

BACFI DENNING LECTURE 2019

Women in law – the next 100 years

Before we can think about the next 100 years we have to see what lessons we can learn from the past. We all know that it is now 100 years since women were allowed to begin to train as professional lawyers and 101 years since women could stand for Parliament. But there are a few other things we also know. First, we know how long it took for them to gain a real foothold in the profession – as late as 1970, 50 years after the Sex Disqualification (Removal) Act 1919, women were still only 5.8% of practising barristers and 3.3% of practising solicitors; but the proportions have leapt over the succeeding 50 years, so that the latest available figures show that women are 36% of practising barristers and just over half of practising solicitors.

Second, the progress of women in politics was even slower than their progress in the law. Until the 1990s, the percentage of women Members of Parliament hovered around 4%; there was a leap to 18% in 1997, to 22% in 2010; and in the last Parliament it was over 30%; in 2016 there were as many women MPs *ever* as there were men MPs *then* in the House of Commons. Legalising all-women shortlists was a great help with this. But the worrying thing about the present

general election is how many comparatively young women are not standing for re-election, many giving the harassment and threats they suffer, and the real fear in which they are put, through social media as the reason.

Third, we know that real progress in women's rights, both in the home and in the workplace, was equally slow over the same period. By the end of the 19th century, married women had acquired the right to keep their own earnings and to hold property in their own names. They had also gained the right not to be locked up by their husbands and to make claims for the custody of their children in the courts. But they had no automatic rights over their children unless and until a court or their husbands gave them some, either by order, agreement or will. And while their husbands could divorce them if they committed a single act of adultery, they could only divorce their husbands if they could show adultery plus something more – such as cruelty or desertion.

That was the state of family law when the 1919 Act was passed and very little changed over the next fifty years. The Guardianship of Minors Act 1925 gave widows rights of guardianship when their husbands died, but not before, and made the welfare of the child the paramount consideration in any court dispute. Wives

gained the right to divorce their husbands for simple adultery in 1923 and the grounds for divorce were expanded to include cruelty and desertion in 1937. Husbands ceased to be liable for their wives' torts and breaches of contract in 1935 – a move which benefitted them as much as their wives.

So consider the state of family law when I studied it in the 1960s. A husband could not be guilty of raping his wife unless they were formally separated. This meant that he could force pregnancy on her if he wished. There was an extremely strong presumption that any children born to a married woman were her husband's children and thus that he had sole rights and authority over them. Remedies for domestic violence and abuse were in their infancy and there was still a strong feeling amongst the police and other authorities that it was wrong to intervene between husband and wife. Women who went to the magistrates' courts for separation orders complaining of persistent cruelty were solemnly asked whether there was any chance of reconciliation. Divorce and separation were based on the theory that one party was innocent and the other guilty of matrimonial fault. This was seen as a strong incentive to both parties to stay together, but in reality it operated much more strongly upon the wife than upon the husband. A wife's marital behaviour was central to what she might expect if the couple parted. If she

was judged even partially at fault she risked losing her home, her livelihood and even her children. Even if she was not at fault, the financial remedies available to her were very limited. If the husband was at fault, he could keep his home, the major part of his income, and still expect a fatherly relationship with his children. For the great majority of women, who had little choice but to adopt the traditional gender role, these were powerful incentives to stay at home and in line.

So although the author of the leading textbook on family law, published in 1957, could assert that husband and wife were now 'joint, co-equal heads of the household' this was very far from the reality. The Law Reform Committee, whose report led to the Married Women and Joint Tortfeasors Act 1935, were equally misguided:

'Women nowadays, whether married or single, engage in almost all professions, trades and businesses and are eligible to hold and do in general hold every sort of public and official post and exercise every right and franchise just as much as men' (1934 Cmd 4770, para 16).

‘Just as much as men’? There had not yet been a woman judge! In the world outside the home, women had begun to work in the civil service – initially as telegraphists in the post office – and as teachers in the rapidly expanding public elementary schools in the 19th century. But they suffered from three disadvantages.

First, they had to give up work as teachers, civil servants or local government officers if they married. The marriage bar for teachers was lifted temporarily during the second world war and permanently by the Education Act 1944. The Royal Commission on Equal Pay which sat from 1944 to 1946 recognised that married women ‘had certain qualifications for teaching which are not offered by either men or spinsters’ (Cmd 6937, para 469) – knowing something about children, perhaps? The marriage bar in the civil service and local government was not formally lifted until after the War and not in the foreign service until the 1970s.

Second, even if they were doing the same work as men, they were routinely paid less. In 1946, the majority of the Royal Commission concluded that women deserved to be paid less than men because they were less efficient. A powerful dissent by three of the four women members refuted the claim that women were less efficient than men (pointing to how capable they had proved themselves to be

during the war). They also ridiculed another of the majority's arguments: that low wages would drive women into marriage, which was a good thing. The dissenters pointed out:

'... the majority seem to have fallen into a major inconsistency. They hold that the introduction of equal pay would tend to exclude women from industry; to be consistent, therefore, they should surely advocate equal pay, for total unemployment would be a more powerful incentive to marriage than mere low earnings.'

In fact equal pay was introduced – on a phased in basis – for teachers, civil servants and local government officers during the 1950s, but in this the public sector was (and probably still is) way ahead of the private sector.

Third, of course, women tended to be segregated into different work from men, which was traditionally paid much less than the work the men were doing. At that time, the trades unions protected the differential – the men should be paid a household wage to enable them to support their families, while women's work was seen as an extra. As the Royal Commission commented, 'The trade unions have

been compelled, not only to uphold, but to promote a clear demarcation between men's and women's work – where such demarcation was possible – in order to protect men's and thus indirectly women's rates of pay' (para 14).

But things did begin to improve, both in the home and outside it, in the second 50 years after the 1919 Act was passed. In family law, most of the reform was prompted by the work of the Law Commission, established in 1965. By 1971 family law had become sex-neutral, in that the same rights and remedies applied both to husbands and to wives. The law could now contemplate a house-husband, in theory at least, or the equal sharing of home-making and breadwinning roles, thus paving the way for same sex civil partnerships and eventually marriage. It also became much kinder to the home-maker and care-giver. The financial remedies available to her or him were greatly improved, although she still had – and has – no automatic right to a share in her husband's earnings or the family home. It is landlords and mortgage lenders who now tend to insist that the home is in joint names. Sharing of assets on breakdown became the norm, originally in order to cater for the needs of the children and their carer, but eventually as a standard in its own right. Once the parties and parents were seen as equal partners, marital conduct as such was rarely relevant to deciding what should happen to the couple's property and

finances or to their children after the relationship ended. In 1972, married mothers gained a status equal to that of married fathers while they were together. In the 1970s, the remedies protecting women from domestic violence and abuse were greatly improved. This included, not only anti-molestation and exclusion orders to protect her in her own home, but also the possibility of flight and rehousing under the Housing (Homeless Persons) Act 1976. In 1991 it became possible to prosecute a husband for raping his wife even if they were still living together – a judge-made piece of law reform for which I believe that the Law Commission can claim some credit.

Things were changing outside the home at the same time. In June 1968, women sewing machinists at the Ford Motor Company's factory in Dagenham went on strike. Pay regrading had rated their work making car seat covers as 'less skilled'. But surprise, surprise, it turned out that no-one else knew how to do it, so car production had to be halted when the stock of seat covers ran out. Barbara Castle, Secretary of State for Employment and Productivity, intervened and brokered a deal which still did not get the women equal pay. That had to wait until after a second strike in 1984.

But at the same time, the UK was negotiating to join the European Economic Communities and equal pay for men and women was one of the founding principles in the Treaty of Rome. It is said that the Dagenham strike led directly to the Equal Pay Act 1970, although its implementation was postponed until 1975, to give employers enough time to adjust. And after the UK joined the EEC in 1973, the Equal Pay Act was joined by the Sex Discrimination Act 1975, prohibiting discrimination on grounds of sex or marital status in a variety of areas, including employment and vocational training. We had moved on from the Sex Disqualification (Removal) Act 1919 to the Sex Discrimination [Removal] Act 1975.

But that was not the end of the story. In 1984, when Susan Atkins and I wrote our book on *Women and the Law*, we tried to examine the law from the point of view of women's lives - education, work, sexuality, motherhood, family roles, power and violence in the home, social security, taxation and citizenship. Many of these subjects had been totally ignored in the standard curriculum.

Looking at things from the bottom up rather than from the top down enabled us to see that the law was not the neutral and objective entity which it was generally assumed to be. It was shot through with male perceptions, anxieties and interests.

A good example was the law of sexual offences. The then law did not define and classify sexual offences according to its declared objectives of preventing sexual aggression, protecting the vulnerable and preserving public decency, but according to the nature of the act committed. This discriminated between the sexes – in that some serious sexual assaults upon women were regarded as less serious than the equivalent act committed against a man.

It also became clear that the law was most anxious to protect men against unwanted homosexual acts and women against unwanted vaginal intercourse. The explanation had to be that male interests were threatened by both. Male interests are of course threatened by unwanted acts or approaches from anybody. But they are also threatened by unwanted vaginal intercourse with 'their' women, because it carries the risk of pregnancy and child birth. Their interest in protecting women is not only in protecting an exclusive sexual preserve, but also in securing reliable heirs of the body and preserving bargainable daughters. But they were only interested in protecting a limited class of females, the 'chaste matron and the virgin spinster'. Prostitutes and less chaste females received much less protection. And this explains why female homosexual acts were never criminalised as such – for men, it was an unthreatening curiosity. But it was taken much more seriously in

those areas of the law which did threaten male interests, such as the upbringing of children.

Another example was the traditional approach to violence perpetrated by men upon their wives or the women with whom they were living. Wives might be condemned for provoking their husbands to violence by nagging, by failing to fulfil their marital duties, even by failing to obey their husbands' reasonable orders. 'But to regard the subtler ways in which women try to get their own way as just as blameworthy as the cruder methods employed by men ignores the structural inequalities in their situations'. One aspect of this is physical strength. Women mostly cannot force men to do what they want. Unless a weapon is involved, a man can do a lot more damage by hitting a woman than a woman can do by hitting a man. Another aspect is dependence.

Even in 1984 roles within the family were often still divided along gendered lines – into male breadwinners and female homemakers. The breadwinner is the owner of the resources and can decide how these are to be allocated. He has first call on any surplus over the family's immediate needs. He has free access to the outside world, through his employment and through his ability to leave the home for leisure

purposes. The homemaker has none of these things and may also be tied to the house by child care responsibilities. She may have to 'resort to the stratagems of the underdog if she is ever to get her own way'. To suggest that she had no right to nag her husband was to suggest that she had no right to set herself up in opposition to him. There was a lot of evidence that domestic violence was triggered, either by male jealousy or by arguments about food or money – a meal not cooked when he came in late, the children's toys left lying around, the mantelshelf not dusted.

Another issue was the failure of the law to recognise that domestic abuse might cover a great many other types of domineering and controlling behaviour than physical violence – hitting or threatening to hit. Men may be afraid of being hit or being threatened with hitting. Women are afraid of many more subtle forms of behaviour – the forms of behaviour which listeners to *The Archers* heard over many months in 2016 – cutting off contact with friends and family, constant belittling, destroying confidence, depriving of money and employment outside the home, rendering powerless. I am grateful to *The Archers* for drawing attention to the problem of what we now call coercive control – which the Supreme Court had recognized in the case of *Yemshaw v Hounslow London Borough Council* [2011] UKSC 3, [2011] 1 WLR 433.

Mention of The Archers of course leads to the other problem which was just beginning to be recognised in 1984 – the phenomenon of women who were so oppressed by their abuser that they felt unable to escape and seek help elsewhere and were eventually driven to attack or even kill him. The law recognised provocation as a defence to murder and a mitigating factor in other offences, but the concept depended on the sudden loss of control and this did not fit the ‘slow burn’ of persistent abuse. The husband who killed his non-violent wife might be punished less severely than the wife who killed her violent husband. The way round this problem was to treat the wife’s state of desperation as a mental disorder – the so-called ‘battered wife syndrome’ - which could lead to a defence of diminished responsibility.

Turning to work outside the home, the Equal Pay and Sex Discrimination Acts were still relatively new in 1984 and their limitations were apparent. The Equal Pay Act was limited to ‘like work’ or ‘work rated as equivalent’ in an employer’s job evaluation scheme, but there was no obligation to undertake such an evaluation. There was nothing to prevent the traditional segregation of men and women into different jobs, where the jobs done by women were paid less than the jobs done

by men – indeed, the five-year delay before the Equal Pay Act came into force may have helped employers reorganize their workforces accordingly. However, the principle of equal pay for work of equal value was adopted by the EEC in its 1975 Directive on Equal Pay (Council Directive 75/117/EC). But this did not find its way into our Equal Pay Act until after the Commission of the European Communities had successfully taken the United Kingdom to the European Court of Justice in 1982 (Case C 61/81 [1982] ICR 578). Union opposition also meant that many women had to bring their individual claims unsupported by their Unions – as Phillips J remarked in another context, ‘It is probably fair to suppose that that the reason the union shared the Post Office’s view on “equality but not yet” is not unconnected with the fact that so many of its members are men who would suffer a loss in seniority if women were to gain’ (*Steel v Union of Post Office Workers* [1978] 1 WLR 64).

Since then, the attitude of the unions has changed dramatically and they now support the women in their equal pay claims. But it still takes courage to pursue an equal pay claim, as the dinner ladies of St Helen’s found, when they were faced with threats that to do so would put the school meals service at risk, as well as the jobs of many of their colleagues. As I commented, this was a ‘classic case of blaming

the victims' (*St Helens Borough Council v Derbyshire and Others* [2007] UKHL 6, [2007] 2 AC 31, para 32).

A second problem was that part time workers were not protected against discriminatory rates of pay, but the great majority of part time workers were married women. This too was eventually cured by the Part-time Workers Directive, which has incidentally benefitted a great many part time judicial office holders, many of whom are women.

A third problem was that the Sex Discrimination Act did not expressly apply to discrimination in grounds of pregnancy – and in *Turley v Allders Department Store* [1980] ICR 66, it was held that dismissal on grounds of pregnancy was not sex discrimination because there could be no male comparator and thus no less favourable treatment. The Employment Protection Act 1978 had provided that dismissal on grounds of pregnancy was automatically unfair but Mrs Turley had not been employed for long enough to qualify to bring an unfair dismissal claim. Yet again, the European Court of Justice had to put things right.

The courts sometimes struggled to understand the depth of the insult to women's dignity involved in sex discrimination. In *Skyrail Oceanic Ltd v Coleman* [1981] ICR 777, Mrs Coleman's employer had written to her saying 'Regretfully I have come to the conclusion that it would not be fair to your husband in his position to keep you employed in a similar capacity'. The Tribunal awarded her £1000 for injury to feelings, the Employment Appeal Tribunal reduced this to £250, and the Court of Appeal to £100. Lord Justice Shaw thought that her 'complaint was trivial and banal even when topped up with much legalistic froth' and that 'when she had dried her tears she would have had to look for new employment and to count herself lucky to find it'. He would have awarded her 1000 pence (£50).

Fortunately, the penny did drop, when male judges began to realise how unfair they would think it if they were treated in the way that women were being treated. The best-known example is *Gill v El Vino* [1983] QB 425, where Tess Gill (a barrister) and Anna Coote (a journalist and social policy analyst) complained that they were not allowed to buy drinks and stand at the bar in El Vino's on Fleet Street. The trial judge took the view that this wasn't a detriment. The Court of Appeal held that that wasn't the question. The question was whether they had been treated less

favourably than men in the provision of a facility. Lord Justice Griffiths explained why they had:

'El Vino's is no ordinary wine bar, it has become a unique institution in Fleet Street. Every day it is thronged with journalists, solicitors, barristers exchanging the gossip of the day. . . . Now if a man wishes to take a drink in El Vino's he can drink, if he wishes, by joining the throng which crowds round the bar and there he can join his friends and pick up, no doubt, many an interesting piece of gossip, particularly if he is a journalist. . . . But if a woman wishes to go to El Vino's, she is not allowed to join the throng before the bar. She must drink either at one of the two tables on the right of the entrance, or she must pass through the throng and drink in the smoking room at the back. There is no doubt whatever that she is refused facilities that are accorded to men, and the only question that remains is: is she being treated less favourably than men? I think that permits of only one answer: of course she is.'

It seems to me that over the last twenty to thirty years we have seen that penny dropping – men and women getting the point of what the right to equal treatment is all about. Can we put that down to the presence of increasing numbers of women in the law? I hope that we can – that our presence in the work force has become less threatening to men, that they can welcome us as colleagues and truly empathise with our point of view, and join a campaign for equal treatment which ought to benefit men as well as women.

But what of the future? I have spent so much time on the past because it shows, not only how remarkably slow progress has been, but also how complicated the story is. And although the battleground has shifted, the battle is not yet won. So what should we still be fighting for?

First, we need genuinely equal opportunities and equal treatment in the legal profession. We know that women are joining the profession in equal if not greater numbers than men. But they are not making it to the top in private practice, either at the Bar or in solicitors' firms. There are a lot of aspects to this.

I still hear shocking stories of discrimination – women not being instructed in the best cases and even being charged out at less money than the men doing the same sort of work. A recent study of published by *The Lawyer* magazine is titled ‘How gendered instructions at the employment Bar are scuppering female barristers’ ambitions for silk’. In 2018, only five out of 38 employment law applications for silk were from women. The proportion of women appearing before the EAT and the Court of Appeal in employment cases is much lower than the proportion of men. Some sets of chambers specializing in the work make conscious efforts to distribute work fairly. Others do not. Some firms of solicitors are more likely to instruct men than women – especially when acting for corporate clients. ‘It will be up to the chambers and the instructing law firms to recognise that they have crucial parts to play.’ And if this is the picture in the ‘relatively feminised’ area of employment law, how much likely is it to be the picture in other areas of the law? We certainly don’t see as many women appearing in the Supreme Court as we ought to do. Over the ten years since we opened, they have been roughly one fifth of appearances, and I suspect that most of these will have been in supporting roles rather than on their feet. We heard from only one woman in *Miller No 1* and none in *Miller No 2*.

Then there is the way in which self-employed practice is organized. Both sides of the profession need to do more to adapt themselves to the reality of women's lives. Women often have very good reasons for taking a career break or stepping sideways into another type of legal career – in government legal service, local government, regulation or as in-house counsel. Their merit should be given its proper recognition in both professions – but I don't need to tell BACFI that.

Second, and following on from that, we need genuine equality of opportunity and equal treatment in the judiciary. My former colleague, Lord Sumption, is famous for saying that it will take 50 years for women to gain parity with men on the bench. We don't think that is right. Since Lord Sumption's prediction in 2012, the percentage of women judges in the courts of England and Wales has increased from 22.6% to 32%. This is an increase of an average of 1.34% a year over 7 years. If this rate were to be maintained, we would need fewer than 14 more years to get to parity in the judiciary as a whole. However, if he was referring only to the higher judiciary, then the picture is not so rosy.

The sort of briefing practices mentioned earlier and traditional assumptions about who gets what sort of judging job are the main reasons why we still have

comparatively few women in the senior judiciary – roughly a quarter in the High Court, Court of Appeal and (until next month) Supreme Court. We need to break down those assumptions and find ways of assessing judicial potential which do not focus on experience of advocacy in the courts in question. We need to find ways of enabling women who took a different career path to enter and make progress in the judiciary. This is beginning to happen. But there is still a suspicion that a non-traditional professional background – such as mine – is not rated as highly as the more traditional experience.

Third, we need to acknowledge and find ways of dealing with the problem of sexual harassment in the workplace. We know that this is still a problem in the legal profession: last year, the IBA published *Us Too? Bullying and Sexual Harassment in the Legal Profession*. One third of their female respondents complained of sexual harassment at work, but in 75% of cases the incident was never reported, because of the status of the perpetrator, the fear of repercussions and the incident being endemic in the workplace. The Bar Council has an impressive set of policies on this and the Inns of Court are also adopting formal policies. Sadly, however, the survey found that harassment is just as likely in places which do have policies and training as it is in those that don't.

Of course the problem is not confined to the legal profession – although I suspect that certain features of self-employed practice may exacerbate it. Last year the House of Commons Women and Equalities Select Committee published a report on *Sexual Harassment in the Workplace* (Fifth Report of Session 2017-2019, HC 725). This found that sexual harassment was ‘widespread and commonplace’. It called upon the Government to put it at the top of the agenda, by, among other things: introducing a new duty on employers to prevent it, along with a statutory Code of Practice; giving interns, volunteers access to the same legal protection as their workplace colleagues; requiring regulators to take a more active role; cleaning up non-disclosure agreements; and reducing barriers to bringing tribunal cases, including the time limit for making claims. This last has a familiar ring – the time limit for women to bring complaints of unlawful sexual intercourse (statutory rape) used also to be three months – thus completely misunderstanding the effect that such conduct, and what leads up to it, can have upon its victims. The government has followed this up with a *Consultation on Sexual Harassment in the Workplace* (beginning on 2 July 2019 and closing on 2 October 2019).

That there is a much wider problem of attitudes towards women and girls generally is shown by the Select Committee's other report in *Sexual Harassment of Women and Girls in Public Places* (Sixth Report of Session 2017-2019, HC): 'sexual harassment pervades the lives of women and girls and is deeply ingrained in our culture . . . It is a routine and sometimes relentless experience for women and girls, many of whom first experienced it at a young age'.

Fourth, we need of course, to do the best we can to close the gender pay gap – something which has not been helped by the decline of collective bargaining and the spread of individual pay bargaining into areas where it did not used to operate. At least, all judges on the same grade are paid the same and everybody knows what that is. But the same is not true in all sorts of working lives theses days.

Fifth, we need to fight to maintain the recognition of the family as its own little social security system – one in which the partner who is economically stronger takes some responsibility for compensating the disadvantage suffered by the economically weaker partner as a result of their relationship. We might not need to do this if women and men were genuinely treated equally in the workplace or if women were not encouraged to reduce their commitment to work outside the

home in order to cater for their families' needs – usually by agreement between the partners. But as things are, this is what often happens and a woman (or a man) who takes time away from work outside the home is likely to suffer a financial loss which she can never make up by herself. Married couples and civil partners still need the remedies that they have and unmarried couples should also be accorded a remedy to adjust the losses and gains arising from their relationship.

Sixth, we need to be much more astute to recognize and condemn the discriminatory effects of certain policies in the field of social welfare. In the Supreme Court, we have been understandably reluctant to hold that certain admittedly discriminatory policies are unjustifiable. It is not our role to subvert the democratic process. So we will only hold that a policy is unlawful discrimination under article 14 of the European Convention on Human Rights if it is 'manifestly without reasonable justification' – the standard by which the Strasbourg court has said that it will judge measures of socio-economic policy. Applying that standard, we held that the rule against splitting child benefit and child tax credit between two households which were sharing the care of a child was justifiable, although indirectly discriminatory on grounds of sex; that the original benefit cap and the revised benefit cap were justifiable, although the first was indirectly discriminatory

on grounds of sex and the second was more directly discriminatory against lone parents with pre-school-age children; and that the removal of the spare room subsidy from a victim of serious domestic violence and rape whose home had been specially adapted as a sanctuary for her was justifiable, although domestic violence is acknowledged to be a form of sex discrimination, against which the state has a positive obligation to provide protection. I dissented in the last three cases and it is some consolation that in October Strasbourg agreed with me on the last.

That is a big enough agenda to be going on with. My hope for the next 100 years is that the parity which women have achieved in joining the profession will lead both women and men to do whatever they can to promote the cause of women's equality in the future – not all women are feminists but many men are and that gives us hope for the future.