

Substantive equality and the extension of marriage

Introduction

This article will assess the recent extension of marriage to include same-sex couples in the UK. Key areas of differential treatment between same-sex and mixed-sex couples will be examined. The discussion will assess the role of marriage, and whether the law has succeeded in achieving marriage equality despite the areas of differential treatment. It will conclude with an assessment of some of the deeper questions in this area. Is substantive equality best achieved through formal equality? Is marriage appropriate for same-sex couples in the first place? To what extent can family law reform achieve substantive equality?

The law in Scotland, England and Wales

It is useful to first summarise the law, and the differential treatment of mixed-sex and same-sex couples under the new regimes. The Scottish Government decided to open up marriage to same-sex couples through the Marriage and Civil Partnership (Scotland) Act 2014.¹ Principally, the Act repeals s. 5(4)(e) of the Marriage (Scotland) Act 1977, this provision states that there is a legal impediment to marriage if the couple are of the same sex. By repealing s. 5(4)(e) the Act effectively makes the existing concept of marriage open to same-sex couples. In England and Wales, the Marriage (Same Sex Couples) Act 2013² explicitly states that marriage between same-sex couples is lawful and provides for equal treatment of same-sex and mixed-sex marriages.

It is important to note that there remains only one single marriage status; a new concept of 'same-sex marriage' has not been created.³ This can be contrasted with the approach taken under civil partnership legislation, which had intended to create a 'separate, but equal' status.⁴ However, despite the existence of a single, openly available marriage status, there are still differences in the treatment of same-sex and mixed-sex couples present in both jurisdictions.

1 'the Scottish Act.'

2 'the English Act.'

3 Brian Dempsey, 'Much Sound and Fury about Marriage Reform' (2013) 81 SLG 34, 36.

4 Civil partnership was intended to be a "parallel but equalising" institution. See: *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam), para 50.

There are provisions in both jurisdictions that relate specifically to the role of celebrants and the participation of religious groups. This was a major source of controversy during the debates. Individual celebrants are extensively protected from having to solemnise same-sex marriages. This is a peculiarly strong and specific form of protection, for example the idea that such 'protection' would be implemented for celebrants who refused to solemnise interracial or interreligious marriages seems ludicrous. Under both Acts religious groups must 'opt-in' to marriage of same-sex couples, this allows them not only to refuse, but to symbolically remain outside of the same-sex regime altogether while remaining within the legal marriage regime for mixed-sex couples. Such explicit protections emphasise the lasting symbolic importance of marriage as a legal institution to traditional and religious groups. An in-depth analyses of celebrants is beyond the scope of the present discussion.

Another major area of differential treatment relates to sexual conduct. In Scotland, the concept of voidability through incurable impotency can apply only to mixed-sex couples. In England, a similar result is provided for with regard to non-consummation. Adultery is also unmodified, the legislation clarifies that the definition of adultery remains as it was prior to the extension of marriage. An extramarital relationship can only be classed as adulterous if the affair included sexual intercourse (that is, penile penetration of the vagina) which can only be carried out between mixed-sex partners. Same-sex couples can still commit adultery, but only if they have sexual intercourse with someone of the opposite sex. Finally, in Scotland there was a provision that made it so the special defence relating to reser only applied to the wife in a mixed-sex relationship, but this was removed in the Scottish Act's passage through parliament, and the defence is now abolished altogether.

There are also several areas other than differential treatment, but the most significant area for our purposes are the provisions relating to sexual conduct, and the fact that they have not been updated for same-sex couples. These provisions will have a lasting effect on all married and reflect on our expectations and perceptions on what marriage is.

The role of marriage

Having established the legal framework, it is now possible to explore the wider legal and

social implications of the extension of marriage. Firstly, it is worth considering the importance of marriage as an institution.

Perceptions of marriage and family life have evolved over the years. The traditional family 'myth' gave people an identity, and produced the expectation that they should strive to fulfil a particular gendered role within a sexual and familial context.⁵ Modern couples are more likely to view marriage as a symbol of romantic and public commitment that they choose to undertake individually, rather than as a result of societal expectations or pressure.⁶ The emphasis on personal commitment as a major part of marriage is a common theme among both mixed and same-sex couples.⁷ However, despite the increase in autonomy and the reduction in social expectations - as well as the introduction of civil partnerships - marriage still carries a great deal of symbolic power. The legal and social aspects combine to create an institution that is meant to embody the highest standard of a lasting romantic relationship.⁸ Marriage has "centrality within a nexus of interlocking beliefs about home, domesticity and parenthood."⁹ Also, the symbolic and political importance of religion continues to play a role. Furthermore, the state has a political interest in maintaining long-term relationships, for social stability and to reduce welfare costs.¹⁰

It is notable that many countries have taken the path of a civil partnership regime followed by full extension of same-sex marriage.¹¹ The powerful symbolism associated with marriage can also be evidenced by the existence of a civil partnership regime in the first place. If marriage was simply a way of conferring legal rights then the government would not have initially gone to the trouble of designing a regime that replicated marriage almost exactly, but was nevertheless differently named and perceived.

5 Alison Diduck, *Law's Families* (Butterworths, 2003), 23.

6 Ibid. 33.

7 Ibid. 32.

8 Ibid. 42; Also see Maria Miller in: HC Deb 5 February 2013, vol 558, col 127.

9 David Clark and Douglas Haldane, *Wedlocked?* (Polity Press 1990), 151.

10 Jonathon Herring, *Family Law* (6th edn, Pearson, 2013) 44; Rebecca Bailey-Harris, 'New families for a new society?' in Stephen Cretney (ed) *Family Law: Essays for the new Millenium* (Family Law 2000), 67.

11 Herring (n10), 82.

The argument for marriage equality

This discussion has briefly considered the role and symbolic power of marriage, and the modern emphasis on commitment. It is now appropriate to investigate the arguments for marriage equality. One of the key arguments comes from 'perfectionist liberals', who hold that human autonomy is intrinsically valuable.¹² It follows from this that the government should empower people, because human autonomy itself has moral value.¹³ This may be particularly important when it comes to the recognition of sexual and partnership rights because "sexual and emotional encounters and attachments are probably the most centrally personal characteristics and experiences we have."¹⁴ From this line of reasoning, it is further argued that a marriage is considered a collective good and therefore limiting access to it could be considered a limit on individual autonomy.¹⁵ Since extending autonomy and empowering citizens is morally good, it is right to extend access to marriage to same-sex couples.

Advocates for marriage equality suggest that the exclusion of same-sex couples creates an implicit judgement of same-sex relationships.¹⁶ It has been established that marriage has a great deal of symbolic importance that is not shared by civil partnerships. Refusing to allow marriage between same-sex couples means that we are symbolically devaluing same-sex relationships.¹⁷ This attitude of same-sex relationships as being abnormal or of lesser value can be directly evidenced in the case law, especially in relation to parents seeking custody over children while they are in active gay relationships.¹⁸ It can also be evidenced in previous legislation, particularly the infamous reference to same-sex relationships as a "pretended family relationship" in the Local Government Act 1986.

The goal of the recent marriage reforms is to achieve substantive and symbolic equality between same-sex and mixed-sex couples, ending the value judgement of relationships.¹⁹ However, much of the argument for marriage equality has focussed on the state

12 Laura-Jane Houghton, 'Same-sex marriage: a perfectionist liberal justification' [2000] UCL Juris. Rev. 301, 316; Nicholas Bamforth, *Sexuality, Morals and Justice* (Cassell, 1997), 264.

13 Houghton (n12).

14 Bamforth (n12), 259.

15 Houghton (n12), 317.

16 Robert Wintemute, 'The Legal Case' (Equal Love) <<http://equallove.org.uk/the-legal-case/>> accessed 23 February 2014.

17 Wintemute (n16); Herring (n10), 82.

18 Nicholas Bamforth, *Sexuality, Morals and Justice* (Cassell, 1997), 46-52.

19 'The Marriage and Civil Partnership (Scotland) Bill: A Consultation' (Scottish Government, 2012), 3.

recognition of the marriage relationship, rather than the obligations that exist between spouses.²⁰ The rules relating to sexual conduct impose an obligation of fidelity as well as a particular legal expectation of sexual performance. Failing to undertake these obligations can see the marriage end in divorce or annulment. While these rules could be seen as archaic, harking back to the time of a traditional marriage designed to produce children and secure property devolution,²¹ the legislation's failure to transpose them has nevertheless been criticised.

Sexuality in marriage

It is worth summarising the key points so far. Firstly, there is a major area of differential treatment in the legislation as a result of the failure to update the obligations relating to sexual conduct, such as adultery. Secondly, fidelity is an important part of the modern perception of marriage for both mixed and same-sex couples. Thirdly, sexuality forms a central part of our identity, and sexual experiences are an important part of the way we define ourselves. Finally, the contractual elements of marriage have been ignored somewhat during the campaign for equal marriage, including the obligations relating to sexual conduct.

It has been argued by critics of the legislation that the failure to transpose the sexual conduct rules represents a shying away from recognising the sexual - and therefore equal - nature of marriages between same-sex couples.²² If substantive equality is sought, then the marriage that is open to same-sex couples must be more than a renamed civil partnership. Crompton argues that the state has a particular problem with recognising the sexuality of same-sex relationships, and notes the wrecking amendment that was attempted in relation to the Civil Partnership Act 2004, which would have opened it up to caring relationships, this reveals an attempt to 'desexualise' same-sex relationships by conservative elements of the state.²³ Crompton goes on to state that the law has a particular pre-occupation with penetration, and has no way of relating to sexual relations

20 Robert Leckey, 'Must equal mean identical? Same-sex couples and marriage' (2014) *Int. J.L.C.* 5, 6.

21 Kenneth Norrie 'Marriage is for heterosexuals – may the rest of us be saved from it' (2000) 12 *CFLQ* 363, 367.

22 Carolyn Naughton, 'Equal civil marriage for all genders' (2013) 43 *Fam. L.* 426; Lucy Crompton 'Where's the sex in same-sex marriage?' (2013) 43 *Fam. L.* 564.

23 Crompton (n22), 565.

in other terms.²⁴ When considering this point it is interesting to note that both in the past and present the criminalisation of homosexuality has often been achieved through the criminalisation of sodomy specifically.²⁵ This reveals that the law has trouble recognising the broad range of human intimacy which exists.

Norrie has stated that fidelity is of different significance in relation to same-sex couples, because there is no possibility of children, stating: "It is more emotional and less physical in meaning than it is for non-gay people: but it is no less important for all that."²⁶ However, as noted by Crompton this claim is backed up with little evidence. Furthermore, this discussion has established the substantial importance of commitment in the perception of both marriages between same-sex and mixed-sex couples.

It is worth noting that these problems do not relate greatly to practical legal rights, for example in adulterous situations a same-sex partner could achieve the same result through intolerable behaviour. However, Crompton argues that the symbolic effect of extending adultery will be important for both the recognition of the equality of same-sex relationships and for the individual spouse who is seeking a divorce based on it. The term 'adultery' carries a particular power in itself.²⁷ Crompton concludes that the definitions should be updated so that the courts would recognise the range of human intimacy, including same and mixed-sex couples.²⁸ Naughton prefers the abolition of consummation and adultery altogether,²⁹ noting that consummation has had a difficult interpretive history.³⁰ Re-interpreting the sexual obligations fairly would be difficult, and possibly lead to a lack of clarity or continuing inequality between same-sex and mixed-sex couples. There is an unsavoury element to the rules relating to sexual conduct, representing a paternalistic 'disciplining' of couples' sexual behaviour. However, Crompton disagrees with abolition, stating: "What sort of message would it send out symbolically to neuter marriage in the very act of opening it to homosexuals?"³¹

24 Ibid. 569-571.

25 For example see the Buggery Act 1533, and existing sodomy laws throughout the world today.

26 Norrie (n21), 367.

27 Crompton (n22), 572.

28 Ibid. 572-574.

29 Naughton (n22), 429-430.

30 Ibid. 427-428.

31 Crompton (n22), 571.

Whatever view is taken, the failure to deal with the issues relating to sexual conduct represent a failure to apply total equality. We have already established the centrality of sexuality to our personal identity, and that commitment is one of the strongest themes in marriage among both same- and mixed-sex couples. It would seem to follow from this that the legal and symbolic rules that relate to sexuality and commitment should have been updated and redefined. Instead the government has sidestepped the issue, arguing that it would create interpretive problems, and that practical legal rights remain essentially the same.³² The reasoning is contradictory. On the one hand it is argued that the practical legal rights granted under adultery and unreasonable behaviour are essentially the same, despite them existing under different names.³³ On the other hand it is also argued that:

“A [civil] partnership is not perceived in the same way and does not have the same promises of responsibility and commitment as marriage. All couples who enter a lifelong commitment together should be able to call it marriage.”³⁴

This focus on symbolism and perception describes the core purpose of the Act. Practically speaking a civil partnership is essentially identical to a marriage, but what is being sought is symbolic equality and recognition. Why then is this not extended to the concepts of adultery and consummation? If “all couples who enter a lifelong commitment together should be able to call it marriage”, should not all spouses who suffer infidelity be able to call it adultery? Given the importance of sexuality and commitment to marriage, this question is more important than the practical legal significance would indicate, and the failure of the government to act appropriately and redefine the terms represents a failure to achieve their stated goal of achieving marriage equality.

Opposition to the extension of marriage

There are also deeper questions raised by the legislation: Should we extend or maintain marriage at all? Furthermore, to what extent can equality be achieved through family law? The remainder of this discussion will focus on some possible answers to these questions.

³² For example see Maria Miller in: HC Deb 5 February 2013, vol 558, col 125.

³³ Ibid.

³⁴ Maria Miller in: HC Deb 5 February 2013, vol 558, col 127.

It has been argued that the focus on marriage reform fails to prioritise adequately other sources of inequality which may exist in relation to same-sex couples, particularly class and race.³⁵ Spade, speaking about the USA, states that equal marriage is a project that will benefit the most privileged, white, and middle-class same-sex couples the most.³⁶ Furthermore, there is an argument that by being included in traditional, conservative institutions such as marriage, activists are allowing themselves to become part of an establishment which still marginalises large parts of the LGBT community.³⁷ While this is not a direct argument against marriage equality itself, it does raise questions over the limitations of the family law, and the relevance of the liberal perfectionist line of reasoning when considering wider inequalities. While extending access to marriage may remain a moral good under a liberal analysis, there may be a great number of other factors inherent in a modern capitalist society which prevent individuals from exercising autonomy; widening economic inequality is cited as a major example of this.³⁸ It is important to note that both the USA and the UK have undergone a similar increase in inequality following the demise of the post-war settlement, and the analysis could apply to both jurisdictions. However, Spade's analysis forms part of a wider critique of contemporary capitalism, and in order to accept it we must also accept some of the underlying precepts – such as the refusal to accept the total legitimacy of liberal democratic states, and the need for radical change.

Another issue with opening marriage to same-sex couples is that it may be an inappropriate response to the problem. It may dissuade couples from exploring and developing their own forms of relationships.³⁹ It has been argued that same-sex couples lack 'models' for traditional relationships in the same way as mixed-sex couples.⁴⁰ Diduck states: "Lesbian women and gay men, however, create their identities outside the norm, without the constraints it imposes on gender expectations and gender practices."⁴¹ Traditional practices such as the definition of 'family' are still incorporated on some level

35 Dean Spade, *Normal Life* (South End Press 2011), 61-62.

36 Ibid.

37 Ibid. 126-127; Also see: Sarah Schulman, *The Gentrification of the Mind* (University of California Press 2013).

38 Ibid. 61-62.

39 Herring (n10), 85-86.

40 Diduck (n5), 30-31.

41 Ibid. 30.

however.⁴² Norrie has argued that the basis of marriage lies in property, and that one of the modern purposes of marriage is to reduce the level of inequality between the sexes by giving spouses access to each other's income in various forms.⁴³ Norrie states that this is inappropriate for same-sex couples as they tend to be less economically interdependent and more financially equal. At the core of these objections is the feeling that marriage is inappropriate and carries too much historical baggage, same-sex couples should be free to choose the form of their own relationships without having to adhere to marriage. Equal treatment does not need to come in the form of identical legislation, differential treatment is already applied in areas such as discrimination law to achieve equality.⁴⁴ Leckey states: "Substantive equality's premise is that a commitment to recognising groups' equal moral worth and to treating them with equal respect may call for treating them in relevantly different ways."⁴⁵

It could be argued that the arguments put forward by Norrie and Leckey are in a sense an endorsement of secular partnership laws integrating cohabitation, rather than being directly in opposition to equal marriage.⁴⁶ While equal marriage is a step forward, it also means increasing the importance and primacy of marriage, Leckey considers this "regrettable."⁴⁷ Marriage is exclusive towards cohabitants and other families not part of the institution. This may also partially explain why the Conservatives found such enthusiasm for the project. An extension of marriage means an extension of the traditional principles which it is founded upon.

The limits of law reform

One possible counterargument to the contentions of Norrie, Leckey and Spade is that by extending marriage the populace will be educated, same-sex couples will face less discrimination, and therefore substantive equality will be a step closer. However there are issues with relying on the law to achieve these goals. Firstly, there is the question of whether bringing same-sex couples into the 'mould' of mixed-sex couples is really

42 Ibid. 31.

43 Norrie (n21), 366.

44 Ibid. 327.

45 Leckey (n20), 16.

46 Norrie (n21), 368-369.

47 Leckey (n20), 21.

desirable, which has been discussed above.

Secondly, there is a deeper sociological question of whether family law reform can achieve such goals in the first place. It has been suggested that there is a great variety of human responses to law, and using legislation to alter human behaviour is very different from educating people or changing their beliefs.⁴⁸ Nevertheless the law can have a strong symbolic social role.⁴⁹ Bamforth has suggested that it is not the law reform itself but rather the debate surrounding it, and the reactions of the populace, which are significant in changing attitudes.⁵⁰ In many cases it could be argued that society changes the law to a greater extent than the law changes society. Cotterrell has argued that “law is merely one aspect of a complex social whole” and claims that the law is “shaped by [social] forces probably to a far greater extent than it can shape them.”⁵¹ Drawing from this, it could be argued that legal reform forms an important part in driving some forms of social progress, especially if there is a great deal of debate, as we have seen in relation to marriage of same-sex couples. At the same time law reform is only part of the process, and cannot operate in isolation from other factors. This point could apply both to those who claim that equal marriage is progressive, and to those who claim it will solidify the conservatism that surrounds the institution. The counterargument based on social education may not be as strong as it first appears, but at the same time the idea that marriage extension will lead to an inherent reinforcement of heterosexual conservatism may also be an oversimplification.

Conclusion

To conclude, it has been established that sexual conduct is a key area of differential treatment in both jurisdictions; adultery, non-consummation, and incurable impotence all remain as they were without having been redefined for same-sex couples. An investigation of the role of marriage has revealed that commitment is a key element to all couples in modern marriages, and that marriage has a powerful symbolic effect. We have also established that substantive equality is an important and justified goal. Liberal perfectionists would argue that this should be achieved through equal empowerment, and

48 Bamforth (n12) 276-280

49 Ibid. 281-283.

50 Ibid.286.

51 Roger Cotterrell, *The Sociology of Law* (2nd edn Butterworths 1992), 65.

some would emphasise the centrality of an individual's sexual identity as being a key part of this empowerment. Following from these points it can be seen that the failure of both Hollywood and Westminster to transpose the rules of sexual conduct has led to a level of symbolic inequality in the new regime. Having already established that marriage has symbolic strength, that perception is a key part of the reforms, and that commitment and sexuality are central to our ideas of marriage, the failure to update the common law rules on sexual conduct represents a manifest failure to achieve equality.

Finally, the objections to marriage equality have been examined. Substantial questions have been raised over both the appropriateness of marriage as an institution for same-sex couples, and the focus on marriage reform as a means of achieving greater equality. The power of law reform to effect social change has been assessed, and it was concluded that often the law can only play a part in this process, rather than single-handedly driving behaviour and perceptions. This means that any argument for or against marriage equality from a purely legal perspective needs to be contextualised within the wider debate, and that law reform cannot be the sole means through which we attempt to achieve substantive equality.