

CAN THE LAW KEEP UP WITH CHANGES IN SOCIETY?

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“THE LAW”

- **Systems of rules and guidelines enforced to govern behaviour.**
- Shapes politics, economics and society and operates as a social mediator of relations between people.
- Reflects the lives of the society it regulates.
- Drives behavioural expectations forward in the best interest of society.
- Catalyses social transformation.





DOMESTIC ABUSE THE STATS NOV 2019

- **2.4 million adults** (16-74)years experienced domestic abuse (1.6 million women and 786,000 men).
- **At the police station**: The police recorded 746,219 domestic abuse-related crimes, an **increase of 24%** from the previous year.
- The police made **32 arrests per 100** domestic abuse-related crimes
- **From Police arrest CPS review**: Referrals of suspects in domestic abuse-flagged cases from the police to the Crown Prosecution Service (CPS) for a charging decision **fell 11%**.
- **The CPS** The charging rate was **74%**, compared to the previous year of 76%.
- **At Court Conviction rate 77%** , similar level to the previous year.

DOMESTIC ABUSE: PROTECTING VICTIMS

- Local authority spending on refuges for abuse victims **fell from £31.2 million in 2010 to £23.9 million in 2017.**
- An estimated **21,084 referrals to refuges in England were declined** in 2017/18, averaging more than 400 referrals declined each week.



DOMESTIC ABUSE: FAMILY COURTS

- Women's Aid and Queen Mary University: **Three in five (61%)** said there was no special measures, such as separate waiting rooms, different entry/exit times, screens or video links, despite the domestic abuse allegations in family courts.
- Almost **a quarter of complainants (24%)** surveyed said they had been cross-examined by their abusive ex-partner.
- More than **two thirds (69%)** reported their abusive ex-partner had also been emotionally abusive towards a child, while **38%** said children had been physically abused → nonetheless, unsupervised contact.

“For far too long, survivors have endured continued abuse at the hands of their abuser in the family courts .Enough is enough?”

We want to see the family courts protect survivors during the court process and ensure that survivors are able to access their right to a fair and just legal process.

We know that perpetrators of domestic abuse are using the family courts to continue to control and abuse victims, and that the family courts’ failure to consistently safeguard survivors and apply fairness during the court process is enabling that abuse.”

per Katie Ghose, chief executive of Women’s Aid

DOMESTIC ABUSE: CROSS-EXAMINATION



Claire Throssell, from Sheffield, was cross-examined by her husband, after they had separated, during two separate court hearings over child arrangements. Her husband went on to kill her two sons in a house fire.

*'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.**it is, in itself, abusive.***

For my part, I am simply not prepared to hear a case in this way again. I cannot regard it as consistent with my judicial oath and my responsibility to ensure fairness between the parties.....

I understand that there is a real will to address this issue but 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.'

(Hayden J, Re A [2017])



DOMESTIC ABUSE: PD 12J AND PART 3A

- Practice Direction 12 J
- Family Procedure Rules, Part 3A
(Vulnerable Persons: Participation in Proceedings and Giving Evidence)

Female judge criticises male colleague who told woman she wasn't raped as she didn't fight back



In a written ruling, Ms Justice Russell said she granted the "vulnerable" woman an appeal for her case which had previously been overseen by Judge Robin Tolson QC in August 2019 CREDIT: GARY LEE

Opinion

When judges don't know the meaning of rape, there is little hope of justice

Sonia Sodha



in trial
ge in our

Family courts 'not safe space' for domestic abuse survivors

5 days ago | UK

A women's charity has criticised a family court judge for a "misogynistic and legally inaccurate" rape ruling.

Mother claims judge's 'outdated views' on sexual assault led him to rule against her in child custody battle



A judge's "outdated views" on sexual assault led him to rule against a mother who accused her former partner of rape, the High Court heard CREDIT: JULIAN ELLIOTT PHOTOGRAPHY/JULIAN ELLIOTT PHOTOGRAPHY



Rape and sexual assault

Family judges could get training after row over comments on rape

Judge was criticised for finding woman was not raped because she took 'no physical steps' to stop man

DOMESTIC ABUSE: JH V MF [2020] EWHC 86 (FAM)

- M asked to give evidence screened ; refused
- Father gave evidence from Counsel's bench despite mother's objections making reference to the 'feng shui' of the court room and the screens saying it was fair and "created some kind of balance" .
- McKenzie friend assisted the father while he was cross-examined.



DOMESTIC ABUSE: JH V MF [2020] EWHC 86 (FAM)

A litany of

FAILURES ...?

- Consent
- Demeanour



DOMESTIC ABUSE: JH V MF [2020] EWHC 86 (FAM)

*“My concern about this occasion centres on the idea that **the mother did nothing physically to stop the father.** In particular, given the position in which intercourse was occurring, because the mother was not in any sense pinned down on this occasion, but could easily, physically, **have made life harder for the father. She did not do so.***

.....

*Following the event, as I have already said, **the mother took no immediate action to report the matter to the police, or indeed to anyone else.***

(Tolson HHJ)



DOMESTIC ABUSE: JHV MF [2020] EWHC 86 (FAM)

*‘My findings on this occasion, as to both these occasions, is that the sex between the parties carried the consent of both. **This was not rape.***

*It may have been that at a point during both occasions of intercourse the mother became both upset **and averse to the idea of the intercourse** continuing.*

But if she did so, I emphasise this was something which was usual for her, the product of events in her past and her psychological state in not being able to take physical pleasure from sex. It was not a consequence of any action on the part of the father.

*Moreover, **at no point during these occasions do I find that the mother withdrew consent or conveyed to the father any discomfiture that she was feeling about the intercourse continuing.** (Tolson HHJ)*



DOMESTIC ABUSE: JH v MF [2020] EWHC 86 (FAM)

‘Judges in the family courts are regularly required to make decisions and find facts in cases where there is domestic abuse; this will include cases where serious sexual assault is alleged to have taken place.

Judges who sit in the family courts are not, however, required to undergo training on the appropriate approach to take when considering allegations of serious sexual assault where issues of consent are raised.

*I have discussed this with The President of the Family Division, and he is going to make a formal request to the Judicial College for those judges who may hear cases involving allegations of serious sexual assault in family proceedings to be given **training based on that which is already provided to criminal judges.***

*This is a welcome development, a cross-jurisdictional approach to training on this important topic **will be of assistance, support and benefit to all judges** and will foster a more coherent approach.’*

(Russell J, *JH v MF* [2020])

COERCIVE AND CONTROLLING BEHAVIOUR: SALLY CHALLEN



- Sally Challen was jailed for life in 2011 at Guildford Crown Court for killing her husband in a hammer attack following decades of abuse.
- The prosecution's case at the time was that this was the action of a jealous woman who suspected infidelity.
- In February 2019, after years of campaigning by her sons and the campaign group Justice for Women, Challen's conviction was quashed

“I met many women in prison who shouldn’t be there. Getting an appeal is very difficult. I was turned down on the first attempt.

The justice system needs to listen

A lot of the problem is that women don’t know they’re in a relationship of coercive control.

It’s family, friends and relatives who do see it. Somehow they have to speak to that person and convince them to leave. They don’t seem to be able to break that tie. It’s a very strong tie and the women are very vulnerable.”



THE DOMESTIC ABUSE BILL :WHERE IS IT?



- Statutory definition for domestic abuse
- Domestic Abuse Commissioner
- Domestic Abuse Protection Notice and Domestic Abuse Protection Order
- Duties on tier one local authorities in England
- Statutory presumption that victims of domestic abuse are eligible for special measures in criminal courts
- Guidance supporting the DV Disclosure Scheme (Clare's Law) on a statutory footing
- Prohibiting perpetrators of abuse from cross-examining victims in person in family courts.

So where are we with domestic violence and the law?

- Family legislation lags behind that in crime.
- Laws and guidance in family cases are effective only if the judge understands and embraces them.
- We have questions to ask about a police/ CPS attitude towards victims and their grasp of what amounts to coercive or controlling behaviour .
- We must seek to understand the discrepancy between the prevalence of abuse and the use of the law to address it .
- We know that the support for victims is the community has gone down.
- We know that the focus of past learning has been based on a male: female model of aggression but far less about female: male aggression and same sex abuse.
- We have to ask why the law has lagged so far behind what is happening in our society.



CHILD SEXUAL ABUSE

- The Independent Inquiry into Child Sexual Abuse (IICSA) in England and Wales was announced by the then British Home Secretary, Theresa May, **on 7 July 2014**
- It was established to examine how the country's institutions had handled their duty of care to protect children from sexual abuse.
- But how far have we comforted ourselves that the lax attitudes shown towards victims of abuse shown by that historical examination of our failings has changed and could not happen again?

SEXUAL EXPLOITATION OF CHILDREN

A REVIEW OF EFFECTIVENESS OF INTER-AGENCY RESPONSES TO CHILD SEXUAL EXPLOITATION IN GREATER MANCHESTER:

- Findings show significant failings by police and children's services.
- Intelligence suggested that offenders were targeting care homes within the city of Manchester area, particularly one home used as an emergency placement unit for children entering the care system, which the report authors said "maintained a steady supply of victims" for the perpetrators
- It is now said that child sexual exploitation is recognised as a serious form of child abuse



HOW MANY OTHER SCANDALS LIE BURIED WAITING TO BE DISCOVERED?

**Can we be confident
that professionals
have moved at a pace
that exceeds the
imagination of
abusers to design
systems to abuse?**



IF THERE IS NO AGE BELOW WHICH ONE CAN SAFELY SAY A CHILD IS NOT AT RISK OF EXPLOITATION-

WHY DO WE WAIT SO LONG TO EDUCATE THEM ABOUT RISK?

- At present, children's data is routinely being used in a way that puts them at risk of grooming and sexual abuse
- On 22.1.2020 we heard of an ambitious proposed intervention by the Information Commissioner's Office (ICO) to place a duty on tech companies to design their platforms in the best interests of the child and proactively risk assess against sexual abuse, whether they are designed for children or not.
- The ICO has a new code which will force the highest risk social networks to make substantial changes to their service to place children in the forefront of how their services are designed and run in practical terms



SOCIAL MEDIA :A PATHWAY TO BULLYING, GROOMING, DRUG GANGS, EXTREMIST BELIEFS



ONLINE HARMS BILL



- Has yet to come forward for parliamentary debate and legislative approval.
- Was intended to legislate to prevent behaviour online which may hurt a person physically or emotionally whether posted online or information sent to a person
- Covers risk of sexual exploitation, radicalisation, gang recruitment and control by bullying.
- Set out a regulatory framework and proposed a new statutory duty of care to make companies take more responsibility for the safety of their users.

THE 'SANCTITY' OF MARRIAGE AND 'NO FAULT DIVORCE'

Section 1 of the Matrimonial Causes Act 1973 (MCA) provides that the only ground for divorce in England and Wales is that the marriage has irretrievably broken down



Owens v Owens (2018) UKSC 41

A screenshot of the Guardian website. The top navigation bar includes 'Subscribe' and 'The Guardian' logo. Below the navigation bar are links for 'News', 'Opinion', 'Sport', 'Culture', and 'Lifestyle'. The main content area features a photo of a woman with white hair, likely a judge, and a headline: 'UK supreme court Unhappy marriage not grounds for divorce, supreme court rules'.

Currently therefore, one spouse has to make accusations about the other's conduct, such as 'unreasonable behaviour' or adultery, or otherwise face years of separation before a divorce can be granted – regardless of whether a couple has made a mutual decision to separate.

ONE PERSON CANNOT A MARRIAGE MAKE

- The Office for National Statistics (ONS) shows that 58% of divorces were based on a fault-based petition in 2017, with 46.6% under the category of unreasonable behaviour.
- **Research carried out by YouGov for Resolution, published in June 2015, found that 27% of divorcing couples who asserted blame in their divorce petition admitted the allegation of fault was not true, but was the easiest option.**
- In reality, petitions for divorce are rarely defended and, if they are, the judge hearing the case will find some way to bridge the gap in the legislation when it is abundantly clear that the marriage is at an end.

PARLIAMENT: A BILL, BREXIT AND PROROGATION

- Bills to provide for 'No Fault' divorce have been raised in the commons since 2015
 - many couples are not in an economic or emotional position to wait a further two-years of separation (or, indeed five-years as in Mrs Owens' case) to avoid alleging fault; funding two houses whilst resolution of the finances is put on hold, and the emotional consequences of not being able to move on arguably has a greater impact on the stability of the family
- The Divorce, Dissolution and Separation Bill
 - The Bill is also intended to ensure that the decision to divorce is a considered one, reduce family conflict where reconciliation is not possible and bring reform that will directly benefit families by supporting parties to focus on the future. It will also introduce no fault divorce

The law needs to change. Political instability has placed private lives on hold. That is unacceptable



Being Transgender :What does it mean to be a man or a woman (or to be gender fluid or gender neutral) as a Parent ?

Even though the Human Fertilisation and Embryology Act 2008 (HFEA) was passed four years after the Gender Recognition Act 2004 (GRA), the HFEA retained the basic definitions of 'mother' and 'father' that appeared in the HFEA 1990 and which were expressly tied to either 'a woman' or 'a man', respectively.

Recognition on birth certificates: In the matter of TT and YY [2019] EWHC 2384

This case identified a gap in the law. McFarlane P said that TT's circumstances and his role, as a male, in the conception and birth of his son, were not expressly provided for in either the legislation governing artificial insemination or that for gender recognition.



Freddy McConnell has lived as a man for years but retained his female reproductive system and gave birth in 2018.

Photograph: ITV/Rex/Shutterstock

SCIENCE IS NOT STATIC

"The judge in care proceedings must never forget that today's medical certainty may be discarded by the next generation of experts or that scientific research would throw a light into corners that are at present dark."

Dame Elizabeth Butler Sloss P said in Re U, Re B

The family justice legal system has sought to develop in line with medical science but can only lag behind it.

Blood at Birth, Ricketts, EDS, FII



GENDER IS NOW LONGER TO BE CONSIDERED A STATIC STATE

GENDER DYSPHORIA

-
- Gender dysphoria in children: **Lancashire County Council v TP (Permission to Withdraw Care Proceedings) [2019] EWFC 30**
 - The Local Authority's (LA) criticised the parents for 'acted impulsively' in relation to 'perceived' gender dysphoria of 2 of their children by actively encouraging their early transition, and risked the emotional harm of them by being unwilling to recognise the long-term implications of such an early transition.

VERSES

- ***'Protocols previously incorporated a watch and wait approach which had prevented truly dysphoric children from Transitioning which had likely resulted in increased rates of depression and anxiety.'***
- ***'Put simply, many who have shown to desist were likely not dysphoric and psychopathology in those who persisted was likely due to forbidden expression of their true gender identity.'* Current guidance suggests that supporting a child who clearly and consistently states that they wish to be the other gender in their preferred gender role is associated with improved mental health and well-being.** Per Dr Pasterski : Expert chartered psychologist and gender specialist

GENDER DYSPHORIA

- Williams J words in conclusion make the point eloquently:

‘Issues relating to gender identity and the medical understanding of such issues is complex and developing and inevitably there is some lag between those professionals at the cutting edge such as Dr Pasterski and others (in which I include myself), which might have played some role in how these proceedings came about.’

- The judgment of Mr Justice Williams sets down a marker as to how previous misconceptions about gender identity should be set aside and the importance of listening to the right experts.

So where are we now?

- **In the Williams J case the family were ‘lucky’ enough to have legal aid as a result of the LA becoming involved and taking proceedings under s 31 of the Children Act.**
- **How will the court deal with this sort of issue when it arises in private law cases where legal aid is now unavailable and the child will not have party status and separate representation automatically?**
- **Who will know what expert to seek out?**
- **Who will pay for the expert?**
- **Do judges have a strong enough understanding of transgender issues in children? What training has been provided to them?**
- **How current is it?**
- **Public concept of gender dysmorphia , transgender and is embryonic and such opinions as are expressed in the press are characterised by suspicion, if not downright hostility to the concept of gender dysmorphia.**



WHEN DOES A PARENT'S BELIEFS BECOME HARMFUL TO A CHILD? WHAT BELIEFS SYSTEMS SHOULD BE TOLERATED?



Tension between traditional medicine and alternative, emerging medical theory.

Some of that theory may turn out to be good science.

Other strands may prove to have nil or negative effect in particular.



"the law and practice in relation to infants ... have developed, are developing and must, and no doubt will, continue to develop by reflecting and adopting 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; for after all that is the model which the judge must emulate for ... he must act as the judicial reasonable parent.

Lord Upjohn in *J v C* [1970] AC 668:

RE G (CHILDREN) [2012] EWCA CIV 1233

*“Within the limits the law – our family law – **will tolerate things which society as a whole may find undesirable.***

*A child’s best interests have to be assessed by **reference to general community standards**, making due allowance for the entitlement of people within the limits of what is permissible in accordance with those standards, to **entertain very divergent views about the religious, moral, social and secular** objectives they wish to pursue for themselves and for their children.”*

WHERE DOES OUR BROAD-MINDEDNESS REACH ITS LIMITS? ARE WE BROAD MINDED ?

Re C (A Child) (Special Guardianship Order) [2019] EWCA Civ 2281 (20 December 2019)

The parents in this case suggested they could survive on the **“energy that exists in the universe and in themselves”**. **“Humans can easily be without food, as long as they are connected to the energy that exists in all things and through breathing”**

Q for the CoA : had the Judge negatively passed judgment on the parents lifestyle and beliefs and by so doing undermined the freedom afforded to them under principle of broad mindedness.

A ; NO ‘character of the parents’ is relevant “only to the extent that it affects the quality of their parenting”



QUESTION

In a multi-cultural, diverse self-web educated society there will be value systems and beliefs that inevitably come into conflict



When does a thought system become dangerous?



Shamima Begum

Captured the attention of both international and national media outlets when she left her East London home aged 15 for the ISIS Syrian stronghold in February 2015.

Part of the trio of 'Bethnal Green schoolgirls' exposed to online radicalisation, leading them to join the terrorist organisation with promises of an idyllic life and marriage to ISIS fighters.

On 13 February 2019 Shamima was discovered in a Syrian refugee camp, pregnant and hoping to return home to the UK in order to raise her unborn child.



SHAMIMA BEGUM: THE ISIS BRIDE

- On 19 February 2019, less than a week after Shamima was discovered in the Syrian refugee camp, she was officially stripped of her UK citizenship. The UK Home Office cited her Bangladeshi citizenship as a justification, suggesting that they did not break international law rendering her stateless. Begum did not have, in fact, Bangladeshi citizenship.
- ***“They have sex with them, they breed with them, they cook for them, they clean for them, they love them and they worship them. And while they’re doing all this, their husbands are busy raping, torturing, stoning, beheading and murdering people. [...] Now, predictably, they both want to return to the safety of their original countries and live at OUR tax-payer expense. To which I say, and excuse my language here but sometimes it’s entirely appropriate: Go f**k yourselves.” Piers Morgan***
- Her baby died aged 3 weeks

END NOTE?

- Legislation moves, more often than not, at a languid pace that politics imposes through changes of Ministers, the prevailing political wind and political expediency.
- Against that stately pace, society develops at often break neck speed where science enables advances to be made that were not within the contemplation of the legislature when words in statutes were chosen : such as gender transition, gender fluidity.
- In other instances we have the law in place to be applied but the application of it is flawed by those entrusted to make it effective: whether we speak of exploitation of children in the care system or by a judge whose concept of rape flies in the face of good sense and reason.

THOUGHTS

As citizens we
deserve more from
our legislature

Accept what has gone
wrong and identifying
what will be done to
change things for the
better that public
respect for the legal
system can maintained



The public will make their voices
heard when they feel
marginalised or ignored by the
legal justice system and the press
has a large part to play in
triggering and amplifying that
message.

**We cannot be
complacent about
the health of our
legal justice
system.**

THANK YOU

THE LAW AND THOSE WHO
WORK IN IT NO LONGER
COMMAND RESPECT BY
DEFAULT. IT HAS TO BE
EARNED NOT DEMANDED