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Articles

Making the case for international family law in the law school curriculum

Ana Speed

AQ – Senior Lecturer and Solicitor - Northumbria University

Making the case for international family law in the law school curriculum Ana Speed

Speed, Ana: Making the case for international family law in the law school curriculum

Introduction

Over the last few decades, there has been a significant increase in the number of cases being dealt with in the family courts in England and Wales which have an international element. These cases draw on how the law regulates family issues with an international dimension, how the law in England and Wales compares with other jurisdictions and how international laws and treaties are implemented, interpreted and enforced.

A brief overview of case law in England and Wales demonstrates the breadth of issues regulated by international family law ('IFL'). When IFL first emerged, it was mainly concerned with high net worth divorce and, in particular, disagreements between wealthy couples who could not agree which jurisdiction divorce proceedings should take place in.¹ The parties would rush to secure jurisdiction under Brussels II or the rule of forum conveniens.² Whilst such cases still exist, IFL increasingly regulates the lives of women and children. This can be evidenced where couples who have been unable to conceive naturally have taken the decision to enter into an overseas surrogacy or adoption agreement. In such cases, courts may be asked to adjudicate on the validity of the agreement entered into or decide where and with whom the children should live.³

IFL also regulates the catastrophic situation where a child is removed from the jurisdiction by a family member. In the case of *Re B and another (Change of Names: Parental Responsibility: Evidence)* [2017] EWHC 3250 (Fam), the children were removed to Iran by their father. The children's mother had been unable to rely on The Hague Convention on the Civil Aspects of International Child Abduction 1980 to secure their return because Iran is not a signatory. The children were made wards of court under the court's inherent jurisdiction and their return was eventually secured by their mother's courageous efforts in travelling to Iran with the assistance of the abduction team of the Foreign and Commonwealth office and the British Embassy in Turkey. Subsequently, she successfully sought the assistance of the court to allow her to change the children's names and to prevent the children's father exercising any aspect of his parental responsibility.

However, it is not necessary for one of the parties (or their assets) to be physically present outside the jurisdiction for a case to have an international dimension. This is demonstrated by the case of *Re E (Children) (Female Genital Mutilation Protection Orders)* [2015] EWHC 2275 (Fam), [2015] 2 FLR 997 and *Re CE (Female Genital Mutilation)* [2016] EWHC 1052 (Fam), [2017] 1 FLR 1255

¹ Hodson, D (2016) *International Family Law Practice*, Fifth Edition. Jordan Publishing

² See *Chai v Peng* [2014] EWHC 1519 and *Mittal v Mittal* [2013] EWCA Civ 1255

³ See *Re JJ (A Child)* [2011] EWHC 921 (Fam) and *Re X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam).

which concerned an application by a Nigerian mother who was habitually resident in the UK for female genital mutilation ('FGM') Protection Orders in respect of her three daughters. The application was made 19 days after the applicant mother's appeal against the decision to decline her leave to remain had been refused. In her witness statement, the applicant disclosed that she had been subject to a forced marriage and had undergone FGM at the hands of her ex-husband, the children's father. She also claimed that it was his intention for his daughters to undergo FGM and if she refused, he would remove them to Nigeria. The respondent father disputed these allegations and applied for permission to permanently remove the children to Nigeria. Following a fact-find hearing, the court found that the mother lacked credibility and had failed to put forward any positive evidence to support the risk to the children. The judge concluded that the allegations had been invented in order to support her application for asylum and accordingly her application was dismissed. It was also found to be in the children's best interest to return to Nigeria with their father.

Family law and practice has adapted to cater for the growth in IFL. This is demonstrated in the introduction of forced marriage protection orders and FGM protection orders, legislation to prevent domestic servitude and human trafficking through the Modern Slavery Act 2015 and a number of practice directions under the Family Procedure Rules 2010 which address practice issues regarding international child abduction and polygamous marriages. The growth of IFL has placed added demands on lawyers, Judges and frontline professional bodies in the family justice system, who are increasingly required to be culturally competent. Judges, for example, may be faced with the question of whether to award the return of a dowry specified in a Nikah contract in financial relief proceedings. Alternatively, a lawyer may be called upon to advise a Muslim woman with a Nikah contract (but no registered civil marriage) about the validity of her marriage and any financial claims she may (or may not) have on the relationship breakdown. Despite initial hesitance from practitioners, England is becoming a world leader in IFL because of its strong links with Europe, North America and the Commonwealth nations.⁴

The legal landscape reflects demographic changes which have been brought about as a result of globalisation, increased migration and the spread of human rights.⁵ In the context of England and Wales, such changes have in part been a result of the common European citizenship brought about through the Maastricht Treaty in 1992. The United Nations estimates that there are currently 1.22m British people permanently living in another European Union country.⁶ In the year to June 2017 there were around 3.7m people living in the UK who are citizens of another European Union Country, representing 6% of the UK population.⁷ This is an increase of 275,000 since the Brexit vote in June 2016.⁸ Asylum is also another source of migration into the United Kingdom. Approximately 177,000 people from non-EU countries sought asylum during the third quarter of 2017.⁹ These applications were received by citizens of 146 countries. More generally, it is estimated that around 9.2m people living in the UK were born abroad, around 14% of the total population of the UK.¹⁰

There is academic support for incorporating IFL within law school curriculums. Stark argues that in the USA IFL has become a legal subject because it matters enough to generate demands that it does so, there is a coherent body of substantive law and an agreed upon set of rules and processes that

⁴ Hodson, D (2016) *International Family Law Practice*, Fifth Edition. Jordan Publishing

⁵ Stark, B (2006) *When Globalisation Hits Home: International Family Law Comes of Age*, 39 *V and J. Transnat'l L.* 1551.

⁶ United Nations, 2015, Department of Economic and Social Affairs, Population Division

⁷ <https://fullfact.org/europe/how-many-uk-citizens-live-other-eu-countries/>

⁸ <https://fullfact.org/europe/how-many-uk-citizens-live-other-eu-countries/>

⁹ *Asylum Quarterly Report*, European Commission, 2017

¹⁰ Office of National Statistics 2017-

<https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/articles/w hatinformationisthereonbritishmigrantslivingineurope/jan2017#migration-statistics-background>

enable it to function and because it grapples with the issues of the day.¹¹ Until that point, she notes, a legal subject can ‘dally in elective seminars and esoteric panels ... but when clients demand lawyers, judges ask for memos, lawyers call their old professors, committees are formed, and bar panels organised, the legal subject must put aside the games of childhood and become rigorous and responsible’¹². Stark was not the first academic in the USA to make observations about the importance of teaching IFL. In 1995, Reynolds talked about the benefits of teaching IFL within a conflicts of law module, as a more topical alternative to the ‘basic troika’ of jurisdiction, choice of law and judgments which was covered in the context of United States law.¹³ Reynolds wrote that conflicts professors are parochial in their focus and ignore IFL because they do not wish to engage with many of the complex statutes that underpin it. However, he felt that studying IFL has benefits for students because the issues are ‘important, liberating, cross-cultural and just plain fun’.¹⁴

However, despite changes to the legal landscape and the increasing academic recognition of IFL as a legal subject, the broad range of IFL issues appear to be largely absent from the law school curriculum in England and Wales, both within family law and private international law modules. Whilst it is not compulsory for students in England and Wales to study family law, the majority are able to elect to study family law in the penultimate or final year of their undergraduate degrees or as part of their post-graduate vocational qualification. In many institutions, family law presents as a popular optional module choice. Many students are interested by the idea of helping private individuals through difficult periods and the human-interest element that comes with highly publicised legal battles such as *Great Ormond Street Hospital v Yates, Gard and Gard* [2017] EWHC 972 (Fam). A brief online review of the design, content and delivery of family law modules up and down the country however, does not make for particularly enlightening reading. Students are taught about divorce and financial relief proceedings, private and public law children proceedings, domestic violence applications and cohabitation disputes. IFL issues may receive a courteous mention in a way that indicates it is ancillary to the studies and (importantly to students) is unlikely to form part of their assessment. Whilst modules in private international law do give students an opportunity to study the process for resolving cross-border disputes, they are more likely to do so in the context of international commercial disputes, contract, tort and property than family law.

This article will draw on recent case law and the work of Reynolds and Stark to conclude that in England and Wales IFL matters, that it is governed by a coherent body of law and agreed upon set of rules and that it grapples with the issues of the day. Accordingly, there is a case for it to be recognised within the legal curriculum.

Does international family law matter in England and Wales?

The extent to which IFL matters can be illustrated through the recent case of *Re M (Children) (Suspected Trafficking – Competent Authority)* [2017] EWFC 56. The case concerned two children (JM and EM) who were brought to the UK from Namibia by a lady claiming to be their grandmother. Border control suspected that the children were victims of human trafficking and they were made subject of protection orders and placed in foster care. It was the grandmother’s case that she had been awarded parental responsibility for the children by a Namibian court and this had been made with the acquiescence of the children’s parents, who lived in Canada. Under the Council of Europe Convention on Action against Trafficking of Human Beings, the Competent Authority was required to determine firstly, whether there were ‘reasonable grounds’ to believe the children were

¹¹ Stark, B (2006) When Globalisation Hits Home: International Family Law Comes of Age, 39 V and.J. Transnat’l L. 1551.p.1586.

¹² Stark, B (2006) When Globalisation Hits Home: International Family Law Comes of Age, 39 V and.J. Transnat’l L. p.1856

¹³ Reynolds, W (1995) Why Teach International Family Law in Conflicts 28 Vanderbilt Journal of Transnational Law p. 412

¹⁴ Reynolds, W (1995) Why Teach International Family Law in Conflicts 28 Vanderbilt Journal of Transnational Law pp. 414-415.

victims of trafficking. Where the Competent Authority finds that there are reasonable grounds to believe a person is a victim of trafficking it then has to make a 'conclusive grounds decision' as to whether there are sufficient grounds to decide that the individual is a victim of trafficking. If so, Children's Services and the Police will be notified.

This case first came before the court on the local authority's application for interim care orders which were granted on 19 January 2017. The court was satisfied, by virtue of Art 20 of Brussels II Revised that it had jurisdiction to make orders as 'protective measures'. The Competent Authority subsequently made a positive 'reasonable grounds' decision. Following further consideration of the evidence, however, the court accepted that the lady was the boys' grandmother and that she did hold a form of parental responsibility for the children. The court was not satisfied that they were brought to England for a two-week holiday, on the basis that the grandmother spoke little English, had insufficient funds and was unable to provide evidence about their accommodation or travel plans. The court concluded that it would be in the children's best interests to return to Namibia under the care of their grandmother. The Competent Authority therefore made a negative 'conclusive grounds' decision.

IFL is most important to the clients whose lives it regulates. This is because, regardless of one's culture, family lives and relationships matter most to people.¹⁵ This is particularly true of children, for whom events like trafficking and abduction are catastrophic and whose voices are not always heard in proceedings. The international element of litigation means that the stakes are high and emotions are more strained, both due to the seriousness of the allegations and the fact that litigation is often taking place in an unfamiliar country. For the children in this case, being removed into foster care during the proceedings would have been distressing and an incorrect or delayed decision would inevitably have led to them suffering further harm. The judgments given can therefore permanently alter family dynamics.

The spread of IFL also means that it is now practised by a broader range of practitioners than ever before. Hodson recognises that the level of knowledge and practical experience of many family lawyers is still relatively low although this is increasing.¹⁶ IFL can be complex and fast-paced, making it daunting for many practitioners. However, IFL clients expect practitioners to deal with international cases 'quickly, knowledgeably and expertly'.¹⁷ In this case, the children, children's mother and grandmother, local authority and Competent Authority all benefitted from legal representation. In international cases, where processes and languages are unfamiliar, representation is vital to allow the parties to properly participate in the proceedings.

Practitioners may face negligence claims if they fail to correctly identify the issues faced by their clients. The need for practitioners to be mindful to IFL issues has been recognised by the judiciary in the context of child abduction. In *Re H (Abduction: Habitual Residence: Consent)* [2000] 2 FLR 294 Holman J stated that:

'... just as every general practitioner must be alert to spot a rare illness (even if he doesn't have the experience to treat it), so also anyone, whether judge or practitioner, having involvement in cases concerning children, must always be alert to spot a possible case of international child abduction'.

The requirement to understand IFL issues also extends to professionals who are expected to identify victims (such as border control, in the case above). In FGM cases regulated health and social care professionals and teachers in England and Wales are required to report known cases of FGM in under 18 year olds to the police.¹⁸

The case of *Re M (Children)* also demonstrates how IFL matters legally and politically. Firstly, it

¹⁵ Stark, B (2006) When Globalisation Hits Home: International Family Law Comes of Age, 39 V and J. Transnat'l L.

¹⁶ Hodson, D (2016) International Family Law Practice, Fifth Edition. Jordan Publishing, page 5.

¹⁷ Hodson, D (2016) International Family Law Practice, Fifth Edition. Jordan Publishing, page 5.

¹⁸ Section 74 of the Serious Crime Act

matters because in this case, IFL was called upon (as it is in many cases) to protect vulnerable minors. Without international legislation (BIIR and the Convention on Action Against Trafficking of Human Beings) the court would not have had jurisdiction to make protective orders in respect of the children and the matter would have been reverted back to the courts in Namibia to determine what should happen to the children. This could have caused delays in a decision being made (which would be contrary to the children's welfare) and could have proved controversial politically because it is unclear what protection would be afforded to the children. Whilst Namibia has made efforts to eliminate trafficking, it does not fully comply with globally recognised standards¹⁹ and victims are often prosecuted for immigration, child labour and prostitution offences.²⁰ In contrast, in 2015, human trafficking was given increased recognition in England and Wales through the Modern Slavery Act 2015, which implemented the Council of Europe Convention on Action against Trafficking in Human Beings into domestic law.

A further indication that IFL matters politically, is that legal aid continues to be available in cases where children are at risk of harm, despite the considerable cuts to legal aid brought about by the Legal Aid Sentencing and Punishment of Offenders Act 2012. Legal aid is also available in domestic abuse cases. Domestic abuse is broadly interpreted and includes culturally specific forms of abuse including forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment.²¹

The importance of IFL has also been recognised by the judiciary through the creation of the Office of the Head of International Family Justice,²² which was established in 2005. The office deals with IFL enquiries from judges, practitioners and academics and ensures the effective cross-border management of cases. It also works closely with the Ministry of Justice, the Foreign and Commonwealth Office and the Central Authority (International Child Abduction and Contact Unit (ICACU) to develop European and international family law and practice. A number of panels, journals and conferences that promote the development of academic and practical knowledge in IFL have also been established. The most notable organisation is The Hague Conference on Private International Law. The Conference is an intergovernmental organisation which is made up of 69 members from all over the world whose legal systems (and the religious and political values underpinning them) can be vastly different.²³ The Conference has been instrumental in developing and administering much of the international legislation around IFL issues through The Hague Conventions and Protocols, and have provided unification, harmonisation and cooperation to cross-border cases.²⁴

The Conference has had particular success in the area of child abduction. In the 1970s, parental kidnapping was becoming a global concern and it was recognised that this was harmful to children's wellbeing.²⁵ The Conference subsequently drafted the Convention on the Civil Aspects of International Child Abduction 1980, which recognises and enforces existing custody rights and ensures the prompt return of children to their country of habitual residence.²⁶ Year on year there has been increase in applications for return orders under the Convention, globally. There were 954 applications worldwide in 1999 compared to 1,961 in 2008.²⁷ In England alone, the ICACU dealt

¹⁹ The Trafficking in Persons Report 2016

²⁰ The Trafficking in Persons Report 2016

²¹ Practice Direction 12J to the Family Procedure Rules 2010

²² <https://www.judiciary.gov.uk/about-the-judiciary/international/international-family-justice/>

²³ Estin, A L (2010) Families Across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States, 62 Fla. L. Rev. 47, 108.

²⁴ *ibid*

²⁵ *ibid*

²⁶ *Ibid* page 37.

²⁷ Judiciary of England and Wales. Office of the Head of International Family Justice for England and Wales. Annual Report 1 January – 31 December 2012.

with 444 applications in 2011, up from 288 in 2010²⁸. Of course, this does not reflect the full picture as these figures do not include children removed to non-Hague countries whose return is sought under the court's inherent jurisdiction.

Finally, IFL matters to our students, who are the future family law practitioners. It matters to them because they must be equipped to deal with the realities of legal practice in England and Wales once they have graduated. For Reynolds, however, the benefits of IFL are greater than this. He indicates that IFL matters because the issues are 'important, liberating, cross cultural and fun'²⁹. IFL is important because family law policy can have a significant impact on the state and the citizens whose lives it regulates. This is demonstrated by unpaid child maintenance which creates a burden on the state through the payment of welfare benefits. The international element of the litigation also means there is 'no room for error' as the parties do not usually have the resources to have a second bite of the cherry. Students' skills are in no small part developed in law school and 'getting it right' is primarily the responsibility of lawyers and judges. Teaching IFL can therefore 'help reduce, albeit in a small way, the sum of human misery'³⁰.

The importance of IFL can be seen in the case of applications for the summary return of a child under the Hague Convention. In such cases, the stakes (and emotions) are undoubtedly high: it is alleged that a child has been unlawfully removed from the country in which they are habitually resident without the consent of the left-behind parent. There is usually a dispute as to the circumstances of the removal and whether the child should be returned. The respondent may raise one of the defences available under Art 12 and 13 of the Convention, these being that the applicant consented to the removal or was not actually exercising their custody rights, that the return would cause the child grave risk of physical or psychological harm or place them in an intolerable situation or that the child objects to being returned. The disputed issues are likely to be compounded by the fact that it may have been some time since the left behind parent has seen the child. The litigation will take place in the country to which the child has been removed; this may be some distance from the child's country of habitual residence and the processes may be different and unfamiliar. The left behind parent will likely need to travel (at a cost to themselves) to attend the hearing and give evidence. There may also be language barriers for which an interpreter will be required. The applicant is likely to have the benefit of legal aid (as long as the case is registered with the ICACU) which is available on a non-means non-merit tested basis. Accordingly, the case should be referred to a specialist solicitor on the ICACU's panel. The same support is not, however, extended to the respondent, who may have a legitimate reason for removing the child(ren) but who will only receive legal aid if they satisfy the strict means and merits criteria.³¹ This inequity can raise tensions and power imbalances further.

Studying IFL is also liberating because it allows students to engage with topics and materials that they may not otherwise encounter on their degree programmes.³² This can promote 'fascinating discussion' and 'intriguing legal questions' for students to engage with.³³ The implications of the UK leaving the European Union and the impact this will have on family law will likely provide interesting (and contentious) legal fodder over the coming few years. Should we maintain the current system of full reciprocity? Would it be preferable to turn EU law into domestic law but lose the existing EU reciprocal arrangements? Could we start from scratch and set up a new arrangement? Would other international instruments suffice?

²⁸ Judiciary of England and Wales. Office of the Head of International Family Justice for England and Wales. Annual Report 1 January – 31 December 2012.

²⁹ Reynolds, W (1995) Why Teach International Family Law in Conflicts 28 Vanderbilt Journal of Transnational pp. 414-415.

³⁰ Reynolds, W (1995) Why Teach International Family Law in Conflicts 28 Vanderbilt Journal of Transnational p 415.

³¹ See *Kinderis v Kineriene* [2013] EWGC 4139 (Fam)

³² Reynolds, W (1995) Why Teach International Family Law in Conflicts 28 Vanderbilt Journal of Transnational Law

³³ *Ibid*

IFL materials are often multi-disciplinary drawing on family law, private and public international law, immigration law, housing law, criminal law and human rights. This can be illustrated through the Istanbul Convention, which will be ratified into domestic legislation through the Preventing and Combating Violence against Women and Domestic Violence (Ratification of Convention) Act 2017. The issue of domestic abuse has gained an increased European focus following the European Council listing the 'protection of victims' as a family law priority for 5 years in 2014. The Convention aims to combat violence against women by implementing preventative and protective measures such as giving the police power to remove perpetrators of domestic violence from the home and setting up telephone helplines and accessible shelters. The English government has already complied with some of its obligations under the Convention such as criminalising coercive control as a form of domestic abuse.³⁴ From an IFL perspective, students can critically engage with the different responses taken by member states to implement their obligations and the effectiveness of these different provisions. These issues are also increasingly represented in the media driven by the rise in popular feminism and the female empowerment campaigns that have been driven by women's rights organisations and celebrities.³⁵

IFL also offers students a different perspective and is therefore cross-cultural.³⁶ Students and lecturers are exposed to different legal systems and approaches to the law. The religious, cultural and political views underpinning these laws can challenge our understanding of concepts such as 'childhood' and 'family'. IFL is a subject which recognises and regulates all walks of life and allows students to engage with the current socio-legal climate that many of the foundation subjects (ie contract, tort, equity and trusts) do not.

Many practitioners would argue that the approach to legal education in England and Wales is too intellectually narrow³⁷ and prioritises the 'laws of the wealthy' which regulate large sums of money, major companies or significant economic actors.³⁸ The laws of the majority are largely ignored. This intellectual focus may relate to the misconception that lawyers do little social welfare law these days, due to the cuts in legal aid.³⁹ Whilst this may be more accurate in areas such as immigration and welfare law, this does not correspond with IFL because legal aid remains available for cases involving domestic abuse and honour-based violence, child abduction and cases where children are at risk of harm. In the context of IFL, it is therefore arguable that not only does the curriculum prioritise the law of the wealthy, but also those laws which reinforce power, race and gender inequalities. Teaching IFL therefore provides a balance against privilege within our curriculum. This means IFL matters pedagogically because it seems to add some much-needed intellectual diversity to legal education in England and Wales.

Is there a coherent body of substantive law and an agreed upon set of rules and processes that enable IFL to function?

Family law and practice in England and Wales has adapted to cater for the growth in international family law, both in domestic law, international law and its rules of practice. This is clearly demonstrated by the introduction of Forced Marriage Protection Orders (by the Forced Marriage

³⁴ See section 76 of the Serious Crime Act 2015

³⁵ See, for example the 'Times up' and the 'Me Too' campaigns.

³⁶ Reynolds, W (1995) Why Teach International Family Law in Conflicts 28 Vanderbilt Journal of Transnational Law

³⁷ See for example, Sanders, A (2015) Poor Thinking, Poor Outcome? The Future of the Law Degree after the Legal Education Training Review and the Case for Socio-Legalism, in H. Sommerlad, S. Harris-Short, S. Vaughan and R. Young (eds), *The Futures of Legal Education and the Legal Profession* (1st ed., Oxford, Hart Publishing and Waters, B (2016) The importance of teaching dispute resolution in a twenty-first century law school, *The Law Teacher*, 51:2, 227-246.

³⁸ Crownie, F. Bradney, A. Burton, M (2013) *English Legal System in Context*, Sixth Edition. p.129.

³⁹ Sanders, A (2015) Poor Thinking, Poor Outcome? The Future of the Law Degree after the Legal Education Training Review and the Case for Socio-Legalism, in H. Sommerlad, S. Harris-Short, S. Vaughan and R. Young (eds), *The Futures of Legal Education and the Legal Profession* (1st ed., Oxford, Hart Publishing.

(Civil Protection) Act 2007) and FGM protection orders (by the Serious Crime Act 2015). Both forms of protection are injunctive relief which impose legally binding conditions on the Respondent to prevent these harmful practices. Legal aid remains available for the applicant on a means and merits basis.

Forced marriage protection orders were introduced in November 2008 to prevent the victim from being betrothed or married to a person without their consent and to declare invalid any such marriages which have already taken place. FGM protection orders were introduced in July 2015 with the aim of safeguarding potential victims of FGM. The conditions imposed by forced marriage or FGM protection orders can include prohibiting the respondent from removing the potential victim from the jurisdiction and requiring their passport to be surrendered. Breach of an order is a criminal offence. There has been a general upward trend in the number of forced marriage and FGM protection orders granted. In the period July 2017 to September 2017 there were 88 applications for forced marriage protection orders and 64 orders made.⁴⁰ This was an increase in the period April 2017 to June 2017, during which there were 78 applications and 72 orders made.⁴¹ There have been smaller numbers of applications for FGM protection, however this is also increasing. Between July 2017 and September 2017 there were 42 applications for FGM protection orders and 34 orders made.⁴² In total, there have been 205 applications and 179 orders made up to the end of September 2017 since their introduction in July 2015.⁴³

Protection orders form part of a wider campaign to protect victims in England and Wales from traditional harmful practices. This is also illustrated by the criminalisation of forced marriage in June 2014 by the Anti-Social Behaviour, Crime and Policing Act 2014 and the creation of the Forced Marriage Unit ('FMU'), which leads on the government's forced marriage policy and casework. In 2016, the FMU gave advice in 1,428 cases.⁴⁴ This represents an increase of 14% (208 cases) compared with the previous year⁴⁵.

Legislation relating to FGM has also been amended to reflect the realities of offences taking place in England and Wales. The Serious Crime Act 2015 extended the criminal offences in the Female Genital Mutilation Act 2003 of performing FGM or assisting a girl mutilate her own genitalia to include acts performed outside the UK by a UK national or a person who is resident in the UK.⁴⁶ These changes will mean that the legislation now captures offences committed abroad by or against those who have a significant connection to the UK but under the 2003 Act would have been missed because the perpetrator was not permanently resident in the UK. Additionally, s 72 of the 2015 Act inserts new s 3A into the 2003 Act, which creates a new offence of failing to protect a girl from FGM. This means that if an offence of FGM is committed against a girl under the age of 16, each person who is responsible for the girl at the time FGM occurred (i.e. anyone with parental responsibility for her) will be liable.

There have not been any prosecutions under the new legislation despite evidence that FGM is a real concern in England and Wales. Statistics compiled by the National Health Service suggests there have been more than 14,000 new cases of FGM identified in the past two years.⁴⁷ There is also evidence that the number of cases of 'honour' based violence, forced marriage and FGM reported to the police in the UK has increased by 53% since 2014 (IKWRO, 2017). Disappointingly, the number of cases referred to the Crown Prosecution Service ('CPS') for a charging decision remains

⁴⁰ Ministry of Justice (14 December 2017) Family Court Statistics Quarterly, England and Wales, July to September 2017.

⁴¹ Ministry of Justice (14 December 2017) Family Court Statistics Quarterly, England and Wales, April to June 2017.

⁴² Ministry of Justice (14 December 2017) Family Court Statistics Quarterly, England and Wales, July to September 2017.

⁴³ Ibid

⁴⁴ Home Office and Foreign & Commonwealth Office (9 March 2017) Forced Marriage Unit Statistics 2016.

⁴⁵ Ibid

⁴⁶ Ministry of Justice and the Home Office (March 2015) Factsheet on Female Genital Mutilation.

⁴⁷ NHS Digital (2017) Female Genital Mutilation Enhanced Dataset July 2017 to September 2017.

low. Only 256 cases of ‘honour’ based violence were referred to the CPS by the police in 2016-2017(5% of the cases reported). This resulted in 215 prosecutions and 122 convictions.⁴⁸

Legislation has also been developed to acknowledge forms of abuse which impacts predominantly vulnerable adult women, migrants and children. An example of this is the Modern Slavery Act 2015. The Act includes a number of provisions extending support for victims of human trafficking to victims of slavery, servitude and forced and compulsory labour. Family practitioners must familiarise themselves with these issues because domestic servitude is a recognised form of familial abuse, particularly within black and minority ethnic (‘BAME’) households.⁴⁹ Around the world, Asian women perform a disproportionate amount of unpaid work both within the home and family businesses.⁵⁰ Many trafficked women also have unsettled immigration statuses or statuses which are dependent on a spouse who is also a trafficker. This can result in them being subject to higher levels of control by abusers as women fear they will be deported. Children (and in particular unaccompanied, internally displaced children) are also disproportionately likely to be victims of modern slavery and human trafficking.⁵¹ This requires a child protection response and frontline staff must be equipped to make the necessary referrals to local authorities. Family practitioners may become involved in the representation of one of the parties in subsequent public law proceedings.

In addition to legislative developments, there have been advances relating to the practice of IFL. There are numerous Practice Directions relating to international matters. These regulate procedural issues such as service outside of the jurisdiction (PD 6B), registration and enforcements of orders (PDs 31 and 32), child arrival by air (PD 12O), reciprocal enforcement of maintenance orders (PD 34A) and tracing payers overseas (PD 34B). They also deal with more substantive issues such as adoptions with a foreign element (PD 14B), child abduction (PD 12F) and polygamous marriages (PD 7C).

A recent example of family practice adapting to the demands of IFL can be seen in the amendments to the divorce petition (Form D8) which came into effect in August 2017. For example, the form now includes a reference to the requirement for separate arrangements to dissolve religious marriages. The petition also includes a list of all grounds which may indicate the English and Welsh courts have jurisdiction, rather than making the presumption that both parties will be jointly habitually resident. Practitioners have however recognised that the petition could go further to reflect the requirements of international law. Allum et al⁵² note that the new petition does not provide space for the court to confirm the time that the divorce petition was received by the court. This is important as the European Court of Justice has directed that in a jurisdiction race, it is the petition which is lodged first which will receive priority under the Brussels II Regulations and not the time that the petition was issued.⁵³ Further, whilst the petition asks whether there have been any existing or previous court proceedings, the reference to proceedings taking place abroad has been removed from the petition.

International family laws have developed in a piecemeal approach to reduce the stress and cost of litigation and promote harmonisation and cooperation between countries. These laws have proved invaluable at times when domestic legislation has been inadequate to handle IFL issues.⁵⁴ An example of this is child abduction. Without Brussels II, if an English mother removed her child to France and the French court subsequently decided not to return the child, the left behind father

⁴⁸ <http://ikwro.org.uk/2017/11/violence-criminalisation-marriage/>

⁴⁹ Mirza, N (2016) South Asian Women’s Experience of Family Abuse: The Role of the Husband’s Mother

⁵⁰ Asian Development Bank (2015) Women in the Workforce: an unmet potential in Asia and the Pacific.

⁵¹ Shelley, L (2000) Human Trafficking: a Global Perspective. Cambridge University Press.

⁵² See the discussion at: https://www.familylaw.co.uk/news_and_comment/imminent-changes-to-divorce-dissolution-petitions-and-to-the-family-procedure-rules#.WkeHRCOcauk

⁵³ MH v MH [2015] IEHC 771

⁵⁴ Estin, A L (2010) Families Across Borders: The Hague Children’s Conventions and the Case for International Family Law in the United States, 62 Fla. L. Rev. 47, 108.

would lose the benefit of the EU provision that gives the English courts the ability to overrule the French decision and order that child's return. The UK return order would no longer be automatically enforceable in France. Instead, the father would have to take his case to France. There would likely be far greater delay which would not be in the child's best interests. Cases would take longer to litigate and greater costs would be incurred (or our legal aid system would be further burdened).

Has international family become a 'player'? Does it grapple with the issues of the day?

IFL deals with issues which affect all levels of society but which disproportionately affect women and in particular minority communities. The rights of cohabitants (or lack thereof) is a good example of this. Contrary to popular opinion, there is no such thing as a 'common law' marriage in England and when relationships break down the courts have no jurisdiction to redistribute the parties' assets and they cannot pursue claims for maintenance. Where family law is unable to assist, the parties may turn to the law of trusts or contract for a remedy, which is unlikely to be satisfactory. There have been many calls for the law to recognise the rights of cohabitants.⁵⁵

In the context of IFL this issue has resurfaced in relation to the validity of Islamic marriages. Muslim men and women will usually have an Islamic Nikah ceremony, which is the religious ceremony. Many Muslims are unaware, however that a Nikah performed in England does not create a legally recognised marriage with the couple still classed as cohabitants in the eyes of English law.⁵⁶ Therefore, should the marriage break down, the parties will not have the same protection of the law as they would have if they had a civil registry marriage. This can be disadvantageous because wives who are brought over from South East Asia may lack the language skills and cultural capital to understand the status of their marriage (and therefore the choice as to whether to have a civil ceremony). Their immigration status may be dependent on their spouse. Muslim women may also be less likely to be financially independent as they may conduct domestic work within the house or unpaid work within a family business. It can also be disadvantageous because it allows husbands to marry multiple women – one woman by way of a Nikah and civil registry and a second wife by way of Nikah only. In such circumstances, there is no polygamy in the eyes of English law but if the relationship with the second wife breaks down, she will have limited financial claims against her husband and may rely on the state for re-housing and welfare benefits. The difficulties this has caused many women lead to the 'Register our Marriage' campaign, which consists of a group of lawyers, academics and parliamentarians who are lobbying for a change to the Marriage Act 1949 so that marriages of all faiths are automatically registered as legally married unless the couple consensually opt out.

A further issue which has received increased academic and practitioner attention is transnational marriage abandonment. This is the practice whereby a British national or resident husband deliberately abandons their foreign national wife abroad. The purpose of abandonment is to prevent wives from asserting matrimonial and/or residence rights in England and Wales.⁵⁷ This enables divorce proceedings, applications for financial relief and residence disputes to take place in England, where the wife is not situated. In turn, this makes it more difficult for her to understand her legal rights, effectively participate in proceedings, and secure adequate support or representation. Transnational marriage abandonment co-exists among forms of domestic abuse

⁵⁵ see for example Resolution's Manifesto for Family Law which called for a legal framework of rights and responsibilities when unmarried couples who live together split up, to provide some legal protection and secure fair outcomes at the time of a couple's separation or on the death of one partner

⁵⁶ https://www.familylaw.co.uk/news_and_comment/the-big-islamic-nikah-myth#.WkgVLSOcauk

⁵⁷ Anitha, S., Roy, A. and Yalamarty, H. (2016) Disposable women: Abuse, violence and abandonment in transnational marriages. Lincoln: University of Lincoln.

which disproportionately affect BAME women, including financial abuse (domestic servitude and dowry abuse), coercive control and physical violence. As a result of campaigns to raise awareness of this issue, transnational marriage abandonment has been recognised as a form of domestic abuse in PD 12J of the Family Procedure Rules 2010.

The examples listed above demonstrate how IFL incorporates much broader issues than simply family law. To be understood fully, transnational marriage abandonment must be viewed within a discourse of access to justice, domestic abuse, human rights and gender inequality. In relation to international law, it fits within a framework of ending violence against women and girls which is evidenced by the UK's obligations under the Convention on the Elimination of all Forms of Discrimination against Women and Girls ('CEDAW') and the Istanbul Convention. Of particular importance here is Art 16.1 of CEDAW which requires state parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and ensure the same rights and responsibility during marriage and its dissolution. In essence, both the study and practice of IFL requires us to recognise that law does not operate in a vacuum and engage with the social and economic context underpinning it.

Conclusion

IFL remains an under taught area of law, confined to the peripheral of family law and private international law modules, if explored at all.⁵⁸ However, as this paper has examined, there is considerable evidence to suggest that it has become a subject in its own right in England and Wales and regulates all areas of family life including marriage and separation, children and domestic violence. The curriculum must recognise this for the benefit of IFL clients, lawyers and the students who will go on to become family law practitioners.

⁵⁸ Reynolds, W (1995) Why Teach International Family Law in Conflicts 28 Vanderbilt Journal of Transnational Law