

Lord Wilson at the Medico-Legal Society in Belfast, Northern Ireland

Marriage is made for Man, not Man for Marriage

18 February 2014¹

Although my practice at the Bar of England and Wales for 25 years and my service in the Family Division of its High Court for the following 12 years were both rooted in family law, in particular in the legal consequences of divorce, it was, I confess, only recently that I began to reflect upon the institution of marriage in any depth. The catalyst was, of course, the debate about the introduction of same sex marriage. Legislation about marriage in Northern Ireland is a matter devolved to the Northern Irish Assembly and I am well aware that your Assembly has resolved not to join England and Wales and, as of a fortnight ago, also Scotland², in introducing a right to marry for people of the same sex³. In an appeal in 2008 about your ban on the adoption of a child by any unmarried couple, the precursors of the judges of the Supreme Court, sitting in the House of Lords, recognised the greater strength of traditional family values in Northern Ireland than

¹ I am indebted to my Judicial Assistant, Mohsin Zaidi, for generating a mass of ideas about possible material for this address.

² <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-25003083>

³ <http://www.newsletter.co.uk/news/regional/assembly-members-vote-to-block-gay-marriage-1-5223296>

elsewhere in the UK⁴; and although tonight I speak on behalf of myself personally, rather than on behalf of the court, I also recognise that greater strength. As an Englishman, I envy it. I also greatly respect the views of those of you which were thus reflected in the Assembly's resolution and I hope that, in coming here tonight at your invitation, I will not cause any offence. In particular if, as a Roman Catholic, you regard marriage as a sacrament entered into before God, or if, as a Protestant, you regard it at least as a gift from God to humanity and thus as "holy" matrimony, and if in either event you tell me that, by the canons of your religion, people of the same sex cannot enter into it, who am I to disagree with you? All I might do is to try to remind you that a marriage, like a divorce in the eyes of Roman Catholics, can be invalid for religious purposes yet valid for secular purposes. The debate has suffered from repeated cross-purposes in that regard. At all events I propose to offer you a historical and international perspective to the institution of marriage; and, as I do so, you will, I believe, readily understand why I, for my part, have come to consider that the concept of marriage is entirely capable of embracing people of the same sex. For, in a word, it is the *elasticity* of the concept which will emerge. As I will try to show, societies have readily changed their rules surrounding marriage to meet changing circumstances and perceptions.

⁴In re P and others (AP) (Appellants) (Northern Ireland) [2008] UKHL 38, para. 72

Any organisation of human society requires that its members should be *classified*. First, we all need to have a name; and our significant connections with other people have also to be recognised. To the extent that they are made by birth and therefore by blood, there is no need for our connections with others to be forged in a ceremony. When I am born, she is automatically my “mother”; he is my “father”; and I am their “son”. These relationships are important because from them flow legal rights and responsibilities; and, for the sake only of good order, they are recorded on my birth certificate. Genetic relationships are fixed at birth and can never be unfixed; but even in that case the law can supervene and, if I am adopted, it will confer on me a different mother and father for its own legal purposes. But, in the case of adults, not subject to a close genetic link, who propose to join in a permanent and exclusive relationship with each other, society has long preferred to recognise the connection between them with a stamp. It stamps them as *married*; and the stamp is applied in a public ceremony. The need for a stamp of “marriage” was first recognised in Mesopotamia in around 2000 BC⁵. Then according to the Book of Genesis, written 600 years later, God said “It is not good that the man should be alone; I will make him a helper suitable for him⁶... For this reason a man shall leave his

⁵ <http://ehistory.osu.edu/world/articles/ArticleView.cfm?AID=58>

⁶ Genesis 2:18

father and his mother, and shall be joined to his wife; and they shall become one flesh⁷.”

I am convinced that sexual relationships which lead to full *cohabitation* between adults are valuable, in particular to any resulting children; I would have thought (although, at my age, I have forgotten the details) that it is highly desirable to be able to apply four eyes, four ears, four hugging arms, four tender lips and two separate stress-levels to the daily care of a child. The more difficult question, beyond the scope of this address, is whether the stamp of *marriage* conduces to the stability of the family unit; but the weight of the evidence in the US, in Sweden and now also in the UK⁸, suggests that it does. Let us then look at different perceptions of what amounts to a marriage.

Take, first, the practice of polygamy or strictly speaking, in that the taking by a wife of more than one husband is virtually unknown, the practice of polygyny. The right to take multiple wives is, I suggest, just as inconsistent with the traditional Western notion of marriage as same sex marriage and yet it is a deeply rooted facet of marriage in other respected cultures. Old Testament Kings, such as Abraham, David and Solomon⁹, practised it. The

⁷ Genesis 2:24

⁸ State of the nation report: poverty, worklessness and welfare dependency in the UK, Page 50. Click [here](#).

⁹ <http://theweek.com/article/index/228541/how-marriage-has-changed-over-centuries>

only condition was set out in the Book of Exodus¹⁰, namely that “if he take him another wife, her food [i.e. the first wife’s food], her raiment and her duty of marriage, shall he not diminish”. As we all know, the Koran permits the taking of up to four wives at any one time and justifies it as a way of providing care for war-widows who might not find new husbands prepared to marry them (and thus to support them) on an exclusive basis¹¹. Polygamy was even permitted by the Brehon laws of Gaelic Ireland. Today it is practised in many parts of the Muslim world. Zulu tribal laws also permit polygamy and have, for example, enabled Mr Zuma, the President of South Africa¹², currently to have four wives as well as 29 children including by previous wives¹³.

The history of Western attitudes towards polygamy is interesting. In 1765 Blackstone, in his famous Commentaries on the Laws of England, dismissed it as “condemned...by the... policy of all prudent states, especially in these northern climates”¹⁴. In Victorian times, however, the West came to feel threatened by it. This was substantially as a result of the rise of

¹⁰ Exodus 21:10

¹¹ The Qur’an, Surat An-Nisa 4:3

¹² <http://www.bbc.co.uk/news/world-africa-17450447>

¹³ <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/southafrica/9205415/South-Africas-president-Jacob-Zuma-to-marry-for-sixth-time.html>

¹⁴ The Laws of England, Blackstone, Vol. I, chapter 15, page 435.

Mormonism, which embraced it. As the Book of Mormon¹⁵ puts it, “and if he has ten virgins given unto him by this law, he cannot commit adultery for they belong to him”. Here, then, were Christian Anglo-Saxons suddenly practising polygamy not only in Utah but apparently also, for example, in pockets of South Wales. In 1866, in the *Hyde* case¹⁶, the newly created English divorce court refused to recognise as valid a marriage celebrated in 1853 between Mormons in what was then the Territory of Utah even though it was only potentially polygamous in the sense that, although the law there permitted polygamy, Mr Hyde had no other purported wife at the time of its celebration. Since he had not been validly married, it followed that the court could not grant him a divorce. In 1862 the US Congress had made entry into a polygamous marriage a criminal offence. Thereafter Mormons in the US continued to enter into them on the premise, in due course rejected by the U.S. Supreme Court, that the 1862 Act had breached their constitutional rights. In 1894 Congress ruled that Utah could not become a state of the union unless it outlawed polygamy¹⁷. The Mormons fell into line and Utah became a state. Even today, however, some fundamentalist Mormons continue to defy the law.

¹⁵ Section 132

¹⁶ *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130

¹⁷http://www.ilovehistory.utah.gov/topics/statehood/index.html?utm_source=twitterfeed&utm_medium=twitter

The law of Northern Ireland, analogous to that of England and Wales, now recognises a polygamous marriage, even if entered into by a person domiciled here, provided that it was celebrated abroad and is only potentially polygamous¹⁸. But in 1988, concerned in particular about the bringing of multiple wives to the U.K. by immigrants from Bangladesh, Parliament provided that only the wife who first came (as opposed to the first wife) would be accorded that status for immigration purposes.

Lord Carey has argued against the introduction of same sex marriage on the basis that it might lead to the introduction of polygamy. The argument seems generally to conjure up a slippery slope once the traditional concept of “one man: one woman” is abandoned. In my view, however, there is no logical nexus between the two potential developments. On the contrary, the introduction of same sex marriage is largely designed to avoid discrimination against gay people, whereas the introduction of polygamy would create discrimination against women even if some of them felt driven to escape poverty by marrying men on that basis.

Take next, by way of another example, the rules which prohibit marriage between certain family members. There was a reasonable list of the

¹⁸ The Polygamous Marriages (Northern Ireland) Order 1995

prohibited degrees in Leviticus¹⁹ – the so-called “Levitical degrees” - but in the eleventh century A.D. a papal decree broadened them out to an astonishing extent – namely to the seventh degree of separation²⁰. The rules were widely ignored but they came in useful if a well-born husband later decided that he wanted the church to annul his marriage. My point is that these rules have changed over time to meet changing social perceptions and that different jurisdictions have different rules. If today, for example, you want to marry your uncle, you should leave the UK and go to Australia, where you would be allowed to enter into what they call an avunculate marriage.²¹ For England and Wales, the basic list of degrees prohibited for *marriage* purposes (there being a narrower list in another statute of persons between whom a sexual act amounts to the *criminal* offence of incest) is set out in the Marriage Act 1949²²; and you have the same list in your 1984 Order. Thus a man cannot marry his mother etc. Of course no list compiled in 1949 would have contemplated attempts at marriage between persons of the same sex: so the list did not trouble to say, for example, that a man could not marry his *father*. When in 2004 the Civil Partnership Act was introduced, it had to provide that persons of the same sex who were in genetic relationships parallel to those specified in the 1949 Act could not

¹⁹ Leviticus 18:6

²⁰ <http://pages.uoregon.edu/dluebke/Reformations441/441MarriageLaw.html>

²¹ Section 23(2) Marriage Act 1961.

²² Marriage Act 1949, Part 1(1) and Schedule 1.

enter into civil partnerships²³; and in England and Wales same sex marriages under the 2013 Act will be prohibited to the same extent.

But the big issue in relation to consanguinity is marriage between first cousins. Although it is prohibited in some jurisdictions, for example in many of the western states of the union, we do not prohibit it. Indeed it is inconceivable that we should do so. For marriage between first cousins is a practice deeply rooted in the culture of our Pakistani and Bangladeshi communities. About one half of their marriages are celebrated between first cousins. Although happily the arrangement of the marriage between the two sets of parents has become less absolute than formerly, in that room is given for the couple – or at least the man – to express an opinion, the exercise remains much more directed by the parents than in our other communities. Siblings appear to favour marriage between their respective children on the basis that it keeps property within the family and that, for the girl, the momentous step is into a union with a boy whose reliability is already established to her family's satisfaction. Let us, however, not hide from the fact that, where one party to it is living abroad, the marriage is also likely to facilitate her or his immigration.

²³ Civil Partnership Act 2004 s3(2) and Part 1 of Schedule 1.

There is lively debate, to which many of you can contribute more than I can, about whether there is any measurably greater risk of genetic abnormality in children born to first cousins. Studies have been conducted of the children of Queen Victoria and Prince Albert, and also, conducted by Charles Darwin himself, of his own children by Emma Wedgwood, in order to see whether their medical problems were thus attributable²⁴. Was a Yorkshire M.P correct to say a few years ago that more disabled babies are born in Bradford's hospitals than generally across the UK²⁵? Apparently all of us have some abnormal genes but, if we marry first cousins with the same abnormal genes, are our children at greater risk of genetic disorder? On any view there is no doubt that, if perpetuated down the generations, marriage between those closely related by blood precipitates disabling abnormalities. It even contributed to the end of the Hapsburg rule in Spain. Throughout the 16th and 17th centuries 80% of marriages of the Spanish Kings were effected within the close family and one overt consequence was the development of a distinctive protruding lip, known as the Hapsburg Lip. The lip of Charles II, who ascended the Spanish throne in 1665 at the age of three, was so deformed that, because also of an enlarged tongue, it was difficult for him to speak and he also suffered stunted growth, physical and

²⁴ <http://www.sciencedaily.com/releases/2010/05/100503111420.htm>

²⁵ <http://www.telegraph.co.uk/health/healthnews/7957808/700-children-born-with-genetic-disabilities-due-to-cousin-marriages-every-year.html>

mental. He died in 1700 and the Hapsburg dynasty in Spain came to an end upon his death.

These prohibitions on marriage within the family used to extend beyond consanguinity to what is called affinity, namely to relationships created by earlier marriages: in other words there was a ban on your marrying certain of your in-laws and certain of your step-relations even though there was no genetic relationship between you and them. In Victorian England there was a particular problem about the ban on marrying your deceased wife's sister. Say your wife died. Who was to look after your children? Her unmarried sister, obviously! She came to live in your home. You fell in love with her. But you couldn't marry her. This example of stunted love was eventually addressed by the Deceased Wife's Sister's Marriage Act 1907. But other prohibitions by reason of affinity remained. Your only means of escape from them was to do what John and Gillian Dare (who were stepfather and stepdaughter) did in 1982, namely to procure an Act of Parliament²⁶ which merely lifted the ban in your particular case. In 1986²⁷ these further prohibitions were largely swept away. But a ban on your marriage with any of your adoptive children remains²⁸: there is no genetic danger there and the

²⁶ John Francis Dare and Gillian Loder Dare (Marriage Enabling) Act 1982

²⁷ Marriage (Prohibited Degrees of Relationship) Act 1986

²⁸ Marriage Act 1949, Section 1 and Schedule 1.

justification appears to be that it is wrong for the law to bless the possible development of erotic feelings within the nuclear family.

Sometimes a law goes further than to define *entitlement* to marry by casting an *obligation* on a person to marry another person of a specified class. The best example is set out in the Book of Deuteronomy²⁹. It is called levirate marriage because in Latin “levir” means “brother-in-law”³⁰. Just as until the 20th century a woman could not marry her deceased sister’s husband, so also a man could not marry his deceased brother’s wife³¹. Think of Hamlet cursing his uncle Claudius and his mother Gertrude for sleeping together between what he described as “incestuous sheets”³² following his father’s death. But the doctrine of levirate marriage said that things were quite different if your deceased brother and his wife had not produced an heir. Deuteronomy said that, in *those* circumstances, you were not merely free to marry her but had a positive duty to do so, so that, in particular, any son of your marriage to her would bear your brother’s name, would be treated his heir and so would carry on that line of the family. Although by the sixteenth century the actual *obligation* under canon law to marry your brother’s widow in those circumstances had long since ceased to exist, the

²⁹ Deuteronomy 25:5-6

³⁰ tnnonline.net/faq/L/Levirate_Marriage.pdf

³¹ Deceased Brother’s Widow’s Marriage Act, 1921

³² Hamlet, Act 1, Scene 2, line 158

Bible's endorsement of levirate marriage proved most unhelpful to Henry VIII. Prior to her marriage to him, Catherine of Aragon had been married to his brother, Arthur, who had died without issue. In vainly trying to persuade the Pope to annul his marriage to Catherine, Henry's main argument was that a marriage to one's sister-in-law was void for affinity. The response however, was that, in that Arthur had died without issue, Henry's had been a levirate marriage, formerly compulsory but on any view still permissible³³. So Henry broke away from Rome and passed a law that the marriage was void. Mary, who was the product of that marriage, later repealed her father's law³⁴ but Elizabeth, who was the product of his next marriage, in effect restored it³⁵. Had it not been for levirate marriage, would we now have a Church of England?

Consider, next, the age at which people are allowed to get married. It varies. A society will choose the age which suits it best. In Africa and Southern Asia marriage between the onset of puberty and the age of 18 is widely permitted and, for the girl, encouraged; and in some communities in Southern Asia it has been expected that she should be married even prior to

³³ www.medievalists.net/files/11010101.pdf

³⁴ <http://www.royal.gov.uk/historyofthemonarchy/kingsandqueensofengland/thetudors/mariyi.aspx>

³⁵ <http://www.royal.gov.uk/HistoryoftheMonarchy/KingsandQueensofEngland/TheTudors/ElizabethI.as>

her first menstruation. Saudi Arabia has no minimum age at all³⁶. Most Western societies now favour a minimum age of about 18, with exceptions along the lines of our law which permits marriage at 16 or 17 with parental or court consent. In Shakespearian England the common law provided that the minimum age was 12 for a girl and 14 for a boy on the basis that, once they were physically capable of becoming parents, they should be capable of getting married. The modern increase in the minimum age has been driven partly by a desire to prevent older men using marriage as a front for sexual abuse of young girls. China, desperately concerned to control its population, now even makes its minimum age 22 for men and 20 for women³⁷.

In our society there is no current controversy about the minimum age for marriage. That is because, to the extent that people want to get married at all³⁸, they prefer to get married later than hitherto. It is intriguing that marriage is increasingly used to confirm the *success* of a relationship that has already been reflected in cohabitation, in an adequate joint income, sometimes in a jointly owned home and, perhaps, in the birth of children, rather than to *herald* a relationship which the parties hope will thus be

³⁶ <http://saudiarabia.angloinfo.com/family/marriage-partnerships/>

³⁷ http://beijing.usembassy-china.org.cn/acs_married.html

³⁸ <http://www.telegraph.co.uk/news/uknews/10296611/Marriage-no-longer-the-foundation-stone-of-family-life.html>

attended. But I must be strict with myself: for my subject is the legal boundaries around marriage, i.e. what people are permitted to do, rather than what, within those confines, they choose to do.

Recently, of course, we have had to consider the interface between the law of marriage and a person's right to legal recognition of any reassignment of his or her gender. Let us take a person reassigned from male to female. Following reassignment she can of course marry a male or, currently, enter into a civil partnership with a female. But what if, prior to the reassignment, she was previously married, i.e. to a female? The answer given by the Gender Recognition Act 2004, which extends to Northern Ireland, is that her reassignment will not be fully recognised until her marriage has been duly dissolved³⁹. If, thereafter and notwithstanding the change, the two women wish to continue to live together, they can do so – and they are of course free to enter into a civil partnership. But, to the extent that same sex marriage were to become permissible, these problems would evaporate; and so the English/Welsh Act of 2013 provides that the reassignment can be fully recognised without dissolution of a prior marriage if (to continue with my example) the original wife were to consent to its continuation⁴⁰.

³⁹ Gender Recognition Act 2004, Section 5.

⁴⁰ Marriage (Same Sex Couples Act) 2013 Section 5 and Schedule 5.

You will say “well, at the very minimum, marriage can take place only between two living persons”. Actually, not so! In 1959 a dam burst and flooded the town of Fréjus in France. Hundreds of lives were lost. When General de Gaulle visited the stricken town, a girl pleaded with him still to be allowed to marry her drowned fiancé He was so touched that he caused the French Parliament to pass a law which enabled her to do so⁴¹.

Apparently about 20 posthumous marriages take place every year⁴² in France: you have to prove that you were genuinely engaged to the deceased and that his/her parents still approve of the marriage. It seems bizarre but, if it really helps the broken-hearted, we have at least to ask: why not?

All these are *current* examples of the disparate boundaries of entitlement to marry but I turn to four *historical* examples.

First, priests. In 1552, following the break with Rome, Parliament allowed priests to get married⁴³. The previous inability of the priest to do so had for some reason not prevented their having children. Parliament seems to have been as much concerned with the rights of their children and of their

⁴¹ <http://www.theguardian.com/world/2004/feb/28/france.comment>. See also

<http://www.nytimes.com/2004/02/19/world/paris-journal-a-love-that-transcends-death-is-blessed-by-the-state.html>

⁴² <http://www.theguardian.com/world/2004/feb/28/france.comment>

⁴³ An Act for the Declaration of a Statute made for the Marriage of Priests, and for the Legitimation of their Children 1552, Statutes at Large, I Hen. VIII to 7 EDW. VI, page 585.

children's mothers following their deaths as with any perception that the priests needed to be unleashed from shackles of chastity genuinely burdensome to them.

Second, slaves. Prior to the Civil War, slaves in the U.S were not generally allowed to get married and their purported marriages were of no legal effect⁴⁴. They had no legal status as persons and were therefore incapable of consenting to marriage. Furthermore slave women could more easily be sexually exploited by their masters if they were not legally married; and slave men could more readily be sold or otherwise deployed if they lacked obligations to wives and children which their masters might have been required to respect⁴⁵. After the war, of course, former slaves had the right to marry. Even so, southern states made crude provisions in this regard. Five states simply provided that all freed men who were then cohabiting as husband and wife should be taken to be married – irrespective of whether they wanted to be married or indeed to continue to cohabit!⁴⁶ Another state gave the cohabitants nine months in which either to get married or to cease cohabitation on pain of prosecution thereafter for adultery⁴⁷.

⁴⁴ <http://www.npr.org/templates/story/story.php?storyId=123608207>

⁴⁵ *A History of Marriage*, Elizabeth Abbott, Page 333.

⁴⁶ *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, Katherine M. Franke, page 277.

⁴⁷ *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, Katherine M. Franke, Page 278

Third, different Christian beliefs. Even up until 1863, here in Ireland, a marriage between a Protestant and a Roman Catholic was void.⁴⁸

Fourth, different races. In 1924 the state of Virginia passed the Racial Integrity Act which made it a crime for a white person to marry a black person and which also decreed that one drop of African ancestry made a person black⁴⁹. The Nazis studied such laws when evolving the 1935 Nuremberg Laws which were designed to protect the so-called purity of Aryan blood from contamination with Jewish blood⁵⁰. As a boy growing up in England in the 1950s, I remember that the influx of our Afro-Caribbean citizens after the war caused real public fear, reflective no doubt of the sentiments behind the laws of apartheid in South Africa, that, within a couple of generations, all our skin would be brown and would demonstrate an irreversible degeneration of our society. Mildred and Richard Loving lived in Virginia and were black and white respectively. In 1958 they got married in Washington D.C but returned to live in Virginia. In 1959 they were convicted of miscegenation under the Virginia Act and a prison sentence upon them was suspended on terms that they left Virginia and did not set foot inside it for 25 years. In the Supreme Court of Virginia a judge

⁴⁸ Marriage and Divorce, Rita J. Simon and Howard Altstein, page 47.

⁴⁹ http://www2.vcdh.virginia.edu/encounter/projects/monacans/Contemporary_Monacans/racial.html

⁵⁰ <https://people.creighton.edu/~idc24708/Genes/Eugenics/History%20of%20Eugenics.htm>

observed “Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents... [This] shows that he did not intend for the races to mix”⁵¹. But in 1967, in the seminal decision of *Loving v Virginia*, the U.S. Supreme Court held that the 1924 Act (and, by extension, analogous Acts in 15 other southern states) violated the couple’s constitutional right to equal treatment⁵². In the UK too inter-racial marriage or cohabitation is no longer regarded as a threat. Apparently two million of us are now of mixed race⁵³; and, when we see signs of it in the way a person looks, we no longer give it a second thought.

Occasionally a right to marry is linked to some wholly unrelated social objective. Thus in 1971 the State of Wisconsin decreed that a man obliged by a court order to pay child support could not get married without establishing that he was not in arrears under the order. In 1978 the U.S. Supreme Court decided – unsurprisingly – that the law was unconstitutional in that it violated a fundamental right to marry inherent in the Equal Protection Clause of the 14th amendment⁵⁴.

⁵¹ ‘A History of Marriage’, Elizabeth Abbott, page 330.

⁵² *Loving v. Virginia*, 388 U.S. 1 (1967).

⁵³ <http://www.bbc.co.uk/news/uk-15164970>

⁵⁴ *Zablocki, Milwaukee Country Clerk v Redhail*. No. 76-879.

But, perhaps above all, consider the impact of the availability of *divorce* on the traditional Christian concept of marriage. Divorce is now so much a part of our culture that perhaps we do not realise the extraordinary inroad which it has made upon the traditional concept except when, in church, we hear the couple promise – in Cranmer’s fine words - to take each other “for better or worse, for richer for poorer, in sickness and in health, to love and to cherish, till death us do part”.⁵⁵ For, while we listen to the happy couple as they make these promises, we also fear for them because we know that about 42% of marriages celebrated in the UK today will *not* endure until death do them part⁵⁶. The uncomfortable mismatch between the promises and the reality arises because divorce is totally alien to the Christian concept. “What therefore God hath joined together,” said Christ, “let no man put asunder”⁵⁷. In many pre-Christian societies, such as Rome in Republican times, divorce was available⁵⁸ – often just to husbands, of course – but, when mediaeval secular law came to reflect Christian teaching, divorce found no place at all. One might expect that, following the Reformation driven by Henry VIII, Britain would have been in the vanguard of states which introduced divorce. In fact, by European standards, it was slow to do

⁵⁵ The Book of Common Prayer 1549

⁵⁶ <http://www.ons.gov.uk/ons/rel/vsob1/divorces-in-england-and-wales/2011/sty-what-percentage-of-marriages-end-in-divorce.html>

⁵⁷ Mark 10:9

⁵⁸ <http://www.pbs.org/empires/romans/empire/weddings.html>

so. The teachings of Luther and Calvin in favour of a right to divorce had greater traction on the continent of Europe and therefore in Scotland, which has always leaned towards the continent in legal matters. The French Revolutionaries even sanctioned no-fault divorce⁵⁹ but Napoleon put a stop to that. It was only in Victorian times that the call in England and Wales for a facility to divorce became irresistible. Let me identify three reasons for this. First, the basis upon which people chose to be married had changed. Instead of a property transaction, often arranged by the couple's parents in order to secure a dowry for the husband and life-long protection for the wife, or even to cement a valuable union between the two families, marriage had become, at least in part, an expression of love between the couple; and so their behaviour towards each other during the marriage had assumed a significance which it had lacked at a time when marriage had been a property transaction. [Incidentally I have always been captivated by the U.S. Declaration of Independence 1776⁶⁰, which makes the pursuit of happiness into a right of man. Apparently Jefferson and the others crossed out a reference to a right of property and wrote in the pursuit of happiness. Bravo!] Second, the increased length of human life generated greater opportunity for strain within a marriage – partly because we do all change as the years go by. Third, the absence of divorce had not inhibited many husbands – and even a few brave wives – from leaving unhappy marriages

⁵⁹ The Reform of French Divorce Law, Dominik Lasok

and entering new relationships; but of course they had not been able to regularise their relationships in a second marriage and so the children born as a result of them had been illegitimate (being a description which, I am happy to say, has become off-limits during my professional lifetime: the only thing which can possibly be described as illegitimate is the conduct, if adulterous, of the parents). In other words the absence of divorce was paradoxically preventing marriage. So, in 1857, Parliament introduced divorce for England and Wales⁶¹ though not of course for Ireland. Its availability was at first limited, in particular for wives, but since then, as we all know, it has been greatly extended and the gender imbalance eliminated. It is a dreadful pity that, here in Northern Ireland as in England and Wales, we misrepresent the availability in *practice* of no-fault divorce, prior to two years of separation, as fault-based divorce; but sadly there seems no longer to be any appetite for a legal move towards transparency in that regard. On any view the granting of an undefended divorce no longer deserves to be a judicial exercise because there is in effect nothing for a judge to decide. But the availability of divorce has had a profound effect on social demographics. *Death* has always enabled the surviving spouse to remarry but the availability of *divorce* precipitates many more remarriages and in their wake come many more step-families and relationships of the half-blood. So the blended family now often replaces the nuclear family. I am not convinced that it is a

⁶⁰ http://www.archives.gov/exhibits/charters/declaration_transcript.html

bad thing: might it not be healthier for children to learn at a very early age to cope with relationships in a mixed and wider family group?

So far I have been inviting you to consider the changing rules about who can enter into marriage and the emergence of rules for easy exit from marriage (otherwise than by death) which have altered the whole concept. But my presentation would be incomplete without reference to changes in the legal effects of marriage. For centuries a wife had no right under our law in England and Ireland to hold property, to enter into a contract or to sue a third party for damages: this was the effect of the doctrine of coverture, under which her legal identity was *covered* up by her husband. This changed in 1882⁶². Formerly a husband did not commit the offence of rape if the victim was his wife. This changed in 1991⁶³. It used to be a criminal offence to commit adultery. This changed in 1857⁶⁴. In divorce proceedings a wife had no right to any part of her husband's capital and her right to be supported by his periodical payments fell away if the court considered her to have been the "guilty party". This changed in the 1960s. Indeed ever since then we judges have been tinkering – and, in introducing in 2000 what soon became a presumption that matrimonial property should

⁶¹ The Matrimonial Causes Act 1857

⁶² The Married Women's Property Act 1882

⁶³ R v R [1991] UKHL 12

⁶⁴ The Matrimonial Causes Act 1857

be shared equally, Lord Nicholls (not a family lawyer but a breath of fresh air) did rather more than to tinker – with the financial consequences of divorce⁶⁵. But I want in particular to draw your attention to the rise of the pre-nuptial contract. Until 2010 the understanding of family lawyers was that engaged couples could not contract out of the financial consequences of any divorce (whatever they might happen to be at the time when it occurred). The stance adopted by the law was: “If you choose to get married, you buy in to the ordinary legal consequences of it. Marriage is a monolith. You can’t pick bits out of it”. Underlying the law’s stance was a patronising attitude to the effect that engaged women, head-over-heels in love, could hardly be expected to make rational decisions about provision for themselves in the event of divorce. But all this changed with the seminal decision of the majority in the Supreme Court in the Radmacher case (the one about the German heiress) in 2010⁶⁶. Now, yes, if two people get engaged and if, having taken legal advice or having chosen not to do so, they freely agree that, in the event of their divorce, the financial consequences will be X rather than whatever is provided by the ordinary law of the land, the courts will, at any rate normally, impose on them no consequences other than X. Indeed we now read that Parliament is likely to enshrine this in a

⁶⁵ White v. White [2000] UKHL 54

⁶⁶ [2010] UKSC 42

statutory provision at any rate for England and Wales⁶⁷. The only caveat is that, since no one can sign away the legal rights of children, born or unborn, provision for *them* can never be less than the ordinary law allows, even if, indirectly, the parent who looks after them will benefit from such provision. All this is relevant to my thesis. For we no longer provide for marriage on a take-it-or-leave-it basis. We let people pick and mix. Marriage is still a *status* but the Radmacher case was a dramatic shift towards accepting that the parties could agree to opt out of bits of it. And, on the same subject, did you know that in a few states of the U.S, such as Arizona⁶⁸, a couple can enter into what is called a Covenant Marriage under which they agree (and the state will uphold) that the only grounds for any divorce between them will be A, B and C, rather than the grounds provided by the state's ordinary law.

All of which brings me back to same sex marriage. When, like me, you reflect on the benefits and, yes of course, also on certain drawbacks of our having incorporated the European Convention on Human Rights into our law in 1998 and of our then having committed ourselves to affording considerable respect to the interpretation of Convention rights favoured by the court in Strasbourg, please do not forget the dramatic improvement in the rights of minority groups, such as gay and trans-gender people, which

⁶⁷ <http://www.telegraph.co.uk/women/sex/divorce/10614831/As-newlyweds-our-combined-fortune-amounted-to...-a-sofa.html>

⁶⁸ www.azcourts.gov/Portals/31/Other%20DR/covenant.pdf

the Convention, as interpreted in Strasbourg, has achieved and which, over 20 years, has raised our life together in this Kingdom to a higher level of mutual respect. It was the Convention which, by the Strasbourg decision in the *Dudgeon* case in 1981⁶⁹, led to your decriminalisation of homosexual acts here. It was the Convention which, by the Strasbourg decision in the *Sutherland* case in 1996, led to the equalisation of the age of consent for same sex acts with that for opposite sex acts⁷⁰. It was the Convention which, by the Strasbourg decision in the *Smith and Grady* case in 1999, led to the right of gay people to serve openly in our armed forces⁷¹. These are milestones along the road to equal treatment for gay people. Wisely, however, the Strasbourg court has stopped short of concluding that the Convention requires states to allow same sex people to adopt or to get married. It concedes that such is a matter for each state to choose for itself, provided always that the choice made is compatible with people's right not to suffer discrimination in the enjoyment of their family life. Last year, in relation to the linked issue of adoption, your Court of Appeal issued a resounding ruling in that regard. It decided that the Northern Irish ban on the adoption of a child by civil partners (or even by just one of them) was discriminatory⁷². Heterosexuals, some of whom, understandably in the light

⁶⁹ <http://www3.imperial.ac.uk/equality/sexualorientation/information/lgbtrights>

⁷⁰ http://www.stonewall.org.uk/at_home/immigration_asylum_and_international/2681.asp

⁷¹ <http://www2.law.ox.ac.uk/opbp/GaysinMilitaryFinal%20Submission.pdf>

⁷² Northern Ireland Human Rights Commission, Re Judicial Review [2013] NICA 37

of their genetic orientation, may instinctively recoil from the contemplation of some homosexual acts, should not allow their own sexual instincts to invade a completely different part of their brain, namely their judgement upon what the law should permit gay people to do.

Same sex marriage is not a novel concept. It was allowed in ancient Egypt and in Republican Rome although it became outlawed under the Roman Empire⁷³. Then, for the next 1500 years, Christian doctrine (and I say this as a committed member of the Church of England) cast an irrational opprobrium upon all sexual acts other than procreative ones. In my view, the malign effects of the doctrine leave a residue even today. At all events, the recent re-emergence of the right of same sex couples to marry began in the Netherlands in 2001. Since then it has been introduced in eight other European countries, including Spain and recently France; and the right is now established in 13 U.S. states. In some states, however, the reform has been mishandled. When in 2009 Connecticut introduced same sex marriage, it decreed that every same sex couple in a civil union should instead be taken to be married – irrespective of whether the couple wanted it⁷⁴. History in relation to the legal treatment of freed couples following the civil war was unfortunately there repeating itself.

⁷³ <http://www.randomhistory.com/history-of-gay-marriage.html>

I wonder whether Northern Ireland will for long be able to hold back the tide in favour of same sex marriages which laps against all Western shores. On any view, however, we have to acknowledge that societies in Africa, Asia and the Middle East regard the issue very differently. This difference should not rank as of the utmost importance in the big scheme of world problems but, as we know from our own lives – our married lives, a passionate difference can jeopardise consensus in other areas. In the light of the whole direction of my address, you will understand why, at any rate, I favour same sex marriage. I accept that a number of same sex couples do not welcome, or at least do not propose to exercise, a right to marry. A few of them seem even to enjoy the sensation of being outside the mainstream of society and do not wish to feel swept into it. Mae West once said “marriage is a fine institution but I ain’t ready for an institution”⁷⁵. Some commentators argue that to extend marriage to same sex couples is to go in the wrong direction and that the better course would be to abolish marriage as an institution with legal effects⁷⁶ and, instead, to pitch a wide family tent which would shelter not just couples, straight or gay, and their children but all those genetic members of it who, for one reason or another, live alone. In our society marriage will surely never again be that all-consuming imperative aspiration which strikes us as so extraordinary when we read our great 19th

⁷⁴ www.glad.org/uploads/docs/publications/ct-civil-union.pdf

⁷⁵ <http://allaboutmae.com/>

⁷⁶ See e.g. http://www.slate.com/articles/news_and_politics/readme/2003/07/abolish_marriage.html

century novels. But it is a structure which I definitely would not jettison. Far from destroying marriage, I think that to allow same sex couples into it strengthens it; but in my view the most important benefit of same sex marriage is the symbol that it holds up to the heterosexual community, not forgetting teenagers apprehensively trying to make sense of their own emerging sexuality, that each of the two types of intimate adult love is as valid as the other. The availability of marriage properly *dignifies* same sex love. To the question “why should same sex couples, who can as civil partners already enjoy all relevant rights, be allowed to get married?”, the proper response in my view is “why shouldn’t they?”. And, to *that* question, it is, as I respectfully suggest to you, not good enough to reply “because marriage is between a man and a woman”. That would be to elevate a feature of the practice of marriage in a number of prior centuries, however universal, into a necessarily intrinsic constituent of it.