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Revisiting the union of marriage: beyond consummation?

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ABSTRACT

This thesis utilises radical feminism to assess whether it could be argued that marriage in the UK context has moved beyond a sexual definition: beyond consummation. The research looks at alternative relationship forms that have emerged to challenge sexual requirements in relationship law, including civil partnerships, same sex marriage and the marriages and civil partnerships of transsexuals. The thesis argues that through incorporating a nullity clause in matrimonial law on the basis of non-consummation, the law effectively requires sex from its heterosexual married citizens. The thesis demonstrates the patriarchal values underlying the consummation requirement and concludes that the challenges that have emerged have not served to dismantle the requirement. We have not moved beyond marriage or consummation.

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INTRODUCTION

Marriage, it seemed to me, demanded a surrender of individual personality that I was not prepared to make.¹

This thesis seeks to establish an analysis of consummation, through the lens of second wave radical feminism, in order to uncover the way in which law views contemporary relationship forms. Sexual intercourse has become so “sacred that it is almost impossible to imagine any serious challenge being made to it. What we have seen...is the total and compulsory enforcement of that sexual practice upon women so that women are allowed absolutely no... escape from it.”² This thesis addresses this compulsory enforcement through an examination of the first, legally compulsory instance of sex in heterosexual marriage. This chapter provides an outline of the main arguments presented in this thesis, a background to the consummation requirement, an outline of the key research questions to be explored, and the aims of undertaking this research and its originality. I explain here the methodology I will utilise and briefly outline radical feminism.

¹ Auchmuty, R. ‘Same-sex Marriage Revived: Feminist Critique and Legal Strategy’ (2004) 14 *Feminism and Psychology* 1 pgs 101-126 pg 104; Jeffreys, S. *Anticlimax- A feminist perspective on the sexual revolution* London, The Women’s Press, 1993 at pg 29

² Jeffreys, S., ‘Sexology and Antifeminism’ in Leidholdt, D. & Raymond, J.G., *The Sexual Liberals & the Attack on Feminism* New York, Pergamon Press 1990 pgs 14-27 pg 17

i: Background

This thesis argues that the legal anomaly of consummation³ which is currently required of opposite-sex couples but not of same-sex couples, creates a hierarchy of relationships premised upon conjugality and is therefore discriminatory. Simultaneously, I argue the legal and religious concept of consummation is harmful to women, as the patriarchal basis of consummation law presents it as something that is *done* to women. The law in the UK allows a marriage to be declared voidable on the basis of non-consummation, but does not allow a civil partnership or same sex marriage to be nullified on the same basis. I argue that a legally valid marriage union requires consummation, and for women, this requires more than Auchmuty's "surrender of individual personality".⁴ The thesis establishes the sexual criteria law and society use in order to distinguish legally valid relationships, while providing analysis in regard to how a relationship can be deemed to acquire legal legitimacy through the consummation act.

I review the legal changes⁵ that have emerged in the UK with regard to relationship legislation and the impact these have had upon understandings of consummation and the role of women in marital sex. Whilst attempts have been made to try and equalise the legal standing of different relationship forms (including same-sex relationships and relationships involving transsexuals), there still exists a legal inequality regarding the intimate sexual relationship between couples across differing groups. Heterosexual married couples have to consummate their union, same-sex couples (in a

³ At its most basic, consummation could be described as the first occurrence of sexual intercourse between married couples after the legally recognised marriage ceremony. This thesis demonstrates that there are in fact many underlying requirements and assumptions about consummation.

⁴ Auchmuty loc cit n1

⁵ For example, the introduction of the *Civil Partnership Act 2004* and the *Gender Recognition Act 2004*, and the *Marriage (Same Sex Couples) Act 2013*.

civil partnership or same-sex marriage) do not, and transsexual people who have not undergone sex reassignment surgery can enter marriage (or civil partnership) unions in their new gender, without the physical capacity to consummate. I demonstrate that consummation is required of marriage, and the definition of consummation is narrow, requiring a specific sexual act to legitimise the relationship. I examine whether or not the failure to extend this to same-sex couples (in marriage and civil partnership), and the legislative silence on the issue as regards transsexuals signifies a legal move beyond consummation.

S12 (a) and (b) of the *Matrimonial Causes Act 1973*⁶ (hereafter MCA 1973) encompasses the relevant consummation legislation, stating that an unconsummated marriage between a man and a woman is voidable on two grounds: the incapacity of one party to consummate, or the wilful refusal of one party to consummate. This means that a court must declare the marriage void, by declaring a decree of nullity, which can only occur at the insistence of one party to the marriage, and during the parties' lifetime.⁷ A decree of nullity "declares that the marriage itself is void, i.e. no valid marriage ever existed, or voidable, i.e. the marriage was valid unless annulled."⁸ This is not replicated in same-sex marriage, explained in Chapter 5. The two types of nullity can be distinguished in the following ways:

A void marriage is one that is legally invalid because, for example:

⁶ *Matrimonial Causes Act 1973*

⁷ There are circumstances where a decree will be barred: s13 (1)(a)&(b) of the *Matrimonial Causes Act 1973* states that the marriage will not be nullified due to incapacity or wilful refusal if the parties both understood, prior to the marriage, that there would not be a sexual relationship.

⁸Judicial & Court Statistics 2007 www.official-documents.gov.uk/document/cm74/7467/7467.pdf (accessed 14/04/09)

- (a) either party was under the age of sixteen at the time of the marriage
- (b) either party was already married

Examples of voidable marriages are those:

- (a) not consummated due to incapacity or wilful refusal (most nullities are on these grounds)
- (b) where one party was suffering from a venereal disease in a communicable form, or was pregnant by someone else at the time of marriage.⁹

When considering consummation, “the act is all”¹⁰ and needs to occur after the marriage ceremony. Historically, heterosexual marriage had been the only legally recognised union between adults, and defines the penetrative sex capable of satisfying the consummation requirement, leading commentators to argue that the prioritisation of marriage has served to promote heterosexual relationships as the norm.¹¹ Marriage past and present has been detrimental and disadvantageous for women. In the past, women and their possessions were legally viewed as the property of their husbands “which stresses the cultural, economic, political and legal supremacy of the husband.”¹² Women were regarded as having granted their implied consent to sexual intercourse whenever their husband wanted. Consummation is a continuation of this

⁹ Idem

¹⁰ Moran, L.J., ‘A study in the history of male sexuality in law: non-consummation’ (1990) 1 *Law and Critique* 2 pgs 155-171 pg 165; *N v. M* [1853] 2 Rob Ecc 623; see Chapter 2 below.

¹¹ Miriam, K., ‘Toward a Phenomenology of Sex-Right: Reviving Radical Feminist Theory of Compulsory Heterosexuality’ (2007) 22 *Hypatia* 1 pgs 210-228; Stychin, C.F, ‘Not (Quite) a Horse and Carriage’ (2006) 14 *Feminist Legal Studies* pgs 79-86

¹² Barnett, H., *Introduction to Feminist Jurisprudence* London, Cavendish 1998 pg 35

treatment of women. It is something that is done *by* a man, *to* a woman, in a specific way, which serves to render the woman's body the husband's sexual property.

Same-sex couples have also been disadvantaged under the law. The enactment of *Civil Partnership Act* (hereafter CPA) came in 2004.¹³ This thesis demonstrates that legal developments for same-sex couples are not as progressive as they first seem. The passing of the *Gender Recognition Act*¹⁴ (hereafter GRA) has meant that transgender people have been able to legally register their 'acquired' gender (retaining the gender binary), and also marry or create a civil partnership, effectively maintaining existing relationship structures. The CPA has allowed for marriage-like unions for same-sex couples, with 6,795 civil partnerships taking place in 2011.¹⁵ The *Marriage (Same Sex Couples) Act* (hereafter M(SSC)A) allows for same-sex couples to marry, perhaps indicating a progressive move away from homophobic legislation.¹⁶

I address whether or not the nature of marriage and the consummation requirement has been challenged and changed in light of civil partnership, same-sex marriage, transsexual marriage and claims by unmarried siblings to access legal provisions. In order to answer these research questions, my research looks at whether or not sexual, married relationships should be legally privileged over non-sexual, unmarried ones. Traditional marriage for the purposes of this research is defined by the case of *Hyde v. Hyde and Woodmansee*,¹⁷ which defines legal (Judeo-Christian) marriage as the

¹³ Homosexual acts between men were illegal until their partial decriminalisation under the *Sexual Offences Act 1967*. Lesbianism was not acknowledged.

¹⁴ *Gender Recognition Act 2004*

¹⁵ <http://www.ons.gov.uk/ons/rel/vsob2/civil-partnership-statistics--united-kingdom/2011/sb-civil-partnerships-in-the-uk--2011.html> (accessed 18/9/13)

¹⁶ This is still a point of contention among scholars and the public- see Chapter 5 below.

¹⁷ *Hyde v. Hyde and Woodmansee* [1866] LR 1 P&D 130

“voluntary union for life of one man and one woman to the exclusion of all others.”¹⁸

Through an analysis of the consummation requirement, this thesis examines whether one should still use this definition of marriage today. Even a superficial knowledge of marriage demonstrates that this traditional definition is not reflective of contemporary circumstances.

The GRA now provides recognition that transgender people can legally change their gender, without undergoing sex reassignment, thereby maintaining existing gender categories.¹⁹ Ignoring at this point the obvious gender implications this raises in terms of consummation, the GRA influences this research in two ways. Firstly, it could be argued that it has diminished any legal significance consummation has, as non-operative transgender people are physically unable to consummate in the required way. Secondly, it could be argued that this is a human rights issue that has had to be absorbed into marriage law, and actually serves to create a further step in the hierarchy of relationships. The very fact that the consummation requirement has not been amended in light of this change reinforces the procreative purpose of marriage. There is no legislative definition of consummation other than to state that it is required, but a case law definition has emerged, often from cases in which a partner has undergone a sex reassignment and where a dispute arises as to whether or not the couple can be said to have truly consummated the relationship.²⁰

¹⁸ Ibid at 133

¹⁹ An (American) example demonstrates the unusual situations this can create: ‘Pregnant US man hails ‘miracle’’ <http://news.bbc.co.uk/1/hi/world/americas/7330196.stm> (accessed 15/04/09)

²⁰ These cases will be developed further in later chapters- *D-e v. A-g (falsely calling herself D-e)* [1845] 1 Rob Ecc 280; *Corbett v. Corbett (Otherwise Ashley)*[1970] 2 W.L.R. 1306, (1971) P. 83; *Bellinger v. Bellinger* [2003] UKHL 21, (2003) WL 1610368

The case law presented in Chapter 2 demonstrates the intimate examination courts have undertaken in assessing marital sexual relations, and analyses the definition of consummation found in *D-e v. A-g*,²¹ where a doctor was called upon to provide extensive evidence regarding the ‘quality’ of the consummation act and concluded that “sexual intercourse, in the proper meaning of the term, is ordinary and complete intercourse; it does not mean partial and imperfect intercourse.”²² This somewhat ambiguous definition of marital sex has set the bench mark against which subsequent cases of non-consummation have been judged. The case of *R v. R*²³ further clarified that ‘ordinary and complete’ intercourse does not require the emission of semen. Further,

full and complete penetration is an essential ingredient to complete intercourse, and the penetration must not be for a very short moment (*W v. W* [1967] 3 All ER 178). A marriage may be consummated although artificial methods of contraception are used (*Baxter v. Baxter* [1948] AC 274). Clearly, therefore, the possibility of conception is not necessary for consummation. So long as the penetration is not of a transient nature, *coitus interruptus* will not bar consummation (*Cackett v. Cackett* [1950] P 253).²⁴

These cases provide just a glimpse of the search to define consummation, and are analysed in Chapter 2. With courts having taken such an intimate, personal and

²¹ *D-e v. A-g (falsely calling herself D-e)*[1845]

²² *Idem*

²³ *R v. R (Otherwise F)* [1952] 1 All ER 1194

²⁴ Hopkins, F. *Formation and Annulment of Marriage* London, Oyez, 1976 pg 61

heteronormatively²⁵ defined examination of consummation, the introduction of the GRA, CPA and M(SSC)A were huge steps for English law. It had been argued that civil partnership would provide marriage like status to same-sex couples, although there has been some debate²⁶ as to whether or not civil partnership truly is marriage, marriage in all but name, or something completely different. The recent enactment of the M(SSC)A demonstrates that civil partnership is not equal (Chapter 5).

I examine whether one can conclude from this that we have moved beyond consummation: perhaps its legal significance is now mute? Civil partnerships and same-sex marriages cannot be dissolved on the basis of adultery, but heterosexual marriages can. Some commentators²⁷ have argued that perhaps this confirms that civil partnership and homosexual sex acts, are not taken as seriously as marriage and that 'unnatural' sexual acts cannot be defined for adultery purposes. If this is the case, they also cannot be defined for the purposes of consummation. On the other hand, the failure to mirror a consummation requirement could signify the beginning of the end for sexually prioritised relationships.

²⁵ I use the word 'heteronormative' to indicate that heterosexual couples have always been regarded by the norm. As such, all attempts by the courts and legislature to define consummation have been premised on this assumption.

²⁶ Barker, N., 'Sex and the Civil Partnership Act: The Future of (Non) Conjuality?' (2006) 14 *Feminist Legal Studies* pgs 241-259; Bottomley, A. & Wong, S., 'Special Issue: Domestic partnerships: stretching the marriage model?' (2006) 14 *Feminist Legal Studies* 2 pgs 141-143; Crompton, L., 'Civil Partnerships Bill 2004: The Illusion of Equality' (2004) 34 *Family Law* pgs 888-891; Feldblum, C.R., 'Gay is good: The moral case for marriage equality and more' (2005) 17 *Yale Journal of Law and Feminism* pgs 139-184; Rainscourt, K., 'The limitations of the Civil Partnership Act 2004: an analysis of cross-border recognition of same-sex marriage' (2006) 25 *Civil Justice Quarterly* 150-154

²⁷ Clarke, V. 'Lesbian and Gay Marriage: Transformation or Normalization?' (2003) 13 *Feminism and Psychology* 4 pgs 519-529; Jeffrey, S. 'The Need to Abolish Marriage' (2004) 14 *Feminism and Psychology* 2 pgs 327-331.

Another family structure legally disadvantaged on the basis of its (absence of) sexual activity is that of persons who live in familial relationships. The case of *Burden*²⁸ involved two elderly sisters who argued that it is discriminatory to omit familial relationships from the definitions of civil partnership, as when one of the sisters died, the other would have to pay inheritance tax, where-as same-sex couples would not. The European Court held that the sisters could not be considered civil partners within the meaning of the CPA, and that this was not a breach of their rights, as civil partnership was created to provide rights for same-sex couples only. Rees-Mogg argues that the Act itself “is avowedly discriminatory. Same-sex couples gain substantial tax advantages, equal to those of a married couple. Members of the same family are not allowed to enter into civil partnerships with each other; nor are unmarried heterosexual couples.”²⁹ This case is examined in Chapter 6, to understand the value placed upon sexual activity within relationships.

Given the recent legal developments briefly outlined above, and the relatively small amount of case-law engaging with ss12 (a) and (b) MCA 1973, one could argue that the research presented here is no longer valid or necessary; law and society have moved beyond focusing on the moment of consummation. There has been no recent case law on this issue, but consummation is still of importance. The MCA 1973 is still the current law on this matter. As the following chapters demonstrate, almost all of the available commentary and literature discussing consummation is written from a medical perspective.³⁰ The research presented here aims to add to the very limited

²⁸ *Burden and Burden v. United Kingdom* app no: 13378/05 [2008]

²⁹ www.timesonline.co.uk/tol/comment/columnists/william_rees_mogg/article1329412.ece (accessed 9/2/08)

³⁰ Friedman, L.J. *Virgin Wives: A Study of Unconsummated Marriages* London, Tavistock, 1962; Loewenfeld, L.A. *On conjugal happiness experience, reflections and advice of a medical man* (3rd ed)

socio-legal research available discussing the effect of the consummation requirement upon understandings of marriage, society, and in particular, upon women. Research into the consummation requirement should not be founded in medicine alone, which has focused upon solving sexual problems to allow consummation to occur. Rather, a socio-legal³¹ analysis of the consummation requirement will provide an invaluable observation of societal views on many issues;

as a polysemic political space consummation has been and continues to be conceived of in a variety of ways: as an issue of property relations, as a matter of kinship, as a topic relating to the transmission of names, as an affair concerned with status and hierarchy, as the object of the problematic of the 'flesh'³².... it is within this setting of consummation as a diverse field of many possible meanings that it emerges as a matter within the domain of sexuality.³³

It is within the domain of sexuality and gender, that this research positions itself.

London, Bale and Danielsson, 1913, translated by Krohn, R.E.S; Chesser, E. *Love Without Fear: A Plain Guide To Sex Technique For Every Married Adult* (New and Revised ed) London, Jarrolds, 1966.

³¹ Traditional legal research known as black letter law has historically comprised of case law, statute and textbooks. The research analysed and presented here is of a socio-legal nature. 'Socio-legal' denotes research which is fundamentally of a 'law in context' approach, which has grown out of law schools. In the UK, most 'socio-legal research' is conducted by legal academics. In the methodology section below, I analyse the compatibility of this 'law in context' approach with feminist research ideals. Banakar, R., & Travers, M. (eds) *Theory and Method in Socio-Legal Research* Oxford, Hart, 2005; Salter, M. & Mason, J. *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* Essex, Pearson Education, 2007; Wheeler, S. & Thomas, P. 'Socio-Legal Studies' in Hayton, D. (ed) *Law's Future(s): British Legal Developments in the 21st Century* Oxford, Hart, 2000, pgs267-279; Goodrich, P. *Law in the Courts of Love* London, Routledge, 1996

³² For example Michael Novak's argument about the primacy of 'one flesh' within marriage debates; Novak, M., 'What Marriage Is' (2004) 156 *Public Interest* pgs 24-30 pg 27

³³ Moran op cit n10 pg 170-171

Whilst the law does not require consummation for a legitimate marriage as such, (it is merely a ground upon which a marriage can be declared voidable), the assumption is that marriages which do not end upon this ground, have been sexual. In this way, the value of consummation does not just remain within the gender and sexuality field. These other qualities of consummation are important; “the convergence of these different associations, particularly as a matter of the flesh, as a question of social hierarchy, [and] as an issue of government, [mean that] consummation is a matrix of already embodied power relations.”³⁴ This point is further explored in Chapters 2 and 3 where I define consummation, and critique its use as a method to define relationships and sexuality. A consummation requirement has far-reaching consequences, the most important of which is its capacity to create and define the arena of legitimate sexuality;

non-consummation marks a point of convergence, a strategic situation where sexuality is deployed. It is a matrix that is a relation of integration, an effective conjunction, where a knowledge (sexuality) outwith the law, is conjoined in law, utilized in securing a closure in a series of episodes. It is through such conjunctions that a deployment of sexuality emerges within the law.³⁵

Consummation links law and sex. Sexuality and sexual relations are a legal and a private issue. This divide between sex in marriage as a public concern and a private act is also a focus of this thesis. I argue that a sexual imperative within relationships

³⁴ Ibid pg 171

³⁵ Ibid pg 170

should not be legislated, evidenced with the ever increasing discourse surrounding sexuality issues. Mainstream discourse such as that produced by the government or the church³⁶ has been used to shape the way in which we view gender and sexuality as unchanging concepts which determine our identity.³⁷ However, “through the lives, struggles and the work of women and men speaking through the many feminisms, lesbian perspectives and gay studies the political nature of identity and its place within a dominant discourse of sexuality is experienced and questioned.”³⁸ I utilise this feminist perspective to provide original analysis, through engaging with radical feminist texts and rehabilitating this theory with current legal developments, whilst also taking note of points of contention with alternative perspectives. Effectively, I wish to both rehabilitate radical feminism, whilst applying it to new social phenomena, such as developments in legal provision for same sex couples. I briefly provide an outline of feminist theory below and in more detail in Chapter 1.

Feminist theory in general argues to varying extents that women have been subordinated in law, and that all areas of society promote patriarchy.³⁹ Moran has used case law to argue that when examining incapacity cases (where it is claimed the male is incapable), the court focuses “upon the body and in particular upon matters

³⁶ Especially the Roman Catholic Church; ‘Vatican drive to curb gay marriage’ <http://news.bbc.co.uk/1/hi/world/europe/3108349.stm> (accessed 25/04/09). There has also been homophobia within the Church of England: *Some Issues in Human Sexuality* Church House Publishing, 2003

³⁷ Whilst the Church has taken a very particular line regarding ‘non-traditional’ family structures, the government (in the UK at least) has provided measures to eliminate discrimination. However the measures they have introduced (CPA and GRA) have still maintained traditional notions of gender and sexuality, for example in requiring transgender people to either declare themselves a male or a female, or requiring same-sex civil partnerships to be between two partners only, modelled upon marriage. The government has tried to mitigate the effects of this by creating ways to make difference more acceptable. For example, see the governments advice on ‘coming out’ and sexuality issues; http://www.direct.gov.uk/en/YoungPeople/HealthAndRelationships/ConcernedAbout/DG_10031257 (accessed 27/04/09)

³⁸ Moran op cit n10 pg 155

³⁹ See further Chapter 1 which details the ways in which different feminist streams have dealt with law, law reform and patriarchy.

relating to the production of knowledge of the male body.”⁴⁰ He argues that “as nature gone wrong, the failure to consummate the marriage has a new urgency both for the individual and for the realisation of social order.”⁴¹ This thesis also argues that consummation impacts social order, but reaches that conclusion through an understanding of the woman’s perspective of marriage and consummation. Previously, when consummation had not occurred, the onus (blame) was placed on the woman,⁴² and would lead the courts to reduce wives to intrusive medical examinations, which had to be conducted by surgeons rather than midwives, perhaps because evidence from a fellow woman would be unacceptable.⁴³

For the most part, feminist theory has focused upon the impact of social phenomena upon women. There have been those that conceptualise sex (and consummation) as structured for the sexual gratification of men only,⁴⁴ for the subordination of women, for procreation⁴⁵ and for the continuation of legitimate inheritance, and further to reinforce the privileged legal and social position of heterosexual relationships.⁴⁶ It has been argued that “sexual pleasure in marriage is to be achieved through contact with the body of another but the other is not to be of the same sex... heterosexuality in marriage is thus legally compulsory in that the institution of marriage is preserved and reserved for women and men...”⁴⁷ This heteronormativity is encapsulated within definitions of consummation and can only be fulfilled by a sexual relationship between a husband and his wife.

⁴⁰ Moran op cit n10 pg 156

⁴¹ Ibid pg 170

⁴² For example *Welde v. Welde* (1731) 161 E.R 447

⁴³ Moran op cit n10 pg 158

⁴⁴ Thomson, M., *Endowed: Regulating the Sexed Male Body* Oxford, Routledge 2007

⁴⁵ Novak op cit n32 pgs 24-30

⁴⁶ Brook, H., ‘How To Do Things With Sex’ in Stychin, C & Herman, D (eds) *Law and Sexuality* Minnesota, Minnesota Press, 2001, pg 132-150

⁴⁷ Collier, R., *Masculinity, Law and the Family* London, Routledge, 1995 pg 148

Whilst this research deals predominantly with consummation, it does not focus specifically on the moment of consummation within a scientific or medical analysis. My focus is what consummation symbolises, in terms of our societal development as regards sexual relations and gender expectations. I focus upon the way in which consummation is a legal, religious and sexual phenomenon, all of which conspire to create a heteronormative society, in which the conjugal family has been prioritised. I examine why society has created a hierarchy of relationships, with (hetero)sexual relationships at the top, based upon the presumed sexual activity and permanence of the relationship.

ii: Research questions, aims and originality

The research presented looks to fill a gap in current understandings of many issues. Firstly, there is very little existing literature available exclusively about consummation, and the literature that does exist is dated, perhaps as a result of the “demise of a *feminist sexual politics* as an optimistic feature of the women’s liberation movement.”⁴⁸ Secondly, there is no current literature that compares the role of consummation alone within civil partnership, marriage and transsexual marriage. Lastly, I seek to demonstrate the effective role radical feminism can play in this type of analysis, arguing that sexual politics should still be a part of feminist theory, and demonstrating that radical feminism can still provide a useful platform from which law and society can be engaged, in order to remove a legal sexual requirement.

⁴⁸ Campbell, B., ‘A Feminist Sexual Politics: Now you see it, now you don’t.’ (1980) 5 *Feminist Review* 1 pgs 1-18 pg 1

The purpose of this thesis is to determine what legally constitutes “ordinary and complete”⁴⁹ consummation, and why this is a necessary legal concept in twenty-first century English law. Having established the legal and social importance of consummation for a valid marriage, I then examine the reasons for its omission from the CPA, the M(SSC)A and the impact of the GRA on a transsexual person’s ability to fully consummate a marriage union. Utilising radical feminism to examine these recent legal changes, (M(SSC)A in particular), also contributes to the originality of my work, for this has not yet been done. Bringing together all my research, I argue that a ‘meaningful’ relationship does not need to be a sexual one, but if it is, the state should not concern itself with legislating this. There is no legal magic that occurs in the moment of consummation which makes a consummated marriage any more enduring than an unconsummated one. The union has already been created through a ceremony, vows and signatures, and sex should not be of legislative importance.

One could argue that this thesis could be written from any feminist perspective (outlined in Chapter 1), and perhaps more convincingly from third wave feminism. However, as explained throughout, I feel that part of the originality of the research presented here is the application/rehabilitation of radical feminism to new legal phenomena, and the strength of the argument radical feminism creates, for the removal of the consummation requirement and sexual relationships from law. The use of radical feminism aside, there also remains the originality of comparing all legally recognised relationship forms in one piece of research. There is no academic work which explicitly looks at consummation (or its absence) across all relationship forms. The aim of this original outlook is to not only demonstrate the viability of radical

⁴⁹ *D-e v. A-g (falsely calling herself D-e)* op cit n20 per Dr Lushington

feminism, in light of new legal phenomena, but also, in providing an overview of all (legal) relationship forms, I am able to more clearly and firmly argue that we have not moved beyond legislating sexual relationships, even when new legislation does not speak of sexual relationships.

iii: Theoretical framework

In utilising feminist legal method, second wave feminism and in particular radical feminism, I work within the feminist belief that we must move beyond assumptions of law as neutral and objective. These feminists call for ‘feminist jurisprudence’, which signals “the shift away from a concentration on law reform and ‘adding women’ into legal considerations to a concern with fundamental issues like legal logic, legal values, justice, neutrality and objectivity.”⁵⁰ This thesis does not argue for women to be ‘added’ to a male legal concept of consummation, but rather highlights the patriarchal reasoning behind the requirement, and argues for a feminist reading of the consummation requirement.

Chapter 1 provides analysis of radical feminism and feminist’s views regarding the issues my thesis raises. I provide here a brief overview of radical feminism and my reasons for using this theory. Radical feminists have produced extensive literature relating to marriage, gender, same-sex partnerships and transgender issues, all key focuses of my research.⁵¹ I use this thesis to ‘map’ progress in feminist theory, and to argue that radical feminists are still actively working to “develop a politics of intimacy that is self-respecting, self-enhancing and generat[ing] social change. The

⁵⁰ Smart, *C Feminism and the Power of Law* London, Routledge 1989 pg 66

⁵¹ These include texts by Daly, de Beauvoir, Auchmuty, Brownmiller and Greer, all of whom are referenced within this research.

politics of intimacy for heterosexual radical feminists continues to be a site of resistance and change, enriching our understanding of the personal as political.”⁵² Developments in feminist theory are generally referred to as waves,⁵³ and each wave influences the one that follows. The third wave emerged as a backlash to second wave feminism, and presents itself as the format in which feminism has finally got it right.⁵⁴

This thesis looks to demonstrate that radical feminism still has something to say, and should not be considered something of the past. Though radical feminism can be seen as old fashioned, it is the perfect theoretical perspective for this research as “central to radical feminist perspectives is the belief that if sexuality is socially constructed, then it can be reconstructed in new and different ways, sexuality need not be coercive or oppressive, it can be challenged and changed.”⁵⁵ This research aims to revise and update theories of consummation in light of relatively recent legal changes, whilst drawing on elements of radical feminism, all with the underlying belief that “women are, as a group, worse off than men, because their interests routinely fail to be given equal consideration.”⁵⁶ The interests of women in consummation are deemed to be the interests of men. Chapter 2 shows marriages that have endured for many years, and have even produced offspring, have been held voidable on the absence of a

⁵² Rowland, R. ‘Politics of Intimacy: Heterosexuality, Love and Power’ in Bell, D. & Klein, R. *Radically Speaking: Feminism Reclaimed* London, Zed Books 1996 pgs 77-86 pg 86

⁵³ The waves are generally understood to correspond to “the decades of the 1970s, 1980s and 1990s respectively, and to a move from liberal, socialist and radical feminist thought to post-modern gender theory.” Hemmings, C. ‘Telling feminist stories’ (2005) 6 *Feminist Theory* 2 pgs 115-139 pg 116

⁵⁴ Ibid pg 123. See also Hekman who argues that it would be difficult to find a feminist who would still argue from the second wave: Hekman, S., ‘Beyond identity: Feminism, identity and identity politics’ (2000) 1 *Feminist Theory* 3 pgs 289-308 at pg 294

⁵⁵ Richardson, D. ‘“Misguided, Dangerous and Wrong” on the Maligning of Radical Feminism’ in Bell, D. & Klein, R. (eds) *Radically Speaking: Feminism Reclaimed* London, Zed Books 1996 pgs 143-154 pg 145

⁵⁶ Purdy, L., *Reproducing Persons: Issues in Feminist Bioethics* New York, Cornell University Press, 1996, p5

consummative act. Legally speaking, a woman's role in the marriage is determined by her ability/willingness to engage in a form of sexual activity deemed acceptable by the court. I explore the traditions of radical feminism and feminist views about consummation, marriage and civil partnerships throughout this thesis, and utilise analysis of doctrine, legal sources and socio-legal texts.

Radical feminism occurred in the second wave. Waves refer both to time and ideological differences, so the second wave refers to the 1960s-1980s and the ideology of women at that time. The emergence of 'third wave' feminism could be seen to suggest that the second wave had ended. I argue that the second wave has not ended and is well placed to analyse issues of gender, sexuality and the family.⁵⁷ The central tenet of second wave feminism is the fundamental belief that women should unify because they are women. Class, race and faith for example were held to be secondary to being a woman.⁵⁸ If the second wave is over, then the identity of 'woman' is no longer the key unifying label. Rather, if each individual woman "is fragmented and likely to have multiple identities that change over time, it would be difficult to find a straightforward link between experience and political activity or to conceive of a politics based on collective interests as a sex- both of which had been crucial for 'second wave' feminism."⁵⁹

Barker argues that feminist waves are not independent and complete movements and the second wave is an ongoing theoretical framework; "rather than focusing on

⁵⁷ Jensen argues that gay men should engage with radical feminism today; Jensen, R. 'Homecoming: The Relevance of Radical Feminism for Gay Men' (2004) 47 *Journal of Homosexuality* 314 pgs75-82

⁵⁸ This has attracted considerable criticism from critical race feminists for example. This is addressed further throughout the research presented.

⁵⁹ Hannam, J., *Feminism* Harlow, Pearson Education 2007 pg 160

theoretical distinctions between the waves, I am using the wave metaphor as a conceptual tool that illustrates the passing of time whilst emphasising the connectivity between past and present.”⁶⁰ I follow this analysis and argue that the move to an individualistic third wave has been premature. Thompson argues that ‘women’ is a necessary defining label, but “it is not sufficient as the unifying factor of feminist politics. It is the opposition to male domination which makes feminism relevant to women wherever they are situated, however differently they are excluded from recognition as human.”⁶¹ Second wave feminism continues to be of importance to women of today, as women unify against continuing male domination.

I do not seek to phrase this research as a story of nostalgia for a lost theory.⁶² Third wave feminism’s premature presentation as the culmination of all feminism before it declares one type of feminism ‘good’ and others ‘bad’. Rather, each preceding element of feminist theory still has a role in contemporary issues. This is not to argue that third wave feminism is of no use, but radical feminism is still of value when it comes to looking at gender and sexuality issues, and to declare otherwise is to do a disservice to women and their needs.⁶³ Researchers still engage with second wave feminism, and it impacts upon the third wave as well. Radical feminism still *is*, and should not be referred to as something of the past. Hannam explains, “young women who have benefited from social changes since ‘second wave feminism’ focus on the

⁶⁰ Barker, N., *Not the marrying kind; feminist critiques of marriage and legal recognition of same-sex relationships* (Unpublished PhD thesis) 2008 pg 208

⁶¹ Thompson, D., *Radical Feminism Today* London, Sage Publishing, 2001 pg 13

⁶² Feminist writing as loss, nostalgia or progress is addressed by Hemmings op cit n53 at pg 126

⁶³ Idem; Torr, R. ‘What’s wrong with aspiring to find out what has really happened in academic feminism’s recent past? : Response to Clare Hemmings’ ‘Telling feminist stories’ (2007) 8 *Feminist Theory* 1 pgs 59-67; Hemmings, C. ‘What is a feminist theorist responsible for? Response to Rachel Torr’ (2007) 8 *Feminist Theory* 1 pgs 69-76

body and sexuality as areas where struggle still has to take place.”⁶⁴ In this respect, whereas other social phenomena may have moved beyond second wave feminism, we arguably still need to engage with second wave theories in areas of the body, sexuality, and in this case, consummation.

The second wave established itself in the USA and spread across the world in the 1960s with ‘bra-burning’ women demanding equal rights with men. Women had been steadily entering the workforce balancing home and work life, and there was a need for new and progressive legislation.⁶⁵ The basis of second wave feminist work is that women are ‘women’ predominantly as a result of nurture rather than nature.⁶⁶ It was within this wave that arguments which explained women’s construction as ‘Other’ emerged. This states that society, law and gender for example, are all built around men, and as women are not men, they are ‘other’. The male body is the comparator. The best known second wave feminist de Beauvoir argued that,

one is not born, but rather becomes, a woman. No biological, psychological, or economic fate determines the figure that the human female presents in society; it is civilization as a whole that produces this creature, intermediate between male and eunuch, which is described as feminine. Only the intervention of someone else can establish an individual as an *Other*.⁶⁷

⁶⁴ Hannam op cit n59 pg 165

⁶⁵ The liberation struggle was not universal. American, French, German, English and Japanese movements were all quite active in the late 1960s. However, Scandinavia for example already had long established marriage and abortion rights.

⁶⁶ See further for example, Friedan, B., *The Feminine Mystique* London, Gollancz 1963

⁶⁷ De Beauvoir, S., *The Second Sex* (1949) Parshley, H (ed and trans) London, Vintage, 1997 pg 295

Hannam explains that de Beauvoir's theories "coupled with her assertion that women were as capable of choice as men, provided feminists with a new way of understanding the social position of women."⁶⁸ Women are different in physical appearance, but there is no reason other than the way we are raised and treated to account for our second class status. The conceptualisation of 'women' as 'other' has meant that being a 'woman' has further unified the members of the struggle. Women experience "oppression as women, not as members of other groups such as their social class. Hence, the explanation for women's oppression is seen as lying in sexual oppression. Women are oppressed because of their sex."⁶⁹

During early feminist action, awareness-raising groups were mixed- allowing both men and women to participate. The women in these groups found themselves relegated to tasks such as catering and minute taking. "It is hardly surprising, therefore, that women began to meet together in autonomous single-sex groups to discuss issues that concerned them and to raise their own demands."⁷⁰ New feminist methods also developed to publicise and explore issues affecting women. One such second wave method is consciousness-raising groups which encouraged women to discuss their life experiences. Through these open and frank conversations, women discovered that their experiences were not unique or strange, but were rather common place amongst most women. Consciousness-raising ensured women's thoughts and feelings were at the forefront of the struggle and began to realise that 'private' issues such as body image, sexuality and relationships needed to be made political.⁷¹

⁶⁸ Hannam op cit n59 pg 135

⁶⁹ Beasley, C., *What is Feminism?* London, Sage, 1999 pg 54

⁷⁰ Hannam op cit n59 pg 139

⁷¹ Ibid pg 143

Consciousness-raising has produced a body of work which extensively examines “the ways contemporary sexuality disqualifies and victimizes, [and] demonstrates the violence in the idea of sexuality and the violence perpetrated in the name of sexuality.”⁷² In exposing these issues, we can “offer many insights which reveal the contingent and contested nature of sexuality. They open a window through which the timeless, necessary, inevitable and exhaustive quality of the discourse of sexuality may be problematized.”⁷³ Critics of consciousness-raising claim it is ‘group therapy’ for women speaking about personal grievances, but the hope is that vocalising these issues will lead towards an “understanding that these may not simply be a result of their personal situations. It was a way of discovering what they had in common *as women*, whatever their differences of class or race or personal experience.”⁷⁴

Critics of consciousness-raising and the omission of class and race from the second wave argue that radical feminism is dominated by the concerns of white middle-class women.⁷⁵ Critical race theory suggests all theories of society should account for race—both that of the speaker and of those they are speaking about. However, this theory also has its pitfalls, some of which are similar to those levelled against radical feminism. This theory is often quite biographical, which is also a criticism of consciousness-raising. Critical race theory often ignores issues of multiculturalism, and the potential complexity and multiplicity of identity and subordination.⁷⁶ It could be seen as essentialist, as race labels are used to unify groups of people, a criticism

⁷² Moran op cit n10 pg 155-156

⁷³ Idem

⁷⁴ Walters, M., *Feminism- A very short introduction* Oxford, Oxford University Press, 2005 pg 112

⁷⁵ Klein, R. & Hawthorne, S. ‘Reclaiming Sisterhood: Radical Feminism as an Antidote to Theoretical and Embodied Fragmentation of Women’ in Ang-Lygate, M., Corrin, C., & Henry, M.S (eds) *Desperately Seeking Sisterhood: Still Challenging and Building* London, Taylor Francis, 1997 pgs 57-68

⁷⁶ Hutchinson, D.L. ‘Critical Race Histories: In and Out’ (2004) 53 *American University Law Review* 6 pgs1187-1215

also thrown at radical feminism, for its use of ‘woman’ as a unifying label.⁷⁷ “[L]esbian feminists and black feminists, [have] challenged the claims of the women’s liberation movement to speak for all women and sought to bring their own experiences and priorities to the fore.”⁷⁸ Whilst I acknowledge the different slant that class and race can bring to some issues, they are not of importance to this thesis. The consummation requirement affects all married women of all races and classes who live and marry under English law.

Furthermore I dismiss the use of some further theories that could be deemed relevant. These omissions are made, as they are made in any theory, and speak to “the boundaries established by any conceptual or theoretical framework, which distinguish that which is addressed and that which is constructed as outside the limits of the theory at hand.”⁷⁹ The rejection of queer theory is explained in Chapter 1, but amounts to my preference to engage with theory which utilises identity theory to both categorize, and universalise experience.⁸⁰ The omission of masculinities studies is also justified later. There also exists a growing literature within the sociology of heterosexuality. This theory has added to the diverse spectrum of feminist views on sexuality. Jackson (who self identifies as a radical feminist), explains that feminist theory tends to categorise sexuality in one of three ways;

1. centrality of male domination

⁷⁷ Harris, A.P. ‘Race and Essentialism in Feminist Legal Theory’ in Wing, A.K (ed) *Critical Race Feminism: A Reader* New York, New York University Press 1997 pgs11-18

⁷⁸ Hannam op cit n59 pg 151-152; Grillo, T. & Wildman, S.M. ‘Obscuring the Importance of Race: The Implication of Making Comparisons between Racism and Sexism (or Other-isms)’ in Delgado, R. (ed) *Critical Race Theory: The Cutting Edge* Philadelphia, Temple Uni Press 1995, pgs564-572

⁷⁹ Ingraham, C. ‘The Heterosexual Imaginary: Feminist Sociology and Theories of Gender’ (1994) 12 *Sociological Theory* 2 pgs203-219 pg203

⁸⁰ Romero, A.P ‘Methodological Descriptions: “Feminist” and “Queer” Legal Theories’ in Fineman, M.A., Jackson, J.E & Romero, A.P *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (eds) Surrey, Ashgate 2009 pgs179-198

2. variability/plasticity of sexuality
3. construction of individual desires⁸¹

She would prefer that all theory engages with all three of these views, but most theory concentrates upon one aspect. I too fall into this trap, as radical feminism focuses predominantly upon the first view, to the exclusion of the others. It could be argued that dominant discourses “around sexuality have been framed from a predominantly white and middle class as well as male and heterosexual perspective.”⁸²

Ingraham argues that the heterosexual imaginary “conceals the operation of heterosexuality in structuring gender and closes off any critical analysis of heterosexuality as an organizing institution.”⁸³ Ingraham argues heterosexuality is taken as natural and unchallenged, whereas gender is seen as socially constructed. I do not explicitly address the consummation requirement from a purely sociological perspective, but radical feminism is in fact the predecessor of this view.⁸⁴ As shown throughout this thesis, radical feminism argues that although there are biological differences between men and women, the meaning of these differences has been prescribed by patriarchy and heteronormativity. If heterosexuality is unchallenged, then gender stereotypes will remain unchallenged. In challenging consummation, this thesis challenges one of the cornerstones of heterosexuality.

iv: Methodology

⁸¹ Jackson, S. ‘Theorizing Heterosexuality: Gender, Power and Pleasure’ (1994) 2 *Strathclyde Papers on Sociology & Social Policy* pgs1-29, pg1

⁸² Ibid pg4

⁸³ Ingraham op cit n79 pg203-4

⁸⁴ Idem

Traditional legal methods use deduction, induction, analogy, hypotheticals and engage with policy and principles to research legal problems. Feminist legal method engages with a different set of principles when examining socio-legal phenomena, as legal methods have traditionally been male methods.⁸⁵ Socio-legal feminist interests include medical care issues, employment issues, child issues, and sexuality issues, and their research “aims to understand the nature of gender inequality and focuses on gender politics, power relations and sexuality. Feminism is also based on experiences of gender roles and relations.”⁸⁶

The ‘law in context’ approach of socio-legal studies could be said of other research methods too. Socio-legal research sits well as a feminist research method, as this type of engagement with the law can open other avenues of research and analysis. Socio-legal research allows feminists to not only look at what the law says, but also how it says it and why. Its benefit also lies in its ability to be utilised for both theoretical and empirical research. The key use of socio-legal research as it relates to radical feminism is that it does not simply state that the solution to gender-biased law is to read it as gender neutral, but rather, to unearth the origins of the sexism of law. Socio-legal research allows women to argue that law is not simply a collection of rules, but that it can be a site of struggle, and its production of gender and identity can be challenged.⁸⁷ The utility of socio-legal research for the purposes of the research presented here is that I utilise the key concern of socio-legal research;

⁸⁵ Bondi, L., et al. *Subjectivities, Knowledges, and Feminist Geographies: The subjects and Ethics of Social Research* Oxford, Rowman & Littlefield, 2002 pg 1

⁸⁶ <http://www.womensstudies.eku.edu/what/> (accessed 20/10/08)

⁸⁷ Smart, C., ‘The Woman of Legal Discourse’ (1992) 1 *Social and Legal Studies* pgs 29-44; Hutter, B.M., & Lloyd-Bostock, S., ‘Law’s Relationship with Social Science: The Interdependence of Theory, Empirical Work and Social Relevance in Socio-Legal Studies’ in Hawkins, K., *The Human Face of Law: Essays in Honour of Donald Harris* Oxford, Clarendon Press, 1997 pgs 19-44

socio-legal scholarship locates legal practices within the context of the other social practices which constitute their immediate environment. Thus it comprehends a complex of administrative, commercial, economic, medical, psychiatric and other disciplinary practices, wherever they impinge upon or interact with law... socio-legal studies subject legal practices to a... empirical inquiry which scrutinizes not merely the legal articulation of the relevant rules and processes but the meaning and effects of those rules and processes as interpreted and enforced, and as experienced by their subjects.⁸⁸

This is relevant to my research as consummation does not stand alone in law, but is impacted by medicine and religion, for example, as demonstrated throughout this research.

Feminist research generally begins through the expression of a hope: “the political commitment to produce useful knowledge that will make a difference to women’s lives through social and individual change.”⁸⁹ Bartlett argues that feminist research should ask “about the gender implications of a social practice or rule: have women been left out of consideration? If so, in what way; how might that omission be corrected? What difference would it make to do so?”⁹⁰ With this in mind, feminist research provides innovative responses to socio-legal issues that affect women on the

⁸⁸ Lacey, N *Unspeakable Subjects: Feminist Essays in Legal & Social Theory* Oxford, Hart, 1998 pg 222

⁸⁹ Letherby, G., *Feminist Research in Theory and Practice* Buckingham, Open University Press, 2003 pg 4

⁹⁰ Bartlett, K.T (1990) ‘Feminist Legal Methods’ in Bartlett, K.T., & Kennedy, R. (eds) *Feminist Legal Theory: Readings in Law and Gender* Boulder, Westview Press, 1991 pgs 370-403 pg 371

ground, whilst facing questions about *which* women are conducting the research, and which women they are studying. Feminist research is therefore hard to generalize. Issues of geography, race, ethnicity and sexuality have all produced alternatives to radical feminist research.

It could be argued that feminist theory in general, but radical feminism in particular has no academic value, as radical feminism is often seen as a political standpoint rather than an academic perspective.⁹¹ It has also been felt by some radical feminists that engaging in academic discourse could be seen as collusion with the patriarchal system that keeps women oppressed. Yet many of the activists of the 1970s are now respected academics and their focus still remains women's issues. It is within this mindset that I present this academic work whilst arguing that it incorporates the main tenets of radical feminism.

Feminists feel that part of the process of socio-legal research is to have acknowledged the fact that women are not listened to. By encouraging conversation about women's experiences, women realise that their experiences are collective, and they are able to express this within the positive atmosphere of consciousness-raising groups. In this way, feminism does not emerge from a "body of theory but rather on instances of the experience of power and lack of power."⁹²

91 Bottomley, A., Gibson, S. & Meteyard, B. 'Dworkin; Which Dworkin? Taking Feminism Seriously' (1987) 14 *Journal of Law and Society* 1 pgs 47- 60 pg 47; Herbert, N., 1992 as quoted in Thompson op cit n61 pg 32

92 Bottomley, Gibson & Meteyard Ibid pg 47; Mackinnon, C.A., *Toward a Feminist Theory of the State* Cambridge, Harvard University Press, 1989 at pg 83-90; Campbell op cit n48 pg 3 and pgs 12-13; Dworkin, A., 'Woman-Hating Right and Left' in Leidholdt, D. & Raymond, J.G., *The Sexual Liberals & the Attack on Feminism* New York, Pergamon Press 1990 pgs 28-40 at pg 29; <http://www.now.org/organization/conference/resolutions/2011.html#1> (accessed 10/02/12) and http://redstockings.org/index.php?option=com_content&view=article&id=76&Itemid=59 (accessed 10/02/12)

I engage with socio-legal research through the utilisation of existing radical feminist research regarding gender and sexuality for example which has developed through consciousness-raising.⁹³ This thesis aims to be the ‘next-step’, using existing theoretical data available from radical feminists to analyse consummation and its links to existing theories of power, domination and gender and sexuality. The methodology here is theoretical analysis used to demonstrate the way in which legislatively, consummation is presented as inoffensive, gender neutral and as a means through which to exit a marriage.

⁹³ See Chapter One below, but also Mackinnon *ibid* pgs 83-90

ONE

THEORETICAL PERSPECTIVE: FEMINIST THEORY

This chapter provides an outline of the extremely broad theoretical contentions of feminist theory. I examine what constitutes feminism, and whether it is academic theory, or political practice. I then outline the history of feminism using the ‘waves’ metaphor. I provide a comprehensive overview of radical feminism’s views on patriarchy, domination and power; the private/public divide and gender and sexuality issues, whilst highlighting criticisms that have been levelled at radical feminists. Radical feminist views on consummation are critiqued in Chapter 3.

Radical feminism argues that the problems women face within the law lie with the whole system of law and society, starting with the very fact that law makers are men, and that men and women are not equal sexually, socially or legally. Radical feminism was the first stream of feminist thought to dramatically break with earlier feminist theories which had tried to work within existing social relations and institutions. Radical feminists believe that patriarchy is all-pervasive, thereby affecting women at the very basic level of their thoughts, setting the way in which women think. This view of patriarchy flows through all feminist theory, but most strongly through radical feminist theory which aims to uncover male domination as a power relation “while struggling for a world where women are recognized as human beings in their own right.”¹ The use of terms such as ‘domination’ is not to indicate that all women are completely powerless to men. If this were the case, feminism would not have been able to emerge. Rather, “it is used for the sake of clarity, in order to designate as

¹ Thompson, D., *Radical Feminism Today* London, Sage Publishing, 2001 pg 8

clearly as possible what it is that feminism is opposing... Feminism says that male domination constitutes the conditions under which we live, but that *it ought not to be so*.”²

Reference to patriarchy throughout this research is used within the meaning outlined above. Radical feminists argue that sometimes “qualifying feminism with any of a variety of pre-existing frameworks serves to disguise the core meaning of feminism.”³ Feminism is not just a political struggle, it is a struggle in the “domain of meaning.”⁴ Whilst feminists are concerned with issues such as rape, children and employment, their analysis means that these matters have a different meaning. The focus is always upon the woman, and ‘women’ as a unifying label. Consequentially, meaning is everywhere, and so too is the possibility of feminist struggle. The politics of feminists are “not confined to the kinds of issues conventionally defined as ‘political’, but...can happen anywhere with whatever tools are closest to hand...[F]eminism is available wherever women are, and advances wherever women do.”⁵

1.1: What is feminism? Theory or practice?

Throughout history there has been a quest to determine the role of women within society. “However, it is eighteenth, nineteenth and early twentieth century feminist campaigns for the elimination of discriminatory laws which prevented women from participating fully in civic life which mark the origins of contemporary feminist thought.”⁶ It is generally accepted that this campaign for women *is* feminism. Feminists “on the whole... tend, often quite

² Idem

³ Ibid pg 1

⁴ Ibid pg 16

⁵ Idem pg 16

⁶ Barnett, H., *Introduction to Feminist Jurisprudence* London, Cavendish 1998 pg 3

deliberately, not to say what they mean by feminism.”⁷ Mackinnon is arguably the most influential and well known radical feminist.⁸ She claims that a theory can be considered feminist “to the extent it is persuaded that women have been unjustly unequal to men because of the social meaning of their bodies. Feminist theory is critical of gender as a determinant of life chances, finding that it is women who differentially suffer from the distinction of sex.”⁹ She argues that radical feminism sees women as women, not as part of another group, or gender neutral. Harris states that all Mackinnon serves to do is ignore other differences, and re-discover white women.¹⁰

Thompson speaks of feminism as a ‘social enterprise’, a framework that is anxious to address social wrongs both morally and politically. It is an ethical stance “in that it starts from and continually returns to questions of good value, of... right and wrong, of what is worthwhile and significant and what is not.”¹¹ She breaks with the tendency to avoid definition and claims feminism is “the struggle against male supremacy and the struggle for a human status for women identifying with women.”¹² Fineman and other feminists use this starting point to claim that the legal theories advanced are “perspective scholarship” which denotes “an ever-growing body of work connected by the fact that it challenges the traditional notion that law is a neutral, objective, rational set of rules, unaffected in content and form by the passions

⁷ Thompson op cit n1 pg 5

⁸ Barnett op cit n6 pg 165

⁹ Mackinnon, C.A., *Toward a Feminist Theory of the State* Cambridge, Harvard University Press, 1989 pg 37

¹⁰ Harris, A.P. ‘Race and Essentialism in Feminist Legal Theory’ in Wing, A.K (ed) *Critical Race Feminism: A Reader* New York, New York University Press 1997 pgs11-18 pg13; Richardson, D. ‘Deconstructing Feminist Critiques of Radical Feminism’ in Ang-Lygate, M., Corrin, C. & Henry, M.S (eds) *Desperately Seeking Sisterhood: Still Challenging & Building* London, Taylor and Francis, 1997 pgs45-56

¹¹ Thompson op cit n1 pg 7

¹² Ibid pg 16

and perspectives of those who possess and wield the power inherent in law and legal institutions.”¹³

Chapters 2 and 3 show that the law regarding consummation has also been presented as neutral, rational and objective, but in reality is a reflection of the passion of men who wield power in law and legal institutions.¹⁴ Feminists examine power structures in society to determine modes of patriarchy as domination. They highlight the public/private dichotomy; an ideological construct “which confines important aspects of the subordination of women to the domain of the ‘private’, and allows some of the most violent manifestations of the power of men over women to go unrecognized and unchecked.”¹⁵ Feminist politics tries to make the private political and public, in an effort to challenge the dichotomy and its effects upon the social and personal development of women. “Feminism means the personal is political”¹⁶ and the political is academic.

MacKinnon claims that the liberation of women, including in law, is “first practice, then theory...Feminism was a practice long before it was a theory... This distinguishes it from academic feminism.”¹⁷ But Bottomley et al argue that feminist theory is now worthy of

¹³ Fineman, M.A., *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* London, Routledge, 1995 pg 24; Smart, C., *Law, Crime & Sexuality: Essays in Feminism* London, Sage 1995 at pg 189 Law is more than sexist, the aims and characteristics of law are male.

¹⁴ Rationality and objectivity are associated with male traits, and so is the law: Smart, C., ‘Law’s Power, the Sexed Body, and Feminist Discourse’ (1990) 17 *Journal of Law and Society* 2 pgs 194-210 pg 204; Smart op cit n12 pg 162

¹⁵ Thompson op cit n1 pg 7; Barnett op cit n6 pg 168

¹⁶ Herbert, N., 1992 as quoted in Thompson op cit n1 pg 32. ‘The personal is political’ means that “what we do everyday matters.” MacKinnon, C.A., ‘Liberalism and the Death of Feminism’ in Leidholdt, D. & Raymond, J.G., *The Sexual Liberals & the Attack on Feminism* New York, Pergamon Press 1990 pgs 3-13 pg 5

¹⁷ MacKinnon, C., ‘From Practice to Theory, or What is a White Woman Anyway?’ in Bell, D. & Klein, R., S (eds) *Radically Speaking: Feminism Reclaimed* London, Zed Books, 1996 pgs 45- 54 pg 46; Bottomley, A., Gibson, S. & Meteyard, B. ‘Dworkin; Which Dworkin? Taking Feminism Seriously’ (1987) 14 *Journal of Law and Society* 1 pgs 47- 60 pg 47; Smart op cit n13 pg 194; Rowland, R. & Klein, R. ‘Radical Feminism: History, Politics, Action’ in Bell, D. & Klein, R. *Radically Speaking: Feminism Reclaimed* London, Zed Books 1996 pgs 9-36

academic recognition as it has matured, as has the general “political and academic climate.”¹⁸ Brooks argues that this ‘divide’ between theory and practice is actually a “falsely constructed binarism,”¹⁹ perhaps silencing the criticism of radical feminism as intellectually inferior, and acknowledging that thesis’ such as this can be written from a feminist perspective, and be considered academic. Whilst recognising “that the divide between theory and practice is to some extent a falsely constructed binarism, there remains the need to engage in a discourse that recognises the reality of exactly how the two inform each other.”²⁰ It is for this reason that I engage with feminist research as an academic perspective. Although consummation is not currently a ‘political’ issue, feminism exists in the debates around consummation, because women are involved in consummation, it is done to them, and their participation is almost unquestioned as a result of the absorption of patriarchal ideals of sex and marriage.

Consummation is a real life experience for women, and radical feminism “has concentrated on creating its theory in the writing of women’s lives and the political analysis of women’s oppression.”²¹ Making issues political and academic is beneficial because it pushes them into the public arena, and onto the public agenda. Women cannot be ‘equal’ with men as long as there is no equality among men. In feminist terms, what women want is a human status where rights, benefits and dignities are gained at no one’s expense, and where duties and obligations do not fall disproportionately on the shoulders of women.”²² MacKinnon says women who work in the legal field need to articulate “the theory of women’s practice-women’s resistance, visions, consciousness, injuries, notions of community, experience of

¹⁸ Bottomley, Gibson & Meteyard op cit n17 pg 48

¹⁹ Brookes, D.L., ‘A Commentary on the Essence of Anti-Essentialism in Feminist Legal Theory’ (1994) 2 *Feminist Legal Studies* 2 pgs 115-132 pg 115

²⁰ Idem

²¹ Rowland, R. & Klein, R.D., ‘Radical Feminism: Critique and Construct’ in Gunew, S (ed) *Feminist Knowledge: Critique and Construct* London, Routledge, 1990 pgs 271-303 pg 271; Thompson op cit n1 pg 135

²² Thompson op cit n1 pg 6 -7

inequality...As our theoretical question becomes “what is the theory of women’s practice”, our theory becomes a way of moving against and through the world, and methodology becomes technology.”²³

1.2: Feminist waves

As a result of changing views and social conditions, differences have emerged between feminist theories over time. The development of feminist theory has not been a linear process, but is often presented as one which “charts the story as one of progress beyond falsely boundaried categories and identities.”²⁴ These changing perspectives within feminism are referred to as waves, “although none of these is totally distinct or isolated from other phases.”²⁵ Just as it is difficult to tell where one wave in the ocean ends and another begins, it is also difficult to determine when one ‘wave’ of feminist theory begins and ends. Hemmings has argued that the telling of feminist history has served to present the emergence of feminism as a more linear process than that described by the wave metaphor, and we should focus upon stressing the links between differing frameworks.²⁶ Those that present feminist history as linear argue simplistically that each phase replaced the one before it, rather than acknowledge the influence of each wave upon the next.²⁷ Radical feminism evolved predominantly within the second wave, though in keeping with the wave metaphor, it embraces elements of first wave feminism, and influences third wave perspectives.

²³ MacKinnon op cit n17 pg 46

²⁴ Hemmings, C. ‘Telling feminist stories’ (2005) 6 *Feminist Theory* 2 pgs 115-139 pg 116

²⁵ Barnett op cit n6 pg 5

²⁶ Hemmings op cit n24 pgs 115-116 and 131

²⁷ Hekman, S., ‘Beyond identity: Feminism, identity and identity politics’ (2000) 1 *Feminist Theory* 3 pgs 289-308 at pg 290

First wave (liberal) feminism was most prevalent in the mid Victorian age, but stretched through to the mid 1980s. These feminists worked within existing systems of law and society, in order to remove the inherent inequalities, without questioning the system's functionality itself. Liberal feminists "accepted law as traditionally portrayed: the rational, objective, fair, gender-neutral arbiter in disputes over rights which applied to undifferentiated but individual and autonomous legal subjects."²⁸ First wave liberal feminists argued that both men and women are autonomous. Consequently, "rationality, individual choice, equal rights and equal opportunity are central concepts for liberal political theory. Liberal feminism...argues that women are just as rational as men and... should have equal opportunity with men to exercise their right to make rational, self-interested choices."²⁹ These liberal feminists have faced criticism from radical feminists both for their view on law, and also for their adoption of "an assimilationist theory of equality that would benefit women only if they acted like men."³⁰

Second wave feminism does not focus primarily on "the substantive (legal) inequalities under which women exist...but rather the legal and societal structure which perpetuates inequalities."³¹ I utilise this view to highlight a legal inequality- the requirement of consummation- and also position this inequality within its legal and societal structure of heteronormativity and patriarchy. Law's use of gender-neutral language pretends to deliver impartiality, objectivity and rationality, but in fact serves to mask "the extent to which law is permeated by male constructs, male standards. The 'reasonable man' so beloved by the common law, does not include women. If women are to be 'reasonable', within the legal

²⁸ Barnett op cit n6 pg 5

²⁹ Cain, P.A., 'Feminism and the Limits of Equality' in Weisberg, D.K (ed) *Feminist Legal Theory: Foundations* Philadelphia, Temple University Press 1993, pgs 237-247 pg 237-238

³⁰ Ibid pg 238; Smart op cit n12 pgs 163-165; Rowland & Klein op cit n17 pg 12

³¹ Barnett op cit n6 pgs 163-164

meaning of the term, they must adopt the male standard of reasonableness.”³² Consummation legislation utilises ‘gender-neutral’ language, presenting the need to consummate as applicable equally to both the husband and wife. However, upon reading the case law and analysis, it becomes clear that in practical terms, consummation is a male construct with male standards.

Radical feminists assert that to argue that women are similar to men “merely assimilates women into an unchanged male sphere. In a sense, the result is to make women into men.”³³ For this reason, radical feminists build their arguments upon the differences between men and women, which have been used by men to subordinate women. Daly states that all text is male constructed, and that ‘moronized’ women “believe that male-written texts (biblical, literary, medical, legal, scientific) are “true”.”³⁴ This rings true of consummation. The fact that there is very little published material about consummation suggests that there is no alternative worth discussing. Failure to examine and criticise the consummation requirement deems the legal existence of consummation ‘true’ and necessary.

In viewing law as male, second wave feminists have developed alternative theories about power, gender and sexuality, and how these relate to specific issues such as abortion, reproductive autonomy and the sex industry. “Radical feminism’s revolutionary intent is expressed first and foremost in its woman-centredness: women’s experiences and interests are at the centre of our theory and practice. It is the only theory *by* and *for* women.”³⁵ Whilst liberal feminists were still focusing on individual rights and equal opportunities, radical

³² Ibid pg 6

³³ Cain op cit n29 pg 238

³⁴ Daly, M., *Gyn/Ecology: The Metaethics of Radical Feminism* Boston, Beacon Press 1978 pg 5

³⁵ Evident in radical feminist consciousness-raising groups. Rowland & Klein op cit n20 pg 272; Raymond, J.G., ‘Not a Sentimental Journey’ in Leidholdt, D. & Raymond, J.G., *The Sexual Liberals & the Attack on Feminism* New York, Pergamon Press 1990 pgs 222-226 at pg 225

feminists were attempting “to find new ways of theorizing women’s relationship to men.”³⁶ Atkinson writes, “the analysis begins with the feminist *raison d’être* that women are a class, that this class is political in nature, and that this political class is oppressed. From this point on, Radical Feminism separates from traditional feminism.”³⁷ Radical feminists provided new insight into the ways in which patriarchy expressed power, not only overtly but also covertly through accepted social norms such as the idea of ‘gender’, creating a “new political and social theory of women’s oppression, and strategies for the end of that oppression, which comes from women’s lived experiences.”³⁸

Extending the feminist theory of male domination, radical feminists have argued that the development of alternative feminist frameworks is not an argument between ‘equally matched contenders’ but rather an attack on radical feminism “powered by allegiances to varieties of malestream thought.”³⁹ The notion of labelling types of feminism “serves the ideological purpose of opening a space within feminism for other ‘feminisms’, thus providing a platform for attacking it from within.”⁴⁰ It will be found throughout this thesis that many authors who are referenced will not self-identify as ‘radical’ but will for example, argue against the institution of marriage, which is why they have been referenced in this work, as I make the same argument, on the basis of the consummation requirement.

Whilst radical feminism may be more revolutionary in its actions and aims, it serves to analyse not only the effect of law upon women, but the root of the law, and the underlying assumptions leading to its enactment. This focus does not discount the contribution made by

³⁶ Hannam, J., *Feminism* Harlow, Pearson Education 2007 pg 144

³⁷ Atkinson, T-G 1974 quoted in Rowland & Klein op cit n20 pg 274

³⁸ Rowland & Klein op cit n21 pg 271

³⁹ Thompson op cit n1 pg 1

⁴⁰ Idem

academics and activists from other frameworks. The word 'radical' means "'pertaining to the root': Radical Feminism looks at the roots of women's oppression."⁴¹ For radical feminists, feminism is not about a revival of a political movement for social equality. Rather, "it is the second wave of the most important revolution in history. Its aim: overthrow of the oldest, most rigid class/caste system in existence, the class system based on sex- a system consolidated over thousands of years, lending the archetypal male and female roles an underserved legitimacy and seeming permanence."⁴²

Theories emerging from within third wave feminism could be considered more relevant to the purposes of this research. The third wave emerged in response to perceived failures of the feminist waves before it, in particular, challenging the essentialist and universalising claims of radical feminism, which it felt rendered "invisible the actual experiences of diversity."⁴³ Butler has strongly argued that gender is something that a woman performs, rather than something she is born with or destined to.⁴⁴ This third wave/queer theory is often seen as challenging the naturalization of identity.⁴⁵ It functions in the gaps of identity politics- challenging existing binaries. I believe radical feminism does the same thing, in a better way. Queer theory was born out of the principles of radical feminism, but in denying universality, its cause is betrayed. It cannot achieve anything if it tries to account for every possible situation. Asch argues that "society will balk at making modifications that include everyone unless dominant members of that society can be perceived to benefit as a by-product of these

⁴¹ Rowland & Klein op cit n21 pg 271

⁴² Firestone, S., *The Dialectic of Sex: The Case for Feminist Revolution* London, The Women's Press, 1979 pg 23

⁴³ Hines, S., 'A pathway to diversity?: human rights, citizenship and the politics of transgender' (2009) 15 *Contemporary Politics* 1 pgs 87-102, pg 96

⁴⁴ Butler, J., *Gender Trouble* New York, Routledge 1990; Hekman op cit n26 pg 293- Hekman argues that Butler's theory of performativity is inadequate as Butler falls into her own criticisms of second wave feminism. Butler's book states the use of binarisms inhabit us, but then argues for the opposite of radical feminist theory.

⁴⁵ Hines op cit n43 pg 96

changes.”⁴⁶ Butler’s ‘gender performatives’ are born out of the insights of de Beauvoir’s conception of gender- in which a person is not born a woman, but rather becomes one.⁴⁷ Rejection of identity within Queer theory leads to a denial of difference. Seidman argues that, “this very refusal to anchor experience in identifications ends up, ironically, denying differences by either submerging them in an undifferentiated oppositional mass or by blocking the development of individual and social differences through the disciplining compulsory imperative to remain undifferentiated.”⁴⁸

Third wave feminism has become increasingly appealing because it is seen to allow feminist theory to move beyond “liberal feminists’ attention to individual women’s rights, radical feminism’s collective action for social justice, and the end of patriarchy,”⁴⁹ and onto a type of feminism which is more reflective of its participants.⁵⁰ In comparison to the perceived ignorance/exclusion of racial diversity by radical feminists, the third wave emerges “as champion of multiplicity and difference.”⁵¹ However, in patriarchy “other disparities of power such as race and ethnicity can be... sexualized,”⁵² and the power dynamic in this sexualisation is best explained by radical feminism and theories of patriarchy. Whilst I do incorporate some third wave feminist’s work, I do not feel that this thesis should be constructed solely from this perspective. I subscribe to the view put forward by second wave

⁴⁶ Asch, A. ‘Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity’ (2001) 62 *Ohio State Law Journal* 1 pgs391-423 pg 401

⁴⁷ Butler op cit n44; De Beauvoir, S., *The Second Sex* (1949) Parshley, H (ed and trans) London, Vintage, 1997

⁴⁸ Seidman, S., ‘Identity and Politics in a ‘postmodern’ gay culture: some historical and conceptual notes’ in Warner, M. (ed) *Fear of a queer planet: queer politics and social theory* Minneapolis, MN: University of Minnesota Press 1993 pg 133

⁴⁹ English, L.M & Irving, C.J., ‘Reflexive Texts: Issues of Knowledge, Power, and Discourse in Researching Gender and Learning’ (2008) 4 *Adult Education Quarterly* 58 pgs 267-283 pg 271

⁵⁰ For example acknowledging other labels such as race.

⁵¹ Hemmings op cit n24 pg 126; Hekman op cit n27.

⁵² Jensen, R. ‘Homecoming: The Relevance of Radical Feminism for Gay Men’ (2004) 47 *Journal of Homosexuality* 314 pgs75-82 pg77

feminists that “law and legal systems operate in an *invariably* sexist manner,”⁵³ and the most effective way to combat this is to unite as women. Conversely third wave feminists argue “law is too complicated a phenomenon to be portrayed in this holistic manner. What needs to be understood from this perspective, is the manner in which law responds to differing problems, and in its operation reveals its well concealed gender bias.”⁵⁴

I further argue against the third wave’s view that ‘grand theories’ are dead.⁵⁵ The second wave is seen as espousing monocausal explanations- for radical feminists this is patriarchy, for Marxist feminists for example, this is class structure.⁵⁶ In my opinion, the ‘grand theories’ of second wave feminism are not complete, especially where issues of gender and sexuality are concerned. We have not obtained all the possible advantages given by second wave theories. We have not exhausted the theories espoused to their full capacity, and although each wave overlaps with the next, perhaps second wave feminism has been too quickly moved away from. Radical feminism has been attacked and marginalized, and feminism has moved more readily into “a comfortable and easy libertarianism, stressing individualism rather than collective responsibility; or into socialism with its ready made structures to attack, withdrawing the heat from the main actors of patriarchy: men themselves.”⁵⁷ Radical feminism in comparison seems naively dependent upon collective action, and is perhaps overly ‘radical’ in its expectations. Some feminists argue that radical feminism focuses too strongly on woman’s biology, and in unifying women as ‘women’, creates an essential woman. But we have not achieved the political aims of the second wave movement,

⁵³ Barnett op cit n6 pg 7

⁵⁴ Idem

⁵⁵ Ibid pg 8

⁵⁶ Smart op cit n13 pgs 167- 171

⁵⁷ Rowland & Klein op cit n17 pg 10

described by Firestone as “not just elimination of male *privilege* but of the *sex distinction* itself.”⁵⁸

Third wave feminism does not appear to be addressing this aim successfully. In reference to consummation, I argue second wave theories are still the most relevant and that universal (monocausal) explanations can be provided. When grand theories are critiqued, and the local and particular are prioritised, at the expense of all-encompassing theories, this serves to endanger the effort to create wide-reaching social change.⁵⁹ Race, age, faith and disability are irrelevant at the moment of consummation. For women who experience consummation, the experience is of course unique to them, but the concept of consummation is universally understood.⁶⁰ The law universalises the experience, as it does not provide different constructs of consummation on the basis of faith, race or age. Following chapters show that the only matter of importance for the law is that the wife is a woman, and must be penetrated vaginally by her husband’s penis. Therefore, to speak of women as one for the purposes of this research is to promote radical feminist thinking, but also to work within law’s own definition.

Richardson argues that no form of feminist theory has adequately dealt with issues of class and ethnicity. She disagrees with “the suggestion that radical feminism is inherently more likely than other forms of feminism to result in a denial of the different interests between, especially, Black and white women.”⁶¹ Stacey explains that universalising the oppression of

⁵⁸ Firestone op cit n41 pg 19

⁵⁹ Ingraham, C. ‘The Heterosexual Imaginary: Feminist Sociology and Theories of Gender’ (1994) 12 *Sociological Theory* 2 pgs203-219 pg206

⁶⁰ Daly argues that “the oppression of women knows no ethnic, national, or religious bounds.” Daly op cit n33 pg 111; Thompson op cit n1 pg 133

⁶¹ Richardson, D. “‘Misguided, Dangerous and Wrong’ on the Maligning of Radical Feminism’ in Bell, D. & Klein, R , S (eds) *Radically Speaking: Feminism Reclaimed* London, Zed Books, 1996 pgs 143-154 pg 147

women and theorising differences between women are two different issues and “plenty of feminist theory which is not claiming the universality of women’s oppression can be challenged for its racist assumptions, and likewise generalised theories of oppression are by no means the prerogative of white feminists.”⁶² However, it has to be acknowledged that there are inconsistencies in adopting a universalist approach. When biology is incorporated into the law, it becomes essentialised for women. For example, it is assumed that all women will inevitably become pregnant, and this “constitutes a problematic *difference* with respect to legal treatment. This construction of womanhood is obviously problematic in that it excludes women who are not and who will not ever become pregnant.”⁶³ MacKinnon states that radical feminism “sees all women in each one... In radicalism, women is a collective whole, a singular noun, its diverse elements part of its commonality.”⁶⁴ The Redstockings argue that as radical feminists engaging with consciousness-raising they “identify with all women... [and] repudiate all economic, racial, educational or status privileges that divide us from other women... [and as such are] determined to recognize and eliminate any prejudices we may hold against other women.”⁶⁵

I believe that when it comes to examining the legal construction and socio-legal understanding of consummation in marriage, second wave feminism has not been used to its full advantage. When trying to effect legal reform, policy makers will be more concerned with a law that affects as many people as possible. Making law reform suggestions from an individualistic (third wave) position means that these proposals will never be taken seriously. This is perhaps the best example of the political rather than academic stance of radical

⁶² Stacey, J 1993 quoted in Richardson op cit n61 pg 148

⁶³ Brookes op cit n19 pg 119 (footnotes)

⁶⁴ MacKinnon op cit n9 pg 40

⁶⁵ http://redstockings.org/index.php?option=com_content&view=article&id=76&Itemid=59 (accessed 10/02/12)

feminism. In order to enact any kind of change, in the law regulating consummation for example, there needs to be strength in numbers to gain power, and hopefully, change.

Whilst radical feminist theory has been heavily criticised, feminists owe much to it. Rights movements need radicals and “what feminists owe to radical feminism is the conviction that what women share is their sexuality and that even if this sexuality has been a source of danger for women in the past, it can become a locus of pleasure and power for each and every woman in the future.”⁶⁶ This thesis argues the same. Consummation is constructed through patriarchal understandings and is something required of women, by men. Once sexual relations are removed from these constraints, there is nothing to say a woman cannot enjoy her sexual experiences with men. To reduce radical feminism “to a simplistic biological determinist argument,”⁶⁷ is to dramatically under appreciate the potential for social change it could still yield.

1.3: Radical feminism: patriarchy, domination and power

In one sense, all feminism is by definition ‘radical’, challenging the central tenets of legal and political thought and demanding full citizenship for women in society.⁶⁸

Patriarchy, domination and power relations are important feminist concepts most prevalent in second wave feminist writing. The ‘personal is political’ shows that our, “so-called ‘private’ life cannot be isolated from society’s attention: the refusal of society and law to recognise the

⁶⁶ Tong, R. *Feminist Thought: A Comprehensive Introduction* London, Unwin Hyman, 1989 pg 138

⁶⁷ Rowland & Klein op cit n21 pg 297

⁶⁸ Barnett op cit n6 pg 163

realities of patriarchy have for too long rendered women vulnerable to abuse, manipulation and violence.”⁶⁹ Feminists have traced the origins of patriarchy to demonstrate its emergence, existence and continued influence. French argues that patriarchy is a hierarchical system which values ‘power-over’. “Originally developed to ensure the human community’s survival, power-over rapidly became, under patriarchy, a value cultivated simply for the experience of being the person in charge, the lawgiver, the “boss,” number one in the “pecking order.””⁷⁰

Bell argues that power is not directly given to men, but that “feminist analysis demonstrates the differential and hierarchical positions of men and women in relations which repeatedly accord men the greater access to the exercise of power.”⁷¹ The research presented here demonstrates the differential positions allocated to men and women within the consummation act, and the law. The patriarchal conception of heterosexuality is one of domination, in the “service of male-gratifying sex and, even more worrisome, as male-defined sex in the service of violence and domination.”⁷² Rifkin too argues that the definition of patriarchy is found in the relationship of power struggles between men and women “in which males hold dominant power and determine what part females shall and shall not play, and in which capabilities assigned to women are relegated generally to the mystical and aesthetic and excluded from the practical and political realms, these realms being regarded as separate and mutually exclusive.”⁷³

⁶⁹ Ibid pg 66

⁷⁰ Tong op cit n66 pg 99; French, M., *Beyond Power: On Women, Men and Morals* New York, Summit Books, 1985

⁷¹ Bell, V. *Interrogating Incest: Feminism, Foucault & the Law* London, Routledge, 1993 pg 42; Bottomley, Gibson, & Meteyard op cit n16 pg 47; Ingraham op cit n59

⁷² Burstow, B. *Radical Feminist Therapy: Working in the Context of Violence* London, Sage, 1992 pg 5

⁷³ Rifkin, J. ‘Toward a Theory of Law and Patriarchy’ in Weisberg, D.K (ed) *Feminist Legal Theory: Foundations* Philadelphia, Temple University Press 1993, pgs 412-418 pg 412

Radical feminism “names *all* women as part of an oppressed group, stressing that no woman can walk down the street or even live in her home safely without fear of violation by men.”⁷⁴

In unifying women against men, women become ‘Other’. Patriarchal gender relations are all pervasive, and the root of all other oppression; “patriarchy is the paradigm par excellence for all modes of oppression; [and]... sexism is prior to all other “isms,” including classism and racism.”⁷⁵ Patriarchy stems through all areas of life, from medicine, where medical services are male-controlled, through to the economy which is structured to disadvantage women and in which money equals power. “Women without economic independence cannot sustain themselves without a breadwinner. They cannot leave a brutal husband, they cannot withdraw sexual, emotional, and physical servicing from men, they cannot have an equal say in decisions affecting their own lives, such as where they might live.”⁷⁶

As the values of the legal system are male, radical feminists are “inclined to be suspicious of government intervention, perceiving the state itself as being intrinsically patriarchal, and also tends to focus on the politics of the ‘private’ sphere, in particular sexuality, motherhood and bodies.”⁷⁷ Rifkin says law is a paradigm of maleness, and that “law and legal ideology under capitalism preserved, transformed and updated pre-existing patriarchal forms to serve the interests of the emerging bourgeoisie.”⁷⁸ Thompson further expands upon the hierarchy and exploitation that exists in the public domain. She claims that “women’s entry into statuses and positions structured by the requirements of male prestige and power, does no more than set up among women the same hierarchies existing among men.”⁷⁹ This is not to say that withdrawing from men is the way to provide societal change. I engage with the stream of

⁷⁴ Rowland & Klein op cit n21 pg 272

⁷⁵ Tong op cit n66 pg 98; Burstow op cit n72 pg 1

⁷⁶ Rowland & Klein op cit n21 pg 279; Beauvoir op cit n47 pg 83

⁷⁷ Beasley, C., *What is Feminism?* London, Sage, 1999 pg 57

⁷⁸ Rifkin op cit n73 pg 412

⁷⁹ Thompson op cit n1 pg 15

radical feminism that acknowledges the problems in society, is suspicious of the law, but challenges the system, without withdrawing from men. Commentators such as MacKinnon⁸⁰ argue that men dominate women, controlling not only the law, and through that, our bodies, but also the discourse used to explain these occurrences. Men have institutionalised sexual violence, and have allowed for the intimate violation of women by men, perhaps quite explicitly expressed in the consummation requirement for valid marriages. When considering patriarchy in marriage, radical feminists reach two conclusions: firstly, the reproductive/biological capabilities of women are used to oppress them, and secondly (hetero)sex manifests inequality between men and women.

This thesis' concentration upon the consummation requirement challenges the patriarchal ordering of sexual understanding. It does not argue that the removal of consummation from law will create equality in sexual relations between men and women. Rather, I use consummation to demonstrate patriarchal culture in sex, and propose the removal of at least one instance from legal significance. The consummation requirement is a specific example of legal inequality for women that needs to be abolished. This thesis critically analyses society's heterosexual structure and demonstrates the symbolic and practical weight the consummation requirement adds to this structure.

Most radical feminists argue that patriarchy and male domination pervade so deeply that men believe they have no choice "other than to respond to [their]... sexual urges, [which]... creates a self-validating tautology of belief predicated on the notion that his aggressive behaviours

⁸⁰ MacKinnon, C., *Feminism unmodified discourses on life and law* Cambridge, Mass Harvard University Press, 1987; Mackinnon op cit n9

are linked to his inherited traits.”⁸¹ Feminists try to break this acceptance of domination as the norm through highlighting “the source of men’s sexuality as deriving in part from... culture and not exclusively from biology.”⁸² Millett⁸³ argues that patriarchy equates to male control of both the private and public world. This control needs to be done away with if “women are to be liberated... To eliminate male control, men and women have to eliminate gender- specifically, sexual status, role, and temperament- as it has been constructed under patriarchy”⁸⁴ which renders men powerful and dominant, and women subordinate.

No matter the choice of definition, “the scene... [has been] set in which body/women/emotion/nature coalesced into that which was rightfully governed by mind/men/reason/culture as the basis for the development of civilised society.”⁸⁵ It is within this framework that women have had their role in society determined for them. Rowland and Klein state that “men have managed to create an ideology which defines men as the ‘natural’ owners of intellect, rationality, and the power to rule. Women ‘by nature’ are submissive, passive and willing to be led.”⁸⁶

Smart uses the term ‘phallogentric’, rather than patriarchal. She holds that within phallogentric culture, the sexual norm is considered to be heterosexuality, in which a man dominates a woman’s body, “and thus heterosexuality achieves a spurious universality against which ‘deviations’ (which are called by special names) are judged. In turn, this (hetero)sexuality is overdetermined by the prioritized activity of intercourse and its

⁸¹ www.feministissues.com/radical_feminism.html (accessed 25/04/09)

⁸² Idem

⁸³ Millett, K. *Sexual Politics* New York, Doubleday, 1970

⁸⁴ Tong op cit n66 pg 96

⁸⁵ Bottomley, A., ‘The Many Appearances of the Body in Feminist Scholarship’ in Bainham, A., Sclater, SD., & Richards, M. (eds) *Body Lore and Laws* Oxford, Hart, 2002 pgs 127-148 pg134-5

⁸⁶ Rowland & Klein op cit n21 pg 278; De Beauvoir op cit n47 at pg 176

satisfactions become synonymous with the pleasures of the phallus.”⁸⁷ This prioritization of pleasure is evident in consummation case-law presented in Chapter 2.

Patriarchy culminates in the idea of ‘one flesh’ and the ownership of women by men; “in marriage, two become one, and that one is the husband.”⁸⁸ Though not explicit in the legislation, this is still the underlying notion behind consummation law. In that first instance of sex in marriage, the husband “makes of that body unequivocally a passive object, he affirms his capture of it.”⁸⁹ Under this explicitly religious doctrine⁹⁰ of ‘one flesh’, women have “found themselves tied to their husbands whose every whim- violent or sexual- could be forced upon her, with no legal rights over her children whatsoever, thus tying her more firmly into a state of dependency in the condition of slavery.”⁹¹ Daly declares that patriarchy in western society is found overtly and subliminally in Christian symbolism, and the all-male trinity, the significance of which is the “image of the procession of a divine son from a divine father (no mother or daughter involved)...This naming of “the three Divine Persons” is the paradigmatic model for the pseudogeneric term *person*, excluding all female mythic presence, denying female reality in the cosmos.”⁹² Consummation was originally a religious requirement, and its patriarchy stems from here.

⁸⁷ Smart op cit n14 pg 201-202

⁸⁸ Brook, H., *Conjugal Rites: Marriage and Marriage-like Relationships before the Law* New York, Palgrave Macmillan, 2007 pg 35-36

⁸⁹ De Beauvoir op cit n47 pg 186

⁹⁰ “That is why a man leaves his father and mother and is united to his wife, and they become one flesh.” Genesis 2:24 (New International Version); Barnett op cit n6 pg 168

⁹¹ Barnett op cit n6 pg 61

⁹² Daly op cit n34 pg 37-38

To understand power is to understand “the means by which people struggle as well as the form and character of state authority and control.”⁹³ Yet how does one reconcile that with the concept of woman as ‘Other’ in which it is argued that women are ‘Other’ to men, in other words that they are the opposite, and not as good as men- with becoming ‘one’ with their husbands? Beauvoir argues that the wife in fact “lets herself be taken without ceasing to be the Other.”⁹⁴ So entrenched is female subordination and male power that he can absorb his wife’s being upon marriage, but still be her master.

1.4: Radical feminism: private/public sphere

The private sphere provides a “backdrop for the public sphere: relations within the private sphere, and particularly the division of labour within the family, often if not invariably dictate the capacity of individuals to participate fully in the public world of government and employment.”⁹⁵ Women often do the larger share of the labour within the (private) family- from housework to childrearing- in order to allow men to participate in the public (economic) sphere. Women who have been able to participate in the public sphere have generally had to balance both spheres, rather than designate the private sphere to their male partner.⁹⁶ Feminist theory argues that confining women to the private (domestic) sphere, unregulated by law, renders women invisible.⁹⁷

⁹³ Cooper, D. *Power in Struggle: Feminism, Sexuality and the State* Buckingham, Open University Press, 1995
pg 1

⁹⁴ De Beauvoir op cit n47 pg 218

⁹⁵ Barnett op cit n6 pg 65

⁹⁶ Breen, R. & Cooke, L.P. The Persistence of the Gendered Division of Domestic Labour (2004)
http://www.nuff.ox.ac.uk/sociology/group/Breen%20papers/breen_cooke.pdf (accessed 27/10/11).

⁹⁷ The absence of law from the private sphere solidifies “male dominance and female subservience.” Taub, N & Schneider, E.M ‘Women’s Subordination and the Role of Law’ in Weisberg, D.K (ed) *Feminist Legal Theory: Foundations* Philadelphia, Temple University Press 1993, pgs 9-21 pg 10; Barnett op cit n6 pg 123; Swanson, J., *The Public and the Private in Aristotle’s Political Philosophy* New York, Cornell University Press, 1992; Diduck, A and Kaganas, F. *Family Law, Gender and the State: Text, Cases and Materials* (2nd ed) London, Hart, 2006 pg 13

O'Donovan argues that legal policy has always distinguished between these falsely constructed spheres, creating a division between public law- for example criminal and constitutional law- and private transactions like property law and torts, and therefore a division between men and women. For her, "the division of labour whereby one spouse works for earnings and the other for love encapsulates the public/private split."⁹⁸ Taub and Schneider elaborate, "contract law... is not available during the marriage to enforce either the underlying support obligation or other agreements by the parties to a marriage to matters not involving property."⁹⁹ As a result of this socially accepted split, there has been a shift in people's expectations regarding state responsibility for assisting families. "As more and more types of relationships become subsumed within the private sphere of the family, the state's responsibility for supporting individuals correspondingly lessens."¹⁰⁰

Given the tendency to separate between the public and the private within the law, it is no surprise that developments in private law are still relatively new, including legislation regarding domestic violence,¹⁰¹ child rights, and same-sex relationships.¹⁰² This new trend in effecting change within the family may be the realisation that, like the family, the 'private sphere' is an ideological, patriarchal, male construct, which will be interfered as and when it suits men. Designating certain areas

⁹⁸ O'Donovan, K. 1985 quoted in Diduck and Kaganas op cit n97 pg 14; Bottomley, Gibson & Meteyard op cit n17 pg 54

⁹⁹ Taub & Schneider op cit n97 pg 12

¹⁰⁰ Diduck and Kaganas op cit n97 pg 14; Diduck, A., 'Shifting Familiarity' (2005) 58 *Current Legal Problems* pgs 235-254

¹⁰¹ In the case of *R v. R (Rape: Marital Exemption)* [1991] 4 All ER 481 it was held that a husband could be convicted of raping his wife. Further developments in this area are found in the *Sexual Offences Act 2003*

¹⁰² For example, the CPA was only passed in 2004

as personal, private and subjective makes them appear to be outside the scope of law as a fact of nature, whereas in fact non-intervention is a socially constructed, historically variable, and inevitably political decision. The state defines as 'private' those aspects of life into which it will not intervene, then, paradoxically, uses this privacy as the justification for its non-intervention... the idea that the family can be private in the sense of outside public regulation is a myth. The state cannot avoid intervening in the shaping of familial relations through decisions as to which type of relations to sanction and codify and which types of dispute to regulate or not regulate.¹⁰³

'Non-intervention' is evident in consummation. Marriage is the key institution of the private sphere. But the state intervenes in the most intimate aspect of this relationship-consummation- under the guise of determining whether or not the marriage is valid. Family law needs to change fundamentally, with the focus shifting away from defining public and private spaces. The use of this public/private divide in law has meant that the law "has operated directly and explicitly to prevent women from attaining self-support and influence in the public sphere, thereby reinforcing their dependence on men."¹⁰⁴ The delineation of the nuclear family (which is assumed to be (hetero)sexual), to the private sphere should mean, in theory at least, that the law has little or no regulation upon the family. It is instead clear that the family straddles the public/private divide. When the state has not wished to involve itself in family matters, it refers to the family as private, but has undertaken extensive examination of intimate and 'private' sexual relationships.

¹⁰³ Rose, N., 1987 quoted in Diduck and Kaganas op cit n97 pg 14; Robson, R., *Sappho Goes To Law School* New York, Columbia University Press, 1998 pg 131-138

¹⁰⁴ Taub & Schneider op cit n97 pg 13

The definition of the nuclear ((hetero)sexual) relationship as the norm for the private sphere effectively renders others outside the protection of the law, whilst ignoring the fact that ‘nuclear’ does not always mean ‘conjugal’ (see further Chapter 6). This tendency to declare the nuclear family the ‘norm’ stems from an ideal of the ‘natural’¹⁰⁵ family, and when making this claim, provides the claimant a “rhetorical advantage. He or she does not have to admit the moral or political aspects of the claim while at the same time... dismiss[ing] all opposition as ‘unnatural’.”¹⁰⁶ It is within the realms of family, gender, sexuality, and marriage that as a society we are most “seduced by appeals to the natural. In this realm, the shifting mores of practice are solidified, some to be sanctified and others condemned. The prevailing form of family is seen as inevitable, as naturally given and biologically determined.”¹⁰⁷ The law uses the public/private divide to prioritise the conjugal family, relying heavily upon this ‘naturalism’ as a justification including reliance on medical evidence to argue that (hetero)sex is natural, biological and even necessary.

Whilst legal developments in family law seemingly move away from viewing marriage as the only form of legally sanctioned relationship, the test for other relationship forms “is the degree to which they are marriage-like’... Law’s normative vision of ‘the family,’ with marriage as the benchmark, is reproduced each time a court is called upon to decide whether

¹⁰⁵ Linton, R., ‘The Natural History of the Family’ in Anshen, R. (ed) *The Family: Its Function and Destiny* New York, Harper & Bros 1949 pgs 18-39; Collier, R., ‘Straight Families, Queer Lives? Heterosexual(izing) Family Law’, in Stychin, C. and Herman, D. (eds), *Law and Sexuality- The Global Arena*, Minneapolis, Minnesota University Press, 2001 pgs164-178.

¹⁰⁶ Diduck and Kaganas op cit n97 pg 16

¹⁰⁷ Barrett, M., & Macintosh, M., 1991 quoted in Diduck and Kaganas- Ibid pg 16; A Southern Women’s Writing Collective, ‘Sex Resistance in Heterosexual Arrangements’ in Leidholdt, D. & Raymond, J.G., *The Sexual Liberals & the Attack on Feminism* New York, Pergamon Press 1990 pgs 140-147 pg 141

a particular living arrangement is ‘familial’ or not,”¹⁰⁸ clearly demonstrated in the debates surrounding the enactment of the CPA and M(SSC)A (Chapter 5).

1.5: Radical feminism: gender and sexuality

Whilst law and other social institutions can be accused of patriarchy that is not to say that all relationships are inherently oppressive. The creation of a hierarchy of relationship forms (heterosexual, cohabiting, homosexual, polygamous etc) is more detrimental to people’s rights than being in a heterosexual relationship, for further privilege is assigned on the basis of membership to a particular relationship form. Men have also controlled women’s bodies through the use of a socially constructed understanding of gender and femininity. Radical feminists have therefore taken the lead in articulating the nature of the sex and gender system, whilst also proposing ways to free women from ‘femininity’, ranging from suggesting a female culture, instead of a male one, to “transforming the institution of heterosexuality so that neither men nor women play a dominant role to rejecting heterosexuality in favour of celibacy, autoeroticism, or lesbianism... radical feminists should be credited with detailing the ways in which men, rather than “society” or “conditions,” have forced women into oppressive gender roles and sexual behaviour.”¹⁰⁹

This thesis works to transform heterosexuality by uncovering the inherent domination required in consummation law, and seeks to alter the socio-legal understanding of the consummation act. Feminists and radical feminists in particular have produced an extensive amount of literature analysing the control men exert over women’s bodies through

¹⁰⁸ Diduck and Kaganas op cit n97 pg 23. Cossman, B & Ryder, B ‘What is Marriage-like Like? The Irrelevance of Conjugalities’ (2001) 18 *Canadian Journal of Family Law* pgs 269-326

¹⁰⁹ Tong op cit n66 pg 95

oppression, sexual control, and the control of medicine. Family, reproductive rights and motherhood also remain subjects of contention for feminists. “The institution of the family is a primary institution of patriarchy. Chained to the theory and practice of...compulsory heterosexuality, the father-dominated family, with its dependent motherhood for women, has enslaved women into sexual and emotional service.”¹¹⁰ Heterosexuality does not *always* produce inequality, but it oppresses and affects all women in some way or another, and motherhood oppresses most women who have children, as men control the workplace, and childcare provisions for working mothers.

Through the 1970s and 1980s, feminists argued about whether or not to focus on the analysis of women’s “‘sameness’ or ‘difference’ (to/from men), concentrating on the issue of whether and how men and women are ‘different’ or ‘equal’ or ‘the same’.”¹¹¹ Radical feminists were split as to whether they should focus on the ‘enemy position’– ie: to focus on men as oppressors- or to focus on the ‘women position’- ie: to focus on women’s oppression, its roots, effects and possible solutions. They felt that “where difference means dominance as it does with gender, for women to affirm differences is to affirm the qualities and characteristics of powerlessness.”¹¹² To argue for sameness would be to still hold men as the comparator. Women’s rights should not be an issue of demonstrating the sameness or difference of women to men. Rather, the key is to uncover and address the dominance and power that men exert over women “because men have defined women as different, [and therefore]... equality arguments cannot succeed.”¹¹³ Radical feminism shifts to a focus upon the ‘sameness’ of women to each other; creating the ‘universal’ and ‘essential’ woman. The

¹¹⁰ Rowland & Klein op cit n21 pg 294; Rowland & Klein op cit n17 pg 32

¹¹¹ Barnett op cit n6 pg 17; MacKinnon, C ‘Difference and Dominance: On Sex Discrimination’ in Weisberg, D.K (ed) *Feminist Legal Theory: Foundations* Philadelphia, Temple University Press 1993, pgs 276-287 pg 276; Smart op cit n13 pg165

¹¹² Mackinnon op cit n9 pg 51; Barnett op cit n6 pg 165; De Beauvoir op cit n47 pg 66

¹¹³ Cain op cit n29 pg 240

differing types of feminist theory adopt differing approaches to the issue of gender, sameness and difference, but as Barnett explains, “radical feminism...conceptualises the question of gender in the light of power relationships, and the disparity of power between men and women, supported by law and society. From this perception, women’s role is determined by her socially constructed gender, which ensures her inequality and subordination in relation to law and society which is characterised by male dominance,”¹¹⁴ rather than a focus on class or difference.

MacKinnon summarises that “...gender is socially constructed as difference epistemologically; sex discrimination law bounds gender equality by difference doctrinally. A built-in tension exists between this concept of equality, which presupposes sameness, and this concept of sex, which presupposes difference.”¹¹⁵ Viewed in this way, concepts such as sex equality become an oxymoron. She further argues that gender is constructed because heterosexuality demands it. Issues of the demands of heterosexuality are further explored in later chapters, but the need for female sexual subordination and male dominance has created gender, and sexuality.¹¹⁶ Thompson conveys her understanding of ‘male dominance’ as a ‘phallic mandate’:¹¹⁷ the belief that women service the penis. This is particularly evident in the research presented in Chapters 2 and 3 in which the law is skewed to service male sexual expectations. Women are complicit in this ideology as they “accept a second-rate ‘human’ status for themselves and eroticize their own subordination.”¹¹⁸ Thompson feels this is most exemplified within conventional heterosexual relations, which promote the idea that women cannot live without a man. For women who are not in relationships, life is portrayed as empty

¹¹⁴ Barnett op cit n6 pg 17-18

¹¹⁵ MacKinnon, C 1987 quoted in Cain op cit n29 pg 240

¹¹⁶ Mackinnon op cit n9 pg 113

¹¹⁷ Thompson op cit n1 pg 36

¹¹⁸ Idem

and unfulfilled, and their lives structured around the need to find a man. In the case law in which women are seen to want a 'full' sex life, this is justified as a desire to bare children, thereby avoiding any protracted judicial discussions of women's sexual desires. As Chapter 2 will show, in the case of women who are over child baring age, discussions turn to the want for a 'normal' marriage, again silencing female sexuality. Instead discourse surrounding the desire to appear 'normal' is prioritised.

Tong explains that this will not change "so long as women's sexuality is interpreted in terms of men's sexuality- as if Eve had indeed been made only to service Adam's every want and need."¹¹⁹ Thompson argues that the term 'gender' is meaningless, as a consequence both of;

the euphemistic role it plays within academic feminism (and the media, and wherever the word 'sex' would do instead), and of the incoherence of its origins. 'Gender' softens the harsh, uncompromising ring of 'male domination'. It provides the appearance of a subject-matter while at the same time enabling the real problems to be avoided. Originally it was set up in opposition to 'sex', to stress the point that the differences between the sexes are socially constructed, not natural. But the 'sex/gender' distinction does not challenge the 'society/nature' opposition- it remains wholly within it. If 'the social' is 'gender', and 'sex' is something other than 'gender', then sex is something other than social. If it is not social, then all that is left is the residual category of 'the natural', and 'sex' remains as 'natural' as it ever was. As a consequence the 'sex/gender' distinction does not disrupt

¹¹⁹ Tong op cit n66 pg 110

and unsettle the society/nature' opposition, but reinforces it because it is the same kind of distinction.¹²⁰

Sexuality is a political issue as a result of the analysis “of the oppression of women through male-defined sexuality and power, and because of the demand to take back our bodies.”¹²¹ It is important to note that the basis of radical feminist opinion is the “belief in the political necessity of women-identified feminism. It means that a woman’s *primary* relationships are with other women. It is to women that we give our economic, emotional, political, and social support.”¹²² Bunch argued that this means women should give their sexual energy to other women rather than engaging in heterosexual relationships.¹²³ I do not agree with the extension of the theory in this direction. I would rather extend Raymond’s work on female friendships. She traced the history of women’s friendships; the history of women as friends, women as lovers, women as economic and emotional supports and companions. She attacks “the dismembering of female friendships...[and] emphasises the intimacy in women’s relationships, stressing that passionate friendships need not be of a genital-sexual nature.”¹²⁴

It could be argued that gender itself needs to be eliminated as a distinguishing category, creating androgynous people. Yet radical lesbian feminist separatists¹²⁵ have argued that in rejecting claims for androgyny, women should actualize their full potential by engaging with the image of the ‘wild female’; “to become a whole person, to make contact with her true,

¹²⁰ Thompson op cit n1 pg 73

¹²¹ Rowland & Klein op cit n17 pg 27

¹²² Ibid pg 29

¹²³ Bunch, C., ‘Lesbians in Revolt’ in Pearsall, M. (ed) *Women and Values* California, Wadsworth, 1986 pgs 128-131; Jeffreys, S. *Anticlimax- A feminist perspective on the sexual revolution* London, The Women’s Press Ltd, 1993 at pg 293

¹²⁴ Rowland & Klein op cit n17 pg 29; Raymond, J.G., *A Passion for Friends: Toward a Philosophy of Female Affection* (2nd ed) Melbourne, Spinifex Press, 2001

¹²⁵ Abbott, S. & Love, B., *Sappho Was a Right-On Woman: A Liberated View of Lesbianism* New York, Stein & Day 1972; Myron, N. & Bunch, C. (eds) *Lesbianism and the Women’s Movement* Baltimore, Diana Press 1975

natural self, a woman need only strip away the false identity- femininity- that patriarchy has constructed for her.”¹²⁶ Radical feminism accepts, and embraces women’s difference from men, and determines that this difference is not a basis upon which to treat women as a secondary class. Littleton argues for an assimilationist view, and points out that often courts hold that women could be just like men, if they were given the chance.¹²⁷ To argue for androgyny is to argue for trying to find some kind of ‘golden mean’ between men and women requiring a “very substantial restructuring of many public and private institutions. In order to be truly androgynous within a symmetrical framework, social institutions must find a single norm that works equally well for all gendered characteristics.”¹²⁸

Littleton argues that she does not believe any court could value women enough to find a middle ground. “Moreover, the problems involved in determining such a norm for even one institution are staggering.”¹²⁹ Radical feminism would balk at an attempt to classify the female body as androgynous. Daly for example would rather that we embrace our whole personhood. If we argue that women are just like men, then little would need to be changed “in our economic or political institutions except to get rid of lingering traces of irrational prejudice... In contrast, if society adopted the androgyny model, which views both women and men as bent out of shape by current sex roles and requires both to conform to an androgynous model,”¹³⁰ then we would need to radically alter our methods of resource distribution.

¹²⁶ Tong op cit n66 pg 107

¹²⁷ Littleton, C.A., ‘Reconstructing Sexual Equality’ in Weisberg, D.K (ed) *Feminist Legal Theory: Foundations* Philadelphia, Temple University Press 1993, pgs 248-263 pg 250

¹²⁸ Idem

¹²⁹ Idem

¹³⁰ Idem

In promoting male attributes as the norm, men have been able to create and maintain power, and render women inferior. The use of the term 'Other' is representative of "linguistic analysis which is premised on binary opposites. Each concept in language contains within itself a primary and subordinate characteristic. The meaning of a word cannot correctly be understood unless both the primary meanings and its (silent) opposite is considered."¹³¹ Woman becomes the opposite of man, and feminine the opposite of masculine. The absence of a penis, and the promotion of male attributes as something to aspire to, have rendered women 'other'.¹³² Daly argues that this form of language is imposed upon women by male society and means that women need to "find our way back to reality by destroying the false perceptions of it inflicted upon us...We must learn to dis-spell the language of phallocracy, which keeps us under the spell of brokenness."¹³³ This refers to a feminist understanding of male patriarchy being all-consuming- to the extent that it structures the language we use. Thompson argues that when people engage with binaries, they need to recognize the hierarchy that exists in language, with male terms valued, and female terms devalued,¹³⁴ effectively silencing women. Daly states that "during the middle ages, *he* had come to be both the female and the male pronoun. After *she* was introduced, it referred only to females, while *he* became "generic," allegedly including women."¹³⁵ She argues that as women, we should embrace radical 'Otherness' so as not to become what patriarchy expects of us.¹³⁶

Beauvoir similarly claims that men never begin by presenting themselves as male, or individuals of a certain sex: "it goes without saying that he is a man...Representation of the

¹³¹ Barnett op cit n6 pg 15; Bottomley, Gibson, & Meteyard op cit n17 pg 53

¹³² De Beauvoir op cit n47 pg 80

¹³³ Daly op cit n34 pg 4

¹³⁴ Thompson op cit n1 pg 79

¹³⁵ Daly op cit n34 pg 18

¹³⁶ Daly, M., 'Be-Witching: Re-Calling the Archimagical Powers of Women' in Leidholdt, D. & Raymond, J.G., *The Sexual Liberals & the Attack on Feminism* New York, Pergamon Press 1990 pgs 211-221 pg 216

world, like the world itself, is the work of men; they describe it from their own point of view, which they confuse with absolute truth.”¹³⁷ In this way, the pronoun *I* further disguises the sex of the speaker, and “makes the speaker/writer deceptively feel at home in a male-controlled language.”¹³⁸ However, Firestone argues that Beauvoir’s conception of woman as the ‘Other’ both in language and in life has perhaps overshot the mark. She asks instead why there has not been serious consideration of “the much simpler and more likely possibility that this fundamental dualism sprang from the sexual division itself?”¹³⁹ Mackinnon similarly argues that Beauvoir’s work provides differing analysis when viewed as description or explanation.¹⁴⁰

Firestone believes that biology, and procreation are the basis on which ‘otherness’ has been constructed, as “the natural reproductive difference between the sexes led directly to the first division of labour,”¹⁴¹ and this trend has continued. Mackinnon questions why men are not ‘other’ to women, and argues that the concept of ‘other’ does not sufficiently explain social power.¹⁴² Whichever of these radical theories one may subscribe to, the fact remains that both outline women’s otherness, be it a result of sexual characteristics, or some other criteria. It is this treatment of women and women’s bodies as something ‘other’ that I believe permeates the consummation requirement.

Radical feminism is often confused with radical lesbian feminism. I do not subscribe radical lesbian feminism, and not all lesbians call themselves feminists, but it is important to demonstrate the breadth of opinions within the radical feminist perspective. Bunch argues

¹³⁷ De Beauvoir, S 1970 quoted in Thompson op cit n1 pg 12

¹³⁸ Daly op cit n34 pg 18; Bottomley, Gibson & Meteyard op cit n16 pg 55

¹³⁹ Firestone op cit n42 pg 16

¹⁴⁰ Mackinnon op cit n9 pg 55

¹⁴¹ Firestone op cit n42 pg 17

¹⁴² Mackinnon op cit n9 pg 55

that men and women are so different, that heterosexuals cannot be true feminists.¹⁴³ True feminists should be, or should choose to be lesbians as “lesbianism is best understood as a revolutionary rejection of all male-defined institutions,”¹⁴⁴ and the decision to be heterosexual is viewed by lesbian feminists as choosing the easy option, and “going with the flow.”¹⁴⁵ Bunch lived in a separatist community of women. She held that this time apart from men allowed for personal growth, and opportunities to develop political analysis. “Despite the fact that she ultimately rejected total separatism because of the isolation it involved, as a political strategy it still has its uses,”¹⁴⁶ as a tool for reflexivity. Yet to extend this separatism to a call for lesbianism is to “fail... to appreciate the nature/nurture debate surrounding homosexuality.”¹⁴⁷ Just as gender is socially constructed, to require women to be lesbians would also reduce sexuality to a social construct. Tong argues that “socially constructed sexual roles make it exceedingly difficult for a woman to identify and develop her own sexual desires and needs...”¹⁴⁸ This thesis allows for the existence of heterosexual feminists. The legal requirement of an occurrence of a particular type of (hetero)sexual act, within a particular social relationship is what I am primarily questioning in this thesis, and it would be counter-intuitive to argue that it should be replaced by a different (homo)sexual act.

Greer states that she wishes she was a lesbian, as “it’s difficult for heterosexual women because there are some aspects of the heterosexual negotiation that are immutable.”¹⁴⁹

¹⁴³ Bunch op cit n123

¹⁴⁴ Tong op cit n66 pg 123; A Southern Women’s Writing Collective, op cit n107 pg 145. See also Clarke, C. ‘Lesbianism- An Act of Resistance’ in Jackson, S. & Scott, S. *Feminism & Sexuality- A Reader* Edinburgh, Edinburgh University Press 1996 pgs 155-161

¹⁴⁵ Rowland, R. ‘Politics of intimacy: Heterosexuality, Love and Power’ in Bell, D. & Klein, R. *Radically Speaking: Feminism Reclaimed* London, Zed Books 1996 pgs 77-86 pg 78

¹⁴⁶ Rowland & Klein op cit n17 pg 30

¹⁴⁷ Rowland op cit n145 pg 78

¹⁴⁸ Tong op cit n66 pg 110

¹⁴⁹ Greer, G: www.bbc.co.uk/iplayer/episode/b00rbkbp/b00rbkiq/Women_Libbers/ (accessed 10/03/10). Broadcast BBC4 9pm 8/3/10; Campbell, B., ‘A Feminist Sexual Politics: Now you see it, now you don’t.’ (1980) 5 *Feminist Review* 1 pgs 1-18 pg 1.

Lesbian feminism developed from radical feminism in an attempt to address this. Richardson explains that radical feminists have been accused of being narrow-minded and sex-negative, and make women “in particular, feel guilty and ashamed of their sexual feelings.”¹⁵⁰ Heterosexual women should not stop expressing their sexuality. Rather, the focus of this research is the legal codification and entrenchment of a form of sexual expression which is articulated as something which is ‘done’ to women.

Lesbianism infused “excitement and reality into separatism”.¹⁵¹ The separatist movement- an extension of the difference movement- used lesbianism as its core focus, and drew on the power of sex to bring women together. Thompson argues that “the ease with which lesbianism was reincorporated in the malestream, at best as a neutrally valued sexual preference, at worst as just one more pornographic scenario, indicates that the struggle is far from over”¹⁵² in identifying the social relations of male supremacy. The place of lesbianism is an issue of contention within feminist theory. Delphy and Leonard demonstrate the importance of allowing for sexual difference within feminist analysis. Brook explains their argument as; “marriage...[is] a key problem in feminist theory, but [Delphy and Leonard] warn against blaming wives for their own situation because to do so would risk alienating women who love men from the women’s movement.”¹⁵³ Women have not possessed the social power necessary to promote their own interests. Rather, “supporting and identifying with men is the only way women are permitted access to the ‘human’ under male supremacist conditions.”¹⁵⁴ Instead, the focus should be upon women identifying with other

¹⁵⁰ Richardson op cit n61 pg 149

¹⁵¹ Thompson op cit n1 pg 15; Richardson, D., ‘Heterosexuality and social theory’ in Richardson, D. (ed) *Theorising Heterosexuality* Buckingham, Open University Press, 1998 pgs 1-20 pg 4

¹⁵² Thompson op cit n1 pg 15

¹⁵³ Brook op cit n88 pg 21; Delphy, C & Leonard, D. *Familiar exploitation: A new analysis of marriage in contemporary western societies* Cambridge, Polity, 1992

¹⁵⁴ Thompson op cit n1 pg 136

women. This 'identity' focus is seen as central to feminism to both challenge male supremacy, and the dominance of heteronormativity.¹⁵⁵

Radical feminists argue that a re-structuring of society alone is not enough to change the oppression entrenched in people's thinking. Rather, "the attitudes of men must be changed and a state of equality made manifest in the power dynamic between men and women."¹⁵⁶ MacKinnon has argued that heterosexuality is the 'primary social sphere of male power'.¹⁵⁷ Others from within the lesbian feminist movement have argued further that "men are the enemy. Heterosexual women are collaborators with the enemy... every woman who lives with or fucks a man helps to maintain the oppression of her sisters and hinders our struggle."¹⁵⁸ I do not endorse this view. Women can be involved in heterosexual relationships whilst still fighting patriarchal society. Radical feminism has been credited with the emergence of lesbian feminist views, but they are not one and the same. "A commonly expressed view is that heterosexual feminists have been silenced as a result of radical feminists making them feel guilty about their sexuality and, more especially, sexual pleasure."¹⁵⁹ I do not agree; "it will not do to continue to blame radical feminism for the reluctance on the part of heterosexual feminists to discuss their...sexual relationships with men."¹⁶⁰ The responsibility for this is the heterosexual woman's. However, as noted in the Introductory Chapter, there now exists a growing body of literature within the field of the sociology of heterosexuality.

¹⁵⁵ Ibid pg 14

¹⁵⁶ Op cit n81

¹⁵⁷ MacKinnon, C. 1982 quoted in Rowland & Klein op cit n21 pg 290

¹⁵⁸ Leeds Revolutionary Feminist Group, 1979 quoted in Rowland & Klein op cit n21 pg 291

¹⁵⁹ Richardson op cit n61 pg 149

¹⁶⁰ Idem

As outlined above, in trying to unify 'women' radical feminists have fallen prey to accusations of essentialism. Essentialism claims are 'aggravating' because they "ignore the rich discussions about the relationships among gender, sexuality and race that took place in"¹⁶¹ the 1970s. Richardson argues that to claim essentialism is to misread radical feminism, and both Richardson and Hemmings argue this occurs through a narrow reading of a few 'key' texts, rather than all of the literature available from the time.¹⁶² Hemmings states the false accusation of essentialism is so often repeated that "it can actually stand as justification for not reading texts from the feminist seventies at all any more. This in itself should make us suspicious, of course, given the political and intellectual vibrancy of this era."¹⁶³ The claim is so often bandied about, that it has become acceptable, unchallenged and naturalised.¹⁶⁴

Cain explains that radical feminists embrace the claim that women are socially constructed. However it is also felt that deconstruction will not lead to some kind of underlying true essence to being a woman. Instead, "they believe that by challenging the male construction of the category "woman," we can begin to construct our own category. We may not be able to free ourselves from socially constructed categories, but a woman-defined "woman" is at least an improvement over the present state of affairs."¹⁶⁵ Brooks asks how those who wish to focus on race for example can avoid accusations of essentialism too. She asks if race can be deconstructed, or if these feminists talk of race in an essentialist way; "can I say, when someone sneers at me because I am African-American or Asian-American, or Hispanic- oh you are mistaken sir, what you see is merely a construct?"¹⁶⁶ To argue that women are

¹⁶¹ Hemmings op cit n24 pg119; Brookes op cit n19 pg 118-119

¹⁶² Hemmings op cit n24; Richardson op cit n61

¹⁶³ Hemmings op cit n24 pg 120

¹⁶⁴ Hemmings op cit n24 pg 121; Brookes op cit n19 pg 115

¹⁶⁵ Cain op cit n29 pg 241

¹⁶⁶ Brookes op cit n19 pg 120

reduced to a 'constructed woman' is no different from a constructed understanding of race.

Thompson argues;

Feminism cannot afford to give priority to the politics of race or class while ignoring male supremacy... to ignore male supremacy is to empty feminist politics of its central meaning... *The categories of 'race' and 'class' also contain men, and any category which includes men tends to be dominated by the interests of men...* Racism or class exploitation are more readily perceivable than the oppression of women because they involve the dehumanization of men.¹⁶⁷ (emphasis added)

In terms of the gender and sexuality focus of this thesis, I believe that discussions of sex and sexual practice from a feminist perspective should not be about reforming or improving sexual relations. Rather, any discussion about sex and sexual practices should focus on the impact that sexual change will have on wider society and wider understandings of power and sex for women. As Cooper suggests, "sexuality shapes, or impacts upon a range of social, cultural and economic practices and relations... sexuality impacts upon the state, becoming embedded within its technologies of power."¹⁶⁸ The very inclusion of sex in politics and the state has meant that particular forms/types of sex have been legally prioritised. Instead of arguing for acceptance of a sexualised society, we should be addressing the ways in which we have become so highly sexualised and why. In the area of consummation at least, if we could see the heteronormativity that the consummation requirement promotes, we could perhaps then argue (as this thesis does), for the removal from the law of a (hetero)sexual

¹⁶⁷ Thompson op cit n1 pg 92-93

¹⁶⁸ Cooper op cit n93 pg 2

requirement which has a historically symbolic, patriarchal and religious function. It would serve to begin to reduce the importance of marriage, and more importantly, the *legal* importance of a 'sexual' marriage. A thesis such as this could not undermine the religious significance of the sexual act, only the legal. No matter the preferred definition of patriarchy as men dominating women, to further their own interests, or men dominating access to power, in respect of a consummation requirement, the patriarchy involved could be seen from both aspects. Men use women's bodies for their sexual pleasure, and they dominate access to consummation through possession of the penis.

Feminists have noted the distinction between "*sex* as a biological and *gender* as a social or cultural category."¹⁶⁹ If sex is something we are born with, then we are born with a woman's body, and we run the risk of creating sex as an essence. This essentialism is the greatest criticism directed at radical feminists, and is often a misguided criticism; "it will be a surprise to anyone who has read the writings of [Daly, Dworkin and Rich] that they believe in essential masculinity and femininity. In fact they constantly seek to understand the construction of gender and they desire the end of male supremacy. There would be little point in challenging male sexual violence if it was thought to be innate."¹⁷⁰ If one considers sex an essence, it "becomes immobile, stable, coherent, fixed, prediscursive, natural, and ahistorical: the mere surface on which the script of gender is written."¹⁷¹ As radical feminist Firestone argues, sex class is so ingrained that it has become invisible.¹⁷²

¹⁶⁹ Moi, T., *What is a Woman?* Oxford, Oxford University Press, 1999 pg 3

¹⁷⁰ Jeffreys op cit n123 pg 283

¹⁷¹ Moi op cit n169 pg 4

¹⁷² Firestone op cit n42 pg 11

There are few that would now argue that the gender divisions we see in society are a result of the biological differences between men and women. Beauvoir claims that the body is a situation deeply related to our subjectivity¹⁷³ and is our embodied relationship with the world. “For Beauvoir, a woman is someone with a female body from beginning to end, from the moment she is born until the moment she dies, but that body is her situation, not her destiny.”¹⁷⁴ This ‘situation’ means that once women are distinguished from men on the basis of their biology, they are distinguished from being ‘human’. Firestone states that,

nature produced the fundamental inequality- half the human race must bear and rear the children of all of them- which was later consolidated, institutionalized, in the interests of men... Women were the slave class that maintained the species in order to free the other half for the business of the world.¹⁷⁵

In this research I have utilised a translation of the ‘Second Sex’ by H.M. Parshley, whilst supplementing my understandings of Beauvoir’s work through other writings, and represent her theories here, to the best of my understanding. This version has been widely criticised,¹⁷⁶ but the newer 2009 edition¹⁷⁷ has also been the subject of criticism,¹⁷⁸ undoubtedly an inevitable result of any attempt to provide a comprehensive translation of a text. What is clear

¹⁷³ Moi op cit n169 pg 60

¹⁷⁴ Ibid pg 76

¹⁷⁵ Firestone op cit n42 pg 192

¹⁷⁶ Moi, T., ‘While we wait: The English translation of the Second Sex’ (2002) 27 *Signs: Journal of Women in Culture and Society* 4 pgs 1005-1035; di Giovanni, J., ‘The Second Sex, by Simone de Beauvoir, translated by Constance Borde and Sheila Malovany-Chevallier’ *Times* December 19 2009

¹⁷⁷ De Beauvoir, S., *The Second Sex* translated by Borde, C. And Malovany-Chevallier, S., London, Vintage Books, 2009

¹⁷⁸ Moi, T., ‘The Adulteress Wife’ (2010) 32 *London Review of Books* 3 pgs 3-6

from both versions, and of most relevance for this research, is the construction of women, and the understanding of woman as ‘Other’.

Woman-identified theory has been shown to be extremely important, and the removal of a consummation requirement would result in a diminishing of the power of heterosexuality as a ‘norm’. In removing sex from marriage, we remove the idea that sex in marriage is normal, natural, biological and *necessary*. As it stands, heterosexuality is “a form of coercion dictated by male ideology/propaganda, by force, by stigma, by the erasure of lesbian existence, and by the erasure of the coercion itself, so that what is imposed is made to look like the natural unfolding of our inclinations.”¹⁷⁹ The removal of sex from marriage would allow for a move away from the institution of marriage. As a feminist I would welcome the removal of the consummation requirement¹⁸⁰ to allow for a creation of ‘legal’ relations that are not based on sex. Alternative basis’ of legal relations are discussed further in Chapter 6, but could for example include relationships of caring or biological relations. Cooper suggests that investigation of theories of power reveal that not all men oppress, or oppress to the same extent. Some men are oppressed by other men. She argues that there are white men who do not oppress, and women who may feel oppressed, but not by an individual, but rather by an “anonymous social or cultural force;”¹⁸¹ patriarchy.

Jaggar’s rejection of a biological determinist understanding of sex and gender means that she has “no reason to believe that by nature all men are one way and all women another, or even that *most* men are one way and *most* women another. The historical interplay of biology and

¹⁷⁹ Burstow op cit n72 pg 15

¹⁸⁰ This removal would be symbolic rather than practical. If a couple wished to separate because their relationship was not sexual, they would most likely utilise divorce law instead. However, the symbolic removal of consummation would be to diminish the link between law and heteronormativity.

¹⁸¹ Cooper op cit n93 pg 9

environment makes this man the way he is and this woman the way she is.”¹⁸² It is clear that *some* men are also oppressed, but radical feminists would not hesitate to claim that most men are one way, and most women another. *Some* women can attempt to evade this oppression, for “the fact that radical feminists themselves are able to escape their false consciousness, even under the system of patriarchy, is evidence of this. If patriarchy were, indeed, all pervasive and totalizing, radical feminism could never have obtained the space it needed to develop.”¹⁸³

A further consideration is the arguments that arise when radical feminism is labelled as ‘sex negative’. Pro-sex feminists have argued “that radical feminism’s representation of women as disempowered actors fails to see women as sexual subjects in their own right... while radical feminists see ‘female sexuality’ as repressed by ‘the patriarchy,’ the pro-sexuality movement sees repression as produced by heterosexism and ‘sex-negativity’- cultural operations often seen as institutionalized in feminism itself.”¹⁸⁴ This leads one to ask if ‘sex’ as we know it is what women would have wanted it to be, or whether it is in fact the result of patriarchy. Whilst not in the scope of this research, it is important to note that it is not an either/or scenario. To declare sex as defined by patriarchy does not undermine women as sexual subjects. Instead, it is to declare that women are capable of and may enjoy sex, but that the type of sex required by the law, and the meaning behind it is worthy of consideration, and is not usually formatted for the benefit of the women involved.

If biology is unchanging (removing here the obvious issues of transsexual and intersex people discussed further in Chapter 4), it should not impact how we view men and women.

¹⁸² Tong op cit n66 pg 128; Rowland & Klein op cit n21 pg 296-298

¹⁸³ Tong op cit n66 pg 128

¹⁸⁴ Hemmings op cit n24 pg 123

Then perhaps the true issue is the gender that we ascribe to the two different recognised physiques. I believe it's naïve to claim that we could overcome the tendency to label the differences we can see in the physiques of people. Perhaps if we were to start again, we would encompass more than two types (male and female), but we would no doubt still create labels. Radical feminism too holds this view, arguing for an acknowledgement that women are different, but equal, rather than the first wave contention that we are the same. It is the meanings that the labels 'male' and 'female' hold that is the true key to seeing women solely as women, in charge of their own destiny, and equal to men. In this way, "to speak of social treatment 'as a woman' is thus not to invoke any universal essence or homogenous generic or ideal type, but to refer to this diverse material reality of social meanings and practices such that to be a woman 'is not yet the name of a way of being human'."¹⁸⁵

1.6: Conclusion

I believe that if you tell the truth of women's
lives, then women's lives have to improve.¹⁸⁶

This chapter has summarised the nuances found in feminist theory, provided an overview of radical feminist theory in particular and shown that feminist theory is more than "simply that of placing women on the agenda."¹⁸⁷ It has been shown that radical feminist work "is developing a theory of male power, in which powerlessness is a problem but redistribution of power as currently defined is not its ultimate solution upon which to build a feminist theory

¹⁸⁵ MacKinnon, C, 1991 quoted in Brookes op cit n19 pg 124

¹⁸⁶ French, M: www.bbc.co.uk/iplayer/episode/b00rbkbp/b00rbkiq/Women_Libbers/ (accessed 10/03/10). First broadcast BBC4 9pm 8/3/10

¹⁸⁷ Bottomley, Gibson & Meteyard op cit n17 pg 49

of justice.”¹⁸⁸ Second wave feminism in particular is not about men and women competing, or comparing the detriments they suffer. It’s focus is the reproduction of patriarchy: practically, theoretically, conceptually and symbolically.¹⁸⁹ The radical feminist task is to change “consciousness, rediscovering the past and creating the future through women’s radical ‘otherness’.”¹⁹⁰ It is this task I bring to the examination of consummation. I hope to change the consciousness surrounding understandings of consummation. In order to do this, I try to rediscover the past; examining the ways in which this patriarchal religious phenomenon became entrenched in law, and finally creating a new understanding of sex in legal relationships, whilst acknowledging the differences between men and women.

The following chapter outlines the legal history of consummation through statute and case law, demonstrating that the “state is male in the feminist sense: the law sees and treats women the way men see and treat women.”¹⁹¹ Chapter 3 then moves on to provide a socio-legal radical feminist analysis of the case law, holding that in consummation (as in marriage) women are subordinate to men. The work of second wave feminists outlined above has argued for “power for women... in women’s own right.”¹⁹² By highlighting the legal and symbolic male power evident in consummation, I provide another example of an instance in which women are subordinate, as well as suggestions for the eradication of this power dynamic, without becoming distracted by sameness/difference arguments, both of which are still detrimental to women.¹⁹³

¹⁸⁸ Mackinnon op cit n9 pg 46

¹⁸⁹ Bottomley, Gibson & Meteyard op cit n17 pg 51

¹⁹⁰ Rowland & Klein op cit n21 pg 274

¹⁹¹ Mackinnon op cit n9 pg 161-162

¹⁹² Barnett op cit n6 pg 167

¹⁹³ Barnett op cit n6 pg 169; Mackinnon op cit n9 pg 51

At first glance, this thesis could be seen to work against the general tenure of feminist theory. Feminists have often called for there to be greater intervention in the private sphere, as it is felt that this sphere inflicts the most harm upon women as it is under-regulated. This is evidenced in the time it took for courts to recognise that marital rape could occur, that domestic violence was a reality and that domestic work should be recognised equally to public sphere work. In this respect, my thesis takes a dramatic turn away from traditional feminist requests, and rather asks for less intervention in private relationships, for this thesis argues that it is inappropriate to legislate what ‘needs’ to happen in the *bedroom* between people engaged in legal relationships.

I uphold Rubin’s contention that “there is an urgent need to develop radical perspectives on sexuality.... A radical theory of sex must identify, describe, explain, and denounce erotic injustice and sexual oppression.”¹⁹⁴ Consummation is a coerced and oppressive act, and the following chapters provide argument that identifies it as such, whilst continuing to enhance and advance radical feminist theory. I acknowledge that in writing from a feminist perspective I am ignoring many perspectives that focus upon men’s theories of sexuality (briefly discussed in Chapter 3), and so I fall prey to the general understanding that male sexuality is “less plastic than that of the female,”¹⁹⁵ and the assumption that sex equates to pleasure for men. Men of course have their own experiences and theories of consummation, but here I aim to represent women’s views of marital sex which are constructed as natural, a wife’s duty, and a husband’s pleasure.

¹⁹⁴ Rubin, G., ‘Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality’ in Vance, C.S (ed) *Pleasure and Danger: Exploring Female Sexuality* Boston, Routledge & Kegan Paul, 1984 pgs 267-319 pg 275

¹⁹⁵ Hall, L.A., *Hidden Anxieties: Male Sexuality, 1900-1950* Cambridge, Polity Press 1991, pg 16

TWO

THE LAW

This chapter clarifies the doctrinal basis of consummation. Consummation originated in religious doctrine but its current form and content and “the establishment of an apparatus for the minute investigation of marital coitus, has been legal in form.”¹ Below, I review the case-law definition of consummation to better understand the legal concept of consummation and to establish how consummation has become a legal concept. This chapter looks at the way in which marriage, which houses the consummation requirement, has been defined in English law. I provide a general understanding of the term ‘consummation’, before moving on to outline the place of consummation in law. Finally, I establish a legal definition of the consummation requirement through an examination of case-law (in which the spouses are genetically male and female from birth), that ranges from the 1700’s through to the 1960’s.

The case law outlined in this chapter has been selected for a number of reasons. Firstly, the majority of the case law is that which is most often cited in academic literature surrounding marriage and consummation. Secondly, using the most often cited cases, I have also gone on to find more obscure case law mentioned within the judgements, in order to present as much case law analysis as possible. Thirdly, I have not omitted cases that at first glance would appear to be at odds with my overall argument. It is important to include as many cases as possible for comprehensiveness, and I argue that cases which appear to contradict my argument only do so upon face value. Further analysis provided in Chapter 3 will demonstrate the overall legislative tenor of non-consummation cases, whilst highlighting the many issues in the case law, which have been approached differently by judges

¹ Collier, R., *Masculinity, Law and the Family* London, Routledge 1995 pg 146

There have been no reported cases of non-consummation in the UK since the late 1960's, though most nullities are on the basis of non-consummation, indicating that nullity on the basis of non-consummation remains.² Historically, the majority of the cases arose “as ways of trying to get round the restrictive divorce legislation of the time, whilst more recent cases on incapacity have arguably been more concerned with restricted rights to marry.”³ There have been no recently reported cases as a result of the increased ease of obtaining a divorce and because the interpretation of consummation law is no longer being challenged.

2.1: How is marriage defined in law?

*Hyde v Hyde and Woodmansee*⁴ states that Judeo-Christian societies and marriages have “essential elements and invariable features,”⁵ which make marriage identifiable as “the voluntary union for life of one man and one woman, to the exclusion of all others.”⁶ The case also stated that there are societies in which marriage is not a prevalent social structure, and inevitably these societies, unlike Christian societies, do not let the wife stand “upon the same level with the man under whose protection they live.”⁷ Feminist literature has revealed the fallacy of equality in marriage.⁸

² Judicial and Court Statistics 2010 <http://www.justice.gov.uk/downloads/statistics/courts-and-sentencing/judicial-court-stats.pdf> (accessed 10/10/12)

³ Collier op cit n1 pg 147

⁴ *Hyde v Hyde and Woodmansee* (1865-69) L.R. 1 P.& D. 130

⁵ *Ibid* at 133

⁶ *Idem* at 133

⁷ *Ibid* at 134

⁸ Fineman, M.A., *The Autonomy Myth* New York, The New Press, 2004

The facts of *Hyde* are not relevant, but its definition of marriage is “deceptively simple... Yet, despite its Victorian heritage, it has not been overruled directly”⁹ and its main principles constitute the MCA 1973.¹⁰ Probert explains that “at a time when it is predicted that one in three marriages will end in divorce, [a union for life]... has the quality of an aspiration rather than an accurate description.”¹¹ Further, marriage should be between ‘one man and one woman’ therefore historically excluding same-sex couples and transsexual people.

In 1885 *Durham v Durham*¹² attempted to expand the definition of marriage. The importance of this case lies in its assertion of the ‘natural’ meaning of the marriage contract. Sir J. Hannen declared that the marriage contract was simple, easy to comprehend by most. “It is an engagement between a man and woman to live together, and love one another as husband and wife, to the exclusion of all others... [with] protection on the part of the man, and submission on the part of the woman.”¹³ Loving one another seems to require sexual intercourse by the courts.

In the absence of a sexual element, the courts have concluded that the essence of marriage is missing from the relationship. Historically, the court has enforced conjugal law to the exclusion of all other family forms, even providing decrees for restitution of conjugal rights, effectually requiring spouses to return to the marital home in the hope that consummation

⁹ Diduck, A., & Kaganas, F. *Family Law, Gender and the State* (2nd ed) Oxford, Hart Publishing 2006 pg 39

¹⁰ The *Matrimonial Causes Act* is a consolidating statute. The original statutes were the *Nullity of Marriage Act 1971* and the *Divorce Reform Act 1969*

¹¹ Probert, R. *Cretney and Probert's Family Law* (7th ed) London, Thomson Reuters/Sweet & Maxwell 2009 pg 29

¹² *Durham v Durham* (1885) L.R 10 P.D 80

¹³ *Ibid* at 82

may occur, though this would not happen in marriages where adultery had occurred.¹⁴ The primacy of conjugality is thus also of relevance in the ending of marriages- adultery can be used as a ground for divorce. The state is always a third party to all marriage contracts in England and Wales.¹⁵ One of the most intrusive and offensive pieces of legislation surrounding marriage is the ability to nullify the marriage on the basis of non-consummation, which in effect renders consummation as a ‘requirement’ of marriage. Card most succinctly summarises this outlook as; “although marriage rights would be *sufficient* to enable lovers to have sex legally, such rights should not be *necessary* for that purpose.”¹⁶

2.2: What is consummation?

The word ‘consummation’... originated around the fifteenth century from the Latin ‘consumare’, meaning to complete, and from ‘summus’, the highest, utmost. Sexual intercourse thus brings to completion or perfection, legally and spiritually, a solemnised marriage through the act of intercourse.¹⁷

Consummation is the first instance of sexual intercourse between a man and a woman after their marriage ceremony. It finalizes a wedding, and occurs when the spouses “perform a single act of sexual intercourse, more specifically an act involving penile penetration per

¹⁴ In the nineteenth century, decrees for restitution of conjugal rights were enforceable by imprisonment. Honoré, T. *Sex Law* London, Duckworth 1978 at pg 9; Cloud, D.M. ‘Physical Examination in Divorce Proceedings’ (1901) 35 *American Law Review* pgs 698-706 at pg 699

¹⁵ The ‘status’ marriage creates can only be terminated by the state: Scott, W.L. ‘Nullity of marriage in canon law and English law’ (1937-1938) 2 *University of Toronto Law Journal* pgs 319-343 at pg 320; Card, C., ‘Against Marriage and Motherhood’ (1996) 11 *Hypatia* 3 pgs 1-23 pg 3

¹⁶ Card: *Ibid* pg 6

¹⁷ Collier op cit n1 pg 144

vaginam.”¹⁸ English law governing marriage and consummation has its foundations within the Christian Church and in particular, the Anglican Church, which disapproves of pleasures of the flesh. They preach that intercourse should be for the purposes of procreation, “and one can only beget legitimate children....in lawful marriage. All sexual activity outside marriage has necessarily some purpose other than procreation and constitutes a sin. Hence, no such activity may be permitted.”¹⁹

The Catholic Church also states “the marriage of two baptized persons... when followed by consummation, is not only a contract resulting in a status, but is also a sacrament, resulting in a relationship, terminable only by death.”²⁰ Hence, marriage and sexual activity have been stringently regulated by the Church, which has influenced the development of the law. The law draws a distinction between an inability to consummate, and a refusal to consummate. Brook explains that in some jurisdictions, the requirement of consummation is “ostensibly obsolete, but its normative basis continues to shape and inform what marriage is and does. Consummation is very much like the handshake that seals a business agreement- it is a kind of corporeal communication.”²¹ The law requires the consummative act to be “ordinary and complete,”²² a concept developed within the case law, and addressed below.

¹⁸ Ryan, F.W., “When divorce is away, nullity’s at play’: A new ground for annulment, its dubious past and its uncertain future’ (1998) 1 *Trinity College Law Review* pgs 15-36 pg 18

¹⁹ Flandrin, J.L ‘Sex in married life in the early Middle Ages: the Church’s teaching and behavioural reality’ in Ariès, P. & André Béjin (eds) (translated by Forster, A) *Western Sexuality: Practice and Precept in Past and Present Times* Oxford, Basil Blackwell, 1985 pgs 114-129 pg 114

²⁰ Scott op cit n15 pg 320; McGrath, A. ‘The annual conference of the Canon Law Society for Great Britain and Ireland’ (2007) 9 *Ecclesiastical Law Journal* 3 pgs 324-326 at pg 325

²¹ Brook, H., *Conjugal Rites: Marriage and Marriage-like Relationships before the Law* New York, Palgrave Macmillan, 2007 pg 53

²² *D-e v. A-g (falsely calling herself D-e)* [1845] 1 Rob Ecc 280 at 298

In many non-consummation cases, claimants who brought suit for nullity also made claims in the alternative for cruelty as it was felt that an absence of sex in a relationship could be considered cruelty.²³ Despite the increased ease of divorce there are still those that view nullity as the preferable form of terminating some relationships. Nullity is a much faster legal solution when compared to divorce and allows for a second religious marriage for those of religious persuasions which disapprove of divorce.²⁴

2.3: Where does the consummation requirement lie in the matrix of family law and how is it defined?

With embarrassment, a sense of duty and an at times obsessive relish, the courts have proceeded to show scant reluctance in scrutinising the marriage bed, the bodies of husband and wife and, in particular, the transgressive nature of sexual dysfunction.²⁵

A New York court stated that the medical and testimonial investigations necessary in cases of non-consummation were so intrusive and distressing, that the parties would be better off if they could come to an agreement to separate between themselves, rather than go to court.²⁶

Of the marriages that do not end as a result of death, most are terminated through divorce.²⁷

However, some marriages are declared void or voidable. Unconsummated marriages fall

²³ *P v P* [1964] 3 All ER 919 held it was not cruelty. See also *Evans v Evans* [1965] 2 All ER 789; *B (L) v B (R)* [1965] 3 All ER 263; *P (D) v P (J)* [1965] 2 All ER 456

²⁴ Scott op cit n15 pg 319

²⁵ Collier op cit n1 pg 152

²⁶ *Devanbaugh v Devenbaugh* 5 Paige (N.Y) 554; Cloud op cit n14 pg 701

under the jurisdiction of ‘voidable’ marriages outlined in s12 of the MCA 1973. A voidable marriage “is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction.”²⁸ In other words, a decree of nullity granted in respect of a voidable marriage, once made absolute, annuls the marriage whilst treating it as having existed until that time.²⁹ For a marriage to be determined voidable, it is one which would have been considered void under Canon law, “because of the existence of a vitiation impediment at the time of celebration, but which ecclesiastical courts were not allowed to question after the death of either party.”³⁰ The consummation requirement is of historical importance to English matrimonial law. Before the Council of Trent 1563, there was no religious ceremony involved in matrimony, only a declaration of intention, “either by a promise expressed in the present tense- ‘per verba de praesenti’- (eg ‘I take you as my wife [or husband]’), in which case the marriage was binding immediately, or by a promise for the future-‘per verba de futuro’- (eg ‘I shall take you as my wife [or husband]’), in which case it became binding as soon as it was consummated.”³¹ However the twenty-fourth session of the Council found that the validity of a marriage would be dependent upon the ceremony being performed in front of a priest and two witnesses, and today, there does not have to be a religious element- a civil marriage will suffice.

S12 MCA 1973 outlines the grounds for a voidable marriage. SS12(a)&(b) hold that a marriage is voidable on the basis of non-consummation owing to the incapacity of either party, or the wilful refusal of the respondent. Applications for nullity need to be brought by

²⁷ Regulated by s1(2) MCA 1973. The Office for National Statistics puts the number of divorces for 2008 at 121,779, compared to the provisional figure of 232,990 marriage registrations. <http://www.statistics.gov.uk/STATBASE/Product.asp?vlnk=14275> (accessed 22/12/10)

²⁸ *De Reneville v De Reneville* [1948] P 100 at 111, CA

²⁹ Halsbury’s Laws of England 4th ed-reissue 29 (3) Matrimonial Law para 399. See also s16 MCA 1973 and Newark, F.H. ‘The operation of nullity decrees’ (1945) 8 *Modern Law Review* pgs 203-218 at pg 204

³⁰ Cretney, S. ‘The Nullity of Marriage Act 1971’ (1972) 35 *Modern Law Review* 1 pgs 57-63 pg 59

³¹ Lowe, N. & Douglas, G. *Bromley’s Family Law* (10th ed) Oxford, Oxford University Press 2007 pg 52

the parties involved, they can only be annulled during the lifetime of the parties, and the decree can be barred in some circumstances.³² The main bars to a decree of nullity in non-consummation cases are outlined in s13 MCA 1973 which holds that a decree won't be granted if the petitioner had prior knowledge of the inability, and led the respondent to believe that a decree would not be sought, or that it would be unjust to grant the decree. A spouse can petition on the basis of their own incapacity to consummate the relationship, but not on the basis of their own wilful refusal.³³ It is for the petitioner "to prove that the incapacity exists. The court has power to order a medical examination, and may draw adverse inferences against a party who refuses to be examined."³⁴ The use of these medical examinations is addressed below.

Voidable marriages are a principle of Canon law. "Although marriage was formed simply by consent, it was an implied term of the contract that the parties had the capacity to consummate it. Physical capacity was thus as much a basic requirement of marriage as the intellectual capacity to consent."³⁵ Traditional Judeo-Christian marriage is stated to unite the couple as 'one flesh'. The most obvious use of this belief is demonstrated in coverture, and the old consortium rules. Coverture declared that husband and wife become one at marriage, and the legally recognised 'one' was the husband. This law operated in England into the nineteenth century, placing women in a subordinate role once married, and declaring that property they brought into the marriage and their personhood become the property of the husband.³⁶ Coverture allowed husbands to "beat their wives, [and]... forbid them from going

³² s13 MCA 1973

³³ *Brown v Brown* (1828) 1 Hagg. Ecc 523

³⁴ Probert op cit n11 pg 48; Cloud op cit n14; Family Procedure Rules http://www.justice.gov.uk/courts/procedure-rules/family/pdf/parts/Web_part_07.pdf (accessed 11/10/12)

³⁵ Probert op cit n11 pg 48

³⁶ *Married Women's Property Act 1870*

to certain places or associating with certain people...”³⁷ Barnett adds that a husband had a ‘right’ to sexual intercourse with his wife, concluding that this served to cement women’s legal subjection under ‘one flesh’. Upon marriage, “the wife impliedly consented to sexual intercourse ‘on demand’ (the converse position did not, of course, pertain). Until 1884, a wife refusing her husband’s sexual demands could find herself imprisoned for such refusal, and the husband could apply for an order of restitution of conjugal rights against his wife.”³⁸

A husband’s ‘right’ to his wife’s body is evident within the case law, with many judges referring to husband’s rights to access his wife’s body. Brook argues that whilst the passing of the *Married Women’s Property Act*³⁹ overturned the worst aspects of coverture, the “logic of coverture has never been entirely extinguished.”⁴⁰ Consortium is a common law doctrine that states that husband and wife are entitled to “the other’s society, assistance, comfort and protection. At one time the right to a spouse’s company was enforceable against a recalcitrant spouse (by means of a decree for restitution of conjugal rights) and against any third party who interfered with the relationships (by claiming damages of enticement, harbouring and adultery),”⁴¹ but these rights were abolished by 1970. The loss of consortium allowed husbands to submit their wives to medical examination and for spouses to be ordered to return home. As with consummation, this is about men’s ownership of women and its diminished use in the courts should be celebrated.

³⁷ Brook op cit n21 pg 69-70

³⁸ Barnett, H., *Introduction to Feminist Jurisprudence* London, Cavendish 1998 pg 61

³⁹ *Married Women’s Property Act 1870*

⁴⁰ Brook op cit n21 pg 69

⁴¹ Masson, J., Bailey-Harris, R., & Probert, R. *Cretney’s Principles of Family Law* (8th ed) London, Sweet and Maxwell 2008 pg 88

A legal requirement for consummation had its most obvious purpose in medieval times. Ryan states “when equality came at a lesser premium, female virginity was highly prized. A new husband, in performing the act of consummation thus rendered her ‘worthless’ to other suitors, symbolically marking out his wife as his ‘property,’ a chattel to cater to his needs.”⁴² Much all of the case law discussed below was decided before the enactment of the current MCA 1973, but well after its medieval purposes were established.

2.4: How is consummation legally defined?

How have judges decided whether or not consummation has occurred? Courts have held that the private sex life of a married couple is open to investigation where the issue of consummation is in doubt.⁴³ Law in general favours certainty and universality, and the case law surrounding non-consummation over the years has attempted to adhere to these characteristics. The remainder of this Chapter demonstrates that although the courts speak of consummation as though it is clearly defined, in fact this is not the case. The following headings demonstrate the key factors judges need to assess in attempting to decide whether or not a marriage has been consummated.

⁴² Ryan op cit n18 pg 34

⁴³ *G v G* (1869-72) L.R. 2 P. & D. 287 at 287

2.4.1: ‘Ordinary and complete.... not... partial and imperfect’⁴⁴ and for the prevention of ‘licentiousness’

Though it is not the first non-consummation case, *D-e v A-g*⁴⁵ provided the most in depth guidance for the criteria judges should prioritise. The case concerned the incapacity of a malformed wife, and a great amount of attention was paid to defining sex in marriage for the purposes of consummation.⁴⁶ The couple were continuing to live as husband and wife, despite not consummating their relationship due to the wife’s malformation, which had been determined incurable by a doctor. Doctors found that sex could occur, but the wife’s vagina was not of normal depth, and she had no uterus. The husband admitted that he had had sex with his wife, but it was imperfect, and resulted in considerable pain on her part.⁴⁷ This case led to a formulation of the legal understanding of consummative/marital sex, which has been referred to in all subsequent cases. Dr Lushington declared that,

sexual intercourse, in the proper meaning of the term, is ordinary and complete intercourse; it does not mean partial and imperfect intercourse; yet, I cannot go to the length of saying that every degree of imperfection would deprive it of its essential character. There must be degrees difficult to deal with; but if so imperfect as scarcely to be natural, I should not hesitate to say that, legally speaking, it is no intercourse at all. I can never think that the true interest of society would be advanced by retaining within the marriage bonds parties driven to such disgusting practices. Certainly it

⁴⁴ *D-e v A-g* op cit n22 at 298

⁴⁵ *Idem*

⁴⁶ This case also affected the transgender community, see Chapter 4 below.

⁴⁷ *B-n v B-n* held that the wife was no longer a virgin, having participated in ‘imperfect’ sex with her husband but was held to be “irremediably incapable of conception.” *B-n v B-n* (1854) 1 Spinks (Ecclesiastical and Admiralty) 248 at 257

would not tend to the prevention of adulterous intercourse, one of the greatest evils to be avoided.⁴⁸

Not only was this ill-defined and unclear formulation adopted in subsequent case law, but further, it was held that consummation was religiously, morally, and socially necessary, for without the power to consummate, “neither of the two principle ends of the matrimony can be attained, namely, a lawful indulgence of the passions to prevent licentiousness, and the procreation of children, according to the evident design of Divine Providence.”⁴⁹ The judgement stated that if a husband were to have a satisfying sexual relationship with his wife, there would be no need or desire to engage in adulterous relationships, and the marriage was nullified. Yet the ‘natural and ordinary’ sex Dr Lushington spoke of was not defined any further; a somewhat ambiguous conception for a social institution which favours certainty.

*B v B*⁵⁰ examined the capacity of ‘artificial’ genitals in achieving this ‘natural ordinary and complete’ intercourse. The husband applied for a decree of nullity on the basis that his wife had undergone an operation to create an artificial vaginal passage of 4-6 inches, and was therefore incapable of consummating their marriage. The wife had physical defects at birth which meant that she had certain male organs which were removed when she was 17, leaving her with no vagina, no menstrual periods and barren. The court record noted that some of her physical appearance was not consistent with ‘a normal female’ but did not expand on what a ‘normal’ woman is, or how the wife in this case differed.⁵¹

⁴⁸ *D-e v. A-g* op cit n22 298

⁴⁹ *Idem*

⁵⁰ *B v B* [1955] P42

⁵¹ *Idem*

It was accepted that the husband was unaware of the full nature of the incapacity, or the necessity for an operation before their marriage ceremony. After the operation, there followed several attempts at consummation. “The husband said that he was unable to penetrate more than two inches, and it was proved that at some stage there was a considerable closure of the passage. The wife alleged that complete, or almost complete, penetration of the passage had been effected.”⁵²

The wife’s counsel referred to Dr Lushington’s opinion in *D-e v. A-g*⁵³ in which he stated that he would not declare a marriage void if he believed that the vagina could undergo surgical intervention, to allow vera copula. Counsel submitted that consummation had occurred in this marriage, and if it had not, it could with surgical intervention, and should therefore not be nullified. *Brown v Brown*⁵⁴ had held that the impediment to consummation had to exist at the time of marriage and be incurable. The husband’s counsel argued that even if the artificial passage could allow for penetration, it would not constitute ‘ordinary and complete’ intercourse. They believed that the facts of *D-e v. A-g*⁵⁵ were not applicable to this case; “The vagina in that case... was a natural one, and the question was whether the natural formation might be lengthened; it was not a wholly artificial channel created by surgery.”⁵⁶

The judge concluded that the husband needed to prove that the marriage had not been consummated, and that the impediment was incurable;

⁵² Ibid at 43

⁵³ *D-e v. A-g* op cit n22

⁵⁴ *Brown v Brown* op cit n33

⁵⁵ *D-e v. A-g* op cit n22

⁵⁶ *B v B* op cit n50 at 44

The main matter to be considered in coming to a conclusion in this case is what amounts to consummation. It is said on behalf of the wife that it is sufficient if it is possible for a husband to have an erection and penetrate into the female body. On the other hand, it is submitted on behalf of the husband that it cannot be said that there is consummation of a marriage where the husband's erection penetrates into an artificial passage which in effect has no relation to the organ which should be there in the wife.⁵⁷

The judge accepted the husband's version of events, concluding that consummation had not occurred. The judge felt that the wife's version was nothing more than "a mere connexion between the parties... and was nothing which could be said to be vera copula or proper coitus between husband and wife."⁵⁸ He continued that even if the consummation described by the wife had occurred, he could not hold it to be consummation as her organ was artificial. As her defect was incurable, she was physically incapable of consummation, thereby confirming the primary importance of 'normal' sexual intercourse.

In the case of *Snowman v Snowman*,⁵⁹ the wife petitioned for nullity on the ground of her husband's incapacity to consummate the marriage, despite the fact that they had suffered two miscarriages. The judgement followed the 'ordinary and complete' principle of *D-e v A-g*.⁶⁰ The evidence of the wife was that "she was willing, that there was no complete penetration but that emission took place ab extra, as the result of which she had a miscarriage."⁶¹ The

⁵⁷ Ibid at 46

⁵⁸ Idem

⁵⁹ *Snowman (Otherwise Bensinger) v Snowman* [1934] P. 186

⁶⁰ *D-e v A-g* op cit n22

⁶¹ *Snowman* op cit n59 at 186

husband did not produce a defence to the petition, and the court doctors found that the wife was a virgin.

This case is important in demonstrating that fertilisation can occur without full penetration, as “semen might have encountered the vagina of the woman and caused a possible pregnancy without penetration or ordinary intercourse as it is properly understood.”⁶² Following *D-e v A-g*, the judge in *Snowman* held that the ‘intercourse’ in this case was unnatural- rendering it incapable of consummative intercourse. This notion of a complete and natural type of sexual intercourse sets a heteronormative requirement.

The case of *W v W*⁶³ also built on the precedent set by *D-e v A-g*.⁶⁴ The wife here petitioned for a decree of nullity on the ground of her husband’s incapacity. Brandon J. declared that consummation was a question of fact. He acknowledged that the emission of seed or the possibility of procreation are not necessary elements for consummation.⁶⁵ The husband was able to penetrate his wife for a short time, but soon after his erection would collapse. The judge decided that “penetration maintained for so short a time, resulting in no emission either inside the wife or outside her, cannot without violation of language be described as ordinary and complete intercourse.”⁶⁶ The marriage was held to be unconsummated and the decree of nullity was awarded on the basis of the husband’s incapacity. These cases demonstrate that consummation appears to often be a matter of inches, and duration, with abstract terms such as ‘nature’ ‘ordinary’ and ‘complete’ utilised, even though emission- which might be held to

⁶² Ibid at 188

⁶³ *W. (Otherwise K) v. W* [1967] 3 All E.R 178

⁶⁴ *D-e v A-g* op cit n22

⁶⁵ *Baxter v. Baxter* [1948] A.C 274 (H.L); Ryan op cit n18 pg 19

⁶⁶ *W. (Otherwise K) v. W* op cit n63

be the ‘completion’ of the act- is rendered unnecessary! Counsels arguments are not contained in the reporting of this case, but I argue that (as in the case law below), it is unlikely that an in depth discussion of female sexuality was undertaken.

2.4.2: Incurability of incapacity and the role of medical men

Medical opinions have often been sought by the courts when there is a claim of incapacity, and failure to submit to medical examination has resulted in presumed impotence, and even contempt of court.⁶⁷ *Brown v Brown*⁶⁸ established that a decree of nullity for non-consummation must be based on impotency or incapacity to consummate; the impediment needs to have existed during the marriage, and needs to be shown to be incurable. The wife in the case of *D-e v A-g*⁶⁹ had already been assessed by a doctor upon her husband’s insistence, but the court also appointed doctors to assess,

whether she is capable of performing the act of generation, and of being carnally known by man, and if she be incapable of performing that act, and of being carnally known by man, whether such her incapacity can be so remedied as to enable her to perform that act, and to be so known.⁷⁰

The absence of a uterus meant that an operation would not remedy the situation. The idea of ‘perfect’ sexual intercourse was reinforced by the doctors in this case who claimed that the sexual intercourse between this couple would “be of a very imperfect character, from the peculiar and unnatural formation of the vagina; it being...an actual cul de sac, and admitting

⁶⁷ *Harrison v Sparrow, falsely called Harrison* (1844) 3 Curteis 1

⁶⁸ *Brown v Brown* op cit n33

⁶⁹ *D-e v. A-g* op cit n22

⁷⁰ *Ibid* at 284

only a very partial insertion of the penis, necessarily restricted to the very limited dimensions of the vagina.”⁷¹ The marriage was nullified on the basis of the wife’s natural and incurable malformation which rendered consummation impossible. The sex that had occurred was deemed “incipient, imperfect, and unnatural”⁷² thereby deeming the wife’s vagina- only 2 inches smaller than would be considered normal- incapable of consummation. Although the wife had been examined by two doctors, the judge requested a report from a third before making his decision. This overreliance on the medical profession is addressed further in Chapter 3. One can only guess whether the judge would have ordered a fourth opinion if the third had not agreed with his views.

The type of sex that those who are ‘incapacitated’ are capable of is deemed so imperfect that women especially, should “be discreet enough to abstain from marriage entirely”⁷³ suggesting that those incapable of sex are not capable of marriage. Some judgements have gone so far as to say that an unconsummated marriage constituted “a severe private injury”⁷⁴ upon the capable party.

In the past, the court would ask that the couple have at least a three year cohabitation, to truly assess the possibility of consummation.⁷⁵ This demand was discriminately applied as demonstrated by the cases of *Welde v Welde*⁷⁶ and *N v M*.⁷⁷ Though separated by a hundred years, these cases have similar facts, both arising from a wife’s petition alleging non-

⁷¹ Ibid at 287

⁷² Ibid at 299

⁷³ *Briggs v Morgan* (1820) 2 Haggard (Consistory) 324 at 326

⁷⁴ Ibid at 327; *Greenstreet, falsely called Cumyns v Cumyns* (1812) 2 Phillimore10 in which the husband wished to ‘atone’ for the injury he had inflicted on his sexually capable wife.

⁷⁵ *B. (Orse S.) v B* [1958] 1 W.L.R 619

⁷⁶ *Welde alias Aston, Mulier v Welde, Virum* (1730) 2 Lee 578

⁷⁷ *N-r, falsely called M-e v M-e* (1853) 2 Rob Ecc 625

consummation on the part of the husband, due to incapacity. In both cases, the courts turned to Canon law, which stated that a couple must cohabit for three years after marriage. If the relationship had not been consummated in that time, and the wife was capable of consummation, then the husband was presumed impotent in the eyes of the law.

Neither of the couples had cohabited for three years. However, the court interpreted the Canon law differently in each case. The judge in *Welde* required the wife to return to her husband and fulfil the 3 years, to prove incapacity. “In *N v M* they concluded that in a similar situation cohabitation of less than three years satisfied the three year requirement.”⁷⁸ In the case of *Welde*, the court decided that in order to grant the decree of nullity sought by the wife, they had to be satisfied that either “the husband was absolutely incapable of consummating the marriage or that the parties had cohabited for a period of three years, that the wife was capable of consummating the marriage during that period and that the marriage had not been consummated.”⁷⁹ Yet in *N v M* the marriage was declared null because the court felt that the two and a half years that the couple had lived together was long enough to overcome any temporary impediment to consummation, had the husband been potent. The three year requirement is “not about the lapse of time alone... but continued facility for consummation.”⁸⁰ The matrimonial home, the shared life and bed, and availability of the female body is the ‘continued facility’ for consummation to occur. In *Welde* the couple had spent much of their marriage apart. The three year requirement in this case was an attempt to extend the ‘facility’ to try and overcome any physical issues that may exist, and to be able to assess their permanence.

⁷⁸ Moran, L.J ‘A Study In The History Of Male Sexuality In Law: Non-Consummation’ (1990) 1 *Law and Critique* 2 pgs 155-171 p 157

⁷⁹ *Idem*

⁸⁰ *N-r, falsely called M-e v M-e* op cit n77 at 637

In the case of *N v M*, both spouses had to submit to medical examination. The husband had tried to counterclaim that there had been no consummation because the wife had a malformed hip joint, making consummation impossible. Doctors had to verify the wife's virginity and hip mobility, before the husband accepted the allegation of impotence. The doctor's examination of the husband found that externally he did not appear to have any defect that would render him impotent. On the part of the wife, the doctor's decided that she was suffering from an "impaired state of health occasioned by distress of mind."⁸¹ This occasioned from the inability to maintain a 'normal' marriage, thereby deeming this wife sensitive and emotional.

The judge examined the medical evidence provided to the court, and felt that clarification was necessary regarding M's impotence. Given that M had no external features indicating impotency, the judge concluded that the doctors' prognosis could only be made based on the fact that the marriage had not been consummated, and therefore M's impotence extended only to his wife. As such, if after cohabitation "a wife is proved to be a virgin capable of consummation, the absence of consummation must necessarily be attributed to the apparent, or non-discoverable, impotence of her husband."⁸²

Sexuality and sexual intercourse are legally constructed as 'natural' when two people live together. A move away from the three year rule is clear in the case of *B v B*.⁸³ The couple in this case had only lived together for seven days. The wife then brought a case for nullity

⁸¹ Ibid at 627

⁸² Ibid at 634-635

⁸³ *B. (Orse S.) v B* op cit n75

based on the husband's impotence. The court had to examine whether or not consummation had occurred, and whether or not seven days was a sufficient period to prove impotence. The husband defended the claim on the ground that the marriage had been consummated on the first night with penetration but no emission. The court's medical evidence found that "the wife was not a virgin, and she admitted having had sexual intercourse with two men before the marriage; the husband was reported to be normally formed and apparently capable."⁸⁴

The judge labelled the husband's description of the marriage as "a little odd."⁸⁵ The husband claimed that he had been drinking on the wedding night, which is why he was able to penetrate his wife, but unable to have an emission. Throughout their first week of marriage, the husband and wife continued to celebrate. The husband continued to drink beer, and made no attempt at intercourse. He claimed that on their last night together (before her trip to Germany), he refrained from making an attempt at sexual intercourse because his wife would be embarking on a long journey the next day. Barnard J. stated that "it is a little odd that if this man, who was obviously in love with this woman, and had married her, realised that a few drinks of beer were likely to upset him in this way, did not abstain from beer in order to have normal sexual relations with his wife."⁸⁶ The wife's assertions were held to be more believable, having stated that her husband was unable to have a normal sexual relationship with her. The judge said that the wife was a "woman with some experience, having had affairs with two other men..." and concluded that the husband's behaviour did "not seem... to be the conduct of a normal man on his honeymoon."⁸⁷ The judge further considered a letter that the wife wrote to the husband describing her disappointment in their marriage, and

⁸⁴ Ibid at 619

⁸⁵ Ibid at 620

⁸⁶ Idem

⁸⁷ Idem

claiming that he had married her under false pretences, as she wanted children, and worried that he would be unable to produce them. Barnard J. claimed that this letter is what you would expect from a wife who had been treated in the way she described. The husband's letter of response did not claim that the marriage had been consummated, as he later claimed in court, but rather told his wife that she must give him a chance, as a week was not long enough to judge impotence.

As regards the duration of the marriage, the ecclesiastical 'trial period' of cohabitation was no longer in force, and the judge argued: "You cannot lay down any particular time. It is a fact, though, to be considered, but the time must depend on the facts of each case."⁸⁸ The judge felt the husband had lied, and tried to make "this beer-drinking an excuse for not having any further sexual intercourse because he realized that, although he might be able to penetrate his wife, he would not be able to have an emission; and I understand from the medical evidence that that is possible."⁸⁹

The wife stated in evidence that whilst dating, they attempted sexual intercourse once, but the husband had again failed to penetrate her, and used the excuse of excessive beer drinking the previous day. The judge concluded that a pattern of behaviour existed with the husband, and that the wife was entitled to a decree on the basis of her husband's incapacity and no amount of time would help the marriage to be consummated.

⁸⁸ Ibid at 622

⁸⁹ Ibid at 622

It would appear that this area of law is clear; there must be a defect that prevents consummation. Yet in the case of *G v G*⁹⁰ a decree was granted despite the legal finding that the wife had no structural defect to prevent consummation. The husband's capacity was not questioned as he was a widower with several children, though this fact alone does not prove that he has the capacity for consummation with this wife. The wife had petitioned for separation on the ground of cruelty, whilst her husband counterclaimed, saying that he was provoked, especially by her refusal to have sexual intercourse with him. The wife submitted to physical examination by two doctors, and had adopted some of the remedies they recommended, but refused others on the ground that she thought they would be harmful to her health. One of the doctors stated he had "examined the petitioner at the request of her husband, and found no malformation or structural defect; but that she was suffering from an excessive sensibility. This condition was generally temporary..."⁹¹ The husband had actively made every effort to induce the wife to submit to the doctors recommendations. The wife's refusal was determined to be incapacity because the doctors believed that without outside aid the couple would never consummate the marriage.

In 1877, a case came to the courts which tested whether it would be acceptable to refuse sexual intercourse within marriage.⁹² The wife in the case refused to have intercourse with her husband. The courts at this time felt that refusal alone could not warrant a decree of nullity, and instead would infer incapacity in order to provide the order. An order was not given in this case, as the husband had not acted in good faith- marrying his wife only to obtain her money, in spite of her 'deformity'. The judge also felt that the three year

⁹⁰ *G v G* op cit n43

⁹¹ *Ibid* at 288

⁹² *S. v A., Otherwise S* (1877-78) L.R. 3 P.D. 72

cohabitation time recommended by law at that time was adequate to “ascertain whether it is a mere coyness on the part of the woman or whether there is any physical incapacity.”⁹³

The case of *M v M*⁹⁴ also dealt with refusal to consummate. The husband brought a petition for nullity, because on his wedding day, his new wife informed him for the first time that she objected to consummating the marriage. The petitioner told her he was happy to wait a few days, and they went through with the ceremony. The marriage however remained unconsummated. The husband was perceived to be ready, willing and able (having undergone a medical examination) to consummate the marriage. The wife, having declined a medical examination, was held to be incapable, and a decree was subsequently granted, thereby demonstrating that refusal to consummate would now constitute grounds for nullity. *S v S*⁹⁵ further confirmed the use of implied incapacity, an early form of ‘wilful refusal’. Here, the wife refused to consummate the marriage. At the time of marriage, the husband agreed that the marriage could remain unconsummated for 6 months to allow the respondent to complete her studies. By the end of the first year of their marriage they had still not consummated the relationship, and it became clear to the wife that she was unable to be the wife he wanted.⁹⁶ He wanted to live a normal married life, with children. However she explained that she was cold by nature, and had no sexual interest. Soon after, the husband petitioned the court. The wife refused to submit to the medical examination, but the husband did, and was found to be capable. The court found that the husband, “had never actually attempted to consummate the marriage, but that was because the respondent had always declined to allow him to do so, and

⁹³ Ibid at 75

⁹⁴ *M. v M. (Otherwise H)* [1906] 22 T.L.R 719

⁹⁵ *S. v S. (Otherwise M)* [1908] 24 T.L.R 253

⁹⁶ Ibid at 253

the Court should in the circumstances infer that the respondent was aware of some physical incapacity on her part which would prevent her doing so.”⁹⁷

The judge issued a decree on the basis that the husband had treated the wife with “every consideration having regard to her conduct, as she evidently did not in the least appreciate her wifely duties... the frigidity on her part amounted to incompetence, and was a physical condition.”⁹⁸ The terminology of ‘wifely duties’ signifies that the Court felt that a woman who consents to marriage, therefore consents to intercourse. *C v C*⁹⁹ also provided a judgement with inferred incapacity, in which the wife told her husband “that she could not love any man as she was too fond of herself... she was averse to consummation of the marriage and absolutely declined to come and live with him, and that he must consider her answer as final.”¹⁰⁰ She was persistent in her refusal, and given her rejection of a court ordered medical examination, the judge inferred incapacity on her part in order to grant the decree of nullity. In the case of *F v P*¹⁰¹ incapacity was again inferred, not just on the basis of the wilful refusal of the wife, but also from her persistent refusal to cohabit with her husband. These two cases demonstrate the expectation of sexual intercourse from a wife, whilst also highlighting the pervasive heteronormative structure of familial relations, requiring a wife to live with her husband.

⁹⁷ Ibid at 254

⁹⁸ Idem

⁹⁹ *C. v C. Otherwise H* [1911] 27 T.L.R 421

¹⁰⁰ Ibid at 421

¹⁰¹ *F. v P.- Otherwise F (Otherwise F)* [1911] 27 T.L.R 429

In the case of *G v G*¹⁰² a medical examination revealed that there were no structural defects in the wife, and the action brought by the husband was deemed a result of “the unreasoning refusal of the wife to permit sexual intercourse.”¹⁰³ No guidance was provided as to what would be considered a ‘reasoned’ refusal to consummate. On the wife’s instigation, the couple agreed to leave the marriage unconsummated for a year or so, (the exact duration being a point of contention between the spouses) as she felt that the spiritual union of a marriage needed to be developed before a physical one. The majority of the judges deemed this an ‘unusual’ view of marriage, and suggested that the husband should have employed some ‘gentle violence’ in his attempts to consummate his marriage! Had he done so, “it would either have resulted in success or would have precipitated a crisis so decided as to have made... [the judges] task a comparatively easy one.”¹⁰⁴ The husband stated that he did not employ violence for his wife was often hysterical and tearful as it was, and he did not wish to aggravate these feelings further. One dissenting judge felt that the wife’s view of marriage was not unnatural, suggesting that the marriage had been rushed into, and the wife was right in wanting to wait before becoming physical with her husband. The arrangement between them indicated that she was willing to have sex with her husband some day, and the judge felt this indicated that this was not a wilful refusal for life. Ultimately, the judges felt sympathy for a husband who was just trying to obtain his rights, and who had shown ‘rare forbearance’ and as such, he was granted the decree.

The case of *S v S*¹⁰⁵ demonstrates the courts prioritisation of incurability. In this case consummation was prevented by a curable defect in the wife, and she remained a virgin

¹⁰² *G v G* [1924] A.C. 349

¹⁰³ *Ibid* at 350

¹⁰⁴ *Ibid* at 357

¹⁰⁵ *S v S (Otherwise C)* [1956] P 1

throughout her 4 year marriage. The husband brought a petition for nullity, based on incapacity and wilful refusal, and the wife counter-claimed, alleging adultery on his part. The wife did not consult a doctor until after the petition, despite her husband's requests.

The wife stated that she was willing to undergo the necessary operation to make herself capable of consummation. Though anxious, she had attempted sexual intercourse with her husband many times. It was determined that consummation had not occurred due to a structural defect in her. Before the petition was brought, the wife had left her husband. For his part, the husband admitted his adultery, and that he had had a child with the other woman. The case was adjourned and during that time the wife underwent a hymenectomy, removing any impediment to consummation, before further argument was heard. Counsel for the husband argued that the judge should look at the date of the petition, when the wife was still incapable, and contended that the operation was a tactical move on the part of the wife, not for the purpose of consummating her marriage. She could not be deemed curable at the date of the petition because she had up to that point refused to seek medical advice.

The judge held the key date for incapacity was the date that the evidence is heard. In this case, the operation had rendered the wife capable of consummation, and it "could not be said that the consummation of marriage had been practically impossible at the date when the evidence was heard. It might in the circumstances have been improbable; but the impractical and the improbable should not be confused."¹⁰⁶ The court's concern was not the structural defect, but the possibility of consummation. The judge argued that if the husband were to return to his wife, it was unlikely that she would refuse to consummate the relationship.

¹⁰⁶ Ibid at 2

Rather, the fact that the husband had left the wife was the main preventative factor in consummation occurring, and so the petition failed on the incapacity claim.

As concerns wilful refusal, the judge felt that although the wife had not been to see a doctor, the husband had failed to prove that this amounted to refusal. The court felt that “her conduct had been more consistent with a state of indecision.”¹⁰⁷ Neglect in complying with her husband’s requests was not necessarily the same as refusal. The judge therefore found that the claim also failed on the claim of wilful refusal. Further the judge stated that a petition on both claims could not be brought; a single cause must be established. In spite of this, where discrepancies existed between the couple’s evidence, the husband “was considered to be a more reliable and convincing witness”¹⁰⁸ and his testimony was preferred. The wife was eventually granted a divorce on the basis of her husband’s admitted adultery.

*S.Y v S.Y*¹⁰⁹ dealt with similar issues, attempting to assess the ‘impact’ of a cure to incapacity. The wife was incapable of consummation, but was willing to undergo the necessary corrective surgery. The husband argued that the surgery would create an ‘artificial vagina’ not capable of consummation. The Court of Appeal held that the wife had a natural, but abnormal vagina in its current form.¹¹⁰ If she were to undergo the recommended surgery, the doctors and court felt that she would be capable of consummative sex. Despite medical evidence of a potential cure, the husband left his wife and initiated the petition. There was

¹⁰⁷ *Idem*

¹⁰⁸ *Ibid* at 3

¹⁰⁹ *S.Y v S.Y (Orse W.)* [1963] P. 37

¹¹⁰ ‘Artificial’ vaginas are further addressed in Chapter 4 below, in the context of transsexual’s ability to consummate.

some discussion in this case as to the degree to which the act would be 'enjoyed' by both spouses. It was suggested that the husband's satisfaction,

would be limited by the fact that the woman was deriving little if any pleasure from it, but again the [medical] consultant took the view that, although probably the woman would not have quite the same satisfaction as she would do if she was normal and had an ordinary vagina, she would get pleasurable sensations which would in turn communicate themselves to the husband... if the operation had been successful, [the husband would] have been able to obtain real sexual satisfaction from it.¹¹¹

Consummation is not judged by someone's level of 'enjoyment,' rather the test for consummation is whether the husband "substantially penetrates the vagina provided by nature for that purpose."¹¹² Further, the wife's potential enjoyment is discussed only in reference to enhancing her husband's enjoyment, rather than in acknowledging her own right to sexual enjoyment, whether this 'communicates' itself to her husband or not. The judges also emphasised the geography of the body. The fact that the 'artificial' vagina was anatomically correct meant that the sex could be considered 'normal'. The court also considered the fact that if the vagina was deemed incapable of consummation, it must also by extension, be deemed incapable for the purposes of adultery or rape, which would create a strange situation. Consequently, the judges held that an artificial vagina was capable of consummation, and the husband's claim failed.

¹¹¹ *S.Y v S.Y (Orse W.)* op cit n109 at 42

¹¹² *Ibid* at 48

In 1908, the courts discussed for the first time, whether someone could apply for a decree on the basis of their own incapacity. The wife's claim in *G v G*¹¹³ was predicated on her husband's incapacity. Medical evidence was presented to the court "to the effect that both parties were apparently competent, but that the generative organs of the husband were unusually large, whilst those of the wife were somewhat small."¹¹⁴ It was found that the wife refused to undergo a small operation to ease the situation. The court at first instance found that the marriage had not been consummated, but stressed that there was not a general incompetence on the part of the husband, but rather incompetence specific to the wife.

Prior to this case, an impotent person could not bring a suit on the basis of their own incompetence. The judges in this case felt that they should follow the direction of Irish courts in this matter, and allow a suit to be brought by the impotent spouse, but this discretion should be exercised carefully.¹¹⁵ The appeal court found the marriage to be unconsummated, but reiterated that "this implied no reflection on either party, as each could no doubt contract marriage with another person."¹¹⁶ The court cannot order the wife to have the operation, and felt there would be no benefit in compelling this couple to continue living together. The Court of Appeal upheld the decree, in a modified form that would avoid any reflection upon the capacity of the husband.

In the case of *Harthan*,¹¹⁷ a husband petitioned on the basis of his own incapacity after 22 years of marriage. The husband was entitled to claim his own incapacity because he "did not

¹¹³ *G. v G. falsely called K* [1908] 25 T.L.R 328

¹¹⁴ *Ibid* at 328

¹¹⁵ The Irish case to which the Court referred is *A. v A.* 19 L.R.Ir 403

¹¹⁶ *G. v G. falsely called K* op cit n113 at 329

¹¹⁷ *Harthan v. Harthan* [1949] P. 115

know of the defect until after the date of the marriage ceremony, he had not deceived the wife, the wife did not know of the defect until after that date, and there was no other reason why he should be debarred from suing.”¹¹⁸ If a party knows of his incapacity, or of his partner’s incapacity before the marriage, he cannot then rely on that fact to nullify the marriage.

Medical examination established the husband’s psychological incapacity. It was stated that he could perhaps be cured if he persevered, but after such a long time, his wife was unwilling. Given this, the husband tried to bring a claim of wilful refusal on the part of his wife. This was dismissed by the Court of Appeal. Returning to the ability of a party to make a claim on the basis of their own incapacity, the judges held that ecclesiastical law allowed for this through a natural development from Roman Catholic views of marriage.¹¹⁹ As it turned out, the couple in this case were granted a divorce between the hearing of this case at first instance and at the Court of Appeal. The discussion at this point was as to whether or not a person could bring a claim based upon their own incapacity, and the court found that as long as there was no deception, a case could be brought.

2.4.3: Persistent and unreasonable refusal

Some of the cases discussed have shown the ways in which incapacity used to be inferred from wilful refusal. After wilful refusal became a ground upon which one could apply for a

¹¹⁸ *Idem*

¹¹⁹ *Harthan v. Harthan* op cit n117 at 120-121. In effect, the judges had to ponder whether there is an implied element of the marriage vows that each party is capable and willing to consummate.

declaration of nullity, judges had new factors to look for in non-consummation cases.¹²⁰ This widening scope for legal interpretation of non-consummation is a daunting development. Instead of saying that a partner has the right to refuse sex in a marriage, the law has further instilled the requirement of sexual intercourse between married couples. This change could be seen as a shift from viewing an ‘incapable’ wife as unfortunate, to viewing one who refuses sex as ‘abnormal’ and not performing the duties of a wife, further reinforcing the notion of woman as wife, mother, and sexual recipient.

Religious couples have featured in nullity cases. In the case of *Jodla v Jodla*¹²¹ a Roman Catholic couple did not intend to have ‘matrimonial relations’ until a religious marriage ceremony had been conducted after their marriage at the registry office. The husband had promised to arrange the religious ceremony, but failed to do so. Both parties brought proceedings for a decree of nullity on the ground of the other’s wilful refusal. The Court found that the husband’s wilful refusal to arrange the religious ceremony excused the wife’s refusal to have sexual intercourse with him. Her request for a religious ceremony equated to a request for sex in her marriage, and the husband’s refusal was without just cause, thereby entitling her to a decree.¹²² In his judgement, Hewson J. painted an interesting picture of sexual requirements in marriage, referring to consummation, and marital sex as the husband’s ‘marital right’. Further, the judge claimed that had consummation taken place, then the couple could live together “as husband and wife in the fullest sense.”¹²³ This suggests that a

¹²⁰ Wilful refusal was defined in *Horton v Horton* [1947] 2 All ER 871

¹²¹ *Jodla v. Jodla (Otherwise Zarnonska)* [1960] 1 W.L.R 236

¹²² *Idem*

¹²³ *Ibid* at 239

‘full’ marriage must contain a sexual element. The judge held that the wife’s request for a religious ceremony showed that she wished to “live wholly as husband and wife”.¹²⁴

The Court of Appeal case *Kaur v Singh*¹²⁵ also had similar facts, and involved a marriage between two Sikhs which required a religious ceremony after the civil ceremony. The Sikh religion requires the husband to organise the religious ceremony, necessary to commence marital cohabitation, but the husband in this case refused to fulfil this duty. Given this situation, the couple had not lived together, or even seen each other, since their civil ceremony. The wife made a petition for nullity on the basis of her husband’s wilful refusal, and at first instance, the wife’s petition was dismissed.

The wife’s family implored the husband to arrange the ceremony, but he eventually revealed that he had no intention of arranging the religious ceremony. “The facts were that he never went near her again, and never tried to persuade her to live with him and have intercourse with him. It may very well be true that, if he had made any such approach, she, according to her religious beliefs, might have said that she was unwilling to allow it before the ceremony. But that never happened.”¹²⁶ Davies L.J. believed this case was indistinguishable from *Jodla*,¹²⁷ and therefore the wife was entitled to a decree based on her husband’s wilful refusal to consummate the relationship, through his failure to ensure the completion of the marriage ceremony according to Sikh traditions.

¹²⁴ *Idem*

¹²⁵ *Kaur v Singh* [1972] 1 W.L.R 105

¹²⁶ *Ibid* at 108

¹²⁷ *Jodla v. Jodla (Otherwise Zarnonska)* op cit n121

*Dickinson v Dickinson*¹²⁸ was a case brought by the husband requesting a decree of nullity on the basis of his wife's wilful and persistent refusal to consummate the marriage despite his repeated attempts. The wife refused sex because she did not want children, and felt intercourse was "unnecessary, vulgar, rude and disgusting: and that many of her married friends lived without such intercourse, and she wished to do the same."¹²⁹ After a month, the husband had a nervous breakdown, and drank excessively. The doctor who attended to him attributed this to the strain he was under as a result of his wife's conduct. The wife did not submit to the court's order for a physical examination. The husband did submit to examination, and the doctors declared him normal in every way.

The husband's counsel asked the judge to find that the wife had a physical incapacity making consummation impossible but the judge refused as he had no evidence for this. Sir Samuel Evans, President, argued that the law on the area of nullity had "been advanced on various points by the instrumentality of judicial decisions, so as to be brought into conformity with more modern ideas."¹³⁰ The change that the judge refers to is the move from the insistence on incapacity, to the provision of relief for cases "where there have scarcely been any circumstances beyond a mere wilful refusal."¹³¹ Given this change, Sir Evans asked "is there any good reason why it should not now be held that a mere wilful refusal... to consummate the marriage is a sufficient ground for the Court to grant a decree of nullity?"¹³²

¹²⁸ *Dickinson v Dickinson (Otherwise Phillips)* (1913) P. 198

¹²⁹ *Ibid* at 200

¹³⁰ *Ibid* at 203

¹³¹ *Ibid* at 204

¹³² *Ibid* at 205

He continued that claims need to be brought in good faith, and the refusal must not be based on a temporary unwillingness that may be cured, but instead needs to be a persistent and determined “refusal to perform the obligations and to carry out the duties which the matrimonial contract involves. It has always been held that the contract of marriage implies the ability to consummate it...it also implies the willingness to consummate it.”¹³³

The husband was granted the decree, for “unless by brute force the husband obliged the wife to submit, the intercourse is practically impossible where the wife acts as she has done in this case...”¹³⁴ Sir Evans found it unpalatable to declare the marriage void on the basis of incapacity that has been unproved, as both the husband and wife could move on to other relationships which could be consummated and result in children. He refused to draw any inference of physical incapacity, and preferred to make the decree for nullity on the basis of the wife’s wilful refusal. This was effectively a refusal to procreate, and a declaration of disinterest in sexual intercourse. Whilst I argue that there is a consummation *requirement*, the inability to fulfil this requirement only comes to light if an action is brought. There are undoubtedly many couples who are not sexually active with each other. Though the marriage contract may imply a willingness and ability to consummate, it does not imply a willingness or ability to procreate.

The case of *Napier v Napier*¹³⁵ was heard in the Court of Appeal. The decision at first instance had overruled that of *Dickinson*,¹³⁶ claiming that it was not “justified in principle or

¹³³ Ibid at 204-205

¹³⁴ Ibid at 207

¹³⁵ *Napier v Napier (Otherwise Goodban)* [1915] P. 184

¹³⁶ *Dickinson v Dickinson (Otherwise Phillips)* op cit n128

by...authorities”¹³⁷ to nullify a marriage on the basis that wilful and persistent refusal to allow marital intercourse is of itself a sufficient ground. At first instance, the judge believed that the issue was not one of wilful and persistent refusal on the part of the wife, but rather that the husband had failed to make any reasonable or real attempts to consummate the relationship and therefore dismissed the husband’s claim.

The husband produced extra information to the Court of Appeal to demonstrate that the refusal of his wife had been persistent and wilful. The husband’s counsel argued that “a decree for restitution of conjugal rights would do...[the husband] no good.”¹³⁸ Lord Cozens-Hardy M.R. felt it important in his judgement to point out that he was bound to give an opinion which conformed to that of the Ecclesiastical Courts, which “did not dissolve a marriage. They only declared that there had been no marriage at all.”¹³⁹ Even with the additional evidence presented to the court, he felt that the decision of first instance should be upheld. There was discussion of inferring incapacity on the wife’s part, but the evidence did not support this.

The husband wanted the judges to follow the precedent set in *Dickinson*¹⁴⁰ where refusal was held to justify a decree. Pickford L.J held that “the Ecclesiastical Courts never accepted non-consummation as a ground for nullity unless it could be referred to impotence or incapacity existing at the time of the marriage. The amount and nature of the evidence necessary to prove such incapacity have varied from time to time, but the necessity of establishing it has

¹³⁷ *Napier v Napier (Otherwise Goodban)* op cit n135 at 184

¹³⁸ *Ibid* at 185

¹³⁹ *Ibid* at 186

¹⁴⁰ *Dickinson v Dickinson (Otherwise Phillips)* op cit n128

never varied.”¹⁴¹ Pickford L.J continued that he believed *Dickinson*¹⁴² was incorrectly decided and that courts cannot extend the meanings outlined in statutes. As such, the claim was again dismissed in the Court of Appeal, because the judges felt they could not extend existing legislation to nullify marriages on the basis of wilful refusal.

The House of Lords case *Horton v Horton*¹⁴³ held that the husband had failed to prove wilful refusal on the part of his wife to consummate the marriage. After their marriage the couple lived with the wife’s parents, and decided not to have children until they had a home of their own. As they disagreed with contraceptives, they refrained from having intercourse. Only one attempt was made to consummate the marriage, and this failed as the husband was unable to penetrate his wife, and further discussion of consummating the relationship was met with unhappiness on the part of the wife. The court examined a letter written by the wife to her husband, in which she stated she had to ask for sex, which she felt was unfair, as a married woman, she felt sexual intercourse was her right, and should be instigated by her husband. The tenor of this case appears to reinforce the view that sexual activity in a marriage is to be initiated by the husband, with the wife as the submissive party, whilst also raising the argument of women’s sexual desire.

In effect, the couple had gone from a state where the husband was unable and unwilling to consummate, to a situation where he wished to consummate, but the wife was no longer agreeable. As far as he was concerned, non-consummation was now the result of his wife’s refusal. His counsel argued that “whatever may have been the earlier history of the marriage

¹⁴¹ *Napier v Napier (Otherwise Goodban)* op cit n135 at 190

¹⁴² *Dickinson v Dickinson (Otherwise Phillips)* op cit n128

¹⁴³ *Horton v Horton* op cit n120

and whichever of the spouses may have been responsible for the non-consummation during that time, it was indisputable that at the later stage it was the wife who was unwilling to consummate.”¹⁴⁴

The House of Lords felt that ‘wilful refusal’ connoted “a settled and definite decision come to without just excuse, and, in determining whether there has been such a refusal, the judge should have regard to the whole history of the marriage.”¹⁴⁵ After a failed attempt at consummation, it was unsurprising that the couple would be anxious about trying again. Yet the wife consulted with her parents and her church to try and remedy the situation. The court held that it was unreasonable for the husband to refuse consummation, when his wife was willing to, and then turn around and demand consummation of his wife. Her resistance would be an effect of her husband’s previous rejection.

2.4.4: Use of contraceptives/ability to reproduce

The use of contraceptives has been discussed in many cases and charts the path from contraception preventing consummation, to contraception now no longer being a bar to consummation. In *Cowen v Cowen*¹⁴⁶ the couple lived abroad, and had agreed that until local medical conditions improved, they would use contraception to prevent pregnancy. Upon improvement, the wife asked her husband to cease using protection so that they could have a child. He constantly refused to do this, and where there was no contraception, practised coitus interruptus. Upon leaving her husband, the wife claimed that the marriage had never been consummated.

¹⁴⁴ Ibid at 874

¹⁴⁵ Idem

¹⁴⁶ *Cowen v Cowen* [1946] P. 36

At first instance the case was dismissed and it was held the marriage had been consummated. At the Court of Appeal, Church doctrine holding procreation as fundamental in marriage was discussed. The judge found that the husband's wilful refusal to consummate the marriage rendered it void. The judge at first instance held that the only question at hand was whether or not penetration had taken place, and the use of contraceptive was not a barrier to consummation. However, the Court of Appeal were of the opinion that;

sexual intercourse cannot be said to be complete when a husband deliberately discontinues the act of intercourse before it has reached its natural termination, or when he artificially prevents that natural termination, which is the passage of the male seed into the body of the woman. To hold otherwise would be to affirm that a marriage is consummated by an act so performed that one of the principle ends, if not the principal end, of marriage is intentionally frustrated.¹⁴⁷

Yet there are those who are sterile, and would also be incapable of fulfilling this requirement. The Court circumvented this complication by stating that there are "obvious reasons of a religious and social character why sterility should not of itself be a sufficient reason for a decree of nullity,"¹⁴⁸ but provided no indication as to what the 'obvious reasons' were.

¹⁴⁷ Ibid at 40

¹⁴⁸ Idem

In *Baxter v Baxter*¹⁴⁹, following a ten year marriage, the husband left his wife, and wanted a decree of nullity on the basis of her wilful refusal to consummate. For the entirety of the marriage the wife would only have intercourse with her husband if he wore a condom. The husband expressed his objections and desire “to have intercourse in the natural way”¹⁵⁰ but complied with his wife’s wishes, believing that he would otherwise be denied sex. The House of Lords held that consummation had occurred even though contraception was used, overruling the *Cowen* precedent.

In *Baxter*, the husband complained that the absence of complete intercourse prevented procreation, and was therefore not acceptable to him, or any church.

The Christian institution of marriage according to the Book of Common Prayer, exists (a) for the procreation of children; (b) for a remedy against sin, and (c) for mutual society, help and comfort. This draws a careful distinction between pleasure and procreation as ends of marriage. Marriage is not consummated by an act designed merely to satisfy carnal lust while avoiding the possible consequence of procreation.¹⁵¹

It was argued that the husband’s acquiescence in the use of a condom was not a voluntary act. When given the option of no sex, or sex with a condom, acquiescence to ‘unnatural’ sex cannot be a voluntary decision on the part of a man. The husband’s counsel claimed that the husband adopted the *only reasonable* course open to him: “to woo her and use the contraceptive in the hope that she would be won over to his outlook on marital happiness

¹⁴⁹ *Baxter v. Baxter* op cit n65

¹⁵⁰ Ibid at 275

¹⁵¹ Ibid at 276

which comes with the possession of children.”¹⁵² However, the case was dismissed, “after all, the defining features of *vera copula* (erection, penetration, and ejaculation) were present and correct. Thus, there is no need for “consummative” sex to be procreative.”¹⁵³ Whilst this case could be seen to be progressive, in that it does not require procreation, it took the House of Lords to make this declaration. The lower Courts had found the husband was an author of his *own wrong* (it being ‘wrong’ to have to have intercourse with contraception), by acquiescing to his wife’s insistence upon condoms. Further, although it was finally held that consummation could occur without the possibility of procreation, a marriage from which children will be born is still the norm. There was no discussion in the decision about the right of the wife to choose not to have children. Preference was given to the fact that the intercourse that had taken place was as close as possible to ‘ordinary and complete,’ with the use of contraceptives.

*Grimes v Grimes*¹⁵⁴ also dealt with the use of contraception and the husband’s insistence upon coitus interruptus. The wife’s counsel tried to distinguish this case from *Baxter*¹⁵⁵ (decided in the same year), on the basis that sexual intercourse cannot be complete or natural when coitus interruptus is practiced. They felt that *Cowen*¹⁵⁶ still applied, and that sexual intercourse cannot be complete before it has reached its ‘natural termination.’ *D-e v. A-g*¹⁵⁷ suggested that any form of imperfect sexual intercourse would lead a husband to seek an adulterous relationship. It could therefore be inferred that coitus interruptus could lead the wife to search for an adulterous relationship.

¹⁵² *Idem*

¹⁵³ Brook op cit n21 pg 55

¹⁵⁴ *Grimes (Otherwise Edwards) v Grimes* [1948] P. 323

¹⁵⁵ *Baxter v. Baxter* op cit n65

¹⁵⁶ *Cowen v Cowen* op cit n146

¹⁵⁷ *D-e v. A-g (falsely calling herself D-e)* op cit n22

The couple had always practised coitus interruptus, so that “when there was intercourse between these two people the husband always withdrew before emission.”¹⁵⁸ The wife was unhappy with this arrangement as she wanted to have children, but her husband did not. The court tried to interpret the new ground of ‘wilful refusal’, holding that “under the new law, if the man, although he is able to perform those functions, wilfully refuses to perform them he is not performing the normal and full act of intercourse and therefore that he is not consummating the marriage.”¹⁵⁹

Reference was made to Dr Lushington’s statement that there are two different types of non-consummation; non-consummation by those that are capable of sex, but not of procreation, and non-consummation by those who are incapable of consummation in its natural sense.¹⁶⁰ In the case of those who are unable to conceive, he would not declare these marriages void, but would declare the marriage with the ‘imperfect’ sexual intercourse void. “If...[these]... principles are applied to the facts of this case... it is right to say that there was never any natural or complete intercourse in the present case,”¹⁶¹ and the wife was entitled to a declaration of nullity.

*White v White*¹⁶² also dealt with coitus interruptus. The wife petitioned for nullity on the basis that this practice prevented consummation because the sexual act had never been completed inside her body. In the alternative, she made a claim for divorce on the basis of cruelty. The

¹⁵⁸ *Grimes (Otherwise Edwards) v Grimes* op cit n154 at 324

¹⁵⁹ *Ibid* at 326

¹⁶⁰ *D-e v. A-g (falsely calling herself D-e)* op cit n22

¹⁶¹ *Grimes (Otherwise Edwards) v Grimes* op cit n154 at 328

¹⁶² *White (Otherwise Berry) v White* [1948] P. 330

wife had explained to her husband that she was unhappy with the practice of coitus interruptus, and wanted to have children, but he did not share her views. In anticipation of her claim failing, the wife added the alternative petition of cruelty, claiming; “the respondent has treated the petitioner with great unkindness and cruelty in that... he deliberately insisted on the practice of coitus interruptus in his sexual relations with her despite her protests and with a full knowledge that his persistence in such practice would and in fact did cause injury to her health.”¹⁶³ The husband denied the allegations made in his wife’s petition. He contended that he sometimes practiced coitus interruptus, but also sometimes engaged in full intercourse. Willmer J. did not believe the husband. The husband’s counsel argued that coitus interruptus should constitute consummation, because intercourse capable of being consummative does not need to result in procreation. Further, they argued that coitus interruptus “does not necessarily avoid the possibility of procreation where the spouses are normal, so that should coitus interruptus be held to be a ground for nullity, there might be children born of a marriage declared void for lack of consummation.”¹⁶⁴

The judge held that the husband’s denial of children was having an impact on the wife’s mental health, and the denial of this could cause injury. She had never had any satisfaction from the sexual side of her marriage, yet the judgement focused upon her inability to have children due to her husband’s refusal. The doctor’s had explained to the husband that his behaviour needed to change, and had led to the wife’s altered mental health. The doctor concluded that if the husband was unwilling/unable to change his behaviour, then the best option available to the wife would be to separate from him. After interviews with doctors, it became apparent that the husband was unwilling to co-operate with any changes.

¹⁶³ Ibid at 331

¹⁶⁴ Ibid at 331-332

The judge had two questions to answer. First, did the facts and the practice of coitus interruptus mean that the marriage had not been consummated? If he answered this question in the affirmative, then the marriage could be nullified. However if he found that the marriage had been consummated, did the facts presented constitute cruelty, thereby entitling the wife to a divorce? The decision in *Grimes*¹⁶⁵ was delivered only two days before the judgement in this case. However Willmer J. felt unable to follow the decision set out in *Grimes*¹⁶⁶ and felt compelled to follow the reasoning of *Baxter*.¹⁶⁷ Willmer J. continued, “I regret very much that, within two days, there should be contrary decisions on what appears to be the same point, but it only goes to emphasize... that this is an extremely difficult point which will at some stage have to be decided by a higher tribunal.”¹⁶⁸

The judge in this case felt unable to give a decree for nullity. The possibility of conception, even whilst practicing coitus interruptus was high enough so that to declare the marriage void would result in a very curious situation whereby a child would exist from a marriage declared void due to non-consummation. Instead, the key element to examine was the extent and meaning of vera copula ie: the conjunction of bodies. In this case, erection and penetration had clearly been achieved. Yet the wife contended that if there had been no emission, vera copula was not complete. Willmer J. explained that “true conjunction” of the bodies had occurred, and that what followed “goes merely to the likelihood or otherwise of conception.”¹⁶⁹ In quick succession, the cases of *Baxter* and *White* had declared that consummation had still occurred with the use of contraceptives, and the practice of coitus

¹⁶⁵ *Grimes (Otherwise Edwards) v Grimes* op cit n154

¹⁶⁶ *Idem*

¹⁶⁷ *Baxter v. Baxter* op cit n65

¹⁶⁸ *White (Otherwise Berry) v White* op cit n162 at 335

¹⁶⁹ *Ibid* at 338

interruptus. This could suggest a move to include as many definitions as possible within the meaning of consummation. This could be considered detrimental to women. It narrows the scope of their own nullity claims, and could reinforce the requirement of sex from wives. Further, these two practices are not so far removed from the aims of consummation as they may first seem. The use of contraceptives may prevent conception, but still allows for 'ordinary' sexual intercourse. The appearance of normalcy has been prioritised here. As regards coitus interruptus, the mere possibility of conception means that it is in fact similar to the previous understanding of consummation.

Moving to the issue of cruelty, Willmer J. found this was the proper place to examine 'imperfect' intercourse, be it the use of contraceptives or coitus interruptus, and consequently made a finding for dissolution on the ground of cruelty (as opposed to a finding of non-consummation), as the husband's conduct had obvious effects on the wife's health. The judge stated that coitus interruptus would not always result in a dissolution based on cruelty. Rather, it was the particular nervous disposition of the wife in this case, and her desire to reproduce that had made coitus interruptus so damaging:

I feel that a husband must take his wife as he finds her, and if she is a woman of a type who needs the full and natural completion of the act, then to persist in withholding it from her, in the face of her repeated complaints and objections, is in itself an act of cruelty, of cold calculated cruelty; and if, as in this case, it does result in serious injury to health, or does contribute

in marked degree to the breakdown of health of the other spouse, then in my judgement it is only right that this court should give relief.¹⁷⁰

In *Cackett v Cackett*¹⁷¹ the husband also insisted on coitus interruptus for the duration of his 12 year marriage, and against the wishes of his wife. The husband was capable of emission, and was aware that the practice resulted in deterioration of his wife's health, but continued as he did not want children. When asked if he would have normal intercourse with the aid of contraceptives, he responded that he did not trust them fully, and would not alter his behaviour. Finally, the wife left her husband after advice from her doctor following the deterioration in her health.

The judge pointed out two issues to the wife's counsel: first, what constitutes natural and complete intercourse? Counsel answered that the meaning of consummation is that which is understood in common usage, and for the male, requiring erection, penetration and emission. The judge found that "it is impossible to determine exactly where normal intercourse begins and ends; there could be no legal standard laid down which would define a matter of that kind."¹⁷² Yet the case law highlighted thus far demonstrates the courts attempts to define normal, complete sexual intercourse since *D-e v A-g*.¹⁷³ The second issue discussed, but left unanswered was the difficulty that arose if a court had to consider the precise point at which emission took place. Hodson J stated that it is impossible to define what amounts to normal intercourse. For "where a woman alleged that the man had failed to complete the sexual act, the court would have to inquire exactly at what stage emission took place, or to what degree

¹⁷⁰ Ibid at 340

¹⁷¹ *Cackett (Orse Trice) v Cackett* [1950] P. 253

¹⁷² Ibid at 259

¹⁷³ *D-e v A-g (falsely calling herself D-e)* op cit n22

of satisfaction was reached by the woman...[There are]... difficulties in... trying to draw the line between a complete act and an incomplete act.”¹⁷⁴

This case was heard by the court after the two contradictory decisions of *Grimes*¹⁷⁵ and *White*¹⁷⁶ and the judge here expressed his inclination to follow the precedent set by *White*.¹⁷⁷ The above cases show that in *Cowen*¹⁷⁸ coitus interruptus rendered sexual intercourse incomplete. However, that case also held that the use of contraceptives would also ensure non-consummation. This was overruled in *Baxter*¹⁷⁹ in which contraceptives did not prevent consummation. The cases of *Grimes*¹⁸⁰ and *White*¹⁸¹ had only served to further cloud the waters in this area. The judge however examined all the preceding judgements before coming to the conclusion that a decree of nullity could not be made but found that the wife was entitled to a decree of divorce based on her husband’s cruelty, following the precedents of *Baxter*¹⁸² and *White*.¹⁸³ He found the husband’s insistence on continuing with a practice his wife had protested, and which injured her health, demonstrated her husband’s cruelty.

Dr Lushington in *D-e* argued that a husband must “submit to the misfortune”¹⁸⁴ of a barren wife. However, a husband should not have to endure a relationship where there is no “natural indulgence of natural desire.”¹⁸⁵ This would indicate that women should preferably be

¹⁷⁴ *Cackett (Orse Trice) v Cackett* op cit n171 at 258-259

¹⁷⁵ *Grimes (Otherwise Edwards) v Grimes* op cit n154

¹⁷⁶ *White (Otherwise Berry) v White* op cit n162

¹⁷⁷ *Idem*

¹⁷⁸ *Cowen v Cowen* op cit n146

¹⁷⁹ *Baxter v. Baxter* op cit n65

¹⁸⁰ *Grimes (Otherwise Edwards) v Grimes* op cit n154

¹⁸¹ *White (Otherwise Berry) v White* op cit n162

¹⁸² *Baxter v. Baxter* op cit n65

¹⁸³ *White (Otherwise Berry) v White* op cit n162

¹⁸⁴ *D-e v. A-g (falsely calling herself D-e)* op cit n22 at 299

¹⁸⁵ *Idem*

capable of procreation, but if not, there should at least be sex. There is talk of a husband's 'right' to sexual intercourse, but there is no such use of language in cases in which the husband is unable or unwilling.

The ability to reproduce was interestingly examined in the case of *Clarke v Clarke*.¹⁸⁶ This case decided that the marriage was null on the basis of non-consummation, despite the couple having a biological child together. The case was originally brought by the wife who asked for a divorce based on her husband's adultery. To avoid this charge, the husband made a counter-petition claiming that the marriage had never been consummated owing to his wife's incapacity.

Four years after their marriage, the wife gave birth to their son who was aged twelve at the date of the hearing. The husband admitted to having sexual intercourse with another woman several times, but held that it could not be said to be adultery, as his marriage had never been consummated. The judge stated that the question of whether or not the marriage was consummated during the fourteen years of cohabitation was one of fact. In cases where there was a child, the presumption would be that consummation had occurred, and the "onus of satisfying the court that the marriage has not been consummated lies heavily upon the husband."¹⁸⁷

Both spouses were medically examined. The court did not extensively examine the possibility of 'fecundation *ab extra*' (pregnancy that occurs in the absence of penile penetration) but

¹⁸⁶ *Clarke (Otherwise Talbott) v Clarke* [1943] 2 All ER 540

¹⁸⁷ *Ibid* at 541

rather accepted it as a medical fact. Therefore, the birth of the child did not indicate consummation in and of itself. For the first three years of their marriage, the couple used a sheath when attempting intercourse, but penetration was never achieved. The husband claimed that “his wife appeared to regard the sexual act as a disagreeable necessity,”¹⁸⁸ and she only fell pregnant when the sheath broke.

After the birth of their son, their attempts at penetration continued to fail. The wife’s account differed, for she claimed she did not insist on the use of a sheath, had no objection to having children and believed that some penetration had been achieved. However, the judge found Mrs Clarke an unsatisfactory witness. He felt she was evasive about matters that “she cannot possibly have forgotten.”¹⁸⁹ Most disturbingly, the judge said;

Mrs Clarke was, in my view, a woman who was devoid of the ordinary sexual instinct: she did not want children, and regarded the sexual act with repugnance. At the same time, she recognised that her husband was entitled to exercise his marital rights and was prepared, at any rate during the first years of her married life, to submit, in so far as she was physically able to do so, to the exercise by her husband of such rights. Inasmuch as any attempt by her husband to have intercourse was repugnant to her, she did not, in my view, even during the first few years after marriage, permit her husband to attempt intercourse as frequently as would have been the case if she had a more normal outlook in such matters.¹⁹⁰

¹⁸⁸ Idem

¹⁸⁹ Ibid at 543

¹⁹⁰ Idem

It was held that there were no physical barriers to consummation on the wife's part, though she suffered from involuntary contractions, thereby physically blocking consummation. There was some claim that prior to the birth of her son the vaginal orifice was small, but this was not a barrier to consummation after the birth of the child. Both the examining doctors held that the wife was frigid. One of the doctors called on, who had not physically examined Mrs Clarke, held that the characteristics of frigidity were aversion to sex, "accompanied by resistance to the male... in some cases, it was accompanied by a desire for personal adornment and material possessions."¹⁹¹ The judge concluded that although Mrs Clarke had a repugnance to sex, "she was able to bring herself to permit attempts by her husband, but her muscular reactions were such that her husband was never able to achieve any real penetration."¹⁹² As a result the marriage was never consummated. It was held to be a physical incapacity rather than a wilful refusal, as the contraction of the muscles was psychological, and not a choice.

The court did not require 'want of sincerity' on the part of the husband. It would not have been unreasonable to require a valid reason on his part for declaring his 15year marriage null. He had declared that he would like to marry someone else. But he explained that he had persevered with his marriage, hoping that the couple's sex life would change after the birth of their child.

The Court of Appeal decision of *J v J*¹⁹³ also specifically dealt with the possibility of reproduction. The wife applied for an annulment of her marriage on the basis of her

¹⁹¹ Ibid at 544

¹⁹² Ibid at 545

¹⁹³ *J v J* [1947] P. 158

husband's incapacity *or* his wilful refusal to consummate the relationship. Just before the couple were married, the husband decided he wanted to undergo an operation to make him sterile. He was still capable of penetration and emission, but conception would be impossible. The doctor required signatures from both the man and his fiancé in order to carry out the operation. His fiancé refused to sign the form, and expressed a strong desire to have children. Eventually, she agreed to sign, on the condition that her husband did not undergo the operation until after their marriage, in the hope that she would be able to change his mind. Unbeknown to her, her partner underwent the operation anyway. This only came to light some six weeks before their wedding.

The marriage went ahead and intercourse took place regularly for the first two or three years, but rarely after that. Before the wedding, when the operation had come to light, the husband told his fiancé that they could adopt. However when she later mentioned this, he would not discuss the matter. The judge at first instance held that the husband was guilty of wilful refusal to consummate, but he still dismissed the wife's claim "on the ground that it would be contrary to public policy to grant it in view of the wife's knowledge of the facts before marriage."¹⁹⁴ No mention was made of the fact that penetration had actually occurred. Rather it was found that the inability to conceive was enough to negate consummation. Following the precedent of the court in *Cowen*¹⁹⁵ in which the court held that the use of contraception rendered the marriage unconsummated, the Court of Appeal found here that they could extend that scope to include the sterile husband. The wife's counsel argued there is no difference between "the application of an external contraception as in *Cowen*... and the achieving of the same result by means of an operation as in this case. The only distinction in

¹⁹⁴ Ibid at 160

¹⁹⁵ *Cowen v Cowen* op cit n146

fact is that in the one case the contraception is occasional whereas in the other it is permanent.”¹⁹⁶

The wife’s counsel argued that she should not be denied a remedy because she had prior knowledge, and that it is contrary to public policy to be deprived of the ability to procreate. Also, “it is equally contrary to public policy that a person capable of generation should be tied to a person permanently incapable of it.”¹⁹⁷ The judgement found that there was no question of natural sterility. Rather, the husband “rendered himself incapable of effecting consummation by reason of a structural defect which he had himself brought about in his organs of generation.”¹⁹⁸ The court further felt that the wife’s knowledge was not a bar to a remedy in law, and held that the amount of time that had passed was not a problem, as she had been unaware of legal remedies open to her. Once aware, she immediately applied to the court for a declaration. In terms of sincerity (a concept that is further addressed below), the court found that she had found out very late, and had protested the idea. The husband had “made her swear to say nothing about this operation to anyone. In any case it would not have been an easy reason for her to give for breaking off her engagement. The natural inference from her evidence... is that she felt that it was too late to draw back,”¹⁹⁹ and so the petition could not fail for insincerity.

Following this case was the case of *R.E.L. v E.L.*²⁰⁰ which followed the ratio of *Clarke*.²⁰¹

This defended petition was brought by the wife. She told the court that her husband had been

¹⁹⁶ *J v J* op cit n193 at 160

¹⁹⁷ *Idem*

¹⁹⁸ *Ibid* at 162

¹⁹⁹ *Ibid* at 164

²⁰⁰ *R.E.L. (Otherwise R.) v E.L.* [1949] P. 211

unable to consummate their marriage, and that she had become pregnant through artificial insemination. She asked for a decree of nullity based on his incapacity, or in the alternative, his wilful refusal. The husband denied the claim, but did not deny that his marriage had never been consummated.

Both spouses underwent medical examinations for the court. The wife was shown to have no impediments “and the husband was capable of consummating the marriage. The trouble was psychological...”²⁰² The husband and wife had also previously visited doctors, and the husband had agreed to undergo some psychological treatment, but the marriage remained unconsummated. The wife was anxious to start a family, and the couple discussed artificial insemination. When she left her husband, she was unaware that the insemination had been successful. She explained that she wanted to be a mother, but also that she hoped the pregnancy would ease their sexual tension, as her urgency would be diminished. The judge believed that her desire to have a child was to try and aid her marital relations, but also because “most women desire children.”²⁰³

The court gave some consideration to the prospect of bastardising the child if a decree was given. The counsel for the wife explained that *Clarke*²⁰⁴ and *Dredge*²⁰⁵ (discussed further below) had shown that legitimacy of a child should not be a deciding factor. Rather, they argued that public policy should allow the petitioner and defendant to separate so that they would be free “to contract normal marriages and found families. There is no real possibility

²⁰¹ *Clarke (Otherwise Talbott) v Clarke* op cit n186

²⁰² *R.E.L. (Otherwise R.) v E.L.* op cit n200 at 211

²⁰³ *Ibid* at 215

²⁰⁴ *Clarke (Otherwise Talbott) v Clarke* op cit n186

²⁰⁵ *Dredge v Dredge (Otherwise Harrison)* [1947] 1 All ER 29

of a normal marriage between the petitioner and respondent; the husband's cure... is highly unlikely and the marriage between them has finally broken down."²⁰⁶ As regards the child, Pearce J. felt that the scope of *Clarke*²⁰⁷ was of limited help in deciding this case. In *Clarke*,²⁰⁸ the child was conceived by an "accidental freak of fecundation ab extra during an attempt to consummate, while here the conception was a deliberate act by the husband and wife."²⁰⁹ The husband's counsel argued this should be taken as a sign that the wife had accepted the marriage. Yet she was unaware that she was pregnant when she left her husband. The judge made reference to a claim of want of sincerity on the part of the wife, and stated that "the question is whether one ought to draw inferences from her conduct and acts which would make it inequitable now to give her a decree."²¹⁰ He held that the wife made it clear throughout that she was unhappy with the marriage, but she persisted. The judge believed that the husband would not suffer detrimentally for having a child with a woman he still claimed to love. There was no lack of sincerity on her part.

A decree of nullity was granted on the basis that the wife had never wished to marry an impotent man, that her pregnancy was not a factor to be considered in the decision as the judge said that the birth of the child was unlikely to overcome "the husband's psychological trouble, or...[resign]...the wife to an unnatural marriage"²¹¹ and further, that she had constantly made it clear that she wished and intended to have a normal married life. Pearce J. stated: "In most nullity cases there comes a moment when the most forbearing wife becomes

²⁰⁶ *R.E.L. (Otherwise R.) v E.L.* op cit n200 at 214

²⁰⁷ *Clarke (Otherwise Talbott) v Clarke* op cit n186

²⁰⁸ *Idem*

²⁰⁹ *R.E.L. (Otherwise R.) v E.L.* op cit n200 at 216

²¹⁰ *Ibid* at 217

²¹¹ *Ibid* at 214

sickened by the role, so unnatural to a sensitive woman, of trying to stimulate an impotent spouse sufficiently to enable him to achieve penetration.”²¹²

In the case of *R v R*,²¹³ the husband was capable of erection and penetration, but was never able to emit semen into his wife’s body. The husband brought the petition himself based on his incapacity to consummate his marriage, and his wife defended the claim. The court was provided with evidence to demonstrate the husband’s ‘strait-laced’ upbringing, and other than “the usual involuntary nocturnal emission of semen of an adolescent... he showed very little interest in matters of sex.”²¹⁴ The couple sought medical advice and treatment over 8 years, in the hope of solving the problem and conceiving a child, but the condition persisted. In the end the husband told his wife he had fallen in love with another woman, and with this other woman he had been able to have intercourse and emission.

The issue for the court was whether this physical intimacy had constituted consummation. It was held that no direct authority existed on this problem, as medical science had not yet caught up “in investigating and explaining the intimacies of the marriage bed, and in enabling parties to give evidence thereon in a comparatively scientific way.”²¹⁵ The court held that consummation is about erection and penetration, and agreed with the judgement in *White* which concluded that ‘true conjunction’ occurs when entry and penetration is complete. Anything that follows is about the likelihood of conception, the possibility of which is not necessary for consummation.²¹⁶ The judge did not think it important to analyse the new

²¹² *Idem*

²¹³ *R v. R (Otherwise F)* [1952] 1 All E.R 1194

²¹⁴ *Ibid* at 1195

²¹⁵ *Ibid* at 1197

²¹⁶ *White (Otherwise Berry) v White* op cit n162 at 338

sexual relationship the husband had entered, and found that the marriage had been consummated, and therefore a decree of nullity could not be given to the husband.

2.4.5: Want of sincerity, and the impact of age and delay

Many of the cases have given consideration to whether or not it would be fair to provide a decree of nullity. In the case of *Guest v Shipley*²¹⁷ for example, it was felt that a decree would be unfair. In a case alleging impotence on the part of the wife, the court found that the suit failed on the basis of a previous suit brought by the wife claiming adultery on the part of her husband. This previous suit had required the husband to plead that the marriage was a lawful one, which he did, whilst not mentioning that the marriage was unconsummated. The case was dismissed. In the case of *S v S*²¹⁸ there was discussion as to whether it would be fair to withhold a decree when it took the wife 16 years to cure her incapacity. At first instance, it was found that the wife had undergone an operation (a hymenectomy) six days before the hearing. The judge found that there had not been wilful refusal, as the wife had made it clear she was willing to consummate the relationship, if possible. The judge at first instance was unsure of the effect of the operation upon the probability of consummation occurring. He held that it offered something more “than the possibility of a cure but less than a probability.”²¹⁹ The judge felt that the wife could not fulfil the onus upon her to demonstrate that the operation offered a high probability of cure. As such the husband was granted the decree he sought. However, after the hearing the wife was medically examined by three doctors, and the court gave leave for their evidence to be heard at the wife’s appeal.

²¹⁷ *Guest v Shipley, Falsely Calling Herself Guest* (1820) 2 Haggard (Consistory) 321

²¹⁸ *S v S (Otherwise W)* [1963] P 162 (C.A)

²¹⁹ *Ibid* at 173

Two doctors gave evidence concluding that the operation had cured the wife of her incapacity. The third doctor was unsure of whether the wife would psychologically be able to have sex, given her past experience. The appeal judges held that the burden of proof is always upon the petitioner to prove that incapacity existed at the date of a hearing, not the respondent wife, and as the operation had provided a possibility of consummation, the claim should fail. The petitioner needed to show that there was incapacity, and that it was incurable. Instead, at the date of hearing, there was a very high probability that consummation could occur.

This case challenged some of the presumptions of non-consummation cases. After a 16 year marriage with no sexual intercourse, the courts would generally infer incapacity on the part of the wife concluding that there had been a sufficient amount of time for consummation to occur, and if it has not occurred, then it was impossible. Given that the length of this marriage was over five times the length of the old ‘three year trial cohabitation’, it would not have been unreasonable for the court to provide a declaration of nullity. However, at the time of the hearing the wife was capable of consummation. The husband’s counsel argued on public policy grounds that “a woman who has imposed a sexless life on her husband for 16 years and done nothing to remedy the situation should not be allowed to rely on last-minute cures.”²²⁰

The appeal judges felt that the first instance judge had incorrectly put the onus of proof on the wife, and not factored in the medical evidence enough. Further, enough weight was not given

²²⁰ Ibid at 169

to *S. v S.*,²²¹ placing the relevant date of incapacity as the date of the hearing. Accordingly, they set the judgement aside, and no decree was granted.

Want of sincerity was also a factor in the House of Lords case *G v M.*²²² The case alleged impotence on the part of the husband. After marriage, G. and M. slept in the same bed for nineteen months, but only attempted consummation for 2 and half months. The husband in this case also had a medical examination which revealed no external physical reasons for his impotence.

The husband alleged that the marriage was not consummated due to his wife's cold demeanour. He alleged that he had to speak to her 'severely' on many occasions due to her behaviour, and that "his wife went to a good many balls and made violent love to more than one person."²²³ The allegations between the two varied between 'nervousness' on the part of the husband, and a growing coldness on the part of the wife towards the husband.

On cross-examination, the husband's doctor found that if the husband was encouraged, "and if a little champagne were given him beforehand, he might succeed with any other woman; but after his failures it would be more difficult with his wife."²²⁴ This concept of requiring alcohol to consummate a relationship is worrying, though is a concept of its time. The judges in this case assessed the wife's 'want of sincerity', referring to the motives behind her claim for nullity. The court held that the wife's conduct after the separation (keeping her married

²²¹ *S v S (Otherwise C)* op cit n105

²²² *G. (the husband) v M. (the wife)* (1884-85) L.R. 10 App. Cas 171

²²³ Ibid at 174

²²⁴ Ibid at 176

name, keeping insurance policies) “proved that the action [for nullity] was prosecuted for a side motive, and not for the single purpose of getting rid of the disappointment resulting from the alleged imperfections.”²²⁵ The implication being that wives who are denied a sexual relationship will be vengeful in their pursuit of nullity. To prove sincerity, the petitioner needed to demonstrate that the claim was not vengeful, and was prompt. One cannot discover something about their partner which makes them want to leave, but still enjoy the benefits of marriage for a considerable amount of time, before bringing a claim to enable them to leave. A “delay in raising a suit of nullity on the ground of impotency is a material element in the investigation of a case which upon the facts is doubtful; but there is no definite or absolute bar arising from it.”²²⁶

Earl of Selborne, L.C contended that ‘want of sincerity’ had overstated importance, and was difficult to prove. It is a matter of psychology rather than proof as it looks “into the motives of a person’s mind rather than... whether a cause of action exists or not.”²²⁷ The crux of this case was the wife’s desire to avoid the stigma of adultery. By appealing for a declaration of nullity, she would be declared incapable of committing adultery (having had a child by another man after separating from her husband), as her marriage never existed. The decision of the lower court was upheld, and the husband’s impotence was held to be found.

*Nash v Nash*²²⁸ also examined sincerity. The wife in this case made a plea of impotence, or in the alternative, of wilful refusal on the part of her husband to consummate the marriage. The court gave particular consideration to the husband’s claim that the petition was insincere. The

²²⁵ Ibid at 178

²²⁶ Ibid at 171

²²⁷ Ibid at 186; Newark op cit n29 pg 212

²²⁸ *Nash Otherwise Lister v. Nash* [1940] P. 60

couple had been married just under three months when the petition was presented, and the couple had a considerable age gap, the wife being 34 years old when they met, and the husband being 73. The husband admitted that he had not consummated the relationship, and that he had no intention of doing so, as he did not want to have children with his wife, yet denied that this was a matter of incapacity. Doctors found that the husband was likely to be impotent. The focus turned to the “unusual question of want of sincerity on the part of the petitioner.”²²⁹ The issue was whether or not the petitioning partner had benefitted in some way from the marriage which would then render it unfair to treat the marriage as never having existed. The judge concluded that the court should only be concerned about the sincerity of the plea, and the focus should not be on “...the general character of the petitioner as a sincere or insincere person, or... with the conduct of the petitioner before her marriage or the motives which prompted her to enter into the marriage.”²³⁰ As such, if a petitioner was aware of impotency before marriage, and then brought a claim of impotency, then the decree would be refused, not on the basis of previous knowledge, but because of the insincerity of the claim.

Given that the husband did not accept that he was impotent, it could not be held that the wife knew before marriage that the union would not be consummated. The judge examined the time between the wife becoming convinced of her husband’s impotence, and bringing the claim. The husband and wife had varying accounts of the attempts at consummation made during their honeymoon, and the judge felt that the younger and fresher memory of the petitioner was preferable to the “hazy and fuddled recollection”²³¹ of the respondent. Sincerity has also been taken to refer to delays in bringing claims for nullity. In this case

²²⁹ Ibid at 61

²³⁰ Ibid at 64

²³¹ Ibid at 66

however, there were only four days between the wife leaving her husband and petitioning the court, though aware of her husband's impotence a month before. Her attempts to salvage her marriage in that month did not negatively affect her claim of sincerity. The petitioner must be shown as "not having wavered in her view as to the action she will take to assert her rights after she attained full knowledge of the facts and the law concerning those rights."²³² It seems unusual that such clarity is required of a spouse at a time that is no doubt upsetting and traumatic. The judge concluded that the wife had received no benefits, material or otherwise, from this marriage, that her petition was sincere, and that the decree would be granted.

In the Court of Appeal case of *Pettit v Pettit*,²³³ brought by the husband, claiming his own incapacity the court dismissed the appeal on the basis that the court has to give consideration to all the circumstances of a marriage, "including the respondent's attitude and reaction to the situation created by the impotence of the petitioner... [including] whether it would be just or unjust that the impotent spouse should obtain a decree."²³⁴ It was felt that it would be unjust and inequitable to grant the husband the decree, the husband having left his wife of 20 years for another woman. It appeared the other woman was pushing for the separation, and given that the wife had paid for the matrimonial home and all the furnishings, it would be unfair to grant the husband the decree he wanted. The judges felt that there were three key factors to assess: firstly, had non-consummation been proved? Secondly, had the husband proved that the incapacity was his own? And lastly, the court had to give consideration to all circumstance in order to determine whether a decree was fair or not. The court did not focus too heavily upon the alleged incapacity, but rather felt that the order would be unfair to the wife. The judges felt that both partners 'suffer' when there is incapacity on the part of one of

²³² Ibid at 69

²³³ *Pettit v. Pettit* [1963] P. 177

²³⁴ Ibid at 177

them. Yet Willmer L.J stated that “the fact that [the husband]... was prepared to go on for upwards of 20 years before seeking advice seems to me to indicate a complete lack of any sense of injury or grievance...this must surely be a matter to take into consideration in determining whether he has approbated the marriage, and... in deciding whether it is fair and equitable to grant relief.”²³⁵

The judges made explicit reference to the fact that the wife in this case was a ‘good’ wife, even providing a child within an unconsummated marriage. It was said that “she has given up her whole life to the husband, has served him faithfully as wife and as mother to his child, as well as being of considerable financial help to him.”²³⁶

Consideration in cases has been given to the age of the parties- in particular the age of the wife. In *Briggs v Morgan*,²³⁷ once the advanced age of the wife was established, the court felt it unnecessary to further medically determine her sexual capability, as she was no longer of child-bearing age, and too old for a ‘sex-drive’. On this basis, Sir William Scott held that the marriage was not worthy of a decree of nullity. The husband was deemed to have approbated a union without sex by taking a wife of her age. *Brown v Brown*²³⁸ also held that the husband’s application for a decree failed as he had not shown that the impediment was incurable, or existed for the duration of the marriage. Rather the judge pointed out that although the main objective of marriage is child-bearing, when an old man takes an old woman as his wife, this cannot operate, and a husband must take his wife “tanquam soror”.

²³⁵ Ibid at 190. A spouse is said to approbate a marriage when they know they have cause to leave, but behave in a way which leads their partner to believe that they will not.

²³⁶ Idem

²³⁷ *Briggs v Morgan* op cit n73

²³⁸ *Brown v Brown* op cit n33

In *Morgan v Morgan*,²³⁹ a petition was brought by the husband on the basis of his own impotence. The couple in this case were married later in life, (the husband being aged 72 and the wife 59) and agreed to marry and live together on a basis of companionship only. During the couple's courtship, kisses were exchanged and after the marriage he gave his new wife £2000.

During questioning, the husband said that he had hoped that after living as husband and wife for some time, their relationship might change, and include a sexual element: "Well, naturally as time goes on and we live together I might possibly have thought possibly connection might be had... I had that in mind, sartorially, like any man would do."²⁴⁰ After the ceremony, the wife left her husband and the court heard evidence that she had mental problems. The husband told the court that he had never had sexual relations with a woman, and at the date of marriage, was unaware of his incapacity. He was only advised of his impotence after a private medical examination. After leaving him, the wife wrote to the husband and asked him to visit her solicitor, where he was informed that she regretted marrying him and she would return his money. She did not return the money and the husband sought his own legal advice, before presenting the petition for nullity.

Following the precedent of *Harthan*,²⁴¹ the petitioner would be entitled to a decree of nullity on the ground of his own impotence, as long as the petitioner and the respondent were unaware of the impotence at the date of the marriage ceremony. Yet in this case, the

²³⁹ *Morgan v Morgan (Orse Ransom)* [1959] P 92

²⁴⁰ *Ibid* at 93

²⁴¹ *Harthan v Harthan* op cit n117

husband's petition was denied. His incapacity was held not to be a relevant factor in the marriage, as neither party was aware of the incapacity and further it was deemed contrary to public policy for the husband to be able to plead his own impotence, having acknowledged that the marriage was undertaken on the basis of companionship only. It is important to note that this acknowledgement does not sit within the general trend of the cases I have outlined. The judge argued that the question which arose was;

whether the husband was debarred from the relief he claimed by reason of his having entered into this marriage on the basis of mere companionship and without any intention of marital intercourse, and whether this court, which must... treat nullity cases as of national importance irrespective of the wishes of the parties, can accept the husband's mental reservations as to the bare possibility of marital intercourse in the future.²⁴²

He argued that the husband could perhaps have requested a decree on the basis of his wife's wilful refusal. However, this was barred once he revealed to his lawyers that he was impotent. A person must have regard to the circumstances in which they have married, at the time they married, and taking into consideration the circumstances of this marriage the husband "could not make a grievance now of what did not occur to him a grievance then."²⁴³ Having approbated the marriage, the husband could not then claim he no longer wished to have a marriage for companionship. There was effectively "a valid agreement between the spouses not to consummate."²⁴⁴

²⁴² *Morgan v Morgan (Orse Ransom)* op cit n239 at 95-96

²⁴³ *Ibid* at 97

²⁴⁴ *Honoré* op cit n14 pg 20; *Ryan* op cit n18 pg 20

In the case of *G v G*²⁴⁵ the judge made time to discuss the merits of bringing the case in the first place. He was careful to say that he was satisfied that the case was “free from all suspicion of being a suit trumped up for the purpose of getting rid of a marriage to which both parties are averse.”²⁴⁶ The judge felt that the length of time of cohabitation provided ample opportunity for consummation to have occurred, and as it had not, he believed it never would. The failure of consummation, (and in this case the failure of the wife) meant that the “ends of marriage, the procreation of children, and the pleasures and enjoyments of matrimony cannot be attained.”²⁴⁷ He claimed the question of non-consummation was a practical one and felt the husband had exhausted all options open to him.

As regards delay, in the case of *B-n v B-n*²⁴⁸ the court gave extensive consideration to the delay in applying for a decree- the couple having been married for 18 years- and felt that given this amount of time and evidence that there had been ‘partial connection’ between the couple, the husband was not entitled to a decree of nullity. The delay alone could not constitute a bar to the decree.²⁴⁹ In *Dredge v Dredge*²⁵⁰ also, the husband and wife were already expecting a child together before their marriage ceremony. After marriage, they did not consummate the union as a result of the wife’s wilful refusal. The wife offered no explanation for her refusal, and did not attend court to defend the suit. By the time the husband filed the petition, the couple’s child was 17 years old. The Court considered the implications on the child in declaring the marriage voidable, but decided it was not a factor in the decision. The judge examined the reasons for the delay in the application, but found the husband’s reasons to be sincere, as was his request for nullity; “he was giving his evidence

²⁴⁵ *G v G* op cit n43

²⁴⁶ Ibid at 290

²⁴⁷ Ibid at 291

²⁴⁸ *B-n v B-n* op cit n47

²⁴⁹ Ibid at 250-251

²⁵⁰ *Dredge v Dredge (Otherwise Harrison)* op cit n205

with complete candour and truthfulness, and I am prepared to accept it.”²⁵¹ This case established that sex before marriage with your spouse does not affect a claim for non-consummation after marriage.

2.5: Conclusions

This chapter has shown the development of consummation law and highlighted the presumptions made by the courts. I do not claim to have presented every case that has dealt with consummation, but rather have made reference to those most referenced in academic literature, and a selection of further cases from which to understand the current legal situation. Throughout the chapter, I have pointed out the issues I feel the case law has identified. Most evidently, the construction of law itself has come to light in this chapter; “when it is most ruthlessly neutral, it is most male; when it is most sex blind, it is most blind to the sex of the standard being applied. When it most clearly conforms to precedent, to “facts,” to legislative intent, it most closely enforces socially male norms and most thoroughly precludes questioning their content as having a point of view at all.”²⁵² Consummation is constricted by these principles, written in language that portrays gender-neutrality, but which impacts most negatively upon women through a male construction and need for sex. It is claimed that this is necessary for the purposes of (male-defined) justice. Chapter 3 will show that most of the case law portrays the husband as the dominant partner, who needs sexual intercourse, and should initiate it. Where the wife has brought a claim of nullity, most have claimed it is a result of their desire to bare children. It is unclear if this is actually true for all, or if these women have been advised that this argument is most likely to succeed in court. Not a single case makes any extensive reference to female sexuality outside

²⁵¹ Ibid at 31

²⁵² Mackinnon, C.A., *Toward a Feminist Theory of the State* Cambridge, Harvard University Press, 1989 pg 248

of the desire to be a mother, or as a 'wifely duty', although the case of *Harthan* has acknowledged role of companionship in marriage.

As regards physical examinations of spouses, Cloud states that although this would seem to violate modesty, in the name of justice, modesty must be put to one side.²⁵³ However, this is only the case for women who should still be in their sexual prime. Wives of a certain age have been deemed unable, and justifiably unwilling to consummate their relationships- a 'natural' consequence of advanced age in women, which diminishes sexual drive.²⁵⁴

The case law and statute show that a marriage can be declared voidable on the basis of non-consummation due to incapacity, or wilful refusal on the part of one of the spouses. Effectively, this creates a positive 'requirement' of the spouses. The spouses have to bring the claim themselves within their lifetime. An incapacity will be deemed incurable if the cure would risk the health of the spouse in question, or if the spouse in question refuses to undergo the treatment necessary to cure it. Refusal to undergo medical examination to establish incapacity may result in an inference of incapacity. Further, the use of contraceptives does not invalidate consummation, and neither does the ability/inability of the wife to have children. A spouse can make a petition for nullity on the basis of their own incapacity, as long it was not known before the marriage. The consummative act must be 'ordinary and complete'²⁵⁵ but coitus interruptus will not necessarily invalidate the consummative act. The emergence of wilful refusal is somewhat of an anomaly because "all other grounds for nullity

²⁵³ Cloud op cit n14 pg 704

²⁵⁴ Ibid at pg 705-706

²⁵⁵ *D-e v. A-g (falsely calling herself D-e)* op cit n22 at 298

depend on circumstances existing at the time of the celebration of the marriage whereas the new ground depends on subsequent conduct.”²⁵⁶

²⁵⁶ Gower, L.C.B. ‘Baxter v. Baxter in Perspective’ (1948) 11 *Modern Law Review* pg 176-195 pg 177

THREE

CRITIQUING CONSUMMATION

...consummation is a lodestar in a constellation of practices aiming to maintain congruence and coherence in often ambiguous, sometimes fluid, and almost inevitably anxiety-ridden categories of sex, corporeality, and sexuality.¹

Chapter two outlined the way in which “the law has constructed ‘natural’ sexual intercourse in its institutionalised setting:...marriage.”² Using radical feminist theory this chapter provides analysis of the legal developments, with particular emphasis on gender/sexuality issues, and incorporates my literature review on current (radical feminist and alternative) perspectives on consummation. I engage with alternative perspectives to demonstrate not only their existence, but also in some cases, the weaknesses of radical feminism, which have been more adequately addressed by others.

3.1: Emerging themes from the case law

To consummate a marriage, a couple must have sexual intercourse once after the marriage ceremony to avoid a claim for nullity on the basis of non-consummation.³ This chapter addresses the trends and issues that arise from the case law presented in Chapter 2: I expand upon the case law’s prioritisation of heterosexual relations, and the presentation of

¹ Brook, H., *Conjugal Rites: Marriage and Marriage-like Relationships before the Law* New York, Palgrave Macmillan, 2007 pg 66

² Collier, R., *Masculinity, Law and the Family* London, Routledge 1995 pg 139; Honoré, T. *Sex Law* London, Duckworth 1978 at pg 1

³ MCA 1973 s12

penetrative sex as ‘normal’. I then develop this further to examine how and why the sexual marriage has been prioritised. I also use the case law to develop the understandings of sex and gender offered in Chapter 1. I highlight the way in which law has treated, or made invisible those who do not fit into the consummation requirement- for example, impotent men- and the way that male sexuality has been presented in court. I present alternative foundations for understanding relationships by asking ‘where is the love?’ in legally recognised sexual relationships. I conclude the chapter with a critique of the court’s overreliance upon medicalised understandings of sex and marriage.

Honoré has argued that the requirements for consummation “are stricter than are needed to establish a case of rape.”⁴ The courts have prescribed a detailed form of penetration for consummation.⁵ The definition and requirements of rape are not as precisely defined. Whilst analysis of academic writing and doctrine about rape is not directly part of this thesis, I provide a brief analysis to try and understand how the law has differentiated its understandings of penetration.

Arguably, definitions of rape and sexual offences remain wide so as to incorporate as many scenarios as possible, to provide legal remedy for as many as possible who suffer sexual offences. The *Sexual Offences Act 2003* states that rape can only be committed by men, (women can commit rape as accessories but not as principles) because a man commits the offence of rape if “he intentionally penetrates the vagina, anus or mouth of another person... with his penis”⁶ without consent.⁷ The marital exemption to this was removed in 1991,

⁴ Honoré op cit n2 pg 17

⁵ *D-e v. A-g (falsely calling herself D-e)* [1845] 1 Rob Ecc 280

⁶ *Sexual Offences Act 2003* s1(a)

reversing “the outdated view that on marriage a wife gave irrevocable consent to sexual relations at any time during the marriage and therefore marital intercourse could not be unlawful.”⁸ This view had been the result of the belief that husband and wife become one flesh at marriage, and it was therefore impossible for a husband to rape himself.

In contrast to overt discussion of penetrative consummation, definitions of rape have been vague. Rape requires penetration, but “what exactly will amount to penetration is an issue which is likely to be left to the jury, giving penetration its normal meaning.”⁹ No clarification is given as to what its ‘normal meaning’ may be, but rape does not require ejaculation. Radical feminist analysis of sex has often been misunderstood as asserting that all women should exert their sexual energies with other women.¹⁰ This view is not shared by all radical feminists. The more common belief is that these sexual relationships are a continuation of subordination: “the argument is that we cannot pretend there is a neat division between ‘bad rape’ and ‘good sexual intercourse’.”¹¹ I would not take this so far as to say that no woman can ever give true consent, but the complexities of sex, and the continued subordination of women mean that there is no ‘neat division’ that can be used to differentiate sex and rape.¹²

An alternative view of rape (applicable to consummation and intercourse), is constructed by Madden Dempsey and Herring who argue that sexual intercourse is a prima facie wrong, “in

⁷ *Sexual Offences Act 2003* states that a surgically constructed vagina is defined as a vagina for the purposes of the definition of rape; *Sexual Offences Act 2003* s79(3)

⁸ Herring, J., *Criminal Law: Texts, Cases and Materials* (4th ed) Oxford, Oxford University Press 2010 pg 419. *R v R* [1991] UKHL 12

⁹ Herring op cit n8 pg 420

¹⁰ This misunderstanding is further analysed in Jackson, S. ‘Heterosexuality and feminist theory’ in Richardson, D. (ed) *Theorising Heterosexuality* Buckingham, Open University Press, 1998 pgs 21-38 pg 22

¹¹ Herring op cit n8 pg 471

¹² For further feminist views of rape see MacKinnon, C.A ‘Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence’ (1983) 8 *Signs* 635-658.

other words it is an act which requires the penetrator to have a good reason for the act of penetration.”¹³ Viewed in this way, the consummation requirement could read something like this: penetration is a prima facie wrong, and the consummation requirement is a codification of this wrong demanded only of heterosexual married couples. Though the Madden Dempsey/Herring view appears beyond the scope of this thesis, it is worthy of extensive discussion as it is applicable to our understanding of sex, and consummation as the first legal requirement of sex within a marriage. The orthodox view of sexual penetration is that sexual penetration is not a wrong; “there is no general moral *duty* not to engage in sexual intercourse.”¹⁴ In fact, the very opposite is argued- sex is necessary because it is biologically required both to maintain the species, and for male gratification for example.¹⁵ These authors offer a new understanding of penetrative sex, and claim that sexual penetration needs justification.¹⁶ They offer a series of explanations and potential exceptions to their theory. The exceptions are cumulative: “in order to avoid prima face wrongdoing, a man engaging in sexual penetration must satisfy each and every potential exception... If any exception fails to be satisfied, then his conduct calls for justification.”¹⁷ Beauvoir similarly argued that the vagina is eroticized through the intervention of a man, and that this,

always constitutes a kind of violation... We still speak of ‘taking’ a girls virginity, her flower, or ‘breaking’ her maidenhead. This defloration is not the gradually accomplished outcome of a continuous evolution, it is an

¹³ Herring op cit n8 pg 472

¹⁴ Madden Dempsey, M. & Herring, J. ‘Why Sexual Penetration Requires Justification’ (2007) 27 *Oxford Journal of Legal Studies* 467-491 pg 468

¹⁵ De Beauvoir, S., *The Second Sex* (1949) Parshley, H (ed and trans) London, Vintage, 1997 pg 35

¹⁶ Madden Dempsey & Herring op cit n14

¹⁷ Ibid pg 473

abrupt rupture with the past, the beginning of a new cycle. Sex pleasure thereafter is obtained through the contractions of the vaginal wall...¹⁸

which is 'activated' through the intervention of a man. I argue the vagina is prioritised in consummation and sex definitions because it is linked to the male's satisfaction, whereas clitoral stimulation is not viewed as dependent upon a man. Madden Dempsey and Herring contend that 'use of force' is necessary for sexual penetration, and that it is widely accepted that the "use of physical force on another person is a prima facie wrong."¹⁹ Although there can be justifications to sometimes using force (for example to pull a child away from a busy road), the use of force is always a prima facie wrong, and its use should be regretted.²⁰ The use of force in these cases does not serve to create a correct act; rather, it creates a justified prima facie wrong. Whilst the authors take no "position as to whether penetration into muscled cavities is best understood as invasion, possession or occupation,"²¹ they highlight the force necessary for the penis to achieve this, and that penile penetration of the vagina therefore requires justification. The only exception they suggest is a situation in which the man "employs no such force (e.g he is immobile during penetration)" and as such does not commit "a prima facie wrong grounded on the use of force."²²

Penetrative sex carries psychological and physical risks and "posing a non-trivial risk of significant harm to another person is a prima facie wrong."²³ The use of force is indicative of physical risks that exist in penetrative sex. Other risks include a degree of abrasion, tearing or

¹⁸ De Beauvoir op cit n15 pg 394

¹⁹ Madden Dempsey & Herring op cit n14 pg 473

²⁰ Tattooing, piercing and surgery all require force and harm too, but are negated by our consent, and are often not regretted.

²¹ Madden Dempsey & Herring op cit n14 pg 474

²² Idem

²³ Ibid pg 475

more serious injury, the risk of contracting a sexually transmitted disease, the risk of unwanted pregnancy and the physical risks associated with continuing a pregnancy to term even when it is planned. Madden Dempsey and Herring identify three exceptions to these risks. The first, is in reference to the risk of pregnancy where it is held that “a man who penetrates the anus of a woman with his penis or a man who penetrates the vagina of a woman with his penis where either the man and/or woman are infertile does not commit a prima facie wrong grounded on posing a risk of pregnancy.”²⁴

The second exception is in reference to the risk of contracting a sexually transmitted disease (STD). A man who is infected with an STD, who sleeps with a woman who is not infected with the identical STD commits a prima facie wrong in placing that woman at risk. “But a disease-free man who penetrates the vagina or anus of a woman with his penis, or an STD-carrying man who penetrates the vagina or anus of a woman with his penis when the woman is infected with an identical strain of the STD, does not commit a prima facie wrong grounded on posing the risk of STD.”²⁵ The final exception is that a man will not commit a prima facie wrong in connection with the risks of abrasion, “in the case of penetration where the man’s penis is sufficiently small relative to the pliability of the woman’s sphincteric musculature, and where adequate lubrication is present so as to reduce the risk of injury below the relevant threshold.”²⁶ Whilst discussing the impact of STD’s, it angers me that non-consummation legislation is held in the same regard as potentially infecting a spouse with a life-threatening disease such as HIV/AIDS.²⁷ Domestic violence does not nullify a

²⁴ Ibid pg 478

²⁵ Idem

²⁶ Ibid pg 479

²⁷ MCA 1973 s12(e)

marriage, but a lack of sexual intercourse will. This de-values any other aspect of marital life, for example love, money, and children.

The psychological risks associated with penetrative sex also constitute a prima facie wrong. There are social meanings attached to sexual penetration, which also impact the psychology of those involved in the act.²⁸ Current social conditions mean that there has been an increase in “the frequency with which women and girls are subjected to actual and threatened sexual abuse.”²⁹ The psychological risk of penetrative sex is found in situations where the woman has previously suffered rape or sexual assault by penetration. For women who have not suffered sexual assaults or rape, the authors hold that sexual penetration still holds a psychological threat because of the culture we live in. The exception to this is “where the risk of psychological harm falls below the relevant threshold.”³⁰ These risks may seem extreme, and it could be argued that “if an act endangers another but the feared injury does not materialize then there is no harm. However, that would be to adopt too narrow an understanding of harm. It is a set-back to an individual’s interest to be exposed to a risk, even if that risk does not materialize.”³¹ If one accepts that penetrative sex is a prima facie harm, then consummation is the legally required embodiment of this.

Feinberg writes about the ways in which society and law makers define harm, in comparison to a ‘wrong’, concluding that there is harm in rape (he does not address consummation), when one undergoes a “sexual act under compulsion or coercion quite against one’s will. Take away the compulsion and coercion and add willing collaboration, and you have

²⁸ Madden Dempsey & Herring op cit n14 pg 482

²⁹ Ibid pg 479

³⁰ Ibid pg 481

³¹ Ibid pg 475

eliminated the harm altogether. Genuinely voluntary consent does just that...”³² Although consummation often entails willing collaboration, the fact that the marriage could be nullified on the basis of non-consummation, renders it a coercive act- the coercion and compulsion being on the part of the state as well as the husband. Radical feminism argues that the harm of consummation and rape stems from the universal wrong perpetrated against women-patriarchy. The law is harmful to women per se, in its construction as gender-neutral. The consummation requirement is part of law, and is harmful to all women in that it places a requirement upon their bodies to perform a particular sexual function. Whether a woman may wish to do so or not is beside the point, as there is a requirement upon her to do so. The law is further harmful to women in that the type of sexual intercourse that must occur is stringently defined, therefore again leaving some marriages open to claims of nullity, even though one of the parties believes the marriage to have been consummated as far as they are concerned. In non-consummation cases where the wife has asked for relief, even when a finding has been made in her favour, it is so as to free that woman from her current husband, to allow her to find another, with whom she can fulfil her duty to have children, and to avoid a barrage of women with ‘nervous dispositions’ as a result of their inability to have children with their husbands. As such, not only is the law harmful in and of itself, but it causes women further harm in the way in which it constructs ‘normal’ marriage and femininity. In terms of heterosexual marriage, all marriages should be consummated, and those that are not are open to nullification, as this is deemed so contrary to the norm. In patriarchal society, rape is a property crime “of man against man. Woman, of course, was viewed as the property.”³³ Rape

³² Feinberg, J. *Harmless Wrongdoing: The moral limits of the criminal law* (Vol 4) Oxford, Oxford University Press, 1990 pg 167

³³ Brownmiller, S. *Against Our Will: Men, Women and Rape* London, Secker & Warburg, 1975 pg 18

needs to be examined for its violation of bodily integrity; for battle lines between refusal and consent; public safety and state concern.³⁴

What are the current social meanings of penetrative sex and consummation? The case law reflects social understandings of penetrative sex and the benefits attached to marriage. Madden Dempsey and Herring hold that penetrative sex violates women because “it is an act through which... [the woman]... is rendered less powerful, less human, whilst the male is rendered more powerful and more human.”³⁵ The woman becomes unequal to the man by virtue of having been fucked by him.³⁶ The actual intentions of a particular couple are irrelevant. The woman will often have given her consent, but the social meaning of penetrative sex overrides a couples good intentions to not be part of patriarchy and afford their partner due respect. As Chapter One showed, radical feminism argues that women are not equal to men, and so any consent given by a woman is not worth as much as that given by a man. The woman is in an unequal position- and likely does not hold any bargaining power. The claim that penetrative sex is a prima facie wrong “on the basis of its negative social meaning is to claim both that it requires justification... and that even where justified, it leaves a moral residue of regret.”³⁷ They conclude that the only way to overcome the negative implications of penetrative sex is to transform its meaning. In order to achieve this, we must enter a post-patriarchal society where our understandings of sex are fundamentally changed. We must fundamentally move away from relationships that are given special privilege

³⁴ Idem; Heath, M. & Naffine, N. ‘Men’s Needs and Women’s Desires: Feminist Dilemmas About Rape Law Reform’ (1994) 3 *Australian Feminist Law Journal* pgs 30-52

³⁵ Madden Dempsey & Herring op cit n14 pg 485

³⁶ Honoré op cit n2 pg 55; De Beauvoir op cit n15 pg 183; Barnett, H., *Introduction to Feminist Jurisprudence* London, Cavendish 1998 at pg 169; Bottomley, A., Gibson, S. & Meteyard, B. ‘Dworkin; Which Dworkin? Taking Feminism Seriously’ (1987) 14 *Journal of Law and Society* 1 pgs 47- 60 pg 53

³⁷ Madden Dempsey & Herring op cit n14 pg 487

because of sex- ie marriage- and remove the legal requirement for penetrative sex in heterosexual relationships- consummation.³⁸

The authors acknowledge that their approach could be considered reductionist “insofar as it conceptualizes the act of sexual penetration as a mere physiological action type.”³⁹ This is a fair assessment, but they justify this approach on two grounds: that the traditional understanding of penetrative sex has limited too narrowly “one’s ability to consider whether our traditional understandings of what counts as rape or sexual assault,”⁴⁰ and that their methodology corresponds with “the laws characterization of sexual penetration as a physiological action type. Statutes prohibiting sexual offences are not defined in terms of their context; instead the law defines prohibited conduct in terms of physiological action types.”⁴¹

Madden Dempsey and Herring’s view is that “there is always a reason against sexual intercourse, at least when it involves a man penetrating a woman’s vagina or anus.”⁴² This is a minority view. Yet its message is far-reaching. If one accepts that penetration is a prima facie wrong, this provides a new understanding of consummation, and of law. In a different text, Herring writes that “sexual penetration can be justified and so this negative meaning may be outweighed by many positive meanings attached to a particular act of sexual

³⁸ My thanks to Tony Bradney who points out that this then means that an argument which began by stressing the importance of not invading even a small child’s autonomy ends by denying the possibility of that autonomy, by denying marriage. Yet marriage is already an institution that is not offered to all- there are limitations on age, affinity and sexuality for example.

³⁹ Madden Dempsey & Herring op cit n14 pg 470

⁴⁰ Ibid pg 471

⁴¹ Idem

⁴² Ibid pg 482

penetration... For most commentators who have written on the issue there is no wrong in sexual penetration per se; it is only sexual penetration without consent which is wrongful.”⁴³

Consent issues highlight the differences between the two approaches. In the majority approach to sexual penetration, we are seeking to identify circumstances which render the act criminal. The Madden Dempsey/Herring view is instead looking for circumstances to justify a wrongful act. If penetration is viewed as a wrongful act, with some justifiable instances, we could argue that consummation is a prima facie wrong, with some justifiable instances.⁴⁴ In this case, non-consummation would not be grounds to nullify marriage. It could then be argued that unconsummated marriages should be celebrated and respected rather than declared void. There should be no implied legal requirement to commit a prima facie wrong, even if it could be argued as justifiable in some instances. In utilising this view, consummation can be seen in a new light, and further, radical feminism is rehabilitated for those who may previously have dismissed the theory. To view sex as a wrong, and to declare that men and women do not have the right to commit this prima facie wrong against each other can only sit within a radical feminist outlook. First and third wave feminism do not emphasise the differences between men and women in the way that radical feminism does. In highlighting this difference, radical feminists are able to explain that the patriarchy that sits behind consummation law renders women unequal in sexual relationships.

Why is consummation deemed necessary by law? Masson et al claim that marital sex ensures fidelity, and in requiring sex from the very beginning of a marriage, will somehow ensure

⁴³ Herring op cit n8 pg 474

⁴⁴ Religious groups would argue that marriage is a justifiable instance.

monogamy.⁴⁵ As demonstrated throughout, monogamy is important in order to sustain a legal situation in which each woman is under the control of a man. However, the consummation requirement does not necessitate ‘satisfaction’. It only requires one act of sexual intercourse after a marriage ceremony. Further, “given that the vast majority of modern spouses will have tested their sexual compatibility prior to the marriage, the significance of this ground has diminished further still.”⁴⁶

The consummation requirement might be desirable for those who hold religious beliefs forbidding them from experiencing sex outside of marriage and for whom divorce is less, or not acceptable. In my opinion, Brook effectively explains the consummation requirement by declaring it a *sexual performative*, through which,

governmental and legal inscriptions of heterosexual and masculine privilege are traced onto the body of the population. The sexual performatives of conjugality continue to produce sexed subjects- some of whom accrue privileges through their actions while others are penalized or disadvantaged.⁴⁷

Her view of sexual performatives makes use of the same theories espoused by Butler that gender itself is a performative, where the performance or the ‘doing’ of gender creates gender.⁴⁸ If one accepts Butler’s argument that gender is performative, given its close ties to sex, it is not a stretch to claim that sexual activity is also performative, with consummation as

⁴⁵ Masson, J., Bailey-Harris, R., & Probert, R. *Cretney’s Principles of Family Law* (8th ed) London, Sweet and Maxwell 2008 pg 63

⁴⁶ Ibid pg 64

⁴⁷ Brook op cit n1 pg 70

⁴⁸ Butler, J., *Gender Trouble* New York, Routledge 1990

the first example of this. David Fraser argues that “the dichotomies of self/other, subject/object are defeated in the act of becoming lovers. The ultimate act, making love... is itself acting.”⁴⁹ Consummation serves to be a real, *and* symbolic representation of all sexual performatives within marriage, confirming and finalising the marriage contract. In Brook’s words, “the sex act does not merely describe or communicate consummation, but *produces* it. In this way, consummation can be understood as performative sex. Consummation is not the only sexual performative associated with marriage, it is merely the first and most obvious one.”⁵⁰ O’Donovan argues that in law, consummation becomes “the final performative act of consecration of the marriage. The primal act of heterosexual intercourse... to be repeated as a generative act *ad infinitum*.”⁵¹

3.2: Prioritisation of heterosexual relations and penetrative sex as ‘normal’

The law is not just concerned to ensure that marriage is a heterosexual institution; it is also concerned with the *form* that sexual behaviour takes and, specifically, the nature of the genital interaction therein.⁵²

This obsession with heterosexuality and form is a result of law’s patriarchal construction. Whilst the term ‘sex’ can refer to a wide range of actions and behaviours, the sex that is required for consummation “refers to a particular type of sex invested with legal meaning

⁴⁹ Fraser, D., ‘What’s Love Got To Do With It? Critical Legal Studies, Feminist Discourse, And The Ethic Of Solidarity’ (1988) 11 *Harvard Women’s Law Journal* pgs 53-82 pg 66

⁵⁰ Brook op cit n1 pg 72

⁵¹ O’Donovan, K., *Family Law Matters* London, Pluto, 1993 pg 46

⁵² Collier op cit n2 pg 148-9

such that it, rather than other sexual acts, comes to stand as “sex” as such, or as *all sex*.⁵³ It is this genital interaction that the law has concerned itself with. Dr. Lushington’s judgement in *D-e v. A-g*⁵⁴ shows this through his assertion that there is a “proper...ordinary...natural”⁵⁵ form of sexual intercourse, and any ‘unnatural’ intercourse would be a ‘great evil’ against the ‘true interest of society’ which serves to maintain ‘normal’ and monogamous marriage, and could lead to adultery- one of the ‘greatest evils’. This judgement is over 160 years old, and one has to remember the social conditions of the time. However, the combination of patriarchy and sexuality remain “monolithic and immutable [even today]... the very naturalness of heterosexuality becomes the abiding truth of sexuality *per se*.”⁵⁶

O’Donovan contends that the missionary position has been and continues to be privileged in sex and law. Although the case law has clearly privileged/demanded vaginally penetrative sex, it has not gone so far as to demand a particular sexual position. O’Donovan argues that consummation as the ‘final performative act’ serves to marginalise other sexual acts/practices. “The missionary position, in which the woman lies under the man and facing him in readiness for coition, has been privileged in this discourse... Although marriage law does not demand that the missionary position is adopted for consummation, it is clear that non-penetrative sexual activity is insufficient.”⁵⁷ This submissive position is symbolic of women’s position in marriage, sex and law.

⁵³ Brook op cit n1 pg 54; Thomson, M. ‘Viagra Nation: Sex and the Prescribing of Familial Masculinity’ (2006) 2 *Law, Culture and the Humanities* pgs 259-283 at pg 260; Jackson op cit n10 pg 23; Richardson, D., ‘Heterosexuality and social theory’ in Richardson, D. (ed) *Theorising Heterosexuality* Buckingham, Open University Press, 1998 pgs 1-20 at 1

⁵⁴ *D-e v. A-g (falsely calling herself D-e)* op cit n5

⁵⁵ Ibid pg 1045 per Dr Lushington

⁵⁶ Collier op cit n2 pg 145; Jeffreys, S. *Anticlimax- A feminist perspective on the sexual revolution* London, The Women’s Press Ltd, 1993 at pg 287

⁵⁷ O’Donovan op cit n51 pg 46

The Courts have shown meticulous and detailed examination of non-consummation concluding that “heterosexual sex is natural and sexuality expressed in marriage is a natural phenomenon. Naturalism denies any alternative organisation of the body, for what is natural is inevitable and cannot be questioned.”⁵⁸ As such, an investigation into consummation such as the one undertaken by this thesis has to construct arguments that question something deemed by many to be accepted and innate. Fishbayn argues that the case of *D-e v. A-g*⁵⁹ reflects “both a quaint prudishness regarding the diversity of sexual practices and, perhaps, a benevolent impulse to find a basis for ending an unhappy marriage that could not otherwise be terminated.”⁶⁰

In the 1970s Honoré described the duties of marriage as:

- (a) To consummate the marriage by having sexual intercourse at least once.
- (b) To develop and maintain a mutually tolerable sexual relationship.
- (c) To be faithful to one another in matters of sex.⁶¹

Divorce law also implies sexual faithfulness as one can claim a marriage has irretrievably broken down on the basis of adultery.⁶² I take issue with Honoré’s second criteria. He admits the duty to maintain a sexual relationship is not set out anywhere in so many words, but emerges as a result of the marriage ceremony. The law here is “concerned with minimum

⁵⁸ Collier op cit n2 pg 147; Hamilton, C. *Marriage as a trade* London, Chapman and Hall, 1909; O’Donovan op cit n51 pg 47; Rubin, G., ‘Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality’ in Vance, C.S (ed) *Pleasure and Danger: Exploring Female Sexuality* Boston, Routledge & Kegan Paul, 1984 pgs 267-319 at pg 275

⁵⁹ *D-e v. A-g (falsely calling herself D-e)* op cit n5

⁶⁰ Fishbayn, L., “‘Not quite one gender or the other’”: Marriage law and the containment of gender trouble in the United Kingdom’ (2006-2007) 15 *Journal of Gender, Social Policy & the Law* 3 pgs 413-441 pg 417

⁶¹ Honoré op cit n2 pg 16

⁶² MCA 1973 s1(2)(a)

standards of conduct, not with the conduct of the ideal husband or wife. For that reason it is put as a duty to try to ensure a tolerable relationship, not to satisfy the other partner.”⁶³ Of the case law discussed in Chapter 2, not one case explicitly required an on-going sexual relationship. *Weatherley v. Weatherley*⁶⁴ stated that, even if contraception is used in all sexual contact, were one spouse then to refuse intercourse, this could not constitute desertion, though under today’s law, one could petition for a divorce on the basis of unreasonable behaviour.⁶⁵ This seems somewhat of a legal anomaly. Why does the law care about consummation, but not about what happens afterwards? Arguably, consummation is regarded as not only the final act of consecration in marriage, but as an indicator of the sexual life to come. It is assumed that a consummated marriage indicates the partner’s sexual capability and the possibility of intercourse continuing during the course of the marriage. Consummation is legally privileged (no matter the later sexual relationship) because it provides at least one opportunity for conception. The case of *Synge v Synge*⁶⁶ held that a wife must provide good cause to refuse her husband marital intercourse, whilst *Hutchinson v Hutchinson*⁶⁷ held that a husband’s refusal to continue marital intercourse was tantamount to desertion, and a wife’s refusal of marital intercourse in *Slon v Slon*⁶⁸ was held to constitute constructive desertion, demonstrating that intercourse in marriage is of significant importance.

Failure to maintain a ‘sex life’ will not result in a decree of nullity (issues of cruelty aside). Rather than solidifying the role of consummation in law, the distinction between the first

⁶³ Honoré op cit n2 pg 23

⁶⁴ *Weatherley v. Weatherley* [1947] A.C 628

⁶⁵ MCA 1973 s1(2)(b); Gower, L.C.B. ‘Baxter v. Baxter in Perspective’ (1948) *Modern Law Review* 11 pg 176-195 at 188

⁶⁶ *Synge v Synge* [1901] P. 317

⁶⁷ *Hutchinson v Hutchinson* [1963] 1 W.L.R 280

⁶⁸ *Slon v Slon* [1969] P.122

instance of sex, and all subsequent sexual contact serves to undermine the arguments given for the continuation of the consummation requirement. If the aim of consummation is to compound the notion of ‘one flesh’; if the aim is to promote heteronormativity; if the aim is to promote procreation, can it be said that these aims are achieved through just one instance of this act? One instance of heterosexual intercourse does not prevent a person from later engaging in homosexual acts, and although it of course does give the opportunity of procreation, it does not guarantee it, especially as contraception does not invalidate consummation.

If a couple consummates their relationship, then under the law they have succumbed to these understandings of sex and have played a role in patriarchal understandings of consummation. One occurrence of sex does not guarantee mutual satisfaction. Nor does it guarantee the avoidance of licentiousness so abhorred by Dr Lushington.⁶⁹ So why has the law not dictated the sexual liaisons required for the entirety of a marriage? There is no clear reason for this omission. If courts are unwilling to discuss the sexual relations required of a marriage after the wedding night, what reason can they have to involve themselves in the wedding night? The government should not require a specific act from its citizens in the bedroom.

Incumbent in understandings of penetrative sex is the notion that the woman is a vessel for the man’s sexual pleasure- she must submit to him sexually as his wife. *N-r, falsely called M-e v M-e*⁷⁰ demonstrates this historical basis for discussing sex as something which is ‘done by’ a man to a woman. The husband’s doctor in this case spoke of the wife in the following terms; ‘to be properly made and formed as to her parts of generation, and apt and fit for man,

⁶⁹ *D-e v. A-g (falsely calling herself D-e)* op cit n5

⁷⁰ *N- r, falsely called M-e v M-e* (1853) 2 Rob Ecc 625

and that no impediment exists, or existed, to her being carnally known by man...”⁷¹ In this formulation, the wife becomes the ‘Other’ to her husband. Not a man, not human, but a vessel for his sexual requirements. The husband’s doctor continued, “a woman must be capable of being carnally known, unless there is some visible or palpable incapacity, or unless she resists the act of intercourse.”⁷²

The judge in this case concluded that impotence in a husband can only be determined when, after trial cohabitation, “and the wife proved to be a perfect woman and a virgin, the non-consummation is by law attributed to the impotence of the husband.”⁷³ The judgement is no doubt a product of its time however it sets the historical and social tone for non-consummation cases today. The wife should be ‘perfect’ (a virgin), and if she is not perfect, this needs to be attributable to outwardly visible physical defects, or psychological resistance. If she is perfect, only then can the blame for non-consummation move to the husband in cases where impotence has no external indicators. So, “the important player in the drama of consummation- the ‘speaking’ part, if you like-is the penis.”⁷⁴ Yet consummation, requires two people, one of whom needs to be a woman. The penetration of woman is the key to the successful completion of consummation.⁷⁵

Masculinity and sexual enjoyment are given prime importance; the consummation act is about the penis. Women are necessary, but the two sexes are supposed to have different roles and draw different pleasures from the experience. “Women’s sexual pleasure, though

⁷¹ Ibid 628

⁷² Ibid at 629

⁷³ Ibid at 635

⁷⁴ Brook op cit n1 pg 55. Collier argues the naturalisation of heterosexual sex is to construct male sexuality, and the penis, as the “essential natural ‘force’.” Collier op cit n2 pg 148. Fraser argues marriage makes women a commodity in a system “where value is defined by the presence or absence of the penis.” Fraser op cit n49 pg 60

⁷⁵ *Clarke (Otherwise Talbott) v Clarke* [1943] 2 All ER 540

recognised, has frequently been constructed in relation to an awareness of the possibilities of conception taking place...it is thus a 'woman's desire for motherhood' which is central to her desire for 'normal' marriage, not her desire for sexual satisfaction *per se*.”⁷⁶

In this way, all other expressions of affection are de-valued. The female orgasms' construction as mysterious and perhaps even non-existent, and maternity as the height of female pleasure have served to create a sexual understanding that promotes a male centred view. As a result, “sexual pleasure received from physical closeness, from bodily contact, but not from penetration, does not exist or denotes female frigidity.”⁷⁷ But this has been viewed as a 'condition' in women, whereby as a general rule a wife should “submit... to her husband's embraces, but principally to gratify him.”⁷⁸

Collier states that discussions of sexuality are changing. A re-thinking of penetrative heterosexual sex, as required for consummation, “has become a matter of concern not simply in assessing the quality of an individual's sexual life. It has also, through the advocacy of 'safe', protected sex and a stressing of the dangers of unprotected sexual intercourse, become a matter of the protection of life itself.”⁷⁹ Gardner and Shute, whilst writing about rape ask “why is penetration so special?”⁸⁰ They argue that although the penetration requirement, with its crude phallocentrism is a “hang over from an era of obsession with female virginity and overbearing preoccupation with the sin of bearing illegitimate children, an era in which

⁷⁶ Collier op cit n2 pg 158. Grosz argues female sexuality and fertility have been deemed the defining cultural characteristics of all women and these functions “render women vulnerable... as... prescribed by patriarchy.” Grosz, E., *Volatile Bodies: Towards a Corporeal Feminism* 1994, Indiana, Indiana University Press, pg 13-14

⁷⁷ O'Donovan op cit n51 pg 48

⁷⁸ Acton, W. 'The Functions and Disorders of the Reproductive Organs (1875)' in Jeffreys, S. (ed) *The Sexuality Debates* London, Routledge & Kegan Paul 1987 pgs 57-73 pg 62

⁷⁹ Collier op cit n2 pg 142

⁸⁰ Gardner, J. & Shute, S. 'The Wrongness of Rape' in Horder, J (ed) *Oxford Essays in Jurisprudence: Fourth Series* Oxford, Oxford University Press, 2000 pgs 193-218 pg 209

women were *officially* regarded as objects... rather than subjects”⁸¹ its solution is not as simple as to do-away with that condition. They argue that penetrative sex has been given a particular moral symbolism that has been over-romanticised, and the desire to create ‘one flesh,’ is a desire to create an “impossible perfect union of two selves through two bodies.”⁸² It is described as the “most complete and literal intertwining of selves”⁸³ and once this possession of another is complete (through marriage, sex or both), the husband is open to objectifying his wife’s body as seen in the courts deference to the (male dominated) medical profession, and in the earlier case law, the principle that a husband ‘submits’ his wife for physical examination.

In the prioritisation of penetrative heterosexual intercourse, Jackson suggests “there is no reason why the conjunction of a penis and a vagina has to be thought of as penetration, or as a process in which only one organ is active...[it is actually] the product of the social relations under which those bodies meet.”⁸⁴ This refers to a point discussed earlier about the value of consummation, not just as an act in a certain moment, but the social value and meaning it provides. However, if the law is ever “out of step with the sexual dictates of nature then the ensuing disorder threatens not only the institution of marriage but ultimately social order per se.”⁸⁵ Adultery, non-heterosexual sex and sex outside of marriage become issues of interest as sites of political deviance, and social breakdown. But, social conditions and trends are ever changing.

⁸¹ Idem

⁸² Ibid pg 210

⁸³ Idem

⁸⁴ Jackson, S., ‘Gender & Heterosexuality: A Materialist Feminist Analysis’ in Maynard & Purvis (eds) (*Hetero*)sexual Politics London, Taylor and Francis, 1995, pg 21

⁸⁵ Collier op cit n2 pg 148

Glennon claims that the best way to rid English law of the consummation requirement would be to advocate gay-rights. She claims that it is within these discussions that the true nature of the use of sexual relationships is seen. However, she is keen to point out that in the struggle for rights, she feels it would be better for gay men and lesbians to ask for express legal recognition, rather than “the possible absorption of lesbian and gay relationships within de-sexualized legal categories, which can amount to little more than homophobic responses to the demands for legal development.”⁸⁶ Unfortunately, the recent enactment of the M(SSC)A does little to help, and is further discussed in Chapter 5.

It appears difficult to produce a conclusive legal reasoning in non-consummation cases, demonstrated through a comparison of *Corbett* and *S.Y.* In *Corbett* an ‘artificial’ vagina was deemed incapable of consummation. But in *S.Y.*, a vagina that was extended was deemed capable of consummation because it was anatomically correct. “On another level, however, there *is* a consistency to be found here; for what marks out the naturalness, or otherwise, of the genitals is not so much their relation to transformative surgery as something much more subjective and difficult to quantify: male sexual pleasure.”⁸⁷

The case laws’ discussion of male sexual pleasure demonstrates the tense relationship between for example the Protestant Church’s two views of marital sex; firstly that sex should be for procreation, and secondly that sex is about a man’s pleasure, to prevent adultery.⁸⁸

Collier argues that at the end of the sixteenth century a shift in the Church’s view of marital intercourse “thus entailed a separation of pleasure and procreation as distinct concepts- at the

⁸⁶ Glennon, L., ‘Displacing the ‘conjugal family’ in legal policy- a progressive move?’ (2005) 2 *Child and Family Law Quarterly* 17 pg 153

⁸⁷ Collier op cit n2 pg 157

⁸⁸ Collier op cit n2 pgs 157-162. King James Bible: 1 Corinthians 6:18-20 & 1 Corinthians 7:1-2

same time, paradoxically, as advocating their inseparability in marital coitus,”⁸⁹ which was reflected in the non-consummation case law. Female sexual pleasure is not discussed in the case law as an end in itself. Marriage is constructed and presented as the primary institution in which women should procreate and fulfil their wifely duties. Where a woman complains of non-consummation, it is often inferred that she is actually complaining of the inability to enter into motherhood. Women enable sexual pleasure, and the continuation of the human race for men. The words ‘woman’ and ‘mother’ have become synonymous but these roles are not divinely intertwined. Men are capable of Mothering.⁹⁰ Yet the dominant image of ‘mother’, “is first and foremost that of a married woman....the term “married mother” is almost never used- rather, it is simply assumed that a mother will be married, carrying the further tacit assumption that a mother is heterosexual.”⁹¹

It is somewhat surprising that procreation is not necessary for consummation “given that one of the most frequently heard rationales for marriage is its suitability as an environment for offspring...”⁹² It can further be inferred from Chapter 2 that “a husband’s lack of sexual appetite is beyond his control and not subject to discipline, but wives are expected to “adjust” their will for sex.”⁹³ The case of *Dickinson v Dickinson*⁹⁴ shows the earliest use of the ‘wilful refusal’ clause. The woman’s refusal to have sex, because she did not want children is deemed capable of causing a nervous breakdown in the husband. Yet the case law makes it clear that procreation (or the possibility of procreation) is not a prerequisite of legal

⁸⁹ Collier op cit n2 pg 157

⁹⁰ Slaughter, M.M., ‘The Legal Construction of “Mother”’ in Fineman, M.A., and Karpin, I., (eds) *Mothers In Law: Feminist Theory and the Legal Regulation of Motherhood*, New York, Columbia University Press 1995 pgs 73-100

⁹¹ Chamallas, M., *Introduction to Feminist Legal Theory* New York, Aspen Publishers, 1999, pg 277

⁹² Brook op cit n1 pg 76

⁹³ Ibid pg 80

⁹⁴ *Dickinson v Dickinson (Otherwise Phillips)* (1913) P. 198

consummation, and actually what is being inferred is that a man ‘needs’ sex.⁹⁵ “Pleasure is thus given priority over procreation but it is a sexual pleasure which is to be derived from sexual intercourse,”⁹⁶ and a pleasure that needs to be experienced by a male. This move to pleasure over procreation was a gradual process. Cases such as *Cowen*⁹⁷ and *J v J*⁹⁸ show the courts initial instinct to nullify cases in which the couple were incapable of conception during the sexual act, be that due to contraception or an operation. In both of these cases there was wilful refusal on the part of the husband to fulfil a role that Gower claims is “what most people would regard as his matrimonial duties,”⁹⁹ i.e: the role to allow the possibility of impregnating his wife.

Why have courts increased their discussions of pleasure, rather than focusing solely on procreation? Is it recognition of changing social conceptions of the role of marital sex? No. Rather, it is recognition that upholding such a requirement is practically difficult. For example, if a marriage is declared voidable due to use of contraception, would the court then have to assess the effectiveness of each respective form of contraceptive? Further, if the condom used is found to have ripped, a voidable act, intended not to consummate the relationship would suddenly be deemed capable of consummating the marriage. This would move the law from examining the intimacies of the marriage bed, to examining whether or not the “contraceptives used on every occasion effectively prevented the male seed from entering the body of the woman.”¹⁰⁰ From the point of view of say the Catholic Church, at first instance one would assume that they would not condone contraceptive use, as it would

⁹⁵ *Baxter v. Baxter* [1948] A.C 274 (H.L)

⁹⁶ Collier op cit n2 pg 159

⁹⁷ *Cowen v Cowen* [1946] P. 36

⁹⁸ *J v J* [1947] P. 158

⁹⁹ Gower op cit n65 pg 178

¹⁰⁰ *Ibid* pg 185

go against teachings about procreation. Alternatively, if the use of contraception could nullify a marriage, the church would also disagree with this because it could lead to a situation of ‘trial marriages’ which also go against teachings of marriage for life.¹⁰¹

*Clarke v Clarke*¹⁰² is the clearest example in which pleasure is prioritised over procreation. 12 years after the birth of their child, and after 16 years of marriage the court still held that the marriage had never been consummated. Sexual pleasure is primarily the male pleasure, and must adhere to the “proper...ordinary...natural”¹⁰³ meaning of the word; “The husband sets the sexual agenda and is not expected to endure anything he might find distasteful or alien to his own needs. Conjugal rights, it seems, are men’s rights.”¹⁰⁴ Whilst the case law and surrounding literature portray (hetero)sex as normal, both in *G. v M.*¹⁰⁵ and in Dr Chesser’s¹⁰⁶ guide to marital sex, worryingly, the use of a little alcohol is also advocated to help ‘loosen’ up nervous women, and ensure the male right is served, though this suggestion of intoxication was refuted and described as doctor’s being ill-equipped to understand issues of non-consummation.¹⁰⁷

Definitions of ‘normal’ penetrative sex have been specially honed within the courts. Case law has shown the development of those groups which lie outside ‘normal’ marriage law- those unable to, and later, those unwilling to consummate. Hinds claims that the acceptance of

¹⁰¹ Ibid pg 187.

¹⁰² *Clarke (Otherwise Talbott) v Clarke* op cit n75. See also *Dredge v Dredge (Otherwise Harrison)* [1947] 1 All ER 29

¹⁰³ *D-e v. A-g (falsely calling herself D-e)* op cit n5 at 1045 per Dr Lushington

¹⁰⁴ Brook op cit n1 pg 81

¹⁰⁵ *G. (the husband) v M. (the wife)* (1884-85) L.R. 10 App. Cas 171

¹⁰⁶ Chesser, E. *Love Without Fear: A Plain Guide To Sex Technique For Every Married Adult* (New and Revised ed) London, Jarrolds, 1966 pg 76

¹⁰⁷ Friedman, L.J. *Virgin Wives: A Study of Unconsummated Marriages* London, Tavistock Publications, 1962 pg 1

‘wilful refusal’ for non-consummation is an extension of the reflection of the judicial tendency to nullify marriages that are deemed to be intolerable and/or unjust from their inception.¹⁰⁸ Analysis of cases that involve ‘mere’ wilful refusal, such as *Dickinson*¹⁰⁹ and *Napier*,¹¹⁰ use terms such as ‘obstinate refusal’ to explain the behaviour of these wives, compounding the assessment of women as sensitive, emotional, weak, hormonal and irrational, thereby justifying treating women as second class.¹¹¹ Women incapable of sex for psychological reasons have been labelled ‘frigid’ which “was the diagnosis offered by men to the women they’d failed to ‘satisfy’- or rather women who’d failed to be satisfied.”¹¹² Why have women’s choices to avoid sex not been seen as a demonstration of their decisiveness, assertiveness and freedom of sexual expression?

3.3: Prioritisation of (sexual) marriage

Marriage is a... social institution that has for centuries inspired moral beliefs which encourage and protect it.¹¹³

Consummation is a “corporeal yoke linking law and marriage,”¹¹⁴ and is the only physical intimacy required by the marriage contract. This physical requirement was not replicated in civil partnership or in same-sex marriage (Chapter 5). Prioritising marriage produces

¹⁰⁸ Hinds, R.L. ‘Domestic Relations- Annulment of Marriage on Ground of Mental Aversion to Physical Consummation’ (1926) 12 *Virginia Law Review* pgs 239-241 pg 239; Bishop, W.D., ‘Choice of Law for Impotence and Wilful Refusal’ (1978) 41 *Modern Law Review* pgs 512-525

¹⁰⁹ *Dickinson v Dickinson (Otherwise Phillips)* op cit n94

¹¹⁰ *Napier v Napier (Otherwise Goodban)* [1915] P. 184

¹¹¹ Stopes, M.C. ‘Married Love (1918)’ in Jeffreys, S. (ed) *The Sexuality Debates* London, Routledge & Kegan Paul 1987 pgs 551-569 pg 554; Hinds op cit n108 pg 240

¹¹² Campbell, B., ‘A Feminist Sexual Politics: Now you see it, now you don’t.’ (1980) 5 *Feminist Review* 1 pgs 1-18 pg 4

¹¹³ www.feministissues.com/radical_feminism.html (accessed 25/04/09)

¹¹⁴ Brook op cit n1 pg 54

“meaningfully sexed bodies and supplies the conditions for which certain kinds of sex are performative- and therefore “special” (privileged).”¹¹⁵ In some of the case law presented there had been fragments of sexual intimacy between the couple, or occasions outside of the marriage where the person had achieved sexual intercourse (with their spouse or another). These occurrences are legally dismissed as irrelevant, and not reflective of the nature of sexual activity within marriage, due to the state’s institutionalised privileging of the “formalized sexual tie between a man and woman, reinforced by the later biological event of parenthood,”¹¹⁶ and anything else is rendered ‘not good enough’.

A point easily forgotten in the discussions of consummation, is the assumption that when the law was made, that (for the wife at least), it would be the first sexual experience. If the couple have had no previous sexual experience, then the wedding night, traditionally thought of as the consummation moment, presents a new frontier in the couple’s relationship. Chesser, writing in the 1960’s explains that the wedding night is more significant for the wife for two reasons, “first, the significance of the occasion from the physical standpoint; second, the tremendous emotional significance of the occasion for the woman... The great majority of wives look upon the honeymoon, and particularly the wedding-night, as the greatest occasion of their lives. Whatever impressions are made then, stay *right through life*.”¹¹⁷

Chesser’s view reinforces the historic view of women as emotional. He goes on to explain that because the moment is so important for the wife, the husband should not regard the wedding-night “solely, or even primarily, as an occasion for his own sexual gratification. If

¹¹⁵ Ibid pg 68

¹¹⁶ Fineman, M.A., *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* London, Routledge 1995 pg 151

¹¹⁷ Chesser op cit n106 pg 67

he regards it thus, not only will his own pleasure be marred but he will wound his wife emotionally and so their married life may be adversely affected.”¹¹⁸ Sperry warns that men find consummation “one of the most delicate and important events in their own lives... Now is the time for the husband to show himself a man, instead of a selfish sensualist or a careless and ungovernable brute,”¹¹⁹ demonstrating that in that moment masculinity moves from brutishness to sexual prowess.

Radical feminism in particular has argued that despite legal developments, English law is still reliant upon the idea of a monogamous sexual relationship between a man and a woman when looking for definitions of the family.¹²⁰ The pervasive image of ‘sexual-family-as-natural’ creates a metanarrative and discourse that transcends disciplines and crosses social divisions, designating the husband-wife relationship as the core intimate relationship for law to legislate, key to both religion and social policy.¹²¹ Law does this whilst claiming to remove itself from the private sphere of life. Brook argues that a lot of energy is used in maintaining an interest in marriage, from the “media frenzy of royal weddings... [to] the very big business of bridal industries. On a more mundane level, there is the inevitable boost in soap opera ratings when a wedding looms into the storyline. Marriage is anything *but* ignored- we are alerted to it at every turn, bombarded daily with images and messages laden with its social significance,”¹²² within the media for example.

¹¹⁸ Idem

¹¹⁹ Sperry, L.B (1900) quoted in Hall, L.A., *Hidden Anxieties: Male Sexuality, 1900-1950* Cambridge, Polity Press 1991, pg 65

¹²⁰ Diduck, A and Kaganas, F. *Family Law, Gender and the State: Text, Cases and Materials* (2nd ed) London, Hart, 2006 pg 3

¹²¹ Fineman op cit n116 pg 1 and 145

¹²² Brook op cit n1 pg 2

Ideas of family and marriage are being challenged with reforms based upon concepts of equality and freedom.¹²³ This invasion into the private sphere has been welcomed by radical feminists in relation to some elements of married life but not in others. For example, radical feminists have drawn a lot of attention to domestic violence, made invisible by the state's refusal to involve itself in marital affairs, and has served useful for the purposes of highlighting the existence of domestic violence, the extent to which it pervades society, and the forms it can take. Marital rape would also still exist were it not for the state's intervention in the nuclear family. In these respects, state intervention has been advantageous. However, I argue that the requirement of sexual intercourse within a marriage, and the intervention of the state to allow for a spouse to nullify any relationship that does not measure up to this standard is not a welcome intrusion into the private sphere. The courts should remain out of the bedroom when it amounts to *demanding* sexual intercourse both in respect of non-consummation, and in claims of lack of sexual intercourse resulting in unreasonable behaviour in divorce. Fineman argues that the law has 'partly pulled aside' the veil of privacy reserved for the family, "revealing the hierarchical nature of the family and its conceptual core of common-law inequality. In response to feminist agitation... the law regulating the domestic has changed,"¹²⁴ but has not yet changed enough to nullify the consummation requirement.

Marriage is still privileged materially, socially and personally.¹²⁵ Married couples have historically been medically privileged and approved "for infertility treatment, adoption,

¹²³ Fineman op cit 116 pg 156. This intrusion into family life has resulted in statutory reforms such as CPA, GRA and M(SSC)A.

¹²⁴ Ibid pg 156; Johnson, S., 'Taking Our Eyes Off the Guys' in Leidholdt, D. & Raymond, J.G., *The Sexual Liberals & the Attack on Feminism* New York, Pergamon Press 1990 pgs 56-60 at pg 56

¹²⁵ O'Donovan op cit n51 pg 56

parental rights on the break-up of relationships.”¹²⁶ Marriage also has its own symbols and iconography. Symbols of marriage include the “engagement ring, church announcements, public notices, invitations, special clothes, wedding dress, veil... Marriage is a *rite de passage* to be celebrated with food, wine, speech; to be recorded on film.”¹²⁷

The marriage institution has promoted the importance of the consummation requirement 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.”¹²⁸ In line with radical feminist understandings of sex and gender, one would argue that consummation within the MCA 1973 is the legalisation of men’s sexual dominance over women, and reinforces the view that procreation is the central purpose of marriage, despite the explicit expression in the courts that this is not the case, and the fact that sexual intercourse between a sterile couple still constitutes intercourse. Collier argues that sexual intercourse serves to differentiate marriage from any other legal contract, establishing marriage as a;

relationship of a different order from, for example, the sex-blind contract relationship...It is the essence of the marriage relationship that there occurs, or at least may potentially occur, heterosexual intercourse... Intercourse and marriage are said to be inseparable but this is not backed with any evidence that marriages actually are contracted with the intention of having ‘legal’

¹²⁶ Idem

¹²⁷ Ibid pg 57

¹²⁸ Herring, J. *Family Law* (4th ed) Essex, Pearson, 2009 pg 56; The Office for National Statistics found that in 2011, less than 30% of marriages had religious ceremonies <http://www.ons.gov.uk/ons/rel/vsob1/marriages-in-england-and-wales--provisional-/2011/sty-marriages.html> (accessed 23/11/13)

sexual intercourse... The parameters of human sexuality transcend the genital connections of the traditional marital sexual dichotomy.¹²⁹

To remove consummation as a requirement would be to directly threaten the institution of marriage. This is why the Court looks at whether or not consummation can occur with the spouse *only*. Intercourse with another is irrelevant. It is necessary to know that within the confines of the marriage in question both parties are capable of satisfying the sexual elements necessary.

In the twenty-first century, the nuclear family model- based on a husband, wife, and children- is not the societal norm in the U.K., and so Hibbs, Barton and Beswick ask why some people still get married?¹³⁰ There are legal benefits, and those of a religious persuasion regard the ceremony as a key part of their lives. The governmental research undertaken by Hibbs, Barton and Beswick found that the Government's stated support "for families is somewhat equivocal in its support for marriage. It says that it neither has a wish to interfere in family life nor to pressure people into one type of relationship. It does not wish to try to make people marry, or criticise or penalise those who choose not to."¹³¹ Despite this, the government does provide greater financial benefits to people who are married. The authors tried to assess the importance of law as a factor in the decision making process of couples when contemplating whether to marry or not. They argued that in fact, many people are unaware of the legal benefits or requirements of marriage, and the main factors considered are economic, social,

¹²⁹ Collier op cit n2 pg 127

¹³⁰ Hibbs, M., Barton, C., & Beswick, J. 'Why Marry?- Perceptions of the Affianced' (2001) 31 *Family Law Journal* pgs 197-207

¹³¹ Ibid pg 197

and emotional.¹³² Marriage provides both legal and social advantages: being in a heterosexual couple is the norm, and marriage is the final, and ‘everlasting’ union used to demonstrate this. It is a status symbol, a sign of desirability, eligibility and fertility.

The legal rights spouses acquire¹³³ are beneficial to the state, which involves itself in the breakdown of relationships, trying to provide equitable division of property and adequate care of children, for example. Herring argues that even if marriage were abolished, a replacement institution would be necessary, “to... legally... regulate family.”¹³⁴ However, no adequate reason is provided for the need to regulate family relations. The requirement of consummation serves to make these ‘legally special’ relationships easily identifiable, for it could be argued that “it is the act of sexual intercourse that most clearly distinguishes marriage from a close relationship between two platonic friends.”¹³⁵

3.4: Sex and gender

The rules surrounding marriage and the necessary criteria for formalising the ceremony serve to maintain a perceived ‘natural order’, for men and women. “Sexed categories are, however, fictions. The familiar binaries of “male/female” and “man/woman” are neither exhaustive nor exclusive. Rather the patriarchal legal construction of marriage is one of a number of mechanisms that makes them seem to be so. Marriage acts as an axle not just for

¹³² Rowland, R. & Klein, R. ‘Radical Feminism: History, Politics, Action’ in Bell, D. & Klein, R. *Radically Speaking: Feminism Reclaimed* London, Zed Books 1996 pgs 9-36 pg 15; Barlow, A., & James, G. ‘Regulating Marriage and Cohabitation in 21st Century Britain’ (2004) 67 *Modern Law Review* 2 pgs 143-176 at pg 161

¹³³ Hibbs, Barton & Beswick op cit n130 pg 200

¹³⁴ Herring op cit n128 pg 90

¹³⁵ Ibid pg 56

heterosexism, but also for corporeal and sexed categories.”¹³⁶ The cultural naturalisation of gender and attempts to “fix the dualisms of male/female, heterosexual/homosexual in place do not ‘float free’ of the law... They are beliefs which have a history, a context and a legally based legitimacy.”¹³⁷ Fineman argues that legal rules become prizes for competing factions. Further, the sexual family represents “the most gendered of an organized women’s movement. While other, nonfamily transformations have fostered male-female competitiveness, the family is the one area where tensions generated by perceived changes in the status and position of women are registered most clearly.”¹³⁸

Consummation serves to reinforce a certain enactment of the sexual act as normal. Man as strong and woman as vulnerable is an accident of biology, and “had it not been for this accident of biology, an accommodation requiring the locking together of two separate parts, penis and vagina, there would be neither copulation nor rape as we know it.”¹³⁹

Collier conceptualises consummation as a ‘heterosexual trinity;’ “that is, erection, penetration and orgasm as the ‘perfect’, ‘complete’ sex act.”¹⁴⁰ Yet case law has reflected that neither male nor female orgasm is necessary to complete the sexual act. Chesser reinforces the view of women as vulnerable, claiming that during the first intercourse women will instinctively want to resist. “This resistance is not entirely due to a fear of possible pain from the rupturing of the hymen, though that may play a part... Much deeper is an instinctive spiritual or mental recoil from full congress. This arises in part from the prospect of losing something which has

¹³⁶ Brook op cit n1 pg 67

¹³⁷ Collier op cit n2 pg 144

¹³⁸ Fineman op cit n1 16 pg 149

¹³⁹ Brownmiller, S, 1976 quoted in MacKinnon, C., ‘From Practice to Theory, or What is a White Woman Anyway?’ in Bell, D. & Klein, R, S (eds) *Radically Speaking: Feminism Reclaimed* London, Zed Books, 1996 pgs 45-54 pg 49

¹⁴⁰ Collier op cit n2 pg 143

been carefully protected.”¹⁴¹ Women are inherently frigid and sensitive, especially virgins. He claims that for a virgin, there is nothing more terrifying than a display of ‘sexual athleticism’ as the husband rushes to display himself as quickly as possible, the shock of which “may yield from that moment a dislike of all sexuality, which will render intercourse difficult, if not impossible.”¹⁴²

None of the available case law discussed fear of hymen rupturing, or fear of penises. Chesser’s assertions place woman in a delicate and subversive role in the first intercourse. The women of the case law are sensitive, and their first impressions render them incapable of understanding that sex may change as partners understand each other’s bodies further, or as they feel more confident to experiment or express what they do and don’t like, or could be dramatically more enjoyable with a different partner. It should also be acknowledged that there has been a change in social trends in sexual attitudes, with many people being engaged in sexual relationships before marriage. This means that although there “may no longer be a sacrifice of female virginity to male sexual desire, there is a sacrifice of autonomy... on unequal terms.”¹⁴³ In theory, a husband sacrifices some autonomy as he ‘becomes one’ with his wife. This sacrifice is however nothing more than symbolic. It is the wife’s autonomy that is in fact sacrificed.¹⁴⁴ Her body becomes part of her husband’s property, but Stychin argues that we need to stop engaging with the construction of our bodies as an object of “(man’s) knowledge. A feminist inspired analysis of property in the body requires that we theorise beginning from the body and from specific experiences of embodiment; rather than from a

¹⁴¹ Chesser op cit n106 pg 68

¹⁴² Ibid pg 69

¹⁴³ O’Donovan op cit n51 pg 47; Holland, J., Ramazanoglu, C., & Thomson, R. ‘In the same boat? The gendered (in)experience of first heterosex’ in Richardson, D. (ed) *Theorising Heterosexuality* Buckingham, Open University Press, 1998 pgs 143-160 pg 146

¹⁴⁴ O’Donovan op cit n51 pg 43

standpoint of ‘universal’ reason which historically has constructed woman as Other.”¹⁴⁵ To be a man, is to be a person. Male sexing “has been so proximate to personification that male sexing has been all but invisible. Men have largely been defined by their individuation and their individuality as persons; women by their homogenisation as a sex and their...confinement to the domestic sphere of life”.¹⁴⁶ This understanding of male sexuality as normal, and as such unquestioned, is addressed next.

3.5: Male sexuality and the impotent man

In consummation, just like the homosexual man, the impotent man signifies a threat both “to marriage and the social body. He is...not really a man at all... As victim of the ‘mythology of virility’ he is one whose sexuality speaks of the truth of his being and for whom entry to the married state is to be denied by reason of the Truth: he is incapable of sexual intercourse.”¹⁴⁷ The impotent man is not denied entry into the state of marriage, but his impotence provides accelerated exit from the relationship, if it is discovered after the marriage ceremony, should either party wish to make this argument. Given the clear sexual requirements necessary for ‘full and complete’ consummation, impotence in the case law was taken to be a male affliction. Women were rather termed frigid, which implies a choice, while impotence implies no choice in the matter. The case law examining male impotence provides a clear understanding of what the judiciary (and to some extent, society) “have taken to be the nature of the male pleasure which is to be derived from sexual intercourse.”¹⁴⁸ Extensive

¹⁴⁵ Stychin, C.F., ‘Body Talk: Rethinking Autonomy, Commodification and the Embodied Legal Self’ in Sheldon, S., and Thomson, M., (eds) *Feminist Perspectives on Health Care Law*, London, Cavendish, 1998 pp211-237, p215

¹⁴⁶ Naffine, N., ‘Our legal lives as men, women and persons’ (2004) 24 *Legal Studies* pgs 621-642 pg 638-639

¹⁴⁷ Collier op cit n2 pg 150

¹⁴⁸ Idem

consideration is not given in the case law to the psychological elements of impotence. The impotent man is most clearly understood when compared to its binary opposite; the potent man. In law and society, the potent man has become a representation of masculinity. Collier explains, “the idea of the ‘family man’ constitutes a model of masculinity which surfaces regularly in legal discourse; he is the embodiment of a virile, responsible masculinity.”¹⁴⁹

The ‘family man’ has been established as married and employed, and “these contingencies, alongside sexual orientation and physical ability, constitute key elements of hegemonic masculinity in law.”¹⁵⁰ The ideal of masculinity has been lent the force of naturalism, as masculinity, and therefore a man’s worth is most evident in its ‘true’ physical form- penetrative sexual intercourse. Only a true man can be the head of a family- he must be heterosexual and virile. The law will protect this family man above all others as the norm. Women can never achieve this norm, therefore “the absence of the penis... signifies femininity and the absence of intercourse... signifies impotence and the unconsummated marriage.”¹⁵¹ Hall argues the creation of the male ‘norm’ implies that sexual discourse operates “exclusively for his benefit and that there...[is] no ambiguity or ambivalence in his position, no possible constrain upon him. He and his sexuality have not been accorded the attention given to attitudes to female sexuality and the construction of deviant identities.”¹⁵²

Male sexuality is afforded a primacy in the case law that is not extended to female sexuality. Judges go to some length to avoid labelling men as impotent. In *N v M*¹⁵³ the judge declared that the doctors had made their declaration of impotence based purely on the fact that the

¹⁴⁹ Ibid pg 151; Thomson op cit n53

¹⁵⁰ Collier op cit n2 pg 151

¹⁵¹ Idem; Thomson op cit n53 pg 263

¹⁵² Hall op cit n119 pg 1

¹⁵³ *N-r, falsely called M-e v M-e* op cit n70 at 634

marriage had not been consummated. There were no external factors to indicate that the husband was impotent. The judge found this troubling, and went to great lengths to suggest that the husband was probably not impotent, but had been impotent with his wife only. Whilst no blame was apportioned to the wife, the very suggestion that the impotence was a result of this marriage only, is a slight on her sexual ability, and reassured the husband's sexual virility. Thomson argues the need for consummation is the need for a moment in which "heterosexual masculinity is defined primarily through performance... The construction of the consummative act is around male activity, response and pleasure."¹⁵⁴

Hall collated the available literature regarding male sexuality in the first half of the twentieth century, and found that for wedding night advice, men were constructed as "the rampant, impetuous male who needed to curb his insurgent desires if the marriage were not to be wrecked from the outset."¹⁵⁵ He stated that few writers mentioned the possibility of a temporary inability to obtain erection, ignoring the possibility of 'failure'. Perhaps less disruptive but equally threatening to marital bliss is the husband who suffers premature ejaculation. This has however not been explicitly addressed in any of the case law. Some research has implied that this was a problem found in the upper classes, because only the educated upper classes could understand the condition.¹⁵⁶ "The more intelligent, cultivated man, because of his higher ideals and aspirations in the sexual sphere, was more likely to suffer from dysfunction, and to worry about his sexual adequacy."¹⁵⁷ One should note Hall's caution that perhaps the research was a bit skewed; "Much of the published writing on

¹⁵⁴ Thomson op cit n53 pg 264

¹⁵⁵ Hall op cit n119 pg 72

¹⁵⁶ Cooper, A., *The Sexual Disabilities of Man and Their Treatment* (2nd ed) H.K Lewis, 1910

¹⁵⁷ Hall op cit n119 pg 78

working-class marriage came from middle-class observers who found it easier to study and comment upon working-class habits and practices than those of their own class.”¹⁵⁸

Consummative intercourse has served to silence women, and increase sexual pressure on men who are expected to have sexual prowess and ability. They are construed as naturally polygamous and aggressive. Women are there to serve their sexual needs within the confines of marriage; “in assigning responsibility for a woman and her children to one man, [channelling]...his socially acceptable sexual expression and free[ing] the energy he might otherwise expend in sexual activity for socially productive work.”¹⁵⁹ It is assumed that all men have these universally understood sexual needs. Women (as long as they have ‘adequate’ vaginas) are passive objects in sex for the use of men, whilst the men are the active element of the sexual act.¹⁶⁰ If the woman is unhealthy, it does not matter as much as if the man is, for only her enjoyment is diminished, “whereas the husband may still continue to obtain full satisfaction.”¹⁶¹ Men rather than women need to initiate intercourse, and sexual penetration is penis led, evidenced by the case law where husbands are encouraged to cajole, persuade, encourage or even intoxicate their wives. The use of radical feminism in this research highlights that not much has changed in the respect of treatment of women from the radical feminist heyday.

¹⁵⁸ Ibid pg 77

¹⁵⁹ Fineman, M.A., *The Autonomy Myth* New York, The New Press, 2004 pg 100

¹⁶⁰ O’Donovan op cit n51pg 47-48; Acton op cit n78 pg 61; Irigaray, L. ‘This Sex Which Is Not One’ in Jackson, S. & Scott, S. *Feminism & Sexuality- A Reader* Edinburgh, Edinburgh University Press 1996 pgs 79-83 pg 79

¹⁶¹ Loewenfeld, H.L. *On Conjugal Happiness: Experiences Reflections and Advice of a Medical Man* (3rd ed- trans by Krohn, R.E.S) London, John Bale, Sons & Danielsson, 1913 pg 38

3.6: Where is the love?

English marriage law sweeps away all the tenderness, all the grace,
the generosity of love, and transforms conjugal affection into a
hard and brutal legal right.¹⁶²

Today's society has arguably moved to relationships primarily predicated on friendship, mutual caring and love,¹⁶³ an ideology that "glorifies men and both glamorizes and enforces heterosexuality- all at the expense of women."¹⁶⁴ Duncan and Phillips explain that although couples now search for love and intimacy, they still have the need to give and receive care, leading to 'families of choice'. As such, "caring and loving relationships are consciously developed and built up on the basis of what they do, rather than depending on a pre-given biological or kinship status... At the same time, the significance of romantic coupling is lessened and friendships become more important,"¹⁶⁵ shifting family life from married couples, to different family forms.

Ariès argues that in the past, conjugal love was secret- something that occurred between husband and wife, privately. Although he is writing about France, the societal changes to which he refers are mirrored in the UK. Ariès says that in terms of love, things changed after the eighteenth century. Religions strong-hold was beginning to diminish. The church had gone through a process of change where marital sex had gone from procreation only, to

¹⁶² Besant, A. 'Marriage: As It Was, As It Is, and As It Should Be (1882)' in Jeffreys, S. (ed) *The Sexuality Debates* London, Routledge & Kegan Paul 1987 pgs 391-445 pg 40;. Stopes op cit n111 pg 558

¹⁶³ Hibbs, Barton & Beswick op cit n130 pg 44; Rowland, R. 'Politics of Intimacy: Heterosexuality, Love and Power' in Bell, D. & Klein, R. *Radically Speaking: Feminism Reclaimed* London, Zed Books 1996 pgs 77-86

¹⁶⁴ Burstow, B. *Radical Feminist Therapy: Working in the Context of Violence* London, Sage, 1992 pg 10

¹⁶⁵ Duncan, S. & Phillips, M. 'New families? Tradition and change in modern relationships' in Park, A., Curtice, J., Thomson, K., Phillips M., Johnson, M., & Clery, E. *British Social Attitudes Survey* London, Sage 2008 pgs 1-28 pg 2

pleasure between husband and wife (yet still with the possibility of procreation ie: no contraceptives).¹⁶⁶ In the west, there was a gradual adoption of the “ideal of marriage requiring husband and wife to love each other (or appear to), like real lovers. Extra-conjugal erotics found their way into the marriage bed, expelling traditional prudishness in favour of real feeling.”¹⁶⁷

The *Hyde*¹⁶⁸ definition of marriage is biologically determined. The criteria for a union encapsulated in the MCA 1973 also speaks of marriage in terms of biology and gender, requiring a [hetero]sexual union. Why is this so? What privileges sex over finances or emotions for providing a legally special relationship? Diduck and Kaganas explain, “...there is no requirement...in the statute [for]... commitment, respect, economic interdependence or emotional fulfilment.”¹⁶⁹ Collier elaborates,

Compassion, consideration, empathy and the ability to love and understand are all subordinated within an economy of masculinity which privileges intercourse above all else in the constitution of the marriage relationship. Other forms of human contact and pleasure are deigned legal validity within a position which takes it for granted that there is a fundamental difference between men and women, and that heterosexuality is normal.¹⁷⁰

¹⁶⁶ Flandrin, J.L. ‘Sex in married life in the early Middle Ages: the Church’s teaching and behavioural reality’ in Ariès, P. & André Béjin (eds) (translated by Forster, A) *Western Sexuality: Practice and Precept in Past and Present Times* 1985 pgs 114-129

¹⁶⁷ Ariès, P. ‘Love in married life’ in Ariès, P. & André Béjin (eds) (translated by Forster, A) *Western Sexuality: Practice and Precept in Past and Present Times* Oxford, Basil Blackwell 1985 pgs 130-139 pg 137

¹⁶⁸ *Hyde v. Hyde and Woodmansee* [1866] LR 1 P&D 130

¹⁶⁹ Diduck & Kaganas op cit n120 pg 44

¹⁷⁰ Collier op cit n2 pg 130

Fraser agrees with the (radical) feminist claim that gender, sexuality, sexual relations and love are important to society and ideologically important because they have been defined and constructed as such by men. Further, he argues that in practice, the characteristics of love and law are incompatible, for love is an experience between people, while law “is the construct of reason: it is about distance, mistrust and the regulation of relations among isolated individuals. Law is about a world in which human interaction only occurs at the level of commodity exchange, where women are objects to be used for men’s pleasure.”¹⁷¹ Therefore, in a world where woman is a commodity, primarily for male pleasure, “the primary signifier, the ultimate sign giving meaning to *all* its constituted subjects is the *phallus*, the penis. All else- love, passion, hate, desire- refers back to and is given meaning by this primary signifier...”¹⁷² To allow for love, women must keep away from men because they first need to discover, “capture and define that which his-story has denied her: contact with her own experience, an experience not entirely mediated through the phallic economy.”¹⁷³

Loving relationships have been referred to as ‘pure relationships’; relationships that people enter freely, for its own sake, and only stay in for as long as is mutually beneficial.¹⁷⁴ This ‘pure relationship’ like the “ideal-typical dyad, has no overarching structure to sustain it. Rather, its key sustaining dynamics are mutual self-disclosure and appreciation of each other’s unique qualities.”¹⁷⁵ Giddens suggests that ‘pure relationships’ are born of changing attitudes to sexuality, and that if notions of gender and sexuality are changing, from absolute to fluid and not essentialist, then sex within relationships is also changing. The intimacy

¹⁷¹ Fraser op cit n49 pg 55

¹⁷² Ibid pg 62

¹⁷³ Ibid pg 66

¹⁷⁴ Giddens, A. *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* Cambridge, Polity, 1992; Jamieson, L. ‘Intimacy Transformed? A Critical Look At The ‘Pure Relationship’ (1999) 33 *Sociology* pgs 477-494

¹⁷⁵ Ibid Jamieson pg 477

required of a relationship is also changing, as both parties contribute equally to the relationship in terms of a shared sense of self-disclosure and “when the new connections between sexuality and intimacy were formed... sexuality became much more completely separated from procreation than before. Sexuality became doubly constituted as a medium of self-realisation and as a prime means, as well as an expression, of intimacy.”¹⁷⁶

Giddens believes that the changing notion of intimacy will create equality within relationships and ‘plastic sexuality’ frees people from the needs of reproduction, and claims that gay men and lesbians forge the way with these new relationships. Whilst couples may class themselves as equals, feminist literature shows there is very little equality in division of labour within relationships for example.¹⁷⁷ Whilst Giddens draws on particular feminist works, he devotes little time to the existing scholarship on themes of the ‘private’ and ‘public’ dichotomy, for example. The fragility of heterosexual couples exists because people know “the relationship is only ‘good until further notice’,”¹⁷⁸ and there is “tension between strengthening cultural emphasis on intimacy, equality and mutuality in relationships and the structural supports of gender inequalities, which make these ideals difficult to attain.”¹⁷⁹

If love is the new social norm for marriage formation, rather than arranged marriages or marriages of convenience for example, then why does the law not legislate ‘special legal relationships’ based on this changed formation? The Book of Common Prayer marriage vows require a couple to express their love for each other through the words “to love and to

¹⁷⁶ Giddens, A., *Modernity and Self-Identity: Self and Society in the Late Modern Age* Cambridge, Polity, 1991 pg 164; Giddens op cit n174 pg 2

¹⁷⁷ Fineman op cit n161 chapter 6

¹⁷⁸ Jamieson op cit n174 pg 486; Giddens op cit n174 pg 58

¹⁷⁹ Jamieson op cit n174 pg 486

cherish”.¹⁸⁰ Yet this requirement of love is not reflected within any matrimonial law. I do not believe that love should be legislated, for it is too difficult a phenomenon to prove. How can a partner demonstrate love? If it can't be proved how can the other partner claim an end to the marriage based on a loveless marriage? One could claim that the consummation requirement could be used or altered to reflect love. If sex is viewed as the ultimate form of love, then why has the consummation requirement removed the love element, and instead been associated with procreation, pleasure, understandings of male sexuality, and the power of the medical profession? Perhaps this links back to law's desire to be certain, predictable and universal, and love's inability to be judged under these criteria.

Fineman suggests an alternative relationship for the law to protect caring relationships. She explains that the existing structure of intimacy is horizontal; founded upon the romantic and sexual affiliation of one man and one woman as necessary for marriage and consummation. Intergenerational lines of affinity and intimacy are sometimes uncomfortably accommodated for, for example “when children are “underage,” or... such as when an ill, elderly parent has to be fitted into the sexual family. The dominant paradigm, however, privileges the couple as foundational and fundamental.”¹⁸¹ The natural sexual family is maintained when children leave home and develop sexual families of their own, and elderly parents move on to care homes etc. There remains a chronic failure to address the more difficult and less attractive elements of family and domestic life- for example who will care for the elderly in the family, the ill or the disabled? The family was built upon the prioritisation of heterosexual pairings. This foundation was essential to the structure of any kind of reform.

¹⁸⁰ The Book of Common Prayer

¹⁸¹ Fineman op cit n116 pg 145

Fineman claims that the family fails to adequately “handle both the demands for equality and the contemporary manifestations of inevitable and derivative dependency.”¹⁸² It is not the family that needs to be reconceptualised but rather we need to abolish legal support for the sexual family.¹⁸³ Fineman wishes to construct protection “for the nurturing unit of caretaker and dependent exemplified by the Mother/Child dyad.”¹⁸⁴ Fineman’s conception would allow for a deviation from heterosexuality, but instead replaces it with a format in which responsibility for care is privatised, rather than expanded and absorbed by the state and society in general.

Fineman, like myself argues only to abolish the *legal* importance of marriage, not marriage itself. Sexual interactions would be governed by the same rules we use for our other social interactions e.g: contract, property, tort, crime etc. People would be free to engage in symbolic marriage ceremonies, but would then undertake a separate negotiation and contract to impose any terms they would like. This is because the marriage contract as it currently stands does not even adhere to legal understandings of contract, as “its terms are not negotiated by the parties, but prescribed by law.”¹⁸⁵ In addition, Courts will not enforce the marriage ‘contract’ or award damages, in the way they would a business contract, and the parties cannot end the contract through mutual consent, but are instead required to more often than not engage with divorce or nullity legislation.¹⁸⁶

Supporters of women’s liberation “see in marriage the model for all other forms of discrimination against women. The marriage contract is the only important contract in which

¹⁸² Ibid pg 228

¹⁸³ Idem

¹⁸⁴ Idem

¹⁸⁵ O’Donovan op cit n51 pg 43; Greer, G., *The Female Eunuch* London, Flamingo, 1999 at pg 272

¹⁸⁶ Honoré op cit n2 pg 11

the terms are not listed, or are expressed so vaguely that there is no clear limit to what a wife must do in order to fulfil them.”¹⁸⁷ The marriage contract implies equality on the part of parties to the contract, but women are actually not equal contractors, but rather are “self-sacrificing in direct proportion to their incapacity to offer anything but this sacrifice. They sacrifice what they never had: a self.”¹⁸⁸ The result is that the marriage contract exploits the woman. Pateman therefore asks, “how can beings who lack the capacities to make contracts nevertheless be supposed always to enter into this contract? Why, moreover, do all the classic theorists... insist that, in civil society, women not only can but must enter into the marriage contract?”¹⁸⁹

Fineman hopes that her new concept will still recognise the need for family, and some of the roles that are necessary within that, but allows people to determine what and who their ‘family’ is, and remove the reading of ‘family’ and ‘marriage’ as synonymous.¹⁹⁰ Jamieson argues that these vertical relationships serve to detract from Giddens’s ‘pure relationships’: “The processes of having children and making a joint project of their upbringing create structure over and above a relationship and therefore necessarily detract from the purity of the ‘pure relationship’.”¹⁹¹ I find the mother-child relationship problematic. Although Fineman explains that men can also mother,¹⁹² I find the gendered terminology troubling. Further, what does this mean for those who do not have, or cannot have children? I applaud the move away from sexually prioritised relationships. The prioritisation of the ‘caring’ relationship is interesting, but my argument is that sex should be removed from law’s regulation of

¹⁸⁷ Ibid pg 37

¹⁸⁸ Greer op cit n185 pg 171; Barlow & James op cit n132 pg 153

¹⁸⁹ Pateman, C., *The Sexual Contract* Cambridge, Polity Press, 1988 pg 6

¹⁹⁰ Fineman op cit n159 pg 123

¹⁹¹ Jamieson op cit n174 pg 488

¹⁹² Fineman op cit n116 pg 234

relationships. People should be trusted to nominate those they wish to have legal relationships with. Inevitably, these choices will probably be based on some sort of affiliation- romantic, parental, or caring. As such, Fineman's belief in prioritising the caring, mother-child relationship, is not too far-fetched from the legal reality I would envisage. Yet this could result in a move from sexually privileged relationships to care-giving relationships being privileged: "the caregiving family would be a protected space, entitled to special, preferred treatment by the state."¹⁹³

Roseneil, Budgeon and others have expressed that "an individual's 'significant other' may not be someone with whom she or he has a sexual relationship."¹⁹⁴ Their research found increasingly different structures of 'family' life, with the focus on 'caring' moving from the family to friends. From the sexual to the individual.¹⁹⁵ They argue that if we are to truly understand the current and future culture of intimacy and care in society, "sociologists should decentre the 'family' and the heterosexual couple in our intellectual imaginaries."¹⁹⁶ The 'family' as an institution "retains an almost unparalleled ability to move people, both emotionally and politically. However, much that matters to people in terms of intimacy and care increasingly takes place beyond the 'family', between partners who are not living together 'as family', and within networks of friends."¹⁹⁷ They conclude that although investigations of the family have moved on to incorporate lesbian and gay families, they are still insufficient to understand the notion of care and intimacy, because "they leave

¹⁹³ Ibid pg 231

¹⁹⁴ Roseneil, S. & Budgeon, S. 'Cultures of Intimacy and Care Beyond "the Family": Personal Life and Social Change in the Early 21st Century' (2004) 52 *Current Sociology* pgs 135-159 pg 138: Preston, J. & Lowenthal, M. (eds) *Friends and Lovers: Gay Men Write about the Families They Create* New York, Plume 1996

¹⁹⁵ Roseneil & Budgeon op cit n194 pg 153

¹⁹⁶ Ibid pg 135

¹⁹⁷ Idem

unchanged the heteronormativity of the sociological imaginary; and... they are grounded in an inadequate analysis of contemporary social change.”¹⁹⁸

If it is felt that love should be legislated for in some way, Fraser’s argument would mean that we must rewrite the law’s relationship to, and understanding of women. Further, “the phallus must be extracted, cut out from its position as signifier. The law of authority... must yield to the law of experience, and experience must give way to a new law of sexuality.”¹⁹⁹ The understanding of intimacy can be challenged by practices within non-normative relationships such as friends or ex-lovers, which serve to “decentre the primary significance that is commonly granted to sexual partnerships and mount a challenge to the privileging of conjugal relationships in research on intimacy.”²⁰⁰

For Ariès, love now is a fleeting emotion, and one that cannot possibly last the duration of a marriage. A real, successful, loving marriage is one that, “stands up to wear and tear- is not created by a ceremony...in church...but by the fact of its duration. The true marriage is a union that endures, with a living, fertile lastingness that defies death.”²⁰¹ It would be naive to assume that everyone who falls in love and marries will stay together forever. Changing divorce rates and family structures cannot be ignored. I argue, we should keep the government out of the bedroom and not use sex as a way to determine legally ‘special’ relationships.

¹⁹⁸ Ibid pg 136

¹⁹⁹ Fraser op cit n49 pg 64

²⁰⁰ Roseneil & Budgeon op cit n194 pg 138

²⁰¹ Ariès op cit n167 pg 139

I do not believe that a sexual relationship- the primary occasion, and symbolic gesture of which is consummation- should be used to define a legally special relationship. Law needs to interact with the reality of family situations. “The focus should...be on the many grey areas or, better, the many different shades in the niches inside and outside the traditional family network.”²⁰² However Vascovics is critical of those that claim that family structures are changing. He claims the conjugal family “has kept its dominance up to the present day... The ‘normal chaos of love’, as it has been called, continues to display quite clear and dominant patterns of the partnerships which... in most cases lead to a quite normal family.”²⁰³ Yet the introduction of civil partnerships, easier divorce, several generations living together, and the increased number of step- or blended- families demonstrate the changing nature of the family: “This does not mean that the traditional family is simply disappearing. But it is losing the monopoly it had for so long...”²⁰⁴

3.7: Reliance upon the medical profession

The case law demonstrated the court’s inclination to defer to medical ‘expertise’ in cases of consummation.²⁰⁵ However, there is an inherent paternalism in the medical profession, and the court’s deference serves only to create doctor-led law.²⁰⁶ No other profession is afforded

²⁰² Beck-Gernsheim, E. ‘ On the Way to a Post-Familial Family: From a Community of Need to Elective Affinities’ (1998) 15 *Theory, Culture & Society* pgs 53-70 pg 54

²⁰³ Vascovics, L. (1991) quoted in Beck-Gernsheim- Ibid pg 55

²⁰⁴ Ibid pg 67-68. Bauman argues that relationships are still desired, but in individualised society, the status that a relationship brings is a blessing and a burden: Bauman, Z. *Liquid Love: On the Frailty of Human Bonds* Cambridge, Polity Press, 2008 at pg viii

²⁰⁵ The medical profession also creates its own legal standards for women during pregnancy, when doctors will overrule a pregnant woman’s wishes to ensure safe delivery of a foetus. Freeman, M.D.A ‘Marriage and Divorce in England’ (1995-1996) 29 *Family Law Quarterly* pgs 549-566 at 553; Rowland & Klein op cit n132 pg 22-26; Campbell op cit n112 pg 4-5

²⁰⁶ McHale, J., Fox, M. & Murphy, J., *Health Care Law: Text and Materials* London, Sweet & Maxwell, 1997; Gillon, R. ‘Autonomy and Consent’ in Lockwood, M (ed) *Moral Dilemmas in Modern Medicine* Oxford, Oxford University Press, 1985 pgs 111-125

such a luxury within the law. Sheldon states “it is not so much that the medical voice is prioritised over other accounts. Rather, it is permitted to *silence* any other completely.”²⁰⁷ Doctor’s ability to examine and diagnose is an extension of paternalism, which is “the view that the health professional is best placed to decide for the patient.”²⁰⁸ Naffine has explained that the most fundamental right extended to humans is “the right to physical integrity. Human dignity is said to reside in what is thought to be our natural inviolability, our separation and freedom from intrusion by others.”²⁰⁹ However, where consummation is in doubt, courts have superseded this fundamental right, and demanded physical examination- often of both partners, but more intrusively of the female partner. This medical intrusion is a result of the biological basis of consummation- requiring a man, and a woman- and is extended by the law positively demanding a sexual act.

Paternalism does not allow for the consideration of a ‘patients’ personal experiences. They are not asked about past experiences, religious views, family obligations etc. Paternalism “rests largely on the presumption that the sole aim of the patient is to be cured and that he is willing to entrust his well-being completely to the doctor’s care.”²¹⁰ In the case of those who have not consummated their relationship and wish to take action in court, the assumption is that the medical profession are best placed to understand why this has not occurred, and that the couple will *want* to be informed of why this has not occurred and how to fix it; no matter how intrusive the medical examination. Glover argues autonomy should not be given absolute priority. For example “if someone wants to start taking heroin, I will think it right to

²⁰⁷ Sheldon, S., ‘A Responsible Body Of Medical Men Skilled In That Particular Art...’: Rethinking The *Bolam* Test’ in Sheldon, S., & Thomson, M., *Feminist Perspectives on Health Care Law* London, Cavendish 1998 pgs 15-33 pg 28 emphasis added

²⁰⁸ McHale, Fox & Murphy op cit n206 pg 76

²⁰⁹ Naffine op cit n146 pg 625

²¹⁰ McHale, Fox & Murphy op cit n206 pg 82; Smart, C., ‘Law’s Power, the Sexed Body, and Feminist Discourse’ (1990) 17 *Journal of Law and Society* 2 pgs 194-210 at pg 202

stop him if I can. This results from giving less weight to his autonomy in this matter than to sparing him the appalling suffering involved in the slow death of a heroin addict.”²¹¹

Are heroin addiction and unconsummated marriage comparable? Is a non-sexual marriage such a threat to society that we will allow a get-out clause for people in non-sexual marriages, and reduce those who can't/won't consummate their marriage to the humiliation of medical examination? I argue that an insistence upon a sexual marriage is not enough to impose these conditions upon people, and in particular, upon women, and Chisholm argues “apart from the medico-legal context, doctors were for a long time hesitant in their approach to non-consummation”²¹² which led to late referrals, with uncertain and piecemeal treatment aims. Writing in the 1970s, Chisholm argued that doctors at that time were better able to deal with non-consummation cases than in the past. Perhaps this explains why there is a distinct lack of case law regarding non-consummation after the late 1960s.

Sheldon explains that the paternalism evidenced in Glover's example serves to subvert autonomy, and is biased towards women because women in general are more likely to “suffer the worst excesses of medical paternalism both in terms of the quotidian medical encounter and the more spectacular intervention. There is also clear evidence to suggest that doctors show least respect for patient autonomy when their patients are women.”²¹³ In the book *Virgin Wives*, 10 female doctors were asked to feed back information from the physical and psychological conditions of wives in unconsummated marriages to a male doctor, and the final version of the book was written by a male doctor. They concluded that there are three

²¹¹ Glover, J., *Causing Death and Saving Lives* Harmondsworth, Penguin, 1977 pg 75-76

²¹² Chisholm, I.D., ‘Sexual problems in marriage: non-consummation’ (1972) *Postgraduate Medical Journal* 48 pgs 544-547 pg 544; Friedman op cit n107

²¹³ Sheldon op cit n207 pg 26

types of women who ‘suffer’ from non-consummation: women who don’t know about sex; aggressive women who view love and fighting as the same thing; and women who want babies but not sex, so their priority is the mothering role, not the wifely role.²¹⁴

Lord Woolf would disagree with my assessment of the court’s *continuing* deference to the medical profession. He contends that “until recently the courts treated the medical profession with excessive deference, but recently the position has changed... for the better.”²¹⁵ Lord Woolf continues, “we have moved from a society which was primarily concerned with the duty individuals owed to society to one which is concerned primarily with the rights of the individual... The move to a rights-based society has fundamentally changed the behaviour of the courts.”²¹⁶

In more recent case law, the courts have not demanded medical intervention. Could this be demonstrative of Lord Woolf’s argument that we are starting to respect the rights of the individual? No. I believe it is a reflection of the effective entrenchment of medical knowledge into courts, and wider society. Gower has claimed that “sexual relations are a most important attribute of marriage, and the experience of most lawyers confirms the opinion of psychiatrists that sexual maladjustments are perhaps the commonest root cause of unhappy marriages.... excessive delicacy is as out of place in the Divorce Court as in the consulting room.”²¹⁷ This mode of thinking is clearly demonstrated in the case law. No stone or bed sheet has been left unturned. Both the medical and legal profession feel that the bedroom is their domain to legislate, and will ensure that people are correctly carrying out their duties

²¹⁴ Friedman op cit n107 pg 35

²¹⁵ Lord Woolf, ‘Are The Courts Excessively Deferential To The Medical Profession?’ (2001) *Medical Law Review* 9 pg 1

²¹⁶ Ibid pg 2

²¹⁷ Gower op cit n65 pg 182

with no sense of embarrassment at the intrusion upon people's personal, private lives. The courts (through the medical experts) conclude that there could be a negative impact upon a person's health if they are not engaged in a sexual relationship.²¹⁸ The law has effectively rendered sexual intercourse normal and natural, and anyone who is not engaged with it will suffer.²¹⁹ This leads one to ask whether marriage should be a private affair, "its form to be determined by the parties themselves, or a public affair, which the state may legitimately require to be conducted with certain formalities? In ascertaining the existence of a marriage, should the law focus on its external appearance or the intentions of the parties?"²²⁰ The presumption is that families have a right to be free from intervention by the state, and that they "have a right to make demands upon the larger society for certain kinds of accommodation and support. Threats to this family are taken seriously."²²¹ Yet the public/private divide is not taken seriously, it is pliable for the purposes of subordinating women. The state always intervenes in the 'private' family- it legislates single-parent households, marital rape, domestic violence- as these threaten the husband-wife dichotomy.

The government should not interfere in the bedroom when it comes to consummation, as there should not be a positive obligation on couples to perform a certain type of sexual act. The state's inaction on this point continues the patriarchal belief of the heterosexual, nuclear, sexual family as the norm. Of course the removal of consummation from legislation could still leave room for couples to divorce on the basis of unreasonable behaviour if they feel their sex life is unsatisfactory. The end result of both actions being the same- exit from the marriage. Yet consummation requires a positive act; it tells couples it is expected. The

²¹⁸ Thomson op cit n53

²¹⁹ Hall op cit n119 pg 2

²²⁰ Probert, R. 'When are we married? Void, non-existent and presumed marriages' (2002) *Legal Studies* 22 pgs 398-419 pg 398

²²¹ Fineman op cit n116 pg 177

divorce criteria allow the couple to argue that they find a lack of sex unacceptable, without setting a requirement for all married couples.

3.8: Conclusions

Consummation: “The primal act of heterosexual intercourse...

to be repeated as a generative act ad infinitum.”²²²

If we accept that intimacy and relationship structures are changing, then how can it be justifiable to provide legal privilege to consummated marriages which do not prioritise a healthy sex life, compatibility or happiness, but rather focus on one sexual experience “which may be performed satisfactorily, if joylessly, in under a minute”?²²³ Relationships have changed so much that now, “care and support flow between individuals with no biological, legal or social recognized ties to each other.”²²⁴ The continuing insistence upon consummation within marriage is a throwback to a relationship structure that no longer dominates.

As explained by Fineman, “tearing the veil of privacy from the traditional family has revealed that, even if not abusive, the family often fails to perform the social and psychological functions that were the justifications for its privileged position.”²²⁵ Change to consummation law has to come from women. Women must acknowledge “the fact that men are totally irrelevant now as far as change is concerned. So we can take our eyes off them and

²²² O’Donovan op cit n51 pg 47

²²³ Ryan, F.W., “‘When divorce is away, nullity’s at play’: A new ground for annulment, its dubious past and its uncertain future’ (1998) 1 *Trinity College Law Review* pgs 15-36 pg 34

²²⁴ Roseneil & Budgeon op cit n194 pg 153

²²⁵ Fineman op cit n116 pg 157

look at ourselves to make a shining new reality right here, right now in the midst of the old putrescent, collapsing world of the fathers.”²²⁶

Changing theories of intimacy- which is defined as sex for the purposes of marriage, and therefore consummation- will not rewrite male privilege. Transforming the legal significance of this one act will not transform the intimacy of sex in marriage or male privilege. “It is not clear, for example, that change in the quality of heterosexual relationships would shatter the interconnection of gendered labour markets, gendered distributions of income and wealth, and gendered divisions of domestic labour.”²²⁷ Rather, it would serve to reduce the medical profession’s influence in law, reinforce individual rights to respect and privacy, and remove a sexual requirement.

²²⁶ Johnson op cit n124 pg 59

²²⁷ Jamieson op cit n174 pgs 481-482

FOUR

TRANSSEXUALISM AND CONSUMMATION

This chapter addresses transsexual people's impact on the consummation requirement. The GRA is silent on the matter of consummation, but this very silence is of importance "as it would seem that transgender people are vulnerable as a class"¹ to annulment on the basis of non-consummation, unless they have been 'honest' about their condition prior to marriage. Their marriages could also be void under s11(c) MCA 1973 which requires parties to a marriage to be "respectively male and female". The term 'transsexual' has been, and will be used here as an "umbrella term that includes transgender, transsexual, bigendered and intersex people."² Through this chapter, the commentary shows that transsexual issues have been discussed by those who claim it is a sexual deviation, not far removed from homosexuality, to those who hold that the 'cure' for transsexual people lies in 'wholly' becoming the other (legally recognised) gender, both for their own mental health, and also to maintain the gender binary.

¹ Sharpe, A.N., 'Endless Sex: The Gender Recognition Act 2004 and the Persistence of a Legal Category' (2007) 15 *Feminist Legal Studies* pgs 57-84 pg 77

² Hines, S., 'A pathway to diversity?: human rights, citizenship and the politics of transgender' (2009) 15 *Contemporary Politics* 1 pgs 87-102, pg 87. These terms have been assigned many different meanings, but the term 'transsexual' is used throughout this chapter to denote a person who feels their birth gender does not match their true gender identity, and may choose to undergo gender reassignment surgery. This suggests that gender and sex are easily identifiable and transsexuals move from one to the other. Past definitions of transsexualism (as shown in this chapter) relied heavily upon the need for reassignment surgery, but contemporary usage of this term "reflects the reality that many individuals undergo a permanent gender transition without having such surgery."-Tobin, H.J. 'Against the Surgical Requirement for Change of Legal Sex' (2006/7) 38 *Case Western Reserve Journal of International Law* 2 pgs 393-435 pg 400

Following pressure from the European Court of Human Rights, the U.K. enacted the GRA enabling a person to legally change and live in their new gender.³ This legislation allows the person to amend every part of their legal life- and most importantly, their birth certificate. Moreover, the law does not require the person to undergo any surgery or hormone treatment to have the physical attributes of the new gender.⁴ A result of this statutory procedure is a shift from biological factors to “psychological factors- largely ignored by the common law- becom[ing] paramount.”⁵ This has meant that a woman, who still possesses a penis, could legally marry a man, but would not be able to consummate her marriage in the way outlined in previous chapters, and could fall prey to an accusation of incapacity to consummate. This will be the focus of the second half of this chapter. If sex is essential from birth, then it cannot change, as shown in chromosomes. The only institution to which this seems to be of significance is marriage, and therefore, the ability to consummate that marriage. It is for this reason that I include such an extensive analysis of transsexual jurisprudence.

The first part of this chapter outlines the definitions of transsexual as presented by law and the medical profession. I then explain the way in which I utilise radical feminism to shape my understandings of transsexual issues. Nearly every text addressing transsexual issues points out the inherent problems in writing about this area when the writer is not transsexual themselves. Sandland expresses the main issue as “‘we’ tend to think in terms of how this or that legal development is seen by ‘them’.”⁶ On this point, I endeavour to stay true to the

³ Sandberg, R. ‘The right to discriminate’ (2011) 13 *Ecclesiastical Law Journal* 2 pgs 157-181 pg 163

⁴ Sharpe op cit n1 argues that in reality the vast majority of transsexuals will have undertaken gender reassignment surgery.

⁵ Masson, J., Bailey-Harris, R., & Probert, R., *Cretney’s Principles of Family Law* (8th ed) London, Sweet & Maxwell, 2008 pg 57

⁶ Sandland, R., ‘Feminism and the Gender Recognition Act 2004’ (2005) 13 *Feminist Legal Studies* pgs 43-66 pg 44. Johnson explains that feminism’s engagement with transgender issues has predominantly been to try and understand ‘gender’ better, rather than to theorise gender from an understanding of the experience of being

guidelines outlined by Hale,⁷ and present this chapter without wishing to cause distress or offence, but merely to assess the way in which our understandings of consummation are furthered or inhibited by transsexual jurisprudence.

4.1: What is gender dysphoria?⁸

Definitions of gender dysphoria or gender identity disorder and the legal developments building upon these definitions have predominantly come from the medical profession and its “construction of transsexualism as a mental illness.”⁹ Those with gender dysphoria usually lack harmony between the body and mind, or harmony between gender identity and gender role. English law has been posited upon scientific medical explanations, rather than “on the normative justifications for linking legal entitlements, such as marriage to sex and gender.”¹⁰ The GRA could be seen as positing recognition as a ‘cure’: creating legal protection for both those who have, or have had (those still suffering, and those who have been cured) from gender dysphoria.¹¹ Transsexual people have been defined as having a powerful urge to transition into their acquired sex to the fullest extent, an urge which often dates back to childhood, until “they come to think of themselves as females imprisoned in male bodies, or

transgender. For the purposes of this research, I subscribe to this feminist engagement Johnson, K., ‘From Gender to Transgender: Thirty Years of Feminist Debates’ (2005) 24 *Social Alternatives* 2 pgs 36-39 at pg 36

⁷ www.sandystone.com/hale.rules.html (accessed 15/03/11)

⁸ ‘Gender dysphoria’ is the terminology adopted by the American Psychiatric Association in their ‘Diagnostic and Statistical Manual of Mental Disorders-IV’ (DSM-IV) to describe those who have a persistent aversion to their physical anatomy and believe it is not compatible with their true gender role. <http://www.dsm5.org/ProposedRevision/Pages/proposedrevision.aspx?rid=482#> (accessed 22/09/12); <http://www.gidreform.org/gid30285.html> (accessed 22/9/12) & The Home Office ‘Report of the Interdepartmental Working Group on Transsexual People’ www.webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/constitution/transsexual/wgtrans.pdf (accessed 12/4/11)

⁹ Sandland op cit n6 pg 49; Sharpe op cit n1; Cowan, S., ‘Gender is no substitute for Sex: A Comparative Human Rights Analysis of the Legal Regulation of Sexual Identity’ (2005) 13 *Feminist Legal Studies* pgs 67-96

¹⁰ Fishbayn, L., “‘Not quite one gender or the other’”: Marriage law and the containment of gender trouble in the United Kingdom’ (2006-2007) 15 *Journal of Gender, Social Policy & the Law* 3 pgs 413-441 pg 414

¹¹ Sandland op cit n6 pg 49. In *Corbett v Corbett* the court was presented with medical evidence stating that psychological treatment does not appear to work on transgender people, and the only ‘cure’ was surgery: *Corbett v Corbett (Otherwise Ashley)* [1971] P.83 at 98

vice versa, and leads to intense resentment of, and dislike for, their own sexual organs which constantly remind them of their biological sex.”¹²

Medical procedures are available “to address the dissonance between psychological sex and physiological structure, ranging from hormone treatment to surgical reconstruction,”¹³ and the undertaking of surgery is often talked of as the ‘end’ of the transsexual journey to bring the transsexual body into harmony with psychological sex.¹⁴ Medical understandings of transsexuals influence rights discourse and law.¹⁵ If one understands sex and gender as separate, this could hold “the potential for a greater diversity of masculinities and femininities.”¹⁶ With medicalised understandings at the forefront of the legal professions mind, how then has transsexual jurisprudence emerged and developed?

4.2: The development of transsexual jurisprudence

One has to acknowledge the increased legal activity regarding sex and gender issues in the early 2000’s. Between the year 2000 and 2006 alone, the UK passed five pieces of legislation addressing gender and sexuality issues, ranging from an equalized age of consent for sex, to enabling Civil Partnership and adoption rights for same sex couples.¹⁷ However, writing in 2005, Conaghan and Millns sounded a note of caution in relying too heavily upon rights

¹² *Corbett v Corbett (Otherwise Ashley)* Idem

¹³ Masson, Bailey-Harris & Probert op cit n5 pg 56

¹⁴ The term ‘post-operative’ here refers to those that engage in genital surgery. The term can be problematic as it does not acknowledge that there are in fact many surgical procedures that can be undergone. There is also disagreement as to whether or not gender reassignment surgery is the ‘proper’ end of the transsexuals’ journey. For the purposes of this chapter, where the term is used in reference to case law, it is to denote that the transsexual person has undergone genital surgery. See further Taitz, J. ‘A Transsexual’s Nightmare: The determination of sexual identity in English law’ (1988) 2 *International Journal of Law and the Family* pgs 139-154 at pg 141

¹⁵ Hines op cit n2 pg 96

¹⁶ Idem; Ingraham, C. ‘The Heterosexual Imaginary: Feminist Sociology and Theories of Gender’ in Seidman, S. (ed) *Queer Theory/Sociology* Oxford, Blackwell, 1996 pgs 168-193

¹⁷ *Sexual Offences (Amendment) Act* 2000; *Adoption and Children Act* 2002; *GRA* 2004; *CPA* 2004, and the *Equality Act* 2006. See Hines op cit n2 pg 88

discourse. Building upon the work of Brown, they contended that existing rights language for gender and sexuality issues could “contribute to the further entrenchment of... disadvantage by reaffirming as universal the abstract norms which are made in man’s image and which reflect his particular concerns.”¹⁸ They asserted that human rights discourse has masked its universal nature and perpetuates women’s exclusion. This point is further developed below after discussion of the case law.

Law’s aim of predictability to avoid and resolve arising disputes has led to a desire to “establish stable categories of social and sexual identity,”¹⁹ whether this be through reference to biology or anatomy. The tension created by the existence of transsexual people has (for some) been seen to demonstrate the “fluidity of gender... a fluidity which refuses traditional modes of categorisation,”²⁰ and further demonstrates the weakness of “law’s projection of the legal subject as stable, unified and capable of categorisation.”²¹

Historically at common law, a male-to-female (hereafter MtF) transsexual remained male.²² Sex was fixed at birth with “reference to gonadal, genital and chromosomal factors.”²³ This legal stance prior to the GRA was widely condemned for its failure to acknowledge the psychological factors involved in sex determination.²⁴ Collier explains that the genital test of

¹⁸ Conaghan, J. & Millns, S. ‘Special Issue: Gender, Sexuality and Human Rights’ (2005) 13 *Feminist Legal Studies* 1 pgs 1-14 pg 2; Brown, W. ‘Suffering Rights as Paradoxes’ (2000) 2 *Constellations* 7 pgs 230-241

¹⁹ Grenfell, L., ‘Making sex: law’s narratives of sex, gender and identity’ (2003) 23 *Legal Studies* pgs 66-102 pg 67; Cowie, F., Bradney, A. & Burton, M., *English Legal System in Context* (5th ed) Oxford, Oxford University Press, 2010 chapter 5

²⁰ Grenfell op cit n19 pg 67

²¹ *Idem*

²² And vice versa. *Corbett v Corbett* op cit n11

²³ Probert, R., *Cretney & Probert’s Family Law* (7th ed) London, Thomson Reuters, 2009 pg 46

²⁴ See criticism from other jurisdictions in *Attorney-General v. Otahuhu Family Court* [1995] 1 NZLR 603; *Re Kevin and Jennifer v. Attorney-General for the Commonwealth* [2001] FamCA 1074

marriage²⁵ means that “for there to constitute a legal marriage there must be the capacity for ‘true’ heterosexual intercourse.”²⁶ This view was encapsulated in law in the case of *Corbett v Corbett*²⁷ outlined below. I do not provide an as in-depth analysis of the case law in this area as I have undertaken in Chapter 2. There are a few key cases, the facts and findings of which I outline below, with particular reference to consummation.

The most often cited case is that of *Corbett v Corbett (Otherwise Ashley)*,²⁸ and it is from this judgement that biological factors had been prioritised prior to the GRA. The case focused on the validity of a marriage, as the wife had been born male, but had undergone gender reassignment surgery which her husband was aware of. After three months of marriage the husband filed a petition to have the marriage declared null and void on the basis that his wife was a man, or in the alternative, a decree of nullity on the basis of her incapacity or wilful refusal to consummate. Mrs Corbett asked for a declaration of nullity on the basis of her husband’s incapacity or wilful refusal to consummate, as she claimed her husband “achieved full penetration on several occasions but withdrew after a very short time without ejaculation, either because he was incapable of ejaculation, or because he was unwilling to do so, and then became hysterical.”²⁹ As such, the judge, a medical doctor by training, had to assess the sex and gender of Mrs Corbett, the validity of the marriage, and the ability of Mrs Corbett to consummate her marriage.

²⁵ The requirement of male and female (penis/vagina) penetrative sex

²⁶ Collier, R., *Masculinity, Law and the Family* London, Routledge, 1995 pg 149

²⁷ *Corbett v Corbett (Otherwise Ashley)* op cit n11

²⁸ *Idem*

²⁹ *Ibid* at 88

The judgement held that marriage is a relationship between a man and woman,³⁰ and the determination of sex for marriage is to be made at birth with particular reference to chromosomes, gonads and genitalia. With sex determined in this way, the judge held that Mrs Corbett was male from birth, and therefore the marriage ceremony undertaken was ineffectual. The judge felt that if Mrs Corbett was found to be a woman, her artificial vagina would never be capable of the ordinary and complete sexual intercourse required by the *D-e v A-g*³¹ conception of sexual intercourse in marriage. The judge felt that Mrs Corbett's sex should be established before considering whether consummation had occurred, in other words, establishing whether there was a marriage to consummate. If penetrative sex had occurred between the two, the case would suggest that 'artificial' vaginas could be capable of penetrative sex. However, Ormrod J., like many radical feminists, found that sex (and the vagina), has an essence that cannot be created artificially.

The court heard from 9 medical experts, discussing Mrs Corbett's body and understandings of gender. Mrs Corbett's first doctor concluded that as a man, April Ashley had a womanish appearance, and several homosexual experiences. Extensive reference was also made to Mr Corbett's desire to dress in female clothes, and to socialise with 'sexual deviants', thereby trying to infer that his association with Mrs Corbett was a desire to further his own sexual deviance, rather than to appreciate her as a woman and create a 'normal' heterosexual relationship. Mr Corbett's evidence stated that his original motives were transvestite to begin with, but that he then "developed for her the interest of a man for a woman. He said that she looked like a woman, dressed like a woman and acted like a woman. He disclosed his true

³⁰ In accordance with the *Nullity of Marriage Act 1971* which legislated this area at the time. s1(c) of the *Nullity of Marriage Act* stated that a marriage would be void if "the parties are not respectively male and female."

³¹ *D-e v. A-g (falsely calling herself D-e)* [1845] 1 Rob Ecc 280

identity to the respondent to show that his feelings had become those of a full man in love with a girl, not those of a transvestite in love with a transsexual.”³²

The judge drew comparisons between the alleged marriage in front of him, and ‘normal’ heterosexual marriages but concluded that the Corbetts’ marriage had little or nothing in common with ‘normal’ heterosexual marriages. Court instructed doctors found that Mrs Corbett had breasts, no penile remains, and a vagina “of ample size to admit a normal and erect penis.”³³ Despite this, the court requested chromosomal analysis, which came back male. Scientific researchers provided evidence which explained that anomalies of sex are broadly divided into two categories- those that are psychological in nature, for example gender dysphoria; and those that are developmental in nature, for example someone who is intersex. Ormrod J. further broke these down to demonstrate the criteria that the medical profession takes into account when assessing the sexual condition of the individual. These criteria are:

- (i) Chromosomal factors.
- (ii) Gonadal factors (i.e., presence or absence of testes or ovaries).
- (iii) Genital factors (including internal sex organs).
- (iv) Psychological factors

Some...would add:

³² *Corbett v Corbett (Otherwise Ashley)* op cit n11 at 92

³³ Ibid at 96 as per the Court’s medical inspectors.

- (v) Hormonal factors or secondary sexual characteristics (such as distribution of hair, breast development, physique etc., which are thought to reflect the balance between the male and female sex hormones in the body).³⁴

Ormrod J. concluded that Mrs Corbett was a man. Her chromosomes were male, she was born with male sexual organs and she had no internal female organs to support a suggestion of intersex, thereby suggesting that her psychology led her to be declared transsexual.³⁵ This case shows sex is determined at the time of birth, rather than say the time of the marriage, or the date of the trial. This is a key difference with consummation law which examines the possibility for consummation, at the date of marriage, at least until the incorporation of wilful refusal. As regards consummation, the case law outlined showed that the capacity for vaginal penetration could be achieved naturally or artificially (through medical intervention), where surgery has been available to cure a physical impediment, and so “the onus was on the spouse seeking to nullify the marriage to prove that the physical defect was incurable by surgery.”³⁶ However, prior to the GRA, no amount of surgery would allow a transsexual person to claim that they were capable of marriage and consummation.

Mrs Corbett’s counsel argued that her doctors had assigned her to the female sex, and the court should also recognise this. Ormrod J. commented that “the word “assign,” although it is used by doctors in this context, is apt to mislead since, in fact, it means no more than that the

³⁴ Ibid at 100

³⁵ Kennedy has argued that the finding of April Ashley as male was ‘unnecessarily conservative’: Kennedy, I.M. ‘Transsexualism and Single Sex Marriage’ (1973) 2 *Anglo-American Law Review* pgs 112- 137 at pg 114; Muller, V. “Trapped in the body”- Transsexualism, the law, sexual identity’ (1994) 3 *Australian Feminist Law Journal* pgs 103-116 pg 103

³⁶ Fishbayn op cit n10 pg 423

doctors decide the gender, rather than the sex, in which such patients can best be managed and advise accordingly.”³⁷ He held that marriage is one area of society and law in which sex is fundamental, and it is necessary to have one man and one woman for the “capacity for natural hetero-sexual intercourse,”³⁸ which is essential to marriage, and to fulfil this essential role, a woman “must have the genitals of a woman, implying that having her vagina penetrated is one of the essential roles of woman in marriage.”³⁹ Gilmore also explored the ‘essential role’ and summarised;

if it referred to the respondent’s ability to have sex as a woman it was contradicted by the medical evidence. If it referred to an ability to look and act like a woman, it was contradicted by his own finding that she lived as a female. If it referred to the ability to procreate, it ignored the law of nullity which does not make such ability a condition of a valid marriage.⁴⁰

Ormrod J. held that the role and definition of ‘woman’ in marriage was so specific that he would not determine whether Mrs Corbett was a woman for other purposes, but purely whether or not she could be a woman in marriage. He concluded that women have an essential role in marriage⁴¹ but did not define this essential role, only to say that a transsexual person is not capable of it. A person’s sex should be decided on the first three criteria above (i)-(iii), based upon biological factors. Where these criteria are not congruent, emphasis

³⁷ *Corbett v Corbett (Otherwise Ashley)* op cit n11 at 104

³⁸ *Ibid* at 105

³⁹ Diduck, A., & Kaganas, F. *Family Law, Family Law, Gender and the State: Text, Cases and Materials* (2nd ed) London, Hart, 2006 pg 49

⁴⁰ Gilmore, S., ‘Bellinger v Bellinger- Not quite between the ears and between the legs- Transsexualism and marriage in the Lords’ (2003) 15 *Child and Family Law Quarterly* 3 pgs 295- 311 pg 310

⁴¹ *Corbett v Corbett (Otherwise Ashley)* op cit n11 at 106. Despite declaring the judgement was in reference to marriage only, it was also upheld in the criminal case of *R v Tan* [1983] QB 1053

should be placed upon the genitals. This focus on the ‘appearance’ of heterosexuality is addressed below, but the judge’s contention seems to be in direct opposition to his view that “marriage is a relationship which depends on sex and not on gender.”⁴²

Poulter criticises the *Corbett* decision, arguing the judgement focused on physical criteria too much, thereby determining sex at the expense of psychological factors which were acknowledged but not thought to be determinant. He criticised Ormrod J.’s acceptance of gender as essential- especially when in connection with certain sexual offences. Poulter argues that the refusal to acknowledge sex change in these areas will lead to what he calls “absurd results. On this basis [she]... could neither be the victim of rape nor could she be charged with soliciting as a prostitute...”⁴³ Poulter also suggested that it was not correct for the judge to identify marriage with a capacity for heterosexual intercourse, as one spouse might have knowledge of the other spouses incapacity, and the marriage would not automatically be void. Poulter’s final criticism recognises the inconsistency in judgements between *Corbett* and *S.Y v S.Y*,⁴⁴ where it was held that a wife with a small vagina was capable of consummation, as she was able to enlarge her vagina by undergoing an operation.

The judgement in *S.Y v S.Y*⁴⁵ was passed down just before that of *Corbett*, and demonstrates the conflict and difficulties in transsexual case law. In *S.Y* the court had to decide whether to issue a decree of nullity on the basis of non-consummation due to a defect in the wife’s sexual organs. The court found that enough scope had been left in *D-e v A-g* to argue that as the defect was curable by surgery, that an artificial vagina in this instance would be deemed

⁴² *Corbett v Corbett (Otherwise Ashley)* op cit n11 at 107

⁴³ Poulter, S., ‘The Definition of Marriage in English Law’ (1979) 42 *Modern Law Review* pgs 409-429 pg 423

⁴⁴ *S.Y v S.Y (Orse. W.)* [1963] P. 37

⁴⁵ *Idem*

the same as a natural one. The wife was a woman from birth, and was held to have a natural, but abnormal vagina which would not allow for full penetration, but could be corrected by surgery. As such, the marriage was valid. The court in this instance felt that even if she had had no vagina, intercourse would be achieved if she underwent an operation to construct one. Poulter states it was inconsistent at the time of *Corbett* to not allow a post-operative transsexual to marry, but to take no action against someone who underwent the operation after the marriage, thereby allowing a 'same-sex' marriage.

Some thirty years after *Corbett* came the House of Lords case of *Bellinger v Bellinger*.⁴⁶ Mrs Bellinger- a post-operative transsexual woman- sought a declaration that her marriage was valid and subsisting since its inception. She had been designated male at birth, but had undergone gender reassignment surgery, and subsequently married her husband, as a woman. The courts' held that Mrs Bellinger's sex was correctly determined at birth, and she was unable to marry a man. The decisions were based upon the biological factors outlined in *Corbett*, and s11 (c) MCA 1973. The House of Lords did however make a declaration of incompatibility in respect of Mrs Bellinger's rights under Articles 8 and 12 of the European Convention on Human Rights: the articles which address the right to a private and family life, and the right to marry. Having undergone surgery, Bradney asks "in such a situation what else can ordinary language do but accord her the gender by which she herself wishes to be known and by which she is in fact known?...Indeed, if ordinary language does not label Mrs Bellinger as female, one might wonder, given the binary nature of the choice available, what label it does accord to her."⁴⁷ Mrs Bellinger's constructed vagina was deemed unable to fulfil

⁴⁶ *Bellinger v Bellinger* [2003] UKHL 21

⁴⁷ Bradney, A. 'Developing Human Rights? The Lords And Transsexual Marriages' (2003) 33 *Family Law Journal* 8 pgs 583-595 pg 587

the ‘essential role’ of a woman in marriage, which seems to suggest a functional test, but “the essential role of a woman in marriage is also related, according to Ormrod LJ, to having female gonads, although the non-functioning of these sexual reproductive organs does not preclude a valid marriage being contracted by a person who is sterile.”⁴⁸

The Lords felt unable to read into s11 (c) MCA the necessary criteria which would then allow Mrs Bellinger to be a woman. Further, s11 (c) uses the present tense, indicating that the date of marriage is not key, but that at all times a marriage must be between a man and woman. When it comes to marriage, “Parliament regards gender as fixed and immutable.”⁴⁹ It is noteworthy that Thorpe LJ was a dissenting voice in this case at the Court of Appeal stage. The issues raised by Thorpe LJ are analysed in reference to their impact upon the consummation debate below. Interestingly, in *Bellinger* the court gave consideration to the point at which a person acquires a new gender in the reassignment process, yet their Lordships “were not required to decide at what stage it would be *necessary* to conclude that a person’s sex was re-assigned, merely whether Mrs Bellinger’s re-assignment treatment was *sufficient* to be able to so conclude.”⁵⁰

The earlier case of *Goodwin*⁵¹ in the European Court of Human Rights declared that English law violated Articles 8 and 12 in relation to transsexual people. *Goodwin* was part of a succession of cases that went through the European Court arguing that transsexual people were deprived of their convention rights; “they suffered a series of losses at Strasbourg, but

⁴⁸ Diduck & Kaganas op cit n39 pg 49

⁴⁹ *Bellinger v Bellinger* op cit n46 at 83

⁵⁰ Gilmore op cit n40 pg 305; The Home Office ‘Report of the Interdepartmental Working Group on Transsexual People’ op cit n8

⁵¹ *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18

each time... the judges urged Britain to reconsider its stance in the light of changes in social and medical opinion”⁵² until the European Court ran out of patience in *Goodwin*.

Further reference needs to be made here to the intervening key cases before the judgment of *Goodwin*, some of which were heard in the European Court of Human Rights. The first of these is *Rees v United Kingdom*⁵³ which concerned a postoperative transsexual man who argued that the UK’s refusal to alter his birth certificate constituted a violation of Article 8 and 12 of the Convention on Human Rights. Failure to amend the birth register limited the applicants integration into social life, prohibited him from marrying as a man, and opened him up to embarrassment and humiliation whenever he had to produce his birth certificate. The court held that the right to marry in Article 12 referred to marriage between people of the opposite *biological* sex as defined by *Corbett*, and that the right to marry is not completely impaired, as a transsexual person can marry someone of the opposite biological sex. Similarly, the court held that it was up to each member state to determine how to meet demands of transsexual people. There was no positive action required to amend the way in which we organise and use birth certificates.

In *Cossey v United Kingdom*⁵⁴ the same arguments regarding Articles 8 and 12 were invoked by a postoperative MtF. However, whereas in *Rees* where the judges had been unanimous in dismissing the claim under article 12, the judges here held by 14 votes to 4 that there had been no violation of article 12. The court felt that the reasoning given in *Rees* was still

⁵²Dyer, C. (2002) ‘Transsexuals’ 33-yr battle for legal rights’ www.guardian.co.uk/gender/story/0,857079,00.html (accessed 26/4/11)

⁵³ *Rees v United Kingdom* (1987) 9 E.H.R.R. 56; Taitz, J. ‘The law relating to the consummation of marriage where one of the spouses is a post-operative transsexual’ (1986) 15 *Anglo-American Law Review* pgs 141-148

⁵⁴ *Cossey v United Kingdom* (1991) 13 E.H.R.R. 622. *Cossey* was followed by *X, Y & Z v United Kingdom* (1997) 24 E.H.R.R. 143 and *Sheffield and Horsham v United Kingdom* (1999) 27 E.H.R.R. 163 both of which again upheld traditional understandings of sex and marriage.

relevant and was not prepared to change its findings and reliance upon biological criteria for sex, and marriage. There was no legal impediment to Miss Cossey marrying a woman, and as regards her inability to marry a man, it was felt by the court that “the criteria adopted by English law are in this respect in conformity with the concept of marriage to which the right guaranteed by Article 12 refers.”⁵⁵ Although it was recognised that some member states would allow a marriage between Miss Cossey and a man, it was held that this was not indicative of a general abandonment of traditional marriage. The court further reconfirmed the biological criteria of *Corbett* for the purposes of continuing traditional marriage.

*Goodwin v United Kingdom*⁵⁶ concerned a postoperative MtF woman who had been unable to change a number of official documents which still stated her sex as male, for the purposes of social security, national insurance, her pension, and the age at which she would be considered a retiree. She had suffered “feelings of vulnerability, humiliation and anxiety”⁵⁷ as her employers, for example, could identify her as transsexual. She had suffered harassment at work, but was unsuccessful at an industrial tribunal, as she was legally a man. Goodwin argued that failure to allow her to amend her documents constituted a violation of her rights under articles 8 (right to respect to life), 12 (right to marry and found a family), 13 (right to an effective remedy), and 14 (freedom from discrimination), of the European Convention on Human Rights. The European Court for the first time unanimously held that there had been a violation of Articles 8 and 12, (dismissing the claims under articles 13 and 14). The court felt that issues such as changing records, social security and insurance were surmountable, “particularly if confined to the case of fully achieved and post-operative transsexuals... as

⁵⁵ *Cossey v United Kingdom* op cit n54 at 45

⁵⁶ *Goodwin v United Kingdom* op cit n51

⁵⁷ *Ibid* at 1 H9

regards other possible consequences, society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.”⁵⁸

It was held that birth certificates are amended after adoption, and that to do the same after gender reassignment would not “pose the threat of overturning the entire system.”⁵⁹ This case does not refer explicitly to consummation, however, it is important to note European displeasure and pressure on the UK to enact legislation that addressed these issues. The court observed that in 2002, having regard to societal and scientific developments, one could no longer claim that ‘man’ and ‘woman’ could be solely defined by biology. For the first time, the court held that it was now artificial to argue that, post-operative transsexuals had not been deprived of marriage rights. “The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. The very essence of her right to marry has therefore been infringed.”⁶⁰

Following *Goodwin*, it was thought that “domestic law, including section 11(c) of the Matrimonial Causes Act 1973, will have to change.”⁶¹ However, marriage is so ingrained into our society’s foundation, that Parliament did not change the MCA. Instead, the GRA was enacted, which consequentially impacted upon marriage anyway; allowing a man with a vagina and a woman with a penis to contract a marriage. Can this end result truly be deemed more desirable than just abolishing marriage and all the legal privilege that goes hand in hand with it? I argue not.

⁵⁸ Ibid at 1 H19

⁵⁹ Ibid at 87

⁶⁰ Ibid at 2 H26

⁶¹ *Bellinger v Bellinger* op cit n46 at 27

Whereas the UK courts have felt unable to progress the law themselves, and have referred the issue back to the legislature, other common-law jurisdictions have dealt with this through judge made law. A New Jersey court in *M.T v J.T*⁶² considered whether or not a two year marriage between a man and a post-operative MtF was valid, and rejected *Corbett's* biological criteria, shifting to focus on promoting psychological and anatomical factors when determining sex. Given that M.T was postoperatively anatomically in harmony with her psychology, the court had no trouble declaring M.T a woman. However, the court did take time to assess her sexual capacity as a woman. Having examined medical evidence, the court concluded that M.T had “a vagina and labia which were adequate for sexual intercourse and could function as any female vagina, that is, for traditional penile/vaginal intercourse.”⁶³ As such, despite moving away from a purely biological understanding of sex and gender, this case then adds a further requirement in the need to be capable of heterosexual intercourse. Sharpe argued this “law reform reproduces the gender order along phallogentric lines.”⁶⁴ The true capacity of a woman in marriage appears to be the ability to be penetrated. The court extensively analysed the surgery M.T had undergone, and the characteristics of her vagina, perhaps suggesting an attempt to ‘naturalise’ her vagina, and heterosexual intercourse. “That is to say, medico-legal discourse, in emphasising textural, spatial and sensual similarities between M.T’s vagina and that of biological women, attempts to rearticulate the relation between the transgender body and the ‘natural’.”⁶⁵

⁶² *M.T. v J.T.* 355 A.2d 204 (1976)

⁶³ *Ibid* at 206

⁶⁴ Sharpe *op cit* n1 pg 62

⁶⁵ *Ibid* pg 63

In New Zealand the Attorney General sought to obtain a declaration as to whether a transsexual person could contract a marriage with someone of their own biological sex.⁶⁶ The court found that recognition was dependent upon surgical reassignment, though the judge found that whilst a couple wishing to marry had to appear as man and woman, they did not “have to prove that each can function sexually.”⁶⁷ The emphasis was placed upon the *appearance* of heterosexuality, if not the functionality of it: “If the law insists that genetic sex is the pre-determinant for entry into a valid marriage, then a male to female transsexual can contract a valid marriage with a woman. To all outward appearances, such ‘marriages’ would be homosexual marriages. The marriage could not be consummated.”⁶⁸

The reference to consummation is confusing here, as the judge had made clear that sexual function was not of importance. Sharpe argues that consummation is deployed here in order to denaturalise the homosexual body, and I argue that it further reinforces the heterosexual nature of marriage, and the physical appearance of heterosexuality.⁶⁹ The judge made clear that unclothed, each partner in a marriage should physically appear male and female. This appearance trumped any kind of functionality found in the new genitalia. Penetrative ability has been seemingly removed from this judgement, replaced instead by a strong desire for aesthetics. In the UK this marriage could fail the existing consummation requirement, despite one partner undergoing expensive and risky surgery, though of course unless challenged, the marriage will remain valid. Previously it would have been void.

⁶⁶ *Attorney-General v. Otahuhu Family Court* op cit n24

⁶⁷ Ibid at 612

⁶⁸ Ibid at 629

⁶⁹ Sharpe, A., ‘Transgender Jurisprudence and the Spectre of Homosexuality’ (2000) 14 *Australian Feminist Law Journal* pgs 23-37 pg 36-37; Thomson, M. ‘Viagra Nation: Sex and the Prescribing of Familial Masculinity’ (2006) *Law, Culture and the Humanities* 2 pgs 259-283 at pg 265

In the Australian case of *Re Kevin and Jennifer v. Attorney-General for the Commonwealth*,⁷⁰ Kevin a FtM transsexual man was held to be a man for the purposes of marriage. Kevin had not had a penis constructed, though he had undergone breast reduction surgery and a hysterectomy. Kevin would clearly not be capable of heterosexual intercourse as a man. Chisholm J. introduced two further criteria necessary for determining sex: those of brain sex, and social and cultural factors. As regards brain sex, this seemingly progressive judgment flounders back into the discussions entertained by Ormrod J. in *Corbett*, and confirms that sex is determined at birth. Further, the introduction of social factors is problematic. The judge heard a substantial amount of evidence from people involved in Kevin's life- friends, family, work colleagues etc- to reiterate that he had always been perceived as a man. The expansion of the law in this way seems to create a further element for recognition- one of 'passing' as the other sex.⁷¹ This is explored below with reference to Butler's work and the view that this perhaps creates a pastiche of masculinity and femininity.

4.3: Conclusions to be drawn from case law

The case law outlined demonstrates the primary aim of trying to avoid the appearance of same 'sex' (biological) marriages. It seems that worries about same-sex marriage have overshadowed understandings and judicial decisions about transsexual people. The focus on biological factors, and the decision of *Corbett* "says much about beliefs in biological determinism and the immutability of sex and their reinforcement through the legitimising authority of law, as well as about the nature of the legal marriage relationship."⁷² Radical

⁷⁰ *Re Kevin and Jennifer v. Attorney-General for the Commonwealth* op cit n24; Sharpe, A., 'Thinking critically in moments of transgender law reform' (2002) 11 *Griffith Law Review* 2 pgs 309-331; Tobin op cit n2

⁷¹ Sharpe op cit n70 pgs 322-325

⁷² Diduck & Kaganas op cit n39 pg 47

feminism talks in essentialist terms when it comes to sex.⁷³ Women and men are different. But radical feminists are disappointed most by the gender definitions that are attached to these differing bodies.

Before the introduction of the GRA, rulings in the UK courts reinforced the connection between sex and gender, whilst the European Court of Human Rights “demonstrated an understanding of lived gender identities and experiences that are distinct from those defined at birth, and of the need for state recognition of these identity practices. Thus, European universal human rights discourse has often had an advantage over state law in its more flexible reading of gender and of gendered intimate relationships.”⁷⁴ Sex has been shown to be immutable. A transsexual person can undergo surgery, take hormones and live in their acquired gender. If we could remove a need for consummation in marriage, we would remove sex, and by extension, gender from marriage, and therefore gender itself would become a mute point. If the foundation institution of society does not make a sex/gender distinction, it would then be difficult to try to extend this distinction to other areas of law.

The courts have treated those who are intersex with a sympathy and compassion that has not been extended to transsexual people in the same way,⁷⁵ though in later cases it was acknowledged that courts wished to act, but could not do so. Ormrod J. in *Corbett* held that sex was to be determined at birth and no amount of surgery or hormones could change that sex. However, if a mistake had been made at birth (usually in the case of intersex people), he held that a ‘change of sex’ could then occur, perhaps contradicting the scientific nature of

⁷³ There has been commentary that there is significance in the change from the common-law distinction of man/woman in *Corbett* and the male/female distinction that was made in the MCA 1973. See further: *Corbett v. Corbett (Otherwise Ashley)* op cit n11; *Bellinger v. Bellinger* op cit n46; *S-T (Formerly J) v J.* [1998] Fam 103

⁷⁴ Hines op cit n2 pg 91

⁷⁵ Fishbayn op cit n10

Ormrod's decision.⁷⁶ In the context of intersex, he made clear that genitals not chromosomes would be decisive if a choice had to be made. In other words, the normative seemed more important than the scientific analysis when it came to the crunch. This is confusing because the judgement in *Corbett* extensively explains that the medical profession often struggles to draw a line between transsexual and intersex.⁷⁷ Perhaps this sensitivity had extended to the medical profession, explaining why no intersex party in the UK felt they had to go to court on marital validity until 2001: the case of *W v W*.⁷⁸ The medical profession has often hidden the intersex status from the patient, and been more willing to "find ways of allowing the patient to continue as a member of their social sex through surgical intervention,"⁷⁹ if it is deemed that doctors made an incorrect determination at birth. Fishbayne suggests that the non-consummation cases discussed in Chapter 2 are perhaps about intersex people, but have not been overtly expressed as such. Until *Corbett*, "all matrimonial cases arising out of developmental abnormalities of the reproductive system had been dealt with as cases in which the marriage was void because one party lacked the capacity to consummate the marriage."⁸⁰ The existence of intersex case law provided the opportunity to talk about gender as nature or choice.

The case of *W v W*⁸¹ involved a woman who had been registered male at birth, but declared intersex as a result of ambiguous external genitalia. As she grew, she began to develop female characteristics, and underwent surgery and married. Upon the termination of her marriage, a case was made by her husband that she was not a woman, and was unable to

⁷⁶ *Corbett v Corbett (Otherwise Ashley)* op cit n11 at 104

⁷⁷ *Ibid* at 101-103

⁷⁸ *W v W* (2001) Fam. 111

⁷⁹ Fishbayn op cit n10 pg 424

⁸⁰ *Ibid* pg 422

⁸¹ *W v W* (Physical Inter-Sex) [2001] Fam 111

consummate the marriage. The court held that as she was born intersex, there could not be a definitive determination of sex at birth, and she was to be declared female, and further that the surgery she underwent made her capable of consummation.⁸² If one compares the cases of Mrs Bellinger and Mrs W, “although different medical labels are attached to... [them]... their subsequent state post-operatively is remarkably similar.”⁸³ Sharpe too argues that “distinguishing between transgender and intersex cannot be reduced to a purely descriptive act... the distinction....proves to be an effect of medico-legal constructions of (bio)logical sex and judicial concerns over demarcating the realm of the ‘natural’.”⁸⁴

4.4: Current legislation

The legal recognition of those who are diagnosed with gender dysphoria is now encapsulated in the GRA, which goes “further than strictly required by the European Court, in that entitlement to recognition is not limited by the G.R.A. to so-called ‘post-operative’ trans people.”⁸⁵ Sandland argues that the GRA reads as “a blunt, pragmatic and somewhat amoral response to the decision of the European Court in *Goodwin*...In its detail it is dry and legalistic.”⁸⁶

Under the GRA, a person with gender dysphoria (over the age of 18) can make an application for a gender recognition certificate on the basis that they have been living in the other (legally recognised) gender, or have changed their gender under the law of a country or territory

⁸² Importantly, she would have needed surgery in order to consummate as either sex.

⁸³ *B v B* [2001] EWCA Civ 1140 at 135

⁸⁴ Sharpe, A. ‘English Transgender Law Reform and the *Spectre of Corbett*’ (2002) 10 *Feminist Legal Studies* pgs 65-89 pg 65

⁸⁵ Sandland op cit n6 pg 51

⁸⁶ *Ibid* pg 46-47

outside the UK.⁸⁷ The application is then considered by a Gender Recognition Panel, who will grant the application if they are satisfied that the applicant has or has had gender dysphoria;⁸⁸ that the applicant has lived in the acquired gender for two years;⁸⁹ and that the applicant intends to continue to live in their acquired gender for the rest of their life.⁹⁰ Jeffreys states MtF transsexuals “must learn and practice feminine traits. Not surprisingly they choose to imitate the most extreme examples of feminine behaviour and dress in grossly stereotypical feminine clothing.”⁹¹ This could be a reaction to having to ‘prove’ their genuine desire to transition, and a wish to not challenge views of femininity in case they risk rejection, or could be a desire on the part of male transsexuals “to become their image of what women can and should be, not a liberated or feminist version.”⁹² Although there is no insistence upon surgery or hormonal treatment, decisions about whether or not to grant a certificate are predicated upon “a clear match between gender identity and presentation.”⁹³ This is constructed upon a medicalised understanding of gender dysphoria, and serves to privilege “a connective relationship between gender identity, bodily appearance, and presentation.”⁹⁴

⁸⁷ ss1 (1) (a) & (b) GRA 2004. In Pakistan the Supreme Court has decided to allow for a third gender category. However, this chapter demonstrates the complexities in anticipating how many people may opt to be classified as such, with arguments ranging from those who hold transgender people wish to be incorporated into the existing gender structure, and those that argue that transgender people wish to challenge the existing binary. ‘Pakistan transgenders pin hopes on new rights’ www.bbc.co.uk/news/world-south-asia-13186958 (accessed 25/4/11); Office for National Statistics ‘Trans Data Position Paper’ (2009) www.ons.gov.uk/about-statistics/...data.../trans-data-position-paper.pdf (accessed 12/4/11). The ONS found that transsexual people, once transitioned, didn’t want to tick boxes on forms that identified themselves as ‘some other’. They wanted to be able to tick male/female according to the gender they had acquired. See also Hausman, B.L. ‘Recent Transgender Theory’ (2001) 27 *Feminist Studies* 2 pgs 465-490 pg 473; Muller op cit n35 pg 103

⁸⁸ s2 (1) (a) GRA 2004

⁸⁹ Ending at the date of the application. s2 (1) (b) GRA 2004

⁹⁰ s2 (1) (c) GRA 2004

⁹¹ Jeffreys, S. *Anticlimax: A feminist perspective on the sexual revolution* London, The Women’s Press, 1993 pg 177

⁹² *Ibid* pg178

⁹³ Hines op cit n2 pg 94

⁹⁴ *Idem*

The application must contain evidence from two medical practitioners, one of whom needs to be a registered medical practitioner from within the field of gender dysphoria or a report from a chartered psychologist in the field. The reports must include details of the diagnosis of the applicant's gender dysphoria;⁹⁵ and detail any treatment the applicant has undergone, is undergoing, or plans to undergo in order to modify their sexual characteristics.⁹⁶ The GRA requires medical input, and requires explanation when transsexual people have not undergone surgery, indicating that though surgery is not required, it is expected.⁹⁷

After a successful application the applicants birth registry entry will be amended, their status as a mother or father will not be affected and their rights to succession under wills created before their certificate will not be affected.⁹⁸ The GRA does not require sterilisation, though this has been required in other countries (e.g Denmark and Sweden). The Act also states that the fact that an applicant has changed their gender will not prevent them from being prosecuted for attempted or committed offences under their old gender.⁹⁹

Probert explains that the process for gender recognition has become a medical one, rather than a legal one.¹⁰⁰ Doctors have moved on from defining 'natural' sex, to now involving themselves in legislation for transsexual people. Probert points out that problems may arise if transsexual people are not encouraged to undergo surgery, which is used as evidence of the "applicant's intention to live in the acquired gender until death."¹⁰¹ Sandland states that the

⁹⁵ s3 (2) (b) GRA 2004

⁹⁶ s3 (3) GRA 2004

⁹⁷ See further Gender Recognition Panel Guidance: www.grp.gov.uk (accessed 27/9/12)

⁹⁸ See further ss10, 12, 15 GRA 2004

⁹⁹ s9 GRA 2004

¹⁰⁰ Probert op cit n23 pg 46

¹⁰¹ Idem

GRA demonstrates “the truism that any act of inclusion also excludes.”¹⁰² The Act creates a new binary- those who will cross and live as the acquired gender for life, and those who won’t; a divide between “conformity and deviance.”¹⁰³ This denial of access for some, means that the law has still left some people ‘out of the loop’, but might also “allow real freedom, a lived reality of the deconstruction of the dyads male/female, conformity/deviance, for others. In ontological terms, the G.R.A. marks a new openness of texture, a new fluidity, to the legal construction of gender.”¹⁰⁴ The Act is representative of existing social realities, in that most people live as either male or female, but the GRA could have been used to challenge this. The Act is not retroactively applicable, because to do so would effectively have declared the relationships prior to gender certificates as same-sex relationships which enjoyed the legal benefits of marriage.

Heterosexuality has been “constructed as a coherent, natural, fixed and stable category; as universal and monolithic”¹⁰⁵ and prior to the GRA, transsexual people posed a threat to this. Rather than change existing marriage law, Parliament chose to create new ‘transsexual specific’ legislation. The characteristics of law are not appreciated by feminists and radical feminists in particular. If law did not engage with male values of certainty, and the male patriarchal gender binary, the life path for transsexual people would undoubtedly be simpler. It is this drive for certainty, and insistence upon proffering differing rights to the two genders, that has left us with a system (even after the introduction of the GRA) that still requires gender to be registered at birth. The House of Lords calls the assessment of gender

¹⁰² Sandland op cit n6 pg 45

¹⁰³ Ibid pg 50

¹⁰⁴ Ibid pg 55

¹⁰⁵ Richardson, D., *Rethinking Sexuality* London, Sage Publications, 2000 pg 20

“essential”.¹⁰⁶ This essential character, and desire for certainty led to the court in *Bellinger* concluding that to declare Mrs Bellinger a woman “would necessitate giving the expressions ‘male’ and ‘female’... a novel, extended meaning: that a person may be born with one sex but later become, or become regarded as, a person of the opposite sex.”¹⁰⁷

4.5: Socio-legal understandings of transsexual issues

Legal understandings of transsexual bodies have emerged from medico-legal arguments and contemporary law reform in this area which “operate within a frame established by the imprint of sexual science.”¹⁰⁸ It is this balance between law and medicine that seems to be engrained in the GRA. But, Hines argues that the GRA’s provisions mark “a sea change in socio-legal attitudes to gender.”¹⁰⁹ If the aim of transsexual people is recognition and harmonisation of their gender and sex, then why has the law not required (physical/anatomical) harmonisation? The post-operative transsexual has most effectively tried to harmonise their sex and gender. Radical feminists and others would question whether, for example a MtF transsexual could truly understand the world as a female? This relies on some general accepted definition of the term ‘female’, and implicitly claims a universal understanding of the world by genetic females. In *Bellinger*’s Court of Appeal hearing, it was noted that “the words ‘male’ and ‘female’ are obviously broader than ‘man’ and ‘woman’, since they encompass the entire animal world. Among humans, it includes those who are not yet adults.”¹¹⁰

¹⁰⁶ *Bellinger v Bellinger* op cit n46 at 19

¹⁰⁷ *Ibid* at 36

¹⁰⁸ Sharpe, A., *Transgender Jurisprudence: Dysphoric Bodies of Law* Oxon, Routledge-Cavendish 2006, pg 17

¹⁰⁹ Hines op cit n2 pg 90

¹¹⁰ *B v B* op cit n83 at 22

The reliance upon *Hyde*¹¹¹ historically excluded transsexuals from marriage.¹¹² This is an unfortunate, and inaccurate reading of the law as expressed in *Hyde*.¹¹³ The insistence of a union between one man and one woman, was not focused upon the biological, although this was the legacy that this case produced, but rather was a result of the courts insistence that a marriage could only be between two people. The court was assessing the validity of a polygamous marriage, not the gender of the parties. The configuration of ‘one man and one woman’ was about numbers, not genders.¹¹⁴

One cannot discuss the impact of the GRA without some examination of the conflicting understandings and discourse surrounding sex and gender. The GRA could be seen as a state shift from sex to gender as the defining element between males and females, as there needs to be no physical (biological) change as such, but rather an outward change. The categorisation of transsexual people as suffering from gender dysphoria creates a biological explanation which in itself “seek[s] to confirm a naturalised binary gender system by constructing transsexualism as an anomaly, that can be treated by medical science.”¹¹⁵ The radical feminist perspective deems sex an essence, but the meaning of this essence, and the gender written over this female body, is one which is defined by patriarchal society.¹¹⁶ There are two preeminent views of sex- the biological determinist view, and the social constructionist view.

¹¹¹ *Hyde v. Hyde and Woodmansee* [1866] LR 1 P&D 130

¹¹² MCA 1973 s11 (c) states that a marriage is void if the parties to the marriage “are not respectively male and female”.

¹¹³ *Hyde v. Hyde and Woodmansee* op cit n114

¹¹⁴ Fishbayn op cit n10 pg 415

¹¹⁵ Johnson op cit n6 pg 37

¹¹⁶ Eriksson, M., ‘Biologically similar and anatomically different? The one-sex model and the modern sex/gender distinction’ (1998) 6 *Nordic Journal of Women’s Studies*1 pgs 31-38 pg 32

The biological determinist view “posits that sex is biological, and gender is an affect of sex.”¹¹⁷ There is an acceptance here that human beings have a fundamental biological nature. The courts have held in *Bellinger* and *Corbett* for example, that with reference to the criteria set out in *Corbett*, one can never truly change ‘sex’: “the change of body can never be complete.”¹¹⁸ The social constructionist view on the other hand, “posits that the meaning of sex is historically and politically specific. Its meaning shifts across time and cultures according to particular political impulses.”¹¹⁹ In this way, there is no universal understanding or meaning of sex. *Corbett* demonstrates the biological determinist approach as it accepts the notion that “destiny is determined by biology and in its refusal to recognise the social and psychological aspects of sex as being material to the determination of sex.”¹²⁰

Fishbayn felt that the *Corbett* judgement paints transsexual people as ‘pastiche’.¹²¹ Butler too has commented on transsexual people creating a pastiche: the notion that they are trying to copy or imitate the gender they acquire, whilst subtly suggesting that the imitation is not believable.¹²² *Corbett* was an expression of the judges discomfort at “Mrs. Corbett’s aesthetic enterprise... [in] the commingling of male and female elements in a single individual.”¹²³ This commingling fundamentally questions the notion of essential sexual identity and sexual capability. Essential sexual identity is often cited as a radical feminist characteristic, and I now outline the uneasy relationship between radical feminism and transsexual people.

¹¹⁷ Grenfell op cit n19 pg 68

¹¹⁸ A sentiment which is oft repeated in the case law: *Bellinger v Bellinger* op cit n46 at 8 and at 56

¹¹⁹ Grenfell op cit n19 pg 68

¹²⁰ Ibid pg 78

¹²¹ Fishbayn op cit n10 pg 421; *Corbett v Corbett (Otherwise Ashley)* op cit n11 at 104

¹²² Butler, J., *Gender Trouble* New York, Routledge 1990; Butler, J. *Bodies that Matter: On the discursive limits of “sex”* London, Routledge, 1993

¹²³ Fishbayn op cit n10 pg 426

4.6: Reconciling radical feminism with understandings of transsexual issues

Transsexual people can be seen as separating sex and gender; “rather than biological ‘sex’ being the marker of identity, ‘gender’ recognizes that identity is more fluidly experienced and practised.”¹²⁴ Under Beauvoir’s understanding of sex and gender, “gender was seen as subset of sex: ‘sex’ defined the parameters, ‘gender’ was the free play available within those parameters.”¹²⁵ Firestone also used a biologically determined understanding of sex, contending that procreation provides a natural block to women’s equality, and outside factors such as improved reproductive technologies are needed in order to free women from this oppression.¹²⁶ Gender is therefore reproduced, generationally.

Following this understanding of gender and sex, the terms went through a time of being used interchangeably, until the Butlerian construction of gender understandings. Butler created a view (heavily influenced by Foucault) in which “sex had increasingly come to be seen as a subset of gender, with the body... produced by gendered ideas and actors.”¹²⁷ She argues that second wave feminism served to make sex essential, and viewed gender as constructed upon this. She argues that sex and gender are both equally linguistically constructed.¹²⁸ Chapter 1 outlined my unease with this construction of sex and gender, so here I will only say that there are clear physical and biological differences between the accepted sexes- men and women. Understandings of gender emerge from this difference. For Beauvoir, this understanding is historical in nature. From birth, the female body is treated differently from the male, and as such what it means to be a woman emerges, under the construct of a patriarchal society. We

¹²⁴ Hines op cit n2 pg 90

¹²⁵ Sandland op cit n6 pg 47

¹²⁶ Firestone, S., *The Dialectic of Sex: The Case for Feminist Revolution* London, Women’s Press; Grenfell op cit n19 pg 91

¹²⁷ Sandland op cit n6 pg 47

¹²⁸ Butler, *Bodies that Matter: On the discursive limits of “sex”* op cit n125 pg 6

are not born as ‘women’ but rather become (are made) such.¹²⁹ A transsexual person can undergo the surgical procedures that will allow them to look like the acquired gender, but the process which begins at birth has not been present.¹³⁰ This gender anxiety appears often in the context of transsexualism, but not in comparable situations, for example where a 2year old girl is in a coma and awakens at age 20. She too will have missed the gender socialisation which creates woman. Legally speaking, “gender seems to be the only paradigm of difference within which ‘self’ is authoritatively permitted to be at odds with ‘body’.”¹³¹ In the context of transsexualism, this probably has more to do with homophobic attitudes than those of sex and gender.¹³²

Butler argues that gender is performed in all aspects. She asks transsexual people to demonstrate the effect of this performativity.¹³³ Not only is this an unfair request, it also naively purports to demolish the gender binary. There seems to be inconsistency between those who argue that transsexual people wish to ‘effectively’ transition from one gender to another, whilst Califia for example, suggests that transsexual people,

¹²⁹ De Beauvoir, S., *The Second Sex* (1949) Parshley, H (ed and trans) London, Vintage, 1997: &, Moi, T. *Simone de Beauvoir: The making of an intellectual woman* Oxford, Blackwell, 1994

¹³⁰ The judgement in Corbett in particular could be seen to support this view. The judge concluded that Mrs Corbett was passing as a woman more or less successfully. The judge felt that sex, and gender are acquired at birth, concluding that: “Her outward appearance at first sight was convincingly feminine but on closer and longer examination in the witness box it was much less so. The voice, manner, gestures and attitudes became increasingly reminiscent of the accomplished female impersonator.” Ormrod J. felt that Mrs Corbett was not effectively able to be a woman, because she had not been so since birth, and as such, her mannerisms and actions were deemed inauthentic by him. *Corbett v Corbett (Otherwise Ashley)* op cit n11 at 104; Burstow, B. *Radical Feminist Therapy: Working in the Context of Violence* London, Sage, 1992 at pg 2; Klein, R. & Hawthorne, S. ‘Reclaiming Sisterhood: Radical Feminism as an Antidote to Theoretical and Embodied Fragmentation of Women’ in Ang-Lygate, M., Corrin, C. & Henry, M.S (eds) *Desperately Seeking Sisterhood: Still Challenging & Building* London, Taylor and Francis, 1997 pgs57-70

¹³¹ Wilton, T., ‘Out/Performing Our Selves: Sex, Gender and Cartesian Dualism’ (2000) 3 *Sexualities* 2 pgs 237-254 pg 242

¹³² Sharpe op cit n1

¹³³ Butler *Bodies that Matter: On the discursive limits of “sex”* op cit n122 pg 11

direct their political efforts toward eliminating the notions of “men” and “women,” rather than working to be perceived by nontranssexuals as a member of either gender... [there has been] an increase in the numbers of people who label themselves as third-gender... and insist on their right to live without or outside of the gender categories that our society has attempted to make compulsory and universal.¹³⁴

Rather than breaking down gender, Butler’s configuration serves to add further categories to our gender understandings. We would end up perhaps with men, women (as other), and transsexual (as a further other). Butler holds that gender performatives seek to harmonise the ‘inside’ with the ‘outside’; a discourse created to provide the concept of a gender-core, primarily to protect heterosexuality. Radical feminists would however suggest that gender stereotypes start from birth when male and female babies are treated differently. As such, in later life to try and claim a gender change, is incompatible with radical feminist understandings even though transsexuals may argue that their early gender socialisation is a coerced gender performance which they feel they fail. Radical feminists take issue with Butler’s work as it flies to such abstract heights that it produces further theoretical questions that never seem to be adequately answered in a way that feels like it refers to women on the ground, and their everyday experiences.¹³⁵ Butler’s insistence upon differentiating herself from the biological determinism found in radical feminism results in an intriguing discussion about power, but does not clearly conclude why there are two sexes.¹³⁶

¹³⁴ Califia, P., *Sex Changes: Transgender Politics* (2nd ed) San Fransisco, Cleis Press, 2003 pg 245

¹³⁵ Moi, T., *What is a Woman?* 1999, Oxford, Oxford University Press; Grenfell op cit n19

¹³⁶ Moi idem: *Butler Bodies that Matter: On the discursive limits of “sex”* op cit n122

Sandland argues that the GRA is the institutionalisation of the Butlerian view, whereas Fishbayn argues that the GRA allows for gender transition but “conceptualizes transsexuality and intersexuality as pathological and repudiates the performative nature of gender.”¹³⁷ I agree with Sandland’s analysis and take issue with several parts of the legislation enacted, not least perhaps that the GRA serves to reinforce heteronormativity, and does not seem to address all the issues that transsexual people experience.

The Butlerian approach is most clearly seen in s9 (1) GRA which reads:

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).¹³⁸

In this way, gender becomes the key dynamic, and sex becomes a by-product. The transsexual person is expected to now effectively ‘perform’ the new sex’s characteristics. Feminist theory in general and radical feminist theory in particular has accepted that gender is understood as the social meaning attached to sex. Radical feminism tries to separate this ‘female’ gender role that is attached to the female body. Butler on the other hand states that this does not go far enough, and feels that sexed bodies are created through discourse. The existence of transsexual individuals, for her, allows the discourse to shift and change, as we learn gender, and the very existence of transsexual people can teach us new things. As it is,

¹³⁷ Fishbayn op cit n10 pg 415

¹³⁸ s9 (1) GRA 2004

we are aspiring to idealised forms of ‘male’ and ‘female’ that Butler feels we cannot achieve. As Johnson explains, “this ideal is maintained through the reiteration and embodiment of gender norms cemented together by heterosexuality.”¹³⁹

Even if one accepts that gender is performed, the *Corbett* judgement is still none the clearer. Although the court found Mrs Corbett’s genitalia looked female, and would probably allow penetration (not constituting consummation), the court found in other areas that she was perhaps not female enough, making assessment of her mannerisms and make-up. In fact, Mrs Corbett is one transsexual woman that has always passed extremely well, and so Ormrod’s comments suggest anxiety precisely because of this fact and his imagined proximity to homosexuality. Moi uses this example to show that to conclude that everyone who ‘performs’ femininity is a woman,

is to blur the difference between a woman who performs femininity, a man (drag artist or cross-dresser) who does it, and a transsexual who has changed his or her body in order to achieve a more convincing ‘performance’. Is the ‘gender’ performed really the same in each case? Even if we assume that these three people all perform the same script (which is by no means a foregone conclusion), does a different body really make no difference at all as to the effect of the performance?¹⁴⁰

Moi contends that someone who undergoes surgery demonstrates a greater commitment to a convincing ‘gender performance’. Under Butler’s contention, if all of our claims to be male

¹³⁹ Johnson op cit n6 pg 36

¹⁴⁰ Moi op cit n135 pg 94

or female “are a fiction, it can be argued that transsexuals are embroiled in much the same process of attaining a ‘sex’ as non-transsexuals.”¹⁴¹ I cannot agree. Contrary to Califia, both the law and most transsexual people do not wish to challenge understandings of male and female.¹⁴² Instead, for many it is a change from one gender to the other. It is not about creating a third gender, or challenging understandings.¹⁴³ It is about living in their true gender; living their lives in a way that is true to themselves. Butler fails to acknowledge the limitations of the body, and further relies heavily upon a community who already have enough issues to endeavour with- surgery, familial relationships, societal reactions, legal requirements, to name a few- to also impact, challenge and change the existing gender binary, when so few of us, who do not have these additional issues do not bother to do so.

It has been argued that the GRA and the possibility of re-assignment surgery allow transsexual people the opportunity to be ‘whole’, reinforcing the idea that there must be uniformity or cohesion between the external and the internal. This flies in the face of radical feminist understandings, which try to distance the female body from ideas of femininity for example. The external body determines how woman are treated from birth, yet the GRA does not require the external body to necessarily match what is felt inside. It is within transsexual issues that “gender identity... is understood as stable and the body as more mobile: the body should correspond to the inner sense, the sense of being woman or man. The body is to be

¹⁴¹ Johnson op cit n6 pg 36

¹⁴² Moi op cit n135 pg 91. Bornstein argues for her right to be recognised as a transsexual woman, rather than just a woman. Transgender people are encouraged to create a ‘past’ for themselves and she argues that instead of joining the ‘gender cult’ which supposes, and enforces heterosexuality, one can simply be defined as transgender: www.mental-backup.de/content/PDF/tiresias.PDF ‘Kate Bornstein: A Transgender Transsexual Postmodern Tiresias’ (accessed 16/4/11). Jeffreys criticises Bornstein’s idea, for the very concept of ‘transgender’ means gender must exist in order for one to be able to transition from one to the other: Jeffreys, S. ‘Heterosexuality and the desire for gender’ in Richardson, D. (ed) *Theorising Heterosexuality* Buckingham, Open University Press, 1998 pgs 75-91 at pgs 84-88

¹⁴³ Sharpe states that incorporating “a third term or gender position has consistently been rendered inconceivable within legal discourse.” Sharpe op cit n1 pg 60; Robson, R., ‘A Mere Switch or a Fundamental Change? Theorizing Transgender Marriage’ (2007) 22 *Hypatia* 1 pgs 58-70 at 62

modified, not vice-versa.”¹⁴⁴ Radical feminists accept the possibility, and scientific knowledge available to now adapt physical appearance, but feel that the internalisation of gender which begins at birth has not been complete in a transsexual person.

Butler’s view of the role of discourse does not allow most women who are not transsexual to ever escape the discourse that shapes them. Radical feminism however allows for the prospect that some women can escape ideas of femininity and female roles. This is through a spectrum ranging from consciousness raising, to separate living from men. Fishbayn claims that when you view *Corbett* and Butler together, “it is precisely because pastiche can have the effect of subverting the fixed binary frame of gender that the *Corbett* judgement sought to contain situations in which it occurs. The binary image is not displaced by the transsexual, but its purported naturalness is undermined.”¹⁴⁵ Effectively, Butler is saying that the existence of transsexuals challenges the gender binary, whilst radical feminists would argue that not only can people not truly change from one gender to the other, but that that is the ambition of most transsexual people; not to try and create a challenge, but to fit in.¹⁴⁶

There is a strand within radical feminism which, given its preference for difference over equality, is hostile to MtF transsexual women. Raymond and Jeffreys for example are hostile to MtF lesbians in particular. Both have argued that men cannot overcome patriarchal privilege, nor can they overcome their male view of women, and Raymond has further argued that ‘sex-change’ in relation to women is another way for men to remove the inherent power

¹⁴⁴ Eriksson op cit n116 pg 36

¹⁴⁵ Fishbayn op cit n10 pg 427

¹⁴⁶ Fishbayn states that some transsexual commentators interpret transsexualism as an example of gender’s fluidity. Conversely, she explains that some transsexuals are offended when it is suggested that they are playing with gender norms rather than expressing their essential gender identity. Idem.

of female biology.¹⁴⁷ Both conclude that “transsexualism is not consonant with lesbianism or women’s liberation”¹⁴⁸ and that transsexualism has developed as a result of the limiting gender roles that exist under male supremacy.

Califia is particularly critical of Raymond’s radical feminist work. Califia states that as a genetic woman, Raymond does not make space for transsexual women in lesbian-feminist media, and only genetic women, “who were adamantly opposed to the inclusion of transsexual women, and indeed, did not see them as women, lesbians or feminists,”¹⁴⁹ were provided the space to talk about transsexual women. Califia concludes that the usual home of radical feminism, as an extreme left political movement, is abandoned when transsexual issues are discussed, and radical feminists set up home in the extreme right with the New Christian Right.¹⁵⁰ This comparison is particularly troubling to an atheist, but I concede the sentiment of Califia’s point, if not perhaps the conclusion he comes to. Radical feminists are almost militant in their beliefs for furthering women’s issues, and I cannot purport to always agree with the ideas expressed, yet there are very few people who could say that they agree with every part of the spectrum of their chosen theory. Califia’s analysis demonstrates the difficulties faced in writing about the subject, even when writing from within the transsexual community, having been born female, and now living as a man. Whilst asking society and Raymond in particular to accept and embrace MtF as women, in his book, Califia refers to himself still as a woman when he feels it will suit his point better.¹⁵¹

¹⁴⁷ Taitz op cit n14: Raymond, J. *The Transsexual Empire: The Making of the She-Male* New York, Teachers College Press, 1994

¹⁴⁸ Jeffreys op cit n91 pg 176

¹⁴⁹ Califia op cit n134 pg 86

¹⁵⁰ Ibid pgs 89-91; Jeffreys op cit n91 pg 166

¹⁵¹ Califia ibid pg 94

Califia suggests that transsexual people will often tell doctors what they need to, in order to obtain the treatment they desire/need. Raymond has argued that in so doing, transsexual people have entrenched idealised forms of masculinity or femininity.¹⁵² Her research found transsexual women who said they would ensure that their children would learn existing gender roles. Califia stated that transsexual women *have to* say this, in order to be allowed to adopt or raise children.

Radical feminist theory has posited that transsexual people are homosexuals who are uncomfortable with their sexuality, and wish to create a heterosexual reality,¹⁵³ though there is no conclusive research to demonstrate how many transsexuals engage in homosexual relationships in their acquired gender. It seems too simplistic and somewhat insulting to claim that the two are automatically linked, but this is outside the scope of this research. Jeffreys and Raymond have shown that;

Nothing upsets the underpinnings of feminist fundamentalism more than the existence of transsexuals. A being with male chromosomes, a female appearance, a feminist consciousness, and a lesbian identity explodes all of their assumptions about the villainy of men. And someone with female chromosomes who lives as a man strikes at the heart of the notion that all women are sisters, potential feminists, natural allies against the aforementioned villainy.¹⁵⁴

¹⁵² Raymond op cit n147 at 91-98

¹⁵³ Jeffreys op cit n91 pg 182

¹⁵⁴ Califia op cit n134 pgs 91-92

I find it disappointing that radical feminism has not ‘radically’ suggested that the existence of transsexuals, rather than threatening femininity, demonstrates that patriarchal insistence upon sex as biological reinforces heteronormativity. I understand Sandland’s argument that this narrow stream of radical feminism is caught by its own argument. Transsexualism can be seen as the search for an essence- “to know that one is what one is not”.¹⁵⁵ In insisting upon gender as an essence, Jeffreys argues that a man cannot know through some psychic projection, what it means to be a woman. The transsexual feels his or her essence is out of step with their body- but Jeffreys reads a MtF transsexuals essence as male.¹⁵⁶

Radical feminism protects and reinforces the existing gender binary in discussions of transsexuals. One would expect this theory to push through current understandings of gender, and promote and support the dismantling of the binary. I would expect something close to Derrida’s understanding of transsexuals as a destabilising force which impacts upon the gender binary “resisting and disorganising it, without ever constituting a third term.”¹⁵⁷ I would not go so far as to argue that the GRA has allowed for this, nor would I argue that the GRA allows us to categorise gender as self-expression. Those who are diagnosed with gender dysphoria, are required to identify themselves as the opposite sex, in order to gain legal recognition.¹⁵⁸ This is not to be read as an insistence upon transsexual people erasing the gender binary, but rather that their very existence should begin to do so.

Radical feminism contends that sex is the primary way we create our identity, and the way in which society divides us. Radical feminists do not get too engrossed in a sex/gender

¹⁵⁵ Sandland op cit n6 pg 63

¹⁵⁶ Jeffreys op cit n91

¹⁵⁷ Derrida, J., *Positions* Chicago, Chicago University Press, IL 1981 pg 43

¹⁵⁸ Sandland argues the GRA has allowed a move to a ‘beyond’ in which gender is meaningless: Sandland op cit n6 pg 64

distinction, but rather argue that both are socially constructed, resulting in differential treatment/experience from birth as a consequence of patriarchy. However radical feminism does not believe that all women will blindly become 'victims'. The very fact that radical feminist writers such as Daly, Beauvoir and MacKinnon can emerge, shows that patriarchy is perhaps not all consuming.

The penchant for biological determination some feel is found in radical feminism creates an undeniable anxiety amongst radical feminists when it comes to discussing the impact of transsexual people upon gender and sexuality issues. Yet this reluctance does not extend to people who want plastic surgery for their noses, breasts, buttocks etc. The reluctance to accept surgically created/altered sexual organs could be seen as reluctance to amend existing social hierarchies;

...women should not be passing as men because they would be usurping power to which they are not entitled and men should not be passing as women because they are thereby surrendering privileges of which they should not lightly dispose. Surgical alteration of both primary and secondary sex characteristics are viewed as fraught with meaning that does not attach to the surgical alteration of other body parts.¹⁵⁹

The disposal of a surgical/hormonal requirement and the refusal to incorporate 'brain sex' into the GRA is perhaps recognition that the extent of surgery undergone is not an adequate measure of a persons' transsexualism. A transsexual person who has not undergone surgery,

¹⁵⁹ Fishbayn op cit n10 pg 440

for whatever reason, will still view themselves as a transsexual person. The feminist mantra “the personal is political”¹⁶⁰ does not translate here for there are a great many transsexual people who do not wish to make gender understandings political. Where now for the relationship between feminism and transsexualism? Johnson explains that transsexual studies could move away from feminist theory and further into its own arena, but concludes that in fact “mutual recognition and collaboration might prove a more theoretically productive and politically effective philosophy.”¹⁶¹

Beauvoir’s concept of women as ‘Other’ leads one to ask ‘why have men behaved like this?’ What have cases such as *Bellinger*, and *Corbett* secured for men? How has the GRA benefitted men? The answer seems to be a continuation of heteronormativity. Moi produces a theoretical understanding that effectively removes performance and biology from the equation when trying to determine whether or not a transsexual person has become their new gender;

All that is required is that we deny that biology grounds social norms. It is neither politically reactionary nor philosophically inconsistent to believe both that a male-to-female transsexual remains a biological male *and* that this is no reason to deny ‘him’ the legal right to be reclassified as a woman.¹⁶²

¹⁶⁰ Johnson op cit n6 pg 38

¹⁶¹ Idem

¹⁶² Moi op cit n135 pg 94

In this way, we would be rid of social gender norms, and would further enhance and realise Beauvoir's emphasis upon men and women's freedom to define their own sex. She emphasises the fact that sex is defined by the Other, so we cannot necessarily define our own sex in abstraction.

Robson states, "as a matter of reform, it may be expedient to argue for the recognition of transgender marriages, but as a matter of critical change, the argument fails."¹⁶³ Rather, one needs to analyse how and where we have used sex and gender in society, particularly to discriminate. I believe that one can accept difference- that men and women are different- but this difference does not need to be a relationship of dominance/subordination. In the context of this thesis, I show that consummation is a legal entrenchment of patriarchy, domination and subordination. In removing consummation, and hopefully removing marriage, the importance of sex and gender will become mute. In fighting for transsexual marriage, we entrench the heterosexual, patriarchal, dominant/subordinate nature of marriage, even if the gender understandings have changed. The *institution* itself creates these limiting characteristics. In fighting for transsexual marriage, I like Robson, "am worried that only a few of the characters will be switched. And that nothing fundamental will be altered."¹⁶⁴

In arguing for the removal of marriage, and by extension gender, anyone who feels their body does not fit who they are does not have to construct their argument in a way which labels them 'ill' or requires them to create a kind of pastiche that they believe represents the gender they wish to be. Taking radical feminism to its logical conclusion- that patriarchy determines women as other- leaves me open to a plethora of ways to explain transsexual issues.

¹⁶³ Robson op cit n143 pg 65-66

¹⁶⁴ Ibid pg 66

However, transsexual people, especially prior to the GRA, shared the fact of ‘otherness’ in that men who wanted to become women were not deemed ‘real’ men by the ‘real’ men, and women who wanted to become men would never be ‘real’ men. If we can work backwards from a position of highlighting the disservice that gender and sex do in terms of consummation and marriage, then we can remove the idea of a ‘real/perfect’ man/woman.

4.7: The impact upon the consummation debate

Prior to the GRA and M(SSC)A, no amount of surgery would allow a transsexual person to claim that they should be allowed to marry as they were of the wrong gender, and held incapable of the consummation act. The insistence upon a male/female gender binary has meant that transsexual people have had to legally change from one gender to the other. The 2004 Act has continued to perpetuate a binary system of gender, “by instigating a system to formally ‘recognise’ only men and or women.”¹⁶⁵ Medicalised understandings of gender serve to present it as static- “bodily, psychically and temporally.”¹⁶⁶ The insistence upon a binary understanding of sexuality and gender is however confused by transsexual sexualities and intimacies.

In the case of *Corbett*, Ormrod J. noted that if for a moment one held that Mrs Corbett was a woman, she would still be incapable of ordinary and complete consummation as, “when such a cavity has been constructed in a male, the difference between sexual intercourse using it and anal or intra-crural intercourse is... to be measured in centimetres.”¹⁶⁷ Sharpe argued that in juxtaposing her “vagina with the practice of anal intercourse, the judgement brings into

¹⁶⁵ Sandland op cit n6 pg 43

¹⁶⁶ Hines op cit n2 pg 94

¹⁶⁷ *Corbett v Corbett (Otherwise Ashley)* op cit n11 at 107

view the homosexual body and its assumed practices.”¹⁶⁸ This propensity to analogise homosexuality and transsexualism is a theme that runs through much case law and surrounding literature. Also, this ignores the decision of *S.Y v S.Y*,¹⁶⁹ and Ormrod J. justifies this by stating that the comments on this issue in that case should be regarded as obiter. In the case of *S.Y v S.Y* the court found that a constructed vagina- be it wholly or partially constructed- would still allow for vera copula.¹⁷⁰ The judgement stated that the arguments put forward in *D-e v A-g* were so constructed because the judgement was given at a time where one could not contemplate surgical intervention to ‘correct’ any defects. For consummation purposes, this case is troubling because there is a large focus upon the sexual ‘satisfaction’ that will be achieved, or not, through an artificial vagina. However the case law shows that sexual satisfaction is not necessary for consummation. The wife in *S.Y v S.Y* had a vagina, which was not at a depth that would achieve full penetration. The case seems to indicate that the vagina should be big enough for a man, and further, the judges make a point to discuss the husbands sexual satisfaction but to not discuss the sexual satisfaction of the woman who has to undergo the operation.¹⁷¹

Jeffreys describes the importance of female sexual satisfaction as innately intertwined with men’s. She explains that,

in the twentieth century operations are carried out on women in the US and in Britain to make women’s vaginas fit their husbands’ penises, and to move their clitorises nearer their vaginas on the grounds that this would

¹⁶⁸ Sharpe op cit n69 pg 26: Taitz op cit n53 pg 146

¹⁶⁹ *S.Y v S.Y (Orse. W.)* op cit n44

¹⁷⁰ Ibid at 46

¹⁷¹ Ibid at 60

make them more likely to experience pleasure whilst the husband experienced his own.¹⁷²

The excessive discussion within case law about natural and constructed vaginas hides the greater issue that even biological women are altering their biology for male satisfaction.¹⁷³ A second worry that emerges from the dicta of *Corbett* is the court's view that,

sex is clearly an essential determinant of the relationship called marriage because it is and always has been recognised as the union of man and woman. It is the institution on which the family is built, and in which the capacity for natural hetero-sexual intercourse is an essential element. It has, of course, many other characteristics, of which companionship and mutual support is an important one, but the characteristics which distinguish it from all other relationships can only be met by two persons of opposite sex.¹⁷⁴

Though the law has changed in this area culminating in the GRA, it is not convincing to argue that marriage should not change because something simply 'is'.¹⁷⁵ It is likewise unconvincing to argue that marriage just 'is' the relationship upon which the family is built. The GRA implies that sexuality and gender are attached "so that sexuality transitions alongside gender to denote either same-sex or heterosexual desire and practice."¹⁷⁶ Hines argues that this insistence upon a gender binary is ironic, given that the GRA is supposed to

¹⁷² Jeffreys, S., *The Sexuality Debates* London, Routledge & Kegan Paul, 1987 pg 2

¹⁷³ See for example the debate emerging from the production of 'virginity cream' to tighten the vagina: <http://www.bbc.co.uk/news/world-asia-india-19353039> (accessed 26/9/12)

¹⁷⁴ *Corbett v Corbett (Otherwise Ashley)* op cit n11 at 105-106

¹⁷⁵ See further: Diduck & Kaganas op cit n39 pg 48

¹⁷⁶ Hines op cit n2 pg 94

be addressing the rights of transsexual people.¹⁷⁷ Although the ‘gender’ element has been privileged in both medicine and law, its main importance arises within the sexual and legal relationships it allows us to create. It is for this reason that such complicated transsexual legislation has been enacted; allowing the institution of marriage to remain intact.

Consummations requirement of “ordinary and complete” heterosexual intercourse means there must be erection of the penis and penetration of the vagina for a reasonable amount of time. Neither the husband nor the wife has to achieve orgasm, and infertility is also irrelevant. Fundamentally, there has to be a man and woman who have the respective necessary physical attributes. Probert argues that this serves to “rob the requirement of consummation of any purpose, whether sex is regarded as either a matter of procreation or of recreation,”¹⁷⁸ and a transsexual person’s (heterosexual) marriage could be challenged on the basis of non-consummation. Any petition for nullity founded upon a gender reassignment that pre-dates the marriage will fail unless the petitioner can prove to the court that they were ignorant of the gender reassignment at the date of their ceremony.¹⁷⁹

The consummation requirement could be seen to have a very narrow purview in regards to transsexual intimacies. Hines contends that most transsexual people stay with their existing partners,¹⁸⁰ and so the consummation requirement would only apply in a few instances. This would be the case where a man, who transitions into a legally recognised woman is with a male partner, or when a woman who is transitioning into a man is with a female partner. These couples could then fall prey to a consummation requirement, but no surgical

¹⁷⁷ *Idem*

¹⁷⁸ Probert op cit n23 pg 48

¹⁷⁹ MCA 1973 s13

¹⁸⁰ Hines op cit n2 pg 93-94; The Home Office ‘Report of the Interdepartmental Working Group on Transsexual People’ op cit n8.

requirement. The GRA fails to update the MCA 1973 to allow for this anomaly, and the GRA has not effectively dispelled the importance of biological sex within marriage. As a result, although to date there have been no reported cases post-2004 legislation, in which a transsexual person has had their marriage nullified due to incapacity to consummate, this is a very real legal possibility (provided that the claim was sincere). In reality, if the non-transsexual partner is aware of the gender history then s/he may be barred from relying on the non-consummation ground for nullity proceedings.¹⁸¹ If they were not aware then they could exit the relationship on the basis of non-disclosure of gender history.

Medical understandings of consummation have not been addressed in the same way within discussions of transsexual people. The medical focus has instead been upon psychological factors, and that which is hidden- the sexual organs- are rendered irrelevant. This is an instance in which state strategy “operationalises the view that ‘gender’ is the government of minds not bodies.”¹⁸² Sandland argues that this creates a dichotomy between the public and private;

The G.R.A. is concerned with a public politics of the presentational, the proper appearance of the gendered body, which trades only in that which is on public display, the various visible signs and indicators of gender identity that figure the interaction of gendered individuals.¹⁸³

¹⁸¹ MCA 1973 s13. Probert, R. ‘How Would Corbett v Corbett be Decided Today?’ (2005) 35 *Family Law* pgs 382-385 at pg 382

¹⁸² Sandland op cit n6 pg 52

¹⁸³ Idem

It is not clear how someone lives effectively in the acquired gender. I argue that this exerts unconscious pressure upon transsexual people to undergo, or try to undergo potentially unavailable, painful and expensive surgery, or hormone treatment. Sharpe further states that, “while on its face the Act does not require applicants to undergo surgery of any kind, it is clearly the expectation of the government that surgery will occur,”¹⁸⁴ as surgery is deemed the logical, medical end of the transsexual journey. This is evident in the requirement to change gender for life, as the law is troubled by the prospect of those who may choose to transition back.

The GRA was based upon preservation of our heterosexual marriage understandings. Whether or not a transsexual person can physically consummate the marriage has been deemed of lesser importance than the *appearance* that the marriage can be consummated,¹⁸⁵ like in the case of *S.Y v S.Y*¹⁸⁶ where the court still took account of the appearance of the wife’s external genitalia, in order to be sure that things ‘looked’ as they should. Thorpe LJ stated that the analysis provided in *Corbett*- the basis for the appearance of heterosexuality- should be questioned because of new social and medical policy.¹⁸⁷ Thorpe LJ stated that we should embrace complexity, rather than insist upon superficial understandings, and accept that “within any marriage there may be physical factors on either or both sides that require acknowledgement and accommodation in the sexual relationship of the parties.”¹⁸⁸ The requirement for consummation (or the appearance of it) has resulted in the requirement for

¹⁸⁴ Sharpe op cit n1 pg 71

¹⁸⁵ Although in *Bellinger*, the judges acknowledged that however extensive gender reassignment surgery may be, it “cannot supply all the equipment that would be needed for the patient to play the part which the sex to which he or she wishes to belong normally plays in having children,” again corresponding heterosexual sex with child bearing, despite the fact that a marriage can be consummated even when there is no possibility of conception through infertility, or contraceptive use. *Bellinger v Bellinger* op cit n46 at 57

¹⁸⁶ *S.Y v S.Y (Orse. W.)* op cit n44 at 38

¹⁸⁷ *B v B* op cit n83 at 113. He outlines these extensive medical and social changes at 155-157.

¹⁸⁸ *Ibid* at 130

gender. If the law removed the capability or necessity for consummation, then gender would not matter to institutions.¹⁸⁹ Thorpe LJ further held that “spectral difficulties are manageable and acceptable if the right is confined by a construction of section 11(c) to cases of fully achieved post-operative transsexuals...”¹⁹⁰ concluding that an invisible factor (chromosomes) should not be the deciding factor for gender, and rather reference should be given to the gender of the person *at the date of the marriage*. The union of marriage is used to seek to “embody... an essentialist conjunction of genitals which then functions as the determinant of whether or not a marriage is to be possible between two individuals.”¹⁹¹ The omission of a surgical and hormonal requirement in the GRA serves to undermine this existing understanding of heterosexual marriage.

Rather than focusing upon consummation as a factor for nullifying a marriage, the focus has shifted when it comes to transsexual issues. A person may seek to annul the marriage on the basis of not knowing that their partner was previously of another gender.¹⁹² It is not about the physical capability of the partners, but rather the honesty of one partner disclosing their past. Honoré states that this need for honesty does not extend to straight couples where “neither husband nor wife is bound to come to marriage a virgin and neither is bound to disclose to the other before or after marriage his or her sexual experience, if any, before marriage.”¹⁹³ If transsexual people undergo transition as a way to enable expression of their true gender identity, then why should they have to disclose their prior, false identity? There is an

¹⁸⁹ Fishbayn states that Parliament’s response to the gender trouble of English law prior to the GRA was not to amend or abolish gender criteria for marriage, but to design a way to allow transgender people into the heterosexual paradigm: Fishbayn op cit n10 at 433

¹⁹⁰ *B v B* op cit n83 at 152

¹⁹¹ Collier op cit n26 pg 149

¹⁹² Sharpe op cit n1 pg 74

¹⁹³ Honoré, T. *Sex Law* London, Duckworth 1978 pg 15; Fausto-Sterling, A. ‘The Five Sexes: Why Male and Female Are Not Enough’ (1993) March/April *The Sciences* pgs 20-25 pg 23

assumption that the transsexual person is a fraudster; a sexual deviant that is trying to trick potential future partners into homosexual relations. For Sharpe, the availability of annulment on this basis has a clear implication; that an undisclosed gender history is a deep breach of trust, possibly resulting in an unknown homosexual encounter, and the risk of this is worthy of ‘institutionalised outing.’¹⁹⁴ Sharpe summarises:

Through the issue of non-disclosure of gender history, we glimpse that an ostensible commitment of the law to present surgical and/or psychological realities is rendered inauthentic. For in this context, legal concern over non-disclosure serves only to reinscribe the ‘truth’ of the past and the past as ‘truth’.¹⁹⁵

It is this ‘truth’ that radical feminists have also seized upon, not as a way to entrench discrimination, but to try and protect women from a further set back. Much has been said of feminism’s understanding and acceptance of transsexual people. But if we recognise that law is mostly reflective of male views, the focus needs to lie upon how men conceive of these transsexual bodies. The amount of male socio-legal research in this area does not begin to compare to the amount of research in other gender sexuality areas such as domestic violence or rape. Could one conclude that men who wish to become women are not seen as true men? And that as such they should be confined to the weaker, emotional, irrational sex? If this is the case, what then of the woman who wishes to gender transition to become a man? Little evidence exists (even within feminist writings) as to how this person will be received by other men.

¹⁹⁴ Sharpe op cit n1 pgs76-81

¹⁹⁵ Ibid pg 81

Marriages entered into after the receipt of a full gender certificate are to be given the ‘respect’ marriage deserves, as they conform to heteronormative ideals to have a man and a woman. Sharpe argues that the need for consummation precipitates any discussion of heterosexual intercourse, yet non-consummation makes a marriage ‘voidable’ not ‘void’. It is only when the parties elect to part that the consummation element becomes important: “thus if, for example, a (male-to-female) transgender woman were to be considered female in law, the rules of consummation would not affect her ability to enter and remain in a lawful marriage.”¹⁹⁶ In this way, Sharpe argues that consummation alone is not enough to locate the MtF transsexual woman outside marriage. As discussed, it is the honesty (or not) of the transsexual partner which is under scrutiny. It could be argued that whilst on face value a transsexual person is not always capable of consummation, if their partner is aware, and leads them to think it will not be used against them, a decree of nullity will not be made. However, this puts unfair duress on a transsexual person to reveal their ‘true’ identity based on biological understandings of sex.¹⁹⁷

4.8: Conclusions

The GRA recognises and medically pathologies’ the existence of transsexual people. It has created consistency in a state which allowed for the treatment of gender dysphoria through the health service, but no legal recognition for the final result. The involvement of the medical profession serves to render gender transition as a medical solution, offering transsexual people an “end to their exile from their true home in the heterosexual binary

¹⁹⁶ Sharpe op cit n108 pg 92

¹⁹⁷ Sharpe op cit n1

paradigm.”¹⁹⁸ In not requiring surgery, the GRA has reinforced the public/private divide; requiring the person to publicly appear to be of the acquired gender, but does not concern itself with whether the person can sexually function as such. It seems that transsexual reform jurisprudence, whilst purporting to provide legal relief to transsexual people, has in fact been “animated by the twin desires of reproducing the gender order and insulating marriage from the stain of homosexuality.”¹⁹⁹ It would have been more practical to remove s11(c) MCA 1973 rather than go through the lengthy process of enacting legislation specifically for transsexual people.

It has been shown that transsexual people do not sit comfortably within radical feminist understandings of sex and gender. As regards consummation, whilst the GRA’s silence on the issue could be taken to demonstrate a ‘moving beyond’ from the consummation requirement, it in fact reinforces the requirement by failing to remove it. If the transsexual partner has not undergone surgical reassignment, and hidden their past from their spouse, their marriage remains liable to falling foul to non-consummation legislation, again reinforcing the consummation requirement within heterosexual marriage.

¹⁹⁸ Fishbayn op cit n10 pg 441

¹⁹⁹ Sharpe op cit n1 pg 60

FIVE

THE IMPACT OF CIVIL PARTNERSHIP AND SAME SEX

MARRIAGE UPON CONSUMMATION

This chapter explores the complex relationship schemes legally created to address same-sex couples, and how these developments effect consummation. These legislative developments are the CPA (the first legally recognised relationship status for same-sex couples, intended to work in tandem with the GRA¹), and the recently enacted M(SSC)A.

In 2005 Peter Tatchell commented that the enactment of the CPA marked “the first time in modern British legal history, [in which]...instead of repealing discrimination parliament has reinforced and extended it.”² This chapter analyses arguments which claim that civil partnership was gay marriage in all but name, to assess the role of consummation in this ‘marriage-like’ institution. I address the omission of a consummation requirement from the CPA, and focus on the impact of feminist theory in this area, and the insistence upon heterosexuality, conjugality and concepts of ‘romantic’ love within relationship law in the U.K. Finally, I examine the omission of consummation in the M(SSC)A and other legal and political developments challenging civil partnership and marriage. The M(SSC)A is a very recent development, and as such, the Chapter focuses predominantly on the established

¹ Fishbayn, L., “‘Not quite one gender or the other’: Marriage law and the containment of gender trouble in the United Kingdom’ (2006-2007) 15 *Journal of Gender, Social Policy & the Law* 3 pgs 413-441 pg 433; Hines, S., ‘A pathway to diversity?: human rights, citizenship and the politics of transgender’ (2009) 15 *Contemporary Politics* 1 pgs 87-102, at pg 93

² Tatchell, P ‘Civil partnerships are divorced from reality’ www.guardian.co.uk/world/2005/dec/19/gayrights.planningyourwedding/print (accessed 10/11/2010)

institution of civil partnership. My conclusions on the M(SSC)A are only initial remarks, based on Hansard debates, but without the benefit of any case law about the Act.

The CPA did not include a consummation requirement. It will be shown that the government felt that “adultery and consummation are defined by heterosexual intercourse; lesbians and gay men do not have heterosexual intercourse, therefore Civil Partners cannot commit adultery or consummate their relationships.”³ These conversations also took place around the enactment of the M(SSC)A, and consummation and adultery were again omitted. The previous chapter demonstrated the inconsistency in demanding consummation within marriage whilst allowing people to legally (though not necessarily physically) change their gender and enter a marriage union physically incapable of consummation. On face value this could be seen as a challenge to the consummation requirement by suggesting consummation may no longer be necessary, yet heterosexual marriages are still voidable if they have not been consummated. The omission of consummation from civil partnership and same-sex marriage can only be seen as a superficial challenge to consummation and the preferential treatment of conjugal relationships. The omission of consummation serves to further emphasise the primacy of the conjugal marital union as the relationship to aspire to, rather than demonstrate a time in which we have moved ‘beyond consummation’.

³ Beresford, S. & Falkus, C. ‘Abolishing Marriage: Can Civil Partnership Cover it?’ (2009) 30 *Liverpool Law Review* pgs 1-12 pg 8; Bamforth, N. ‘“The benefits of marriage in all but name”? Same sex couples and the Civil Partnership Act 2004’ (2007) 19 *Child and Family Law Quarterly* 2 pgs 133-160 pg 137

5.1: 'Welcome to segregation, UK-style'⁴: Development of civil partnerships in English law

Gay men and lesbians have historically suffered from second class status in British law. There was legislative silence in issues of same-sex relationships, and criminalisation of (male) homosexual acts. The Courts took the lead,⁵ until the enactment of the CPA, which provided the first legally recognised relationship between people of the same sex. The relationship is formed through the signing of a civil partnership document in the presence of witnesses and a registrar. The ceremony for the signing should have no religious elements, and should not be undertaken in a religious building,⁶ signifying the political power that some religious institutions still have. Conway stated that at the time, “objections from religious groupings influenced the political decision to prevent same sex couples from having a marriage. However, wide amending of legislation... ensured that the effect of a civil partnership is to endow on the participants the same legal status as spouses.”⁷ This new relationship form was not extended to include people of the opposite sex, as it was felt that marriage already fulfilled their relationship requirements.

There are several differences between civil partnership, and heterosexual marriage (the institution it was supposedly mirroring), but for the purposes of this thesis, the key difference between the two relationship forms is that sexual activity is not a factor in civil partnerships.

⁴ Tatchell, P op cit n2

⁵ *Fitzpatrick v. Sterling Housing Association* [2000] 2 FLR 27; *Ghaidan v. Godin-Mendoza* [2004] UKHL 30; Barker, N., ‘For Better or For Worse? The Civil Partnership Bill [HL] 2004’ (2004) 26 *Journal of Social Welfare and Family Law* 3 pgs 313-324 at 313

⁶ CPA 2004 s2. The *Equality Act 2010* s202 now allows for civil partnership registrations to take place on religious premises, on a voluntary basis rather than demanding it of all religious premises.

⁷ Conway, H.L., *Family Law* (2nd ed) Oxford Hodder Education, 2007 pg 14

Consummation is not required to seal the union,⁸ and further, adultery is not a basis upon which the relationship can be legally ended.⁹ The Act therefore served to de-sexualise homosexual relationships.¹⁰ Monogamy is required and a person entering a civil partnership cannot already be married or in a civil partnership.¹¹ The CPA's omission of adultery as a cause for dissolution deems homosexual adultery acceptable (or invisible), but heterosexual adultery serious enough to constitute the basis for a divorce. This omission demonstrated "the most significant way in which lesbian and gay relationships remain(ed) unassimilated to an unchallenged norm of heterosexual marriage."¹² The government argued that adultery was omitted due to its specific meaning within heterosexual relationships, and that "it would not be possible nor desirable to read this across to same-sex civil partnerships,"¹³ though no reason was given for its lack of desirability. Instead, sexual promiscuity could be dealt with as 'unreasonable behaviour'.

⁸ Non-consummation can render a marriage voidable under the MCA 1973 ss 12(a) & (b). Conversely, the CPA lists the grounds for rendering a partnership voidable, and consummation is not included in that list: CPA 2004 s50(1).

⁹ Adultery is a fact that can establish a ground for divorce- that of irretrievable breakdown of a marriage (MCA 1973 s1(2)(a)). Adultery is not included in the CPA grounds for dissolution: CPA 2004 s44(5). Instead, civil partners will have to show this as 'behaviour' which means that the 'applicant cannot reasonably be expected to live with the respondent': CPA s44(5)(a). Other differences between the two institutions are the fact that marriages can occur in religious premises, and a pre-existing venereal disease can make a marriage voidable, but these are not reflected in the civil partnership legislation.

¹⁰ Moving the conversation away from what goes on in the bedroom, to one of familial bonds: Ettlbrick, P.L. 'Wedlock Alert: A Comment On Lesbian and Gay Family Recognition' (1996-1997) 5 *Journal of Law and Policy* pgs 107-166 at 138

¹¹ Unless a divorce is sought, "one spouse per person is monogamy, however promiscuous the spouses may be." Card, C., 'Against Marriage and Motherhood' (1996) 11 *Hypatia* 3 pgs 1-23 pg 10

¹² Stychin, C., 'Not (Quite) a Horse and Carriage' (2006) 14 *Feminist Legal Studies* pgs 79-86 pg 83

¹³ Women and Equality Unit, *Responses to Civil Partnership: A framework for the legal recognition of same-sex couples* (November 2003) <http://www.equalities.gov.uk/pdf/Responses%20to%20Civil%20Partnership%20-%20a%20framework%20for%20the%20legal%20recognition%20of%20same-sex%20couples.pdf> pg 36 (accessed 19/06/11); Hasson, E. 'Wedded to 'fault': the legal regulation of divorce and relationship breakdown' (2006) 26 *Legal Studies* 2 pgs 267-290 at pg 286; Lowe, N. & Douglas. *G Bromley's Family Law* (10th ed) Oxford, Oxford University Press, 2007 pg 98

At its point of inception, the CPA was supposed to assimilate same-sex couples into a heterosexual norm, emulating marriage, and aiming to prevent any further need to discuss extending marriage to same-sex couples.¹⁴ Gay rights campaigners and others fought to ensure the same or similar rights as those found in heterosexual relationships. In order to achieve this, arguments of ‘sameness’ were used to demonstrate the similarities between same-sex and opposite-sex couples, in an attempt to emphasise the ‘functional equivalence’ of both types of couple.¹⁵ Yet how can one argue sameness when the “contorted conceptual objective of Civil Partnership appears to have been how to ‘make it look like marriage’ without it being named marriage and preserving the distinct institution of marriage for heterosexuals[?]”¹⁶ Auchmuty argues that in fact the difference in name meant that the Act could go as far as it did in providing rights, and one must acknowledge that this was the first time that the views of those who favoured legal recognition of same-sex relationships were accepted.¹⁷ Despite arguments of sameness, it took a further 9 years for marriage to be extended to same sex couples.¹⁸

¹⁴ Barker, N., ‘Sex and the Civil Partnership Act: The Future of (Non) Conjugal?’ (2006) 14 *Feminist Legal Studies* pgs 241-259 pg 241; Hale, B., Pearl, D., Cooke, E. & Monk, D. (eds) *The Family, Law & Society: Cases and Materials* (6th ed) Oxford, Oxford University Press, 2009 pg 60; Boyd, S.B. ‘Family, Law and Sexuality: Feminist Engagements’ (1999) 8 *Social and Legal Studies* 3 pgs 369-390 pg 379

¹⁵ Cossman, B. & Ryder, B., ‘What is Marriage-Like Like? The Irrelevance of Conjugal’ (2001) 18 *Canadian Journal of Family Law* pgs 269-326 pg 287; Boyd, S.B. ‘The Perils of Rights Discourse: A response to Kitzinger and Wilkinson’ (2004) 4 *Analyses of Social Issues and Public Policy* 1 pgs 211-217 pg 213

¹⁶ Beresford & Falkus op cit n3 pg 5; Stychin op cit n12 pg 79; Auchmuty, R. ‘Same-sex Marriage Revived: Feminist Critique and Legal Strategy’ (2004) 14 *Feminism and Psychology* 1 pgs 101-126 pg 102. The refusal to use the name ‘marriage’ for same-sex unions is discriminatory: Pearce, A., ‘Coupledom’ (2008) 158 *New Law Journal* 7328 pgs 951-953 pg 951

¹⁷ Auchmuty, R. ‘What’s so special about marriage? The impact of Wilkinson v Kitzinger’ (2008) 20 *Child and Family Law Quarterly* 4 pgs 475-498 at pg 484

¹⁸ Arguments for same-sex marriage/spousal recognition should not be based on equality and sameness, ‘gay’ people are not an easily identifiable group, and this ‘group’ should not aspire to heteronormativity. Cooper, D. ‘Like Counting Stars?: Re-Structuring Equality and the Socio-Legal Space of Same-Sex Marriage’ in Wintemute, R. & Andenaes, M. (eds) *Legal recognition of same-sex partnerships: a study of national, European, and international law* Oxford, Hart Publishing, 2001 pgs 75-96; Bamforth op cit n4 pg 140; Iyer, N. ‘Categorical Denials: Equality Rights and the Shaping of Social Identity’ (1993) 19 *Queen’s Law Journal* pgs 179-208

In the government consultation report for civil partnership, the Government acknowledged that there were three concerns expressed regarding the introduction of civil partnership: concern that a secondary institution would be inferior, and instead marriage should be open to all; concern that gay marriage should not exist, and that a separate institution was appropriate, and finally concern that civil partnerships were too similar to marriage, and effectively created gay marriage.¹⁹ Graham explains that at the time, 'gay marriage' was seen to have "symbolic clout precisely because it acknowledge[d] that queer sex is not incompatible with an institution charged with the task of national reproduction. Indeed, the nation itself might start to look a little queer. Therein lies the rub."²⁰ This is why the two institutions remained 'symbolically' different. The government's response to concern was to state that they had "no plans to allow same-sex couples to marry. The proposals are for an entirely new legal status of civil partnership. Same-sex partnership registration schemes already operate alongside opposite-sex marriage in some other countries."²¹ Yet in the lesbian and gay consciousness civil partnership and gay marriage had, to some extent, become one and the same. In interviews conducted with same-sex couples who had already, or intended to register their partnerships, Shipman and Smart found that their interviewees "slipped easily into the terminology of 'marriage' which in turn makes the Government's insistence on maintaining the difference between CP and marriage seem pedantic and unworkable."²²

19 Women and Equality Unit op cit n14 pg 13-14

20 Graham, M., 'Gay Marriage: Whither Sex? Some Thoughts From Europe' (2004) 1 *Sexuality Research & Social Policy: Journal of NSRC* 3 pgs 24-31 pg 25

21 Women and Equality Unit op cit n14 pg 14; Lord Bishop of Rochester stated: "it is not the Government's intention to introduce same-sex marriage in the Bill and... its scope is not restricted to couples in a sexual relationship." Lord Bishop of Rochester, HL Deb 24 June 2004 vol 662 cc 1366. Lord Tebbit felt that the act was gay marriage as it provided the same rights. Lord Tebbit HL Deb 24 June 2004 vol 662 cc 1367

²² Shipman, B., & Smart, C., 'It's Made a Huge Difference': Recognition, Rights and the Personal Significance of Civil Partnership' (2007) 12 *Sociological Research Online* 1 <http://www.socresonline.org.uk/12/1/shipman.html> (accessed 11/7/11) at 4.14

Commentators unconvinced of the legislative value of civil partnerships have argued that lesbians and gay men now “run the risk of losing the distinctive identities that lesbians and gays have been able to evolve out of pejorative discourses and exclusionary treatment, such as affirmative cultures, egalitarian practices and supportive community structures.”²³ Conservatives who argued that homosexuals should not be allowed into the marriage institution based their claims on a number of factors. Religious groups that were called on to give feedback on civil partnerships emphasised their scriptures dislike of homosexuality, whilst others felt gay marriage would violate their freedom of religion, as they would have to tolerate a situation their religion deems immoral.²⁴ Further, notions of homosexuals as promiscuous and ‘unfit’ for marriage are deep-rooted in some areas of society.²⁵ If civil partnerships are just marriage by another name, they serve only to absorb lesbian and gay relationships into a heterosexual norm.

Conservatives realised that diminished numbers of people marrying could signify that the institution is in trouble. There was therefore an argument for “extending the right to marry to gays and lesbians. History shows that when ideologically significant institutions find themselves under threat, the solution that often presents itself is to strengthen them by opening their ranks to new blood.”²⁶ The Lord Bishop of Oxford also acknowledged that the similarities to marriage had been troubling to some in the Church, but that marriage is under a great strain. He continued,

²³ Auchmuty op cit n16 pg 110

²⁴ Ferguson, A. ‘Gay Marriage: An American and Feminist Dilemma’ (2007) 22 *Hypatia* 1 pgs 39-57 pg 46

²⁵ <http://www.guardian.co.uk/commentisfree/2010/oct/19/gay-men-promiscuous-myth> (accessed 1/10/12)

²⁶ Auchmuty op cit n16 pg 117

the Church has failed to communicate its sublime vision of faithful loving human relationships as reflecting the divine love; or our conviction that that is what leads to human flourishing both for society and individuals. If the prime responsibility of the Church today is to communicate something of that vision, the possibility of fully committed, faithful same-sex relationships, or covenanted partnerships, will, I believe, strengthen rather than undermine what is at the heart of the Christian faith as it is reflected in the marriage covenant.²⁷

This extension could be seen to bring monogamy and traditional values to an element of society which has not historically been attributed with these values.²⁸

Beresford and Falkus have argued that marriage should be abolished, and all relationships should be governed by the CPA. They argue that marriage is deeply flawed and civil partnerships are a better form of regulation.²⁹ Yet this ignores the fact that civil partnerships are based upon the marriage model. Through the extension of civil partnerships to encompass opposite-sex couples, the authors feel the flaws of marriage would be overcome. In so doing, marriage would become a symbolic, religious institution only. I argue that the problems of marriage were entrenched in civil partnerships as the two institutions are too similar, and the M(SSC)A serves only to bring gay couples further into a heterosexual mould. If civil partnerships are marriage in all but name, then we do not overcome the basic problems found in the family and “the oppression of gay people starts in the most basic unit of society,

²⁷ Lord Bishop of Oxford, HL Deb 22 April 2004 vol 660 cc 399

²⁸ Glennon, L. ‘Strategizing for the Future through the Civil Partnership Act’ (2006) 33 *Journal of Law and Society* 2 pgs 244-276 pg 253

²⁹ Beresford & Falkus op cit n3

consisting of the man in charge, a slave as his wife, and their children on whom they force themselves as the ideal models. The very form of the family works against homosexuality.”³⁰ Beresford and Falkus argue that civil partnership has its own flaws, and an amalgamation of the two institutions into civil partnership would perhaps not address heterosexism. What remains disappointing to me is the decision to advance this argument rather than one in which marriage and marriage-like relationships are abolished completely. However, there are of course those who wish to make a public statement about their relationship. Before same sex marriage, Card stated: “if marriage is a deeply flawed institution, even though it is a special injustice to exclude lesbians and gay men arbitrarily from participating in it, it would not necessarily advance the cause of justice on the whole to remove the special injustice of discrimination.”³¹

Civil partnerships could more broadly be seen to challenge definitions of the family, which for some is easily defined as “a heterosexual conjugal unit based on marriage and co-residence,”³² though of course other definitions exist. Weeks, Heaphy and Donovan found in their research that most in the gay community have families of choice- which often include friends.³³ These relationships are generally non-sexual, non-binary, and have not been recognised by the CPA, which surely should have acknowledged the reality of same-sex relationships on the ground. This is a result of the desire to mirror marriage’s structure of two parties. In the case of civil partnerships, partnerships which are impliedly sexual have been

³⁰ The Gay Liberation Front: Manifesto (1971) <http://www.fordham.edu/halsall/pwh/glf-london.asp> (accessed 4/10/12); Jeffreys, S. ‘The Need to Abolish Marriage’ (2004) 14 *Feminism and Psychology* 2 pgs 327-331

³¹ Card op cit n12 pg 6

³² Silva, E.B. & Smart, C., ‘The ‘new’ practices and politics of family life’ in Silva, E.B & Smart, C. (eds) *The New Family?* London, Sage, 1999 pgs 1-13 pg 1

³³ Weeks, J., Heaphy, B. & Donovan, C., *Same Sex Intimacies- Families of Choice and Other Life Experiments* London, Routledge, 2001 pg 9

protected by the law. This implied sexual element is also evident when one sees that civil partnerships can only have two parties to the agreement- a structure reflective of the marriage model.³⁴ Although the CPA does not explicitly require sex in the way that marriage does, Lord Goodhart explains the purpose of the Act “is to give same-sex couples- who will normally, although, as in the case of marriage, not invariably, be people who are having or have had a long-term sexual relationship- the right to legal and public recognition of their status.”³⁵ The continued emphasis on a ‘couple-based’ relationship has “helped to maintain responsibility for financial support and caretaking within the private family.”³⁶ The Act has served to increase the scope of state intervention and regulation of relationships, and has now been able to encompass a previously untamed section of society within its aim of privatising care.³⁷ Not only is the married-nuclear family expected to look after its members, there is now a greater expectation on those in civil partnerships to do the same. Though it could be argued that people choose to live in twos to manage the complexities of relationships, radical feminists argue that there is “no particular reason why people should live in twos, except in so far as this arrangement has served patriarchy by ensuring that each woman is kept under the personal control of a man.”³⁸

Feminist theorists have highlighted the different legal rights that come with being part of the public and private sphere. Marriage and civil partnerships are thought of as private

³⁴Laymon, L.N. ‘Valid-where consummated: the intersection of customary law marriages and formal adjudication’ (2000-2001) 10 *Southern California Interdisciplinary Law Journal* pgs 353-384 at pg 360

³⁵ Lord Goodhart HL Deb 22 April 2004 vol 660 cc 397

³⁶ Glennon, L. ‘Displacing the ‘conjugal family’ in legal policy- a progressive move?’ (2005) 2 *Child and Family Law Quarterly* 17 pgs 141-163 pg 148; Barker op cit n14 pg 249; Boyd, S.B. ‘Best Friends or Spouses? Privatization and the Recognition of Lesbian Relationships in *M. v. H.*’ (1996) 13 *Canadian Journal of Family Law* pgs 321-341 pg 335

³⁷ Card, C., ‘Gay Divorce: Thoughts on the Legal Regulation of Marriage’ (2007) 22 *Hypatia* 1 pgs 24-38 at 24

³⁸ Auchmuty op cit n16 pg 122

relationships, yet are partially state regulated. If one wished to claim that civil partnership was a way in which to dramatically change family forms, it failed on the basis of its implied sexual element, through its insistence and protection of duality in relationships and on its insistence upon the union being between two people who are within the allowed degrees of relations. It further fails on the basis that it maintains the public/private relationship of family regulation.

The CPA was not the first attempt in the UK to legislate for relationships outside of marriage. The registration scheme offered by Lord Lester in 2002 was intended to apply to same-sex and opposite-sex couples, but concern that the bill would undermine marriage led to it being withdrawn.³⁹ Lord Lester withdrew his bill on the promise that the government was looking into enacting legislation. Instead, the final Act that emerged shifted the focus to address those who were unable to enter marriage unions. Prior to Lord Lester's bill was Jane Griffiths' Relationships (Civil Registration) Bill of 2001-2, which was also never enacted. The government's final version of civil partnership was considerably 'less radical' than these earlier proposals.⁴⁰

Soon after the ratification of the Act, it faced its first legal challenge from a lesbian couple.⁴¹ Wilkinson and Kitzinger had married legally in Canada. Upon relocating to the UK, they went to Court to argue that their marriage should be recognised, or in the alternative, they

³⁹ Diduck, A and Kaganas, F. *Family Law, Gender and the State: Text, Cases and Materials* (2nd ed) London, Hart, 2006 pg 67; Cooke, E., 'Registered Partnerships- Coming Soon?' (2002) 32 *Family Law* pgs 232-233 pg 232

⁴⁰ Auchmuty op cit n16 pg 101; Hasson op cit n13 pg 289

⁴¹ *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam)

should be given leave to marry in the UK. Failing this, they sought a declaration of incompatibility, stating that s11(c) of the MCA 1973 was incompatible with the *Human Rights Act* 1998. The couple argued the classification of their relationship as a civil partnership served to ‘downgrade’ their relationship status. The court declared that same-sex couples could not marry under English law, but were able to enter into civil partnerships, and no breach of human rights existed, for the protected marriage was of the traditional sense-between a man and a woman. The creation of civil partnership was deemed an effective and appropriate format to provide legal rights, without threatening the existing understandings of marriage. Disappointingly, Wilkinson and Kitzinger did not highlight the disparities between marriage and civil partnerships, the two most obvious of which, Auchmuty argues, are ‘religious sanction’ and the ‘requirement’ of monogamy. Auchmuty argues that the claimants avoidance of these two points meant that they “wanted a ‘marriage’ shorn of the two attributes that distinguish it from a civil partnership in English law. In other words, they wanted something that *looked like* a civil partnership... but was called a marriage.”⁴²

Beresford and Falkus state that the *Wilkinson* case “could have provided a much needed opportunity to reappraise some of the heterosexist assumptions pertaining to marriage, such as adultery and consummation.”⁴³ Instead, Sir Mark Potter P returned directly to the *Hyde*⁴⁴ definition of marriage. Probert suggests that invocation of this case was not necessary to reach a decision as the provisions of the CPA were clear. Rather, *Hyde* “was used to bolster

⁴² Auchmuty op cit n17 pg 485

⁴³ Beresford & Falkus op cit n3 pg 10

⁴⁴ *Hyde v Hyde and Woodmansee* (1865-69) L.R. 1 P.& D. 130

the argument that marriage was intrinsically a heterosexual institution.”⁴⁵ Auchmuty argues that the very essence of the case served to reinforce the conservative idea that marriage had primacy over all other relationship forms.⁴⁶

Although Stonewall was involved in the creation of the CPA, Barker, Shipman, and Smart have all stated that they feel the public debate surrounding the construction of the Act was removed from the everyday experiences and concerns of lesbians and gay men.⁴⁷ Shipman and Smart summarise the Stonewall campaign as one in which civil partnership was emphasised as “preferable to marriage because it should be seen as a twenty-first century means of recognising modern relationships and that this was preferable to attempting to radicalise the traditional notion of marriage. They developed a basic ‘equal’ but ‘different’ position in which CP was positioned as separate from marriage but equal to it, and with a more modern flavour.”⁴⁸ Stonewall focused on emphasising the ‘straight’ nature of these relationships, to encourage the passing of the bill, and to avoid too much criticism from the religious right.⁴⁹ If groups such as Outrage! had been consulted, it would have been apparent that many in same-sex relationships were anxious about ‘falling into line’ with a heterosexual institution.⁵⁰ These anxieties re-emerged during discussions for the enactment of the M(SSC)A. No-one disputed that same-sex couples deserved legal rights. The form those

⁴⁵ Probert, R., ‘Hyde v Hyde: defining or defending marriage?’ (2007) 19 *Child and Family Law Quarterly* 3 pgs 332-336 pg 335

⁴⁶ Auchmuty op cit n17

⁴⁷ Barker op cit n14; Shipman & Smart op cit n22

⁴⁸ Shipman & Smart op cit n22 at 2.5

⁴⁹ Barker op cit n5 pg 319

⁵⁰ Tatchell, P. *Unwedded Bliss* http://www.petertatchell.net/lgbt_rights/partnerships/unwedded_bliss.htm (accessed 19/7/11)

rights should take was disputed. To be 'co-opted' into a heterosexual institution is deeply concerning.

Queer theory has been used to dissect the binaries of hetero and homosexual.⁵¹ Stychin suggests that there are six binaries that could be read into the CPA: marriage/not marriage; sex/no sex; status/contract; conjugality/care; love/money; responsibilities/rights,⁵² and that the CPA uncomfortably straddles both sides of these dichotomies. I dispute the assertion that civil partnership can be both marriage, and not marriage, and the enactment of same sex marriage shows that it is not the same. Whilst I risk opening myself up to the oft cited criticism of essentialism levied at radical feminists, it seems apparent to me that something is either a marriage or it is not. Stychin's argument of 'marriage in all but name' does not convince me that this is enough to state that a civil partnership is not a marriage. It is 'inferior' marriage. The Hansard debates show that the institution was modelled completely upon marriage. Baroness O'Cathain said "let there be no mistake- this is a gay marriage Bill in all but name."⁵³ The only significant difference is the sexual element, which had been reserved for heterosexuals, but which is implied through the insistence upon relationships being between two people who are not allowed to be blood relations etc. Civil partnerships emulate a 'stable couple form' and so further the aims of marriage, and society. Effectively, civil partnership allowed those unable to marry to "further the same social policy goals."⁵⁴

⁵¹ Queer theory creates its own labels whilst trying to eliminate others: Cooper, D., *Power in struggle: feminism, sexuality and the state* Buckingham, Open University Press, 1995 pg 15; Stychin, C.F., 'Couplings: Civil Partnership in the United Kingdom' (2005) 8 *New York City Law Review* pgs 543-572; Collier, R. 'Straight families, queer lives? Heterosexual(izing) family law' in Stychin, C. & Herman, D. (eds) *Sexuality in the Legal Arena* London, Athlone Press, 2000 pgs 164-177

⁵² Stychin op cit n51 pg 548

⁵³ Baroness O'Cathain HL Deb 22 April 2004 vol 660 cc 404

⁵⁴ Stychin op cit n51 pg 549

In respect of the sex/no sex binary, Stychin argued that the discussions surrounding the Act made clear that “civil partnerships are sexual relationships, and that they will be entered into by people who define themselves as lesbian or gay.”⁵⁵ Yet the Act does not explicitly speak of sexual actions. Stychin argues that the partnership must contain sex, rather than render it invisible; “surprisingly, then, we find that implicitly lesbian and gay sex (provided it is contained and disciplined within this relationship form) is one of the prime justifications for the privileging of the relationship. Sex has its privileges.”⁵⁶ In this sexualised context, Stychin then turns his attention to consummation, to argue that consummation and gay people are the apt context in which to evoke queer theory;

...the non-consummation problem concerns the indefinability of gays as a category, and this is a point that connects very closely to the concerns of queer theory, which is aimed at fostering category crises as a way to de-naturalize the hetero/homo binary.⁵⁷

Radical feminism strongly disagrees with this perspective and I argue it is not a matter of being unable to identify gays, but rather that there is discomfort and unwillingness to enter into a protracted technical legal debate about the actions that would constitute sexual intercourse for gays, as again evidenced in the consultation process for the M(SSC)A.⁵⁸

Stychin argues that sexuality is a matter of discourse, asking “when is the elderly spinster

⁵⁵ Ibid pg 554

⁵⁶ Ibid pg 555

⁵⁷ Ibid pg 556

⁵⁸ Equal civil marriage: a consultation (March 2012) <http://www.homeoffice.gov.uk/publications/about-us/consultations/equal-civil-marriage/consultation-document?view=Binary> (accessed 8/10/12)

couple also a couple of lesbians?”⁵⁹ As such, as much as there is no explicit sex, there has to be sex to distinguish these relationships.⁶⁰ Lord Tebbit found this incomprehensible. In arguing for siblings to be allowed to enter into civil partnerships, he stated; “we know why there is a consanguinity rule for heterosexual marriage. It is for the protection of potential offspring. That is the basis of it. In a marriage between persons of the same sex, there will clearly be no offspring, so why is that rule included? All it does is to prohibit siblings entering a civil partnership.”⁶¹ The unmarried sister example is also utilised to demonstrate the status/contract binary. It is argued that if civil partnership does not convey the status of marriage, can it be considered anything more than a domestic contract of sorts?⁶² I would argue that civil partnership does convey status- the status of ‘marriage-like’. It does not allow for the partners to create their own contracted relationships. It implicitly requires sex, without defining homosexual sex acts.

I do accept Stychin’s binary of conjugality/care. This binary addresses the CPA’s need to insist upon conjugality, whilst effectively pushing care and economic dependence further into the private sphere. The discourse surrounding the Act emphasised this caring role, in trying to demonstrate gay relationships similarities to marriage, and to do this effectively, the language of ‘love’ was used to demonstrate the financial convenience that occurs: “money must follow from love (status) rather than from tax planning (contract), in large measure because of the desire to control the potential cost to the state of this legislation.”⁶³

⁵⁹ Stychin op cit n51 pg 557

⁶⁰ Lowe & Douglas op cit n13 pg 113; Masson, J., Bailey-Harris, R., & Probert, R. *Cretney Principles of Family Law* (8th ed) London, Sweet & Maxwell, 2008 pg 83

⁶¹ Lord Tebbit House of Lords Grand Committee, 10 May 2004, GC27

⁶² Stychin op cit n51 pg 559

⁶³ Ibid pg 569; ‘Love’ has a heterosexual definition: Giddens, A. *The Transformation of Intimacy: Sexuality, Love & Eroticism in Modern Societies* Cambridge, Polity Press, 1992

5.2: Role/absence of consummation within the CPA

A conceptual gap between partnership and marriage is... suggested by partnership law not acknowledging that relationships can be sealed by bodily consummation.⁶⁴

Within the civil partnership provisions, a sexual element is perhaps inferred through duality and the degrees of relationship allowed, but not explicitly required. It is not a factor in any suit for nullity. Humphreys states that “there can be no ambiguity”⁶⁵ that the legislature intended civil partnerships to be sexual. Could the ‘functional equivalence’ of homosexual and heterosexual relationships as loving, nurturing and ‘caring’, imply that same-sex couples view their relationships as necessarily conjugal for civil partnership? As an institution based on marriage, perhaps participants feel that sex is necessary just as it is in marriage.

I argue that consummation was not omitted as a result of thorough investigation of case law and feminist critique, resulting in an understanding of the heteronormative role of consummation, and the damage that it does to women in particular. Neither was it a realisation that not all families involve a sexual couple. Parliament failed to define gay sexual acts because they were unable to do so in a positive way.⁶⁶ In the House of Lords Lord St John of Fawsley argued that he was happy that the term ‘relationship’ was not defined within the proposed legislation;

⁶⁴ Pearce op cit n16 pg 953

⁶⁵ Humphreys, J., ‘The Civil Partnership Act 2004, Same-Sex Marriage and the Church of England’ (2005) 8 *Ecclesiastical Law Journal* 38 pgs 289-306 pg 297

⁶⁶ The Government were perhaps politically unable/unwilling to evaluate the ways in which the law regulates relationships, including the legal conception of adultery and consummation. Beresford & Falkus op cit n3 pg 10

if a relationship were to be defined... one would be in very deep waters indeed. There is no reference to homosexuality in the definition in the bill, and a very good thing too. People have a rather limited idea of any relationship where sex is involved. After all, there are relationships that can be loving, committed and celibate. If one attempts to define the nature of “relationship” by words of one kind or another, one will merely create a harvest of difficulties for the future.⁶⁷

Civil partnership’s omission of any sexual element indicates that it was felt that these sexual acts were not ‘real’ sexual acts, indefinable, and incapable of producing ‘ordinary and complete’ intercourse. Rubin contends that western society in the past generally considered “sex to be a dangerous, destructive, negative force... It may be redeemed if performed within marriage for procreative purposes and if the pleasurable aspects are not enjoyed too much.”⁶⁸ Same-sex acts are not procreative and therefore could be left undefined, yet required. It is precisely because sex is viewed in the way outlined by Rubin that the consummation act is so prescriptive. It is also because of this view of sex, that civil partnership was created separately from marriage, as there was “distaste for sharing the institution with couples who challenge gendered domestic arrangements and do unimaginable things in bed.”⁶⁹ Whilst heterosexual acts have long been defined, by the law and church for example, what is required of same-sex couples remains ambiguous.

⁶⁷ Lord St John of Fawsley, HL Deb 24 June 2004 vol 662 cc 1356

⁶⁸ Rubin, G., ‘Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality’ in Vance, C.S (ed) *Pleasure and Danger: Exploring Female Sexuality* Boston, Routledge & Kegan Paul, 1984 pgs 267-319 pg 278

⁶⁹ Auchmuty op cit n16 pg 117; Graham op cit n20 pg 25

Barker called the omission of defined sexual ability a “negative gap... a place where lesbian and gay sexuality is left unspoken. Members of Parliament avoided having to discuss, identify, and legally define, lesbian and gay sexual acts (within a positive, non-criminal context).”⁷⁰ The Government justified omission of a consummation requirement with reference to consummation having a specific heterosexual meaning. They held that the “absence of any sexual activity within a relationship might be evidence of unreasonable behaviour leading to the irretrievable breakdown of a civil partnership, if brought about by the conduct of one of the parties. However, that would be a matter for individual dissolution proceedings.”⁷¹ Failure to consummate due to wilful refusal would perhaps have been easier to establish within civil partnerships than incapacity to consummate, but the legislature did not make any attempt to assimilate these criteria into the CPA.

I believe the emergence of the CPA was not a positive acceptance of homosexual couples, but rather a bowing down to European pressure to acknowledge relationship discrimination based upon sexual orientation.⁷² It was this pressure to conform to the growing trend of same-sex relationship legislation that led to the emergence of the CPA, rather than Parliamentary enthusiasm to recognise family structures or relationships that are not based upon heterosexual conjugality. Shipman and Smart assert that it is likely the Government were observing other countries developments, and “would have seen that the introduction of gay marriage into other similar liberal democratic societies had not led to the immediate loss of

⁷⁰ Barker op cit n14 pg 251

⁷¹ Women and Equality Unit, op cit n13 pg 37

⁷² Other countries including Denmark, Norway, Sweden, France, Belgium, and Germany had enacted legislation addressing registered partnerships by 2002, with some extending marriage to same-sex couples. The government realised it was only a matter of time before a case was brought against them, so moved to introduce their legislation before being forced into piecemeal concessions: Shipman & Smart op cit n22 at 1.2

power for the party in government, nor to huge civil unrest and discontent.”⁷³ Were the aim to be recognition of non-traditional family structures, one would hope we would have seen an extension of the legislation to encompass family structures that for example involve more than two people or involve people who are related, for the creation of civil partnership left some family forms in the cold.⁷⁴

Rather than argue that the lack of a consummation requirement in the CPA means that we have moved beyond sexualised understandings of relationships, I would instead agree with Barker’s contention that the omission of an explicit requirement reconfirmed that “the only ‘legitimate’ sexual relationship is a heterosexual one... therefore same-sex civil partnerships do not need to be [visibly] sexual; conjugality being reserved for the pinnacle institution in the hierarchy of relationships: marriage.”⁷⁵ Any extension of familial rights is premised upon accepting the rights and obligations of marriage, rather than legal expansion recognising the peculiarities of the alternative relationship forms. Graham argues that same-sex relationship recognition has only been achieved through talk of “loving relationships, caring respect for gays and lesbians, economic benefits, and rights of various kinds,”⁷⁶ rather than an acknowledgement of any peculiarities of these relationships. ‘Loving’ relationships are deemed a less controversial topic than homosexual sex acts. Supporters of the CPA such as Lord Alli and Lord Lester often couched their arguments in language of ‘loving’ relationships. Lord Higgins voiced the concern felt by many, including myself regarding the

⁷³ *Idem*

⁷⁴ Whittle, S. ‘An association for as noble a purpose as any’ (1996) 146 *The New Law Journal* 6735 pgs 366-368 pg 368

⁷⁵ Barker op cit n14 pg 248

⁷⁶ Graham op cit n20 pg 25

discrepancy between the implicit sexual requirement, but the lack of an explicit demand for it;

The trouble is that the Bill implies, to some extent, that these civil partners will have a sexual relationship. However, other speeches have suggested the opposite; namely, that the Bill does not do so... It is not all clear why a same-sex couple in a sexual relationship entering into a civil partnership should enjoy the tax and other benefits which a same-sex couple entering into a civil partnership which does not have a sexual relationship would not have.⁷⁷

The Act only requires the participants to be of the same sex. There is no explicit sexual requirement, or a requirement for the partners to love each other. There are married couples who also could be best described as friends, and who do not have a sexual relationship. Yet no reasonable excuse is given as to why there is still a sexual element required of opposite-sex couples, when many of them will not fulfil it.

Law's continued insistence "on interpreting concepts such as adultery and consummation according to heterosexual parameters,"⁷⁸ suggests that these concepts have clear, and factual meanings. Beresford and Falkus argue that terms such as 'consummation' can be interpreted in flexible ways, and the fact that they are interpreted in such a stringent way is "therefore

⁷⁷ Lord Higgins HL Deb 22 April 2004 vol 660 cc 428-429

⁷⁸ Beresford & Falkus op cit n3 pg 2

due to choice, not inevitability.”⁷⁹ The legislature’s refusal to be flexible demonstrates its insistence upon, and preference for heterosexuality.

In Canada, the case of *P. (S.E) v P. (D.D)*⁸⁰ held that the definition of adultery did not need to automatically mean penile penetration; in fact it was held that the law does not need to define sexual activity. Rather, the court held that the key to adultery was the betrayal of trust. If this definition of adultery were to be extended to civil partnership, and marriage, we could dramatically reduce the impact of sex in these relationships. Again, true equality would only exist through the abolition of both marriage and civil partnership, rather than an antiquated understanding of what goes on in the bedroom. Both relationship forms serve only to bolster heterosexual coupledness, and patriarchal domination of women. To even begin to contemplate a consummation requirement for civil partnership would serve only to further entrench civil partnership as an alternative form of marriage.

Civil partnership created somewhat of an anomaly wherein heterosexual couples were discriminated against; since “heterosexual couples are excluded from civil partnerships, a married couple could claim discrimination on the basis that their marriage would be voidable by non-consummation whereas a civil partnership is not.”⁸¹ If we demanded a consummation requirement in civil partnership, we would be playing into the notion of heterosexuality as respectability and legitimacy. The inclusion of an inherently heterosexual requirement into a homosexual institution could be seen as creating ‘good’ and ‘bad’ queers, who are either

⁷⁹ *Idem*

⁸⁰ *P. (S.E) v P. (D.D)* [2005] BSSC 1290

⁸¹ Barker op cit n14 pg 252

respectable, or not.⁸² By creating a ‘silent’ sexual element, “fear and hatred of queer sexuality remains unaddressed. In fact, this absence leaves the cultural basis for homophobia largely intact.”⁸³ Homophobia is not the result of gay marriage, or a lack of gay marriage. Yet if one were to discuss the reality of homosexual sexual acts, in conjunction with legal recognition in a non-heterosexual model, perhaps progress could be made. Unbelievably, Lord Lester argued that it was inappropriate on privacy grounds to inquire whether a couple is sexually active or intends to be.⁸⁴ He states that before his marriage, no one asked if he intended to be sexual, and this sexual silence should be extended to civil partnership. However, married couples can exit their relationship on the basis of a lacking sexual element- non-consummation- and civil partners, who are supposed to be receiving a relationship standard comparable to marriage, do not have this specific ground as an exit clause.

5.3: Development of same sex marriage in the UK, and the role of consummation

Following the enactment of the CPA, two developments emerged. Under the ‘Equal Love’ campaign, Peter Tatchell and others launched a bid to have marriage opened up to same-sex couples, and civil partnership opened up to opposite-sex couples.⁸⁵ This was the first challenge to the ban on heterosexual couples entering civil partnerships.⁸⁶ The campaign challenged the separation of two “legal institutions, with different names but identical rights

⁸² Hines op cit n1 pg 90; Stychin, C, *A nation by rights: national cultures, sexual identity politics, and the discourse of human rights* Philadelphia, Temple University Press, 1998 at 200

⁸³ Graham op cit n20 pg 27; Ettlbrick op cit n10 pg 109

⁸⁴ Lord Lester of Herne Hill, House of Lords Grand Committee, 10 May 2004 GC17- GC18

⁸⁵ <http://equallove.org.uk/> (accessed 7/8/11)

⁸⁶ Tatchell, P. ‘I’m backing straight civil partnerships’ www.guardian.co.uk/commentisfree/2009/nov/24/straight-civil-partnerships/print (accessed 10/11/2010)

and responsibilities,”⁸⁷ by enlisting eight couples, (four same-sex and four opposite-sex) to apply for access to the institution from which they are excluded.⁸⁸ Upon receipt of their rejections, the case was to be taken directly to the European Court of Human Rights on the basis of violations of Article 14 which protect against discrimination, the right to marry (Article 12) and the right to respect for family life (Article 8), the argument being that if both institutions must exist, then access to them should be equal, as the institutions are the same.⁸⁹ Had consummation and adultery just been removed from marriage, then the CPA would not have been necessary.⁹⁰ In the House of Commons, Sir Roger Gale suggested that same-sex marriage was not the way forward, and actually the best solution would be to withdraw same-sex marriage, abolish the CPA “abolish civil marriage and create a civil union Bill that applies to all people, irrespective of their sexuality or relationship... That would be a way forward.”⁹¹

Auchmuty states that “the addition of heterosexual couples who positively *choose*... [civil partnership] could elevate its status to one of equality by removing the sense of being a consolation prize for the different or non-heterosexual”⁹² though as O’Donovan argues, one should not view desire for inclusion as confirmation of an institution.⁹³ The CPA has to date not been expanded to allow heterosexual couples.

⁸⁷ <http://equallove.org.uk/the-legal-case/> (accessed 7/8/11)

⁸⁸ www.discodamaged.com/2010/10/equal-love.html (accessed 27/10/11); www.pinknews.co.uk/2010/11/09/straight-couple-denied-civil-partnership-again/ (accessed 10/11/2010) & www.guardian.co.uk/lifestyle/2010/nov/08/heterosexuals-attempt-civil-partnership (accessed 10/11/2010)

⁸⁹ Boyd op cit n15

⁹⁰ A move that Auchmuty believes many heterosexuals would support: Auchmuty op cit n17 pg 496

⁹¹ Sir Roger Gale HC 2nd Reading 5 February 2013 cc152

⁹² Auchmuty op cit n18 pg 489

⁹³ O’Donovan, K. *Family Law Matters* London, Pluto Press, 1993 pg 48; Robson, R., *Sappho Goes To Law School* New York, Columbia University Press, 1998, pgs 7-8

The more recent development comes from the current coalition governments enactment of the M(SSC)A, finally confirming that marriage and civil partnership were not equal relationships.⁹⁴ It was argued in the House of Commons that these legal partnerships were not perceived in the same way as marriage and nor did they contain the same “promises of responsibility and commitment as marriage. All couples who enter a lifelong commitment together should be able to call it marriage.”⁹⁵ During consultation for the new law, the government acknowledged that consummation and adultery had been hitherto heterosexually defined. They proposed that non-consummation and adultery would need to be extended to same-sex couples, and these concepts would need to be defined by case law, as they had been for heterosexual couples.⁹⁶ They offered no guidance for how these definitions would develop. However, between consultation and enactment, consummation and adultery were removed from the final legislation.⁹⁷

During Parliamentary discussions for same-sex marriage many of the same arguments engaged for civil partnership were utilised, most of which focused upon equality, and the similarities between same-sex and opposite-sex couples. Hansard references many MPs who highlighted the need to equally recognise love in this form. MPs made statements which were supposed to reassure opponents that marriage would not be distorted beyond all recognition, and that this would be a small change, the same as all changes before it.⁹⁸ As regards consummation, when asked about its omission (as well as that of adultery) the Minister for

⁹⁴ Bamforth op cit n3 pg 134

⁹⁵ Maria Miller HC 2nd Reading 5 February 2013 cc127

⁹⁶ Equal civil marriage: a consultation (March 2012) <http://www.homeoffice.gov.uk/publications/about-us/consultations/equal-civil-marriage/consultation-document?view=Binary> (accessed 8/10/12)

⁹⁷ Adultery is deemed possible only with a member of the opposite sex: M(SSC)A 2013 Schedule 4 Part 3

⁹⁸ For example, in the 19th century, one could only marry in an Anglican church, no matter a persons own denomination. Also, it wasn't until the twentieth century that married men and women were seen as equal before the law.

Women and Equalities responded that “there is already no legal requirement for consummation. Our provisions will mean that adultery stays as it is and that couples will have the opportunity to cite unreasonable behaviour, as do many already.”⁹⁹ As argued throughout this thesis, the mere existence of a consummation clause creates a consummation requirement. In removing consummation and adultery, same-sex marriage appears to suggest no need for monogamy, and the impression that “gay couples are not as well considered.”¹⁰⁰ A same-sex marriage can only cite adultery as a reason for separation when the adulterous relationship is with a person of the opposite sex.¹⁰¹ Same-sex adultery is deemed invisible. Parliamentary discussion seemed to imply that this is not of importance, and the use of ‘unreasonable behaviour’ would suffice for both adultery and non-consummation.¹⁰² But radical feminism highlights the importance of discussing social phenomena, through methodology such as consciousness-raising.

Whilst I argue against the consummation requirement, its inclusion in the new legislation would have provided an interesting legal development for equality. However, this would have still amounted to state defined and state required sexual activity. Further impact would include for example, a revisiting of rape definitions. Unfortunately the omission of consummation appears to be a result of continuing governmental inability to produce a legal definition of sexual intercourse for same-sex couples,¹⁰³ rather than as a result of consideration of the fact that consummation is state required intercourse; intercourse which is

⁹⁹ Maria Miller HC 2nd Reading 5 February 2013 cc125

¹⁰⁰ Nadine Dorries HC 2nd Reading 5 February 2013 cc147

¹⁰¹ M(SSC)A Schedule 4 Part 3(2)

¹⁰² Geraint Davies HC 2nd Reading 5 February 2013 cc203

¹⁰³ Jeffreys, S. *Anticlimax- A feminist perspective on the sexual revolution* London, The Women’s Press Ltd, 1993 pg 315

male defined;¹⁰⁴ and heavily reliant upon medical understandings of female bodies and male ‘needs’. When discussing the omission of consummation from the new legislation, Stonewall joked that its members were more concerned about extending marriage rights as a whole, and that “perhaps sex is something that heterosexual people are slightly more fixated about than homosexuals.”¹⁰⁵ Whether true or not, it is disappointing that the leading LGBT pressure group felt this to be worthy humorous matter, rather than worthy or further investigation. Governmental refusal to include consummation was surely not a result of a sudden disinterest in sex. Out4Marriage followed suit in their analysis of the place of consummation in the new legislation;

Consummation- the heterosexual community seems obsessed with the way that we consummate our marriages. Consummation is different for every LGBT couple. There is no need to be sexually active or inactive in a relationship and I do not think we should be legislating for that. From my point of view, when we have weddings that are varied out last-minute because someone is on their deathbed, they are not consummated, so we do have some sort of precedent in law. The whole issue itself needs to be put to one side, because I think what people do in the privacy of their own bedroom is their own business.¹⁰⁶

¹⁰⁴ Mackinnon, C.A., *Toward a Feminist Theory of the State* Cambridge, Harvard University Press, 1989 pg 131

¹⁰⁵ Ben Summerskill (Stonewall): Public Bill Committee: 12 February 2013: Marriage (Same Sex Couples) Bill cc64

¹⁰⁶ James-J Walsh (Out4Marriage): Public Bill Committee: 12 February 2013: Marriage (Same Sex Couples) Bill cc81

5.4: What do the CPA and M(SSC)A mean for feminists?

Card has expressed concern that the radical feminist perspective on marriage is in danger of being lost through the couching of same-sex marriage in equal rights discourse.¹⁰⁷ Whilst writing for the legal recognition and regulation of lesbian marriage, Robson stated that legal marriage for same-sex couples would resolve three desires:

First, we want our relationships not to suffer in comparison to heterosexual relationships. Second, we want the legal system to be responsive to solving disputes among ourselves. And third, we want the reality and perception of equality.¹⁰⁸

Same-sex marriage has been enacted, but it remains to be seen whether these aims will be fulfilled. Robson concludes that these aims could just as readily be achieved through the abolition of marriage. As such feminists face the unenviable dilemma “of whether to support gay marriage to promote these individual civil rights or whether to critique marriage as a part of the patriarchal system that oppresses women.”¹⁰⁹ Whilst some feminist theory has argued that women should only engage their sexual energies with other women, this argument has never stretched to an insistence on that relationship being marriage-like. Card’s reluctance to support gay marriage is “not because the existing discrimination... is in any way justifiable but because... [marriage]...is so deeply flawed that... [it seems]... to me unworthy of emulation and reproduction.”¹¹⁰ As Auchmuty concludes, the idea that second wave feminists

¹⁰⁷ Card op cit n11 pg 1

¹⁰⁸ Robson op cit n93 pg 146

¹⁰⁹ Ferguson op cit n24 pg 39

¹¹⁰ Card op cit n11 pg 2

“would ever want to claim the right to marry is a bizarre one.”¹¹¹ As such, the M(SSC)A does not sit comfortably with radical feminist views on marriage or consummation.

Radical lesbian feminists have found the notion of ‘natural’ coupledness- that of a man and a woman- distasteful and degrading. The Leeds Revolutionary Feminist Group for example claimed that men and women should not be sexually involved with each other because “every man knows that a fucked woman is a woman under the control of men, whose body is open to men, a woman who is tamed and broken in.”¹¹² For these women, a marriage-like relationship is the pinnacle of hell, and they have advocated for separatism. Auchmuty argues that the emergence of a case like *Wilkinson* demonstrated,

a different strategic decision from the second-wave feminists and those of their successors who have pursued an anti-marriage, pro-alternatives agenda. Specifically, Kitzinger and Wilkinson believe that it is better to go for *inclusion* first and *deconstruction* after... I do not think it is the right strategy in the UK, because marriage no longer has the meanings they (or indeed Sir Mark Potter) ascribe to it. And the reason for *this*, I would argue, is because those second-wave feminist critiques have entered public consciousness over the 20 or 30 years since they were first made, to the extent that they are now *mainstream social knowledge*.¹¹³

¹¹¹ Auchmuty op cit n17 pg 490

¹¹² <http://www.ivorcatt.com/2204.htm> Leeds Revolutionary Feminist Group 1981 (accessed 19/06/11)

¹¹³ Auchmuty op cit n17 pg 490-491

Humphreys' research claims that prior to the M(SSC)A, most civil partnerships were viewed as "gay marriages,"¹¹⁴ and that legally speaking, it made sense to consider them as such.¹¹⁵ In extending marriage, there was a serious failure to take the opportunity to extensively challenge existing relationship forms, and we have again ended up with "nothing more than an attempt to perpetuate a social policy of segregation"¹¹⁶ and a continuation of the assumption that marriage is the institution to aspire to.

Auchmuty, writing after the publication of the UK government's proposal for civil partnerships, argued that lesbians and gay men should not be assimilated into a heterosexual marriage-like model, but should emphasise gay relationships as a better model for all relationships.¹¹⁷ She argued that civil partnerships would amount to *almost* marriage, but that name is important. Even if the aims and objectives of civil partnership and marriage were the same, Auchmuty argued that the difference in name was symbolically important and "exists beyond, and sometimes in spite of, the legal and material reality. Marriage confers upon individuals the highest social status and approval. That is what makes the concept of registered partnerships or civil unions qualitatively different from marriage, even if, legally speaking, they guarantee the same rights."¹¹⁸ This was confirmed by the extension of marriage legislation.

¹¹⁴ Humphreys op cit n65 pg 289

¹¹⁵ She concludes that in the majority of situations the legal consequences of marriage and civil partnership are the same: Ibid pg 291-293. Barker argues that dissolution of civil partnerships is socially considered to be a 'divorce': Barker op cit n5 pg 318

¹¹⁶ http://www.samesexmarriage.ca/equality/rdp_main.htm (accessed 19/7/11)

¹¹⁷ Auchmuty op cit n16

¹¹⁸ Ibid pg 102

I argue that although the institutions create the same results, civil partnership was a secondary (and by extension, inferior) institution built on marriage principles, and at the time of its enactment, it was easy for feminists to argue that “gender roles have been an impervious feature of marriage for so long that it seems very unlikely that the institution will ever change.”¹¹⁹ Could it be categorically determined that same-sex couples will not fall into the same patriarchal pitfalls? For both ends of the spectrum of radical feminists- those who have encouraged optional lesbianism, and those who have encouraged women to abstain from marrying- civil partnership and gay marriage have fallen short of any possible positive revolutionary effect.¹²⁰

Glennon suggests that civil partnership allowed for a “levelling out of relationship forms from which a more streamlined debate on family obligations can take place.”¹²¹ I disagree. Civil partnerships were modelled upon marriage, so the use of plural ‘forms’ is unsubstantiated, and the extension of marriage curtails further discussion. Rather, I would have used civil partnerships to further bolster the argument for abolishing marriage. Returning to consummation for a moment, civil partnership implicitly required sexuality that it cannot describe whereas heterosexual marriage has required sexuality of a very particular nature, and same sex marriage also implies undefined sex. Both institutions are sexually prescriptive (whether expressed or implied), and oppressive. The formulation of civil partnership in this way, and the inability to prescribe sexual activity in same sex marriage

¹¹⁹ Ettlbrick op cit n10 pg 119

¹²⁰ Auchmuty op cit n16 pg 103

¹²¹ Glennon op cit n28 pg 248-249

does nothing but confirm that anything short of penetrative sex between a man and a woman will be deemed inadequate.¹²²

Same sex marriage, which appears to offer the same legal privileges as heterosexual marriage advantages those who have “jobs offering spousal health benefits and property and incomes where tax liability made a difference- that is, middle-class white men.”¹²³ When vocal opposition to marriage began to appear in the 1970s “most of the marriage advocates were gay men unconnected to feminism, while most lesbians, newly emerged from consciousness raising groups that actually supported sexual and family choices not involving men, along with feminist gay men, fought for broader definitions of family,”¹²⁴ beyond the scope of heterosexuality.

One could argue that lesbians should rejoice at the prospect of legal entry to a relationship in which they do not need to be legally tied to a man. However, when that institution is an extension of an institution in which men have been superior and have shaped the way in which the institution works- could a civil partnership or marriage between two women ever truly be a ‘marriage’ of equals? Auchmuty explains that “heterosexual marriage [has] purported to be a union of equals but, however ‘equal’ husbands and wives were in the eyes of the law, they were far from being so politically, socially or economically.”¹²⁵

¹²² Auchmuty op cit n16 pg 105

¹²³ Ibid pg 109

¹²⁴ Ettlbrick, P.L., ‘Domestic Partnership, Civil Unions, Or Marriage: One Size Does Not Fit All’ (2000-2001) 64 *Albany Law Review* pgs 905-914 pg 908; Ettlbrick op cit n10 pg 122

¹²⁵ Auchmuty op cit n16 pg 109

Whether we accept that civil partnerships and same sex marriages are sexual or not, their formation upon the heterosexual marriage model is concerning. For years, “feminists fought the routine social channelling of women into marriage as the only legitimate forum for sexual and intimate expression.”¹²⁶ Glennon argues that the introduction of the CPA was a continuation of family recognition policy that has “never been...clear or coherent.”¹²⁷ This is evident from piecemeal legislative developments like the GRA and CPA, and now the M(SSC)A. Ettelbrick argues that anything resembling gay marriage is bad for lesbians and gay men for three reasons. Firstly, if viewing this as family policy, one should make sure support is provided for all families. Secondly, she does not believe that the family structures of lesbians and gay men neatly fit into the marital model which prioritises heterosexuality and procreation. And thirdly, the marriage institution is not consistent with the call to end discrimination and establish family equality. She argues that if gay marriage were to be extended across America, many people would still choose not to marry.¹²⁸ Effectively, marriage is not a ‘good enough’ institution, and its previous conception as ‘civil partnership’ does not make it any better.

Feminists have repeatedly explained that the marriage model means that women are not equal to the men they are with and this inequality is also present in the bedroom. Ferguson has argued that rights in the bedroom exist only “if Big Brother is allowed to watch to ensure you are supporting the national imaginary of the heterosexual nuclear family.”¹²⁹ This governmental and societal gaze is inescapable. Radical feminists have consistently argued

¹²⁶ Ettelbrick (2000-2001) op cit n124 pg 907

¹²⁷ Glennon op cit n28 pg 247

¹²⁸ Ettelbrick op cit n124 pg 913

¹²⁹ Ferguson op cit n24 pg 41

that all women should be allowed the choice to “remain single, not to become mothers, or to be lesbians”.¹³⁰ The very possibility of these choices, let alone if women actually take them up, serves to undermine patriarchal heterosexuality. Civil partnership and same sex marriage do not undermine patriarchal heterosexuality, as the partnerships created are trying to emulate the pinnacle of heterosexual patriarchy. I agree with Ferguson that same-sex couples “should not marry, not just because marriage is a risky institution for women, but because the right to form democratic queer families ought not be tied to one’s marital status and the implicit social hierarchies this assumes.”¹³¹

The essentialist critique of radical feminism (collective identity) could now be said to be symptomatic of civil partnership and same sex marriage, which requires cohesion of same-sex couples into a heterosexual mould. Radical feminism demands that a woman is a ‘woman’ first, before any other title or label. Civil partnership and same sex marriages demand several labels such as ‘marriage-like’ and ‘silently homosexual,’ for the necessary sexual activity is undefined. Another disturbing element is the discourse that surrounded the emergence of these developments. Discussions of ‘sameness’ were utilised to demonstrate that there were no logical reasons to exclude same-sex couples from marriage. This strategy ignored the effects of marriage upon women, and instead suggested that anyone excluded from marriage is inherently socially and legally disadvantaged.¹³²

It seems that just as with the GRA, the silence surrounding consummation within the CPA is as troubling as the vocal expression for it within the MCA 1973, let alone the confusion

¹³⁰ Ibid pg 49

¹³¹ Ibid pg 54

¹³² Barker op cit n14 pg 243

added by its omission from the M(SSC)A; a supposedly ‘mirroring’ legislation. The final aim must always be the realisation that the legislature has no place in prescribing sexual activity. Consummation’s construction of two bodies becoming ‘one flesh’ has not been transferred to civil partnerships, nor to same-sex marriages, and the idea of losing your identity or individuality thorough becoming ‘one flesh’ is not perpetuated.¹³³ Unfortunately, this is not a conscious consequence, but rather one of circumstance- in that Parliament did not wish to entertain which acts would be necessary to become one flesh within a civil partnership. Even ten years later, parliamentarians were unwilling to debate the sexual activity necessary to consummate a homosexual marriage. In 2004, this overt absence of sex and religion allowed the Church of England to support civil partnership legislation. Once sex was omitted from the Act, the Church was able to emphasise that civil partnership “is not based on a presumption of a sexual relationship between the couple. Hence the Church argued that it was possible for couples to enter into Civil Partnership while still living within the teachings of the Church.”¹³⁴ The same arguments were made use of for discussions of same-sex marriage.

Harding is one of very few academics who have tried to assess the impact of various relationship registration schemes upon everyday life for lesbians and gay men. Using legal consciousness studies, Harding examined the way in which “ordinary people approach, use and think about law in everyday life,”¹³⁵ and mapped the ways in which couples had undertaken ‘commitment ceremonies’ in jurisdictions that have not extended legal recognition to same-sex couples. She argued an emerging theme of her research was the

¹³³ Civil partnership also does not allow for a religious ceremony, making the partnership purely legal: Sandberg, R. ‘The right to discriminate’ (2011) 13 *Ecclesiastical Law Journal* 2 pgs 157-181 at pg 158

¹³⁴ Shipman & Smart op cit n22 at 2.9

¹³⁵ Harding, R., ‘“Dogs Are “Registered”, People Shouldn’t Be’: Legal Consciousness and Lesbian and Gay Rights’ (2006) 15 *Social & Legal Studies* 4 pgs511-533 pg512

“perceived power of legal change to create social change, and to ‘normalize’ same-sex relationships,”¹³⁶ and some of her respondents thought that attaining legal rights was more important than achieving acceptance of lesbians and gay men in society.”¹³⁷

5.5: Insistence upon heterosexual conjugal relationships and romantic love

Advocates of the CPA and the M(SSC)A argued that the aim was to treat same-sex couples “as far as we possibly can, as though they were heterosexual so far as the recognition in law of their relationship is concerned.”¹³⁸ In keeping with this aim, a potential benefit of the expansion of marriage is its ability to closet homosexual relationships. When declaring oneself to be in a civil partnership- it is clear that the person speaking is in a same-sex relationship, for opposite-sex couples are still excluded from civil partnerships. In now declaring oneself ‘married’ it is assumed that the speaker is heterosexual. Could one then argue that these Acts are an effective challenge to marriage and conjugality as previously understood?

What does it mean to be in a ‘conjugal’ relationship? I use the term ‘conjugal’ to denote a relationship differentiated from other relationships in life through sex. Heterosexual marriage has explicitly required conjugality. Conjugal relationships are “marriage or marriage-like relationships... [which prioritise] sexual-coupledness to the exclusion of other emotionally and

¹³⁶ Ibid pg 520

¹³⁷ Ibid pg 522

¹³⁸ Lord Lester of Herne Hill, House of Lords Grand Committee, 10 May 2004, GC17

economically interdependent adult relationships.”¹³⁹ I explore the form and regulation of non-conjugal relationships in the next chapter. At this stage I wish only to explore the emphasis upon sex as a criterion to distinguish relationships in our lives. These sexual relationships have been legally prioritised through marriage and civil partnership, as demonstrated in the parliamentary discussions surrounding same-sex marriage. Opponents of the new legislation reiterated that state involvement in marriage was due to its child-centred nature. It was stated that “if marriage were simply about love and commitment, we would first have to define love as being sexual love, because otherwise non-sexual relationships that are based on love and commitment would also have to be treated as marriage on the basis of the definition of equality.”¹⁴⁰

These sexual relationships have become one and the same as romantic relationships within the public conscience, and it is “axiomatic that all married couples are in love with each other.”¹⁴¹ Geller explains that

the idea that romance-based marriage is the highest human aspiration and the ultimate female good pervades... [our] culture... bolstered by the notion that individuals- especially women- find ultimate fulfilment in a sanctioned, monogamous, sexual partnership and that those without spouses are fragmentary ‘single’ beings whose lives are in error... The sense of the couple as a unit so basic, so intrinsic, and so mystical that it defies analysis,

¹³⁹ Glennon op cit n37 pg 152

¹⁴⁰ Robert Fello HC 2nd Reading 5 February 2013 cc146

¹⁴¹ Greer, G. *The Female Eunuch* London, Flamingo, 1999 pg 222

is everywhere. The belief that all other forms of attachment are of lesser importance is so deeply ingrained that it generally requires no defence.¹⁴²

When asked why the new institution of civil partnership was modelled on heterosexuality, the government responded; “civil partnerships are designed to support stable families and to recognise committed, interdependent and loving relationships. The Government does not believe that any of these characteristics or qualities are exclusive to heterosexual people’s relationships,”¹⁴³ yet took another 9 years to prove this with marriage legislation. If one could formulate the argument that civil partnership was progressive in ending the emphasis upon conjugality, it would serve to actually weaken civil partnership. It would signal that it was not deemed necessary to change the most important heterosexual institution- marriage- but rather to introduce a separate, less important institution which did not warrant a sexual element. The symbolism of marriage as the pinnacle gesture of love “renders the legal aspects... [of marriage] incidental to a more fundamental impulse which may be so strong as to make marriage inevitable, whatever the conditions.”¹⁴⁴

In conjunction with abolishing marriage and marriage-like relationships we need to educate people in protecting their own rights, and creating their own individual relationship arrangements, whilst bearing in mind the fact that women in particular have not usually been equal participants in contractual agreements (see Chapter 1). The consummation requirement in marriage is a form of expressing ‘ownership’ upon the body, and in this light, the homosexual body is not deemed worthy of ownership.

¹⁴² Geller, J. 2001 quoted in Barker op cit n14 pg 248

¹⁴³ Women and Equality Unit, op cit n13 pg 32

¹⁴⁴ Auchmuty op cit n16 pg 112

This thesis has strongly argued against marriage. Glennon accepts that marriage holds an idealised position in society, yet argues that it is in fact a “moving target... [I]ts content is contested through fluid patterns of spousal expectations and interdependencies and increased reliance on ‘personal fulfilment’ when making choices about the continuation of relationships.”¹⁴⁵ This is a romanticised conception of marriage, and the very fact that consummation still remains a legal requirement means that marriage is an extremely dangerous institution, requiring heterosexuality or the attempt at a heterosexual norm from its participants. This legitimising power of the law has now been extended to same-sex couples, but only to those who conform to heterosexual ideals of aspiring to marriage.

5.6: Conclusion

It is very important for us to understand that what same-sex couples seek is an acknowledgement that their relationship is real, has legal significance and carries rights and responsibilities. It is not a commercial contract; it is something very different.¹⁴⁶

What is clear is that whilst the idea of marriage does not sit well with radical feminists, historically “the fact that lesbians and gays... [were] prevented by law from doing what heterosexuals can do almost without even thinking about it prompts equally strong

¹⁴⁵ Glennon op cit n28 pg 257

¹⁴⁶ Baroness Scotland of Asthal, HL Deb 24 June 2004 vol 662 cc 1362

feelings.”¹⁴⁷ It is therefore equally ‘feminist’ to both agree and disagree with gay-marriage.¹⁴⁸ Unfortunately the CPA and M(SSC)A fell short of any revolutionary impact gay relationship legislation could possess, as they were both drafted to reflect marriage.¹⁴⁹ Even if same-sex marriage could undermine “compulsory heterosexuality, this should not immunize marriage itself from interrogation. Marriage, as much as- if not more than- heterosexuality, is a political institution,”¹⁵⁰ and this is why I have included an analysis of same-sex marriage in this research.

The creation of civil partnerships, and the expansion to same sex marriage, with their implied sexual element has left unchallenged the base assumption that “there *should* be a distinction between the ‘benefits’ that conjugal and non-conjugal relationships are entitled to (that is, that conjugal relationships should be privileged), and that conjugal relationships are more easily definable and identifiable than non-conjugal relationships.”¹⁵¹ The line drawn by the state in protecting and prioritising conjugal relationships means that the sexual relationship is still at the top of the hierarchy.¹⁵²

I argue that all civil partnership status and same-sex marriage achieve is the extension of definitions of sex and love. The couples at the top of the hierarchy are still expected to love

¹⁴⁷ Auchmuty op cit n16 pg 106. Further, “the question whether lesbians and gay men should pursue the right to marry is not the same as the question whether the law is wrong in its refusal to honour same-sex marriages.” Card op cit n11 pg 5

¹⁴⁸ Halley, J. ‘Behind the Law of Marriage (I): From Status/Contract to the Marriage System’ (2010) 6 *Unbound Harvard Journal of the Legal Left* pgs 1-58; Robson op cit n93 pg 80

¹⁴⁹ Barker op cit n14

¹⁵⁰ Robson, R. ‘Compulsory Matrimony’ in Fineman, M.A; Jackson, J.E & Romero, A.P *Feminist & Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* Surrey, Ashgate, 2009 pgs313-328, pg313

¹⁵¹ Ibid pg 247

¹⁵² See for example Baroness Wilcox HL Deb 22 April 2004 vol 660 cc 394-395

one another, and are still expected to be having sexual relations.¹⁵³ Anything short of this would be deeply troubling for a society that still believes that marriage creates the most stable environment for children, love and sex. Yet sex and love are the most difficult elements of a marriage to prove. One can show financial dependence through bank accounts for example. One can show whom they nominate as next of kin, through forms provided by employers or hospitals. Yet the romantic mythology of love and sex play a key role in relationship forms, despite being 'invisible'. Shipman and Smart claim, "love and marriage are seen as the cultural justification for each other and marriage is taken to be the demonstration of love."¹⁵⁴ The aim of creating equality seems to have fallen short, for consummation and adultery are not deemed equal concepts, and further, some churches can refuse to conduct same-sex marriages. More than this, same-sex couples now have a choice of one institution, whilst opposite-sex couples are still refused entry to civil partnerships! When challenged on this, the Government argued that there is no need to extend civil partnership to heterosexual couples. Civil marriage and religious marriage already exist, which provide the benefits of a civil partnership.¹⁵⁵ Yet this fails to acknowledge that marriage "is not good for queers, it is not good for unmarried heterosexuals, and it is often not good for heterosexual women."¹⁵⁶

Same sex marriage and civil partnership further privatise care, imitate heterosexual marriage, and forgo "the perfect opportunity to rethink in a radical way the institution of the family in law."¹⁵⁷ The extension of marriage to same-sex couples has furthered the advantages associated with marriage. There are the personal advantages- for example those provided by

¹⁵³ Rubin op cit n68 pg 279. Harding's research respondents argued that civil partnership created another step in the legal hierarchy of relationships: Harding op cit n135 pg 525

¹⁵⁴ Shipman & Smart op cit n22 at 4.2

¹⁵⁵ Maria Miller, Public Bill Committee: 12 February 2013: Marriage (Same Sex Couples) Bill

¹⁵⁶ Graham op cit n20 pg 24

¹⁵⁷ Stychin op cit n51 pg 570-571

the work place for those in marital relations- and there are family benefits that all who are linked by marriage are entitled to. Boyd argues that whilst the struggle for recognition has been a legitimate and necessary cause, she feels it “ought not to be seen as sufficient to achieve social equality across class, race and gender differences as they intersect with sexuality.”¹⁵⁸

It appears evident that the government has extended the scope of a discriminatory and harmful institution to encompass a larger portion of society, whilst expressly claiming that the extension is an attempt to create equality. Polikoff contends that “the desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism,”¹⁵⁹ though Eskridge has argued the converse in that gay marriage is a radical challenge to the traditional gender roles of marriage.¹⁶⁰ I cannot believe that the inherent patriarchy of the marriage institution will be dispelled by having partners of the same sex. Patriarchy is entrenched, and will only be compounded rather than disrupted with gay marriage. Auchmuty states that the problem with marriage is not just the mere presence of men, but the

privileged status of the institution over all other lifestyles and statuses (especially for women), its role in the privatisation of care, the relentless cult of love and romance, so often followed by disappointment and

¹⁵⁸ Boyd op cit n14 pg 378

¹⁵⁹ Polikoff, N.B. ‘We will get what we ask for: why legalizing gay and lesbian marriage will not dismantle the legal structure of gender in every marriage’ (1993) 79 *Virginia Law Review* pgs 1535-1550 pg 1536

¹⁶⁰ Eskridge, W.N. ‘The Ideological Structure of the Same-Sex Marriage Debate (And Some Postmodern Arguments for Same-Sex Marriage)’ in Wintemute, R. & Andenaes, M. (eds) *Legal recognition of same-sex partnerships: a study of national, European, and international law* Oxford, Hart Publishing, 2001 pgs 113-129

disempowerment, and... the extent and seriousness of domestic violence within marriage. Second-wave feminism was also characterised by a deep suspicion of the State.¹⁶¹

Radical feminism has been under-utilised in the debate, and could further be utilised by gay and lesbian people to create a “political and cultural project... there is [for example], virtually no public critique of pornography and, more generally, the sex industry in the gay male world.”¹⁶² In effect, whether gay marriage or civil partnerships are viewed as marriage or not, “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.”¹⁶³

¹⁶¹ Auchmuty op cit n17 pg 491

¹⁶² Jensen, R. ‘Homecoming: The Relevance of Radical Feminism for Gay Men’ (2004) 47 *Journal of Homosexuality* 314 pgs75-82 pg 79

¹⁶³ Auchmuty op cit n17 pg 497

SIX

WHERE DO WE GO FROM HERE?

Preceding chapters have shown that family forms/relationships which contain a conjugal relationship at their core are privileged by law. Law makers assume that there should be a difference in legal provision to conjugal and non-conjugal couples.¹ This chapter assesses what, if any, impact non-conjugal and the removal of consummation would have on understandings of family and sex. The radical feminist aim here is to build on the observation that “power differences are routinely sexualized... [and we should] engage in critical self-reflection about the way those power relations affect the most intimate aspects of our lives and ask if there not other ways to structure our lives that will be more satisfying.”² I outline the legal challenges to marriage that have emerged which serve to question the legal privileging of sexual relationships, and then provide analysis as to the value of the marriage institution today. This chapter also assesses the importance of including non-consummation as a ‘voidable’ factor, rather than one which renders a marriage ‘void’. The chapter concludes with an argument for the dissolution of marriage, whilst providing some suggestions and examples of alternative understandings and conceptions of relationships, commencing with the removal in law of sex and the primary act of marital sex- consummation.

¹ Barker, N., ‘Sex and the Civil Partnership Act: The future of (non) conjugal?’ (2006) 14 *Feminist Legal Studies* pgs 241-259 pg 247

² Jensen, R. ‘Homecoming: The Relevance of Radical Feminism for Gay Men’ (2004) 47 *Journal of Homosexuality* 314 pgs75-82

Conjugal (nuclear) 'normal' relationships are no longer the norm. In fact "the norm seems to be the diversity of family form, not the one-size-fits-all structure of marriage..."³ There is now a diverse spectrum of households which contain multiple generations, single parent households, siblings, friends or senior citizens who live together, to name a few, the primary relation of which is not based on sexual intercourse.⁴ But the legislature has been particularly slow at keeping up with familial changes, in the hope perhaps, that a failure to change might encourage people to engage with marriage, as in the case of M(SSC)A. Chapter 5 demonstrated that when expansion has occurred, it has been modelled upon marriage, and serves to bolster marriage and marriage-like relationships alone. Instead of trying to fit more and more relationships into the marriage model, we should "abolish marriage as a legal category... All relationships between adults [should] be nonlegal and, therefore, nonprivileged- unsubsidized by the state. In this way, "equality" is achieved in regard to all choices of sexual relational affiliations. I suggest we destroy the marital model altogether and collapse all sexual relationships into the same category- private- not sanctioned, privileged, or preferred by law."⁵

Society and law have created a situation in which all sexual acts, whether viewed through the lens of feminist theory, medical perspectives or religion for example, are deemed acceptable (legally privileged) or not. Rubin states, "heterosexual encounters may be sublime or disgusting, free or forced, healing or destructive, romantic or mercenary. As long as it does not violate other rules, heterosexuality is acknowledged to exhibit the full range of human

³ Ettelbrick, P.L., 'Domestic Partnership, Civil Unions, Or Marriage: One Size Does Not Fit All' (2000-2001) 64 *Albany Law Review* pgs 905-914 pg 906

⁴ www.beyondmarriage.org/full_statement.html (accessed 19/06/11)

⁵ Fineman, M.A., *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* London, Routledge 1995 pg 4-5

experience.”⁶ The CPA and M(SSC)A implicitly moved ‘homosexual acts’ to the legally acceptable sphere though the sexual acts were rendered invisible, perhaps indicating that homosexuality was not felt to encompass the opportunity to ‘exhibit the full range of human experience.’

6.1: Is non-conjugality a threat to the ‘family’ and sex?

Despite changes, sexual acts have remained a key way to distinguish relationship forms. What importance does the sexual element of a relationship hold for law? If one holds that procreation and inheritance is the key, then what of impotent or non-conjugal units? There does not appear to be a clear reason for requiring sex in legally privileged relationships, nor a reason for requiring consummation as consecration of a marital union and the first instance of marital sex. Family forms that are not built upon heterosexual intercourse fulfil many of the functions that conjugal units do, and could be further beneficial to women who are subjected to second class status within matrimonial relations. Alternative family forms are also capable of family functions such as love, emotional and financial support, and the bearing and raising of children. Chapter 2 outlined the existence of marriages in which the male partner was impotent for example. These marriages are not automatically void, but are voidable if the husband remains impotent with his wife for the duration of the marriage. What would be the harm in all marriages being non-sexual in the eyes of the law? Clearly humans would not fail to continue repopulating the earth, as many children are born outside of marriage, and no longer suffer the stigma of illegitimacy. Jensen argues that whether or not we manage to end up in a conjugal relationship should be of less importance than the feeling of community. He argues that the objective for all should “not simply be finding that “special someone” but,

⁶ Rubin, G., ‘Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality’ in Vance, C.S (ed) *Pleasure and Danger: Exploring Female Sexuality* Boston, Routledge & Kegan Paul, 1984 pgs 267-319 pg 282

rather, helping to build such a community based... on principles of justice and equality as understood within a radical [feminist] framework.”⁷ A shared radical feminist outlook will be more fulfilling than a conjugal relationship.

Conjuality has been most openly challenged at “crucial points in the evolution of the relational status of same-sex couples,”⁸ and it seems that the only threat non-conjuality would pose is one to the symbolism and discourse of marriage. Symbolically, marriage has always been the highest commitment (legally and emotionally) that one human can make to another. Because of this, our entire discourse surrounding relationships is built upon our understanding of marriage. Prior to the M(SSC)A, gay friends would often jokingly refer to their partners as their ‘husband’ or ‘wife’, utilising the very labels marriage has always attached to the durable relationship. The word ‘consummation’ is automatically associated with the first instance of sexual relations in marriage, even though the word can be used in other contexts. To remove the consummation requirement from law would lead eventually, to a different understanding of the word, and further, the breakdown of the sexual expectations of marriage. The symbolic threat is perhaps more serious when viewed from a religious perspective. Consummation is the Judeo-Christian consecration of the marriage; the instance upon which the husband and wife historically became one flesh. In practice however, religious groups that hold these values would continue to incorporate consummation within their religious marriages, and there seems no apparent reason not to remove consummation from existing marriage law on religious grounds.

⁷ Jensen op cit n2 pg77

⁸ Glennon, L., ‘Displacing the ‘conjugal family’ in legal policy- a progressive move?’ 2005 2 *Child and Family Law Quarterly* 17 pgs 141-163 pg 152

6.2: Legal challenges to conjugal relationships

Prior to the UK Government's proposal to extend marriage to incorporate same-sex couples (thereby absorbing more couples into the existing marriage institution), legal challenges to the definition of marriage were generally brought by same-sex couples.⁹ As no case law yet exists to challenge the M(SSC)A, here I present some of the case-law that emerged in challenging civil partnerships and conjugal relationships in general. With the creation of civil partnerships, a new and weaker target emerged for the legal exploration of the discrimination against non-conjugal relationships. The CPA faced a legal challenge to its reliance upon 'couples' in the case of *Burden and Burden v. The United Kingdom*¹⁰. Here, two cohabiting elderly sisters argued that the CPA was discriminatory in its omission of familial relationships from its scope of inclusion. The omission of an explicit sexual requirement meant that the sisters felt able to argue that all (sexual or non-sexual) same-sex relationships should be included in the Act's provisions. The sisters argued that civil partners would not be liable for inheritance tax, yet when one of the sisters died, the remaining sister would be. Given that there was no sexual element encapsulated in the CPA, the sisters argued that their relationship was fundamentally no different from a civil partnership. The court dismissed their claim. Humphreys observed that, "it is hard to see why it would be a good thing for sisters who have entered a civil partnership for tax reasons to have to go through a process identical to divorce in order subsequently to marry."¹¹ The very fact that the case could emerge at all signifies the importance, and normalisation of consummation in marriage, in making legally privileged relationships easily identifiable, and the legal and societal confusion that ensues from its omission from relationship legislation. Had the civil

⁹ Cases where there has been some success have been won through focusing on other matters such as rental agreements, or definitions of *family*, rather than definitions of marriage. *Ghaidan v. Godin-Mendoza* [2004] UKHL 30; & *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 A.C. 27

¹⁰ *Burden and Burden v. The United Kingdom* (2008) 47 E.H.R.R. 38

¹¹ Humphreys, J., 'The Civil Partnership Act 2004, Same-Sex Marriage and the Church of England' (2006) 8 *Ecclesiastical Law Journal* 38 pgs 289-306 pg 293

partnership legislation bolstered its prohibited degrees of relationship clause¹² with a non-consummation one a case like *Burden* would never have materialised. As early as 2003 the government's 'Women and Equality Unit' conducted research into the passing of the CPA, recording that,

the proposed civil partnership registration scheme is aimed at addressing a specific shortcoming in the recognition of same-sex couple relationships. The Government believes that home-sharers, carers and siblings generally don't have the same case for being recognised as a couple. In the case of siblings, they already have a legally recognised relationships to each other, and the rights to reflect that relationship, in areas such as inheritance and when visiting in hospital. This does not apply to a same-sex couple who can be treated as two strangers under current law.¹³

It is clear from this that the key word/relationship is 'couple'. The siblings in *Burden* were a couple, in that there were two of them, and they also cared for each other whilst sharing finances and a home. But the key component of a 'couple' in the governments thinking is a sexual element, despite the absence of a sexual requirement in the CPA to distinguish two same-sex people as a 'couple' or not. Pearce explains that the near-success of the *Burden* case can be blamed on the concessions made by the government when enacting the CPA. Religious lobbying meant that civil partnership became an undefined relationship, which lacked not only a sexual element, but also religious content, creating a status of "merely

¹² CPA s3(1)(d)

¹³ Women and Equality Unit, *Responses to Civil Partnership: A framework for the legal recognition of same-sex couples* (November 2003) <http://www.equalities.gov.uk/pdf/Responses%20to%20Civil%20Partnership%20-%20a%20framework%20for%20the%20legal%20recognition%20of%20same-sex%20couples.pdf> (accessed 19/06/11)

material implications,”¹⁴ though this situation has now changed with the enactment of s202 of the *Equality Act 2010* which allows religious premises to voluntarily conduct civil partnership ceremonies.

Prior to the M(SSC)A, discussions of same-sex unions were often linked to those of cohabiting couples who were not married, under the umbrella concept of ‘unformalized relationships’. Glennon argued that combining discussion of same-sex couples who *could not* marry, and opposite-sex couples who *would not* marry would lead to difficulty in trying to map a legal response. She explained that the “consultation paper on civil partnerships concluded that it was impossible to design a single framework to meet the needs of both same-sex couples who wanted to formalize their relationships and opposite-sex couples who did not want to marry.”¹⁵ As such, the scope of civil partnership was narrowly drawn. Glennon however, sees this as beneficial;

...opening up registration to *all* couples could have permanently entrenched the use of relationship form in legal policy, perpetuated the exclusion of those who do not formalize their relationship, and hindered the development of a more beneficial long-term anti-essentialist strategy which demotes the significance of relationship status in favour of a functionalist approach which asks more critical questions about the legal obligations of family members.¹⁶

¹⁴ Pearce, A., ‘Coupledom’ (2008) 158 *New Law Journal* 7328 pgs 951-953 pg 951

¹⁵ Glennon, L. ‘Strategizing for the Future through the Civil Partnership Act’ (2006) 33 *Journal of Law and Society* 2 pgs 244-276 pg 249

¹⁶ *Ibid* pg 250

It was generally accepted that relationships such as the one evidenced in *Burden* were different from relationships that could constitute a civil partnership, the difference at the time being the “legal inability of same-sex partners to formalise their relationships, and if so then the government’s position seems to reinforce the view that opposite-sex partners should simply get married if they want the legal benefits and protection that comes with that status.”¹⁷ Again, this difference relies on the definition of two people as a ‘couple’, and the implicit sexual relationship this suggests. Parliamentary discussions surrounding the CPA ranged from those who wanted the legislation to reflect its primary purpose- that of providing legal rights to same-sex couples- to those who wanted the legislation to be a catch-all for relationship forms that fell outside of existing relationship legislation. For radical feminists, it was a very difficult time, as discussed in Chapter 5. Whilst radical feminists want women to have rights, they do not want those rights to be bound to a relationship status.

There followed several anxious exchanges in the House of Lords, which led to Baroness Scotland of Asthal extensively outlining the “considerable rights already enjoyed by relatives who care for other relatives or live with them for significant periods before the death of one or the other.”¹⁸ She comprehensively detailed the existing arrangements, concluding that the new legislation was “specifically designed to meet the needs of same-sex couples. The solution to their problems has been determined by the particular nature of their relationship.”¹⁹ She was able to phrase her argument as such, because it was believed that civil partnership would negate the need to ever extend marriage to same-sex couples.

¹⁷ Diduck, A and Kaganas, F. *Family Law, Gender and the State: Text, Cases and Materials* (2nd ed) London, Hart, 2006 pg 68

¹⁸ Baroness Scotland of Asthal, HL Deb 17 November 2004 vol 666 cc 1450

¹⁹ Ibid cc 1452

Baroness O’Cathain fervently argued for the inclusion of family members in civil partnership, and claimed that the Act would lead to “greater injustice than it claims to address”²⁰ if they were excluded. Yet even the Baroness’ assertion that the scope of civil partnership should be wide would not effectively deconstruct existing understandings of relationships. She insisted that relationships are ‘partnerships’ between *two* parties.²¹ But there is no guidance as to what would happen if there had been three sisters involved in the *Burden* case? The Baronesses argument’s read as an attack on any forms of sex that do not conform to heterosexual understandings. She endeavoured to distil the ‘normalising’ effects of the CPA by drowning same-sex relationships out within legislation that is a ‘catch-all’ for those who do not live up to marriage. The same can now be said for the M(SSC)A, where the Government appears to be hoping that the sections of matrimonial law which have been omitted (consummation and adultery) will be forgotten, and as many same-sex couples as possible will be brought into the marriage mould. The Baroness was almost successful in her push to extend the Bill, save for the House of Commons, and impassioned speeches from Lord Alli for example, who explained that “this Bill is about same-sex couples whose relationships are completely different from those of siblings.”²²

Baroness O’Cathain’s supporters felt that the proposed legislation would result in further inequality to those who would now fall outside both marriage and civil partnership. Lord Maginnis stated; “the Bill undermines the traditional family in two ways: it creates a form of gay marriage and it ignores family relationships in the way that it distributes benefits.”²³

²⁰ Baroness O’Cathain, HL Deb 24 June 2004 vol 662 cc 1363

²¹ Baroness Scotland of Asthal expressed this view more eloquently than I can, when she asked “how would three sisters living together choose which two of them would form a civil partnership?” Baroness Scotland of Asthal HL Deb 24 June 2004 vol 662 cc 1387

²² Lord Alli HL Deb 24 June 2004 vol 662 cc 1369

²³ Lord Maginnis of Drumglass HL Deb 24 June 2004 vol 662 cc 1371

However, these Lords' true feelings were later revealed when Lord Maginnis stated that it is unfair to punish those who "are not indulging in an unnatural sexual practice."²⁴ The Lords wished to insulate marriage, and place further restrictions and pressure upon the gay community. Baroness Wilcox unbelievably required more of homosexual couples than she did of those within the 'pinnacle' relationship: marriage. She stated that "it is wrong for gay people, who have suffered for too long from discrimination, to secure for themselves what this Bill gives and to resist it for others, who are equally loving, equally committed and equally debarred from the ability to marry."²⁵ Why did she not demand the same from married couples?

6.3: The value of marriage

At its inception, marriage appeared to be "of considerable legal advantage to all women, unless they were prepared and could afford to remain celibate. The marital package deal could afford to be extraordinarily unfavourable to them."²⁶ Though times have changed, and women no longer *need* marriage, the institution does not reflect this and continues to be extraordinarily unfavourable to women. This thesis has examined just one small aspect in which marriage is unfavourable to women, and shown the inappropriateness of defining legally significant relationships through sexual contact. Consummation symbolises the core responsibility of marriage, and implies that the relationship will remain sexual. Whilst at first glance the GRA and the CPA seemed to herald an end to the sexual requirement, or perhaps a diminishing of its significance, the previous chapters and the recent creation of same sex marriage have shown this to be false.

²⁴ *Idem*

²⁵ Baroness Wilcox HL Deb 24 June 2004 vol 662 cc 1382

²⁶ Hoggett, B., 'Ends and Means- The Utility of Marriage as a Legal Institution' in Eekelaar, J.M & Katz, S.N (eds) *Marriage and Cohabitation in Contemporary Societies: Areas of legal, social and ethical change- an international and interdisciplinary study* Toronto, Butterworth, 1980 pgs 94-103 pg 96

Marriage is a primary institution of socialisation, a place where people learn the norms and values of their society.²⁷ The most common definition of marriage is a legal tie based on religious doctrine, which symbolises commitment, and privileges (hetero)sexual affiliation. In the past, an exchange of vows was deemed more Godly than consummation, because “it had the decisive advantage over the principal alternative doctrine (which made copulation the initiant of marriage), that it made possible a true marriage between Joseph and Mary without impugning the perceptual virginity of the mother of Christ.”²⁸ Marriage produces a hierarchy within the institution and amongst other relationship forms, and is the preferred institution for procreation. Of course there are a myriad of other meanings, “perhaps as many meanings as there are individuals entering, or *not* entering, the relationship,”²⁹ but radical feminists argue that “no matter how much we try to avoid replicating patriarchal... relations, these are reproduced in the institution of marriage.”³⁰ The very institution is borne of patriarchy, and although the language used in the consummation clauses is gender-neutral, and despite some women bringing forth claims of nullity, the research presented here has shown the falsehood of the MCA’s gender-neutrality. I have also demonstrated that whilst women have been able to utilise non-consummation legislation, the ‘type’ of woman has been closely monitored, with most declaring that they are normal women who wish to be able to reproduce.

Marriage has perpetuated disadvantage against women and upheld patriarchal power relations most clearly identified by radical feminists, through its traditional structure of a male-headed household. Pateman argues society is built on the ‘original contract’ which is a “sexual-social

²⁷ Collier, R., *Masculinity, Law and the Family* London, Routledge 1995 pg 146

²⁸ Engdahl, D.E. ‘The Secularization of English Marriage Law’ (1967-1968) *University of Kansas Law Review* 16 pgs 505-528 pg 507; Masson, J., Bailey-Harris, R., & Probert, R. *Cretney Principles of Family Law* (8th ed) London, Sweet & Maxwell, 2008 pg 14-15

²⁹ Fineman, M.A., *The Autonomy Myth* New York, The New Press, 2004 pg 99

³⁰ O’Donovan, K. *Family Law Matters* London, Pluto Press, 1993 pg 48

pact, but the story of the sexual contract has been repressed.”³¹ The society created through this pact is a patriarchal one: “it is sexual in the sense of patriarchal- that is, the contract establishes men’s political right over women- and also sexual in the sense of establishing orderly access by men to women’s bodies.”³² In patriarchal society, the public sphere is prioritised over the private sphere, and so “the story of the social contract is treated as an account of the creation of the public sphere of civil freedom. The other, private, sphere is not seen as politically relevant. Marriage and the marriage contract are, therefore, also deemed politically irrelevant.”³³ But they are not, they are still interfered with and therefore to claim that the family is private is “an incoherent ideal and... the rhetoric of nonintervention is more harmful than helpful.”³⁴ Because conjugal relations, (and consummation) are presented as natural in the private sphere, “so the law of male sex-right and the sexual contract completely disappear.”³⁵ Pateman argues that marriage should not be replaced with civil contracts, for these are also imbued with patriarchal knowledge and inequality and so marriage *and* contract should be abolished.

O’Donovan asks if marriage is a sacred union, or a determinable contract?³⁶ She claims that marriage cannot stand as a legal contract: “its terms are not negotiated by the parties, but prescribed by law. It is not a contract freely entered into by any adult but is open only to certain persons under specified conditions according to law.”³⁷ Marital roles are ascribed by the law on the basis of gender, not at the discretion of the partners. This results in the sacrifice of personal autonomy, and unequal partners. If marriage is not a contract, it becomes

³¹ Pateman, C., *The Sexual Contract* Cambridge, Polity Press, 1988 pg 1

³² Ibid pg 2

³³ Ibid pg 3

³⁴ Olsen, F.E. ‘The Myth of State Intervention in the Family’ (1985) 18 *University of Michigan Journal of Law Reform* pgs 835-864 pg 835

³⁵ Pateman op cit n29 pg 106

³⁶ O’Donovan op cit n28 pg 43

³⁷ Idem

an institution- something entered into under the rules of the institution. Even with the expansion of marriage, these rules are heteronormatively defined.

Halley argues that marriage provides status, but incorporates elements of contract. She states, “depending on how many elements of contract we add, marriage moves down the spectrum towards contract. But everyone tacitly agrees that it can never go all the way, because some aspects of marriage are ineradicably different from ordinary contracts. It is status plus some fragmentary elements of contract.”³⁸ Marriage and contract could be viewed as opposing formats. Marriage when controlled by state becomes public, (though it purports to be a private institution) which is the opposite of contract which is “variable, private, and controlled by the will of the parties not that of the state.”³⁹ Marriage provides status, and there currently exists no “law of being single.” Single people are only subject to law in the case of “single fathers and single poor welfare recipients”⁴⁰ and often these determinations are made on the basis that the rules of marriage don’t apply.

Herring suggests four alternative ways the state and law might distinguish people who are strangers from those who are in a close relationship. Firstly law could rely on whether or not a couple have cohabited for two years or more, and/or have a child. If so “they are given the rights married couples and civil partners currently have... The difficulty is in defining cohabitation.”⁴¹ Secondly the focus could be on the kind of relationship the couple have developed. Here, one would question if the relationship had “reached a depth where it

³⁸ Halley, J. ‘Behind the Law of Marriage (I): From Status/Contract to the Marriage System’ (2010) 6 *Unbound Harvard Journal of the Legal Left* pgs 1-58 pg 2

³⁹ *Ibid* pg 4

⁴⁰ *Ibid* pg 31

⁴¹ Herring, J. *Family Law* (4th ed) Essex, Pearson 2009 pg 98

deserves a particular benefit? ...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.”⁴²

Herring’s third suggestion is to shift the focus to the agreement made between the couple. Couples could be required, or encouraged to “prepare and sign a legal agreement. This is only satisfactory where the parties are aware of the benefits of doing so... even if such contracts were drafted there is a fear that they would too quickly become out of date. [Any change in circumstances would mean that] ...the contract would need to be updated.”⁴³ This also assumes that women have equal power in contractual agreements, and does not prevent couples from specifying sexual requirements in their private contracts.⁴⁴ Lastly, Herring argues that the state could create an alternative institution to marriage, “for example registered partnerships. However, it is unlikely that people who do not wish to marry would choose to register their partnerships,”⁴⁵ and I would argue that this would surely end up amounting to marriage in all but name. The benefit of Herring’s suggestions is that at first glance, they do not require consummation.

The French have a different system for relationship recognition and registration known as PACS (Du Pacte Civil de Solidarité et du Concubinage). “The PACS allows two people- whether living in a conjugal relationship or not- to register a contract in a municipality, which reduces to writing their commitment to each other, and which must include the obligation to

⁴² Idem

⁴³ Idem

⁴⁴ See further Shultz, M.M. ‘Contractual Ordering of Marriage: A New Model for State Policy’ (1982) 70 *California Law Review* 2 pgs 204-334 at pgs 212-213

⁴⁵ Herring op cit n39 pg 98

provide mutual assistance and support.... It is justified as a universally available contract to which all are equally entitled to participate on the basis of being members of the Republic.”⁴⁶ O’Donovan argues that “the problem with express contracts is that their usefulness is limited to the articulate middle-classes; the problem with implied contracts is that their interpreters are likely to be imbued with the patriarchal attitudes so rightly deplored in relation to marriage.”⁴⁷ Yet marriage in its current form is already a contract (not in a traditional sense), which is severely detrimental to women who partake in it. A self-negotiated relationship agreement should be the result of discussion and compromise between all who are involved within it. Within these discussions, one envisions that discussions will occur surrounding the sexual expectations of those in the relationship.

New South Wales has created new legal forms that acknowledge the limited and limiting role of sex.⁴⁸ Cohabiting relationships have been designated two forms: those of a ‘domestic relationship’ nature which are between two adults who live as a couple, and a second category of ‘close personal relationships’ which are non-sexual and can be within the prohibited degrees of relationship for marriage. Whilst this may appear to be a radical feminists dream, there are still several issues such as the fact that there are two categories- those that are, and those that are not sexual- suggests that there are no other alternatives to adult relationships. Also these relationships are again based upon a relationship between two people.

⁴⁶ Stychin, C.F., ‘Couplings: Civil Partnership in the United Kingdom’ (2005) 8 *New York City Law Review* pgs 543-572 pg 551

⁴⁷ O’Donovan, K. ‘Legal Marriage- Who needs it?’ (1984) 47 *Modern Law Review* pgs 111-118 pg 116

⁴⁸ *Property (Relationships) Act 1984 (NSW)*

So, why marry? O'Donovan claims that people continue to marry because "marriage has a sacred, magical status."⁴⁹ Marriage is legally the culmination of two free but unequal acts committed by the husband and wife uniting the pair and establishing legal regulation. "The performative acts by the couple are their voluntary taking of one another as husband or wife, with all that these terms connate; the sexual act, after the ceremony is the seal of the union. Law regulates entry into marriage, the ceremony and the validity of both. In that sense law constitutes the marriage."⁵⁰ This legally constituted marriage is sacred and magical because it is unchanging- an 'emblem of continuity'.⁵¹ Even the creation of same-sex marriage has left the institution of heterosexual marriage intact. Instead of amending existing marriage law, a new law was passed, mirroring nearly all the features of marriage, except the most sacred- consummation. Marriage's sacred element is found in its character "as an institution [that]...calls on a past, understood and shared tradition, and on an eternal future, a perpetuity."⁵² I do not dispute this traditional element. The prioritisation of the married unit for the production of children and legitimacy of sexual relations is "learned yet known anew by each generation and in each generative act"⁵³ within marriage. But marriage's traditional elements stem from religion, and societal structures that are no longer the mainstream view. I advocate for the dissolution of marriage as an institution but do not deny its religious importance to some.

*Hyde*⁵⁴ relied on the belief that "legitimate unions endorse a 'natural' order of sexuality, and this assumption has shaped marriage law in profound ways."⁵⁵ Defining our (legal)

⁴⁹ O'Donovan op cit n30 pg 44

⁵⁰ Ibid pg 45

⁵¹ Ibid pg 47

⁵² Idem

⁵³ Idem; Honoré, T. *Sex Law* London, Duckworth 1978 pg 39

⁵⁴ *Hyde v. Hyde and Woodmansee* [1866] LR 1 P&D 130

understanding of marriage on the basis of a case from the late 1800's, has resulted in the continuing importance of the consummation requirement for heterosexual couples. *Hyde*⁵⁶ insists that the marriage union be undertaken voluntarily. Poulter has examined the few Victorian cases based upon the principle of voluntariness,⁵⁷ finding that there have been cases which have granted decrees,⁵⁸ and others in which decrees have been denied.⁵⁹ Where decrees were granted, there were overt demonstrations on the part of the wife that she had been forced into the marriage, including duress by her husband during the ceremony, and examples of her throwing her wedding ring on the floor at the ceremony. Instances of these situations have diminished since the governments recognition of the need for protection for those who are being forced into marriages and enactment of the *Forced Marriage (Civil Protection) Act*.⁶⁰ Where a marriage has taken place, the court tries to assess whether the person's will was overborne. At one time, the courts would only provide a decree for nullity if there was a threat of immediate danger to life, limb or liberty. However this does not take account of people's differing tolerance of threats. As such, the Court of Appeal has held that the test is a subjective one of whether the threats and/or pressure could be sufficient to destroy the consent given and to overbear the will of the individual.⁶¹

The *Hyde*⁶² requirement of a union for life is also bizarre. At the time that the judgment was passed, the *Matrimonial Causes Act 1857* was the current law, and contained provision for

⁵⁵ Brook, H., *Conjugal Rites: Marriage and Marriage-like Relationships before the Law* New York, Palgrave Macmillan, 2007 pg 56. One must remember that the anxiety expressed in this case was also a result of the Mormon marriage that was under discussion.

⁵⁶ *Hyde v. Hyde and Woodmansee* op cit n54 at 133

⁵⁷ Poulter, S., 'The Definition of Marriage in English Law' (1979) 42 *Modern Law Review* pgs 409-429 at 410

⁵⁸ *Scott v. Sebright* (1886) 12 P.D. 21; *Bartlett v. Rice* (1894) 72 L.T. 122; *Ford v. Stier* [1896] P.1

⁵⁹ *Miss Field's Case* (1848) 2 H.L.C. 48; *Cooper v. Crane* [1891] P. 369

⁶⁰ *Forced Marriage (Civil Protection) Act 2007*

⁶¹ *Hirani v. Hirani* (1982) 4 F.L.R. 232 CA. See further discussion in Bradney, A. 'Duress, Family Law and the Coherent Legal System' (1994) 57 *Modern Law Review* pgs 963-972 in which comparisons are drawn between *Hirani* and Scottish case law on the matter.

⁶² *Hyde v. Hyde and Woodmansee* op cit n54

divorce decrees in English courts. As such, “how then could Lord Penzance have included within his definition of legal marriage the requirement derived from Christian doctrine that it be “for life”?”⁶³ More to the point, how can this still be required today, in a society with diminished marriage rates and increased divorce rates? Poulter suggests that as a staunch Protestant, perhaps Lord Penzance in the case of *Hyde* felt that polygamy was morally abhorrent.⁶⁴ This belief in marriage for life was earlier encapsulated in the case of *Evans v Evans*,⁶⁵ where Lord Stowell claimed “the general happiness of the married life is secured by its indissolubility. When people understand that they must live together...they learn to soften by mutual accommodation... they become good husbands and good wives, from the necessity of remaining husbands and wives, for necessity is a powerful master in teaching the duties which it imposes.”⁶⁶

Given societal developments (and the existence of divorce at the time), we could read Lord Penzance’s phrase ‘for life’ as; ‘for life, or until a decree of annulment or divorce is given’ though this idea could be attacked as “tending to sacrifice the quality of idealism for legal pedantry.”⁶⁷ The retention of the phrase serves to ignore the reality of increasing divorce rates. Probert explains that although the number of divorces granted was a very small number, it was a dramatic increase to previous divorce rates, and it was possibly feared that the marital stability of the early 1800s had been lost.⁶⁸

⁶³ Poulter op cit n57 pg 419

⁶⁴ See further Vesey-Fitzgerald, S.G ‘Nachimson’s and Hyde’s Cases’ (1931) 47 *Law Quarterly Review* pgs 253-270 at 255. However now attitudes towards polygamy have become more liberal, see further: Poulter, S.M *English Law and Ethnic Minority Customs* London, Butterworths 1986

⁶⁵ *Evans v. Evans* (1790) 1 Hagg.Con. 35

⁶⁶ Ibid at 36-37

⁶⁷ Poulter op cit n57 pg 421

⁶⁸ Probert, R. ‘Hyde v Hyde: defining or defending marriage?’ (2007) 19 *Child and Family Law Quarterly* 3 pgs 322-336 at 331

Marriage was also required to be a union between one man and one woman, legally reinforcing heterosexuality, and serial monogamy. This requirement negatively affects those who wish (or are required by religion) to engage in polygamous relationships, as does the phrase ‘to the exclusion of all others’.⁶⁹ A person who is lawfully married cannot contract a second marriage before the legal ending of the first. The historical reasoning for the declaration of marriage for one man and one woman was very much a result of the Victorian age, and perhaps an exaggerated response to the perceived threat of the other- Mormon polygamous marriage.⁷⁰ The effect of polygamous marriages has been dealt with by statute,⁷¹ but ironically, the use of ‘one man and one woman’ then became synonymous with cases involving transsexuals.

The Canadian Law Commission provided a more efficient understanding of relationships within their research into adult relationships. I refer here to other jurisdictions solely because the U.K has not commissioned such research, and therefore it would be difficult to definitively speak about the UK. I point to the work in Canada and other jurisdictions, not to say that we should draw the same conclusions, but to say, these are alternatives being explored in other jurisdictions, and perhaps we should pay attention to the research they are producing. It would be naive to say that we should wholeheartedly adopt the suggestions of other jurisdictions.

The Canadian Law Commission held that “state regulation of personal relationships should... seek to enhance other values: personal security, privacy and religious freedom, while

⁶⁹ See Poulter, S. ‘Hyde v. Hyde: A Reappraisal’ (1976) *International and Comparative Law Quarterly* 25 pgs 475-508

⁷⁰ Fishbayn, L., “‘Not quite one gender or the other’”: Marriage law and the containment of gender trouble in the United Kingdom’ (2006-2007) 15 *Journal of Gender, Social Policy & the Law* 3 pgs 413-441 pg 415

⁷¹ *Matrimonial Proceedings (Polygamous Marriages) Act 1972*

pursuing legitimate government objectives in a coherent and efficient manner.”⁷² If the state were willing to recognise these qualities over the qualities deemed to be associated with sex, eventually a community would emerge in which we would be encouraged to explore “non-exploitative, non-abusive possibilities in love, gender, desire and sex- and in the creation of new forms of constructed families without fear that this searching will potentially forfeit for us our right to be honoured and valued within our communities and in the wider world.”⁷³

Marriage is such a fundamental part of society that it also holds discursive importance. ‘Husband’ and ‘Wife’ have legal and symbolic meaning, as does the ability to live up to these labels. Brownmiller’s work argues that penetration is a word which describes “what the man does.”⁷⁴ A proper (equitable) contract demands that no account is taken of substantive attributes- such as sex. “If marriage is to be truly contractual, sexual difference must become irrelevant to the marriage contract; ‘husband’ and ‘wife’ must no longer be sexually determined. Indeed, from the standpoint of contract, ‘men’ and ‘women’ would disappear.”⁷⁵ The language of consummation is also interesting. You can consume a body with your mouth- cannibalism. But consummation, gives a different form of pleasure, and a different discursive meaning. Marriage serves to provide sexual property in women, and the wife “has no corresponding right. After consummation further heterosexual acts are assumed to take place in accordance with male desire. It is evident that the law approves heterosexuality in marriage but withholds its constitutive power from other relationships not legally approved.

⁷² Law Commission of Canada *Beyond Conjuality- Recognizing and supporting close personal adult relationships* 2001 pg xi

⁷³ Op cit n3

⁷⁴ Brownmiller, S. *Against Our Will: Men, Women and Rape* London, Secker & Warburg, 1975 pg 334. She also discusses feminist works that argue for alternative discourse, such as the use of the word ‘enclosure’ or ‘insertion of the penis.’

⁷⁵ Pateman op cit n31 pg 167. See also Halley op cit 38 pg 15

The requirement of consummation places primacy on penetrative sex, an act constitutive of masculinity.”⁷⁶

Through the insistence upon consummation as the final act in the heterosexual marriage ceremony, case law has created a body of knowledge of male sexuality, which serves to marginalise other sexual acts. Medical developments have also catered to this requirement with the development of Viagra for example. “The missionary position, in which the woman lies under the man and facing him in readiness for coition, has been privileged in this discourse... Although marriage law does not demand that the missionary position is adopted for consummation, it is clear that non-penetrative sexual activity is insufficient.”⁷⁷ Mackinnon takes this further and states that what is sexual is “what gives a man an erection. Whatever it takes to make a penis shudder and stiffen with the experience of its potency is what sexuality means culturally.”⁷⁸

Lord Penzance’s classification of the marriage formula is archaic but its use in law seems consistent in cases where traditional understandings of marriage are perceived to be under threat. Interestingly, all of the criteria required for Lord Penzance’s marriage are also applicable to cohabiting couples,

⁷⁶ O’Donovan op cit n30 pg 46; Thomson, M. ‘Viagra Nation: Sex and the Prescribing of Familial Masculinity’ (2006) *Law, Culture and the Humanities* 2 pgs 259-283 pg 271

⁷⁷ O’Donovan op cit n28 pg 46. Jeffreys states that the very idea of sexual ‘dysfunction’ demonstrates the belief in the existence of ‘correct sexual function.’ Jeffreys, S. *Anticlimax- A feminist perspective on the sexual revolution* London, The Women’s Press Ltd, 1993 pg 31

⁷⁸ Mackinnon, C.A., *Toward a Feminist Theory of the State* Cambridge, Harvard University Press, 1989 pg 137; A Southern Women’s Writing Collective, ‘Sex Resistance in Heterosexual Arrangements’ in Leidholdt, D. & Raymond, J.G., *The Sexual Liberals & the Attack on Feminism* New York, Pergamon Press 1990 pgs 140-147 at pg 140

after all there may be cohabiting unions that are heterosexual, lifelong and monogamous, just as there may be marriages that do not fulfil all- or, in those jurisdictions that allow same-sex marriage, *any*- of these criteria. As a *definition* of marriage, then, Lord Penzance's description of marriage is seriously flawed, since it is capable of encompassing a large number of persons who are not married while at the same time excluding a significant number of married couples.⁷⁹

To effectively change our conception of the consummation requirement, we need to start with changing, or preferably eradicating marriage. Probert argues Lord Penzance's words were shaped by the historical context, and were not even immediately regarded as defining marriage.⁸⁰ The criteria offered for a legally recognised marriage has not always been taken literally in all contexts: "when considering the availability of divorce, the courts have not insisted that a marriage be 'for life', nor has recognition been denied to 'non-Christian' marriages."⁸¹ She concludes that Lord Penzance's configuration of marriage be understood as a defence of the institution, rather than a definition of it. Understood in this way, modern judges could move away from the constraints of this case. Other than the few criteria outlined here for a valid marriage, there is not an all embracing definition that is consistently evident across all married couples which seems to make law's embrace of the institution unusual. To

⁷⁹ Probert op cit n68 pg 323

⁸⁰ It wasn't until 1892 that a law textbook advocated the case of *Hyde* as the definition of marriage, and the case was not referred to by another court until 1888 in *Re Bethell* (1888) 38 Ch D 220. It was referred to in *Armitage v Armitage* (1866) LR 3 Eq 343- but had little influence upon that case. See further also: Probert op cit n68 pg 322-325

⁸¹ Probert *ibid* pg 322

'be married' does not indicate how the couple are actually living their lives or expressing morality.⁸²

6.4: Arguments for the dissolution of the marriage institution and consummation

While marriage is considered contractual rather than a consequence of status, there are three parties to this contract- the man, the woman, and the state. Although the man and woman have limited power to alter the terms of the marriage agreement, through prenuptial agreements, for example, the state retains enormous power.⁸³

What benefit is obtained through this state involvement? Could an institution that is so deeply embedded in society ever truly be removed as a social reality? I argue probably not, though this is not a very radical feminist view. I maintain that it is unlikely that marriage would ever lose its symbolic importance, but it could indeed lose its legal significance.⁸⁴ The marriage rate has decreased, but not at a sufficient rate to claim a successful radical feminist campaign. Brook has argued that even if marriage were to be abolished, conjugality would still be "unavoidably inscribed in the body politic"⁸⁵ purely as a result of the amount of time this institution has existed. Despite the drop in marriage rates, the extension of marriage to absorb same-sex couples demonstrates Governmental (and perhaps societal) belief that marriage is the 'correct' institution for the containment of sexual relations. Whilst purporting to examine alternative family forms, the report compiled by the Law Commission in Canada still ended

⁸² Fineman op cit n29 pg 75

⁸³ Robson, R., *Sappho Goes To Law School* New York, Columbia University Press, 1998, pg 149

⁸⁴ O'Donovan op cit n30 pg 56

⁸⁵ Brook, H., 'How To Do Things With Sex' in Stychin, C. & Herman, D. (eds) *Law and Sexuality* Minnesota, Minnesota Press 2001 pgs 132-150 pg 143

up referring to marriage in a way which suggested that the authors felt that marriage was the superior relationship form.⁸⁶

Throughout my research I have encountered the same two questions from most of the people I have explained my work to. Firstly, what is the point of writing a thesis on removing the consummation requirement when it will never happen? Marriage is too fundamental to society, and consummation is a fundamental element of it. Secondly, if it were to ever happen, what possible benefit could it provide to anybody? This thesis has suggested the abolition of marriage from within, starting with the most basic and most harmful function and assumption of the marital relationship- that it will be sexual in nature. When it comes to marriage, radical feminists should focus on forced sexual activity- consummation. The case law in Chapter 2 showed how non-consummation has been used to nullify otherwise loving, caring, and supportive marriages, some of which have even resulted in children, but no understandable reasoning for this is given by the courts or the legislation. Arguments calling for the end of marriage generate discussion about ensuring sexual promiscuity, and appropriate environments for the raising of children, neither of which are guaranteed by marriage. There appears to be no reason to still have a consummation requirement, even if it only serves to make a marriage voidable, rather than automatically void. This is argued from a radical feminist perspective because radical feminism most clearly provides a solution to the problem of legislating consummation. First wave feminism would argue that the non-consummation clause be altered to better reflect the inclusion of women's views. I disagree, for the very construction of sexual intercourse which defines consummation is patriarchal in

⁸⁶ See pg xvii of the Commission Report. Here the Commission explain that registered partnerships won't require a residential element "just as in marriage there is no requirement that married couples live together." It is unclear to me why the comparison to marriage needs to be made, when the Commission is supposed to be moving away from 'marriage-like' relationships. It seems the comparison is drawn to reassure those who might worry that any new relationship forms are not marriage-like enough. Law Commission of Canada op cit n70 pg xvii

origin, and could not be overcome with a change in the formulation of the consummation requirement. Further, third wave queer theory is too engrossed in detailing the “complex network of social relations”⁸⁷ that women are in. In breaking down female identity into many small components, no significant social change will ever occur. Radical feminism’s strength lies in its unifying force, uncovering the harm that non-consummation legislation does to women. Radical feminism most successfully traces the patriarchal development of law and as Chapter 1 showed, radical feminism also shows the ways in which heterosexuality reproduces itself, through consummation and marriage.

I argue for the abolition of ‘sexually-defined’ relationships because society is too heavily reliant upon sexual definitions of relationships. The expansion of marriage to same-sex couples reinforces this view, and I argue that this further demonstrates that marriage will not become one option on a menu of relationships forms, but rather it is restating its primacy by becoming the only relationship form. In trying to eradicate the sexual element of marriage- and consummation as the primary instance of this- I am not ignoring the importance that sex can have for both homosexual and heterosexual couples, but rather using consummation to unmask the inherent sexism, patriarchy and subordination of women which lies in marriage. Furthermore, the very fact that a marriage could be nullified on the basis of non-consummation alone is deeply troubling for understandings of marriage. In making the personal political, we have seen from the case-law alone that not all marriages are automatically sexual.

In heterosexual relationships, social attitudes and the language of sex show that sex is done to women and does not encompass the many types of sex available, or the feelings that can exist

⁸⁷ Namaste, K. ‘The Politics of Inside/Out: Queer Theory, Poststructuralism, and a Sociological Approach to Sexuality’ (1994) 12 *Sociological Theory* 2 pgs220-231 pg221

in a non-sexual relationship. In homosexual relationships there is sometimes the categorisation of one partner as more female than the other, with terms such as ‘camp’ or ‘femme’, and so the gender connotations of sex filter into these relationships also. There are of course arguments which claim “widespread recognition that partnership relationships offer unique opportunities as well as challenges, for the exploration of love, sex and commitment, balancing the affirmation of one’s individuality with strong mutual involvement.”⁸⁸ Yet the previous chapters have shown the inherent damage done to women by attaching notions of love and sex to marriage. I wish to eliminate the legal significance sex has in creating legitimacy for relationships. If one chooses to enter a relationship of this kind, then so be it, but to create statute that allows a get out clause as a result of no sex is an implied requirement of sex by the state. Cossman and Ryder argue that too much legal weight is placed upon a relationship status. They urge the legislature to ask itself if the status of an individual’s relationship is truly relevant.⁸⁹

The radical feminist position is often compared with that of marriage reform feminists, where the choice appears to be between rejecting marriage or hoping for change. Ferguson argues that this choice is too simplistic. Rather, “whether marriage is reformable in a feminist direction in a particular context depends on the other resources available to women through the legal system, as well as their options in the economic system, and their social and citizen status.”⁹⁰ Whilst women continue to partake in marriage in its current legal form, their economic, social and citizen status will be governed by this choice. Clive too asks whether

⁸⁸ Weeks, J., Heaphy, B. & Donovan, C., *Same Sex Intimacies- Families of Choice and Other Life Experiments* London, Routledge, 2001 pg 105

⁸⁹ Cossman, B. & Ryder, B., ‘What is Marriage-Like Like? The Irrelevance of Conjuality’ (2001) *Canadian Journal of Family Law* 18 pgs 269-326 pg 312

⁹⁰ Ferguson, A. ‘Gay Marriage: An American and Feminist Dilemma’ (2007) 22 *Hypatia* 1 pgs 39-57 pg 51

marriage is unnecessary, not as a social or religious institution, but as a legal concept.⁹¹ He argues that the social institution is removable from the legal institution- suggesting for example that it is not needed to order the way we live, where we live, and what surname we use, concluding that “traditional obligations of married couples to live together and be sexually faithful to each other are manifestly unenforceable in modern conditions and could be discarded without any difficulty,”⁹² with tax relief and death benefits arranged through a system of nomination rather than spousal relations.

Clive also examines bigamy and the exploitation of women:

The real question is whether the abolition of marriage and bigamy together would leave a vacuum in which women would be dangerously exposed to exploitation by men falsely claiming to commit themselves to a long-term relationship. It is doubtful whether marriage and bigamy provide any real protection at present. The danger of exploitation in personal and sexual relationships is always present but there is very little that the law can do about it. My own guess is that the abolition of the legal concept of marriage and the crime of bigamy would make very little difference in this area.... The long-term goal in this area should be the abolition of private dependency, by encouraging independence and treating poverty as an individual rather than a family phenomenon.⁹³

⁹¹ Clive, E.M.. ‘Marriage: An Unnecessary Legal Concept?’ in Eekelaar, J.M & Katz, S.N (eds) *Marriage and Cohabitation in Contemporary Societies: Areas of legal, social and ethical change- an international and interdisciplinary study* Toronto, Butterworth, 1980 pgs 71-81

⁹² Ibid pg 71

⁹³ Ibid pg 72-73

This long-term goal would be achieved with the abolition of marriage. In removing marriage, serious consideration would need to be given to the impact of Article 12 of the *European Convention on Human Rights*, which provides a right to marriage. If marriage were to be abolished as a legal relationship, where would the UK stand? Clive asks “would [the Convention]... be breached if a country abolished marriage as a legal concept but gave its inhabitants complete freedom to participate in such religious or social marriage ceremonies as they thought fit?”⁹⁴ Arguably not. Marriage would still exist as the religious institution it first emerged as. Further, alternative legal relationships would be able to emerge which would not be contaminated with the historical patriarchies contained in marriage and would not be limited by the parameters of matrimonial law.

For true equality and practicality, surely it has to be easier to remove marriage, than to try and extend matrimonial law to encompass all possible relationship forms?⁹⁵ There is no legal requirement to marry or enter a civil partnership but state incentives exist for those who do continue the sex-based prioritisation of relationships. Within feminist academia, marriage has “been seen as prostitution, where a woman trades sexual servicing for shelter and food. Sex is compulsory in marriage for women, ensuring heterosexuality within the economic bargain.”⁹⁶ Marriage ‘protects’ women “in the same way that the institution of slavery was said to ‘protect’ blacks- that is, that the word ‘protection’ in this case is simply a euphemism for oppression.”⁹⁷

The Canadian Law Commission recommended the elimination of “the distinctions between conjugal and non-conjugal relationships; to prioritise the function of relationships over their

⁹⁴ Ibid pg 78

⁹⁵ Robson op cit n83 pg 149

⁹⁶ Rowland, R. & Klein, R.D., ‘Radical Feminism: Critique and Construct’ in Gunew, S (ed) *Feminist Knowledge: Critique and Construct* London, Routledge, 1990 pgs 271-303 pg 294

⁹⁷ Cronon, S. 1973, as quoted in Rowland & Klein idem

form and to diminish government reliance on relationship status as the proxy for the conferment of rights and obligations.”⁹⁸ If radical feminists were to be given a leading role in this elimination process, I argue our social landscape would look very different and relationships could be self-negotiated and regulated.

People should be free to contract their own relationships of choice. The preference of radical feminists would be that those relationships of choice are not, and do not, resemble marriage. But, if those contracting into these relationships are truly educated in the many forms that relationships can take, and especially as women, are aware of the symbolic and historical significance of marriage as an institution in which women are subjugated, then radical feminists would have to rest easy, and hope that most women would not enter this type of relationship. Our want and desire to ‘save’ every woman cannot trump their free will once they have been presented with all the options available to them. It is the mentality of ‘marriage as automatic and expected’ that needs to be addressed.

The Canadian Commission argue relationships need to encompass “emotional and economic interdependence, mutual care and concern and the expectation of some duration.”⁹⁹ These are values that are associated with marriage, again creating the feeling that marriage is the superior relationship form, and any new relationships should mirror these. Pleasingly, the Commission do acknowledge the laws ‘extensive surveillance’ of intimate elements of relationships- in the UK for example- investigating when claims for nullity are brought as to the occurrence or not of consummation.

⁹⁸ Law Commission of Canada op cit n72 pg 153

⁹⁹ Ibid pg 114

This thesis has shown my unease at the existence of legislation allowing for voidable marriages, rather than full engagement with divorce law. Masson et al explain that the Law Commission in the UK have rejected any prospect of abolishing voidable marriage, and the medical examinations that often go with it; “and it seems unlikely that further reform of the law governing the annulment of marriage will be on the agenda in the foreseeable future. Indeed, it may be that reform of the law of nullity has become less likely in recent years because of the awareness that it is a more acceptable solution than divorce to certain ethnic minorities and those of strong religious belief.”¹⁰⁰ The removal of ‘voidable’ marriages, especially on the basis of non-consummation is unlikely for two reasons:

First, certain Christian denominations and their members draw a clear distinction between the annulment and the dissolution of marriage and would be offended if the distinction were blurred. Secondly, some people, associating divorce with stigma, preferred to keep matters involving no moral blame such as impotence and mental disorder as grounds for nullity.¹⁰¹

One could suggest that consummation’s categorisation as ‘voidable’ rather than ‘void’ indicates that the law does not place as much importance upon consummation as I do within this thesis. But I suggest that further examination of the conditions upon which a marriage can be declared ‘voidable’ produces a list of strange bedfellows. An inability to consummate a marriage is deemed as serious as entering the marriage whilst pregnant by another man;

¹⁰⁰ Masson, J., Bailey-Harris, R., & Probert, R. *Cretney’s Principles of Family Law* (8th ed) London, Sweet and Maxwell 2008 pg 84. See also Lowe, N. & Douglas, G. *Bromley’s Family Law* (10th ed) Oxford, Oxford University Press 2007 at pg 70

¹⁰¹ Lowe & Douglas *ibid* pg 69

having a sexually transmitted disease; and suffering from a mental disease, yet Beauvoir states it is “absurd to make a duty of such a delicate and difficult matter as the first intercourse.”¹⁰²

Consummation’s categorization as ‘voidable’ demonstrates the belief that marriage does need sex, but the courts will only interfere when asked by one of the parties. This does not serve to diminish the importance this requirement has taken on. It is a codified sexual requirement that will serve to end a marriage without taking into consideration any other factors.¹⁰³ In 1970, a UK Law Commission report suggested (to no avail) that grounds of nullity of voidable marriages should be absorbed into the grounds of divorce.¹⁰⁴ Divorce indicates that the marriage didn’t work out whereas claims for nullity imply that there was some kind of impediment to the marriage at the start. One could therefore argue that wilful refusal would perhaps more suitably fit as a ground for divorce, as the other grounds for voidable marriage exist at the time of marriage, whereas wilful refusal occurs after the marriage ceremony. Yet the Law Commission felt that the end result was always non-consummation, and it would seem strange to differentiate between the reasons that led to it: “From the parties’ point of view the relevant fact would be that the marriage had never become a complete one. To tell them that, in the eyes of the law, failure to complete it due to one cause results in their marriage being dissolved, would seem to them to be a strange result.”¹⁰⁵ The desire of law makers to keep law certain and universal overrules any logistical issues that arise from the implementation of the law.

¹⁰² De Beauvoir, S., *The Second Sex* (1949) Parshley, H (ed and trans) London, Vintage, 1997 pg 461: MCA 1973

¹⁰³ Except of course where the court may refuse to grant the decree on the basis that the condition was known prior to marriage, and the petitioner, knowing that the marriage could be annulled, behaved towards the respondent in a way that indicated that no petition would be made. Here it would be unjust to grant the declaration.

¹⁰⁴ The Law Commission (Law Com No. 33) *Family Law Report on Nullity of Marriage* 1970

¹⁰⁵ *Ibid* pg 14

One could further ponder whether the removal of a consummation requirement would serve only to ‘closet’ marital sex the way domestic violence and marital rape were once closeted and silenced. I do not believe this would be the case. “Marriage is obscene in principle in so far as it transforms into rights and duties those mutual relations which should be founded on a spontaneous urge; it gives an instrumental and therefore degrading character to the two bodies in dooming them to know each other in their general aspect *as* bodies, not as persons. The husband is often chilled by the idea that he is doing a duty, and the wife is ashamed to find herself given to someone who is exercising a right over her.”¹⁰⁶ This right is enshrined in consummation, and its removal -although symbolic, for marital sex will continue- serves to remove the ideological superiority of heterosexual acts, and the ‘necessity’ of sex in marriage. Consummation is a political issue, because sexuality and marital sex have been politicised. This is a key radical feminist concept: “Because of the radical feminist analysis of the oppression of women through male-defined sexuality and power, and because of the demand to take back our bodies, radical feminism has identified sexuality as political. The interrelationship between heterosexuality and power was named.”¹⁰⁷

Ettelbrick’s argument that we should pursue a course which “recognizes the caring and committed relationships of all families- not just those who wish to marry and not just those that include lesbian and gay couples”¹⁰⁸ is a worthy notion, though I would add that we should positively ensure that any relationship recognition preserves women’s rights and freedom, without legislating for sexual conduct. There would undoubtedly be problems with this ‘recognition of all’. It would perpetuate the states intervention and role in creating

¹⁰⁶ De Beauvoir op cit n102 pg 463

¹⁰⁷ Rowland, R. & Klein, R. ‘Radical Feminism: History, Politics, Action’ in Bell, D. & Klein, R. *Radically Speaking: Feminism Reclaimed* London, Zed Books 1996 pgs 9-36 pg 27

¹⁰⁸ Ettelbrick op cit n2 pg 905

‘legitimacy’, and like Fineman’s theory, of prioritising the Mother-Child dyad, could result in the further privatisation of care. Barker suggests “we need to deconstruct the purpose and function of recognition/regulation and separate it from ideology and romantic mythology about what families and relationships are and should be.”¹⁰⁹

6.5: Conclusions

Whilst some legal and social changes have taken place in the marriage (and marriage-like) institution, the radical feminist critique of marriage has “remained remarkably consistent in [its]... portrayal of the effects of its socially approved unequal dynamics of power on men and women.”¹¹⁰ Marriage, which is heterosexuality institutionalised, constrains and harms women- its requirement of heterosexual sex (for as yet homosexual sex remains undefined); an act which is done ‘by’ one man ‘to’ one woman for life- is at the core of that.¹¹¹ Despite the removal of sex from the CPA and M(SSC)A, the institutions’ construction as a ‘mirror’ of heterosexual marriage automatically makes it an institution in which women, or the ‘femme’ partner will be held to be inferior. Marriage must be dismantled, and one of its most harmful requirements- consummation- needs to go first.

I do not argue for a ‘closeting’ of sexual relationships. That is not the aim of the research presented here. In fact, research by other feminists writers has demonstrated the dangers inherent in privatising sexual relationships including the development of domestic violence and marital rape. I acknowledge that heterosexual relations are inherently dangerous for

¹⁰⁹ Barker op cit n1 pg 255

¹¹⁰ Auchmuty, R. ‘Same-sex Marriage Revived: Feminist Critique and Legal Strategy’ 2004 14 *Feminism and Psychology* 1 pgs 101-126 pg 105; Jeffreys op cit n77 pg 299

¹¹¹ Richardson, D., ‘Heterosexuality and social theory’ in Richardson, D. (ed) *Theorising Heterosexuality* Buckingham, Open University Press, 1998 pgs 1-20 pg 12

women, but I cannot go so far as to claim that sexuality is a 'choice'.¹¹² Radical feminism allows for mutual support between women, and so this research demonstrates the rehabilitation of this theory, in allowing for relationships of mutual support- not based on sexual activity. I propose that the law should not demand the violation of women in this way. It is positive reinforcement of sex as something that is 'done' to women, and something that *must* be done to a *wife*. When combining society's obsession with the marital relationship, and adding to this at least one instance of enforced heterosexuality, even in the twenty-first century one cannot claim that men and women possess equality within marriage or law.

¹¹² Klein, R. & Hawthorne, S. 'Reclaiming Sisterhood: Radical Feminism as an Antidote to Theoretical and Embodied Fragmentation of Women' in Ang-Lygate, M., Corrin, C. & Henry, M.S (eds) *Desperately Seeking Sisterhood: Still Challenging & Building* London, Taylor and Francis, 1997 pgs57-70

CONCLUSIONS

In its broadest reading, this research aims to assess if understandings of relationships (in particular marriage) have moved beyond consummation, and if this question can be answered from a radical feminist perspective. Overall, the research demonstrates that we have not moved beyond consummation, as non-consummation is still a ground upon which a heterosexual marriage can be nullified (upon the insistence of one party to the marriage), where the sexual intercourse is judged to have not been ‘ordinary and complete’¹ in the heterosexual understanding of penetrative sex. In this way, “sex simply becomes penetration, and pleasure is defined in terms of duration of tumescence, or simultaneous orgasm, or ejaculation *in vaginam*.”² This conception of marital sexual intercourse has been used to define legally ‘meaningful’ relationships, and the subordination of other relationship forms.³ I feel very uneasy that as a society we could “want the courts to spend time on the mechanics of spousal sexual relationships, debating exactly how many inches of penetration are required for consummation,”⁴ and the use of radical feminist theory has proved useful for addressing underlying socio-legal explanations for the inclusion and maintenance of consummation in marital law. Below I outline some of the key themes and findings of this thesis and identify further research opportunities that emerge from these themes.

¹ *D-e v. A-g (falsely calling herself D-e)*[1845] 1 Rob Ecc 280 per Dr Lushington

² Smart, C., ‘Law’s Power, the Sexed Body, and Feminist Discourse’ (1990) 17 *Journal of Law and Society* 2 pgs 194-210 pg 201-202

³ Rowland, R. ‘Politics of Intimacy: Heterosexuality, Love and Power’ in Bell, D. & Klein, R. *Radically Speaking: Feminism Reclaimed* London, Zed Books 1996 pgs 77-86 pg 83; Card, C., ‘Gay Divorce: Thoughts on the Legal Regulation of Marriage’ (2007) 1 *Hypatia* 22 pgs 24-38 pg 24

⁴ Probert, R. ‘How Would *Corbett v Corbett* be Decided Today?’ (2005) 35 *Family Law* pgs 382-385 pg 383

i: Why consummation?

One of the aims of this thesis is to fill a gap in academic research by providing a socio-legal overview of consummation. The research has shown that there is very little academic (non-medical) research into consummation; most references to non-consummation are made in passing in articles or textbooks predominantly focused on wider issues. This thesis provides a comprehensive overview of the current law in relation to consummation, and the case-law that has led to its definition. Chapters 2 and 3 demonstrate that the apparent gender-neutrality of the consummation requirement is symptomatic of the patriarchy that pervades law, as outlined in Chapter 1, and that the legal construction of consummation is particularly harmful to women, viewing all as sexual objects and potential mothers. In cases where there has been non-consummation, many of the wives for example have been labelled as emotionally unstable as a result of being denied a 'normal' marriage, and children.

Consummation is presented as something that is natural, necessary, a husband's right, and something that is *done* to women. Women who are unable or unwilling to conform to this have been medically constructed as unnatural or frigid. Men who have been unable or unwilling to conform are spoken of in sympathetic tones, for it is often the result of impotence. Where the wives in these cases have been granted a decree of nullity, it has not been as a result of a discussion or acknowledgement of a reciprocal 'right' to marital intercourse, but merely as a result of every woman's desire to procreate. Even in cases where it is clear there is a physical impediment in the husband to sexual intercourse with any woman, courts have developed case law which makes clear that only the marriage in question is key, perhaps to maintain illusions of masculinity, and insinuate the fault lies with the wife.

The consummation requirement is used to discriminate between relationship forms, to reinforce the gender binary, and to justify legal privileging of marriage. Chapter 6 concludes that there is no legal reason to require state involvement in the sexual relationship of husband and wife (unless there is an issue of rape). It does not seem coherent that the possibility of infecting your spouse with HIV/AIDS⁵ (which should give a get-out quick path) should be held on a par with a marriage in which there is no sexual intercourse. Divorce is a long and costly process which does not nullify the marriage, and leaves a blemish on the parties romantic history. It is not comprehensible that a case of non-consummation can be justification to circumvent divorce law.

The analysis of consummation in this thesis acknowledges that consummation is “an interplay of factors,”⁶ from gender and sexuality to medicine and legal privilege. Moran argues that consummation has shifted from a juridical matter to one of sexuality. The analysis provided in this thesis examines consummation from both of these spheres, though the absence of any recent case law⁷ could indicate a shift to the sexuality sphere. From both spheres, I conclude that consummation is detrimental to women, and reinforces the male (and marital) ‘need’ for sex.⁸ The only apparent difference between the two ways of analysing

⁵ MCA 1973 s12(e)

⁶ Moran, L.J., ‘A study in the history of male sexuality in law: non-consummation’ (1990) 1 *Law and Critique* 2 pgs 155-171 pg 167

⁷ Although the Court Statistics demonstrated the continued use of nullity clauses for non-consummation: Judicial and Court Statistics 2010 <http://www.justice.gov.uk/downloads/statistics/courts-and-sentencing/judicial-court-stats.pdf> (accessed 10/10/12)

⁸ Jeffreys, S. *Anticlimax- A feminist perspective on the sexual revolution* London, The Women’s Press Ltd, 1993 pg 145

consummation is the gender-neutrality⁹ with which it is presented in law, where as when viewed as an issue of sexuality, it is more clearly male.

Two unexpected findings arise from the research. Firstly, at the outset I underestimated the extent to which the medical profession would be involved. Chapters 2 and 3 highlight that consummation was initially a religious requirement, which was subsumed into law. Courts then allowed the medical profession to provide a scientific definition of consummation, to the detriment of other sexual experiences. Secondly, Madden Dempsey and Herring¹⁰ provide a really interesting critique of penetrative sex, in which they explain that all penetrative sex requires justification. In this light, given their analysis, and the patriarchal basis of consummation, one could read the consummation requirement as state induced sexual activity that the state holds to be justifiable. As argued throughout, I cannot agree that requiring consummation is justifiable, and instead, under the Madden Dempsey/Herring logic, argue that consummation could be seen as state sanctioned rape.¹¹ It is not the act itself which is of issue. It is rather that it is demanded by the state. The choice of married couples to engage in sexual intercourse or not, should not be legally demanded: "...we want to prohibit the state from enforcing its morality when that morality prohibits our sexual practices."¹² I found no case law in which it was claimed by the wife that consummation had occurred through rape.

⁹ MacKinnon, C.A., 'Liberalism and the Death of Feminism' in Leidholdt, D. & Raymond, J.G., *The Sexual Liberals & the Attack on Feminism* New York, Pergamon Press 1990 pgs 3-13 pg 6

¹⁰ Madden Dempsey, M. & Herring, J. 'Why Sexual Penetration Requires Justification' (2007) 27 *Oxford Journal of Legal Studies* 467-491

¹¹ Lowenfeld has argued that the wedding night often amounts to rape: Loewenfeld, H.L. *On Conjugal Happiness: Experiences Reflections and Advice of a Medical Man* (3rd ed- trans by Krohn, R.E.S) London, John Bale, Sons & Danielsson, 1913 pg 200; MacKinnon has argued that the state has allowed for enforced sex by not engaging aggressively with incest, rape and pornography laws: Mackinnon, C.A., *Toward a Feminist Theory of the State* Cambridge, Harvard University Press, 1989 at pg 244; Brownmiller, S. *Against Our Will: Men, Women and Rape* London, Secker & Warburg, 1975 pg 316

¹² Robson, R., *Sappho Goes To Law School* New York, Columbia University Press, 1998, pg 133

It would be interesting to see if it would be held to constitute consummation, or if the rape would erase its consummative effect.

ii: The CPA, GRA and M(SSC)A: relationships today

This research fills a second gap in academic research by examining the CPA, GRA and M(SSC)A for their effects upon consummation exclusively. Chapters 4 and 5 demonstrate that issues of non-consummation with respect to relationships that fall under these legislative developments have not been the exclusive focus of socio-legal research to date, but have rather again been mentioned in passing. As regards civil partnership, the parliamentary debates outlined demonstrate the deliberate omission of consummation from the CPA. The reason given is that consummation is heterosexually defined, and there is no benefit in trying to find its same-sex equivalent. Whilst this was to be initially overturned by the M(SSC)A, the final legislation followed suit with the CPA.

As regards relationships of transsexuals, Chapter 4 shows that consummation has once again been ignored.¹³ The GRA did not incorporate any need for surgery, but the MCA 1973 s12(a) which addresses non-consummation on the basis of incapacity, was not accordingly altered. This has left transsexuals open to having their marriages nullified on the basis of their incapacity to consummate.¹⁴ A better solution to “the extension of the meaning of consummation or the manipulation of the statutory bar would simply be to abolish

¹³ Probert op cit n4 pg 383

¹⁴ The Home Office ‘Report of the Interdepartmental Working Group on Transsexual People’ [www.webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/constitution/transsexual/wgtrans.pdf](http://www.dca.gov.uk/constitution/transsexual/wgtrans.pdf) (accessed 12/4/11); Tobin, H.J. ‘Against the Surgical Requirement for Change of Legal Sex’ (2006/7) 38 *Case Western Reserve Journal of International Law* 2 pgs 393-435 pg 419

consummation as a ground for nullity altogether. If this were done, there would be no need to debate the meaning of consummation in the context of same-sex relationships and the marriages of transsexuals would be secure.”¹⁵

Marriage as an institution has been shown to have many negative and damaging aspects, most of which impact negatively upon women. Women have consistently shown that marriage is not an institution in which they are treated equally. This inequality starts from the ‘wedding night’, when women are supposed to submit to male dominance and power and need for sex.

Why, then, would anyone marry? Because it is a tradition, glorified and romanticized. It grants status. It is a significant (social) mark of adulthood for women in patriarchy. It is a way to avoid certain hassles from one’s family of origin and from society at large- hassles to oneself, to one’s lover (if there is only one), and to children with whom one may live or whom one may bring into being. We need better traditions. And women have long needed other social marks of adulthood and ways to escape families of origin.¹⁶

The removal of the consummation requirement would not generate equality between the sexes, but would address and highlight the patriarchal basis of law. Altering existing consummation law would not make women equal participants in consummation. It is already supposed to be a gender-neutral law. It needs to be removed. Sex may still be expected in

¹⁵ Probert op cit n4 pg 384

¹⁶ Card, C., ‘Against Marriage and Motherhood’ (1996) 11 *Hyypatia* 3 pgs 1-23 pg 9

marriage, but the consummation requirement makes it a legislative demand, and the end aim must always be the abolition of marriage to prevent the subordination of women.¹⁷ Consummation in its current formulation is presented as something that women should do, should want to do, need to do, and that the sexual relationship should continue throughout the marriage. This leaves those unable or unwilling to submit themselves to this open to legal action by their partner. To remove consummation would not be just a simple re-formulation of heterosexual marriage, but a re-conceptualisation of expectations of women in general, and their bodily interactions with men. Oakley states that to-date, women's sexuality "is supposed to lie in her receptiveness and this is not just a matter of her open vagina: it extends to the whole structure of feminine personality as dependent, passive, unaggressive and submissive."¹⁸

iii: Radical Feminism

The secondary aim of this research was to assess the academic value of second wave radical feminism in issues of sexuality such as consummation, for it appears that recently there "has been a repudiation, or perhaps forgetfulness, of the feminist critique of marriage that was so well developed in the 1970s."¹⁹ One might question how I can claim to write about the removal of consummation from a radical feminist perspective. Undoubtedly, the 'radical' perspective is to call for marriage to be abolished altogether, but this call has not been heard.²⁰ The GRA has meant that more people can fit into the marriage model, and the

¹⁷ Rowland, R. & Klein, R. 'Radical Feminism: History, Politics, Action' in Bell, D. & Klein, R. *Radically Speaking: Feminism Reclaimed* London, Zed Books 1996 pgs 9-36 pg 31; Auchmuty, R. 'What's so special about marriage? The impact of *Wilkinson v Kitzinger*' (2008) 20 *Child and Family Law Quarterly* 4 pgs 475-498 pg 492

¹⁸ Oakley, A. 'Sexuality' in Jackson, S. & Scott, S. *Feminism & Sexuality- A Reader* Edinburgh, Edinburgh University Press 1996 pgs 35-39 pg 36

¹⁹ Jeffreys, S. 'The Need to Abolish Marriage' (2004) 14 *Feminism and Psychology* 2 pgs 327-331 pg 327

²⁰ Idem

creation of the CPA and M(SSC)A have done nothing more than to bring homosexual couples in 'from the cold' into a heterosexual relationship ideal. With the research presented, I show that it is *no less* radical to suggest shifting the discussion to the abolition of consummation as a legal requirement. It is a way to break patriarchal marriage from within, whilst highlighting another example of the fallacy of gender-neutral law.

Jackson explains that the,

coercive equation of sex= coitus= something men do to women is not an inevitable consequence of an anatomical female relating sexually to an anatomical male, but the product of the social relations under which those bodies meet. Those social relations can be challenged... it is not male and female anatomy nor even... the act of intercourse itself which constitute the problem, but rather the way in which heterosexuality is institutionalized and practised under patriarchy.²¹

The research presented demonstrates that second wave feminism usefully assesses current constructions of consummation, whilst explaining the patriarchal foundations of the consummation requirement. These definitions are more useful and relevant than those offered by first and third wave feminists, as demonstrated throughout the research presented. Further,

²¹ Jackson, S. 'Heterosexuality, Power and Pleasure' in Jackson, S. & Scott, S. *Feminism & Sexuality- A Reader* Edinburgh, Edinburgh University Press 1996 pgs 175-179 pg 176; Jensen, R. 'Homecoming: The Relevance of Radical Feminism for Gay Men' (2004) 47 *Journal of Homosexuality* 314 pgs75-82

Chapter 1 demonstrates that radical feminism is not to be read as 'lesbian feminism'. Radical feminism's emphasis on,

coercive aspects of sexuality and on the interconnections between sexuality and women's oppression has also led to the charge that radical feminists cannot deal with sexual pleasure and are simply anti-sex. This caricature both ignores the diversity of opinion among radical feminists and equates opposition to specific sexual practice with an anti-erotic stance. What is the case is that radical feminists have problematised desire and pleasure and have suggested that they might be reconstituted.²²

Heterosexual women can engage with gender and sexuality issues from a radical feminist perspective because consummation is the same for all women, and is treated as such by the law. Radical feminism works for social change, and that must include "healthy loving relationships with men, or there is no point in being part of a social movement for change."²³ The "social and legal meaning of what it is to be a 'wife' [also] stretches across class and racial differences. Of course, not all married couples behave in the same way as 'wives' and 'husbands,' but the story of the sexual contract throws light onto the institution of marriage; however hard any couple may try to avoid replicating patriarchal marital relations, none of us can entirely escape the social and legal consequences of entering into the marriage

²² Jackson, S. 'Heterosexuality and feminist theory' in Richardson, D. (ed) *Theorising Heterosexuality* Buckingham, Open University Press, 1998 pgs 21-38 pg 24

²³ Rowland op cit n3 pg 81. Of course radical feminism is not the only social theory to offer suggestions for social change, but as argued throughout, I find radical feminism the most influential of all.

contract.”²⁴ Radical feminism also treats women as one group and is therefore the appropriate theoretical method through which to conduct this research.²⁵

Radical feminism has argued that men control power, evident through their creation and control of the law. Given this, why would this thesis argue that a solution could lie in a law change? A law change of this nature would serve many functions. Firstly and most evidently, it would remove a legal requirement for sexual activity. Secondly, the removal would bring focus back to the patriarchal history of our laws, and the way in which they reinforce male supremacy.²⁶ If the legislature could see the way that consummation law subordinates women, and change the law as a result of women’s experience, this could possibly lead to further developments for women, and an end to the silencing of women in law.²⁷

iv: Further research opportunities

The research presented in this thesis is confined to the research questions outlined in the introductory chapter, and is of a theoretical nature. One could undertake the same research aims, but incorporate empirical research such as interviews with religious leaders and lawyers, and questionnaires could be distributed to couples who have registered to marry (perhaps in both religious and civil ceremonies) to assess contemporary views and understanding of consummation.

²⁴ Pateman, C., *The Sexual Contract* Cambridge, Polity Press, 1988 pg 18

²⁵ Fineman, M.A., *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* London, Routledge 1995 pg 43-44

²⁶ Auchmuty, R. ‘Same-sex Marriage Revived: Feminist Critique and Legal Strategy’ 2004 14 *Feminism and Psychology* 1 pgs 101-126 pg 104

²⁷ See further Mackinnon op cit n11 pg 248; Smart op cit n2 pgs 194-195

The research presented here argues that the consummation requirement is inherently patriarchal, and therefore beneficial to men and detrimental to women. Further research could perhaps build upon the existing literature of consummation in masculinities studies. In masculinities research where consummation is mentioned, it is often in passing (though in greater detail than any feminist analysis). The structure of this thesis could be used, and a replica analysis produced from a masculinities perspective. This could also be extended to the empirical research suggested above.

At the legislative level, it would also be beneficial to interview those that were involved in the construction of the CPA, GRA and M(SSC)A as to their attitudes and governmental attitudes surrounding the effects of these legislative developments upon consummation, and the omission of non-consummation from the CPA and M(SSC)A. Chapter 4 could be the basis of an entire thesis and produce research incorporating field work and analysis into the lived experience of transsexuals and the consummation requirement.

My aim was to provide the legal and social history of consummation, and present where it stands. “Now we must deny it a future.”²⁸

²⁸ Brownmiller op cit n11 pg 404

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