

# Defining family in a law context



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## 1. Introduction

The term family is a “ fluid” concept[1], used to describe different forms of expressions regarding the intimacy shared in private life based on care and interdependence. It comprises of diverse relationships, including homosexual or heterosexual couple with or without children, cohabiting with or without legal formality.[2]Therefore, if the family is the core social environment in society, then family law is any form of governing and supporting those close emotional relationships between adults, children and the state.[3]However, it is difficult to define the family law due to changes in social norms and standards. There is also a wide range of laws, such as immigration law and employment law[4], that may have significant influence on family life, therefore family law usually is considered as an “ ambiguous and incoherent” subject.[5]

To explore the question of what family law is, this paper will seek to address two main issues. First, to discuss the ways to define the concept of family within the law. Second, to evaluate what family law is from several different theoretical approaches.

## 2. Changing ideas of ‘ family’ in law

The traditional concept of ‘ family’ in law takes the idea of the nuclear family, which comprises of a married heterosexual couple with children. [6]Apart from the context of marriage, it was considered an “ abuse of the English language” to include other relationships.[7]According to the statistics provided by the Office for National Statistics (ONS)[8], the number of the nuclear family has decreased 500 thousand compared to the data from 2000

to 2015 while the cohabiting couple family has become the fastest growing family type reaching 3.2 million in the past decade. Meanwhile, the most common family type changes from the idealised family into the form of the married couple or civil partner couple without any children.[9] This situation pushes the law to respond to this gap[10] by shifting from the traditional nuclear family into the idea of “New Families”.[11]

The concept of “New Families”[12] begins with the recognition of unmarried couples regardless of children, but still requires ‘an appropriate degree of apparent permanence and stability’.[13] Same sex relationships have recently been accepted as a ‘family’ in *Fitzpatrick v Sterling Housing Association*, [14] where “longstanding, close, loving and faithful, monogamous homosexual relationships...is deemed to make someone a member of a “family”’.[15] Lady Hale also highlights that widening the scope of the family, regardless of the sex, could recognise the importance of the principles of dignity, humanity and equality.[16] Therefore, the law does not limit the definition of family life and accepts the different forms of family as long as they can establish the degree of intimacy and stability and sharing of lives.

However, the law has categorised an exclusion, friendship has been refused as the relationship of the family due to lack of “degree of intimacy and stability”.[17] Arguably, Diduck argues that there are blurring lines between family and friends in contemporary society, as “friends become lovers and lovers become friends”[18].

### 3. What is “Family Law”?

This section examines how the family law works in relations to the family. The functions have been briefly divided into four main categories: protection, regulation, radiating message and promotion of equality, and further use several theoretical approaches respectively for evaluation.

#### i. Protection and Support

A “ Good parent” in a family is usually considered as a person who provides physical, emotional and financial support for their children. They also protect the children and family members from harm.[19]In terms of the functionalist approach, family law has “ a series of goals to be fulfilled”.[20]Eekelaar has suggested that the main objectives of family law are the enforcers of protection and support to the family.[21]As an example, the most common situation encountered by law is domestic violence. According to the research by the ONS, there are over 78% of incidents of the domestic abuse involved violence.[22]The introduction of Family Law Act 1996 is one of legislation for allowing the victims to obtain the help for protection. It attempts to bring consistency to the civil remedies and emphasises the protection of the human rights for safeguarding victims from domestic violence.[23]The application of this law yielded positive results, as the data provided by the ONS showed the numbers of domestic violence have generally decreased by 0.7 million over the past decade.[24]

However, difficulty arises when it is assumed that the law is the only factor to influence the family.[25]By using the above example, the law influence may not be the sole reason for the reduction of domestic violence, thus there

are other possible factors to improve the domestic violence situation, such as government support and educational policy.[26]

The uncertainty of family law further arguably undermines this approach where it is difficult to simplify the laws into one single goal. In the case of the 1996 Act on divorce claims that it is pursuing both contrary goals, including, to encourage marriage and to make it possible to break down the marriage with as little bitterness as possible, therefore, it cannot precisely assess the effectiveness of family law.

## ii. Regulation and Adjustment of family life

The relationship between law and family has been described as the 'protector of private life'. [27] However, the traditional division of public and private sphere have given rises to debates of whether it is appropriate to regulate the private life by the law. The opinion of traditional liberal position suggests that it is improper for the state to regulate and intervene on private affairs. [28] For example, if the law illegalises adultery, it might violate the privacy of family life. It also seems impossible and difficult for the law enforcers to control all private properties for the adultery issue.

Respecting private life upholds the principle of autonomy. The traditional liberal position respects individual's decisions about how they wish to develop their own beliefs and personality on the family issue. [29] Arguably, the promotion of autonomy principle does not necessarily mean that the law should be entirely cast out of the private sphere. Some "undesirable" [30] forms of family life, such as child abuse, might require and deserve the intervention to regulate and adjust to the private family life. For <https://assignbuster.com/defining-family-in-a-law-context/>

example, there has been an increase of criminal law used against parents whose children misbehave. Therefore, it is not a clear picture to distinguish one of intervention or deregulation.

Although the law is difficult to have clear-cut for public and private intervention to family life, it seems to endorse the shift to privatisation. The law attempts to regulate the private life less and less.[31]The law encourages divorcing couples to use mediation for the family and financial dispute resolution, rather than settling it through court. The current Government also gives the clear direction about the role of the court that the law should “ focus on protecting the vulnerable from abuse, victimisation and exploitation and should avoid intervening in family life except where there is clear benefit to children or vulnerable adults in doing so”.[32]In other words, the law can focus on the regulation and adjustment of the “ family in crisis”.[33]

### iii. Sending Message to the Public

With collaboration with the family regulation policy, the Law Commission recognises the ability of family law was to send the message to the public about the desirable behaviour of ‘ good’ family living.[34]Law upholds the traditional values of nuclear families with unrestrictive form, underlining those qualities as an ideal family model. Therefore, the law encourages the former partners of the divorced family and lone parent families to “ go on to make a new family”[35], rather than focusing on the remedying the broken family. The government policy takes this approach to achieve ‘ good’

divorce, now defined as one that creates the separate-but-continuing family.

[36]

The message sent by the law can be reviewed through the usage of judicial language and style in the judgments.[37]Traditionally, the expression of “paternalism” or “welfare” highlight the breadwinner in a traditional patriarchal family was responsible for supporting continually his pre-separation marital obligation after the breaking-down of marriage.[38]In the 1990s, the judgment starts to shift to the language of equality or rights, which supports and assumes a diverse and democratic form of family. The breadwinner became obliged to ‘share’ what became re-conceived as the ‘fruit of the marital partnership’.[39]The language radiates the message that the law shifts to emphasise the principle of non-discrimination, mutuality, right or entitlement and equality.

#### iv. Promotion of Equality

Family law positively promotes the principle of equality and non-discrimination. The widening scope of what is a family, by allowing diverse relationships is a significant indication of justice, equality and inclusivity. [40]The enforcements of Civil Partnership Act 2004 and Marriage (Same Sex Couples) Act 2013 grant most of the rights and responsibilities of marriage to the registered same-sex couples to enjoy the equal right and status for family life[41]as the heterosexual marriage couples.[42]

Arguably, there are still some limits on equality and discrimination. On 21<sup>st</sup> February 2017, the Court of Appeal rejected heterosexual couples entering into civil partnerships.[43]The judgment fails to allow the couples to seek <https://assignbuster.com/defining-family-in-a-law-context/>

fairness and equality and to eliminate discrimination between heterosexual and homosexual couples. The judgment has further potentially violated the human rights under Article 14 taken with Article 8 of the European Convention on Human Rights (ECHR)[44]. The couples might not make their personal family choices. Hence, Lord Arden further urged the need to change the law by the Parliament.

To further argue regarding inequality within the law. Historically, the law has discriminated against women in divorce where the husbands are able to divorce their wives on the basis of adultery. However, the wives are only able to divorce their husbands based on the grounds of the incestuous adultery.[45]Therefore, the law seeks to emphasise the concept of “equality” before the law that both men and women are on “equal footing”[46]and to avoid men abusing their gender to obtain an unfair advantage.

The law also ensures everyone in society could equally access safety and justice through the law. In terms of domestic violence, the evidence provided by the Rights of Women, mentions that there are up to 40% of women who could not satisfy the restrictive requirements of Legal Aid.[47]On 23<sup>rd</sup> Feb 2017, the removal of the five-year limit and the admission of fresh categories of evidence aims to help large numbers of women and also men, who were previously been deprived of legal advice and representation, can obtain legal aid for family disputes.[48]Estelle du Boulay, Director of Rights of Women commented that this renew commitment is “both victory for women and also for common sense.”[49]The law is lowering the thresholds for more people to seek the justice through law.

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However, feminist perspectives argue that there is still a loophole between gender equalities. They criticise the disadvantages from the assumption of the traditional gender role in society: the father is the active breadwinner whilst the mother is the ‘ traditional day to day carer’.[50] Yet, *SRJ v DWJ* [51] invokes the entitlement of monetary value for the contribution of the wife that she gave up her work as a teacher to concentrate on her family. The court attempts to redress the gender imbalance that exists in the traditional family-based discourses. Therefore, the parties’ respective responsibilities to each other base on the discourse of “ rights, compensation, mutuality, and gender equality”.[52]

#### 4. Conclusion

Family law is a special law due to the wide scope of families and wide ranges of issues it deals with throughout its historical and contemporary period. This paper has examined family law from four different categories: Functional, adjustive, radiating message and equality. Although these four categories might not cover all issues, it briefly summarises the main principles of family law and further evaluates its effectiveness regarding on concerned issues.

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