

課題文を読んで、以下の全ての問いに答えなさい（解答は横書き、句読点・括弧も1字分として計算する）。

なお、課題文中の [...] は省略を示している。

問 1

課題文 1 は、‘state intervention in family life’ の必要性についてどのように説明しているか、400 字程度で述べなさい。

問 2

課題文 1 および課題文 2 の内容を踏まえて、国家が家族に関する法を定めることの意義とその問題点について、あなた自身の考えを 1000 字程度で述べなさい。

【課題文 1】

Alongside the emergence of a contractual model of family relationships, the eighteenth and nineteenth centuries also saw the development of a liberal conception of the family as a private sphere beyond the reach of state interference. From this, stems the attitude that the state should not tell parents how to bring up their children, or that violence within the family is ‘domestic’ and somehow deserving of different treatment from violence between strangers. Much agonizing^{*1} may be expressed by reformers regarding the ‘acceptable’ limits of state intervention in family life, but such debates take place in apparent ignorance of two fundamental points. First, the state has long ‘interfered’ in family life by laying down expectations of behaviour, ranging from the obligations of marriage (demonstrated, if only negatively, by the historical grounds for separation or divorce) to the requirement, since 1870, that parents ensure their children receive education. Secondly, it ignores the fact that what goes on ‘in the private sphere’ is thereby *endorsed*^{*2} by the state’s willingness to allow it to take place. Thus, by declining to ‘tell parents that they cannot hit their children’, the state sanctions^{*3} their corporal punishment. It is not that there is no law forbidding such punishment, but that there is a law permitting it. On this basis, there is no such thing as ‘non-intervention’ in family life, because where law and policy draw a line, they mark a judgment on what is to be regarded as acceptable behaviour between family members.

Arguments that state intervention is somehow ‘wrong’ may conjure up^{*4} images of a totalitarian state which directs how children are to be brought up and indoctrinates^{*5} them regardless of parental preferences. The extent to which people may live their lives and bring up their children according to their own beliefs and value systems is indeed one of the tests of a free society, and is reflected in Article 8 of the European Convention on Human Rights^{*6} which

guarantees the right to respect for one's private and family life. The juxtaposition*⁷ of the concepts of privacy and family is significant and reflects classical liberal thinking.

[...]

It should not be thought that all overt*⁸ state intervention is coercive. The creation of a welfare state might be criticized by some right-wing commentators as destructive of individual and family responsibility and autonomy, but it may also be viewed as the collective expression of concern for all members of society and a factor which can facilitate and strengthen family relationships. The balance between encouraging welfare dependency and breaking family ties is a difficult one which continues to exercise those responsible for social policy. Few nowadays would argue that the provision of comprehensive health service undermines family solidarity by removing the onus*⁹ of caring for one's relatives, but the debate concerning who should care family members when a relationship ends retains strong echoes of such sentiments. The question whether the state should support an ex-wife, or mother and children, or whether her former husband and the children's father should do so is a key issue in family law reform, with a pendulum effect*¹⁰ caused by political and economic spending priorities and complicated by ideological and moral arguments, producing now a swing towards state support, now a return to individual obligation.

Where intervention *is* coercive, difficult decisions may have to be taken and again, the underlying values influencing them need to be recognized. How far should parents, for example, be permitted to withdraw their child from sex education or religious education in school because these are incompatible with their own beliefs? Protocol I, Article 2 of the European Convention*¹¹, provides that 'the state shall respect the right of parents to ensure ... education and teaching [provided by the states is] in conformity with their own religious and philosophical convictions'. This therefore supports the rights of parents to withdraw their children, although this is not a completely unfettered right. Yet the Article also guarantees that '[no] person shall be denied the right to education'. Can a child therefore insist that she attend lessons deemed unsuitable by her parents? This example demonstrates clearly how rights assumed to offer protection against a coercive state may come to be claimed in effect against other individual family members, with the state inevitably deemed by some to be acting coercively if it upholds either the right of the parents, or the child, against the other.

(出典) An Introduction to Family Law by Gillian Douglas, Oxford University Press, 2001,
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ただし、出題のため一部省略・改変した箇所がある。

- (註) *1 agonize 苦悩する *2 endorse 是認する
*3 sanction 公認する *4 conjure up もたらす
*5 indoctrinate 教化する、特定のイデオロギーを教え込む
*6 Article 8 of the European Convention on Human Rights 欧州人権条約第 8 条
*7 juxtaposition 並置 *8 overt あからさまな
*9 onus 負担 *10 pendulum effect 振り子効果
*11 Protocol I, Article 2 of the European Convention
欧州人権条約第 1 議定書第 2 条

【課題文 2】

Once a family relationship has been identified, the extent to which the law can and should intervene to regulate family life is contested. We do not expect the law to determine the conduct of our day-to-day family relationships, and nor should it.

Traditionally, the family is regarded as the private sphere, protected from regulation by the state. This is in contrast to the public sphere of the market and public affairs. Theoretically, the law draws a boundary between the public and private by direct regulation of the public sphere. Regulation of the family is left to other social mechanisms, leaving the family as a place of personal freedom to order its own affairs. This element of privacy means that intervention in family life should be avoided by the state. The types of relationship existing in the private sphere of the family will be different in nature to those in the public sphere of work and professional behaviour.

It is not desirable to have an entirely strict division between public life and private behaviour, untouched by the law. A strict division places behaviour in private beyond the scope of legal regulation and this puts individuals at risk of harm. For example, if someone is experiencing violence at the hands of an intimate partner in the home, the law should be able to intervene to punish and restrain such behaviour. Eekelaar*¹ suggests that concept of public and private spheres had dissolved because law is public instrument, but has to be used when the apparently private behaviour of family impacts on the public interest. He argues that the public interest is served by the proper functioning of the family, and so justifies the intervention of the law in regulating family life, but means that the family may no longer be described as entirely 'private' and beyond public regulation by the law.

The analysis of the family as being private and beyond the scope of the law does not capture the many ways in which the law may influence the conduct of family life, both directly and indirectly. Elliot*² highlights that welfare and legal provision can privilege certain family

forms, for example by granting tax advantages to married couples in order to encourage adults to contract marriages. Although certain family forms may be privileged, this does not mean that families' lives are necessarily defined and organised in this way. There still remains personal choice in the arrangement of family life and personal status.

The role the law can play in validating a person's status is also very important in *both* the public and private sphere. The Gender Recognition Act 2004^{*3} allows an individual to apply for their legal status to match their acquired gender. This was highly significant for the public status of individuals, changing their name and gender on their passport and driving licence for example, but also in the private sphere, acknowledging the changed gender status for the individual and altering the legal ability to contract a marriage.

The public-private analysis also fails to capture the reality that both family and public behaviour, such as work, are inherently interlinked and the practice of each influence one another. This has been highlighted by the changes caused by the Covid-19 pandemic causing people work from home and juggle childcare and schooling alongside work responsibilities. This approach to considering the role of law in affecting family practices identifies the influence of law in constructing and defining 'appropriate' behaviour of family members holding particular status. Feminist scholars have regarded this insight as particularly important, demonstrating how concepts of family relationships influence the perception of gender roles and affect women's roles in the family and wider society. The power of the law in defining the identity and role of individuals within the family can constrain choices and construct values around the expected behaviour of both men and women. These norms encourage certain forms of behaviour, often in accordance with gendered expectations.

For example, although it is now more common for women to maintain a form of paid employment after they have given birth, they are more likely than the father to be in part-time employment, partly because the mother is likely to be less well paid, and partly because of gendered expectations surrounding the care of children. However, these norms can change and develop over time and the law may change also. It used to be the case that only women obtained maternity leave on giving birth, but leave can now be split between the parents. The interaction of employment law with the management and allocation of parental obligations demonstrates that it may not be family law directly that impacts on family life, but also other areas of law as well.

(出典) Family Law by Ruth Lamont, Oxford University Press, 2022, Reproduced with permission of The Licensor through PLSclear, pp. 20-21.

ただし、出題のため一部省略・改変した箇所がある。

(註) *1 Eekelaar = John Eekelaar (家族法学者)

*2 Elliot = Faith Robertson Elliot (社会学者)

*3 The Gender Recognition Act 2004 イギリスで 2004 年に成立した「ジェンダー承認法」