State, Law and Family By Mary Ann Glendon

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BOOK REVIEWS

ERIC M. CLIVE*


This book can be read at two levels: as a straight exercise in comparative law and, as a sustained thesis on the relationship between the state and the family as reflected in the laws on the formation, consequences and dissolution of marriage. The two levels are interwoven and interdependent, but for the purposes of this review it is convenient to consider them separately.

As an exercise in comparative law the book is a most successful and, for English-speaking students, a most useful survey of recent family law developments in France, West Germany, England and the United States, with substantial references to Sweden and occasional references to other countries. It is, so far as I can judge, accurate, apart from the statement that adoptive siblings cannot marry each other in English law and the slightly misleading reference to Scottish informal marriages which would not lead the reader to suppose that marriages by cohabitation with habit and repute are still possible. It is also brilliantly clear, thanks to a careful selection and arrangement of material and a skillful and economical use of language. The comprehensiveness of a practitioner’s manual is not to be expected in a book of this kind but, that having been said, the coverage is remarkable.

There were only two areas which I would like to have seen covered in more detail. The first is the law relating to children. In the past century and a half there has been an enormous increase in legal protection for children, involving sometimes direct state interference with the parent-child relationship and sometimes indirect interference through legislation on such matters as education and employment. A complete view of the interaction of state, law and family would have to take this important body of law into account. This, however, is perhaps a criticism of the title rather than the contents of the book. The second area which I would like to have seen covered more fully is that of the personal effects of marriage. The author deals with the authority structure


2. M. GLENDON, STATE, LAW AND FAMILY 41 (1977) [hereinafter cited as GLENDON]. This is contradicted in id. n.126 which states the position accurately citing the Adoption Act 1958, 7 & 8 Eliz. 2, c. 5, § 13(3).

3. GLENDON, supra note 2, at 54.
within the family and family names but I would love to have had her views on the effects of marriage in relation to immigration, nationality, evidence and litigation. Developments in these areas would, I am sure, have provided further support for her thesis on the withering away of marriage.

It is, however, ungracious to quibble about what is not provided when so much is provided. The extensive coverage is made possible by the author's refusal to get bogged down in case law. Leading cases are referred to when necessary but, for the most part, Professor Glendon concentrates on key legislative texts, providing her own elegant translations of those in French and German, and on considerations of legislative policy. Students sometimes claim that statutes are duller than cases. This book shows how wrong they are. The reasons behind the statutes, the sociological framework, the views of commentators and critics are here deftly sketched in. Professor Glendon is by no means uncritical herself. She does not, for example, see the recent English and French divorce law reforms through rose tinted spectacles. Therefore, I was all the more surprised by her restraint in writing of the inhumane French system of dispensations from marriage prohibitions and of the chaotic English marriage license system. However, there is throughout the book an abundance of perceptive analysis which makes for interesting reading. In short, at the level of straight comparative law, this book is accurate, clear, remarkably comprehensive and extremely readable. But it is very much more than that.

The book develops, by reference to the legal systems studied, the thesis that marriage is becoming "dejuridified." The state is getting less and less involved in the formation of marriage, in the legal consequences of marriage, and in the termination of marriage. At the same time more and more legal consequences are being attached to de facto relationships.

So far as the formation of marriage is concerned, Professor Glendon points out that in France, West Germany, England and the United States recent changes have been in the direction of reducing restrictions on the individual's freedom to marry — to such an extent that in some of those jurisdictions the idea of a basic individual right to marry has emerged. This tendency, well documented in the book by reference to the internal laws of the four countries studied, can also be illustrated by the Hague Convention on Marriage signed in 1978. Twenty years ago such a Convention would have been concerned with preventing "runaway marriages" by people anxious to evade the restrictions of their personal laws. In the 1978 Convention the dominant theme is the minimization of restrictions on international marriages and the extension of recognition to as many marriages as possible. The draft Convention is a multilateral monument to a libertarian approach to the formation of marriage. Having dealt with the formation of regular marriages, the author devotes a

4. Id. at 29-35.
very interesting chapter to "Marriage — Like Institutions" and shows how, in the countries studied, the law has given more and more recognition to de facto families in various ways. There follows a substantial chapter on the legal effects of marriage, both personal and economic. In relation to the personal effects of marriage, the main trend has been away from the old model of the husband as head of the family and toward a new model of legal equality. This has made it easier for the law to retreat from detailed regulation of interspousal relations. It is no longer concerned with the imposition of a particular stereotype. The position is not so clear-cut with regard to the economic effects of marriage.

At first sight it might seem to many that the law was intervening here more than ever. There is great concern about the enforcement of maintenance orders and there is, in many separate property jurisdictions, an increasing awareness that legal equality often co-exists with economic inequality and an increasing willingness to do something about it. Professor Glendon establishes three points very firmly. First, there has in fact been a noticeable movement away from the idea of the wife's right to be supported by the husband and towards the idea of reciprocal contributions to household expenses. Secondly, there have been significant recent changes in the matrimonial property laws in all of the systems studied; the changes have been in the direction of greater equality of husband and wife in the traditional community property systems and in the direction of greater sharing of certain assets in the traditional separate property systems. Thirdly, private matrimonial property is becoming much less important because of the rise of "new property" in the form of employment rights, social security rights, pension rights and so on. Whether it follows that the law is withdrawing from the regulation of matrimonial property is more questionable. In most of the book the author can point to established trends. In this area some of the trends are not yet clear and she may be ahead of her time.

The problems facing law reformers are certainly thorny ones. First, should "women's potential, as distinguished from their actual, status . . . be emphasized in framing laws affecting the economic relations of spouses?" Secondly, "how much weight should be given to the fact that laws emphasizing and responding to the factual economic dependence of married women may tend themselves to perpetuate dependence and to discourage the acquisition of skills and seniority needed to make married women economically independent and equal in the labour market?" And thirdly, "there is the question of how, even conceding the compatibility of sharing mechanism with current economic behavior of spouses, we can assess their compatibility with current marriage behavior and ideologies. Is ideology at cross-purposes, in the short run at

6. GLENDON, supra note 2, ch. 5.
least, with economic reality?" This is a particularly impressive part of the book. A mass of difficult material is handled with great skill and perspicacity. I personally agree with Professor Glendon's cautious assessment that the tensions in the present situation do "not lead inevitably to the sharing of worldly goods. Compulsory sharing, and the kind of restraints that even deferred community property can put on the freedom of each spouse to deal with his own property, may come to be seen by increasing numbers of spouses as undesirable . . . ." And I am fortified in that view by the practical consideration that, when everything is taken into account (the small proportion of spouses who own substantial property, the extent of voluntary sharing, the need to allow opting out of any community property system, the succession laws, the adjudge powers of divorce courts), systems of compulsory sharing end up by being very complicated exercises for the benefit of comparatively few people. Even those who disagree with this point of view cannot but benefit from the material Professor Glendon assembles (far more than can be mentioned in this review) and her clear statement of the issues.

In dealing with the issues of "free terminability" of marriage the author is in easier waters. The rise of no-fault divorce, with or without adhering remnants of the old fault-based system, has been remarkably contemporaneous in the four countries studied, while the indications seem fairly clear that divorce on unilateral demand is on the way in. It exists in fact in most jurisdictions, in the sense that few people who really want a divorce cannot get one. It has been introduced in law in Sweden and Washington. With regard to the consequences of divorce, the idea that an obligation of support continues between divorced spouses is under challenge on all sides. Here again, however, the difficulties are immense. If the private law cannot provide a solution, the obvious alternative is public support but that tends to depend on current perceptions of national affluence.

A difficulty for the author's thesis on the dejuridification of marriage is that, in all the jurisdictions studied, the surviving spouse has been increasingly preferred to blood relatives in the scheme of intestate succession — to such an extent that he or she very often takes the whole of the average intestate estate. The explanation is, perhaps, that if we are moving away from a society of small self-contained family units, we are moving away even faster from a society composed of large kinship groups. It is true, as the author points out,

8. GLENDON, supra note 2, at 163-64.
9. Id. at 164.
10. See id. at 226-27.
13. Whether it need depend on actual national affluence is another question. No more people are going to be supported at any much higher level whichever system is adopted.
that in this area "no force pushes strongly for maintaining independence of the spouses' economic interests." It is also true that for millions of people what matters is pension rights and claims against the state, not succession rights.

In the final chapter Professor Glendon sets the developments she has described in a broad historical context. After the verve of the preceding chapters I found the historical part of the final chapter rather slow, but that probably says more about my preferences than about the chapter's merits. The book picks up speed again at the end when Professor Glendon sums up her arguments and reaches some general conclusions. The main one is that "the present period of change can only be seen as a downward curve of de-juridification and deregulation, a return to forms of social control other than legal rules concerning the formation, dissolution and organization of married life." (emphasis in original). I find this thesis totally convincing. It does not mean, of course, as Professor Glendon makes clear, that the state is keeping clear of intervention within the family circle. Indeed the reverse could be said to be the case. Precisely because the state no longer erects a wall around the legal family circle it is more willing than ever before to step inside it to protect individuals from abuse, exploitation and deprivation.

It is impossible within the confines of a review to do justice to the richness of this book. It must be read by anyone interested in family law. For me, its significance is that it establishes a new advanced base for consideration of the subject. There is plenty of work still to be done in the foothills but, at the conceptual level, where do we go from here? Perhaps toward a general theory of the law on human groups.

14. GLENDON, supra note 2, at 288.
15. Id. ch. 7.
16. Id. at 321.

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Recent events in Iran and Afghanistan have reawakened American concerns over the real and threatened diminutions of our national security which result from conflict in an area remote from our shores. Our Navy has recently disclaimed its ability to guarantee the nation's security in the Atlantic Ocean, while more distant waters have become the center of our strategic focus. Our

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