

Reading the Runes: Conflict, Culture and “Evidence” in Law-making in the UK

Emma Crewe, SOAS, University of London

Abstract

In public discourse the idea of “evidence-based” law-making implies that expert opinion consists of incontrovertible facts that can be turned into solutions, irrespective of politics. Laws about children are often conceived as if they are especially free from the contamination by politics. This paper will challenge such assumptions, relying on a contemporary historical and ethnographic study to demonstrate how evidence and politics are entangled when you have conflicts over cultural change. I followed one clause about parenting as it made its journey through the Westminster Houses of Parliament to be transformed from a bill into the Children and Families Act 2014, observing the rituals of the chamber and committees, and the more discursive private discussions with civil society, which led to changes to the parliamentary texts. I found a complex web of relationships behind the public performances and underneath these texts and meetings between Ministers, civil servants, Parliamentarians, activists, lawyers, social workers, fathers, mothers and children. Making law is more about negotiating between clashing interests and values and reading the runes than weighing up evidence and planning the future as if it could be predicted.

Keywords: lawmaking, evidence, scrutiny, legal anthropology, Parliament

Introduction

Public institutions in the UK continue to be under pressure to base their new policies and laws on “evidence” and to rely on expert opinion or rigorous research to turn incontrovertible facts into solutions irrespective of politics. Laws about the welfare of children are often conceived as if they are entirely free from the contamination by politics. Maclean and Kurczewski describe four case studies of family law between 1985 and 2010 that range from superb to catastrophic, with the Children Act 1989 at one end and the Child Support Act 1991 at the other (2011). The success of the Children Act 1989 is attributed to careful research and an absence of political interference while the disastrous Child Support Act was pushed forward by politicians against the advice of knowledgeable officials. Their view is that haste, political interests and flimsy evidence harm law-making.

Such assumptions persist despite challenges by academics. Davies points to many other inevitable drivers of policy-making alongside evidence, such as ideology, judgements of policy makers, availability of resources, bureaucratic culture, and the role of lobbyists (2012: 41). Sanderson echoes this point, “... policy making involves much more than reference to evidence of ‘what works’; the process of formulating and delivering policy takes place in a political context and is subject to many legitimate influences from a range of stakeholders and interests” (2009: 699). When change is seen through the lens of complexity, then the non-linear change, diversity and instability found in the world makes the simple claims of evidence-based decision-making even more fundamentally problematic. Mowles, influenced by American pragmatism, argues that evidence is always contestable and so likely to produce a paradox: “the more evidence is collected, the more contestation, so rather than creating greater certainty, the research for evidence may only create greater uncertainty and ambiguity, i.e., multiple meanings with no necessary connection between them” (2015: 10–12). It is the process of contesting evidence, and the entanglement of evidence and politics, within the scrutiny of law that I look at in this article.

In the first section of the article I provide a social and political background to the clause of one bill and why he was introduced into family law. I then describe its voyage through the Westminster Parliament – both the House of Commons and House of Lords – between 2013–2014, explaining how and why it was amended. In the final section I offer some reflections about the processes of law-making, how evidence is produced within Parliament and the ways in which the use of evidence is embedded in a complex configuration of relationships, rituals and conflicting interests.

“Section 11: Welfare of the Child: Parental Involvement” Is Introduced

To understand the politics of law-making, including what takes place behind the most public scenes and under the documents, I followed one 250 word clause for nearly two years as it travelled outside and through the Westminster Parliament (2012–2014). This piece of contemporary history was part of a larger ethnographic study of the UK Parliament (for details about methods see Crewe 2016 and for the full story of this clause see Crewe 2015).¹ Clause 11 of the Children and Families Bill, or section 11 once it became an Act, was about parenting. It began its life with the heading “Shared Parenting” and a provision requiring the courts to presume that children of separated parents would benefit by having both parents involved in their life, unless the contrary is shown. Where did it come from? The transformation of family life in the last fifty years in the UK has seen greater involvement of fathers in parenting and this change is reflected in children’s arrangements on divorce or separation. Most separating parents agree between themselves where their children should live as well as contact hours with each parent but about 40 000 applications are made to the courts annually to settle disputes over contact. It was once assumed by the courts that mothers would be the main parent, but the language changed to reflect cultural shifts, so that whichever parent had been the main carer was likely to provide the child/children’s main home (the “resident parent”) while the other one (the “non-resident parent”) had the children to stay for shorter periods. An assumption that children benefitted from having one main home prevailed. Whether this clause was catching up with cultural change, or attempting to provoke it, was one of the areas of contestation during the making of this law.

What does the “evidence” say about children’s welfare on separation? They are better off if parental conflict is low, they have a good relationship with at least one parent, their main parent is not suffering from mental health problems and their family is financially secure (Mooney et al., 2009: 10–13). Children want to be involved with both parents if they get along with them, but not if they have a poor relationship (ibid: 16), so the logic of children’s perspectives might be a huge investment in family therapy and eradicating child poverty. But few MPs heard directly from children. In their surgeries MPs met mothers worried about the threat of violence from ex-partners, and fathers with horror stories about how they had been shut off from children by estranged partners and the courts. Fathers’ rights had been given publicity for some time, but also been damaged, in the eyes of nearly all policymakers, by the campaigning antics of the activist group Fathers4Justice. They are known for dressing up as Batman and climbing buildings, disrupting traffic,

throwing condoms filled with purple-dyed flour at Tony Blair (then Prime Minister), and encouraging people to post accusations about ex-partners, solicitors and social workers on a website. However, more measured organizations, such as Families Need Fathers, won more support among politicians with their child-focused approach and even-handedness by supporting both men and women who were denied access to their children. The reputations of these organizations are important because people are swayed not only by the logic of an issue, but by how they feel about the people advocating for it and whether they can identify with them, sometimes influenced by their own personal experience.

As a result of these various threads of influence, the 2010 Coalition Agreement of the new Conservative and Liberal Democrat government stated: “We will encourage shared parenting from the earliest stages of pregnancy – including the promotion of a system of flexible parental leave”, and their mid-term review reiterated these pledges.² It was apparently several middle-aged male Ministers who championed it but views within the Coalition, and even the Conservative Party, were varied and strongly held.

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| Sir David Norgrove (Chair) and the Family Justice Review panel report on family justice | November 2011 |
| Government consultation on parenting | June–September 2012 |
| Draft family justice clauses published without section 11 | September 2012 |
| Tim Loughton MP and Minister of Children and Families, replaced by Edward Timpson MP | September 2012 |
| Justice Select Committee undertakes pre-legislative scrutiny of the family justice part of the Bill | September–December 2012 |
| Draft clause on parental involvement published | November 2012 |
| Coalition of anti-shared parenting NGOs formed | November 2012 |
| APPG on Child Protection and the APPG on Children hold meetings and informal inquiries | July 2012 onwards |
| The Bill is published by the government | February 2013 |
| First and Second Reading in the Commons | February 2013 |
| Public Bill Committee considers the Bill in 19 days | March–April 2013 |
| Report Stage and Third Reading of the Bill in the Commons | June 2013 |
| First and Second Reading in the Lords | June–July 2013 |
| Lords considers the Bill in Grand Committee in 12 days | October–November 2013 |
| Report stage in the Lords in 5 days | December 2013–January 2014 |
| Third Reading in the Lords | February 2014 |
| Ping-pong: House of Commons, final consideration of the House of Lords amendments including to clause 11 | February 2014 |
| Bill given Royal Assent, so becomes an Act | March 2014 |
| Family justice provisions become effective | April 2014 |
| Section 11 goes into law | October 2014 |

The Norgrove review on family law reported in 2011, arguing against the idea of legislation to promote shared parenting because it would dilute the principle underlying the Children Act 1989 – that decisions should be based on the best interests of the child – and shift the emphasis from children’s welfare to parental rights. The government consulted on shared parenting in any case. They received 214 responses on four options; more than half of them were in favour of introducing a clause about shared parenting but many of those were individuals promoting fathers’ rights, whereas organizations representing children were against the idea of putting it into law. The government absorbed concerns about the risk of abuse in their final wording of the clause to strengthen the prevention of harm. Meantime All-Party Parliament Groups began a series of discussions with politicians, lawyers, social workers, managers of children’s services, children’s guardians, professional associations, academics and charities about the proposed Bill.³ Decades of experience were articulated, weighed up and debated.

Table 2.
First draft of the clause

1A Shared parenting

(1) Section 1 of the Children Act 1989 (welfare of the child) is amended as follows:

(2) After subsection (2) insert –

“(2A) A court, in the circumstances mentioned in subsection (4)(a) or (7), is as respects each parent within subsection (6)(a) to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child’s welfare.”

(3) After subsection (5) insert:

“(6) In subsection (2A) ‘parent’ means parent of the child concerned; and, for the purposes of that subsection, a parent of the child concerned –

(a) is within this paragraph if that parent can be involved in the child’s life in a way that does not put the child at risk of suffering harm; and

(b) is to be treated as being within paragraph (a) unless there is some evidence before the court in the particular proceedings to suggest that involvement of that parent in the child’s life would put the child at risk of suffering harm whatever the form of the involvement.

The circumstances referred to are that the court is considering whether to make an order under section 4(1)(c) or (2A) or 4ZA(1)(c) or (5) (parental responsibility of parent other than mother).”

In September 2012 an architect of the Bill, Children’s Minister Tim Loughton MP, was replaced in a reshuffle by Edward Timpson MP. Loughton’s attachment to shared parenting and promoting father’s rights as parents was ferocious. Timpson’s view was more measured. As a family lawyer he wanted legislation to address the perception of bias in the courts, and thereby improve relationships between parents and children, but not to promote shared parenting as, although definitions vary, the phrase implies for many that children divide their time equally between separated parents. Draft clauses for inclu-

sion in a bill were sent to four Select Committees for pre-legislative scrutiny and the shared parenting clause went to the Justice Select Committee, which had already carried out an inquiry into family courts and recommended that no legislative statement should be added to the Children Act 1989 to promote shared parenting (House of Commons 2012: 25). The Justice Select Committee listened to witnesses, to those speaking both for and against shared parenting for the second time. As examples, Mr Justice Ryder, the judge in charge of modernizing the family justice system, pointed to the irony that it was the most co-operative parents who are least likely to go to court but most likely to make shared parenting work. Families Need Fathers liked the direction of travel and anticipated that even if decisions in the courts remained unchanged, parents in the shadow of the law would be influenced by the clause. All were looking into the future, using their imagination to guess what responses the clause might elicit filtered through their experience, hopes and views. The Select Committee Members held a range of opinions, but like political parties are inclined to link impact with consistency, so they deliberated and negotiated to reach a consensus that did not contradict their earlier position.

Meanwhile, those campaigning for “shared parenting” took to the press and social media. The press repeatedly misreported the proposed change as the introduction of equal time with both separated parents, although the government did not intend to prescribe a time allocation.⁴ In November 2012 a consortium of organizations and individuals concerned about the promotion of 50:50 shared parenting met for the first time at the charity Coram Children’s Legal Centre. Whether those attending were representing lawyers’ associations, children’s charities, family organizations, or interested as academics, they were all worried about the threat to the Children Act 1989, which states “the child’s welfare shall be the court’s paramount consideration”. They feared people (especially parents “in the shadow of the law” sorting out their own disputes) would assume “shared parenting” means equal time. The consortium discussed their tactics. If they argued vigorously against the clause it might stir things up and encourage the fathers’ rights groups to ask for more; if they said nothing those groups might assume the clause hadn’t gone far enough, so they should still ask for more. They wrote a joint letter to Minister Timpson selecting some research from the UK and some international studies to support their warning of the potential harm of promoting shared parenting as equal time.

The Justice Select Committee’s report on pre-legislative scrutiny of the justice parts of the Bill concluded that they did not really like clause 11, but if it had to be there, then the heading should be changed from “Shared Parenting” to “Parental Involvement”. The government then produced the draft Bill in early 2013. In the process of drafting legislation the politicians determine the broad content, the officials work out detail and Parliamentary Counsel (the government’s legislative draughtsmen and women) produce the text. They all

know that when the opposition crawl over every word of the Bill, they will test, probe and attempt to amend as much as possible. So the government tend to “over-egg” the first draft, in the words of one civil servant, so they have wiggle room. In relation to parental involvement, Edward Timpson MP told me he kept clause 11 for a mix of reasons. His personal view was partly derived from his professional experience as a lawyer, watching parents fail to get the best outcome because they did not understand the law. Fathers perceived the law as biased, so it made sense to correct this perception. He also paid attention to lobby groups, who are worth listening to even if you expect to disagree, he added, and to other Ministers, MPs in the Coalition (many with strong views) and in the opposition, as well as officials and professionals across government.⁵ As a consequence, government kept the wording of the clause unchanged from its earlier draft but accepted the Justice Select Committee’s recommendation to change the heading from “Shared Parenting” to “Parental Involvement” with the preface: “Welfare of the Child” to emphasize that children’s benefit, and not parents’ rights, was their focus.

A Voyage through Parliament

During 2013 the Bill made its way through Parliament. The text of this Bill was formally debated in 23 events in the Commons and 19 in the Lords (not including brief motions about the timetable). In total 1 153 amendments to the whole Bill were “tabled”. Just before Second Reading the NGO consortium sent a briefing paper to sympathetic MPs but not to those championing fathers’ rights because it would have given them an advantage to see their arguments in advance. The bill was introduced to Parliament formally by Minister Timpson with David Norgrove listening from the gallery. Some of those who spoke had personal experience as separated parents. David Blunkett’s view was that this strengthened people’s wisdom rather than weakened it: “I do not normally speak about this, because it is too raw and sensitive. Although I am not saying that they should not speak, if they have not had experience of the family court and the family justice system they should be wary of taking a view” (2013). The opposition winding up called for the government to listen to children’s voices more closely. As with any Second Reading, different types of evidence – research, personal experiences and consultation – were thrown into the mix with minimal discussion about their source or how this knowledge was produced. Politicians were making the case for the power of their evidence, as much as the case for their viewpoint, by assuming its authority. It is as if entering into a deconstruction of their knowledge production could introduce an element of doubt which could undermine their rhetorical power.

The following month the government produced an “Evidence Pack”, offering arguments in favour of the family justice provisions of the bill and anticipating its likely impact.⁶ Clause 11 was intended to send a message that it is good for children to stay in contact with both parents and help dispel the perception of bias against fathers in the family courts. But the pack acknowledged that anticipating change was difficult: “It is not possible to reliably quantify the impacts of the measures on these groups because it largely depends on a behavioural response on the part of parents.” So clause 11 was based on trying to influence people by guessing how they were likely to respond to a clarification in the rules. The government were hoping to instil greater responsibility towards children in both parents, especially fathers, and fuller confidence in the court. No amount of evidence could substantiate this desired prediction, this reading of the runes, because (like much policy- and law-making) it relies so heavily on speculation.

The same arguments for and against clause 11 emerged during the Public Bill Committee, which considered the Bill in detail. Public Bill Committees always have a majority of government MPs on them and since Ministers rarely accept amendments – it is as if incorporating opposition amendments would entail a loss of face for them – and Members on both sides are whipped, many view them as ineffectual. But the government viewpoint is that these debates are useful for alerting them to concerns and possible amendments that they might agree to later on. Those they agree with, they often take away for the parliamentary draughtsmen to knock into shape and be re-presented as government amendments. Those they disagree with, they understand better. They can gather powerful arguments for defending themselves against dissenters at the next stage or, if especially threatening, for soothing them in private meetings. Tactically government tend to hold out against amendments for as long as they can to stay in control, one official told me.

Before they considered amendments, this committee took evidence from 32 witnesses, quite a few of them had already appeared before committees or APPGs, including the Minister. Then Edward Timpson and his opposition counterpart Lisa Nandy settled into dialogue, their dark suits, black hair, turquoise tie/shirt respectively perfectly matched. The mood of these sessions was unusually collaborative until they reached clause 11. Lisa Nandy said that the children’s charities were unified in opposition to it. Several interventions from the government MPs sounded impatient; faces became red. Even the customarily gentle Edward Timpson and Lisa Nandy became quite tetchy:

Mr Timpson: I am sorry that the hon. Lady has – perhaps inadvertently – reinforced an impression that I pleaded with her not to create by talking about 50:50 time. The clause is absolutely not about 50:50 time... – [Interruption]. If the hon. Lady could listen carefully to what I am trying to say, it would be helpful...

Lisa looked thunderous at this point and replied:

Lisa Nandy: I am grateful to the Minister for taking time to respond... However, it isn't worthy of the Minister, who has such a commitment to children, to suggest that the problem of the perception of shared time has been created by children's organisations and others who are seeking to tackle it. The problem has been created by his own Government, who, by his own admission, are seeking to tackle a perception rather than an actual problem.⁷

Nandy and her colleague Sharon Hodgson MP withdrew an amendment stating: "Involvement means any kind of direct or indirect involvement that promotes the welfare of the child, but shall not be taken to mean any particular division of a child's time",⁸ knowing that they couldn't win a vote on it yet. They tried again at Report Stage with Stephen Twigg (Opposition Spokesperson for Education) on 11 June 2013, when the Bill returned to the Chamber but again failed.

Throughout 2013 those against the promotion of shared parenting continued to be in a bind. Rumours persisted that it had high-level Cabinet support, especially from Iain Duncan Smith MP, so it wouldn't be dropped (King 2012). If they made too much of a fuss, then fathers' groups might retaliate and demand a stronger wording. So most campaigners kept a low profile. Similarly fathers' groups, such as Families Need Fathers, gave quiet support to the clause, not wanting to attract too much attention to it or stir up conflict. They had already spent years building up support for this in both Houses, so a big noise would have been counter-productive.

When the bill reached the Lords, peers spoke both for and against with Baroness Perry of Southwark, former Chief Inspector of Schools, delighted that children would spend more time with their fathers but Baroness Butler-Sloss, informed by decades of working as a judge and then President of the Family Division of the High Court, warning that the clause was designed to reduce a bias in the courts that doesn't exist. Government Minister Lord McNally dismissed the objections as reflecting a generation gap – opponents were out of touch, he implied – and all amendments were rejected at this stage.⁹

The consortium of NGOs met again in November 2013. They continued to discuss the likely impact of the Bill, worrying that parents will bully each other into agreeing an equal split in time. Although the government continued to resist the idea of clarification, claiming that a new website would make the meaning of the clause clear, all the NGOs found this site woefully inadequate.¹⁰ They agreed that it was in the House of Lords that they should persuade parliamentarians to amend the Bill by putting forward just one amendment to clause 11. More than one would give the appearance of disunity and split potential supporters. So defining "involvement" was settled upon as the

amendment that would most improve the text. They agreed to send out a two-page briefing to the 100 most sympathetic peers and give a briefing to those who might put their name to the amendment. One of the most sympathetic peers, Baroness Butler-Sloss, hosted a private meeting for peers and two children's charities, including Coram Children's Legal Centre. CCLC proposed the wording of their amendment, explaining that it had been put by the opposition in the Commons and that if peers unified around this one amendment it would have far more clout. It was agreed that it should be fronted by a Crossbencher, especially if it was Baroness Butler-Sloss, and supported by the opposition led by former Children's Minister, Baroness Hughes of Stretford, who was also present.

At the final stage of debate Baroness Butler-Sloss, and two other peers, moved an amendment to define parental involvement, making it crystal clear that it meant either direct or indirect contact between parent and child and not a particular division of time. She complimented the government on their intentions but expressed a regret that the clause contained a "presumption". Behind the "regret" lurked the terrible possibility that if provoked, she might move an amendment to remove the clause altogether. But she wasn't doing that, she soothed. She was merely defining involvement particularly for the benefit of families who don't go to court and come to an arrangement between themselves. An almost identical one had been put to the Commons Public Bill Committee on 14 March 2013 by Lisa Nandy MP, at Commons Report stage by Nandy and colleagues, and in Grand Committee by Baroness Hughes, so this was also an opposition amendment from the Commons, originally drafted by the Coram Children's Legal Centre, and influenced by discussions with various charities and others concerned or affected by the clause. But the opposition peer expressing support – Baroness Hughes – did not mention its history. She allowed the amendment to be fronted by the one woman who was most difficult for government to ignore: Baroness Butler-Sloss, the legal giant of family law. She put it to a vote and with the Coalition government peers whipped to vote against, and the opposition Labour Party to vote for it, she won by four votes – the only division that the government lost on this Bill.

The amendment was sent to government lawyers and Ministers and civil servants met with Baroness Butler-Sloss to do a deal, as she put it.¹¹ The government accepted the amendment and agreed not to reverse it in the Commons, in fact they proposed it in a government amendment with their own slightly adjusted wording. Without this agreement, the Bill might have ping-ponged between the two Houses – with Baroness Butler-Sloss refusing to back down – and the government would have had to use the Parliament Act to force it through, which she knew they did not want to do. A powerful combination of forces – Baroness Butler-Sloss, the Crossbenchers supporting her, the Labour Party, charities and academics – had defeated the government in the

Lords. Although a few Conservative backbench MPs objected to it in the final debate in the Commons, they had no choice but to agree to it so the bill was finally passed with no further votes on the Clause.

| Table 3. Final version of section 11 in the Act |
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| <p>* The changes are underlined.</p> <p><u>Welfare of the child: parental involvement</u></p> <p>(1) Section 1 of the Children Act 1989 (welfare of the child) is amended as follows:</p> <p>(2) After subsection (2) insert –</p> <p>“(2A) A court, in the circumstances mentioned in subsection (4)(a) or (7), is as respects each parent within subsection (6)(a) to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child’s welfare.”</p> <p>“(2B) In subsection (2A) ‘involvement’ means involvement of some kind, either direct or indirect, but not any particular division of a child’s time.”</p> <p>(3) After subsection (5) insert:</p> <p>“(6) In subsection (2A) ‘parent’ means parent of the child concerned; and, for the purposes of that subsection, a parent of the child concerned –</p> <p>(a) is within this paragraph if that parent can be involved in the child’s life in a way that does not put the child at risk of suffering harm; and</p> <p>(b) is to be treated as being within paragraph (a) unless there is some evidence before the court in the particular proceedings to suggest that involvement of that parent in the child’s life would put the child at risk of suffering harm whatever the form of the involvement.</p> <p>The circumstances referred to are that the court is considering whether to make an order under section 4(1)(c) or (2A) or 4ZA(1)(c) or (5) (parental responsibility of parent other than mother).”</p> |

The Culture of Making Law and Law Shaping Culture

Making laws is about “reading the runes”, as Edward Timpson put it to me, divining the future based on one’s understanding of the present. Parliament is there to scrutinise this process of divination. No one could accuse the government of failing to allow scrutiny of this section 11. It was talked over, sometimes in minute detail, by a Select Committee, one Public Bill Committee and one Grand Committee, in many events in two debating chambers, and huge (but unknown) numbers of experts outside Parliament. Scrutiny resulted in at least three significant changes: (1) the first was influenced by the government consultation (strengthening harm), (2) the second by the Justice Select Committee (changing the title); and (3) the third by a coalition in the Lords (defining involvement). But in the rush to evaluate the outcomes of scrutiny, the importance of process can be overlooked. Looking at politics and evidence underneath the textual versions of section 11 illustrates how the two are entan-

gled in complex ways that might imply a questioning of the idea of the purity of evidence.

I have described how shared parenting had ferocious political backing at the highest levels, on the one hand. On the other hand, both pro- and anti-shared parenting had various types of evidence supporting their case. During the passage of the Bill social scientific surveys, legal cases and personal testimonies were brought into debate to substantiate contradictory positions about interests. The promotion of shared parenting seems to be in the interests of non-resident parents as individuals, the majority of whom are fathers, but the interests of women as mothers bumps up against fraught feminist-informed debates depending whether you focus on unpaid care as a source of women's oppression or women's rights within households (Fehlberg et al., 2011). The evidence about where the interests of children lie is even more complex. According to some psychological research, children under four years old benefit from having one main home and one main carer, whereas older children are more flexible (McIntosh et al., 2010). For a minority of children, whatever their age, promoting shared parenting may increase the risk of harm if one parent is violent. So a solution that benefits one child will harm another. Some might argue that children's interests can only be properly assessed by a far more thorough consultation with different groups of children.

In any case no amount of weighing up the research will lead to a straightforward "evidence-based" solution because it always requires interpretation and prioritizing within a specific political and cultural context. As Aristotle pointed out, making a decision about what is good for others is an ethical process, one he advised needs practical wisdom rather than the application of universal rules. John Dunn warns that modern political theory focuses on intention but gives inadequate weight to practical skill (2000). Part of the practical skill is about deliberating on the plurality of interests affected by law directly or in its shadow. Since what is good for some will be bad for others, reading the runes – imagining the future on the basis of the present – is fraught with danger for politicians. Their decisions will always be distasteful to some and in this sense we might even be grateful to politicians for courting inevitable unpopularity. According to Dunn:

The very purpose of political society itself is precisely to stand in – by clear and predictable legal and judicial arrangements, backed by effective powers of enforcement – for the erratic and dangerous conditions generated by the collision of institutionally unrestrained human partiality (ibid: 84).

So it is not impartiality we should demand of our politicians; it is honesty about their partiality – inevitably and continually privileging the interests of one group above another – because law-making can never *just* be the ra-

tional assessment of evidence; it would lack morality if it was or pretended to be so.

Watching the passage of section 11 was not so much a process of politicians mechanically weighing up the evidence, but listening to different groups of people deliberate, discussing their plural and partial views and taking sides. The social organization of the people involved was structured in complex ways, sometimes common to the usual ways of the Westminster Parliament and sometimes unique to the time. As is customary, the changes to the text were directly accomplished by those most closely involved on a day-to-day basis – the politicians and officials – either in highly ritualized events (committees and debates) replete with rules that create a procedural maze for politicians to navigate, in policy discussions within their party and across government, or behind the scenes on computers that are never seen. Every change to the Bill required agreement across government departments. The Cabinet Office co-ordinates the process of policy approval and while this used to be deeply secret, they have published documents explaining exactly how this works.¹² During the Coalition the process of approval was more onerous than usual, due to the persistent disagreements between Conservative and Liberal Democrats, especially for changing any proposals that were in the Coalition Agreement (as this one was). Although politicians often claim that children's issues are non-political, the parties took roughly different sides in these debates on Clause 11: those MPs pushing for change on the side of the government tended to champion fathers' rights, while the opposition was firmly on the side of a complex mix of women's and children's interests.

More fluidly, politicians and officials were involved in a series of relationships with groups of people who had a stake in the clause. Section 11 was presented as if it was apolitical but it was deeply political in the sense of being about the changing relationship between families and the state. While legal aid has been cut in private law cases, the state is being pushed (or pulled) out of family life and replaced with mediation and technology in the guise of a website guiding parents about how to handle separation. The text was fought over with some vigour because it could redefine family life for hundreds of thousands of people. Those potentially affected were the imagined beneficiaries of the clause: the children and parents in families that separate. The cases that go to court might involve over 40 000 in a year but families that don't get to court (120 000 in 2013), the ones in the shadow of the law, may be as much or more dramatically affected. Between these families and the politicians/officials are a range of professionals who represent or work with or for parents, women, mothers, fathers or children: judges, magistrates, lawyers, social workers, Cafcass guardians, children's charity workers, women's organizations and fathers' groups. The less formally ritualized events, such as All-Party Parliamentary Group meetings, political party meetings and meetings to lobby

politicians, consisted of freer discussion and debate or less antagonism. These were perceived as less political, but that doesn't make them so. Politics entails agreement and co-operation, as much as disagreement and conflict; depending upon who is in the room, the disagreement is either part of the discussion or its backdrop, but it is always at the least implied. It was through ritualized meetings that power struggles could be fashioned into law in the same way that the local government meetings that Abram observed in Norway also allowed the resolution of complex and messy relations involved in governing: "the meeting form enables all of these varied points of contention to be managed and sculpted into the democratic process" (2017: 43).

Scrutiny within Parliament should not be judged only by the extent to which the formal process results in an end product – that is, an amended text of a bill. The political debates between parliamentarians and with those affected or interested are as important. It is the framework of scrutiny enabling parliamentary and public debates to take place around an issue that matters. Some calls for "evidence-based policy" give the impression that a rational process of weighing up research findings and expert testimony should lead linear-fashion to clear priorities. But the circulation of "evidence" for and against the idea of putting a statement about parental involvement in legislation was far from linear. The "evidence" had within it contradictions (about the statistics), conflicts of interests (e.g. between some fathers and mothers) and huge shifts in patterns of family life. So while even more public discussion of these contradictions, conflicts and changes in the evidence would have been useful, politicians will necessarily be in the business of making political judgements rather than merely rational assessments.

Assuming that the evidence could tell you about the past was problematic enough. Using it to predict what might happen in the future was even harder, which is another reason why the relationship between evidence and law can't be linear. This is partly why Dewey proposes that:

policies and proposals for social action ... be treated as working hypotheses, not as programs to be rigidly adhered to and executed. They will be experimental in the sense that they will be entertained subject to constant and well-equipped observation of the consequences they entail when acted upon, and subject to ready and flexible revision in the light of observed consequences (Dewey as quoted by Sanderson, 2009: 711).

We need a more experimental and practical approach to action. It is not only the contradictions and uncertainty of evidence that should incline us to Dewey's intelligent, rather than evidence-based, decision-making, it is also its contestability. Different groups of people in society produce truth, and therefore what they see as "evidence", in different ways. The French anthropologist Bru-

no Latour compares how lawyers and scientists produce knowledge or what they both call “evidence” when asserting its truth (2010). Lawyers use documents and speech to establish what is true and false in a specific context even though the subject is not visible, while scientists are concerned with establishing universal truths by observing or deducing events or processes that do not depend on specific context and may be in the past, present or future. In law, form rather than content, in the shape of the *presentation* of evidence, is crucial to establishing truth in a particular case. In science, theories about the *content* of reality are what matter, whereas the way you present facts has no bearing on their validity. Thus the claim of objectivity is achieved in different ways by these two professional groups. In legal and scientific documents authorship plays a different role in establishing the authority of particular knowledge too: in scientific articles the authors, and peer reviewers, are important in establishing the reliability of the claims (Biagioli 2006: 127), while documents used in a court of law are made credible through a judicial process where the authors are nameless. In both cases, though, when faced with controversy both science and legal knowledge becomes highly technicalised, not because it is inherently technical because as part “of a rhetorical strategy of getting one’s own collections of statements black boxed as truth” (Riles, 2005: 1008). It is hardly surprising that politicians are influenced by both the rhetorical claims of science and law. When questioning witnesses who give “evidence” in Select Committees, MPs can sound like lawyers; when arguing for a policy position in debates, they can sound more like scientists. Evidence becomes part of the rhetorical performance rather than a technical process stripped of politics and rather than condemning this as a form of contamination, we should understand it as a cultural response to political conflicts.

Although processes of scrutiny in law-making in this bicameral Parliament were extensive, and engagement resulted in the public, a select committee, civil society, the opposition and Cross-bench (or independent) peers in the upper House all having a clear influence on amendments to the text, the “evidence” was simply presented to justify political positions rather than debated in public meetings. A thorough discussion of the significance of different types of knowledge (research, experience, practice, court cases and so on), including reflection on how the knowledge was produced and whether it was reliable, did take place but only in private meetings (e.g., held by All-Party Parliamentary Groups). Such discussions held in public, including in parliamentary debates, would have enriched the capacity of backbench and opposition MPs, but also other stakeholders, to scrutinise government proposals.

Anthropologists once wrote about conflicts *between* cultures but as Anelise Riles points out “cultures are not billiard balls: there are no hermetically sealed cultures... cultures are hybrid, overlapped and creole” (2008: 285) so we are as interested in conflicts *within* cultures. This means not only study-

ing content of clashes in interests or values – in this case between what fathers, mothers and children want, how they see themselves and relate to each other – but also the form as well. When such conflicts enter the the law-making institution of Parliament, to study law making we need to look at how these desires, images and relationships are performed through documents, meetings and rituals. Only then will the relationship between evidence and politics at a particular time and place be revealed.

Endnotes

- 1 This ethnographic research was carried out on a Leverhulme Research Fellowship (2011–12) thanks to the generosity of the Leverhulme Trust.
- 2 http://assets.cabinetoffice.gov.uk.s3-external-3.amazonaws.com/midtermreview/HMG_MidTermReview.pdf [accessed 24 April 2014].
- 3 For example, see the minutes of the APPG on Children held on 15 October 2012 with David Norgrove and Edward Timpson, <http://www.ncb.org.uk/media/861509/121106_cf_bill_-_fam_law_reforms_final.pdf> [accessed 30 May 2014].
- 4 For example, see the Channel 4 documentary in January 2013 as well as various newspaper articles including <<http://www.theguardian.com/commentisfree/2012/jun/13/fathers-rights-overlooked-law-welcome>> [accessed 9 October 2014]; <http://www.bbc.co.uk/news/education-20223526#?utm_source=twitterfeed&utm_medium=twitter>; and <<http://www.telegraph.co.uk/news/uknews/law-and-order/9656507/Absent-fathers-to-get-legal-right-to-spend-time-with-their-children.html>> [accessed 20 February 2014].
- 5 Interviewed by Emma Crewe, 8 April 2014.
- 6 <http://media.education.gov.uk/assets/files/pdf/f/family%20justice%20-%20evidence%20of%20impact1.pdf>, pp. 84–86, [accessed 17 February 2014].
- 7 Public Bill Committee, 14 March 2013, col. 291–2.
- 8 This amendment was originally drafted by Hazel Kent, a family paralegal at Coram Children’s Legal Centre, her colleague Kirstin Andersen and its Director, Professor Carolyn Hamilton. See their briefings: http://www.childrenslegalcentre.com/index.php?page=cooperative_parenting_response [accessed 14 October 2014]. This along with briefings sent to both the House of Commons and House of Lords were discussed by the whole consortium of NGOs.
- 9 HL Debates, 2 July 2013, col. 1118–9.
- 10 The website can be found here: <http://www.sortingoutseparation.org.uk>. A subsequent evaluation found that users agreed with their criticisms. Although users liked the idea of a site, they found it difficult to use and were disappointed by lack of detailed information, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/289400/863summ.pdf> [accessed 3 August 2014].
- 11 Interviewed by Emma Crewe, 13 October 2014.
- 12 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/224997/Guide_to_Cabinet_Committees_2012.pdf> [accessed 24 April 2014].

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