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FUTURE DIMENSIONS IN FAMILY LAW

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A survey

To look at the future is turning to the past. It is from that vantage point that one can best measure both the importance and the direction of the changes which occurred and the trends they carry.

The law does not operate in a vacuum : it is essentially tributory of social change, particularly so in the field of family law, which is so closely linked to the everyday way of life of people.

While all of us -- who have dealt in family matters be it as lawyers, judges, professors, some of us for a number of years already -- are aware of the profound and significant change which occurred in the family, particularly within the last decade, it may not be without interest to draw briefly a large picture of those happenings in terms of both social change and social policy as implemented in the law relating to the family.

One must go back to what was originally considered the traditional family, as supported by legislation, to realize the road to what is now accepted as the modern family, with its legal consequences.

Traditionally shaped in the values of immemorial times, the family up to recent times was a close-knit, although extended, unit devoted to the common interest of its members, as a rule stable and of lifelong duration. Marie-Thérèse MEULDERS-KLEIN[1] has described the traditional family in a few words:

> Que ce soit dans le cadre d'une société sans classe, simple et homogène, ou dans le cadre plus vaste et plus complexe d'une société de classes, antique, féodale ou même bourgeoise, la famille traditionnelle postule la soumission à des valeurs ou intérêts communs et ne tolère guère que l'union conjugale et la stabilité familiale soient livrées aux tribulations de la subjectivité individuelle.

Conversely, the modern family, nuclear in dimension and more and more of short duration, based on the free will of the parties, is oriented towards equality, freedom of its partners in the pursuit of individual happiness, with the underlying assumption of the neutrality, if not the support, of the modern states.

While it was said that such a change in the concept of Family can be traced back to the post-industrial an economic revolution of the last century[2], one can probably look back as far as the Seventeenth Century, perhaps earlier, for the philosophical trends enhancing equality, individual freedom, and personal power of the individual prevailing over that of the State[3]. The full impact of this change was to be felt with the advent of the "affluent society", an era which the Western civilizations have now entered into.

The emergence of this attractive philosophical turn together with scientific discoveries, economic prosperity, and mass access to formal education, brought about its sequels long, in fact, before the law was to meet them. To name just a few of these new realities: the coming of married women into the labour force (facilitated by contraception and abortion which severely reduced the birthrate), cohabitation and desertion in the pursuit of more rewarding personal relationships (again made easier by the new freedom of the partners in marriage and their economic independence, extended studies, the progressive shift in moral values, the pluralism of society, urbanisation, as well as the advent of the social welfare state). The traditional family was profoundly shaken. So was to be legislation relating to the family.

Oriented towards the protection of secular values as ingrained in the social concept of the family of its times, family law did then promote such principles as the head of the community, the sanctity of marriage, the submission of the wife and the "till death do us part". Faced with a different set of values, the law gradually looked for alternatives which, while preserving marriage as a privileged institution, would provide relief for those, in greater number every day, who were unwilling to pay the price.

Both in substantive law and in conflict resolution approaches were these alternatives considered and, to a certain degree, implemented.

The most advanced western societies, the U.S.A. and Scandinavia - particularly Sweden, have tended to limit the conditions to enter into marriage to the very essentials while at the same time facilitating a free opting-out, to the point where marriage itself tends to become a "shadow institution", in the words of Professor Glendon[4], in a way not so dissimilar to de facto marriage. This becomes more evident when one considers the pecuniary effects attributed to both forms of life in common, as

they tend to be similar[5]. Granting the illegitimate child the same status as the child of marriage as is now the trend, is another step towards minimizing the distinction between marriage and de facto marriage, independently from the justified concern towards the best interest of children[6].

The evolution of marriage property laws is aimed at achieving a degree of equality between spouses. The newly acquired economic independence of each partner within marriage has brought about reforms in divorce laws which tend to do away with maintenance as a corollary measure to divorce[7].

Inheritance laws, as well as those relating to torts, have moved towards the recognition of de facto marriage, even to the detriment of the legitimate spouse[8].

Few areas are left which remain an incentive to prefer marriage to another form of life in common, while the neutrality attitude of the state in this field seems to invite people to freely choose other alternatives altogether as rewarding or almost so. Social legislation bluntly treat

marriage and long-term cohabitation on the same footing. Fiscal laws, though often incoherent, do not always privilege the institution of marriage [9]. As so vividly put by Professor Brenda Hoggett [10]:

> ... The legal system has clearly abandoned one set of moral principles in favor of a pair of social goals which have proved incompatible. Family law no longer makes any attempt to buttress the stability of marriage or any other union. It has adopted principles for the protection of children and dependent spouses which could be made equally applicable to the unmarried. In such circumstances, the piecemeal erosion of the distinction between marriage and non-marital cohabitation may be expected to continue.
>
> Logically, we have already reached a point at which, rather than discussing which remedies should now be extended to the unmarried, we should be considering whether the legal institution of marriage continues to serve any useful purposes.

Not only are those changes dramatically evident in substantive law, the process of conflict resolution of family disputes has been undergoing a steady revamping.

On the one hand, "post-office divorces" are a fact in England (a special procedure: no court appearance by the couple), mass divorces are granted in the U.S.A., divorce by mutual consent is no longer an issue [11].

On the other hand, recognizing and stressing the human and social aspects of family breakdown, as opposed to its legal implications, structures have been modified to cope with this new attitude. Behavioural sciences have infiltrated the once preserved field of family law.

The adversary system has become anathema. Experts' opinion is more and more frequently relied upon, particularly in matters of custody and division of property. Criteria for divorce having been relaxed, judges more or less grant divorces as a matter of public interest when no chance of reconciliation appears, especially since 80% or more divorces go uncontested. Litigation has shifted from divorce grounds to accessory measures, particularly so in the field of matrimonial property. Conciliation of issues, separation agreements are in fashion. Judges assume a new role in assessing conciliation possibilities and in the distribution of assets between spouses.

Structures are being modified. The establishment of family courts, or specialized divisions of existing courts, with their cohort of social science expertise, tend to dilute judicial power, once supreme, by providing

larger scopes of investigation and in so doing, in fact associating others to the decisional process. Sooner or later may emerge the notion that divorce either is a private affair in which the state has no business or must be dealt with in an administrative fashion.

That is where we stand now. Where do we go from here?

I have no crystal ball, and prophecies tend to be not only detestable but mostly inaccurate. Even if one may detect a return to conservatism, politically at least, as well as a renewed interest towards more conservative sets of moral values, one can hardly believe that the new trend towards equality, independence, neutrality and the pursuit of individual happiness is reversible, at least in a forseeable future.

Statistics are eloquent. It is estimated that 44% of marriages will end up in divorce [12]. The most recent U.S. statistics indicate that 4.5% more divorces

were granted in the U.S. in 1979 (1.18 million divorces). In Canada, the latest study made by Statistics Canada [13] indicates that the 70's brought significant changes in the pattern of marriages and divorces. Now, more than one in three marriages end in divorce, and fewer Canadians are getting married. The rate of divorces increased to 34% of all marriages, from 25% at the outset of the 70's. In England, one third of marriages end in divorce, which is a five-fold increase of the rate per 1,000 marriages [14].

Cohabitation, particularly among the younger generation, remains a viable alternative for a number of couples. It is estimated that 8 to 10 million couples have chosen that way of life in the U.S. [15], while 15 to 16% do so in Sweden [16].

The present legislation tends to recognize de facto marriage [17], and what legislation does not accomplish, case law does [18]. There is no sign of a move away from that direction. (Quebec's new Family Code, however, does not recognize de facto marriages, while social legislation does.)

Almost all the Canadian provinces, following the

trend in England and the U.S., have adopted, in the field of matrimonial property, new sets of rules tending to a fair and equitable distribution of assets between spouses(19).

Maintenance is on the way out, except maybe as a transitory measure and for the disabled housewife(20). The proposed Family Code of Quebec is very significant in that respect (Bill 89 assented to December 19, 1981, partly in force since April 2, 1981). The following proposed articles (not yet in force because of constitutional restrictions as regards divorce) are however a clear indication of that trend:

> 560. Divorce extinguishes the right which the spouses had to claim support unless, on a motion, the court, in granting a divorce, orders one of the spouses to pay support to the other or reserves the right to claim support.
>
> 561. The court may reserve the right to claim support only if, on granting the divorce, it is unable to rule equitably as to such right, either because one spouse is prevented by exceptional circumstances from availing himself of his right, or because it has been established that the existing state of the needs and means of the spouses is likely to change in the near future.
>
> In no case may the right to claim support be reserved for a period of over two years.
>
> 562. If the court grants support to a spouse, it is payable as a pension.

The court may replace or complete the alimentary pension by a fixed sum payable immediately or by instalments over a period of not more than three years.

563. The order awarding support may be reviewed by the court whenever new facts so justify.

However, no order awarding a fixed sum may be reviewed even in the case of unforeseen change in the means or needs of the parties.

564. Except in the case of fraud, the right of a spouse to claim support is extinguished pleno jure at the expiry of the period during which the right has been reserved if it has not been exercised.

565. Where the court has awarded support or reserved the right to claim support, it may at all times after divorce declare the right to support extinguished.

The welfare state has moved in particularly as regards maintenance and the enforcement of support orders. One author has predicted that by the year 2000 maintenance will fall solely on the state. Already, there is some suggestion that parental and spousal alimentary obligations should be the prime responsibility of the state given the short duration of marriage, the rate of remarriage, and the forming of new relationships outside marriage.

All this implies a shift in litigation from divorce grounds and maintenance disputes to matrimonial property issues, a trend which is already apparent when one looks

at the reported family law cases. At the same time, given the liberalism with which cohabitation and remarriage are regarded, one can visualize the new emphasis on the newly-formed family units as incidental to maintenance and custody: as between the first family and a second family, whose entitlement should take precedence? Linked closely to that question is the responsibility of the state.

In the U.S., the primary questions in 1981 have concerned the distribution of property, such as the increased willingness of the courts to recognize education as a distributable asset at the time of divorce, pension rights, "good will" as an asset, and even future income of the debtor spouse as a "property" to be shared[21]. So in England[22] where the bank was unable to obtain possession of the home because the wife, who had contributed to the purchase price, was held to have an overriding interest protected by her occupation of the property, which bound the bank although it had no notice of it. This question seems to be treated in the same fashion whether the couple is married or not[23].

Judges may, in the future, have to deal more and more with mortgage creditors and mistresses,

oriental rugs[24] and business ventures in disputes involving the distribution of family assets. Cohabiting partners may make more frequent use of the court system to settle their property disputes. Where there exists no legislative provisions for cohabitants, this may imply a greater amount of judicial discretion. In my view, a new era of judicial discretion is also opening, given the equitable distribution rules. At the same time, one can predict, given the complexity and multiplicity of these new situations, a need for greater knowledge, expertise, and specialization on the part of judges.

In the field of child custody, the recognition of coequal rights of both parents, coupled with the increasing number of women in the working force and the assertion of fathers' rights, may still complicate the delicate task of the judge in awarding custody.

In that area, perhaps more than in any other, there is an increasing use of independent social workers, psychologists, psychiatrists, for mediation purposes, due to a growing awareness of the shortcomings of the traditional court system in the resolution of custody matters. Consent to assessments outside the courts,

which might either be binding on spouses or assist the court in the determination of custody issues, is more and more frequently used.

On the other hand, courts themselves have moved from traditional assumptions which once barred one parent from being awarded custody: interspousal misconduct such as adultery and desertion, homosexuality, are now regarded in a different light, just as is the "tender years" doctrine. The continuity and quality of the relationship between the child and the custodial parent, biological or psychological, have gained in importance (25). The rights of access of the non-custodial parent have been challenged (26).

The issue of joint custody is one of continuing concern. Maintenance for children, if separated from spousal maintenance, may become less litigious while raising more questions as to the duty of maintenance over 16 years of age, since continuing education remains a trend. With new and successive family units constantly forming, should a child be entitled to claim support from the biological parent as well as any person standing "in loco parentis"? If so, how are these "parental" obligations to be assessed?

These are questions that are beginning to be asked.

Children's independent representation in parental disputes is the topic of the day. Judges may well be called upon to break new grounds in that direction, particularly in view of the legislative inaction(27). The advent of specialized courts, unified family courts, or special divisions of existing courts calls for more specialization on the part of judges(28):

> Mais, quelle que soit la juridiction investie et l'étendue de ses compétences, l'idée de spécialisation demeure prépondérante, en raison même de la spécificité des problèmes familiaux et de l'office du juge en ces matières : spécialisation des chambres, impliquant un regroupement des compétences; spécialisation des magistrats, impliquant une meilleure formation en sciences humaines et en techniques d'entretien et l'adjonction de services auxiliaires pluridisciplinaires renforcés; spécialisation des procédures, plus simples, plus rapides, plus compréhensibles et moins coûteuses, permettant le dialogue et la collaboration active des parties dans la recherche de solutions négociées, sans passion ni marchandages.

Changes in the adjudication are foreseeable since those specialized courts tend to minimize the effects of the adversary system to put more emphasis on the conciliation of issues, get input from the behavioral sciences, make more frequent use of expert advice. Some will talk of the dilution of the court's adjudicating function.

This, of course, is in line with the increasing dissatisfaction concerning the adversary process in that particular area of the law[29]. Mediation of issues being viewed more and more as the only viable alternative, it implies a less active role on the part of the judge in the resolution of conflicts, as regards both grounds for divorce and corollary measures, a role to be assumed by trained negociators and mediators[30]. In that perspective, the judge remains the final arbitrator resorted to only in cases where other means of settlement have failed. His function may then become of a more judicial nature and his caseload diminish considerably.

However, it is not altogether certain that a more dramatic shift in the court process in matters of family disputes shall not see the day within the foreseeable future. Alternatives to formal court process are already examined in the light of the criticism of the court system and particularly of the adversary process, the sheer overburden on the court system today, the cost of family litigation, the advent of "post-office divorce" or

"rubber-stamping" of divorce decrees dealt with by registrars, the introduction of expertise, and the increased popular pressure for "more humane courts" where the parties can be helped to settle their differences in an informal atmosphere. Participation in the decision-making process, in labour relations as well as in family relations, is "à la mode". It seems to me almost inevitable that sooner or later special family courts will be looked at in the light of administrative tribunals. One first step in that direction has already been made in the field of the enforcement of support orders, which is taken over by the state, albeit still within the court system[31], and the trend seems definitely set in that direction[32].

I venture to suggest at the outset that not only we, Canadians, are over-judicialized in the field of family law, but we have dramatically failed to respond to the shifting social attitudes and challenges of the twentieth century in the resolution of family conflicts.

Divorce is a reality. Increasing cohabitation as an alternative to marriage is a fact. The breakdown of interpersonal relationships is often a tragedy. A human failure first, a legal problem only when the parties

fail to reach a satisfactory settlement of accessory issues, particularly as regards alimony, matrimonial property and custody. The traditional function of the courts has been to decide legal issues. In the field of family law, both issues, human and legal, intertwine so closely that one cannot be dissociated from the other. I purport to say that the traditional court system is ill-equipped to deal with the first and should only deal with the second, albeit not in a vacuum.

A critical view of the courts

For the purpose of this paper, I do not intend to discuss the substantive aspects of family law. In the face of the inertia of the legislatures -- although less so in the last few years -- the courts have had to assume the leadership to ensure the relevance of the law to the new social realities(33). Courts and legislature, in family law more than in any other area of the law, have become "partners in the enterprise of lawmaking"(34). This, I submit, is a proper function which the courts have faithfully performed(35). Courts performing essentially a basic conflict resolution service to the community, I propose to examine this role critically in

the light of family disputes, and to look at some alternatives to the court system.

Courts are primarily adjudicative, authoritative and adversial. By popular standards -- any settlement is better than court litigation -- adjudication can be said to be a sign of failure of other conflict resolution techniques. One readily admits however, that adjudication is the only alternative in certain matters such as criminal law when the guilt or innocence of a person accused of a serious crime is at stake. Such is not the case in family law. According to the Law Reform of Canada(36):

> In our opinion, the divorce courts are not equipped to determine questions of guilt or innocence nor can they ascertain the extent to which each spouse may have contributed to the breakdown of the marriage. Responsibility for the breakdown of the marriage and inter-spousal misconduct should, therefore, be expressly excluded from consideration in any judicial determination of the right to inter-spousal maintenance. Only the needs and resources of the respective parties should be considered.

Enforceability of decisions is another function of the courts. When it is realized that 75% of the court orders relating to maintenance in particular are not enforced, and that in custody matters, enforcement can only be for a very limited time (due to changes in the lifestyles of

the parents, mobility, the age of children, their wishes, etc.), one questions the effectiveness of the court system in that connection. According to the Law Reform Commission of Canada[37]:

> It is well known that many court orders regulating family matters, and particularly orders for maintenance, go unheeded. It is estimated that some degree of default with respect to obligations arising under maintenance orders occurs in as many as 75 per cent of all orders. Such a high rate of default results in considerable public expenditures by way of welfare assistance.
>
> Lawyers are frequently unable or unwilling to institute enforcement proceedings, particularly where difficulties are encountered in tracing the whereabouts of the missing spouse or parent or where the legitimate cost of legal services is disproportionate to the amount that will be realized by enforcement of a maintenance order. In most jurisdictions, the courts themselves assume no primary responsibility for ensuring that their orders are complied with. Accordingly, for all practical purposes, a court order is often worth no more than the paper is it written on.

The adversary process provides a set of rules designed to ensure that trials run smoothly and guarantee due process of law to all parties involved. It stems from the passive role assigned to the trier of fact where the issues are defined by the parties. One cannot underestimate the great importance of the adversary system in the search for truth. Cross-examination often provides the only effective way to achieve that goal. In the field of family law, however, adversary procedures have been depreciated [38].

Given this brief critical review, and the sheer overburden of the court system today, we cannot escape asking whether matrimonial conflicts could be dealt with otherwise in a more satisfactory way. What are the alternatives?

The alternatives

The choice of alternatives to the traditional court process in that particular field of the law calls for a number of assumptions and a definition of objectives.

The first of these assumptions is obviously that the traditional court system does not provide a proper forum for the resolution of family conflicts. In that regard, taking everything into account, it can validly be assumed that family conflicts should not be dealt with within any form of decision-making process, but rather be left entirely to the decision of the parties involved. Marriage, after all, is a private affair, a consensual act that requires no interference by the state other than setting minimal norms to ensure propre social behavior. This line of thought suggests that the impersonal power of the state prevents people rather than helps them to utilize their personal

capability for settling their differences. By continually providing crutches, one can hardly hope to see the patient walk normally.

This ultimate goal, although possibly valid in the long run, takes for granted that all those involved in this emotional struggle of marriage breakdown are healthy enough to walk by themselves. Is there not a more realistic and middle-course approach where the healthy could be left to themselves and the sick helped to recover?

Defining objectives is not only relevant but essential in the choice of alternatives to court conflict resolution process. There are in fact a number of possible means to achieve conflict resolution outside the courts: official or unofficial, private or public, structured or not, arbitration or conciliation, administrative boards, umpire, community groups, ombudsman, to name but a few. Depending on the objectives pursued, the means to achieve them will vary.

The objectives of family law has been described by Sir Leslie Scarman, Chairman of the Law Commission of England, in the following terms(39):

> There is (...) something approaching unanimity as to the objectives of family law. They are: first and foremost, the preservation of family life; secondly, if and when family life breaks down, that divorce should be available in relief of human suffering, and that, whether divorce follows or not, matrimonial breakdown with its inevitable splintering of the family group — man, woman, children — should be met by proper arrangements for the care and upbringing of the children and the support of the spouse who is not the breadwinner.

According to the Quebec Civil Code Revision Office, the objectives of the conflict resolution of family matters should be[40]:

> ... to favourize the full development of families and of children, to strengthen the family's internal unity, and do everything it can to restore family cohesiveness in time of conflict and to avoid irreparable conflict in attitude and behaviour when possible.
>
> Family members must be encouraged to exercise their responsibilities by first trying to solve the problem themselves, then seeking the help of the appropriate services. This means giving more importance to inter-personal family relationships and creating a coherent, well-organized system of family aid services.

and more precisely to[41]:

1. humanize and personalize the legal process in family matters;
2. make the legal system and auxiliary court services accessible and efficient;

3. reach settlements which take the interest and rights of each family member into account;

4. create an atmosphere favorable to calm and dignified settlement of family conflicts;

5. appraise the conflict in all its aspects and identify the underlying problems;

6. prevent permanent breaks, whenever possible, and promote conciliation of the parties in conflict;

7. enforce court decisions more efficiently;

8. promote self-assessment of the court system with a view to making changes in structure and substantive law, when necessary;

9. make the Court open to the community so as to obtain the interest and the confidence of the general public.

Those objectives could be achieved, no doubt, within an adapted and reoriented court system by such simple mechanisms as different physical sittings, a certain specialization of judges, a new set of rules of procedure designed to fit the particular nature of the conflict, pre-trial conferences, the addition of specialized services, etc. The same objectives could possibly be met by resorting to other types of conflict resolution processes. Let us examine briefly the three main alternative bodies: administrative tribunals, arbitration boards, and the mediation process.

Structurally, administrative tribunals are adjucative. They are flexible in that they are staffed with specially trained people and usually have a policy formulation and implementation role. Appointed by the government, they generally imply less independence, unless their selection criteria are similar to those of judges. If so, why not judges?

The rules of procedure of an administrative tribunal usually are not adversary in nature, which suits one of the objectives desirable in matrimonial disputes at their early stages.

Proponents of the administrative tribunal for family counseling and divorce suggest that these boards are better suited to (1) handle the detailed and multiple problems of investigation and accurate determination of facts, (2) advise and aid adjustment of the parties involved, and (3) supervise and utilize community facilities for family problems and family betterment (42).

Apart from the necessity for court-administered legal standards to guarantee due process of law for the protection of the defendant, the adversaries of such administrative

tribunals for deciding divorce cases have stressed the necessity to protect the parties and their children by orders for temporary custody and support. The suspension and enforcement of such orders would appear to be a "proper judicial" function. Finally, courts are subject to well-established techniques of review under standards set by constitutional provisions, and such review guard the court's clientele against basic unfairness[43]. The Report of the Governor's Commission on the Family, of the State of California[44], echoes this opinion:

> (T)o remove family matters from the Courts and to treat them as matters for administrative determination would debilitate the administration of justice and would diminish the efficacy of the process by inviting successive appeals to the Courts. The enforcement of orders would be made more complicated and less effective, and a procedure already too labyrinthine would needlessly be made more complex and costly by the creation of a new entity at a different level. In domestic relations matters no less than in any others, we believe, society is entitled to the integrity and objectivity of the judicial process — but it is also entitled to a process aimed at providing help for families in trouble and employing the resources of the community to that end.

Similarly, the Institute of Judicial Administration at the University of Birmingham submitted the following considerations to the Law Commission of England[45]:

> To what family matters, if any, should the process of adjudication be applied?
>
> We think this raises the question whether the courts, or some other arbiters, such as a family council, or a panel of behavioural scientists, ought to have cognisance of at least some family matters. We think that the case for retention of the courts is unanswerable. Ultimately, all the matters within the family court's suggested jurisdiction lead to the need for a decision. We think there is no evidence that there exists bodies better equipped to perform this function than "courts".

In Canada, various provinces have studied alternatives in this particular field, and none of them has favoured the administrative tribunal proposal. In the last analysis, administrative tribunals do not, structurally, possess features sufficiently attractive to be an adequate substitute for the court system which already has a tradition of impartiality, mechanisms for adjudicative and enforcement powers, while their shortcomings as regards a non-adversarial and conciliation approach may well be easy to remedy.

What has been said of administrative tribunals could also apply to <u>the arbitration process</u> when one realizes that its main distinction from the court process is that the parties choose the arbiter or arbiters. Its function is also adjudicative, and it shares many of the shortcomings of the courts, save maybe informality and expertise.

While informality may be desirable at the initial stage of matrimonial conflict resolution, it may be quite undesirable at the final stage when a decision must be reached based on fact-finding. Expertise, of course, is a laudable goal in this specialized field of law.

In fact, courts and parties resort more and more to expertise in the settlement of custody disputes, for example. It is to be foreseen that it will also be resorted to more often in the area of matrimonial property disputes, given in particular the mounting incidence of fiscal laws and the provisions for equitable distribution of assets between spouses, inflation, and so on. Expertise is then available to the parties within the court rooms.

The advantage of choosing the arbiter may not be so great, considering that judge-shopping in the courts is not unknown of. Arbiters as well are often chosen among the Bench and Bar.

Finally, enforcement mechanisms lack totally in the arbitration process.

Then, is <u>mediation</u> a better alternative?

Rather than being adjudicative, mediation is a process of convincing the parties to agree to a solution. It can be either official or private. As Professor Felstiner put it, the mediator "must construct an outcome in the light of the social and cultural context of the dispute, the full scope of the relations between the dispudents and the perspective from which they view the dispute."(46)

As such, mediation provides a tremendous advantage over the court system by avoiding both the polarization of the adversarial process and the winner-looser attitude that follows adjudication. However, this is true only when mediation succeeds in helping couples to achieve a new and shared perception of their relationship and re-direct their attitudes towards each other(47). In case of failure, the alternative remains the court system with the particular disadvantage of having to start all over from scratch.

In addition, mediation not being adjudicative, does not provide for enforcement of orders.

Administration tribunals, arbitration or mediation present both advantages and disadvantages when compared

to the traditional court system as a means of resolving family conflicts. The disadvantages may be less evident when compared to the advantages of a court system adapted to meet the needs of a family in trouble.

One would welcome a study in order to determine how each of these alternatives is most susceptible to suit the adult, the child and the financial arrangements involved in a family dispute. One would suspect that perhaps the conciliation process is more adapted to adults in their search to settle their emotional problems and their desire to make custody arrangements in the best interests of the child, while the arbitration process may be more suitable as regards financial arrangements.

It strikes me that where disputes are not settled amicably, the traditional adjudicative function of the courts remains the only viable alternative to insure justice to the parties, through its tradition of due process of law, the impartiality of its members, the respect of such basic rules as that of "audi alteram partem", etc. This is not to say that the court system has responded adequately to the challenges of the 70's, or is able to meet the tremendous changes ahead.

It is not for us judges, but for the legislatures, to reform the court structures. Law reform commissions have dealt with this problem and put forward a number of proposals destined to better the traditional court system. None so far has rejected it altogether. I, for one, favour the proposal put forward by the Quebec Civil Code Revision Office[48] of a court with a double function both social and judicial.

It is not my purpose today to value one proposal against the other. What is important for us judges is rather to be aware of the shortcomings, the criticisms, the challenges and the proposed remedies. With the advent of more judicial discretion — in the area of family law — judges will be empowered with a very useful tool in the pursuit of family justice. This tool may also become a dangerous weapon : disparity in the disposition of cases may widen. Case law becomes a most useful tool in assuring consistency[49].

Judges apply the laws and, generally speaking, are not called upon to devise policies[50]. In fact, however, in family law matters more than in any other area of the law, judge-made laws are not unknown of. In that sense,

judges do shape the laws of the future, and to a certain point share policy-making[51]. A caveat: judge-made laws may be seen as bordering on the arbitrary.

This is a very brief review of the changes in the making as regards social attitudes, substantive law and the conflict resolution process. These changes cannot fail to have a profound influence on the judiciary.

In some circles, judges are seen as ultra-conservative, often reactionary. In the face of such a new era in family law, it might be expected that some among us will react adversely, be it to changes in the substantive aspect of the law, or to the new or different role the judge will be called to assume. May I suggest that the judiciary should be the first to welcome changes which will best serve the interests of justice in this particular area of the law. In my view, it is from that perspective only that such changes should be viewed.

It may well be that some may disagree as to what represents the best interests of justice. It may well be

that some may resent the foreseeably less active role of the judiciary in the conflict resolution process, the toning down of the adversary process in favour of a more relaxed and informal set of rules, the sharing of the decision making-with other disciplines. These are legitimate concerns, but in my opinion, they do not warrant a negative attitude to change.

As for social changes, the family evolves slowly, but new forms emerge continually[52]. While divorces are on the rise, it may only mean that couples are learning the hard way the road to equality, freedom, tolerance, pluralism, etc. Cohabitation, which has become a new way of life for thousands, only seems to prove that the law can do so much but, as Marie-Thérèse Meulders-Klein puts it, it does not cross the threshold of human feelings — "le Droit s'arrête au seuil des sentiments"[53].

Changes in the substantive aspects of the law have thrown the judge in the midst of the family : "papa, maman, le juge et moi" ! While the efficiency of such intervention may be doubted in some respects (conciliation, refusing divorce decrees when the parties show irreconcileable differences, etc.) one cannot question

the usefulness of his role in arbitrating differences and insuring the protection of the rights of the parties and their children.

Given a wide judicial discretion, by the end of the day, judges may have the best opportunity to take a leadership role in insuring a thorough family justice, particularly where the legislator has failed to assume that role.

In the conflict resolution process, given the trend to a more informal and relaxed set of rules, it will become the province of the judge to insure that the fundamental rules of law are respected throughout, due process and fairness to the parties are not abandoned in the pursuit of negociated settlements. Giving in inconsiderately to experts may only mean abdication of the judge's primary function as an adjudicator, while at the same time dispensing with such expertise in order to assert the court's authority may only serve to defeat the purpose of the law without achieving thorough justice to the parties.

In the years to come, the balancing act of the judiciary is bound to become more delicate. A constant awareness,

a more refined knowledge of the law and of the resources available, specialization, the elaborating of uniform criteria, as I see it, seem to be the way of the future for the judiciary — a task more demanding, but how much more rewarding — in the pursuit of family justice.

The judiciary has performed outstandingly well so far, and there is no reason to believe that it will not meet the challenges of the next century, given the proper legislative and administrative framework, and it own dynamic forces.

Claire L'Heureux-Dubé

Vancouver, August 1981

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33. Rathwell c. Rathwell, (1978) 2 S.C.R. 436; Pettkus v. Becker, supra, note 5.

34. Louis L. Jaffe, English and American Judges as Law-Makers, Oxford, Clarendon Press, at p. 32, as quoted by Rosalie S. Abella, in "Family Law in Ontario: Changing Assumptions", The First Hugh G. Doyle Lecture in Family Law, University of Ottawa Law School, 27 Nov. 1980 (mimeo).

35. Bora Laskin, The Institutional Character of the Judge, Jerusalem, Magnes Press (Hebrew University), 1972, p. 17, as quoted by Rosalie S. Abella, supra, note 34.

36. Law Reform Commission of Canada, Working Paper 13, Divorce, 1975, p. 53.

37. Law Reform Commission of Canada, Working Paper 1, The Family Court, 1979, pp. 50-51.

38. See Quebec Civil Code Revision Office, Report on the Family Court, 1975, p. 40:

> "When domestic discord strikes at family life few things could be better calculated to intensify antagonism than the cruel and senseless system which requires one spouse to attack the other in pleadings open to the public press, to bring witnesses into court to expose sin and shame, and to air his own unsavory accumulation of dirty linen." (P.W. Alexander, The Family Court - An obstacle Race?, 1958, 19 Univ. Pitt. L. Rev. 602, at p. 615.

The Law Reform Commission of Canada, in Divorce (supra, note 36), pp. 23-24 and 25:

> The present divorce process involves adversary procedures that pit the spouses against each other. An extensive body of opinion in law, medicine, and the social and behavioural sciences asserts that adversary legal procedures are inappropriate to resolve family disputes. What is needed are preventive, therapeutic and investigative procedures.
>
> (...)
>
> In short, the present procedure in divorce seems unduly formal, sometimes involved, and always expensive. It is not conducive to a therapeutic or conciliatory approach and often frustrates the possibility of preserving the marriage or resolving collateral issues on a reasonable basis acceptable to both spouses. The ritual of the undefended divorce promotes hypocrisy and a disrespect for the law and its administration. What appears to be necessary is a reform of the substantive law so as to eliminate the fault concept and a contemporaneous reform of legal and judicial procedures that will permit a more constructive response to the problems of marriage breakdown. Later in this paper we shall male specific recommendations on both of these matters.

Dean Roscoe Pound, The Place of the Family Court in the Judicial System, (1959) 5 N.P.P.A. Journal 161, at p. 169, wrote:

> There are four applications of the analogy of a proceeding in chancery rather than that of an action at law, which should govern in the family court procedure:
>
> 1. Instead of being wholly contentious, the proceeding in the family court division should be intestigatory directed to determining the best disposition or adjustment of the family situation as a whole and seeking a complete disposition thereof. It may involve a contentious trial of certain issues of fact. But the proceeding as a whole should not be primarily and characteristically contentious.
>
> 2. The purpose should be to work out and seek to establish whatever plan is best for the family as a whole while not ignoring the interest

3. All persons who will be affected by a complete disposition should be made parties to the proceeding and there should be a simple method of bringing parties into the proceeding as part thereof or dismissing them.

4. The court should have an adequate staff of well-trained assistants.

A family court made to the model set by the juvenile court as a court of equity may be relatively informal in its procedure... What is required is simple investigatory procedure with contentious trial of issues of fact.

I had occasion myself, more than ten years ago, to express similar views (Claire L'Heureux-Dubé, "Le droit de ne pas divorcer", (1969) C. de D. 121, at p. 133).

39. Mr. Justice Scarman, "Family Law and Law Reform", Public Lecture, University of Bristol, March 18, 1966, at p. 2.

40. Quebec Civil Code Revision Office, Report on Family Law, 1976, p. 31.

41. Idem, pp. 32-33.

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44. Report of the Governor's Commission on the Family, California, 1966, at p. 10.

45. University of Birmingham, Institute of Judicial Administration, Family Courts: Comments on a Paper prepared by the Family Courts Working Party of the Law Commission, April, 1972, p. 9, para. 23.

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52. König, International Encyclopaedia of Comparative Law. 1974. p. 36.

53. Meulders-Klein, supra, note 1, at p. 751.