Working for Justice:
Comparative Reflections on Family Law

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A1 General Word of Thanks

Thank you all for coming today. I feel honoured to be the first female professor of law in the School’s history and am very grateful for all the support that I have received in gaining that honour. Over the years many people and institutions have actively encouraged my work, but it is not possible for me thank everyone personally here. I would, however, like to mention the Government and University of Botswana, the University of Texas at Austin School of Law, the Max Planck Institute for Social Anthropology at Halle/Saale, the School of Oriental and African Studies, University of London and the Centre for Socio-Legal Studies at Oxford.

I would also like to thank my colleagues at Edinburgh university, not only in the School of Law, but also in the School of Social and Political Studies and at the Centre of African Studies, as well as all the students who have engaged in many stimulating and challenging discussions with me. Finally, last but not least, I would like to thank my husband Ed Wilmsen for his unstinting support for all my endeavours.

Introduction – General Comment on Scots Family Law

Family Law in Scotland has changed out of all recognition since I first began studying it as Eric Clive’s student here at Edinburgh in the 1970’s, as a brief overview will affirm. Since those days the field has developed to provide greater legal recognition of the fact that today families take many forms in Scotland, and that, while marriage continues to play an important role there is now recognition of same sex and cohabiting couples as a family unit. In a landmark case, Fitzpatrick v Sterling Housing Association, reported in 1999, the House of Lords held in an English case, that a same-sex partner was capable of being a member of the original tenant’s “family” for the purposes of succeeding to his deceased partner’s tenancy, while a subsequent Court of Appeal case, Ghaidan v Godin-Mendoza (reported in 2002) went one step further in holding that in order to render the Rent Act 1977 compatible with the Human Rights Act 1998 and Art.8, the words “as his or her wife” were to be read to mean “as if they were his or her wife or husband”. The effect of this was to enable a same sex partner to be treated
as if he or she were a spouse and thus entitled to succeed to the tenancy. Since then, in keeping with European developments and changes brought about by the European Court of Human Rights at Strasbourg, the Civil Partnerships Act 2004 has been introduced into Scots law, that to all intents and purposes gives same sex couples the same rights as married couples in all but minor details, while the Gender Recognition Act of the same year, now permits transsexuals to marry in their reassigned gender.

Most recently, there have been the reforms brought about by the Family Law (Scotland) Act 2006 that have been in the pipeline since the Scottish Law Commission’s Report on Family Law published in 1992, that cover a whole range of domains, including the greater provision of rights for both same-sex and heterosexual cohabiting couples. Further reforms are in the offing, and have included the new Adoption and Children (Scotland) Act 2007 which completes the process that was begun in the pioneering case of T Petitioner in 1997 by opening up adoption to gay couples.

All these legal developments are in keeping with demographic changes in Scotland which note

• That the number of married couple families declined from over half of the families in Scotland in 1991 to 43% in 2001. In contrast, the proportion of cohabiting couples, ungrouped individuals and lone parent families in Scotland rose between 1991 and 2001;

• That over a third of cohabiting couples in Scotland now have dependent children living with them from that or previous relationships and that 43% of live births in 2001 were to unmarried parents;

• That while the age of first marriage continues to rise, and the number of Scottish marriages declines, the number of stable cohabiting couples, both heterosexual and same-sex continues to increase, so that 60% of births to unmarried parents were registered by parents at the same address.

Thus the changing dynamics of family life create challenges for law in its approach to the recognition and enforcement of legal rights and duties among family members and the privileging of certain forms over others. An interesting example is provided by the
Burden sisters who have recently taken a case to the European Court of Human Rights on the basis that they have been discriminated against because the laws of inheritance tax, that provide for non-taxable transfer of capital on death and that apply to spouses and civil partners, do not apply to them. This is because although they have written wills in favour of each other, when one dies the surviving sister will be hit by a substantial tax bill that will require her to sell the family home. The sisters who are aged 80 and 88 have lived together since birth in the family home, and have not only nursed their mother and father and two aunts until they died, but have always taken care of one another. It will be interesting to see how the Court responds to their claims and the implications that this has for the ways in which law and social policy respond to sharing and caring in the domestic sphere.

B2 Pursuing Family law in Botswana

Moving on from Scotland, my first experience of family law in action, on the ground, was in Botswana in southern Africa where I went with Sandy McCall Smith to help set up the law department in the University of Botswana in 1981. At that time students from the universities of Botswana, Swaziland and Lesotho came to Edinburgh for 2 years training out of their 5 year programme as part of a longstanding link set up by Sir Thomas Smith many years ago. In 1981 the government of Botswana decided that it wanted to establish its own law school in Botswana and Sandy agreed to set this up and asked me to accompany him to draft the foundation course in family law. I was initially reluctant to do this as I was not familiar with the laws of Botswana but Sandy assured me that all would be well as my legal training would stand me in good stead, all I would need to do would be to read the relevant statutes and case law on marriage, divorce and adoption and construct the course accordingly.

Emboldened by this advice, I duly set off only to find that things were not quite as I anticipated. The first challenge arose when I encountered “customary” law. Doreen Khama, one of the students from Botswana who had come to Edinburgh, and who set up the first all women law practice in Botswana, was driving me around the capital Gaborone when I saw people sitting under some trees in a meeting. I asked her what they were doing and she stopped the car and took me over to them explaining that this
was a customary court. I asked her what this involved and she explained that in keeping with local traditions when parties were in conflict or dispute they would go to the customary court and the matter would be dealt with by them and the local community without lawyers present.

I realized immediately that my course on family law would be incomplete without making some reference to customary law so I went to the library at the university to find out more about it. My training as a “black letter lawyer” in tax, company, conveyancing and contract law made written texts my first port of call. In this way I came across anthropological publications, including the seminal work by Issac Schapera, especially *A Handbook of Tswana Law and Custom* published in 1938 when Botswana was still the Bechuanaland Protectorate subject to British colonial overrule before it acquired independence in 1966. Schapera’s work made fascinating reading and really sparked my interest but alas it told me little about how customary law was then integrated within the national legal system of Botswana. I was now in a quandary, confronted with the inadequacies of constructing a course based purely on western-style law, derived from statutes and cases in the magistrates’ courts and the High Court, the stuff of traditional Western legal scholarship, I needed to integrate customary law into my course, but how was this to be done? For customary law is based upon oral transmission that exists outside written texts embodied in legislation and does not depend upon the written word for its legitimacy. My training at the Faculty of Law in Edinburgh did not prepare me for this, and I had to look beyond the familiar, conventional sources of law to more social scientific approaches embodied in socio-legal studies and anthropology.

This meant approaching the study of law through extended case studies of dispute, interviews, historical records and ordinary people’s life histories. Thus I not only worked with conventional legal sources such as legislation, court records, and court proceedings, as well as interviews with court officials, but also extended my research data to include ordinary people’s discussions of everyday life, including women’s and men’s life histories and extended narratives of dispute. To do this I had to carry out field research and did so among Bakwena (a senior branch of Tswana speakers for whom the country is named) in their central village, Molepolole, between 1982 and 1989. At the heart of Kwena affairs in terms of the social, political, and ritual life of
the morafe, I translate this a polity rather than “tribe”. This village is not only 70
kilometers away from the capital city but is also a bustling regional centre whose
population has recently overtaken that of Serowe as the largest village in Botswana.

Research was carried out in 1982, 1984 and 1989. It examined the role played by
marriage in the social construction of relationships between women and men and the
ways in which marital status affects the kinds of claims that women pursue with
respect to their male partners, such as maintenance and rights to property, very similar
to the kind of family law claims pursued in Scotland. Throughout this period I worked
closely with Mr. S. G. Masimega, a respected elder of Molepolole, who acted as my
guide and interpreter in translating from one official language, Setswana, into the
other which is English. He was an influential person in the village, having acted as
personal secretary to the late Chief Kgari Sechele (1931-1962) and having served on
the district council and on important committees such as the Village Development
Committee and the Parent Teacher Committee. He was affectionately known
throughout the village as “Mr Commonsense” and was in his 70's when I first began
my research. Throughout his adult life he acted as advisor and interpreter to
generations of researchers stretching back to Schapera in 1936. Without his support
and guidance I and many others would not have been able to carry out our research.
He died in 1996.

My focus in nine months of research in 1982 was on acquiring knowledge of families’
problems in everyday life and how these were dealt with in terms of formal legal
institutions. Inevitably this involved a study of cases and disputes which provided my
main source of data. When I returned to Edinburgh at the end of 1982, I came into
contact with Adam Kuper and Simon Roberts (who became my PhD supervisor) who
kindly paved the way for me to meet Issac Schapera or Schap as he was known to his
friends. Another research visit to Botswana was planned for 1984 in order to do a
more detailed study of everyday life and to collect life histories from members of one
social unit in the village, a ward known as Mosotho kgotla. Schap very generously
provided me with his unpublished fieldnotes on Bakwena. These came as a surprise as
most people, including Adam and Simon, were unaware that they existed; they had
been acquired too late to be included in *A Handbook of Tswana Law and Custom.*
Schap’s notes included genealogies which enabled Mr Masimega and me to trace back the descent of people present in Mosotho kgotla from 1984 to 1937. Perceived initially as a means for providing the background in which my material on disputes could be placed in context over time, the life histories of these kgotla members became more central to my analysis as I grew to appreciate the role they play in shaping the context in which people structure and pursue negotiations and claims, or, alternatively, desist from doing so. The social histories play a key role in accounting for people’s access to, and use of, law; they were updated in 1989 when I again visited Molepolole. On this occasion Mr Masimega and I also took the opportunity to follow up on what had happened to individuals, disputants and personnel from previous research periods. In this way, we were able to develop a longitudinal perspective on the research stretching over eight years, thus providing a picture of continuity and change across two generations as well as highlighting the differences between and among the sexes.

During the course of these research visits, people responded to my presence in various ways. Some, knowing of my links with the University of Botswana (where I taught the family law course in 1982) and with the capital city, Gaborone were suspicious of me on the assumption that I was a government spy. Others welcomed me because of those links; they thought I had influence and could go back to Gaborone and tell government officials that they should respect and support the kgotla system and customary law. Some wondered why a “young” girl like myself had interest in pursuing the questions I asked. Much concern was expressed over the fact that I was an unmarried woman without a child, the issue was not that I was not married so much as that I didn’t have a child and various suggestions and offers were made as to how this could be rectified. In general though people were receptive and open to the discussions that took place. Mr Masimega and myself became familiar figures walking round the village and on my return visits people used to comment “there goes the old man again with his shadow”.

This ethnographic approach to research is in keeping with anthropological, social-scientific perspectives on law that critically examine questions about law’s legitimacy and authority from the perspective of social actors who are often marginalized in mainstream legal discourse. It provides a space for them to have a voice. Such a
perspective raises questions about who has the power to construct, shape, transform or contest the terms of reference upon which the negotiation of claims in both formal and informal arenas rests. This has particular implications for women in Botswana who find that power, constructed out of the gendered nature of the world in which they live, creates challenges for their use of both Tswana customary and Western style law. In making explicit the connections between knowledge and power and legal status and social context it is clear that women in Botswana fare no better under Western style law, despite its claims to equality and neutrality. For their power to negotiate their intimate relationships with men is shaped by the gendered construction of the Tswana social. This is a world in which men generally have better access to resources than women. While there are women who are able to overcome the constraints that normally face them in their dealings with men their ability to do so depends on how they are situated within familial and extended networks of which they form part and on a whole range of elements, including class, which are factored into the encounters that take place in everyday life.

Such an analysis, which situates law in relation to other bodies and agencies that construct social relations, such as families, households, and economic and political institutions, opens up for discussion aspects that remain unaddressed by formal legal discourse, namely:–

a) the conditions that facilitate or impede access to legal forums;

b) the factors which underpin the power and authority of narratives in social and legal settings, including the role of gender, that lead to the empowerment of some individuals while silencing others;

b) alternative strategies for those who are excluded or silenced by the formal legal system in seeking redress;

c) the gap between law in theory and in practice; and

d) the broader question of how law is constituted and reconfigured through social processes that frame both its continuity and transformation over time.
Such discussion extends the remit of what constitutes a legitimate focus for legal inquiry by drawing together the threads of ‘public’ and ‘private’ dimensions of social life to reveal what underpins the relationship between power, law, and discourse that governs people’s daily lives. In doing so, a more grounded view of law is acquired, one that is freed from the traditional ‘top down’ model of law and which promotes an understanding of the disparities that exist that is central to any meaningful analysis of access to justice or alternative dispute resolution which currently provide a major focus for governmental research and policy at a national and international level.

C3 Returning to Scotland: Socio-Legal Approaches to Law and Gender Issues

As a result of working in Botswana I found myself having to rethink the way I approached the study of law in Scotland. It made me reassess my approach to research and the teaching of family law, which I shared with my former colleagues, Elaine Sutherland and then Lilian Edwards. Gender was not an issue that had crossed my mind when I started my research in Botswana but I became sensitized to the issue when I looked at women’s access to resources as structured through their relationships in the family domain. I also became engaged with more socio-legal materials which have helped to shape both editions of Family Law that I co-wrote with Lilian.

One realization that I brought back from the field was the need to stop framing family law in terms of marriage. At the start of my research in Botswana it became very clear that there were very large numbers of women having children who were not married. While marriage is still important there for ideological and other reasons, nonetheless there is a great disjuncture between marriage and child bearing. This is also the case in Scotland today. In order to take account of this phenomenon when writing both editions of family law I adopted a lifecycle approach, starting with the position of the unborn child and working up through childhood until marriage with all it entails becomes one of the options that is open to an individual.

In accessing a whole range of materials including statistics and research reports published by government agencies, charitable foundations and our own Centre for Research on Families and Relationships at Edinburgh it became clear that what I
discovered in Botswana was also salient in Scotland. For these types of materials made it clear that with respect to gender, when it comes to access to resources women have less ability to accumulate property than men, due to their role within the family. In Scotland women and men in both marital and cohabiting relationships tend to have different and unequal opportunities to earn and amass property because they take on different roles within the family and this has implications for policies affecting them. This is especially the case when we consider not only traditional forms of wealth such as heritage and capital, but also the so-called "new property", a term coined by Karl Reich in the 1960’s, which includes wages from employment, and benefits associated with such labour, or purchased by it, such as pensions, insurance rights and contribution-based social security benefits. The "new property" is of crucial importance in most Scottish households. In 1981 only 8 per cent of Scots had savings of £10,000 or over and only 15 per cent had savings of £5,000 or over. Since then the proportion of households without any type of bank or building society account has fallen, especially since 2000. Nonetheless, the poorest households are still four times as likely to be without an account as those on average incomes. In many Scottish households, therefore, the major assets are rights under life insurance policies and pension schemes. However, when it comes to pensions women tend to be poorly provided for. According to the Department for Work and Pensions,

Married or cohabiting women pensioners have, on average, very low personal incomes compared with married or cohabiting male pensioners. On average, compared with a married or cohabiting woman, a married or cohabiting man will get approximately twice as much in state benefit, far more in private pension, and more in other income. Widowed, divorced and separated women pensioners have more income in their own right than married women pensioners, but less than the equivalent men.

Statistics demonstrate that women are less likely to acquire these resources than men, for a number of reasons to do with their domestic role within the family, and, in particular, their responsibilities for child care. Such care responsibilities often prevent women from taking on full-time jobs. In general, when women with dependent children work, they do so part-time, in order to accommodate the needs
of child care and domestic responsibilities. Part-time work tends not only to be worse paid than comparable full-time employment, but also gives rise to less in the way of associated benefits, e.g. occupational pension rights. Even where women are employed, and have access to some form of pension scheme, fewer of them are members of such schemes than their male colleagues. This may be due to the fact that women generally earn less than men. Low pay not only affects women but also has an impact on their children.

Such findings raise questions about how far, and to what extent, Scots law does or should take account of these economic and social factors in framing policies and law that have an impact on family members.

D4 Comparative Treatment in USA: Human and Constitutional Rights’ issues and the Treatment of Unmarried Fathers

The gender issue also arose when I taught American family law at the University of Texas at Austin between 1996 and 2004. Not only did American statistics reveal circumstances akin to those in Scotland surrounding women’s acquisition of resources in the USA but also similar treatment in law of the unmarried father. As you are all aware discussion of gender issues is not confined to women. Men may also be subject to gender discrimination and one area that has been in the spotlight in recent years is the position of the unmarried father with regard to parental responsibilities and rights in respect of his children. This area of law highlights what has assumed a growing importance in legal discourse over the years, namely human rights and the transnational dimensions of law.

In the American context discussion of rights involves constitutional issues. For within the structure of the American legal system while the 50 individual states have rights to legislate on matters, such as family law, that fall within their own jurisdiction, such legislation must not fall foul of either their own state constitutions or the Federal Constitution. The latter incorporates a Bill of Rights guaranteeing and upholding certain rights and freedoms with respect to individuals. These include rights to due process, privacy and equal protection under the 14th Amendment. These rights are akin to those promoted by the European Convention on Human Rights and Fundamental Freedoms now
embodied in UK legislation under the Human Rights Act 1998. These include Article 8 dealing with respect for private and family life, Article 6 dealing with a right to a fair hearing and Article 14 dealing with the right to nondiscrimination.

When it comes to parental responsibilities and rights it is clear that women and men have been treated differently in both the USA and Scotland. For while women acquire the state of a parent together with full parental responsibilities and rights on the bright of their child (regardless of their marital state); men did not acquire such legal status through a mere biological connection to the child. They must either (a) have been married to the mother at the time of conception or birth, or (b) where unmarried have acted in some way to establish some connection to the child beyond a mere biological one. In Scotland this involved registering a section 4 agreement with the mother or pursuing a court action under section 11 of the Children (Scotland) Act 1995. In the USA what became referred to as “the biology plus test” was applied, this involved evidence of cohabiting with mother and child in a family unit or maintaining support and contact with the child.

Discriminatory treatment was justified in the USA on the basis that as a matter of overriding social policy the state had legitimate interests in denying unmarried fathers’ rights that did not amount to an infringement of their constitutional rights. A similar approach was adopted in McMichael v UK where an unmarried father took his case to the European Court of Human Rights on the basis that he had no domestic legal right to obtain custody of his son or to participate in a children’s hearing involving care and adoption proceedings. He argued that this infringed his right to respect for family life under Article 8 in a discriminatory manner that was contrary to Article 14. He was not successful, however, as the government was able to appeal to the proviso in Article 8, para 2, which requires any interference with family life to be justified on the basis that it is in accordance with the law and necessary to achieve a legitimate aim in a democratic society. The European Court ruled that in this case the government’s aim which was to provide a mechanism for identifying ‘meritorious’ father’s through legislation was a legitimate one that justified differential treatment.

Since McMichael things have moved on. The demographic changes outlined earlier have lead to a reassessment of the social role of the father, with a shift from “the stereotyped image of the unmarried social father as a social deviant” to the
idea that unmarried fathers have something positive to add to the upbringing of their child. This is a view that is reinforced generally by wider acceptance of the ideals of joint parenting and shared childcare. And so at last we have section 23 of the Family Law (Scotland) Act 2006; this provides for fathers to acquire parental responsibilities and rights, although unmarried to the mother, where there is joint registration of the birth by the mother and the father.

E 5 Child’s Voice in Legal Proceedings/Transnational Law and Comparative Work with Randy.

As the focus on marriage has receded into the background with an emphasis in family law today being placed on parenthood, so the position of the child has come to the forefront. Along with an increasing emphasis on human rights there has been a growing awareness of the need to take account of developments in the international arena including the United Nations Convention on the Rights of the Child (UNCRC). Taking account of the child as a legal person, who is an active rather than a passive being, with a voice and a capacity to express views on major decisions affecting them, has led to legislation such as the Children (Scotland) Act 1995 that seeks to give effect to the spirit of the Convention. This Act provides for those reaching major decisions about children, including courts and children’s hearings, to take account of their views where practicable, where children are sufficiently mature. Thus children must be consulted as to whether they wish to express a view and, where they do so, this view must be taken into account. There is a presumption that a child aged 12 or over has sufficient maturity, although this does not preclude taking the view of children under that age who are deemed to be sufficiently mature.

However, while the child’s views must be considered they do not necessarily determine the outcome, as those reaching a decision must do so on the basis that the child’s welfare is paramount. This is in keeping with Article 12 of the UNCRC that not only provides for the child to express his or her views freely but also requires that "the child shall ... be provided the opportunity to be heard in
judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body."

The Convention's imperative and the provisions of the Children (Scotland) Act 1995 have stimulated interest in the questions about how children may be empowered to communicate, the kinds of stories they tell, how these stories are understood and interpreted, and for what purposes they are used by legal decision-makers. How do those who were previously voiceless speak?

With this interest in children as social actors, I began a comparative research project with my colleague Dr Randy Kandel from the John Jay College of Criminal Justice in New York City. This project on “The Child’s Voice in Legal Proceedings.”[ Funded by the Annenberg Foundation and the British Academy] contrasts the differing approaches to juvenile justice and care proceedings displayed by the lay-based, relatively informal setting of children’s hearings in Glasgow, with the more formal proceedings in a New York State Family Court in the USA. In acquiring data between 1997 and 2000 on what children do and do not say, and how children are understood or misunderstood in different types of setting, the study examines the ways in which children's views and needs are expressed and determined in legal proceedings involving care and protection. In particular, it explores the extent to which children can participate either directly or indirectly in legal hearings that affect their welfare, comparing the similarities and differences in the treatment of young people within differing legal jurisdictions. It explores how abstract international discourses on welfare and rights affect people on the ground. My colleagues in the Centre for Law and Society have been addressing these issues in the broader context of juvenile justice in Scotland.

Despite the very different settings of a New York Family Court and Scottish children’s hearings in Glasgow it became evident that similar problems emerge in implementing the child’s voice in children’s proceedings (where children either commit offences or are victims of offences by family members).

These are
• An ongoing tension and conflict between rights-based and welfare based approaches. This not only arises in the application of formal law, but is also apparent in the friction between local, communities’ norms governing children’s participation, and the kind of norms promoted by legislation that those in authority seek to uphold giving rise to a legal pluralism that is rarely acknowledged.

• The social difficulty for children in speaking “directly” – either because of the formalities of the situation itself or the anxieties about speaking out to and about family members in a public forum.

• The transfer of the child’s “voice” from the child’s “direct” speech to the “indirect” speech of a representative.

In Scotland, since the Human Rights Act 1998 became law there has been an increasing emphasis on strengthening the due process rights of the child and family. Ironically, however, our research shows that attempts to promote a greater respect for rights may have unintended consequences of the kind that may lead participants to being more circumspect, rather than more open and transparent at hearings. An example is provided by the provision of social background reports to children and families. This is intended to promote due process by making sure that all participants have the relevant information that is central to the decision-making process. However, a number of panel members who make the decisions at hearings observed that far from making the process more transparent, it may render it more opaque, as some social workers have become much less candid, if not vague, in what they write. In some cases this results in social workers making statements like the family feel “unable to co-operate” rather than revealing that lack of co-operation is due to a parent’s drug addiction. As a result panel members are left in the dark about what is really going on in the child’s life and find it difficult to make the best possible disposal for the child due to lack of information.

When it comes to having a “voice”, children and young people’s participation at hearings has always been problematic. This was highly evident from the hearings
we observed and many of the children we interviewed observed that they found them “scary” as “it’s frightening to have to go and talk in front of lots of people”. As one 13 year old girl explained, panel members “are all strangers. I don’t know them. But they know all about you.” In addition, while panel members strive for participation in terms of openness that enhances the information-gathering process many young people harbour the opposite conception of the process, namely that it is better to say as little as possible or to remain silent. This is to avoid breaching a notion of loyalty and trust within their social world, most notably to family and their peer group, as well as out of fear for what their speech might set in motion.

Even where children’s participation is indirect, through representation, this can prove problematic. A number of young people we interviewed did not favour having an adult represent them in the process because this person might, as one 15 year old boy observed “end up mixing your story up and getting it wrang”. Where representation occurs there is always the issue as to whether the representative is acting in the role of a lawyer, as an advocate for the child, or more like a curator ad litem whose role is to promote the child’s best interests. In practice these roles tend to get blurred and in our American research we found that some law guardians who were meant to act as advocates, in fact adopted best interests paternalism by letting hearings proceed (when they could have been dismissed on procedural grounds) because they were of the view that these young people, and I quote, “need help from the court to stay on the right path.”

In focusing on children as social actors, our research highlights the strategies they adopt as they manoeuvre their way through the legal system, and contrasts their approach with that of the institutions and personnel who exercise authority over them. Understanding how children and those operating the system such as panel members, social workers, and others experience and perceive the legal process is crucial if children’s participation and empowerment are to be meaningful concepts. This is especially pertinent given the Scottish Executive’s extensive proposals for reform in *Getting it Right for Every Child*.
Engaging in research that explores how a local constituency, be it a children’s hearing in Glasgow or a family court in upstate New York, responds to challenges raised by international conventions such as the United Nations Convention on the Rights of the Child or the European Convention on Human Rights and Fundamental Freedoms raises questions that extend beyond the domain of family law. These concern the role of law in a transnational world subject to the conditions of globalization. How does law work in an age where law and legal institutions now cross local, regional and national boundaries and in which the ‘local’ is embedded in and shaped by regional, national, and international networks of power and information. For the last five years I have had the great pleasure of working with Franz and Keebet von Benda-Beckmann at the Max Planck Institute for Social Anthropology, Hale/Saale, Germany on Developing Anthropology of Law in a Transnational Field. This project (funded by the ESRC, the Wenner-Gren Foundation in the USA, the British Academy and the Max Planck Institute) also involved working with colleagues Peter Fitzpatrick at London University, Birkbeck School of Law and Jane Cowan and Marie-Benedicte Dembour, at the anthropology and law departments at the University of Sussex.

Our research explored how law works under conditions of globalization through an analysis of empirical data, including a large, diverse and rich ethnography developed out of field work. This analysis was structured around two key themes, 1) Governmentality, The State and Transnational Processes of Law and 2) Space, Territoriality and Time. The data covered a wide range of social fields including citizenship within states and the recognition of transnational ties as they impinge upon adoptees, refugees, and nationals who have emigrated abroad. It not only examined individuals and their relationship with the state, but also explored more powerful states’ attempts to exercise supervision over other states through regulating their terms of entry to the European Union (EU), or through exercising control through development cooperation in the form of project law.

The data also document how social actors navigate plural legal settings under varied constellations of power, ranging from Scottish children’s hearings to Canadian fishermen in the Bay of Fundy to the Bhutanese state’s attempts to
reform the judicial system in accordance with an Anglo-American legal tradition; to local people negotiating their relationship with state and religious orders and/or customary law, in Ladakh or Amdo, or in Aceh or West Sumatra in Indonesia.

The purpose was to 1) explore the operation and effects of legal pluralism, that is, of coexisting multiple legal orders within a social domain at multiple levels; 2) to address the ways in which states regulate and respond to pluralism in contexts where they can no longer be viewed as the central standpoint from which to analyse law and its impact on communities and social actors; and 3) to examine the role of international human rights as perceived and utilised by various constituencies including indigenous people, minorities, states, non-governmental organisations and individuals. Thus my research with Randy represents only one strand in the interaction and dialogue that ensues between transnational and other kinds of law.

Why Important: Working for Justice
In pursuing these research questions, through empirically grounded data, these analyses contribute to a greater understanding of how law operates and how justice is perceived by opening up new dialogues about the authority and legitimacy of law that are no longer solely dependent upon the power of the state for their recognition. Thus the focus shifts from a view of state power as homogeneous or absolute to the impact of governmentality on ways of living and on social institutions including the state. Such an approach not only explores how the state through its various development programmes and organizational structures attempts to control territory and people but also examines how this relates to non-state modes of control and regulation at both local and supranational levels.

In dealing with the plurality of law, anthropologists of law provide an important perspective on law and globalisation. For while legal pluralism has become an accepted term in some legal and political science studies, it is mainly understood as the co-existence of state law, international and transnational law with the result that analyses remain limited to the question whether such transnational connections influence state law at the national level. By engaging with local
perspectives and their integration with or resistance to these broader arenas. Anthropologists of law not only show how transnationalised law can affect other legal orders within the state, for instance religious law, customary or traditional law but also demonstrate the ways in which these orders stand in complex interrelationships and how they affect each other. In drawing out these connections it becomes clear that neither the fate of transnational law nor its impact on local legal constellations can be understood without giving attention to the plural legal character of such local situations.

The actor oriented perspective, by underlining the various ways in which power is configured in the different social settings and how it is accommodated, adapted, ignored or resisted by the numerous actors, stresses the concrete ways in which people and institutions use law to negotiate their universe. In this process the dominance of state law may be called into question, or at least subjected to challenge, as they strive to achieve their goals. For example, the appropriation of human rights discourse discloses a tension between global understandings of law and its implementation and local activists’ ideas of how to achieve the goals articulated in the human rights system.

Such an approach to law undermines any view of globalisation as a “monolithic entity” producing uniform results by highlighting global ordering in terms of the complex changing patterns of homogenization and diversity. By placing actor-oriented perspectives at the core of analysis it becomes clear that the ‘local’ cannot be viewed as a sphere that is simply acted upon through the imposition of external institutions, interests, or market forces derived from national, regional or international agencies brought to bear on its domain. Instead, these perspectives provide for an analysis that not only examines how the global shapes the local but how the local responds. Thus, they promote a more finely tuned account of the effects of globalisation and its interventions, one that acknowledges that these phenomena represent socially constructed and continually negotiated processes.

Such a viewpoint not only allows for local agency but provides insights into local agents’ strategies for dealing with such phenomena, involving their manipulation, appropriation or, even, subversion of such phenomena, in particular contexts.
This in turn promotes an understanding of how these “external” interventions become endowed with a diverse and localized sets of meanings and practices. These issues are not only of theoretical interest to the disciplines of law and social science but also have a practical dimension when translated into individuals’ experiences of law. Such knowledge, based on the kind of micro-studies carried out by anthropologists, sociologists and socio-legal scholars, can be used to flesh out the abstract propositions of law to develop a grounded dialogue between theory and practice that is not only necessary for understanding the operation of contemporary family law but which is currently lacking in both the law and globalization debate and the general study of law.