MARRIAGE FROM THE EIGHTEENTH CENTURY TO THE TWENTY-FIRST CENTURY
Some reflections on *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130

The Incorporated Council of Law Reporting Annual Lecture for 2013 given by Sir James Munby, President of the Family Division, on 25 April 2013 at the Law Society

From the very earliest days of the Council's activities – it appears on page 133 of the first volume of the Council's Divorce reports – comes what can probably lay claim to being a passage more familiar to the non-lawyer than almost any other to be found in a law report. It forms part of every marriage ceremony performed in a Register Office. It appears, framed, on the wall of most Register Offices. I refer, of course, to the famous statement in *Hyde v Hyde* by Sir James Wilde (better know to posterity as Lord Penzance[1]):

> "marriage, as understood in Christendom" – this is replaced in modern official usage by a reference to the law of England – "may … be defined as the voluntary union for life of one man and one woman, to the exclusion of all others."[2]

Thus, what the Victorians thought of as the legal concept of marriage. But what of the purposes of marriage? Our ancestors would probably have turned to the Book of Common Prayer, with its statement of "the causes for which Matrimony was ordained":

> "First, It was ordained for the procreation of children, to be brought up in the fear and nurture of the Lord, and to the praise of his holy Name. Secondly, It was ordained for a remedy against sin, and to avoid fornication; that such persons as have not the gift of continency might marry, and keep themselves undefiled members of Christ's body. Thirdly, It was ordained for the mutual society, help, and comfort, that the one ought to have of the other, both in prosperity and adversity."

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1 I notice that in ICLR Online modern editorial intervention has perpetrated the solecism of identifying the judge as Lord Penzance. Judgment was delivered on 26 March 1866; Wilde was not created Lord Penzance until April 1869.

2 *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130, 133.

Stripped of the language of religion: the procreation and nurture of children; sex; and the "mutual society" of the spouses.

And what of the Victorian view of the nature of the relationship between the spouses? The definitive answer was given by the first President of the Probate Divorce and Admiralty Division, Sir James Hannen, in *Durham v Durham* in 1885:[3] "protection on the part of the man, and submission on the part of the woman."

Almost 150 years after *Hyde v Hyde*, at a time when Parliament is considering whether to legalise same-sex marriage and the Supreme Court of the United States of America is grappling with constitutional issues about the same topic,[4] I venture to ask, How much of all this still survives today?

First, a little more about *Hyde v Hyde*.

The petitioner, an Englishman, met his future wife, the respondent, in London. Both were Mormons. They went to Salt Lake City, Utah (at that time a Federal Territory, not a State) in the United States, where they were married. The marriage was celebrated by none other than Brigham Young, the president of the Mormon church, and the governor of the territory, according to the rites and ceremonies of the Mormons. The petitioner went on a mission to the Sandwich Islands, leaving the respondent in Utah. On his arrival at the Sandwich Islands, he renounced the Mormon faith. A sentence of excommunication was pronounced against him in Utah and his wife was declared free to marry again. She contracted a marriage according to the Mormon form at Salt Lake City with the co-respondent, with whom she had since cohabited. This was the adultery complained of by the petitioner in his petition for dissolution of marriage. The evidence was that at the time when the marriage between the petitioner and the respondent was celebrated, polygamy was a part of the Mormon doctrine, and was the common custom in Utah.

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[3] *Durham v Durham* (1885) 10 PD 80, 82.

[4] Appeals from *Perry v Brown* 671 F 3d 1052 (2012) and *Windsor v United States* 699 F 3d 169 (2012).

Sir James Wilde dismissed the petition. His reasons are summarised, with characteristic accuracy and succinctness, in the head-note:

> "A marriage contracted in a country where polygamy is lawful, between a man and a woman who profess a faith which allows polygamy, is not a marriage as understood in Christendom; and although it is a valid marriage by the lex loci, and at the time when it was contracted both the man and the woman were single and competent to contract marriage, the English Matrimonial Court will not recognise it as a valid marriage in a suit instituted by one of the parties against the other for the purpose of enforcing matrimonial duties, or obtaining relief for a breach of matrimonial obligations."

The whole of the judgment merits the most careful study. Here I need refer only to two short passages: one,[5] where Sir James said "it is obvious that the matrimonial law of this country is adapted to the Christian marriage;" the other,[6] where, referring to polygamy, he said "it may be well doubted whether it would become the tribunals of this country to enforce the duties (even if we knew them) which belong to a system so utterly at variance with the Christian conception of marriage, and so revolting to the ideas we entertain of the social position to be accorded to the weaker sex."[7]

Now it might be thought that, even without taking the longer historical perspective available to us today, there are three slightly puzzling features of *Hyde v Hyde*. The first, and most obvious, is that by 1866 marriage was no longer "for life". Judicially granted divorce had been introduced by the Matrimonial Causes Act 1857, which also established the Court for Divorce and Matrimonial Causes, the ancestor of today's Family Division. The grounds for divorce were limited and discriminated between husband and wife. Section 27 of the Act permitted a husband to petition for divorce

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5 *Hyde v Hyde*, 135.

6 Ibid, 136.

7 For the classic identification of the woman as the "weaker vessel" see *Pretty v Pretty (The King's Proctor Shewing Cause)* [1911] P 83, 87, 89, per Bargrave Deane J: "Some people think that … you must treat men and women on the same footing. But this Court has not taken, and, I hope, never will take, that view. I trust that, in dealing with these cases, it will ever be remembered that the woman is the weaker vessel: that her habits of thought and feminine weaknesses are different from those of the man." He added: "this Court is always willing to recognize the weakness of the sex". The contrast with the views more recently expressed by Oliver J (as he then was) in *Midland Bank Trust Co Ltd v Green (No 3)* [1979] Ch 496, 527, is striking.

on the ground that his wife had been guilty of "adultery". A wife, in contrast, could petition for divorce on the ground that her husband had been guilty of "incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce à mensâ et thoro, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards". I shall return in due course to some of the implications of this.

The second puzzling feature of *Hyde v Hyde* is its failure to engage at all with the fact that by 1866, not very long after the complete reorganisation of British India in the aftermath of the Mutiny of 1857, Britain was, if not already, well on the way to becoming, the world's largest Muslim power. And Islam, to say the obvious, permits polygamy. Sir James referred frequently in his judgment to "Christendom" or to "the Christian world" or to "Christian marriage" and drew a contrast with what he referred to[8] as "countries peopled by a large section of the human race in which men and women do not live or cohabit together upon these terms – countries in which this Institution and status are not known", adding "In such parts the men take to themselves several women". By way of quotation from what Lord Brougham had once said,[9] he referred to "Turkish or other marriages among infidel nations." He cited a Privy Council case[10] about Parsee marriages. But what is perhaps striking is that Sir James said nothing about the British treatment of Muslim or other customary marriages in India[11] or, coming closer to home, about Jewish marriage.[12] And what of marriage as practised by the pre-Christian Romans – or was this in his view not marriage at all? Nor does he seem to have grappled with the implications of the fact, proved in evidence before him,[13] that a potentially polygamous marriage by Brigham Young in Utah would, if valid in Utah, be recognised as valid by the Supreme Court of that indubitably Christian country the United States of America.

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8 *Hyde v Hyde*, 133.

9 *Warrender v Warrender* (1835) 2 Cl&F 488, 531.

10 *Ardaseer Cursetjee v Perozeboye* (1856) 10 MooPC 375, 419.

11 As to which see section 5 of the Punjab Laws Act 1872.

12 For both of which see Fitzpatrick, Non-Christian Marriage, [1900] 2 Journal of Comparative Legislation, NS, 359. I am indebted to Max Kaufman for the reference to this most interesting article.

13 *Hyde v Hyde*, 131.

The third aspect of *Hyde v Hyde* to be noted is the contrast with the approach earlier adopted by Sir William Scott (later Lord Stowell), perhaps the greatest of all the distinguished judges who have sat in the seat it is now my privilege to occupy. Ever since the Act for the Better Preventing Clandestine Marriages (Lord Hardwicke's Marriage Act) was enacted in 1753, the meaning of marriage in English law has been a matter for Parliament and regulated by statute. The right to determine what constitutes a valid marriage was removed from the Church and assumed by the State. Consistently with this, and long before the introduction by the General Registration Act 1836 of civil marriage before a Registrar, Sir William, sitting in the Consistory Court of London, could say that marriage "is a contract according to the law of nature, antecedent to civil institution."[14] Contrasting the "notion that prevailed in the dark ages, of the mysterious nature of the contract of marriage, in which its spiritual nature almost entirely obliterated its civil character", Sir William said that "In more modern times it has been considered, in its proper light, as a civil contract, as well as a religious vow".[15]

Moreover, Lord Hardwicke's Act marked the clear severance of marriage as recognised by the State from exclusively Christian marriage, for section 18 recognised marriages between Jews. Scott recognised that the powers of the Ecclesiastical Courts of the Church of England, which at that time had sole jurisdiction in matters of marriage, were not confined to Christian marriage.[16] As he put it, "The marriages of Jews are expressly protected by the marriage act; and persons of that persuasion are as

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14 *Lindo by her Guardian v Belisario* (1795) 1 Hag Con 216, 230. The full passage reads as follows: "It is a contract according to the law of nature, antecedent to civil institution, and which my take place to all intents and purposes, wherever two persons of different sexes engage, by mutual contracts, to live together. Our first parents lived not in political society, but as individuals, without the regulation of any institutions of that kind. It is hardly necessary to enter something of a protest against the opinion, if any such opinion exists, that a mere commerce between the sexes is itself marriage. A marriage is not every casual commerce, nor would it be so even in the law of nature. A mere casual commerce, without the intention of cohabitation, and bringing up of children, would not constitute marriage under any supposition. But when two persons agree to have that commerce for the procreation and bringing up of children, and for such lasting cohabitation, that, in a state of nature, would be a marriage, and, in the absence of all civil and religious institutes, might safely be presumed to be, as it is popularly called, a marriage in the sight of God. It has been made a question how long the cohabitation must continue by the law of nature, whether to the end of life? Without pursuing that discussion, it is enough to say that it cannot be a mere casual and temporary commerce, but must be a contract at least extending to such purposes of a more permanent nature, in the intention of the parties. The contract, thus formed in the state of nature, is adopted as a contract of the greatest importance in civil institutions, and it is charged with a vast variety of obligations merely civil."

15 *Turner v Meyers (falsely calling herself Turner)* (1808) 1 Hag Con 414, 416-417.

16 For a discussion of this in the context of Jewish marriages see Fitzpatrick, 369-374.

much entitled to the justice of the country as any others, for I take the doctrine to be that all persons who stand in the relation of husband and wife in any way the law allows, as by a foreign marriage, or by a domestic marriage not contrary to law, have a claim to relief on the violation of any matrimonial duty."[17] In a later case he said that the Ecclesiastical Courts exercised "an undoubted jurisdiction upon the general law of marriage, so far as the legality of that contract is constituted by the law of this country"; indeed in the very case in which he said that, Sir William determined the question whether an alleged Jewish marriage was valid, applying Jewish law as explained by the Beth Din.[18]

Down the years there have been many changes in the law of marriage and divorce. I must be selective. In relation to marriage let me give three examples. (1) Since *Hyde v Hyde* the law relating to prohibited degrees has been modified by a succession of statutes[19] culminating in the Marriage (Prohibited Degrees of Relationship) Act 1986. (2) The ages of capacity to marry (14 for males and 12 for females) were altered to 16 for each sex by the Age of Marriage Act 1929. (3) Although the actual decision in *Hyde v Hyde* remained good law for over a century, English law now recognises as valid an actually polygamous marriage where both parties were domiciled outside England and Wales at its inception and a potentially (but not actually) polygamous marriage even if the parties were domiciled here at formation.[20] English law also recognises as valid a marriage valid under the *lex loci celebrationis* even though the parties were at the time of the marriage under the age of 16.[21]

In relation to divorce the law has been transformed since Lord Penzance's day. The Matrimonial Causes Act 1884 abolished the right to enforce a decree for the restitution of conjugal rights by attachment, so neither husband nor wife could any longer force the other to return to conjugal association. The Matrimonial Causes Act 1923 removed much of the previous discrimination from the divorce law: section 1 of

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17 *D'Aguilar v D'Aguilar* (1794) 1 Hag Ecc 773.

18 *Lindo v Belisario*. To similar effect see *Ruding v Smith* (1821) 2 Hag Con 371, 384-385.

19 See the Colonial Marriage and Divorce (Deceased Wife's Sister) Act 1906, the Deceased Wife's Sister's Marriage Act 1907, the Deceased Brother's Widow's Marriage Act 1921, the Marriage (Prohibited Degrees of Relationship) Act 1931 and the Marriage (Enabling) Act 1960.

20 See the Matrimonial Proceeds (Polygamous Marriages) Act 1972 as amended by the Private International Law (Miscellaneous Provisions) Act 1995.

21 *Alhaji Mohamed v Knott* [1969] 1 QB 1; for a recent example see *Re K; A Local Authority v N and others* [2005] EWHC 2956 (Fam), [2007] 1 FLR 399, paras [30]-[32].

the Act permitted a wife to petition for divorce on the ground that her husband had been guilty of adultery. Section 2 of the Matrimonial Causes Act 1937 further amended the law by permitting a petition to be presented by either party on the grounds of the other's desertion or cruelty or if the other was incurably of unsound mind. Section 7 made wilful refusal to consummate a ground for a decree of nullity.

Fundamental reform of divorce law had, however, to await the Divorce Law Reform Act 1969, which replaced the old law with the provisions now to be found in the Matrimonial Causes Act 1973. A petition may be presented by either party "on the ground that the marriage has broken down irretrievably." But to establish that the marriage has broken down irretrievably the petitioner must prove one or more of certain "facts": adultery, unreasonable behaviour, desertion or separation.[22]

Part 2 of the Family Law Act 1996, which has never been brought into force and is now to be repealed,[23] provided for the further simplification of the grounds for divorce. The sole ground for divorce was to be a statement of belief that "the marriage has broken down."

Thus the formal law, but what of the social and sexual realities?

Generally speaking, a sexual relationship is implicit in any marriage.[24] A marriage is voidable if it has not been consummated owing to incapacity or wilful refusal. And a refusal of sexual intercourse may be a ground for divorce on the ground of 'behaviour'. Furthermore, in ordinary circumstances an agreement before marriage not to have sexual intercourse after its celebration strikes fundamentally at the basis of the marriage itself and is contrary to public policy and void.[25]

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22 The effect of this was that rape, sodomy and bestiality ceased, as such, to be grounds for divorce (I use the convenient shorthand expression though recognising that, strictly speaking, the only "ground" for divorce is the irretrievable breakdown of the marriage), though each would almost invariably, at least if non-consensual, constitute unreasonable behaviour.

23 See clause 18 of the Children and Families Bill.

24 On all this see *X City Council v MB, NB and MAB (By His Litigation Friend the Official Solicitor)* [2006] EWHC 168 (Fam), [2006] 2 FLR 968, paras [55], [62]-[63].

25 *Scott v Scott (otherwise Fone)* [1959] P 103n, 106.

That said, neither a sexual relationship nor the ability to procreate is necessary for there to be a valid marriage. The law has always recognised that a man may take a woman as his wife *tanquam soror vel tanquam frater*, as our ancestors would have put it applying the canonist's maxim.[26] As Sir William Scott said,[27] although "Parties marry for offspring; for the enjoyment of each other's person", it may be that a marriage "at a time of life when the passions are subdued" is "contracted only for comfortable society", the spouses being "fairly left to just reflection and more placid gratifications." The law was very clearly stated by Sir James Wilde in *A v B* in 1868:[28]

> "For although it has been said that the procreation of children is one main object of marriage, yet it cannot be doubted that marriages between persons so advanced in years as effectually and certainly to defeat that object, are perfectly legal and binding. The truth is, *consensus non concubitus facit matrimonium*."

So much, as a matter of law, for the sexual component in marriage. But what about procreation?"

Time was when the one tended to lead to the other. In the modern world the link between sex and procreation is very much less clear cut. Two great developments since Lord Penzance's day have transformed matters. First, contraception means that conception is no longer the typical consequence of sexual intercourse. Second, modern 'high-tech' methods of IVF mean that there can be conception without intercourse. For those who have grown up in the modern world it is hard to comprehend the immense gulf which separates our world from his.[29]

Late into the nineteenth century contraception was tainted with notions of immorality and vice and associated with prostitutes and courtesans.[30] Indeed, there was very little

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[26] See, for example, Sir John Nicholl in *Brown v Brown* (1828) 1 Hagg Ecc 523, 524, Sir Cresswell Cresswell in *W v H (falsely called W)* (1861) 2 Sw&Tr 240, 244, and, for a more modern example, *Morgan v Morgan (otherwise Ransom)* [1959] P 92.

[27] *Briggs v Morgan* (1820) 3 Phill Ecc 325, 330, 331–332.

[28] *A v B* (1868) LR 1 P&D 559, 562.

[29] See on all this *R (Smeaton on behalf of SPUC) v Secretary of State for Health* [2002] EWHC 610 (Admin), [2002] 2 FLR 146, paras [171]-[189], [329], [332]-[337].

[30] For an interesting discussion of this point in relation to the future King Edward VII's affair in 1871 with Lady Susan Vane-Tempest see Ridley, Bertie: A Life of Edward VII, 2012, p 148.

general awareness of the possibility of contraception prior to the decisive event of 1877 – what Sir Alexander Cockburn CJ called the ill-advised and injudicious prosecution of Charles Bradlaugh and Mrs Annie Besant for publishing a treatise on contraceptive methods. Their conviction was eventually overturned on a technicality,[31] but the almost hysterical judicial reaction is evident from the subsequent proceedings in Chancery, where it was held that the publication of the book was in itself sufficient grounds for removing Mrs Besant's 7-year-old daughter from her mother's custody.[32] Whatever the views of the judges, however, the prosecution had the effect of publicising the possibility of using artificial means to control conception.

The limited extent to which legal views had changed by the 1920s can be gauged from the judicial treatment of Marie Stopes.[33] As late as late as 1941 a judge of what is now the Family Division could refuse to accept as common knowledge the use of contraceptives.[34] By the late 1940s, however, the corner had been turned with the decision of the House of Lords in *Baxter v Baxter* in 1947[35] and the publication in 1949 of the report of the Royal Commission on Population.[36] The Commission recommended that all restrictions on giving contraceptive advice to married women under public health services should be removed. But it did not suggest giving advice to unmarried women. Only in 1967, when Parliament passed the National Health Service (Family Planning) Act 1967, were the remaining institutional restraints on the provision of contraception for social rather than purely medical reasons and the remaining distinction between the provision under the NHS of contraceptives to the married and the unmarried finally swept away.

A poet famously announced that "Sexual intercourse began / In nineteen sixty-three". One may quibble about whether he was correct in his identification of the year. For the family lawyer, 1967, which saw the enactment in June of the National Health

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31 *Bradlaugh (Charles) and Besant (Annie) v The Queen* (1878) 3 QBD 607, reversing *R v Bradlaugh (Charles) and Besant (Annie)* (1877) 2 QBD 569.

32 *Re Besant* (1878) 11 ChD 508, 514 (Sir George Jessel MR at first instance), 531 (James LJ on appeal).

33 See *Sutherland and Others v Stopes* [1925] AC 47.

34 Langton J in *Firth v Firth* (1941, unreported: see *Baxter v Baxter* [1948] AC 274, 278).

35 *Baxter v Baxter* [1948] AC 274.

36 Cmd 7695, paras 427, 434, 536, 657, 667.

Service (Family Planning) Act 1967, in July of the Sexual Offences Act 1967 decriminalising homosexuality and in October of the Abortion Act 1967 legalising abortion, may have the stronger claim. But in matters social and sexual, as in so many other spheres, the modern world – our world – is indeed a creation of the 1960s. The ready availability of the contraceptive pill, both commercially and legally, removed the fear of unwanted pregnancy. The legalisation of abortion removed the fear of the consequences of contraceptive failure. Sex was now something to be enjoyed, if one wished, for purposes having nothing to do with procreation. And sex between consenting adults of the same sex was no longer criminal. A fundamental link – the connection between sex and procreation – had been irretrievably broken. We are surely in a world that neither Sir James Wilde nor Sir James Hannen could ever have contemplated even in their wildest imaginings.

The law has gradually kept pace. The law has long been that consummation requires what Dr Lushington[37] called *vera copula*, true or natural coitus.[38] But by the 1950s it had been recognised that procreation, whether actual or potential, is not necessary. Thus there can be consummation though the wife is beyond the age of child-bearing, though either or both parties are sterile,[39] whether through natural causes or surgical intervention, or though the man wears a condom,[40] practises coitus interruptus, or is incapable of ejaculation.[41]

Conversely, if much more recently, modern forms of medical technology mean that intercourse is no longer a necessary prerequisite to conception. This has led to further developments in the law of parenthood. For example, the Adoption and Children Act 2002 for the first time enabled same sex couples to adopt.

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37 *D-E v A-G (orse D-E)* (1845) 1 Rob Ecc 279, 299, *SY v SY (orse W)* [1963] P 37.

38 That is, complete penetration of the vagina by the penis in the normal way.

39 The decision to the contrary in *J v J* [1947] P 158, a case where the husband had been sterilised shortly before the marriage, was overruled by *Baxter v Baxter* [1948] AC 274.

40 *Baxter v Baxter* [1948] AC 274.

41 *R v R (otherwise F)* [1952] 1 All ER 1194. Expressed in the Latin in which so much of the judicial discussion of these matters is traditionally obscured, "vera copula consists of erectio and intromissio": ibid, 1198

And what of the marriage relationship?[42] Time was when our law took the view that a wife's body, like her property, belonged to her husband. As that learned judge. McCardie J once explained:[43]

> "Broadly speaking, it was the view of lawyers and of the law in the middle of the eighteenth century that the property of a woman became her husband's on marriage, that her body belonged to him, that he could restrain her liberty at his pleasure, and that he could administer physical correction at his discretion, subject, of course, to the rule of moderation … She was his creature and his possession."

Not for nothing did John Stuart Mill when writing in 1869 on The Subjection of Women say that:

> "If married life were all that it might be expected to be, looking to the laws alone, society would be a hell upon earth."

Today the law views marriage as something very different from what it was even 50 years ago. Victorian judges, as we have seen, saw the essence of marriage as "protection" and "submission", an attitude that lingered on well into the 1950s and even later – though it is true that in 1954 in *Re Park* the Court of Appeal did wonder whether submission on the part of the woman was still an essential part of the contract.[44]

To put the point plainly, although the husband had the right to what the law called his wife's consortium, her company and services, including her sexual services, she did not have a reciprocal right to her husband's consortium, merely a duty to give him her society and her services. Moreover, it was for many years the view (albeit sometimes doubted) that a wife, as part of the matrimonial contract, had consented to sexual intercourse with her husband and could not retract that consent. This deemed consent

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42 On all this see *Sheffield City Council v E and another* [2004] EWHC 2808 (Fam), [2005] Fam 326, paras [111]-[131], and *X City Council v MB, NB and MAB (By His Litigation Friend the Official Solicitor)* [2006] EWHC 168 (Fam), [2006] 2 FLR 968, paras [58]-[59].

43 *Place v Searle* [1932] 2 KB 497, 499.

44 *In the Estate of Park, deceased, Park v Park* [1954] P 89, 99, 131, 137.

underlay both the assumption that a man could not be guilty of the rape of his wife and, as decided in *Clarence*[45], that he committed no criminal offence if he infected her with a venereal disease. The Divorce Court was more enlightened. For it had been recognised in the very early days of the new Court for Divorce and Matrimonial Causes that an adulterous husband who infected his wife with a venereal disease might be guilty of the matrimonial offence of cruelty, thereby entitling her to divorce him on the ground of adultery and cruelty.[46]

These relics of a former age lingered on for a surprisingly long time. Only very recently were the last of them exploded as the fictions they had always been. Some of this change is distressingly recent and one does not need to be an ardent feminist to believe that we still have some way to go.

We tend to forget the astonishing extent to which society's views about marriage, and about the place of women, not merely in society but also in the home and in marriage, have changed; not only, and most obviously, since Sir James Hannen was speaking in 1885 but also in the 50 years and more that have elapsed since the Court of Appeal gave judgment in *Re Park*. It is an effort now to imagine the role of the married woman in the nineteenth century, or even 50 years ago for that matter.

True it is that Sir James Hannen was speaking of marriage at a time after – even if only very shortly after – the Married Women's Property Act 1882 and the Matrimonial Causes Act 1884 had revolutionised so many aspects of the relationship between husband and wife. But the famous decision in *Jackson* in 1891,[47] that a husband could not lawfully imprison his wife, still lay in the future.

It was only in 1923 that the discriminatory divorce laws were reformed by the Matrimonial Causes Act 1923 and only in 1925 that the Guardianship of Infants Act 1925 established the principle that mothers and fathers, wives and husbands, have

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45 *R v Clarence* (1888) 22 QBD 23.

46 *Brown v Brown* (1865) LR 1 P&D 46 and *Boardman v Boardman, The Queen's Proctor Intervening* (1866) LR 1 P&D 233.

47 *R v Jackson* [1891] 1 QB 671.

equal rights with respect to their children.[48] Not until 1973 was it finally established that a husband could be guilty of the common law offence of kidnapping his wife.[49] Not until 1981 was the doctrine of the unity of husband and wife dismissed as a medieval fiction to be given no more credence than the medieval belief that the Earth is flat.[50] Not until 1992 was the husband's immunity from prosecution for rape finally exploded as the absurd fiction it had always been.[51] Not until 2000 was equality identified as the core principle of ancillary relief.[52] Not until 2004 was the husband's immunity in relation to sexually transmitted infections likewise swept away.[53]

As I said in the *Sheffield* case in 2004,[54] the fact is – the modern view is – that the wife is no longer the weaker partner subservient to the stronger. Today both spouses are the joint, co-equal heads of the family. Domestic matters of common concern are to be settled by agreement, not determined unilaterally by the husband.

At the same time the law has had to grapple with the very profound changes in family life – in the nature of the family – which we have seen in recent decades. Until very recently, family law was concerned largely, if not exclusively, with the family wrought in the image of Lord Penzance's definition of marriage. The family of today is very different, though in saying this we need to remember, as Professor Lawrence Stone's great works have taught us, that what we currently view as the traditional or conventional form of family is itself a comparatively modern development.[55] But there have on any view been very profound changes in family life in recent decades.

These changes have been driven by five major developments. First, there have been enormous changes in the social and religious life of our country. We live in a secular and pluralistic society. But we also live in a multi-cultural community of many faiths.

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48 *Re G (Education: Religious Upbringing)* [2012] EWCA Civ 1233, [2013] 1 FLR (forthcoming), paras [23]-[24].

49 *R v Reid* [1973] QB 299.

50 *Midland Bank Trust Co Ltd v Green (No 3)* [1982] Ch 529, 542 per Sir George Baker "We now know that the Earth is not flat. We now know that husband and wife in the eyes of the law and in fact are equal."

51 *R v R (Rape: Marital Exemption)* [1992] 1 AC 599.

52 *White v White* [2001] 1 AC 596, 605.

53 *R v Dica (Mohammed)* [2004] EWCA Crim 1103, [2004] QB 1257.

54 *Sheffield City Council v E and another* [2004] EWHC 2808 (Fam), [2005] Fam 326, paras [130]-[131].

55 See now, Dabhoiwala, The Origins of Sex: A History of the First Sexual Revolution, 2012.

One of the paradoxes of our lives is that we live in a society which is at one and the same time becoming both increasingly secular but also increasingly diverse in religious affiliation. Secondly, there has been an enormous increase in the number of trans-national families. When travel was limited by the speed of a horse, most people hardly moved from the locality of their birth. The railways and the steamship broadened people's horizons enormously. But it was only the introduction of the Boeing 747 and its successors and the enormous reduction in the price of air travel in recent decades that has made it possible for ordinary people to travel back and forth across the world so easily and so frequently and thus to find partners abroad. Thirdly, there has been an increasing lack of interest in – in some instances a conscious rejection of – marriage as an institution. The figures demonstrate a decline in marriage. Fourthly, there has been a sea-change in society's attitudes towards same sex unions. Within my lifetime we have moved from treating such relationships as perversions to be stamped out by the more or less enthusiastic enforcement of a repressive criminal law to a ready acknowledgment that they are entitled not merely to respect but also to equal protection under the law. Finally, there have been the enormous advances in medical, and in particular reproductive, science to which I have already referred. Reproduction is no longer confined to 'natural' methods. Many children today are born as a result of 'high-tech' IVF methods almost inconceivable even a few years ago.

The result of all this is that in contemporary Britain the family takes an almost infinite variety of forms. Many marry according to the rites of non-Christian faiths. People live together as couples, married or not, and with partners who may not always be of the opposite sex. Children live in households where their parents may be married or unmarried. They may be brought up by a single parent. Their parents may or may not be their natural parents. They may be the children of parents with very different religious, ethnic or national backgrounds. They may be the children of polygamous marriages. Their siblings may be only half-siblings or step-siblings. Some children are brought up by two parents of the same sex. Some children are conceived by artificial donor insemination. Some are the result of surrogacy arrangements. The fact is that many adults and children, whether through choice or circumstance, live in families more or less removed from what, until comparatively recently, would have been recognised as the typical nuclear family.

All of this poses enormous challenges for the law, as indeed for society at large. Many of these changes have given rise to profound misgivings in some quarters. We live in a society which, on many social, ethical and religious topics, no longer either thinks or speaks with one voice. These are topics on which men and woman of different faiths or no faith at all hold starkly differing views. It is not for a judge to choose between them. That is a task for Parliament.

Against this background, I return to the linked questions of marriage and divorce.

We have seen that Lord Hardwicke's Act had two epochal effects. First, the right to determine what constitutes a valid marriage was assumed by the State, by Parliament. Secondly, the Act marked the clear severance of marriage as recognised by the State from exclusively Christian marriage. And as long ago as 1868, within only two years of *Hyde v Hyde*, a Royal Commission could espouse the notion that, from the State's perspective, marriage is a purely civil contract. What view, then is the State to take of marriage? At this point two rather different issues come together: gay marriage and divorce law reform.

First, divorce law reform. I have already sketched out the many changes and reforms since 1866. At this point it may be helpful to consider the law's treatment of the fundamental issue of sexual infidelity within marriage.

The effect of the 1857 Act was that, whereas a husband could divorce his wife for simple adultery, a wife could not divorce her husband unless she could prove either what might be described as aggravated adultery (that is, adultery coupled with incest, bigamy, cruelty, desertion or rape[56]) or sodomy or bestiality.

Quite apart from the double standard of morality which made divorce easier for men than for women, the oddity of this was whereas, in the case of a husband, sodomy seems to have been treated as a more serious matrimonial offence than adultery, in the

[56] Until *R v R (Rape: Marital Exemption)* [1992] 1 AC 599, it had been the view that a wife irrevocably consented to sexual intercourse with him. Consequently, since on this view a husband could not rape his wife, any rape by him would necessarily involve another woman, and thus be adultery: Cretney, Family Law in the Twentieth Century, 2003, 169. Even on this view, however, a husband could be guilty of raping his wife if they were legally separated: *R v Clarke* [1949] 2 All E.R. 448; or if he aided and abetted another man to rape her: *R v Cogan* [1976] QB 217.

case of the wife it was not a matrimonial offence at all! The latter anomaly remained a feature of the law until 1969.[57]

All this was swept away by the 1969 Act, but one curiosity remains. Adultery requires at least some penetration.[58] It follows from this narrow definition that any other form of sexual activity is not adultery. It may be thought strange that the only form of sexual infidelity which survives as a ground for divorce is adultery, for other forms of sexual infidelity can be just as serious a breach of a spouse's marital obligations. If sexual infidelity in all its various non-adulterous forms can be addressed adequately and appropriately as a species of unreasonable behaviour, why not also adultery? And why not remove non-consummation as a ground for nullity? Disputes about consummation are few in number and are, it might be thought, an unpleasant and hurtful anachronism. Sexual infidelity, including adultery, could continue to be a species of unreasonable conduct, as could unjustifiable refusal of sexual relations. Why should adultery, for this purpose, not follow rape, sodomy and bestiality into the pages of legal history?

Once upon a time the answer to this question might have been found in the unique need (so it was thought) to penalise adultery as the only form of sexual behaviour which can, generally speaking, lead to conception.[59] Concerns about spurious issue no doubt underlay the double standard enshrined in the 1857 Act. But this rationale can hardly have survived the abolition of the double standard by the 1923 Act, let alone all the subsequent developments in sexual technology. Taking stock of the realities of the post-Kinsey world of the 21st century, it is not at all obvious why adultery alone should survive as a sexual ground for divorce.

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57 "Women are now slightly "more equal" than men in this respect. A woman may petition for divorce on the grounds of her husband's unnatural offences. Such partialities in a woman do not constitute a matrimonial offence against her husband unless it can be proved that their indulgence has injured his health and thus constituted cruelty": O R McGregor, Divorce in England: A Centenary Study, 1957, p 29.

58 That is, penetration of the vagina by the penis. Partial penetration will suffice. Thus an act of adultery need not be such a complete act of intercourse as is required to consummate a marriage. To use the language of the consistorial courts, there can be adultery without a *vera copula*. So, the fact that a wife is *virgo intacta* is not inconsistent with partial intercourse sufficient to amount to adultery: *Sapsford v Sapsford and Furtado* [1954] P 394, *Dennis v Dennis (Spillett Cited)* [1955] P 153.

59 Though consider *Russell v Russell* [1924] AC 687, 721-722.

In fact, has the time not come, if not to implement the unimplemented Part II of the Family Law Act 1996 then at least to legislate to remove all concepts of fault as a basis for divorce and to leave irretrievable breakdown as the sole ground?

And so to gay marriage. Persons of the opposite sex can marry. Those of the same sex cannot; they have to make do with a civil partnership. No doubt this is progress of a kind but is this halfway house tenable in the long run?

There is, of course, a technical problem that has to be addressed: consummation as currently understood is, by definition, impossible in the case of a same sex marriage and sexual infidelity with a person of the same rather than the opposite sex cannot be adultery as currently understood. Government has identified three possible approaches to the problem.

The Civil Partnership Act 2004 defines a civil partnership in purely formal terms, as a relationship formed by the fact of registration. Civil partnership knows neither adultery nor inability or refusal to consummate.[60] The present government in its consultation on gay marriage sought to avoid this. It spelt out its proposals in this regard, making clear[61] that what it called the "concepts" of non-consummation and adultery would apply equally to same-sex and opposite-sex couples, adding that "case law may need to develop, over time, a definition as to what constitutes same-sex consummation and same-sex adultery". Now this may avoid one difficulty but it surely creates problems of its own: it begs the question of what form such a re-definition might take. What species of sexual conduct, in the case of adultery what form of sexual infidelity, is to be required? The answers, it might be thought, are far from obvious. The Marriage (Same Sex Couples) Bill currently before Parliament takes a different course. Put shortly, neither inability nor refusal to consummate will be available as a ground for annulment of the marriage of a same sex couple. Adultery will be available as a 'ground' for divorce, but only if the conduct involves persons of the opposite sex. It will be interesting to see where the Parliamentary process takes us.

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60 See on this, Cretney, Same Sex Relationships: From 'Odious Crime' to 'Gay Marriage', 2006.

61 Equal civil marriage: a consultation, Government Equalities Office, 2012, paras 2.14–2.16.

Behind these technicalities, important as they are – and they surely raise some very fundamental issues indeed about the very nature of marriage – there arises the key issue: should we legislate for gay marriage? That is a political and social question on which I express no views at all. It is, it must be, a matter for Parliament.

Three observations are perhaps in order.

First, we must have regard to all the immense social, sexual and legal changes since *Hyde v Hyde* to which I have invited your attention. As against that, however, we must have regard to the undoubted fact that, until very recently indeed, it went without saying that marriage, whether religious or civil, and whatever form it took, involved a relationship between a man and a woman (in the case of polygamy, a man and two or more women; in the case of polyandria, a woman and two or more men[62]).

Second, we must have regard to the equality and non-discrimination arguments that have found favour, for example, in the courts of Canada,[63] Massachusetts[64] and South Africa.[65]

Third, and to return finally to what Sir James Wilde said in *Hyde v Hyde*, there is the point made by the Supreme Court of Canada in 2004:[66]

> "The reference to "Christendom" is telling. *Hyde* spoke to a society of shared social values where marriage and religion were thought to be inseparable. This is no longer the case. Canada is a pluralistic society. Marriage, from the perspective of the state, is a civil institution."

The court added:[67]

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62 As to which see Fitzpatrick, 361-364.

63 See, for example, *Halpern v Attorney General of Canada* (2003) 172 OAC 276, *Reference re Same-Sex Marriage* [2004] 3 SCR 698 and *Hincks v Gallardo* 2013 ONSC 129.

64 See Cretney, 218-290.

65 Ibid, 291-344.

66 *Reference re Same-Sex Marriage* [2004] 3 SCR 698, para 22.

67 Ibid, para 25.

> "Several centuries ago it would have been understood that marriage should be available only to opposite-sex couples. The recognition of same-sex marriage in several Canadian jurisdictions as well as two European countries belies the assertion that the same is true today."

Much has happened since then. In Europe same sex marriage has now been legalised in nine countries, first in the Netherlands and subsequently (in this order) in Belgium, Spain, Norway, Sweden, Portugal, Iceland, Denmark and, just this week, France. Elsewhere it has been legalised in nine of the United States of America (Connecticut, Iowa, Massachusetts, New Hampshire, New York, Vermont, Maine, Maryland and Washington) and the District of Columbia and in Canada, South Africa, Argentina, Uruguay and, only last week, New Zealand. The list of countries is instructive. To look no further afield, same sex marriage is not confined to Scandinavia or the Protestant north of Europe; it has been accepted in the Catholic south.

In his 2005 Oxford Clarendon Lectures, Stephen Cretney pondered the "fundamental ambiguity"[68] and lack of logical consistency he found at the heart of the 2004 Act. He ended on an optimistic note:[69]

> "It may be that in the years ahead public opinion, reinforced by the fact that thousands of civil partners will be living in our midst without any signs of divine or other vengeance being taken against them or the society which sanctions and recognises their position, will be prepared to accept calling this relationship "marriage". Time will tell."

Well, Santiago and Granada have not gone the way of the Cities of the Plain, nor have Stockholm and Gothenburg.

It is for Parliament to decide where we go, to decide what in the modern age we mean by marriage. Marriage is and always has been fundamental to human beings. But what

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68 Cretney, 37.
69 Ibid, 72.

is the essence or nature of marriage? Is it still what Lord Penzance thought or is it something different? We must await the Parliamentary verdict.[70]

[70] I am grateful to Sir Nicholas Mostyn for taking the time to discuss parts of this with me. The views expressed are my own, as, of course, are any errors.