



PRESIDENT OF THE
FAMILY DIVISION

**Changing families: family law yesterday, today and tomorrow – a view
from south of the Border**

A Lecture by Sir James Munby

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In the year when we are commemorating the centenary of the extension of the franchise to women – though only to *some* women – it is perhaps useful to start what I have to say by looking at the state of English family law a 100 years ago. It was, in truth, scarcely changed from the legacy bequeathed by the Victorians to the Edwardians.

Victorian family law was founded on three great pillars.

First, it went without saying that the basis of the family was a marriage that was Christian (or if not Christian, then its secular or other religious equivalent) and, at least in theory, lifelong. Thus, Sir James Wilde’s famous definition of marriage in *Hyde v Hyde*: “I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.”

Secondly, the relationship of the husband and the wife within that marriage was fundamentally unequal. The classic statement of the nature of marriage was that of my predecessor, Sir James Hannen P, in 1885 in *Durham v Durham*: “protection on the part of the man, and submission on the part of the woman.” “Protection” and “submission” reflect a characteristically Victorian view of the man as prepotent and the woman as essentially frail and weak. Even in the 20th century, in 1911, a judge of what is now the Family Division of the High Court could say:

“Some people think that ... you must treat men and women on the same footing. But this Court has not taken, and, I hope, never will take, that view. I trust that, in dealing with these cases, it will ever be remembered that the woman is the weaker vessel: that her habits of thought and feminine weaknesses are different from those of the man”.

He added: “this Court is always willing to recognize the weakness of the sex.” This, as will be recalled, was at the height of the suffragette campaign – one wonders what was really going through the judge’s mind.

These views were an unconscionable time a dying. As late as 1954 the Court of Appeal in *Re Park*, although wondering whether submission on the part of the woman was still an essential part of the marriage contract, was unwilling to state unambiguously that it was not. It took another 50 years until the doctrine received its final quietus in 2004.

That to us the language of these Victorian judges seems ludicrous, even offensive, shows just how far we have come, though at this point foreboding suggests that humility is perhaps in order: past judicial utterances we now find almost absurd should serve as a terrible warning of how history will, in due course, come to judge the present generation.

The inequality inherent in the marriage relationship was underscored by the notorious ‘double standard’ enshrined in the law of divorce. The effect of section 27 of the Matrimonial Causes Act 1857 was that, whereas a husband could divorce his wife for simple adultery, a wife could not divorce her husband unless she could prove either what might be described as aggravated adultery (that is, adultery coupled with incest, bigamy, cruelty, desertion or rape) or, in the alternative, sodomy or bestiality.

Thirdly, the relationship of parent and child was in large measure left to the unregulated control of the father. The father was virtually absolute, the law was disinclined to intervene and the modern concept of the child’s welfare was almost wholly absent from the law. Only in 1902 do we see the first statement of the modern principle that the child’s welfare is “paramount.”

The corollary of the second and third of these fundamental principles, when taken in combination, was, of course, that the mother’s rights in relation to her children were precarious. In striking contrast with the position of the errant father, moral failings were enough to separate a mother forever from her child – a doctrine that lingered on, albeit in somewhat attenuated form, well after the First World War.

Standing back from the detail, three features of the Victorian approach are striking. First, enthusiastic adherence to the view, as expressed by a judge in a family case in 1905, that the function of the judges was “to promote virtue and morality and to discourage vice and immorality” – so, the purpose of the law was the enforcement of morals. Secondly, a very narrow view of sexual morality. And thirdly, the dominant influence wielded by the Christian churches.

Happily for us, the days are past when the business of the judges was the enforcement of morals or religious belief. That was a battle fought out in the nineteenth century between John Stuart Mill and Sir James Fitzjames Stephen (Stephen J) and in the middle of the last century between Professor Herbert Hart and Sir Patrick Devlin (Devlin J). The philosophers had the better of the argument, and rightly so.

The 19th century debate between Mill and Stephen was reignited by the publication in 1957 of the Report of the Committee on Homosexual Offence and Prostitution (the Wolfenden Committee), which defined the function of the criminal law as being:

“to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others ... It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined.”

This time the debate began with the judges. In 1957 Lord Denning, speaking in a debate in the House of Lords on the Wolfenden Report, denounced homosexual acts as “unnatural vice” which “strikes at the integrity of the human race.” Posing the question “Is this conduct so wrongful and so harmful that, in the opinion of Parliament, it should be publicly condemned and, in proper cases, punished?” his answer was emphatic: “I would say that the answer is, Yes: the law should condemn this evil for the evil it is”.

In 1959 Sir Patrick Devlin delivered his justly celebrated Maccabaeian Lecture, *The Enforcement of Morals*, also attacking the thesis propounded by Wolfenden. His language, if less colourful and muscular than Stephen’s, was to much the same effect. He held that “an established morality is as necessary as good government to the welfare of society”, that societies “disintegrate ... when no common morality is observed”, and accordingly that “The suppression of vice is much the law’s business as the suppression of subversive activities; it is no more possible to define a sphere of private morality than it is to define one of private subversive activity.” The criminal law could properly be used to proscribe any immorality to which the man on the Clapham omnibus would react with “intolerance, indignation and disgust.” His adversary, Professor Herbert Hart, took much the same position as Mill. The debate raged for some time. It died away without any definitive conclusion, but time has shown that Hart had had much the better of the argument.

A poet famously suggested that ‘Sexual intercourse began / In nineteen sixty-three’. That caustic comment, which Larkin mordantly related to what he called ‘the end of the Chatterley ban’, conceals an important truth. The simple fact is that in so many matters social and sexual the modern world – our world – is a world which has come into being during the lifetime of many of us alive today. It is a development of the 1960s.

The moment at which the world changed can, in fact, be identified even more closely than Larkin suggested. The last hurrah of the ancien regime was not so much the failed prosecution of Penguin Books Limited in 1960 for publishing D H Lawrence’s *Lady Chatterley’s Lover* but rather the famous – or infamous – decision in 1961 of the House of Lords in *Shaw v Director of Public Prosecutions*, for it marked the end, even if not recognised at the time, both of the ancien regime in matters sexual and of the pretension of the judges to set themselves up as *custos morum*.

The assertions of the judges in *Shaw* were, no doubt, in part a response to the recommendations in the report of the Wolfenden Committee. But they were no more than the dying fulminations of an age which, viewed even from the perspective of less than 60 years, now seems almost as remote from us as Nineveh or Babylon.

Six years later, in 1967, the world changed. In June, Parliament enacted the National Health Service (Family Planning) Act 1967, sweeping away the remaining institutional restraints on the provision of contraception for social rather than purely medical reasons and the remaining distinction between the provision under the NHS of contraceptives to the married and the unmarried; in July, the Sexual Offences Act 1967, decriminalising homosexuality; and in October the Abortion Act 1967, legalising abortion.

The ready availability of the contraceptive pill, both commercially and legally, removed the fear of unwanted pregnancy. The legalisation of abortion removed the fear of the consequences of contraceptive failure. Sex was now something to be enjoyed, if one wished, for purposes having nothing to do with procreation. And sex between consenting adults of the same sex was no longer criminal. A fundamental link – the connection between sex and procreation – had been irretrievably broken.

Time was when one tended to lead to the other. In the modern world the link is much less clear cut. Two great developments have transformed matters. First, as I have said, contraception means that conception is no longer the typical consequence of sexual intercourse. Secondly, and conversely, modern forms of medical technology mean that intercourse is no longer a necessary pre-requisite to conception – which has, in turn, led to further developments in the law of parenthood. We are surely in a world that neither Sir James Wilde nor Sir James Hannen could ever have contemplated even in their wildest imaginings. For those who have grown up in our modern world, it is hard to comprehend the gulf which separates our world from theirs.

Judges are no longer *custos morum* of the people, and if they are they have to take the people's customs as they find them, not as they or others might wish them to be. Once upon a time, as we have seen, the perceived function of the judges was to promote virtue and discourage vice and immorality. I doubt one would now hear that from the judicial Bench. Today, surely, the judicial task is to assess matters by the standards of reasonable men and, of course, *women*.

As Hart pointed out, both Stephen and Devlin assumed a society marked by a very high degree of homogeneity in moral outlook and where the content of this homogeneous social morality could be easily known. He suggested that neither of them had envisaged the possibility that society is, and on one view had already by the 1960s become, morally a plural structure. Be that as it may, it can hardly be disputed that the last few years have marked the disappearance in an increasingly secular and pluralistic society of what until comparatively recently was in large measure a commonly accepted package of moral, ethical and religious values. This means that on many of the medical, social, ethical and religious issues which the family courts increasingly have to grapple with there is simply no longer any generally accepted common view.

At the same time the law has had to grapple with the very profound changes in family life – in the nature of the family – which we have seen in recent decades.

Until very recently, family law was concerned largely, if not exclusively, with the family wrought in the image of Sir James Wilde's definition of marriage. The family of today is very different, though in saying this we need to remember, as Professor Lawrence Stone's great works have taught us, that what we currently view as the traditional or

conventional form of family is itself a comparatively modern development. But there have on any view been very profound changes in family life in recent decades.

These changes have been driven by five major developments. First, there have been enormous changes in the social and religious life of our country. We live in a secular and pluralistic society. But we also live in a multi-cultural community of many faiths. One of the paradoxes of our lives is that we live in a society which is at one and the same time becoming both increasingly secular but also increasingly diverse in religious affiliation. Secondly, there has been an enormous increase in the number of trans-national families. When travel was limited by the speed of a horse, most people hardly moved from the locality of their birth. The railways and the steamship broadened people's horizons enormously. But it was only the introduction of the Boeing 747 and its successors, and the enormous reduction in the price of air travel in recent decades, that has made it possible for ordinary people to travel back and forth across the world so easily and so frequently and thus to find partners abroad. Thirdly, there has been an increasing lack of interest in – in some instances a conscious rejection of – marriage as an institution. The figures demonstrate a decline in marriage. Fourthly, there has been a sea-change in society's attitudes towards same sex unions. Within my lifetime we have moved from treating such relationships as perversions to be stamped out by the more or less enthusiastic enforcement of a repressive criminal law to a ready acknowledgment that they are entitled not merely to equal protection under the law but also to acceptance and respect. Finally, there have been the enormous advances in medical, and in particular reproductive, science to which I have already referred. Reproduction is no longer confined to 'natural' methods. Many children today are born as a result of 'high-tech' IVF methods almost inconceivable even a few years ago.

The result of all this is that in contemporary Britain the family takes an almost infinite variety of forms. Many marry according to the rites of non-Christian faiths. People live together as couples, married or not, and with partners who may not always be of the opposite sex. Children live in households where their parents may be married or unmarried. They may be brought up by a single parent, by two parents or even by three parents. Their parents may or may not be their natural parents. They may be children of parents with very different religious, ethnic or national backgrounds. They may be the children of polygamous marriages. Their siblings may be only half-siblings or step-siblings. Some children are brought up by two parents of the same sex. Some children are conceived by artificial donor insemination. Some are the result of surrogacy arrangements. The fact is that many adults and children, whether through choice or circumstance, live in families more or less removed from what, until comparatively recently, would have been recognised as the typical nuclear family.

All of this poses enormous challenges for the law, as indeed for society at large. Many of these changes have given rise to profound misgivings in some quarters. We live in a society which, on many social, ethical and religious topics, no longer either thinks or speaks with one voice. These are topics on which men and women of different faiths or no faith at all hold starkly differing views. All of those views are entitled to the greatest respect but it is not for a judge to choose between them. The law must adapt itself to these realities; but much of that is and must be a task for Parliament.

However, it is important to appreciate just how very recent so much of this is. We tend to forget the astonishing extent to which society's views about marriage, and about the place of women, not merely in society but also in the home and in marriage, have changed; not only, and most obviously, since Sir James Hannen was speaking in 1885 but also in the 50 years and more that have elapsed since the Court of Appeal gave judgment in *Re Park*. It is an effort now to imagine the role of the married woman in the nineteenth century, or even 50 years ago for that matter.

True it is that Sir James Hannen was speaking of marriage at a time after – even if only very shortly after – the Married Women's Property Act 1882 and the Matrimonial Causes Act 1884 had revolutionised so many aspects of the relationship between husband and wife. But the famous decision in *Jackson* in 1891, that a husband could not lawfully imprison (or physically chastise – beat) his wife, still lay in the future.

Important changes followed the First World War. The Representation of the People Act 1918 extended the vote to women, though only on a narrow and discriminatory franchise. The Sex Disqualification (Removal) Act 1919 threw the professions open to women. In 1923 the discriminatory divorce laws were reformed by the Matrimonial Causes Act 1923 and in 1925 the Guardianship of Infants Act 1925 established the principle that mothers and fathers, wives and husbands, have equal rights with respect to their children.

After this burst of reforming zeal, most of family law slumbered for the next forty years or so. During the 1920s and 1930s, the judges of the Probate, Divorce and Admiralty, as it was called in those days, were, to put it politely, conservative and limited in outlook. Many of them had been shipping lawyers. The judge who argued most copiously and vigorously for reform of family law, McCardie J, was a common lawyer who sat in the King's Bench Division. He was, alas, decades ahead of his time. The only really important piece of reform, the Matrimonial Causes Act 1937, removing some of the absurdities of the divorce laws which had been castigated by Sir Gorell Barnes P as long ago as 1906, was the achievement of a back-bencher, the redoubtable A P Herbert. Nor was the period after the Second World War characterised by many significant reforms of family law.

Only in the 1960s was there important change. In July 1967 Parliament legislated to secure the deserted wife's right to remain in the former matrimonial home. In October 1969 the divorce law was radically reformed, followed not long after, in May 1970, by reform of the law relating to ancillary relief and, on the same day, the Equal Pay Act 1970.

But not until 1973 was it finally established that a husband could be guilty of the common law offence of kidnapping his wife. Not until 1981 was the doctrine of the unity of husband and wife dismissed as a medieval fiction to be given no more credence than the medieval belief that the Earth is flat. Not until 1992 was the husband's immunity from prosecution for rape finally exploded as the absurd fiction it had always been. Not until 2000 was equality identified as the core principle of ancillary relief. Not until 2004 was the husband's immunity in relation to sexually transmitted infections likewise swept away. And not until 2010 did the Equality Act 2010 abolish the common law rule that a husband must maintain his wife and consign to history the

final discriminatory relics of our property law (the presumption of advancement) – though it is to be noted that neither of these provisions has yet been brought into force!

So much of this is so distressingly recent, but if the *law* is perhaps finally in most respects in respectable shape, the same cannot yet be said of the *economic and professional* position of women. At the very time when we are commemorating and celebrating the extension of the vote to women a 100 years ago, a swathe of powerful institutions – the BBC and many others – are being forced to confront the still astonishingly large and seemingly indefensible differentials between what men and women doing comparable work are being paid.

And let me give an uncomfortable example much closer to home. The first women to be appointed Queen’s Counsel in England and Wales were Helena Normanton and Rose Heilbron in 1949. The appointments this year (2018) bring to 430 the total number of women who have gained that distinction. But much of this is so very, very, recent. In 1971, when I was called to the Bar, the total was only 5; by 1988, when I took Silk, the figure had crawled up to 33; and by 2000, when I was appointed to the Bench, the total was still only 116. In other words, although it is 70 years since the first women took Silk, 73% of all the woman who have ever taken Silk have been appointed in the last 18 years. And even now, decades after the number of woman coming to the Bar had reached equality with the number of men, only a little over 15% of QCs are women [the Bar’s published figures for 2017 show that, of the 1,663 QCs, 1,409 were men and only 254 were women].

If the process of reform in relation to the legal status of women has been long and slow, reform in relation to those who are gay and in same-sex relationships has been very much more recent. As late as the 1990s, as we recently had occasion to remark in the Court of Appeal, the language used by the family courts in relation to gay people and their supposedly negative impact on children makes for very uncomfortable reading today. Put bluntly, it is the language of an earlier age. Only in 2002 was the law changed by the Adoption and Children Act 2002 to enable same-sex couples to adopt. Only in 2004 was civil partnership introduced by the Civil Partnership Act 2004. And only in 2013 was Sir James Wilde’s definition of marriage superseded by the extension of marriage to same-sex couples by the Marriage (Same Sex Couples) Act 2013.

As the case I have just referred to so powerfully illustrates, a current vital concern of family law has to be to ensure the extension to transgendered people of the equal protection of the law – where much remains to be done.

On a more mundane level, much of emphasis in more recent years has been on reform of the processes and procedure of the family courts, driven in large part by the recommendations of the Family Justice Review chaired by David (now Sir David) Norgrove.

In 1974 a committee chaired by the late Sir Morris Finer (Finer J) recommended the creation of a family court. Forty years later, in April 2014, that obviously sensible idea came to fruition with the establishment of a single Family Court, covering the whole of England and Wales and subsuming within it the family work of the Family Proceedings Court (which was abolished) and the County Court and the vast bulk of the work of the Family Division of the High Court (a few, albeit important, areas of

work remain within the exclusive jurisdiction of the High Court). All tiers of family judge, lay Magistrates, District Judges, Circuit Judges and High Court judges of the Family Division, are judges of and sit in the Family Court.

Alongside this reform has been a focus on the imperative need for judicial continuity and robust judicial case management. Cases are now allocated, on issue, by a judicial allocation team not merely to the appropriate tier of judge but to a specific judge who thereafter is personally responsible for the case. At the first directions hearing, the allocated judge makes an order which (a) identifies the issues, (b) sets the timetable for the case and (c) gives comprehensive directions down to and including the final hearing.

This robust case management is facilitated by four rigorously enforced principles. The first is the guiding principle that what is to be done is confined to what is “necessary” to enable the court to decide the case fairly and justly. That test determines what issues the court will decide, what witnesses (including expert witnesses) will be called and whether or not an adjournment will be permitted. The second is a deliberately prescriptive Practice Direction (PD27A) which lays down both the format and contents of the bundle to be used at every hearing and which, crucially, forbids a bundle larger than 350 pages unless specifically permitted by the judge. The third is the rule that the parties cannot agree any alteration to the timetable unless it is approved by the judge. The fourth is the requirement typically inserted in case management orders requiring every party to report to the court any non-compliance with the order, whether on their part or the part of others. Back of all this is the clearly understood obligation on everyone to comply, meticulously and on time, with every order of the court.

Accompanying all this, are the more prescriptive procedures for the timetabling and hearing of both public law (care) cases and private law cases laid down in, respectively, the PLO (Public Law Outline) and the CAP (Child Arrangements Programme). The latter, in particular, is supported by the recently revised, and much more rigorous and enhanced, Practice Direction 12J, designed to improve the court’s handling of the scourge of what we now refer to as “domestic abuse”, in recognition of the reality that such abuse extends far beyond what we have traditionally thought of as “domestic violence.”

The family orders project which I established some years ago is now coming to fruition with the issuing, under my imprimatur, of standard forms of order for use in all family cases. The benefits of standardisation are obvious, and will become all the greater as the necessary IT becomes more generally available. The first batch of such orders, dealing with financial remedies case, was issued late last year to general acclamation – indeed, I learn that it is proposed to adopt them in Hong Kong. The second batch, dealing with children cases, has just gone out for final consultation, and I anticipate that they will be formally issued in the early summer.

Digital working advances steadily. We have for some time been using a sophisticated electronic diary – fDiary – as the essential tool for listing cases and allocating them to specific judges; it displays at the press of button, for example, the availability for a year or more ahead of individual judges as well as enabling the judicial allocation team and

the listing officer to see, in spreadsheet presentation, what all the judges in even the largest court centre are doing, day by day and week by week.

But this is only the beginning, as the family court moves, with ever increasing rapidity, to the online, paperless court of the future, where applications are issued online, and where both the court file – the eFile – and the hearing bundle – the eBundle – are electronic. Already, many barristers have given up bringing paper to court; everything they need is on their laptop or iPad.

Online applications are being piloted with online divorce as the initial project; planning for pilots for the online issue of private law cases and public law (care) cases is well advanced, as is planning for the online issue of financial remedies cases. The online application marks a deliberate break with the past. The applicant no longer fills in the traditional court form – the divorce petition, for example – but instead completes an online questionnaire carefully designed to tease out all the relevant information in a way which is both user friendly and, so far as possible, fool-proof. The online divorce pilot has been a triumphant success and shows, to my mind conclusively, that this is – must be – the way of the future.

Last, but by no means least, we have driven forward the transparency agenda, with the objective of opening up what the family courts do to much greater public and professional scrutiny, by encouraging the publication of many more judgments, not merely in cases of legal interest but more generally so that people can see what the family courts are doing in the more ‘ordinary’ or ‘routine’ cases.

But much remains to be done. We must push forward with the transparency agenda and with the implementation of the digital court of the future. We are about to pilot specialist FRCs (Financial Remedies Courts) within the Family Court. Perhaps most important of all, and a matter of increasingly pressing concern, we must completely revamp not merely the guidance (such as it is) offered to litigants in person but, even more importantly, the absurdly over-detailed and over-long Rules and Practice Directions which govern our process. The Rules, which are surprisingly rarely consulted by lawyers, and are incomprehensible to lay people, are simply not fit for purpose. Even drastic pruning will not suffice; we have to throw them away and start again.

Finally, I turn to perhaps the greatest challenge facing the family courts.

Unlike the civil courts, which essentially look only to the past, the family court looks both to the past and to the future: to the past to help determine what should happen in the future. That is all to the good, but, too much of the time, the exercise is still limited to determining what is the appropriate disposal for the case: what is to happen to the child in future. In the family court, where the welfare of the child is, by statute, the court’s paramount concern, it is all too easy to focus on the child’s future, without paying adequate attention to what it is that has brought about the court’s involvement in the first place. And, especially with younger children, that has to do almost exclusively with the parent, not the child. For, typically, the problems are those of the parent, not the child. So, far too little time is spent identifying the underlying problem or, more typically, problems and then to setting out to find a solution for the

problem(s). In a sentence: family courts ought to be but usually are not problem-solving courts.

The way forward is shown by the great success of FDAC, the Family Drug and Alcohol Courts, the first, and triumphantly successful, example of problem-solving in the family court. Fundamentally, the approach adopted in FDAC is a combination of judicial monitoring and a multi-disciplinary therapeutic intervention tailored to meet the needs and problems of the parents in care cases where the underlying issue is parental substance abuse. Very careful independent academic research has proved that FDAC works and that FDAC saves money. More children are reunified with parents if the case has gone through FDAC than through the normal family court, and there is significantly less subsequent breakdown. FDAC increases the sum of human happiness and decreases the sum of human misery. And it saves the local authorities who participate significant sums of money: £2.30 for every £1 spent.

Another, more recent, project which is already proving a great success is PAUSE, where the objective is to break the pattern we see so frequently in the family courts of mothers who find themselves the subject of repeated applications for the permanent removal of each of their successive children. Again, as with FDAC, the approach is founded on identifying and then tackling the, often numerous, underlying problems and difficulties which have confronted the woman – in short, helping her to ‘turn her life around’. There are other projects adopting similar approaches.

I believe that this points the way forward to what in my view is so urgently required: a fundamental re-balancing of the family court towards what ought to be its true role as a problem-solving court, engaging the therapeutic and other support systems that so many children and parents need.

Meanwhile, and amidst all this ongoing reform, the judges have to apply the law as they find it, rather than as they might wish to see it.

There are three, interlinked, techniques by which the judges can keep, if not the law at least the application of the law, up-to-date.

The first are the more liberating principles of statutory construction which have had so marked an effect in recent years: the onward march of the principles of ‘purposive construction’ and of ‘reading down’ in accordance with the Human Rights Act 1998. Striking examples in family law in recent years can be found in the now extensive jurisprudence in relation to surrogacy and, in particular, the difficult and already in some respects outdated language of section 54 of the Human Fertilisation and Embryology Act 2008.

The second I can best describe, if you will forgive me, by reference to what I said last year in the Court of Appeal in a case, *Owens v Owens*, which has attracted no little notoriety and to which I must return on another point in due course. It was a divorce case, where the legislation currently in force is the Matrimonial Causes Act 1973, re-enacting the corresponding provisions of the Divorce Reform Act 1969. For present purposes, what I said was this

“... It is well known that many hold the view ... that times have moved on since 1969, and that the law is badly out-of-date, indeed antediluvian. That may be,

and those who hold such views may be right, but our judicial duty is clear. As Sir Gorell Barnes P said in *Dodd v Dodd ...*, our task is *jus dicere non jus dare* – to state the law, not to make the law.

In one respect, however, the law permits, indeed requires us, to look at matters from the perspective of 2017. Section 1 of the 1973 Act is an "always speaking" statute ... Although one cannot construe a statute as meaning something "conceptually different" from what Parliament must have intended ... where, as here, the statute is "always speaking" it is to be construed taking into account changes in our understanding of the natural world, technological changes, changes in social standards and, of particular importance here, changes in social attitudes. Thus, in *R v Ireland*, it was held that those who inflict psychiatric injury by use of the telephone can be guilty of offences under the Offences Against the Person Act 1861 notwithstanding that the telephone had not then been invented and that such psychiatric injury would not then have been recognised ...

The most obvious application of the principle in family law relates to the concept of a child's "welfare", as the word was used in section 1 of the Guardianship of Infants Act 1925, now section 1 of the Children Act 1989. The concept of welfare is, no doubt, the same today as it was in 1925, but conceptions of that concept, to adopt the terminology of Professor Ronald Dworkin, or the content of the concept, to adopt the corresponding terminology of Lord Hoffmann ... have changed and continue to change ...

So, in my judgment, when section 1(2)(b) of the 1973 Act, reproducing section 2(1)(b) of the Divorce Reform Act 1969, uses the words "cannot reasonably be expected", that objective test has to be addressed by reference to the standards of the reasonable man or woman on the Clapham omnibus: not the man on the horse-drawn omnibus in Victorian times which Lord Bowen would have had in mind ..., not the man or woman on the Routemaster clutching their paper bus ticket on the day in October 1969 when the 1969 Act received the Royal Assent, but the man or woman on the Boris Bus with their Oyster Card in 2017."

The third, inter-linked if more general principle, applying across the whole field of the law relating to children, is, as explained by Lord Upjohn in 1969 in *J v C*, that welfare is to be judged by reference to "the changing views, as the years go by, of reasonable men and women, the parents of children, on the proper treatment and methods of bringing up children"; and that the task of the judge is to "act as the judicial reasonable parent." Since, as I have mentioned, section 1 of the 1989 Act is an 'always speaking' statute, this means that a child's welfare is to be judged today by the standards of reasonable men and women in 2018, not by the standards of their parents, grandparents or great-grand parents in 1989, 1971, 1925 or 1902. And fundamental to this is the need to have regard to the ever-changing nature of our world: crucially, for present purposes, changes in social attitudes.

This last point is particularly significant when one bears in mind the remarkable changes in our society in recent years. Society has changed, is changing and will no doubt continue to change at a quite remarkable rate, and it is essential that our law –

our family law in particular – keeps pace, as it does, with these societal realities. The fact is, as the daily business of the Family Division so vividly demonstrates, that we live today in a world where the family takes many forms and where surrogacy, IVF, same-sex relationships, same-sex marriage and transgenderism, for example, are no longer treated as they were in even the quite recent past. The Children Act 1989 is a remarkably skilfully planned and drafted statute, which has stood the test of time with great success – but that is in large part because we are not tied to the world of 1989 but can assess things and evaluate what is best for children by reference to the rather changed world of 2018.

What then are the characteristics of Lord Bowen’s man (or, I would add, woman) on the Clapham omnibus or Lord Upjohn’s reasonable man or woman in contemporary British society? I sought to provide the answer in 2012 in *Re G (Education: Religious Upbringing)*:

"If the reasonable man or woman is receptive to change he or she is also broadminded, tolerant, easy-going and slow to condemn. We live, or strive to live, in a tolerant society increasingly alive to the need to guard against the tyranny which majority opinion may impose on those who, for whatever reason, comprise a small, weak, unpopular or voiceless minority. Equality under the law, human rights and the protection of minorities, particularly small minorities, have to be more than what Brennan J in the High Court of Australia once memorably described as 'the incantations of legal rhetoric'."

In short, the judge must seek to march in step with contemporaneous society: neither lagging too far behind nor adventuring too far ahead.

Now this is all very well, but it takes us only so far. The judge can interpret the law, and in doing so can and must apply contemporary standards, but the judge cannot change the law. That is a matter for Parliament.

I turn therefore, finally, to the pressing need for statutory reform of the substantive law. Here the omens are not as good as one would wish. The appetite during the few short years from 1967 to 1970 for statutory reform in the areas of law with which we are here concerned has never been equalled since. The astonishing speed with which the Family Justice Review package of reform was, in large measure, implemented in 2013-2014 was almost unprecedented – and a precedent which shows no sign of being repeated within the foreseeable future. Much more representative of the snail’s pace of so much of this kind of reform, however necessary and however obvious (and not just in hindsight), is the forty years it took to implement Sir Morris Finer’s recommendation for a family court, something surely not opposed by anyone with an informed interest in the matter.

The depressing history of law reform in relation to socio-legal matters was depicted with biting sarcasm by E S Turner, in *Roads to Ruin: The Shocking History of Social Reform*, first published in 1950 and dedicated to Colonel Blimp: “Gad, sir, reforms are all right as long as they don’t change anything.” More recently, the history of the reform of family law in the late nineteenth and twentieth centuries has been treated with massive scholarly erudition and no little mordant wit by Stephen Cretney in his remarkable *Family Law in the Twentieth Century: A History*, published in 2003.

Turner began by quoting the Reverend Sydney Smith:

“There are always worthy and moderately gifted men who bawl out death and ruin upon every valuable change which the varying aspect of human affairs absolutely and imperiously requires.”

Turner continued by observing that:

“It is a salutary thing to look back at some of the reforms which have long been an accepted part of our life, and to examine the opposition, usually bitter and often bizarre, sometimes dishonest but all too often honest, which had to be countered by the restless advocates of ‘grandmotherly’ legislation.”

He then proceeded to establish his thesis by chapters on the hard-fought opposition to such diverse legislative projects as the abolition of mantraps, the prohibition of the use of small boys to clean chimneys and the introduction of that saviour of so many seamen’s lives, the Plimsoll Line. Two of his chapters deal with topics closer to the hearts of family lawyers: one the long-fought Parliamentary campaign to legalise marriage between a man and his deceased’s wife sister; the other the long-fought Parliamentary campaign which eventually led to the enactment of the Married Women’s Property Act 1882.

The first campaign, immortalised in 1882, by Gilbert in his couplet in *Iolanthe*, “he shall prick that annual blister, Marriage with deceased wife's sister”, occupied Parliament from 1835 until 1907, when the Deceased Wife’s Sister’s Marriage Act 1907 eventually reached the statute book; though even then, as Cretney demonstrates, the process did not finally conclude until the enactment of the Marriage (Prohibited Degrees of Relationship) Act 1986. As late as 1949, Turner records, continuing reform of this branch of the law – an attempt to legalise marriage between a man and his *divorced* wife’s sister – was opposed by the Bishops and by reference to Virgil’s line, *facilis descensus Averni* [the path to Hell is easy]. As he comments, one has to wonder “what all the fuss was about, and just why it was so confidently prophesied that the nation would go careering into Avernus.” Almost seventy years on, one suspects that, historians of the absurd apart, no-one either knows or cares.

In relation to the other, the campaign leading to the enactment of the 1882 Act, Turner bitingly observes,

“Often, in the same volumes of *Hansard* which carry those doom-laden debates on the Deceased Wife’s Sister Bill, there are to be found, embalmed in humbug, the prophecies of social ruin inspired by that other bogey-bill of mid-Victorian times: the Married Women’s Property Bill. It is a nice question which measure evoked the more obtuse counter-arguments or roused the more censure from the righteous.”

Failings and delays in the legislative process, and the timidity of so much Parliamentary activity, call forth in his great book some of Cretney’s most lapidary and mordant phrases. I confine myself to one:

“in 1857 the Palmerston government decided to legislate for judicial divorce (for which there seemed to be comparatively little demand) and rejected pleas to

legislate on married women's property (for which there was a great deal of demand."

But that was not the only oddity of 1857. Kate Summerscale, in her recent retelling in *Mrs Robinson's Disgrace: The Private Diary of a Victorian Lady* of the remarkable case of *Robinson v Robinson and Lane* in 1859, notes what one can only think of as the delicious irony that in the summer session of 1857 "Lord Palmerston's government had pushed through the Matrimonial Causes Act, which established the Divorce Court, and the Obscene Publications Act, which made the sale of obscene material a statutory offence." Both, she opines, had identified sexual behaviour as a cause of social disorder. But, she continues:

"A year on ... they seemed to have come into conflict: police officers were seizing and destroying dirty stories under the Obscenity Act, while barristers and reporters were disseminating them under the Divorce Act. 'The great law which regulates supply and demand seems to prevail in matters of public decency as well as in other things of commerce,' noted the Saturday Review in 1859" – The author, she suggests, was James Fitzjames Stephen, later Stephen J – "'Block up one channel, and the stream will force another outlet; and so it is that the current dammed up in Holywell Street flings itself out in the Divorce Court.'"

In 1908, F M Cornford, a young classical scholar at Cambridge, published *Microcosmographia Academica*, an incisively coruscating analysis of the world of university politics, though its resonance is much wider. This brilliant book is famous for its statement of the principle that

"There is only one argument for doing something; the rest are arguments for doing nothing. The argument for doing something is that it is the right thing to do. But then, of course, comes the difficulty making sure that it is right";

followed by a devastating analysis of all the many reasons put forward for doing nothing, the most famous being the *Principle of the Wedge*, the *Principle of the Dangerous Precedent*, and, most famous of all, the *Principle of Unripe Time*.

Now I should like to think that this is all of no more than historical interest and that matters are very different today. Would that they were; but they are not. Let me conclude, therefore, by examining a few of the parts of family law most pressingly in need of statutory reform.

The first, and in many ways the most obvious, is the long-running problem of cohabitant's rights. If a marriage or civil partnership terminates by divorce or dissolution, the court has power to redistribute the assets between the parties. None of this applies to cohabitants, however long the relationship has lasted and whether or not there are any children. This is an injustice which has been recognised almost as long as I have been in the law. The frequency of the occasions on which the problem has been considered by the House of Lords and, more recently, the Supreme Court over the best part of 50 years, has demonstrated that, whatever the degree of judicial ingenuity, neither the common law nor equity is capable of producing an effective remedy. Reform is desperately needed. The Law Commission has recommended reform. Thus far Governments have failed to act. Reform is inevitable. It is

inconceivable that society will not in due course have righted this injustice, but how many more women are to be condemned to injustice while our masters delay, constantly persuading themselves, presumably, that the time is not yet ripe?

A second area very badly in need of reform is the law of divorce. The law has been unchanged since 1969. Significant reform of the law was intended by the Family Law Act 1996, but the relevant provisions were never brought into force and have now been repealed. *Owens v Owens*, to which I have already referred, brought the issue to renewed prominence. The judge found that the marriage had irretrievably broken down but nonetheless held – and in so holding was upheld by the Court of Appeal – that the wife, who with some justification considered herself trapped in a loveless marriage, had failed to establish any ‘ground’ upon which she was entitled to a decree; specifically because, to use the convenient short-hand expression, she had failed to establish ‘unreasonable behaviour’ on the part of her husband.

I did not mince my words. Having described what I referred to as “the everyday realities behind the professorial ponderings or the moralisers’ anathemas”, I continued:

“The simple fact, to speak plainly, is that ... the law which the judges have to apply and the procedures which they have to follow are based on hypocrisy and lack of intellectual honesty. The simple fact is that we have, and have for many years had, divorce by consent, not merely in accordance with section 1(2)(d) of the 1969 Act but, for those unwilling or unable to wait for two years, by means of a consensual, collusive, manipulation of section 1(2)(b). It is ironic that collusion, which until the doctrine was abolished by section 9 of the 1969 Act was a bar to a decree, is now the very foundation of countless petitions and decrees.

The hypocrisy and lack of intellectual honesty which is so characteristic a feature of the current law and procedure differs only in magnitude from the hypocrisy and lack of intellectual honesty which characterised the ‘hotel divorce’ under the old law, so mercilessly satirised in 1934 first by Evelyn Waugh in *A Handful of Dust* and then by A P Herbert in *Holy Deadlock* ... Too often the modern ‘behaviour’ petition is little more than a charade. The ‘hotel divorce’ centred on a charade played out in front of the chambermaid or private inquiry agent who then gave evidence of events which would enable a judge, who either was or affected to be credulous, to find that adultery had been committed even though the services provided by the unnamed woman found in the respondent’s bed when breakfast was taken in usually did not include the sexual intercourse which was, as it remains, essential to the act of adultery. That particular charade ‘worked’ because of the legal principle that adultery could be inferred if there was inclination and opportunity; the modern charade ‘works’ because of the operation of the rule of pleading (not in the real world much affected by either [statute] or [rule]), that if a claim is conceded it goes through in effect by default.”

We await the outcome of the pending appeal to the Supreme Court with eager anticipation.

A third area in which it is increasingly recognised that radical reform is not merely necessary but inevitable – though views on what form such reform should take are sharply divided – is that of ancillary (financial) relief following divorce. The process has started with revealing work done by the Law Commission. It has now been taken up, as with the previous two, by the *Times*, which has gathered together a remarkable coalition of the ‘great and the good’ in support of its campaign. It will be interesting to see whether the *Thunderer* can eventually succeed where so many others have failed.

In this connection I cannot resist a last look at Turner, writing, as you will recall, 68 years ago.

“Misguided and preposterous though some of this opposition now appears, it is doubtful whether it will seem any more peculiar, one hundred years hence, than some of the reasons we produce today for perpetuating hardship and injustice. Our ancestors thought it absurd that wives should wish to keep their own earnings; our descendants may be astonished at our system which forces a man to maintain a woman, sometimes for life, after a hopeless marriage has been disrupted. It is likely that our descendants will derive ... much heartless fun from contemplation of our divorce laws, and the reasons we use to defend them.”

Well, as you will appreciate, we have only another 32 years to go!

A vital aspect of the ongoing transformation in the family justice system has to be reform of our still creaking rules about access to and reporting of family cases. Nothing short of radical reform will enable us to rid ourselves of the relentlessly repeated and inevitably damaging charge that we operate a system of private – some say secret – justice. The task is massive, the complexity of the law is quite astonishing – itself a reproach to any reputable system of justice – and the differences of view as to what should be done run deep and in some respects seem almost unbridgeable. Statutory reform is essential – the Administration of Justice Act 1960 which remains the foundation of the modern law is no longer fit for purpose in the world (unknown in 1960) of the internet and social media. The history of attempts at reform is unpromising: consider the origins and fate of Part II of the Children, Schools and Families Act 2010, never implemented and now repealed. But it would be scandalous if in 10 or 20 years’ time we were still having to try and muddle along as we do at present.

Let me give a final example. As long ago as 2006, a judge in the Family Division drew attention, expressing himself in fairly robust language, to the fact that judges in family cases lacked the power to prevent what statute had forbidden in criminal cases, the cross-examination in person by alleged perpetrators of domestic violence of their alleged victims. As can readily be appreciated, such cross-examination lends itself to abuse, not least the abuse that the court has to stand by, effectively powerless, while the abuse continues in court and, indeed, as part of the court process. I had been pressing for quite some time for action to be taken and was therefore pleased when the Government included appropriate clauses in the Prisons and Courts Bill 2017. That Bill fell at the General Election, and Government remains unwilling or unable to say

when it will be reintroduced. Meanwhile, and I quote from a damning judgment given by a Family Division judge in May 2017:

“It is a stain on the reputation of our Family Justice system that a Judge can still not prevent a victim being cross examined by an alleged perpetrator ... the process is inherently and profoundly unfair. I would go further it is, in itself, abusive ... The iniquity of the situation was first highlighted 11 years ago ... it has taken too long. No victim of abuse should ever again be required to be cross examined by their abuser in any Court, let alone in a Family Court where protection of children and the vulnerable is central to its ethos.”

Who could possibly disagree?

The case for reform of this “stain” on our system is overwhelming. There is only one possible argument: it is the right thing to do. So why not do it? Or is the time no longer ripe?

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