Perspectives on

PERSONAL RELATIONSHIPS

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Introduction

Canadians want their law to embody justice, and their legal system to support this ideal. They expect legal institutions to be accessible and accountable. They want the law to respect and promote the values of their democratic political tradition. At the same time, they desire law that is responsive to the emerging needs of society.

To fulfil its statutory mandate in a manner that respects and reflects these expectations, the LAW COMMISSION OF CANADA has organized its first Research Programme around the idea of relationships. Such a focus underscores the importance of relationships to human beings. However important it may be to acknowledge and promote the individual as the locus of legal rights, we must not lose sight of the wisdom reflected in John Donne's memorable words (and I paraphrase): "No person is an island." A focus on relationships also underscores the role of law in structuring and shaping (not always in the most appropriate ways) human interaction in modern society. Not infrequently, law actually reinforces rather than palliates unjust distributions of power and social inequality.

Ongoing human relationships must not, of course, be seen just as pale reflections of legal concepts and statuses: for example, parent - child; cultural community - member; debtor - creditor; or citizen - state. They are, rather, dynamic social institutions that often transcend the categories and definitional criteria meant to give them legal form. The LAW COMMISSION has selected four characterizations through which to pursue its study of relationships: (1) personal relationships; (2) social relationships; (3) economic relationships; and (4) governance relationships.

The first of these is most closely connected to the theme of the Conference, and it is within that frame that we are currently addressing many of the issues here on the table. Under the theme Personal Relationships we seek to examine basic societal institutions that structure and regulate relationships of dependence and interdependence. Many of these institutions capture close and intimate domestic relationships. Canadian law now rests on a number of assumptions about how people organize their private lives, and how they relate to those with whom they make a home.

These assumptions are frequently out of touch with the facts. As a result, some legal policies and procedures derived from them are either obsolete or counter-productive. For example, many social programmes do not today reach their intended beneficiaries because of the evolution of different forms of family life and conjugal relationships. More generally, Canadian law seems inadequate to respond to physical, economic, psychological and sexual abuse in a wide variety of situations involving adult domestic partners and others who live together in non-conjugal settings. The LAW COMMISSION thinks it opportune to look closely at how the legal system characterizes and deals with all types of relationships of dependence and interdependence.

Socio-Cultural Aspects of Personal Relationships Between Adults

Let me begin with a caveat. My interest here, and my observations relate to relationships between adults who have chosen to make a home together. I am not addressing the idea of the family as an institution for child-rearing. Nor am I addressing the issue of single-parent led families. Nor finally, am I addressing the idea of a family as an institution for providing care to the elderly who find themselves in a situation of dependence. My concern is with relationships of dependence and interdependence between adults who are now living, or who have previously

lived, together in a household.

In a socio-demographically complex modern liberal society, many traditional societal institutions that reflected the accumulated heritage of a once dominant culture and religion no longer play the normative role they once did. To understand why, it is important to situate the sociology of modern relationships and their construction by the law. Unfortunately, such an exercise is, in large measure, a speculative endeavour. While numerous contemporary data-sets may be found to support various hypotheses, historical material is less reliable -- largely because there are a number of questions we never thought to ask until recently, and therefore a number of important modern conceptual categories for which disaggregated data simply does not exist. Thus, we know that diverse types of household arrangements today have a public face that in previous decades they did not. What we do not know with certainty is whether there are, in fact, more of these diverse household arrangements than in previous decades, or simply that they are now more public, or a bit of both. This is an empirical question worth pursuing.

But, regardless of whether diversity of household arrangements is on the increase, such diversity is a contemporary fact of life. The following are clearly observable. There now are visible many more households involving at least one spouse who has been previously married. This is true whether or not the current household involves people who are currently married to each other. There now are visible many more households involving hetero-sexual couples who are not married to each other. This is true whether one or both of the partners have been, or are currently married to another persons, or whether they have never been married at all. There now are visible more households involving hetero-sexual relationships of more than two people. There now are visible more households involving same-sex couples. Some of these involve persons who have never been married, and some involve one or both persons who have been, or who are currently married to someone else. There now are visible more households involving two or more adults who are not involved in a conjugal relationships of any sort. This may involve same-sex or opposite-sex relationships. It may involve relationships within a family -- a parent-child or sibling relationship. It may involve relationships grounded in friendships, whether of a same-sex or opposite-sex nature.

The official law of the political state has historically used, sometimes with minor adjustments, dominant socio-cultural-religious structures to articulate and organize the conceptual frame for a whole series of social and legal policies. In the past, the private law (and in a parasitic fashion, the substantive criminal law) typically was the most significant reflection of this conceptual frame. Issues of status and filiation were paramount: concepts like husband, wife, widow, widower, parent, child, legitimate, illegitimate, niece, nephew, brother, sister, half-brother, half-sister, aunt, uncle, grandparent, in-laws, etc., served a central organizing role. The deep import of these status relationships was most closely revealed in the law of intestate succession, and in the law of persons and family.

Until the past 50 or so years, the vast bulk of policy judgments concerning various status relationships were derived from religious understandings of marriage. These policy judgements addressed questions as diverse as : (1) who is entitled to marry and under what conditions? (2) what are the economic consequences of marriage for couples? (3) what is the bearing of marriage of the contractual capacity of spouses? (4) impact does the marriage of a child's parents have on his or her name and economic entitlements? (5) what types of legal exclusions are visited upon people married to each other (conflicts of interest, gifts in fraud of creditors, and spousal non-torts, for example)? (6) when should marriage bear on principles of the criminal law such as those relating to evidentiary privilege, to conspiracies and accessories, and to the

definition or non-definition of crimes (rape, for example).

More recently, the normative impact of the private law concepts of marriage and filiation has come to transcend their direct interpersonal object. A number of contractual arrangements with third parties have come to reflect the presuppositions of dominant socio-cultural-religious status relationships. The law of what was formerly known as the status of "master and servant" offers several striking examples: (1) the concept of a family, and not a living, wage; (2) the designation of beneficiaries of private insurance, pension, health and disability benefits; (3) the types of state-run medical, workers compensation and wage-related social security entitlements that are transferable to family members; and (4) other fringe benefits of all descriptions (access to company housing, health clubs, golf clubs, conference travel, *etc*.).

At the same time, the public, non-employment related social welfare network was built up in large part around the notion of the child-rearing family, and especially the notion of the child-rearing family where parents were married to each other. Finally, a number of other regulatory initiatives were made contingent upon the marriage relationship: landlord-tenant relations; civil commitments; substituted decision-making; capital gains rollovers; dependant's relief; and the right to immigrate are a few of the most well-known.

Addressing Disjunctures of Law and Fact

The obvious disjuncture between the sociological reality of adult domestic relationships of dependence and interdependence and legal definitions, and the increasing legal deployment of one such relationship -- the marriage relationship -- to organize public policy, raises for many a series of troubling questions. Two are of a preliminary kind. First, should the law even be concerned about the disjuncture between its regulatory frame and social fact? Second, if so, should its ideological orientation for reconciling states of law and states of fact be to adjust the former to the latter or should it be to reinforce the former as a disciplining factor upon the latter?

Most, although not all (and the minority view is increasing in popularity), jurists answer the first question in the affirmative. For them, the law of the State is the most important institution of normative social ordering and must, therefore, both mould and mirror society. The debate raised by this question is fundamentally about the nature of legal concepts and the interrelation of legal concepts arising in non-State legal orders with those articulated by the State. I return to this issue of legal pluralism later. As for the second question, opinions are more divided. Nevertheless, as the impulse for and interest in the conference attests, many jurists believe (at least in non-constitutional law fields) that the law must take cognizance of a changing society. Its role is to facilitate self-directed human interaction, not to repress it.

This being said, the range of other questions immediately suggested by the response to the second question is far from narrow. In the present context they include at least the following:

1. Is the manner in which the law currently frames its various policies appropriate to the social facts relating to high affect adult relationships in modern Canadian society?

2. Should the law even attempt to single out particular adult relationships for special recognition? For example, is there any case for the law to continue to sanction marriage of the type it has traditionally recognized?

3. Do we have a clear picture of what legitimate interests of the state in adult relationships might be?

4. Should the law take a differentiated view of these interests? Or should all its interests reach an identical audience?

5. Is this issue one of reproduction, one of conjugality, or one of high-affect adult relationships?

6. Is the issue one of discrimination between different types of conjugality, or one of incompletely theorized policy objectives?

7. Should the law attempt to address this disjuncture in purely instrumental ways, or should it also be concerned about the symbolism of high affect relationships between adults?

The Sociology and Psychology of Relationships

These various legal inquiries are not the only questions that must be addressed in assessing how the law apprehends and characterizes adult personal relationships. For once one abandons socio-cultural-religious dogma as a justification for legal policy and as a vehicle of characterization, one is driven to seek alternative forms of justification. In the late 20th century neo-conceptualism seems to be attracting significant support. By neo-conceptualism I mean the invocation of "rights ideology" as a way of disanchoring concepts from their cultural grounding. In this endeavour, discrimination and equality have assumed a dominant role. For example, a socio-cultural-religious concept of filiation that depends on notions of legitimacy flowing from the marriage of a child's parents is seen to discriminate against children born out of wedlock. Equality demands that the legal default rule should be one that treats all biological children in the same way. Whether neo-conceptualism actually provides a sufficient justificatory basis for legal policy or whether it merely hides teleology is a question to which I shall return later.

Earlier this century, the policy-maker's first refuge in responding to dysfunctional socio-religious-cultural concepts was, as the very term dysfunctional intimates, functionalism: what is the purpose for any given legal construction and any given substantive policy? Of course, since purposes are themselves judgements of value about the way we construct facts, a host of other issues comes immediately to the fore. Many of these resonate in social science disciplines like sociology and psychology.

A first question is this. As a matter of sound public policy, why should the law worry about relationships at all? Let me develop the point further. With the notable exceptions of marriage, filiation, and fiduciaries, legal relationships of the common law or a civil code were designed around a nexus of individuals: contract, tort, and restitutionary claims. The vast bulk of modern legislation is also directed to individuals -- attributing rights and imposing obligations. Is there any reason for rethinking this structure? Specifically, are there things that happen in relationships that we see as socially beneficial, such that we should actually orient our legal-regulatory regimes to promote relationships, rather than just targeting individuals?

For a functionalist this is, in no small measure, an empirical question. Imagine that it could be shown that the lives of people who lived in stable, nurturing, longer-term relationships are no

better or no worse than those of people who live alone, or in a series of punctual, short-term relationships. Conversely, imagine that we were to discover that people who live in stable, nurturing, longer-term relationships actually live healthier, happier, more productive lives. Again, imagine that we were to discover that there is a correlation between those who claimed the recognized status of marriage and individual well-being. Conversely, imagine that we were to discover that it made no difference at all, and that the factual character of the relationship -- its nature, length, intensity, for example -- regardless of who were parties to it and regardless of whether it had formal legal sanction, was the key determinant of well-being. Ought any of these discoveries to make a difference to how we frame legal-social policy? And, if so, upon what basis are we making decisions about, and measuring notions like health, happiness, productivity and well-being?

A second series of questions relates more to psychology than sociology. All there certain needs of adults as individuals -- whether or not they are in any kind of relationship at all -- that underpin our understanding of the human condition? This type of inquiry leads to theories of human development and personality and is, for that reason, more controversial. Without pretending to claim that the list that follows is exhaustive, one might at least configure (and here one is borrowing from Abraham Maslow) some of the following needs of individuals.

1.	Physiological Needs:	water; food; sex; sleep
2.	Safety Needs:	shelter; physical security; economic security
3.	Love Needs:	love; belongingness; intimate relationships
4.	Respect Needs:	self-respect; acknowledgement; esteem of others
5.	Self-Actualization Needs:	truth; beauty; justice; symbolic expression

For present purposes, the central question is whether the State have any role in recognizing, legitimating and meeting these needs. As social policy, should the State worry about the provision of water, food, shelter, physical security, and so on? Should it be preoccupied with nurturing love, self-respect, and public virtue for citizens? If the answer to at least some of these questions is yes (as it most surely is), should the State to provide for these needs directly, or should it do so by facilitating the flourishing of non-governmental societal institutions through these needs may be met? By posing the question this way, one sooner or later arrives at an inquiry about relationships. For while some needs might be best by religious and social organizations, some seem to require direct high-affect personal interactions. Yet are we confident that relationships should be characterized as purely instrumental -- to be valued and encouraged by the State whenever, but only when, they turn out to be the most efficient means of responding to certain needs of individuals? Might relationships have intrinsic merit as a context in which human symbolic expression can flourish?

A third series of questions is this. If we think that it is an important individual need to build and nurture affective relationships with other adults, how do we ensure that these relationships are neither dysfunctional nor pathological? What in fact might be the central characteristics of healthy relationships? Since these questions directly address the activity of symbolic social structure-building among adults, they have been well worked over in the social work literature. The following is a relatively conventional listing of the psycho-sociological character of relationships taken from the "person in environment" manual of the U.S. National Association of Social Workers. In keeping with the social work tradition it is focused on "role" and the identification of "relationship" through "role".

1. Power - Equality: how equal is power within the relationship?
   is any imbalance negotiated or imposed?
   is their mutuality and interdependence?

2. Ambivalence - Commitment: what is the commitment to the relationship?
   is it commensurate from both parties?
   is the relationship affective or utilitarian?

3. Victimization - Respect: do the parties respect each other as individuals?
   is one party victimizing the other?
   is this victimization economic, psychological or physical?

4. Isolation - Recognition: what is the web of extra-relationship affective relationships?
   does each party choose other networks of relationships?
   can the relationship "speak its name"?

5. Instability - Stability: is the physical location of the relationship transient?
   is there a reasonable secure place that can been seen as a foyer?
   is there a shared stable place for the relationship to flourish?

The assumption underlying this inventory is that equality, commitment, respect, recognition and stability are central characteristics of healthy adult relationships. Even though one can see them reflected in the modern bivalent Christian marriage vows -- "to love, honour, cherish and respect, for better or for worse, in sickness and in health, *etc*." -- they in fact have little to do either with religious dogma or with conjugality as such. Rather, they signal the features of all adult relationships of high affect and interdependence in which parties have some understanding of their roles, and are comfortable with and accepting of those roles.

Take an example. Imagine a relationship between adults who stand as parent and child in a situation of interdependence. With advancing years and declining health, this may turn into a relationship that is more one of dependence. Are both persons accepting of their changed roles and able to maintain mutual commitment, respect and recognition even in the face of a growing inequality?

The Role of the State in Adult Relationships

The above discussion of various social-scientific hypotheses about the needs of adults and the characteristics of healthy adult relationships of interdependence does not, of itself, tell us much about what the attitude of the State towards such relationships should be. Nor does it tell us whether there is or should be a legitimate State interest in fostering relationships displaying these characteristics. Nor does it tell us how that legitimate State interest can be realized. To repeat, the question whether the State should develop policies and programmes to sustain relationships over and above those it deploys to protect and nurture the individual? As a

complementary inquiry, one may ask whether the State's role in nurturing or supporting relationships is justified by the value of the relationship as such, or whether this role is justified only because some other social purpose -- *e.g.* the raising of children -- is being served?

Of course, before these questions can be answered it is necessary to develop some general analytical grid through which current legal policies can be plotted against the needs of adults in such relationships. The LAW COMMISSION has asked Tom Anderson to undertake a complete inventory of federal legislation to determine how, and for what purpose, the law currently deploys concepts like family, couple and spouse. Over 1800 occurrences have been found, and this does not even include the *Income Tax Act*. At the same time we are developing a model of the main interests that the State might reasonably pursue in any legal-regulatory regime relating to high-affect adult relationships of interdependence. These we have tentatively grouped under four headings: physical security and integrity; social security and solidarity; psychological and emotional security; and economic security or mutual support. Under each of these headings are listed some of the main legal issues that reflect the interest in question.

1. Physical Security and Integrity

   - marital rape
   - protecting a relationship from outside physical attack
   - reporting of domestic abuse
   - elder abuse

2. Social Security and Solidarity

   - spousal privilege in the criminal law
   - conspiracies and attempts and accessories
   - economic crimes as between spouses?
   - should we permit tort suits between people in relationships regardless of their status?

3. Psychological and Emotional Security

   - non-exploitation and victimization
   - should we try to promote recognition?
   - should we try to sustain organizations that work to promote healthy affective adult relationships?

4. Economic Security and Mutual Support

   - pensions and fringe benefits
   - equal tax treatment of spouses
   - alimony and other private wealth transfers
   - should the state encourage pooling of resources as it now does with matrimonial regimes?

In addressing these issues it should not be assumed that the law's attitude to formal marriage relationships is always benign. On the one hand, for many years the law actually attenuated its concern for individual well-being because people were married -- the law of rape and conspiracies being classic examples. It is still much more difficult to establish economic exploitation where the relationship is between persons who are spouses. And in many cases, the tax regime penalizes those who are married. On the other hand, in many circumstances the law enhances its concern for individual well-being because of the existence of a marriage relationship.

It should also not be assumed that the interest of the State is just in what it can accomplish with the criminal law, or with its regulatory, taxing and spending prerogatives. On the one hand the State does deploy criminal and administrative law -- anti-discrimination prohibitions as between types of relationships in so far as housing, education, landlord tenant, zoning, *etc*. is concerned. On the other hand, it systematically encourages private institutions that nurture adult relationships -- *e.g.* churches, benevolent associations, *etc.* -- and it broadly facilitates relationship based contractual ordering -- *e.g.* private pension, insurance, sick leave or other employment entitlements.

Finally, it should not be assumed that today the law has a formal litmus test for relationships. Recently the courts held that the rule preventing spousal pension rollovers in the *Income Tax Act* in the case of formally constituted "December - March marriages" is not discriminatory. On the other hand, there also appears to be no settled functional criteria -- duration, nature, intensity, scope, cohabitation, degree of economic and psychological integration, or whatever -- by which the relationship can be easily identified.

One might summarize the argument to this point by noting that the only thing that is clear about the law's understanding of, and reaction to, adult relationships of intense affect, is that there is no clarity. This, as much as anything else, grounds the interest of the LAW COMMISSION in this conference.

Lessons of Instrumental Law Reform

Let us suppose for a moment that Parliament were to acknowledge that its social policy goal should be that of supporting stable, nurturing, adult relationships -- or at least some of these. How could it rewrite federal statutes so as to produce a closer coherence between its desired policy and its legal instruments? That is, how could it modify the rules relating to family reunification in immigration law, spousal privilege in the law of evidence, the definition of bigamy in the *Criminal Code*, the capital gains rollover in the *Income Tax Act*, employment benefits in the *Public Service Employment Act*, eligibility criteria for benefits under pension, employment insurance, old age security, and on and on, so that they embrace everyone who falls within the desired policy objective but do not extend to those who do not?

The technical issue is whether there are better or worse ways of drafting legislation in order to accomplish these goals. Two complementary inquiries are engaged: what new concepts of law can be imagined? and, even more importantly, what are new ways to imagine concepts of law? Let me clear about the differences between these inquiries. The first is an instrumental inquiry: how to better line up policy and legal definition. The second is a profoundly symbolic inquiry: how to do reform law in a manner that captures the loyalty and fidelity of citizens to the implicit values being advanced.

Throughout the 20th century law reformers and Parliaments have been preoccupied with

the first of these inquiries. Today, we are coming to the realization that it is the second that is more important. Let me explore this idea by briefly considering, within the civil law and common law traditions in Canada, the two traditional ways by which we have sought to redraft legislation that has become over-, or as is most often the case, under-inclusive.

A first technique is simply to extend the existing definition of the concept by which eligibility is determined. This can be done through a legislative analogy or by an express statutory fiction. Both methods are routinely deployed by Parliament. An example of the former (the extension of a concept by analogy) can be found in the law relating to adoption. An adopted child is, with only a very few exceptions (for example, eligibility to marry a biological sibling adopted by another family), treated as if he or she were the biological offspring of the adopting parents. An example of the latter (the extension of a concept by statutory fiction) can be seen in the way that the law has extended the idea of real estate (or in the civil law of Quebec, the idea of immoveable property) to include certain objects (chattels, or in the civil law of Quebec, moveable property); certain chattels (moveables) closely associated with land (such as family heirlooms) are deemed by the law to be "chattels real" ("immoveables by destination") and are treated by the law relating to inheritance, to take one example, as if they were, in fact, real estate (or in the civil law of Quebec, immoveable property).

Both in the case of adoption and in the case of extending the concept of real estate (immoveable property) the legislature is making a policy choice about the scope of a legal concept. It determines that a situation not obviously falling within a historical definition should, nonetheless, be treated thereafter as if it did. It is worth noting that in both cases, but especially in the second, the extension of the concept really contorts the root ideas associated with the initial concept: it is hard to imagine, for example, that many Canadians would automatically think that a family heirloom falls within the same legal category as a piece of land.

In so far as implementing a generalized public policy of nurturing the physical, emotional, psychological and economic security of persons in stable, nurturing, adult relationships is concerned, Parliament could, adopting the first technique, simply stipulate that all these other types of relationships -- widowed brother and sister; elderly sisters; old army buddies; mother and daughter; and so on -- should be treated in the same way as the traditional marriage relationship. Here the language in each particular statute would have to provide something like: "In this Act, a person who lives in a relationship A or B or C, shall be entitled to do X or Y or Z in the same manner and with the same effect as a person who is lawfully married."

By contrast, were Parliament to adopt the second definitional technique, it would redefine marriage so that all these other relationships would fall within the new definition. Rather than drafting a series of legislative amendments to individual statutes, it would take their existing conceptual and definitional organization and redefine the content of the concept.
It would state: "The term "spouse" means persons who live in a relationship A or B or C."

There is also a second well-known technique by which Parliament can redraft legislation that has become over- or under-inclusive. It is possible to rewrite a statute in a way that abandons an existing concept as the reference point for the policy to be pursued. Normally, when it chooses this route, Parliament focuses on the substance of the desired policy objective: it identifies criteria of inclusion and exclusion that relate to the facts of a human situation or to the purposes that people are pursuing, rather than to the formal categorization of that situation.

There are many examples of this approach to rewriting statutes in the field of commercial

law. In several provinces, legislatures have given up extending old concepts like mortgages to new and analogous legal situations (such as conditional sales agreements), where debtors also deserve to be protected against unfair practices by creditors. They have, rather, chosen to invent a brand new concept called "a security interest" and to define it without reference to existing legal concepts like chattel mortgages, conditional sales agreements and long-term leases. The new concept is defined exclusively by reference to the substance of the commercial transaction in issue. It bears notice that in this case, the legislature is dissociating a concept that has historically been tied to formal criteria of definition, and replacing it with a definition that relates to the purposes being pursued by creditors and debtors: "if a bird walks like a duck and it quacks like a duck, the law should treat it as if it were a duck!"

In so far as implementing a generalized public policy of nurturing the physical, emotional, psychological and economic security of persons in stable, nurturing, adult relationships is concerned, Parliament could, adopting this approach, rewrite its various laws relating to pensions, tax, insurance, or whatever, so that the criterion for eligibility would relate to purposes of, and substantive facts about, the relationship -- its length and character, for example -- rather than to the precise marital status of the persons in it. This technique resembles the extension of a concept by analogy in that it deploys substantive features of a relationship to describe the relationship, but it differs from extensions by analogy because it does not make reference to the previous concept -- it replaces that concept.

To understand what choices are now open to Parliament, and why in the past it has used one or the other of these approaches in different situations, it is necessary to take a little detour into the history of legal concepts in Canada's two legal traditions: the civil law and the common law. Since at least Roman times European private law and the law carried over to former European colonies have been grounded in an approach to legal definitions that lawyers usually call "legal formalism". This means that fundamental legal concepts have been defined in one of two ways. Some are defined by reference to something in the material world -- physical persons, land, objects, and so on. Others, that do not relate to a thing, but rather a status or an activity -- a sale, a lease, heirship, and so on -- have been defined by deducing their "true characteristics or their essential nature". Only rarely have our everyday legal concepts initially been defined by asking what purpose they serve.

The practical effect of relying on these two kinds of formal legal definition can be seen in how the most fundamental distinction in the private law has been drawn. This is the distinction between an object of legal rights (property) and a subject of legal rights (persons). It is, of course, intuitively appealing to see the distinction as simply reflecting the purely physical characteristics of things and human beings. But, upon reflection we can see that in modern law the concepts of "property" and "person" have only a loose connection to material facts. For example, it is hard to imagine that some "persons" recognized by the law -- such as business corporations -- are really like human beings; and it is also hard to imagine that some contemporary objects of property -- such as chemical formulae -- are just like rocking chairs. Even centuries ago the complexity of the concepts of "property" and "person" was widely understood: certain human beings such as slaves, married women and young children were considered by the law as the property of their master, husband or father; conversely, certain objects such as idols and sacred relics were often invested with legal personality.

Once it is understood and accepted that even "simple" legal concepts do not automatically line up with material things, alternative means for fixing their scope have to be found. That is, in order to include and exclude certain social facts or legal relationships from any given concept,

new criteria for defining the concept need to be announced. Historically, the law moved away from definitions based on the physical properties of things by adopting definitions of pure legal concepts grounded in their "true characteristics or their essential nature". These new concepts were then expanded or contracted over the years in order to produce desired policy outcomes without Parliament having to create novel regulatory regimes. In this technique of defining the essential features of a concept one sees a total reversal of the approach that rests on relating legal concepts to material things. Far from the "social facts" driving the definition of a legal concept, the legal definition of the concept comes to drive how "social facts" are understood.

Over a large range of legal fields, concepts originally extracted from everyday experience have been extended through relatively benign fictions. Especially where the initial referent of the concept was a material thing, the policy object being pursued does not usually cause people to question the technique that the legislature chooses to expand a concept in order to pursue it. Extending the concept of an object of property to include money, cheques and company share certificates is an obvious case where the extension of a material concept did not provoke people to question the technique that the legislature chose to achieve its policy objective.

Where, however, a legal concept has no material reflection but is defined by its presumed "essential characteristics", analogical extensions can sometimes be highly controversial. Where the original concept relates to a transaction of some sort, people usually accept the extensions are usually accepted in the same way that they do the extension of concepts relating to material things. A good example can be seen in the legal rules that govern the pledging of property as security for a loan. The traditional concept of a pledge requires a debtor actually to hand over an object to his or her creditor (for example, a pawnbroker). In the 19th century the concept was extended so that it would also encompass pledges where only a document representing title to the object being pledged is handed over to the creditor (for example, the handing over of an ownership certificate for a car to a pawnbroker). No great hue and cry about Parliament of courts corrupting the concept of the pledge was then forthcoming.

But this is not always the case. Where a legal concept defined by its "essential characteristics" is grounded in socio-cultural reference points such as custom, tradition, religion, morality or ideology, analogical extensions can cause significant debate. This is particularly the case when they are fictitiously or even analogically extended by law well beyond the definitional limits provided by these other socio-cultural reference points. Today, there is probably no better example of a legal (and a socio-cultural) concept under this kind of stress than the concept of marriage. Understanding the reasons why marriage has become such a contested legal concept gives us a good insight into the issues that Parliament has to confront every day in recrafting its legislation whenever socio-cultural concepts are in issue.

Legal Concepts Under Stress

It is not an understatement to say that the legal concept of marriage is under stress. The reasons are multiple, and relate as much to sociology as to law.

Sociologically, we know that religious concept of a married couple is no longer as dominant as a domestic arrangement. The nuclear family (and the idea of marriage for love) exerts a less powerful bond on spouses than that historically exerted by the extended family (and the idea of marriage as a socio-political-economic arrangement between families). So while divorces, annulments of marriage and abandonment have always existed, their frequency today is much greater. Again, as people live longer, marriages can potentially last longer and marriage

vows "till death do us part" become harder to sustain. Still again, the social stigma (and economic cost) of living together as an unmarried couple is much less potent than previously. And finally, many other domestic arrangements between two adults that previously remained relatively discreet are now being overtly proclaimed. People who are involved in all different kinds of domestic arrangements see no longer see any reason why they need to conceal these.

As for reasons tied more closely to the law, two should be noticed. On the one hand, social life has become much less anonymous than it was at the turn of the century. As the State has taken on a greater role in sanctioning and registering marriages (and as organized religion has receded as the sanctifier and recorder of marriage), it has become more difficult for a spouse informally to end a marriage through abandonment, move far away to a new parish and then engage in a bigamous remarriage. Too many other regulatory features of modern life -- driver's licenses, medicare cards, social insurance cards, income tax filings -- follow us wherever we move. As a result, the law actually wind up, by ricochet, encouraging the formation of non-marital domestic unions among those already married or previously having been married.

On the other hand, over the past century the State has come to be more and more involved in providing social benefits that were previously dispensed by religious or charitable organizations. As the range of these social benefits expanded it was necessary to establish criteria of entitlement. Borrowing from the religious approaches that it was gradually overtaking, the State increasingly deployed the concept of marriage as the omnibus referent for its whole gamut of social policies -- tax, pension, social welfare benefits, survivorship, housing and insurance rights. Even though it is not always clear that there is a necessary connection between the fact of marriage and the policy goals being pursued, because marriage is a handy concept for identifying a large number of those who are to be targeted by the policies in question, it is often reflexively used by Parliament in this way. And because the law has now invested so much policy baggage in the concept of marriage, it has made the definition of marriage and not the policy goals themselves the focus of political and social debate.

In order to trace out why the recasting of legal concepts that are grounded in socio-cultural practices is so difficult, some further attention to the marriage example is necessary. It is clear that the legal definition of marriage derived from moral-religious ideals can be helpful for consecrating certain relationships between adults. This symbolic effect is true of all culturally-grounded definitions. But as the basis of legislative policy designed to promote the physical, emotional, economic, and psychological security of couples, the concept of marriage is both under and over-inclusive.

First, it is under-inclusive in the sense that it excludes many stable, nurturing, adult relationships of dependence and interdependence that are deserving of being embraced within the social policies adopted by Parliament. One need think only of those relationships I adverted to earlier.

Second, the definition of marriage is marginally over-inclusive for these purposes in that some *de jure* marriages have no *de facto* content worthy of legal deference -- the couple no longer lives together, or got married to facilitate immigration, or simply to benefit from public or private income support programmes.

The traditional socio-cultural definition of marriage appears to have been, in the 19th and early 20th centuries, a reasonably effective and useful point of reference for Parliament to use when targeting the beneficiaries of its social policies. Or so it would seem on the basis of existing

social data. Since most married persons were (and today still are), most of the time, apt targets of the legal principle being announced (or appropriate recipients of whatever benefit was intended), the concept of marriage became a surrogate for careful policy specification and explicit statutory definition. Today, however, the increasing diversity of stable, nurturing, adult relationships means that marriage is no longer the only point of reference. Rather, marriage has simply become an easy legislative tool for a Parliament or legislature that has neither the energy nor the political will to clearly articulate the precise situations that it seeks to target with any particular legislative programme.

The under-inclusiveness of the traditional moral-religious concept of marriage as a vehicle for advancing social policy is now too obvious to be ignored; and this under-inclusiveness has generated, over the past fifty years, two predictable responses. Many argue that other non-marriage relationships should be analogized to marriage for purposes of identifying who should be eligible to receive a given benefit.

Parliament has not been unresponsive to these arguments. During World War II it provided that most "common law" spouses of soldiers killed on active duty would be able to claim a military widows' pension under the same conditions as legally married widows of soldiers killed on active service. Over the years this type of extension of the definition of marriage by analogy has become a frequent practice.

Yet, because these extensions have always been an *ad hoc* response to particular situations where the appropriateness of the extension has been almost unanimously agreed, they have never provoked a rethinking of the policy bases of the benefit in question. Moreover, because the concept of marriage remains the default register for identifying who should receive these social benefits, there are clear limits on the kinds of relationships to which the analogy can be extended: no extended concept of the traditional socio-cultural definition of marriage will ever reach two elderly siblings who have always lived together in a non-conjugal relationship.

For these reasons, others argue for an explicit expansion and redefinition of the concept of marriage that would remove from the idea two elements upon which it has heretofore rested: the notion of a relationship between two persons of opposite sexes; and the notion of a relationship that has as one of its potential outcomes, procreation. On this view, marriage would be redefined so as to cover all manner of non-traditional stable, adult relationships of dependence and interdependence: sibling relationships; relationships between parent and child; relationships between old friends; same sex relationships; and so on.

These two responses (and especially the second) have, of course, provoked consternation among policy-makers and confusion verging on a crisis among those charged with trying to draft legislation. As governments recognize the pitfalls of using socio-cultural concepts to ground the legal definitions through which social policies are advanced they are compelled to grapple with figuring out the best ways to express who should be entitled to claim the benefit of these policies. In a modern socio-demographically diverse society, where the life projects of citizens can be multiple and highly different one from the other, legal definitions grounded in the moral-religious traditions of a particular group are no longer adequate. In a theocracy, of course, governments do try to legislate one particular kind of religious morality, but it is precisely the refusal to impose a uniform religious practice that characterizes secular and tolerant societies such as Canada. Legal definitions must be subservient to policy, rather than the reverse.

Symbols of Social Solidarity

Almost all the social policies that are now make parasitic on the concept of marriage can be seen actually to depend on legislative assessments of the intensity of dependence and interdependence and nurture within a relationship. Thinking through what public policies we wish to pursue as a society, given the evident plurality of domestic situations that seem to cry out for some response is, obviously, a delicate and difficult task. But the concern of the LAW COMMISSION is not just with the particular policy response being contemplated. As noted, we are, in fact, now in the process of investigating a whole series of questions touching the rationale for and continued utility of numerous legal distinctions grounded in the definition of marriage.

But this is only the beginning. A much deeper concern is with finding, elaborating and then assessing the relative merits of the different legal means available for achieving Parliament's desired result, whatever it may be, by legislation. And this brings me to the nub of the issue now confronting policymakers.

How important is the concept of marriage anyway? Let me put the various alternatives by beginning with current substantive restrictions on who may marry. In principle, there are five preconditions to marriage. Intending spouses:

1. must have reached the minimum aged to consent to marriage;
2. must not be too closely related to each other by consanguinity or alliance;
3. must not currently be married to someone else;
4. must be only two persons; and
5. must be of the opposite sex.

Today, each of these "social control" restrictions is under reconsideration. The issues bear consideration.

Some feel that there should be no difference between consent or capacity in marriage and consent or capacity to contract generally. By contrast, others feel that March-December and December-March marriages (so-called intergenerational marriages) should not be permitted.

Again, some feel that the rules of consanguinity are too restrictive and that biology has disproved the "gene-pool" rationale for them. In any event, not all marriages are conjugal, and not all conjugal marriages produce children. By contrast, some feel that these restrictions are too narrowly drawn and should be expanded to include relationships of alliance such as brother-in-law, sister-in-law, non-consanguineous nieces and nephews, parents-in-law and so on.

Still again, there are those who think the bigamy prohibition is too narrowly drawn. Most often this viewpoint is expressed in the idea that married couples should not be permitted to divorce. Conversely, there are those who see it as anachronistic. Why cannot those who are married set up more than one marriage household? They point to the fact that support payments between ex spouses produce this effect as an economic matter anyway.

The fourth requirement is also a point of friction. Some feel that there is no difference between true polyandry and true polygamy and serial polyandry and serial polygamy. There must be a limit on the number of times people can marry. On the other hand, many religious traditions do permit polygamy and polyandry today. As Canada becomes more culturally diverse, why should it not do likewise?

Finally, there are those who believe so strongly in the opposite sex requirement that they would prohibit marriage even between opposite sex couples when one or the other is transgendered. And there are many who believe that same-sex couples should be permitted to marry under exactly the same conditions as opposite-sex couples.

What are the lessons of these reflections on the current "preconditions" to marriage? A number come immediately to mind. First, none of these preconditions are naturally given; all are socially constructed. Second, the fact that they are contested means that they are important to people; definitions that are not important are usually dealt with pragmatically. Third, the various requirements are not inextricably linked; it is possible to permit same-sex marriages without permitting polygamy and polyandry, or *vice versa*. Fourth, none are directly tied to any other social policy that the State is currently pursuing; while at one point they may have been developed because the State was trying to reinforce a particular religious vision for society, this is no longer an explicit policy.

These lessons are only slowly percolating into legal policy. And they often do so only indirectly. For example, policy-makers are now asking whether it is appropriate for Parliament to reconsider its use of definitions grounded in moral-religious ideals when it has available other ways of identifying the beneficiaries of its social policies. Should, for example, Parliament abandon these types of legal definitions as the mechanism by which to advance social policies designed to ensure the physical, economic, emotional and psychological security of adults living together? Might, to take a pragmatic issue, this approach not permit these policy goals to be implemented coherently across Canada without regard to the sectarian attachments of any particular group of citizens?

But this approach misses the important symbolic function of socio-cultural-religious concepts. Even were it possible to pursue social policies by defining entitlement by reference to the policy being promoted, rather than be reference to traditional socio-cultural definitions, it is not clear that this would change the contours of much contemporary policy debate. It is true, of course, that in so far as the issues of physical, emotional, psychological and economic security are concerned, the policy question could then be seen as no longer involving an attempt to determine the "true definition" of marriage. It could be seen, that is, as one of identifying the true scope of legitimate state interests in structuring and nurturing healthy adult relationships of dependence and interdependence that serve the interests of those who are involved in such relationships.

But the State still continues to recognize the symbolic status of marriage. Even though all of the policy issues on the table could be resolved in a functional, non-discriminatory way, it remains the case that bigamy, polygamy, polyandry and same-sex marriage remain proscribed. It also remains the case that long-term sibling relationships, for example, cannot be characterized as marriages. What, then, is the State to do?

Five general kinds of responses are possible. The first four of these retain the current theoretical orientation of the law relating to high affect adult relationships of interdependence. That is, they organize legal responses by reference to concepts that are deemed to have essences. A relationship is characterized by certain features -- whether formal or functional -- that are deemed to define it. From this essence a number of legal consequences are then deemed to flow. The essentialized concept is the nexus between states of fact and legal outcome.

The five possible types of response are as follows:

1. Do nothing. This has, with the minor exceptions of provincial tinkering with the age of consent and federal tinkering with rules relating to prohibited degrees of consanguinity, and the major exception of the rationalization of divorce, been the approach of the past fourteen decades.

2. Redefine marriage to overcome certain prohibitions. Presently, there are two areas where there exists a significant call to do so -- the recognition of same-sex marriages and the recognition of polygamy and polyandry. It is not inconceivable, however, that there will soon be claims to remove consanguinity prohibitions such that parent-child and sibling partners (whether opposite sex or same-sex) can marry.

3. Complement the concept of civil marriage with an additional concept to parallel it for relationships now excluded. Most proposals to establish "registered domestic partnerships" or "pactes de solidarite civile" are of this nature, although it should be noted that in many proposals, the "registered domestic partnership" option is also meant to be open to persons who are entitled to marry, but do not wish to do so.

4. Replace the concept of civil marriage with an alternative concept. Establishing a regime of "registered domestic partnerships" or "pactes de solidarite civile" could also serve this purpose. If such an approach were to be taken, however, the State would not also maintain the concept of marriage.

5. Withdraw from the marriage business. Were such an option to be taken, the State would simply eliminate the concept of marriage from the statute book without replacing it with any other concept. All legal policies now made contingent upon marriage, or analogies to it, would be pursued by reference to functional concepts.

As a matter of antidiscrimination law, the second, fourth and fifth options would necessarily pass constitutional muster. As a matter of broad social consensus the first and third options seem to have broadest support. As a matter of social psychology, and the idea of State recognition of symbols of social solidarity, the second and fourth are most plausible. As a matter of reconciling competing interests in a multicultural, diverse society, where the life projects of citizens are displaying an enormous diversity the fifth may be the preferred option.

If the law of the State could exist perfectly well without itself defining the concept of marriage until the mid-19th century -- deferring this question to various religious bodies, it is worth considering whether the law of the State could exist perfectly well in the 21st century without itself defining marriage. This, ultimately, is the lesson that legal pluralists
have been preaching since the late 1960s.

Conclusion

There are, evidently, no easy answers to the issues confronting the LAW COMMISSION OF CANADA as it pursues it research under the theme of Personal Relationships. But if it can at least come up with new concepts of law and new ways of conceiving legal concepts that might lead to less polarization and a broader social consensus about policies to be pursued, it will have at least

partly achieved one of its central ambitions.

In doing so three key steps must be taken. The first is to clarify what the policies actually being pursued are, and what the policies to be pursued should be. The second is to disaggregate legal concepts so that their contribution or non-contribution to achieving these policies can be assessed. The third is keep both the instrumental and symbolic aspects of law and legal regulation clearly in view at all times. If anything, this is the toughest challenge. It is also the challenge that the LAW COMMISSION OF CANADA has set for itself.