JUDICIARY OF ENGLAND AND WALES

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"THE FAMILY IN THE 21ST CENTURY"

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From the point of view of a United Kingdom Lawyer, the title of this address-the Family in the 21st Century-invites at least brief consideration from a historical perspective, so far and fast have legislative events and assumptions concerning the family moved in the last few decades as compared with the centuries which have gone before.

Under the entry Family, the current edition of the Encyclopaedia Britannica initially defines it thus:

"A group of persons united by the ties of marriage, blood, or adoption, constituting a single household, and interrelating with each other in their respective social positions of husband and wife, mother and father, son and daughter, brother and sister... Frequently the family is not differentiated from the marriage pair, but the essence of the family group is the parent-child relationship, which may be absent from many marriage pairs."

Note that, while the essence of family life is identified, as we would all identify it, as the parent-child relationship, there is an assumption that it is a relationship within the ties of marriage.

This emphasis can be traced back to the Marriage Act of 1753, introduced by Lord Hardwicke "For the Better Preventing of Clandestine Marriages." Until that time, the formal ceremony of marriage was essentially limited to the upper echelons of society. Prior to that time regulation of marriage had been left to the church and the ecclesiastical courts were responsible for the regulation and recognition of marriages without the intervention of legislation. The only registers of marriages were of those which took place in church. However, the church had come to tolerate an extreme degree of informality for the purpose of recognising a couple as married. An ecclesiastical court would hold a valid marriage to have been contracted simply by the mutual consent of the parties provided that the couple had agreed to take one another as husband and wife, using words in the present tense to that effect wherever the words were spoken and irrespective of whether there were any witnesses. What inaccurately came to be called 'common law marriage' was thus widely recognised and accepted as a de facto status appropriate to the vast majority of the population. By defining and laying down the formalities required in respect of a valid marriage (including a religious ceremony in church, and residence and publication of banns in the parish where the ceremony was performed), Lord Hardwicke's Act swept away the acceptance hitherto accorded to less formal arrangements and, whatever the stated purpose of the Act, its effect was rapidly to establish state control over marriage through the ecclesiastical church and to create a clear legal dividing line between marriage and mere co-habitation which had hitherto not existed. Nearly a century later, when the Marriage Act 1836 and the Registration Act of the same year allowed couples to marry by civil ceremony and registration, they

relaxed the need for a particular religious ceremony but extended and confirmed the legal regulation and formalisation of marriage as the only legally recognised basis of family life. These measures taken in conjunction with the Common Law definition of marriage propounded by Lord Penzance in Hyde v Hyde 1866 LR1P&M 130 ("The voluntary union for life of one man and one woman to the exclusion of all others"), not merely reinforced the view of society of the moral superiority and desirability of marriage, but for two centuries established marriage as the only socially acceptable way by which to partner or to parent, so that unmarried mothers and their children where universally stigmatised by both society and the law. Unmarried mothers had great difficulty in enforcing the right to maintenance for their illegitimate children contained in the Poor Law Amendment Act 1844 and, even under its successor, the Affiliation Act 1957, (until its repeal by the Family Law Act 1987), an unmarried mother's evidence of paternity was insufficient in law to establish her claim without corroboration.

In fact, until quite late in the 20th Century the approach of English law in the field of Family Law was to concern itself with the form and status of marriage and the rights arising between the parties on its formation and dissolution, including rights of custody and access in respect of children of the marriage, and to discount or ignore unmarried co-habitation as a proper, or at any rate desirable, basis for family life. Indeed, at the beginning of this 21st Century, whilst recognising the wider forms of family life, in particular for the purposes of child protection, our family law is still essentially marriage-centred.

Over the last 30 years, however, for a variety of reasons unmarried cohabitation has become socially so widely practised and accepted at all levels of society and the number of couples electing to cohabit has risen so fast, that social and peer pressure to acquire married status, even for the purpose of childbearing, is now confined to particular sections of society. Between 1986 and 1989 cohabitation increased from 5% to 15% of all couples in the United Kingdom, and now over a quarter of children are born to unmarried cohabiting parents. In the National Statistics of 2004 these trends are predicted to continue and increase. Marriage is still broadly valued as an ideal, but the decision whether or not to marry or simply to cohabit is widely recognised to be a question of personal choice in relation to which questions of stigma no longer attach.

So far as the attitude of the United Kingdom Government is concerned it is still supportive, and I believe rightly supportive, of the institution of marriage.

At the close of the 20th Century, having derided the "return to family values" policy propounded by the previous Government in the early 1990s, the present Government nonetheless stated its own agenda of "strengthening marriage" in its 1998 Green Paper Supporting Families as follows:

"Marriage does provide a strong foundation for stability for the care of children. It also sets out rights and responsibilities for all concerned. It remains the choice of the majority of people in Britain. For all these reasons, it makes sense for the Government to do what it can to strengthen marriage." ["para 4.8"].

In a recent judgment of my own I have stated the position as it seems to me as follows:

"It is apparent that the majority of people, or at least of governments, not only in England but Europe-wide, regard marriage as an age-old institution, valued and valuable, respectable and respected, as a means not only of encouraging monogamy but also the procreation of children and their development and nurture in a family unit (or "nuclear family") in which both maternal and paternal influences are available in respect of their nurture and upbringing."

Despite calls from the Law Society in 2002 and the Solicitors Family Law Association in 2003 to recognise and provide for the rights of the parties in long term cohabiting relationships between men and women, the Government has so far taken no further steps in that direction. It is right to observe that the Law Commission is moving forward upon this front. In its discussion paper of July 2002, "Sharing Homes" (Cmd 5666), which was directed principally to the reform of property law in respect of cohabiting couples, the Law Commission stated that it found it "impossible" to propound a satisfactory reform of

property law on a limited basis in this respect but recommended that the position of cohabitants should be looked at more broadly.

A broader look has now been taken in the form of Law Commission Consultation Paper No 179 "Co-habitation – the financial consequences of a relationship breakdown" which has just been issued and runs to some 373 pages. However, as its name implies, that Consultation Paper is still not a comprehensive review of the law as generally applicable to cohabiting couples, but is confined to the financial consequences of the termination of long term co-habiting relationships whether by separation or by death.

The Consultation Paper proceeds upon the basis that the promotion of marriage is an important objective. However, it questions whether that objective is in fact weakened by proposals for reform in relation to the parties' property rights and the introduction of wider forms of financial relief between co-habitants following break-up. Of particular relevance to this conference, it provisionally concludes that there is a strong case, with which I would personally agree, for remedies to be made available between unmarried couples who live together with children i.e. as a family for two principal reasons:

First, where couples live together with one or more children as a family they generally adapt their original roles within the relationship in order to provide appropriate support for the children and each other, most notably where one partner gives up full time paid work to care for a young child in reliance on the other partner's financial contribution to the household. Given that cohabiting parents are likely to adopt money management practices similar to those of many spouses, it seems wrong that, where that has been a joint decision by a cohabiting couple to conduct their family life in this way, the long term financial "gains" and "losses" should simply lie as they fall on the basis of ordinary application of the laws of property.

Second and more important, where there are children there is a recognisable public interest in their continuing welfare. Separation of cohabiting couples inevitably impacts on children who have been part of their parents' shared household. Schedule 1 to the Children Act 1989 now affords the court the power to make a range of orders on application made by a parent for the maintenance of a child. However, it has important practical limitations and the current law fails to address adequately the financial hardship experienced in many cases by women as the primary carers of children upon the break-up of cohabitation and this inevitably affects the quality of life of the children for whom that adult party continues to care.

In this context, in the 21st Century, it is right that family courts should seek to protect the rights and interests of children within the family unit, whatever its form. By and large, adults can look after themselves and have the choice of marriage open to them as a permanent relationship. Children, however, are dependent upon their parents to provide for their welfare and protection and, in so far as that welfare and protection may be an incidental casualty upon break-up of a long term familial relationship, the law should seek to protect them in the setting of private law, as it does in the public law field of child protection, in which the threshold for intervention is of course a great deal higher.

It is of interest to state in parenthesis that the hesitancy of the Government and its reluctance to move in respect of the rights of cohabiting couples of opposite sex, is in notable contrast to the speed with which, as part of its non-discrimination policy, it moved to introduce and pass the Civil Partnership Act 2004, which has adopted what may conveniently be termed the "marriage mirror" approach to formally registered civil partnerships between same-sex couples. In addition, the Adoption and Children Act 2002 permits adoption of a child by "two people (whether of different sexes or the samesex) living as partners in an enduring family relationship" (s.144b). The latter is a radical step, well ahead of most European jurisdictions.

It is perhaps the arrival on the family scene, if I may so term it, of same-sex couples as parents, whether by means of adoption or donor insemination which most dramatically illustrates how times have changed since family law was concerned only with the family wrought in the image of Lord Penzance's definition of marriage. One need only refer to the case of In re G, recently decided in the House of Lords, which involved a bitterly fought

dispute between warring parents over residence and contact in relation to their children to see how far and how quickly we have moved.

In delivering the leading judgment in the House of Lords, with which all their Lordships were agreed, Baroness Hale of Richmond said:

"The issues in this case arise in a novel context but they are issues which may arise whenever there are disputes about the future care and upbringing of children. The context is that of a lesbian couple who made the conscious decision to have children together, who together arranged for anonymous donor insemination at a clinic abroad, and who brought up the children together until their relationship broke down. Now sadly they are locked in a dispute about the future of those children which is just as bitter as the dispute which arises between heterosexual couples. And the issues arising are just the same as those which may arise between heterosexual couples. The legal principles are also the same."

One need only add by way of background that, shortly before the break- up, the couple had registered their Civil Partnership under the new legislation, but that, by the time of the litigation, the partner who walked out and who was the primary carer of the children had found a new partner with whom she was contemplating registration of a Civil Partnership and that, to complete the family picture, the abandoned partner herself had a seventeen year old son born as a result of anonymous donor insemination during a previous relationship of hers who had established a close bond with the warring couple's two much younger children who regarded and loved him as a brother.

What, one may ask rhetorically, would Lord Hardwicke or Lord Penzance have made of that? What, one may also ask, would they have made of the multi-cultural and pluralistic society in which family judges now operate, not only in the United Kingdom but worldwide in the United States, Europe and other Commonwealth Countries where many different ethnic and cultural groups live and raise their children under more or less rigid views of family life and discipline all of which have to be accommodated and adjudicated upon within their various jurisdictions.

Such groups marry according to the rites of many religions. Others cohabit as couples, whether married or not and with partners who as we have seen may not always be of the opposite sex. Children live in households where parents may be married or unmarried or there may only be a single parent. Their parents may or may not be their natural parents and their siblings may be half-siblings or step-siblings. Whether as a result of choice or circumstance, many adults and children live in family groups far removed from that of the traditional nuclear family.

I indicated earlier that United Kingdom family law, based as it still is upon encouragement of the institution of marriage, has only recently sought to address the option of recognising other types of cohabitation for the purposes of deciding the property rights of the adults concerned. However, the focus of our law relating to children, in particular under the 1989 Act, has more urgently and readily adapted itself to the changes in our society which I have just highlighted.

While retaining the ideal of marriage as the societal unit best suited to the rearing of children, our family law and practice, as in many other family law systems which have their origin in European cultural values and Christian ideals of marriage, have come to appreciate that the particular assumptions about relationships between children and parents which are enshrined in those values and ideals are often inappropriate as a standpoint when dealing with cultures where conceptions of kinship and good child rearing practice are significantly different from the nuclear family model.

The Children Act laid down in United Kingdom law the primacy of the child's welfare in relation to the resolution of any question before the Courts concerning the welfare and upbringing of a child, whatever the nature of that child's parentage or family unit. However, in those jurisdictions which have large immigrant communities, quite where the balance lies in welfare terms between recognising and accepting the traditional norms of other cultures within a society and judicial system based on European traditions and values is, and will remain, one of the greatest problems facing family courts in the 21st century.

To take but one example, in various West African Countries the term “mother” extends beyond the biological mother and is used of the matriarch or other senior member of a kinship system who discharges the maternal role within the extended family group, while its other members (including it may well be the biological mother of children within the family group) are absent elsewhere, earning money to be sent home for the support of that family group. I recently tried a case where a Ghanaian child’s immigrant status was at risk because, in questions and answers given in separate interviews, her alternative references to her Grandmother back in Ghana and her biological mother here in this country had been wrongly taken by immigration officials as signs of a manufactured family history.

It can be very important, particularly in public law cases, for courts concerned with immigrant or indigenous ethnic communities not so to privilege parents, or relegate the rights of other family members, to a degree which conflicts with the child-rearing values of those communities. It may well on occasions be wrong to assume that a child’s best interests lie in preserving the continuity of that child’s relationship with one “psychological parent” or willy-nilly to apply notions of the nuclear family to Muslim extended families. Again, in Australia, it has been necessary to appreciate that the child rearing practices among aboriginal families often differ markedly and that, whereas white Australian culture tends to emphasise permanence and stability as positives for children, indigenous culture sees the movement of children, either geographically, or within kinship groups as beneficial.

Considerations of this kind call for conscientious and delicate handling whether in the context of private law disputes between parents as to the upbringing of, or contact with, their children, or in the field of public law in the course of Care Proceedings by local authorities.

As already indicated, in the United Kingdom we operate under the regime of the Children Act 1989, a comprehensive legislative landmark which in section 1 firmly established the principal that in disputes concerning children (whether under private or public law) the welfare of the child is the court’s paramount consideration even over parent’s rights, and affirmed the modern legal approach set out in the Law Commission Report which preceded it and which stated that, since those rights are only derived from the parents’ duties and essentially exist to secure the welfare of their children, they are better treated as “responsibilities” (see section 2 and 3 of the Act). However, this is not a nuance recognised or articulated in the European Convention on Human Rights and, since the incorporation of the Convention into English Law, despite the prescriptive nature of the welfare check list in s.1 of the Children Act, it is often necessary, in the light of the issues raised, for the court to analyse those issues in terms of the balance between the need to recognise and safeguard children’s rights on the one hand and adult rights to respect for their family life on the other.

The rights to respect for family and private life provided for in Article 8 of the Convention, are rights which are essentially susceptible of assertion by adults in seeking to resist state interference within the family circle in relation to the parental function and prerogative of making decisions as to the needs, welfare and general upbringing of the children. There is a clear primary recognition by the Convention of family autonomy based upon the view that the family unit (nuclear or extended) is the bedrock of a true and stable society and the best means by which the welfare and proper upbringing of children are achieved within that society. It involves the necessary assumption that families operate most successfully if allowed to establish their own values and rules and that constant scrutiny and interference undermines the confidence and certainty in that respect which is itself beneficial to children.

At the same time, the enlightened modern state, aware of the opportunities for abuse behind close doors, has a social and moral duty to provide for a proper system of child protection in the face of abuse or other conduct involving substantial harm or risk of harm to the children of the family. Thus, Article 8 (2) provides that there shall be no interference with private and family life say for the protection of health or morals or the protection of the rights and freedoms of others.

Those ‘others’ of course include children whose rights and needs in Care Proceedings are ex hypothesi required to be considered separately from those of their parents. However, there is no guidance or elaboration afforded by the Convention in the sense of any additional or separate formulation of the rights of children within, or independently of, their family life.

For international guidance, European courts may draw upon the provisions of the United Nations Convention on the Rights of the Child. It is, after all, the manifesto of rights recognised at an international level by those countries which have ratified the Convention. Although not formally part of national law, their working function is as a spur to legislation and a guiding light to domestic courts. Not only do they set out the rights of the child to basic care and nurture but, by Articles 12, 13 and 14 they recognise the child's right to express and have weight accorded to its views, the child's right to freedom of expression and to freedom of thought, conscience and religion. By so doing, they emphasise the need for courts to recognise those elements as part of a good upbringing and in particular that, as children become older, they should be encouraged to develop a capacity for independent thought and self-determination. None of these rights is inconsistent with the provisions of the Children Act or its welfare check list; quite the reverse.

As the law has developed in the United Kingdom since 1989, and with the need after 2000 to focus upon the implementation and application of the European Convention on Human Rights, there is increasing acceptance and emphasis by the courts that children of appropriate age (as to which opinion differs) have their own rights to assert, and views which should be heard, in disputes concerning their welfare which may well be at odds with their parent's views. The requirement for appointment of the Guardian in care proceedings is the most obvious recognition of this. But the concern is a wider one than the simple issue of separate representation. It is a concern to ensure that the children themselves who are of an age and understanding to appreciate the nature of the issues involved, which above all affect them and their long term welfare and happiness, should have the opportunity to speak their minds, and to carry forward in their future lives the knowledge that at least their point of view was taken into account. The whole Voice of the Child debate is illustrative of a mounting preoccupation with this theme world-wide.

In this respect one of the topics in which I am particularly interested is the traditional reluctance of the English Judge to talk to children in private. I understand that it is regularly done on the continent of Europe. This English reluctance is rooted in the rules of evidence and the adversarial mode of trial; in the fact that what is said in private by the child to the judge cannot be tested in evidence or in cross-examination; and that the judge cannot promise confidentiality to the child, because of his duty to inform the parties of issues which trouble him as a result of what the child has said, so that the parties may address them before judgment. Nonetheless it is my view that, in an effort to ensure the welfare and happiness of children, and to listen to their voice first hand, we should encourage judges to be willing to talk in private to children who wish to do so, trusting the judge to retail the burden of his concerns or any changed perception having heard the child, while respecting the confidence of the child in sensitive areas.

I know that this causes concern in certain quarters, not least among child psychiatrists. In particular on the basis that judges, with insufficient training, with no opportunity for preliminaries, with only a short time at their disposal, and with varying degrees of approachability, sensitivity and caution in respect of their task, may (a) form untrustworthy impressions or (b) may unfairly seem to place the burden of dispute resolution upon the child.

I understand those concerns but I believe they could be met by appropriate training. I should also make clear that I am not proposing a requirement, upon judges in all, or indeed most, cases to talk directly to the child but rather to consider receptively whether it is a desirable course in the particular case. In the majority of cases, it may well remain unnecessary for the judge to see the child personally because the report of a Guardian or welfare officer will have recorded the child's views and the veracity of the report as to the child's stated views will not be open to doubt. However, in two categories of case at least, I consider it desirable. First, where for whatever reason, there is cause to question whether the reporting officer or guardian's expression of the child's views is sufficient or correct. This may arise as a result of challenge or allegations of coaching by one of the parties, by reason of doubts expressed by the Guardian him or herself, or simply from the form of the report. Second, it may arise in a

case where the child has himself expressed a wish to speak to the judge. In the absence of very good reasons I do not think any judge should refuse such a request.
Of course, many (probably most) children old enough to express their views will have no desire to see the judge. Most families and children find the court process difficult and intimidating and all the child wants is for the dispute to go away, let alone to participate in it. But where they wish to speak to the judge, they should in my view be permitted to do so in the absence of very unusual circumstances.
In her speech on the child's right to family life, President McAleese has touched on many other questions which require, and will continue to require, resolution in the 21st century in relation to the family as it now exists and as it will undoubtedly further develop. Time constraints, if nothing else, prevent me from reporting on the state of play in the English courts in these respects. That will be done in the many workshops of the next few days. Those topics are very much to the forefront of judicial thinking and concern in the United Kingdom and, in relation to solutions, we are much assisted by the formation just over two years ago of the Family Justice Council, an interdisciplinary body over which I preside but which has a minority of judicial members and a strong and articulate majority of non-legal experts from all agencies concerned in the family justice system including strong representation from experts in the fields of medicine, psychiatry, welfare and mediation services, and ministerial representatives.
I will, however, identify two particular matters which may be of interest to an international conference of this kind. The first relates to the increasing problem of the international abduction of children in what, with the ease and cheapness of air travel, has become the global village in which we all live.
In this respect, I feel entitled to bang the drum for the work of my predecessor, Baroness Elizabeth Butler-Sloss, whose work is now continued by Lord Justice Thorpe as Head of International Family Justice, in not only ensuring the compliance of our judges with our own obligations speedily to deal with applications for the return of children removed from the jurisdiction of states which are co-signatories of the Hague Convention, but in bridge-building with Islamic states which are not parties to the Hague Convention. In the case of Pakistan, the origin of a large ethnic community in the United Kingdom, it is now over two years since our two countries entered into a bilateral judicial protocol to deal with cases involving the wrongful removal from England to Pakistan, and vice versa, along Hague Convention lines. This has proved of great practical value and assistance in enabling the courts to approve applications by individual parents of Pakistani origin to take a child of the family on holiday to Pakistan in circumstances where the other parent has fears that such removal may in fact prove permanent. A similar arrangement in the form of the Cairo Declaration of 17 January 2005 has since been agreed in principle with the Egyptian judiciary.
Baroness Butler-Sloss, who recently attended the 50 year celebrations of the Supreme Court of Pakistan, is of course here. For those interested she will, I understand, be willing to supply copies of her speech made on that occasion in which she sets out the progress made both by United Kingdom judicial representatives and the Permanent Bureau of the Hague Convention in their contacts with Islamic States.
Finally, I think this an appropriate occasion to make clear that I and my fellow judges, in common with those of many other jurisdictions, are becoming increasingly convinced that money spent by governments in encouraging mediation and funding mediation schemes to enable parents to resolve their private law disputes, particularly involving children, short of the court door is money well spent and we look with envy towards Australia and New Zealand where the governments of those countries have recently acted decisively in that direction.

- Mediation reduces the levels of distress suffered by children. It is now appreciated just how upsetting court proceedings between parents are for children: research in 2001 showed that children involved in protracted cases experience high levels of stress comparable with those found in public law proceedings: 46% had significant levels of emotional and behavioural difficulties.

- Mediation also reduces delay in the resolution of the parties' differences; by intervening early, and enabling the parties to reach agreement, parents can consider what is best for their children before they become entrenched and adversarial in their approach to family breakdown. Cases removed from the court system also reduce delay for others who cannot resolve their differences without a court hearing

- Finally, as government should realise mediation is cost-effective. It has high success rates and is far less expensive than litigation, which necessarily involves lawyers as well as expensive judge and court time.
