THE 2001 WORLD CONGRESS ON FAMILY LAW AND THE RIGHTS OF CHILDREN AND YOUTH

OPENING CEREMONY REMARKS

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20 SEPTEMBER 2001
BATH, ENGLAND

It is a great honour to speak at the opening ceremony on the third occasion that we have gathered for the World Congress on Family Law and the Rights of Children and Youth.

I had the honour of chairing the opening session of the last World Congress at San Francisco and also had an involvement with the first Congress in Sydney.

My association goes back even further than that however, in that I accompanied Stuart Fowler and Rod Burr to Hong Kong in 1989 on a mission that led to the setting up of the Family Law Section of Lawasia, which in turn led to the holding of the First World Congress in Sydney in 1993.

That was a most successful Congress, as was the second one in San Francisco.

It is particularly pleasing that the UK should be the locale for the present Congress and I congratulate the organisers upon their choice of location in this lovely city of Bath and upon the hard work that I know lies behind the presentation of a Congress such as this.

It is particularly appropriate that a World Congress should be held linking Family Law with the rights of children and youth. Family Law is really mainly about children and youth and their rights and needs. It is an unfortunate fact that all too often family law is dismissed in somewhat disparaging tones as divorce law.

Divorce as such plays an increasingly minor role in the area as we increasingly move to a recognition that the termination of a marriage relationship as such is less a matter for the State than for the individuals concerned and that very often we are dealing with relationship breakdown rather than the breakdown of a marriage.

That battle has not yet been completely won however. In Louisiana a concept of "Covenant Marriage" has been introduced, which can only be terminated upon bases resembling the old fault grounds of divorce. Even in Australia a senior religious leader called last month for the

reintroduction of fault and some of the more radical father's groups appear to support such an approach.[1]

Experience has however taught most of us that human relationships are not particularly suitable for regulation by means of the law and that the reintroduction of restrictive divorce laws is more likely to render marriage irrelevant than to control community morals. At the same time, in the absence of appropriate laws to protect the children and the property of unmarried couples, such laws are likely to considerably disadvantage children and women who are the product of, or live, in such relationships.

Family Law is a much wider topic than the law relating to marriage and divorce and this Congress provides a very good example of that fact. It covers in addition, not only the area of State intervention in order to protect children but also the protection of children from unwarranted ill treatment and embraces the whole area of the protection of the rights of all children embraced by the Convention on the Rights of the Child. I am pleased that so much of the programme at this Congress is devoted to such broad issues

The latter Convention has been ratified by more countries than any other similar international instrument and indeed the remaining relevant non ratifying country is the USA.

However, in common law countries at least, the act of ratification does not carry a commitment with it to incorporate the Convention into domestic law. In common law countries it is clear that unless domestic law is silent or ambiguous in relation to the subject matter of the

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[1] The Full Court of the Family Court of Australia in B and B: Family Law Reform Act (1997) FLC 92-755 said at para 10.2:

> "Unlike the United States and continental legal systems, where the entry into treaties or conventions creates self executing law, the English and Australian position is that such treaties do not enter into domestic force unless and until there is a legislative act. In Koowarta v Bjelke Petersen (1982) 153 CLR 168 at 224 Mason J (as he then was) said:-
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> > "It is a well settled principle of the common law that a treaty not terminating a state of war has no legal effect upon the rights and duties of Australian citizens and is not incorporated into Australian law on its ratification by Australia (Chow Hung Ching v The King (1948) 77 C.L.R 449, at p. 478; Bradley v The Commonwealth (1973) 128 C.L.R 557, at p. 582). In this respect Australian law differs from that of the United States where treaties are self-executing and create rights and liabilities without the need for legislation by Congress (Foster v Neilson (1829) 2 Pet.253 at p.314".

Convention, then the Convention has no legal relevance.[2] Indeed in Australia, successive Governments have signalled an intention to amend the law to nullify even this limited operation of the Convention, although that has not yet happened. Needless to say this followed an immigration case decided against the Government of the day by the High Court of Australia.[3]

The same applies to other Conventions such as the UN Convention on the Elimination of all Forms of Discrimination against Women (the CEDAW Convention 1981), the UN Declaration on the Rights of Disabled Persons 1975 and significantly in recent times the 1951 UN Convention on Refugees.

In effect, this enables common law countries to posture as supporters of human rights while effectively ignoring them so far as executive decisions and their internal legislation is concerned. This is not to say that such conventions do not have a persuasive effect in common law countries, but it also means that where a particular government perceives the national interest (or its future electoral success) to be involved, then such conventions can be safely ignored, without the possibility of a challenge in the national courts, at least on treaty grounds.

I consider that one of the things that we should be aiming for at this Congress is to adopt a resolution calling upon such countries to abrogate the effect of these legal doctrines and truly commit themselves to the international conventions to which they are parties.

In the absence of such an approach, the whole movement to protect human rights is endangered by the ease with which the countries that pay scant regard to human rights can excuse their more extreme actions by means of comparison with the actions of countries that normally do respect human rights, but may find it expedient not to do so in particular circumstances.

Until now I have been speaking of common law countries, which are normally first world countries where the rule of law is largely respected. In addition most European countries and Japan fall into this category and

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[2] Archbishop George Pell 'We must save the family or pay the price' *The Age* (Newspaper) 24 August 2001.

[3] Teoh's case (1995) 183 CLR 273

there are of course a number of other countries in the Americas, Asia and Africa who do so as well.

When one looks beyond such countries, the plight of children and youth is often much worse and economic conditions in third world countries may render such conventions largely irrelevant. The blame for this however, does not lie entirely within such countries.

We are all familiar with the fact that globalisation and the doctrine of the supremacy of the market place has led to the most appalling abuse of the young in such countries. This has often been at the behest of multinational companies, many of which command funds substantially greater than the countries concerned. There is I believe, room for much greater control of such organisations, the head offices of which are usually to be found in the USA, Europe or Japan.

Such controls can be imposed by mutually agreed legislation taking effect across national boundaries and this is something that we as voters in democratic countries can influence. Another control can also be effectively imposed by consumers themselves in wealthier countries imposing boycotts upon the products of such rogue companies. The difficulty is often the identification of the products of such companies, given their multinational nature and their interlocking shareholdings through chains of nominee companies and other corporate facades.

The problem however is not just one of corporations. One of the great weaknesses of democracies has been their habit of tolerating and indeed encouraging the most odious regimes in other countries on the grounds of so called national interest. We have seen this happen time and time again in Central and South America, in Asia and in Africa.

One can only hope that the present crisis will lead to a re-thinking of that approach and that we will cease to tolerate such regimes and the concomitant human rights abuses that go with them.

The programme at this Conference reveals the wide range of areas that need to be addressed if the rights of children and youth are to be protected and enhanced. I am sure that over the next few days we will make considerable progress at not only addressing these problems but will make a beginning at finding possible solutions.

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