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CAN THE LAW KEEP UP WITH CHANGES IN SOCIETY?

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This lecture seeks to be a springboard for thought and challenge; it is a review of some of the issues that have occupied the courts, the media and the public over the past 6 months or so. Having been part of the legal world since becoming a barrister in 1986 I have witnessed the way I which our law has had to adapt to maintain its relevance to society. The last year has been a tumultuous one for the legal world. Has the law proved itself fit for purpose when dealing with issues that could not have been predicted 1 or 5 or 10 years ago?

What do I mean by 'the law'? In basic terms it is a system of rules and guidelines enforced to govern social behaviour. It operates as a regulator of relations between people.

The law has to 'reflect' the lives and general values of the society it regulates. If it did not it would cease to have relevance. Without relevance there would be no respect for it. The law operates on the basis that it reflects the rules generally recognised as being a necessary substructure underpinning the social contract between citizens. Disobedience of the rule of law by society at large would make society ungovernable. Without it there would be conflict between social groups and communities and issues would be resolved on a personal level rather than by the state on an objective set of criteria.

Law not only reflects societies behavioral expectations it can also drive them forward in the best interest of society despite the public lagging behind the evolution of thought: such as ending capital punishment or banning corporal punishment in schools[1].

The law can also act as a catalyst in the process of social transformation by establishing the legal framework for positive change in society i.e.) the right of an individual not to be discriminated against because of gender or religion. It can achieve equality for previously marginalized sectors of society: homosexuality was decriminalized for consenting males aged over 21 for same sex acts in private in 1967[2] but age of consent equality was not achieved until 2001 in the UK[3]. S 28 of the Local Government Act 1988[4] was not repealed until 2003[5]. The Gender Recognition Act 20004[6] gave transgender people full legal recognition of their gender, allowing them to acquire a new birth certificate (although gender options are still limited to 'male' and 'female'). Same sex couples could enter into a civil relationship in 2004[7] but it was not until the subsequent Marriage (Same Sex Couples) Act 2013 that marriage was permitted[8].

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[1] Banned in state schools in 1986 but not until 1999 in the independent education sector but it remains lawful in the home in England and Wales: Children Act 2004 s 58 provided for 'reasonable punishment' of children in contrasts to corporal punishment being prohibited in Scotland through the enactment of the Children (Equal Protection from Assault) Scotland Act 2019.

[2] Sexual Offences Act 1967; Scotland and Mothering Ireland didn't follow suit until 1980 and 1981 respectively.

[3] 2009 in NI.

[4] Introduced by the Conservatives Government under Margaret Thatcher) canned local authorities from 'promoting sexuality' or 'pretended family relationships' and prohibited local authorities from funding educational materials and projects perceived as 'promoting homosexuality'.

[5] A delay for which David Cameron MP apologised for in 2009.

[6] Which came into effect in 2005.

[7] The Civil Partnership Act 2004.

[8] Permitting same sex couples in England and Wales to marry, Scotland followed suit in 2014. NI still does not have marriage equality.

In the last decade, even in the last year, we have witnessed profound changes in our society and the breadth of issues that are brought to the court for adjudication. Think of the Supreme Court battles over Brexit and the prorogation debacle, think of Alfie Evans and Charlie Gard and the legal struggle over a child's life and death[9]. Think of the Shamima Begum "Isis Bride' controversy and the issues it raised over her British citizenship and that of her baby. Society is ever evolving. The web has exposed a world, and the opinions of its denizens, to public view. The internet explosion of information has hastened the pace of change and the law has to engage with challenges brought to its court rooms when legislation so often moves, sloth-like, through Parliament.[10]

In this lecture I propose to dip and dive into issues that have engaged me over the past year to address the question of whether some of our laws affecting our relationships with one another and with the state have adapted to change and challenge.

I begin with the most intimate of relationships - those we have with our partners - because it is often the bedrock for the lives we lead in our communities. I will discuss domestic abuse, coercive and controlling behavior and no-fault divorce. This paper then goes on to discuss our attitudes towards the family and our role as adults and parents. I talk about the shift from a binary male/female parent household to a rich mix of parentage and whether the law has kept apace of advances in medicine and science that enable gender transition and gender reassignment in children as well as adults. I question whether we have been given the tools by parliament and the law to protect our children from the social media world that consumes. Lastly, I reflect on how the law has dealt with a society where there is not just one faith or belief that defines the society it serves and how we decide what if permissible and what is harmful. This has been a testing lecture to write. When I ask if the law has moved at a pace society requires, I have been left with more questions than answers. Let me explain why.

Domestic abuse

Abuse within the privacy of a home trespasses upon and blights all that we treasure in safe relationships. Home should be a place free from fear, from having to present a false face. Home should be a private place to be oneself, to choose what to eat, what to wear, what to say and do without fear of getting 'it' wrong. Yet for many 'home' is the place where one most vulnerable and unsafe. Domestic abuse is not a new social phenomenon: it has gone on for centuries. But what is changing is our understanding of the scale of the problem and our awareness of what constitutes abuse.

Statistics: the problem

Office of National Statistics Data (November 2019)[11] looking at the year ending March 2019

- An estimated 2.4 million adults aged 16 to 74 years experienced domestic abuse in the last year (**1.6 million women and 786,000 men).** This is not a pure gender issue. **We don't know the scale of abuse by women to men or within same sex relationships because it is likely to be under reported by the victim because of fears of being disbelieved, ridiculed, judged.**
- At the police station: The police recorded 746,219 domestic abuse-related crimes, an **increase of 24%** from the previous year. **Whether that reflects improved recording by the police or increased reporting by victims is unknown.**
- The police made 32 arrests per 100 domestic abuse-related crimes[12]. **Whether that reflects an unwillingness of the victim to take it further or reflects a police decision not to do so is unclear from stats alone.**

[9] https://www.gresham.ac.uk/lectures-and-events/child-medical-treatment 2.5.2019 'The Child and Medical Treatment: The Chance to Live, or to Die with Dignity?' Professor Jo Delahunty QC, Dr Imogen Goold

[10] I have spoken before about the balance between Politics and the Law: https://www.gresham.ac.uk/lectures-and-events/politics-and-legal-profession 7.3.2019 'Politics and The Legal Profession'

[11] 'Domestic abuse in England and Wales: year ending March 2019,' Office of National Statistics, [https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwalesoverview/november2019]

[12] Equating to 214,965 arrests (in the 39 police forces that supplied data).

- 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%**[13]: **What reason was registered? Is any record keeping required?**
- The CPS The charging rate[1] was 74%, compared to the previous year of 76%.
  So, we have a significant 24% increase in reporting of, yet a decrease in charging referrals to the CPS and a (small) decrease in charging decision to proceed by the CPS? Is this because of the time lag from police to CPS re 2018 cases? Should we expect to see an increase in referrals and positive charging decisions in y/e 2020? Or is there a continued pattern of cases not being taken up once reported?
- At court over three-quarters of domestic abuse-related CPS prosecutions were successful in securing a conviction in the year ending March 2019 (77%), a similar level to the previous year. **Are juries and judges now more alert to issues of bias and pre victim judgment based on relationship history, clothing worn, and alcohol drunk?**

Looking away from the criminal justice system: What is being done to protect the victim (and the children) as opposed to punishing the abuser?

Answer: not enough.

- Local authority spending on refuges for abuse victims fell from £31.2 million in 2010 to £23.9 million in 2017.[14]
- An estimated 21,084 referrals to refuges in England were declined in 2017/18, averaging more than 400 referrals declined each week.[15]

What happens when the victim seeks protection from the family court system?

A report by Women's Aid and Queen Mary University of London into domestic abuse, human rights and child contact cases in the family courts from last year found three in five survivors reported there were no **special measures**[16] in place despite allegations of domestic abuse in their case[17]. Three in five (61%) said there was no special protection, such as separate waiting rooms, different entry/exit times, screens or video links, despite the domestic abuse allegations.[18]

Complainants reported they were repeatedly not believed, blamed for experiencing abuse, and seen as 'unstable' by judges, barristers and Cafcass (Children and Family Court Advisory and Support Service) officers.[19]

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 with an abusive parent was the most frequent outcome in cases sampled by the report.[20]

Katie Ghose, chief executive of Women's Aid said in conclusion:

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[13] from 110,653 in the year ending March 2018 to 98,470

[14] https://www.bbc.co.uk/news/uk-politics-49003726

[15] https://www.independent.co.uk/news/uk/home-news/uk-home-office-domestic-abuse-bill-government-womens-aid-a8737231.html

[16] **Special measures** are steps taken for vulnerable or intimidated witnesses, to help them to give their best evidence, whether during a police interview or in court. Such special measures should be tailored to the person's particular needs. They can include: giving evidence in court from behind a screen so the victim cannot see the abuser, giving evidence from outside the courtroom via live video link, The assistance of a Registered Intermediary to help the victim understand the questions asked and to give answers accurately. Intermediaries are communication specialists who can help victims and witnesses who have difficulty communicating; they are not interpreters.

[17] https://www.independent.co.uk/news/uk/home-news/uk-home-office-domestic-abuse-bill-government-womens-aid-a8737231.html

[18] Ibid.

[19] https://www.theguardian.com/society/2018/may/30/domestic-abusers-still-able-to-cross-examine-victims-in-court

[20] Ibid.

"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."[21]

So why has the family court system lagged behind an evident need to improve its delivery of justice?
In January 2016, Women's Aid published a report, Nineteen Child Homicides, calling on the government to review the treatment and experiences of victims of domestic abuse in family law courts. The report included this important passage:

'Allowing a perpetrator of domestic abuse who is controlling, bullying and intimidating to question their victim when in the family court regarding child arrangement orders is a clear disregard for the impact of domestic abuse, and offers perpetrators of abuse another opportunity to wield power and control.'

Who could possibly disagree?

On 15 September 2016 the issues raised by Women's Aid and by the APPG were debated in the House of Commons (Hansard Vol 614, Col 1081).

As the then president of the family division Sir James Munby said 3 years ago in January 2017 in his *16th View from the President's Chambers: Children and vulnerable witnesses: where are we?* [22]

'The debate makes disturbing and distressing reading. It should be read, and re-read, in full, particularly by the complacent and those who doubt the importance, the magnitude and the severity of the matters being discussed.' He quoted a number of examples: here are two:

Mrs Maria Miller, the Conservative MP for Basingstoke, put the point plainly (Col 1086):

'… More victims – not just women but children – are now being cross-examined by perpetrators of abuse in family court proceedings. Women's Aid estimates that one in four women are directly questioned by a perpetrator, and the same can happen to children. Victims should be protected when giving evidence in court. Few Members in this place can be content to see alleged abusers cross-examine those affected by domestic violence. This has to be re-examined urgently. We need to put an end to survivors of domestic abuse being cross-examined by their alleged abusers in court.'

Peter Kyle, the Labour MP for Hove spoke forcefully on the same point (Cols 1097-1100). He concluded with this:

'Progress has been made, but it has been glacial. We have not seen the transformation that is desperately needed. The abuse and brutalisation of women and families is being perpetuated via our legal system. To abusers, the family court is simply another tool through which to extend their hate, their violence and their control of extremely vulnerable women – exactly the kind of people the state exists to protect. Every day that these practices are allowed to continue, shame is heaped on our system of justice, on this House and on our Government, because we have the power to stop this happening and yet it continues.'

Munby P asked the question:

'Where are we now? At the end of 2016 there was depressingly little to show for over two years' hard pounding. It seems that things may now be changing. My ambition is that everything necessary is in place by the end of 2017. This is do-able – if, but only if, there is the appropriate sense of urgency and commitment.

Re reading the speech delivered by Munby P in 2020 it is deeply depressing to read this:

'Whilst no-one can quarrel with the vitally important principle to which this is directed – the need to prevent alleged perpetrators cross-examining alleged victims) – I have to question whether the prohibition recommended by Cobb J is something that can properly, indeed lawfully, be achieved by a practice direction... the view which I have expressed extra-judicially is that

[21] Ibid.
[22] Mr James Munby (19 January 2017)

primary legislation is required. That legislation is now promised. In the circumstances I propose to omit this particular amendment'

The promised legislation did not happen. Proposed changes in legislation to prevent perpetrators cross-examining victims in the family courts were initially included in the prisons and courts bill 2017, which was abandoned when Theresa May called the 2017 general election. The family division continued to permit cross examination that compounded the abuse the victim had come to court to address.

As Hayden J said in Re A (a minor) (fact finding; unrepresented party) [2017] EWHC 1195 (FAM)[23]

'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. This may not have been the worst or most extreme example but it serves only to underscore that the process is inherently and profoundly unfair. I would go further 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.'

Again, nothing happened. As Hayden J said a year later in PS *v BP* [2018] EWHC 1987 (FAM[24])

'There can be no guidance where the situation is, as here, untenable. Until Parliament addresses these circumstances the best I can offer is a forensic life belt until a rescue craft arrives'

The Family Division did what it could without legislation; it created revised guidance for the judiciary and professionals known as PD12J[25] drafted to balance the rights of the parties to ensure a fair hearing whilst making provision for trial adjustment to enable the alleged victim to participate without oppression in the hearing. It also set out what approach the judge should take in analysing allegations of domestic violence and expanding the concept of abuse to take account of and to describe coercive and controlling behaviours. PD12J was to be read, digested and applied without exception in any case involving allegations of DV Per Munby P:

"Given the obligatory nature of the PD12J it is essential that judges at all tiers of the Family Court are familiar with the Practice Direction, and apply it as they are obliged to do, and conscientiously. The APPG reports a clear consensus from its Parliamentary hearing as to the "patchy" operation and/or implementation of PD12J throughout the family courts; the APPG felt that if PD12J was always put into practice and strictly followed, a number of the pressing concerns raised in the Parliamentary hearing would automatically be addressed, "and the safety and well-being of women and children would be far better protected".'

'I wholeheartedly and emphatically agree. I repeat and emphasise Cobb J's key message: 'it is essential that judges at all tiers of the Family Court are familiar with the Practice Direction, and apply it as they are obliged to do, and conscientiously.'

That was said in 2017. PD12J was to be applied in conjunction with Family Procedure Rules (FPR) 2010 Rule 3A[26] 'VULNERABLE PERSONS: PARTICIPATION IN PROCEEDINGS AND GIVING EVIDENCE' which came into force on 27.11.17. Part 3A sets out a clear judicial pathway to approaching and hearing cases in which allegations of abuse give rise to a party being deemed' vulnerable'. Guidance to judges is thus explicit and well established. So how can we have a situation in 2019 where a senior judge (the Designated Family Judge of the Central Family Court no less) conducted a hearing involving serious allegations on intra marital rape with such ignorance of his duties in a domestic abuse case and showed such callousness towards the alleged victim that it led, on 22.1.2020, to a successful appeal against his decision in an excoriating judgment by Russell J upon his management of the hearing? I refer to JH v MF [2020] EWHC 86 (FAM).

[23] https://www.bailii.org/ew/cases/EWHC/Fam/2017/1195.html

[24] https://www.bailii.org/ew/cases/EWHC/Fam/2018/1987.html

[25] https://www.judiciary.uk/wp-content/uploads/2013/02/privatelaw-pd12j-child-arrangements-and-contact-orders-domestic-violence-and-harm.pdf

[26] https://www.justice.gov.uk/courts/procedure-rules/family/parts/part-3a-vulnerable-persons-participation-in-proceedings-and-giving-evidence

This was a private law case heard in August 2019 involving allegations of serious domestic abuse including rape and violence and the impact that they would have, if proved, on the father's contact with his child. The mother was represented by counsel, the father was not but had a MacKenzie Friend to support him. The mother had asked for screens to be made available so that she could give her evidence without having to look at the father. The judge refused.

Thus, from the outset the trial went wrong: As Russell J set out:

> *'The mother is a vulnerable witness as set out and defined by FPR 2010 r3A.7 (a) (i); (d); (e); (j) and (f) and had applied for screens to be made available in the court room (r3A.8 (a)) as a measure to be put in place to assist her in giving her best evidence: to enable her to do so is the court's duty under r3A.5. The judge took the inexplicable step, contrary to the expressed view and request of the Appellant, and contrary to the rules of procedure, of ordering that the Appellant give evidence from counsel's row as "better" than using the witness box and screens.'*

As a result of the positioning of the mother, not only was she denied the protection she was entitled to enable her to give the best evidence she could when recounting distressing details of her intimate life, but the *'unsurprising difficulties that the trial judge then encountered in being able to hear the Appellant's evidence'.*

The judge then decided, without any request by the father, that the father should also give evidence from counsel's bench. Tolson HHJ QC rejected the mother's counsel'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".*

As Russell J explains:

> "*The Respondent was then able to give evidence sitting next to his McKenzie friend who was, as a consequence, able to assist the Respondent in the answers he gave when the Respondent was being cross-examined. It follows that the Respondent was given an advantage and assistance denied to the Appellant. As was submitted by trial counsel in her skeleton argument and I accept "… it is plain and requires no citation that when a witness is giving evidence, they are 'under oath' and are to receive no prompting, assistance or advice during the midst of it."*

Russell J ruled that these failings alone were sufficient to grant the appeal, but she continued her review of Tolson HHJ QCs trial conduct in what is one of the most excoriating judgments I have ever read.

Russell J described Tolson HHJ QC's[27] approach towards the issue of consent as *'manifestly at odds with current jurisprudence, concomitant sexual behaviour, and what is currently acceptable socio-sexual conduct.*'

The mother had described being penetrated whilst she had been forced to bend before the father on all fours. Tolson HHJ QC had said of that:

> *'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.'*

Russell J dealt with this approach witheringly:

> *'This judgment is flawed. This is a senior judge, a Designated Family Judge, a leadership judge in the Family Court, expressing a view that, in his judgment, it is not only permissible but also acceptable for penetration to continue after the complainant has said no (by asking the perpetrator to stop) but also that a complainant must and should physically resist penetration, in order to establish a lack of consent…'*
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> *'In keeping with his approach thus far the judge had apparently concluded that it is necessary for victims of sexual assault to report the assault or make a contemporaneous report. Yet it is now explicitly accepted that many victims will not do so, out of fear or embarrassment which are based on their cultural, social or religious background and the concomitant pressures, mores or beliefs.'*

[27] http://www.bailii.org/ew/cases/EWHC/Fam/2020/86.html

In relation to a second allegation of rape which involved the removal of the mothers clothing for penetration, Tolson HHJ QC had said:

> '*I do not see why the mother could not, should not, have made life difficult for the father in the circumstances in which she found herself by preventing the removal of the pyjama bottoms. There is no evidence of any kind that a struggle pursued, nor again is a case advanced that the father was being physically coercive on this occasion. Insistent in his requests, yes, but physically coercive, no.*'

Russell J responded:

> *'Again the judge's conclusion on whether sex was consensual or not is wrongly predicated on the presumption that to establish non-consensual penetration the complainant should have physically resisted. Similarly, the judge said "There is no evidence of any kind that a struggle pursued, nor again is a case advanced that the father was being physically coercive (Russell J emphasis) on this occasion" as can be seen below physical coercion or violence or the threat of violence is not considered a necessary element when considering consent or the lack of consent, thus the judge was wrong in his approach.*'

She continued:

> *'The judge had accepted that "at a point during both occasions of intercourse the [Appellant] became both upset and averse to the idea of intercourse continuing. [Russell J emphasis]" but he continued to reach the conclusion that had the Appellant done so it was not as a consequence of any action on the part of the Respondent because it was "something that was usual for her, the product of her past and her psychological state in not being able to take physical pleasure from sex." The judge went to say that "at no point do I find that the [Appellant] withdrew consent or conveyed to the [Respondent] any discomfiture that she was felling about intercourse continuing.'*
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> *'The judge failed to explain the reasons for his findings; as to why, if it was evident to the judge that the Appellant had become averse to sexual intercourse continuing it was not evident to the Respondent; and, secondly, why it was acceptable for the Respondent to insist on sexual intercourse knowing that it was distressing and unwelcome to the Appellant. … The fact is that this judge had largely relied on his view that the Appellant had not vigorously physically fought off the Respondent.'*

There are two hideously outdated and flawed attitudes displayed by Tolson HHJ QC in his judgment which Russell J confronts with disdain 1) consent 2) demeanor.

As Russell J says:

Consent

> *'Non-consensual sexual intercourse was considered lawful within a marriage until as late as 1992 (Cf. R [1992] 1 AC 599) it has not been lawful in any other sphere for generations. There is no principle that lack of consent must be demonstrated by physical resistance, this approach is wrong, family judges should not approach the issue of consent in respect of serious sexual assault in a manner so wholly at odds with that taken in the criminal jurisdiction (specifically the changes in place since Sexual Offences Act 2003 and subsequent amendments).*
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> *'The judge in the instant case should have considered the likelihood whether the Appellant had submitted to sexual intercourse; he singularly and comprehensively failed to do so instead employing obsolescent concepts concerning the issue of consent.*

Demeanor

> *'Appellate case law is redolent with cautionary guidance and comment on the need to look beyond demeanour when reaching a conclusion about the veracity of any witness yet the judge baldly said at paragraph 13 that the Respondent had the "better of the argument" describing the Respondent's demeanour as straightforward without more. In this he failed, as he was required to, to give reasons for preferring the evidence of one party over the other (Cf. Lord Justice McFarlane (as he then was) in V (A Child) (Inadequate Reasons for Findings of Fact) (2015) EWCA Civ 274).*
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> *'Certainly the fact that the judge preferred the Respondent's case was patent throughout his judgment. His reasons, such as they were for dismissing the evidence of the Appellant were wrong; specifically, the judge made a finding regarding the Appellant's psychological state of mind without any forensic expert evidence (the absence of which had been a matter he himself alluded to previously at paragraph 7 of his judgment) when he said, in an exchange during closing submissions with counsel, "she [the Appellant] gives a description of a woman who is of a highly anxious, it might be said, neurotic, disposition"…'*

'If the Appellant appeared to be, and was in actuality anxious, and the judge referred to her as anxious from the outset of the hearing, and again in his judgment (see paragraph 15) is unsurprising given the judge's comprehensive failure to apply Part 3A.'

'The failure of the judge to provide the Appellant with the means of giving her best evidence was evidenced by the fact that her oral evidence was not heard by the judge and was not picked up on tape. To go on, as this judge did, to use it as one of the reasons he questioned her evidence is aberrant.'

'Moreover, in his judgment the judge wholly failed to consider or even to entertain any likelihood that her anxious presentation was as a result of previous abuse, including the probability that this had included abuse by the Respondent. Or, as was submitted by counsel for the Appellant that, that as a vulnerable witness, she was likely to have been distressed when she gave her evidence which, in turn, would have had an impact on her ability to recall matters that had taken place. During oral her evidence, in response to a question by counsel, the Appellant had said she was "stressed, nervous. I haven't slept, eaten anything. It's hard if he can be here". It is of note that there are facilities for witnesses to give evidence by video link near or in the Central Family Court.'

The judgment of Russell J needs to be read in full to understand the full extent of Tolson HHJ QC's failings. As she said, '*the judgment was so flawed as to require a retrial; his decision was unjust because of serious procedural irregularity and multiple errors of law.'*

The ramifications of this expose of such an outdated judicial attitude must not be ignored. Russell J concluded her judgment with this recommendation:

'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. Currently there is comprehensive training on the procedural aspects of such trials and the implementation of PD12J in particular. 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. Such training is provided to judges who are likely to try serious sexual allegations in the criminal courts. In principle the approach taken in family proceedings should be congruent with the principles applied in the criminal jurisdiction. 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.'

I could not agree more.

It does the family "justice' system no favour to have judges sitting in cases in which such manifestly out of date and dangerous attitudes are held with the attendant risks that poses to the victim and the children. It is no wonder that this case attracted widespread press interest and public condemnation.

But I ask: had there not been an appeal (which was heard in public) to a senior and robust judge would we have had such a robust denunciation of the conduct of a colleague and a strong recommendation as to what to do to avoid repetition of his mistakes?

The question this case will inevitably raise is 'in how many other cases has this happened where the victim has not had a robust lawyer prepared to take the matter up on appeal'?

I would like to make it plain that the revulsion expressed by the legal profession at the way Tolson HHJ QC conducted this hearing has been widespread. Jenny Beck of Beck Fitzgerald spoke eloquently about it on Radio 4 yesterday (28.1.202). The press has rightly taken up the matter lending weight to the attempts made by a dogged

and gifted journalist, Louise Tickle, to challenge the 'secrecy' of the family court room[28]. As she wrote in The Guardian this week:

> *'I am typically contacted several times a week by women who say family judges have not taken their evidence of domestic abuse seriously. These women, often mothers fearful of the man they say abused and sometimes raped them, are without question retraumatised by a system presided over by some judges who have simply not accepted a modern understanding of what is and is not domestic abuse or sexual assault.*

Confidence in the ways in which allegations of sexual abuse are dealt with have to be addressed and transparently so; how else can we, in the family system, expect to take make decisions in the best interests of victims and children?

We still need the legislation to be passed which places the family court in the same position as the criminal courts to achieve fairness: the legislation described as 'imminent' in 2017[29].

Brexit wrangles and prorogation of parliament stymied its passage in 2019. It cannot wait.

What is it?

The Domestic Abuse Bill

What does the Bill include?[30]:

- creating a statutory definition of domestic abuse, emphasising that domestic abuse is not just physical or sexual violence, but can also involve emotional, coercive or controlling[31], and economic abuse.
- establishing in law the Domestic Abuse Commissioner to stand up for victims and survivors, raise public awareness, monitor the response of local authorities, the justice system and other statutory agencies and hold them to account in tackling domestic abuse.
- providing for a new Domestic Abuse Protection Notice and Domestic Abuse Protection Order—placing restrictions and other requirements on perpetrators in order to better protect victims.
- placing a duty on tier one local authorities in England (County Councils, Metropolitan and Unitary Authorities, the Greater London Authority) to provide support to victims of domestic abuse and their children in refuges and other safe accommodation.
- creating a statutory presumption that victims of domestic abuse are eligible for special measures in the criminal courts (for example, to enable them to give evidence via a video link).
- placing the guidance supporting the Domestic Violence Disclosure Scheme ('Clare's Law') on a statutory footing.
- creating a new domestic abuse offence in Northern Ireland to criminalise controlling or coercive behaviour.

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[28] See her article on the Tolson case Louise Tickle, 'In our secret family courts, judges still don't understand what rape means,' The Guardian[28]

[29] The Bill was introduced with cross-party support by Theresa May's government in July. However, when Parliament was prorogued it meant that all the bills currently passing through the Commons and Lords were lost, including this one.

[30] https://www.familylaw.co.uk/news_and_comment/queen's-speech-december-2019-domestic-abuse-bill-and-divorce-dissolution-and-separation-bill-reintroduced

[31] Coercive behaviour is an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim

Controlling behaviour is a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.

In many cases the conduct might seem innocent - especially if considered in isolation of other incidents - and the victim may not be aware of, or be ready to acknowledge, abusive behaviour. A pattern of controlling or coercive behaviour can be well established before a single incident is reported but the consideration of the cumulative impact of controlling or coercive behaviour and the pattern of behaviour within the context of the relationship is crucial. This approach will help assess whether a pattern of behaviour amounts to fear that violence will be carried out; or serious alarm or distress leading to a substantial adverse effect on usual day-to-day activities.

- prohibiting perpetrators of abuse from cross-examining their victims in person in the family courts.
- extending the extra-territorial jurisdiction of the UK courts so that, where appropriate, UK nationals and residents who commit certain violent and sexual offences outside the UK may be brought to trial in the UK.

Note however that Katie Ghose of Women's Aid said they were thrilled the government had introduced a ban on abusers cross-examining victims in the family courts but made plain that this alone did not go far enough:

> '*Although this new law is much welcomed, it alone will not protect survivors in the family courts and challenge the 'contact at all costs' approach by judges, which is putting children in danger […] We look forward to working with the government to introduce greater protections in the family courts for survivors, such as special measures to safeguard them in the courtroom, and ensure that children's safety is put at the heart of all decisions made by the family courts.'*

It was described by Sandra Horley, chief executive of Refuge, as a *"once in a generation"* opportunity. It can't be missed or diluted down. So, will there be a response to Women's Aid criticism that special measures such as separate waiting rooms, different exit and entry times, and screens in order to protect domestic violence victims should be facilitated in family courts as they are in crime?[32]

We have waited long enough for the legislation. It has to be comprehensive.

During the Queen's Speech in December 2019 the government outlined its intentions to reintroduce the Bill. The government also announced plans to pilot integrated domestic abuse courts.[33]

The Sally Challen case[34]

This case brought the concept of coercive and controlling behaviour as a form of domestic abuse into the mainstream. It saw a huge miscarriage of justice rectified and demonstrates that the criminal justice system has only just started to keep up with society's new-found recognition of coercive control.

- Sally Challen was jailed for life in 2011 at Guildford crown court for killing her husband in a hammer attack following decades of abuse.
- Challen said she suffered 40 years of controlling and humiliating abuse by her husband before the incident. Challen claimed diminished responsibility at the time, and her case was that she had been subjected to abuse and intimidation by her husband, whom she met when she was 15.
- 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 and a retrial ordered at the Court of Appeal after a panel of three judges rules it was unsafe in light of new evidence that was not available at the time of her trial.
- The appeal court was told that she had two mental disorders at the time of the killing, and that her condition was likely to have been made worse by the coercive control she experienced.
- David Challen (Sally Challen's son): "*The abuse our mother suffered, we felt, was never recognised properly and her mental conditions were not taken into account. As sons, we get another shot for our story to be heard, the events that led to our father's death to be heard, and for our mother to have another shot at freedom – a freedom she has never had since the age of 15.*"
- Challen admitted manslaughter but pleaded not guilty to murder. She was due to face a new trial.
- In June 2019 Mr Justice Edis sitting at the Old Bailey announced she would not face a retrial. The prosecution said that the Crown accepted her plea to the lesser charge. Challen was sentenced at the Old Bailey in London to 9 years and 4 months (time she had already served) for the manslaughter of her husband.

[32] https://www.independent.co.uk/news/uk/home-news/uk-home-office-domestic-abuse-bill-government-womens-aid-a8737231.html

[33] https://www.familylaw.co.uk/news_and_comment/queen's-speech-december-2019-domestic-abuse-bill-and-divorce-dissolution-and-separation-bill-reintroduced

[34] https://www.theguardian.com/uk-news/2019/jun/07/sally-challen-will-not-face-retrial-for-killing-husband; https://www.theguardian.com/law/2019/feb/28/sally-challen-wins-appeal-against-conviction-for-murdering-husband

Challen walked free from court to applause from supporters and said at the press conference:

> *'Many other women who are victims of abuse as I was are in prison today serving life sentences. They should not be serving sentences for murder but for manslaughter […] I still love Richard and miss him dreadfully and wish that none of this had happened. I'm just so happy I can begin to live my life again. I have had major ups and major downs. Without the support of my family and my endless telephone calls to them at inappropriate times, I don't know how I would have coped […] It has been a really long road and at one point I didn't see any light at the end of it. It's wonderful to be free and to be able to see my sons. I'm so grateful to them. […] 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.'*

Justice for Women said it was fighting 10 other similar cases (see their campaigns at: https://www.justiceforwomen.org.uk

Harriet Wistrich, Justice for Women's founder, said the CPS had a commitment and obligation to understand domestic violence "*but you don't see it in practice. You see them going ahead as though they just want to win these cases. I would like to see them honour their commitments."*

So where are we with domestic violence and the law? We can see that the legislation in family lags behind that in crime. We learn that what laws and guidance there are in family cases are as effective only if the judge that is there to apply them 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[35] [36]. 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[37] but far less about female: male aggression and same sex abuse. In an era where Radio 4 had the prescience to sow the seeds of a storyline in 'The Archers' (not the most radical programme) about domestic abuse and coercive and controlling behaviour involving two characters over a 2 ½ year period that came its climax in a fictional trial in 2016[38] we have to ask why the law has lagged so far behind what is happening in our society.

Sexual exploitation of children

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[39]. It was established to examine how the country's institutions had handled their duty of care to protect children from sexual abuse. Its scope is huge and its historical time frame long. The expose of the extent and duration of pedophile Jimmy Saville's sexual exploitation of his vulnerable victims shocked the nation.

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?

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[35] This lecture note is too long to explore the data but the material in this publication makes concerning reading 'Coercive control cases have doubled – but police still miss patterns of this domestic abuse', The Conversation (July 23 2018)[35]

[36] BBC Data (December 2018) Figures for the first 2.5 years of the new coercive and controlling behaviour law show the majority of cases were dropped without a charge (4837) with the Home Office saying The Home Office said there had been 235 successful convictions since the law was introduced. We know that it is an issue that there is an increasing awareness of: Office of National Statistics Data (November 2019): 17,616 offences of coercive control recorded by the police in the year ending March 2019, compared with 9,053 in the year ending March 2018 but I will leave the last word to Adina Claire, Acting Co-Chair Executive of Women's Aid: *"It is encouraging that the coercive control legislation is being used more and that recorded incidents have almost doubled. However, domestic abuse remains at epidemic levels, with an estimated 1.6 million women experiencing domestic abuse last year alone. Despite this, police are making fewer referrals to the CPS and there has been a decrease in the proportion of female victims reporting domestic abuse to the police.*

[37] Office of National Statistics Data (November 2019)[37] the statistics show that, while domestic abuse can happen to anyone, women experience the most severe and repeated forms of abuse. 84% of homicide victims killed by a current or former partner are female, which shows why specialist refuge services for women, including expert services for BME women, have to exist."

[38] https://www.bbc.co.uk/news/magazine-35961057

[39] https://www.iicsa.org.uk/investigations

I talked about the issues of sexual exploitation of children in care in Bradford in a previous lecture[40] that dealt with events in 2015. I had not thought another report exposing exploitation on a vast scale would have to be read in 2019. Yet this month a report was published into the scandal of sexual exploitation, rape and trafficking of children in local authority 'care' in Manchester[41].

The report was ordered by Andy Burnham, Mayor of Greater Manchester off the back of the BBC broadcast of the *Betrayed Girls* documentary about the Rochdale grooming scandal and sexual exploitation of many children in the care system by predominately Asian men. It was released on 14.1.2020. It found significant failings by police and children's services. Whilst it reviewed events of 2004 it makes troubling reading because the victims of abuse have moved into adulthood unassisted by appropriate support and protection and offenders remain at large. On information known at the time the police identified various restaurants and takeaways in south Manchester where suspects were employed. 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. The authors of the report concluded:

> *'There was significant information held by both Manchester City Council and Greater Manchester Police on individuals who potentially posed a risk to children, but we can offer no assurance that appropriate action was taken to address the risks they presented to children. There were very few criminal justice outcomes resulting from Operation Augusta. Fundamentally, Operation Augusta failed to meet the original objective of tackling the widespread and serious sexual exploitation of looked after children.'*

It is now said that child sexual exploitation is recognised as a serious form of child abuse. In the aftermath of the publication of the report there was a concerted effort by the relevant Mancunian agencies to explain that things have changed. Statutory agencies now operate through multi-agency integrated teams and services set up to proactively prevent children from being exploited in the first place, finding and prosecuting the perpetrators when it happens, and putting victims first by listening to them and providing them with the support they need. A Greater Manchester Safeguarding Standards Board has also been created with representatives from each of the 10 local safeguarding partnerships, chaired by an independent expert, to provide independent scrutiny to see how well Greater Manchester is responding to this complex and difficult issue. That work is now subject to peer review and the outcomes are being checked again by national experts external to Greater Manchester.

The question we need to ask is 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?

How far has the law kept abreast of issues affecting our young? What about 'sexting', online or social media bullying? Technology and its use in the hands of the young who appeal to have an intuitive knowledge of how to use it outstrips the learning curve of most adults and certainly outpaces the law in anticipating the damage that can be caused my its misuse.

How our school age children are taught about boundaries and safe relationships is a matter that hits the headlines when the problem becomes a crisis and a child commits suicide or a police prosecution changes a school kid into a schedule 1 offender before their adult lives have begun.

The question I often ask myself is '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?

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[40] https://www.gresham.ac.uk/lectures-and-events/dealing-with-sex-abuse-how-does-the-family-court-assess-risk 1.3.18 "Sex abuse: How does the Family Court Assess Risk'

[41] 'Independent assurance review of the effectiveness of inter-agency responses to child sexual exploitation in Greater Manchester' Part 1; an assurance overview of Operation Augusta. Commissioned in 2017 by Greater Manchester Mayor Andy Burnham published Jan 14 2020.

At present, children's data is routinely being used in a way that puts them at risk of grooming and sexual abuse. On the biggest social networks, children are offered up to abusers by friend suggestion algorithms, and within a few clicks those young people can be contacted and groomed. Algorithms also push self-harm and suicide content at already vulnerable young people, further damaging their wellbeing and risking devastating consequences.

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. This means children's accounts will ordinarily have the highest privacy settings, and geolocation settings will be turned off, by default. Social networks will be required to produce impact assessments on their platforms that specifically look at the risks of online grooming, physical harm and access to inappropriate content. Only the highest risk sites will have to consider upfront age verification. Instead most social networks will need to invest in less intrusive age assurance tools that will enable them to identify children and young people to offer additional account safeguards.

In the view of the NSPCC:

> 'This *strikes the right balance between being frictionless for children, but proportionate for industry. Crucially, it does not penalise children for wanting to use the sites they love and puts the onus where it should be – companies making sure their own sites are safe to use. We applaud the move to ensure algorithms will only be allowed if appropriate measures are in place to protect children from harmful effects, in particular the risk of being fed self-harm and suicide content. Friend of friend suggestions that recommend who to link up with online, and potentially provide abusers with young people to groom, will also be switched off.'*

The Age Appropriate Design Code will be rolled out in a year. Tech companies that break the code may face heavy sanctions imposed by the ICO. The ICO code's promise to enforce GDPR fines of up to 4 per cent of global turnover should focus tech boardrooms' minds. The Commissioner, Elizabeth Denham, must enforce the Code in a proportionate and risk-based way, and target those social networks that carry the greatest risk to children.

I agree with Andy Borrows, NSPCC Head of Safety in the article he published on Monday in the article he wrote for 'The Telegraph' that whilst the Code is a positive move forward it cannot work miracles. The Online Harms White Paper so talked about in 2019 (its consultation period concluded in April 2019)[42] has yet to come forward for parliamentary debate and legislative approval.

It 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[43]. It covered the risk of sexual exploitation, radicalisation, gang recruitment and control, bullying. It 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. It will also make companies deal with harm that is caused by information or activity on their sites. Where is it now?

The last update on the government's site on this paper was July 2019: another casualty of the parliamentarian Brexit induced inertia of 2019?

'No Fault' divorce

The case of 2019 that garnered headlines and showed the law to be out of date was **Owens v Owens [2018] UKSC 41.** This incredibly sad case revealed a chasm in our existing divorce law which has blighted the lives of unhappily married couples for decades.

[42] https://www.gov.uk/government/consultations/online-harms-white-paper

[43] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/811923/EASY_READ_Online_Harms_White_Paper.pdf

Context: 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. The court cannot hold that the marriage has broken down irretrievably unless the petitioner satisfies the court of one or more of the five facts set out in MCA section 1(2). Some of the facts are fault based (adultery, behaviour, desertion), but two relate only to periods of separation.

The facts are:

a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent (often referred to as the "unreasonable behaviour" fact);
c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted (two years separation with consent); and
e) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition (five years separation - no consent needed).

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.

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.

One person cannot a marriage make.

Mrs Owens came to public attention because, in 2016, His Honour Judge Tolson QC, sitting in the Central Family Court, refused to grant Mrs Owens (the petitioner) a decree nisi of divorce, even though he found that the marriage had broken down. The husband had defended the divorce.

Tolson HHJ QC had to apply this staged process:

(a), by reference to the allegations of behaviour in the petition, to determine what the respondent did or did not do;

(b), to assess the effect which the behaviour had upon this particular petitioner in the light of the latter's personality and disposition and of all the circumstances in which it occurred; and

(c), to make an evaluation whether, as a result of the respondent's behaviour and in the light of its effect on the petitioner, an expectation that the petitioner should continue to live with the respondent would be unreasonable.

Given Mrs Owens clearly stated position the analysis of factors b) and c) could have been open to a number of interpretations. This judge found that the petitioner had failed to prove, within the meaning of section 1(2) (b) of the Matrimonial Causes Act 1973, that her husband had behaved in such a way that she could not reasonably be expected to live with him. The petition was said to have been drafted in "anodyne terms".

Mrs Owens appealed to the Court of Appeal. In 2017, "*with no enthusiasm whatsoever",* Lady Justice Hallett agreed with Sir James Munby, then President of the Family Division, that the appeal should be dismissed:

'…this court cannot overturn a decision of a trial judge who has applied the law correctly, made clear findings of fact that were open to him and provided adequate reasons, simply on the basis we dislike the consequence of his decision.'

Lady Justice Hallett regretted that the decision would leave the wife "*in a very unhappy situation"*.

Sir James Munby spoke of an aspect of the law and procedures being based on *"hypocrisy and lack of intellectual honesty":* Sir James added that, "*Too often the modern 'behaviour' petition is little more than a charade"*. He said that this charade 'works' because of the operation of the rule of pleading that if a claim is conceded it goes through, in effect, by default.

Lady Justice Hallett said that it was for Parliament and not judges to change the law.

In July 2018, the Supreme Court dismissed a further appeal by Mrs Owens, meaning that she must remain married to Mr Owens for the time being.

Lord Wilson acknowledged that the appeal gave rise to *"uneasy feelings"*. He said that it was for Parliament to consider whether the law should be changed:

Lady Hale described the case as "troubling" but agreed that *"it is not for us to change the law laid down by Parliament - our role is only to interpret and apply the law that Parliament has given us"*.

Parliament: a Bill, Brexit and Prorogation

Bills to provide for 'No Fault' divorce have been raised in the commons since 2015. Those efforts accord with the views of some senior members of the Judiciary; the Family Mediation Taskforce and Resolution (the national organisation of family lawyers) as examples. The Times newspaper has campaigned for change. It is long overdue.

I am aware of the arguments against No Fault divorce, but I am not convinced. Opponents suggest this risk devaluing marriage by making divorce akin to a tenancy contract which can be terminated without reason. They say the current law encourages stability of family life and promotes reconciliation by making couples wait a period of separation if they do not wish to allege fault.

This approach fails to acknowledge that many couples have already put work into maintaining the relationship before beginning divorce proceedings. 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. It has also been argued that attempts to make dissolution of marriage easier and more expeditious could increase divorce rates. The implications on society of an increase in the number of children impacted by divorce, including the increased likelihood of emotional problems, could be significant.

It is misconceived however to ignore the effects the current system is already having on the psychological health of couples and children. The Nuffield Foundation's 'Finding Fault?' report has noted the large reliance on fabrication and exaggeration in fault-based petitions. If the objective of family law is to minimise post-separation conflict, forcing couples to attribute blame or wait a period of separation is a short-sighted way of promoting an amicable divorce. It clearly undermines the couple's ability to agree child arrangements and their finances, and the stability of the separated family moving forwards, therefore.

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

The Divorce Dissolution and Separation Bill[44]

The Divorce, Dissolution and Separation Bill is intended to remove issues that create conflict within the divorce process and introduce a minimum timeframe before the court makes a conditional divorce. 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 Bill would include:

- retaining the sole ground of irretrievable breakdown, but replacing the requirement to make an allegation about the other spouse's conduct or demonstrate a period of separation with the requirement to state to the court that the marriage has irretrievably broken down
- introducing a new minimum period of 20 weeks between the start of proceedings and applying for the conditional order (the six-week period between conditional and final order—currently called decree nisi and decree absolute—will remain)
- Introducing a new option for a joint application in cases where the decision to divorce is a mutual one.

Again, all progress was lost with the prorogation of Parliament. The Bill entered Parliament on 7 January 2020, and it is hoped it will be passed soon?[45]

Being Transgender

The issues I have addressed above highlight the areas where known, long standing, problems require redress in law and practice. But what of issues emerging in the recent past that have challenged our concept of what it means to be a man or a woman (or to be gender fluid or gender neutral) How has the law responded to a profound challenge to the premise upon which so much legislation was founded?

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

TT is Mr Freddy McConnell. He has lived as a man for years and obtained a Gender Recognition Certificate to be legally recognised as male. He is a female to male transgender male. He suspended testosterone treatment and had intra-uterine insemination with donor sperm. He became pregnant and gave birth to a child. He wished to be registered as his child's father or "parent". However, the registrar general concluded that he had to be registered as the child's "mother" on the birth certificate. His appeal was heard by Macfarlane P.

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. 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. The additional concept of a second 'parent' introduced by the 2008 Act was restricted to a second female parent in the specific circumstances of s.42 and s.43, and had no application to the instant case[46].

At common law, a person whose egg was inseminated in their womb and who then became pregnant and gave birth to a child was that child's "mother". The status of a "mother" arose from the role that a person undertook in the biological process of conception, pregnancy and birth. Being a "mother" or "father" was not necessarily gender specific, although until recent decades it invariably was so. It was now possible, and recognised by law, for a "mother" to have a male-acquired gender, and for a "father" to have acquired the female gender. Section 12 of the GRA was both retrospective and prospective. That meant that the status of a person as the father or mother of a child was not affected by the acquisition of gender under the GRA, even where the relevant birth took place after the issue of a Gender Recognition Certificate[47].

HFEA s.33, which defined the meaning of "mother", did so to deal with circumstances where an embryo or sperm and eggs were placed into the womb of the person who then carried the pregnancy to the birth of a child. That

[44] https://www.familylaw.co.uk/news_and_comment/queen's-speech-december-2019-domestic-abuse-bill-and-divorce-dissolution-and-separation-bill-reintroduced

[45] https://www.gov.uk/government/news/divorce-blame-game-to-end

[46] Paras 123-127 of judgment.

[47] Para 149

section did not include artificial insemination and did not therefore encompass the circumstances of the claimant's case. However, if a transgender man had an embryo or sperm and eggs placed into their womb, s.33 would be engaged, and that person would be the child's "mother", irrespective of the male gender that they had acquired, even if it was formally recognised by a Gender Recognition Certificate. Parliament could not have intended an alternative outcome in a case such as the claimant's where the only distinction was the specific process of assisted reproduction used.[48]

The requirement for the claimant to be registered as the child's mother interfered with his, and his child's, art.8 rights. The psychological and social reality for them was that the claimant was the child's father. Further, if an occasion arose where the claimant was required to produce the child's full birth certificate that would cause embarrassment and distress for both parent and child. However, a balance had to be struck between the parent's individual right to privacy and the child's right to know about their biological identity, particularly for medical reasons… In addition, the outcome sought by the claimant would mean that the child would never have a "mother", which would mark him out from all other children (my emphasis).

Outcome: In establishing the scheme of birth registration, and in holding by GRA s.12 that the fact that a person's gender had become the acquired gender following the issue of a certificate "does not affect the status of the person as the father or mother of a child", Parliament had made a social and political judgement as to how the competing interests should be accommodated. In doing so, it had afforded priority to the need for clarity as to parental status. There were child-focused reasons in favour of striking the balance that way. The government was pursuing the legitimate aim of establishing a coherent birth registration system. The requirement that the person who gave birth was registered as the child's mother was fully justified, proportionate and fair. The adverse impact on the claimant was substantially outweighed by the interests of third parties and society at large in the operation of a coherent registration scheme, and art.14 had not been breached [49](my emphasis).

This case isn't over yet. An appeal is pending. For my part I'm not sure that Parliament has made an active judgment about how the transgender status of a parent should be recorded. That ascribes a level of awareness of the issue and debate on it that I have not seen evidence of in Hansard. I am also unpersuaded that it would 'mark out' the child by not having a mother in the birth certificate: that's a situation same sex male couples grapple with. The court also concluded that the adverse impact on the claimant was substantially outweighed by the interests of third parties and society at large in the operation of a coherent registration scheme, but other countries have shown it is perfectly possible to operate a coherent scheme, without needing "motherhood" on the certificate. Sweden and Canada for example allows Trans parents to register births in gender neutral birth certificates.[50] Is it not time to confront that fact that the current birth certificate is out of date and should be changed to reflect the diverse reality of modern parenting?

<u>Science and its role in the law</u>

As Dame Elizabeth Butler Sloss P said in Re U, Re B[51] :

> *"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."*

Gender issues may not have been in her mid when she uttered these truths but she expressed beautifully the dilemma the law faces in the complex cases that come before it which grapple with developments in science on the outer reaches of judicial consciousness but which are essential to know to do justice to the individuals that come before them.

The family justice legal system has sought to develop in line with medical science but can only lag behind it. The complexity of the medical evidence in family cases has progressively increased over recent years with lawyers and

[48] Para 164-8

[49] Paras 263-273.

[50] https://www.theguardian.com/society/2019/sep/25/transgender-man-loses-court-battle-to-be-registered-as-father-freddy-mcconnell

[51] RE U, RE B (Serous Injury: standard of Proof) 2004 EWCA Civ 558

judges being required to understand and assimilate evidence relating to non-accidental head injury, factitious illness, bone density and now genetic variants or abnormalities to name but a few specialist fields. We now accept that gender is no longer to be considered a static state: nor is the science that informs our understanding of it.

Family courts are hugely reliant on medical experts to assist in ensuring that the decisions reached are fair and take account of the most recent scientific research. Case outcome can depend hugely on the quality of the expert instructed and the experience and attitude of judge who heard the case.

Gender Dysphoria

Gender dysphoria in children: Lancashire County Council v TP (Permission to Withdraw Care Proceedings) [2019] EWFC 30[52]
This is a striking case that shows how swiftly science moves and how much responsibility there is on the judge (and experts) to keep abreast of it for fear of making decisions that can change family relationship in profound and potentially irrevocable ways. This case concerned a family with children said by their parents to have gender dysphoria[53].

The Local Authority's (LA) criticised the parents for 'acted impulsively' in relation to 'perceived' gender dysphoria of their children by actively encouraging their transition and risked the emotional harm of them by being unwilling to recognise the long-term implications of such an early transition.

The LA took this point on harm because the children's complete social transition into females occurred at a very young age and was actively encouraged by their parents. the parents' actions were criticised by a host of social work professionals. One can imagine the distress that caused the parents who were trying to do the right thing in a situation that was novel to them and to many of the professionals they encountered. It was their good fortune that the court instructed Dr Pasterski, a consultant psychologist specialising in gender identity.

Mr Justice Williams noted with interest how the area of gender identity issues had so swiftly developed:

> *'Dr Pasterski is a chartered psychologist and gender specialist with 23 years of experience in conducting gender identity assessments in children and adolescents. In her report she identifies that there have been recent changes to the diagnostic criteria for gender dysphoria and that research on mental health and transgender children have shed light onto critical historical misunderstandings related to clinical presentation in gender dysphoria. Firstly, that children who present with gender dysphoria are likely to desist in their cross-gender identification and secondly that gender dysphoria is inherently associated with high rates of comorbid psychopathology. She notes both have been shown to be false. She identifies that these misunderstandings arise from two particular factors. Firstly earlier studies which showed that up to 80% of children desist in gender dysphoria included children who presented with gender incongruent behaviour but did not necessarily state the wish to be or that they were the other gender. Thus children displaying gender variance may have been wrongly diagnosed with gender dysphoria. As a result of this treatment 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. As Dr Pasterski puts it '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.' (my emphasis)*[54]

Williams J words in conclusion make the point eloquently:

> *'As I observed during the course of the hearing that issues relating to gender identity and the medical understanding of such issues is complex and developing and that 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.'*

[52] https://www.familylaw.co.uk/docs/pdf-files/lancashire-county-council-v-tp-and-others-(permission-to-withdraw-care-proceedings-2019-ewfc-30.pdf?sfvrsn=622e9f17_2
[53] Gender dysphoria is a condition where a person experiences discomfort or distress because there's a mismatch between their biological sex and gender identity. It's sometimes known as gender identity disorder (GID), gender incongruence or transgenderism.
[54] Para 58

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.

It poses the question of how many other cases would have been decided differently if current expert knowledge had been available at the time decagons were made with lifelong consequences.

Consider *Re J (A Child)* [2016] EWHC 2430 (FAM). In this matter before Hayden J, a mother was found to have caused her son significant emotional harm by 'making him' live as a girl. Hayden J concluded: '*This is not a case about gender dysphoria, rather it is about a mother who has developed a belief structure which she has imposed upon her child.'* [§73] The boy's residence was transferred to the father, and a care order was made whilst the boy was to continue living with his father.

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? Who will instruct 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? These family disputes will be played out in private where the public concept of gender dysmorphia 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[55].

As The Mermaids[56] CEO Susie Green said:

> *'Over the last few years, we've seen an explosion in media stories relating to children and gender issues and, while some of it has been responsible and understanding, much has been misleading, ill-informed and even, at times, cruel. One consistent issue we've found is that politicians, presenters, campaigners and influencers are eager to speak about Trans and gender-questioning children without listening to them first.'* [57]

So, when does a parent's belief become harmful to a child? What beliefs systems should be tolerated?

I have dealt with the compelling and distressing cases of Charlie Gard and Alfie Evans in my lecture of 2.5.2019 alongside Dr Imogen Gould[58]. I set out there the tests the court applies when considering how to resolve disagreement between the state and the parents over what treatment a child should receive. I shall not repeat that analyses here. But the point to extract from those cases is that there was a 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 effects.

Those cases attracted widespread public interest because of the compelling facts and the fact that a child was at the point of death according to the state. But what of lifestyle beliefs that have not, and may never, reach the point of a medical emergency.

Howe does the court evaluate whether a parent's genuine belief in what is best for a child is a matter for the family to develop? When it should intervene?

Dictum still applies can be traced back to Lord Upjohn in *J v C* [1970] AC 668:

> *'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.'*

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[55] Corpus Linguistics research carried out for the charity Mermaids by Professor Paul Baker of Lancaster University

[56] https://mermaidsuk.org.uk/. Mermaids has been supporting Trans and gender-diverse children, young people, and their families since 1995. Mermaids supports gender-diverse children and young people until their 20th birthday, as well as their families and professionals involved in their care.

[57] Https: //mermaidsuk.org.uk/exclusive-new-research-reveals-the-truth-about-newspaper-coverage-of-trans-issues!.html

[58] https://www.gresham.ac.uk/lectures-and-events/child-medical-treatment

The court of appeal in *Re G (Children)* [2012] EWCA Civ 1233 reiterated and endorsed that approach and had this to say on what is considered to be within the limits of what is acceptable according to the reasonable man or woman:

> *'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.' [§39] […]*

One of the issues courts have had to grapple with give the accessibility of the World Wide Web is the degree to which philosophies can emerge which gain currency over continents that outpace the ability of the legal world to anticipate them until a case forces a decision upon them.

How far as a general public do, we place ridicule on such belief systems? When does a belief system/ lifestyle put a child's welfare at risk and go beyond the pale of what is acceptable?

Hedley J in Re L (Care: Threshold Criteria) [2007] 1 FLR 2050 said that:

> '*society must be willing to tolerate very diverse standards of parenting, including* ***the eccentric****, the barely adequate and the inconsistent….it is not the provenance of the state to spare children all the consequences of defective parenting. In any event, it simply could not be done.'*

Where does our broad-mindedness reach its limits?

Consider Re C (A Child) (Special Guardianship Order) [2019] EWCA Civ 2281 (20 December 2019)[59]. The mother appealed from the special guardianship order made in respect of her daughter aged 5 by HHJ Tolson QC on 14th August 2019 at the conclusion of care proceedings.

In the context of both parents having been assessed as having mental health difficulties the court of appeal was asked to consider if Tolson HHJ QC had negatively passed judgment on the parents lifestyle and beliefs that undermined the freedom afforded to them under the Re L principle of broad mindedness.

When dealing with the background, Tolson HHJ QC had referred to the parents' lifestyle and their beliefs commenting that the mother has:

> '*adopted a lifestyle which can be said to go well beyond the merely alternative"* and that her beliefs are *"deep-rooted"*. She "*has difficulty accepting not just the validity of Western medicine but that such medicine is not in itself harmful"*. He also said that: "*Perhaps at its most extreme the mother has suggested that both she and C ought to be capable of being 'breatharians', meaning that they should be able to survive without food and possibly water"*.

The parents in this case suggested they survive on the:

> *'energy that exists in the universe and in themselves". "Humans can easily be without food, as long as they are the connected to the energy that exists in all things and through breathing.'*

The mother appealed on the basis, inter alia, that the judge's decision offended against the principle that the courts "*must be willing to tolerate very diverse standards of parenting"*. It was submitted that the judge concluded that C's lifestyle and beliefs were by themselves a source of harm to C. It was argued that the judge allowed his views about, and his disapproval of, the mother's lifestyle and beliefs to distort his welfare assessment so as to render it flawed. McFarlane LJ considered that, what might be called the Re L perspective, is "out of place" in a welfare evaluation, it is clear that the "character of the parents" is relevant "only to the extent that it affects the quality of their parenting". This is because the court is assessing the welfare consequences for the child of that 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 thought and belief become dangerous, and to whome?**

Shamima Begum: the Isis Bride

[59] https://www.bailii.org/ew/cases/EWCA/Civ/2019/2281.html

Shamima Begum first 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. Shamima Begum was a 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 Begum was discovered in a Syrian refugee camp, pregnant and hoping to return home to the UK in order to raise her unborn child her previous Syrian born babies having died. As soon as The Times published their interview, she was again in the spotlight and the spectacle of media coverage, opinions, analysis and public outcry rapidly unfolded. Just as quickly, the debates became focused on her status as a British citizen. On 19 February 2019, less than a week after Shamima Begum 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

She launched an appeal against the Home Office's move to revoke her citizenship and prevent her from returning to London. Lawyers for Begum alleged she had been left stateless, was unable to mount a "fair and effective" legal challenge and was at risk of "death, inhuman or degrading treatment". The court heard that if she were forced to go to Bangladesh, her parents' country of origin, she was at risk of being hanged.

Press interest in her case was intense. It led to views being expressed such as this:

> *"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

A critique of the coverage was undertaken by Sheri Labenski in '*Women's violence and the law: in consideration of Shamima Begum*'[60]. It makes thought provoking reading. It argues that gendered and sexist narratives on women's roles in terrorist organisations, and violence more broadly, restrict women's visibility in legal narratives on war. She argues that Shamima Begum was tried by the public media with the outcome that a February 2019 Talk Radio poll of 288,100 found that 99% of the respondents did not think she should be allowed to enter the UK, and a Sky News poll found that 78% of respondents believe revoking her citizenship was the right choice.

How far did the Home Office's decision equate to a trial by media, the impetus for the decision instigated by a vocal right-wing public outrage, fuelled largely by the press? Was it lawful?

We now know that Shamima Begums son died aged 3 weeks. At the time he was born Shamima Begun had British Citizenship. Her son was a British citizen. In the short time he lived, how much attention was focused on him as an innocent. He had family in the UK who pleaded to care for him. No criticism had been made of their conduct. They had publicly decried Isis and lamented their daughters fight from the country child in need?

How far has the Begum case been an example of political games and attempts to appeal to public conscience over legality, for the child if not the parent?

The debate has not gone away. Articles such as that by Azadeh Moaveni in The Guardian ' *We must not abandon the women and children of Isis in camps in Syria* ' [61] make us think about the operation of law, politics and the press and the responsiveness of each to the challenges that an ever-morphing concept of 'society' requires us to engage with. As the author says

> '*Across Europe, governments are wrestling with how to deal with women like Shamima Begum and their children. It is a problem of extraordinary complexity, spanning everything from evidential requirements for terrorism prosecutions to the relationships states have with Turkey and successful court appeals launched by women's families.'*

[60] https://blogs.lse.ac.uk/wps/2019/11/20/womens-violence-and-the-law-in-consideration-of-shamima-begum/
[61] https://www.theguardian.com/commentisfree/2019/nov/27/women-isis-syria-camps-refugees

The UK has now repatriated its orphans found in the camps, and it is believed that there are no more left in Turkey though there may yet be a small number of unaccompanied minors (children whose parents may be alive, but who are separated from them).

> '*The vast majority of British children reside in camps with their mothers, and how the government intends to deal with this is unclear: child separation is illegal without the mother's agreement and the* Syrian Democratic Forces *is adamantly against it, aware that by releasing children it will be saddled with their mothers, perhaps forever'.*

There is a cautious note of optimism expressed by Ms Moaveni she writes:

> *'European governments, including the UK's, do have the ability to deal with this situation: they are already coping with a sizeable number of independent returns, with security services, police and social care mobilised. Each country has intimate knowledge of its cohort of women. They also know, with a fair measure of confidence, who poses the greater risk upon return. They know who energetically chose, who stumbled, and who was coerced into travelling to the caliphate.* She points to the lack of coverage, let alone outcry, over the repatriation of orphans, and the lack of outcry in Britain has been striking. She opines that '*It suggests politicians have more room to maneuver around repatriation than they might have thought. They can point to the realities in the camps – that there are regretful women who run pizza collectives and hold French and English classes, preparing their children for school life back home, and militant women who burn down tents and stab others to death for apostasy. They can explain it is wrong and inhumane to keep these women all mixed in together and, most of all, to expose children to such depravity. And they can ensure that the rule of law prevails, with adults facing justice for any crimes they may have committed.'*

Is she right?

End note[62]

In this lecture I have explored areas of personal and professional interest that have made me question the ability of the law to respond as it should to the ever-changing society it seeks to serve.

Legislation moves, more often than not, at a languid pace that politics imposes through changes of Ministers, the prevailing political wind and political expediency. Cross bench support does not guarantee a swift passage of a Bill as we know too well from the tortuous path (as yet unfinished) to the statute books of the Domestic Abuse Bill and the No Fault Divorce Bill. Against that stately pace society develops at often breakneck 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.

This lecture might be seen as a year 'book–end' to that I delivered on 31.1.2019 on the 30th Anniversary of the Children Act 1989[63]. I concluded that the Children Act was an instrument of reason and creativity that had largely withstood the ravages of time. The preparation for this lecture has been thought provoking.

I am left with the strong view that we cannot be complacent about the health of our legal justice system. As citizens we deserve more from our legislature. We require proactive rather than reactive thinking from Parliament. And as for those who interpret the law, our judiciary, they have to be clear about when their limits have been reached in terms of creative interpretation. As the representatives of the State in delivering 'justice' under the law made by Parliament it is important that they are as ready to scrutinise , and make public, their own failings as they are of those who come before them for 'justice' It is only by accepting that things have gone wrong and saying what will be done to change things for the better that public respect for the legal system can maintained.

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[62] This lecture could not have been written without the assistance of Frankie Sharma, researcher at 4 Paper Buildings. I am indebted to him for his help

[63] https://www.gresham.ac.uk/lectures-and-events/30-anniversary-children-act-1989 30.1.2019

On a very basic level the last year alone has shown us that 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.

The law, and those who work in it, can no longer command respect by default. Respect has to be earned not demanded. For my part, I think that is an entirely healthy attitude for society to have.

Next lecture: The Insider's Guide to Becoming a Barrister

Thursday, 5 March 2020, 6:00PM - 7:00PM Barnard's Inn Hall

This lecture provides an insider's brutally honest guide to what it's like to be a self-employed barrister - the highs and lows of the career, the work behind the scenes that makes a difference to outcomes in court, and the art of persuasion in it.

What are the ways of working that can make a difference to success and failure, for the client and to professional development for the barrister? What transferable skills does the advocate have looking at life Beyond the Bar?

https://www.gresham.ac.uk/lectures-and-events/barrister-insiders-guide