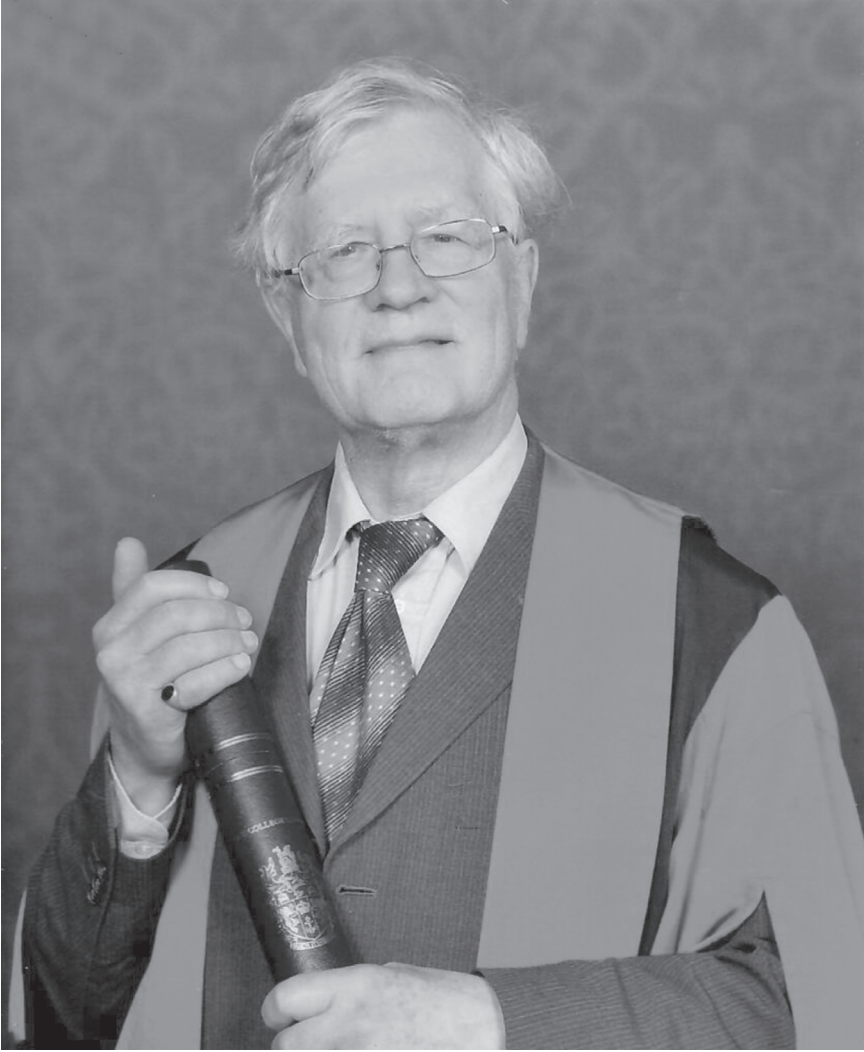


FAMILY MATTERS



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Essays in Honour of John Eekelaar

Edited by

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EDITORS' PREFACE

Almost every Festschrift begins with a statement that if ever there was a person who deserved one, it is the person being celebrated. However, never was this truer than in the case of John Eekelaar. Our suggestion of a Festschrift in honour of John Eekelaar was greeted with huge warmth and enthusiasm by a substantial body of the worldwide 'family law community'. So many told us of the honour they felt at being asked to contribute to this volume. The resultant 66 contributions in this book, involving 77 contributors across so many jurisdictions, speak for themselves of the very high esteem in which John is held within the field of family law across the globe.¹

Of course, that reaction came as no surprise. John Eekelaar is a 'giant of family law'² and, as many leading scholars in this volume acknowledge, his contribution to family law scholarship is unrivalled. As Judith Masson observes, John has 'made massive contributions across the whole range of family law research and scholarship: to theory, the analysis of policy, case law and statute law, and to the development of empirical research over two generations (at least) of family law researchers'.³ Indeed, Gillian Douglas notes that John was 'probably the first scholar in the United Kingdom systematically to combine theoretical, contextual and empirical insights with doctrinal rigour, in order to explore how family law operates in practice, as well as in theory'.⁴ It is perhaps John's deep engagement with theory, in addition to the other forms of scholarship, which particularly marks him out. As Marsha Garrison observes, '(v)ery few try their hands at both theoretical and empirical inquiry', yet John has made major contributions in both arenas.⁵ Andrew Bainham and Jonathan Herring, respectively, comment that, '[i]n the course of his long and unparalleled career, John Eekelaar never failed to ask the difficult questions'⁶ and '[a]nyone tempted to think that family law is a "soft" subject for academic study, or has little of philosophical interest, will soon have their minds changed

¹ There were many more academics and judges who would have wished to contribute, but whose commitments, particularly in light of the Covid-19 pandemic, made contributing in the suggested time-frame impossible.

² As Claire Fenton-Glynn puts it in her chapter, at p. 981.

³ Masson, p. 933.

⁴ Douglas, p. 115.

⁵ Garrison, p. 181.

⁶ Bainham, p. 931.

by reading any of John's work.⁷ The variety of subject matter upon which John has brought to bear this range of research and scholarship is equally impressive, as evidenced by John's extensive publications list.⁸ Fareda Banda comments that the 'breadth and volume of his work is astounding,'⁹ and Gillian Black observes that '[w]hichever topic in family law one lights upon, one is certain to find that John has gone before.'¹⁰ Several contributors draw attention to the groundbreaking, keystone, or prescient nature of John's work (Martha Bailey, Anne Barlow, Jo Bridgeman, Shazia Choudhry and Rachel Taylor, Aoife Daly, Ursula Kilkelly and Conor O'Mahony, Mark Henaghan, Jens M. Scherpe, Brian Sloan, John Tobin, Nick Wikeley),¹¹ or the profound contribution he has made to understanding of an area (see, for example, Belinda Fehlberg, Kristin Natalier, Bruce M. Smyth and Monica Campo),¹² or highlight the impact of John's research upon the development of law in their own jurisdictions (for example, Kathryn O'Sullivan, Nicolás Espejo-Yaksic).¹³

As editors, we were confronted with an incredible wealth of material for this volume, and the unenviable task of grouping the 66 contributions into a structure that would allow the reader to find areas of interest more quickly. Therefore, we divided the book into six main parts:

- I. The Family Justice System and the Work of Family Lawyers, Judges and Academics.
- II. Developing Family Law and Policy: Culture, Concepts and Values.
- III. Horizontal Family Law: Relationships Between Adults (with subparts on Marriage, Cohabitation, and Financial Aspects and Property).
- IV. Vertical Family Law: Children, Parents and Parental Figures (with subparts on Parentage, Parenthood and Responsibility for Children; Children's Rights and Welfare; Post-Separation Parenting and Child Support; and State Intervention).
- V. Individual Family Law.
- VI. Other Family Matters.

Many of the contributions straddle several areas of family law and could have been placed in a different part of the book. Nevertheless, we hope that the

⁷ Herring, p. 149.

⁸ See pp. 1091–1105, over which 240 publications are listed.

⁹ Banda, p. 147.

¹⁰ Black, p. 309.

¹¹ Bailey, p. 739, Barlow, p. 469, Bridgeman, p. 948, Choudhry and Taylor, p. 775, Daly, Kilkelly and O'Mahony, p. 801, Henaghan, p. 671, Scherpe, p. 638, Sloan, p. 832, Tobin, p. 691. As Nick Wikeley comments at p. 899, John's work has been 'path-breaking in exposing and exploring choices of principle in family law and social policy'.

¹² At p. 854.

¹³ O'Sullivan, at p. 535 and Espejo-Yaksic, at p. 623.

chosen structure and placement of chapters does overall justice to the wonderful contributions that we have received.

The book opens with John's Memoir,¹⁴ providing background on John's life and career, explaining from his own point of view his developing academic interests and engagement with them. This has spared us as editors a great deal of what otherwise would have been our task to provide an introduction for the book. We are very grateful to John for agreeing to include his Memoir, which means that this brief Preface can concentrate on mapping out the themes of the contributions and paying tribute to John.

The first part of the contributions in honour of John opens with Baroness Hale of Richmond's examination of the influence of academia on family law, which inter alia highlights John's early works, *Family Law and Family Security* and *Family Law and Social Policy*, and the important part John played in broadening the scope of family law scholarship.¹⁵ As Richard Chisholm notes in his chapter, John's work opened scholars' eyes to 'the potential range of family law scholarship'¹⁶ and, as Bill Atkin put it in his, John's work represented a turning point from 'family law as a black-letter law subject, to one that can only be properly explored in its wider social, cultural, ethical and political context'.¹⁷

Mavis Maclean, John's long-term research partner, in her chapter expresses her appreciation of John's 'interest in social policy ideas as part of a socio-legal approach to family law research in Oxford', and explains key questions about justice and welfare, and family law and family policy, that have engaged them, and the future empirical work it has led them to consider.¹⁸ Not surprisingly, John's sociolegal and social policy focus provides a stimulus for several contributions, such as Bill Atkin's chapter on Family Law and Social Policy in a Post-Colonial Nation,¹⁹ Velina Todorova's harrowing account of 'cultural gender wars' in Bulgaria,²⁰ Lei Shi's explanation of the family values clause in Chinese law,²¹ and Kirsten Scheiwe's examination of developing social policy on caring rights and obligations in German law.²² Other chapters examine the development of particular areas of family law over time, evidencing both change and continuity (for example, Sir James Munby's examination of judicial attitudes in England and Wales in the twentieth century,²³ and Sanford N. Katz's account of developments in the law of marriage and adoption).²⁴

¹⁴ Eekelaar, pp. 1–23

¹⁵ Hale, pp. 27–40.

¹⁶ At p. 836.

¹⁷ At p. 197.

¹⁸ Maclean, pp. 41–55.

¹⁹ Atkin, pp. 197–209.

²⁰ Todorova, pp. 245–261.

²¹ Lei Shi, pp. 227–244.

²² Scheiwe, pp. 263–281.

²³ Munby, pp. 81–97.

²⁴ Katz, pp. 295–306.

Mavis Maclean's chapter, of course, also highlights the importance of John's empirical work, and the subject matter of several other chapters indirectly pays homage to such work, for example Garrison's exploration of the empirical turn in family law,²⁵ Masson's examination of what our understanding of care proceedings can learn from empirical studies,²⁶ and Haskey's statistical analysis of trends and transitions in families, partnerships and relationships in England and Wales.²⁷ Rob George's chapter draws inspiration from John's groundbreaking work (often with Mavis Maclean) on legal professionals and their roles within the family justice system, providing an account of George's own research (with Mavis Maclean), and reflecting on how it informs our understanding of the family justice system.²⁸ Several other contributions cluster around this theme of family justice or the family justice system. Sir Mathew Thorpe provides a memoir of the work of the appellate judge in the Court of Appeal,²⁹ Sir Ernest Ryder's chapter (dedicating to John his Blackstone Lecture) examines 'Justice in a Crisis';³⁰ Andrew Bainham explores the issue of justice in care proceedings;³¹ Gillian Douglas examines the enforcement of orders in the family justice system;³² and Benoit Bastard provides an account of the development of family mediation in France.³³

John's later work, notably his book *Family Law and Personal Life*, sought to refract the subject of family law through the lenses of power, rights, respect, friendship, responsibility, truth and community. John has also explored how family law treats the emotion called 'love'. Many of the contributions engage with some of these themes. Craig Lind focuses on the theme of power in family law,³⁴ and Sarah Trotter examines the theme of truth and reality, exploring different constructions in relation to knowledge of origins and knowledge of potential offspring.³⁵ Other chapters similarly engage with matters of identity, such as Fenton-Glynn's chapter on gender identity,³⁶ and with matters of biological connection, such as Thérèse Callus' exploration of the sharing of genetic information,³⁷ and Harry Willekens' interrogation of the use of biological criteria in the allocation of parental rights and obligations.³⁸ Unsurprisingly,

²⁵ Garrison, pp. 181–195.

²⁶ Masson, pp. 933–946.

²⁷ Haskey, pp. 367–385.

²⁸ George, pp. 58–72.

²⁹ Thorpe, pp. 73–80.

³⁰ Ryder, pp. 99–114.

³¹ Bainham, pp. 915–931.

³² Douglas, pp. 115–127.

³³ Bastard, pp. 1028–1041.

³⁴ Lind, pp. 165–180.

³⁵ Trotter, pp. 1011–1023.

³⁶ Fenton-Glynn, pp. 981–995.

³⁷ Callus, pp. 999–1010.

³⁸ Willekens, pp. 567–580.

given John's many works on parenthood and parental responsibility, a number of other chapters explore various aspects of the parent-child relationship. Emily Jackson examines when a mother is not a mother,³⁹ Carmen Draghici offers a human rights perspective on putative fathers in English law,⁴⁰ Olga A. Khazova examines the issue of social parenthood with reference to the European Court of Human Rights case *Nazarenko v. Russia*,⁴¹ and Mark Henaghan explores grandparental rights in Aotearoa New Zealand.⁴² Four further chapters explore the concept of parental responsibility: Nicolás Espejo-Yaksic charts developments in understandings of parental responsibility in Latin America,⁴³ Jens M. Scherpe explores the concepts of joint and individual responsibility, the English courts' *de facto* destruction of the latter, and whether a 'duty to inform' might offer a compromise;⁴⁴ Stephen Gilmore looks at recent case law on the age of discretion and the scope of parental responsibility;⁴⁵ and Jo Bridgeman examines parental responsibility and public responsibilities for the welfare of children.⁴⁶ Two chapters then focus on the parental duty to support children. Bruce M. Smyth, J. Thomas Oldham and Prem Aleema highlight the importance of flexibility in changing times,⁴⁷ and Nick Wikeley examines the notion of shared care in the UK child support scheme.⁴⁸ The issue of post-separation parenting arrangements is the subject of a number of chapters. Richard Chisholm reflects on law reform in Australia;⁴⁹ Belinda Fehlberg, Kristin Natalier, Bruce M. Smyth and Monica Campo offer insights from research in Australia on the meaning of 'home' for children;⁵⁰ Satoshi Minamikata provides an account of disputes about child-parent contact in Japan;⁵¹ and Brian Sloan examines the law on adoption and post-adoption contact between children and their birth parents.⁵²

The theme of 'rights' (and capacity) plays out heavily in many chapters (for example, Encarnación Roca Trías, Nwudego Nkemakonam Chinwuba).⁵³ As Fenton-Glynn observes, John's 'writing on children's rights, in particular, has been field-defining.'⁵⁴ Unsurprisingly, therefore, contributors address the

³⁹ Jackson, pp. 581–593.

⁴⁰ Draghici, pp. 595–609.

⁴¹ Khazova, pp. 612–621.

⁴² Henaghan, pp. 671–685.

⁴³ Espejo-Yaksic, pp. 623–636.

⁴⁴ Scherpe, pp. 637–653.

⁴⁵ Gilmore, pp. 655–669.

⁴⁶ Bridgeman, pp. 947–959.

⁴⁷ Smyth, Oldham and Aleema, pp. 883–897.

⁴⁸ Wikeley, pp. 899–912.

⁴⁹ Chisholm, pp. 836–852.

⁵⁰ Fehlberg, Natalier, Smyth and Campo, pp. 853–868.

⁵¹ Minamikata, pp. 869–882.

⁵² Sloan, pp. 817–832.

⁵³ Roca Trías, pp. 283–294; Chinwuba, pp. 1061–1074.

⁵⁴ Fenton-Glynn, p. 981.

legacy of John's work on the protection of children's interests (John Tobin).⁵⁵ Aoife Daly, Ursula Kilkelly and Conor O'Mahony examine the significance of John's dynamic self-determinism for the development of the child's best interests principle in international human rights law.⁵⁶ The rights of child offenders are examined (Christine Piper),⁵⁷ including foreign national offenders (Kathryn Hollingsworth and Helen Stalford),⁵⁸ as well as the autonomy rights of competent minors (Martha Bailey),⁵⁹ and children's rights to vaccination in the context of the Covid-19 pandemic (Robert Dingwall).⁶⁰ The significance of children's interests in the context of gender violence (Teresa Picontó Novales)⁶¹ or domestic abuse (Shazia Choudhry and Rachel Taylor)⁶² is also explored.

The role of community and of cultural values, and their interaction (indeed sometimes tension) with individuals' interests, is also a theme running through some of John's work. Picking up on this, Fareda Banda examines colonialist legacies and continuities, and tensions between culture and welfare,⁶³ and Farrah Ahmed, Ghena Krayem and Balawyn Jones explore cultural voluntarism and sharia processes.⁶⁴ Julia Sloth-Nielsen's examination of whether, in constitutional family law in South Africa, pluralism can be reconciled with constitutionalism addresses similar themes.⁶⁵

Several chapters explore the theme of love with respect to family law and its aims (Jonathan Herring, Mariela Neagu, Wendy Schrama and Jet Tigchelaar).⁶⁶ The significance of the related notion of sexual intimacy for regulation of adult relationships is explored by Gillian Black,⁶⁷ and Jordi Ribot Igualada examines tort liability for loss in intimate relationships.⁶⁸

Of course, John has also written widely on the legal regulation of (adult) family relationships, and several chapters engage with, or take their inspiration from, his work on the law relating to marriage, and to couples who cohabit. Rebecca Probert considers John's 'modest proposal' for reform of marriage law in England and Wales,⁶⁹ Thandabantu Nhlapo's chapter focuses on customary

⁵⁵ Tobin, pp. 690–703.

⁵⁶ Daly, Kilkelly and O'Mahony, pp. 801–815.

⁵⁷ Piper, pp. 705–721.

⁵⁸ Hollingsworth and Stalford, pp. 723–738.

⁵⁹ Bailey, pp. 739–755.

⁶⁰ Dingwall, pp. 757–772.

⁶¹ Picontó Novales, pp. 789–800.

⁶² Choudhry and Taylor, pp. 773–787.

⁶³ Banda, pp. 132–147.

⁶⁴ Ahmed, Krayem and Jones, pp. 211–226.

⁶⁵ Sloth-Nielsen, pp. 349–366.

⁶⁶ Herring, pp. 149–163; Neagu, pp. 961–977; Schrama and Tigchelaar, pp. 329–347.

⁶⁷ Black, pp. 309–327.

⁶⁸ Ribot Igualada, pp. 1043–1059.

⁶⁹ Probert, pp. 389–401.

marriage in South Africa,⁷⁰ and Jamil Ddamulira Mujuzi examines the presumption of marriage from repute in Kenya.⁷¹ Patrick Parkinson 'laments' the erosion of marriage,⁷² while Katharina Boele-Woelki's and Anne Barlow's respective chapters explore legal regulation of the increasing number of couples who are neither married nor in registered partnerships.⁷³ Sir Philip Moor similarly explores the plight of unmarried couples, examining whether financial provision for unmarried couples, in comparison with married couples, is fair.⁷⁴ Andy Hayward explores the related topic of 'family property'.⁷⁵ John's many important articles and case comments on the topic of family property and finances also inspire several other contributions: Baroness Deech of Cumnor's critical examination of the need for reform of the law of financial remedies;⁷⁶ and Sir Nicholas Mostyn's and Kathryn O'Sullivan's examinations of the direction of travel, respectively, of spousal maintenance in England and Wales, and maintenance laws in Ireland.⁷⁷

Beyond the substantive content of the chapters, overall they speak of 'admiration' and 'inspiration'. Several contributors acknowledge the inspiration they have drawn from John's work (Wendy Schrama, Richard Chisholm, Anne Barlow)⁷⁸ and/or the immense intellectual debt owed to him (Patrick Parkinson, Nick Wikeley, Craig Lind, Jo Bridgeman). These debts include the copious references to, and insights drawn from, John's work,⁷⁹ or his work providing models for contributors' own research,⁸⁰ or influencing their thinking.⁸¹ The importance of John's scholarship to the teaching of family law is also acknowledged, noting the enduring nature of John's work, and that his articles would always be within – indeed, often at the top of – any family law reading list (Emily Jackson, John Tobin).⁸²

It is clear throughout the contributions that John is much admired, and 'spoken of with remarkable warmth and affection' (Jonathan Herring).⁸³ Claire Fenton-Glynn highlights the perhaps less well known and quieter contribution John has made to those around him: 'Whether it be in conferences, workshops, or through his work on the *International Journal of Law, Policy and the Family*,

⁷⁰ Nhlapo, pp. 403–417.

⁷¹ Mujuzi, pp. 419–431.

⁷² Parkinson, pp. 433–446.

⁷³ Boele-Woelki, pp. 450–467; and Barlow, pp. 469–485.

⁷⁴ Moor, pp. 505–516.

⁷⁵ Hayward, pp. 549–563.

⁷⁶ Deech, pp. 489–504.

⁷⁷ Mostyn, pp. 517–533; and O'Sullivan, pp. 535–548.

⁷⁸ Schrama and Tigchelaar, p. 329; Chisholm, p. 836; Barlow, p. 469.

⁷⁹ Wikeley, p. 899; Lind, p. 165.

⁸⁰ Parkinson, p. 433.

⁸¹ Bridgeman, p. 958.

⁸² Jackson, p. 581; Tobin, p. 689.

⁸³ Herring, p. 149.

his engagement with the ideas of others – and particularly young scholars coming through the ranks, unsure of their academic footing – has encouraged a new generation of family lawyers.⁸⁴ Christine Piper's recollection of John's kindness in taking time to chair papers in a postgraduate conference when she was a student provides just one example of this generosity.⁸⁵ Moreover, as Nigel Lowe comments, 'John was a key figure in creating and nurturing The International Society of Family Law which was so influential in shaping the Family Law agenda and provided opportunities for academics around the world to meet and to discuss issues of joint concern.'⁸⁶ Several contributors acknowledge how they have benefited immensely from John's guidance, both on a personal and on a professional level. John has played a considerable role in the career development of others, and in connecting scholars with each other. This is captured nicely in Patrick Parkinson's comment that, aside from his research, 'John's influence really is remarkable, for he has also been a mentor and friend to so many other family law scholars around the world.'⁸⁷

Indeed, the editors of this volume met at Oxford because of John Eekelaar, in the academic year 2004/2005, being easily identifiable as the oldest students attending John's family law lectures. As it later turned out, Stephen Gilmore was going to be John's last research student, and Jens M. Scherpe was to attend the very last tutorial John would ever give. Both of us returned to our academic careers much the better for our encounters with John, and thus we have our own personal reasons why it has been such a privilege and pleasure for us jointly to organise this *Festschrift*. The contributions in this book are a testament to the vast impact of John's ideas within the discipline of family law, and to his kindness and humanity.

Finally, we should like to thank all the team at Intersentia, in particular Ann-Christin Maak-Scherpe and Rebecca Moffat, whose support of this project and guidance throughout its production have been exceptional.

Stephen Gilmore and Jens M. Scherpe
London/Cambridge, 23 May 2022

⁸⁴ Fenton-Glynn, p. 981.

⁸⁵ Piper, p. 705.

⁸⁶ Lowe, p. 1075.

⁸⁷ Parkinson, p. 433.

CONTENTS

<i>Editors' Preface</i>	v
<i>List of Contributors</i>	xxi

Memoir: What I Have Tried to Do

John EEKELAAR	1
---------------------	---

PART I. THE FAMILY JUSTICE SYSTEM AND THE WORK OF FAMILY LAWYERS, JUDGES AND ACADEMICS

The Influence of Academia on Family Law: From the Battlefield to Mount Olympus

Brenda HALE, Baroness Hale of Richmond	27
--	----

Family Law and Social Policy: Justice and Welfare

Mavis MACLEAN	41
---------------------	----

Legal Professionals and the Family Justice System

Rob GEORGE	57
------------------	----

The Work of the Appellate Judge in Family Law: A Memoir

Sir Mathew THORPE	73
-------------------------	----

Adultery, Equality and Children's Welfare: Judicial Attitudes in the Twentieth Century

Sir James MUNBY.....	81
----------------------	----

'Justice in a Crisis'

Sir Ernest RYDER.....	99
-----------------------	----

Enforcement of Orders in the Family Justice System: Obligation, Gender and Authority

Gillian DOUGLAS.....	115
----------------------	-----

PART II. DEVELOPING FAMILY LAW AND POLICY: CULTURE,
CONCEPTS AND VALUES

John Eekelaar and His Work: An Appreciation	
Fareda BANDA	131
John Eekelaar, Love and Family Law	
Jonathan HERRING	149
Power in Family Law and Personal Life	
Craig LIND	165
Integrating Facts and Values in Family Law	
Marsha GARRISON	181
Family Law and Social Policy in a Post-Colonial Nation	
Bill ATKIN	197
Cultural Voluntarism and Sharia Processes in Australia	
Farrah AHMED, Ghena KRAYEM and Balawyn JONES	211
Getting the Message of the New ‘Family Values Clause’	
Lei SHI	227
Gender Wars in Bulgaria	
Velina TODOROVA	245
Caring Rights and Obligations in German Family Law and Social Policy: How Far Have We Come?	
Kirsten SCHEIWE	263
Constructing Family in a Rights-Based Law	
Encarnación ROCA TRÍAS	283
Marriage and Adoption Laws in America: Continuity and Change	
Sanford N. KATZ	295

PART III. HORIZONTAL FAMILY LAW: RELATIONSHIPS
BETWEEN ADULTS

Adult Relationships and the Ongoing Legal Significance of Sexual Intimacy	
Gillian BLACK	309

Aims of Family Law Tested Against Dutch Family Law: What's Love Got to do with It?	
Wendy SCHRAMA and Jet TIGCHELAAR	329
25 Years of Constitutional Family Law: Can Pluralism be Reconciled with Constitutionalism?	
Julia SLOTH-NIELSEN	349
Families, Partnerships and Relationships in England and Wales: Trends and Transitions	
John HASKEY	367
<i>Marriage</i>	
Eekelaar's 'Modest Proposal' for Reforming the Law of Marriage	
Rebecca PROBERT	389
Missed Opportunities in Customary Marriage Law in South Africa: Law versus Culture ... Again	
Thandabantu NHLAPO	403
The Contentious Legal Status of Marriage by Presumption or Repute in Kenya	
Jamil Ddamulira MUJUZI	419
The Erosion of Marriage	
Patrick PARKINSON	433
<i>Cohabitation</i>	
Legislating the Relationship of Couples who are Neither Married Nor Registered	
Katharina BOELE-WOELKI	449
Coupledness and the Law: What Next After Equal Civil Partnership?	
Anne BARLOW	469
<i>Financial Aspects and Property</i>	
Reactionism, Reform or Revolution	
Ruth DEECH, Baroness Deech of Cumnor	489

Financial Provision for the Married and the Unmarried: Is the Law Fair? Sir Philip MOOR	505
Spousal Maintenance: Where Did it Come From, Where is it Now, and Where is it Going? Sir Nicholas MOSTYN	517
Irish Maintenance Laws' Direction of Travel and the Likelihood of Reform Kathryn O'SULLIVAN	535
John Eekelaar's Contribution to Family Property: Reflections on 'A Woman's Place – A Conflict between Law and Social Values' Andy HAYWARD	549
PART IV. VERTICAL FAMILY LAW: CHILDREN, PARENTS AND PARENTAL FIGURES	
<i>Parentage, Parenthood and Responsibility for Children</i>	
What (if Anything) can Justify the Use of Biological Criteria for Allocating Parental Rights and Obligations? Harry WILLEKENS	567
When is a Mother not a Mother? Emily JACKSON	581
Putative Fathers in English Law: A Human Rights Perspective Carmen DRAGHICI	595
Some Reflections on a European Court Case: <i>Nazarenko v. Russia</i> Olga A. KHAZOVA	611
From <i>Patria Potestas</i> to Parental Responsibility: Trajectories of a Concept Nicolás ESPEJO-YAKSIC	623
Parental Responsibility: To Consult or Consent, is that the Question? Jens M. SCHERPE	637
A Black Cloud Over the Age of Discretion and the Scope of Parental Responsibility? Stephen GILMORE	655

What are Grandparental Rights in Aotearoa New Zealand? Mark HENAGHAN	671
<i>Children's Rights and Welfare</i>	
From Emerging Rights to Enduring Relevance: The Legacy of John Eekelaar's Work on Children's Rights John TOBIN	689
The Welfare and Rights of Children: Are Offenders Excluded? Christine PIPER	705
Future-Proofing Children's Rights Protections for Child Foreign National Offenders: Blurring the Bright Lines Kathryn HOLLINGSWORTH and Helen STALFORD	723
Limits on the Autonomy Rights of Competent Minors Martha BAILEY	739
Children's Rights in Pandemic England: The Case of Vaccination Robert DINGWALL	757
Rights, Welfare and Domestic Abuse: 'Beyond the Welfare Principle'? Shazia CHOUDHRY and Rachel TAYLOR	773
Developments in the Protection of Children's Rights in Spain: With Special Reference to the Context of Gender Violence Teresa PICONTÓ NOVALES	789
The Best Interests Principle and the Evolution of International Human Rights Law: Revisiting Eekelaar's Dynamic Self-Determinism Model in Light of Contemporary Children's Rights Issues Aoife DALY, Ursula KILKELLY and CONOR O'MAHONY	801
Contact and Adoption in the Twenty-First Century: 'Disjuncture Between Reality and the Legalities'? Brian SLOAN	817
<i>Post-Separation Parenting and Child Support</i>	
Reforming Children's Law: Learning from the Australian Experience Richard CHISHOLM	835

Exploring the ‘Best Interests’ Principle: ‘Home’ After Parental Separation for Children and Young People who Have Experienced Domestic Abuse Belinda FEHLBERG, Kristin NATALIER, Bruce M. SMYTH and Monica CAMPO	853
Right to Contact and the Life-Span Development of the Non-Resident Parent Satoshi MINAMIKATA	869
Child Support in the Twenty-First Century: The Importance of Flexibility in Changing Times Bruce M. SMYTH, J. Thomas OLDHAM and Prem ALEEMA	883
Shared Care in the UK Child Support Scheme Nick WIKELEY	899
<i>State Intervention</i>	
What is Justice in Care Proceedings? Andrew BAINHAM	915
Understanding Care Proceedings: Learning from Empirical Research Judith MASSON	933
Parental Responsibility and Public Responsibilities for the Welfare of Children Jo BRIDGEMAN	947
Love and the State: Why Children’s Rights Matter for Children in Care Mariela NEAGU	961
PART V. INDIVIDUAL FAMILY LAW	
Gender, Identity and the Law Claire FENTON-GLYNN	981
Regulating Family Behaviour in Sharing Genetic Information: Advocating a ‘Purposeful Abstention’ of the Law Thérèse CALLUS	997
Truth and Reality in Family Law Sarah TROTTER	1011

PART VI. OTHER FAMILY MATTERS

Family Mediation in France: Production of Disappointment

Benoit BASTARD 1027

Redressing Intimate Wrongs: The Nebulous Contours of Tort Liability for Emotional Loss in Intimate Relationships

Jordi RIBOT IGUALADA 1043

Legal Capacity and Family Matters in Nigeria

Nwudego Nkemakonam CHINWUBA 1061

Living without the Jurisdictional Rules of Brussels IIa

Nigel LOWE 1075

John Eekelaar's Publications 1091*Index* 1107

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