IN-LAWS AND OUTLAWS

Kinship and Marriage in England

Sybil Wolfram

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— and —
OUTLAWS

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L'Homme 1, 1961 published my first researches into the controversy over marriage with a deceased wife's sister, *The Listener* 1966 an early draft of work on the decline of English mourning, the *Criminal Law Review* 1983 some of my researches on the 1908 Punishment of Incest Act, and the *Oxford Journal of Legal Studies* 1985 a more extended version of my findings on the history of English divorce 1700–1857 than is given here in Chapter 5. A more elaborate study of surrogacy (Chapter 11) was presented to the Society for Applied Anthropology at its annual meeting at Reno, USA 1986 (in press). I am grateful to the Board of Literae Humaniores of Oxford University for a grant assisting me to attend this meeting, as well as for a grant in 1983 for research assistance in perusing *The Times* on nineteenth-century divorces.

Sybil Wolfram
Oxford, 1986

To Louis Dumont

Introduction

I have two principal objects in this book. The first is to increase understanding of the style of kinship found in the Western world, by presenting one example, England in the nineteenth and twentieth centuries.[1] In reading or talking about features of English (and Western) kinship, one meets explanations, often common to the society and long-lived, which do not fit the facts. A second aim is to examine this theorising, a phenomenon of some interest, and where possible to dispose of false theories in favour of more promising methods.

Background

Kinship has been a major branch of social anthropology since McLennan's *Primitive Marriage* (1865). Theoretical discussion has led to much expertise, theoretical apparatus, and sophistication. Fieldwork monographs supply a vast body of empirical knowledge about the way in which kinship is organised and thought about in other societies. Such works as Malinowski's famous study of the Trobriand islanders *The Sexual Life of Savages* (1929) made a wide Western public acquainted with a society whose kinship customs and beliefs differed greatly from their own, a society in which, for example, the suggestion that a man plays a part in the procreation of his wife's children is greeted with incredulity and counter-argument. Lévi-Strauss's *Les Structures élémentaires de la Parenté* (1949), translated into English in 1969 as *The Elementary Structures of Kinship*, displayed, perhaps more clearly than ever before, the immense variety of kinship systems existing in different parts of the world.

Western social anthropologists have not studied the kinship of their own society or societies with the same intensity that they have accorded to others. For this the emphasis on fieldwork may be partly responsible. To acquire its language and live in a society as much as possible like a native is the method *par excellence*, often the only one, of finding out about a society which is not the ethnographer's. But it is not necessarily so rewarding when the

society under investigation is his own, and clearly incomplete if it is highly literate.

There has been another source of malaise among anthropologists. This is the belief that kinship is not, or is no longer, an important aspect of life in Western societies and does not throw up material of similar interest nor yield to the kind of systematisation which has proved successful in the study of the kinship of other societies. This impression seemed confirmed by the problems of fitting the Western 'cognatic' system into existing theoretical frameworks, expatiated on, for example, in Fox's classic textbook *Kinship and Marriage. An Anthropological Perspective* (1967) and by the 'modest results' attained by anthropologists like Maranda who in his book *French Kinship: Structure and History* (1974) could find almost nothing of interest to say.[2]

In the last few years the situation has begun to change. Historians have turned their attention to the history of the family and of sex and marriage in England, and several substantial works have appeared, notably Stone's *The Family, Sex and Marriage in England 1500– 1800* (1977).[3] Another work, this time of anthropological origin, Goody's *The Development of the Family and Marriage in Europe* (1983), attempted a more global treatment, ranging over much of early Europe.

Field

In this study I concentrate on England in the present and recent past. The Christian, or ex-Christian, world shares an ancient and distinctive kinship system, sufficiently unusual in the world at large to baffle social anthropologists, whose work has lain elsewhere. But within a broadly uniform pattern, it has many local and temporal variants.

England, for instance, unlike Russia, recognises no relationship between the kin of two spouses. Mourning at the death of relatives, still found in France, has long vanished from English life. The United States is more favourably inclined to commercial 'surrogate' motherhood than England.[4] England differs in detail even from Scotland, with which it was united in 1707. For example, in Scotland divorce was permitted for adultery or desertion by either spouse from 1560 onwards. It was nearly four

centuries (1937) before this was so in England. In Scotland incest has been a crime since 1567. It became so in England only in 1908, and then between a far narrower range of relatives than in Scotland. Initially separate studies are clearly indicated.

Several aspects of English kinship have changed during the nineteenth and twentieth centuries. The rate of divorce has increased 1,000-fold since 1858. Prohibitions on sexual unions between relatives by marriage have been progressively whittled away, and some of the remnants are currently under discussion. 'Incest' has narrowed in scope. Formalised mourning, a conspicuous feature of mid-nineteenth-century England, began to decline at the end of the century and is now scarcely in living memory. The nature of the marriage tie, apart from greater ease in dissolving it, has altered. So has the standing of extra-marital unions, and the position of wives. The part played by the Church and religious belief has greatly diminished.

Some changes occurred almost imperceptibly. Others, such as the transformation of divorce into a judicial procedure in 1857, alterations in the property relations of husband and wife in the 1870s and 1880s, or that 'eternal blister', legalising marriage with a deceased wife's sister, provoked controversy, in the last case for more than 60 years.

Over the centuries English lawyers and theologians[5] have given systematic accounts of many aspects of kinship. Parliamentary debates on legislative changes are recorded verbatim in *Hansard*. Often these are preceded by official fact-finding Commissions, and accompanied by vociferous unofficial argument in books, pamphlets, journals, newspapers. Before 1857, when divorces were effected by private Act of Parliament, proceedings and Acts of every divorce are preserved. Court and public mourning was regulated by orders published in the *London Gazette*. Documentation is extensive, so extensive that in this study I can make no pretensions to completeness.

Many facets of English kinship are governed by custom rather than law, and here I have employed, among other sources, fiction of the day. The novel, particularly in the nineteenth century, supplies a wealth of information about social beliefs and conventions. It helps us to trace changes in, for example, the custom of mourning or the attitude to extra-marital sexual unions, or to reconstruct past conventions. It is also one of the sources that assist us in seeing that, amid all the change, many aspects of

English kinship have undergone no alteration, or so little as to appear negligible by the side of other societies. The vocabulary, known among social anthropologists as 'kinship terminology', is virtually identical. Servants have vanished, but the proper composition of the household is otherwise little changed. The ideals of marriage remain in many respects the same. So do the principal concepts by which English kinship is organised.

Organisation

The pattern of the ethnographic part of this book (Part 1), where I present facts about English kinship, is largely modelled on the anthropological field-work monograph, to a lesser extent on legal writing about what is now known as 'Family Law'.[6] Separate chapters or sections are devoted to aspects of kinship conventionally studied in the field, such as prohibitions of sexual unions between relatives, mourning for the dead, kinship terminology, preferences in the choice of a spouse, the nature of the marriage tie and (less usual in anthropological studies) divorce. In the final chapter I turn to a recently born subject: the effects on kinship of new techniques affecting the production of babies. Emphasis throughout is on the relationship between the aspects of kinship described, which I claim fit together in a systematic fashion.

Development over time is more extensively included than would be usual in either anthropological or legal works but the whole is not presented in the manner most common in historical works. Apart from the fact that I concentrate on areas which have interested social anthropologists (as well as indigenous lawyers or novelists), I do not divide the time into periods and I follow a chronology only where it is relevant for my purposes.[7] There is less description of the personnel involved in particular activities or disputes than is favoured by many historians. On the other hand I attend more to laws, customs, beliefs known to every native, and taken for granted in England. I avoid technical anthropological vocabulary (except for the occasional use of such rudimentary terms as 'unilinear', 'patrilineal', 'matrilineal' and 'cognatic'),[8] but I aim to supply material comparable to that available on the kinship systems of other societies.

English life has of course changed in many ways since the early nineteenth century: in transport, modes of communication,

production of goods, distribution of wealth, the structure of social classes. Or one might cite, during the period, the introduction of universal education, the rise of science and technology, the growth of the media, the decline of the Church, the loss of an empire. The list is almost endless. That there have been such changes in England is common knowledge to most English people, and those of related societies, even if dates and details are by now often shrouded in obscurity. Most have been extensively written about. Information on such points is included in the text only where it is necessary, for example to understanding an argument or evaluating an explanation. Sometimes it is relegated to notes.

Justification

Members of a society will commonly try to justify their customs if they are called in question or alternatively attempt to supply good reasons for making some change. The justifications considered appropriate clearly differ from society to society, over periods of time, sometimes from one setting to another. For example, to claim that something accorded with the Scriptures, or God's Word, used to be an accepted way of justifying it in England. In the course of the nineteenth century it was gradually replaced by citing the findings of experts, notably scientists.[9] Certain specific arguments make good platforms. In Parliament, that something is not really a change, that it brings England into line with Scotland or opens to the poor what is open to the rich assists the passage of a new law. Conversely, the claim that it is a change, will necessitate some other change, etc., is an argument against a measure. Some popular justifications, for example, the English belief that the laws against incest are designed to prevent idiot children, may persist, sometimes even conjoined with inconsistent beliefs. The style and content of justification in a society are of evident sociological interest.

In the course of this book, I cast doubt on the validity of some English justifications as explanations of English laws and customs or changes in them. In Part 2 I turn to the problems of explaining features of English kinship in more detail.

Explanation

Some aspects of English kinship have received little theoretical attention. In other cases explanations have been attempted. Sometimes, as with 'incest prohibitions', explanations have been extensively debated. But the theories which have been put forward rarely appear well founded. When examined they commonly turn out to be seriously defective. Counter-evidence does not generally dislodge them: it is resisted, evaded or ignored. The scientific attitudes supposed to operate in the society do not appear to function well in this area.

If, as I try to show by example, extant explanations of, let us say, why incest is forbidden in England, why mourning has vanished or the divorce rate risen, are not correct, the obvious next step is to look for better explanations. It proves very difficult to find them. The enterprise is much more complex than is often appreciated, and generally fails, especially if customs are taken in isolation from each other and we limit ourselves to the usual types of explanation.

It is noticeable that in England a law or custom which appears desirable (like the prohibition of incest) is generally assigned a useful purpose. Less attractive or apparently undesirable developments like the increase in extra-marital unions or the growth of divorce will more often be attributed to a cause, such as improved contraception or the emancipation of women. The common failure of causal and purposive explanations makes it necessary to consider whether a different type of explanation may not be more apposite.

Rationality

In Western society, a considerable premium is placed on rationality both of action and belief. At one time primitive societies, and their customs and beliefs, were regarded as irrational, with a 'pre-logical mentality'. Later, arguments were adduced either to separate off areas in which irrationality might be expected to occur or to prove the universality of rational action and belief. Thus Malinowski suggested that rationality does not prevail, whether in savage or civilised societies, in what he called 'the realm of belief': 'beliefs quite contradictory to each other . . .

may co-exist' he wrote.[10] Quine and other philosophers have held that inconsistent beliefs are impossible and any appearances to the contrary misleading.[11]

It is a theme of this book that there are customs and beliefs which are neither strictly speaking rational nor properly called 'irrational'. Among them are many of our beliefs about kinship, and, as I shall claim, consequent assertions, actions, customs, and laws.

Notes

1. 'England' refers to England and Wales throughout. It does not include Scotland or Ireland.

2. Maranda complained of his 'modest results', p. 11. He used almost no primary sources. See S. Wolfram Review of P. Maranda *French Kinship: Structure and History* (The Hague and Paris 1974) in *Man. Journal of the Royal Anthropological Institute* vol 10, London 1975, pp. 158–9 for further comments on his *modus operandi*.

3. E. Shorter *The making of the Modern Family* London 1976 uses predominantly eighteenth-century sources on France 'with parts of Germany and Scandinavia thrown in from time to time' (p. 14). He believes them to be 'typical of the West as a whole', if admitting the conclusion to be 'precipitous' (p. 15).

4. 'Surrogate' mother is the term used for a woman who bears a child for another woman, from her own ovum or the commissioning mother's. See below Chapter 11.

5. The importance of ecclesiastical law in matters of kinship, which will become apparent, means that much theological writing can also be regarded as legal writing.

6. Earlier more commonly as e.g. 'The Marriage Law of England'.

7. Appendix A pp. 231–3 contains a chronological summary.

8. These terms may qualify e.g. inheritance, or we may speak e.g. of a name descending 'patrilineally' or of 'patrilineal' groups (composed of patrilineal relatives, i.e. those patrilineally related). 'Patrilineal' means 'through males only', 'matrilineal' 'through females only', 'unilinear means 'patrilineal or matrilineal' i.e. in one line only, 'cognatic' means 'through either sex'. The terms are often extended to whole kinship systems or even societies. The terms 'exogamy' and 'endogamy' have entered legal and other non-anthropological writing. Like 'incest prohibition', they lack clear meaning. Their history and ambiguities are discussed at length in Chapter 8 Section 2.

9. It is instructive to note that while 'evenings of biblical criticism' occurred in Parliament throughout the deceased wife's sister controversy (1842–1907), the Church of England turned to Malinowski in 1940 and to other anthropologists in 1984 for expert advice on permitting marriage with hitherto forbidden relatives-in-law. (See Church of England *Report of the Commission on Kindred and Affinity as Impediments to Marriage* 1940, Appendix 3; Church of England *No Just Cause* 1984, Appendix VI.) The medical bias in the 1980s, for instance in discussions of 'surrogacy' etc. 1984–5 is also noteworthy. Scientific authority generally ousted religious authority some decades before 1907.

10. B. Malinowski 'Baloma; the Spirits of the Dead in the Trobriand Islands'

Journal of the Royal Anthropological Institute London 1916, reprinted in B. Malinowski *Magic, Science and Religion and other Essays* Illinois 1948, pp. 194, 210.

11. W.V. Quine *Word and Object* MIT 1960, Section 13, and in many other works. See S. Wolfram 'Facts and Theories: Saying and Believing' in J.Overing (ed.) *Reason and Morality* ASA monograph 24 London 1985a, pp. 71–84 for details and discussion.

Part 1

1 Basic Ideas

English kinship is very much more systematic than is often appreciated, whether in everyday life or by modern historians, lawyers, sociologists and social anthropologists. The indigenous tendency to explain individual practices in terms of their supposed functions and causes has probably helped to obscure the existence of pervasive principles of thought uniting one practice with another. It would be a mistake to claim that English laws and customs are entirely consistent or that changes never owe anything to relatively fortuitous circumstances.[1] Nevertheless, as I hope to show, when we understand the concepts in terms of which English people think about kinship, we can discern order, even in change.

1. Equivalence and Similarity

The idea that things are grouped into kinds, not by God or nature, but by man has a long history in English philosophical thinking. It was already a major theme of Locke's *An Essay Concerning Human Understanding* (1690) that 'it is men who . . . range [particular things] into sorts, in order to their naming', 'the boundaries . . . whereby men sort them, are made by men', the 'sorting of things is the workmanship of men'.[2] In the nineteenth and twentieth centuries social anthropologists became increasingly aware of the corollary that in different societies, men may sort many things, including kinship ties, in radically different ways.

By the late nineteenth century it was well known that the linguistic grouping of relatives could take many forms, cousins perhaps being assimilated to brothers and sisters or different cousins distinguished, and that 'blood' relationship is frequently traced not as in England through both parents, but 'unilinearly', that is, only in the male line ('patrilineally') or only in the female line ('matrilineally'). At first, differences from England and other civilised nations were generally regarded as somewhat strange

and exotic, and often as indicating the infantile or barbarous state of the societies in question.

During the twentieth century the climate changed. Such seemingly basic facts as that someone's mother or father is a direct 'blood' relation came to be seen not as facts but as matters of local classification. Malinowski was still perplexed when he found the 'father' treated as a relation by marriage among the Trobriand Islanders, in many respects as rational as any civilised society, and toyed with hypotheses of ignorance of physical paternity or Freudian style repression.[3] In the 1950s, Dumont was able show beyond reasonable doubt that even someone's mother may be considered as a relation by marriage, and such inferences drawn as that her brother is related to him not as his uncle, as he would be in Europe, but as his father's brother-in-law, a relation by marriage, resembling his own brother-in-law.[4] By this time, anthropologists were acutely aware of the pitfalls of 'enthnocentricity', and no longer regarded concepts of their own society as closer to reality or superior to those of others. Indeed, at present it is more often English or Western kinship than that of other societies which they find problematic.[5] To English people not acquainted with the different ways in which relatives can be classified, on the other hand, English classifications have appeared, and still do appear, not as one mode of grouping among many but as if they represented facts of nature, so obvious as not normally to demand mention. They require description.

In England 'relatives' are distinguished from non-relatives. In English legal writing and in common thought, relatives are divided into two kinds. On the one hand there are blood relations. On the other there are relatives by marriage, known as 'relations-in-law' and 'step-relations'. In legal parlance these are distinguished as 'consanguineous' and 'affinal' relations. Two people are consanguineous, or 'blood', relations when one is a direct descendant of the other, i.e. is his or her child, child's child etc. or when both are descended from some common ancestor. 'Affinity' or relationship by marriage is the relation between a person and his or her spouse's blood relations and blood relations' spouses.

Anthropologists often still employ these categories of consanguinity, or descent, and affinity in order to describe kinship systems in other societies. But they normally also emphasise that the existence of two (or more) such categories of kin does not

entail similarity either in the attributes of each or in the relatives that are assigned to them. Societies clearly differ greatly in their view of 'descent' or 'affinity' as well as in their divisions of relations between them.

The English term for one category of kinship, viz. 'blood relation' probably derives from a particular theory of heredity which was prevalent in England until about 1900. This is that characteristics pass from parent to child through blood. According to Dobzhansky:

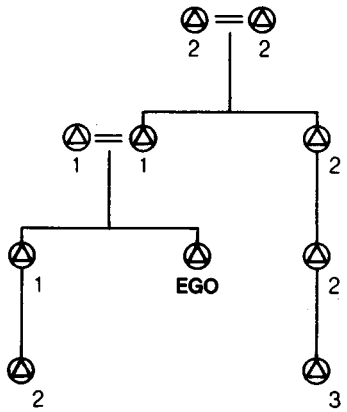
> The parental 'bloods' were supposed to mix in the progeny so that the heredity of the child was a solution, or an alloy, of equal parts of parental heredities. The heredity of a person was thought to be an alloy in which the heredity of each of its four grandparents were represented by one-quarter, of each of eight great-grandparents by one-eighth, etc. (1955)[6]

It is consistent with this theory, and with the genetic or Mendelian theory of heredity which replaced it,[7] that in England a person is considered to be related in the same way to both parents and to the kin of each.

Several distinctions are drawn between blood relations. In some contexts, for instance, the 'direct line' from parent to child is contrasted to 'collateral' relationship, where two people are both descended from a common ancestor. Within the 'direct line', ascendants (parents, parents' parents, and so on) are distinguished from descendants (children, children's children, and their children etc.). Again, there is 'half-blood' as well as full blood: children with both parents in common are 'full blood'; those who share only one parent are 'half-blood'. Relationship may be 'legitimate' or 'illegitimate'. Someone is 'illegitimate' if his parents are not married. If he is illegitimate, then he is not a legitimate relative of his 'natural' parents and their relatives, but only an illegitimate one.

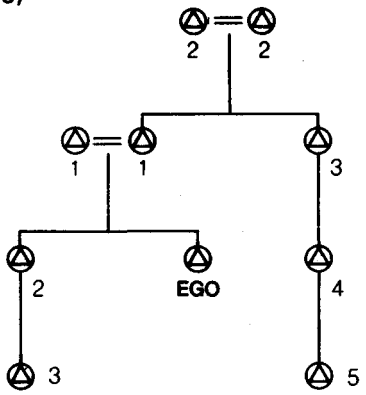
Relationship is also distinguished by distance. Some relatives are considered 'closer' than others. The idea of distance of relationship is formalised. It is computed in 'degrees', a relative in the first degree being closer than one in the second, and so on. The formalisation requires more detailed description. There have been two methods of reckoning degrees in England. One prevailed before the Reformation. The other replaced it.

Figure 1.1 The canon law reckoning of degrees (Numbers indicate the degree from Ego)



⊛ indicates men or women
△ indicates men
○ indicates women

Figure 1.2 The civil law reckoning of degrees (Numbers indicate the degree from Ego)



The first, of Germanic origin, was the 'canon law' reckoning of degrees, which was employed by the Roman Catholic Church. On this computation, the degree of relationship between two people depended on the number of generations one of them was distant from their common ancestors. If they were of different