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The Politics of Pragmatism: Family Law Reform in England and Wales

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A. Introduction

The examples of family law reform discussed in this article illustrate the varying mechanisms through which legal change in the UK is instituted. The first primarily concerns the grounds and process of divorce. This has fallen exclusively within the province of the Lord Chancellor's Department, which is the nearest institution to a Ministry of Justice which the UK has, in the sense that it is responsible for running the court system (but many important matters concerning criminal justice fall under the remit of the Home Office). The second is the question of child support. This has primarily been the concern of the Department of Social Security, and the system set up by that Department in 1993 has been subject to intensive scrutiny by the House of Commons' Social Security Select Committee. The most recent changes, embodied in a statute of 2000, are currently being prepared for implementation. The third concerns the basis upon which assets are divided on divorce. That, too, has been of concern to the Lord Chancellor's Department, but the most significant development actually occurred within the court system itself, in line with classic common law judicial methods. A fourth area covered is that of adoption. This primarily falls within the jurisdiction of the Department of Health, although in this case a review of adoption law and practice became a matter for the personal concern of the Prime Minister, who commissioned the Performance and Innovation Unit in the Cabinet Office to start the review process by identifying key problems and suggesting a basis for proceeding further. Given these differing provenances, it is not surprising if family law lacks coherence. However, in 1998 the Home Office made an attempt to link family policies together in a 'Consultation Document', *Supporting Families*, to which various departments contributed. The fifth area covered is largely administrative, but could have important repercussions on some aspects of the family justice system. This concerns the framework in which the interests of children are represented to courts. The basis of this framework has been subject to re-appraisal

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and reform, though the process has been largely bureaucratic and controlled by civil servants.

Given the largely political and bureaucratic nature of the processes described above, it is not surprising that actions taken have a strongly pragmatic character, as will be seen. However, there is a final mode of legal development which is quite new for the UK, and is, at least theoretically, strongly based on principle. In October 2000 the Human Rights Act 1998 came into effect. This incorporates the European Convention on Human Rights and Fundamental Freedoms directly into UK domestic law. Since October 2000 the courts have been bound to interpret legislation as far as possible consistently with the Convention and its jurisprudence, and to develop the common law according to the principles found there. Courts will not be able to 'set aside' inconsistent legislation, but may make a 'declaration of incompatibility', upon which the Government is expected to act to remove the incompatibility. In future, legislation must be accompanied by a ministerial certification of belief in its compliance with the Act. So the silent operation of human rights norms may begin to reform family law *from within*, with consequences which may become evident at later dates.

It must also be made clear that this article covers only England and Wales. Family law has long taken a separate path in Scotland, and this will be accentuated now that Scotland has a separate Parliament. Northern Ireland's family law has also varied from that in England and Wales, and this is also likely to become sharper in the context of the newly devolved institutions in that region, should they prosper.

B. Divorce Reform: Family Law and Politics

It is ironic, and may be revealing, that the most significant legal development in UK family law at beginning of 2001 was a non-event. In January 2001 the Government abandoned the proposed new divorce 'system' enacted in Part 2 of the Family Law Act 1996, but not implemented.[1] It is a complicated story.[2] The gist is that as long ago as 1990 the Law Commission had felt that the current divorce law, which dates from 1971, was unsatisfactory in that the residual elements of fault (which allowed divorce to be granted without investigation on the basis of uncontested allegations of

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1 Lord Chancellor's Department, 'Press Release 16 January 2001' in (2001) *The Independent*, 16 January 2001.

2 This is partially told in the following: G. Douglas, 'England and Wales' in *The International Survey of Family Law 1996* (A. Bainham (ed.)) (The Hague, 1998) at pp. 158–169; J. Eekelaar, 'Family Law: Keeping Us "On Message"' in (1999) 11 *Child & Family Law Quarterly*, at p. 387; J. Eekelaar, M. Maclean and S. Beinart, *Family Lawyers: The Divorce Work of Solicitors* (Oxford, 2000); C. Smart, 'Divorce in England 1950–2000: Moral Tale?' in *Cross Currents: Family Law and Policy in the US and England* (S.N. Katz, J. Eekelaar and M. Maclean (eds)) (Oxford, 2000) at Chapter 16.

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adultery and 'unreasonable behaviour') aggravated conflict (by encouraging assertions of blameworthy conduct) and operated unfairly. It proposed a complete 'no-fault' system, under which divorce would (almost) automatically be granted solely on the basis that a stipulated period of time had elapsed after one of the parties gave formal notice that the marriage was at an end.[3] Despite this apparent endorsement of divorce on unilateral demand (albeit after a waiting period), the Lord Chancellor in the Conservative Government, Lord Mackay, took up this proposal. However, whether out of conviction, or on the belief that it was necessary to do so in order to win the approval of the Parliament, in which the Government had only a narrow majority, Lord Mackay promoted the scheme as a way of pursuing two further goals: *saving marriages* and *saving money*. Marriages were to be saved by emphasizing that the 'waiting period' was to be an opportunity for 'reflection and consideration', at the beginning of which the party instigating the process would be fully informed, through the compulsory attendance at an 'information meeting', about the financial consequences of the separation and its effects on the children, in the hope that reflection on their responsibilities might lead the parties to revise their intentions. Money would be saved by removing the negotiation process, in the case of those marriages which could not be saved, as far as possible from lawyers, and transferring it to mediators, as it was believed that mediated solutions to financial and other issues would cost less than legally-brokered ones. This would be done by *requiring* clients who qualified for public funding of their action to be assessed by a mediator, with the prospect of losing entitlement for funding for legal help if the mediator thought the case suitable for mediation, and by using the compulsory information meetings to *encourage* people who could afford to pay for legal services to use mediators instead.

When the Blair Government came to power in 1997, it took over these aspirations. However, when the scheme had been enacted in 1996, provision was wisely made for monitoring some of its key innovations through trial schemes. When the results of these became available, they showed that, far from saving marriages and turning people away from lawyers, information meetings helped to overcome peoples' doubts about whether to divorce, and made them even more likely to see a lawyer. Furthermore, research also showed that the prospects of mediation bringing about savings to the overall costs of divorce were highly uncertain[4] and that lawyers were capable of providing a good service for divorcing clients, and often did so.[5] Contrary to the Government's initial assumptions, evidence showed that very few disputes on matters arising during a divorce were ever *litigated*; they were almost always settled by consent.

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3 Law Commission, *Family Law: The Ground for Divorce* (London, 1990).

4 See the Lord Chancellor's Department, *supra* note 1, which refers to the relevant research: <www.open.gov.uk/lcd>

5 See J. Eekelaar, M. Maclean and S. Beinart, *supra* note 2. It is interesting that the day the government announced its abandonment of the Family Law Act divorce scheme, it also announced increases in the remuneration rates for publicly funded family law work.

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Changes in court procedures introduced during 2000 meant that some of the worst instances of excessive costs in litigation could now be controlled by closer judicial management of those cases which did come before a court. Since information meetings were failing to realize the Government's (unrealistic) hopes of saving marriages, the Government could simply have dropped the idea about information meetings but nevertheless proceeded with the original Law Commission proposal of allowing divorce to be granted solely on the basis of a waiting period. But it dropped the scheme in its entirety. This was probably because to have abandoned the 'marriage-saving' elements but proceeded with a simpler mechanism for divorce would have been exploited in the press as undermining marriage, a risky matter for the Government in a year when a general election seemed likely. So the 1971 divorce law, flawed and hypocritical though it is, stays with us. It has the virtue that lawyers know how to manipulate it to achieve what their clients want. It works, and it works (usually) quickly. Yet once again family law has been determined by pragmatic political calculation.[6]

Divorce is not the only area where family law has struck political controversy. In 1995, a virulent media campaign was largely responsible for forcing the Conservative Government to amend legislation designed to give the same protection against domestic violence to unmarried as well as to married (heterosexual) partners.[7] The legislation is now drafted so as to ensure a slightly lower level of protection for the unmarried,[8] although this is unlikely to make any difference in practice.[9] In another area, the Blair Government's repeated attempts to repeal a measure of its Conservative predecessor which says that local education authorities may not promote homosexuality in schools as a 'pretended' form of family life[10] ended in failure after repeated rejection by the House of Lords,[11] and the enactment which equalized the age of lawful consent to heterosexual and homosexual intercourse at 16[12] became law only by the invocation of a special constitutional mechanism (the

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[6] It is not clear whether the policy of pushing applicants for public funding from lawyers to mediators will also be dropped. However, on the same day when the government announced it was abandoning the scheme, it also announced increases in legal aid fees for family law work, and the Lord Chancellor said: 'I want to ensure that people have the best possible legal help and advice when they have problems in these very difficult areas'. Such warm words contrast strongly with earlier official disparagement of the role of lawyers in family matters.

[7] See J. Eekelaar, 'The Family Law Bill – The Politics of Family Law' in (1996) 26 *Family Law*, at p. 45.

[8] Family Law Act 1996, Part IV. This section of the 1996 Act has been implemented.

[9] See G. Douglas, *supra* note 2.

[10] Local Government Act 1988 s. 28.

[11] However, the measure was repealed in Scotland by the newly created Scottish Parliament. Yet even there the political debate was intense.

[12] Sexual Offences (Amendment) Act 2000. The Act introduces a new offence if someone over eighteen has a sexual relationship with someone over sixteen but under eighteen in relation to whom he or she is in a position of trust. Such a position is held by a person who 'looks after' another in the sense of being 'regularly involved in caring for, training, supervising or being in sole charge of' another person.

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Parliament Acts) because it too had been rejected three times by the House of Lords. So there can be no question in the UK at present of legislative steps to introduce 'gay marriages', or even 'registered partnerships'. The context for all this is the fear of (further) undermining family life, and hence promoting lawlessness and general irresponsibility. This theme of 'responsibility' was a strong element in the Conservative administration, but is no less so under the New Labour Government. But, although the Conservatives tended to equate 'family life' with marriage, the New Labour Government has shown a greater willingness to embrace, albeit nervously, other forms of family living.[13] The emphasis is slowly shifting from seeing marriage as the defining feature of privileged family living, to making the presence of children the determining factor. As one sign of this, from 2000 the married persons' tax allowance was converted to a child tax credit, payable irrespective of the marital status of the parent. Even the Conservative Party, which initially argued for the reinstatement of the married persons' allowance, modified its position and proposed an allowance only for married persons who had a child under eleven and one parent living at home.[14]

C. The Rise of Parenthood: the Child Support Scheme, Moral Crusades and Bureaucratic Folly

The growing emphasis on parenthood rather than marriage as a source of obligations was first clearly discernible in the enactment of the Child Support Act 1991, implemented in 1993, which made the fact of genetic parenthood the basis of an inalienable financial obligation which became enforceable if a parent left the home (becoming an 'absent parent'). The extent of the obligation was determined by an administrative agency according to a formula which gave absolute priority to that obligation over any 'social' obligations that parent might have undertaken towards anyone else's children (for example, step-children).[15] Probably the major reason for this development was a wish to recoup from 'absent parents' some of the rising social security costs caused by the sharp increase in the number of mother-only families during the 1980s, and that is underlined by the fact that the Department of Social Security designed the scheme, which was implemented by a quasi-autonomous agency, accountable primarily to that Department. But it was also thought that the rigorous enforcement of this obligation would enhance men's sense of moral

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13 Home Office, *Supporting Families* (London, 1998).

14 See 'Hague 'reneged' in married couples' pledge' in (2001) *The Independent*, 22 February, p. 8.

15 See G. Douglas, 'Marriage, Cohabitation and Parenthood – from Contract to Status' in *Cross Currents: Family Law and Policy in the US and England* (S.N. Katz, J. Eekelaar and M. Maclean (eds)) (Oxford, 2000) at Chapter 10.

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responsibility.[16] Yet the scheme was inflexible and over-ambitious, necessitating extensive revisions in 1995, which in turn created complexities that strained the system almost to the point of breakdown.[17] The New Labour Government instituted a complete review and the Child Support, Pensions and Social Security Act 2000 introduced a new formula for calculating liability, though the time needed to re-programme the relevant mechanisms will delay implementation until April 2002. The basic formula is much simplified: the 'non-resident parent' will pay 15 per cent of net weekly income for one child, 20 per cent for two and 25 per cent for three or more. There is a maximum cut-off point. Reductions are allowed for step-children living with the non-resident parent, thus re-asserting the strength of social obligations as against the primacy of those established by biology, favoured under the original scheme. Other important changes are that no account will now be taken of the income of the parent who has the child,[18] and that the opportunities for 'exemptions' (fine-tuning), for example, to allow the debtor parent to meet housing costs, are much reduced. Furthermore, it will now become possible for a recipient parent who is receiving social security benefit (income support) to keep a proportion of the child support payments without reduction of the benefit. So, while the average payments are likely to fall, the poorest recipients will see some benefit. In general, the strategy is premised on a form of distributive justice that there is a 'basic' proportion of any parent's income which 'should' be allocated to the benefit of that parent's children, (almost) whatever that parent's or the other parent's circumstances. But these circumstances can be ignored only if the payment does not bite too deeply into the debtor-parent's income, for if it does, considerations of commutative justice (fairness between the parents) become relevant, and the costs involved in assessing them defeat the dominant objectives of the scheme of maximizing speed and efficiency in assessing and enforcing the obligation. Hence the scheme can only aim at a kind of 'rough justice', achieving transfers of relatively small payments. But this may be sufficient to establish both a cost-effective operation and also the further goal of encouraging voluntary compliance.

Any person who is receiving state benefits will be required to make an application for child support under the scheme. But what of parents who do not receive such benefits? The original idea was that these people, too, should be forced through the agency, and courts were to be disallowed from making child maintenance orders.

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[16] M. Maclean and J. Eekelaar, 'Child Support: The British Solution' in (1993) 7 *International Journal of Law & the Family,* at p. 205.

[17] For discussions of the problems, see G. Davis, N. Wikeley and R. Young, *Child Support in Action* (Oxford, 1998); J. Eekelaar, 'Child Support as Distributive and Commutative Justice' in *Child Support: The Next Frontier* (J. Thomas Oldham and M.S. Melli (eds)) (University of Michigan, 2000) at p. 151; M. Maclean, 'Access to Justice in Family Matters in Post-War Britain' in *Cross Currents: Family Law and Policy in the US and England* (S.N. Katz, J. Eekelaar and M. Maclean (eds)) (Oxford, 2000) at Chapter 24.

[18] This is well-justified on both administrative grounds and in principle: see N. Wikeley, 'Child Support – The New Formula, Part 1' in (2000) 30 *Family Law,* at p. 820.

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However, the previous Government allowed courts to continue to make orders which incorporated an *agreement* between the parents about child maintenance. In fact, most separating parents make such agreements which are incorporated into Consent Orders, and where that happens, the statutory agency is excluded. However, when the revised scheme takes effect, while courts may continue to make Consent Orders, it will become possible for either parent to go to the agency *after a year has passed since making the Consent Order*, and the agency's assessment can replace the one originally agreed. This looks as if it could inject new uncertainty into the settlement process, but in fact it is likely that it will simply serve to ensure that the original agreements are based on the principles of the agency assessment. Other aspects of the settlement can be framed to ensure that the whole basis of the agreement is not subsequently undermined by an agency application. Nevertheless, the effects of this change (which will only be known some time after April 2003) will need to be closely observed.[19]

D. Property Distribution and Financial Provision after Divorce: Law Reform through the Courts?

The child support scheme applies to all parents, married or not, but is confined to extracting income payments for the benefit of children. It does not cover transfers designed to meet the needs of adults, even if they are the parents of a common child. To make claims on that basis, it is necessary that the couple should have been married,[20] for if they divorce, the courts have jurisdiction to make maintenance orders and allocate any of their joint *or independently owned* property between them. This jurisdiction has been conferred on the courts by legislation, currently the Matrimonial Causes Act 1973, which commands the courts to give 'first consideration' to the interests of any child of the marriage who is under eighteen, and take into account a wide range of factors (like the age of the parties, the length of the marriage and their contributions to the marriage), but does not give any guidance as to *the manner* in which these factors should be taken into account.

Despite this lack of guidance, the basis upon which the discretionary jurisdiction

[19] See N. Wikeley, 'Private Cases and the Child Support Agency' in (2001) 31 *Family Law*, at p. 35.

[20] There seems little immediate prospect of this jurisdiction being extended to non-marital partners, whether heterosexual or homosexual, although for a number of years the Law Commission (a statutory agency charged with keeping the law under review) has been considering whether to make recommendations as to how the law should deal with problems that arise between 'homesharers'. Concerns about media reaction to any proposals that might seem to 'undermine' marriage may be among the reasons why the Commission has been so reluctant to make any.

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is exercised had stabilized sufficiently that in most low to moderate income cases, what the courts would do in the case of a dispute was sufficiently settled that about 95 per cent of cases were settled by consent, often (though not always) after negotiation between lawyers.[21] The general objective was 'needs-based': the idea was to try to ascertain the 'reasonable requirements' of each party, and to ensure, if at all possible, that the parent with the children continued to live in the home, and also that the housing needs of both parties were adequately protected. In most cases the issues turned on practicalities: making the most of scarce resources.[22] However, in those cases where assets remained unallocated after the parties' 'reasonable requirements' were met, and especially if one of the parties had accumulated wealth through a business enterprise, the law became uncertain, much depending on the way individual judges evaluated the 'contributions' made by each party to the marriage. In general, judges were unwilling to allocate to a wife assets which the husband has accumulated through his business endeavours unless she had contributed directly towards that enterprise. Two cases in the 1990s showed that wives of wealthy husbands were likely to receive only a small proportion of the total value of the combined assets: Mrs Dart received UKP9 million from a total pool of some UKP400 million, and Lady Conran received some UKP10 million from a pool of UKP40 million.[23] Any 'entitlement' they may have earned by virtue of contributing to the family fortunes by performing the role of a 'wife' was constrained by an assessment of their 'reasonable requirements'. However, in *White v. White*[24] the House of Lords re-oriented the way the courts should go about deciding how to divide such assets. The guiding principle was to avoid treating the contributions to the family made by men and women unequally. From now on, courts were to expressly justify why the total assets should not be divided equally. This decisively shifts the underlying rationale from one based on assessing needs ('reasonable requirements') to one based on 'entitlement'; the entitlement arising out of contributions to the marriage, and not just to the acquisition of specific assets. However, despite the apparent clarity of this shift, the leading judgement of Lord Nicholls immediately clouds it in mystery; first, by stating that this did not mean that there was now a 'presumption' of equal division, or even that equal division should be a 'starting point'. Furthermore, he thought that *un*equal division would be the more common outcome. This is because reasons could presumably be given in most cases for departing from equality, though Lord Nicholls does not state what reasons

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[21] For a general review, see *Eekelaar*, 'Post-Divorce Financial Obligations' in *Cross Currents: Family Law and Policy in the US and England* (S.N. Katz, J. Eekelaar and M. Maclean (eds)) (Oxford, 2000) at Chapter 18.

[22] For an account of the practices of solicitors in this regard, see J. Eekelaar, M. Maclean and S. Beinart, *supra* note 2.

[23] *Dart v. Dart* [1996] 2 FLR 286; *Conran v. Conran* [1997] 2 FLR 615.

[24] [2001] 1 All ER 1. See P. Duckworth and D. Hodson, 'White v. White – Bringing Section 25 back to the People' in (2001) 31 *Family Law*, at p. 24; J. Eekelaar, 'Back to Basics and Forward into the Unknown' in (2001) 31 *Family Law*, at p. 30;

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these may be. Presumably they relate to the factors which courts are already obliged[25] to 'take into account' when exercising their discretion (such as age of the parties, length of the marriage, and so on), but no guidance is given as to how these factors are to be applied. So the matter is thrown open once again. This immediately caused much uncertainty among practitioners as to how to negotiate settlements, especially in the case of wealthy clients, and even what to do about agreements which had been concluded before the decision was announced, but not yet implemented. In 1998, the Government, through the Lord Chancellor's Department, had recommended that the law should be amended to give better guidance.[26] The law, it was suggested, should state the objective as being to 'do that which is fair and reasonable between the parties and any child of the family', and go on to state that, in doing this, the court would seek to achieve the following aims:

1. First, to promote the welfare of any child of the family ... by meeting the housing needs of any children and the primary carer, and of the secondary carer ...;
2. Second, the court would take into account the existence and content of any written agreement about financial arrangements, reached before or during marriage, which has not been enforced ...;[27]
3. Third, having dealt with the above the court would then divide any surplus so as to achieve a fair result, recognizing that fairness will generally require the value of the assets to be divided equally between the parties;
4. Fourth, the court would try to terminate financial relationships between the parties at the earliest date practicable.

By 2001, none of these suggestions had been taken further forward, despite consideration of the issues by an Advisory Committee to the Lord Chancellor. The decision in *White* has injected urgency into the matter. So has the fact that, as from December 2000, the courts for the first time acquired the power to split pensions when dealing with assets on divorce. The question of whether the value of pensions should be part of a divorce settlement had become increasingly debated during the 1990s. Previously, they were not much taken into account, largely because courts had no power to make orders which were binding on pension companies. At most, courts (or negotiators) would compensate a divorced spouse for the loss of expectation in sharing in the other spouse's pension benefits by awarding her a larger share in other available assets. In 1995 the courts acquired the power to make an 'earmarking' order against a pension company which took effect only when the pension became

[25] Matrimonial Causes Act 1973 s. 25.
[26] Home Office, *supra* note 13, at p. 38. Although the document was published by the Home Office, these sections were contributed by the Lord Chancellor's Department.
[27] The government were also suggesting that such agreements should be legally binding, but not where any child had been born into the marriage, or where various safeguards had not been satisfied: Home Office, *supra* note 13, at p. 33.

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payable, and required the company to pay a proportion of the pension income to the pensioner's former spouse.[28] But this has proved unpopular, since at the time of divorce it is often difficult to know what the parties' circumstances will be when the pension becomes available. Now, under the Welfare Reform and Pensions Act 1999, the court can evaluate the 'cash equivalent' of the pension at the time of divorce and order a share of this to be applied to the benefit of the pension-holder's former spouse. But this can only take the form of a new or additional pension, not of a straight cash payment. Nor does the Act state *in what proportions* the cash equivalent should be allocated between the spouses. That depends on the general principles of asset re-distribution which, as we have just seen, have been rendered uncertain after the decision in *White*. The process of making them more certain might be left to the chance development of case law. This, however, is likely to be slow, inconsistent and expensive for divorcing people. It is therefore arguable that it would be better to use legislation, or possibly some formal mode of judicial statement made in the context of consolidated appeals, as occurred recently in the case of domestic violence.[29]

E. Adoption: Reform from the Top

An impression was certainly generated over the last few years that 'adoption is in crisis'.[30] This was tied to a perception (not actually substantiated) that social workers were obstructing adoption placements because of 'political correctness', disapproving of trans-racial placements or the placement of children with adults who were considered 'too old' or 'too fat'. Behind this lay a generalized fear that a large number of children were being brought up in local authority residential homes who were a burden on public funds, and posed a risk to social order when they grew up. It is certainly true that the numbers of children adopted have fallen dramatically since the 1960s. But the fall has been almost entirely confined to the adoption of babies: there were only 195 babies adopted in 1998 compared to 12,641 in 1968.[31] However,

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28 Pensions Act 1995.

29 *Re L, re V, re M and re H* [2000] 2 FLR 334 where the Court took the opportunity of dealing with a number of appeals *together* to consider a recent report of experts on how the issue of contact (visitation) should be handled in cases of domestic violence, and issued general guidance on the matter.

30 See, for example (1999) *The Independent*, 4 March, giving relative percentages of children adopted out of state care between local authorities in an attempt to 'shame' those who were doing 'badly', and 13 April 2000, saying Members of Parliament were demanding 'hit squads' to take over adoption services which were not placing a sufficient number of children for adoption.

31 See *Lowe*, 'English Adoption Law: Past, Present and Future' in *Cross Currents: Family Law and Policy in the US and England* (S.N. Katz, J. Eekelaar and M. Maclean (eds)) (Oxford, 2000) at Chapter 14.

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the numbers of older children who were adopted 'out of care' have remained relatively steady over the same period (around 2,000 a year); indeed, they rose from 1,900 in 1997 to 2,900 in 1999. Nevertheless this number (an average of about 4 per cent of all children being 'looked after' by local authorities), has been deemed too low, and crude statistics showed wide variations in the extent to which local authorities moved children 'out of care' into adoption. Therefore in February 2000 the Prime Minister required the Performance and Innovation Unit of the Cabinet Office to review the whole position. The Unit produced a Consultation paper in July 2000,[32] and the Department of Health published a White Paper in December 2000.[33] Seldom can a complex area of family and social law reform have been investigated so rapidly, displaying the imprint of Prime Ministerial drive. Yet, perhaps for the same reason, the results are somewhat opaque.

The White Paper seeks, first, to speed up the whole adoption process. New National Standards should require a 'plan for permanence' (that is, long-term care) to be made within six months of the child being 'looked after' by a local authority, and if the method of achieving permanence is adoption, an adoptive family should have been found within a further six months. This will involve extensive recruitment of adopters, which it is hoped will be assisted by a new national Adoption Register of approved families. The White Paper says assessment of potential adopters needs to assure the safety of the child and the adopters' ability to meet its needs, but adds that 'it should not be judgmental in its consideration of potential adopters'[34] and that 'people should not be automatically excluded from adoption on grounds of age, health or other factors, except in the case of certain criminal convictions'.[35] Perhaps reflecting political sensitivities, the document does not mention the 'judgmental' nature of the current 'automatic' prohibition against joint adoption by *unmarried* partners. Court proceedings are also to be speeded up through expansion of the number of specialist judges, concentration of adoption applications in specialist adoption centres, and by piloting schemes for increased use of judicial case management.[36] An additional mode of achieving permanence is to be introduced where adoption is thought unsuitable, which is provisionally called 'special guardianship'.[37] This seems to be like the idea of 'custodianship' enacted, but never implemented, in the Children Act 1975. The White Paper does not, however, tackle the issue of whether the present *consequences* of adoption, which assume the complete legal severance of the child from its birth family, are suitable in modern

[32] Performance and Innovation Unit, 'Adoption: the Prime Minister's Review' (PIU Report, London, July 2000).
[33] Department of Health, *Adoption: A New Approach* (London, 2000) December (hereafter, White Paper).
[34] Ibid. para 6.18.
[35] Ibid. para 6.22; see also para 2.16.
[36] Ibid. paras 8.8 and 8.11.
[37] Ibid. paras. 5.8–10.

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conditions,[38] despite its recognition that 'a child's needs to maintain links to their birth family including parents, grandparents, brothers, sisters and other significant people should always be considered'.[39] Similarly, the White Paper fails to address directly the question of the test to be applied if a parent refuses to agree to the child's adoption, even if others think adoption would be best for the child. The present test, (which includes asking whether the parent is withholding consent 'unreasonably') is ambiguous and unsatisfactory, but probably does not mean that adoption could be forced through *merely* on the ground that a court thinks that adoption is in the child's best interests. The Children Act 1989 also was carefully constructed to make sure that the state could not sever the parent/child relationship against the parent's wishes unless there was evidence that the child was suffering, or at risk of suffering, 'significant harm'. Yet, because in *other* respects the Children Act 1989 makes the child's welfare the court's 'paramount consideration', it is sometimes thought that this should be the test for adoption, too. Perhaps it should, but if so the fundamental strategy of the Children Act 1989, of confining the forcible intervention by the state in the parent/child relationship to high-risk situations, will be breached. The White Paper at one point recognizes that 'different approaches must be taken depending on the type of application. In some cases the needs of the children will be paramount and in others they will be taken into account'.[40] Yet it also says that the Government will 'align the Adoption Act 1976 with the Children Act 1989 to make the needs of children paramount in making decisions about their future'.[41]

These ambiguities on specific areas of contention are what might be expected in a government paper primarily concerned with driving a policy forward, but will have to be confronted at some point. As far as action is concerned, the White Paper promises much. A schedule for action to take place during 2001, designed to achieve substantial implementation by the end of the year, is set out in detail.[42] Funding is promised, including the resources necessary to improve the system of post-adoption support, including the payment of financial allowances. The review has not resolved all the problems of modern adoption, and only time will tell whether, in the long-term, children actually benefit as a result or whether this initiative will come to be seen as yet another attempt by the state to reconstruct in its preferred image the

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[38] See N. Lowe, 'English Adoption Law: Past, Present and Future' in *Cross Currents: Family Law and Policy in the US and England* (S.N. Katz, J. Eekelaar and M. Maclean (eds)) (Oxford, 2000) at p. 338: '... it is by no means obvious that *all* connections should be severed and indeed with older children being adopted it makes less sense to do so. This notion of severance should be re-examined and kept to a minimum necessary to ensure the irrevocable permanence of the placement'.

[39] White Paper para 6.43.

[40] Ibid. para 2.11.

[41] Ibid. para 4.14; see also paras 8.26–7.

[42] Ibid. Chapter 9.

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family life of the poor.[43] However, it seems unlikely that people will escape noticing that 'something is being done'.

Finally, the susceptibility of the Government to media publicity was illustrated by a case in January 2001 when a couple, who had been disapproved of as adopters in the UK, succeeded in adopting twins in the USA, using the services of an agency contacted through the internet, and by 'outbidding' potential adopters in America. In response, the Government announced the accelerated implementation of the Adoption (Intercountry Aspects) Act 1999 which deals, among other things, with using British local authorities to arrange foreign adoptions, and the recognition of foreign adoptions.[44]

F. Organizational Change from within the Bureaucracy: the Children and Family Court Advisory and Support Service (CAFCASS)

The Criminal Justice and Court Services Act 2000 contains provisions for the establishment of a new non-governmental agency, the Children and Family Court Advisory and Support Service (CAFCASS). The Service consists of a chairman and no less than ten other members, appointed by the Lord Chancellor, may have a staff and chief executive (approved by the Lord Chancellor) and is to operate under the supervision of the Lord Chancellor.[45] The Act states that, 'in respect of family proceedings', it is 'a function' of the Service to:

> (a) safeguard and promote the welfare of . . . children (in family proceedings), (b) give advice to any court about any application made to it in such proceedings, (c) make provision for the children to be represented in such proceedings, and (d) provide information, advice and other support for children and their families.[46]

This makes clear that the service will be concerned with the representation and welfare of children caught up in 'family proceedings' (that is, broadly, court proceedings of a family nature), though it leaves it open for the Service to assume other functions.[47] Unusually, this enactment was not preceded by a White Paper, and the Government's plans for the Service have been surprisingly inaccessible, in

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[43] See the discussion by Guggenheim on the US Adoption and Safe Families Act 1997 in *Cross Currents: Family Law and Policy in the US and England* (S.N. Katz, J. Eekelaar and M. Maclean (eds)) (Oxford, 2000) at Chapter 25.

[44] (2001) *The Independent*, 22 January, p. 5.

[45] Criminal Justice and Court Services Act 2000, Schedule 2.

[46] Criminal Justice and Courts Act 2000 s. 12 (1).

[47] It is not clear whether such other functions will have to be conferred by statute; ibid. s. 11(1) says the service is to 'exercise the functions conferred on it by virtue of this Act or any other enactment'.

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view of the projected institution of the service in April 2001. However, a 'Vision' document produced by a Lord Chancellor's Department CAFCASS Project Team in June 2000 implies a wider remit, to include promoting and providing 'new and additional services' where 'families in dispute need more support, information and advice from neutral sources about the likely outcomes of their actions'. This does not seem to be necessarily restricted to court-centred issues. However, the main immediate effect of the reform is to bring under the control of the Service existing institutions which have differing roles, and traditions, in respect to the interests of children when they are considered by the courts. These are the guardians *ad litem*, who usually represent the child (through a solicitor) in public law – such as child protection – proceedings, and who are presently drawn from panels managed by local authorities, but are not employed by local authorities; family court welfare officers, who investigate, when a court so instructs, the welfare of children in private law – such as divorce – proceedings, and who are employed by the Probation Service, which falls within the remit of the Home Office; and certain officials of the Official Solicitor's Office a centralized government department with the status of a solicitor and the remit to protect the interests of persons under some incapacity in litigation. The 'Vision' Document sees this amalgamation as providing an opportunity for flexibility, 'the cross-fertilization of good ideas and best practice', and the imposition of 'national standards'. Whether this will be easily achieved remains to be seen.

G. Human Rights: a New Engine for Change?

It is difficult to assess the extent to which the UK's accession to the European Convention on Human Rights and Fundamental Freedoms has affected its family law. Prior to the incorporation of the Convention into domestic law by the Human Rights Act 1998, individuals alleging that their human rights had been infringed needed to apply directly to the Commission and the Court in Strasbourg. In the 1980s some decisions went against the Government, leading to improvement in the right of contact between parents and their children who had been taken into the care of the state,[48] and greater access to local authority records concerning children in their care.[49] More recently, the Court of Human Rights held that the acquittal of a stepfather on a criminal charge for severely beating a 9-year old child with a garden cane failed to protect the child against 'torture or inhuman and degrading treatment'.[50]

The Government's response to this was to suggest that the 'reasonable chastisement' which the common law permits parents to inflict on their children

48 *W, O, B and R v. UK* (1988) 10 EHRR 29.
49 *Gaskin v. UK* (1982) 4 EHRR 293.
50 *A v. UK* (1999) 27 EHRR 611.

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should be more precisely defined.[51] It is not clear whether this controversial (and possibly unworkable) suggestion will be made law.

In other cases, UK litigants have been less successful at the court. There have been a number of cases when transsexuals have challenged the Government's refusal to alter the law under which a person's sexual identity is deemed fixed at birth according to a 'chromosomal' test, and cannot be changed thereafter in the event of gender reassignment surgery. They have all failed,[52] so that in the UK transsexuals do not have the right to marry in their 'new' gender. But human rights jurisprudence on such matters can evolve, and we cannot know how a challenge to the English courts under the Human Rights Act 1998 would be treated. It may also be concerns about human rights implications that have led the Government to indicate that it might be willing to expand the rights of children conceived as a result of artificial insemination, to receive certain information about the sperm donors. At present this right is very restricted. However, it is not intended that the children should be told the identity of the donors. The information would be limited to matters such as ethnic origin, medical history and the place of donation.[53] Possibly, the Human Rights Act 1998 would require wider disclosure on the basis of the 'right to family life'.

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[51] Department of Health, 'Protecting Children: Supporting Parents. A Consultation Paper on the Physical Punishment of Children' (London, 2000).

[52] *Rees v. UK* (1987) 9 EHRR 56; *Cossey v. UK* (1991) 13 EHRR 622; *Sheffield and Horsham v. UK* [1998] FCR 141.

[53] See (2000) *The Independent*, 18 September.

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