

What's Wrong With Adultery?

An argument to modernise the definition of adultery in divorce law

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The Marriage (Same Sex) Couples Act 2013 (“MSSCA”) introduced the equal right to marry for same-sex couples. Whilst clearly a leap forward for equality, the Act also entrenched in statute an outdated definition of adultery, limiting it to conduct between the respondent and a person of the opposite sex. Although same-sex couples now have the equal right to marry, the rights and responsibilities contained within the status of marriage discriminate on the basis of sexuality.

This essay argues that there are strong grounds for repealing this statutory definition and replacing it with a broader gender neutral definition. For there to be truly equal marriage, differences between the rights and responsibilities attached to the status’ of opposite-sex marriage and same-sex marriage must be reconciled.

Equality

Equal treatment does not necessarily result in equality, and not all forms of equality are equal. The current law provides formal equality. I argue that

substantive equality is not only desirable and achievable, but essential to preserving the long term integrity of the institution of marriage.

Formal Equality

Formal equality treats everyone equally *despite* any difference in individual or group characteristics. It upholds the norm whilst claiming to advance equality, and does not recognise that in some contexts, individual or group-based characteristics are not only relevant, but important. It looks to achieve consistency and equality of outcome whilst perpetuating in-built procedural prejudice. It denies variety, assumes heteronorms, and works to maintain them—wilfully blind to individual and group characteristics.

The essence of formal equality is neatly summed up thus: “*The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.*”¹

It is in this way that the “MSSCA” 2013 provides equality in relation to adultery. There is one definition of adultery that applies equally to all, and practically applies only to one sub-class of married people.

¹ Anatole France, *The Red Lilly* (1st edn, 1894) Chapter 7

Formal equality does not take into account the needs of different groups within marriage, but blindly asserts that in order to be equal the same definition of adultery must apply. However, the status quo of marriage has changed and in order to achieve true equality, the historic definition of adultery can no longer be maintained.

It might be said by some that to admit this is to admit same-sex marriage is different to opposite-sex marriage. In reality there is only one status of marriage, regardless of the genders of the spouses, and it is the discrimination of the subclass that creates the difference and should be eliminated.

Substantive equality

Substantive equality works to ensure that everyone is treated equally in light of individual or group characteristics by providing equality of opportunity. It focuses on the disadvantage, taking into account the characteristics of a group, on the basis that there is no status quo and acknowledging that certain groups of people start from a position of disadvantage by virtue of historical subjugation.

Substantive equality recognises differences, but affirms equality, requiring the law to take diverse perspectives into account.

An Historic Definition; A Modern Concern

In 1958, at the second Maccabaeian Lecture to the British Academy, Lord Devlin spoke of his opposition to the proposed decriminalisation of homosexuality in the Wolfenden Report.² Speaking more broadly of marriage and divorce, and said:

“There is something unreal about discussing grounds of divorce and debating whether they should be narrowed or widened. It is like designing products for manufacture by a machine that is so antiquated that it has almost ceased to work.”³

The grounds of divorce were widened, and the antiquated machinery upgraded, with the introduction of the Matrimonial Causes Act (“MCA”) 1973 and the Special Procedure in 1978.⁴ The current regime has now been in place for over 40 years, resisting the threat of no-fault divorce in the mid-nineties.⁵ Although admittedly not perfect, the ‘products’—specifically the definition of adultery—are in desperate need of modernisation.

There has long been a variety of public understanding of what constitutes adultery. Examples of this can be found in *Barnacle v Barnacle* [1948]:⁶

² Patrick Devlin, *The Enforcement of Morals* (1st edn, OUP 1965)

³ *ibid* 75

⁴ Stephen Cretney, *Family Law in the Twentieth Century – A History* (OUP 2003) 381

⁵ Jonathan Herring, *Family Law* (6th edn, Pearson 2013) 131

⁶ P 257, 261

“Adultery is having sexual connexion with a woman not your wife, who is not over fifty years of age; and it is not adultery if she is over fifty;”

“I did not think it was adultery during the daytime;”

“I thought it meant getting a girl into trouble;”

“I thought it meant drinking with men in public houses.”

There remains today a vast array of understanding of what constitutes adultery.

During the passage of the “MSSC” Bill, there was notable media attention around the definition of adultery and the possible consequence of its disappearance.⁷ However, since the enactment of the Bill, there has been only scant media attention. In early 2015 a petition to the Scottish Parliament demanded a review of the definition of adultery, but was ultimately rejected.⁸ In August 2015 on Radio 4’s iPM programme, the issue was discussed via the story of a woman who was unable to obtain a divorce on the grounds of adultery after her husband left her for a man. She called for the law to “grow up about what sexual intimacy means today.”⁹ There is a dissonance between legal and social

⁷ John Bingham, ([telegraph.co.uk](http://www.telegraph.co.uk), 26 January 2013) <<http://www.telegraph.co.uk/news/politics/9827596/Gay-marriage-bill-opens-door-to-abolition-of-adultery.html>> accessed 1 October 2015

⁸ Tom Peterkin, (*The Scotsman*, 3 March 2015) <www.scotsman.com/news/politics/top-stories/call-for-adultery-to-cover-same-sex-marriages-1-3707028> accessed 1 October 2015

⁹ Jennifer Tracey, (*BBC News*, 1 August 2015) <<http://www.bbc.co.uk/news/magazine-33718943>> accessed 1 October 2015

definitions attributed to adultery, and as a social concept adultery has a wider meaning beyond its legal definition.

The terminology surrounding adultery in law is important. In the same year as *Barnacle*, the House of Lords considered the meaning of intercourse in the case of *Baxter v Baxter*.¹⁰ Whilst wishing to avoid “unnecessary detail on the topic,”¹¹ Viscount Jowitt JC held that the purpose of marriage was not necessarily procreation, but conjugal society. This squeamishness around discussing sex in the law has been part of the problem in England & Wales.

There are strong legal and social arguments for a definition of adultery that reflects changing social attitudes. In *Baxter*, Viscount Jowitt JC ruled that the definition of intercourse was to be taken as it was understood in “common parlance.”¹² an important phrase as it reflects the need for the law to adjust to changing social attitudes. This accords with Lord Devlin, who in 1958 stated that “marriage, though entered into by contract, confers, when completed, a status in society and that gives society a say in the terms of the arrangement,”¹³ suggesting that the law should serve a normative function, excluding social changes not yet dominant public norms as perceived by society at large. The law should adapt to

¹⁰ [1948] AC 274

¹¹ *ibid* 289

¹² [1948] AC 274

¹³ n2. 63

our evolving society, as well as incorporate a paternalistic role as moral gatekeeper.¹⁴

Adultery is the ultimate breach of the marital vow, intimately bound to the institution of marriage, and as such, it is essential it should be available equally to all. The definition and meaning of marriage has remained the same; it is only the entry requirements that have been modified. The restrictive definition of adultery remains one of the last elements maintaining sexuality based inequality in the law. Today, the status of marriage is available to same-sex couples and is, on the whole, accepted by society. Just as marriage has transcended heteronormative constraints to reflect a changing society, so too must adultery.

The law

Schedule 4, Part 3 of the “MSSCA” amends Section 1 of the “MCA” 1973, and defines adultery as consisting of:

“Only conduct between the respondent and a person of the opposite sex may constitute adultery for the purposes of this section.”

¹⁴ n2. 78

The definition of adultery prior to this was found in the common law,¹⁵ described as “*a voluntary act of sexual intercourse between the husband or wife and a third party of the opposite sex.*”¹⁶

Adultery is the first factual basis under the single ground for divorce—irretrievable breakdown of the marriage—and is set out in Part 1, s.1 (1) (a) of the “MCA” 1973:

(2) The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts, that is to say—

(a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

Before the introduction of the MSSCA 2013, there was still the possibility of modernisation of the definition of adultery by the common law. As I shall discuss later, other jurisdictions have been able to overcome dated interpretations of adultery and offer substantive equality. It was the particular path taken in the development of the definition that prevented this in England & Wales.

¹⁵ *Dennis v Dennis* [1955] 2 All ER 51, 160

¹⁶ n5. 118

The Passage of the Bill

The initial intention of Parliament was to leave the definition of adultery to develop in common law, but there were concerns this could lead to a period of legal uncertainty.¹⁷ It was felt that Parliament itself was not up to the task of defining adultery, and so the old common law definition was passed into statute. One problem was that the restrictive definition of adultery was being used as a part of the argument against equal marriage, leading to a circular debate.¹⁸ As the focus remained on the introduction of the equal right to marry, discussion around adultery became sidelined. Opponents to equal marriage maintained that same-sex relationships were fundamentally different and were best recognised legally through the separate institution of Civil Partnership.¹⁹ This desire for separation succeeded to the extent that there are differences between same-sex and opposite-sex marriage in the definition of adultery.

Other Jurisdictions

The development of the definition of adultery in Canadian law is a useful contrast due to its origin the law of England & Wales.

Canada legalised same-sex marriage with the introduction of the Civil Marriage Act 2005 (“CMA”). The title of the Canadian “CMA” can be contrasted to the

¹⁷ John Bingham, 'Fidelity not necessarily 'important' in marriage, suggests peer' (*The Telegraph* 2013) <<http://www.telegraph.co.uk/news/politics/10133269/Fidelity-not-necessarily-important-in-marriage-suggests-peer.html>> accessed 1 October 2015

¹⁸ Marriage (Same Sex Couples) Bill Deb, 7 March 2013, c433

¹⁹ HC Deb 5 February 2013, Vol 558, Col 147

parenthesised “MSSCA” of England & Wales. Over here, references to ‘civil marriage’ or ‘equal marriage’ were rapidly dropped after the consultation stage in favour of ‘Marriage (Same Sex Couples).’ The parenthesis nests ‘same-sex couples’ within ‘marriage’, but at the same time keeps them separate and distinct.²⁰

In Canada, the Court reasoned that the “CMA” indicated a social change sanctioned by Parliament, and as the will of Parliament it was not too great a leap for the common law to modernise the definition of adultery.²¹ This happened later in 2005 to include same-sex infidelity.

The Canadian Court found that the *‘wrong for which the petitioner seeks redress is something akin to violation of the marital bond’* and in light of this there should therefore be no reason why the wrong should be limited to acts of heterosexual sexual infidelity. Concluding that *‘[i]ntimate sexual activity outside of marriage may represent a violation of the marital bond and be devastating to the spouse and the marital bond regardless of the specific nature of the sexual acts performed’*²²

This shows the Courts willingness to depart from traditional interpretations of adultery in favour of one that reflects modern views through the interpretation

²⁰ Mark Harper, *Same Sex Marriage And Civil Partnership: The New Law* (Jordan 2014) 67

²¹ *P (SE) v P (DD)* [2005] BCSC 1290 [43]

²² *ibid* [48]

of the will of Parliament. The flexibility and ingenuity of the Canadian Courts is to be commended in this decision.

The origin of divergence between Canada and England & Wales on same-sex adultery is found within the Canadian Divorce Act 1968²³ which introduced the following ground of divorce:

3. (b) *has been guilty of sodomy, bestiality or rape, or has engaged in a homosexual act;*

“Homosexual act” was not defined and was available to either partner regardless of gender. In England & Wales, something similar was considered during the debate over the “MCA” 1938. Viscount Dawson of Penn stated that in the interests of equal treatment, sodomy as a ground of divorce should be replaced with homosexuality on the basis that it would be unfair to continue to constrain that ground of divorce to a sexual act that is only capable of being performed by men.²⁴ This proposal was, however, rejected on the basis of being beyond the scope of the recommendations of the Royal Commission of 1912.²⁵

In Canada, “homosexual act” received a common law definition in 1982 as ‘a *positive, physical act between at least two persons of the same sex having as its*

²³ Divorce Act 1985 RSC, c 3 (2nd Supp)

²⁴ HL Deb 07 July 1937 Col 106 cc69, 141

²⁵ Home Office, *Royal Commission on Divorce and Matrimonial Causes* (Cmd 6481 1912)

*object, whether satisfied or not, the gratification of the sexual drives or propensities or preferences of the parties.*²⁶ Abandoning over-precision in the description of what constitutes a “homosexual act” further aided the courts in later synthesising same sex adultery. Canada - in contrast with England & Wales - was less squeamish about discussing sex, and less obsessed with precise descriptions. It is this dichotomy that has in part caused our trouble in defining adultery.

The Need for Reform

The equal right to marry is now a reality. However, the rights and responsibilities contained within the status of marriage are different for same-sex married couples. For the right to marry to be substantively equal, the rights and responsibilities within marriage should apply equally to all. Furthermore, it remains the position for opposite-sex couples that should a spouse engage in extramarital affairs with a member of the same sex, there is no ground for petitioning for divorce under adultery.

Reform of the definition of adultery is desirable because the current state of the law:

1. maintains legal absurdity that opposite-sex couples cannot divorce under adultery as a result of an extra-marital same-sex affair
2. locks out the possibility of common law development in line with societal changes

²⁶ *Guy v Guy et al* (1982) 35 OR (2d) 584 (Ont SC)

3. establishes formal equality for homosexual couples which excludes the rights of a definitive class of persons
4. conflicts with popular public conception of meaning of adultery

Whether intended or not, crystallisation of a gendered definition of adultery in statute suggests same sex marriages are not expected to be held to the same standard of fidelity as opposite sex marriages. This not only demeans the social and legal recognition of same sex relationships, but also undermines the institution of marriage.

Proposed Reform

My proposal is to repeal the statutory definition of adultery under Schedule 4, Part 3 of the “MSSCA” 2013 and replace it with the following:

3 (1) Section 1 of the Matrimonial Causes Act 1973 (divorce on breakdown of marriage) is amended as follows.

(2) After subsection (5) insert—

“(6) sexual conduct between the respondent and another may constitute adultery for the purposes of this section.”.

It would be necessary to define “sexual conduct,” and I propose to base this definition on that used in Canada to definite “homosexual act:”

(3) “sexual conduct” is a positive, physical act between at least two persons having as its object, whether satisfied or not, the gratification of the sexual drives or propensities or preferences of the parties;

This would set out the framework for adultery, but would allow a natural development of the definition by increments, accommodating diversity and societal changes.

There is no doubt that this change would prove controversial for some and would be seen as a further attack on the sanctity of marriage. But the institution of marriage would in fact be strengthened as a whole by ensuring the same expectation of fidelity is applied to all.

The Canadian Courts have pioneered a new definition for adultery, taking into consideration the historical significance and the underlying purpose of the definition.

In England & Wales, it is not clear why the definition of adultery was not left to the common law. What can be certain is that the added complexity of defining adultery could have put the whole “MSSC” Bill in jeopardy with additional delays and debate in Parliament. The legal definition of adultery has been left over-specific, outdated and unfit for purpose. Although it is understandable that adultery was sidelined during the highly political passage of the “MSSC” Bill,

until the rights and responsibilities of marriage are updated to be the same for all, there will be no real equal marriage.

Same-sex marriage is here, whether people like it or not, and there is no justifiable reason for denying same-sex married couples substantive equality by maintaining an outdated definition of adultery that does not accord with the wider public understanding in “common parlance.” It is true that adultery may be an outdated concept, and fault-based divorce could well be on its way out, but until that happens, inequality will remain until we have a suitable non-gendered definition of adultery.

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