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THE AUTONOMY OF THE CITIZEN IN THE CONTEXT OF FAMILY LAW DISPUTES

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I am honoured to have been asked to present this the 7th Conkerton Memorial Lecture in the year that Liverpool celebrates being the European Capital of Culture.

Some of you will already know of the views I have expressed in lectures and articles over the last two years in which I have been endeavouring to bring prominence to what I regard as the fault lines in the system of family justice which we operate on behalf of all of our citizens. Those citizens have expectations of what the system i.e. their fellow citizens, and you and I as lawyers and judges, should provide when they are in need of our help. I have previously argued for greater recognition to be given to those expectations and for more respect to be afforded to the wishes and feelings of the vulnerable caught up in the system. I have argued for more public scrutiny of what we do provided that the vulnerable are protected. I have suggested that more proportionate dispute resolution processes should be designed which wherever possible avoid the costly and damaging adversarial disputes that can otherwise result. I have also argued for a new problem solving approach to be taken by the specialist family judiciary which would necessitate the identification in all proceedings of the key issues of law and fact which require resolution.

I am going to use the opportunity presented by this prestigious lecture to explain why I have argued for these reforms by considering examples of the relationship between individuals, agencies and the State and the manner in which social and welfare decision making is undertaken in England and Wales. I hope to provide a reasoned basis for the proposals I have made and for the case management and procedural rules which we have put into place in the family courts.

I am going to begin by highlighting a theoretical argument which underscores some of the problems we face.

Many if not most academic and theoretical commentators base their juridical analyses and proposals i.e. their theories and the practical applications of the same on the footing that both the state and its citizens are entirely rational. They postulate that for any set of predictable factual circumstances principles of law and practice can be fashioned which when applied will have the consequence of clarity, consistency and certainty. There is also a minority view (at least so far as the Western common and civil law traditions are concerned) which it is asserted achieves the same result namely that decision making should be overtly based upon principles derived from a belief system (e.g. theocratic or quasi theocratic

systems of law or governance). Both positions operate on the basis that human endeavour entails or has the consequence of positive progress.

Both theoretical constructs have a tendency in their application to an ever increasing authoritarian approach to the regulation of personal relationships and the determination of social and welfare questions which in practice has a number of detrimental consequences. The consequences of the prevailing notion that 'the state knows best' may include the following a) the failure to acknowledge that individual actions can be irrational i.e. be lacking in any utilitarian or beneficent rationale but nevertheless not be significantly harmful b) that redressing that aspect of human life inevitably carries with it the risk that the encroachment on individual autonomy by the state or its agencies is disproportionate and tends to remove from the individual citizen and their community the aspects of personal and civic responsibility which are both a worthy substitute and the real precursor models for state intervention, and c) that while tending towards utility and beneficence in theory, state actions in practice are dogmatic, bureaucratic, inflexible and lacking the essential acknowledgement of that element of individual and corporate human existence which is the subjective or emotional component. Furthermore, state actions even when democratically validated may be no more positive or rational than those of an individual. If ever there was an aspect of governance and jurisprudence which should acknowledge these factors, it is family and social welfare law.

For these among other reasons I argue for a family justice model which recognises that there are a myriad of ways of living one's life in company with others which do not need prescription or validation from the state including the courts. Where protection and/or help is needed that should be available through the provision of services close enough to individuals and their community to be able to identify local solutions to problems including self help. The form of tribunal should be more closely matched to the nature and extent or gravity of the key issues and the mechanism of resolution should be re-focussed on problem solving. This should include an emphasis on alternative dispute resolution opportunities for the majority of low risk cases we see which could involve local practitioners whether legal or otherwise and, for example, in an inter-disciplinary forum, the local community, family members and friends. The family court should sponsor and regulate such a process while providing its essential parallel service for the high risk and serious issue cases.

At an international lawyers conference in March of this year I was asked to consider the same problems from the perspective of the state and its citizens being regulated (and arguably over regulated) by international institutions. The aim of that conference was to describe ways of enhancing international access to family, social and welfare justice while trying to provide some consistency across jurisdictions by finding common principles of general application so that the autonomy of the state and its citizens might not be disproportionately interfered with in the process.

We began by discussing the continuing development of international obligations which are freely entered into between states and which affect the rights and interests of citizens. These may provide for directly applicable individual obligations policed by international institutions whether in a regulatory manner or by providing supra national access to justice for state bodies or citizens. Included within these arrangements there are codes of practice or law derived from the state ceding specific principles at the international level which are then available locally i.e. the detail of the operation of the principles is subject to the right to opt in or out by the state and the remedy available to the citizen is in the domestic forum alone. In a wide ranging review of comparative mechanisms of domestic decision making and the effect of international obligations on the same it was suggested that having regard to our experience of '*subsidiarity*' in all its forms, there is a need in the family and social care arena (as distinct from that relating to international trade and competition) for agreed precepts or rules that act as automatic inhibitors if not actual barriers to the

disproportionate interference in the autonomy of both states and individuals by supra national institutions. This is an important recognition of the diverse ways in which societies and communities develop while providing the opportunity to open up access to justice through international co-operation. That has arguably been achieved in the Hague Conference process in relation to international child abduction but, one might suggest, is yet to be achieved at least so far as England and Wales are concerned in our acceptance of developing European Union family and social care instruments.

Positive examples of a proportionate relationship between international institutions and their member states and citizens can also be found in extra-territorial access to justice opportunities that are provided domestically e.g. in the choice of applicable law in many European jurisdictions, the choice of forum and the development of private international law concepts within a state that can have the effect of widening access to justice in a range of circumstances that are becoming increasingly common thereby arguably enhancing the autonomy of the individual within a state. This alternative but very effective means of international access to justice is, I would suggest, one of the more effective developments that best recognises both the autonomy of the state and the autonomy of individuals. Whether one looks at the structure which is the success of Hague or the ability of civil law jurisdictions to implement applicable law opportunities one can see that by the provision internationally of a carefully drafted set of principles – a code – the domestic jurisdictions are enabled to provide an enhanced service without the prescription of an international institution with power to override the domestic court.

An alternative but successful jurisdictional and theoretical model can be found in the way we implement the jurisprudence of the European Court of Human Rights in the domestic context. I would suggest that the existence of that court in its function as final arbiter of the meaning of the principles agreed between the signatory states not only provides access to justice for the individual but is a successful model of proportionate intervention which should likewise commend itself to us all.

These are arguments and examples on a grander scale from which one can draw some conclusions by analogy but it is in the domestic context that I am able to suggest that there are more obvious lessons to be learned as to how we identify and resolve discrete problems of autonomy in relation to the rights and interests of individuals.

In England and Wales the state intervenes in the private and family life of both adults and children in a number of quite distinct ways:

There are 'public law' proceedings where an agency of the state intends to place a child in the public care or under supervision and where the intervention of the state is mandatory and approved by Parliament or through the family courts. The aim is to protect the child. There are equivalent processes for vulnerable adults who are at risk of harm both in the Court of Protection and in the inherent jurisdiction of the High Court.

There are public interest proceedings where an individual is entitled to obtain a change of status in law and/or fact and where the state through the courts provides the mechanism e.g. a decree of divorce, a declaration of legitimacy or of habitual residence etc.

There are private law proceedings between parents and occasionally the child or vulnerable adult where the state voluntarily intervenes in the guise of the court or occasionally a welfare agency and at the request of one or both parties to determine disputes which cannot be resolved by the individuals themselves e.g. residence, contact, healthcare, education and so on.

In each of these areas the state lays down minimum and sometimes enforceable expectations in respect of essentially private relationships e.g. co-habitation, child maintenance, child welfare and residential and nursing care for the incapacitated. In some but not all of the questions that arise in these proceedings the autonomy of adults and young people to make enforceable agreements or to advocate their position is restricted by law or policy considerations, some valid and some arguably less so.

Is there a common thread underpinning these expectations and what we permit our citizens to agree and in what circumstances we permit them to advocate their own interests? Or on a closer analysis should we be developing or explaining the principles which exist in the public domain so that they are susceptible of more scrutiny: whether that be the legal policy imperatives underpinning our decisions or the decisions themselves? For my part I have long advocated and continue to advocate an opening up of the family courts but I equally emphasise that there must be protections for the private interests of the individuals concerned.

I suggest that the time is ripe for an increasing emphasis on autonomy, social responsibility and flexibility of service delivery including in the legal domain to achieve a real benefit for individuals. The state must be prepared to listen to individuals and be seen to do so. That will include allowing them to come to their own agreements more often than we do and providing opportunities to facilitate and enforce the same and more explicit guidelines to protect the vulnerable within our processes so that they can participate on a level playing field.

I will also suggest that there is a model that can be developed from our experience in the international arena whereby local implementation of commonly held principles is the rule with access to the full court for enforcement and interpretation of the principles that it is agreed are commonly held.

To take a few discrete examples of the problems we face:

In matrimonial finance proceedings in England and Wales the factors which the court is mandated to consider in any redistribution of capital and income are no more than relatively self-evident headings. We are all acutely aware that in the last decade the principles of division to be applied to surplus money cases have changed while the statutory factors have remained constant. The emphasis is on fairness by reference to a recognition of the equality of spousal contribution. All other principles are up for grabs and so the effect of a short marriage, the so called 'lettuce leaf' spouse, the inherited family business (especially a farm) or the exceptional contribution of some spouses as entrepreneurs or innovators (or celebrities) cause headline reconsiderations from first principles. The consequence is said to be uncertainty and a significant fracture line between the surplus money cases and the average marital breakdown where belt tightening or worse is the norm.

Although statutory reform is an answer to the problem of uncertainty and lack of clarity which we now experience, more sophisticated or lateral thinking practitioners are looking to the future of pre-nuptial agreements and standard form solutions i.e. pre-formed codes of guidance as solutions upon marital breakdown. Greater recognition of the need for such a problem solving approach is important but equally so is the acknowledgment of the importance of the agreement between the parties – the deal – a contract properly advised upon. There are of course many problems associated with this approach and I do not minimise them e.g. the overbearing and/or abusive partner, the powerful family and the need to make provision for dramatic changes in circumstance. But as Bennett J has recently remarked and the Court of Appeal has positively inclined, a properly informed, detailed and advised agreement with in-built possibilities for the exigencies of life can and should be recognised by the court. That surely is a better reflection of the autonomy of partners to a

marriage contract. They expect the state's protection on dissolution but that can and should be provided by good procedural safeguards and, I would suggest, a new place for precedent guidance (in the sense of model agreements and practices) – almost a matrimonial finance handbook of good practice. The challenge is to write it or more accurately to re-write it. The process of implementing it might then best be provided in the first instance by enforceable arbitration in the manner suggested by Thorpe LJ.

In that context what of cohabitation breakdown? The parties did not want the validation of the state in their quasi marital relationship. Why should they have any access to its processes or be unilaterally required to submit to its processes on breakdown? After all, the welfare and finances of any child are already provided for. For my part I accept there should be a residual jurisdiction to protect a party who is financially and unfairly harmed by the emotional disruption of breakdown but should this not be an exceptional solution? Shouldn't the autonomy of these parties be respected at least to the extent that the state says "if you do not enter into an agreement we will simply split your available 'cohabitation' assets in two". If ever there was an incentive to enter into an agreement that would be it. More elaborate arrangements would no doubt then be developed e.g. pre and post cohabitation agreements.

In private law cases we recognise the autonomy of the adults involved though not always the children. The adults are free to come to agreements about the existence of parental responsibility and its exercise: residence, contact, name change, education and other specific issues relating to their children. They do not need the approval of the court. In cases where disputes arise before the courts there is a voluntary acquiescence of parental responsibility by the adult parties in the jurisdiction of the court. That is the significant intrusion into their autonomy which they voluntarily and hopefully temporarily accept. What of the position of children: the classic exposition of the child's position is set out in *Mabon v Mabon* [2005] EWCA Civ 634 @ [2005] 2 FLR 1011 where it was said by the Court of Appeal:

> "This case provided a timely opportunity to recognise the growing acknowledgment of the autonomy and consequential rights of children both nationally and internationally….
> The courts must, in the case of articulate teenagers, accept that the right to freedom of expression and participation outweighed the paternalistic judgment of welfare….
> It was simply unthinkable to exclude young (men) from knowledge of and participation in legal proceedings that affected them so fundamentally"

The voice of the child is in my judgement insufficiently heard and I have no hesitation in saying that the provisions in England and Wales for obtaining that voice and where appropriate providing for separate representation of the child are resource light and for that reason relatively inadequate. Having regard to the duties imposed on a court, the pendulum should by now have swung more firmly in favour of allowing many children not only a voice as reported on paper, assuming that to be an adequate enquiry into their wishes and feelings on the issues in question in the proceedings, but also party status i.e. a direct voice (be it their own or that of a lawyer, a guardian or a lay advocate) to protect their interests. That is an inroad into the autonomy of their parents, but in my view a necessary acknowledgment of the autonomy of the child as a citizen in their own right. Arguments about both the abusive behaviour of parents and the abusive nature of the process on children who are the subjects of proceedings can and should be heard in every case but absent those considerations on the facts representation should be regarded as the norm.

Again, I would suggest, were the courts system able to provide in children proceedings greater access to less combative and more constructive dispute resolution solutions in the manner already achieved by some family mediation groups and collaborative law practitioners and in the in-court conciliation proposal known as 'Children First', we may by a

greater involvement of the children concerned broker better quality and swifter solutions. Such solutions might even provide the answer to the debate about privacy. Whereas the courts need to be open to scrutiny it is unlikely, I would suggest, that mediation, collaborative law solutions and other ADR opportunities need to be, applying as they will be agreed principles explained in published codes of guidance and practice.

What then of public law proceedings where public care or adoption may be the consequence. We recognise that the voice of the child must be heard and in almost all cases representation by a lawyer and a welfare guardian is provided. This is because the child's ECHR article 8 rights are engaged and there exists in section 31 of the 1989 Act a human rights compliant threshold for intervention. Sadly, in too few of the cases where children have a Gillick competent voice which dissents from the expert welfare advice of the guardian do we see their separate representation. Ask yourself the question: are all of these children consenting to their temporary or permanent removal from the family home? Some of course want and need that step to be taken but others will not. For the same reasons as apply in private law disputes I would suggest that much greater flexibility must be exercised so as to recognise the autonomy of the child who is the subject of proceedings and sometimes also that child's siblings.

The time has surely come for a more sophisticated analysis of the competence of the child concerned precisely because the court is mandated to have regard to the child's wishes and feelings and cannot properly do so without an analysis and determination of the child's understanding which in simple terms is the child's competence having regard to the issues which have arisen. Competence or capacity is an issue specific question and therefore it is fundamental to a judgment on competence that the court has in mind the key issues in the case. One should start with the proposition that the Gillick competent child should be heard and that entails an analysis at the beginning of the proceedings of the key issues to be solved against which competence can be judged and thereby representation provided.

In vulnerable adult cases, we have a much more flexible and appropriate representation and decision making process. The new Mental Capacity Act 2005 implemented only recently in England and Wales provides a threshold for competence which is sophisticated and exclusive in its definition and competence is of course presumed unless proved to the contrary. Lay and professional advocacy and decision making processes are set out both in the statute and in the most comprehensive code of guidance that hitherto has been written for courts in the social welfare arena. That provides for agreements prior to competence being lost which are to be respected (the living will and power of attorney provisions), family and independent advocates and decision makers to avoid the need for the court to be involved and where it is involved the equivalent of both full welfare representation and a full acknowledgment of the expressed views and wishes of the incompetent adult.

This is a Rolls Royce service which I would like to see provided for children. The key to obtaining it was the form of legislative intervention. Parliament provided a permissive jurisdiction with principles which clearly outline the restrictions on state intervention but with the assistance of comprehensive guidance which seeks to avoid the need for proceedings thereby enhancing the autonomy of the individual whether competent or not. We also have the beginning of a recognition in the residual inherent jurisdiction of the High Court as to how to protect competent but overborne and vulnerable adults using similar mechanisms. I am not of course confusing the position of the vulnerable adult whose capacity is presumed unless and until proved otherwise with that of the child whose capacity would need to be proved but I am flagging up the need for a better quality service for children and families in order to achieve better outcomes.

Finally let me take you to one example of the impact of international instruments. You will all know of the emphasis under Brussels II (Rev) of hearing the child in question e.g. where

there is a child abduction application under the Hague Convention but as between European jurisdictions. Although in public law we believe that we should afford a direct voice to a child rather than a mere paper analysis, we have been slow to provide the same voice for a child in abduction cases. Aside from paternalistic attitudes, the rationales for this are the summary nature of the proceedings and the overarching policy of the Convention once habitual residence is established and absent one of the very narrow defences to removal or retention by a parent. We are at odds with our European colleagues in the manner in which we give a voice to the child in these proceedings. The majority practice is at least to see the child if not to join the child as a formal party. In a recent case: *Re C* [2008] EWHC 517 (Fam) I gave judgment in Hague and non-Convention abduction proceedings where I have joined as parties a family of children over the age of 5. I was asked to review the existing authorities on representation for children in these cases and applied what I believe are now clear tests laid down by the House of Lords which are for the first time weighted in favour of the competent child being more involved.

These are of course somewhat disparate examples but I firmly believe that we can identify some conclusions which will help us to develop this area of law and practice. In order to do so we need to answer the following questions:

> What are the general principles susceptible of universal application and which provide the touchstones of fairness and protection?
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> Have we addressed and obtained a balance between the autonomy of the individual and the state both as respects those principles and our legal practices and procedures?
>
> In so far as we strive to improve both access to justice and the consistent application of common principles, have we provided an opportunity both for the individual adult and for the person who is vulnerable and in need of the state's protection to obtain access to justice in the jurisdiction of their choice?
>
> Have we developed a theory of minimum intervention but with comprehensive good practice guidance that fosters the independence and responsibility of the citizen while protecting our less fortunate colleagues?
>
> Have we provided proportionate and alternative dispute resolution mechanisms?
>
> Can supra national institutions help (and I would argue that they can)?
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> If so, should they not be constrained in some way so that in the absence of exceptional circumstances the right of access for the application of common principles is in a domestic forum but in accordance with a developing code which can be interpreted internationally and in default can be enforced against the state in an international forum of last resort?

Let me attempt to piece together some conclusions from the pot pouri of not necessarily related concepts which we have discussed:

1. At the beginning of all family proceedings a decision should be taken about whether anything needs to be removed from the public domain by the restriction of publication, identity, whereabouts or access to the court. Otherwise the process and the judgment of the court should be subject to public scrutiny.

2. At the beginning of all family proceedings the key issues to be decided should be identified so that disproportionate enquiry and intervention are prevented.

3. At the beginning of all children and vulnerable adult proceedings decisions should be made as to how the subject's wishes and feelings on the key issues identified are to be received. It should be a presumption that the child who is Gillick competent in relation to a key issue should be provided with representation or an effective means of exercising their autonomy, for example by making representations to the judge.

4. There should be a competence enquiry alongside an early wishes and feelings enquiry – whether by a lawyer or a guardian or another form of advocate.

5. Such enquiries should take place within a process which places greater emphasis on alternative and more proportionate dispute resolution mechanisms.

6. New dispute resolution mechanisms need strong ground rules which can best be provided as they have been in the field of mental incapacity by codes of practice or guidance.

7. Where the ground rules have been complied with the court should make available its enforcement powers to give effect to the agreements reached.

8. The structure of the ground rules and the codes of practice and guidance and their inter-relationship with the courts and more formal court proceedings should be defined. It is not statutory change that we need but rather a Family Courts Handbook which describes the services we should provide in association with our existing courts and the principles upon which they operate.

9. If we do not consider these options we will be in danger of failing to meet the expectations of our clients and aside from that we will allow our existing resources to be overwhelmed.

A change in our mindset about the provision of family justice which enhances the role of the citizen and their local community would in my judgement have the corollary that when the family court as an agency of the state has to act to protect the vulnerable its decisions are regarded as significant (i.e. worthy of recognition), enforcement, comment and criticism in the public domain. As any jurist will tell you these are after all only some of the basics for the validation of a justice system.

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30.10.08