

FAMILY LAW

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Contents

1. Marriage
 2. Children
 - 2.1. Parental Responsibility
 - 2.2. Fostering
 - 2.3. Tutorship/Guardianship
 - 2.4. Wardship
 - 2.5. Adoption
 - 2.6. Interdiction
 3. Family Court
- Glossary
Bibliography
Biographical Sketch

Summary

This contribution attempts to provide a broad and comparative picture of family law, although the civil jurisdiction background of the author may weight the attention given to some aspects of the subject.

Family law has often been described as encompassing all those laws relating to the family. However, the very definition of “family” presents so many problems that this is rarely a satisfactory description. To define family law in general, it is sufficient to simply say that it is the law relating to the family. However, in a more concrete and scientific way, the first step must be to define the meaning of family itself.

Undoubtedly, meanings attributed to the word “family” differ from continent to continent and then again from state to state. Sociologists spend much time and effort itemizing the nuclear family, the extended family and so on. At law, it is important to define who is part of family because more often than not, the law assigns definite rights and obligations in virtue of the fact that a person is a member of a family. This importance is not restricted to interpersonal relationships, but extends to the recognition the state accords to persons by virtue of their appertaining to a family, as in the case of social security legislation and rent laws. Legislation has also come under fire for not considering a homosexual couple as a family and failing to accord them rights to adopt, enjoy tax cuts, and housing benefits.

It is also vital to delineate the boundaries of the term family when a family court must be cognisant of issues of family law. In Israel, for example, matters pertaining to

succession law are decided by the family court, while Japan restricts its *modus operandi* strictly to interpersonal issues.

At the outset, it is apparent that family law means diverse things to diverse people and for this reason, it is often criticized for failing to be as objective as other categories of legislation. This unknown quantity is both its greatest strength and weakness. This law regulates human relationships. It reflects the moral health and wealth of the state it represents. Because people are constantly changing and attitudes and customs develop in keeping with these changes, family law often has a tough time keeping up. It is the most vibrant and often most relevant canvas of life in any state at any given time and for this reason alone deserves study and attention.

We may never be the direct subjects of criminal law, commercial law or constitutional law, but our involvement in family law is automatic from our birth until our death. This is because the matter of registration of birth and death usually falls under family law. Even if we are fortunate to go through life never having recourse to the courts, we have no alternative but to request confirmation of our (civil) existence through a birth certificate on entering school, receiving a vaccination, being awarded a child allowance and a host of other events.

The Romans dealt with family law under the title “Of Persons” and those countries whose law has a Roman law base retain this heading and approach to the present day. Most common law countries have opted for a specific code of family law or for the grouping of various statutes related to family law issues. Both civil and common law jurisdictions have increasingly voted in favor of a consolidated family code because this makes matters much clearer for persons subject to the law and persons seeking to enforce it.

1. Marriage

The institution of marriage has come under siege, with the numbers of people marrying for the first time dwindling in some countries and the tally of people remarrying, reaching an all-time high. Many sociological factors have contributed to this shift and the law has had to move apace to keep up with developments.

The taboo surrounding sexual relationships outside marriage has, in many countries, disappeared altogether. In other states it is still strong and marriage is still promoted for the unity and stability of the family. Family law regulates the conditions, which must apply for marriage to validly take place. Although ages differ, most jurisdictions establish a minimum age for marriage and prohibit marriage between close relations, even though varying degrees are acceptable in the wide range of jurisdictions. Current debate concerns the admission of same sex marriage with few states permitting marriage, but increasing numbers bestowing legal recognition on a union between same sex couples. The distinction is relevant, largely because of the effects relating to social security and fiscal law, as well as the social and moral implications of this evolution.

For a marriage to be valid, apart from the formal conditions, inherent conditions must be met. Unless the persons marrying are in a position to signify their consent, no marriage

can take place. In this way, physical or moral compulsion to marry and mental illness, for instance, are reasons for the annulment of a marriage. Annulment means that the marriage is deemed never to have taken place. This is in direct contrast to divorce where a valid marriage took place but the state declares that there are reasons for the marriage to be terminated. Both annulment and divorce free the parties to marry again. In some states marriage is regulated by church law and there is either no civil counterpart, or the state accepts a residual role. Islamic law is a case in point, although the impact on Jewish law and Canon law should not be underestimated.

Once marriage takes place, the spouses have rights and duties. There is a reciprocal obligation to provide moral and material support, by which the law seems to intend maintenance and solidarity. Failure to provide maintenance without just cause can result in penal sanctions against the offender. Many jurisdictions have signed international treaties in an effort to ensure payment of maintenance, spousal support or alimony to their nationals—even across borders. Lack of moral support is often cited as a ground for separation and/or divorce. It comes under the guise of neglect or psychological abuse and can be cited as having contributed greatly to the breakdown of the marriage.

Prior to marriage, some states recognize a legal stage known as betrothal—commonly referred to as engagement. Although the concept of an agreement between prospective spouses with a view to marriage has fallen into disuse in many parts of the world, there is still strong emphasis on the institute in countries where the custom of pre-arranged marriages still exists. Where a promise of marriage is broken, the offending party may be sued for real and, at times, moral damages. This would include damage to reputation or hardship incurred through the breaking of the promise for moral damages. Real damages are easier to quantify and would include any outlay made with a view to the marriage. One very old case cites the jilted boyfriend as suing for soft drinks (sodas) bought for the girlfriend during their two-year courtship.

Marriage is viewed as a lifelong exclusive contract between a man and a woman. As indicated earlier, there are exceptions to this definition with relation to gender. In some parts of the western world there are “duration vows,” which introduce the duration into the contract, so that vows are exchanged for a determined period, e.g. 10 years, and then reviewed. Suggestions have also been made to do away with the exclusivity element and include an agreement that both parties are happy to forego the obligation of fidelity. Such ideas do little to encourage unity and stability and are certainly not acceptable within the greater part of our legal jurisdictions.

Within some religions and most notably in Islamic law, it is permissible to have more than one wife, and in this way the exclusive element is dropped from the marriage contract. Polygamous unions such as these are not subject to time bar and are permissible, depending on the ability of the man to support more than one family. When two people marry, the law in a great number of countries automatically assumes that property gained within the marriage is to be shared between both spouses. The prospective spouses may wish to exclude such an inference or regulate their property in some other way. A matrimonial regime is the term given for defining the method of apportioning property within a marriage and is most commonly applied in countries with a civil law background

Regimes include the community of acquests where all property gained during marriage, other than that which is paraphernal by destination, is held and administered in common. Paraphernal property is property pertaining exclusively to one spouse by virtue of its being attained prior to marriage or from some source extraneous to the marriage, such as inheritance. When community of acquests applies, all earnings of both spouses are automatically placed in a common fund and shared equally.

Should one of the spouses be unable to make a financial contribution, the other spouse is still obliged to share. This is based on the assumption that both spouses make a contribution to the family, whether their work is inside or outside the home. The most typical example occurs when a woman takes time off work to have children. She is deemed to make contribution in kind, although she is not making a direct financial contribution to the acquests. Both spouses share the earnings of the breadwinner.

Separation of estates is an alternative regime whereby each spouse retains absolute autonomy over individual property. In this case, an arrangement for day-to-day administration would have to be settled between the spouses. Where both spouses have a separate income, this works very well. However, when one spouse is at a different position and particularly when the spouses start a family, it has been found hard to maintain strict separation without committed accounting skills. Where one party takes time out of gainful employment for the benefit of the family, this regime creates a financial penalty, unless provision is made to cover the discrepancy.

Another matrimonial regime is community of property under separate administration, where the spouses agree to administer their property individually but pool the remaining property at the end or dissolution of their marriage. This latter regime appears at first sight to be the best of both worlds, but interpretation of the practical aspects has led to restrictions in the administration of personal property during marriage. This is because of the interest in prospective quantum when partition taken place. In real terms, this means that if one spouse owns property and wishes to sell it, the other spouse should have no right to interfere. However, that spouse might argue that the property will greatly appreciate in value and should not be sold because of the eventual share in the residue.

In determining rules for spouses within marriage, family law attempts to cite a standard acceptable to the society it reflects. With growing disinterest in marriage, many legislatures have recognized the so-called common law marriage, whereby a couple may live together without the formalities required by law for marriage and still benefit from some of the rights accorded to married couples— and incur some of the responsibilities.

Time frames vary from one jurisdiction to another but where a couple has lived together for a determinate period of time, obligations relating to support and rights to property come into existence. It is a sad paradox that the exercise of these rights invariably becomes important at the termination of the marriage rather than when things are going smoothly. In determining whether the common law wife of 10 years standing has rights to maintenance for herself and children of the union or in apportioning community property or awarding monies in exchange for work carried out in the business of one party, family law invariably turns to the standards applied in marriage.

With increasing equality between the sexes worldwide, choices within marriage are becoming a matter for both spouses to determine. In most developed countries, choices regarding the matrimonial home, administration of property, contribution of maintenance and succession rights are equally divided according to the needs of the family as determined by the spouses. There are, however, many other cultures where male dominance still colors marriage and renders it an unequal bargain with the wife, who is largely subservient to the wishes of her husband. Family law has been influential in reflecting changes brought about by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), but there still remain a number of jurisdictions where cultural interpretation does not permit the effective application of well-intended family law legislation.

At the end of the marriage comes divorce, at the request of one or both spouses or with the death of either of the spouses. Most countries in the world permit or acknowledge divorce; Malta, for example, recognizes a divorce given by a foreign judgment, but does not permit divorce itself. There are, however, differing opinions as to the method by which a divorce may be awarded and its effects. Initially, divorce carried a stigma with it, but in most cultures, this has long since gone and multiple divorces have become fashionable in some parts of the world.

Divorce may be attained on either a fault or no-fault basis. Grounds for fault include adultery, desertion, violence and failure to provide support without just cause. Family law has emphasized a shift away from fault-based divorce in an effort to maintain civil communication between the parties. Methods such as conciliation, mediation and family case conferencing are used to remove as much of the trauma from marital breakdown as possible. Studies have repeatedly shown that spouses and children are invariably adversely affected by divorce. The law tries to ensure that it contributes no additional institutional abuse.

In granting a divorce decree, the family courts determine the rules that will apply to the couple following the end of their marriage. Community property is divided or apportioned, maintenance may be awarded together with arrangements for modality and duration of payment and authorization including a declaration signifying the civil capacity to remarry. (Where divorce has not been finalized and a new marriage is entered into, there would be a crime of bigamy.) Arrangements regarding care and custody of children and contact or access orders are often one of the most emotional parts of the divorce process, causing the court and the parties greatest concern.

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Biographical Sketch

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