

Family law at a distance

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Lord Sumption

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“Family law at a distance”. As will be obvious to all of you, it is the only point of view from which I am qualified to say anything about the subject at all. Although my own practice at the bar was broader than most, I never practised in the Family Division. So unlike most of those who have stood where I stand, to deliver the keynote speech at these conferences, I cannot claim to speak to you from personal experience. But inexperience is not always a handicap.

In this case, it provides a convenient occasion to say something about the advantages and disadvantages of specialisation. Like any body of specialists, the family bar and the solicitors with whom they work are a great depository of knowledge and experience. In a field where most decisions are essentially discretionary, specialised knowledge and experience are more than usually valuable. Yet even by the standards of legal specialists, family law seems usually self-contained to an outsider. Not only is it surrounded by impermeable barriers, but it is internally subdivided by equally impermeable partitions. There are practitioners, and even judges, who regard themselves as money people, and will not touch children cases, and vice versa. Some practitioners in both categories would run a mile rather than deal with trusts or tax. To me this all seems rather surprising.

Admittedly, I come to this question with a certain amount of baggage. I have always taken the view that legal specialisations are essentially bogus. At the bar, I liked to trespass on other people’s cabbage patches. As a judge I do it most of the time. But there have been two occasions in my professional life when I have been shaken in my view that it is all just law. One was my only foray, as Counsel, into patent litigation. I will not trouble you with this unhappy story. It persuaded me that chemical patents at least were a remote juridical island, best left to its savage inhabitants. The other occasion was when I started reading up in preparation my first encounter with family law in the Supreme Court.

The case was *Prest v Petrodel Resources* [2013] 2 AC 415. I call it a family case, but I suppose that the essential issue was whether it really was one. The question was whether the property of the

husband's companies was property to which he was "entitled in possession or reversion" for the purposes of section 24 of the Matrimonial Causes Act 1973. This mattered because otherwise there was no power to transfer it to the wife. Some people might have thought that this depended on the law of England relating to property and to companies. By that law the answer was clear. A shareholder, even a sole shareholder, had no property whatever in the assets of a company. The company was some one else. So it was with some surprise that I discovered, reading through past authorities, that the law of England was widely thought not to apply in the Family Division. Five years earlier, in *A v A* [2007] 2 FLR 467 and *Whig v Whig* [2008] 1 FLR 453, Sir James Munby had protested that it was not sufficiently appreciated in the Family Division that the basic principles of law were precisely the same there as in the other Divisions of the High Court. Nonetheless the judge, following a long-standing practice of the Division, held that in family law the husband was "entitled in possession or reversion" to property if he had the practical ability to procure its transfer to the wife, whether or not he actually owned it. The Court of Appeal would have none of this. Lord Justice Rimer, delivering the leading judgment for the majority, robustly declared that legal concepts had the same meaning in the Family Division as they did anywhere else, and that the current approach of the Family Division judges would have to stop. Lord Justice Thorpe, the only family judge sitting with him, dissented. In the Supreme Court, the case was heard by seven justices, including two former family judges. This time there was no disagreement on the essential point. The family judges agreed with the assorted property, company and commercial lawyers that section 24 was governed by principles of law of general application. I suggested in my own judgment that "courts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different."

The principle that there are no desert islands in the law seems to me to be a valuable one, which applies well beyond the realm of family law. The essential reason why I am sceptical of specialisation is that I do not regard law as comprising distinct bundles of rules, one for each area of human affairs. This is partly because no area of law is completely self-contained. Family law, like contract law, tax law, insolvency law or almost any other kind of law, has to be applied to a variety of different kinds of property and other legal rights. These have their own legal characteristics, which do not always lend themselves to the ends of justice as a family judge would see them. The programme for this conference is a useful reminder of this.

There is, however, a more fundamental reason for deprecating an excessively specialised approach. Law is, or at least should be, a coherent system. Of course, different human problems pose their own peculiar challenges, which the law must accommodate. But these challenges are

not always as peculiar as people think. The practice of law, whether by judges or advocates, involves applying a range of common techniques and common instincts to a variety of legal problems. The common techniques are the objective construction of legislation and other written instruments, a respect for the body of decided case-law, and a sensitivity to changing attitudes in the world outside the law. The common instincts are those of the common law, which are essentially libertarian. They are founded on respect for the autonomy of the individual, a rejection of abstract moral duties unless traceable to some particular relationship or status, and a distrust of prescriptive rules without a clear social justification. These instincts operate within broad limits determined by our most basic collective ethical and moral values, in other words by public policy. The late Ronald Dworkin, in the last book that he wrote before his death, observed that truth is not only coherent but mutually supporting. What we think about any moral or legal issue must be able to stand up to any argument we find compelling about any other. The erection of impenetrable partitions between different areas of law obstructs this process. It is the fastest route to incoherence that I know.

Family law is in some respects special. Historically, it was not part of the common law, but belonged to the jurisdiction of the ecclesiastical courts. Traditionally, its instincts have been very different from those of the common law. They were paternalist and protective. They were founded on moral principles about family life which would once have been justified in religious terms but now tend to be justified in terms of pragmatic social policy. They were an assertion of the power of the state in an area of human affairs where the principle of autonomy has usually counted for much less. Modern family law has moved a long way from its origins. But family litigants do not have the unfettered right allowed to every other litigant to resolve their differences by agreement. Even beyond the realm of family law, strictly so-called, the law has never accepted that a married woman is bound by whatever her husband has induced her to agree to; nor, since the end of the nineteenth century, that a child is at the disposal of his or her parents.

These instincts, however, are not immutable, and the last few years has seen a convergence between family law and the instincts of the common law. *Prest v Petrodel* was one illustration. But in some ways the most striking pointer to the direction of travel is to be found in the cases about nuptial agreements. The twin decisions in *Macleod v Macleod* [2010] 1 AC 298 and *Radmacher v Granatino* [2011] 1 AC 534 may be said to have introduced the law of contract into the Family Division, even if they stopped short of treating nuptial contracts as legally binding. In *Radmacher* the majority of the Supreme Court overtly justified the weight that they attached to them by reference to the principle of autonomy, rejecting the protective approach which had

characterised the law administered by family courts for more than a century and a half. “It would be paternalistic and patronising”, they said, “to override their agreement simply on the basis that the court knows best.” I must suppose that those who wrote this fully understood how significant a break with past assumptions it represented. But the only place where it is spelled out is the dissenting judgment of Baroness Hale, the only former family judge on the panel.

The process of assimilating family law with general principles of law has recently taken a further step in the case of *Sharland v Sharland* [2015] 3 WLR 1070, although admittedly it is a step of a rather technical kind. I don’t suppose that I need to say much about the background to this case. It concerned the circumstances in which a consent order for financial relief could be set aside on account of a dishonest misrepresentation or non-disclosure by one party. The law of contract would have had a ready answer to this problem. Once it was found that the husband’s misrepresentation had influenced the wife to settle, the consent order would have been set aside as of right. It would have been pointless to argue that the result would have been the same anyway. The wife’s right to make an autonomous choice had been violated. The fraud had deprived her of the chance to litigate her case. The court must therefore allow her to start again, and try her chance if she wished to. The contrary argument in *Sharland* was that the result was different in the Family Division, because the consent order derived its force from the judge’s approval of the terms and not from the agreement of the parties. It followed that the contractual analysis did not apply. The judge accepted this argument. He declined to set the order aside, because he thought that he would have approved the terms even if he had known the true facts. The Court of Appeal agreed. But there was a vigorous dissent from Lord Justice Briggs, who thought that a deceived wife was as much entitled to her chance to litigate as the deceived purchaser of a second-hand car. In the Supreme Court her appeal was allowed. Baroness Hale, delivering the leading judgment, found the common law relating to the rescission of ordinary contracts “instructive”. In reality, it was the common law analysis which was accepted.

There is a curious footnote to *Sharland*. Forty-five years earlier, a rather similar question had arisen in *Dietz v Lennig Chemicals Ltd* [1969] 1 AC 170, but in the Queen’s Bench Division. The House of Lords set aside a consent order for misrepresentation in an action under the Fatal Injuries Act. They did this notwithstanding that the Queen’s Bench judge had had to approve the settlement terms because one of the Plaintiffs was an infant. It never occurred to the House that the court’s approval made a difference. *Dietz* is cited in *Chitty on Contracts* and in the White Book for the proposition that a consent order may be set aside on account of any representation which would have vitiated the antecedent agreement. But, curiously and I think characteristically,

it was not cited in *Sharland*, either to the judge or to the Court of Appeal, and it only arose in the Supreme Court because one of the Justices drew attention to it in the course of argument.

For obvious reasons, family law is more sensitive to changing social and moral values than other areas of law. The Court in *Radmacher* was influenced not just by the approach of the common law, but by the attitude of other jurisdictions whose social values seemed to be similar to our own. The social and financial autonomy of the great majority of modern women in western societies may well lead to more convergence with the libertarian traditions of the common law. The law's approach to children has moved in the opposite direction, as the growing public perception of their vulnerability feeds into legislation and judicial attitudes. But even there, the law uses its parental authority to impose what are essentially libertarian solutions. In his penetrating judgment in *Re G (Children)* [2013] FLR 677, Sir James Munby has equated the welfare of children with "an essentially Aristotelian notion of the 'good life'". Like Aristotle, he thought that the essence of the good life lay in personal self-fulfilment. Personally, I think that he was right about this. But it is a very humanist, a very individualist, and a very western view. Important sections of our society do not share it, including much of the Islamic and Orthodox Jewish communities and the spiritual end of the green movement. The orders that he made in that case for the education of the children were overtly designed to give them the widest possible range of autonomous choices about their own way of life, although in the eyes of the Hassidic community from which they came the very purpose of education was to limit their choices to what was thought to be acceptable to the Almighty.

One of the problems of specialisation is that it encourages a view of one's subject which is too self-contained. We do not have to resort to Aristotle for a solution to our problems, but we can at least look into the garden next-door. In my experience, with a few notable exceptions, judges and advocates rarely search for principle beyond their own areas of specialised expertise. Advocates come into court with a library of familiar authorities which are part of the vernacular of practice in their area, without trying to relate them to any more fundamental legal principles. They take for granted rules of law which sometimes strike outsiders as distinctly odd but are too familiar to have struck practitioners that way. In the Supreme Court this is particularly problematic. We deal mainly with cases where the existing authorities are inconclusive, unsatisfactory, out of date or non-existent. One of the advantages of an appellate system is that it allows decisions from a specialised jurisdiction to be reviewed from the outside, "at a distance" if I may echo the title of this address. There will usually be at least one specialist on the appeal panel, both in the Court of Appeal and the Supreme Court. But his or her voice will not necessarily be decisive. The proposition has to run the gauntlet of external scrutiny. This permits

a measure of cross-fertilisation between different areas of law, which for my part I think profoundly healthy.

This is not of course a phenomenon peculiar to family law. In the last half-century the law of contract has been significantly influenced by concepts derived from public law. The concept of property in private law has been fundamentally affected by human rights law. The law of securities and the law of restitution have been transformed by a much wider resort to equitable principles than would have been conceivable a generation ago. The rules for construing patents and deeds, which were once a law unto themselves, have now been more or less integrated into the general body of principle governing the construction of written instruments. The work of the Supreme Court, and before it the House of Lords has, I think, contributed to these developments. But it also reflects the greater flexibility of the legal profession. The division between the chancery bar and the common law bar, which was once absolute, has become almost imperceptible. Barristers, at least at the top end, are more inclined than they were to break out of their specialities. The family bar, I think, remains one of the more insular areas of practice. This deprives it of perceptions which would enrich it, as it has enriched other areas of law. Ultimately all of this depends on a willingness on the part of practitioners working in their core areas to look critically at familiar principles and relate them to what is happening elsewhere. Sometimes, distance lends enchantment.

I wish you all a fruitful and intellectually challenging day.