1 Introduction

In most societies around the world it is widely accepted that it is best for children to be brought up in ‘stable intimate partnerships’ and that such partnerships can provide adults with much personal fulfilment. The regularisation of these stable relationships has in England and Wales been channelled through marriage, but marriage worldwide is a hugely varied phenomenon. For example, there is no agreement over whether marriage is polygamous or monogamous (i.e. how many parties there should be to a marriage); whether or not the upbringing and/or nurturing of children is central to the concept of marriage; whether marriage partners should be chosen by the parties themselves or by their wider family; or at what age marriage is appropriate. In Britain, in our culturally diverse society, it would be difficult to say anything about the nature of marriage that would be true for all married couples. Traditionally, it has been the Christian conception of marriage which has been dominant, although it is far from clear exactly what that conception is. Increasingly, there is a divide between the church’s and the law’s understanding of marriage. Legal marriages can take place in circumstances which would not be approved by many churches. It is interesting that some religious groups have even seen the need for legal marriages to be bolstered by special religious pledges, involving commitments beyond the legal obligations of marriage. In England and Wales we have recently seen the creation of civil partnerships, an alternative to marriage which is open only to couples of the same sex. As we shall see later, the fact that it was felt necessary to create a status different from marriage, although very similar to marriage in legal effect, shows how powerful the traditional understandings of marriage still are.

Marriage used to be the main focus of family law. Textbooks would concentrate on discussion of the formalities of marriage, the consequences of marriage, and its dissolution. However, today, many commentators on family law feel that parenthood is the core concept in family law and that marriage is of limited legal significance. Diduck and Kaganas have suggested that ‘marriage is both central and peripheral to family law but arguably remains at the heart of family ideology’. Their argument is that, while the legal consequences of marriage are limited, the symbolic nature of marriage still plays an important part as providing an

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1 For a wonderful history of marriage see Probert (2009a).
2 Thatcher (1999).
3 National Statistics (2008d) records that 68% of all marriages were civil ceremonies (i.e. not in a church or other religious building).
4 E.g. the Promise Keepers movement in the United States, discussed critically in Fineman (2004: 130–1).
image of what the ideal family should be. That said, marriage still creates some important legal consequences – it would not be possible for a lawyer to advise a client over a family matter unless the lawyer knew whether the couple were married. There are two particular challenges that threaten to limit the legal significance of marriage even further. First, there are calls for the traditional definition of marriage to be widened, for example that two adults be permitted to marry, and that divorce should be more readily available. As marriage has become easier to enter and to exit, any claim that it is a special relationship deserving of particular respect becomes harder to maintain. Secondly, there are arguments that those who are unmarried but live together in many ways like a traditionally married couple should be treated in the same way as a married couple. These pressures make it harder to claim a unique status for marriage.

2 Statistics on marriage

The significance of marriage as a cultural concept appears to be changing. This leads many commentators to believe that marriage is in decline. Some statistics certainly suggest that it is.

KEY STATISTICS

There was a 40% drop in the number of marriages between 1972 and 1998. In 2008 there were 232,990 marriages in England and Wales. Although there had been a rise in the number of marriages at the turn of the century, this has not continued and the current figure is well below the 480,300 marriages in 1972. In 2008, the number of men marrying per 1,000 unmarried men aged 16 or over was 21.6; for women the rate was 10.6. These rates were a drop from the rates in the year 2000, which were 29.5 and 25.7. These are the lowest rates since calculations were first done in 1862.

Significantly, in 2008, 37% of marriages were second or further marriages for at least one of the parties. This suggests that there are numbers of people marrying, divorcing and remarrying who are keeping the numbers of marriages at their present rate.

The number of people who choose not to marry at all has greatly increased. Soon we will be in the position of marriage not being the norm for adults in the UK. Barlow et al. suggest that we are at a time ‘where unmarried cohabitation is quite normal and where marriage is more of a lifestyle choice rather than an expected part of life’.

Whether or not marriage is in terminal decline remains to be seen. It is clear that the nature of marriage is changing. Three points in particular are worth noting. First, the average age of first marriage in England and Wales has changed – the average age of marriage has risen from 23 for men and 21.4 for women in 1975 to 32.1 for men and 29.9 for women in 2008.

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6 Thornton Azinn and Xie (2007).
8 National Statistics (2010b).
9 National Statistics (2010b).
10 National Statistics (2010b).
11 Barlow et al. (2005: 49).
12 National Statistics (2010b).
Secondly, it is now commonplace for a couple to cohabit before marriage. Thirdly, the likelihood that marriage will end in divorce has greatly increased.

3 What is marriage?

A The meaning of marriage

It is impossible to provide a single definition of marriage. Indeed, one approach is to say that one cannot define marriage because marriage is whatever the parties to a marriage take it to mean. Thus, a Christian couple seeking to base their marriage on biblical principles may well see their marriage in very different terms from a couple who understand their marriage to be open and short-term, entered into for tax purposes. Further, the wife’s experience and understanding of marriage may be very different from the husband’s. At one time a common marriage vow of a wife was that she be ‘bonny and buxom in bed and board’! As this indicates expectations of the obligations of marriage have changed over time.

Martha Fineman has written:

Marriage, to those involved in one, can mean a legal tie, a symbol of commitment, a privileged sexual affiliation, a relationship of hierarchy and subordination, a means of self-fulfilment, a social construct, a cultural phenomenon, a religious mandate, an economic relationship, the preferred unit for reproduction, a way to ensure against poverty and dependence on the state, a way out of the birth family, the realization of a romantic ideal, a natural or divine connection, a commitment to traditional notions of morality, a desired status that communicates one’s sexual desirability to the world, or a purely contractual relationship in which each term is based on bargaining.

And this, she suggests, is not an exhaustive list. The lack of a clear definition of marriage may be a sign of the times. It reflects the religious, cultural and ethnic diversity within our society. As Glendon writes:

the lack of firm and fixed ideas about what marriage is and should be is but an aspect of the alienation of modern man. And in this respect the law seems truly to reflect the fact that in modern society more and more is expected of human relationships while at the same time social changes have rendered those relationships increasingly fragile.

But it would be too easy to see marriage as simply being whatever the parties want it to be, because this denies a wider understanding of marriage within society, in particular the role it plays as an ideal that people aspire towards. Not everyone agrees that marriage is still something aspired too. Rosemary Auchmuty suggests it is generally regarded as old-fashioned and based on sexist assumptions. People feel they need to justify why they are getting married these days, rather than having to explain why they are not. Marriage can be examined from a number of perspectives:

14 See Chapter 3.
17 Eekelaar (2007).
18 Glendon (1989).
19 Auchmuty (2009).
Chapter 2 Marriage, civil partnership and cohabitation

(i) Functional

From a functionalist approach it would be necessary to decide what the purpose of marriage is. Some insist that children are at the heart of marriage. Hoggett et al. suggest: ‘If nothing else, then, marriage is about the licence to beget children.’ Engels, on the other hand, saw the role of marriage and family as an integral part of the regulation of private property and the creation of legitimate heirs. Others would emphasise the role of creating an environment of love and comfort for the husband, wife and any children.

(ii) Psychological

Others analyse marriage by considering the psychological need to marry and the psychological interactions between the two marriage partners. For example, one perspective is to see marriage as a conversation between the spouses, formulating their own relationship and their common view of the world. Anthony Giddens has argued that modern intimate relations are entered into ‘for what can be derived by each person from a sustained association with another; and . . . is continued only in so far as it is thought by both parties to deliver enough satisfaction for each individual to stay within it.’ In other words, people are now more individualistic and are only willing to stay in relationships so long as they feel they personally are benefiting from them.

(iii) Political

It is also possible to consider the role marriage plays in wider society. Some see the subjugation of women as the essence of marriage. Marriage has been described as ‘a public form of labour relationship between men and women, whereby a women pledges for life (with limited rights to quit) her labour, sexuality and reproductive capacity, and receives protection, upkeep and certain rights to children.’ Baroness Hale has, however, rejected the argument that there should nowadays be a feminist objection to marriage: ‘These are not the olden days when the husband and wife were one person in law and that person was the husband. A desire to reject legal patriarchy is no longer a rational reason to reject marriage.’ Mount has suggested that marriage is far from a conservative institution, but rather it is subversive, protecting individuals from the power of the state and the church.

(iv) Religious

There is a wide variety of religious understandings of marriage. Some religions teach of a spiritual union between spouses on marriage, with the spouses’ love reflecting God’s love. Some religions regard marriage as indissoluble, although others do not take a hard line on divorce. In England and Wales the law’s understanding of marriage has historically been strongly influenced by Christian theology. In Sheffield CC v E and S, Munby J stated that

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20 Hoggett et al. (2003).
22 Berger and Kellner (1980).
25 Lenard (1980).
27 Mount (1982).
'although we live in a multi-cultural society of many faiths, it must not be forgotten that as a secular judge my concern ... is with marriage as a civil contract, not a religious vow'.\textsuperscript{31} This is hardly controversial, but the fact that Munby J felt it was necessary to say what he did indicates the hold of religion over the notion of marriage.

**B The legal definition of marriage**

The most widely accepted definition of marriage in the law is that in *Hyde v Hyde and Woodhouse*:\textsuperscript{32} ‘the voluntary union for life of one man and one woman to the exclusion of all others’. This is perhaps better understood as an ideal promoted by the law rather than a definition as such. As we shall see, it is quite possible to have a legally valid marriage which is entered into involuntarily,\textsuperscript{33} is characterised by sexual unfaithfulness, and is ended by divorce. Contrast the *Hyde* definition with the more recent definition of marriage provided by Thorpe LJ: ‘a contract for which the parties elect but which is regulated by the state, both in its formation and in its termination by divorce because it affects status upon which depend a variety of entitlements, benefits and obligations’.\textsuperscript{34} Notably this has no requirement that the parties are opposite sex; that the marriage is for life; or monogamous. Indeed it seems only the ‘voluntariness’ element of the *Hyde* definition remains in his formulation. It should not, however, be thought that Thorpe LJ’s definition represents the current law. Lord Millet demonstrated that some members of the judiciary have a more traditional understanding of the concept when he stated:

> Marriage is the lawful union of a man and a woman. It is a legal relationship between persons of the opposite sex. A man’s spouse must be a woman; a woman’s spouse must be a man. This is of the very essence of the relationship, which need not be loving, sexual, stable, faithful, long-lasting, or contented.\textsuperscript{35}

The law has had much to say about who can marry whom and how the relationship can be ended, but says very little explicitly about the content of the relationship itself. In fact, it would be possible for a couple to be legally married but never to have lived together or had any kind of relationship.\textsuperscript{36} In *R (On the Application of the Crown Prosecution Service) v Registrar General of Births, Deaths and Marriages*\textsuperscript{37} the Crown Prosecution Service sought an order preventing a marriage between a man charged with murder and the woman intended to be the main prosecution witness at his trial. It was argued that the marriage was being entered into so that she would not be a compellable witness against him. However, the Court of Appeal refused to grant the order. It would not examine the reason why the couple wanted to marry and consider if it was a valid one.\textsuperscript{38} This is not surprising because the law cannot force a married couple to live in any particular relationship. The law on marriage merely provides parameters within which the couple are free to develop the content of their marriage as they wish.

\textsuperscript{31} [2004] EWHC 2808 (Fam), para 116.
\textsuperscript{32} (1866) LR 1 PD 130 at p. 133, per Lord Penzance. This definition is discussed in Poulter (1979) and Probert (2007e).
\textsuperscript{33} If a marriage is not entered into voluntarily then the marriage will be voidable, which will mean that it is a legally valid marriage, but can still be set aside if the pressurised party wishes to have the marriage annulled.
\textsuperscript{34} Bellinger v Bellinger [2001] 2 FLR 1048, at para 128.
\textsuperscript{35} Ghaidan v Godin-Mendoza [2004] UKHL 30.
\textsuperscript{36} Vervaeke v Smith [1983] 1 AC 145.
\textsuperscript{38} See also M v H [1996] NZFLR 241 where the New Zealand court upheld the marriage of two students entered into solely so that their parents’ wealth would not be taken into account in calculating the level of their grant. Note also that in *Frasik v Poland* (22933/02) the ECtHR confirmed that prisoners had a right to marry.
C  Why do people marry?

Several recent studies have sought to discover why people marry. Of course, the decision is rarely made entirely on rational grounds. Hibbs et al. carried out an interesting study into why people married. Forty-two per cent of those engaged people questioned gave ‘love’ or ‘love and . . .’ as the reason for marriage. A further 13 per cent stated the reason for marriage as being a sign of commitment and 9 per cent as marriage being a sign of progression of their relationship. Three per cent said they did not know why they were getting married! Three factors which might have been expected to appear were rarely mentioned: only 4 per cent mentioned children being a reason to marry; less than 1 per cent mentioned religion; and none gave legal reasons for getting married. A study by Eekelaar and Maclean emphasised that different ethnic groups gave different reasons for marriage. They found that among some communities religious reasons and a desire to please parents constituted an important reason for marrying. They suggested that reasons for marrying could be divided into three categories: pragmatic (e.g. for legal reasons); conventional (e.g. pressure from parents, religious belief); or internal (e.g. to affirm their commitment to each other). They found that the vast majority of their respondents referred to conventional or internal reasons in explaining their decision to marry.

Alissa Goodman and Ellen Greaves in a recent survey of the evidence concluded that a couple are more likely to marry rather than cohabit if:

- the mother is of Indian, Pakistani or Bangladeshi ethnicity;
- the mother is religious;
- the mother’s parents did not separate;
- there are no children of previous partners in the household;
- the mother and father have high levels of education;
- the parents own their own home;
- the couple lived together for longer prior to the child’s birth;
- the pregnancy was planned;
- the mother was 20 or older when her first child was born;
- there is more than one child in the household;
- the parents have a higher relationship quality when the baby is 9 months old.

Another study, looking at why people did not marry, found that the most common reason given was that people could not afford it (21.8 per cent of those questioned). The cost of marriage is also sometimes given as a reason for delaying marriage. One report suggested that the

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39 Much less research has been carried out on why people cohabit, but see Smart (2000a) and Barlow et al. (2005).
40 Barlow (2009a).
41 Hibbs, Barton and Beswick (2001). See also Barlow et al. (2003).
42 Kiernan (2001) found a strong link between marriage rates and religious belief.
43 Although 3% stated that legal considerations had influenced their decision to get married. In fact 41% of those questioned thought (quite incorrectly) that marriage would not change their legal rights and responsibilities towards each other. See also Barlow et al. (2005: 56).
44 Eekelaar and Maclean (2004).
45 Goodman and Greaves (2010b: 5).
Marriage as a status or contract

Marriage could be regarded as either a status or a contract. In law, a status is regarded as a relationship which has a set of legal consequences flowing automatically from that relationship, regardless of the intentions of the parties. A status has been defined as ‘the condition of belonging to a class in society to which the law ascribes peculiar rights and duties, capacities and incapacities’. So, the status view of marriage would suggest that, if a couple marry, then they are subject to the laws governing marriage, regardless of their intentions or choices. The alternative approach would be to regard contract as governing marriage. The legal consequences of marriage would then flow from the intentions of the parties as set out in an agreement rather than any given rules set down by the law. In English law marriage is best understood as a contract.

Baroness Hale has stated:

Marriage is, of course, a contract, in the sense that each party must agree to enter into it and once entered both are bound by its legal consequences. But it is also a status. This means two things. First, the parties are not entirely free to determine all its legal consequences for themselves. They contract into the package which the law of the land lays down. Secondly, their marriage also has legal consequences for other people and for the state.

However, Dewar and Parker have suggested marriage should be regarded as ‘a contractually acquired status’. There are some legal consequences which flow automatically from marriage, and other consequences which depend on the agreement of the parties. The law sets out: who can marry; when the relationship can be ended; and what are the consequences for the parties of being married. However, following the Children Act 1989 and Family Law Act 1996, increasing emphasis is placed on encouraging the parties to resolve their disputes at the end of their relationship themselves without referring them to court.

Some have argued that it would be preferable to move towards a more contractarian view of marriage. The law could require each couple wishing to marry to decide for themselves exactly what the legal consequences of their marriage would be in a pre-marriage contract. If necessary, the law could produce some sample contracts that people might choose to use. The supporters of such a proposal tend to fall within three camps. First, some feminists argue that a contractarian view of marriage would enable women to avoid the traditional marital roles that are disadvantageous to them. Secondly, from a libertarian perspective some argue that the law should not impose upon people any regulation of their intimate lives. Spouses should choose their own form of regulation rather than there being one kind of marriage

50 For support for marriage as a status see Regan (1993a).
54 Pre-marriage contract forms are available on the Internet, according to Kavanagh (2000).
sanctioned by the state.\textsuperscript{56} After all, there are many different kinds and understandings of marriage and a contractual-based approach can recognise those differences.\textsuperscript{57} Thirdly, there are traditionalists who believe that the present law on marriage is too liberal and that a couple should be allowed to contract to enter a ‘traditional’ marriage, for example severely restricting access to divorce.\textsuperscript{58}

Opponents of contractual marriage argue that pre-marriage contracts are unpopular among the general public because they are ‘not very romantic’.\textsuperscript{59} They implicitly accept that marriage may not be for life. Perhaps more significantly, it is argued that entering a fair contract is only possible if the parties are fully aware of each other’s financial position, are independently advised and have equality of bargaining power.\textsuperscript{60} In only a few cases will this be so. Even if the parties do have full information and equality of bargaining power, the parties cannot foresee the future, and so the contract may rapidly become outdated and need to be continually renegotiated.\textsuperscript{61} Other opponents argue that the contract approach overlooks the interests the state might have in the marriage: the state might wish to support marriage because it has benefits for society as a whole; or the state may have an interest in ensuring that people are not taken advantage of within intimate relationships.\textsuperscript{62} If this is so, the state will not want to leave the law of marriage entirely up to the parties themselves. Mary Lyndon Shanley has suggested that the contractual view of marriage ‘fails to take into account the ideal of marriage as a relationship that transcends the individual lives of the parties’.\textsuperscript{63} Margaret Brinig\textsuperscript{64} argues that marriage represents public support and reinforcement for relationships that enable trust to be built up because they rest on a long-term commitment. A compromise solution would be for the state to offer people who wish to marry a range of alternative forms of marriage from which they can choose. For example, some states in the United States offer, as an alternative to the standard marriage, ‘covenant’ marriage, which permits divorce in limited circumstances only.\textsuperscript{65}

### 5 The presumption of marriage

If a man and a woman live together, believe themselves to be married, and present themselves as married, the law presumes that they are legally married.\textsuperscript{66} Where the presumption does apply anyone who seeks to claim that the couple are not married must introduce evidence to rebut this presumption. The policy behind this is that a couple who believe themselves to be married should not suffer the disadvantages that would follow from being found not to be married without there being clear evidence.\textsuperscript{67} In many cases the presumption can be rebutted by showing that they do not appear on the register of marriage.

\textsuperscript{56} Evans State (1992).
\textsuperscript{57} Shultz (1982).
\textsuperscript{58} See Chapter 3 for a discussion of these arguments.
\textsuperscript{59} Bridge (2001: 27).
\textsuperscript{60} McLellan (1996).
\textsuperscript{61} Alexander (1998).
\textsuperscript{62} Herring (2009b).
\textsuperscript{63} Lyndon Shanley (2004: 6). Regan (2004: 69) argues that marriage is a way of upholding and reinforcing commitments.
\textsuperscript{64} Brinig (2010).
\textsuperscript{65} Waddington (2000: 251–2). Fineman (2004: 133) reports that where these are available only 1.5% of marriages have been covenant marriages.
\textsuperscript{66} The presumption was preserved by s 7(3)(b)(i) of the Civil Evidence Act 1995. A detailed discussion of the presumption is found in Borkowski (2002).
\textsuperscript{67} Borkowski (2002).
Non-marriages, void marriages and voidable marriages

The presumption is most often used where the marriage took place a long time ago or abroad and so official records are not be available. In Martin v Myers, where the couple had never travelled abroad, the court held that as there was no record of their marriage in the register of marriage this was strong evidence to rebut the presumption. In A-M v A-M (Divorce: Jurisdiction: Validity of Marriage) a couple, originally from the Middle East, who had travelled extensively and had cohabited for around twelve years were regarded as married: the court was willing to presume that the couple had married overseas. In such a case it will be extremely difficult to show that a couple had not married somewhere overseas. In A v H (Registrar General for England and Wales and another intervening) a cohabitation of a year and a half was insufficient.

The presumption can be rebutted if it can be shown that the parties did not undergo a legal marriage. However, the longer the parties have cohabited, the stronger the presumption is that they are legally married. In order to rebut the presumption of marriage, clear and positive evidence must be introduced. In Pazpena de Vire v Pazpena de Vire a distinction was drawn between cases where the couple have cohabited following a ceremony but there are doubts whether the ceremony is valid, and cases where there is no evidence of a ceremony but there has been a lengthy cohabitation, with the couple believing themselves to be, and being regarded by others as being, married. Where there has been some kind of ceremony then it must be shown beyond reasonable doubt that the ceremony was an invalid marriage, otherwise the presumption will apply. Where there is no evidence of a ceremony there must be firm evidence that there was no marriage. It is important to appreciate that the law is not saying that couples who live together are married because they cohabit, but that there is a presumption that they have undergone a ceremony of marriage unless proved otherwise. If the validity of a marriage is ambiguous, there is power under s 55 of the Family Law Act 1986 for a court to make a declaration clarifying the status of the marriage.

6 Non-marriages, void marriages and voidable marriages

Although it is relatively rare for a party to seek to have a marriage annulled in law, nullity is particularly important because, in effect, it defines who may or may not marry and reveals what the law sees as the essential ingredients of marriage. What might appear to be a ceremony of marriage can either be:

1. a valid marriage;
2. a voidable marriage;
3. a void marriage; or
4. a non-marriage, a ceremony of no legal significance.

It is necessary to draw some important distinctions at this point:

72 [2009] 3 FCR 95
73 Chief Adjudication Officer v Bath [2000] 1 FLR 8.
74 Chief Adjudication Officer v Bath [2000] 1 FLR 8.
75 [2001] 1 FLR 460.
76 See the useful discussion on the distinction between these in Probert (2002b).
A The difference between divorce and nullity

The law relating to marriage draws an important distinction between those marriages which are annulled and those which are ended by divorce. Where the marriage is annulled the law recognises that there has been some flaw in the establishment of the marriage, rendering it ineffective. Where there is a divorce the creation of the marriage is considered proper but subsequent events demonstrate that the marriage should be brought to an end.

B The difference between a void marriage and non-marriage

A void marriage is one where, although there may have been some semblance of a marriage, there is in fact a fundamental flaw in the marriage which means that it is not recognised in the law as valid. This needs to be distinguished from a non-marriage, where the ceremony that the parties undertook was nothing like a marriage and so is of no legal consequence. It is a nothing in the eyes of the law. The distinction is of great practical significance because if it is a void marriage then the court has the power to make financial orders, redistributing property between the couple. If the ceremony is a non-marriage the court has no power to redistribute property and the couple will be treated as an unmarried couple.

In *Hudson v Leigh (Status of Non-Marriage)* [2009] 3 FCR 401 Bodey J listed the following factors as indicating whether a marriage was a void marriage or a non-marriage.

(a) whether the ceremony or event set out or purported to be a lawful marriage;
(b) whether it bore all or enough of the hallmarks of marriage;
(c) whether the three key participants (most especially the officiating official) believed, intended and understood the ceremony as giving rise to the status of lawful marriage; and
(d) the reasonable perceptions, understandings and beliefs of those in attendance.

In that case it was clear the event was a non-marriage. Neither the parties nor the celebrant intended the ceremony to be a marriage and the normal wording of a marriage service was altered so it did not appear to be a marriage. By contrast in *Gereis v Yagoub* [1997] 1 FLR 854, [1997] 3 FCR 755 the couple went through a purported marriage at a Coptic Orthodox Church without going through the legal formalities. Although the priest had encouraged the parties to have a civil ceremony of marriage, they had not done so. Judge Aglionby stressed the following facts in deciding this was a void marriage: the ceremony had the ‘hallmarks of an ordinary Christian marriage’; the parties regarded themselves as married (they had sexual intercourse only after the service); the couple held themselves out as a married couple by, for example, claiming married couples’ tax allowance. He therefore decided that the marriage was void in that the parties had knowingly and wilfully intermarried in disregard of the formalities under the Marriage Act 1949. In *B v B* [2007] EWHC 2472 (Fam) a couple got married in a hot air balloon in California. The marriage had not complied with the formality requirements of English or Californian law. It was emphasised in this case that the couple had tried to marry. The husband argued it was all intended as a sham, but the court thought a couple would not go to all the effort they had to undertake a sham. The marriage was therefore void, rather than being a non-marriage.
It could be argued that the case law is discriminating against ethnic minorities because their ceremonies do not 'bear the hallmarks of a marriage' as understood in a Christian context.\(^{81}\) Indeed an Islamic ceremony in a private flat\(^{82}\) and a Hindu ceremony in a restaurant\(^{83}\) have been held to be non-marriages, being too far distant from what one would expect from a marriage ceremony.

In *Muñoz Díaz v Spain*\(^{84}\) the ECtHR rejected an argument that the non-recognition of a Roma marriage by Spanish law was an interference in their right to marry under article 12 or was discriminatory and breaching article 14. The court noted that civil marriage in Spain was open equally to everyone. However, they did find a breach of the woman’s rights under the first protocol, combined with article 14, because the state had led her to believe her marriage was recognised, in which case denying her claims to her husband’s pension on the basis that there was no marriage breached her rights. So there is no right of a minority culture to have its marriages recognised in the law, but the state must be careful to ensure people know what does or does not count as a marriage.

### C The difference between a void and a voidable marriage

A void marriage is one that in the eyes of the law has never existed. A voidable marriage exists until it has been annulled by the courts and, if it is never annulled by a court order, it will be treated as valid. This distinction has a number of significant consequences:

1. Technically, a void marriage is void even if it has never been declared to be so by a court, whereas a voidable marriage is valid from the date of the marriage until the court makes an order. That said, a party who believes his or her marriage to be void would normally seek a court order to confirm this to be so. This avoids any doubts over the validity of the marriage and also permits the parties to apply for court orders relating to their financial affairs.\(^{85}\)

2. A child born to parties of a void marriage would be technically ‘illegitimate’, unless at the time of the conception either parent reasonably believed that they were validly married to the other parent.\(^{86}\) The concept of illegitimacy is now not part of the law, but still there are a very few consequences that depend on whether a child’s parents are married or unmarried.\(^{87}\)

3. The distinction between a void and a voidable marriage may also be important in determining one person’s rights to the other’s pension.\(^{88}\)

4. Any person may seek a declaration that the marriage is void,\(^{89}\) but only the parties to the marriage can apply to annul a voidable marriage. This reflects a fundamental distinction in the grounds on which marriage can be declared void or voidable. The grounds on which a marriage may be declared void are those circumstances in which there is an element of public policy against the marriage – hence any interested person can seek a declaration of

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\(^{81}\) See the discussion in Probert (2002b).


\(^{83}\) *Gandhi v Patel* [2002] 1 FLR 603.

\(^{84}\) [2010] 1 FLR 1421.


\(^{86}\) Legitimacy Act 1976, s 1(1).

\(^{87}\) See Chapter 7.


nullity. The grounds on which a marriage may be voidable do not indicate that there is a
public policy objection to the marriage, but rather that there is a problem in the marriage
which is so significant that, if one of the parties wishes, the marriage can be annulled.

Having discussed these distinctions it is now necessary to consider the grounds on which a
marriage may be void or voidable.

D The grounds on which a marriage is void

As already noted, the grounds on which a marriage is void are those which reflect a public
policy objection to the marriage. The grounds are set out in the Matrimonial Causes Act
1973, s 11:

**Legislative Provision**

Matrimonial Causes Act 1973, section 11

(a) that it is not a valid marriage under the provisions of the Marriage Acts 1949 to 1986
(that is to say where—
(i) the parties are within the prohibited degrees of relationship;
(ii) either party is under the age of sixteen; or
(iii) the parties have intermarried in disregard of certain requirements as to the formation
of marriage);

(b) that at the time of the marriage either party was already lawfully married;

(c) that the parties are not respectively male and female;

(d) in the case of a polygamous marriage entered into outside England and Wales, that either
party was at the time of the marriage domiciled in England and Wales.

These grounds will now be considered separately.

(i) Prohibited degrees

The marriage between two people who are related to each other in certain ways is prohibited. It is interesting that nearly all societies across the world have bars on marriages between people who are related. In Britain the restrictions are based on two groups of relations: those based on blood relationships (consanguinity) and those based on marriage (affinity). The details of the law are set out in the Marriage (Prohibited Degrees of Relationship) Act 1986, s 6(2).

1. The prohibited consanguinity restrictions mean that marriage between the following is not permitted: parent–child; grandparent–grandchild; brother–sister; uncle–niece; aunt–nephew. These include relations of the half-blood as well as those relationships based on the whole blood. It will be noted that cousins may marry under English law.
2. The affinity restrictions are traditionally based on the ‘unity of husband and wife’. This is the notion that, on marriage, a husband and wife become one. These prohibited degrees based on marriage are controversial because some believe that the doctrine of unity upon which they are based is outdated. Only one remains: Marrying a stepchild. A step-parent can marry the child of a former spouse if: (i) both parties are aged 21 or over; and (ii) the younger party has not been a child of the family in relation to the other while under the age of 18. The effect of the law is that if a step-parent acts in a parental role towards a stepchild, the two can never marry. The bar on parents-in-law and children-in-law that used to exist was abolished by the Marriage Act 1949 (Remedial) Order 2007 No 438. This follows the decision in B v UK\(^{94}\) where a man wanted to marry his daughter-in-law. The law (at the time) prohibited this and they challenged it in the European Court of Human Rights. The Court held that the UK law improperly interfered with the couple’s right to marry under article 12 of the ECHR. The UK Government argued that the policy was justified in order to discourage sexual rivalry between parents and children and to protect a child from confusion over who their parents and grandparents were. However, the Court felt that the fact that parents- and children-in-law could cohabit meant that these risks existed anyway and the marriage bar did not prevent them arising. The Government responded by removing the bar.

3. Even though adoption normally ends the relationship between the adopted child and his or her birth family, the restrictions on marriage between an adopted child and members of his or her birth family apply as above. An adoptive child and adoptive parent are also within the prohibited degrees of relationship. Version 95 However, an adopted child can marry other relations that arise from the adoption. So a man could marry the daughter of his adopted parents.\(^{96}\)

The restrictions based on these relationships are justified by three arguments.\(^{97}\) The first is the fear of genetic dangers involved in permitting procreation between close blood relations. This would not justify bars based on affinity\(^{98}\) and with the availability of genetic screening may be harder to support. A second argument in favour of these bars is that permitting marriage between close relations may undermine the security of the family. The argument is that children should be brought up without the possibility of approved sexual relations later in life with members of their family. A third argument can be based on the widespread instinctive moral reaction against such relationships.

It should be recalled that although these restrictions prevent, say, a father marrying his daughter, there would be nothing to prevent them cohabiting, although any sexual relations would constitute the crime of incest.

(ii) Age

There are two requirements that relate to the age of the parties:

1. A marriage will be void if either party to the marriage is under 16.\(^{99}\) All western societies have some kind of age restrictions on who may marry and a minimum age for legal sexual

\(^{95}\) This is a permanent bar and applies even if the child is adopted for a second time.
\(^{96}\) Assuming the daughter is not his half-sister.
\(^{97}\) For an argument that the list of prohibited relationships should be added to, see Cretney, Masson and Bailey-Harris (2002: 42).
\(^{98}\) Interestingly, Australia has removed all restrictions on marriage based on affinity: see Finlay (1976).
relations, although exactly what that age is varies from state to state and generation to generation.\textsuperscript{100} The choice of the age 16 in England and Wales reflects the policy of the criminal law that it is unlawful for a man to have sexual intercourse with a girl under 16. It also reflects the concern of society about any children that may be born of such a union: the parents may be too young to care for the children and the burden could then fall on the state. There is also the argument that, below that age, the parties may not fully understand the consequences of marriage.

2. The second requirement is that if either party is between the age of 16 and 18 then it is necessary to have the written consent of each parent with parental responsibility.\textsuperscript{101} It is possible for the teenager to apply to the court to have the parental consent requirement revoked. However, if the marriage goes ahead without that consent (or on the basis of a forged consent), it would still be valid. The significance of this requirement, then, is that it permits a registrar to refuse to carry out a wedding without this consent. Rebecca Probert has questioned whether requiring parental consent to marry is appropriate in this day and age.\textsuperscript{102}

(iii) Formalities

There are complex rules governing the legal formalities required for a marriage. The exact requirements depend on whether the marriage was performed within the rites of the Church of England or outside. The detailed provisions will not be discussed here.\textsuperscript{103}

The purposes of having formalities can be said to be as follows:

1. The formality requirements help to draw a clear line between a marriage, an engagement, and an agreement to cohabit.

2. The formality requirements ensure that the parties do not enter into marriage in an ill-considered or frivolous way. To fulfil the requirements takes some time and effort. Further, they ensure that the moment of marriage is a solemn event. This reinforces the seriousness of marriage to the parties and those present.

3. The existence of the formalities helps to ensure that there is a formal record of marriages.\textsuperscript{104}

4. The formalities also ensure that anyone who wishes to object to the marriage can do so.

There are, however, dangers that formalities can be too strict. There are two particular concerns. The first is that couples may be discouraged from marrying if the formalities are too onerous. This concern led to the passing of the Marriage Act 1995, which has greatly increased the number of places where a marriage can take place. Secondly, if the law were interpreted too strictly, a minor breach of the rules could invalidate what might appear to be a valid marriage. The law has dealt with this concern under ss 25 and 49 of the Marriage Act 1995.

\textsuperscript{100} Indeed, until 1929 in England a girl could marry from the age of 12.

\textsuperscript{101} Unless there is a residence order, in which case only the parents with parental responsibility and residence order need consent: Marriage Act 1949, s 3, as amended. A guardian or local authority can also provide consent in certain circumstances.

\textsuperscript{102} Probert (2009).

\textsuperscript{103} See Cretney, Masson and Bailey-Harris (2002: ch. 2).

\textsuperscript{104} Although see the remarkable case of \textit{Islam v Islam} [2003] FL 815 where, although the evidence showed that the woman had been married, she was not able to show that she had married the man she claimed to be her husband. The judge asked the papers to be sent to the Crown Prosecution Service so that it could consider possible criminal proceedings against the wife.
which state that a marriage is void for breaching the formalities only if the parties marry knowingly and wilfully in breach of the requirement.  

One further issue is whether the parties should be required to undergo biological tests, in order to see if either party is suffering from an infectious illness. There have been calls for genetic testing to be carried out on the parties before marriage. 

At present no biological tests are required in England and Wales. The reason may be that a requirement of tests would discourage marriage.

There have also been some calls that couples be required to attend marriage counselling sessions before marriage. The closest the Government has come is the proposal that a ‘clear and simple guide’ detailing the rights and responsibilities of marriage should be made available to all couples planning to marry. This seems very sensible given the lack of understanding over the legal consequences of marriage. In the USA a computer questionnaire has become a popular way for a couple to check compatibility before marriage. Apparently, having taken the test and considered the results, 10 per cent of couples decided not to marry.

(iv) Bigamy

If at the time of the ceremony either party is already married to someone else, the ‘marriage’ will be void. The marriage will remain void even if the first spouse dies during the second ‘marriage’. So, if a person is married and wishes to marry someone else, he or she must obtain a decree of divorce or wait until the death of his or her spouse. If the first marriage is void it is technically not necessary to obtain a court order to that effect before marrying again, but that is normally sought to avoid any uncertainty. In cases of bigamy, as well as the purported marriage being void, the parties may have committed the crime of bigamy. Chris Barton has argued that there is little justification for making bigamy a crime and instead more could be done at the time of marriage to check whether parties are free to marry.

Many cultures do permit polygamous marriages, although in British society monogamous marriages are the accepted norm, which is rarely challenged. There are concrete objections to polygamous marriages. Some argue that polygamy may create divisions within the family, with one husband or wife vying for dominance over the others, and particularly that divisions may arise between the children of different parents. Supporters of polygamous marriage argue that polygamy leads to less divorce and provides a wider family support network in which to raise children. Polygamy could also be regarded as a form of sex discrimination unless both men and women are permitted to take more than one spouse. There have also been suggestions that permitting polygamous marriages involves an insult to the religious sensitivities of the majority.

105 See Chief Adjudication Officer v Bath [2000] 1 FCR 419, [2000] 1 FLR 8 for an example of a case where the parties were unaware of the non-compliance with the formalities.


110 Dredge v Dredge [1947] 1 All ER 29.

111 In Khan v UK (1986) 48 DR 253 the European Court of Human Rights rejected an argument that the bar on polygamous marriage infringed the parties’ rights under article 12 of the European Convention.

112 Barton (2004).

113 For a detailed discussion see Bradney (1993); Parkinson (1996). Shah (2003) discusses the extent of unofficial polygamy in the UK and highlights the problems in regulating against it.


115 Devlin (1965).
Chapter 2  Marriage, civil partnership and cohabitation

(v) The parties must be respectively male and female

A marriage is void if the parties are not respectively male and female in a biological sense. This gives rise to two separate issues. The first is deciding what is a man and what is a woman: in particular, how the law should deal with transsexual and intersex people. The second is whether the law should permit two people of the same sex to marry if they wish. As these situations raise different problems they will be considered separately. The first shall be discussed here, but the issue of same-sex marriage will be considered when civil partnerships are discussed.

(a) Transsexual people

The question of deciding how to define sex has arisen in particular because of the law’s treatment of transsexual people. These are people who are born with some or all of the biological characteristics of one sex, but psychologically feel they belong to the other sex. There is a treatment available on the National Health Service and in private hospitals, known as ‘gender realignment surgery’ (popularly known as a ‘sex change operation’). This, combined with hormonal drug treatment, has the effect that the outward appearance of the patient matches their ‘psychological sex’. Such a person can then operate in society to a large extent as the sex they feel they ought to be. It should be stressed that this complaint is well recognised medically and some clinicians believe that the condition may have a physical, rather than a psychological, cause.

The law relating to transsexual people is now dominated by the Gender Recognition Act 2004. Before that legislation the leading case on transsexual people and marriage was Corbett v Corbett, a decision of Ormrod J. He argued that for the purpose of the law an individual’s sex is fixed at birth: ‘The law should adopt in the first place the first three of the doctor’s criteria, i.e., the chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention.’ So, in the case before him, April Ashley, born as a man but having undergone a ‘sex change operation’ and living as a woman, was a man and could not enter into a marriage with a man. The law based on that case was found incompatible with the ECHR in Goodwin v UK and I v UK. Following Goodwin, the case of Bellinger v Bellinger issued a declaration that the definition of sex in s 11(c) of the Matrimonial Causes Act 1973 which prohibited a transsexual person marrying in her declared sex was incompatible with articles 8 and 12 of the European Convention on Human Rights.

116  Taitz (1988); Khaliq (1996); Sharpe (2002); Whittle (2002).
117  There is no definitive data on the number of transsexual people, but estimates vary between 2,000 and 5,000: Home Office (2000a).
118  Although there is no right to such treatment: R v North West Lancashire HA, ex p A [2000] 2 FCR 525.
119  This term is disliked by many transsexual people who argue that the operation is not changing their sex, but rather is bringing their body in line with their true sex. By contrast see Eekelaar (2006b: 55) who sees the Gender Recognition Act as creating a clash between legal truth and physical truth.
120  [1971] P 83.
121  At p. 106.
122  Sharpe (2002) and Whittle (2002: ch. 7) provide a detailed analysis and criticism of his decision. See also Chau and Herring (2002: 347–51).
The Government responded by producing the Gender Recognition Act 2004. Under the Act a person can apply for a Gender Recognition Certificate. Section 9(1) explains:

**LEGISLATIVE PROVISION**

Gender Recognition Act 2004, section 9(1)

Where a full gender recognition certificate is issued to a person, the person’s gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person’s sex becomes that of a man and, if it is the female gender, the person’s sex becomes that of a woman).

There are two alternative grounds on which a person may apply to the Gender Recognition Panel for a certificate. First that they have ‘changed their gender’ under the law of another country. Secondly, they are living in the gender which is not that on their birth certificate. To issue a certificate on the second ground the panel must be persuaded that the applicant:

**LEGISLATIVE PROVISION**

Gender Recognition Act 2004, section 2(1)

(a) has or has had gender dysphoria,
(b) has lived in the acquired gender throughout the period of two years ending with the date on which the application is made,
(c) intends to continue to live in the acquired gender until death.

The applicant is required to produce reports from experts in the field to establish these facts. It should be noted that it is not necessary for a person to have undergone any surgery. Once a certificate is issued the individual’s gender is changed for all purposes. In *R (AB) v Secretary of State for Justice* AB had been issued with a certificate meaning she was a woman and it was therefore held to be unlawful to place her in a man’s prison.

Where the individual is married the Panel cannot issue a full gender recognition certificate, the reason being that otherwise the result would be a same-sex marriage. Instead an interim gender recognition certificate is issued to the applicant. This will become a full certificate if their spouse dies or the marriage comes to a legal end. The issuing of an interim gender

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126 www.grp.gov.uk is the website of the Gender Recognition Panel and contains some useful material on its work.
127 This phrase is given in quotation marks because many transsexual people do not regard themselves as having changed sex, but as having their body altered to align to their true sex.
128 Gender Recognition Act 2004 (GRA 2004), s 2(1).
129 GRA 2004, s 3.
131 These provisions reveal the desperate lengths to which Parliament feels it needs to go in order to ensure there cannot be a same-sex marriage.
A recognition certificate can be a ground for annulment or a fact to be relied upon to establish the ground of divorce.\textsuperscript{133} In \textit{Parry v UK}\textsuperscript{134} a husband, with the support of his wife, had undergone gender reassignment surgery. The couple were devout Christians and wished to remain married, but the husband wanted a full recognition certificate. As we have seen she could not do both: she either could get the certificate\textsuperscript{135} or remain married. The ECtHR rejected their complaint that the current English law infringed their ECHR rights. The fact that they could get a gender recognition certificate and then enter a civil partnership meant their rights were not infringed.

As already stated, the full certificate changes the legal categorisation of the person’s sex, but it does ‘not affect the status of the person as the father or mother of a child’.\textsuperscript{136} As Stephen Gilmore has pointed out, this means that a person could be the mother of one child and the father of another.\textsuperscript{137} It should also be noted that those transsexual people who do not apply for a certificate have their sex determined by the \textit{Corbett} test set out above.\textsuperscript{138} Between 4 April 2005 and 31 January 2010 1,443 full certificates have been granted; and 46 interim certificates. Only 46 applications were refused and 7 withdrawn.\textsuperscript{139}

Generally the Act has been welcomed. At last individuals suffering from gender identity dysphoria can be recognised in law as having the sex with which they identify. Yet there are some who raise concerns about the legislation. Alison Diduck\textsuperscript{140} has expressed concern that the legislation appears to regard gender dysphoria as an abnormal dysfunction that needs special medical and legal treatment. It is almost as if it is some highly contagious condition which needs careful control and monitoring. Certainly the wait for two years is a long time. While a wait before undergoing surgery may be sensible given it is so hard to reverse, is there a need for a wait before obtaining a certificate? John Eekelaar objects to the fact that on the issue of a gender recognition certificate a new birth certificate is issued. He argues doing so feeds the climate of discrimination and harassment that the legislation is designed to combat. If society approves of gender reassignment surgery it should ‘shout about it from the rooftops’\textsuperscript{141}. However, transsexual people claim that the surgery is bringing their body in line with their true sex. So reissuing the birth certificate is correcting an erroneous document. Andrew Sharpe notes that the Act makes a failure to disclose gender a ground of annulment of a marriage. This, he suggests, reveals the suspicion the law retains about transsexual people.\textsuperscript{142}

Others have complained that the legislation does nothing for a transsexual or an intersex person who wishes to be regarded as neither male nor female. Indeed the legislation can be said to reflect the law’s obsession with categorising people into being either male or female.\textsuperscript{143} Some commentators have argued that far from there being two boxes for male and female, there is rather a scale of maleness and femaleness.\textsuperscript{144}

\textsuperscript{133} GRA 2004, Sch 2.
\textsuperscript{134} Application No. 42971/05.
\textsuperscript{135} They were unkeen on the option of getting a gender recognition certificate and entering a civil partnership.
\textsuperscript{136} GRA 2004, s 12.
\textsuperscript{137} Gilmore (2003b). Where a woman gives birth to a child, is later given a gender recognition certificate and thereafter, with his new female partner, receives fertility treatment at a licensed clinic and a child is born as a result.
\textsuperscript{138} Probert (2005).
\textsuperscript{139} Gender Recognition Users Panel (2010).
\textsuperscript{140} Diduck (2003: ch. 1).
\textsuperscript{141} Eekelaar (2006b: 76).
\textsuperscript{142} Sharpe (2007).
\textsuperscript{143} Chau and Herring (2004: 201); Sandland (2005).
\textsuperscript{144} O’Donovan (1993); Chau and Herring (2004).
(b) Intersex people

Transsexual people must be clearly differentiated from intersex people who are born with sexual or reproductive organs of both sexes. As the biological sex of an intersex person is ambiguous at birth, the doctors, in consultation with the family, will select a sex for the child.145 Tragically it can later become clear that the doctors made the wrong choice and the child’s body develops in a way clearly in line with the opposite sex. In such cases it is possible to amend the birth certificate to reflect the fact that an error was made in determining the sex at birth and the child will be regarded as having the later sex.

The leading case in this area is now W v W (Nullity),146 where Charles J held that if a person was born with ambiguous genitalia the individual’s sex was to be determined by considering: (i) chromosomal factors; (ii) gonadal factors; (iii) genital factors; (iv) psychological factors; (v) hormonal factors; and (vi) secondary sexual characteristics (such as distribution of hair, breast development, etc.). Notably, Charles J accepted that a decision as to someone’s sex could be made at the time of the marriage, taking these factors into account. As we have seen, some commentators take the view that the position of intersex people reveals that there is no hard and fast division between male and female, but rather there is a scale between maleness and femaleness and people are placed at various points on that scale.147 To them we should simply treat everyone as a person and not classify people as male or female. That would mean, in this context, that any two people should be allowed to marry. Objectors to this view might reply that it overlooks the reality that the vast majority of people clearly do strongly regard themselves as either male or female. It is highly artificial to refer to a scale when virtually everyone is at either end of it.

(vi) Public policy

There is one reported case where a marriage was rendered void on the basis of public policy. In City of Westminster v C148 the Court of Appeal held a marriage between a man with severe intellectual impairment and a woman in Bangladesh performed over the telephone void. He lacked capacity to have any understanding of the nature of marriage and would be unable to consent to sexual relations. The marriage was described as exploitative of the woman and of the man. Although normally lack of capacity would render a marriage voidable rather than void, public policy justified this marriage being declared void.

(vii) Marriages entered into abroad

Complex issues of private international law arise over the recognition of marriages conducted abroad, and these are not discussed in this book.149

E The grounds on which a marriage is voidable

The grounds on which a marriage is voidable are set out in the Matrimonial Causes Act 1973, s 12:

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145 For a detailed discussion of the medical and legal issues surrounding intersexual people see Chau and Herring (2002 and 2004).
147 The argument is developed in Chau and Herring (2002). See also the interesting discussion of the meaning of sex in Grenfell (2003).
148 [2008] 2 FCR 146, see Probert (2008a) for a discussion of this case.
149 See, e.g., Murphy (2005).
Marriage, civil partnership and cohabitation

Chapter 2

These grounds will now be considered separately.

(i) Inability or wilful refusal to consummate

The importance of consummation was originally based on the theological ground that the act of sexual intercourse united the two spouses in a spiritual union and was therefore necessary to complete the sacrament of marriage. The requirement of consummation can also be explained in non-religious terms in that it is the act of sexual intercourse that most clearly distinguishes marriage from a close relationship between two platonic friends. However, given the increase in sexual relations outside of marriage it is harder to argue that sexual intercourse has a unique place in marriage. It has even been suggested that it is a sexist requirement in that it is easier for a man to show he has the capacity to engage in sexual intercourse than it is for a woman.\(^{150}\) The importance of consummation could also be said to amount to an encouragement for married couples to produce children.\(^ {151} \)

In order for a marriage to be consummated there need only be one act of consummation; but the act must take place after the solemnisation of the marriage.\(^ {152} \) So in \(P \text{ v } P\),\(^ {153} \) where a husband only had sexual relations eight times in 18 years, the marriage was not voidable and divorce was the only way to end the marriage. There are two grounds of voidability connected to consummation. The first ground is a wilful refusal by a spouse to consummate the marriage, and the second is the incapacity of either party to consummate the marriage. The applicant for the nullity application can rely on his or her own inability to consummate but not on his or her own wilful refusal. This is because a party should not be able to rely on his or her own decision not to consummate in order to annul a marriage. It is useful to have the two alternative grounds as it may be difficult in a particular case to discover whether the non-consummation was due to inability or wilful refusal.

\(^ {150} \) Welstead and Edwards (2006: 35).
\(^ {151} \) Baxter \text{ v } Baxter [1948] AC 274.
\(^ {152} \) Dredge \text{ v } Dredge [1947] 1 All ER 29.
\(^ {153} \) [1964] 3 All ER 919.
What is meant by consummation? ‘Consummation’ is defined as an act of sexual intercourse. Consummation can only be carried out by the penetration of the vagina by the penis. No other form of sexual activity will amount to consummation. Intercourse needs to be ‘ordinary and complete, and not partial and imperfect’. There needs to be full penetration, but there is no need for an ejaculation or orgasm. In *Baxter v Baxter* the House of Lords held that consummation took place even though the man was wearing a condom. There have even been cases where a pregnancy resulted from a sexual act but the court decided there was no consummation because there was no penetration. This reveals that the consummation requirement is not explained by the state’s interest in the potential production of children.

‘Inability to consummate’ means that the inability cannot be cured by surgery and is permanent. Inability can be either physiological or psychological. Inability also includes ‘invincible repugnance’, where one party is unable to have sexual intercourse due to ‘paralysis of the will’, but this must be more than lack of attraction or a dislike of the other partner.

There has been much debate over whether the incapacity to consummate marriage has to exist at the time of the marriage. In other words, what would happen if the husband was rendered impotent as a result of a fight he had with the bride’s father during the reception? Under Canon Law impotence could be relied upon only if the impotence existed at the time of marriage. This reflected the crucial distinction between nullity and marriage: nullity applies when defects exist at the time of marriage, while divorce is used when defects occur after the time of the marriage itself. However, the Matrimonial Causes Act makes no reference to the inability existing ‘at the time of the marriage’, whereas it makes explicit reference to ‘at the time of the marriage’ in relation to other grounds of voidability. It is therefore submitted that there is a strong case that the inability can occur at any time before or during the marriage as long as the union has not yet been consummated.

‘Wilful refusal to consummate’ requires a ‘settled and definite decision not to consummate without wilful excuse’. If there has been no opportunity to consummate the marriage then it will be hard to show that there has been a wilful refusal unless one party has shown ‘unswerving determination’ not to consummate the marriage. ‘Wilful refusal’ may also occur where the parties have agreed only to have intercourse under certain circumstances (e.g. after a religious ceremony). In such a case then a refusal by one party to abide by the condition may constitute ‘wilful refusal’. For example, in *Kaur v Singh* a couple agreed they would be legally married and then undergo a religious ceremony, and only after that would the marriage be consummated. The couple were legally married but the man then refused to undergo the religious ceremony, although he was willing to consummate the marriage. The wife was unwilling to consummate the marriage until the religious ceremony was performed.

154 D-E v A-G (1845) 1 Rob Eccl 279 at p. 298.
155 R v R [1952] 1 All ER 1194.
156 [1948] AC 274.
157 There is some doubt about coitus interruptus (where the man withdraws before ejaculation): *Cackett v Cackett* [1950] P 253; *White v White* [1948] P 330; *Grimes v Grimes* [1948] 2 All ER 147. The issue was left open in *Baxter v Baxter* [1948] AC 274.
158 *Clarke v Clarke* [1943] 2 All ER 540. The marriage here had lasted 15 years.
159 If the inability to consummate can only be cured by potentially dangerous surgery then the inability will be treated as permanent: *S v S* [1956] P 1.
160 *G v G* [1924] AC 349.
161 *Singh v Singh* [1971] P 226.
162 *Horton v Horton* [1972] 2 All ER 871.
163 Perhaps because the parties are living in different places (e.g. the husband is in prison).
165 *A v J* [1989] 1 FLR 110.
166 [1972] 1 All ER 292.
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She applied for and was granted a nullity decree on the basis of wilful refusal to consummate.\textsuperscript{167} There is some doubt over the position of the law where the parties agree before the marriage that they will not consummate the marriage at all. It seems to be that such an agreement would be regarded as contrary to public policy\textsuperscript{168} unless the parties have a good reason for the agreement.\textsuperscript{169} The marriage will not be annulled on the ground of wilful refusal if the lack of consummation is due to a just excuse,\textsuperscript{170} although the case law reveals very little on the exact meaning of this.\textsuperscript{171}

(ii) Lack of consent

The Matrimonial Causes Act recognises four circumstances which may cause a person to be unable to give consent so as to render a marriage voidable. These are ‘duress, mistake, unsoundness of mind or otherwise’.\textsuperscript{172} The law seeks to resolve a tension here. On the one hand there is the view that it should not be too easy to have a marriage annulled. On the other hand, at least in the West, consent is regarded as a highly important factor in marriage. At one time the law required that the lack of consent was apparent at the time of the ceremony.\textsuperscript{173} Although the appearance of consent may be important as a matter of evidence, it is now clear that it is not a formal requirement.

It should be noted that lack of consent renders a marriage voidable rather than void. This means that if a party does not consent to the marriage but later changes his or her mind and is happy with the marriage, the marriage will be valid and there is no need to remarry. The separate ways in which a lack of consent may be demonstrated will now be discussed.

(a) Duress

If it could be shown that someone was compelled to enter a marriage as a result of fear or threats, the marriage may be voidable due to duress. The following issues have been discussed in the case law:

1. What must the threat or fear be of? At one time it was thought that it was only possible for duress to render a marriage voidable if there was a threat to ‘life, limb or liberty’.\textsuperscript{174} The Court of Appeal in \textit{Hirani v Hirani}\textsuperscript{175} suggested that the test for duress should focus on the effect of the threat rather than the nature of the threat. In other words, the threats can be of any kind, but it must be shown that ‘the threats, pressure or whatever it is, is such as to destroy the reality of the consent and overbear the will of the individual’.\textsuperscript{176} In the case of \textit{Hirani v Hirani}\textsuperscript{177} the court accepted that social pressure could overbear the consent. The woman was threatened with ostracism by her community and her family if she did not go through with the marriage, and the fear of complete social isolation was such that there was no true consent. In \textit{P v R (Forced Marriage: Annulment: Procedure)}\textsuperscript{178} Colderidge J

\textsuperscript{167} See also \textit{A v J} [1989] 1 FLR 110.
\textsuperscript{168} \textit{Brodie v Brodie} [1917] P 271.
\textsuperscript{169} \textit{Morgan v Morgan} [1959] P 92.
\textsuperscript{170} Borkowski (1994).
\textsuperscript{171} \textit{Horton v Horton} [1972] 2 All ER 871.
\textsuperscript{172} Article 16(2) of the Universal Declaration of Human Rights 1948 states that: ‘Marriage shall be entered into only with the free and full consent of the intending spouses.’
\textsuperscript{173} \textit{Cooper v Crane} [1891] P 369.
\textsuperscript{176} \textit{Hirani v Hirani} (1982) 4 FLR 232 at p. 234.
\textsuperscript{177} (1982) 4 FLR 232.
\textsuperscript{178} [2003] 1 FLR 661. See also \textit{NS v MI} [2006] EWHC 1646 (Fam) where the \textit{Hirani} approach was adopted.
followed Hirani and held that severe emotional pressure could be such as to mean that there was no genuine consent to marry. Hirani should be contrasted with Singh v Singh, where the couple had not met before the marriage and the wife agreed to marry only out of respect for her parents. As the wife entered the marriage, not out of fear, but out of a sense of duty, it could not be said that she did not consent to the marriage. The effect of the Hirani decision is that those who have undergone an arranged marriage in the face of a serious threat have the choice of either accepting their culture and the validity of the marriage or accepting the dominant culture’s view that marriage should be made voidable. This could be regarded as an appropriate compromise between respecting the cultural practice of arranged marriages and respecting people’s right to choose whom to marry.

2. The Law Commission has suggested that really what is at issue is the legitimacy of the threat rather than the lack of consent. After all, many people feel a pressure from family or society to get married. This approach is reflected in other areas of law where duress is an issue, for example contract law, where reference to the ‘overborne will’ has largely been abandoned. When someone is acting under duress it is not that they do not make a choice but rather that the choice is made in circumstances in which it should not lead to legal effect. This then requires the court to make a judgment on whether the horrors of the alternative meant that the choice should not be given effect, rather than considering whether there was true consent. It may be that when the issue next comes before the Court of Appeal it will focus on the legitimacy of the threat as well as the impact of the threat on the victim.

3. Must the fear be reasonably held? What if a threat was made, but a reasonable person would not have taken it seriously? In Szechter it was suggested that duress could not be relied upon unless the fear was reasonably held. Against this is Scott v Selbright, in which it was suggested that as long as the beliefs of threats were honestly held, duress could be relied upon. The Scott v Selbright view seems preferable because it would be undesirable to punish a person for their careless mistake by denying them an annulment.

4. Was the threat reasonably made? In Buckland v Buckland a man was alleged to have made a young woman pregnant while he was in Cyprus. The police threatened him with arrest and prosecution unless he married the woman. He denied the allegation but, fearing the police’s threats, agreed to marry the woman. Simon J agreed that the marriage was voidable due to lack of consent on the grounds of duress. However, he stressed that this was because he believed the young man’s version of events, namely that he had barely met the woman and was not responsible for the pregnancy. The threat was therefore ‘unjust’. However, had he been responsible for the pregnancy, Simon J’s judgment seems to imply that the marriage would not have been annulled. Some commentators have argued that this is a wrong approach and that if there is a genuine lack of consent the marriage should

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179 [1971] P 226.
180 See also Re KR (Abduction: Forcible Removal by Parents) [1999] 2 FLR 542, where the court was willing to use wardship to protect a 17-year-old from being taken abroad for an arranged marriage.
181 Parkinson (1996). In NS v MI [2006] EWHC 1646 (Fam) Munby J emphasised that the court must beware of stereotyping.
184 Bradney (1994).
186 (1886) 12 PD 21 at p. 24.
be voidable regardless of whether the party was at fault in causing the duress. Even if *Buckland* is followed in future cases, surely it can never be reasonable to impose a threat requiring someone to enter into a marriage?

5. **By whom must the threat be made?** The threat can emanate from a third party; it need not emanate from the spouse.188

**(b) Mistake**

A mistake can also negate consent. So far the law has only allowed two kinds of mistake to negate consent. The first is a mistake as to the other party’s identity. It must be a mistake as to identity rather than a mistake as to attribute.189 So, for example, a marriage would not be voidable if one party wrongly thought the other was rich,190 or a marvellous cook.191 But a marriage would be voidable if a party to the marriage thought the person they were marrying was someone else (e.g. if there was a case of impersonation).192 The second kind of mistake that will make a marriage voidable is when there is a mistake as to the nature of the ceremony. So, if one party believes the ceremony is one of engagement, say, then this can invalidate the marriage.193 However, a mistake as to the legal effects of marriage is insufficient.194

It is arguable that in the light of *Hirani* this area of the law is open to reconsideration; that the law should focus not on the kind of mistake, but the effect of the mistake on a person’s consent. So, for example, if it was crucial to a wife that her husband belonged to a particular religion then a mistake as to his religion could invalidate her consent. Only future cases will tell whether such a liberal approach can be taken, or whether the traditional approach of accepting only mistakes as to the person or the nature of the ceremony will negate consent.

**(c) Unsoundness of mind**

If a person lacks the capacity to marry, no one else can consent on their behalf. Unsoundness will only lead to a marriage being voidable if it exists at the time of the marriage. So a marriage will not be void if someone becomes mentally ill after the marriage. There is a presumption that people are of sound mind, and so the burden of proof lies on the person seeking to have the marriage annulled. To determine whether there is sufficient unsoundness of mind to render the marriage voidable, Singleton LJ in *In the Estate of Park*195 stated that it is necessary to ask whether the person was:

> capable of understanding the nature of the contract into which he was entering, or was his mental condition such that he was incapable of understanding it? To ascertain the nature of the contract of marriage a man must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage. Without that degree of mentality, it cannot be said that he understands the nature of the contract.

In *Sheffield City Council v E and S*196 it was emphasised that every adult is presumed to have the capacity to consent. The test for capacity did not focus on whether the individual understood

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188 *H v H* [1954] P 258; NS v MI [2006] EWHC 1646 (Fam).
189 *Moss v Moss* [1897] P 263.
190 *Wakefield v Mackay* (1807) 1 Hag Con 394 at p. 398; *Ewing v Wheatly* (1814) 2 Hagg Cas 175.
191 See *C v C* [1942] NZLR 356 for a New Zealand case where a woman who married a man she believed (incorrectly) to be a famous boxer failed in her attempt to have the marriage annulled.
193 An example of this can be found in *Valier v Valier* (1925) 133 LT 830.
that they were getting married, but rather whether they understood the nature of the duties and responsibilities attached to marriage: that spouses were to live together and to love each other to the exclusion of all others. Normally it involved sharing a common domestic life, sharing each other’s society, comfort and assistance. Marriage was not meant to be a difficult concept to understand. Munby J emphasised that if a person’s competence was challenged in court the judge must focus on whether the person had capacity to marry, not on whether it was wise for them to marry. Controversially he held that it was not necessary to show that the person understood the character of the person they were marrying. In this case there were concerns that the man was a violent and abusive man, and that the woman, who suffered various learning difficulties, did not appreciate that. It might be thought the character of one’s partner is central to marriage. A violent abusive marriage is a very different thing from a loving one.

In X City Council v MB\(^{197}\) it was held that to have capacity to marry, a person would have to have capacity to consent to sexual intercourse. That meant they would need to understand the character and nature of sexual intercourse and the reasonably foreseeable consequences of it. They would also need the capacity to be able to choose whether or not to engage in it. The case demonstrates the way the law regards sexual intercourse as an essential element of marriage. Given the fact that much sexual intercourse takes place outside marriage, it may be questioned whether sexual relations should be seen as central to the notion of marriage.\(^{198}\)

**(d) Otherwise**

The statute refers to a lack of consent through factors other than duress or mistake. These include the following:

1. **Drunkenness.** There is no clear authority on whether the marriage is voidable where one party was drunk and so did not consent to the marriage. There are two views here. One is that drunkenness should be seen as analogous to being of unsound mind and so would make a marriage voidable. Another view is that a party should not be able to rely on a lack of consent that arises due to their own fault, and so voluntary intoxication should not render a marriage voidable. In Sullivan v Sullivan\(^ {199}\) it was suggested that the groom was so drunk that he was unable to understand the nature of the ceremony and so the marriage was voidable.

2. **Fraud and misrepresentation.** Neither fraud nor innocent misrepresentation will on its own affect the validity of the marriage.\(^ {200}\) However, if the fraud or misrepresentation leads to a mistake as to the identity of the other party or the nature of the ceremony then, as discussed above, the marriage will be voidable.

**(iii) Mental disorder**

A marriage is also voidable if either party is suffering from a mental disorder\(^ {201}\) at the time of the marriage to such an extent that they are unfit for marriage: that is, ‘incapable of carrying out the ordinary duties and obligations of marriage’.\(^ {202}\) It is necessary to distinguish this from

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\(^{197}\) [2007] 3 FCR 371.

\(^{198}\) Some religions teach that sexual intercourse should only take place in marriage. This has been the traditional Christian view and may explain why sexual relations are regarded as central to marriage.

\(^{199}\) (1812) 2 Hag Con 238 at p. 246.

\(^{200}\) Swift v Kelly (1835) 3 Knapp 257 at p. 293; Moss v Moss [1897] P 263.

\(^{201}\) As defined by the Mental Health Act 1983.

\(^{202}\) Bennett v Bennett [1969] 1 All ER 539.
the lack of consent through unsoundness of mind. The mental disorder ground covers those who are able to understand the nature of a marriage but are unable to perform the duties of marriage due to a mental illness.

It should be stressed that both of the grounds relating to mental illness only make the marriage voidable and not void, so there is nothing to stop those with mental illnesses, even extreme ones, from marrying, the one exception being where the court finds a public policy objection to the marriage. 203

(iv) Venereal disease and pregnancy

A marriage is voidable if the respondent is suffering from venereal disease at the time of the ceremony or if the respondent was pregnant by someone other than the petitioner. It should be noted that a wife cannot seek nullity on the ground that the husband has fathered a child through another woman prior to the marriage. It may be thought that venereal disease and pregnancy should no longer be regarded as sufficient grounds to annul a marriage, although, as we shall see, a petitioner will not be able to use these grounds if they were aware of the disease or the pregnancy at the time of the marriage. The continued use of the term ‘venereal disease’ is a little unfortunate because it is one that is no longer used in medical circles. ‘Sexually transmitted disease’ is the preferred phrase. 205

(v) Sham marriages

What is the position of a couple who go through a marriage purely for the purpose of pretending to be married, even though they never intend to live together as husband or wife? This is most likely to arise in a case involving immigration. 206 The House of Lords in Vervaeke v Smith 207 suggested that such marriages are valid, even though in that case the parties only saw each other on a few occasions after the marriage and the aim of the marriage was to enable the wife to obtain British citizenship and so avoid deportation. 208 Although such a marriage was valid, it may not be sufficient for the purposes of immigration rules. So a person entering a sham marriage in order to enter the UK might find themselves unable to come to Britain, but married to someone they do not know. It seems the use of marriage purely for immigration purposes is not uncommon. 209

F Bars to relief in voidable marriages

There are no bars to a marriage being void, although there are some circumstances which prevent the petitioner from seeking to annul a voidable marriage. These bars are found in s 13(1) of the Matrimonial Causes Act 1973. If the bar is established the court may not annul the marriage. The burden is on the respondent to raise the bar as a defence. If the respondent

203 City of Westminster v C [2008] 2 FCR 146, see Probert (2008) for a discussion of this case.
204 The term is not defined in the Act.
205 It is not clear whether the courts would be willing to stretch the meaning of venereal disease to include HIV.
206 See Asylum and Immigration (Treatment of Claimants etc.) Act 2004, s 19 which was used to introduce a regime requiring those subject to immigration control to obtain a certificate from the Secretary of State before marrying (unless they were marrying within the rites of the Church of England). This scheme was designed to prevent sham marriages entered into for immigration purposes, but see e.g. R (On the application of Baiati) v Secretary of State [2008] 3 FCR 1 which declared such schemes as discriminatory and incompatible with the right to marry in the ECHR.
208 Divorce may well be possible, of course: e.g. Silver v Silver [1955] 1 WLR 728.
209 BBC Newsonline (2009a).
does not mention the bar, the court cannot raise it on his or her behalf. If no statutory bar is established the court cannot bar the annulment on the basis of public policy. This indicates that the bars exist not for public policy reasons but for the protection of the petitioner. We will now consider the different bars.

(i) Approbation

Section 13(1) of the Matrimonial Causes Act 1973 states:

**LEGISLATIVE PROVISION**

**Matrimonial Causes Act 1973, section 13(1)**

The court shall not . . . grant a decree of nullity on the ground that a marriage is voidable if the respondent satisfies the court—

(a) that the petitioner, with knowledge that it was open to him to have the marriage avoided, so conducted himself in relation to the respondent as to lead the respondent reasonably to believe that he would not seek to do so; and

(b) that it would be unjust to the respondent to grant the decree.

It is essential that both paragraphs (a) and (b) be proved to the court’s satisfaction. The basis of this bar is that it is seen as contrary to public policy and unjust to allow a person to seek to annul the marriage after leading the other party to believe he or she would not challenge the marriage. For example, in *D v D (Nullity)* the husband relied on his wife’s refusal to consummate the marriage in a nullity petition. However, he had previously agreed to the adoption of a child. It was held that his action indicated to the wife that he intended to treat the marriage as valid. Similarly, a man marrying a woman who he knows suffers from a mental disorder or is pregnant would be barred from seeking to annul the marriage on these grounds. It may be that if the marriage has lasted some time the court might imply from the delay in bringing the petition that the petitioner had consented to the marriage.

In order to establish the bar it must be shown that to annul the marriage would be unjust. For example, in *D v D* it might have been unjust to leave the wife caring for the children on her own. However, in that case the wife consented to the nullity decree and so it was thought not to be unjust to her to grant the decree. In considering justice under (b) the court is likely to consider factors such as the length of the marriage, financial implications of the nullity, and social implications of granting a decree.

(ii) Time

A decree of nullity will normally not succeed unless brought within three years of the date of the marriage, the exception being a petition based on impotence. The policy behind this is clear: parties need a degree of security in their marriage – if three years have passed, then to claim that the marriage is fundamentally flawed seems unrealistic. In *B v I (Forced Marriage)*

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210 *D v D (Nullity)* [1979] Fam 70.
211 *MCA 1973*, s 13(2). There is an exception if the petitioner suffered from some kind of mental disorder.
a 16-year-old girl was forced into a marriage in Bangladesh and was only able to alert someone over three years later. The court was unable to declare the marriage a nullity, but could declare it to be a marriage which was incapable of recognition within the UK. It was significant in that case that the woman would have faced significant stigma within her community if she had relied on divorce. Otherwise the obvious solution to her situation would have been to seek a divorce.

(iii) Estoppel

Can a party ever be prevented from obtaining a nullity decree on the basis of estoppel? There are two kinds of estoppel that might be relevant. The first is estoppel by conduct where one party so conducts himself or herself that it would be unjust for him or her to deny the facts that he or she has led the other to believe are true. *Miles v Chilton* provides an example of the kind of situation under discussion. A husband sought annulment on the ground that his wife was already married at the time of the marriage. The wife argued that the husband had deceived her into believing that her ‘first’ husband had divorced her. The court held that this was no answer to the husband’s petition, because otherwise the court would be prevented from discovering the true state of affairs. So estoppel by conduct was not found relevant in this case.

The other kind of estoppel is *estoppel per rem judicatam*, meaning that a party cannot seek to overturn a court’s decision. A decree of nullity is what is known as a judgment *in rem*: proceedings cannot be started which seek to undermine such a judgment. However, if the nullity petition is dismissed this affects only the parties themselves. So, if a man is granted a nullity petition on the ground that the wife is married to another man, no one can seek to undermine the basis of the annulment by suggesting in a court that the first marriage was invalid. However, if the petition had been dismissed on the ground that the first marriage was invalid this does not bar anyone except the parties themselves from seeking to show that the first marriage was in fact valid.

**Effects of a decree of nullity**

Section 16 of the Matrimonial Causes Act 1973 states:

**LEGISLATIVE PROVISION**

Matrimonial Causes Act 1973, section 16

A decree of nullity granted after 31st July 1971 in respect of a voidable marriage shall operate to annul the marriage only as respects any time after the decree has been made absolute, and the marriage shall, notwithstanding the decree, be treated as if it had existed up to that time.

A child of a void marriage is treated as legitimate due to s 1(1) of the Legitimacy Act 1976, as long as at the time of the marriage either (or both) parties reasonably believed that the marriage was valid. *Re Spence* has clarified the law and said that if the marriage was annulled after the birth then the child was legitimate.

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215 (1849) 1 Rob Eccl 684.
216 There are contrary dicta in *Bullock v Bullock* [1960] 2 All ER 307 at p. 309.
217 Under the Family Law Act 1986, s 56 a declaration of legitimacy can be made if there is any doubt.
Due to ss 23 and 24 of the Matrimonial Causes Act 1973 on granting a decree of nullity, the court has the power to make ancillary relief orders to the same extent as if a divorce order was being made. However, following Whiston v Whiston,²¹⁹ as interpreted in Rampal v Rampal (No. 2),²²⁰ if the marriage is void on the ground of bigamy then the court might decide that the applicant’s conduct was such that the court should not award her any ancillary relief. In J v S-T²²¹ the applicant was born a woman, underwent a partial sex-change operation, lived as a man, and then married a woman. After 17 years of marriage the wife²²² petitioned for a declaration that the marriage was void on the ground that the parties were not respectively male and female. The husband applied for ancillary relief. The court held that there was a discretion in the court to award ancillary relief. However, in exercising its discretion the court decided not to make any award bearing in mind his deception as to his sex.²²³ By contrast in Ben Hashem v Al Shayif²²⁴ as both the husband and wife had been fully aware of the bigamous nature of their marriage, the bigamy had no impact on the amount awarded.

**H Reform of nullity**

There were 331 petitions for annulments in 2008, of which 200 were granted.²²⁵ The tiny numbers involved raise the question of whether we need all the complex law on nullity that we have. The concept of a void marriage is necessary if there are to be limits on who may marry and to whom. However, there has been some debate over whether the concept of voidable marriage should be abolished. The Law Commission²²⁶ supported the retention of voidable marriage by arguing that to some couples it is particularly important that annulment rather than divorce ends their marriage. This tends to be for religious reasons. Cretney has argued that the law on voidable marriage could be abolished, leaving questions of annulment to the church or other religious bodies.²²⁷ There is much to be said for this approach, given that the vast majority of annulment petitions are brought for religious reasons.

**I Forced marriages**

The Government’s Forced Marriage Unit dealt with 420 cases of forced marriage in 2009. Of these, 30 per cent concerned under-18s, and 86 per cent were women.²²⁸ Most cases involved members of south Asian communities.²²⁹ Article 12 of the European Convention on Human Rights protects the right to marry. This includes the right not to be forced into a marriage against your will. The problem of ‘forced marriages’ is one which the courts have had to deal with increasingly often.²³⁰ We have already seen that if a party is forced into a marriage as a result of threats or pressures then the marriage can be annulled on the basis of no consent.

²²⁰ [2001] 2 FCR 552.
²²² It took the wife 17 years to find out that her husband had not been born a man. The facts of the case reveal the dangers of looking in a man’s sock drawer.
²²³ As a result of ss 1(1)(a) and 25(4) of the Inheritance (Provision for Family and Dependants) Act 1975 a person who in good faith has entered into a void marriage may apply to the court for reasonable provision out of the estate.
²²⁵ Ministry of Justice (2009).
²²⁷ Cretney (1972). See also Probert (2005).
²²⁸ Walsh (2009a).
²²⁹ Department for Children, Schools and Families (2009).
²³⁰ See Dauvergne and Millbank (2010) for a discussion of the international dimension.
Chapter 2  Marriage, civil partnership and cohabitation

Here we will consider how the court will deal with a case where there are concerns that a forced marriage is about to take place. Hogg J has described forced marriage as ‘abusive’. 231

It should be emphasised that there are no legal objections to an arranged marriage, where the parents determine who their adult child should marry. Parents may encourage or persuade their child to marry the person they propose. There are many communities where this is common practice and the courts will not invalidate a marriage or seek to prevent the parents urging their child to marry, unless the pressure used becomes illegitimate. In A Local Authority v N 232 Munby J warned that courts must be sensitive to cultural, social and religious circumstances and the courts should not assume that an arranged marriage is a forced one. The Government is aware that it is necessary to draw a clear distinction between a forced marriage and an arranged marriage:

There is a clear distinction between a forced marriage and an arranged marriage. In arranged marriages, the families of both spouses take a leading role in arranging the marriage but the choice whether or not to accept the arrangement remains with the prospective spouses. In forced marriage, one or both spouses do not (or, in the case of some adults with disabilities, cannot) consent to the marriage and duress is involved. Duress can include physical, psychological, sexual, financial and emotional pressure. 233

An arranged marriage is entered into freely by both people, although their families take a leading role in the choice of partner. 234 However, the point at which the encouragement of the family members crosses the line to become duress – changing an arranged marriage to a forced marriage – is not easy to pinpoint.

It is easy to be over-simplistic in an understanding of forced marriages. In fact, they involve a complex interplay of gender and age discrimination. They should not be seen simply as the product of a minority cultural practice, as economic difficulties and immigration policies also play an important role. 235 Nor should it be assumed that only young women are affected – men can be, 236 as can older women. 237 It should be remembered, too, that it is not just the entry into forced marriages that needs tackling, but women need to be enabled to leave such marriages. 238 The issue needs also to be seen in the broader context of so-called ‘honour’ based violence. 239

The courts have shown an increased willingness to make orders to protect someone from a forced marriage. There are three jurisdictions the courts can use: Forced Marriage (Civil Protection) Act 2007; the Mental Capacity Act 2005; and the inherent jurisdiction. Where the only issue of concern is the forced marriage, then the 2007 Act should be used. Where, however, there are a range of issues over which the court needs to make orders, the Mental Capacity Act 2005 should be used if the person lacks mental capacity; or the inherent jurisdiction order if the person does not.

(i) Forced Marriage (Civil Protection) Act 2007

The 2007 Act was passed to provide specific protection to people at risk of being forced into a marriage. The Act does not deal with the validity of forced marriages, those are dealt with by the law on voidability. The Act enables the court to make ‘forced marriage protection orders’.

231 Re B; RB v FB and MA (Forced Marriage: Wardship: Jurisdiction) [2008] 2 FLR 1624.
234 Forced Marriage Unit (2006: 1).
235 Gill and Anitha (2009); Chantler, Gangoli and Hester (2009).
236 Samad (2010).
237 Gangoli and Chantler (2009).
238 Chantler, Gangoli and Hester (2009).
239 Re B-M (Care Orders) [2009] 2 FLR 20.
A forced marriage is defined as one where one person forces another to enter into a marriage without their ‘full and free consent.’ Force here includes physical and psychological threats; and includes threats, whoever they are directed towards. The Act gives the court a broad discretion to make whatever order is necessary to protect the individual at risk: it can order ‘such prohibitions, restrictions or requirements . . . and . . . other terms . . . as the court considers appropriate for the purposes of the order’. This could include surrendering a passport, or prohibiting a party from contacting another. In deciding whether to make an order the court must have regard to ‘all the circumstances including the need to secure the health, safety and well-being of the person to be protected’. Notably the Act states that in ascertaining that person’s well-being, the court is to have regard to his or her wishes and feelings (so far as reasonably ascertainable) and giving them ‘such weight as the court considers appropriate given his or her age and understanding’. To date there has been little litigation using the Act.

(ii) **Mental Capacity Act 2005**

The Mental Capacity Act 2005 enables courts to make orders to promote the best interests of mentally incompetent people. The Act can only be used in relation to issues over which a person lacks capacity.

(iii) **The inherent jurisdiction**

Recently, the courts have also shown a willingness to use the inherent jurisdiction to protect individuals who are at risk of being forced into a marriage. It has even been used in respect of British nationals living overseas. The jurisdiction can be exercised over vulnerable adults. These are people who might have capacity to make the decision on whether or not to marry, but are for some other reason vulnerable. This may be because they have some disability or because someone is exercising undue influence over them. In *Re SK (An Adult) (Forced Marriage: Appropriate Relief)* the court was told about a young British citizen who it was believed was facing threats from her family urging her to marry. Even though she was currently in Bangladesh, Singer J was willing to make orders under the inherent jurisdiction to prevent her parents from ‘causing or permitting’ her being married or betrothed. Subsequently the young woman appeared before the court and told it that she did not need the protection of the court and the orders were discontinued. In *M v B* the inherent jurisdiction was used to protect S who was aged 23 and suffering from learning difficulties. There were concerns that S was to be married without her consent. Having found that she lacked the capacity to consent, orders were made prohibiting her parents from entering her into a formal or informal contract for marriage. The inherent jurisdiction can still be used for those who have capacity but who are in some other way vulnerable.

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241 FLA, s 63A(4).
242 FLA, s 63B.
243 FLA, s 63A.
244 See the discussion in *Re SK (An Adult) (Forced Marriage: Appropriate Relief)*.
245 See also *Re SA* [2006] Fam Law 268 where a woman was mentally competent but was deaf, dumb and blind in one eye – orders were made protecting her from a forced marriage. The concern was that she would not be able effectively to communicate her opposition to any marriage.
246 *Re SA (Vulnerable Adult with Capacity: Marriage)* [2007] 2 FCR 563.
A same-sex couple cannot marry. They can, however, enter a civil partnership. This status was created by the Civil Partnership Act 2004 (CPA 2004). In 2008 there were 7,169 civil partnerships entered into in the UK. This was a significant decrease from the figure of 16,106 in 2006. That is not so surprising, because 2006 was the first full year during which civil partnerships were available and no doubt many couples had been waiting for some time. However, it was an 18 per cent drop on the figures for 2007. Indeed, notably, the average age of entering a civil partnership in 2007 was 42.8 for men and 41.2 for women, while it had been respectively 47.0 and 43.6 in 2006. By the end of 2008 a total of 33,956 civil partnerships had been formed since the introduction of the legislation; 53 per cent of couples entering civil partnerships were male and 47 per cent were female.

As we shall see, in many ways civil partnerships are ‘marriage in all but name’. The President of the Family Division in Wilkinson v Kitzinger has explained:

Parliament has taken steps by enacting the CPA to accord to same-sex relationships effectively all the rights, responsibilities, benefits and advantages of civil marriage save the name, and thereby to remove the legal, social and economic disadvantages suffered by homo-sexuals who wish to join stable long-term relationships.

The reader may well wonder why the Government did not take the simple step of allowing same-sex marriage. The reason was essentially political. There was remarkably little opposition to the CPA 2004 because it did not create same-sex marriage. To create this status, which is legally equivalent to marriage, we needed an Act with 264 sections and 30 schedules.

**Who can enter a civil partnership?**

Civil partnerships can only be entered into by same-sex couples. Opposite-sex couples can either marry or cohabit. A civil partnership is created when the parties sign a civil partnership document ‘at the invitation of, and in the presence of, a civil partnership registrar’ and ‘in the presence of each other and two witnesses’.

There are other restrictions on who can enter a civil partnership: the parties must not be married or already a civil partner; they must both be over the age of 16 and they must not be within the prohibited degrees of relationship. These restrictions match the equivalent to the ones found in marriage.

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251 Wintemute and Andenaes (2001) provide a very useful collection of essays on the legal regulation of same-sex relationships.
254 National Statistics (2010c).
255 This was the description used by Baroness Hale (2004a) writing extra-judicially. See further Bamforth (2007). [2006] EWHC 2022 (Fam) at para 121. See Harding (2007) and Eekelaar (2007) for a discussion of this case.
257 Civil Partnership Act 2004 (CPA 2004), s 1(1).
258 CPA 2004, s 2(1).
259 Where a person is under 18 parental consent is required: s 4.
260 CPA 2004, s 3.
B How do you form a civil partnership?

In many ways the creation of a civil partnership is much like a civil wedding. There are two important differences, however. First, in a civil wedding it is the exchange of vows, rather than the signing of the register, which creates the marriage.\(^{262}\) Secondly, no religious services can be used while a civil partnership registrar is officiating at the signing of the register.\(^{263}\) Of course, there is nothing to stop the couple from having a religious service after they have become civil partners. However the Equality Act 2010\(^{264}\) allows for the creation of regulations that will permit religious groups to have a civil partnership as part of a religious service. This recognises the fact that some religious groups are supportive of same-sex relationships.

C Annulling a civil partnership

A civil partnership can be void or voidable. It will be void if:\(^{265}\)

1. the parties were not of the same sex;
2. either of them was already a civil partner or married;
3. either of them was under the age of 16;
4. the parties were within the prohibited degrees of relationship; or
5. they both knew that certain key formality requirements had not been complied with.\(^{266}\)

A civil partnership will be voidable on the following grounds:\(^{267}\)

LEGISLATIVE PROVISION

Civil Partnership Act 2004, section 50

(a) either of them did not validly consent to its formation (whether as a result of duress, mistake, unsoundness of mind or otherwise);
(b) at the time of its formation either of them, though capable of giving a valid consent, was suffering (whether continuously or intermittently) from a mental disorder of such a kind or to such an extent as to be unfit for civil partnership;
(c) at the time of its formation, the respondent was pregnant by some person other than the applicant;
(d) an interim gender recognition certificate under the Gender Recognition Act 2004 has, after the time of its formation, been issued to either civil partner;
(e) the respondent is a person whose gender at the time of its formation had become the acquired gender under the 2004 Act.

These match the void and voidable grounds for marriage, with two notable exceptions: the non-consummation grounds are not included, nor is the venereal disease ground. We will

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\(^{262}\) Cretney (2006a: 23).
\(^{263}\) CPA 2004, s 2(5).
\(^{265}\) CPA 2004, s 49.
\(^{266}\) CPA 2004, s 49.
\(^{267}\) CPA 2004, s 50.
look at the reasons for this later. The Act also contains bars to relying on annulment and these match those discussed above for marriage.\textsuperscript{268}

\textbf{D The end of the civil partnership}

Civil partnerships will end on the death of the party or on an order for dissolution (the equivalent of divorce). The law on dissolution of a civil partnership is very similar to the law on divorce and will be discussed in Chapter 3. For now, it is worth noting that adultery is a fact which establishes the ground for divorce, but not dissolution.

\textbf{E The effect of a civil partnership}

Baroness Hale in \textit{Secretary of State for Work and Pension v M}\textsuperscript{269} explained that civil partnerships have ‘virtually identical legal consequences to marriage’. We shall be looking at the consequences of marriage and civil partnerships later in this chapter. Jill Manthorpe and Elizabeth Price have argued that although civil partnership has enabled same-sex couples to have the relationship between themselves formally recognised, their relationship with their partner’s children or wider family is not recognised in law or socially to the same extent as occurs in marriage.\textsuperscript{270} In particular a civil partner of a woman may not be in as strong a position as a husband in relation to their children. This is explored further in Chapter 9.

\textbf{F The differences between civil partnership and marriage}

As has been repeated several times, there are very few differences between spouses and civil partners. As Stephen Cretney explains, the care taken by Parliament to ensure that marriage and civil partnerships were treated in the same way is revealed by the fact that the CPA 2004 amends legislation as diverse as the Explosive Substances Act 1883 and the Law of Property Act 1925.\textsuperscript{271} The most important differences between marriage and civil partnership are the following:

1. The formalities at the start of the relationship: in a civil partnership it is the signing of the register, rather than the exchange of vows, which creates the legal relationship. Further, unlike a marriage, a civil partnership ceremony cannot contain a religious service.\textsuperscript{272} However, section 202 of the Equality Act 2010 allows for regulations to be passed which will permit religious groups to have civil partnership ceremonies in the context of a religious service.

2. The non-consummation grounds and venereal disease ground are not present as a ground of voidability in civil partnerships, while they are in marriage.

3. Adultery is not a fact establishing the ground for dissolution of a civil partnership, although it is for divorce.

4. If a woman receives assisted reproductive services her husband will be regarded as the father of the child. Her civil partner would not be regarded as a parent of the child.\textsuperscript{273}

\textsuperscript{268} CPA 2004, s 51.
\textsuperscript{269} [2006] 1 FCR 497 at para 99.
\textsuperscript{270} Manthorpe and Price (2005).
\textsuperscript{271} Cretney (2006a: 29).
\textsuperscript{272} Interestingly, a survey of same-sex couples found that a significant minority wanted a religious element in the civil partnership celebration: Readhead (2006).
\textsuperscript{273} The Court of Appeal recognised this in \textit{Re G (Children) (Residence: Same-Sex Partner)} [2006] 1 FCR 681.
What are we to make of these differences? One response is to suggest that they are so minor as to be of negligible practical significance. The exact moment when the status is created is of no practical relevance; nullity is very rarely used and is mainly of significance for those with strong conservative religious beliefs; and in a case of adultery a civil partner can rely on a behaviour ground for dissolution. Another response is to be more cynical. The lack of reference to adultery and non-consummation demonstrates the law’s failure to recognise that gay sex is real sex. Baroness Scotland, a Government minister at the time of the passing of the CPA, explained: ‘There is no provision for consummation in the Civil Partnership Bill. We do not look at the nature of the sexual relationship, it is totally different in nature.’ The coyness apparent in the Government’s explanation that it was not possible to produce a same-sex equivalent to consummation and adultery, may indicate a reluctance to accept same-sex relationships at full value. Is the law suggesting that same-sex sexual behaviour is something that should not be talked about?

G Is the Civil Partnership Act to be welcomed?

Are civil partnerships good news?

Supporters of the Civil Partnership Act see it as an important step towards recognising the equality of same-sex relationships. It means that same-sex couples can now have, effectively, the same rights and responsibilities as married couples; same-sex couples are as worthy of recognition and as socially valuable as opposite-sex ones. The Act ensures that same-sex couples need not suffer legal disadvantage, in the sense that they can, if they wish, have the legal rights open to a married opposite-sex couple. As Baroness Hale eloquently explained in Ghaidan v Godin-Mendoza:

Homosexual couples can have exactly the same sort of interdependent couple relationship as heterosexuals can. Sexual ‘orientation’ defines the sort of person with whom one wishes to have sexual relations. It requires another person to express itself. Some people, whether heterosexual or homosexual, may be satisfied with casual or transient relationships. But most human beings eventually want more than that. They want love. And with love they often want not only the warmth but also the sense of belonging to one another which is the essence of being a couple. And many couples also come to want the stability and permanence which go with sharing a home and a life together, with or without the children who for many people go to make a family. In this, people of homosexual orientation are no different from people of heterosexual orientation.

The Government explained its thinking behind the Act in this way:

Today there are thousands of same-sex couples living in stable and committed partnerships. These relationships span many years with couples looking after each other, caring for their loved ones and actively participating in society; in fact, living in exactly the same way as any other family. They are our families, our friends, our colleagues and our neighbours. Yet the law rarely recognises their relationship... in so many areas, as far as the law is concerned, same-sex relationships simply do not exist. That is not acceptable.

275 Readhead (2006); Weeks (2004).
276 Hale (2004); Murphy (2004).
278 The ‘them’ and ‘us’ terminology might be thought revealing.
279 Women and Equality Unit (2003).
Public opinion is divided on the acceptability of same-sex behaviour. There is still a notable minority of people for whom it is unacceptable. In a 2002 survey, 23 per cent of people questioned thought that same-sex conduct should be illegal.\textsuperscript{280} In a survey in 2010 only 36 per cent of people thought that same-sex behaviour was ‘always or mostly wrong’. In 1983 the figure had been 62 per cent.\textsuperscript{281} Even among religious people only a half believed that same-sex sexual activity was always or almost always wrong.\textsuperscript{282} Notably the surveys suggest that opposition to same-sex relationships is largely found in older sections of the population and that the rate of opposition in decreasing year on year.

The Act has also received criticism from those who think that same-sex couples should be treated in the same way as opposite-sex couples. They should be allowed to marry. The Act is an inappropriate sop to those whose prejudice prevents them recognising the equal value of same-sex and opposite-sex relationships. Michael Freeman\textsuperscript{283} has pointed out that the law is not very strict over who is granted the special benefits of being married: paedophiles and murderers can marry. So why should same-sex couples not be allowed to marry? As one protest banner put it, ‘Charles can marry twice! Gays can’t marry once!’\textsuperscript{284}

Are those who object to the Act on the basis that it does not provide marriage making a mountain out of a molehill? After all, what is in a name? Civil partnership offers same-sex couples all the same rights as marriage; who cares what it is called? To supporters of gay marriage it is a matter of equality. The difference in name indicates that same-sex couples are regarded as somehow ‘different’ from opposite-sex couples.\textsuperscript{285} And there is much symbolic significance attached to the name marriage, which is still seen as the ideal form of family life.\textsuperscript{286} On the other hand, it might be thought that the lack of any effective opposition to the CPA 2004 depended on the terminology used in the Act. Is it better to have civil partnerships which have widespread acceptability or gay and lesbian marriage which would be controversial and antagonistic to some?

A rather different point is taken by Stephen Cretney who is concerned that the lack of a requirement that the civil partnership be consummated means that it could be open to misuse by those seeking to take advantage of its provisions for financial reasons. He asks:

\begin{quote}
could it, in the twenty-first century, really have been intended to create such a huge marketing opportunity for all those financial advisers with their glossy pamphlets inciting elderly gentlemen who want to spend their days pottering quietly off to Lords or the Oval secure in the knowledge that their financial futures are mutually secured or indeed elderly ladies who like sharing visits to art exhibitions or needlework competitions?\textsuperscript{287}
\end{quote}

However, it should be pointed out that marriage, too, can be (and is) entered into purely for financial or immigration purposes, despite the fact that there is the consummation requirement. His point really is that the sexual element of the civil partnership, although pointedly not referred to in the Act, is in fact very important as it helps to distinguish a civil partnership (and a marriage) from a friendship.

\textsuperscript{281} National Centre for Social Research (2010).
\textsuperscript{282} National Centre for Social Research (2010).
\textsuperscript{283} Freeman (1999).
\textsuperscript{284} Spotted by Cretney (2006a: 20). The reference is to Prince Charles.
\textsuperscript{285} For support for this perception from analysis of conversations see Land and Kitzinger (2007).
\textsuperscript{286} See Chapter 1.
\textsuperscript{287} Cretney (2006a: 50).
In the first in-depth study of same-sex couples who had entered civil partnerships a number of interesting points emerged. Among civil partners it was common to refer to themselves as ‘married’ and few had faced negative reactions to their status. Many couples noted that they had been accepted as sons-in-law or daughters-in-law and as full members of their partner’s family. Interestingly, while 80 per cent of the members of the gay and lesbian community welcomed the Act, only 50 per cent wanted marriage to be extended to include same-sex couples. Another study found ambivalence towards civil partnership in the gay and lesbian community, with some describing it as ‘pretend marriage’ or ‘second class’. Others were, however, wary of marriage, seeing it as a ‘church thing’ and not a label they would feel comfortable with.

The future: gay marriage?

It is possible to identify a journey which several countries have already taken in response to same-sex couples. First, the law removes criminal offences outlawing same-sex activity. Secondly, the law grants same-sex couples an increasing set of rights. Thirdly, a status equivalent to marriage, but different from it, is granted to same-sex couples. Finally, same-sex couples are allowed to marry. If this path is followed in the UK then civil partnership may well be no more than a stepping stone on the way to recognising same-sex marriage. Only then will same-sex and opposite-sex relationships be regarded as of equal value. Of course another option will be for civil partnerships to become open to both same-sex and opposite-sex couples and for marriage to cease to have legal relevance.

Public opinion remains divided on the question of whether same-sex couples should be allowed to marry. In a survey in 2002, 50 per cent of those questioned thought ‘yes’ and 50 per cent thought ‘no’. But it appears that the percentage in favour of permitting same-sex marriage increases every time a survey is done. In a 2004 survey, only 11 per cent of those questioned said they would be very disappointed if their child was gay or lesbian. Another recent public opinion poll found that 61 per cent of the public supported gay marriage and 51 supported children being taught in schools that gay relationships are of equal value to marriage. This suggests that gay relationships are receiving increasing public support. It may be that the existence of civil partnerships will increase the acceptability of the concept of same-sex marriage. Indeed it is notable that the media often incorrectly refer to civil partnerships as ‘gay marriage’.

Indeed, arguably it is the cultural significance of the Act that is of greater importance than the legal consequences. However, critics will argue that by keeping same-sex couples out of marriage, a homophobic message is reinforced by the Act. In Home Affairs v Fourie a South African case, Justice Albie Sachs, argued:

288 Smart, Masson and Shipman (2006).
289 Clarke, Burgoyne and Burns (2007).
290 Glennon (2005).
293 Beresford and Falkus (2009).
294 ICM (2002).
296 Bennett (2009).
298 Hull (2005).
The exclusion of same sex couples from the benefits and responsibilities of marriage, accordingly, is not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It represents a harsh if oblique statement by the law that same sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.

There are, of course, voices against same-sex marriage. Many of these are based on religious beliefs, arguing that marriage is a religious concept and that allowing same-sex marriage would infringe their religious concepts of marriage. One conservative Christian group has complained of ‘cultural genocide’ as a result of legislation prohibiting hate speech and equal treatment of same-sex couples. Miss California claimed to have been robbed of the chance to become Miss USA 2009 because of her anti-gay marriage stance. However, there is no need for the legal concept of marriage to match religious ones; indeed it does not, at present, for many religions. Even if it was thought that the law should match religious views of marriage, then which religious view should be followed? There are plenty of religious groups who support same-sex marriage. More importantly, the offence caused to those who have religious objections to same-sex marriage must be weighed against the harm caused to those same-sex couples who wish to marry. In weighing these it may be thought that harm to the same-sex couple would be greater and more personal than that to those with religious objections.

Lynn Wardle, seeking to present a non-religious argument against same-sex marriage, argues:

The union of two persons of different genders creates a union of unique potential strengths and inimitable potential value to society. It is the integration of the universe of gender differences – profound and subtle, biological and cultural, psychological and genetic – associated with sexual identity that constitutes the core and essence of marriage. Just as men and women are different, so a union of two men or of two women is not the same as the union of a man and a woman.

Notice that this view is based on a strong belief in the differences between the genders. Indeed a strong case can be made for saying that the opposition to same-sex marriage inevitably reflects a desire to maintain a difference between sexual roles. Even if you agreed with Wardle that there is a benefit in integrating the universes of two different people, does that only occur when they are of different sex? Others argue that same-sex relationships are less desirable than opposite-sex ones in other ways: they are less stable, less likely to raise children, or less effective in raising children. The argument that appears to carry the most merit...
is that a same-sex couple will not be able to produce a child together, without medical intervention. But we allow opposite-sex couples who are infertile, or who have no intention of having children, to marry.\footnote{Cretney (2006a: 14–15).}

Not all members of the gay and lesbian community are supporters of ‘gay marriage’. The main concern is that by adopting marriage gay relationships may start to mimic heterosexual ones. Lesbians and gay men should be seeking to develop their own kinds and forms of relationship, rather than adopting heterosexual models.\footnote{Weeks (2004: 35); Boyd and Young (2003); Ettlebrick (1992).} However, even those who adopt this view are likely to accept that the law should give same-sex couples the option of marriage, even if they think that same-sex couples should not take up that right.\footnote{Glennon (2006); Auchmuty (2004); Toner (2004).} There is also a concern among some that although civil partnership will offer recognition and protection for ‘orthodox’ same-sex couples, those gay men and lesbians who do not match the marriage model (e.g. they have more than one regular partner) will be further ostracised.\footnote{See the discussion in Lind (2004); Barker (2004).} More cynically, Adam has argued that the Civil Partnership Act is just a way for the state to get gay men and lesbians to take on financial responsibility for children or other adults who would otherwise be the responsibility of the state.\footnote{Adam (2004).}

A rather different concern has been voiced by Rosemary Auchmuty.\footnote{Auchmuty (2008: 485).} That is, that calls for same-sex marriage might be seen as suggesting that marriage is something good that should be encouraged and is an ideal to aspire to. However, she sees marriage as being an institution which has and still does oppress women. She is not opposed to gay marriage, but believes it should not be seen as the most important issue for those promoting the interests of the gay community. She explains:

> whether you see marriage as an oppressive bastion of male power, as the second-wave feminists did, or simply as outmoded and irrelevant, as many contemporaries do, the goal should surely be to get rid of it, or at least to let it die out of its own accord – not to try to share in its privileges, leaving the ineligible out in the cold.

A rather different set of objections to the Civil Partnership Act is that it is only open to same-sex couples. Why should an unmarried heterosexual couple wishing to register their relationship not be able to take advantage of this legislation? It has even been suggested (somewhat ironically) that the legislation discriminates on grounds of sexual orientation in making civil partnerships open only to same-sex couples.\footnote{Wong (2005) considers this argument.} The Government’s answer to such complaints was that opposite-sex couples had marriage available to them and therefore had no need for civil partnership. This, however, overlooks the argument that an opposite-sex couple may dislike marriage with its historical and religious baggage and wish to formalise their relationship in another way. It also overlooks the case of couples who wish to have a legal formality for their relationship, but cannot marry, such as two sisters who in old age have shared a home together, or an elderly parent cared for by her son. Indeed, in the House of Lords’ debates on the CPA 2004 a ‘wrecking amendment’ was introduced to the Act which was designed to permit such couples to register their relationships. It failed; and rightly so. Although there is a good case for better legal recognition of those caring for others, the CPA 2004 was not the place in which to do it. What the argument showed is that it is the sexual...
element of the relationship, with what that represents, which leads us to regard a relationship as being different from a relationship between friends.314

The issue arose in *Burden v UK*315 where two unmarried sisters had lived together for many years. They were concerned that if either of them died the other would be liable to pay inheritance tax. They complained to the European Court of Human Rights that they were denied the exemption from inheritance tax that was available to married couples and civil partners. The Grand Chamber of the ECtHR rejected their complaint stating that a relationship between siblings is ‘qualitatively of a different nature to that between married couples and [civil partners] . . . The very essence of the connection between siblings is consanguinity, whereas one of the defining characteristics of a marriage or Civil Partnership Act union is that it is forbidden to close family members.’ They went on to explain that what is special about a civil partnership is the existence of the public undertaking and the rights and obligations that go with that. That makes civil partnership (and marriage) different from cohabitation. This seems the correct response to this case. What the sisters really wanted was to be exempt from inheritance tax, rather than become civil partners.316 The strength of their case indicates a need to reform inheritance tax, rather than extend the law on civil partnerships.

The legal challenge to the absence of same-sex marriage came hard on the heels of the implementation of the Civil Partnership Act 2004.

CASE: *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam)

In *Wilkinson v Kitzinger*317 a Canadian lesbian couple, who had married in Canada (which permits same-sex marriage), sought a declaration as to their marital status under English law. If English law did not recognise their marriage they wanted a declaration of incompatibility in respect of the Matrimonial Causes Act under the Human Rights Act 1998. They failed. The case was heard by Sir Mark Potter, the President of the Family Division. The fact that they lost is perhaps not surprising, although the strength of language in the rejection of their argument is. He started with the easy question: under English law a same-sex couple could not marry and so their marriage could not be recognised. The wording of the Matrimonial Causes Act was quite clear about that.

The harder question was whether this was compatible with the European Convention on Human Rights (ECHR). Sir Mark Potter pointed out that the European Court of Human Rights had consistently said it would be inappropriate to use the Convention in areas of considerable social, political and religious controversy in respect of which there was no consensus across Europe. Gay marriage was such an area.318 A key point in the judgment was that Parliament had very recently debated the issue of regulation of same-sex relationships and had passed the Civil Partnership Act. This, the President thought, could not be considered to be an unacceptable compromise for the issue.

He rejected the view that civil partnership was second-class marriage, but said it was a parallel and equalizing institution designed to redress a perceived inequality of treatment of long-term monogamous same-sex relationships, while at the same time demonstrating support for the long established institution of marriage.

314 Cretney (2006a).
315 [2008] ECHR 357, [2008] 2 FCR 244.
316 Auchmuty (2009).
317 [2006] EWHC 2022 (Fam).
318 The Netherlands, Belgium and Spain permit same-sex marriage.
Quite why the reference is to only ‘perceived’ inequality is a mystery. More controversially, he went on to indicate that he thought the compromise adopted by Parliament was appropriate. Parliament, he explained, had declined to alter the deep-rooted and almost universal recognition of marriage as a relationship between a man and a woman. He approved of Lord Nicholls’s statement in *Bellinger v Bellinger* 319 ‘Marriage is an institution or a relationship deeply embedded in the religious and social culture of this country. It is deeply embedded as a relationship between two persons of the opposite sex.’

The President rejected the argument that there were rights to same-sex marriage to be found in either article 8 or 12 of the ECHR. 320 Article 12 provided for the right to marry, but marriage here he interpreted in its traditional sense. As to the right to family life in article 8, the House of Lords in *M v Secretary of State for Work and Pensions* 321 had made it clear that a same-sex couple currently did not fall within the definition of ‘family life’. In any event, the CPA 2004 provided a same-sex couple with all the legal benefits of marriage. There was no aspect of their private life which was interfered with by not being able to marry. It could not, therefore, be said that there was an interference with Convention rights which was discriminatory on the basis of sexual orientation and therefore contrary to article 14. 322 Even if there was any discrimination it could be justified with the aim of protecting the traditional understanding of marriage. 323

Perhaps the most surprising passage is the following, which is worth quoting at length:

118 It is apparent that the majority of people, or at least of governments, not only in England but Europe-wide, regard marriage as an age-old institution, valued and valuable, respectable and respected, as a means not only of encouraging monogamy but also the procreation of children and their development and nurture in a family unit (or ‘nuclear family’) in which both maternal and paternal influences are available in respect of their nurture and upbringing.

119 The belief that this form of relationship is the one which best encourages stability in a well-regulated society is not a disreputable or outmoded notion based upon ideas of exclusivity, marginalisation, disapproval or discrimination against homosexuals or any other persons who by reason of their sexual orientation or for other reasons prefer to form a same-sex union.

120 If marriage is, by longstanding definition and acceptance, a formal relationship between a man and a woman, primarily (though not exclusively) with the aim of producing and rearing children as I have described it, and if that is the institution contemplated and safeguarded by Article 12, then to accord a same-sex relationship the title and status of marriage would be to fly in the face of the Convention as well as to fail to recognise physical reality.

He went on to explain that the CPA 2004 was a recognition that same-sex relationships were not inferior to opposite-sex ones, but rather, as a matter of nature and common understanding, different. 324

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319 [2003] 2 AC 467 at para 46.
320 See Murphy (2004) for an argument that a proper interpretation of the ECHR is that same-sex couples should have a right to marry. See the response by Bamforth (2005), challenging his approach to the issue and arguing that focusing on justice and autonomy, rather than the wording of the ECHR articles, is a more effective approach.
321 [2006] 2 WLR 637.
322 See W. Wright (2006) for a discussion of such an argument.
323 He referred to the unreported decision of the European Court of Human Rights in *Estevez v Spain*, 10 May 2001, which quoted the promotion of family life based on marriage as a legitimate state aim.
324 [2006] UKHL 11 at para 113. It is not quite clear how he thought they were different.
As indicated already, the fact that the application was unsuccessful is not surprising; what is, is the manner of its rejection. The President could have left the issue as a matter for Parliament given the social and political issues raised. The fact that he went on to make a detailed argument against recognising same-sex marriage is interesting, because it was unnecessary. Opponents of his view would reject the idea that support for traditional married family life justifies discrimination against same-sex couples. As Baroness Hale, dissenting in *M v Secretary of State for Work and Pensions*, \(^{325}\) stated:

No one has yet explained how failing to recognise the relationships of people whose sexual orientation means that they are unable or strongly unwilling to marry is necessary for the purpose of protection or encouraging the marriage of people who are quite capable of marrying if they wish to do so.

The President’s judgment repeats the argument at several points that opposite-sex and same-sex relationships are ‘equal but different’, but he fails to make it clear what he thinks is different about a same-sex and an opposite-sex couple. Presumably it is the nature of the sexual relations, but what exactly is it about the difference that is thought worthy of a comment or a legal distinction? Even if one can locate a difference between same-sex and opposite-sex couples, is it one that should matter? Nicholas Bamforth \(^{326}\) argues:

Love, mutual commitment and long-term emotional, physical and moral support are among the most important ingredients of a decent human life. To those who support – normatively speaking – the rights to autonomy (or dignity) or equality, it is morally unimportant whether such things are provided by a partner of the opposite sex or one of same sex.

Although it was suggested earlier that in time civil partnerships will be regarded as a stepping stone on the way to recognising same-sex marriage, that is not the only possible consequence of official recognition of same-sex relationships. Will it (further) challenge the traditional gender roles within marriage and heterosexual relationships? Will it open up the possibility of a child having two fathers or two mothers? \(^{327}\) Will it further challenge the legal distinction between male and female? \(^{328}\)

**8 Unmarried cohabiting couples**

There is enormous difficulty in discussing unmarried couples because there are so many forms of cohabitation. The term ‘cohabiting couple’ can range from a group of students living together in a flat-share, to a boyfriend and girlfriend living together while contemplating marriage, to a couple who have deliberately decided to avoid marriage but wish to live together in a permanent stable relationship. Lord Hoffmann in *Re P* \(^{329}\) stated: ‘Statistics show that married couples, who have accepted a legal commitment to each other, tend to have more stable relationships than unmarried couples, whose relationships may vary from quasi-marital to ephemeral.’ Baroness Hale in the same case stated:

Some unmarried relationships are much more stable than some marriages, and vice versa. The law cannot force any couple, married or unmarried, to stay together. But being married does at least indicate an initial intention to stay together for life. More important, it makes a great legal
difference to their relationship. Marriage brings with it legal rights and obligations between the couple which unmarried couples do not have.\textsuperscript{330}

One set of researchers\textsuperscript{331} suggested that there are essentially four categories of cohabitants:

- the Ideologues: those in long-term relationships, but with an ideological objection to marriage;
- the Romantics: those who expect to get married eventually and see cohabitation as a step towards marriage, which they saw as a serious commitment;
- the Pragmatists: who decided whether or not to get married on legal or financial grounds;
- the Uneven Couples: where one partner wanted to marry and the other did not.

The law has not yet provided a coherent approach to cohabitation, but in several statutes married and unmarried couples have been treated in the same way. Apart from these special provisions, the law treats unmarried couples as two separate individuals, without regard to their relationship. If there is no specific statutory provision then the law treats an unmarried couple in the same way as it would two strangers.\textsuperscript{332}

Same-sex couples who have not entered into a civil partnership can claim many of the rights that are available to opposite-sex unmarried couples.\textsuperscript{333} In 1999 the House of Lords in \textit{Fitzpatrick v Sterling Housing Association Ltd}\textsuperscript{334} accepted that a gay person was a member of his partner’s family. Lord Nicholls in \textit{Secretary of State v M}\textsuperscript{335} has stated that ‘under the law of this country as it has now developed a same sex couple are as much capable of constituting a “family” as a heterosexual couple’. Little could Sister Sledge have foreseen that the theme from their song ‘We are family’ would be repeated by a Law Lord, albeit in a slightly more erudite way. In \textit{Ghaidan v Godin-Mendoza}\textsuperscript{336} the House of Lords accepted that the phrase ‘a person who was living with the original tenant as his or her wife or husband’ could include a same-sex couple.\textsuperscript{337}

Perhaps a key legal difference is that a same-sex relationship does not fall within the scope of respect for family life under article 8 of the European Convention on Human Rights, although it would fall within the definition of private life.\textsuperscript{338} However, it is unlawful under the European Convention to discriminate upon the grounds of sexual orientation.\textsuperscript{339}

Tyrer J in \textit{Kimber v Kimber}\textsuperscript{340} suggested the following factors be considered in deciding whether there is cohabitation:

1. whether the parties were living together under the same roof;
2. whether they shared in the tasks and duties of daily life (e.g. cooking, cleaning);
3. whether the relationship had stability and permanence;

\textsuperscript{330} \textit{Re P} [2008] UKHL 38, para 108.
\textsuperscript{331} Barlow, Burgoyne and Smithson (2007).
\textsuperscript{332} CPA 2004, Sch 24 amends statutes to ensure that same-sex and opposite-sex cohabitees are treated in the same way. Bailey-Harris (2001c: 605; 2000) provides a powerful argument that same-sex and opposite-sex cohabitants should be treated in the same way.
\textsuperscript{334} [2006] 1 FCR 497 at para 506.
\textsuperscript{335} [2004] UKHL 30.
\textsuperscript{336} In \textit{Nutting v Southern Housing Group} [2004] EWHC 2982 (Ch) it was emphasised that to be living as a spouse one had to have a life-long commitment.
\textsuperscript{337} \textit{ADT v UK} [2000] 2 FLR 697.
\textsuperscript{339} \textit{Kotke v Saffarini} [2005] EWCA Civ 221 for other discussion of what cohabitation means.
4. how the parties arranged their finances;
5. whether the parties had an ongoing sexual relationship;
6. whether the parties had any children and how the parties acted towards each other’s children; and
7. the opinion of the reasonable person with normal perceptions looking at the couple’s life together.

There are some statutory attempts at defining cohabitation. Section 144 (4)(b) of the Adoption and Children Act 2002 states that ‘two people (whether of different sexes or the same sex) living as partners in an enduring family relationship’ can adopt. A more common form of definition of cohabitation is found in the Family Law Act 1996: ‘two persons who, although not married to each other, are living together as husband and wife or (if of the same sex) in an equivalent relationship’.

What is clear is that more and more couples are choosing to cohabit. In 2008, 45 per cent of children were born to a mother who was unmarried. In 2007, of those aged 16–29 10 per cent were married, while 16 per cent were cohabiting. In 2007 around 10 per cent of the adult population were cohabiting. Cohabiting couples tend to be younger than married couples, with half being headed by a person under the age of 35. Only 10 per cent of married households are headed by someone under 35. Of women in the age group 18 to 59, 25 per cent were cohabiting outside marriage.

The evidence suggests that some cohabitants are living together, but planning to marry; while others see cohabitation as an alternative to marriage. In one study only 9.7 per cent of cohabiting couples said that they were not considering getting married, although 22.7 per cent stated that they did not regard marriage as important. Certainly cohabitation before marriage has become the norm. Where cohabitation does not end in marriage it tends to break up. The average length of cohabitation is about two years, after which the couple tend either to marry or split up. But, as already emphasised, we must be careful not to make generalisations: many long-term cohabiting relationships do exist.

9 Comparisons between the legal position of spouses or civil partners and unmarried couples

It is surprisingly difficult to compile a complete list of the differences between the legal positions of spouses or civil partners and unmarried couples, primarily because the law does not provide a clear statement of the rights and responsibilities of marriage. Some of the main differences in the legal treatment of married and unmarried couples will now be discussed.

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341 FLA, s 62(1)(a) (as amended by the Domestic Violence, Crimes and Victims Act 2004).
342 This is a Europe-wide phenomenon: see Kiernan (2001). For a thorough discussion of the statistics on cohabitation, see Haskey (2001).
343 National Statistics (2010a).
345 National Statistics (2010a).
346 Babb et al. (2006: 27).
350 See also Barlow et al. (2005: 7–11).
A  Formalities at the beginning and end of a relationship

The law closely regulates the beginning and end of a marriage or civil partnership. It sets out certain formalities that must be complied with in order for a legal marriage or civil partnership to start, and it only ends when the court grants a decree absolute of divorce, or a dissolution. An unmarried cohabiting relationship can, by contrast, begin or end without any notification to any public body. While every marriage and civil partnership is centrally registered, there is no such record of cohabitation. One consequence of these formalities is that, although the law can restrict who can enter marriage or civil partnership, there is obviously no restriction as to who may cohabit – there is nothing to stop any number of men or women, unmarried or married, from cohabiting.

It is easy to overestimate the practical importance to the parties of the legal formalities at the beginning and end of a relationship. The legal requirements of marriage or civil partnership are not particularly difficult to comply with, and the legal formalities take up little time when compared with the non-legal trappings that often accompany marriage or civil partnership, which take up much more of the money and attention of the parties. Similarly, in relation to separation, although divorce or dissolution does include legal formalities, when compared with the paperwork and practical arrangements of the ending of a long-term relationship the legal formalities of divorce or dissolution can be of minor importance. The paperwork concerned over, for example, separating joint bank accounts, resolving the occupation of the home, dealing with the mortgage or tenancy, changing arrangements over electricity, gas bills, etc. can make the formalities connected to the divorce or dissolution itself seem small.

B  Financial support

During the marriage or civil partnership itself each party can seek a court order requiring one to pay maintenance to the other, but one unmarried cohabitant cannot seek maintenance from another. In fact, it is very rare for one spouse to seek maintenance from the other except in the context of divorce. Where it is sought, the amounts awarded tend to be low and difficult to collect.

Of far more significance is the fact that on divorce or dissolution the court has the power to redistribute property owned by either party. However, on the ending of an unmarried relationship the court only has the power to declare who owns what and has no power to require one party to transfer property to the other or to pay maintenance. Although this is a crucial distinction between spouses or civil partners and unmarried couples, three important factors need to be stressed. The first is that for many couples the Child Support Act 1991 and Children Act 1989 cover the maintenance for children. These Acts apply equally to married and unmarried couples. Secondly, once the child support has been resolved, there is often not enough spare money to consider spousal or partner support. In fact, in fewer than half of all divorces do the courts make any order dealing with the parties’ financial resources.

The third distinction is that, as we shall see later, in resolving disputes between unmarried cohabitants over property the courts have utilised various equitable doctrines (for example, constructive trusts) which have in effect given the courts wide discretion in deciding the appropriate share of the equitable interest. Indeed in some cases involving unmarried couples

351 See Chapter 5.
352 The common law duty on a husband to maintain a wife was abolished in s 198 of the Equality Act 2010.
353 Barton and Bissett-Johnson (2000).
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the results using the equitable doctrines are those which would be expected if the couple were
married and the court were hearing the case under the Matrimonial Causes Act 1973.

Cohabiting couples, unlike spouses or civil partners, can enter binding cohabitation con-
tracts which will determine what will happen to their property on separation.\(^{354}\) However,
care must be taken in the wording of such contracts. In \textit{Sutton v Mischon de Reya} \(^{355}\) the claimant
asked a firm of solicitors to draft a cohabitation contract. Sutton and a Swedish businessman,
Mr Stahl, wished to conduct a ‘master–slave’ relationship. They asked that the contract back
this up by confirming that Sutton was to have absolute power over Stahl, to obey him in
everything he said on pain of punishment and to hand over to Sutton all his property.
Charles J held that such a contract amounted to, in effect, a contract for sexual services. He
saw a key distinction between a contract for sexual relations outside marriage which was not
enforceable and a contract between people who are cohabiting in a relationship which
involves sexual relations. Charles J, in a surprising turn of phrase, stated that ‘even a moron
in a hurry’\(^{356}\) could tell that the contract in this case fell into the former category and so was
not enforceable.

C  Children

There used to be a crucial distinction drawn between ‘legitimate’ and ‘illegitimate’ children.
This affected the status of children and the nature of parental rights over children. The label
of illegitimacy has now been abolished by the Family Law Reform Act 1987 and only minor
differences exist in the legal position of ‘legitimate’ and ‘illegitimate’ children.\(^{357}\) However,
there are still important differences between the legal position of married and unmarried
fathers. As we shall see, one of the key concepts of the law relating to parenthood is parental
responsibility. Every mother of a child automatically acquires parental responsibility for her
child, but the father of the child will automatically acquire parental responsibility only if he
is married to the mother. An unmarried father may acquire parental responsibility by being
registered as the father on the child’s birth certificate, lodging at the court a parental respon-
sibility agreement, or the father may apply to the court for a parental responsibility order.
This is a significant difference between married and unmarried fathers, but is of less import-
ance than it might at first appear, for two reasons. First, the courts have been very willing to
award parental responsibility to a father who applies for it. The second is that in day-to-day
issues parental responsibility is of limited importance. Many unmarried fathers carry out
their parental role unaware that they do not have parental responsibility. Whether or not a
father has parental responsibility is only really of significance when major decisions have to
be made in respect of the child, such as whether a child should have a medical operation.

D  Inheritance and succession

Where a person dies without having made a will, the person is intestate. In such a case the
deceased’s spouse or civil partner will be entitled to some or all of the estate, depending on
the application of various rules which will be discussed in Chapter 12. However, an unmarried
partner of the deceased is not automatically entitled to an intestate estate. All an unmarried
partner can do is to apply under the \textit{Inheritance (Provision for Family and Dependents) Act

\(^{354}\) They cannot contract out of child support obligations, however: \textit{Morgan v Hill} [2006] 3 FCR 620.


\(^{356}\) At para 23.

\(^{357}\) See Chapter 7.
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1975 for an order that in effect alters the intestacy rules and awards them a portion of the estate. So, a bereaved unmarried partner must apply to the court in order to be put in the same position as the bereaved spouse if his or her partner is intestate.

**E  Criminal law**

There used to be important distinctions between married and unmarried couples in criminal law, but many of these have been removed.

1. **Rape.** It used to be a common law rule that a husband could not be guilty of raping his wife.\(^358\) This was justified in two ways. First, there was an emphasis on the concept of the unity of husbands and wives – as a husband and wife are one in the eyes of the law, sexual intercourse between them could be no crime.\(^359\) Secondly, it was argued that on marriage the wife impliedly consents to intercourse at any time during that marriage and that such consent was irrevocable. Eventually the House of Lords in *R v R (Rape: Marital Exemption)*\(^360\) abolished the marital exception for rape and this was confirmed by Parliament in the Criminal Justice and Public Order Act 1994. Lord Keith explained that marriage ‘is in modern times regarded as a partnership of equals and no longer one in which the wife must be the subservient chattel of the husband’.\(^361\) So now the substantive law on rape is the same whether the defendant be the victim’s husband or not.\(^362\)

2. **Actual bodily harm and grievous bodily harm.** There is some confusion in the criminal law over the circumstances in which one person may injure another with their consent. In *R v Brown*\(^363\) the House of Lords confirmed the conviction of some sadomasochists who were convicted of assaulting each other even though their ‘victims’ had consented to the infliction of the pain. In *R v Wilson*\(^364\) a husband was convicted of assault occasioning actual bodily harm for branding his initials on his wife’s buttocks in spite of her consent. The Court of Appeal overturned the conviction. There is some dispute over how to reconcile these two cases. One argument is that the courts distinguished between injuries caused within marriage and injuries caused by gay couples.\(^365\)

3. **Coercion.** The defence of coercion\(^366\) is available to a wife who has committed a crime (apart from murder or treason) as a result of threats from her husband. If a wife commits an offence in the presence of her husband there is a rebuttable presumption that she should not be convicted because she was acting as a result of her husband’s coercion. The defence is very similar to duress, the main difference being that coercion does not require a threat of death or serious injuries. The defence is not available to an unmarried couple\(^367\) or even to those with void marriages.\(^368\) It has been widely criticised as based on an outdated presumption that wives are under the thumb of their husbands.

\(^{358}\) Although he could be guilty of other criminal offences against his wife.

\(^{359}\) This was never a very convincing explanation, because a husband could be convicted of assaulting his wife.


\(^{361}\) [1991] 4 All ER 481 at p. 484.

\(^{362}\) Although it appears that marital rapists still receive lower sentences than non-marital rapists (Warner (2000)).

\(^{363}\) [1993] 1 AC 212.

\(^{364}\) [1996] 3 WLR 125.

\(^{365}\) Although in *Emmett*, unreported, 15.10.99 a man’s conviction following injuries caused to his partner during an (alleged) sadomasochistic incident with his fiancée was upheld. For an alternative explanation and discussion see Herring (2009c: ch. 6).

\(^{366}\) Criminal Justice Act 1925, s 47.

\(^{367}\) *R v Court* (1912) 7 CAR 127.

\(^{368}\) *R v Ditta, Hussain and Kara* [1988] Crim LR 42.
4. **Theft.** Under s 30 of the Theft Act 1968 a person can only be prosecuted for theft against his or her spouse if the Director of Public Prosecutions has given consent.

5. **Conspiracy.** A person cannot be guilty of conspiring with his or her spouse or civil partner, unless it is alleged that they conspired with other people. 369

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**Contract**

It was only after the Law Reform (Married Women and Tortfeasors) Act 1935 that wives were able themselves to enter contracts that were legally effective. Husbands and wives can enter into contracts with each other, but will have to show that there is intent to create legal relations. For example, in *Balfour v Balfour*370 the Court of Appeal held that a promise by a husband to pay his wife £30 per week while he was abroad was unenforceable. This was because there is a presumption that spouses do not intend to be legally bound by such agreements. The rule does not apply to spouses who have separated. A married couple cannot enter into an enforceable contract which excludes the jurisdiction of the divorce court. So, a court can make orders in relation to children or financial matters regardless of any contracts the spouses have signed. The position for unmarried couples is similar. Although they may enter a contract they must persuade a court that their agreement was intended to be legally binding. A crucial difference is that a married couple or civil partners cannot enter into a contract which governs what would happen to their property in the event of their divorce or dissolution because that would be to interfere with the court’s jurisdiction under the Matrimonial Causes Act 1973. An unmarried couple can sign a contract which will determine what happens to their property when the relationship ends.

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**Tort**

The rule that a spouse could not sue his or her spouse in tort was revoked by the Law Reform (Husband and Wife) Act 1962 and the rule that a husband had to be joined in any tortious action brought by or against a wife was abolished by statute in 1935. 371 In relation to tort, married and unmarried couples are therefore now treated in the same way. The most remarkable case of partners suing in tort is *P v B (Paternity; Damages for Deceit)*372 where a man sued in deceit after his partner had falsely told him he was the father of her child, as a result of which he claimed he paid her £90,000 to support the child. His action was held not to be barred on the grounds of public policy. 373

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**Evidence**

There are two issues here: can a spouse give evidence against the other spouse (is he or she competent), and can a spouse be forced to give evidence against the other spouse (is he or she compellable)? 374 At one time spouses were not compellable375 witnesses in civil or

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370 [1919] 2 KB 571.
373 A spouse will not be permitted to sue a former spouse in tort if this is regarded as an attempt to unsettle the financial orders reached on divorce: *Ganesmoorthy v Ganesmoorthy* [2003] 3 FCR 167.
375 By saying a witness is compellable it is meant that a witness can be forced to give evidence.
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criminal proceedings against their spouses, the idea being that a spouse should not be forced into the appalling dilemma of either committing perjury or giving evidence which would harm his or her spouse in the proceedings. The spouse was considered an incompetent witness in criminal proceedings because the evidence would be so tainted that a jury would not be able to treat it fairly. These positions have been changed by statute.

The present law is now that in civil proceedings a spouse or civil partner is both a compellable and a competent witness. In criminal proceedings generally the spouse or civil partner is competent, but not compellable.\(^{376}\) In other words, if a spouse or civil partner is willing to give evidence against his or her spouse or partner he or she may do so, but will not be forced to. The exceptions are that if the husband and wife or civil partners are jointly charged for an offence, then neither is competent to give evidence for the prosecution (unless the charges against them are dropped or they plead guilty). Under s 80 of the Police and Criminal Evidence Act 1984 there is a shortlist of offences for which the spouse or civil partner is compellable. These are offences which involve an assault or injury or threat of injury to the spouse or any person under the age of 16, or a sexual offence against a person under 16.\(^{377}\) There are no special rules relating to the evidence of cohabitants.\(^{378}\)

## I Matrimonial property

The Family Law Act 1996 provides married couples and civil partners with home rights which provide a right to occupy the matrimonial home.\(^{379}\) There are also special provisions relating to family property during bankruptcy, and pension rights, which we will discuss later. These provisions do not apply to cohabitants, who are given no particular protection on bankruptcy.

## J Marital confidences

Communication between spouses used to be subject to special protection so that a spouse who disclosed confidential information about the other could be found in breach of confidence. However, the law on confidential information has now developed so that it covers cohabitants.\(^{380}\) It has even been found that there could be confidential relations between a husband and the person he was having an adulterous relationship with.\(^{381}\)

## K Taxation and benefits

There are special exemptions from tax that apply to married couples and civil partners but not unmarried couples. The most important are in respect of inheritance tax and capital gains tax allowance.\(^{382}\) The Labour Government removed the married couples’ tax allowance, which was an allowance against income tax available to married couples but not to unmarried

\(^{376}\) In *R (On the Application of the Crown Prosecution Service) v Registrar General of Births, Deaths and Marriages* [2003] 1 FCR 110 a defendant to a charge of murder married the chief prosecution witness to take advantage of this rule. The Crown Prosecution Service in that case unsuccessfully applied to prevent that marriage.

\(^{377}\) This includes attempting, conspiring, aiding, abetting, counselling, procuring or inciting their commission.

\(^{378}\) This was confirmed by the Court of Appeal in *R v Pearce* [2001] EWCA Crim 2834, [2002] 3 FCR 75. It rejected an argument that, following the Human Rights Act 1998, cohabitants should not be compellable witnesses.

\(^{379}\) See Chapter 4.


\(^{381}\) *CC v AB* [2008] 2 FCR 505. See also *John Terry (previously 'LNS') v Persons Unknown* [2010] EWHC 119 (QB).

\(^{382}\) Tax Law Review Committee (2003) provides a useful summary of the differences between married and unmarried couples’ taxation.
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couples. The removal of this tax advantage has been strongly criticised. For example, Mary Corbett of the Catholic Family Group wrote: ‘Only naive people would think that the marriage allowance would have kept anyone together, but the allowance was a symbol worth keeping because it pointed to marriage as a worthwhile commitment.’\(^{383}\) It is significant that the Labour Government replaced the married couples’ tax allowance with a tax credit for those who care for children. In relation to state benefits, unmarried couples and married couples are generally treated in the same way. It has been alleged that now some married couples are disadvantaged as compared to lone parents in the tax and benefits systems.\(^{384}\) The Prime Minister has announced that he intends the Government to provide tax advantages for married couples and those in civil partnerships.

\section{Citizenship}

Anyone who is not a citizen of the UK and colonies does not become a citizen by marrying someone who is. She or he may obtain nationality by naturalisation or by one of the other methods. The spouse’s requirements for naturalisation are less strict than for others. If a person is settled in the UK then the spouse will be given entry clearance as long as he or she can show the marriage is not a sham and that the couple are able to accommodate and maintain themselves. There is a similar power for engaged couples, but not unmarried cohabitants.\(^{385}\) Following the Civil Partnership Act spouses and civil partners are treated in the same way for immigration purposes.

\section{Statutory succession to tenancies}

Statute has provided rights to a tenant’s family to succeed to the tenancy on the death of a tenant. The phrase ‘family’ has been interpreted to include opposite-sex or same-sex cohabitants.\(^{386}\) The phrase ‘as husband and wife’ includes opposite-sex or same-sex couples.\(^{387}\)

\section{Domestic violence}

Married couples, civil partners and cohabitants are associated persons and so can apply for non-molestation injunctions. Cohabitants can also apply for occupation orders, although if the applicant does not have property rights in the property she will be treated less favourably than she would have been had she been married or a civil partner.\(^{388}\)

\section{Fatal Accident Act 1976}

The Fatal Accident Act 1976 permits a spouse or civil partner of a deceased killed in an accident to claim damages under certain circumstances. Under this Act a cohabitant is able to have a claim in the same way as a spouse or civil partner if he or she had been living with the deceased for at least two years immediately before the date of death.\(^{389}\)

The next two issues are differences of a theoretical rather than practical nature.

\(^{383}\) Corbett (1999).
\(^{384}\) BBC Newsonline (2007a).
\(^{385}\) Cretney, Masson and Bailey-Harris (2002: 92–3) for the detail of the law.
\(^{386}\) Fitzpatrick \textit{v} Sterling Housing Association Ltd \textit{[2000]} 1 FCR 21.
\(^{387}\) Ghaidan \textit{v} Godin-Mendoza \textit{[2004]} 2 FCR 481.
\(^{388}\) See Chapter 6.
\(^{389}\) It does not cover those who were ‘going out’ together but not cohabiting: Kotke \textit{v} Saffarini \textit{[2005]} 1 FCR 642.
**P  The doctrine of unity**

The principal effect of marriage at common law is that the husband and wife become one. The doctrine of unity finds its basis in Christian theology. Blackstone wrote:

> By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; . . . Upon this principle of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.

The effects of this doctrine were never fully explained in the law and today the doctrine is regarded with cynicism. Lord Denning MR in *Midland Bank Trust Co Ltd v Green (No. 3)* explained that the position used to be that ‘. . . the law regarded the husband and wife as one and the husband as that one’. However, he made it clear that the doctrine of unity is now of very limited application.

**Q  Consortium**

The concept of consortium is not clear but has been defined by Munby J in *Sheffield CC v E and S* as ‘the sharing of a common home and a common domestic life, and the right to enjoy each other’s society, comfort and assistance’. At one time there was an obligation on the wife to provide her husband with ‘society and services’, although a husband did not owe the wife a corresponding duty. However, Munby J emphasised that nowadays spouses are ‘joint co-equal heads of the family’ and any rights of consortium are equal and reciprocal. However, the concept of consortium is rarely enforced in law. In *R v Reid* it was confirmed that a husband could be guilty of kidnapping his wife and that the right of consortium did not provide a defence to such a charge.

**10 Engagements**

Before marriage it is common for couples to enter into an engagement, when the parties agree to marry one another. In the past, under common law, such agreements were seen as enforceable contracts, and so if either party, without lawful justification, broke the engagement then it would be open for the other to sue for breach of promise and to obtain damages. Such an action was abolished by the Law Reform (Miscellaneous Provisions) Act 1970, s 1, which stated that no agreement to marry is enforceable as a contract. The abolition was justified on the basis that it was contrary to public policy for people to feel forced into marriages through fear of being sued.

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390 The Bible, Genesis 2: 24; Genesis 3: 16.
391 Blackstone (1770: 442).
392 [1982] Ch 529 at p. 538.
393 In Ünal Tekeli v Turkey [2005] 1 FCR 663 it was said to be contrary to the ECHR to require a married couple to both take the husband’s surname; that was sex discrimination and could not be justified in the name of promoting marital unity. The Court left open the question of whether it would be permissible to require the couple to share a surname.
394 [2004] EWHC 2808 (Fam) at paras 130–1. The case is discussed in Gaffney-Rhys (2006).
396 It is possible for a party to be engaged even though he or she is married to someone else: Shaw v Fitzgerald [1992] 1 FLR 357, [1992] FCR 162.
397 Law Commission Report 26 (1969), although Bagshaw (2001) discusses the possibility of an action being brought in the tort of deceit if a person promised to marry another, without ever intending to do so.
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In general, engaged couples are treated in the same way as unmarried couples, though engagement and agreement to enter a civil partnership still has legal significance in a number of ways:

1. Property of engaged couples. When resolving property disputes between an engaged couple s 37 of the Matrimonial Proceedings and Property Act 1970 applies.\textsuperscript{398} The effect of this provision is described in detail in Chapter 4, but, in brief, it states that if someone improves a house he or she thereby acquires an interest in it. Apart from this provision, the property of an engaged couple is treated in the same way as that of an unmarried couple.\textsuperscript{399}

2. Gifts between engaged couples. The Law Reform (Miscellaneous Provisions) Act 1970, s 3(1) states that: ‘A party to an agreement to marry who makes a gift of property to the other party to the agreement on the condition (express or implied) that it shall be returned if the agreement is terminated shall not be prevented from recovering the property by reason only of his having terminated the agreement.’ So each case will turn on its own facts and depend on whether the gift was subject to an implied condition that the gift should be returned if the marriage did not take place. For example, furniture bought for the intended matrimonial home may be thought to be conditional upon marriage and therefore should be returned if the engagement is broken. A Christmas gift would probably be regarded as unconditional.

3. The gift of an engagement ring is presumed to be an absolute gift and therefore can be kept by the recipient, but this presumption can be rebutted if it can be shown there was a condition that the ring be returned in the event of the marriage not taking place.\textsuperscript{400} For example, if the ring had belonged to the man’s grandmother and was intended to be passed down within her family, it may be presumed that the ring should be returned if the engagement is broken.

4. Domestic violence. Engaged couples are ‘associated’ people for the provisions of Part IV of the Family Law Act 1996 and so can automatically apply for a non-molestation order against one another. However, the Act requires the engagement be proved in one of a number of distinct ways (see Chapter 6).

\textbf{11 Should the law treat cohabitation and marriage or civil partnership in the same way?}

It should be noted that many European countries have legislated to treat married and unmarried couples in the same way.\textsuperscript{401} There are various ways of considering this question.

\textbf{A Does the state benefit from cohabitation to the same extent as from marriage or civil partnership?}

The state has traditionally favoured marriage and sought to encourage people to marry, most explicitly by providing tax advantages to married couples which are not available to unmarried


\textsuperscript{399} See Chapter 5.

\textsuperscript{400} Law Reform (Miscellaneous Provisions) Act 1970, s 3(2). See Cox v Jones [2004] 3 FCR 693 for a case where the man was not able to show that the ring was not intended as a gift.

\textsuperscript{401} Thorpe LJ (2002: 893).
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people. However, marriage is not encouraged only through such explicit means. As Katherine O’Donovan explains: ‘Marriage endures as symbol . . . it may be presented as private but it is reinforced everywhere in public and in political discourse.’\(^{402}\) A study of attitudes among the general public towards marriage revealed that two thirds of those interviewed saw marriage as an ideal family form, although notably only 28 per cent of respondents thought marriage made couples better parents.\(^{403}\) In another poll only 44 per cent of those questioned thought marriage was essential to ensuring a lasting relationship.\(^{404}\) Most recently a poll found that 70 per cent of those aged between 20 and 35 wanted to marry, including 79 per cent of those currently cohabiting.\(^{405}\) But why is it that the Government, through public statements and policies, seeks to encourage marriage and civil partnership?

There are five particular advantages to the state which are often cited:

1. Sir George Baker, a former President of the Family Division, has argued that marriage provides the ‘building blocks’ of society and is ‘essential to the well-being of our society, as we understand it’.\(^{406}\) Lord Hoffmann has declared: ‘The state is entitled to take the view that marriage is a very important institution and that in general it is better for children to be brought up by parents who are married to each other than by those who are not.’\(^{407}\) This view, although a popular notion amongst politicians, lacks precision. What does it mean that marriage is a building block or the foundation of society? It could be argued that a married couple may feel they have a greater stake in society than two single people, and so may be more willing to contribute to it.\(^{408}\) This is certainly open to debate as, for example, single people may well be more likely to use public transport and perhaps even be more vulnerable to crime. It could be suggested that marriage or civil partnership provides psychological benefit to the couple themselves, which might in turn make them better citizens.\(^{409}\) It has been suggested that marriage makes a couple wealthier, happier and healthier.\(^{410}\) These arguments are all hard to prove either way. We have not tried a society without marriage, and so do not know whether society would be different without marriage.

2. It may be that the state wishes to support marriage and civil partnership in order to promote the production of and caring for children. The Labour Government’s view was that: ‘many lone parents and unmarried couples raise their children every bit as successfully as married parents. But marriage is still the surest foundation for raising children and remains the choice of the majority of people in Britain. We want to strengthen the institution of marriage to help more marriages to succeed.’\(^{411}\) The Conservative Party’s Centre for Social Justice has also voiced its support for the institution of marriage.\(^{412}\) It claimed that those children not in two-parent families are:\(^{413}\)

- 75 per cent more likely to fail at school
- 70 per cent more likely to be a drug addict

\(^{402}\) O’Donovan (1993: 57).
\(^{403}\) Barlow et al. (2001).
\(^{404}\) ICM Poll (2002b).
\(^{405}\) de Waal (2008).
\(^{406}\) Campbell v Campbell [1977] 1 All ER 1 at p. 6.
\(^{408}\) Berger and Kellner (1980).
\(^{409}\) There is some evidence of a higher incidence of premature death among unmarried rather than married men: McAllister (1995).
\(^{410}\) Waite and Gallagher (2001).
\(^{412}\) Centre for Social Justice (2009).
\(^{413}\) Centre for Social Justice (2010).
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- 50 per cent more likely to have an alcohol problem
- 40 per cent more likely to have serious debt problems
- 35 per cent more likely to experience unemployment/welfare dependency.

They claimed that married relationships were more stable than unmarried relationships\textsuperscript{414} and so it was in society’s interests to promote marriage. This claim is controversial and we shall return to it shortly.

3. A third alleged benefit to the state is that by managing the start of a relationship the state is able to regulate the relationship if it breaks down. The state may wish to ensure that at the end of a relationship the arrangements for children will promote the child’s welfare, and that the spouse’s or civil partner’s property is divided between them in a way that is just. If a marriage or civil partnership breaks down, the couple must turn to the courts for a divorce or dissolution so that the marriage or civil partnership can be officially terminated; however, if an unmarried couple separate, the court may well not be involved at the end of the relationship. The strength of this view is weakened in the light of the present law. First, the law, in both financial and child-related matters, essentially allows the parties themselves to resolve these matters and intervenes only if there is a dispute. Secondly, this view does not explain why the law does not try to provide the same intervention for unmarried couples.

4. A fourth benefit is economic. If a person falls ill, or becomes unemployed, and so no longer has an income, then the financial responsibility is likely to fall on the state if that person is single, whereas spouses or civil partners would depend on each other. A further economic benefit is the straightforward fact that a couple sharing accommodation require less housing than two single people.

5. Marriage and civil partnership can be used as an effective evidential tool. If the law were to abolish the legal significance of marriage then it would be necessary to create some kind of alternative in order legally to regulate family life. Perhaps cohabitation would provide that alternative. The difficulty is that a couple might be sharing a house, but not necessarily sharing their lives. The definition of cohabitation and the investigation that would be necessary to decide whether or not a couple were sharing their lives would be far more complex and expensive than deciding whether a person is married. The couples who marry or enter civil partnerships therefore save the state’s and courts’ time and effort in formally establishing the nature of their relationship.

Many of these benefits of marriage or civil partnership to the state are also provided by cohabiting relationships. Further, it is unclear whether all or even most married couples or civil partners provide these benefits.\textsuperscript{415} However, the core question is whether unmarried cohabiting couples are as stable as married or civilly partnered ones.\textsuperscript{416} This is especially important when considering their role in raising children. It is very difficult to obtain statistics on cohabiting relationships because there are no formalities marking their beginning and end. The evidence available suggests that unmarried cohabiting relationships are shorter lived.\textsuperscript{417}

\textsuperscript{414} The Labour Government claimed this too: HM Government (2010a).
\textsuperscript{415} Huston and Melz (2004) argue that although there are benefits in some couples marrying, that is not true for all couples.
\textsuperscript{416} For the case that cohabitation does not benefit the state to the same extent as marriage, see Morgan (2000). She argues that there are higher rates of domestic violence, child abuse and alcohol abuse. For a study arguing for similar findings in the United States (including an argument that married couples record higher levels of sexual satisfaction than unmarried ones) see Waite (2000).
\textsuperscript{417} McRae (1997); Haskey (2001); Kiernan (2001).
One study found that around 27 per cent of couples that were cohabiting when their child was born have separated by the time the child is aged 5, compared with 9 per cent of couples that were married when their child was born.\(^{418}\)

However, it is also clear that unmarried cohabitants tend to be economically less well off, and it may be their economic position rather than their marital status that truly affects the stability of their relationship.\(^{419}\) In other words, even if the cohabiting couple had married, their relationship would not have lasted any longer.

After an extensive review of the literature Alissa Goodman and Ellen Greaves conclude:\(^{420}\)

Our findings suggest that while it is true that cohabiting parents are more likely to split up than married ones, there is very little evidence to suggest that this is due to a causal effect of marriage. Instead, it seems simply that different sorts of people choose to get married and have children, rather than to have children as a cohabiting couple, and that those relationships with the best prospects of lasting are the ones that are most likely to lead to marriage.

Similarly Miles, Pleasence and Balmer found that, once age and socio-economic factors were taken into account, ‘there was little difference in breakdown rates between married and cohabiting respondents’.\(^{421}\)

Goodman and Greaves make similar findings in relation to child welfare,\(^{422}\) concluding that encouraging parents to marry is unlikely to lead to significant improvements in young children’s outcomes. They found that there are differences in development between children born to married and cohabiting couples but this reflects differences in the sort of parents who decide to get married rather than to cohabit. For example, compared to parents who are cohabiting when their child is born, married parents are more educated, have a higher household income and a higher occupational status, and experience a higher relationship quality early in the child’s life. It is these and other similar factors that seem to lead to better outcomes for their children. Having taken account of these (largely pre-existing) characteristics, the parents’ marital status appears to have little or no additional impact on the child’s development.

We might ask if there are any rational reasons why married relationships or civil partnerships might be stronger than unmarried ones. Four reasons will be suggested. The first is that marriage or civil partnership may indicate a deeper commitment to the relationship.\(^{423}\) This may be true for many couples but is clearly not true for all. The current divorce rate demonstrates that marriage is not a guarantee of lifelong commitment. Indeed in Eekelaar and Maclean’s research\(^{424}\) no difference in the level of commitment to the relationship was found between married and unmarried couples. There is, however, one sense in which it might be argued that a spouse or civil partner has a greater commitment to the relationship and that is in terms of the legal responsibilities undertaken. The potential financial liability of a spouse or civil partner is certainly greater than that undertaken by a cohabitee.\(^{425}\) In financial and legal terms, at least, a child is likely to be better off if his or her parents are married than if they are unmarried.\(^{426}\) Anita Bernstein sees one of the strongest arguments in favour of

\(^{418}\) Benson (2009). See also Kiernan and Mensah (2010).

\(^{419}\) See Ermisch (2006) for a discussion of how being raised in a single parent household can affect a child.

\(^{420}\) Goodman and Greaves (2010b).

\(^{421}\) Miles, Pleasence and Balmer (2009: 54).

\(^{422}\) Goodman and Greaves (2010a).

\(^{423}\) Morgan (2000); Gallagher and Waite (2001).

\(^{424}\) Eekelaar and Maclean (2004).

\(^{425}\) Cleary (2004).

\(^{426}\) Lewis (2006) rejects the arguments that attitudes of married and unmarried couples towards their relationship are identical, especially in cases of recoupling.
marriage being that ‘as a form of enforced commitment, state-sponsored marriage facilitates investment – that is, the sacrifice of short-term gain for the prospect of returns in the long term’.  

This may well be true but, as Maclean and Eekelaar point out, ‘marriage is neither a necessary nor sufficient condition for the acceptance of personal obligation’. They argue:

> It becomes increasingly difficult to identify being married in itself as necessarily, or even characteristically, constituting a significant source of personal obligations in the eyes of the participants in such relationships.

They suggest it is the obligations negotiated by the parties which are the source of the obligation for all couples, be they married or cohabiting.

The second reason why one might believe that marriages or civil partnerships are more enduring than cohabitation is that the social pressure against ending a marriage or civil partnership may be greater than the pressure against ending an unmarried relationship. Again this may be true, depending on the attitude and culture of the parties, their families and communities.

Thirdly, the legal barriers to divorce or dissolution may slow down the marital breakdown process, which might increase the chance of reconciliation. The strength of these arguments is very much open to debate. Even if it could be shown that marriage itself makes couples more stable, it could still be argued that the state should do more to encourage and support unmarried relationships rather than privileging married relationships. Fourthly, it can be suggested that the characteristics or values of cohabiting couples differ from married ones and these make them more likely to separate.

An argument that is sometimes made in this debate is that treating unmarried couples in the same way as married couples will discourage marriage or civil partnership, thereby harming society. The Conservative Party’s Centre for Social Justice commissioned research which suggested that 58 per cent of those questioned thought giving cohabitants the same rights as married couples would undermine marriage. This argument is weak. Kiernan, Barlow and Merlo have analysed marriage rates in Australia and Europe and have found ‘little evidence of a relationship between the introduction of legislation giving rights to cohabiting couples with subsequent changes in the propensity to marry’.

As has already been mentioned, it is very unlikely that people decide not to marry because of the legal consequences. Simply put, few people know the law in this area. Even those who do are more likely to base their decision to marry on religious and social views, or to be influenced by their families, friends and culture.

**Choice**

An alternative approach is to focus on ‘choice’. Deech has argued that if a couple choose not to marry it is wrong for the law to treat them as if they were married as this would negate their choice and show a lack of respect for their decision. She argues:

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428 Maclean and Eekelaar (2005b).
430 See, e.g., Lye and Waldron (1997).
431 Morgan (2000).
432 Centre for Social Justice (2009).
434 Smart and Stevens (2000).
Should the law treat cohabitation and marriage or civil partnership in the same way?

My preference is for the rights of the individual, or human rights, in this instance autonomy, privacy, a sphere of thought and action that should be free from public and legal interference, namely the right to live together without having a legal structure imposed on one without consent or contract to that effect. It is better not to have legal interference in cohabitation and leave it to be dealt with by the ordinary law of the land, of agreements, wills, property and so on.\textsuperscript{437}

There are perhaps three difficulties with this view, despite its persuasive power.\textsuperscript{438} The first is that it is doubtful to what extent many couples \textit{choose} not to marry, at least to what extent they choose not to take on the legal consequences of marriage.\textsuperscript{439} In reality few couples decide positively not to get married because of the legal differences in treatment and, indeed, few marry because of the legal benefits.\textsuperscript{440} Indeed in one survey 69 per cent of those questioned thought living together outside marriage created legal rights.\textsuperscript{441} A major Government campaign to combat this has had limited effects. In a recent study only 38 per cent of people knew that cohabiting did not give you the same rights as being married.\textsuperscript{442} A second problem is that some couples disagree over whether or not to marry. It may be, for example, that the woman wants to get married but the man does not. It seems a little harsh to say she has chosen not to marry. Deech, rather bluntly, replies that such a person should either leave her partner or accept the unmarried status. A third argument is that some of the legal consequences of marriage do not reflect the couple’s decision but rather the justice of the situation or the protection of a state interest (for example, protecting the interests of children).\textsuperscript{443} One might take the view that it should not be possible to choose not to have justice or not to protect a state interest. Alternatively, it could be said that although cohabiting couples might not want all of the consequences of marriage, this does not mean they do not want the law to intervene at all at the end of their relationship.\textsuperscript{444} In spite of these responses, where both members of a couple have decided firmly to reject the legal consequences of marriage, to deny respect to that choice seems unduly interventionist.

It may be that Deech’s argument is more persuasive when seen as a call for marriage to be treated in the same way as cohabitation. In other words, regardless of whether the couple are married or not, the law’s response should focus on their commitment to each other, rather than having the consequences of the status of marriage ‘imposed upon them’.

\textbf{C Reflecting current attitudes}

Another approach is to argue that the law should reflect current attitudes. Studies suggest that many people do not regard cohabitation outside marriage as immoral and indeed there is often talk in the media of ‘a common law wife’, suggesting that if a couple have lived together for a certain time they are treated as married.\textsuperscript{445} In a recent study, 51 per cent of people believed that ‘common law marriage’ existed.\textsuperscript{446} A survey of media references found that media use of the terms ‘common law husband’ or ‘common law wife’ vastly outnumbered

\begin{itemize}
\item[437] Deech (2010d).
\item[439] Oliver (1982).
\item[440] Hibbs, Barton and Beswick (2001).
\item[441] Hibbs, Barton and Beswick (2001: 202).
\item[442] National Centre for Social Research (2008).
\item[443] Herring (2005a).
\item[444] Haskey (2001: 53).
\item[445] See the discussion of the common law marriage myth in Barlow, Burgoyne, Clery and Smithson (2008) and Probert (2008b).
\item[446] National Centre for Social Research (2008).
\end{itemize}
articles emphasising that the concept does not exist.\(^{447}\) This meaning of ‘common law marriage’ is not legally recognised. Unmarried couples are often under the misapprehension that once they have cohabited for a while they will be treated as if they are married.\(^{448}\) It may be argued that the law should reflect this popular (mis)understanding. Of those interviewed in a recent survey, 61.4 per cent suggested that cohabitants who had lived together for ten years should have the same maintenance rights as married couples, and 92.1 per cent thought they should have the same inheritance rights.\(^{449}\) However, another study\(^{450}\) found a significant difference in the attitudes towards financial matters of those married couples divorcing and cohabiting couples who were separating. Divorcing couples talked about ensuring there were fair financial arrangements for the children and then dividing what was left, while separating cohabitants talked about each partner taking back what they had brought into the relationship. Interestingly, the role of children appeared to play a much smaller part in the discussions of cohabitants.

Although it appears now to be generally accepted that it is ‘all right’ for a couple to live together without intending marriage, this does not mean that marriage has lost its meaning.\(^{451}\) In one study of people in their twenties 75 per cent disagreed with the statement that there was no point getting married anymore.\(^{452}\) Further, a majority of people still see marriage as the ideal basis for child raising,\(^{453}\) although it should be noted that cultural and religious factors can greatly influence attitudes towards marriage. Despite these positive attitudes to marriage the majority of the public appears to support giving couples who have cohabited for a considerable period of time the same rights as spouses or civil partners.\(^{454}\) Another survey found a strongly and widely held view that children of unmarried parents should not be treated any differently from those of married ones.\(^{455}\)

### D. Discrimination

It might be argued that to treat married and unmarried people’s family rights and responsibilities differently amounts to discrimination of their rights under article 8 of the European Convention on Human Rights in a way prohibited by article 14. The European Court has not yet specifically stated that discrimination on the grounds of marital status is covered by article 14, but it has been implied in several cases. In Re P\(^{456}\) the House of Lords held that for the purposes of the Human Rights Act 1998 treating cohabitants differently from married couples did amount to discrimination, although that could be justified in some cases. In Gomez v Spain\(^{457}\) a woman who separated from her cohabitant of 18 years complained that her inability to make the financial claims that a wife could make against her husband on divorce infringed her convention rights. The Commission held that any difference in treatment was justifiable by the need to protect the traditional family. She had chosen not to take up the

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\(^{447}\) Probert (2007b).

\(^{448}\) Pickford (1999). In their survey Barlow and James (2004: 161) found that 56% of respondents believed that people who had cohabited for a period of time were ‘common law spouses’. Among cohabitants the figure was 59%.

\(^{449}\) Barlow et al. (2001; 2003).

\(^{450}\) Maclean et al. (2002).

\(^{451}\) In Barlow et al. (2005: 124) 84% of those aged 18 to 24 agreed with that statement.

\(^{452}\) Wicks and Asato (2002). In MORI (1999) 77% disagreed with the statement that marriage is dead.

\(^{453}\) Barlow et al. (2005: 21).

\(^{454}\) Barlow et al. (2005: 51).

\(^{455}\) Barlow, Burgoyne, Clery and Smithson (2008).

\(^{456}\) [2008] UKHL 38, discussed Herring (2009a).

\(^{457}\) Application 37784/97 (19 January 1998).
advantages of marriage and therefore the discrimination was proportionate. The implication of this might be that some differences in treatment between married and unmarried couples will be unlawful discrimination under the ECHR and others will not. It may be, for example, that parental rights should not differ as between married and unmarried parents, but the rights they have between themselves can.\footnote{Although see \textit{B v UK} [2000] 1 FCR 289 where the ECHR upheld differences in relation to parental responsibility between married and unmarried fathers.}

\section{Should marriage be discouraged?}

There are, of course, arguments that the state should not encourage marriage.\footnote{See Chapter 1.} Some feel that marriage is an institution which has helped perpetuate disadvantage against women.\footnote{For an economic analysis supporting this conclusion see Slaughter (2002).} Katherine O’Donovan has sought ‘to break free from marriage as a timeless unwritten institution whose terms are unequal and unjust’.\footnote{O’Donovan (1993).} The argument is that marriage ensures the maintenance of patriarchal power, through the power given to husbands as ‘head of the household’.\footnote{Smart (1984).} Martha Fineman\footnote{Fineman (2006: 63).} has argued ‘Marriage allows us to ignore dependency in our policy and politics’ and that means care-givers (normally women) bear the burden of caring with no social reward. Other criticisms have been similar to those launched against the family, namely that marriage can be self-centred, with the couple focusing on preparing their home rather than working in the community around them. From an opposite perspective, marriage can be seen as anti-individualist. O’Donovan summarises Weitzman’s view of marriage:

\begin{quote}
this unwritten contract, to be found in legislation and case-law, is tyrannical. It is an unconstitutional invasion of marital privacy, it is sexist in that it imposes different rights and obligations on the husband and wife, and it flies in the face of pluralism by denying heterogeneity and diversity and imposing a single model of marriage on everyone.\footnote{O’Donovan (1984: 114).}
\end{quote}

Other commentators detect a modern understanding of marriage among younger people which is based on a partnership of equals, sharing the burdens of homemaking, child-caring and wealth creation,\footnote{Schwartz (2000) describes such marriages as ‘peer’ marriages.} although the extent to which such marriages occur in reality, rather than as an aspiration, is a matter of debate.

\section{Protection}

Baroness Hale, writing extra-judicially, has argued that the law needs to protect cohabitants from inequality. She writes:

\begin{quote}
Intimate domestic relationships frequently bring with them inequalities, especially if there are children. They compromise the parties’ respective economic positions, often irreparably. This inequality is sometimes compounded by domestic ill-treatment. These detriments cannot be predicted in advance, so there should be remedies that cater for the needs of the situation when it arises. They arise from the very nature of intimate relationships, so it is the relationship rather than the status that should matter.\footnote{Hale (2004a).}
\end{quote}
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Notably this argument does not necessarily require that cohabitation be treated identically to marriage, but it does call for protection from inequality that flows from cohabitation – particularly the unfairness that women face as a result of undertaking the child-caring role in the relationship.

12 The Law Commission’s proposed reforms

The Law Commission’s Consultation Report 2007, *Cohabitation: The Financial Consequences of Relationship Breakdown*, proposes reform to the law. This is discussed in Chapter 4. Their proposal will give cohabitants some financial remedies on separation, but these will be less extensive than available to married couples. The Government announced in 2008 that it will delay responding to the Law Commission proposals until it has seen the impact of similar proposals which have been enacted in Scotland. The Government has particular concerns over the costs to the state of enacting such a scheme.

13 What if the state were to abolish legal marriage?

One point of view is that marriage should cease to have any legal significance, although holders of this view would be happy for marriage to continue to have religious and social significance. This would mean that any legal regulation of relationships would not depend on whether couples are married or not, but rather on different criteria: for example, whether a couple have children, or the length of time a cohabitation has existed. So, for example, if the Government wishes to give benefits to stable couples who care for children, these could be directed towards couples with children who have stayed together for five years, rather than giving the benefit to all married couples, which would be over-inclusive. Glendon foresaw the withering away of marriage. She argued that the law was moving to ‘break the family down into its component parts and treat family members as separate and independent’.

DEBATE

After marriage?

If the law does not rely on marriage, how might the law distinguish two strangers from two people in a close relationship, assuming it wishes to? The following are some possibilities:

1. The law could rely on cohabitation. This proposal could be that if a couple have cohabited for two years and/or have a child then they are given the rights married couples and civil partners currently have. In effect this would create a system where you must ‘opt out’

467 Hale (2009b).
468 See Bernstein (2006) for a useful set of essays discussing this. For support for this from a religious perspective see Barrow and Bartley (2006).
469 Clive (1994). But see Bridge (2001: 9) who questions whether such an approach is compatible with article 12 of the European Convention on Human Rights.
470 Such a proposal is developed in Law Commission of Canada (2002).
472 For a discussion of whether family law could be reduced to a network of personal rights and obligations, without obligations emanating from ‘the family’, see Eekelaar (2000a).
473 See Baker (2009b) for a discussion of Australian law which has taken an approach similar to this.
of marriage if you are cohabiting. Most proponents of such a scheme would accept that people could marry in the 'normal' way too. The difficulty is in defining cohabitation. Does it require staying overnight: how many nights a week are necessary? Proof of cohabitation (or non-cohabitation) may also prove difficult. Fineman would seek to regulate relationships of dependency and care, rather than cohabitation. There would be problems in defining this too.

2. An alternative approach is to focus on the kind of relationship. Has the relationship reached a depth where it deserves a particular benefit? Simon Gardner, in the context of property rights, has suggested considering whether the relationship displays 'communality'. The difficulty with this approach is that it is very difficult for a third party (e.g. a judge) to understand the nature of a particular relationship. Some people, for example, would attach great significance to a sexual relationship; others would pay little attention to this.

3. Another approach is to focus on the agreement between the parties. This could require or encourage the parties to prepare and sign a legal agreement. This is only satisfactory where the parties are aware of the benefits of doing so. It is notoriously difficult to persuade people to make wills. It is doubtful we will be more successful in persuading people to make cohabitation contracts. We will return to this issue in Chapter 5.

4. It would be possible for the state to create an alternative to marriage, for example registered partnerships. However, it is unlikely that people who do not wish to marry would choose to register their partnerships. Partnerships would, however, be useful for those who are legally barred from marriage.

5. To some commentators the significance attached to parenthood reflects the decreasing importance of marriage. Dewar suggests ‘that family law is increasingly emphasising the maintenance of economic and legal ties between parents and children after separation, as if to create the illusion of permanence in the face of instability. Since, by definition, neither marriage nor cohabitation are available for the purpose, these continuing links are founded on parenthood.’

Questions
1. If two friends came to see you asking your advice as a lawyer as to whether they should enter a civil partnership or whether they should cohabit, what would you recommend and why?
2. Would it really make any difference to the law if it was decided that marriage was of no legal significance?

Further reading
Read Deech (2010d) for a passionate argument against treating unmarried couples in the same way as married ones. Read Auchmuty (2008) for an argument that marriage is outdated and is on its way out.

For a useful discussion see Lewis (2001b).
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14 Conclusion

This chapter has considered the nature of marriage, civil partnership and cohabitation. Increasing numbers of people are deciding to live together outside marriage and, in response, the legal distinctions between married and unmarried couples are lessening. Most significantly, the tax advantages awarded to married couples and civil partners have been replaced by a tax credit to those caring for children (whether married or not). This reflects a suggestion that it is parenthood rather than marriage or civil partnership that is at the heart of family law. This is not to say there are no legal differences between married and unmarried couples, but those differences that remain are controversial and many argue that the distinctions should be removed. As the legal consequences of marriage lessen, it is harder to justify the restrictions on who can marry whom. Further, if marriage or civil partnership is not to be the touchstone for deciding who are a legally recognised couple, what should replace it? There are great difficulties in finding an alternative: cohabitation or the intentions of the parties, for example, are not susceptible to ready proof, particularly when compared to examining the marriage register to see if a couple are married. The truth is that the term ‘cohabitants’ can cover a vast range of different kinds of relationship. The bureaucratic difficulties caused by defining cohabitation might ultimately lead to the law deciding that intimate relationships between adults give rise to no legal obligations whatsoever and that obligations should flow instead from parenthood.

Further reading


480 See Garrison (2007) who regards this as one of the great benefits of marriage. Kotke v Saffarini [2005] EWCA Civ 221 shows the difficulties the courts can face in defining cohabitation.


Visit [www.mylawchamber.co.uk/herring](http://www.mylawchamber.co.uk/herring) to access study support resources including interactive multiple choice questions, weblinks, discussion questions and legal updates.

Use **Case Navigator** to read in full some of the key cases referenced in this chapter with commentary and questions:

- Ghaidan v Godin-Mendoza [2004] 3 All ER 411
- R (On the Application of the CPS) v Registrar General [2003] 1 All ER 540
- Sheffield City Council v E and S [2005] Fam 326
- Sutton v Mischon de Reya [2004] 3 FCR 142
- Wilkinson v Kitzinger [2007] 1 FCR 183