited is it as a driving principle of family regulation? Are the players within family life now sufficiently equal for the concept of solidarity to be abandoned? Has the rhetoric and reality surrounding family adjusted itself to more individualistic notions of constructions of family? Or is the renegotiation of the gender contract still ongoing within the family sphere, leaving some family members more exposed than others? In order to consider these questions and drawing on examples from English and Welsh Family Law, this paper will examine how family solidarity is constructed within different relationship styles from legal and social norm perspectives and consider what the role of autonomy and equality within private family law is and/or should be. It will argue that mixed messages are being sent and received and that the consequences are potentially gendered when viewed in the wider social context. the family, which according to Hale also serve the best interests of wider society.

Masha Antokolskaia, Amsterdam Free University, The Netherlands

Parenting in Stepparent Families: Legal Status, De-facto and Perceived Solidarity

The legal status of the three parents in step-parent families (legal parentage and parental responsibilities) does not always coincide with their actual parental roles. This is one of the results of the multidisciplinary comparative research commissioned in 2012 by the Dutch Ministry of Justice. The two aims of this research are to obtain a picture of the extent of correlation between the legal status and the de-facto parental roles in the stepparent families and to find out how the various actors view the current legal regulation and how they envisage the ideal one. Therefore the investigation 'measures' both the actual degree of solidarity in step-parent families (care and financial contributions) and the perceived solidarity, represented by the (step-)parents' vision of their ideal status.

In contrast with English law, Dutch law does not allow attribution of parental responsibilities to more than two persons. That means that a step-parent can obtain parental responsibility only at the expense of the non-resident parent. In our sample both legal parentage and parental responsibilities rests with the biological resident and non-resident parents in approximately 60% of cases, whilst only 2% of stepparents has the status of a legal parent (via partner adoption) and/or has parental responsibility. Our study shows that in 50% of cases these legal arrangements appear not to reflect the factual situation. On the one hand, only 50% of the non-resident parents actually fulfils a role in their children's lives which is equal to that of residential parent or at any rate substantial. About 30% fulfils a minor role and about 20% no role at all. On the other hand, about 50% of the stepparents fulfils a role in their children's lives which is equal to that fulfilled by the resident parent or anyway a substantial role. For both categories that means that in 50% of cases there is a discrepancy between the legal parental status and the factual parental role. This discrepancy might be seen as incentive to change the law. How the (step-)parents ideally perceive their legal status differs between the various actors. 37% of

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the stepparents would like to share parental responsibility with the resident parent. 34% of the resident parents would like to share parental responsibility with the stepparent or (29%) to hold it together with him or her. In contrast almost 74% of the non-resident parents would like to share parental responsibility with the resident parent, and 12% would like to hold it alone. The idea of parental responsibility for more than two parents evokes both positive (equality of all parents, more adequate reflection of the factual situation, better protection of children) and negative reactions (more conflicts; 'three is a crowd', weakening position of the non-resident parent).

Therefore it becomes clear that de-facto family solidarity in step-parent families in 50% of the cases is not in conformity with the legal status. At the same time the way in which each of the three groups resident parent, non-resident parent and stepparent of parents in step-parent families envisages their ideal legal status (perceived solidarity) differs both from their current legal status and their de-facto roles in their children's lives. Moreover their wishes mutually exclude one another – at least as long as the law limits the number of parents to just two. Finding an adequate legal responds to such a situation is not an easy task.

Tone Sverdrup, Oslo University, Norway

Solidarity for whom? How should law treat married and unmarried families?

Family solidarity includes putting family interests ahead of self-interests and acting on the basis of what is economically rational for the family as a whole. A typical example is when a spouse or a cohabitant undertakes more than his or her share of the unprofitable tasks in the family – childcare and the coverage of consumption expenses – and end up with owning no appreciable assets even after a long relationship. The two parties' work efforts may be equal at any given moment, yet inequality is generated over time because the work performance of one is consumed while that of the other is partly invested. The question is to what extent the law should equalize such disparities upon relationship breakdown. The solidarity that comes from interdependence has to some extent been weakened in pace with changing gender roles. Can one still claim that a partner has contributed to the other's capital accumulation, or must one be content with establishing an economic loss? Changing social norms have led to renewed tension between core values like family solidarity and autonomy. Statutory regulations in unmarried cohabitation are analysed in this perspective. Drawing on experience from the Nordic countries, this paper will consider how socio-demographic characteristics and social acceptance of cohabiting relationships have influenced the nature of the legislative issue. Finally, the paper discusses the advantages and disadvantages of a property regime where assets are divided according to fixed rules compared to a discretionary regime that provides compensation to avert unjust enrichment.

Marsha Garrison, Brooklyn Law School, USA

Fostering Marriage and Family Responsibility Through Norm Creation: The U.S. Experience

This presentation will describe and analyze federal efforts to promote marriage and family responsibility through legislation, educational programs, and public rhetoric. It will focus on the marriage promotion campaign initiated during the Bush administration and its successor program, which emphasizes responsible fatherhood. The origins and results of these initiatives will be used to chart some general lessons about the possibilities and pitfalls inherent in government attempts to change patterns of individual behaviour and family relationships.