

VICTORIAN LEGAL DILEMMAS HIGHLIGHTED BY GILBERT AND SULLIVAN, AND RE-EXAMINED
THROUGH 21ST CENTURY EYES

It is almost unthinkable that anyone would write a musical about the Companies Act 2006. Whilst riveting, of course, it is hardly *Mamma Mia* or *Les Misérables*. It is surely even more unlikely that, if they did, anyone would come to watch it. It is a tribute to the popularity of the light operas of W.S. Gilbert and Sir Arthur Sullivan that *Utopia Ltd*, one of the latest of their works, first performed in 1893, ran for 245 performances, despite the fact that its plot revolved around the company law statutes of the time and, in particular, the limited liability of companies.

Utopia Ltd is far from being the only Gilbert and Sullivan opera with a significant amount of legal content. This is not surprising as Gilbert had a brief career as a barrister. Apparently this was not a success; it is said that he averaged only five clients a year. A career as a busy barrister tends to leave little space for other things, so we can be grateful that Gilbert turned his back on this early legal career and concentrated, instead, on writing the libretti which, teamed with Sullivan's memorable music, have entertained audiences around the world for so long. Once heard, both tunes and words stick in your head, which is more than can be said for most legal submissions, or judgments, with perhaps a few honourable exceptions such as Lord Denning's lyrical start to his judgment in *Miller v Jackson* [1977] QB 966: "In summertime village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch."

Trial by Jury advertises its legal setting plainly in its title, and many would turn to it as an example of how legal themes feature in the Gilbert and Sullivan repertoire. Another good example is *Iolanthe*, first produced in 1882. Its plot is ludicrous, and it may be its sheer absurdity that enables Gilbert to get away with jibes which are capable, otherwise, of causing real offence.

The two main settings are Arcadia, which is home to a community of fairies, ruled over by their Fairy Queen, and the House of Lords. *Iolanthe* was the life and soul of Fairyland, but she broke fairy laws by marrying a mortal, and was banished by the Fairy Queen in punishment. She has a son, Strephon, who has fallen in love with Phyllis, who is a Ward in Chancery. The two intend to marry, but the marriage requires the permission of the Lord Chancellor because of the wardship. The Lord Chancellor will not consent. Indeed, the whole question of Phyllis's marriage is causing him terrible hardship.

The role of the Lord Chancellor has changed completely since Victorian times. Now, Lord Chancellors do not sit in any judicial capacity at all, the Constitutional Reform Act 2005 having made that impossible. The welfare of wards is the province of the judges in the family courts. But at the time when Phyllis was a ward, it was to the Lord Chancellor, presiding over the Court of Chancery, that applications in relation to wards had to be made. As a result, as the Lord Chancellor laments:

"everyone who'd marry a Ward
Must come to me for my accord,
And in my court I sit all day,

Giving agreeable girls away...
But never, oh, never a one for me!
Which is exasperating for
A highly susceptible Chancellor.”

He is “quite prepared to marry again”, and he has no false modesty about his talents and his charms. As he says:

“The Law is the true embodiment
Of everything that’s excellent.
It has no kind of fault or flaw,
And I, my Lords, embody the Law.”

He has fallen for Phyllis in a big way and, over the course of the opera, we see him struggling with the dilemma that this presents for him. It keeps him awake, as he describes in the well-known song “When you’re lying awake with a dismal headache...” which so perfectly captures the ever-changing nature of nightmares. Eventually he persuades himself that, actually, *he* is the best match for Phyllis and it would be in her best interests to marry him. This means that he must consent, most reluctantly of course, to her marrying him.

There is, in this ridiculous farce, a serious point, as the Lord Chancellor well knows. As he says, “there’d be the deuce to pay in the Lords If I fell in love with one of my Wards!”.

By now, alarm bells are ringing loudly in the ears of the modern lawyer, warning that there is an issue here in relation to judicial bias.

In fairness to the Lord Chancellor, appreciating that to award Phyllis’s hand to himself would be “open to misconstruction”, his starting point was to waive his claim, but he rapidly abandons that, and remains involved in the case, albeit bemoaning the fact that he stands “in two capacities, and they clash, my Lords, they clash”.

The experience of one of his (real) predecessors, Lord Cottenham, should have shown him the way. In 1852, Lord Cottenham had had his decrees set aside, in *Dimes v The Proprietors of the Grand Junction Canal* (1853) 3 H.L. Cas 759, on the ground that he had had, at the relevant time, a substantial shareholding in the company which was the respondent in the proceedings. The maxim that no man should be judge in his own cause was said not to be confined to a cause in which the judge is a party but to extend to a cause in which he has an interest, and this was even though no one could suppose that Lord Cottenham could be in the remotest degree influenced by his investment. This was an example of a direct pecuniary interest in the proceedings, but a direct pecuniary interest is not a pre-requisite in apparent bias, as the *Pinochet* case ([2000] 1 AC 119) shows.

The law on apparent bias has been considered by the courts on a number of occasions in relatively recent times (see for example *Porter v Magill* [2002] 2 AC 357, *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416, and, dealing with arbitrators, *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] 3 WLR 1474). The “fair-minded and informed observer”, who is nowadays the (fictional) arbiter of the apparent bias question,

considering all the circumstances relevant to the position of the Lord Chancellor vis-à-vis Phyllis's case, would not be likely to have much difficulty in concluding that there was "a real possibility that the tribunal was biased".

The Lord Chancellor is not the only target in *Iolanthe*. Both Houses of Parliament have satirical fun poked at them. Private Willis, on sentry duty in Palace Yard in Westminster, muses on the political system of the time, including the fact that:

"When in that House M.P.s divide,
If they've a brain and cerebellum too,
They've got to leave that brain outside,
And vote just as their leaders tell 'em to."

He rationalises this on the basis that:

"...the prospect of a lot
Of dull M.P.s in close proximity,
All thinking for themselves, is what
No man can face with equanimity."

The problem for the establishment is that Strephon is going to go into Parliament, backed by the supreme authority of the fairies, which means he will command a large majority. Their magic powers will ensure that every measure that pleases him will be passed by both Houses. This makes both Houses "shake in their shoes", fearing, for example, that the House of Lords might have to "sit ... through the grouse and salmon season" or that the Peerage may be thrown open to "Competitive Examination".

In particular, Strephon intends to "prick that annual blister, Marriage with deceased wife's sister". It seems extraordinary now that the Marriage Act 1835 contained an absolute prohibition on a marriage between a man and his deceased wife's sister. Repeated attempts had been made from as early as 1842 to reverse this by legislation, but it was not until the Deceased Wife's Sister's Marriage Act 1907 that the prohibition was removed. The strength of feeling that had held up this change is perhaps exemplified by the Earl of Shaftesbury's speech during the Second Reading of the 1907 Act in the House of Lords. To change the law would be "wrongful and pernicious, and fraught, both morally and spiritually, with endless possibilities for evil", he said.

There cannot be many campaigns to change the law which carry on, actively, for over 60 years. Divorce law is a notable present-day example of a law that has resisted reform, but change has certainly not taken anything like that long. The present divorce law dates back to 1969. It requires the petitioning spouse not only to prove that the marriage has irretrievably broken down, but also to establish one of five "facts", which revolve around the conduct of the other spouse or a period of separation. It has long been recognised that the process of proving one of the "facts" can engender dispute and conflict between the spouses, rather than enabling them to look constructively at new arrangements for their changed circumstances. However, it was not until after the high-profile case of *Owens v Owens*

[2018] UKSC 41 that there was sufficient momentum to change the law, in the Divorce, Dissolution and Separation Act 2020, which is due to come into force during 2022.

There is far more to say about Gilbert and Sullivan's comic operas than could possibly fit in an article such as this, and it is hoped that the reader will explore them further. Apart from anything else, it would be a shame not to hear the very enjoyable music.

For the avoidance of doubt, the views expressed by the characters in the operas must not be taken necessarily to represent those of the author.