Family Courts: A Parallel Universe?

The family courts in Britain are often accused of being detached from reality but there are some striking parallels within the system that indicate a severe breakdown of the judicial machine and how it functions in Modern England.

Family law is generally divided up into two sectors: the public sector and the private sector. Where the public sector tends to deal mostly with adoptions and care orders with a strong emphasis on local authority intervention, the private sector is usually used for divorces and disagreements within divorce, both custodial and financial. Yet, the two sectors are not mutually exclusive due to an overlap between them; perhaps then the most worrying aspect of these two sectors is that they both appear to suffer from the same extreme symptoms which seems to suggest that the difficulties the family courts face are in fact now so deeply rooted that neither sector can function at a level that is efficient or humane.

Of the many torments these suffering courts endure, there are perhaps ten which haunt both the public and private sectors on a regular basis:

1) Hearings: The need for Speed:
The family courts are very slow; they are clogged up with applications and there are not enough judges to handle the workload. The implication of such a delay in cases involving children is stark; a child taken from his or her parents, if wrongfully taken, may have to wait months before they are returned back into the arms of their loving families. Conversely, as in the case of Baby P most recently, a delay in detection and inspection of a child's environment, whether through professional oversight or negligence, can make the difference between life and death.

2) Assistance: The Self Represented Applicant:
For many, court is too expensive to attend. Legal aid is given to very few and the super wealthy are a minority demographic, leaving a big chunk of people who just don't have the ability to hire a lawyer. With the advent of the recession, many people who are already caught up in the system will find themselves without a lawyer and having to face court on their own. The courts are not eager to assist in this context; for example, the courts have a facility for offering free transcripts to parties who ask for them, but few people are aware of this right and the court makes it very difficult to access this information and to subsequently allow parties to access their judgments without cost. The courts also offer resources to guide litigants in person in relation to forms they may need and general advice on their case, but again, this information is not easy to find. One anxious and mumbling litigant in person plus two very tired and ridiculously grumpy judges equals one very lopsided hearing (and that's before the wigs start wiggling and the capes start flapping….)

3) Evidence: Keeping it real?
Getting the delicate balance between the best interests of a child and their parents is a task that requires enormous skill and that skill will depend heavily on the quality of evidence to hand. In the private sector, where divorcing spouses are hurt and emotional, the true status of a person's ability to parent or their financial situation can be hard to discover as often one or both parties feel the need to conceal the truth out of fear or anger. Getting real evidence to prove or disprove a fact is virtually impossible under the current system and in the above scenario begs the question: is fact finding always the best way? Where issues relate to

physical or emotional abuse of a child, facts are vital and one of the greatest challenges to date for the court system relates to the quality and legitimacy of medical expert evidence. In the past, the courts have been happy to use medical theories that by and large had not been proved based on the understanding that the expert in question used that theory and therefore it was assumed to be sound. Mistakes have been made as a result of untested theories being used to help formulate a judgment, usually where an expert in his field has come to a conclusion based on a less than objective theory and this practice has underscored the sometimes misplaced kudos the courts have placed upon such experts.

4) Legislation: Coming to terms with the terms:
Drafting legislation is horribly tricky; trying to ensure that the wording is concise and helpful as well as broad enough to make an Act flexible, requires some serious brain power (as well dosages of caffeine that are illegal in several countries) but the Family Law collection with its vague terms being bandied about in court rooms all over England can come across as echoes of a language in law that can sometimes become too distant to have any effect. A term that has been highlighted by the press through a series of miscarriages of justice is “Risk of significant harm”, first mentioned in the Children Act 1989 but no specific guidelines were given to constitute the meaning of risk of significant harm. The concept behind the phrase is progressive in that there is a desire to protect vulnerable children but the Act offers little guidance as to what exactly a risk of significant harm is in real terms. To this day, the question of just what the term embodies is unclear.

At the heart of family law and again to be found in the Children Act 1989, one term that is used as the basis of every decision is the ‘welfare of the child‘. This is not explicitly defined in the Act, but offers a vague indication of what to factor in when trying to assess it and further legislation and precedents do little to clarify its meaning.

5) Judicial Discretion: Don’t do as I do, do as I say!
Vague terminology and the less than airtight evidence that can form part of the court’s resources in coming to a decision, lend themselves to over-use of judicial discretion and as a result the interpretation of terms like the welfare of the child or analysis of evidence, becomes diverse. Whilst diversity and flexibility in the court’s decision making process can be a powerful way to tailor a decision to each party so that it is effective, when a system starts to suffer from falling standards across the board, the quality of that discretion then deteriorates. This is unfortunately the danger with discretion: it is only as good as the quality of the advice the judge receives.

6) Disciplinary Procedures: Paying the price for bad advice
In circumstances where a judge makes a mistake in his decision that leads to either a wrongful care order or an unnecessary adoption order for instance, it is rare to see that judge being held accountable for that error of judgment and yet in most professions, when a professional makes a mistake, he is either asked to redress the error by compensating the aggrieved party or if the mistake is severe, loss of one’s job usually follows. So how is it that in a system where such sensitive and serious decisions are being made on a regular basis, that these professionals seem to evade being held responsible for their mistakes?

The media have covered in great detail the recent mistakes made by Haringey Council and maybe now that such low levels of competence are being detected, those men and women who were responsible for the catalog of errors will be forced to take responsibility. Yet, cases like these only serve to temporarily highlight the growing problem of lack of accountability

and funding and there has not yet been an assessment into the frequency of mistakes that are made. There is the underlying concern that even where cases involving professionals do eventually sort themselves out satisfactorily, we do not yet have a clear indication of whether or not these cases suffered single or multiple errors along the way, which were only redressed when a competent eye was allowed to glance over the details of such cases. In other words, the frightening reality may be, that the system may be functioning at dangerously low levels of competence and if the few competent people in the system are not at hand to oversee work being done, there is a real possibility that councils like Haringey, may continue to make the sorts of mistakes that cost lives. If this is the case, the argument that blunders like these are few and far between, would be pointless.

Ofsted have started the ball rolling with their review of various local authorities and the reports have been damning; will the relevant authorities learn from these mistakes or will they continue to protect their own interest and if so, at what price?

7) Conflicts of Interest: Is impartiality an illusion?
Social workers, judges and lawyers' roles are designed to be independent organisms, but conflicts of interest are a constant menace in the system. Social workers may be asked to work towards targets like the late incentivisation process which thankfully has now been scrapped but saw local authorities rushing to push through adoptions without the relevant care, in order to get the financial rewards, large commissions for the authority in question for hitting adoption targets. The intention was well meaning; to place children in loving homes and out of the care system as quickly as possible and the incentive to do that was cash for the councils in question. Nevertheless, these financially based incentives did not to work well in this kind of environment and the end result was that the process let the children down.

Judges face many silent challenges; they have to take into consideration policy, contemporary culture and advice from expert witnesses and weigh it up with their own perception of the evidence before them and their own personal back ground. From time to time, the media print stories about judges who allowed their personal motivations to sway their judgements, it does happen of course, but where a system functions on judgement, to prevent personal input from a judge is never going to be a viable option. The overt problem with judgement is that it tends to stifle the truth.

Lawyers too face conflicts of interest; they are duty bound to serve the courts first and their pockets second, to put truth and justice on a pedestal and strategic game-play back where it belongs. The reality is not that romantic; working for a law firm or chambers ultimately means working as part of a team, which in our present adversarial system, has to take a side. The lawyer views himself as an adversary and his opponent, the lawyer for the opposing party. To a parent, used to having to employ diplomacy, tact and as a method of last resort firm rationale, this approach might seem irrational, not least of all because a parent knows that even when there is an obvious guilt present in one party (like their own children), to use punishments that alienate and upset can never achieve the desired end goal; understanding.

8) Opening up the Family Courts: Let there be light!
2008 has been a revolutionary year for the family courts; branded secretive and a shambles, the system has been left to lick its wounds, and like a naughty child sent to the corner of our collective English consciousness to contemplate its wrongdoing. But what if we encouraged the system to be more open with us, the British public, what if we asked these courts to bare their souls? Jack Straw has assured the public that he will be bringing in measures to make

the courts more accessible and more transparent. There are conflicting views in relation to the use of media reporting and not surprisingly some of the organisations that have faced the greatest levels of criticism to date are very much against media intrusion, like Social Services. Whilst media intrusion will not be a guarantee of quality and excellence within the system, it will place pressure on the system to try and perform at better levels of competence. And a healthy amount of pressure might just kick-start some meaningful debate on reform.

9) Fighting Talk: The redundant battle

Living in a world where nuclear weapons have taken military strategy to another level, the thought that military strategy itself is no longer relevant is a playful one. Why send thousands of men into battle when we can just terrify the pants off our neighbours by pointing big metal radioactive missiles at them instead? The court system is based on an adversarial approach but as more information becomes available and more issues start to surface, the use of adversarial strategy starts to lose its efficiency and its allure. In matters of family, to divide is not to conquer but to irreparably damage the delicate fabric of a society. Having lawyers who are negotiating and concealing information from each other to gain a home advantage is to show the flaws in this process in all its glory, for a retentive attitude can only lead to retentive decision making. In a situation where two or more people are in a great deal of pain emotionally, to ride roughshod over their predicament with tactical horseplay seems farcical. War in the court room and outside of it has become redundant; this is the age of collaboration.

10) TLC: Tender Loving Courts

Whilst there is no suggestion that the court room should become a place where parties hug trees and the judges hand out cups of herbal tea, the notion that the courts approach each case with a renewed compassion and a considered determination to treat each party with care is a welcome one for those of us who have experienced the cruel and callous psychological aspects of the system. Short sighted in its way to be, the family courts have perhaps missed the most vital aspect of their role: to restore peace and harmony to the land. If the system encouraged open communication between the lawyers, allowed both sides to see the evidence that came into their hands and worked towards allowing the public to trust their professionals and to promise implicitly that they would help, as far as possible, to restore peace of mind and to infuse it into the next chapter of our lives, wounded and emotionally drained as we are when we come to it, it may just be the court system’s saving grace. Complete impartiality may never be a reality in a system which relies on human intervention to come to a resolution, but collaboration between all the parties, working for the benefit of the family unit, could conceivably give impartiality a chance.

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