

Solidarity, autonomy and equality: mixed messages for the family?

Anne Barlow*

Abstract

Whereas solidarity was the backbone of both family life and (patriarchal) family law, autonomy (and equality) are arguably becoming the concepts of reform within modern family law. Yet whilst autonomy is an alluring concept and one which is difficult to argue against from an individual perspective, this article challenges its suitability as a driving principle of family regulation. It is suggested that the players within family life (in all styles of relationship) have not and perhaps cannot be assumed to achieve sufficient substantive equality for autonomy to rule the private family sphere, where structural issues and gendered social norms within wider society expose some family members more than others to relationship-generated disadvantage. Rather, this paper argues that we need to address the mixed messages being sent by recognising the need for interdependence within family life and the obstacles to substantive equality and autonomy in this frame. This is best done by promoting the positive notion of family solidarity as the centre-piece of family law, rather than autonomy, which, it is suggested, would avoid falling prey to the negative association with victimhood that has been experienced by notions of dependency and vulnerability in these debates.

* Professor of Family Law and Policy, University of Exeter. A version of this paper was first presented at the Final Conference of the Leverhulme International Network on New Families; New Governance, University of Notre Dame in London, September 2014.

INTRODUCTION

Adult couple relationships are increasingly characterised as equal partnerships where the partners should be at liberty to jointly exercise their autonomy around decision-making on family issues. We see this developing explicitly and implicitly in England and Wales in a range of areas where family law's protective role would once have expected to govern regulatory principles. Recent examples of this phenomenon include: - recognition of enforceable pre-nuptial agreements;¹ replacement of statutory child support obligations with parent-negotiated child maintenance;² strong regulatory encouragement of family mediation;³ and rejection of calls for family law regulation of cohabitant separation.⁴ This line of liberal thinking based on assumptions of equality and autonomy is replacing (quite understandably on one level) old family law protections which aimed to redress dependency and vulnerability.

However, the suitability of these liberal concepts (at least in their pure form) to family regulation is open to question. Family life is not just about the interests of a collection of autonomous individuals. Intrinsicly it is something more than the sum of its individual parts. It involves a joint enterprise, centred around an ethos of what might be termed 'solidarity'. Family solidarity⁵ has been the cornerstone of the family law of our European neighbours and fundamental to the principles underpinning community of property regimes. It is suggested here that it is a concept which still captures and embodies the collective nature of the enterprise of family life. In social terms, it can perhaps be seen as the invisible glue which holds family life together and is important not only to the functioning of families themselves, but also to wider society which depends on the

¹ According to the principles decided in the Supreme Court decision of *Radmacher v Granatino* [2010] UKSC 42.

² The Child Maintenance and Other Payments Act 2008 began the process of the latest child support reforms, moving to a calculation formula based on gross income and introducing the Child Maintenance Enforcement Commission (CMEC) to oversee the Child Support Agency. The Coalition government reviewed the system again. In the paper by DWP, *Strengthening Families, promoting parental responsibility: the future of child maintenance* Cm 7990 (TSO, 2011), a new approach which indicated that parents were best placed to determine the arrangements which would work best for them (at p 6) was put forward. CMEC was subsequently abolished in the Public Bodies Order (SI 2012/2007), transferring its powers back to the DWP which introduced the Child Maintenance Service by exercise of the powers of the Secretary of State in the 2008 Act. The new system strongly encourages agreement and if parents cannot agree, the parent seeking child maintenance must pay a fee to get a statutory calculation of maintenance and to collect maintenance from a reluctant payer, 4 per cent of the maintenance is deducted from the sum collected, whilst the payer is charged an additional 20 per cent of the sum payable.

³ Introduction of compulsory Mediation Information and Assessment Meetings (MIAMs) by the Children and Families Act 2014 before issuing private law family proceedings, combined with the availability of legal aid only for mediation for resolution of such disputes (Legal Aid Sentencing and Punishment of Offenders Act 2012) other than in a very small range of prescribed cases similarly is requiring the exercise of autonomy, rather than providing easy access to the protective framework of legislation.

⁴ On 6 September 2011, Jonathan Djanogly, then a junior Justice Minister, announced that, having carefully considered the Law Commission's recommendations in its report *Cohabitation: the financial consequences of relationship breakdown* (TSO, 2007, Law Com No 307) Cm 7182, together with the outcomes of research on the Family Law (Scotland) Act 2006, the Government did not intend to reform the law relating to cohabitation in this Parliamentary term.

⁵ According to K Bayertz in *Solidarity (Philosophical Studies in Contemporary Culture)* (Springer, 1999, at p 3), the core meaning of solidarity is the perception of mutual obligations between the members of a community. He explains the concept of solidarity has its roots in the Roman Law of Obligations where 'the unlimited liability of each individual member within a family or other community to pay common debts was characterised as *obligatio in solidum*.' It is associated with the French revolutionary political principle of *fraternité* and through the work of Comte and later Durkheim became a basic sociological term.

care and support which families provide as part of the bond which solidarity creates. In its original guise, the idea of family solidarity suited patriarchal thinking. Such solidarity went hand in hand with the traditional gender contract within married families where protective values of paternalism and duties of sacrifice were dominant. It fitted well with a gendered separation of the roles around breadwinning and caregiving for the benefit of the collective family enterprise which was accepted and embedded within social and legal norms.⁶ Yet the norms surrounding this traditional model of family life have been challenged and the nature of family solidarity has adapted over time to reach out to new forms of family, including same-sex spouses and civil partners who aspired to it. The term 'family solidarity' is therefore used in this article as an evolving concept which encapsulates the joint enterprise, mutual support and obligations which modern family life (in all its different forms) encompasses from a moral and economic perspective and which is often reflected and reinforced in legal regulation. It stands in contrast to individualistic notions of autonomy and recognises the altruism which is often required to fulfil its demands.

Yet some might argue that such a concept is no longer needed in an age of equality. This line of thinking fits well with the developing autonomy discourse within which contract can replace the role of family law. If the traditional notion of solidarity around breadwinning and caregiving is obsolete, then it is arguably unnecessary for family law to regulate families in a particular way. To do so can be seen as protective and paternalistic. The basis for this is that couples (whether married or unmarried, same- or different-sex, intact or separated) are now in the 21st century equal partners and therefore equally autonomous and free to negotiate their respective roles and financial position within their couple relationships and wider family. But this, it is suggested, can only hold true if we have actually become a society of substantively equal individuals within a family life which no longer needs the supporting solidarity of the institution of family.

Drawing on recent data on employment and caregiving practices, this article will argue that we have not yet achieved that state and indeed, should question whether it is one that should be regarded as an ideal. It will suggest that to continue to move towards autonomy and formal equality is to misunderstand something fundamental about the nature of family life and what distinguishes it from the relationships between unconnected individuals in civil society. It takes the view that there remains an important role for family law to play in regulating family life beyond any bilateral contract between partners and that this should involve placing a positive, modernised reconceptualisation of family solidarity as a norm at the heart of family law.

THE ALLURE OF AUTONOMY AND EQUALITY

Autonomy and equality are on the face of it very attractive principles which people endorse and which are very hard to argue against. Why would anyone not want to think that they were autonomous and equal members of society? Yet, given the dominance of different norms and values which in practice operate within the private sphere of the family, it is important to question how universally appropriate these public sphere principles are to the regulation of family life. Here quite different idealised values of love, care, emotional and financial support, altruism and collective enterprise are embedded and are vital to and have an influence on its functioning and decision-making. These can be seen to serve not only the collective family good but also the wider interests

⁶ For a discussion of the shifting cultural context which has framed private family law over the past 25 years, see C Smart, 'Law and family life: insights from 25 years of empirical research' [2014] *CFLQ* 14-29.

of society as a whole which depends on the family in many ways and not least to undertake the business of bringing up the next generation, as well as increasingly to provide support to the older generation. These values are by their nature antithetical to free, autonomous, individual action and decision-making by individual family members acting in their own selfish interests. This is one reason why the state has traditionally regulated marriage as a legal status which confers rights and obligations rather than as a simple bilateral contract. However, the traditional approach to regulating family solidarity is in a process of change which goes hand in hand with the ongoing, if as yet incomplete, renegotiation of the gender contract. If principles of equality and autonomy dominate family law thinking, it can be reasoned that as couple relationships comprise two equal partners, there is no reason why the law should not allow them to exercise their autonomy in decision-making around family issues within intact and post-separation families. But surely this begs the question of what equality and autonomy look like in the family sphere today, where these concepts are not straightforward and, it is suggested, might often be illusory rather than real. Whilst there is usually formal equality between partners, can there be substantive equality between members of a couple (whether intact or separated) if structural factors and gendered social norms do still influence couple behaviours? Similarly, how much individual autonomy is there for a partner in a decision which is made jointly by a couple for the benefit of the family as a whole, but which has long term adverse financial repercussions for just that one partner?

Leaving aside for now the answers to these questions, as noted above, recent developments reveal private family law principles are increasingly taking a pro-autonomy stance with a proportionately diminishing protective role. The clearest example of the shift towards couple autonomy in family law-thinking is the recent endorsement by the majority of the Supreme Court of enforceable pre-nuptial agreements in *Radmacher v Granatino*⁷ which for the first time confirmed that spouses in England and Wales may contract out of statutory financial provision on divorce. The reasoning in favour of this new approach was clearly couched in the language of autonomy and concerns about the reality of family decision-making when entering a pre-nuptial agreement were swept aside. In contrast to the dissenting judgment of Lady Hale, who recognised that ‘choices are often made for the overall happiness of the family’⁸ and pointed out that the reality of the autonomy of people who are about to marry to make considered, rational choices may be open to question,⁹ Lord Wilson wholeheartedly embraced the autonomy discourse in the leading judgment:

‘The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy...It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best.’¹⁰

Yet, this is to assume that each party to a pre-nuptial agreement holds equal power and autonomy over the process and will continue to do so throughout the marriage, thus not needing family law protection, which is often not the case. Even if power is equally held at the point of the marriage, how possible is it to act in accordance with one’s own interests under the agreement (e.g. not to give up work to preserve one’s earning capacity), in the face of competing needs to act in the wider

⁷ [2010] UKSC 42.

⁸⁸ *Ibid* at [188].

⁹ *Ibid* at [135].

¹⁰ *Ibid* at [78].

family interests (e.g. to move abroad with your children to enable you to live together as a family while your spouse pursues their own advantageous career opportunity)?

However, the appeal of the autonomy discourse even in the family law sphere is difficult to deny. As Alison Diduck has pointed out, 'Autonomy is in many ways the friendly face of individual responsibility.'¹¹ The change in rhetoric away from individualism towards autonomy has cleverly removed the association of individualism with the negativity of selfishness and coupled it with the positive discourses of freedom, choice and equality. This positive if superficial shift has also enabled other challenges to the autonomy discourse (mainly found in the feminist literature) to be seen as negative reactions which are then more easily dismissed, as discussed below. The allure of autonomy principles facilitates the neat sidestepping of questions as to why in some situations autonomy and formal equality are not appropriate principles for family regulation, effectively marginalising such issues in mainstream debate. Thus to go back to some of the examples of the move towards championing autonomy in family law set out above, whilst parental agreement around child maintenance on separation is to be encouraged, to remove the parent with care's free access to the statutory mechanism of calculation and enforcement of payment of the appropriate sums, is to misunderstand the substantive inequality in power between the payer and payee. Similarly, to assume the strongly encouraged autonomy for those on legal aid to agree children (and financial) matters only through mediation will result in appropriate agreements in high conflict cases, is to abdicate law's responsibility to safeguard the best interests of the children. Yet the greater allure of principles of autonomy in an era of formal partner equality and economic austerity has now been conveniently used to trump any seen need to provide meaningful access to private family law protection.

RISING ABOVE AUTONOMY AND FORMAL EQUALITY – AN IMPOSSIBLE CHALLENGE?

A number of attempts have been made to challenge the dominant liberal discourses around (male) conceptions of autonomy and formal equality in and beyond the family law sphere within different bodies of feminist literature. Gilligan's moral theory of the 'ethics of care' was put forward as an alternative female platform of thinking with care at its centre and has been used to challenge the male voice within traditional notions of justice.¹² Similarly arguments pointing out the need to appreciate the critical distinction between formal and substantive equality¹³ before a gender-free level playing field is created are well rehearsed and are particularly pertinent to the family law sphere, as discussed below. A distinction has also been drawn between individual and relational autonomy,¹⁴ where only the latter recognises the impossibility of autonomy within family life and builds on the ethics of care discourse to put forward a notion of relational autonomy which recognises the interdependency and vulnerability of both children and adults who will always act in relation to each other. These have been joined by attempts by Fineman to recast her notion of

¹¹ A Diduck, 'Autonomy and Vulnerability in Family Law: the Missing Link' in J Wallbank and J Herring (eds), *Vulnerability, Care and Family Law*, (Routledge, 2014), pp 95-114, at p 96.

¹² See C Gilligan, *In a Different Voice*, (Harvard University Press, 1982).

¹³ For a useful discussion see R Guerrina, *Mothering the Union: Gender Politics in the EU*, (Manchester University Press, 2005) at pp 17-25.

¹⁴ J Herring, 'Relational autonomy and family law' in J Wallbank, S Choudhry and J Herring, *Rights, Gender and Family Law* (Routledge 2010) at pp 257-275. This builds on the 'ethics of care' line of argument, first put forward in C Gilligan, *In a Different Voice*, (Harvard University Press, 1982), to temper pure autonomy as the modern regulatory force within family law.

family dependency¹⁵ within the universality of the broader concept of 'vulnerability' to which we are all subject in many areas of life (e.g. global financial crises; environmental disasters) and which, she argues, the responsive state should acknowledge (and preferably respond to) by replacing the focus in law on the autonomous liberal legal subject with the vulnerable legal subject.¹⁶

Yet whilst all of these feminist arguments are well made and should carry great force, it is suggested that they have inadvertently cast themselves in a negative light and thus are too easily dismissed. As Brown has argued, vulnerability has been 'remoralised' in a way which strips it of its power:

'On first impressions, 'vulnerability' seems linked to a therapeutic and well-meaning approach to helping those 'less well off' in society. A more critical examination of the operationalisation of the concept suggests that although focusing on 'the vulnerable' is helpful for some people some of the time, this policy also has less benevolent effects related to bureaucratic condescension, selective systems of welfare, paternalism and social control.'¹⁷

Later, she insightfully concludes,

'A focus on 'vulnerability' gives tacit emphasis to the individual factors which contribute to difficult circumstances, rather than the structural forces which may have influenced life chances and situations.'¹⁸

Thus, the exposition of 'dependency' and 'vulnerability' as experienced in the family sphere do undoubtedly challenge the male-dominated vision of autonomy and formal equality as the most appropriate regulatory norms. Yet their construction in opposition to the dominant liberal discourse in law can be seen to take on the mantle of 'female victim', at a time when a 'male' version of autonomy has gained credibility as the more appropriate legal principle. The dominance and acceptability of such 'male' thinking is undoubtedly reinforced by a (false) widely held belief in realised gender equality. Together, it is argued here, autonomy and formal equality combine effectively to become the acceptable and attractive face of individualism, which reduces the visibility of a lack of substantive equality and which enables the concept of vulnerability, like dependency before it, to be easily cast as an unfortunate, avoidable state. Vulnerability then immediately takes on negative attributes for which exceptions to normal rules may have to be made and which may, therefore, quite legitimately from this perspective come at a price. As Diduck explains,

'Just as dependence excluded one from the class of the responsible, vulnerability seems in the new rhetoric to preclude one from being classed as autonomous.'¹⁹

This negative imagery of and negative response to dependence and vulnerability in social policy and law can be seen to avoid the need for the state to address the underlying problems both of substantive gender equality within and beyond heterosexual relationships and of the real lack of meaningful autonomy in the family situation. For where there are legal and practical caring

¹⁵ See M Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press, 2004).

¹⁶ M Fineman, 'The Vulnerable Subject' 20 *Yale Journal of Law and Feminism* 1 (2008); 'The Vulnerable Subject and the Responsive State' 60 *Emory Law Journal* 251 (2010).

¹⁷ K Brown, 'Re-moralising vulnerability' 6(1) *People, Place & Policy Online* 41-53 (2012), at p 42.

¹⁸ *Ibid* p 50.

¹⁹ A Diduck, 'Autonomy and Vulnerability in Family Law: the Missing Link' in J Wallbank and J Herring (eds), *Vulnerability, Care and Family Law*, (Routledge, 2014), pp 95-114, at p 98.

responsibilities, they, in reality, make it impossible to be truly autonomous – financially or as a matter of personal liberty. Such an approach also sidesteps the consequences of devolved ‘family responsibility’ (where the state does not provide affordable, high quality childcare or eldercare), and the social norms which feed into the decision-making around who undertakes which roles within family life. Such norms might be termed the obligations of ‘family solidarity’, which require personal sacrifice for the greater good of the family. These social norms and feelings of moral obligation (e.g. the perceived desirability of one parent being available to collect young children from school rather than pursue a full-time career), pull against free choice and the autonomy to act in your own individual interests. Whilst on the one hand, these norms are willingly accepted and indeed embraced by family members who believe it is right to decide to put the collective good before their individual interests, their subtle influence on family decision-making, still risks creating differential and often gendered ‘relationship-generated disadvantage’,²⁰ the effect of which may only be fully realised later, such as at the point of relationship breakdown.

It will therefore be argued here that a positive concept of a modernised family solidarity which recognises the benefits of such solidarity for both the family (men, women, children and other ‘dependents’) and wider society is needed as the new centrepiece of family law. This endorsement of the necessity and collective benefits of interdependence will aim to replace the false friends of autonomy and formal equality as the dominant discourse within family law and avoid the concept being cast negatively in the role of the vulnerable female victim. It will also address the mixed messages around autonomy, equality and expected family practices currently being sent by family law and policy.

SOCIAL AND LEGAL NORMS, EQUALITY AND FAMILY SOLIDARITY – UNPACKING THE MIXED MESSAGES

Probably because as a society we are still in the throes of renegotiating the gender contract around the roles to be played by men and women, mothers and fathers within family life, as things stand, there are definitely mixed messages being sent by family law. Whilst it has embraced the (formal) equality and autonomy discourses for use in private family law, at the same time it also endorses the public mores and social norm notions of family obligations. As we have seen, certain values are embedded within idealised intact family life around love, care and altruism. This holds true in general but has particular resonance around good parenting which still today requires a selfless devotion to the family cause. These social norm notions of family obligation will inevitably clash with the exercise of individual autonomy and will also often be unequally shared along gendered lines. So a new approach which applauds and recognises the benefits and risks of engaging in the joint enterprise of family solidarity should be constructed to embody notions of the equal value of different family roles and recognise the limits these (for good cause) place on the exercise of individual autonomy. Let us first consider the origins of the concept of family solidarity before examining the gendered structural and social norm constraints placed on achieving substantive gender equality within the family sphere.

Origins of family solidarity

²⁰ This concept was identified in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.

The concept of 'solidarity' in family law is most commonly found in the Civil Codes of the jurisdictions of our European neighbours. The French *PaCS* (Pacte Civil de Solidarite or Civil Solidarity Agreement) in which same and different-sex cohabiting couples can make and then register an agreement on how to share their property on separation and which also then attracts a formal legal status and certain marriage-like rights in French law, is perhaps the best known example of its recent use to a British audience.²¹ As indicated above, the idea of solidarity in the family law context encapsulates the mutual support and obligations which family life encompasses from a moral and economic perspective but which is often reflected and reinforced in legal regulation. It can be seen as the often unspoken loose rules of expected behaviours which are embedded as social norms around the joint enterprise of family life. These combine to form an invisible but societally understood glue which holds family life together and which demarcates the expected behaviours of those in a family relationship from those of unconnected individuals. Its legal embodiment can be seen in the traditional community of property regimes (immediate community of acquests on marriage) under which family gains and losses acquired during a marriage are shared equally and through which different gendered contributions of breadwinning and homemaking are ostensibly recognised as being of equal value.²² This approach has been challenged and adapted over time, resulting in the ability to opt into a separate property regime and the rising popularity of deferred community of property, which preserves separate property during marriage, with a community of property arising only on separation in many jurisdictions.²³ Some will argue that it is therefore time to reject such pooling and redistribution of family assets and collective responsibilities as the mainstay of family life and family law on the basis that couples (whether married or unmarried, same- or different-sex, intact or separated) are in the 21st century now equal and therefore autonomous, leaving them free agents to negotiate their roles and asset division within their relationship and wider family. But as set out below, we have yet to become a society of substantively equal individuals which no longer needs the supporting solidarity of the institution of family and this will remain the case whilst caregiving work is largely devolved to the private family with economic consequences for primary carers and homemakers.

Family law does not deny its patriarchal history and should aim to reflect the changing norms surrounding the gender contract and family practices over time. We have certainly made progress since Lord Denning's clear normative assertions around what the gendered roles and legal expectations were in marriage in the 1970s. In *Wachtel v Wachtel*,²⁴ he used these to justify an order awarding a husband two thirds of the assets on divorce, and the wife just one third:

'The husband will have to go out to work all day and must get some woman to look after the house – either a wife, if he remarries, or a housekeeper, if he does not. The wife will not usually have so much expense. She may go out to work herself, but she will not usually employ a

²¹ See French Civil Code, articles 515-1 – 505-7. For background see e.g. R Probert and A Barlow, 'Le Pacs est arrivé: France embraces its new style family', [2000] *International Family Law* 182.

²² See further, A Barlow, 'Property and Couple Relationships: What Does Community of Property Have to Offer English Law?' in A Bottomley and S Wong, *Changing Contours of Domestic Life, Family and the Law* (Hart, 2009).

²³ The Swedish model was the first to move towards deferred community in the 1970s on this basis and is now the common Scandinavian model. See further E Cooke, A Barlow and T Callus, *Community of Property: A Regime for England and Wales* (Policy Press, 2006).

²⁴ [1973] Fam 72 (CA).

housekeeper. She will do most of the housework herself, perhaps with some help. Or she may remarry, in which case her new husband will provide for her.²⁵

This seems to the 21st century audience quite shockingly stereotypical, echoing gender norms from a bygone age. Yet recent research on who does the housework within families makes clear this is still in practice very much women's work. In the nationally representative British Social Attitudes Survey (BSA Survey) in 2006, women still did all or most of the laundry in 77 per cent of households and undertook all or most of the cleaning and meal preparation in around 60 per cent, although shopping and caring for sick family members were more equally shared.²⁶ Men's low levels of participation in such household tasks persist despite women's far greater engagement with the labour market. Indeed, a woman's part-time working (in contrast to full-time working) does not significantly affect how such tasks are shared within the household.²⁷ When these questions were repeated in the 2012 BSA Survey, no significant changes in these domestic behaviours were found. As the editors remark in their introduction,

'[A]ctual behaviour at home has not caught up with changing attitudes. Women still report undertaking a disproportionate amount of housework and caring activities, spending an average of 13 hours on housework and 23 hours caring for family members each week, compared with eight and 10 hours respectively for men.'²⁸

Structural obstacles to equality and autonomy?

Who undertakes these roles is clearly linked to pay, cost of childcare/domestic help and partner employment options. Yet where research by the Family and Childcare Trust shows that *part-time* childcare costs for a family of two children are 4.7 per cent higher than the average UK mortgage bill for the family home²⁹, it is unsurprising that for lower-middle income households at least, it often makes financial sense for one partner to undertake the childcare, if only on a part-time basis. Indeed, the Trust's subsequent 2015 survey reports childcare costs have risen 33 per cent since 2010, much higher than inflation, and that according to OECD figures, childcare costs in the UK (alongside Ireland) are now the highest in Europe, making them so expensive that families are increasingly better off if one partner gives up work to look after their offspring.³⁰ However, longer term, whichever partner reduces their paid work to undertake childcare or other domestic work is likely to reduce their own labour market value over time. This matters little in the intact family, but potentially exposes the weaker economic partner to poverty at the end of the relationship unless family law steps in to mitigate. Following an autonomy discourse, the logical consequence is that as

²⁵ Ibid at p 94.

²⁶ R Crompton and C Lyonette, 'Who does the housework?' in A Park, J Curtice, K Thomson, M Phillips, M. Johnson, and E Cleary (eds), *British Social Attitudes: The 24th Report*, (Sage, 2008) p 53.

²⁷ Ibid pp 56-58. See also C Lyonette. and R Crompton, 'Sharing the load? Partners' relative earnings and the division of domestic labour', *Work, Employment and Society*, (2014), 1 – 18.

²⁸ A Park, C Bryson, E Clery, J Curtice, and M Phillips, (eds.), *British Social Attitudes: the 30th Report*, (NatCen Social Research, 2013), available online at: www.bsa-30.natcen.ac.uk .

²⁹ J Rutter, *Annual Childcare Costs Survey*, (Family and Childcare Trust ,2014), available at [http://www.fct.bigmallet.co.uk/sites/default/files/files/Childcare Costs Survey 2014 FINAL for website.pdf#overlay-context=annual-childcare-costs-surveys](http://www.fct.bigmallet.co.uk/sites/default/files/files/Childcare%20Costs%20Survey%202014%20FINAL%20for%20website.pdf#overlay-context=annual-childcare-costs-surveys) .

³⁰ J Rutter, *Annual Childcare Costs Survey*, (Family and Childcare Trust ,2015), available at [http://www.fct.bigmallet.co.uk/sites/default/files/files/Childcare cost survey 2015 Final.pdf#overlay-context=annual-childcare-costs-surveys](http://www.fct.bigmallet.co.uk/sites/default/files/files/Childcare%20cost%20survey%202015%20Final.pdf#overlay-context=annual-childcare-costs-surveys) .

both partners have freely chosen their roles, each should bear the consequences of that choice. Certainly in the cohabitation context, this is the approach the law of England and Wales takes, although in the absence of a valid pre-nuptial agreement agreeing otherwise, compensation for 'relationship generated disadvantage' and a principle of equal sharing of matrimonial assets is recognised where assets are available on divorce.³¹ But are these free choices that partners make, or is the situation more complex? Let us now consider what influences choices around childcare in the equal partnership model of modern family life and what the implications are for family solidarity.

Ideally in an equal relationship, both partners may wish to share childcare or the costs of childcare equally. Yet two part-time jobs or the cost of full-time childcare for two or more children will most often make family finances unsustainable. In the absence of 'free' childcare by a relative (and 27 per cent of UK families use grandparents as carers³²), a choice then has to be made around who should give up work or work part-time to facilitate the childcare. There are various factors likely to influence this decision, both financial and non-financial. One powerful factor will undoubtedly be which partner is the highest earner, as the family as a whole are likely to want to maximise their income. This is where structural issues beyond the individual family's control come into play but are seen as matters of free choice, in line with the autonomy discourse, rather than constrained choice. The continued existence of the so-called gender pay gap is confirmed annually in surveys. However, the gap can be measured in various ways. If you take the median hourly pay rate, excluding overtime, as used by ONS, the news is good as the gender pay gap is narrowing. In 2014 this reduced to 9.4 per cent compared with 10 per cent in 2013 and confirms an overall downward trend, from 17.4 per cent in 1997.³³ So per hour, women earn around 90p compared to a man's £1. However, this does not tell the whole story. Research drawing on ONS earnings' data for the Halifax's annual examination of the behaviour and experiences of men and women in the labour market shows that in 2012, men in full-time employment were actually paid on average one third more than women in full-time employment, where average male earnings were £36,156 compared to average female earnings of £27,291.³⁴ The same survey confirms that 67 per cent of women are in employment compared to 77 per cent of men, but that 37 per cent of women work part-time compared with just 10 per cent of men. Thus among working age women, we find that their employment behaviour is quite different to that of men's and on closer examination, these different patterns polarise most during the years a family has young children. Unsurprisingly, in 2013 women up to the age of 49 with children had lower employment rates than those without children. Yet for

³¹ Cohabitants have no right to claim maintenance from their partner on relationship breakdown. They may claim financial provision for the benefit of the child under Schedule 1 Children Act 1989 from the other parent, but there is no compensation element for relationship generated disadvantage nor a principle of fairness, in contrast to the divorce context, following the decisions in *White v White* [1999] and *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 where fairness involves acknowledging the equal value of financial and non-financial contributions and is achieved by meeting needs, sharing assets and compensating for relationship generated disadvantage.

³² J Rutter, *Annual Childcare Costs Survey*, (Family and Childcare Trust, 2015), available online at http://www.fct.bigmallet.co.uk/sites/default/files/files/Childcare_cost_survey_2015_Final.pdf#overlay-context=annual-childcare-costs-surveys.

³³ ONS, Annual Survey of Hours and Earnings (ASHE) 2014 Provisional Results, (Office for National Statistics, 2014), available at http://www.ons.gov.uk/ons/dcp171778_385428.pdf.

³⁴ Halifax PLC, *Men v Women: The economic and financial divide 2013* available at - http://www.lloydsbankinggroup.com/globalassets/documents/media/press-releases/halifax/2013/1903_menvwomen.pdf. Note that this measure reveals what men and women do actually earn and would include factors such as overtime payments worked for and received, not included in the hourly earnings rate.

men the opposite was true, as men with children were more likely to work than those without.³⁵ Indeed, in the 25-34 age range, only 63 per cent of women with children work, as compared with 89 per cent of men with children and 86 per cent of women without children in the same age group.

Thus women as a group earn less than men, added to which caring for children would seem to have a direct and gendered link to the employment behaviours of men and women, where women are likely to loosen their ties with the labour market whilst men tend to strengthen theirs, showing that the gender stereotypical roles within families have not disappeared.

Whilst financial calculations are clearly a factor in the choices made, it seems unlikely that this is the sole reason why women rather than men take on the lion's share of the childcare and domestic roles. Let us consider how such lingering gender stereotypical behaviour might relate to prevailing social norms around parenting behaviours. What behaviour by women do we associate with 'being a good mother'? Not, it is suggested, how much they earn or how successful a career they have maintained. This may be regarded as admirable in other ways – succeeding in 'having it all' and perhaps providing a good role-model for daughters in particular – but it probably does not enhance their quality of mothering in the eyes of society. This is still linked to how well children are cared for, where research confirms the ideology of motherhood remains rooted in care-giving.³⁶ Thus parents, but mothers in particular, are judged on whether children get to school on time; how well behaved children are; how well-presented they are; how happy they are; how they are cared for when they are sick and in general. Childcare is still a female dominated activity and remains so in the mind of the public. In the BSA survey 2012 where respondents were asked to pick a range of family work and childcare options, only nine per cent of people chose options that did not involve the mother being ascribed the sole or main carer role.³⁷ Even when both parents work full-time, who would you guess schools typically call first when a child is ill?

In contrast, consider how we judge 'a good father'. Whilst the BSA Survey 2012 confirms that only 13 per cent of the British public supported a gendered separation of roles with the man as a sole breadwinner,³⁸ as a society, perhaps we still see men's primary role as that of breadwinner, with more sharing of the caring now expected as an 'add-on', as icing on the cake? A father's public sphere role is always acknowledged as important to the family and there is little or no pressure to give up work or work part-time when children come along. Yet is this as true for mothers? Even if we do not articulate it overtly, not wanting to undermine arguments around equality, we still, as a society, expect mothers, more often than fathers, to control the private sphere of family life. Mothers, not fathers, in most cases are still principally charged by society with family organisation, with pulling the strings which make everyone's lives move smoothly, bearing what the French call the *charge mentale* (mental load) of this work even when they are in full-time paid work. Given this, perhaps women themselves still think they ought to be doing this to be a good mother, whereas men still see their primary role as breadwinners. Research would seem to support this influence of

³⁵ ONS, *Full report - Women in the labour market* (ONS, 2013) available at http://www.ons.gov.uk/ons/dcp171776_328352.pdf pp 8-9.

³⁶ T Arendell, 'Conceiving and investigating motherhood: the decade's scholarship', 62(4) *Journal of Marriage and the Family* 1192, (2000).

³⁷ A Park, C Bryson, E Clery, J Curtice, and M Phillips, (eds.), *British Social Attitudes: the 30th Report*, (NatCen Social Research, 2013), available at <http://www.bsa.natcen.ac.uk/latest-report/british-social-attitudes-30/gender-roles/attitudes-to-gender-roles-change-over-time.aspx>.

³⁸ Ibid.

gendered social norms in employment decision-making. Forty per cent of respondents to the BSA 2012, selected the part-time working mother plus full-time working father as their preferred model for family life, with less than one per cent supporting role reversal and only four per cent supporting both parents working full-time. This is a strong reflection of how the operation of social norms in wider society may affect decision-making by families. Duncan and Edwards³⁹ study of lone parent employment choices has described this influence on decision-making as ‘gendered moral rationalities’, whereby choices are shaped according to what social norms dictate as ‘good mothering’ rather than purely financial considerations, and these may vary between different socio-economic classes and ethnic communities. Even though partners do now both perform some of each of the breadwinning and caregiving roles, in general they are still not evenly distributed. In the Netherlands, where the employment patterns as in the UK show fathers working full-time with women predominantly working part-time following childbirth, research has looked at how the Dutch ideology of motherhood has changed. Whereas intensive mothering, in which mothers (rather than fathers) should spend large amounts of time, physical and emotional energy and money (earned by fathers) raising children was the dominant view,⁴⁰ this has now shifted towards a less traditional motherhood ideology, in which women are expected to work part-time, yet they are also expected to mother intensively when at home.⁴¹ This therefore shows that there is a gendered differential effect linked to social norms around these choices. As the 2012 BSA Survey editors state,

‘It seems that while attitudes that there should be a clear gender divide - with male breadwinners and female home-keepers - have been almost eradicated (believed by only one in eight people in 2012), when children are involved, substantial minorities of the public still believe that women would prefer to, and indeed should, stay at home rather than take on paid work.’⁴²

TIME FOR A NEW RHETORIC?

This is the landscape in which the renegotiation of the gender contract is ongoing and negotiations are nowhere near finished. If the provision of high quality affordable childcare and eldercare were the preserve of the State rather than the family as they are in Scandinavia, then the move towards substantive equality and individual autonomy within the family sphere might be our direction of travel. We have seen some recent reforms such as the introduction on the 5th April 2015 of the ability to share parental leave more equally.⁴³ The General Election in 2015 did also see far greater engagement by political parties around the issue of childcare, yet demand outstrips supply in the UK. It is also very expensive, although the Childcare Bill announced in the Queen’s speech promises 30

³⁹ S Duncan and R Edwards, *Lone Mothers, Paid Work and Gendered Moral Rationalities*, (Palgrave Macmillan, 1999).

⁴⁰ G Beets, A Liefbroer and J De Jong Gierveld, ‘Combining employment and parenthood: a longitudinal study of intentions of Dutch young adults’, 16(5) *Population Research and Policy Review* 457–74, (1997).

⁴¹ Sociaal en Cultureel Planbureau (The Netherlands Institute for Social Research), *Emancipation Monitor*, (SCP, 2008).

⁴² A Park, C., Bryson, E, Clery, J., Curtice, and M Phillips, (eds.), *British Social Attitudes: the 30th Report*, (NatCen Social Research, 2013), available at <http://www.bsa.natcen.ac.uk/latest-report/british-social-attitudes-30/gender-roles/attitudes-to-gender-roles-change-over-time.aspx> .

⁴³ The Shared Parental Leave Regulations 2014 No. 3050.

hours free childcare per week for 3 and 4 year olds.⁴⁴ Furthermore, as we have seen, the British Social Attitudes Survey 2012 shows that people still believe that the part-time working mother with a full-time working father should be the parenting model of choice for families with children. Thus if there is to be little inroad into the structural and social norm factors which affect the employment and caregiving choices of partners and with no large-scale infrastructure investment into nursery and afterschool provision on the horizon, unless family law steps in to value and respect the style of family solidarity which families choose, the gender inequalities on relationship breakdown will prevail and become more entrenched behind the veneer of the growing autonomy discourse. It is true that in the married context, this is exactly what family law already does. As Lord Nicholls recognised in expounding what fairness should mean where gendered roles have been adopted, 'If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer.'⁴⁵

Indeed, this non-discrimination principle between breadwinner and homemaker has also been confirmed as extending to same-sex civil partnerships in *Lawrence v Gallagher*⁴⁶ (and presumably now to same-sex marriage), despite the lack of gender disparities in that context. This recognises that family solidarity extends beyond the heterosexual context to newer family forms and is not necessarily gendered, where different roles are adopted for the benefit of the family. However, the fact that the assumption of these roles and consequent differential impact on the partner's financial position on relationship breakdown is not yet recognised as extending to cohabiting couples in England and Wales is something which needs to be addressed, although within the UK some account is at least taken of economic disadvantage incurred in such relationships in Scots Law.⁴⁷ Pre-nuptial agreements can also mean that the economic disparity generated by a marriage can be ignored, and the couple's autonomy to enter such an agreement will trump the non-discrimination approach to fairness at the point of divorce, where the agreement itself is adjudged to have been fairly entered into at the outset of the marriage and is not proved to be unfair at the time of divorce.⁴⁸

Rather, a reframing of the concept of family solidarity is needed, which moves away from paternalism and sacrifice but positively values interdependence rather than individual autonomy and explicitly recognises as equal the different contributions and sacrifices which the joint enterprise of family life, in all its 21st century guises, entails. This recognition of solidarity would act to bridge the gulf, where appropriate, between the differential and often gendered consequences of the enterprise of family life experienced by partners, particularly where relationships break down. The rationale for this is therefore a positive recognition of contribution to family life and the needs of wider society rather than 'charitable' compensation for an unfortunate, economically vulnerable victim.

⁴⁴ See The Queen's Speech 2015, presented to Parliament on 27th May 2015, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/430149/QS_lobby_pack_FINAL_NEW_2.pdf.

⁴⁵ *White v White* [2001] AC 596 at 605.

⁴⁶ [2012] EWCA Civ 394.

⁴⁷ Family Law (Scotland) Act 2006. See the call for similar legislation in England and Wales by the Supreme Court in *Gow v Grant*[2012] UKSC 29.

⁴⁸ *Radmacher v Granatino*[2011] UKSC 42.

CONCLUSION

It is suggested that in any event it cannot be appropriate for family law to assume an equality and autonomy discourse, which permits it to disregard the positive work around caring for children and the elderly, which families do and are expected to do for each other and for society. Whilst we should not ignore the structural inequalities and continue to press for change, we should at this moment in time promote the importance of solidarity in all styles of family relationship and acknowledge the sacrifices in and around the family business of caring to enhance its normative value in social and legal terms. We need to rebut the mixed messages which deny the cost to one's autonomy of being a good parent and instead trumpet its underlying importance and value to society.

We should, of course, continue to look hard at what role we want family law to perform in regulating family life around caregiving in both pre- and post-separation families and in providing for a plurality of responses to non-traditional family forms. This is not a fixed state of affairs but one which needs to respond to social change and changing social norms, but only when change becomes a reality rather than an ideal. We cannot ignore the fact that social expectations around caregiving and breadwinning roles are often still gendered in the British context, even where both parents work. Change will happen over time but, there should be clear and positive legal recognition that the caregiving roles commonly undertaken within families are as equally valuable as 'breadwinning', yet have economic consequences for the primary caregiver. This is, of course, currently reflected in the non-discrimination principle developed in the divorce context through Lord Nicholls' analysis in *White*. This does, to its credit, embody a substantive equality discourse centred on entitlement and fairness. However, it is argued, this must not only be retained in the divorce context in private family law, but also expanded to apply on cohabitation breakdown where there is economic relationship-generated disadvantage.

By adopting a positive approach to the value of family solidarity – both breadwinning and caregiving – we can hope to get away from the negativity which surrounds the discourses of vulnerability, dependence and even relationship-generated disadvantage, all based on the female-centred ethics of care discourse. Solidarity, as a concept, has the virtue of going beyond ethics of care to embrace the joint enterprise of family life in all its different forms. It will be found within relationships of same and different-sex couples whether married or unmarried, with or without (step-)children and within the post-separation family too. It can and should therefore be used to positively recast the value of the family business of caring and mutual support both within and outside marriage.

There is a real risk that without more nuanced thinking, the autonomy and formal equality rhetorics will reinforce each other and lead family law to ignore the value of care, support and personal commitment undertaken within the family to the collective benefit of both family and wider society. Such developments should be resisted, not by replacing the liberal legal subject with a vulnerable legal subject as suggested by Fineman, but by placing at the heart of family law a modernised concept of family solidarity which recognises the positive face of interdependency in the 21st century and which embraces the new discourse of joint enterprise through which the family business of caring and of love and support are not outshone by the glossy, superficial allure of formal equality and autonomy.