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'Lady Hale, The Supreme Court and Family Law'

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Brexit, alas, dominates the news in the UK. And is likely to continue for the foreseeable future, despite the result of the recent General Election. While divorce analogies abound, little attention has been paid to the potential implications of Brexit for family law. An exception was a 'Brexit and Family Law', Special Issue of *Child and Family Law Quarterly*, published towards the end of 2017. The five contributors all raised significant concerns. Although the Brussells II Regulations might in part be replaced by international conventions, there are likely to be considerable uncertainties in UK-EU border disputes about a variety of family law cases concerning both children and adults.

Beyond family law, one consequence of Brexit has been a heightened focus on the Supreme Court, which has twice been called upon to determine cases that seek to challenge the Government's attempts to weaken the role of Parliament. These conflicts have fed, at best, debates about the workings of the (unwritten) constitution and, at worst, frightening outbursts attacking the essential role of judges in a liberal democracy. In the most recent case, where the court held that the proroguing of Parliament was unlawful, the media paid considerable attention to the President of the Supreme Court, Lady Hale. As a result she has become a widely recognised public figure, which for judges in the UK is highly unusual, even for the most important judge in the country. The large spider-broach she wore when delivering the latest judgment about Parliament's powers has been adopted as an online symbol, although for what precisely is not clear, and a beautifully illustrated children's book *Equal to Everything: Judge Brenda and the Supreme Court* (LAG, 2019) is fast becoming a best-seller.

Brenda Hale retires in 2020. Atypically for senior judges in the UK she began her career as an academic. She was the first woman to be a Law Lord and member of the Supreme Court, and until very recently the only one. Hale's background, again atypically for

Supreme Court judges, is in the field of family law. As a Law Commissioner she was one of the main architects of the Children Act 1989. Events and commentaries marking the thirtieth anniversary of that ground-breaking statute, which recast the relationships between children, parents and the state, have consistently noted how it has stood the test of time and that current problems are, on the whole, more systemic and economic, rather than legal.

A further feature of Lady Hale's distinctiveness has been her willingness to openly identify as a feminist. In a key case about the legal status of pre-nuptial arrangements - *Radmacher v Granatino* [2010] UKSC 42 - she gave the sole dissenting judgment against 8 male judges. Expressing concern about the disproportionate impact of the recognition of pre-nuptial arrangements on women, she was explicit about the fact that she considered the gender of the judges relevant to the outcomes they reached. She concluded her judgment by observing that: 'marriage still counts for something in the law of this country and long may it consider to do so'.

What marriage 'counts for', what symbolic meanings it conveys are questions that were critical to two recent cases decided by the Supreme Court, headed by Lady Hale, and in both cases their judgments have resulted in statutory intervention.

Owens v Owens [2018] UKSC 41 concerned a wife applying to obtain a divorce on the grounds 'that the respondent, her husband, had behaved in such a way that she could not reasonably be expected to live with him'. This was in accordance with the Matrimonial Causes Act 1973 s.1(2)(b), the most frequently used ground for divorce. Most unusually the husband in this case chose to defend the divorce and even more unusually was successful in doing so. The case sent shock waves through the family law world as such applications routinely progress without any real issue or scrutiny; and not infrequently on facts less serious than those in the *Owens* case. Consequently it drew attention to what one of the judges described as the practice of 'consensual, collusive manipulation' in the drafting of applications for divorce under this ground. Lady Hale addressed misgivings about the approach taken by the judge who had initially refused to grant the divorce and

demonstrated some sympathy with Mrs Owens view that he had failed to take into account changing social attitudes about marital expectations. Sticking to the rule that it is not for an appeal court to determine questions of fact, she suggested that the correct outcome would be for the case to go back for a rehearing which might have led to the divorce being granted. However this was not the redress sought and she 'reluctantly' agreed that the appeal by Mrs Owens failed. The case brought to the fore and reinvigorated long standing criticisms of the practices related to and the implications of ‘fault-based divorce. These concerns were emphasised by the Supreme Court and the judgments invited Parliament to consider reforming the law, which has remained unchanged since the Divorce Reform Act 1969. A new law - the Divorce, Dissolution and Separation Bill - was subsequently presented to Parliament in October 2019. If enacted this would remove all reference to the current legal facts (including adultery and ‘reasonable behaviour’). Instead, one or both parties would simply be required to file a statement of irretrievable breakdown. That statement would then be confirmed after a minimum waiting period of six months. The Bill has wide support but with the dissolution of Parliament prior no further progress will be made.

While concerning a very different issue, the institution of marriage was also central to *R on the application of Steinfeld and Keidan v Secretary of State for the International Development (in substitution for the Home Secretary and the Education Secretary)* [2018] UKSC 32. In this case an opposite-sex couple were seeking to argue for a right to enter a civil partnership. Civil Partnerships were established in 2004 to provide gays and lesbians with all the rights of marriage while at the same time avoiding - for political reasons - antagonising those who argued that marriage was only for opposite sex couples. When gay marriage was eventually enabled ten years later by the Marriage (Same-Sex Couples) Act 2014, many questioned whether there was a need for civil partnerships but this pragmatic earlier institution remained in place. Consequently same sex couples had a choice of two institutions, whereas opposite sex couples only had the option of marriage. This subsequently enabled Rebecca Steinfeld and Charles Keiden, an opposite sex couple, to argue that the UK was in breach of its obligations under the Article 14 of the European Convention on Human Rights when taken in conjunction with

Article 8. The Supreme Court upheld their claim but left it to Parliament to decide how to respond. The government could have simply abolished civil partnerships. This was the approach adopted by Norway, Sweden, Denmark, Iceland and the Republic of Ireland. Instead however they decided to extend civil partnerships to opposite sex couples. The Civil Partnerships, Marriages and Deaths (Registration etc) Act was passed in 2019 and the first opposite sex civil partnerships were registered in December 2019. For Steinberg and Keiden and their fellow campaigners this is a victory not just for legal equality but was always framed as a progressive move, freeing opposite sex couples from the traditional patriarchal trappings of marriage. This is undoubtedly a genuine feeling. But it is a feeling and not a logical argument as civil non-religious marriages have long existed and many of the social conventions about marriage - the wearing of rings, the husband 'giving away' the daughter, the wife adopting the surname of the husband - are precisely that, social conventions. While Lady Hale held in favour of the applicants in the Supreme Court it is questionable whether she would have agreed with the solution found by the government. Indeed she had held in an earlier case that:

> 'These are not the olden days when the husband and wife were one person in law and that person was the husband. A desire to reject legal patriarchy is no longer a rational reason to reject marriage.' *Re P (Adoption: Unmarried Couple) [2008] UKHL 38*

Indeed in another earlier decision, prior to the introduction of civil partnerships, she held in favour of treating a gay couple as 'living as a husband and wife' not on the basis of gay equality but because she considered that gender was no longer a relevant factor in determining the legal relationship between men and women in marriage (*Ghaidan v Godin-Mendoza* [2004] UKHL 30).

While largely symbolic one unintended practical consequence of the reform is that the long standing campaign to recognise some degree of cohabitation rights is likely to have been severely damaged. This is because arguments in favour of extending civil partnerships claimed - despite all the evidence to the contrary, that cohabiting opposite sex couples will now be able to and will wish to enter civil partnerships. It will, of course, be interesting to see how many opposite sex couples opt for civil partnerships. The

evidence from same sex couple is that only older couples - those over the age of 40 - opt for civil partnerships.

The rationale for the existence of two almost identical institutions is hard to fathom. But while the relevant alternative sto marriage are different, the position is similar to that in Belgium and The Netherlands. Comparing how people across the three jurisdictions make use of them in the future might be a way of examining changing attitudes to marriage.

UK family law has always adopted a piece meal ad hoc approach. Both the *Owens* case and the incremental slow move to no-fault divorce and the *Steinberg* case and subsequent legislation reveal the extent to which family law reflects emotional attachments to political and personal ideals and aspirations. And they may be progressive or traditional. But emotion plays an all too easily overlooked underlying motive and rationale and one has to read between the lines of the formal logic of the judgments of the Supreme Court to detect it.