Reflective Summary Piece

Taking this course, my expectations were that of any other law course; learn the law and apply it. Happily reality has proved far more interesting with the course forcing me to readjust my perception of the role of law in society, challenging my assumptions (some previously unrealised) and forcing me to reassess my view what the law should be. I have realised that law is not solely about the rules but also about the people that the rules govern. Law exists in a context and to be of maximum benefit cannot be understood or applied disassociatively.

Marilyn Wright’s observation that people often misconstrue the legal system with a justice system exactly described my initial view of the family law system. This view remained unchanged despite experience in a family law practice (last year); even after witnessing first-hand the drastic results of family law on families. My understanding and view of family law was a cold, detached, technical perception of rules to be applied in circumstances; certainly I would feel for clients where the outcomes were unfavourable but never once did I consider the underlying rationale or purpose of the rules, much less question them. Despite the name, for me family and law remained largely distinct and unrelated concepts.

This largely positivistic view however has been continually challenged and ultimately softened by the learning during the course.

Family law is ‘…designed to play a protective role in preventing or reducing exploitation in relationships…It simply cannot abrogate its responsibility to those outside the bounds of formal marriage’[[1]](#footnote-1)

The above quote triggered the journey away from strict positivism by highlighting the function of the law. It crystallised the nagging feeling that something was missing in my understanding of family law; there had to be more to family law than a set of rules to divide property and care for children. Although a purposive approach to the interpretation of legislation might be clear to anyone else, coming from a different cultural and educational background, I have always had a rather literal/black letter approach to the law. Further compounding this ‘tunnel vision’ is my [cultural and religious] background, where family issues are very largely kept private, within the personal realm. Realising that the law existed to protect people was therefore not something I had considered; I had always considered the law as restrictive, oppressive and governing ‘out-group’ relations. On hindsight the need for and the purpose of legal regulation of relationships during or after breakdown is blindingly obvious as although social norms (religious or cultural) might operate, they are not legally enforceable and so cannot truly protect.

This led me to consider the importance of the protection family law provides. Financially, socially and emotionally, family law provides a mechanism to ensure that neither party leaves a relationship overly disadvantaged. Performing 4 stage property adjustment process during the take-home highlighted how financially disadvantageous a relationship can be to the home-maker, especially when children are involved. Socially and emotionally, family law affords abused partners legal protection from the abusive relationship and takes into consideration family violence in child-care arrangements (though it should award financial adjustments too). This protection cannot be underestimated as I think few people consider the breakdown of relationships when entering into one and so do not ‘protect’ themselves financially or emotionally. Law therefore plays an incredibly important social function to prevent continued exploitation and balances out (albeit imperfectly) interests of both parties.

Having realised the purpose, the second part of the quote provided more food for thought. Just because a relationship does not fit one’s religious or cultural definition of ‘marriage’ does not mean it is undeserving of protection. De facto and married couples obtain legal rights by virtue of their relationship. However the failure to accord the rights of married couples to same-sex couples seems contrary to the protective purpose of the law. One possible problem would be the failure to explicitly recognise and overcome the distinction between legal and social definitions of family; I certainly never did (despite many conversations with gay friends over gay-marriage) and perhaps law reform efforts might focus on highlighting this distinction.[[2]](#footnote-2) It might be that in realising the function of the law as protecting parties from exploitation rather than perpetuating a certain set of beliefs or social norms, individuals might realise that concepts in family law belong not to religion but to society. Failing to recognise and make this legal/social distinction is unjust and highly undesirable.

These realisations (though probably obvious to most others) have made me reconsider the way I approach family law (and indeed law more generally) as although there is a need to distinguish legal concepts from social concepts, it is crucial not to forget the bigger picture and the purpose of family law when applying it and seeking reform. Thus a strict positivist approach to family law does not serve the best interests of the parties as ultimately it is the parties who have to live with the decisions, not the courts or lawyers. It may be naïve but it seems that a less legalistic view of approaching family law matters is mostly beneficial to the parties and to separate ideas of justice and fairness from the family legal matters might do more harm than good.[[3]](#footnote-3)

1. Lisa Young and Geoff Monahan ‘Family Law in Australia’ 7th Edition, Lexus Nexus, 2009, 150. [↑](#footnote-ref-1)
2. I think reform efforts actually do but I never consciously realised this. [↑](#footnote-ref-2)
3. ADR seems to reflect this. [↑](#footnote-ref-3)