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Disciplinary Brief

# JUSTICE, RIGHTS AND FAMILY RELATIONSHIPS

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Nicholas Wolterstorff's fascinating and helpful essay on justice and rights is thought-provoking in many respects. As a lawyer, I hardly need reminding, of course, of the centrality of justice in all that I do. Without what Wolterstorff calls second order justice, (that is, the laws, sanctions and systems that secure first-order justice), not only would I have no professional work to do, but I would also have no students to teach.

This brief response offers some thoughts about Wolterstorff's analysis in the context of my own work in family law.

## The intoxication with rights

Wolsterstorff's essay is greatly concerned with rights. That is unsurprising for two reasons. First, much of law is indeed about vindicating rights, and so the terms 'rights' and 'justice' necessarily go hand in hand. Secondly, rights talk is ubiquitous in many international and national settings, notably in the U.S. which is, with respect, particularly intoxicated with 'rights', for better or for worse. That is, rights are a hugely important part of American political discourse. A great many social arguments are fought out on the battlefield of the courtroom by reference to claims of constitutional rights.

This is a culturally specific phenomenon, and we must guard against either an assumption of its universality or a belief that a rights-oriented society is a manifestation of a lived-out Christianity. The centrality of rights-talk in western societies may be contrasted with the tradition of eastern cultures such as China. Traditionally, the Chinese recognised the enacted or "positive" law, called "fa", which meant the rules prescribed by an earthly ruler. However, in traditional Confucian thought, there was generally a suspicion of *fa*. It was seen to be much better for the preservation of harmony and order in the universe that social relations should be governed by "li", the ethics, taboos, ceremonies and customs of the community. The distrust of *fa* is demonstrated in the introduction to the oldest datable code of law in China, the *Tso Chuan* (535 BC) in which it was said:

> The ancient kings, who weighed matters very carefully before establishing ordinances, did not [write down] their systems of punishments, fearing to awaken a litigious spirit among the people. But since all crimes cannot be prevented, they set up the barrier of righteousness, bound the people by administrative ordinances, treated them according to just usage, guarded them with good faith, and surrounded them with benevolence . . . But when the people know that there are laws regulating

> punishments, they have no respectful fear of authority. A litigious spirit awakes, invoking the letter of the law, and trusting that evil actions will not fall under its provisions. [ 1 ]

A similar pattern may be seen in Japan, where honour and good faith have traditionally been seen as important factors in maintaining relations. [ 2 ] In the latter half of the 19th century, Japan adopted a legal system which was modelled substantially on the legal codes of continental Europe. This "western" idea of law was, however, grafted onto traditional Japanese methods of social ordering. For a variety of reasons, including cultural inhibitions, the limited number of lawyers, [ 3 ] and the high costs associated with judicial procedures, there has in the past been a limited use of courts to adjudicate disputes. [ 4 ] As Abe and Nottage write, "most disputes are settled either by negotiation between parties or through mediation services provided by courts or other ADR procedures, before developing into lawsuits". [ 5 ]

I was struck by the ongoing relevance of this only recently in a discussion with senior staff of the Ministry of Justice in Singapore. Singapore has for a long time restricted the intake of students to its law schools. Many Singaporeans go overseas to study, but only a limited number of law schools in other countries are recognised as providing a training that will allow Singaporean students to become legally qualified in their own country. The senior manager of the Justice Department explained to me that the Singaporean government did not want to have many lawyers because it did not want the country to become an overly litigious society. She referenced Chinese cultural values in support of this.

Of course, a society that does not have a robust legal system through which the panoply of human rights, property rights and contractual rights are protected by an independent judiciary, is gravely deficient. However, reflection on the values of other successful cultures is an important corrective to any assumption that a rights-based order of the kind that exists in some of the more litigious Western societies gives effect to Christian beliefs.

## Family law and the maintenance of relationships

Not every area of law involves consideration of rights. Certainly, rights talk is not very helpful in the family law context. Yes, the right to bodily integrity, the right to dignity and a variety of other rights could be invoked to explain why it is that we must tackle the scourge of domestic violence. However, a duty based upon *agape* might be equally or more compelling as an explanation for why men should not beat their loved ones, whether out of rage or alcohol or drug-fuelled disinhibition.

When it comes to parenting arrangements after separation, which is where most disputation occurs, rights are unhelpful. What is needed, for the most part, is cooperation and compromise when there may be no particularly good solutions. Counselling and mediation are frontline forms of assistance to help parents reach child-focused parenting arrangements. Laws have little of real value to add to the resolution of such conflicts unless a court decision is necessary.

The limitation of a rights analysis may be illustrated by the problem of relocation disputes. These are cases where the primary caregiver, almost invariably the mother, wants to relocate a long distance from the father and take the children with her. Often there are good reasons for this, such as wanting to go 'home' to where there is parental or other family support, or furthering a new relationship.

Family breakdown brings two legitimate claims into conflict. The first is the claim to autonomy. As one senior Australian

judge commented: [ 6 ]

> "One of the objects of modern family law statutes… is to enable parties to a broken relationship to start a new life for themselves, to control their own future destinies and, where desired, to form new relationships, free from unnecessary interference from a former spouse or partner or from a court."

On the other hand, parents have obligations towards their children, and this will ordinarily involve an obligation on each parent to support and protect the children's relationship with the other. Marriage may be freely dissoluble in an era of no-fault divorce; but parenthood is not. [ 7 ]

The tension between the right to post-separation autonomy and the benefit to children of maintaining a close relationship with both their parents is particularly acute in relocation cases. If the father cannot move to where the mother wants to live, then very difficult decisions need to be made about where the best interests of children lie in the circumstances, given the conflicting, but legitimate desires and aspirations of each parent.

The analysis is not particularly helped by rights-talk, for if mothers or fathers assert their rights – and they do – what they mean, not infrequently, is that their interests should take precedence over the interests of the other parent or the children.

Nor is it really helpful to ask what is 'just'. I have a view on the justice issue in the abstract. To quote two other senior Australia judges: [ 8 ]

> The reality is that maternity and paternity always have an impact upon the wishes and mobility of parents: obligations both legal and moral, the latter sometimes lasting a lifetime, restrictive of personal choice and movement have been incurred.

My starting point, in thinking about what is just, is that our obligations to our children trump our rights. We have obligations to the children *and* to our former partner, that put considerable restraints upon our autonomy. This is so whether we have entered into the covenant of marriage, or have made an implied commitment to the sexual partner and any future child by engaging in sexual intercourse that may result in a child's birth. This does not mean that ordinarily mothers should be restrained from taking the children away from the location where the father happens to live. Parenting after separation does not rest upon the rule in musical chairs that you need to remain wherever you happen to be when the music stops. It must always be asked whether fathers can move to where the mothers want to live, even if this is difficult. Sometimes though, it really may be impossible. The divorced or unmarried partner may have no legal right to live and work in the other parent's country of origin.

Even if I have a prima facie view that the responsibility to protect the children's relationship with the other parents should ordinarily take precedence over personal fulfillment, I have to acknowledge that the issues are not often resolved by appeals to a preconceived idea of what is just.

My colleagues and I followed 80 parents in 70 families who had relocation disputes over some five years. [ 9 ] The circumstances of these parents were enormously varied. A few of the mothers had been subjected to serious violence. Some fathers had, from the mothers' accounts at least, a very limited sense of responsibility towards their children. Memorably, one mother described her former partner as a 'hands-on parent'. He always handed on the care of his young

children to a woman in his life – his mother, or his latest girlfriend. [ 10 ] Yet he strongly opposed the relocation of the children's mother to a place where she had more family support. In other cases, the fathers were evidently extraordinarily dedicated to the wellbeing of their children. Of course, the accounts of each of our interviewees was coloured by their own perspective. In only ten cases did we hear both parents' stories.

What was clear from the research was that where children did have a close relationship with the non-resident parent, a move a long distance from that parent was detrimental to the children's wellbeing. Video-technology and the ease of plane travel diminished children's sense of loss but did not eradicate it. [ 11 ]

## The relationship between the first and second order of justice

This brings me to my final observation on Wolsterstorff's very helpful analysis. Second order justice is not always about rights. In the family law context, second order justice provides a decision-maker when parents cannot agree. The family law judge must make decisions about what is in the best interests of children with little reference to rights. That it is a legal process at all may seem puzzling to the outside observer; but sometimes there are factual issues of great significance to determine, such as the extent of domestic violence or allegations of child sexual abuse. A good family law system needs to depend heavily on appropriately qualified medical or psychology-trained experts who can offer opinions on what is likely to be in the best interests of children.

Family law judges don't really seek to administer justice in parenting cases. We ask of them not that their decisions be just but that they be wise. The second order justice is what litigants have a 'right' to – a right to present their case to an independent decision-maker who will deliver Solomonic justice (but often without the benefit of Solomon's wisdom). Family law thus complicates Wolferstorff's distinction between first and second order justice.

## Justice, relationships and peace-making

So as a Christian, what aspect of the faith is most important to me in working in this difficult area of family law? It is not Isaiah 61, pertinent as this is in so many other societal contexts. My role is to ask myself how we can resolve these difficult family law disputes in ways that are most protective of children and which reduce, as far as possible, the levels of conflict between parents.

In this respect, I believe the innovation to the Australian family law system in which I have been involved that will, in the long-term, prove to have been most valuable, was the development of Family Relationship Centres across the country. These centres, fully funded by government, provide an early intervention strategy in the aftermath of relationship breakdown and an alternative to resolving parenting issues after separation through lawyers and courts. [ 12 ] They aim to help parents in a holistic way to navigate the transition from parenting together to parenting apart. The staff, at intake, refer parents to the range of different services that they might need in the aftermath of separation and offer free, or almost free mediation.

Yes, as lawyers we must pursue justice and where appropriate, seek to vindicate rights; but we should beware lest our thinking about justice be dominated by a rights paradigm. Blessed, said Jesus, are the peacemakers. In his teaching in the

Sermon on the Mount he urged us at times not to pursue our rights. “If anyone wants to sue you and take your shirt, hand over your coat as well. If anyone forces you to go one mile, go with them two miles” (Matthew 5:40-41). Relationships may matter more than rights in certain situations. Loving our enemies may be better than suing them. It is not that a focus on rights, particularly the rights of others, is misplaced – not at all – but in Jesus’ teaching, justice is contextualised within a broader ethical and relational framework.

## End Notes

[ 1 ] Quoted in Needham J and Ronan C, *The Shorter Science and Civilization in China* (Cambridge UP, Cambridge, 1970), Ch 16.

[ 2 ] See Haley J O, T*he Spirit of Japanese Law* (University of Georgia Press, Athens and London, 1998), pp 162–167.

[ 3 ] Kawashima T, "Dispute Resolution in Contemporary Japan" in Taylor von Mehren A (ed), *Law in Japan: The Legal Order in a Changing Society* (Harvard UP, Cambridge, 1963), p 41.

[ 4 ] See, eg, Ramseyer M J and Nakazato M, *Japanese Law: An Economic Approach* (University of Chicago Press, Chicago and London, 1999), pp 91ff; Davis J W S, *Dispute Resolution in Japan* (Kluwer Law International, Den Haag, 1996), pp 124ff.

[ 5 ] Abe M and Nottage L, "Japanese Law: An Overview" [2008] JPLRes 1: available at http://www.asianlii.org/jp/other/JPLRes/2008/1.html).

[ 6 ] *AMS v AIF* (1999) 199 CLR 160 at 208, Kirby J.

[ 7 ] Parkinson, P, *Family Law and the Indissolubility of Parenthood*, (New York: Cambridge UP (2011). Once, family law was built upon the indissolubility of marriage. Now, marriage is freely dissoluble, but western societies have had to come to terms with the fact that parenthood is not so readily dissolved. Parents remain connected to their former partners through their children. Divorce, therefore, is not the end of the family, but a restructuring of the continuing family in two different households.

[ 8 ] *U v U* (2002) 211 CLR 238 at 262, Gummow and Callinan JJ.

[ 9 ] A summary of our findings can be found in Parkinson P & Cashmore**, J,** 'Reforming Relocation Law – An Evidence-based Approach' (2015) 53 *Family Court Review* 23-39. We recommend that courts, dealing with a relocation case, examine carefully how important to the child the relationship with the non-resident parent (usually the father) is; whether he can move, and if not, what is the least detrimental alternative for the children in the circumstances.

[ 10 ] Parkinson P & Cashmore**, J**, 'When Mothers Stay: Adjusting To Loss After Relocation Disputes' (2013) 47 *Family Law Quarterly* 65-96. This was a small study of 15 mothers who were not allowed by the court to move or gave up their legal battle to do so. For most, life improved over time, and they were able to adjust to their circumstances particularly if they could see the benefit to the children of having stayed in reasonable proximity to their father. However, for a minority, it proved very difficult, even years later.

[ 11 ] Cashmore, J & Parkinson, P, "Children's 'Wishes and Feelings' in Relocation Disputes" (2016) 28 *Child and Family Law Quarterly* 151-173. For children who moved there was a difference between their locational adjustment and their relational adjustment. They coped much better with moving home and school than with relational loss. Children coped much better with plane travel than with long car or bus journeys.

[ 12 ] Parkinson P, 'The Idea of Family Relationship Centres' (2013) 51 *Family Court Review* 195–213. I was privileged to be able to put the idea of these centres privately to the Prime Minister, John Howard. He, and the government, accepted the proposal, and these centres became the centrepiece of major reforms to the family law system which were announced in 2004. There are 60 such centres across Australia. They reduced the number of cases involving children going to court by about 32% in five years.

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