

Report: Knowledge, Skills and Values

DOCTRINAL AREA: FAMILY LAW

1. Knowledge

What core elements are essential for students to enable them to have a substantive understanding of the field?

The common global curriculum for family law is based on human relationships within families: the formation and recognition of relationships (both formal and informal), their functioning, their dissolution and the legal consequences of family breakdown. Family law is socio-legal in orientation in that the law cannot be considered in isolation from the context of the social, economic, political, cultural and religious beliefs of the society in which it operates. There must be due sensitivity accorded to the diversity of cultural and religious traditions, beliefs and norms present within different societies. The precise boundaries of family law are “fuzzy”, for example in some jurisdictions, issues of succession and inheritance based on family relationships may be part of the standard curriculum, while elsewhere such issues would be considered as a separate doctrinal area.

A further outline of the core elements of knowledge can be found in Appendix 1.

2. Skills

In addition to the general skills outlined in the Outcomes of a Legal Education, are there any skill sets particular to this field which students should have attained at the end of the course?

B(iv) states that a law graduate should be proficient in: “constructing a legal position and effectively communicating (orally and in writing) within a legal context.”

In the context of family law, effective communication requires a level of emotional intelligence, paying attention to interpersonal relationships and recognising the role of emotions in family disputes.

3. Values

What values specific to this field should students incorporate in an overall ethical legal education? What values specific to this field can be used to illustrate and reinforce an ethical legal education?

As family law in different jurisdictions reflects different religious and cultural traditions and beliefs, it is challenging to articulate values which can be universally accepted. It was recognised that historically changes in values and social attitudes have been

major drivers in the evolution of family law. So in relation to the status of men and women within the family, there has been a shift away from patriarchal legal systems to the elimination of discrimination against women. However although some legal systems would subscribe to the value of “gender equality” before the law, other legal systems hold to a principle of “gender equity” within the law.

The value that the best interests or the welfare of the child should be accorded primary consideration was generally accepted. However, the question of what are the child’s best interests may produce different answers in different jurisdictions as any evaluation takes into account ethical, social, moral, religious, cultural, emotional and welfare considerations. It was noted that scientific and technological advances, for example, in relation to assisted reproduction techniques, have required family law to develop new concepts of parenthood and that future scientific advances may pose further challenges to traditional understandings of the family and family law.

4. How has globalisation impacted your course?

Traditionally the focus for family law has been predominantly domestic or national. By the late 20th century, with greater global mobility there are greater numbers of international families and therefore an increase in the number of disputes with an international dimension

So family law now has to take into account:

- (i) Disputes over children with an international dimension, both relocation cases and international child abductions
- (ii) Legal implications of creating parenthood across national boundaries, through inter-country adoption and international surrogacy arrangements
- (iii) Conflict of law issues, whether between states within a federation or nation states, especially with respect to issues of marital status, now that same-sex marriage has been legalised in a number of jurisdictions.

5. Are there areas where international standards are adopted?

Here we considered international instruments which are unique or specific to family law.

- (i) United Nations Convention on the Rights of the Child 1989
- (ii) The Hague Conventions on International Child Abduction 1980 and Inter-Country Adoption 1993.

6. How did that come to pass?

In relation to the UNCRC 1989, we noted that many countries have reservations about substantive areas of law. So this mechanism means that international standards will not apply to those areas of law. In general, we noted that there would

be no direct enforcement of Convention rights unless they were incorporated into national law.

In relation to The Hague Conventions, the concept of a Central Authority in each signatory State creates a mechanism to improve co-ordination and enforcement. However not all states have ratified The Hague Conventions as only 80 countries are members of The Hague Conference.

7. What areas in your field will be the next ones to be influenced by globalization?

- (i) Conflict of laws issues in the context of same-sex marriage.
- (ii) International surrogacy – possibility of equivalent of Hague Convention dealing with establishment and recognition of a child’s legal parentage.
- (iii) Rights of transgender people.
- (iv) Children’s right to participate in context of parent-child relationship.
- (v) Status of the unborn child –issues around fetal surgery, termination, wrongful life claims.

8. How should we prepare our students confidently to meet these challenges within a regime of the rule of law?

We prepare our students through a combination of approaches: sound technical knowledge and expertise in the law, with insight and empathy to respond with understanding, integrity and compassion to the human experiences which lie behind the law.

9. What are the major areas for investigation in this field?

In addition to the areas indicated in 7 above, the following areas are suggested as key fields for investigation:

- (i) International standards for substitute parenting.
- (ii) Implications of genetic engineering and cloning for family law.
- (iii) Post-divorce maintenance and property distribution.
- (iv) International standards for child support with respect to non-marital fathers.
- (v) The development of specialist family courts and judges and the link to mediation.

10. How can collaborative approaches across regions inform the scholarship in this field?

Collaborative approaches allow identification of “solutions” to common problems and issues which might be better than the existing response within the domestic system.

11. What trends are developing in the field which researchers and scholars both in and outside of the field should be aware?

In addition to the issues mentioned above, there are two particular trends which are worthy of note. The first is the impact of scientific and technological changes, particularly in the field of genetic engineering and assisted reproduction. The second is in relation to the aging world, particularly in terms of the legal and moral obligations between parents and adult children.

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Appendix 1

In terms of defining core elements of knowledge, it might be appropriate to divide the field into two substantive areas, adult relationships and children in the family setting alongside the nature of the family justice system and the role of ADR.

Adult relationships

Globally there is a diversity of relationships between adults which are recognised by different legal systems.

(a) Formation of adult relationships

(i) Marriage: definition of marriage, rules governing entry into marriage, legal consequences during the marriage.

(ii) Other status based relationships between adults, for example, civil partnerships. Definition, rules governing entry, legal consequences during the relationship.

(iii) Non-marital cohabitation: definition, legal consequences (if any) during the relationship.

(b) Termination of adult relationships

(i) Divorce or dissolution of status based relationships (marriage and civil partnerships): rules and process.

(ii) Consequences of termination (which may include non-marital cohabitation if legal consequences are attached). This includes rules on property and support and the extent to which marriage contracts or cohabitation contracts are respected.

(c) Domestic violence and abuse

(i) Protection of victims: criminal law response and civil law orders restraining behaviour of the perpetrator and in some instances excluding the perpetrator from the home.

Children in the family setting

There are fundamental principles which apply across many jurisdictions but the interpretation and application of the principles may vary depending on different contexts.

(a) Fundamental principles in the law relating to children

(i) The welfare or 'best interests' principle: definition and operation in decision-making.

(ii) The concept of children's rights: theoretical foundations and participation rights of children. United Nations Convention on the Rights of the Child 1989.

(b) Formation of relationships between children and adults

(i) Defining and classifying children.

Rules on age and birth status.

(ii) Recognising parentage and other family ties.

Definitions of parentage and parenthood. Rules determining who is recognised as a child's legal parent. This includes where a child is born as a result of artificial reproductive techniques and surrogacy.

(iii) Regulation of parenting.

Allocation of rights and responsibilities.

(c) Intra-family disputes: parental separation

(i) Legal framework for determining parenting arrangements after parental separation, including parental relocation (Hague Convention on the Civil Aspects of International Child Abduction 1980).

(ii) Financial support for children.

(d) Child abuse and child protection

(i) Classification and effects of child abuse.

(ii) Legal responses: criminal law and civil orders authorising short or long term removal of the child from the home, with termination of parental rights and substitute parenting (including the law of adoption).

The nature of the family justice system and the importance of ADR.

One commonality at the global level is the trend to seeing courts as the destination of last resort for family disputes. ADR is used either to divert disputes from the court system or to provide a kinder and more constructive way to address family conflict compared to what is perceived as an adversarial court process. Core knowledge for students includes appreciation of the range of ADR practised within the specific jurisdiction, whether counselling, negotiation, mediation (in and out of court), collaborative law, or arbitration.