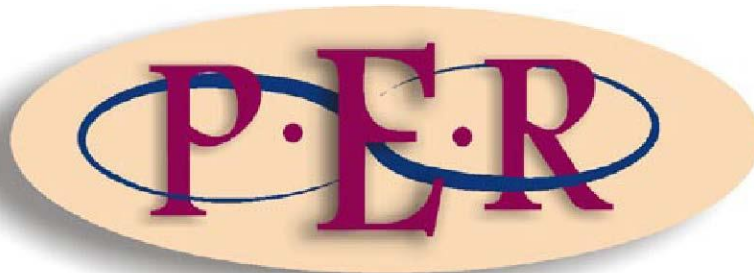**Author: C Rautenbach**

BOOK REVIEW

MANAGING FAMILY JUSTICE IN DIVERSE SOCIETIES

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Managing Family Justice in Diverse Societies[*]

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1   Introduction

The "management" of family justice in diverse cultural and religious societies remains a highly topical and vibrant theme. Formerly homogenous societies are increasingly diversifying as a result of globalisation, especially in Europe, where governments are progressively faced with the challenges migrant cultural and religious groups pose to existing legal frameworks. Contrariwise, to assume that historically diverse communities know all the answers because of their exposure to cultural and religious differences over a longer period of time is a misconception. The failure of many governments to effectively "manage" family justice in those societies is testament to the fact that existing policies and legal frameworks do not necessarily work. There is no one size that fits all and this book succeeds in exploring "what response the law has or should have to different family practices arising from cultural and religious beliefs" by discussing "management" strategies from a legal viewpoint in various jurisdictions.[1]

There is no apparent link between the jurisdictions discussed (Israel, South Africa, England, Spain, Poland, France, Wales, Botswana, Iran and Bangladesh) besides the fact that they are all more or less confronted with the challenges family diversity brings to the fore, especially within a legal context.

A reader looking for solutions and strategies to "manage" family diversity will, however, be disappointed. As explained by the editors[2] the contributions in the book are a collection of studies intended to contribute to academic debate, which certainly also forms part of the general democratic debate, and the discussions are relevant at least for that reason. This having been said, it would have been helpful if the editors had conceptualised some of the issues associated with their debates, especially those appearing in the title of the book, namely "family justice", "managing" and "diverse societies", because of their fluidity and the contestation surrounding their meanings.

This contribution reviews the contents of the 17 chapters that make up the bulk of the book *Managing Family Justice in Diverse Societies* recently published by Hart Publishing in the Oñati International Series in Law and Society.

2   The contents of the book

Structurally, the book is divided into four parts. Part I deals with "Theories, Ideologies and Strategies" and contains four chapters. In Chapter 1 entitled "Law and Community Practices", John Eekelaar cautions against the clothing of family norms with the force of law, because families are groups within which power structures exist which are not and should not be regulated by state laws. In addition, he argues that laws cannot or should not cater for the nuances in personal relationships, and neither should they impose dominant ideologies upon the personal lives of individuals. He refers to three models of state regulation of family behaviour, *viz*. the "authorisation" model, the "delegation" model and the "purposive abstention" model. The model that he prefers is one of "purposive abstention", which means that "moral and social obligations within families are not normally given the force of law unless their failure threatens community interests, or to achieve justice when families fall apart".[3]

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2   Maclean and Eekelaar "Introduction" 2.
3   Eekelaar "Law and Community Practices" 16-17.

A critique against Eekelaar's Eurocentric approach is voiced by Prakash Shah in Chapter Three entitled "Shadow Boxing with Community Practices: A Response to Eekelaar". According to him Eekelaar's preference of the "purposive abstention" *vis-à-vis* the "cultural voluntarism" model is reflective of the *status quo* in many jurisdictions. Such a viewpoint gives no recognition to the fact that cultural differences are in need of legal protection and recognition, and also blatantly ignores social realities in Europe and elsewhere.

The idea that family justice should remain within the personal sphere through the application of Religious Alternative Dispute Resolution (RADRs) mechanisms is explored by Farrah Ahmed in Chapter 2, which is entitled "Religious Norms in Family Law: Implications for Group and Personal Autonomy". By RADR she means "arbitration, mediation or reconciliation in accordance with religious norms, agreed to by the parties in a contract and recognised and (if appropriate) enforced by the state".[4] She challenges the idea that group autonomy necessarily restricts individual autonomy and argues that RADR has the potential to enhance individual autonomy, because it protects an individual's freedom of religion and may even provide opportunities for an individual to influence the decision of the RADR body. In addition, she contends that the fact that RADR allows group norms and leaders to be chosen and developed by the groups means that RADR has the potential to enhance personal autonomy because individuals would have greater political influence over the doings of the RADR bodies.

In a similar vein, Samia Bano discusses RADR in the context of family law in Chapter 4, which is entitled "Muslim Dispute Resolution in Britain: Towards a New Framework of Family Law Governance?". She points out there are many unofficial Muslim bodies applying Muslim family law in Britain.[5] These bodies are neither unified nor do they represent a specific school of thought, and their orders are binding only *inter partes*. Part II of the book illustrates how "Regulating the Interaction between Religious and Secular Norms in Different Jurisdictions" takes place, and consists of six chapters. It

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4   Ahmed "Religious Norms in Family Law" 34.
5   Bano "Muslim Dispute Resolution in Britain" 65-69.

describes how states deal with or should deal with cultural and religious diversity within their borders.

Pascale Fournier, Pascal McDougall and Merissa Lichtsztral wrote Chapter 5, which is entitled "A 'Deviant' Solution: The Israeli *Agunah* and the Religious Sanctions Law". They describe the situation where a Jewish husband keeps his wife chained to him by refusing to grant her a religious divorce (the *get*). In order to prevent this from happening, Israel enacted the 1995 Rabbinical Courts Law (Enforcement of Divorce Judgments) 5755-1995 which grants rabbinical courts the power to adjudicate Jewish divorces by issuing certain sanctions compelling the husband to issue the *get* to his wife. Sanctions would include the prevention of a husband from travelling abroad, the refusal to issue the husband with a driving licence or passport, or even the imprisonment of the husband until he issues a *get* releasing his wife.[6] Their research demonstrates that, although the application of this legislation has been inconsistent and fuzzy, it has given women considerably more bargaining powers in the negotiation process to obtain a divorce.[7]

Waheeda Amien authored Chapter 6, which is entitled "The Gendered Benefits and Costs of Legal Pluralism for Muslim Family Law in South Africa" and argues in favour of legislative recognition for Muslim family law in South Africa. She argues convincingly that the current unrecognised status of Muslim marriages is not favourable to women because their marriages fall outside the realm of the mainstream legal systems in South Africa (the common and the customary law). She continues to discuss two Bills in various stages of evolution that have the potential to cater for the future recognition of Muslim marriages. The first one, namely the "Muslim Marriages Bill", was introduced into cabinet and published for comments in 2011 but does not, according to Amien, satisfy the needs of Muslims in their entirety. The second one is a joint effort of the Commission for Gender Equality and the State Law Advisor's Office and is referred to as the "Recognition of Religious Marriages Bill". The Bill is fairly unknown and has not yet reached the stage where

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[6]   Fournier, McDougall and Lichtsztral "A 'Deviant' Solution" 92-93.
[7]   Fournier, McDougall and Lichtsztral "A 'Deviant' Solution" 91-100.

public participation has been invited. Amien contends that the absence of regulation of certain aspects of Muslim family law in the Bill opens the possibility for the Muslim community to continue regulating their own family law in a discriminatory manner. She argues in favour of legislative regulation of Muslim family law but cautions against a mere codification of discriminatory Muslim rules and asks that codification must be done within a human rights framework.[8]

In Chapter 7, which is entitled "Assessing the Impact of Legislating for Diversity: The Forced Marriage (Civil Protection) Act 2007", Mavis MacLean examines the impact of a statute aimed at the prevention of forced marriages in the United Kingdom, especially where custom or religion allows for such practices to be performed. To her surprise and the surprise of many others, the provisions of the Act have been invoked much more often than initially suspected, and have been instrumental in the protection of many young people against human rights abuses.[9] She also discusses future legalisation to criminalise forced marriages and warns that such steps must be taken with caution, because they could easily backfire and negate the good effect the Forced Marriage (Civil Protection) Act 2007 has had so far.

Chapter 8, entitled "Religious Freedom and Protection of the Rights to Life in Minors: A Case Study", is authored by Teresa Picontó-Novales. She discusses the well-known situation where someone's life, especially that of a minor, is threatened because, in the particular scenario she discusses, the religious principles of the Jehovah Witnesses prohibit a blood transfusion. The author makes it clear that the conflict between apparent self-same values and rights such as the right of individuals to exercise their rights and freedoms as they please, the right to life and health, and children's rights, on the one hand, and cultural and religious rights and parental rights on the other, is not easily resolved. In this particular case the boy died because of his and his parents' refusal to allow a blood transfusion to save his life. The parents were subsequently prosecuted for the offence of homicide by omission but the different opinions reached in the three judicial decisions that followed are a

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8   Amien "Muslim Family Law in South Africa" 122.
9   Maclean "Forced Marriage" 134.

clear indication of the difficulties of the case. Although the constitutional court eventually found that the parents were not guilty, the author is of the opinion that the state authority's sensitive response to the religious beliefs of the family contributed to the eventual demise of the young boy which could have been prevented if it had intervened at a much earlier stage.[10]

"Cultural Norms, National Laws and Human Rights: How do we Balance Respect for Diversity and the Rights of the Vulnerable? The Case of Under Age Marriage of Roma Girls and Boys in Europe" is the title of Chapter 9 by Jacek Kurczewski and Malgorzata Fuszara. They discuss the conflict situations where state laws prescribe a certain age for marriage and sexual intercourse whilst certain Roma traditions allow for marriage and intercourse at a much younger age.

Yasmine Debarge and Benoit Bastard are the authors of Chapter 10, which has the title "Child Access Services in France: A Universal Service serving Diverse Clients". The chapter evaluates the situation in France, where historical developments have led to a total aversion against anything (culturally) different. They explain that the Child Access Services is a welfare service operating in a secular state intended to re-establish the relationship between a parent and a child. Most of the people serviced by these services come, however, from families with different cultural and religious backgrounds, which complicates the parent-child bonding process, especially if culture and religion are being ignored.

Part III of the book focuses on community behaviour or, as the editors describe it, "Non-state Responses to the Interpretation of Social Norms between Communities". It consists of five contributions commencing with Chapter 11, which is authored by four authors[11] and entitled "Accommodating Religious Divorce in the Secular State: A Case Analysis". The authors conducted an empirical research into the doings of three unofficial religious tribunals (a Shariah council, a Jewish Beth Din and a Catholic tribunal) in England and Wales and come to the conclusion that such tribunals

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10   Picontó-Novales "Religious Freedom and Protection of Minors" 149-150.
11   Gillian Douglas with Norman Doe, Russell Sandberg, Sophie Gilliat-Ray and Asma Khan.

generally do not have a problem with being unrecognised by the states, because they understand and accept the demarcation between religious and secular authority - in other words the separation between church and state. The authors see their existence and operation outside the mainstream legal system as "no more than a passive tolerance of religious practice undertaken without expectation of state recognition".[12] As a result of the differences between English law and religious laws, they also do not foresee the future recognition of any of these tribunals.

Jagbir Jhutti-Johal wrote Chapter 12, which is entitled "How Parties to Sikh Marriages use and are Influenced by the Norms of their Religion and Culture when engaging with Mediation". He explains how modernity has influenced the development of cultural practices within the Sikh community, especially when a marriage breaks down and issues of mediation and divorce come to the fore. Although certain religions and cultures show resilience against change, the Sikh community has realised that change is inevitable and they are applying a parallel system where they try to mend the broken marriage first through family mediation and, if that does not succeed, permitting the couple to obtain a secular divorce.

Focusing on a postcolonial country, namely Botswana, Anne Griffiths wrote Chapter 13 entitled "Managing Expectations: Negotiating Succession under Plural Legal Orders in Botswana". She empirically investigates the "shifting norms that have brought about women having greater access to resources and property"[13] and illustrates how societal changes have brought about a change to the customary law of succession to include women who have previously been excluded from succession to property. Her ethnological approach to matters of law provides us with valuable information and insight into socio-legal realities and should be followed in other pluralistic post-colonial countries where customary law exist alongside the mainstream legal system.

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12   Douglas *et al* "Accommodating Religious Divorce" 198.
13   Griffiths "Negotiating Succession in Botswana" 222.

Chapter 14, entitled "Rights, Women and Human Rights Change in Iran", was authored by Nazila Ghanea. It discusses examples of notable changes in Iranian family law as a result of female activism. However, the few developments that have taken place over the last few years are in danger of regressing again as a result of the influence on state policy of powerful and repressive elite groups.

Farah Deeba Chowdhury wrote Chapter 15, entitled "Muslim Family Law in Bangladesh: Resistance to Secularism", and illustrates how civil society in Bangladesh is resisting secular changes imposed by the state, in favour of Muslim law. She comes to the conclusion that although there are instances of gender discrimination in Bangladesh, any reforms will be accepted only if they occur within an Islamic framework. The reason is the composition of the Bangladeshi people; they are predominantly Muslim and will thus resist a secular approach to a large extent.

The books ends with Part IV with the heading "Reflections" and returns to the question of how much family conduct needs to be regulated by the law. In other words, what should be kept in the family and what should be regulated by the state? The first contribution in this part is Chapter 16, authored by Jordi Ribot, with the title "How much Family Conduct do we need to Regulate through Family Law?" In his contribution Ribot echoes Eekelaar's sentiments when he says that the involvement of the state in family law should be limited, especially in the case of cultural and religious minorities "who are willing to settle conflicts arising in family matters according to their non-state ethnic, cultural or religious norms".[14] Ribot proposes a hybrid approach of the law and social practices which will not "jeopardise individual self-determination or result in gender-discrimination".[15]

The final chapter of the book, Chapter 17, written by Marjorie Smith and Ann Phoenix, is entitled "Variation and Change in Normative Parental Discipline: Persuasion or Legislation". They discuss the controversial issue of the corporal

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[14]   Ribot "How much Family Conduct do we need to Regulate?" 274.
[15]   Ribot "How much Family Conduct do we need to Regulate?" 290.

punishment of children by their parents and come to the conclusion that a variety of complex norms are at play for which no uniform response in law exists or should exist.

3   Concluding remarks

The contributions in this book investigate some of the responses the law has or should have to families with different "lifestyles, ways of living together, value systems, traditions and beliefs" in a variety of legal systems. It is evident from the discussions that family diversity issues are not unique but are shared by many jurisdictions. The only difference is the way the jurisdictions deal with the issue.

This book contributes to a greater awareness of the challenges family diversity brings to the fore and sets out what it proposes to do, namely not "to propose a single definite strategy that should be adopted" to deal with family diversity, but to provide "material on which researchers, advocates and policy makers can draw in furthering their understanding of and seeking solutions to the problems raised by this significance social development".[16] It is indeed the first and the last categories of persons that are encouraged to make use of the valuable information contained in the book, as it contributes to our understanding of the modern day impact of cultural and religious diversity and the demands such diversity makes on contemporary governments.

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[16]   See preamble to the book.