FAMILY

IN ARCHANA PARASHAR FRANCESCA DOMINELLO

LAW

CAMBRIDGE

THE FAMILY IN LAW

Archana Parashar and Francesca Dominello



CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom One Liberty Plaza, 20th Floor, New York, NY 10006, USA 477 Williamstown Road, Port Melbourne, VIC 3207, Australia 4843/24, 2nd Floor, Ansari Road, Daryaganj, Delhi – 110002, India 79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence

www.cambridge.org Information on this title: www.cambridge.org/9781107561793

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First published 2017

Cover designed by Tanya de Silva-McKay
Typeset by Integra Software Services Pvt Ltd
Printed in China by C & C Offset Printing Co. Ltd., February 2017

A catalogue record for this publication is available from the British Library

A Cataloguing-in-Publication entry is available from the catalogue of the National Library of Australia at www.nla.gov.au

ISBN 978-1-107-56179-3 Paperback

Additional resources for this publication at www.cambridge.edu.au/academic/familylaw

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The Family in Law by Archana Parashar and Francesca Dominello provides a jurisprudential analysis of current family law, connecting doctrinal discourse with sociological, historical and economic analyses of the institution of the family.

The law's reliance upon the nuclear family ideology is central to the book's discourse, and provides the framework for in-depth analysis of the key areas of family law – marriage, divorce, children and property matters, as well as the legal regulation of abortion, assisted reproductive technologies, child protection and adoption.

The book is written for Australian legal actors whether students, academics or professionals. Readers are encouraged to question current frameworks, critique well-known cases and make informed conclusions about what changes could be made to engender a fairer and more equitable society.

In developing doctrinal analysis within a theoretical framework, the approach of the book challenges the conventional boundaries of family law, giving all readers a solid foundation and well-rounded understanding of this area of law and how it functions in the wider social context.

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ACKNOWLEDGEMENTS

This book is a culmination of many years of conversations between us. We have developed our views by sounding out colleagues and students in our classes. However, this project is a joint venture in more ways than that and we acknowledge the inputs and encouragement of colleagues and well wishers over time. In particular we wish to thank the staff of Cambridge University Press for supporting the publication of this book. We are very grateful to former Commissioning Editors, David Jackson, for encouraging us to submit a book proposal, and Martina Edwards for overseeing the final stages of that process. We are particularly thankful to Lucy Russell and Emily Thomas for their patience and guidance during the process of writing this book. We are grateful to the anonymous reviewers for their comments on the various chapters and to Joy Window for proofreading all of those chapters.

Macquarie Law School provided a very conducive atmosphere for completing this project and among others we would like to thank our colleagues Natalie Klein and Lise Barry for their support. We also wish to acknowledge the financial assistance provided by the Faculty of Arts, Macquarie University, and the research assistance provided by Dilara Reznikas and Isabella Ryan.

It is only appropriate that this book on family law was made possible due to the support of our families and we acknowledge this most sincerely. Archana dedicates the book to her mother and father, and her husband Vasudevacharya; Francesca to the memory of her parents, Cesarina and Vincenzo; her husband, Michael; her sisters, Antonella and Marisa; her children, Edita and Orlando, and all her nieces and nephews. Together we dedicate the book to our friend and mentor, Tony Blackshield, and to the memory of our friend and colleague, Lucy Martin.

DRELACE

Family law is an area we can all claim to have a vested interest in because of the impact it can have on everyone in society. This book adopts a unique approach to the study of family law by locating the family as central to understanding the content of family law and its development. Approaching the study of family law in this way, we have used an interdisciplinary framework that draws on sociological, historical and economic analyses of the institution of the family. There are many difficulties in trying to move across disciplinary boundaries, but in focusing on what these discourses say about the nature of family our aim is to demonstrate how the law also has its own understanding of what constitutes a family. The different things these discourses say about the family provide a framework for critiquing law's treatment of the family and thereby contribute to achieving a fairer law.

This approach is also unique in developing a distinctly jurisprudential analysis of family law. If, as we contend, the law has its own idea of what is a family then it becomes more clearly apparent how the law is engaged in the construction of the legal meaning of 'the family'. Hence the title of the book – *The Family in Law*. In developing this jurisprudential understanding of family law we are guided by the precept that legal meaning is constructed knowledge. In jurisprudential terms this view challenges the dominant positivist conceptions of law, particularly the understanding that the law is ascertainable by a process of applying objective and neutral reasoning. Although positivism has many nuances and has been challenged extensively in various critical discourses, it is also true that it retains a hold on our collective legal imagination. Thus, while cutting edge legal discourses are usually critical in nature, mainstream legal discourses have remained mostly doctrinal. This is well illustrated in the divide that exists in legal scholarship between those academic journal articles that are interdisciplinary and theoretical in an expansive sense and legal textbooks that are largely, if not exclusively, doctrinal.

The prominence of the legal positivist mode of thinking is achieved by a number of strands coming together; that is, in common law jurisdictions the heavy emphasis on judicial interpretations as the source of legal meaning helps create the impression that it is possible to discover the true meaning of any law. The conceptual device of legal reasoning as a special kind of reasoning legitimises the authority of judges to provide objective interpretations of the law. Legal education that emphasises learning specific skills over theoretical analyses of the law complements this worldview. It follows that the dominant understanding of legal study as professional training makes engaging with critical or interdisciplinary analyses of the law an optional extra, a matter of personal preference.

Critical theoretical analyses of law thus remain on the periphery of legal scholarship, revered and ignored at the same time.

We wish to bridge the gap between critical and doctrinal analyses of the law but without getting lost in the technical jargons of these different ways of thinking. For example, we use Foucault's insight that discourse is constructed and extend it to demonstrate how legal discourse is formed at various sites. However, we intentionally avoid engaging in technical debates about different methods of discourse analysis or on the 'correct' way of interpreting Foucault's ideas. We have also chosen not to engage with the contemporary debates about legal positivism or critical legal thought. Our aim is to carve a path between the technical extremes of critical and doctrinal thought in order to demonstrate how legal meaning is constructed rather than discovered. The focus of the book is on family law and how the family is constructed in law, but the implications of what we are saying run deeper. In the broader context of law this approach has profound implications for all legal actors because it means accepting that we each have a role in the construction of legal knowledge through the way we express our own conceptions of law. This also means we share a responsibility in the content of law and whether it operates fairly in society.

The book provides an overview of the legal doctrine on the conventional key areas of family law – marriage formation, divorce, children and property matters. In the discussion of these areas we develop the central thesis of the book – that family law relies on the nuclear family construct as the norm against which all other family structures are measured. This conceptualisation continues to reproduce certain assumptions about the family in law; namely, that it is predominantly a private institution whose main function is to provide economic and emotional support for its members. As will be made evident, provisions for property settlement, child support, and the presumption of equal shared parental responsibility cumulatively function in a way that places the greater costs of family breakdown on the more vulnerable members of the family, in an attempt made by the state to avoid bearing these costs itself.

This approach is problematic for a number of reasons, particularly as it implicates family law in maintaining relations of inequality that exist in the family and in society more broadly. As the realities of gender inequality, discrimination and poverty persist in our society, this book is a timely contribution in considering the place of family law within the wider social context. In demonstrating the ideological function of current family law perpetuating the nuclear family as the dominant structure, our aim is to enable the reader to explore the possibilities of family law engendering a more fair and equitable society.

In developing the doctrinal analysis of family law within an interdisciplinary theoretical framework, the book challenges the conventional understanding often found in conventional family law texts (that family law merely reflects the assumptions made about the family in other disciplines), to explore how the law makes explicit choices in regulating family life and the values to be pursued in law. In each chapter these choices will be exposed through an examination of the way the law understands the family, constructs

its own legal knowledge about the family, and how these legal assumptions impact those seeking relief in family related matters. In exposing the choices made in the field of family law, readers will be able to understand the law as a site for the construction of legal knowledge about the family. In exposing the different ways the concept of family can be understood, the reader will be able to consider and reflect on their own understanding of the family and begin to appreciate how they could make a valuable contribution to the construction of family law.

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