

## Spouses, partners and parenting

*Francis Bennion takes a look at alternatives to marriage*

What is one to make of that hate figure Peter Tatchell, who last Easter so wickedly insulted the Archbishop of Canterbury in his own medieval pulpit? I ask that after reading Peter's provocative article 'New rights for unmarried partners'.<sup>1</sup> In a like context, but more importantly, I also have to ask what, after her recent press conference, is one to make of that icon of the Family Division Dame Elizabeth Butler-Sloss?<sup>2</sup>

In the latter connection let me first slip in a quotation from Blackstone about the independence of the higher judiciary. Blackstone is sexist of course, the possibility of Dame Elizabeth Butler-Sloss not having entered his purview. We can make allowances for that. What he said about the independence of the higher judiciary (and it is still true) was: 'In this distinct and separate existence of the judicial power in a peculiar body of men [now add women], nominated indeed, but not removable at pleasure by the Crown [today read Mr Tony Blair], consists one main preservative of the public liberty; which cannot subsist long in any state unless the administration of common justice be in some degree separated . . . from the executive power [again, Mr Tony Blair]'.<sup>3</sup>

This might be abbreviated by saying that under our constitution the public is protected from executive excesses by the fact that the higher judiciary is virtually irremovable, and that when necessary this calls for bold and independent-minded action by them in defence of the public. I shall call that Blackstone's apophthegm when I return to it later in this article. Upon its basis the higher judiciary is about to receive unprecedented powers under the Human Rights Act 1998.

### The Tatchell thesis

Back to Peter Tatchell. I need to be careful here, because middle-aged Peter told me only the other day that he has admired my writing since he was a teenager. I must not do anything to alter that trusting view, yet obviously I need to preserve my integrity and be true to myself.

This raises a question. One's ideas change with advancing age, so at what time of life is one oneself? The answer must be that one is oneself when one is in one's prime (as Miss Jean Brodie would undoubtedly have said). When I was in my prime, just after my period as a churchwarden,<sup>4</sup> I wrote copiously in defence of gays and lesbians, and in opposition to dismal homophobes. So that must be the real me, surely. I should disregard the fact that in latter years, as I near my end, I have been drifting back towards the old values. Or should I?

In his article Peter decried the institution of marriage, saying-

'Marriage evolved historically for three main reasons. First, as a way of ensuring male domination over women and children (in particular the sexual possession of women by

<sup>1</sup> See p. 1451 above.

<sup>2</sup> The report in *The Times* is on page 4 of the 16 October 1999 issue.

<sup>3</sup> Sir William Blackstone, *Commentaries on the Laws of England* (16th edn, 1825) p. 269.

<sup>4</sup> See page 1296 above.

men). Second, to guarantee the inheritance of property through the male line . . . And third, to regulate and stabilise the conception and rearing of children.’

I will give him the last of these. It corresponds (more or less) with the first reason given in the recital in Cranmer’s Book of Common Prayer of the causes for which matrimony was ordained: ‘for the procreation of children, to be brought up in the fear and nurture of the Lord, and to the praise of his holy Name’. Peter’s statement does not correspond in the least with the other two reasons Cranmer set out. These were-

‘Secondly, [Marriage] was ordained for a remedy against sin, and to avoid fornication; that such persons as have not the gift of continency might marry, and keep themselves undefiled members of Christ’s body.

‘Thirdly, It was ordained for the mutual society, help, and comfort, that the one ought to have of the other, both in prosperity and adversity.’

Peter and I would join in gladly accepting the last reason. The second is dubious, if not downright bad. I prefer, as I am sure Peter would, what I have elsewhere put forward: ‘We should develop and fulfil our sexual nature throughout life (the duty of sex-fulfilment) because sexuality is an essential and vital part of the human constitution’.<sup>5</sup>

### **Unmarried Partners Act**

Peter says there is increasing evidence of public dissatisfaction with the institution of marriage, whether as laid down by the church or by the state (or both combined). A sensible society would carry out research to discover whether this is really so, and if so why. Not having a sensible society, we are forced back on guesswork like Peter’s proposed Unmarried Partners Act. Does anyone really want this? In the absence of research, one cannot say. Certainly I would not say it is unwanted. Yet I have misgivings. They are chiefly prompted by the fact that the word ‘rights’ occurs 37 times in Peter’s article; and the word ‘duties’ only once. Yet if one person has a right, some other person or persons must have a duty to satisfy that right. It is necessarily a mirror-image situation.

Then Peter asserts that gays and lesbians should be able to marry. As an old parliamentary draftsman I immediately reply (as Professor Joad of Brains Trust fame did long ago): it depends what you mean by marriage. If you follow the old Christian way and define marriage as the lifelong union between a man and a woman with a view to the virtuous raising up of any children of their union, then clearly gays and lesbians cannot marry. If you take it as meaning any form of union, the tale is different. Shakespeare presumably thought it was different when he wrote-

‘Let me not to the marriage of true minds  
Admit impediments. Love is not love  
Which alters when it alteration finds,  
Or bends with the remover to remove . . .’

Peter says that if the true minds of a gay or lesbian couple seek a form of marriage, so be it. Who can gainsay that? Generously, homosexual Peter also considers the plight of heterosexuals who disdain true marriage yet seek a link. His Unmarried Partners Act is open to them too.

Will the proposed Act do any of these people any good? Being an honest man, Peter tells us that when ten years ago Denmark introduced a gay partnership law there was a very low take-

---

<sup>5</sup> Bennion, *The Sex Code* (Weidenfeld and Nicolson 1991) p. 298.

up. He says the overwhelming majority of Danish same-sex lovers have chosen not to register their partnership. Why should it be any different here?

Peter's answer is to put forward a slightly different law. In a crucial passage he says that marriage has had its day and we need to rethink partnership rights from first principles. If marriage did not exist, he says, it is unlikely we would invent it now. He adds that the marriage formula 'accords less and less with contemporary needs and aspirations'. What tired language that is, I can't help thinking. So much the worse, I feel, for contemporary needs and aspirations. The present generation are missing the point.

### **Has marriage really had its day?**

This point, which was readily grasped by generations of human beings in our past but has been partially lost today, is expressed in those words of Cranmer's. Marriage 'was ordained for the mutual society, help, and comfort, that the one ought to have of the other, both in prosperity and adversity'. It is otherwise set forth in Cranmer's wording of the new husband's pledge to his new wife. He must answer yes to the question

'Wilt thou have this Woman to thy wedded wife, to live together after God's ordinance in the holy estate of Matrimony? Wilt thou love her, comfort her, honour, and keep her in sickness and in health; and, forsaking all other, keep thee only unto her, so long as ye both shall live?

These are noble words, calling forth nobility from those who subscribe to them. For the sake of the children, if for no other reason, one does not flee from the relationship when the going gets tough. If the two have different ideas about some important matter they do not split on that rock; one defers to the other or they compromise. Lifelong marriage is a true artefact, to be worked at constantly and lovingly by both spouses (I eschew the word 'partners', which really belongs to the world of business). The process may last half a century or more. The product is a human triumph.

Peter's new-fangled partnership would work this way. The two people (heterosexual or homosexual) would enter into a common-form partnership agreement, selecting the features of their own arrangement from a pick and mix menu. The printed form for this would be available from a Post Office or Town Hall. The arrangement need not involve cohabitation. It would not be available to those who were married or already had a partnership agreement with someone else. After signature the form would be sent for registration to the Registrar of Partnerships. It would have precedence over a will, to prevent testamentary skullduggery. The Registrar would issue a Certificate of Partnership. Marriage lines would become partnership lines.

Dear Peter's plan is full of obvious flaws. One I have not so far mentioned lies in his naïve idea of annulment-

'The Partnership Agreement can be annulled at any time by one or both of the partners signing a Partnership Annulment (a standard form available from a Post Office or Town Hall).'

This is reminiscent of the Jewish *get*, by which the husband (but not of course the wife) can divorce the spouse on a sudden by simple delivery of a suitably-worded piece of paper. Many Jewish people frown on this today. What value would the rights conferred by a registered Partnership Agreement have if it could be cancelled out in a moment by a visit from the postman? I fear my valued friend Peter Tatchell will have to think it all out again.

## **Back to Dame Elizabeth**

I return to Blackstone's apophthegm. Dame Elizabeth Butler-Sloss has recently been promoted by Tony Blair (it was done in the name of the Queen, but it was really by Tony Blair). She is now President of the Family Division and I respectfully congratulate her. In the Times, her press interview was headed 'Senior judge backs adoptions by gays'. Oh dear! Was that really wise, one asks oneself?

We are told by the Times that Dame Elizabeth has a Conservative background. She said that formerly she was 'dubious about the stability of children living in a family with two parents of the same sex'. *Stability*. Was that really the word she chose to use?

Now, she tells us, she has changed her mind. Now she thinks it would be 'quite wrong not to recognise that different children need different types of home'. Again I ask, did she really say that? It strikes me as nothing but Orwellian double-speak.

Let me translate it into single-speak. Dame Elizabeth might have truthfully said: 'God knows I hate this as much as anyone, but I have to get shoved along by the Zeitgeist just like any ordinary person'. She should remember Blackstone's apophthegm.

Consider those weasel words 'the stability of children'. Over the years a baby boy reared by gay 'parents' will absorb through the pores the ethos of his rearers. He will come to believe that 'gay is good' and will probably end up gay himself. Similarly for a girl baby reared by lesbians. Do our fostering and adoption authorities really think this is just a question of 'stability'? I think not; they have too much common sense.

Dame Elizabeth says that 'different children need different types of home'. More weasel words. In the present context they can only mean 'lesbian or gay kids need lesbian or gay parents'. Does anyone except Peter Tatchell and his Stonewall colleagues really believe that? Anyway, how can you conscientiously brand a young child as gay or lesbian for life, rather in the way a Chicago stockbreeder brands his new-born calf? We all know it is not right to do that.

In relation to children, the Family Division is the custodian of the Crown's ancient *parens patriae* jurisdiction. This humane doctrine has for centuries manifested the royal concern for the welfare of those subjects too young to fend for themselves. In recent legislation Parliament has supported this view, stating in various Acts that in making court orders the interest of the child must always be treated as paramount. Are the interests of the child being treated as paramount when two gay men are indulged in their wish to adopt a young boy?

Another point concerns the European Convention on Human Rights. In another recent interview<sup>6</sup> Dame Elizabeth says it is important to remember that children have rights under the Convention. If the Family Division authorises the adoption of young children by homosexuals how long will it be before the court is confronted by the argument, brought on behalf of a child made subject to such an adoption order, that it contravenes article 8 of the Convention? This entrenches every person's right to respect for their private and family life, and states that there shall be no interference with this by any public authority (which includes the Family Division).

## **Raising Cain**

---

<sup>6</sup> *Counsel* October 1999, p.18.

The Family Division has great power over the way some children are reared. What qualifications do lawyers have for exercising such power? The judges of the Family Division are brilliant lawyers, or they would not have risen so high. Does this necessarily mean they are also skilled in child rearing? The connection is not obvious, and they need to learn. For part of this learning process I commend an American book published this year, *Raising Cain* by the child psychologists Dan Kindlon and Michael Thompson. Its sub-title is 'Protecting the emotional life of boys' and it should be read by everyone concerned with the rearing of boys.

It will be a revelation to some that boys have an emotional life. This book graphically shows that they do, and that it is of crucial importance how rearers treat it. Out of many important passages in the book I commend the following in the present context-

'The fear of homosexuality imposes a tough taboo that isolates boys physically from the comfort of touch and sexualizes any touching that does come their way . . . One of our [boy] clients told us how the appearance of Tom, a new boy at the school - a boy who also happened to have long blond hair and feminine features - upped the fear level of other boys in the class. One fourteen-year-old, Greg, was accused of being attracted to Tom. The tormentors chalked the boys' names together in a heart on the pavement in front of the school. They whispered "faggot" quietly whenever they passed the targeted boy. One day they put a stick of butter in Greg's locker - butter being the preferred lubricant for anal intercourse in their world-view - and from that point on they would just walk by him and whisper "butter".'<sup>7</sup>

The British publishers of *Raising Cain*, Penguin, say of the book-

'Using their own case studies and field research, the authors show that the most valuable gift we can give our sons is that of emotional literacy, and they give positive, practical advice on the ways parents can help boys cultivate emotional connectedness and develop effective relationships with their family, teachers and peers.'<sup>8</sup>

*Raising Cain* shows from case histories how difficult it is, even in a normal heterosexual environment, for growing boys successfully to weather the storms of adolescence. This being so, it is surely wrong for Dame Elizabeth to 'back adoptions by gays' - at least when there is no reason to suppose that the adopted infant has any lasting inclination towards homosexuality.

I respectfully suggest that Dame Elizabeth and her judicial colleagues in the Family Division do what I above advised Peter Tatchell to do: think it all out again. Scrupulous independence of mind, not slavish devotion to the Zeitgeist, is what the British people pay them to deploy.

Tailpiece: grow your own boy

It was announced in the Times on October 28 that two gay men from Essex are expecting the birth of a baby boy after depositing their sperm in the womb of an American married woman. The Los Angeles Superior Court has ruled that the two men can be named on the birth certificate as the boy's parents.

*Francis Bennion is a barrister and author.*

1999.018 149 NLJ 1699. Letter in reply from Tatchell published 149 NLJ 1850.

---

<sup>7</sup> Pp. 84-85.

<sup>8</sup> Back cover.